

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 47/2022 OF 3RD JUNE 2022

BETWEEN

SATUGA GENERAL CONTRACTORS

AND SUPPLIES LTD APPLICANT

AND

THE COUNTY SECRETARY,

COUNTY GOVERNMENT OF KISII 1ST RESPONDENT

COUNTY GOVERNMENT OF KISII 2ND RESPONDENT

Review against the decision of the County Government of Kisii in respect to Tender No. MOSOCHO/KCG/HLT/KDSP II/2/2021-2022 for proposed upgrading of Mosochi Market Health Centre-Kitutu Chache South SubCounty.

BOARD MEMBERS

- | | |
|---------------------------|---------------|
| 1. Ms. Faith Waigwa | - Chairperson |
| 2. Ms. Isabel Juma | -Member |
| 3. Ms. Phyllis Chepkemboi | - Member |
| 4. Dr. Joseph Gitari | - Member |
| 5. Eng. Kimani Mbiu, OGW | - Member |

IN ATTENDANCE

Mr. Stanley Miheso - Holding brief for Acting Board Secretary

BACKGROUND TO THE DECISION

The Tendering Process

The County Government of Kisii, the Procuring Entity and the 2nd Respondent herein, invited sealed tenders from interested eligible tenderers for Tender No. MOSOCHO/KCG/HLT/KDSP II/2/2021-2022 for proposed upgrading of Mosoch Market Health Centre-Kitutu Chache South SubCounty (hereinafter referred to as the 'subject tender') by way of open national tendering method open to both local and national tenderers through re-advertisement in The Standard Newspaper on Friday the 25th March 2022, The Star Newspaper on Friday-Sunday the 25th-27th March 2022, the 2nd Respondent's website (www.kisii.go.ke/tenders) and IFMIS Portal (supplier.treasury.go.ke) with a tender closing date of 8th April 2022 at 11:00a.m. Complete tenders were to be submitted online through the IFMIS Supplier Portal: (supplier.treasury.go.ke) and manual submission of tenders was expressly prohibited.

Addenda

Through Addendum No.1 of 29th March 2022 and Addendum No.2 of 12th April 2022, the 2nd Respondent amended bill of quantities and introduced bill of quantities for a borehole respectively, while extending the tender submission deadline to 13th April 2022 and later to 19th April 2022 at 11:00a.m respectively.

Tender Submission Deadline and Opening

According to the minutes of the tender opening signed on 20th April 2022 by the subject tender's Tender Opening Committee (hereinafter referred to as the 'Tender Opening Minutes'), at the extended tender submission deadline of 19th April 2022 at 11:00a.m, the 2nd Respondent made multiple attempts to connect to the VPN from the host at the National Treasury in an attempt to access submitted tenders for opening. However, the exercise was not fruitful.

Consequently, the 2nd Respondent postponed the opening of tenders to the following day being the 20th April 2022. On 20th April 2022 at 9:00 a.m., the 2nd Respondent acknowledged receipt of four (4) tenders that had been submitted at the time of tender submission deadline. Shortly thereafter, the Tender Opening Committee opened the four (4) tenders and recorded the following tenderers as having submitted their respective tenders: -

No.	Tenderer's name
1.	Chabrit Company Limited
2.	Satuga General Contractors & Supplies Limited
3.	Cathemax Investments Ltd
4.	JN Investments Limited

Evaluation of Tenders

A Tender evaluation team appointed by the 1st Respondent (hereinafter referred to as the 'Evaluation Committee') planned to evaluate the four (4) tenders in three stages as captured in an Evaluation Report signed by members of the Evaluation Committee on 18th May 2022 (hereinafter referred to as the 'Evaluation Report') namely:

- 1) Preliminary/Mandatory Evaluation;
- 2) Technical Evaluation; and
- 3) Financial Stability

However, the Evaluation Committee only evaluated tenders at the Preliminary/Mandatory Evaluation stage by having each evaluator independently evaluate the four (4) tenders.

Preliminary/Mandatory Evaluation

At this stage of evaluation, the Evaluation Committee was required to evaluate tenders by applying the criteria outlined in the Mandatory Requirements for Main Works and Mandatory Requirements for Medical Equipment read with Clause 2.0 – Preliminary Examination for Determination of Responsiveness of Section III – Evaluation and Qualification Criteria at page 21 of the blank tender document issued to prospective tenderers by the 2nd Respondent (hereinafter referred to as the 'Tender Document'). Tenders needed to meet all the mandatory requirements at this stage to qualify to proceed to the next stage of evaluation.

At the end of the evaluation at this stage, the Evaluation Committee determined all the four (4) tenders non-responsive, including that of the Applicant thus, none of the four (4) tenders proceeded to the next stage of evaluation.

Recommendation

The Evaluation Committee recommended that the subject tender be re-advertised as none of the tenderers was responsive to the criteria in the Tender Document.

Professional Opinion

In a Professional Opinion dated 19th May 2022, the Supply Chain Management Officer of the 2nd Respondent, Ms. Jackline Ondimu, recommended to the Accounting Officer, Ms. Alice Abuki the 1st Respondent herein, to re-advertise the subject tender on the basis of non-responsiveness pursuant to Section 84 (1) and (2) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act').

The 1st Respondent approved the 2nd Respondent's recommendation.

Notification to tenderers

Vide letters dated 24th May 2022, tenderers were notified by the 1st Respondent of the outcome of evaluation of the subject tender.

REQUEST FOR REVIEW

Satuga General Contractors and Supplies Ltd, the Applicant herein, lodged a Request for Review dated 3rd June 2022 and filed on even date together with a Verifying Affidavit sworn on 2nd June 2022 by Joseph Arina, a director of the Applicant, together with a Statement dated 2nd June 2022, through the firm of Amondi and Company Advocates seeking for the following orders: -

- a) The Procuring Entity's decision to set out in the Letter dated 24/05/2022 purporting to reject and declare the applicant's tender unsuccessful be and is hereby set aside.***
- b) The Procuring Entity be and is hereby ordered to review the evaluation process and declare the applicant's tender as successful.***
- c) The PE be and is hereby ordered to pay the Applicant the costs of and incidental to this Request for Review together with the interest therein.***
- d) Any other additional, further, incidental and/or alternative orders as this Honourable Board may deem just and expedient.***

In a Notification of Appeal and a letter dated 3rd June 2022, the Acting Board Secretary of the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') notified the Respondents of the existence of the Request for Review and the suspension of procurement proceedings for the subject tender while forwarding to the Respondents 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 Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within 5 days from 3rd June 2022.

On 17th June 2022, the Respondents filed an Affidavit in Response to Request for Review sworn on 15th June 2022 by Nelson Mageto, the 2nd Respondent's Head of Procurement. Further, the Respondents submitted 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 16th June 2022, the Acting Board Secretary notified all tenderers in the subject tender, via their respective email addresses as provided by the Respondents, 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 on the subject tender within 3 days from 16th June 2022. No tenderer in the subject tender other than the Applicant filed any pleadings or documents with respect to the subject tender in the instant Request for Review.

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.

No party filed submissions in the instant Request for Review.

APPLICANT'S CASE

The Applicant avers that it was a tenderer in the subject tender, following an invitation to tender by the Respondents, and based on the criteria for tender evaluation and the award criteria, it believes its tender was substantially responsive.

However, the Applicant avers that following the evaluation exercise, the Respondents notified it of its unsuccessfulness citing the reason for unsuccessfulness in a regret letter dated 24th May 2022 and received on 27th May 2022 as "***failure to demonstrate having a similar engagement before by attaching a minimum number of two (2) similar contracts of cumulative minimum value Kshs. 30 Million completed in the last 5 years starting 1/01/2017.***"

According to the Applicant, it submitted three similar engagements more specifically the Proposed Construction of a Mortuary at Marani Level 4 Hospital (i.e KCG/CO/PROC/2/133/2017-2018 at Kshs.3,996,970 and KCG/ME/C/13/2019-2020 at Kshs.3,274,000) and the proposed construction of Maternity Unit at Makueni Referral Hospital (i.e.

MAKUENI/GMC/MED/7/007/2018-2019 at Kshs.28,367,567) thereby leading to a cumulative experience in terms of work done in the hospital set up with a cumulative value of Kshs. 35,638,537 as well as the Construction of the Accounts and Civil Registry's Office at Kiogoro Matumwa-Nyaribari Chache which covers general setup thus satisfied the mandatory provisions of Section D (2) on Specific Construction and Contract Management Experience which envisages '***a minimum number of TWO similar contracts of cumulative minimum value KSHS 30 MILLION completed in the last five years starting 1/01/2017***'.

The Applicant clarifies that in respect of the Proposed Construction of a Mortuary at Marani Level 4 Hospital i.e. KCG/ME/C/13/2019-2020 it was subcontracted by Kyle Jayson Contractors Ltd whereas in the Maternity Unit at Makueni Referral Hospital it was subcontracted by Hawi Kenya Ltd at a cost of Kshs.28,367,567 out of a contract sum of Kshs.69,183,206.

It is the Applicant's case that the Respondents in disqualifying its tender, failed to properly evaluate its tender before tendering an award contrary to the criteria preset in the Tender Document and Section 98(b) of the Act and before carrying out due diligence particularly on the aspect of demonstrated experience in undertaking similar engagements with a cumulative value of Kshs.30 Million completed in the last five years starting 1/01/2017.

Consequently, the Applicant avers that the Respondents contravened Section 86 (1) (b) and Section 127 of the Act and Clause 35 of Section E: Evaluation

and Comparison of Tenders of the Tender Document, when they failed to award the subject tender to it, which tender the Applicant argues had the highest score based on the evaluation and award criteria provided in Clause 35 of Section E. Evaluation and Comparison of Tenders.

The Applicant further alleges that the Respondents' letter of notification dated 24th May 2022 was issued in contravention of Section 87(3) as read with Section 176 (1) (j) (k) of the Act for failure by the Respondents to promptly notify it of the award of tender or the reasons thereof. According to the Applicant, this was in spite of it notifying the Respondents of the said failure vide a letter dated 16th May 2022 and which letter requested the Respondents to furnish the Applicant with the tender-opening minutes of the subject tender which tender opening minutes have never been furnished to date save for a regret letter dated 24th May 2022 received by the Applicant on 27th May 2022.

To this end, the Applicant seeks to have the disqualification of its tender set aside, evaluation process of the subject tender reviewed and its tender declared successful on the following grounds, that the Respondents a) carried out an evaluation process that was not fair, equitable, transparent, competitive and cost-effective in arriving at their decision to reject the Applicant's tender "***for failure to demonstrate having a similar engagement before by attaching a minimum number of two (2) similar contracts of cumulative minimum value Ksh. 30 million completed in the last five years starting 1/01/2017***" contrary to

Article 227(1) of the Constitution; b) breached Section 79 of the Act and the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020') pursuant to which the Applicant's tender ought to have been determined to be substantially responsive for having adhered to all the mandatory requirements; c) breached Section 80(6) of the Act for failure to carry out evaluation of the subject tender within 30 days from the date of opening of tenders; d) breached Section 86(1)(b) and 127 of the Act for failure to award the subject tender to the Applicant yet the Applicant's tender had the highest score, e) breached Section 87 and 176(1)(j)(k) of the Act for failure to notify the Applicant of the award of the subject tender or the reasons thereof.

Given the foregoing, the Applicant alleges that the Respondents have *ipso facto* breached Sections 3, 55(1)(f)(h), 2 and 79 of the Act, Regulations 2020 and Article 227(1) of the Constitution.

The Applicant further alleges that it stands to suffer loss and damage unless the Respondents decision set out in the regret letter dated 24th May 2022 is set aside and annulled by the Board and prays for the instant Request for Review to be allowed as prayed.

RESPONDENTS' RESPONSE

The Respondents contend that evaluation of tenders in the subject tender was carried out in compliance with the Act as well as the evaluation criteria

in the Tender Document and most specifically the evaluation criteria at page 25 of the Tender Document Part D titled, 'Experience (2) "Specific Construction and Contract Management Experience (Health Sector)' requiring a minimum number of similar contract of cumulative minimum value of Kshs. 30 million completed in the last 5 years prior to advertisement of the subject tender.

According to the Respondents, the 2nd Respondent intends to get a service provider capable of both supplying the medical equipment and constructing the hospital facilities under one contract and that the Evaluation Committee interpreted this to mean that in the last 5 years, a tenderer had to demonstrate that it had been engaged in a similar contract arrangement of both supplying, equipping, installing and commissioning medical equipment including construction of a project of cumulative amount NOT less than Kshs.30 million.

It is the Respondents contention that the Applicant did not meet the aforesaid requirement and the Applicant's tender was considered non-responsive because; a) the Marani project cited by the Applicant was for Kshs. 3,996,970/= a sum much lower than what was required and was purely for construction works without supply and b) the Makueni project cited by the Applicant was only for supply of medical equipment amounting to Kshs. 28,367,567/=, which amount was still below the required threshold and without construction.

It is also the Respondents contention that Section 80(2) of the Act requires evaluation and comparison to be done using procedures and criteria set out in the tender documents and the 2nd Respondent was bound by the same in the subject tender.

According to the Respondents, the evaluation exercise was concluded within the 30 days' threshold provided under Section 80 (6) of the Act.

Given the foregoing, the Respondents contend that the 2nd Respondent was within the law in declaring the Applicant's tender non-responsive and pray for dismissal of the instant Request for Review.

BOARD'S DECISION

The Board has considered each of the parties' case, pleadings, documents and confidential documents submitted by the Respondents to the Board pursuant to Section 67 (3) (e) of the Act and finds the following issues call for determination: -

1. Whether the 2nd Respondent's Evaluation Committee evaluated tenders in the subject tender within a maximum statutory period of thirty (30) days in accordance with Section 80(6) of the Act;

2. Whether the 2nd Respondent's Evaluation Committee evaluated the Applicant's tender in accordance with the

procedures and criteria set out in the Tender Document specifically under Item 2. Specific Construction & Contract Management (health sector) of Clause D. Experience of 1. Mandatory Requirements for Main Works in accordance with Section 80(2) of the Act;

3. What orders should the Board grant in the circumstances.

The Board will now proceed to address and determine the aforementioned issues.

Whether the 2nd Respondent's Evaluation Committee evaluated tenders in the subject tender within a maximum statutory period of thirty (30) days in accordance with Section 80(6) of the Act.

The Applicant alleges that tenders were opened on 19th April 2022 in the presence of its representative, Linet Moronya, during which the system was down hence tenderers' representatives were informed that they would be notified of a fresh date for tender opening and which event according to the Applicant never took place. Based on this date of 19th April 2022, the Applicant alleges that the Respondents failed to evaluate tenders within the statutory period of 30 days provided in Section 80(6) of the Act because, as at 16th May 2022 when the Applicant wrote to the Respondents requesting for opening minutes, it had not received any communication from the Respondents regarding closing/opening process.

The Respondents confirm that on 19th April 2022 when they attempted to open the tenders, they experienced technological challenges because the system was low necessitating tenderers' representatives attending the tender opening, to be requested to attend tender opening the following day, 20th April 2022, at the same time, 11:00a.m., and at the same venue. It is the Respondents contention that the evaluation exercise was successfully concluded within 30 days threshold as provided by Section 80(6) of the Act.

The Board now deems it necessary to establish the meaning of tender/bid evaluation and what it entails.

The Black's Law Dictionary, 6th Edition defines 'Bid Evaluation' as follows:-

'After the submission deadline, the process of examining, and evaluating bids to determine the bidders' responsiveness, and other factors associated with selection of a bid for recommendation for contract award.'

Section 85 of the Act further states that:-

'Subject to prescribed thresholds all tenders shall be evaluated by the evaluation committee of the procuring entity for the purposes of making recommendations to the accounting officer through the head of procurement to inform the decision of the award of contract to the successful tenderers.'

From the above provisions and having noted the ordinary meaning of tender/bid evaluation, it is our view that evaluation of tenders is conducted with a view of recommending a tenderer for award of a tender.

Section 80(4) of the Act is further instructive on the document that marks the end of evaluation. It states as follows:-

'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'

Section 80(7) of the Act provides for signing of the evaluation report by members of an evaluation committee as follows:

'The evaluation report shall be signed by each member of evaluation committee.'

An Evaluation Committee having conducted evaluation of tenders is able to recommend a tenderer for award of a tender. The recommendation envisioned by the Head of Procurement function is only in respect of his/her professional opinion given pursuant to Section 84 of the Act advising the Accounting Officer on the appropriate action to take.

In essence, evaluation of tenders ends once the Evaluation Committee prepares and signs an Evaluation Report containing a summary of evaluation

and comparison of tenders and recommendation of award. It therefore follows that the evaluation of tenders does not include all other processes post the signing of the evaluation report by an evaluation committee.

It is worth noting that the period of evaluation of tenders does not include a post qualification evaluation pursuant to Section 83 of the Act, a professional opinion rendered by the Head of Procurement Function pursuant to Section 84 of the Act and award of tenders by the Accounting Officer pursuant to Section 87 of the Act only need to be made within a period when a tender remains valid in accordance with Section 87 (1) of the Act.

The Board observes that the subject tender was floated as a national open tender and Section 80(6) of the Act is instructive on the timeline for evaluation of tenders which reads as follows:

Section 80 (6) reads as follows:

"80. Evaluation of tenders

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

Accordingly, evaluation of tenders is required to be carried out within a maximum period of thirty (30) days from the date of commencement of evaluation of tenders.

We have carefully studied the confidential documents submitted to the Board by the Respondent pursuant to Section 67(3)(e) of the Act and note from the Tender Opening Minutes that tenders in the subject tender were opened on 20th April 2022 at 09.00a.m. Thereafter, the Evaluation Committee having been appointed by the 1st Respondent on 19th April 2022 were instructed to commence evaluation on 21st April 2022 at 12:00noon at a venue to be advised. However, the Evaluation Committee commenced evaluation of tenders on 12th May 2022 as opposed to 21st April 2022 as directed by the 1st Respondent and completed evaluation of tenders on 18th May 2022 as signified by the signing of the Evaluation Report by all members of the Evaluation Committee on 18th May 2022. From this narrative of events, it is clear that the total number of days taken by the Evaluation Committee in conducting evaluation of tenders from date of commencement of evaluation on 12th May 2022 to the date of completion of evaluation on 18th May 2022 was seven (7) days, both days inclusive.

In this regard therefore, the Evaluation Committee conducted evaluation of tenders in the subject tender within the statutory maximum period of thirty (30) days in accordance with Section 80(6) of the Act noting that the Evaluation Committee evaluated tenders in seven (7) days if both the commencement and completion days for evaluation are reckoned in the computation of time.

In the circumstances, we find the 2nd Respondent's Evaluation Committee evaluated tenders in the subject tender within a maximum statutory period of thirty (30) days in accordance with Section 80(6) of the Act.

Whether the 2nd Respondent's Evaluation Committee evaluated the Applicant's tender in accordance with the procedures and criteria set out in the Tender Document and specifically under Item 2. Specific Construction & Contract Management (health sector) of Clause D. Experience of 1. Mandatory Requirements for Main Works in accordance with Section 80(2) of the Act.

The Applicant alleges that its tender was determined non-responsive for failure to demonstrate having similar engagement before, by attaching a minimum number of two (2) similar contracts of cumulative minimum value of Kshs.30 million completed in the last five years starting 1/01/2017 as required under Section D(2) on Specific Construction and Contract Management Experience in the Tender Document.

According to the Applicant, it submitted three similar engagements more specifically the proposed construction of a mortuary at Marani Level 4 Hospital (i.e KCG/CO/PROC/2/133/2017-2018 at Kshs.3,996,970 and KCG/ME/C/13/2019-2020 at Kshs.3,274,000) and the proposed construction of maternity unit at Makueni Referral Hospital (i.e. MAKUENI/GMC/MED/7/007/2018-2019 at Kshs.28,367,567) thereby leading to a cumulative experience in terms of work done in a hospital set up at a cumulative value of Kshs. 35,638,537 as well as construction of accounts and civil registry's office at Kiogoro Matumwa-Nyaribari Chache which covers general setup thus satisfied the mandatory provisions of Section D (2) on Specific Construction and Contract Management Experience in the Tender Document.

The Applicant clarified that in respect of the proposed construction of a mortuary at Marani Level 4 Hospital i.e. KCG/ME/C/13/2019-2020 it was subcontracted by Kyle Jayson Contractors Ltd whereas with respect to maternity unit at Makueni Referral Hospital, it was subcontracted by Hawi Kenya Ltd at a cost of Kshs.28,367,567 out of a contract sum of Kshs.69,183,206.

On the other hand, the Respondents contend that the Evaluation Committee interpreted the evaluation criteria at page 25 of the Tender Document Part D titled Experience (2) 'Specific Construction and Contract Management Experience' to mean that in the last 5 years, a tenderer had to demonstrate that it had been engaged in a similar contract management of both supplying, equipping, installing and commissioning medical equipment including construction of a project of cumulative amount NOT less than Kshs.30 million.

According to the Respondents, the Applicant's tender was determined non-responsive for failure to meet the aforementioned evaluation criteria which according to the Respondents, since the 2nd Respondent intends to get a service provider capable of both supplying the medical equipment and constructing the hospital facilities under one contract, the aforementioned evaluation criteria required a minimum number of similar contract of cumulative minimum value of Kshs.30 million completed in the last 5 years prior to the advertisement of the subject tender.

It is the 2nd Respondent's contention that; a) the Marani project referred to by the Applicant was for a sum of Kshs.,3,996,970/= which sum was lower than what was required and was purely for construction works; and b) the Makueni project the Applicant referred to was for a sum of Kshs.28,367,567/= which amount was below the required threshold as cumulative and was for supply of medical equipment only.

According to the Respondents, the 2nd Respondent was bound by the provisions of Section 80(2) of the Act which requires evaluation and comparison of tenders to be done using the procedures and criteria set out in the Tender Document.

Article 227(1) of the Constitution provides as follows with respect to procurement of public goods and services:-

'When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.'

Section 79(1) of the Act provides for responsiveness of tenders and requires tenders to conform to all mandatory requirements in a tender document and reads as follows:-

'79. Responsiveness of tenders

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

Section 80(1) and (2) of the Act on the other hand provides for an evaluation committee to evaluate tenders and, in evaluating tenders, to use the procedures and criteria set out in a tender document. The said Section 80(1) and (2) of the Act read 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.'

In **Miscellaneous Application 407 of 2018 Republic v Public Procurement Administrative Review Board; Arid Contractors & General Supplies (Interested Party) Ex parte Meru University of Science & Technology [2019] eKLR** (hereinafter referred to as the Meru University case), Justice John M. Mativo held as follows with respect to

responsiveness of tenders and mandatory requirements of a tender document:

"The materiality of irregularities is determined primarily by assessing whether the tender requirements have been substantively achieved. The starting point is Section 79 of the Act which provides as follows:-

79. Responsiveness of tenders

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

.....

72. A proper construction of the above provision shows that the requirement of responsiveness operates in the following manner:-

a. A bid only qualifies as a responsive bid if it meets with all requirements as set out in the bid documents. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements.

b. Indeed, public procurement practically bristles with formalities, which bidders often overlook at their peril.

73. Such formalities are usually listed in bid documents as mandatory requirements – in other words, they are a sine qua non for further consideration in the evaluation process. The

standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing or empowerment. Bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome.

74. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions.

.....

78. In essence, a conforming / compliant / responsive tender is defined as a tender that complies with all the "material" or "substantial" aspects of the tender invitation.

79. For there to be fairness in the public procurement process as required under Article 227, all bids should be considered on the

basis of their compliance with the terms of the solicitation documents, and a bid should not be rejected for reasons other than those specifically stipulated in the solicitation document.

80. The Evaluation Committee has a duty to act fairly.
..... The Bid documents contained clear instructions to bidders. No contest was raised before me that the requirements cited by were not in the bid documents.

81. A Procuring Entity is bound by its Bid Documents. Mandatory conditions cannot be waived.

82. The Evaluation Committee had no choice but to evaluate the bids in accordance with the eligibility and mandatory requirements of the Tender Documents by examining the documents before it.
.....

83.

84.

85. The purpose of a tender is not to reward bidders who are clever enough to decipher unclear directions. It is to elicit the best solution through a process that is fair, equitable, transparent, cost-effective and competitive. “[Emphasis ours]

In the Meru University case, Justice Mativo held, *inter alia*, that; (i) a responsive tender is one that has met the eligibility and other mandatory

requirements in a tender document, (ii) a tenderer has a legitimate expectation that a procuring entity will comply with its own tender conditions, (iii) for there to be fairness in a public procurement process as required by Article 227(1) of the Constitution, all tenders should be considered on the basis of their compliance with the terms of a tender document and should not be rejected for reasons other than those specifically stipulated in a tender document, (iv) an evaluation committee has a duty to act fairly, (v) a procuring entity is bound by its tender document, (vi) an evaluation committee has no choice but to evaluate a tender in accordance with the eligibility and mandatory requirements of a tender document by examining the documents before it and (vii) the essence of a tender is to elicit the best solution through a process that is fair, equitable, transparent, cost effective and competitive.

We have carefully studied the Tender Document of the subject tender and note the evaluation procedure and criteria for the subject tender is set out and provided for at Section III – Evaluation and Qualification Criteria read with Clause 1. Mandatory Requirements for Main Works at page 25 of the Tender Document, Clause 2. Mandatory Requirements for Medical Equipment, Clause 3. Technical Requirements for Medical Equipment and Financial Evaluation at page 26 of the Tender Document.

Clause 2. Preliminary examination for Determination of Responsiveness of Section III – Evaluation and Qualification Criteria at page 21 of the Tender Document provides as follows in part:

'The Procuring Entity will start by examining all tenders to ensure they meet in all respects the eligibility criteria and other requirements in the ITT, and that the tender is complete in all aspects in meeting the requirements provided for in the preliminary evaluation criteria outlined below.....

Tenders that do not pass the Preliminary Examination will be considered non-responsive and will not be considered further.

[The Procuring Entity will provide the preliminary evaluation criteria. To facilitate, a template may be attached or clearly described all information and list of documentation to be submitted by Tenderers to enable preliminary evaluation of the Tender]'

At page 25 of the Tender Document, the following mandatory requirements were set out, in part, with respect to the main works in the subject tender

'1. MANDATORY REQUIREMENTS FOR MAIN WORKS

No.	Subject	Requirements	
A. General Requirements			
...
B. Historical Performance			
....
C. Financial Performance			

...
D. Experience			
1
2	Specific Construction & Contract Management Experience (health sector)	A minimum number of TWO similar contracts of cumulative minimum value of kes 30 million completed in the last 5 years starting 1st January, 2017: (EXP-4.2)	Mandatory
E. Bidders Proposals			
...
F. Personnel CV (Attach Academic Certificates and Certificates of Registration) (Form PS-1)			
...
Any bidder who does not meet any of the above requirements will not be considered for further evaluation			

Failure to meet any of the criteria set out at the Mandatory Requirements for Main Works meant that a tender would not be considered for Mandatory Requirements for Medical Equipment and so forth.

The issue in contention is whether the Evaluation Committee evaluated the Applicant's tender using the criteria set out and/or provided for in Item 2 of D. Experience of Clause 1. Mandatory Requirements for Main Works in the Tender Document which required the Applicant to, as a mandatory requirement for main works, provide a minimum number of two (2) similar contracts of cumulative value of Kshs.30 million completed in the last 5 years starting 1st January 2017 to demonstrate specific construction & contract management experience in the health sector.

We have not found any description or meaning of the words '*similar contracts*' in the Tender Document, hence, we will consider the ordinary meaning of the word 'similar' as defined in the dictionary, and the meaning of the word 'contract' as defined in Tender Document.

The Collins Dictionary of English, 7th Edition, defines the word 'similar' as '***alike to another, but not necessarily identical***'.

Clause 1. of the Invitation To Tender at page vii of the Tender Document describes contract as '***proposed upgrading of Mosochi Market Health***

Centre-Kitutu Chache South Subcounty. Further, Clause 1.1 of Section I – Instructions To Tenderers provides for the scope of works for the subject tender as a ***'works contract'***.

Taking the definition of 'similar' and 'contract' into account, we can deduce that 'similar contracts' means works provided by a tenderer, that are alike but not necessarily identical to the works the 2nd Respondent requires for the subject tender, which refers to a combination of goods and services for the upgrading of Mosoch Market Health Centre-Kitutu Chache South Subcounty.

In this regard therefore, 'similar contracts' for specific construction & contract management experience in the health sector as pertains to the mandatory requirements for main works in the subject tender refers to works experience that is alike to the works required to upgrade Mosoch Market Health Centre-Kitutu Chache South Subcounty but not necessarily identical.

In essence, the Evaluation Committee was required to evaluate the Applicant's tender, *inter alia*, by examining the Applicant's tender to ensure that it met, in all respect, (i) at least two (2) contracts, (ii) of works alike to works required to upgrade Mosoch Market Health Centre-Kitutu Chache South Subcounty but not necessarily identical, (iii) of cumulative value of Kshs.30 million and (iv) completed in the last 5 years starting 1st January 2017 to demonstrate specific construction & contract management

experience in the health sector with respect to mandatory requirements for main works.

At this stage, we find it necessary to define the meaning of the word 'cumulative' .

The Cambridge Business English Dictionary © Cambridge University Press defines the word cumulative as follows: -

"Increasing by one addition after another, and including all the amounts that have been added before"

Going by this definition therefore, the two similar contracts completed in the last 5 years starting 1st January 2017 required of the Applicant to demonstrate specific construction & contract management experience in the health sector as a mandatory requirement for main works needed to have their values when added up, to amount to at least Kshs. 30 million.

With this background on what was required of the Applicant to demonstrate specific construction & contract management experience of mandatory requirements for main works, we shall now proceed to determine whether the Applicant's tender satisfied the mandatory requirement for main works set out in Item 2. Specific Construction & Contract Management Experience (health sector) of D. Experience of Clause 1. Mandatory Requirements for

Main Works to warrant it to proceed for further evaluation by examining the Applicant's original tender submitted to the 2nd Respondent in the subject tender against the Evaluation Report, both documents forming part of the confidential documents submitted to the Board by the Respondents pursuant to Section 67(3)(e) of the Act.

We have carefully studied the Applicant's original tender and note that the Applicant provided the following documentation with respect to satisfying the mandatory requirements in Item 2. Specific Construction & Contract Management Experience (health sector) of D. Experience of Clause 1. Mandatory Requirements for Main Works of the Tender Document:

- i) A duly filled Form EXP - 4.2(a) providing for the following specific construction and contract management experience;
 - a) Construction of a mortuary at Marani Level 4 Hospital at Kshs.3,996,970.00 awarded on 12th April 2018 and completed in April 2019 as a prime contractor ;
 - b) Construction of a maternity unit at Makueni County Referral Hospital at Kshs.69,183,206.00 as a sub-contractor furnishing labour materials, services, tools and equipment awarded in 2018 and completed in February 2019;
- ii) A schedule of the following, *inter alia*, completed projects;
 - a) Construction of a maternity unit at Makueni County Referral Hospital at Kshs.28,367,567.00 completed as a sub-contractor furnishing labour materials, services, tools and equipment awarded in 2018 and completed in February 2019;

- b) Construction of a mortuary at Marani Level 4 Hospital at Kshs.3,996,970.00 completed in May 2019;
- iii) Notification of Award of Contract dated 12th April 2018 in Tender No.KCG/H/Q/20/2017-2018 for proposed construction of a mortuary at Marani Level 4 Hospital at a contract amount of Kshs.3,996,970.00 issued in favour of the Applicant by the 1st Respondent together with its attendant Form of Agreement dated 16th April 2018, Local Service Order dated 23rd April 2018 and completion certificate dated 1st April 2019 for completion of building works.
- iv) Sub-contractor Agreement dated 26th February 2020 between Kyle Jayson Contractors Ltd as the main contractor and the Applicant as the sub-contractor for all labour, materials, services, tools, equipment and other things necessary to fully perform and complete works for the proposed completion of Marani Mortuary located at Marani Sub County Hospital at Kshs.3,274,000.
- v) Sub-contract Agreement dated 9th July 2018 between Hawi Kenya Ltd as the contractor and the Applicant as the sub-contractor for all labour, materials, services, tools, equipment and other things necessary to fully perform and complete works for the proposed construction of maternity unit at Makueni County Referral Hospital at Kshs.28,367,567.00, a letter dated 9th July 2018 from Hawi Kenya Ltd notifying the Applicant of acceptance of its tender for subcontract to construct a proposed maternity unit at Makueni County Referral Hospital at Kshs.28,367,567, a completion certificate dated 15th February 2019.

Given the foregoing, we note that the Applicant provided proof of three projects namely, (i) construction of a mortuary at Marani Level 4 Hospital at Kshs.3,996,970.00 as a main contractor, (ii) completion of Marani Sub County Hospital at Kshs.3,274,000.00 as a subcontractor and (iii) construction of maternity unit at Makueni County Referral Hospital at Kshs.28,367,567.00 as a sub-contractor. All these projects were performed and completed in the past 5 years starting 1st January 2017. Some of these projects were construction projects while others were supply of medical equipment and whose values when added up amounted to at least Kshs. 30 million.

We have carefully studied the Evaluation Report and note that the Applicant's tender was determined non-responsive at the Preliminary/Mandatory Evaluation stage for failure to demonstrate having a similar engagement before by attaching a minimum number of two (2) similar contracts of cumulative minimum value of Kshs.30 million completed in the 5 years starting 1st January 2017 even though the Applicant filled for Exp- 4.2 it did not attach supportive documents i.e. completion certificates and contract agreements of cumulative amount of Kshs.30 million threshold (similar supply, install, commission medical equipment and construction bit).

However, we have hereinbefore outlined the documentation the Applicant supplied to demonstrate that it satisfied the mandatory requirements of Item 2. Specific Construction & Contract Management Experience (health sector)

of D. Experience of Clause 1. Mandatory Requirements for Main Works of the Tender Document.

Given the foregoing, the 2nd Respondent's Evaluation Committee did not evaluate the Applicant's tender in accordance with the procedures and criteria set out under Item 2. Specific Construction & Contract Management (health sector) of Clause D. Experience of 1. Mandatory Requirements for Main Works on the Tender Document contrary to Section 80(2) of the Act.

What orders should the Board grant in the circumstances.

We note from the Evaluation Report that the Applicant's tender was determined responsive on all other mandatory requirements at the preliminary evaluation stage save for Item 2. Specific Construction & Contract Management (health sector) of Clause D. Experience of 1. Mandatory Requirements for Main Works of the Tender Document.

We have established and held that the Applicant indeed satisfied the evaluation criteria set out under Item 2. Specific Construction & Contract Management (health sector) of Clause D. Experience of 1. Mandatory Requirements for Main Works of the Tender Document. We have also held that even though the Evaluation Committee evaluated tenders within the maximum statutory period of thirty (30) days required under Section 80(6) of the Act, the Evaluation Committee did not evaluate the Applicant's tender in accordance with the procedures and criteria set out under Item 2. Specific

Construction & Contract Management (health sector) of Clause D. Experience of 1. Mandatory Requirements for Main Works of the Tender Document contrary to Section 80(2) of the Act.

In the circumstances we deem it fit and just to cancel and set aside the decision of the 2nd Respondent's Evaluation Committee determining the Applicant's tender non-responsive at the preliminary/mandatory evaluation stage and admit the Applicant's tender to the Technical Evaluation stage for purposes of evaluation and completion of the procurement process to logical conclusion.

The upshot of our findings herein are that the instant Request for Review is meritorious to the extent of the orders issued hereinbelow.

FINAL ORDERS

In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, 2015, the Board makes the following orders in the Request for Review dated 3rd June 2022: -

- 1. The 2nd Respondent's Evaluation Committee's decision determining the Applicant's tender in Tender No. MOSOCHO/KCG/HLT/KDSP II/2/2021-2022 for proposed upgrading of Mosochi Market Health Centre-Kitutu Chache South SubCounty non-responsive at the**

preliminary/mandatory evaluation stage be and is hereby cancelled and set aside.

- 2. The 1st Respondent's Regret Letter addressed to the Applicant and all other tenderers in Tender No. MOSOCHO/KCG/HLT/KDSP II/2/2021-2022 for proposed upgrading of Mosochi Market Health Centre-Kitutu Chache South SubCounty be and are hereby cancelled and set aside.**
- 3. The 1st Respondent is hereby ordered to direct the 2nd Respondent's Evaluation Committee to admit the Applicant's tender to the Technical Evaluation stage of Tender No. MOSOCHO/KCG/HLT/KDSP II/2/2021-2022 for proposed upgrading of Mosochi Market Health Centre-Kitutu Chache South SubCounty and evaluate of the Applicant's tender at the Technical Evaluation stage forthwith.**
- 4. Further to Order 3 above, the 1st Respondent is hereby ordered to ensure the procurement proceedings of Tender No. MOSOCHO/KCG/HLT/KDSP II/2/2021-2022 for proposed upgrading of Mosochi Market Health Centre-Kitutu Chache South SubCounty proceeds to its logical conclusion within 14 days from the date of this decision.**

5. Given 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 24th day of June 2022



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CHAIRPERSON

PPARB



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SECRETARY

PPARB