

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 92/2022 OF 21ST OCTOBER 2022

BETWEEN

GILBI CONSTRUCTION COMPANY LIMITED APPLICANT

AND

THE ACCOUNTING OFFICER,

ANTI-COUNTERFEIT AUTHORITY 1ST RESPONDENT

ANTI-COUNTERFEIT AUTHORITY 2ND RESPONDENT

M/S ATHI RIVER HOUSING COMPANY

LIMITED..... INTERESTED PARTY

Review against the decision of the Accounting Officer, Anti-Counterfeit Authority in relation to Tender No. A.C.A./OT/006/2021-2022 Purchase of Two (2) Go- Downs in Nairobi

BOARD MEMBERS PRESENT

- | | |
|------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. QS. Hussein Were | -Member |
| 3. Mrs. Irene Kashindi | -Member |

IN ATTENDANCE

1. Mr. Philemon Kiprop - Holding brief for Acting Board Secretary

BACKGROUND OF THE DECISION

The Tendering Process

Anti-Counterfeit Authority, the Procuring Entity and the 2nd Respondent herein, invited eligible tenderers to submit tenders in response to Tender No. A.C.A./OT/006/2021-2022 Purchase of Two (2) Go-Downs in Nairobi (hereinafter referred to as the "subject tender") using an open national method of tendering and by way of an advertisement on 7th June 2022 on MyGov Newspaper Supplement and on the 2nd Respondent's website (www.aca.go.ke), or (www.supplier.treasury.go.ke) with a submission deadline of 22nd June 2022 at 10.00 a.m. There was to be a pre-bidding session on 14th June 2022 but no tenderer was present for the exercise hence it did not take place.

Tender Submission Deadline and Opening of Tenders

A total of six (6) tenderers submitted their tenders in response to the subject tender within the tender submission deadline and nine (9) tenders were recorded in the opening minutes for the subject tender dated 22nd June 2022 (hereinafter referred to as "Tender Opening Minutes") as follows:

Tenderer No.	Name of Tenderer	No. of copies	Space & Price/ SQM	Tender Sum (Kshs.)
1. (a)	Gilbi Construction Co. Ltd	2	790 SQM @ Kshs. 63,291.1392/ SQM	50,000,000.00
1. (b)	Gilbi Construction Co. Ltd	2	790 SQM @ Kshs. 63,291.1392/ SQM	50,000,000.00
2.(a)	Purple Dot International Ltd	2	790 SQM @ Kshs. 48,100.00/ SQM	37,999,000.00
2.(b)	Purple Dot International Ltd	2	790 SQM @ Kshs. 48,100.00/ SQM	37,999,000.00
3.	Geoma General Merchants	2	790 SQM @ Kshs. 67,983.160/ SQM	120,000,000.00

4. (a)	Athi River Housing Co. Ltd	2	790 SQM @ Kshs. 77,160.00/ SQM	62,,500,000.00
4.(b)	Athi River Housing Co. Ltd	2	790 SQM @ Kshs. 77,160.00/ SQM	62,500,000.00
5.	Placid View Properties Ltd	2	790 SQM @ Kshs. 83,345.00/ SQM	67,510,000.00
6.	Three Bees Limited	2	790 SQM @ Kshs. 83,334/ SQM	60,000,480.00

Evaluation of Tenders

A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1st Respondent undertook evaluation of the nine (9) tenders in the following three stages and as captured in an Evaluation Report signed by the Evaluation Committee members on 22nd July 2022 (hereinafter referred to as the "Evaluation Report"):

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

Mandatory/ Preliminary Evaluation

At this stage of evaluation, the Evaluation Committee was required to apply the criteria outlined as Clause a) Confirmation of compliance with mandatory requirements of the Evaluation Criteria at page 11 and Mandatory Requirements of Section II: Instructions To Tenderers at page 11 of the blank tender document issued to prospective tenderers by the 2nd Respondent (hereinafter referred to as "the Tender Document"). Tenders were required to satisfy all the 9 mandatory requirements at this stage to qualify to proceed for evaluation at the Technical Evaluation stage. A failure to satisfy any one of the 9 mandatory requirements would render a tender non-responsive at this stage.

The Evaluation Committee noted that Mandatory requirement no. 1 at page 11 of the Tender Document required tenderers to sign the Price Schedule Form while mandatory requirement no. 5 at page 11 of the Tender Document required tenderers to sign the Registration Form but a place to sign was not provided as had been done in the other forms with the same requirement. Pursuant to Section 79(2) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act"), the Evaluation Committee agreed not to penalize any tenderer who failed to sign on the above forms and therefore treated it as a minor deviation.

At the end of evaluation at this stage, two (2) tenders were found to be non-responsive and the other seven (7) tenders, which included the Applicant's and the Interested Party's tenders, were found responsive. The tenders that were found responsive proceeded for evaluation at the Technical Evaluation stage.

Technical Evaluation

At this stage of evaluation, the Evaluation Committee was required to apply the criteria outlined as Clause b) Technical Evaluation of the Evaluation Criteria at page 11 and Technical Evaluation of Section II: Instructions To Tenderers at page 12 of the Tender Document. Tenders would be evaluated in three stages and were required to score above 30 out of 60 marks in stage one to qualify for further evaluation under stage two (site visit). Tenders were required to get a combined score of 70 marks and above in stage one and two to proceed to stage three for Structural, Architectural and other Specialist Works Integrity check. Only tenders which qualified in stage three would proceed to the Financial Evaluation stage.

At the end of evaluation at this stage, five (5) tenders were found to be non-responsive, which included the Applicant's tenders, and two (2) tenders, submitted by the Interested Party, were found responsive and proceeded for evaluation at the Financial Evaluation stage.

Financial Evaluation

At this stage of evaluation, the Evaluation Committee was required to apply the criteria outlined as Clause c) Financial Evaluation of the Evaluation Criteria at page 11 and Financial Evaluation of Section II: Instructions To Tenderers at page 13 of the Tender Document. All technically responsive tenders would be evaluated and ranked from the lowest to the highest and the successful tender would be the lowest evaluated price (cost per square meter).

Tenderer No. 4, the Interested Party herein, who was responsive to the Technical Evaluation requirements quoted Kshs. 77,160.00 per SQM totalling to Kenya Shillings Sixty-Two Million, Five Hundred Thousand (Kshs. 62,500,000.00) only per Go-Down as follows:

Tender No.	Tenderer	Floor Are	Cost per square metre	Total Cost	Rank
4A	Athi River Housing Co. Ltd	810	77,160.00	62,500,000.00	1
4B	Athi River Housing Co. Ltd	810	77,160.00	62,500,000.00	
TOTAL				125,000,000.00	

Evaluation Committee's Recommendation

The Evaluation Committee recommended the Interested Party to be considered for valuation of the Go-Downs by the State Department for Lands and award of the subject tender to it at a cost of **Kenya Shillings Sixty-Two Million, Five Hundred Thousand (Kshs. 62,500,000.00) only per Go-Down totaling to Kenya Shillings One Hundred and Twenty-Five Million (Kshs. 125,000,000.00)** only if the valuation carried out by the State Department for Lands indicates that there is value for money in the procurement of the two Go-Downs.

Professional Opinion

In a Professional Opinion dated 22nd July 2022 (hereinafter referred to as the "Professional Opinion"), Senior Supply Chain Management Officer, Mr. Martin Atemo, reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender.

Thereafter, Ms. Fridah Kaberia, the Acting Executive Director of the 2nd Respondent approved the Professional Opinion on 26th July 2022.

Notification to Tenderers

Tenderers were notified of the outcome of evaluation of the subject tender vide letters of Notification of Intention to Award the subject tender dated 10th October 2022.

REQUEST FOR REVIEW

On 21st October 2022, the Applicant filed a Request for Review dated 21st October 2022 together with a Supporting Affidavit sworn by John Maina Ng'ang'a, its Sales Manager, on 21st October, 2022 through the firm of Chepkuto Advocates, seeking the following orders:

- a) A declaration that the Procurement Entity breached the provisions of Article 227(1) of the Constitution and Sections 79(1) and 80(2) of the Public Procurement and Asset Disposal Act;**
- b) The decision of the Procuring Entity to award the Tender to the Interested Party be annulled and set aside;**
- c) The Board be pleased to order a re-evaluation of Tender No. A.C.A/OT/006/2021-2022 for Purchase of Two (2) Go-Downs and award the tender to the Applicant who strongly believes it has the lowest competitive bid;**

- d) The Board be pleased to annul any contract that may have been entered into by the Respondents and the Interested Party before the lapse of the 14-day period within which tenderers may seek administrative review;**

- e) The Board be pleased to stop any implementation of any such contract entered into between the Respondents and Interested Party;**

- f) The Respondents be compelled to pay the costs to the Applicant arising from/and incidental to this Application;**

- g) The Board to make such and further orders as it may deem fit and appropriate in ensuring that the ends of justice are fully met in the circumstances of this Request for Review.**

In a Notification of Appeal and a letter dated 21st October 2022, Mr. James Kilaka, the Acting Board Secretary of the Public Procurement Administrative Review Board (hereinafter referred to as the "Board"), notified the 1st and 2nd Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said 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

1st and 2nd Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five days from 21st October 2022.

In opposition to the Request for Review, the 1st and 2nd Respondents on 26th October 2022 filed through J.O. Adera, Advocate, a Notice of Appointment of Advocate dated 26th October 2022, and a Memorandum of Response dated 26th October 2022.

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

On 24th March 2020, the Board issued Circular No. 2/2020 detailing the Board's administrative and contingency management plan to mitigate COVID-19 pandemic. Through this circular, the Board dispensed with physical hearings and directed that all requests for review applications be canvassed by way of written submissions. The Board further cautioned all parties to adhere to the strict timelines as specified in its directive as the Board would strictly rely on the documentation filed before it within the

timelines specified to render its decision within twenty-one days of filing of the request for review in accordance with Section 171 of the Act. Clause 1 on page 2 of the said Circular directed that pleadings and documents would be deemed properly filed if they bore the Board's official stamp.

On 3rd November 2022, the Applicant filed a Supplementary Affidavit sworn by John Maina Ng'ang'a on 3rd November 2022. Parties did not file written submissions.

APPLICANT'S CASE

The Applicant avers that it participated in the subject tender as a tenderer and submitted its tender in strict compliance with the terms of the Tender Document, the Act and the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "the Regulations 2020"). The Applicant avers that it expected that its tender, amongst others, would be evaluated in accordance to the provisions under Section II: Instructions To Tenderers which laid out the evaluation criteria at page 11 of the Tender Document.

The Applicant avers that it received a call on 12th October 2022 requesting it to collect a letter from the 2nd Respondent dated 10th October 2022 which informed it of the extension of the tender validity period by 30 days from 20th October 2022. The Applicant avers that it also received a letter of

Notification of Intention to Award the subject tender dated 10th October 2022 informing it that it was not the successful tenderer.

The Applicant avers that the letter of Notification of Intention to Award the subject tender notified it that its tender was unsuccessful and non-responsive at the Technical Evaluation stage for reasons that (a) the Evaluation Committee was allegedly unable to inspect Go-Down No. 19 with respect to its Tender No. 1B which had been proposed for sale at the time of the site visit because the key was broken and therefore Tender No. 1B was not evaluated; (b) its Tender No. 1A scored below the required pass mark; and (c) the report by Public Works indicated other reasons for failure were (i) that the floor area of Go-Down 18 with respect to Tender No. 1A was damp, a pointer to some underlying defects that could negatively affect stored goods/exhibits; (ii) the kitchen was small and could not accommodate common standard appliances such as a fridge and water dispenser and leave decent air circulation space; (iii) it lacked overhead cabinets in the kitchen; (iv) there were two (2) spacious offices on one warehouse not fully furnished; (v) the top office was not fully furnished; (vi) the Go-Down had an exposed water tank; (vii) there was an unpleasant smell at the main entry of the warehouse complex; and (viii) the ladies WC was very narrow in size.

The Applicant avers that the Evaluation Committee was unable to access Go Down No. 19 with respect to Tender No. 1B due to an unforeseen accident on the Applicant's part which left the key providing access to the premises

broken. This situation was promptly corrected and the Evaluation Committee notified of their ability to gain access to evaluate the said Go-Down on the next day following the site visit since another key had been availed to facilitate access. Having notified the Evaluation Committee that, it could gain access to evaluate the said Go-Down on the next day, the Applicant avers that it expected them at the site on the following day but the Evaluation Committee members never returned, which is evidence of their unwillingness to carry out the evaluation.

The Applicant avers that the Evaluation Committee in scoring its Tender No. 1A, relied on a criterion not provided for under the Technical Evaluation stage to eliminate it from the procurement process. It is the Applicant's case that it ought to have received 40 out of 60 marks at the first phase of the technical evaluation and that it met all the requirements provided under the second phase of the technical evaluation involving the site visit hence a fair and objective evaluation in tandem with the provisions of Article 227(1) of the Constitution ought to have awarded it a total of 80 marks at the Technical Evaluation stage automatically qualifying it for evaluation at the Financial Evaluation stage.

The Applicant avers that the 2nd Respondent's reliance on reasons indicated in the report by the State Department of Public Works (hereinafter referred to as "the Public Works Report") to render it non-responsive at the Technical Evaluation stage, subjected it to an unfair evaluation by focusing on

requirements falling outside the purview of the Tender Document and inconsequential to the scoring. That the 2nd Respondent acted *ultra vires* and is therefore in contravention of the provisions of Section 80(2) of the Act which requires the evaluation of tenders to be done using the criteria set out in the Tender Document. The Applicant avers that it had a legitimate expectation that the 2nd Respondent would comply with its own tender conditions and fairly evaluate its tender in accordance with the provisions of the Tender Document hence its disqualification amounts to an illegality contrary to Article 227(1) of the Act.

The Applicant further avers that the Public Works Report was to be issued as part of the 2nd Respondent's due diligence which was to be carried out on a tenderer who had already passed the Technical Evaluation stage. By carrying out due diligence on its premises, the Applicant contends that this is a clear indication that its tender had successfully passed the Technical Evaluation stage and it was indeed the lowest evaluated tenderer.

The Applicant avers that due to the fact that the Go-Downs mirrored each other, the marks that ought to be awarded in Tender No. 1A ought to have been similar to those awarded in Tender No. 1B had the Evaluation Committee been willing to evaluate the premises in Tender No. 1B.

The Applicant avers that in addition to having scored above the set pass mark of 70%, it was the lowest evaluated tenderer with its tender price being

Kshs. 50,000,000.00 which was lower than that of the Interested Party which quoted Kshs. 62,500,000.00. Further, the Applicant alleges that the Go-Downs belonging to the Interested Party are of a lower standard compared to its Go-Downs and is shocked by the 2nd Respondent's actions of picking a building of a lower standard at a higher price.

The Applicant avers that the 2nd Respondent failed to uphold and promote the principles of fairness, equitability, transparency, competitiveness and cost-effectiveness in the procurement proceedings as stipulated under Article 227(1) of the Constitution and by reason of the said breaches, it has suffered loss and damage since (a) it has lost the right to compete fairly in the award of the subject tender; (b) the tender has not been fairly evaluated; and (c) it has been denied an opportunity of the award of the subject tender.

Consequently, the Applicant prays that the Board grants the orders sought in its Request for Review.

RESPONDENTS' CASE

In response to the allegation of having unlawfully disqualified the Applicant's tender for being unable to inspect Go-Down No. 19 for Tender No. 1B and failure to take into account the Applicant's invitation to inspect the said premises on the following day, the Respondents contend that it complied with Regulation 76(2) of Regulations 2020. The Respondents contend that

the Evaluation Committee visited Go-Down 19 with respect to Tender No. 1B but was unable to access the same for evaluation despite the Applicant having sufficient notice to prepare for the site visit hence cannot be said to have breached their obligations. Additionally, that the Evaluation Committee was bound to evaluate and consider the Applicant's Go-Down 19 with respect to Tender No. 1B and not any other premises which was not in the subject tender.

The Respondents further contend that the Evaluation Committee was bound by strict timelines and was comprised of members from different directorates hence securing their attendance created logistical impracticalities that would have adversely affected the Committee's timeline and allowing the Applicant two days to inspect its premises would have amounted to affording them an unfair advantage over the other tenderers who had one-day site visits.

The Respondent concedes that items 1,2, and 3 of the Applicant's Tender No. 1A were properly scored and does not contest the sub-total score of 40 marks. However, the Respondents contend that the Evaluation Committee did not consider any requirement outside the scope of the Tender Document or Act noting that the Tender Document at page 11 indicated that the Evaluation Criteria would include Structural, Architectural, and other Specialist Works Integrity Check which is anchored on Section 80(3)(b) of the Act which provides that each criterion shall be expressed so that it is applied, in accordance with the procedures, taking into consideration price,

quality, time and service for the purpose of evaluation. The Respondents contend that this is a qualitative criterion adopted in evaluating the space proposed for occupation by the tenders received and was included in the Tender Document in actualizing the 1st Respondent's responsibilities under Section 60(3)(a) and 60(3)(g) of the Act which require the technical requirements to incorporate conformity to design, specification, functionality and performance and factor in the cost of servicing and maintaining the item.

The Respondents contend that they are tasked with the safe custody of seized goods which must be properly preserved, *inter alia*, for court processes including criminal prosecution as stipulated under Sections 25(1)(c) and 27(1) of the Act. Hence, the Evaluation Committee observed that the floor of Go-Down No. 18 with respect to Tender No. 1A was damp, a pointer to some underlying defects that could negatively affect stored goods/exhibits. Additionally, the observations highlighted in the Public Works report spoke adversely to the functionality and performance of the space, its quality, and overall integrity which informed the score of 27 marks giving the Applicant a total score of 67 marks.

The Respondents contend that the Evaluation Committee acted within the scope of Section 80 (2) of the Act since it was allowed to deal with the technical aspects of the procurement as described in the Evaluation Criteria at page 11 of the Tender Document and pursuant to Section 46(3) and 46(4)(a) of the Act. Additionally, the Respondents contend that they

complied with provisions of Article 227(1) of the Constitution and Section 3 and 79(1) of the Act and conducted a fair, transparent, cost effective, and equitable procurement process.

In conclusion, the Respondents contend that the Applicant has no basis to allege any illegality on their part, has not demonstrated the manner it has suffered loss or damage as a result of being rendered non-responsive and requests the Board to dismiss the Request for Review with costs.

APPLICANT'S REJOINDER

In its rejoinder, the Applicant avers that it took all necessary measures in readiness of the Evaluation Committee's site visit and could not have foreseen the breakage of the key which cannot be used to gauge its preparedness for the site visit and excuse the Respondents' unwillingness to evaluate its premises.

The Applicant further avers that the Evaluation Committee had stated that it would return to inspect the Go-Down once another key had been availed and the 2nd Respondent's procuring officer had even called at 7.23 p.m. on the same day to inquire whether it had obtained another key following which the Applicant confirmed that a new key was available and was advised to convey this information to the 1st Respondent. The Applicant avers to having called

the 1st Respondent the next morning and that the 1st Respondent stated that she would inform the rest of the Committee members and communicate when they would come back for evaluation. The Applicant avers that it waited for the Evaluation Committee for the entire day and decided to call the 1st Respondent at 3.47 p.m. to confirm if they would be coming for the site visit but the call went unanswered and the Applicant was also unable to reach the 2nd Respondent's procuring officer.

The Applicant avers that the Evaluation Committee had requested to inspect another Go-Down having failed to access Go-Down No. 18 with respect to Tender No. 1B and confirmed that all the Go-Downs within the Applicant's premises were the same. Further, the Applicant avers that the Respondents have confirmed they had 30 days to evaluate tenders in the subject tender and since they utilized 9 days out of the set 30-day period, they had an additional 21 days out of which one could have been dedicated to carrying out the evaluation which would have afforded them an opportunity to compete fairly against other tenderers.

The Applicant avers that the Tender Document did not provide that a tender would be disqualified due to the Evaluation Committee's lack of access to the Go-Down on the date of inspection neither did it dictate that failure to provide access to inspect the site would lead to disqualification at both stages of the Technical Evaluation stage indicating that the Respondents actions

amounted to amending the Tender Document contrary to Section 75 of the Act.

The Applicant avers that the Respondents' computation of marks in stage two of the Technical Evaluation stage was not an accurate representation of facts since the evaluation criteria was expressly confined to the availability of specific features. In line with the said criteria, the Applicant avers that it had power, water, and sewerage connection; was located in a secure environment with a perimeter wall and a gate; had adequate parking and offloading space; had good road accessibility; and contained office spaces, washrooms and a kitchen. Hence the Respondent's averments that the marks were based on a qualitative criterion are unmeritorious and that the Applicant expected that it would have been awarded 40 marks since it met all the requirements as per the evaluation criteria in the Tender Document.

The Applicant avers that the Respondents was under a duty to ensure that the Tender Document spelt out all the requirements that would be considered in evaluation the tenderers and failed to adhere to the provisions of Section 70(3) of the Act which dictates that tender documents ought to contain sufficient information to allow fair competition among tenderers.

The Applicant avers that page 11 of the Tender Document set the Structural, Architectural and Other Specialist Works Integrity check as a stand-alone stage in the technical evaluation phase and that the assessment of a tenderer in stages one and two was therefore exclusive of the Structural, Architectural and Other Specialist Works Integrity check meaning that the Respondents admit that the Applicant passed stage one and two.

The Applicant avers that an evaluation criterion cannot be implied and the third stage under Technical Evaluation at page 11 of the Tender Document did not provide the criteria for evaluation. A tenderer was only required to attain a total of 70% in stage one and two to qualify for Financial Evaluation. Hence, the third staged did not have any impact either on the scoring of bidders or on the progression of successful bidders to the Financial Evaluation stage and the Respondents attempt to rely on the purported findings of the said integrity check to inform the awarding of scores under stage two of the Technical Evaluation stage amounts to an illegality and offends the principles of fairness, transparency and competitiveness and contravenes the provisions of Section 70(3) and 58(2) of the Act.

BOARD'S DECISION

The Board has considered each of the parties' cases, documents, pleadings, written submissions, authorities together with confidential documents submitted to the Board by the 1st Respondent pursuant to Section 67(3)(e) of the Act and finds that the following issues call for determination.

- 1. Whether the Evaluation Committee evaluated the Applicant's Tender No. 1A and 1B in accordance with the provisions of Article 227(1) of the Constitution, Section 80(2) of the Act read with Clause b) Technical Evaluation of the Evaluation Criteria at page 11 and the Technical Evaluation of the Evaluation Criteria of Section II: Instructions To Tenderers at page 12 of the Tender Document.**

- 2. What orders should the Board grant in the circumstances?**

Whether the Evaluation Committee evaluated the Applicant's Tender No. 1A and 1B in accordance with the provisions of Article 227(1) of the Constitution, Section 80(2) of the Act read with Clause b) Technical Evaluation of the Evaluation Criteria at page 11 and the Technical Evaluation of the Evaluation Criteria of Section II: Instructions To Tenderers at page 12 of the Tender Document

The Applicant alleges that the 2nd Respondent breached the provisions of Article 227(1) of the Constitution, Section 80(2) of the Act and Clause b) Technical Evaluation of the Evaluation Criteria at page 11 and Technical Evaluation of Section II: Instructions To Tenderers at page 12 of the Tender

Document by failing to evaluate its Tender No. 1B following the breakage of the key to Go-Down 19 on the day of the site visit leading to lack of access to the said premises by the Evaluation Committee. The Applicant alleges that the Evaluation Committee failed to evaluate the said premises despite being invited back for evaluation the following day when another key had been availed. Further, the Applicant contends that the 2nd Respondent unfairly evaluated its Tender No. 1A beyond the requirements outlined in the Tender Document.

The Respondents on the other hand contend that they adhered to the provisions of the Constitution, the Act and the Tender Document in evaluating the Applicants Tender No. 1A and 1B and did not evaluate the same outside the scope of the Tender Document.

We note that the Respondents vide a letter dated 10th October 2022 notified the Applicant of the outcome of evaluation of the subject tender as follows:

".....

This notification of intention to award (Notification) notifies you of our decision to award the above contract. The Transmission of this notification begins the standstill period of 14 days. During the standstill period, you may:

a. Request a debriefing in relation to the evaluation of your Tender; and/or

b. Submit a procurement-related Complaint in relation to the decision to award the contract.

I) The Successful Tenderer: -

<i>Bidder No.</i>	<i>4 (bids 4a and 4b)</i>
<i>Name:</i>	<i>M/S Athi RIVER Housing Co. Ltd</i>
<i>Address:</i>	<i>P.O. Box 4466-00506 Tel: 0722519151</i>
<i>Tender Sum:</i>	<i>Kshs. 62,500,000.00 Per Godown</i>
<i>Valuation Price</i>	<i>Kshs. 52,000,000.00 Per Godown</i>

-
- A. The Evaluation Committee was unable to access and inspect Godown No. 19 (Bid) which had been proposed for sale by the bidder at the time of the site visit because the key was broken and therefore bid 1B was not evaluated;***
 - B. Your bid, 1A scored below the required pass mark;***
 - C. That other reasons indicated in the report by Public Works for failure of bidder No. 1 at the technical evaluation stage were as follows:***

- *That the floor area of Godown 18 (bid 1A) was damp, a pointer to some underlying defects that could negatively affect stored goods/exhibits;*
- *Kitchen- It is small and cannot accommodate common standard appliances such as a fridge and water dispenser and leave decent air circulation space;*
- *Lacks overhead cabinets in the kitchen;*
- *Office space – There are 2 spacious offices on one warehouse not fully finished;*
- *The top office was not fully finished;*
- *The godown had an exposed water tank;*
- *There was unpleasant smell at the main entry of the warehouse complex; and*
- *Ladies WC was very narrow in size.*

Yours faithfully,

.....”

The Board is cognizant of Article 227 of the Constitution which requires procurement of goods and services to be undertaken in a system that is fair, equitable, transparent, competitive and cost-effective and provides for a legislation that governs public procurement and asset disposal framework as follows:

"227. 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)**
- b)**
- c) and**
- d)"**

The Board observes that the legislation contemplated in Article 227(2) of the Constitution is the Act. Section 80 (1) and (2) of the Act is instructive on how evaluation and comparison of tenders should be conducted by a procuring entity as follows:

"80. Evaluation of tender

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

(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.”

Section 80(2) of the Act as indicated above requires the Evaluation Committee to evaluate and compare tenders in a system that is fair using the procedures and criteria set out in the Tender Document. A system that is fair is one that considers equal treatment of all tenders against a criteria of evaluation known by all tenderers since such criteria is well laid out in a tender document issued to tenderers by a procuring entity.

The Board has carefully studied the Tender Document of the subject tender and notes that the criteria for evaluation of the subject tender was set out in Section II- Instructions To Tenderers at page 3 to 13 of the Tender Document.

Clause b) Technical Evaluation of Evaluation Criteria at page 11 of the Tender Document provides as follows:

"Technical Evaluation: Tenderers who are responsive under the mandatory evaluation criteria shall be evaluated as per the Technical Evaluation Criteria set out under Instructions to Tenderers. The technical evaluation shall be undertaken in three stages. Tenderers are required to score above 30 out of 60 Marks in stage one to qualify for further evaluation under stage two (site visits). Tenderers are required to get a combined score of 70 marks and above in stage one and two to proceed to stage three for Structural, Architectural and other Specialist Works Integrity check. Only tenderers who qualify in stage three will proceed to Financial Evaluation."

Additionally, Technical Evaluation of the Evaluation Criteria of Section II: Instructions To Tenderers at page 12 of the Tender Document provides as follows:

<i>Stage One</i>			
			<i>Total score</i>
<i>Go-down to have a total usable floor space measuring between 697 and</i>	<i>Above 883 sq.mts.</i>	<i>35 marks</i>	<i>35 marks</i>
	<i>697 sq. mts.- 883 sq. mts.</i>	<i>20 marks</i>	

1,115 square meters	Below 697 sq. mts.	0 marks	
Go-down to be located within Nairobi and its environs (The reference point will be the ACA HQ)	Below 15 kms	15 marks	15 marks
	15kms- 35kms	10 marks	
	Above 35 kms	5 marks	
Provide as built drawings	10 marks	10 marks	10 marks
Sub-Total			60 marks
Stage Two			
Site Visit	Have power, water, and sewerage connection	10 marks	40 marks
	Be in a secure environment with a perimeter wall and a gate	10 marks	
	Have adequate parking and	10 marks	

	<i>offloading space</i>		
	<i>Have good road accessibility</i>	<i>5 marks</i>	
	<i>Have provisions for office space, washrooms and a kitchen</i>	<i>5 marks</i>	

N.B. ONLY bids that score 70% pass Mark and above will proceed to the final evaluation stage (Financials).

The import of the above provisions of the Tender Document is that a tender would be evaluated in three stages at the Technical Evaluation stage and would be scored against the requirements set out under Stage one and Stage Two of the Technical Evaluation of Evaluation Criteria of Section II- Instructions To Tenderers at page 12 of the Tender Document. Only tenders which attained the pass mark of 70% and above would proceed to the Financial Evaluation stage.

The Board notes that Regulation 76 of Regulations 2020 dictate that the Evaluation Committee shall conduct a Technical Evaluation by comparing each tender to the technical requirements of the goods, works, or services in the Tender Document as follows:

"76. Technical evaluation

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

The Board has studied the Evaluation Report and observes that upon evaluation, the Applicant's Tender No. 1A scored 40 out of 60 marks at Stage One of the Technical Evaluation requirements and 27 out of 40 marks at Stage Two of the Technical Evaluation requirements which added up to a total score of 67 marks. The Applicant's Tender No. 1B scored 10 out of 60 marks at Stage One of the Technical Evaluation requirements and no marks were allocated at Stage Two of the Technical Evaluation requirements which added up to a total score of 10 marks. According to the Evaluation Report, the Evaluation Committee was unable to access and inspect Go-down No. 19 with respect to Tender No. 1 B which had been proposed for sale by the tenderer at the time of the site visit because the key was broken and

therefore Tender No. 1B was not evaluated. The Committee further observed that the floor of Go-down 18 with respect to Tender No. 1A was damp, a good pointer to some underlying defects that could negatively affect stored goods/exhibits. The Applicant's tender was determined as non-responsive at the Technical Evaluation stage having failed to score the pass mark of 70%.

We have studied the Applicant's original tender submitted to the Board as part of the confidential documents pursuant to Section 67(3)(e) of the Act in response to the subject tender and note the following with respect to the evaluation criteria that the 2nd Respondent's Evaluation Committee found the Applicant's tender non-responsive:

No.	Requirement	What the Applicant provided in its original Tender No. 1A	Outcome of Evaluation of the Applicant's original Tender No. 1A as captured in the Evaluation Report, Professional Opinion and the 1 st and 2 nd Respondents Statement of Reply	What the Applicant provided in its original Tender NO. 1B	Outcome of Evaluation of the Applicant's original Tender No. 1B as captured in the Evaluation Report and the 1 st and 2 nd Respondents Statement of Reply	Observation by the Board of the Applicant's original tender
Stage One: Technical Requirements						
1.	<ul style="list-style-type: none"> • Go-down to have a total usable space measuring 	<ul style="list-style-type: none"> • Page 21 of the tender indicated 790 	<ul style="list-style-type: none"> • Awarded 20 marks 	<ul style="list-style-type: none"> • Page 21 of the tender indicated 790 square meters 	<ul style="list-style-type: none"> • Not awarded any marks. 	<ul style="list-style-type: none"> • The Board notes that Tender No. 1 was correctly awarded 20 marks since its submitted square feet

						<p>technical requirement having submitted a total usable space of 790 square meters at page 21 of its tender which was between 697 and 883 square meters and therefore ought to have scored 20 marks.</p>
2	Go-down to be located within Nairobi and	<ul style="list-style-type: none"> Submitted Certificate of 	<ul style="list-style-type: none"> Awarded 15 marks 	<ul style="list-style-type: none"> Submitted Certificate of 	<ul style="list-style-type: none"> Not awarded any marks 	<ul style="list-style-type: none"> The Board notes that the Applicant was awarded 15 marks in Tender

	<p>its environs (The reference point will be the ACA HQ) Below 15 kms – 15 marks</p>	<p>Title Number I.R 172308 at page 33 to 35</p>		<p>Title Number I.R 172308 at page 33 to 35</p>		<p>No. 1A meaning that the Evaluation Committee established that the Go-Down located below 15 kilometers from ACA HQ and was within Nairobi and its environs.</p> <ul style="list-style-type: none"> The Board notes that the Applicant was not awarded any marks for Tender No. 1B despite availing similar title
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Stage Two : Site Visit								documents being	Certificate of Title	Number I.R No.	172308 of as	those availed in	Tender No. 1A	and hence ought	to have been	awarded 15 marks	since the	Evaluation	committee at this	stage was relying	on documents	submitted and not	on the site visit.																																																																																																																																																																																																																																																																																																																																																																																																																																						

1.	Have power, water, and sewerage connection	<ul style="list-style-type: none"> At page 47 of the tender the Applicant confirmed that: <ul style="list-style-type: none"> there was a septic tank and treatment plant well connected to the Go-down The premises is connected to KPLC 	<ul style="list-style-type: none"> Following the site visit the Applicant was awarded 8 marks as indicated in the Evaluation Report. the Electrical Engineer's Site Inspection Report by Eng. K.D.Kibet established with colored photos that power connection was sufficient KPLC 	<ul style="list-style-type: none"> At page 47 of the tender the Applicant confirmed that: <ul style="list-style-type: none"> there was a septic tank and treatment plant well connected to the Go-down The premises is connected to KPLC 	<ul style="list-style-type: none"> Following the site visit: <ul style="list-style-type: none"> the Electrical Engineer's Site Inspection Report by Eng. K.D.Kibet noted that they were unable to visit and assess Go-down for Tender No. 1B due to access issues. No marks awarded as Applicant was not evaluated. 	<ul style="list-style-type: none"> The Board notes that the Applicant's Tender No. 1 was to be evaluated against this requirement to establish if it had power, water and sewerage connection It is our considered view that the Tender No. 1A ought to have
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	<p>is connected to KPLC Mains electricity and meters were functional plus a backup generator that only lights the common areas.</p> <ul style="list-style-type: none"> • There is a borehole 	<p>connection C/W adequate protection, adequate lighting in Go-down storage space, adequate lighting & power for washrooms, kitchen and office areas.</p>	<p>Mains electricity and meters were functional plus a backup generator that only lights the common areas.</p> <ul style="list-style-type: none"> • There is a borehole and water tanks for water storage 	<p>scored 10 marks since from the site visit reports it was confirmed that it met this technical requirement and it had power, water and sewerage connection.</p>
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		<p>and water tanks for water storage that is well connected to the washrooms and kitchen in all Go-downs.</p>		<p>that is well connected to the washrooms and kitchen in all Go-downs.</p>		
4	<p>Be in a secure environment with a perimeter</p>	<ul style="list-style-type: none"> At page 47 of the tender the Applicant 	<ul style="list-style-type: none"> Following the site visit the Applicant was awarded 6 marks as 	<ul style="list-style-type: none"> At page 47 of the tender the Applicant confirmed 	<ul style="list-style-type: none"> The Report by Arch. Asst. Kivisi Kafuna noted that they only viewed one Go- 	<ul style="list-style-type: none"> The Board notes that the Applicant's Tender No. 1 was to be evaluated against

<p>wall and a gate</p>	<p>confirm d that the Go-Downs were in a secure place with a perimeter wall and a gate and there are security personnel guarding the</p>	<p>indicated in the Evaluation Report.</p> <ul style="list-style-type: none"> the Report by Arch. Asst. Kivisi Kafuna established with colored photos that the site had a perimeter wall, one main gate with both gates guarded sufficiently, 	<p>that the Go-Downs were in a secure place with a perimeter wall and a gate and there were security personnel guarding the premises sufficiently.</p>	<p>Down due to broken keys during the site visit.</p>	<p>this requirement to establish if it was in a secure environment with a perimeter wall and gate.</p> <ul style="list-style-type: none"> It is our considered view that the Tender No. 1A ought to have scored 10 marks since from the site visit report it was confirmed that the Applicant's Go-down met this technical
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5	<p>Have adequate parking and offloading space</p>	<p>At page 47 of the tender the Applicant confirmed that the Go-</p>	<p>Following the site visit the Applicant was awarded 8 marks as indicated in the Evaluation Report.</p>	<p>At page 47 of the tender the Applicant confirmed that the Go-Downs</p>	<p>The Report by Arch. Asst. Kivisi Kafuna noted that they only viewed one Go-Down due to broken keys</p>	<p>The Board notes that the Applicant's Tender No. 1 A was to be evaluated against this requirement to establish if it had adequate</p>	<p>requirement by being in a secure place with a perimeter wall and a gate and having security personnel guarding the premises sufficiently.</p>
premise	24hrs						

		<p>Downs had ample parking space and offloading area catering to all vehicle sizes.</p>	<ul style="list-style-type: none"> The Report by Arch. Asst. Kivisi Kafuna established with colored photos that the site had adequate parking spaces, offloading space is available, turning and reversing was easy since the space was large. He observed that the site parking was not well 	<p>during the site visit.</p>	<p>parking and offloading space.</p> <ul style="list-style-type: none"> We note that the issue of demarcation was not a technical requirement for evaluation in the Tender Document. It is our considered view that the Tender No. 1A ought to have scored 10 marks since from the site visit report it was confirmed that the
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			<p>demarcated which can create blocking of some vehicles.</p> <ul style="list-style-type: none"> • Report by Structural Engineer Mutua Maeda noted that the parking is paved with cabbro paving blocks and the road accessing the site was tarmacked. 			<p>Applicant's Go-down met this technical requirement by having adequate parking and offloading space.</p>
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6	Have good road accessibility	<ul style="list-style-type: none"> At page 47 of the tender the Applicant confirmed that the Go-Downs had a tarmacked road from Mombasa Road leading to the premises 	<ul style="list-style-type: none"> Following the site visit the Applicant was awarded 3 marks as indicated in the Evaluation Report. The Report by Arch. Asst. Kivisi Kafuna established without any attached photo that the site has access from one murrum road which was in 	<ul style="list-style-type: none"> At page 47 of the tender the Applicant confirmed that the Go-Downs had a tarmacked road from Mombasa Road leading to the premises with only 100 meters of 	<ul style="list-style-type: none"> The Report by Arch. Asst. Kivisi Kafuna noted that they only viewed one Go-Down due to broken keys during the site visit. 	<ul style="list-style-type: none"> The Board notes that the Applicant's Tender No. 1 A was to be evaluated against the technical requirement establishing if it had good road accessibility and not the state of the road as per the Tender Document. It is our considered view that the Tender No. 1A ought to
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		<p>with only 100 meters of weathere d road before the entrance to the premises.</p>	<p>poor state and approximately 60m from the feeder road. It was noted that Cabro had been installed within the whole external circulation spaces.</p>	<p>weathered road before the entrance to the premises.</p>		<p>have scored 5 marks since from the site visit report there was no indication that the Go-downs did not have good road accessibility.</p>
7	<p>Have provisions for office space, washrooms and a kitchen</p>	<ul style="list-style-type: none"> At page 47 of the tender the Applicant confirme d that the 	<ul style="list-style-type: none"> Following the site visit the Applicant was awarded 2 marks as indicated in the 	<ul style="list-style-type: none"> At page 47 of the tender the Applicant confirmed that the Go-Downs 	<ul style="list-style-type: none"> The Report by Arch. Asst. Kivisi Kafuna noted that they only viewed one Go-Down due 	<ul style="list-style-type: none"> The Board notes that the Applicant's Tender No. 1 A was to be evaluated against the technical requirement

		<p>Go-Downs had toilets on the ground and first floor, a shower, a kitchenette and a reception office at the ground floor.</p>	<p>Evaluation Report.</p> <ul style="list-style-type: none"> The Report by Arch. Asst. Kivisi Kafuna established with a colored photo of office space and kitchen that the kitchen was small and could not accommodate appliances such as fridge and water dispenser and leave decent 	<p>had toilets on the ground and first floor, a shower, a kitchenette and a reception office at the ground floor.</p>	<p>to broken keys during the site visit.</p>	<p>establishing if it had provisions for office space, washrooms and a kitchen as indicated in the Tender Document. and not on the size of the same.</p> <ul style="list-style-type: none"> It is our considered view that the Tender No. 1A ought to have scored 5 marks since from the site visit report it was confirmed that it
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			<p>circulation space and lacked overhead cabinets, that there were two no. spacious office on one warehouse not fully finished, not fully finished top office with exposed tank, and that there were two spacious and well-designed cloakroom on</p>		<p>had provisions for office space, washrooms and a kitchen hence met this technical requirement.</p>
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the ground floor.

- The report by Eng. Levi Cheworei also indicated that the kitchen space was very small in size and could not accommodate kitchen equipment.

From the analysis enumerated in the table above, it is the Board's considered view that the Evaluation Committee ought to have scored the Applicant's Tender No. 1B 40 marks at Stage One of the Technical Evaluation since it met all the requirements stipulated in the Technical Evaluation stage at page 12 of the Tender Document. We say so because the Applicant submitted similar documents in Tender No. 1B as those submitted in Tender No. 1A and evaluation at this stage was based on the submitted documents in the tender and **not** on the requirement for a site visit. As such, it is our considered view that the Respondents acted unfairly in denying the Applicant's Tender No. 1B marks at Stage One of the Technical Evaluation at page 12 of the Tender Document.

It is also clear to the Board from the site visit evaluation that the Applicant's Tender No. 1A met the technical requirements stipulated under Stage Two of the Technical Evaluation at page 12 of the Tender Document since we have established that the evaluated Go-down No. 18 with respect to Tender No. 1A (a) had power, water, and sewerage connection and ought to have scored 10 marks; (b) was in a secure environment with a perimeter wall and gate and ought to have scored 10 marks; (c) had adequate parking and offloading space and ought to have scored 10 marks; (d) had good road accessibility and ought to have score 5 marks; and (e) had provisions for office space, washroom, and a kitchen hence ought to have scored 5 marks.

The Board is cognizant of the provisions of Section 70 (3) of the Act which stipulate that tender documents ought to contain sufficient information to allow for fair competition amongst tenderers and provides as follows:

"(3) The tender documents used by a procuring entity pursuant to subsection (2) shall contain sufficient information to allow fair competition among those who may wish to submit tenders"

We have established that the additional reasons cited by the Evaluation Committee in disqualifying the Applicant were outside the scope of requirements to be evaluated during the site visit as enumerated at Stage Two: Technical Evaluation of Evaluation Criteria of Section II- Instructions To Tenderers at page 12 of the Tender Document. If it was the intention of the Respondents to evaluate tenders against the reasons indicated in the Public Works Report, then the Respondents had an obligation to categorically stipulate the same in the Tender Document at the time of issuing the same to tenderers so that tenderers would know from inception the evaluation criteria at the Technical Evaluation stage for them to prepare and submit tenders in conformity with the said requirements. In line with this view, the court held in **Miscellaneous Civil Application No. 85 of 2018, Republic V Public Procurement Administrative Review Board Ex Parte Meru University of Science & Technology; M/S AAKI Consultants Architects and Urban Designers (Interested Party) [2019] eKLR**, that:

"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."

The Board notes the argument advanced by the Respondents in support of the Evaluation Committee's reliance on the reasons highlighted in the Public Works Report to disqualify the Applicant's Tender No. 1A at the Technical Evaluation stage by alleging that the evaluation criteria would include Structural, Architectural and other Specialist Works Integrity check which was allegedly anchored on Section 80(3)(b) of and Sections 60(3)(a) and 60(3)(g) of the Act. The Board having carefully studied the Tender Document notes that Clause b) Technical Evaluation of Evaluation Criteria of Section II:

Instructions To Tenderers clearly provided that the Technical Evaluation would be undertaken in three stages of which tenders were required to score above 30 out of 60 marks at stage one to qualify for evaluation at stage two and tenders were required to get a combined score of 70 marks and above in stage one and two to proceed to stage three for Structural, Architectural and other Specialist Works Integrity check. As such, it is our considered view that the Applicant's Tender No. 1A ought to have been evaluated in accordance with the requirements under Stage One and Stage Two of Technical Evaluation before being subjected to the Structural, Architectural and other Specialist Works Integrity check at Stage Three of Technical Evaluation as provided in the Tender Document.

The Board has also noted that the Applicant's Tender No. 1B was not evaluated since the key broke during the site visit hence the Evaluation Committee had no access to Go-down No. 19. We note that the Applicant avers to have invited the Evaluation Committee for the site visit on the next day having obtained another key. The Board is of the considered view that the Applicant cannot have known that the key to its premises would break during the site visit and this was an occurrence beyond its control. It was only fair for the Evaluation Committee to avail the Applicant an opportunity to evaluate its Go-down once the Applicant confirmed it had obtained another key noting that this confirmation was done without any delay. The Respondents confirmed in their Memorandum of Response at page 2 that they had 30 days to evaluate and consider tenders from the date of opening tenders and that the 2nd Respondent issued letters dated 10th October 2022

to extend the tender validity period to allow for conclusion of various approval processes. We find that the Respondents had sufficient time to evaluate the Applicant's Tender No. 1B and ought to have made an effort to go back for the site visit and afford the Applicant a fair opportunity to be evaluated and considered in the subject tender in compliance with the principle of fairness as espoused in Article 227(1) of the Constitution.

Further, we are cognizant of the provisions of Article 47(1) of the Constitution on procedural fairness as follows:

"(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."

The Board notes that procedural fairness is a constitutional requirement in administrative action and goes beyond the traditional meaning of the duty to afford one an opportunity of being heard. Even in instances where there is no express requirement for a person to be heard before a decision is made, the authority entrusted with the mandate of making the decision must act fairly. In **Civil Appeal 52 of 2014 Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR**, the Court of Appeal held that:

"Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches

the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in Article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed."

In Judicial Review Miscellaneous Application No. 36 of 2016 Republic v National Police Service Commission Exparte Daniel Chacha Chacha [2016] eKLR the court while addressing the elements of procedural fairness referred to the case by the Supreme Court in **Baker v. Canada (Minister of Citizenship & Immigration) 2 S.C.R. 817** 6 where it was held that:

"The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions.

53. The Court further emphasized that procedural fairness is flexible and entirely dependent on context. In order to determine the degree of procedural fairness owed in a given case, the court set out five factors to be considered: (1) The nature of the decision being made and the process followed in making it; (2) The nature of the statutory scheme and the term of the statute pursuant to which the body operates; (3) The importance of the decision to the affected person; (4) The presence of any legitimate expectations; and (5) The choice of procedure made by the decision-maker. [Emphasis ours]

From the foregoing, we find that the Respondents' Evaluation Committee failed to evaluate the Applicant's Tender No. 1A and 1B in accordance with the provisions of Article 227(1) of the Constitution, Section 80(2) of the Act read with Clause b) Technical Evaluation of the Evaluation Criteria at page 11 and the Technical Evaluation of the Evaluation Criteria of Section II: Instructions To Tenderers at page 12 of the Tender Document.

What orders should the Board grant in the circumstances?

We have established that the Respondents had an obligation to evaluate the submitted tenders using the procedure and criteria set out in Clause b) Technical Evaluation of the Evaluation Criteria at page 11 and the Technical Evaluation of the Evaluation Criteria of Section II: Instructions To Tenderers

at page 12 of the Tender Document as read with Section 80(2) of the Act and Article 227 (1) of the Constitution.

Having found that the Applicant's tender No. 1A and 1B were not properly evaluated, any action undertaken thereafter emanating from an unfair and unlawful evaluation cannot be allowed to stand because such actions are consequently null and void.

Having found that the 2nd Respondent rendered the Applicant's Tender No. 1A and 1B non-responsive contrary to provisions of Article 227(1) of the Constitution, Section 80(2) of the Act read with the provisions of the Tender Document, the Board deems it fit to order the 1st Respondent to direct the Evaluation Committee to re-admit the Applicant's Tender No. 1A and 1B at the Technical Evaluation stage and conduct a re-evaluation of the Applicant's Tender No. 1A and 1B at the Technical Evaluation stage together with all other tenders that made it to the Technical Evaluation stage taking into consideration the findings of this Board and the provisions of the Act and the Tender Document.

The upshot of our findings is that the instant Request for Review succeeds with respect to the following specific orders:

FINAL ORDERS

In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review dated 21st October 2022:

- 1. The Letter of Notification of Intention to Award addressed to the Interested Party dated 10th October 2022 with respect to Tender No. A.C.A./OT/006/2021-2022 for Purchase of Two (2) Go-Downs in Nairobi, be and is hereby nullified and set aside.**

- 2. The Letters of Notification of Intention to Award addressed to all the unsuccessful tenderers including the Applicant dated 10th October 2022 with respect to Tender No. A.C.A./OT/006/2021-2022 for Purchase of Two (2) Go-Downs in Nairobi, be and are hereby nullified and set aside.**

- 3. The 1st Respondent is hereby ordered to direct the Evaluation Committee to re-admit the Applicant's tender at the Technical Evaluation stage and conduct a re-evaluation of the Applicant's tender at the Technical Evaluation stage together with all other tenders that made it to the Technical Evaluation stage in accordance with the provisions of the Tender Document, the Act, Regulations 2020 and the Constitution while taking into consideration the Board's findings in this Request for Review.**

4. Further to Order No. 3 above, the Respondents are hereby directed to proceed with the procurement process to its logical conclusion including the making of an award to the successful tenderer within fourteen (14) days from the date of this decision.

5. Given that the procurement process for the subject tender is not complete, each party shall bear its own costs in the Request for Review

Dated at NAIROBI, this 11th Day of November 2022.



.....
CHAIRPERSON

PPARB



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SECRETARY

PPARB