

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 102 OF 2022 OF 6<sup>TH</sup> DECEMBER 2022**

**BETWEEN**

**MILKA TRADING LIMITED ..... APPLICANT**

**AND**

**THE ACCOUNTING OFFICER,**

**SAMBURU COUNTY GOVERNMENT ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY GOVERNMENT OF SAMBURU ..... 2<sup>ND</sup> RESPONDENT**

**SAIMEN ENTERPRISES LIMITED ..... INTERESTED PARTY**

Review against the decision of the Accounting Officer of the County Government of Samburu in relation to Tender No. SCG/T/009/22-23 for Supply of Food Stuff

**BOARD MEMBERS PRESENT**

- |                      |              |
|----------------------|--------------|
| 1. Ms. Faith Waigwa  | -Chairperson |
| 2. Ms. Njeri Onyango | - Member     |
| 3. Eng. Mbiu Kimani  | - Member     |

## **IN ATTENDANCE**

Mr. James Kilaka

-Ag. Board Secretary

## **BACKGROUND OF THE DECISION**

### **The Tendering Process**

Samburu County Government -Department of Education and Vocational Training, the Procuring Entity and the 2<sup>nd</sup> Respondent herein, invited interested tenderers to submit tenders in response to Tender No. SCG/T/009/22-23 for Supply of Food Stuff (hereinafter referred to as the "subject tender") by way of an advertisement in the Daily Nation on 3<sup>rd</sup> November 2022 as well as the 2<sup>nd</sup> Respondent's website [www.samburu.go.ke](http://www.samburu.go.ke) or the Public Procurement Information Portal website [www.tenders.go.ke](http://www.tenders.go.ke). The subject tender was reserved for women and tenderers were required to submit their tenders through the IFMIS Supplier Portal not later than 11<sup>th</sup> November 2022 at 10:00 a.m.

### **Submission of Tender and Tender Opening**

The Applicant was among the tenderers that submitted their tenders in response to the subject tender within the tender submission deadline of 11<sup>th</sup> November 2022 at 10:00a.m. The tenders were opened immediately after the closing date and time.

## **Evaluation of Tenders**

Evaluation of Tenders was provided for under Section III- Evaluation and Qualification Criteria at pages 33 to 43 of the blank tender document issued to prospective tenderers by the 2<sup>nd</sup> Respondent (hereinafter referred to as "the Tender Document"). The Evaluation Criteria as indicated at pages 42 and 43 of the Tender Document was to be conducted in the following stages:

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

### **Mandatory requirements**

At this stage of evaluation, tenderers were required to comply with the twelve (12) mandatory requirements set out in the evaluation criteria at page 42 of the Tender Document to proceed for evaluation at the Technical Evaluation stage. Copies of the documents under the mandatory requirements were required to be certified by a Commissioner for Oaths.

The Applicant was determined non-responsive at this stage for failing to meet Mandatory requirement no.11 of the Mandatory Requirements at page 42 of the Tender Document and did not proceed for further evaluation.

## **Technical requirements**

Clause 2.2.1 Evaluation of Technical aspects of the Tender of Section III- Evaluation and Qualification Criteria at page 34 of the Tender Document stipulated that the 2<sup>nd</sup> Respondent would evaluate the Technical aspects of the Tender to determine compliance with the 2<sup>nd</sup> Respondent's requirements under Section V "Schedule of Requirement" and whether tenders were substantially responsive to the Technical Specifications and other requirements.

Tenderers were required to comply with the four (4) technical requirements set out in the evaluation criteria at page 43 of the Tender Document. Tenders were required to score at least 70% to be subjected to Financial Evaluation.

## **Financial Evaluation**

The Lowest Evaluated Tender would be the tender of the tenderer that met the Qualification Criteria and whose tender has been determined to be a) most responsive to the Tender Document; and b) the lowest evaluated price as stipulated in Clause 38.1 Lowest Evaluated Tender at page vi of the Tender Document.



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

It is not possible for the Public Procurement Administrative Review Board (hereinafter referred to as "the Board") to make reference to the Evaluation Committee's recommendation of award of the subject tender since the 2<sup>nd</sup> Respondent did not submit to the Board an Evaluation Report signed by the Evaluation Committee members appointed by the 1<sup>st</sup> Respondent detailing evaluation of tenders in the subject tender.

### **Professional Opinion**

It is not possible for the Board to make reference to the Professional Opinion that ought to be prepared pursuant to Section 84 of the Public Procurement and Asset Disposal Act (hereinafter referred to as "the Act") reviewing the manner in which the subject procurement process was undertaken including evaluation of tenders since no Professional Opinion with regard to the subject tender was submitted to the Board by the 2<sup>nd</sup> Respondent.

### **Letter of Notification**

Vide letter of notification of unsuccessful tenderer dated 28<sup>th</sup> November 2022 and signed by Mr. Robert Lentauwo, Acting Chief Officer, the Applicant was notified that its tender had been determined unsuccessful upon evaluation for reason that it did not provide audited accounts for the year ended 2018

as it was a mandatory requirement, thus did not proceed for technical evaluation.

### **REQUEST FOR REVIEW**

On 6<sup>th</sup> December 2022, M/s Milka Trading Limited, the Applicant herein, filed a Request for Review dated 5<sup>th</sup> December 2022 together with a Supporting Affidavit sworn by Mili Piyush Savla, on 5<sup>th</sup> December 2022 through the firm of Kipkenda & Company Advocates seeking the following orders, verbatim:

***a) THAT the decision of the Respondent reflected in its letter dated 28<sup>th</sup> November 2022 effectively declaring the Interested Party as the successful bidder in relation to Tender Number SCG/T/009/2022-23 and IFMIS Negotiation No. 1110083-2022/23 for Supply of ECDE Foodstuff be and is hereby annulled and set aside in its entirety.***

***b) THAT the Letter dated 28<sup>th</sup> November 2022 and the decision of the Respondent reflected in the said Letter in relation to Tender Number SCG/T/009/2022-23 and IFMIS Negotiation No. 1110083-2022/23 for Supply of ECDE Foodstuff declaring the Applicant's bid as unsuccessful be and is hereby annulled and set aside in its entirety.***

c) **THAT** the Respondent be directed to re-admit the Applicant's bid and to carry out and re-evaluate the Applicant noting to observe and apply the criteria in the Tender document as required by section 80 of the Public Procurement and Assets Disposal Act and to carry out the re-evaluation in compliance with section 77 and 86 of the Act.

d) **THAT** upon grant of prayer (a) and (b) above, the Honourable Review Board be pleased to order that the Applicant's bid had complied with the mandatory requirements and direct the Respondents to evaluate the Applicant at the Technical Evaluation Stage and subsequent stages to its logical conclusion and after re-evaluation to issue the Applicant with successful notification letter in compliance with the letter and spirit of section 87(3) of the Act.

e) **THAT** in the alternative to prayer (c) and (d) above, the Respondents be directed to terminate the entire procurement process herein and the Board be pleased to order a fresh procurement process after the Respondents have corrected any misleading anomalies and errors on the Tender document.

***f) THAT the Honourable Review Board be pleased to make such other or further orders at it may deem just, expedient, and appropriate in ensuring that the ends of justice are fully met in the circumstances of this Request for Review.***

***g) THAT the Respondents be compelled to pay to the Applicant the costs arising from and incidental to this Request for Review.***

In a Notification of Appeal and a letter dated 6<sup>th</sup> December 2022, the Acting Board Secretary of the Public Procurement Administrative Review Board (hereinafter referred to as the "Board"), Mr. James Kilaka, notified the Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the Respondents a copy of the Request for Review together with the Board's Circular No. 02/20 dated 24<sup>th</sup> March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five days from 6<sup>th</sup> December 2022.



On 8<sup>th</sup> December 2022 the firm of Mbugwa, Atudo & Macharia Advocates filed a Notice of Appointment dated 8<sup>th</sup> December 2022 to act for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in this matter. On 14<sup>th</sup> December 2022, the 1<sup>st</sup> and 2<sup>nd</sup> Respondent filed a Statement of Response dated 13<sup>th</sup> December 2022 and signed by Robert Lentaowo, Acting Accounting Officer, Education and Vocational training.

On 15<sup>th</sup> December 2022, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed their written submissions dated 14<sup>th</sup> December 2022.

The Applicant did not file any written submissions.

### **APPLICANT'S CASE**

The Applicant avers that it submitted its tender having fulfilled all the requirements stipulated in the Tender Document but received a Letter of Notification of Unsuccessful Bidder dated 28<sup>th</sup> November 2022 notifying it that its tender was unsuccessful for the sole reason that it did not provide audited accounts for the year ended 2018 and hence did not proceed to technical evaluation.



The Applicant avers that the reason relied on by the 2<sup>nd</sup> Respondent was very extraneous to the provisions of the Tender Document since it submitted the latest audited accounts for the years 2021, 2020, and 2019 and that if properly evaluated it wouldn't have failed the Mandatory requirements stage. The Applicant further avers that if the 2<sup>nd</sup> Respondent intended to rely on the audited accounts for the years 2020, 2019 and 2018, then the statement "last three years" under Mandatory Requirement No.11 is a total contradiction as the tender was advertised on 3<sup>rd</sup> November 2022 and closed on 11<sup>th</sup> November 2022 meaning that the last year should begin from 2021 and not 2020 as presumably interpreted by the Respondents.

The Applicant avers that if considered from the wordings of the Tender Document, then its tender should have been considered responsive. Further, the Applicant avers that the Tender Document did not contain sufficient information to allow fair competition among those who wished to and submitted their tenders hence the decision to declare its tender as unsuccessful was a violation of Section 70(3) of the Act.

The Applicant avers that in any case its tender for Ksh. 43,928,600.00 was not only responsive, having complied with all the mandatory requirements of the Tender Document but significantly lower in comparison to the Interested Party's tender of Ksh. 44,664,400.00 thus was inevitably economical, efficient, and effective hence value for money.

The Applicant states that there is reasonable basis in law for the Board to interfere with the decision of the Respondents in relation to the subject tender and grant the prayers sought in its Request for Review.

### **RESPONDENTS' CASE**

In response, the 1<sup>st</sup> and 2<sup>nd</sup> Respondent confirmed that the Applicant was among the tenderers who expressed interest in the subject tender. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent contend that the Tender Document provided for Mandatory Requirements to all tenderers at Page 42 and that any tender which did not comply with the mandatory requirements was deemed as non-responsive and not subject for further evaluation.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondent contend that Mandatory Requirement No. 11 required a tenderer to provide audited accounts for the last three years which were signed and stamped by a certified auditor (2020,2019,2018) which the Applicant failed to provide thus being rendered non-responsive.

In response to allegations of breach of Section 70(3) of the Act, the 1<sup>st</sup> and 2<sup>nd</sup> Respondent contend that the Tender Document contained sufficient information to allow fair competition among those who wished to submit tenders and that having specified the years for which a tenderer was

required to submit audited accounts being 2020,2019 and 2018, a departure from this mandatory requirement rendered the Applicant's tender non-responsive as per section 79(1) of the Act.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondent contend that the Applicant is self-contradicting by stating that its tender, if correctly evaluated, complied with all the mandatory requirements yet proceeding to claim that the Tender Document did not contain sufficient information to tenderers to allow fair competition.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondent contend that if the mandatory requirements were not clear, the Applicant ought to have sought clarification from them before proceeding to participate in the tendering process. That in the absence of any complaint/enquiry by the Applicant or any other tenderer, it is to be assumed that the availed information was clear and understandable to tenderers.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondent contend that the Applicant's prayer for an order that it complied with all the mandatory requirements would be ultra vires and in excess of the Board's jurisdiction since Section 79 of the Act confers upon the Evaluation Committee the power to evaluate responsiveness of a tender and any order for re-evaluation of the subject tender would be in total violation of Article 227 of the Constitution and a waste of tax payers' money.

In conclusion, the 1<sup>st</sup> and 2<sup>nd</sup> Respondent contend that they did not breach any statutory duty and pray for the Request for Review to be dismissed with costs.

### **BOARD'S DECISION**

The Board has considered each of the parties' cases, documents, pleadings, authorities and finds the issues that arise for determination are:

- 1. Whether the 2<sup>nd</sup> Respondent's Evaluation Committee evaluated the Applicant's tender with respect to Mandatory Requirement No. 11 of the Evaluation Criteria, Mandatory requirements of Section III-Evaluation and Qualification Criteria at page 42 of the Tender Document in accordance with Section 79 and 80(2) of the Act read with Regulation 74 of Regulations 2020 and Article 227(1) of the Constitution;**
- 2. What orders should the Board grant in the circumstances?**



We now proceed to address and make a determination on the aforesaid issues.

**Whether the 2<sup>nd</sup> Respondent's Evaluation Committee evaluated the Applicant's tender with respect to Mandatory Requirement No. 11 of the Evaluation Criteria, Mandatory requirements of Section III-Evaluation and Qualification Criteria at page 42 of the Tender Document in accordance with Section 79 and 80(2) of the Act read with Regulation 74 of Regulations 2020 and Article 227(1) of the Constitution**

The Applicant case is that the tender evaluation criteria in the Tender Document required a tenderer to provide audited accounts for the last three years signed and stamped by a certified auditor (2020, 2019, 2018) and in compliance, it submitted the latest audited accounts for years 2021, 2020, and 2019 as these were the audited accounts for the last three years. The Applicant submits that if the Respondent intended to rely on the audited accounts for the years 2020, 2019, and 2018, then the statement "last three years" is a total contradiction considering that the tender closed on 11<sup>th</sup> November 2022 and as such, the last year should begin from 2021 and not 2020 as presumably interpreted by the Respondents.



On their part, the Respondents contend that the Applicant's tender was rendered non-responsive upon evaluation in line with the provisions of Section 79(1) and 80(2) of the Act having failed to meet the requirements of mandatory requirement no. 11 of the Evaluation Criteria, Mandatory requirements of Section III-Evaluation and Qualification Criteria at page 42 of the Tender Document which required tenderers to submit an audited account for the year 2018 as specified.

The Board has examined the blank Tender Document as submitted to the Board and note that Mandatory Requirement No. 11 was set out under the Evaluation Criteria, Mandatory requirements of Section III-Evaluation and Qualification Criteria at page 42 of the Tender Document as follows:

**"EVALUATION CRITERIA**

**1. Mandatory requirements**

	<b><i>The qualification criteria required from Tenderers in ITT Clause 14.3(b) is modified as follows: Mandatory Requirements</i></b>	
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<b>S/NO</b>	<b>Evaluation attribute</b>	<b>YES/NO</b>
<b>1</b>	.....	
<b>2</b>	.....	
<b>3</b>	.....	
<b>4</b>	.....	
<b>5</b>	.....	
<b>6</b>	.....	
<b>7</b>	.....	
<b>8</b>	.....	
<b>9</b>	.....	
<b>10</b>	.....	
<b>11</b>	<b><i>Must provide audited accounts for the last three years signed and stamped by a certified auditor (2020,2019,2018).</i></b>	
<b>12</b>	.....	

***Only bidders meeting all the mandatory requirement will proceed to technical evaluation stage.***

***Note. Copies of document specified above shall be certified by a commissioner for Oaths”***

The import of the above mandatory requirements of the Tender Document is that tenderers were required to comply with all the 12 mandatory requirements at the Mandatory requirements stage for their respective tenders to proceed to the Technical Evaluation stage. If a tenderer did not satisfy even one of the 12 mandatory requirements, its tender would be found non-responsive and would be disqualified from proceeding to the Technical Evaluation stage.

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



*regulation of fees chargeable for services rendered.*

***(3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)-***

***(a) the criteria shall, to the extent possible, be objective and quantifiable;***

***(b) each criterion shall be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality, time and service for the purpose of evaluation; and***

***(4) ....."***

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 for in a tender document issued to tenderers by a procuring entity. Section 80(3) of the Act requires for such evaluation criteria to be as objective and quantifiable to the extent possible and to be applied in accordance with the procedures provided in a tender document.



Section 79 of the Act provides for responsiveness of tenders as follows:

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

From the above provision, a tender only qualifies as a responsive tender if it meets all requirements set out in the tender documents. In the case of **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].*

The Board notes that Regulation 74(1) of Regulations 2020 states that:

***"74. Preliminary evaluation of open tender***

***(1) Pursuant to section 80 of the Act and upon opening of tenders, the evaluation committee shall first conduct a preliminary evaluation to determine whether—***

- (a) a tenderer complies with all the eligibility requirements provided for under section 55 of the Act;***
- (b) the tender has been submitted in the required format and serialized in accordance with section 74(1)(i) of the Act;***
- (c) any tender security submitted is in the required form, amount and validity period, where applicable;***
- (d) the tender has been duly signed by the person lawfully authorized to do so through the power of attorney;***
- (e) the required number of copies of the tender have been submitted;***
- (f) the tender is valid for the period required;***
- (g) any required samples have been submitted; and***
- (h) all required documents and information have been submitted.*** [Emphasis by the Board]"



The Board has not had an opportunity to study the Evaluation Report prepared by the Evaluation Committee of the 2<sup>nd</sup> Respondent since the 2<sup>nd</sup> Respondent failed to submit the same to the Board despite being requested by the Acting Board Secretary to avail the same pursuant to Section 67(3)(e) of the Act. Nevertheless, having studied the Applicant's pleadings, we note from paragraph 5 of the Applicant's Supporting Affidavit sworn by Mili Piyush Savla on 5<sup>th</sup> December 2022 and filed together with the Request for Review on 6<sup>th</sup> December 2022 that the Applicant was notified that its tender was unsuccessful vide a letter of notification of unsuccessful tenderer dated 28<sup>th</sup> November 2022 marked as Exhibit MPS-3 which reads in part:

"....."

***This is to inform you in that your offer in relation to Supply of Ecde Foodstuffs SCG/T/009/N/111083/2022-23 has been determined to be unsuccessful upon evaluation. We intend to make a contract with Saimen Enterprises Limited, P.O. Box 159-20600 Maralal at a total tender sum of Kshs. 44,664,400.00 (Fourty Four million Six hundred and Sixty-Four Thousand Four Hundred Shillings Only).***

***The brief reason why your tender was not successful is:***

- 1. Did not provide audited accounts for the year ended 2018 as it was a mandatory requirement, thus did not proceed to technical evaluation.***

....."

The Board further notes that the Applicant at Paragraph 8 of its Supporting Affidavit sworn by Mili Piyush Savla on 5<sup>th</sup> December 2022 confirms that it submitted the latest audited accounts for the years 2021, 2020 and 2019 which it considered to be the required audited accounts for the last three years and marked the same as Exhibit MPS-4. Our understanding of the Applicant's case is that it interpreted of the words "last three years" as stipulated in mandatory requirement No. 11 to mean the years 2021, 2020 and 2019 . The Applicant argues that since the tender closed on 11<sup>th</sup> November 2022, the last year would begin from 2021 and not 2020.

However, the Board having carefully studied the Tender Document notes that mandatory requirement No. 11 is set out in clear terms and requires a tenderer to "***provide audited accounts for the last three years signed and stamped by a certified auditor (2020, 2019 2018)***". In essence, a tenderer in submitting its tenderer is required to categorically provide audited accounts for the years 2020, 2019, and 2018 and not for any other period.

In our considered view, the required accounts were specific to the year 2020, 2019 and 2018. We note that this requirement was not subject to any misinterpretation as the required years was set out clearly in the Tender Document. The Applicant's tender hence failed to comply with mandatory



requirement no. 11 of the Evaluation Criteria, Mandatory requirements of Section III-Evaluation and Qualification Criteria at page 42 of the Tender Document having failed to avail the audited accounts for the year 2018 rendering it non-responsive and such a tender could not proceed for further evaluation at the Technical requirements stage.

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 held that,

***".... 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]***

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, held that;

***"...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]

The import of the aforementioned cases is that mandatory requirements cannot be waived. In this instance therefore, the 2<sup>nd</sup> Respondent's Evaluation Committee had no option but to find the Applicant's tender non-responsive at the Mandatory Requirements stage having failed to meet Mandatory requirement no. 11 of the Evaluation Criteria, Mandatory requirements of Section III-Evaluation and Qualification Criteria at page 42 of the Tender Document

In the circumstances, we find that the Applicant's tender did not comply with Mandatory Requirements No. 11 of the Evaluation Criteria, Mandatory requirements of Section III-Evaluation and Qualification Criteria at page 42 of the Tender Document to proceed for evaluation at the Technical

Evaluation stage and that the 2<sup>nd</sup> Respondent's Evaluation Committee evaluated the Applicant's tender in accordance with the provisions of the Tender Document as read with section 79(1) and 80(2) of the Act.

### **What orders should the Board grant in the circumstances?**

We have established that the 2<sup>nd</sup> Respondent's Evaluation Committee evaluated the Applicant's tender in adherence with the requirements of the No. 11 of the Evaluation Criteria, Mandatory requirements of Section III- Evaluation and Qualification Criteria at page 42 of the Tender Document and rendered the Applicant's tender non-responsive at the Mandatory requirements stage.

Consequently, we deem it fit to dismiss, which we hereby do, the Applicant's Request for Review for lacking in merit and make the final orders set out below.

### **FINAL ORDERS**

In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, 2015, the Board makes the following orders in the Request for Review dated 5<sup>th</sup> December 2022 and filed on 6<sup>th</sup> December 2022: -

1. The Request for Review dated 5<sup>th</sup> December 2022 and filed on 6<sup>th</sup> December 2022 by the Applicant with respect to Tender No. SCG/T/009/22-23 for Supply of Food Stuff be and is hereby dismissed.
2. Given the findings herein, each party shall bear its own costs in the Request for Review.

Dated at NAIROBI, this 28<sup>th</sup> day of DECEMBER, 2022



CHAIRPERSON  
PPARB



SECRETARY  
PPARB