

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 72/2022 OF 11<sup>TH</sup> AUGUST 2022**

**BETWEEN**

**MAKINDU CONSOLIDATED LIMITED.....APPLICANT**

**AND**

**NG-CDF KIBWEZI WEST,**

**FUND ACCOUNT MANAGER.....1<sup>ST</sup> RESPONDENT**

**NG-CDF KIBWEZI WEST.....2<sup>ND</sup> RESPONDENT**

**DICKY&MICHELLE CIVIL ENGINEERING**

**LTD.....INTERESTED PARTY**

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Review against the decision of the Account Manager of the NG-CDF Kibwezi West with respect to Tender No. KBZWT/NG-CDF/KAKULINI BOYS/2021/001 for the Construction of a Swimming Pool to Completion at Kakulini Boys High School- Kikumbulyu South Ward.

**BOARD MEMBERS**

- |                        |                                  |
|------------------------|----------------------------------|
| 1. Mrs. Njeri Onyango  | - Vice-Chairperson (panel chair) |
| 2. Mrs. Irene Kashindi | - Member                         |
| 3. DR. Paul Jilani     | - Member                         |
| 4. Mr. Steve Oundo     | - Member                         |
| 5. Ms Isabella Juma    | - Member                         |

## **IN ATTENDANCE**

1. Mr. Philemon Chemoiywo - Holding Brief for Board Secretary

## **BACKGROUND TO THE DECISION**

### **The Tendering Process**

The NG-CDF, Kibwezi West Constituency, (hereinafter referred to as, "the Procuring Entity"), on 1<sup>st</sup> July 2022 advertised Tender No. KBZWST/NG-CDF/KALULINI BOYS/2021-2022/001 for the construction of a swimming pool to completion at Kakulini Boys High School, Kikumbulyu South Ward (hereinafter referred to as the 'subject tender') by way of Open Tendering Method.

### **Bid Submission Deadline and Opening of Bids**

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The tender advertisement documents were to be downloaded from the Procuring Entity's website <[www.tenders.go.ke/www.ngcdf.go.ke](http://www.tenders.go.ke/www.ngcdf.go.ke)> and submit the filled documents to the NG-CDF tender box by the 15<sup>th</sup> July 2022 at 10:00 a.m. The tender documents were opened on 15<sup>th</sup> July 2022. A total of three (3) bidders submitted their tender documents:

1. M/s Makindu Consolidated Limited
2. M/s Dicky and Michelle Civil Engineering Limited
3. M/s Berucy Engineering & Construction Limited

## Evaluation of Tender Bids

An Evaluation Committee evaluated tender bids in three stages, namely;

- i. Mandatory Requirements Evaluation;
- ii. Technical Evaluation; and
- iii. Financial Evaluation

### Mandatory Requirements Evaluation

At this stage of evaluation, each member was let to evaluate independently by filling the forms issued comprising the requirements each bidder should meet before proceeding to the next stage. This was done in accordance with the requirements in the tender documents.

BIDDER		Dicky& Mitchell Civil Eng. ltd	Makindu Consolidated Ltd	Berucy Eng. & Construction ltd
NO	Qualification criteria	01	02	03
1	Cert Of Incorporation	/	/	/
2	NCA 5 building	/	/	/
3	NCA 7 Mechanical works	/	N.V expired	/
4	KRA Pin	/	/	/
5	Tax Compliance	/	/	/
6	Form of tender filled	/	X	/
7	Business questionnaire	/	/	/
8	CR12 Certified/ I.D s of Directors	/	X	/
9	Bid security	/	/	/
10	Serialization of pgs	/	/	/
	Remarks	R	N/R	R

Notes:

X- No Certificate Attached

r - Certificate Attached

R - Responsive

N/R - Non-Responsive

At this stage, M/s Makindu Consolidated Limited was found to be non-responsive for reason: the copy of the NCA provided for mechanical works was not valid (expired), the form of tender not properly filled and not stamped while Copy of Cr 12 and "copies of identification cards for directors were not certified".

### **Technical Evaluation**

The Technical scores for the remaining two bidders were gauged as per the tender document. The technical scores were obtained by combining individual's technical scores and obtaining an average for each technical criteria. The Evaluation Committee noted that although the bidders had attached completion certificates for various construction works, none had provided evidence showing that they had undertaken a similar construction of a swimming pool.

At this stage, M/s Berucy Engineering and Construction Limited failed to meet the average technical marks required which was to be 70% out the maximum possible 100%.

## **Financial Analysis Evaluation**

At this stage, the Evaluation Committee was to consider the lowest evaluated tender for the award as against the funds allocated for the construction works.

In the end, M/s Dickey & Michelle Civil Engineering Limited was found to be the lowest evaluated bidder for Ksh. 9,970,825 as against the allocated funds of Ksh. 10,700,000.

## **The Evaluation Committee's Recommendation**

In view of the evaluation process, the Evaluation Committee recommended for award the tender to **Ms. Dicky and Michelle Civil Eng, Ltd P.O Box 66 Emali**, at the quoted tender sum of **Ksh 9,970,825 Nine Million Nine Hundred and Seventy Thousand Eight Hundred and Twenty-Five Shillings** only. Through a Professional Opinion dated 26<sup>th</sup> July 2022 the Supply Chain Management Officer seconded the recommendation for his rejection or approval to which the Fund Account Manager approved.

## **Notification of Non-Award**

In a letter dated 27<sup>th</sup> July 2022 the Procuring Entity notified M/s Dickey & Michelle Civil Engineering Limited of the award of the subject tender and by letters dated same day the other two tenderers received their regret letters.

## **REQUEST FOR REVIEW NO. 72/2022**

The Request for Review was lodged by M/s **Makindu Consolidated Ltd**, on 11<sup>th</sup> August, 2022 in the matter of Tender No. KBZWT/NG-CDF/KAKULINI BOYS/2021/001: for the Construction of a Swimming Pool to Completion in Kakulini Boys:

**The Applicant seeks for the following orders: -**

1. ***THAT the decision by the Procuring entity to the Applicant herein dated 27<sup>th</sup> July 2022 and awarding the Tender TENDER NO. KBZWT/NG-CDF/KAKULINI BOYS/2021/001 to the Interested Party herein be set aside.***
  
2. ***THAT the Board be pleased to Review all the records ~~submitted in the Procurement process, the form and substance of the Applicant's tender Documents, and substitute or vary the decision of the Procuring Entity and award the TENDER NO. KBZWT/NG-CDF/KAKULINI BOYS/2021/001 to the Applicant.~~***
  
3. ***THAT in the alternative, the Board be pleased to order and direct that the Procurement process be done a fresh and an award be made within Seven (7) days.***

By a letter of 11<sup>th</sup> August 2022, the Acting Board Secretary in a Notification of Appeal informed the Procuring Entity and other tenderers of the lodging of a Request for Review filed by the Applicant. The Respondent was required to file its response within 5 days of the date of this letter together with the confidential documents as per Section 67 of the Public Procurement and Asset Disposal Act 2015 (hereinafter, 'the Act'). Forwarded together with the Notification of Appeal was the PPARB Circular No. 02/2020 of 24<sup>th</sup> March 2020

The Applicant filed the Request for Review dated 4<sup>th</sup> August and filed 11<sup>th</sup> August 2022, the Applicant also submitted an Amended Request for Review filed 12<sup>th</sup> August 2022 the same was accompanied by a Statement in Support of the Request for Review sworn by one Mr. Thomas Ombok Omollo dated 11<sup>th</sup> August 2022 and filed on 12<sup>th</sup> August 2022. On 23<sup>rd</sup> August 2022, the Respondents appointed M/S Abidha & Company Advocates, as their advocates on record and filed its Statement of Response sworn by one Mr. David Kaberia Murungi, on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents dated 22<sup>nd</sup> August 2022 and filed 24<sup>th</sup> August 2022.

### **THE APPLICANT'S CASE**

The Applicant raised 14 grounds in seeking to persuade the Board to review the impugned decision and annul the same. The grounds are summarised as below. The Applicant states that vide a letter dated 27<sup>th</sup> July 2022 and sent via WhatsApp on 28<sup>th</sup> July 2022, the Procuring entity

through its Fund Account Manager informed the Applicant that their Bid had been unsuccessful for the following reasons, hereunder replicated verbatim:

- a) Dropped at Preliminary Stage form of tender not properly filed
- b) CR12 and ID of directors not certified.
- c) NCA certificate for mechanical works expired.

The Applicant notes that the Reasons provided in the Notification letter, both collectively and separately are non-factual and misleading as shall be specifically addresses in the subsequent paragraphs. Further, the Applicant with regard to the first reason provided, avers that it submitted the Form in the correct manner as per Criteria 1 on the Responsiveness and Completeness Criteria. The amount was indicated and the same was duly filled, signed and Stamped and subsequently, accordingly received. The allegations by the procuring entity are therefore false which out rightly invalidates the first reason provided by the 1st Respondent.

With respect to the allegations that the CR12 and Identification Cards of directors was not certified, the Applicant disputes the same and states that the copies that were submitted were certified as per requirements 8, 9 and 13 of the Responsiveness and Completeness Criteria and the allegations by the procuring entity are therefore false. On allegations that the NCA Mechanical works expired, are false as well, as it had a Valid NCA

Mechanical works certificate. The Applicant further avers that in any event, it is clear from the Completeness and Responsiveness Criteria Requirement 8, the Certificate of Mechanical Sub- Contractor NCA 7 is what was required from Applicants which the Applicant herein did attach in compliance with the requirements thereof

The Applicant avers that the reasons provided in the Notification letter, both collectively and separately are non – factual and, the Applicant herein having been in the construction industry for a cumulative period of over Ten (10) years, has the benefit of experience and longevity in matters of this nature, which would not cause it to be guilty of non- compliance in the manner stated by the Respondents. The Applicant avers that it can therefore be inferred that the Applicant's tender was responsive in both form and content and ought to have advanced to the technical and financial evaluation stages with subsequent success.

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The Applicant argues that in the tender opening conducted on 15th July 2022, the Applicant herein submitted the **lowest evaluated bid** in the sum of Kenya Shillings Nine Million, Seven Hundred and Sixty-One Thousand, Nine Hundred and Seventy-Two (9,761,972/-) which is comparatively lower than the winning bid of Nine Million Nine Hundred and Seventy Thousand, Eight Hundred and Twenty Five (9,972,825/-) and by awarding the tender to the highest bidder, notwithstanding the fact that the Applicant herein is the lowest qualified bidder is contrary to Section

80(3) of the Public Procurement and Asset Disposal Act, 2015 and Article 227 of the Constitution which provides that the Procurement of public goods and services must be "..... in accordance with a system that is fair, equitable, transparent, competitive and cost effective..."

In the end, the Applicant concludes that the Award of the Tender as done did not meet the threshold of fairness, equity, transparency, and competitiveness as enshrined under Article 10 and 227 of the Constitution 2010, as well as Principles set up in Section 3 of the Public Procurement and Asset Disposal Act 2015.

### **The Respondents Case**

On their part, the Respondents raised a preliminary objection arguing that they received the hard copies of the Notification of Appeal dated 11<sup>th</sup> August 2022 on 19<sup>th</sup> August 2022 and that they were yet to receive any email from either the Applicant or the Board. They aver that the Request for Review was not filed within the statutory period of 14 days from the date of Notification of award as stipulated by Section 167(1) of the Act. They further argued that by the time of receipt of the notification of appeal, they had entered into a contract with the successful bidder M/s Dickey & Michelle Engineering Civil Limited in accordance with Section 135 of the Act on 15<sup>th</sup> August 2022 and that the site has already been handed over and excavations had already been done.

Further and in reply to the Request for Review, the Procuring Entity states that on 1st July, 2022 the 2nd Respondent invited qualified bidders to tender for the proposed construction of a swimming pool at Kakulini Boys High School under Tender No. KBZWST/NG-CDF/KAKULINI BOYS/2021-2022/01 for which they received bids from 3 (three) bidders, the Applicant being one of them.

The Procuring Entity states that the Evaluation Committee considered the bids as per the requirements in the tender documents thereby carrying out the preliminary evaluation to determine responsiveness of the bidders. The Procuring Entity avers that at the preliminary stage the Applicant was dropped while Ms. Berucy Engineering and Construction Company Limited and Dicky & Mitchelle Civil Engineering Ltd proceeded to the technical stage at which point Berucy Engineering & Construction Limited was dropped thereby leaving Dicky & Mitchelle Engineering Ltd to be considered at the financial evaluation and the successful bidder's financial proposal of Ksh. 9,970,825 was found to have been within the budget, the same was reasonable and fair in the current circumstances.

The Procuring Entity avers that the Applicant's bid was rejected at the preliminary stage for the reasons which were well founded and can be seen from the tender documents, consequently, the allegations by the Applicant that the same were false is in bad faith. The Procuring Entity further states that it is inaccurate as alleged by applicant that the highest

bidder had made a financial proposal of Ksh. 10,089,700/=. In addition, the Applicant's bid having failed at the preliminary stage could not be considered for the technical and financial evaluation.

Based on the foregoing averments the Respondents request the Board to dismiss the Request for Review by the Applicant with costs to the 1st and 2nd Respondents.

### **Interested Party's Case**

The Interested Party filed its Submissions dated 25<sup>th</sup> August 2022 and filed on 26<sup>th</sup> August 2022. They aver that this Board lacks jurisdiction. They peg their argument on the same arguments raised as a preliminary objection by the Respondents.

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The Interested Party avers that having signed a contract with the Procuring Entity [Respondent herein] on 15<sup>th</sup> August 2022, this Board is bereft of jurisdiction since that is one of the grounds under which this Board is denied a lifeline to entertain a request for review under Section 167 (4) (c) of the Act.

The Interested Party proceeds to aver that in the unlikely event that the Board finds that it is clothed with jurisdiction, then they submit that the Request for Review is unmeritorious and should be dismissed with costs to

the Interested Party. It is the Interested Party's case that the Applicant's bid was regularly, procedurally and lawfully rejected at the preliminary evaluation stage and reasons for doing so communicated to the applicant. In the end, they conclude by asking the Board to declare the request for review as unmerited.

### **BOARD'S DECISION**

The Board has considered the Applicant's case, pleadings, documents and its statement in support of its request for review submitted to the Board; the Response and documents submitted by the Respondents and finds that the following issues crystalize for determination: -

- a) Whether the Request for Review dated 4<sup>th</sup> August and filed on 11<sup>th</sup> August 2022 was filed within the prescribed time and so whether or not the Board has jurisdiction to entertain the instant Request for Review;**
- b) Whether the Agreement signed between the Procuring Entity and successful tenderer dated 15<sup>th</sup> August 2022 is valid;**
- c) Whether the Applicant's tender was properly evaluated and disqualified at Mandatory/Preliminary stage in terms of the criteria set out in the Tender document?**

**d) What orders should the Board grant in the circumstances.**

We deem it fit to begin with the preliminary objection that was raised by the Respondents herein and supported by the Interested Party. The determination of this aspect will answer the first issue for determination above. In doing so, we propose to combine both issue (a) and (b) above since we deem them closely related and better resolved jointly in this decision.

**a) Whether the Request for Review dated 11<sup>th</sup> August 2022 was filed within the prescribed time and so whether the Board has jurisdiction to entertain the instant Request for Review?**

**And if so,**

**(b) Whether the Agreement signed between the Procuring Entity and successful tenderer dated 15<sup>th</sup> August 2022 is valid?**

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Jurisdiction is defined in Halsbury's Laws of England (4th Ed.) Vol. 9 as *"...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision."*

Nyarangi, JA stated as follows in the *locus classicus* case of *The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989)* *eKLR*:

***"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction." [Emphasis is ours]***

Assumption of jurisdiction by courts and other decision-making bodies in Kenya is a subject regulated by the Constitution, by statute law, or both. From the foregoing, it is sufficiently settled that the jurisdiction of a court, tribunal or any other decision-making body is derived from the Constitution, an Act of Parliament or both. This Board is a creature of an Act of Parliament owing to the provisions of section 27 of the Act with specific functions expressed in section 28 of the Act as follows: -

***"27. Establishment of the Public Procurement Administrative Review Board***

***(1) There shall be a central independent procurement appeals review board to be known as the Public Procurement Administrative Review Board as an unincorporated Board.***

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

***28. Functions and powers of the Review Board***

***(1) The functions of the Review Board shall be—***

***(a) reviewing, hearing and determining tendering and asset disposal disputes; and***

***(b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law."***

In order to invoke the jurisdiction of the Board, the conditions set out in section 167 (1) of the Act must be satisfied. The said provision states as follows: -

***"Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed."***

***[Emphasis ours]***

Section 167 (1) of the Act gives aggrieved candidates and tenderers who claim to have suffered or risk suffering loss or damage due to a breach of a duty imposed on a procuring entity by the Act or the Regulations a right to seek administrative review within fourteen days of; notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process. Regulation 203 (2) (c) of the Regulations, expounds on the manner in which the fourteen-day period for seeking administrative review can be applied as follows: -

**"203. Request for a Review**

**1) A request for review under section 167(1) of the Act shall be made in the Form set out in the Fourteenth Schedule of these Regulations**

**2) The request referred to in paragraph (1) shall-**

**a) state the reasons for the complaint, including any alleged breach of the Constitution, the Act or these Regulations;**

**b) be accompanied by such statements as the applicant considers necessary in support of its request;**

**c) be made within fourteen days of—**

**i. the occurrence of the breach complained of, where the request is made before the making of an award;**

**ii. the notification under section 87 of the Act; or**

**iii. the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder." [Emphasis ours]**

Section 87 of the Act referred to in Regulation 203(2)(c)(ii) of Regulations 2020 provides as follows:

**87. Notification of intention to enter into a contract**

**(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall**

**notify in writing the person submitting the successful tender that his tender has been accepted.**

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

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

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

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It is therefore clear from a reading of Section 167(1) and 87 of the Act, Regulation 203(1), (2)(c) & (3) of the Regulations and the Fourteenth Schedule of the Regulations that an aggrieved candidate or tenderer invokes the jurisdiction of the Board by filing a request for review with the Board Secretary within 14 days of

- (i) occurrence of breach complained of, at any stage of the Tender process once the Applicant becomes aware of the breach, or
- (ii) notification of intention to enter into a contract having been issued or

- (iii) Date of occurrence of the breach at any stage of the procurement or disposal process.

The Respondents and the Interested Party, have urged this Board to find that the instant Request for Review was filed outside the prescribed statutory period hereinabove detailed. We have reproduced the law in order to guide the ensuing arguments by this Board. We note that the Letter for Notification of Award to the successful bidder was dated 27<sup>th</sup> August 2022, same day Letter(s) of Regret to the unsuccessful bidders were dated. The Respondents aver that "the 14-day period lapsed on 10<sup>th</sup> August 2022 and that they are yet to receive any email from the Applicant or the Board." We understand this to indicate that perhaps the Respondents meant they have not received any email from the Board notifying them of the filing of the Request for Review.

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We note that the Request for Review while dated 4<sup>th</sup> August, 2022, was filed on 11<sup>th</sup> August 2022 and the amended version of the Request for Review was filed on 12<sup>th</sup> August 2022. To succeed in this objection, the Respondents have to show that the Notification letter to the Applicant was remitted to and received by the said Applicant at least more than 14 days before the date of filing of this Application. The burden to so prove lies with the Respondent who has made the allegation. The Respondent on their part refer to the date of the letter of Notification of 27<sup>th</sup>, July, 2022, but do not state in their Response the date and mode of service upon the

Applicant of the same. We note that arithmetically the 14 days from 27<sup>th</sup> July, indeed would lapse on 10<sup>th</sup> August 2022. However, the only evidence of service of the Notification is from the Applicant who confirmed in their Statement in support of the Application, that they received the Notification via a WhatsApp message on 28<sup>th</sup> July, 2022. In the absence of other evidence in rebuttal, that is the date from which time shall be computed. This Board has previously held that in computing time, the date of receipt of the Notification is not reckoned. Accordingly, in this instance, time started running on 29<sup>th</sup> July, 2022. The 14 days would therefore run to the 11<sup>th</sup> of August, 2022, which is the day that the Request for Review Application was filed. It is the Board's position therefore that the Application for Review was properly filed within the time prescribed under Section 167(1) of the Act. The Respondent and Interested Party's objection on the Board's jurisdiction is for that reason dismissed as the Board holds that it has the requisite Jurisdiction to hear and determine this matter.

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Upon an Application for Review being filed with the Secretary of the Board, under section 167, the Secretary of the Board, is required under section 168 of the Act, to immediately notify the Accounting Officer of the procuring Entity of the fact of the filing of the Application and ask that all proceedings touching on the subject procurement be suspended. This notification is also served on all tenderers. The Respondents have alleged that they only received the hard copies of the Request for Review dated 11<sup>th</sup> August 2022 on the 19<sup>th</sup> August 2022. They argue that by this date

they had signed an agreement with the successful tenderer signed on 15<sup>th</sup> August 2022. They peg their decision to enter into contract pursuant to Section 135 of the Act on the lapse of the 14 days' statutory period provided for under Section 135(3) of the Act. The Respondents have denied receiving any email from either the Applicant or the Board informing them of the lodging of the instant Request for Review. The Interested Party on their part have not addressed the issue of whether or not they received Notification from the Secretariat.

We have taken time to peruse the Confidential documents submitted to the Board pursuant to Section 67 of the Act. Part of those documents are the letter of Notification and letters of regret issued under the Letterhead of the Procuring entity. At the heading of those letters is an email address contact, "[cdfkibweziwest@cdf.go.ke](mailto:cdfkibweziwest@cdf.go.ke)". We have also received a confirmation from the Secretariat of the Board of the email Notice issued by the Secretary to the Board on 11<sup>th</sup> August, 2022, immediately upon the filing of this Application, which we reproduce herein below in part, there is evidence that an email containing the requisite Notification emanated from the Board Secretariat to the Procuring Entity on 11<sup>th</sup> August, 2022, as follows:-

*"From: PPARB - PPRA <pparb@ppra.go.ke>  
Sent: Thursday, August 11, 2022 16:42  
To: cdfkibweziwest@cdf.go.ke <cdfkibweziwest@cdf.go.ke>  
Cc: info@muumbilaw.com <info@muumbilaw.com>; bmuumbi@muumbilaw.com <bmuumbi@muumbilaw.com>  
Subject: Application 72-2022  
Attached kindly find....."*

*Regards*

*For Board Secretary*

*Public Procurement Administrative Review Board*

*KISM Towers*

*Ngong Road*

*P O Box 58535-00200*

*NAIROBI*

*Tel No. 3244000*

*Website: [www.ppra.go.ke](http://www.ppra.go.ke)"*

From the attached email, it is clear that the email address which appears in the confidential documents shared with the Board pursuant to Section 67 of the Act, in particular the 'Notification of Award of Contract' letter dated 27<sup>th</sup> August 2022, the original tender Document, as well as on the Agreement executed between the Procuring Entity and the Third Party, is the same email address to which the notification of appeal was sent by the Secretary to the Board on 11<sup>th</sup> August 2022 at 16:42 hours. This is at least 3 days before the date the Agreement is stated to have been executed. We have also noted a letter dated 24<sup>th</sup> August 2022 from the 1st Respondent addressed to the Board Secretary, through one Mr. David Kaberia Murungi, the Fund Account Manager, wherein he states that the email address appearing in its letterhead '**...is not in use and I don't have even the password to the same...**' consequent to that, the Respondents have purported to avail to the Board Secretary communication channels among them are two email addresses and a cellphone number which they say are the ones in use and can reach him directly. It is however worth noting that

even in the said letter dated 24<sup>th</sup> August 2022, the letter head retains the same email address as above cited, that the Respondents purport is not use. Further, it is conceded that that email address goes to some other department or section within the procuring Entity.

Having found as such we now turn to the law in order to determine the fate of any actions not done in tandem with the Act.

Section 168 of the Act states as follows:

***"168. Notification of review and suspension of proceedings***

***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 as a manner as may be prescribed."***

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It is clear that once a Review Application has been filed, the Board Secretary is under duty to notify the Procuring Entity as a mandatory requirement and the subject procurement proceedings are forthwith suspended. We note that the Notification of Appeal addressed to the Fund Manager of the Procuring Entity actually captures this reference at Paragraph 2 therein. The Board is satisfied that the Board Secretary acted in terms of the provisions of section 168 and issued notification to the

Respondents and the Interested party of the filing of this Application on the very day the same was filed, and that the email address of the procuring Entity used is that to be found in the Procuring Entity's own Letters of Notification and Regret and in the original Tender document. Thus, in the absence of other cogent evidence, the email issued on 11<sup>th</sup> August 2022 was properly served upon the Respondents to their known email address.

In the upshot, the summative value of all the extracts and the law above, the Board arrives at the inescapable conclusion that the Agreement signed between the Procuring Entity and the successful bidder on 15<sup>th</sup> August, 2022, is null and void ab initio for having been executed contrary to the law. For avoidance of doubt, any actions done by the Procuring Entity and the Interested Party after the lodging of a request for review in accordance with Section 167 of the Act and the Notification in accordance with Section 168 of the Act is a nullity. We need to add here that having read the Interested Party's submissions, we find that the gist therein is in consonance with the averments raised by the Respondents under this ground. In light of this, we find that the argument raised as ground one in the submissions dated 25<sup>th</sup> August 2022 and filed 26<sup>th</sup> August 2022 has to suffer the same fate. It is unmerited and therefore this Board is legally seized with the requisite Jurisdiction in the instant Request for Review and shall proceed to address the issues of merit in the Application.

**c) Whether the Applicant's tender was properly evaluated and disqualified at Mandatory/Preliminary stage in terms of the criteria set out in the Tender document?**

We now turn to the argument by the Applicant that its bid was not properly evaluated as captured in summary form under the Applicant's case above. We have perused the Request for Review, the Response by the Procuring Entity, the Blank Tender Documents, the Original Bids, the Evaluation Report and the Professional Opinion that were submitted to us. We note the phases taken in evaluating the bids submitted namely:- Preliminary, Technical and Financial Evaluation stages. We have noted the reasons advanced by the Procuring Entity to the Applicant in its Letter of Regret dated 27<sup>th</sup> July 2022. The Applicant has termed those reasons as non-factual and misleading since they aver they met all the requirements. We will produce the extracts of the specific criteria upon which the Applicant was disqualified before turning to the law.

Herein Below are the extracts of the specific criteria upon which the Applicant was disqualified:-

Section III qualification Criteria

**Pre- qualification checklist for Completeness and responsiveness**

This Section contains all the factors, methods and criteria that the Employer shall use to evaluate applications. The information to be provided

in relation to each factor and the definitions of the corresponding terms are included in the respective Application Forms.

S/No	Completeness and Responsiveness Criteria	Requirement	Weight	Remarks
1.	Form of Tender	<ul style="list-style-type: none"> <li>- Amount must be indicated</li> <li>- Dully fill, sign and stamped</li> </ul>	<b>Mandatory</b>	
	Registration with National Construction Authority (At least NCA 5 - Building	<ul style="list-style-type: none"> <li>- Attach</li> </ul>		
8	works) Mechanical Sub-Contractor NCA 7 and Above Current Practicing NCA License	<ul style="list-style-type: none"> <li>- Attach documents</li> <li>- Valid</li> </ul>	<b>Mandatory</b>	

13.	Certified copy of CR12 ( for limited companies) and copies of IDs for company directors	- Attach	<b><i>Mandatory</i></b>	
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Paragraph 3, of the Applicant form of Tender at page 087 reads as follows,

'We agree to abide by this tender until \_\_\_\_\_ [*insert date*], and it shall remain binding upon us and may be accepted at any time before that date.'

#### **Under Mechanical Sub-Contractor NCA 7 and Above**

Under this limb of the Tender Document, the requirement (e) was that the bidders were to attach documents being an NCA 7 Certificate and above.

#### **Under Certified Copies of CR12 (for Limited Companies) and Copies of IDs for Company Directors (*emphasis ours*)**

Under this the requirement, (h) was to attach certified copies of CR12 and copies of the directors' IDs.

We proceed to note as follows from the perusal of the original bid of the Applicant vis-à-vis the above required criteria:

- i. The Applicant's form of tender as found at page 087 is substantially filled, the amount is indicated as appropriate. However, paragraph 3 therein is not filled in. It is left blank.**
  - ii. The Applicant at page 112 has attached a Certificate of Registration given to M/S Tykon Ventures limited duly registered as a Mechanical Engineering Service Contractor Category NCA 7 being Applicant sub-contractor Certificate Registration No. 56347/M.0622 issued on 6/10/2022 and valid until 06/30/2022. This is the same Certificate annexed as "T004" of the Statement in Support of the Request for Review.**
  - iii. The Tender Notice inviting prospective bidders was issued on 01/07/2022 with a closing date of 15<sup>th</sup> July 2022. This is a day after the stated expiry of validity of the NCA Certificated in (ii) above.**
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- iv. At page 107 of the Applicant's bid is attached a CR12 that is duly certified as a true copy of the original**
  - v. At page 115 is attached the National Identity Card of Margaret Mumbui Muema. There is no National Identity Card for one Mr. Stephen Ngei Musyoka, who also appears in the CR12 in (iv) above as a Director/Shareholder. We note that the ID of the said Stephen is now attached to their affidavit.**

Having perused and reproduced the requirements in the tender document dated 1<sup>st</sup> July 2022 vis-à-vis the original bid submitted by the Applicant

which was the document before the Evaluation Committee, and having in mind the notes we have made above, we now proceed to the law.

Article 227 of the Constitution of Kenya provides as follows:

***"Procurement of public goods and services***

- (1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.***
- (2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following—***
- a) Categories of preference in the allocation of contracts;***
  - b) The protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination;***
  - c) Sanctions against contractors that have not performed according to professionally regulated procedures, contractual agreements or legislation; and***
  - d) Sanctions against persons who have defaulted on their tax obligations, or have been guilty of corrupt practices or serious violations of fair employment laws and practices." [Emphasis ours]***

Section 79(1), (2) and (3) of the Act which provides as follows: -

**"79(1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents.**

**79(2) A responsive tender shall not be affected by—**  
**(a) minor deviations that do not materially depart from the requirements set out in the tender documents; or**  
**(b) errors or oversights that can be corrected without affecting the substance of the tender.**

**79(3) A deviation described in subsection (2)(a) shall—**  
**(a) be quantified to the extent possible; and**  
**(b) be taken into account in the evaluation and comparison of tenders"**

Section 80(2) of the Act provides as follows: -

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**"80(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 Republic v Public Procurement Administrative Review Board ex parte Internet Solutions Ltd: Kenya Airports Authority Ltd & 3**

**Others (Interested Parties) [2021] eKLR.** the Learned Judge, Jairus Ngaah said,

*"... As much as section 79 (2) (a) says that a responsive tender shall not be affected by "minor deviations that do not materially depart from the requirements set out in the tender documents" there is no doubt that failure to comply with mandatory requirements cannot, by any stretch of imagination, be regarded as 'minor deviations'." [Emphasis ours]*

In **Republic v Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020] eKLR** the Court stated:

*"In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. 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." [Emphasis ours].*

Further, *in Republic v Public Procurement Administrative Review Board ex parte Guardforce Group Limited; Pwani University & 2 Others (Interested Parties) [2021] eKLR. Justice E.K. Ogola, stated;*

**"...it becomes apparent to this court that the aspect of compliance with the mandatory requirement of the tender document aims to promote fairness, equal treatment, good governance, transparency, accountability and to do away with unfairness. Failure to conform to this mandatory requirement, and/or exempt or give an opportunity to those who had not earlier on conformed to this mandatory requirement translates to unequal and unfair treatment of other tenderers and, if allowed, may encourage abuse of power and disregard of the law by not only bidders, but also procuring entities."** [Emphasis ours]

Considering the above Constitutional, Statutory and case law, this Board is left with an inevitable conclusion that the tender bid by the Applicant failed to meet the threshold of the three criteria items set out above and was properly evaluated as non-responsive and disqualified at the Mandatory/Preliminary stage and therefore could not proceed to the Technical evaluation stage. Whereas the Letter of Notification in respect to the 2<sup>nd</sup> ground of disqualification refers to lack of Certification. The position is that it is the Certified ID of the 2<sup>nd</sup> Director that was missing from the original tender document as seen from the original tender document of the Applicant. Any one of the items listed as non-compliant was sufficient to render the Applicant's tender nonresponsive and lead to disqualification.

The Applicant has alleged that its bid was "the lowest evaluated bid". We need to dissuade the Applicant from this position. At the opening, the bidders price quotes are read out and recorded. That does not amount to

an evaluation. The bids are simply accepted and recorded without much analysis. This is done by a Tender Opening Committee, which is in fact different from the Tender Evaluation Committee. The evaluation process starts thereafter undertaken by the Evaluation Committee appointed by the Accounting Officer of the Procuring Entity, based on the criteria set out in the Tender document. The fact only of having quoted the lowest price bid as recorded at the Tender Opening does not make any bid the "lowest evaluated tender" unless and until it meets ALL the criteria set out in the various stages of the evaluation process. In this case the Applicant's tender having been disqualified at the Mandatory/preliminary stage cannot be the Lowest Evaluated bid.

We are of considered view that failure to comply with the mandatory requirements in the instant request for review does not in any way amount to a 'minor deviation' and as such the provisions of Section 79(2) of the Act would not be applicable in the Applicant's case. In our view, an Applicant who fails to meet the mandatory requirements such as attaching of ID copies of the directors of the company and filling in the entire form, which have otherwise been met by other bidders cannot expect any preferential treatment. In the Board's view if the requirements explicitly provided for in the blank tender document were to be 'waived' and/or 'flagged' as minor for any one bidder, it will run a travesty to the hallowed provisions of the principles of fairness as espoused in Article 227(1) of the Constitution of Kenya. Waiving any mandatory requirement would mean that the Applicant's tender would be evaluated differently from those of the other

bidders. The intended uniformity in evaluating bids received would clearly be lost and with it the very essence of making standard provisions and criteria for Tender Evaluations.

Sections 79(1), 80(2) of the Act have the import of commanding a Procuring Entity that a responsive bid is one that meets **ALL** the eligibility and mandatory requirements in the Tender Document and therefore the Evaluation Committee is bound to follow the procedure and criteria that is set out in the Tender Document beforehand. In this regard, it is our considered view that the Applicant's bid was rightfully evaluated. These provisions are in our view meant to entrench the National values and principles enshrined in Article 10 and establish a society founded on transparency and good governance.

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## **FINAL ORDERS**

In exercise of the powers conferred upon it by Section 173 of the Act, the Board makes the following orders in the Request for Review dated 11<sup>th</sup> August 2022 in respect of Tender No. KBZWST/NG-CDF/KAKULINI BOYS/2021-2022/01: -

- 1. The Request for Review dated 11<sup>th</sup> August 2022 be and is hereby found unmerited and dismissed;**

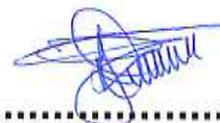
**3. The Procuring Entity be and is hereby directed to proceed with the subject tender in strict conformity with the relevant law as guided in this decision, to its logical conclusion.**

**4. In view of the fact that the asset disposal process is still ongoing, each party shall bear its own cost in the Request for Review.**

**Dated at Nairobi, this 1<sup>ST</sup> day of SEPTEMBER 2022**



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**VICE CHAIRPERSON (Panel Chair)**  
**PPARB**



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**SECRETARY**  
**PPARB**



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