

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 5/2023 OF 17TH JANUARY 2023

BETWEEN

EPCO BUILDERS LIMITED APPLICANT

AND

THE ACCOUNTING OFFICER,

PWANI UNIVERSITY RESPONDENT

IFATA ENGINEERING SERVICES LIMITED INTERESTED PARTY

Review against the decision of the Accounting Officer, Pwani University in relation to Tender No. PU/OT/12/2022/2023 for Proposed Erection and Completion of School of Agriculture Complex- Phase I at Pwani University.

BOARD MEMBERS

- | | |
|----------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mr. Jackson Awele | -Member |
| 3. Dr. Paul Jilani | -Member |

IN ATTENDANCE

1. Mr. James Kilaka - Acting Board Secretary
2. Ms. Maureen Kiyundo - Secretariat

PRESENT BY INVITATION

- APPLICANT** - **EPCO BUILDERS LIMITED**
1. Dr. Wilfred Mutubwa - Advocate, Dr. Mutubwa Law Advocates
 2. Ms. Joy Anami - Advocate, Dr. Mutubwa Law Advocates

- RESPONDENT** - **THE ACCOUNTING OFFICER,
PWANI UNIVERSITY**
- Mr. Lidbury Were - Head of Procurement

- INTERESTED PARTY** - **IFATA ENGINEERING SERVICES
LIMITED**
- Mr. Kimathi - Advocate, JMK Partners Advocates

BACKGROUND OF THE DECISION

The Tendering Process

Pwani University (hereinafter referred to as "the Procuring Entity"), invited sealed tenders for Tender No. PU/OT/12/2022/2023 for Proposed Erection

and Completion of School of Agriculture Complex- Phase I at Pwani University (hereinafter referred to as the "subject tender") using an open method of tendering and by way of an advertisement on 26th October 2022 on the Procuring Entity's website www.pu.ac.ke and also on the Public Procurement Information Portal (PPIP) (<https://tenders.go.ke>). The subject tender's submission deadline was set for 9th November 2022 at 11.00 a.m.

Addendum

The Procuring Entity issued an addendum dated 7th November 2022 which clarified that tendering would be under open national tender and clarified on the subject tender's drawings.

Submission of Tenders and Tender Opening

According to the Minutes of the Tender Opening signed by members of the Tender Opening Committee on 10th November 2022 (hereinafter referred to as "Tender Opening Minutes"), a total of nine (9) tenderers submitted their tenders as recorded in the Tender Opening Register. The nine (9) tenders were opened in the presence of tenderers' representatives who attended the tender opening session as indicated in the Record of Attendance and were recorded as having submitted their respective tenders in response to the subject tender within the tender submission deadline as follows:

No.	Tenderer's Name
1	Magic General Contractors
2	Alymran Investment Ltd
3	Dantax Enterprises Ltd
4	Jedy General Contractors
5	Laguno Construction Company Ltd
6	Tulsi Construction Ltd
7	EPCO Builders Ltd
8	Procost Ideas Ltd
9	Ifata Engineering Services

Evaluation of Tenders

A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the Respondent undertook evaluation of the nine (9) tenders in the following three stages as captured in an Evaluation Report dated 7th December 2022 (hereinafter referred to as the "Evaluation Report") submitted to the Public Procurement Administrative Review Board (hereinafter referred to as the Board) as part of confidential documents pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'):

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

Preliminary Evaluation

At this stage of evaluation, tenders required to comply with the requirements outlined in Clause 2 Preliminary examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 24 to 25 of the blank tender document issued to prospective tenderers by the Procuring Entity (hereinafter referred to as "the Tender Document"). Tenders that did not pass the Preliminary Evaluation would be considered non-responsive and would not be considered further.

At the end of evaluation at this stage, eight (8) tenders, which included the Applicant's tender were determined to be non-responsive and eliminated from further evaluation. One (1) tender submitted by the Interested Party was determined responsive, thus proceeded for technical evaluation.

Technical Evaluation

At this stage of evaluation, tenders were required to comply with the evaluation criteria outlined under Clause i) Details Technical Examination and the Technical Evaluation Criteria of Section III- Evaluation and Qualification Criteria at page 31 to 32 of the Tender Document. Tenders were required to

attain a minimum of 70 points at this stage to qualify to proceed to the next stage of evaluation. Tenderers who scored below 70 points would be disqualified from further evaluation.

At the end of evaluation at this stage, the Interested Party's tender having scored 80 points proceeded for Financial Evaluation.

Financial Evaluation

At this stage of evaluation, tenders were required to comply with Clause ii) Details Financial Examination of Section III- Evaluation and Qualification Criteria at page 30 of the Tender Document.

At the end of evaluation at this stage, the Interested Party was determined to be the lowest evaluated responsive tenderer as indicated in Table 10: Proposed Contract Award at page 28 of 29 of the Evaluation Report.

Evaluation Committee's Recommendation

The Evaluation Committee recommended award of the subject tender to the Interested Party being the lowest evaluated tenderer at the total price of Kenya Shillings One Hundred and Twenty-Five Million, Four Hundred Ninety-Seven Thousand, Three Hundred Twenty Only (Kshs. 125,497,320.00) Inclusive of VAT

Professional Opinion

In a Professional Opinion as an internal memo to the Respondent and dated 3rd January 2023 (hereinafter referred to as the "Professional Opinion"), the Head of Procurement, Mr. Lidbury Were, reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and thereafter, concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender. The Finance Department confirmed that funds were available as evidenced by the Finance Officer's signature and stamp dated 3rd January 2023 endorsed therein.

The award of the subject tender to the Interested Party was approved by the Respondent on 4th January 2023.

Notification to Tenderers

Vide letters dated 3rd January 2023, tenderers were notified of the outcome of evaluation and award of the subject tender.

REQUEST FOR REVIEW

On 17th January 2023, the Applicant filed a Request for Review dated 15th January 2023 together with a Supporting Affidavit sworn by Mayur R. Varsani, its director, dated 16th January 2023 through the firm of Dr. Mutubwa Law Advocates, seeking the following orders, verbatim:

- a) Pending hearing and full determination of the instant Request for Review, an interim stay and suspension be issued by this Honourable Board in respect to the entire Tender No. PU/OT/12/2022/2023 for the Proposed Erection and Completion of the School of Agriculture Complex – Phase I at Pwani University;***
- b) The Honourable board compels the Respondent to declare the Applicant's tender as the most responsive tender and consequently award the Tender No. PU/OT/12/2022/2023 for the Proposed Erection and Completion of School Agriculture Complex – Phase I at Pwani University to the Applicant herein;***
- c) In the Alternative to prayer (b) above, the Honourable Board compels the Respondent to declare the Applicant's bid as responsive for purposes of preliminary evaluation stage of the tender process; and to direct the Procuring Entity to admit and consider the Applicant's bid, along with the other tenderers at the technical and final evaluation stages of the tender;***
- d) Costs of and incidental to these proceedings be awarded to the Applicant;***
- e) Any other Order that the Honourable Board may deem fit and appropriate to issue.***

In a Notification of Appeal and a letter dated 17th January 2023, Mr. James Kilaka, the Acting Board Secretary of the Board, notified the Procuring Entity and the Respondent 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 Procuring Entity and the Respondent were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 17^h January 2023.

On 23rd January 2023 Prof. J.P. Kahindi, PhD Acting Vice Chancellor and the Respondent herein filed a Memorandum of Response to the Request for Review dated 20th January 2023 and submitted to the Board confidential documents in the subject matter pursuant to section 67(3)(e) of the Act.

Vide letters dated 26th January 2023, 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 26th January 2023.

On 30th January 2023, the Interested Party filed a Notice of Appointment dated 30th January 2023, a Memorandum of Response dated 28th January 2023 through the firm of JMK Partners Advocates LLP.

Pursuant to the Board's Circular No.02/2022 dated 24th March 2020, physical hearings were dispensed with and directions given for 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 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.

However, vide a Hearing Notice dated 30th January 2023, the Acting Board Secretary, notified parties and all tenderers in the subject tender of online hearing of the instant Request for Review slated for Wednesday, 1st February 2023 at 12:00 noon, through the link availed in the said Hearing Notice.

On 30th January 2023, the Interested Party filed written submissions opposing the Request for Review dated 30th January 2023. On the day of the online hearing of the instant Request for Review, 1st February 2023, the Applicant filed written submissions dated 1st February 2023 and its list and

bundle of authorities dated 1st February 2023. The Respondent did not file any written submissions.

PARTIES' SUBMISSIONS

Applicant's Submissions

During the online hearing, Counsel for the Applicant, Dr. Mutubwa submitted that the Applicant was aggrieved in the subject tender on two elements centered on (a) interpretation of clause 2(b) and (c) and; (b) interpretation of the entire clause 2 Preliminary Examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 24 and 25 of the Tender Document.

Dr. Mutubwa submitted that on 4th January 2023, the Applicant received a letter dated 3rd January 2023 from the Respondent informing it that its tender had been rejected on account of being non-responsive for failing to meet the Preliminary Evaluation criteria set out in the Tender Document.

Dr. Mutubwa submitted that the Applicant had no issue with the position taken by the Respondent regarding the Preliminary Evaluation Criteria requiring the Applicant to demonstrate that it had two sub-contractors being an electrical sub-contractor for electrical works and a mechanical sub-contractor. Dr. Mutubwa further submitted that clause 2 had sub-clause (a) to (l) and amongst these, only two sub-clauses provided for sub-contractors.

Dr. Mutubwa submitted that the Applicant's understanding of the criteria provided under clause 2 of the Tender Document is that (a) the sub-contractors required were domestic contractors; (b) the domestic sub-contractors were not required to enter into a contract with the Procuring Entity; (c) the Applicant needed to only demonstrate that the electrical and mechanical sub-contractors were licensed by the Energy Regulatory Commission in accordance with the provisions of clause 2(b) and (c) and were licensed to practice the trade for which they were being proposed, which the Applicant complied with.

Dr. Mutubwa submitted that the Respondent's position is that all contractors, being the main contractor and the sub-contractors, had to comply with all the documentation required under sub-clause 2(a) to (l). Counsel was of the view that this was an illogical interpretation of clause 2 because there is no possibility that a domestic sub-contractor would be required to comply with the same provisions as the main contractor since the domestic sub-contractor does not enter into a contract with the Procuring Entity. Dr. Mutubwa argued that if this was the case, all main contractors including the Interested Party had to provide a KRA certificate, PIN certificate, CR12, a bid bond of Kshs. 2.5 million for the main contractor and all subcontractors, a dully filled business questionnaire for the main contractor and all subcontractors, a stamped Tender Document for the main contractor and all subcontractors. As such, if the criteria described by the Respondent was to be applied, then all the sub-contractors under the main contractor would have to provide all the documents under sub-clause 2(a) to (l).

Dr. Mutubwa urged the Board to examine the submitted confidential documents and if the Respondent's argument was valid, then the subcontractors provided by the Interested Party and all other tenderers should comply with this provision. Dr. Mutubwa submitted that the only documents required were those in sub-paragraph 2(b) & (c) and that all other documents were to be supplied by the main tenderer hence the Applicant complied with provisions of sub-clause 2 (a) to (l) and clause 2 (b) and (c) of the Tender Document.

Dr. Mutubwa submitted that a tender document is required to be clear, unambiguous and detailed enough to elicit a proper response. Counsel further submitted that a Procuring Entity cannot apply a different evaluation standard, post facto, after tenderers submitted their tenders and the interpretation supplied by the Respondent without forewarning the Applicant and other tenderers that the domestic subcontractors would be required to comply with the same criteria and same documentation required of the main contractor was retrospective application of an interpretation not known to tenderers.

Dr. Mutubwa submitted that should the interpretation given by the Respondent be sustained, it would mean that the Tender Document in the subject tender breached provisions of Article 227 of the Constitution and section 70 of the Act since it is vague and open to multiple interpretations. Dr. Mutubwa further submitted that the Applicant would rely on authorities

submitted in its written submissions demonstrating that the Board has held on numerous occasions that once a tender document is capable of several interpretations, it is vague, not clear, ambiguous and cannot therefore present a fair opportunity to tenderers to properly anticipate the manner in which evaluation will be conducted.

Dr. Mutubwa submitted that the Applicant met the Preliminary Evaluation Criteria, its tender was the lowest in terms of its financial proposal and proceeded to pray that the Board (a) direct the Procuring Entity to award the subject tender to the Applicant; (b) in the alternative admit the Applicant to the Technical and Financial Evaluation stage; or (c) direct parties to retender and direct the Procuring Entity to prepare a tender document that was compliant with the law for parties to start the process afresh.

Dr. Mutubwa submitted that the purpose of public procurement is to give a fair opportunity to every person who is eligible to tender and where a tender document fails the objectivity test, the tendering process is no longer free, open and transparent but becomes open to manipulation as evidenced in the subject tender from the several interpretations and therefore an abuse of the tendering process. Dr. Mutubwa concluded by submitting that the Board is the vanguard of procurement proceedings and invited it to either note that the Applicant complied with the strict provision of the Tender Document or that the Tender Document was insufficient for purposes of having an open and transparent procurement process.

Upon enquiry by the Board on whether the Applicant had sought in its pleadings for an order to start the procurement process afresh, Dr. Mutubwa in response submitted that it was the Board's discretion to issue appropriate relief and that the Applicant had sought to be awarded the subject tender on the strength of the reasons stated and that it would suffice if the Applicant was readmitted at the Technical Evaluation stage.

Respondent's Submissions

In response to the submissions by Mr. Lidbury Were, the Head of Procurement of the Procuring Entity, on behalf of the Respondent, submitted that the Evaluation Committee adhered to the evaluation criteria set out in the subject tender's Tender Document. Mr. Were further submitted that the said evaluation criteria required the main contractor and subcontractors to adhere to mandatory requirements and upon evaluation of the Applicant's tender, it was found non-responsive since on the part of sub-contractors, the Applicant did not meet the laid out mandatory requirements.

Mr. Were submitted that in comparison with other tenderers, only the Applicant and another tenderer failed to satisfy the aspect on sub-contractors noting that the remaining seven (7) tenderers understood the qualification criteria set out in the Tender Document.

Interested Party's Submissions

Counsel for the Interested Party, Mr. Kimathi submitted that as per the provisions of the law, a tender was responsive if it met the eligibility and mandatory requirements provided in a tender document. Consequently, the Applicant's tender failed to meet the eligibility test in terms of clause 2 at page 24 of the Tender Document having admitted that it failed to submit the domestic sub-contractors certificate of registration, Pin certificate from KRA, valid Tax compliance certificate and CR12.

Mr. Kimathi submitted that clause 3.6.1 at page 2 of the Tender Document was clear in terms of eligibility of tenderers and that the Applicant, by failing to avail the requisite documents, failed the eligibility test since the criterion used was applicable to both main contractors and sub-contractors. Mr. Kimathi further submitted that it was within the knowledge of the Applicant that it was required to submit documents proving eligibility of its sub-contractors and failure to do so left the Procuring Entity with no choice but to declare its tender non-responsive.

Mr. Kimathi submitted that in this instance, the Procuring Entity had an issue with regards to establishing whether the documents submitted by the Applicant pertaining to their subcontractors were legitimate and for it to understand the eligibility of the domestic sub-contractors, it was necessary for the Applicant to submit the certificate of incorporation, CR12, VAT certificate, KRA pin, Tax compliance of its domestic sub-contractors.

Mr. Kimathi submitted that the Applicant filed the instant Request for Review with the aim of circumventing procurement laws by stating that the Tender Document was ambiguous and failed the objectivity test yet only two tenderers, as submitted by the Procuring Entity, failed to submit the documents under contest. Mr. Kimathi further submitted that it was common practice in such tender as the subject tender for requested documents to be submitted hence the criteria was not an afterthought.

Mr. Kimathi submitted that Clause 36.3 of Section II- Tender Data Sheet (TDS) at page 23 of the Tender Document named and designated Electrical Sub-contractors and Mechanical Sub-contractors stating their relevant qualifications which requirement was within the Applicant's knowledge. Mr. Kimathi objected to the orders sought and submitted that nothing can cure a non-responsive tender.

Upon enquiry by the Board on provisions of Clause 2 of the Tender Document on whether sub-contractors were required to have all these documents i.e. provide or have bid bond of Kshs. 2.5 million, Mr. Kimathi in response submitted that sub-contractors were not required to submit the bid bond and that none of the parties had argued along that line. Mr. Kimathi emphasized that page 23 of the Tender Document provided that the relevant qualifications of the proposed sub-contractor were required to be added to the qualifications of a tenderer for the purposes of evaluation and to

understand the import of the word “relevant”, one would be required to read the Tender Document with a holistic view.

On further request to guide the Board on whether there was any other document for the Preliminary Evaluation Criteria that was not relevant, Mr. Kimathi responded by pointing out that the certified copy of registration, CR 12 , VAT and KRA PIN for sub-contractors were needed as they relate to eligibility in terms of tax since the Tender Document required tenderers to avail documents evidencing compliance with the law.

Applicant’s Rejoinder

In a rejoinder, Dr. Mutubwa submitted that neither the Respondent nor the Interested Party coherently submitted on the evaluation criteria under clause 2 of the Tender Document following enquiries on the same by the Board. Dr. Mutubwa submitted that the argument introduced that documents required of the sub-contractors were to be relevant, was an interpretation being made after the fact and whatever constituted relevant documents was not objective.

Dr. Mutubwa reiterated that the only specific documents with regard to domestic sub-contractors are set out in sub-clause 2(b) and (c) of the Tender Document and that the sub-contractors would not enter into any agreement with the Procuring Entity.

Dr. Mutubwa concluded by stating that the Interested Party, unlike other tenderers, seemed to possess information, unknown to the Applicant and which was not pleaded as it had an understanding of how the Procuring Entity would proceed with evaluation of tenders.

At the conclusion of the online hearing, the Board through its Chairperson, informed parties that the instant Request for Review having been filed on 17th January 2023 was due to expire on 7th February 2023 and that the Board would render its decision on or before 7th February 2023 by communicating the same to parties via email on 7th February 2023.

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 Respondent pursuant to Section 67(3)(e) of the Act and oral submissions of parties and finds that the following issues call for determination.

- 1. What is the interpretation of the provisions of Clause 2 Preliminary examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 24 and 25 of the Tender Document that the Procuring Entity's Evaluation Committee ought to have**

applied while evaluating and comparing tenders in the subject tender;

- 2. Whether the Procuring Entity's Evaluation Committee evaluated and compared tenders in the subject tender with respect to the criteria set out under Clause 2 Preliminary examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 24 and 25 of the Tender Document in accordance with Section 79 and 80(2) of the Act read with Regulation 74 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020') and Article 227(1) of the Constitution;**

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

What is the interpretation of the provisions of Clause 2 Preliminary examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 24 and 25 of the Tender Document that the Procuring Entity's Evaluation Committee ought to have applied while evaluating and comparing tenders in the subject tender;

It is the Applicant's case that (a) a tenderer desirous of being awarded the subject tender was required to submit to the Procuring Entity a tender which included its own qualifications and those of a proposed domestic sub-contractor particularly in the areas of electrical and mechanical works; (b) pursuant to Clause 2 (b) and (c) of Preliminary examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 24 and 25 of the Tender Document, a tenderer had to propose a domestic Electrical, and Mechanical sub-contractor, being specialized sub-contractors, and the main contractor was required to submit, along with its tender, relevant qualifications of the proposed specialized domestic sub-contractors ; and (c) Clause 36 of Section I: Information to Tenderers at page 15 of the Tender Document was clear that the Procuring Entity only wished to enter into a contract with the Main contractor and not its domestic sub-contractors.

The Applicant submits that it interpreted Clause 2 to mean that as a tenderer, it was required to simply demonstrate in its tender that its proposed sub-contractors were registered by the National Construction Authority, had the relevant practicing licenses, and that the sub-contractors were required to sign and stamp a letter of commitment to the main contractor indicating that they would undertake the works.

The Applicant contends that the Procuring Entity erred by introducing or using a criteria which was not provided for in the Tender Document and if

indeed all domestic sub-contractors ought to have provided all the documents under Clause 2(a) to (k) of Preliminary examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 24 and 25 of the Tender Document then the Tender Document was ambiguous and not clear on the criteria for evaluation of domestic sub-contractors hence fell short of the objectivity, transparency, and clarity test provided in Article 227 of the Constitution read with section 70(3) of the Act.

The Respondents and the Interested Party on their part interpreted the provisions of Clause 2 to mean that the main contractor and sub-contractor were required to comply with minimum conditions set out at the Preliminary Evaluation stage and that the requirements under Clause 2(d), 2(e), 2(f), and 2(g) of Preliminary examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 24 and 25 of the Tender Document were mandatory requirements and applied to both the main contractor (tenderer) and all subcontractors. As such, the Applicant having failed to adhere to the criteria relating to all sub-contractors was non-responsive.

The Board notes that the bone of contention is on interpretation of the Preliminary Evaluation Criteria provided under Clause 2 of Preliminary examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 24 and 25 of the Tender Document.

The Board has carefully studied the Tender Document of the subject tender and note that the criteria for evaluation of the subject tender was set out in Section III-Evaluation and Qualification Criteria at page 24 to 32 of the Tender Document. Clause 2 at page 24 and 25 of the Tender Document provided for Preliminary examination for Determination of Responsiveness and set out the minimum conditions for compliance by the main contractor and all sub-contractors in the Tender Document and Tender Invitation Notice and reads as follows:

"2. Preliminary examination for Determination of Responsiveness

The Procuring Entity will start by examining all tenders to ensure they meet in all respects the eligibility criteria and other requirements in the ITT, and that the tender is complete in all aspects in meeting the requirements of "Part 2- Procuring Entity's Works Requirements", including checking for tenders with unacceptable errors, abnormally low tenders, abnormally high tenders and tenders that are front loaded. The Standard Tender Evaluation Report Document for Goods and Works for evaluating Tenders provides very clear guide on how to deal with review of these requirements. Tenders that do not pass the Preliminary Examination will be considered irresponsive and will not be considered further. This stage of evaluation shall involve determination of compliance with minimum conditions set out in the Tender

document and Tender Invitation Notice for the main Contractor and All sub-contractors.

These conditions shall include the following but not limited to:

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- a) A certified copy of Registration with National Construction Authority in NCA 4 and above (Building works) with a valid annual practicing license for the Main Contractor;***
- b) The bidder must have a Domestic Electrical Subcontractor for the Electrical Works registered with National Construction Authority in NCA 6 and above for electrical works with a valid annual practicing license and Energy Regulatory Commission (E.R.C) Registration category 'C -1' and above, who must sign and stamps the bid document. (A signed commitment letter from the Sub-contractor to the main contractor indicating that they will undertake the works must be attached).***
- c) The bidder must have a Domestic Mechanical Subcontractor for Mechanical Works registered with National Construction Authority in NCA 6 and above for Mechanical works with a valid annual practicing license. (A signed commitment letter from the sub-contractor to the main contractor including that they will undertake the works must be attached).***

- d) A certified Copy of Certificate of registration/incorporation***
- e) A certified Copy of VAT/PIN certificate from KRA***
- f) A certified Copy of Valid Tax Compliance Certificate***
- g) A certified Copy of CR 12 of not more than one year***
- h) The Bid has been submitted in full and in the original format/order as issued by the Procurement Entity
Distortion of the Tender Document is NOT allowed,
distorted Tender Documents will LEAD TO
DISQUALIFICATION***
- i) Dully filled, signed and stamped form of tender***
- j) Dully filled, signed and stamped Business Questionnaire***
- k) Tender documents must be clearly digitally serialized (no manual serialization)***
- l) A Bid Bond of Kenya shillings Two Million Five Hundred Thousand (Kshs. 2,500,000.00) of the bid price in form of a bank guarantees from reputable bank or approved insurance firm and must remain valid for 150 days for the date of tender opening in prescribed format. Note: The original bid bond must be attached."***

From the above, we understand the provisions of Clause 2 of Preliminary examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 24 and 25 of the Tender Document to mean that the main contractor and all sub-contractors were to be evaluated to

determine their compliance with the laid out minimum conditions set out in the Tender Document and Tender Invitation Notice. The main contractor in this instance equates to a tenderer in the subject tender. We note that the said minimum conditions would include but not be limited to the conditions listed under Clause 2(a) to (l) of Preliminary examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 24 and 25 of the Tender Document at page 24 and 25 of the Tender Document. We further note that it was only under Clause 2(b) and (c) of Preliminary examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 24 and 25 of the Tender Document that a sub-contractor was mentioned and the requirements to be met by the sub-contractor provided for. Clause 2(a), (d) to (l) of Preliminary examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 24 and 25 of the Tender Document had no mention of a subcontractor under any of the laid down requirements.

The Board observes that the provisions of Clause 2(b) and (c) of Preliminary examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 24 and 25 of the Tender Document used the word must, hence made it mandatory for a tenderer to have a Domestic Electrical Subcontractor for Electrical Works and a Domestic Mechanical Subcontractor for Mechanical Works, both registered with National Construction Authority in NCA6 and above and with valid annual practicing licenses. We note that Clause 2(b) of Preliminary examination for Determination of Responsiveness of Section III- Evaluation and Qualification

Criteria at page 24 and 25 of the Tender Document, made it mandatory for the Domestic Electrical Subcontractor to sign and stamp the tender in addition to availing together with the tender a signed commitment letter addressed to the main contractor indicating that they would undertake the work. We further note that Clause 2(c) of Preliminary examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 24 and 25 of the Tender Document made it mandatory for a tenderer to avail together with the tender a signed commitment letter addressed to the main contractor by the Domestic Subcontractor indicating that they would undertake the work.

Having perused the Tender Document, this Board observes that Clause 1 General Provisions of Section III-Evaluation and Qualification Criteria at page 24 of the Tender Document mandated the Evaluation Committee, while evaluating and qualifying tenders, to only use the criteria set out under Section III-Evaluation and Qualification Criteria. Clause 1 reads as follows in part:

".....*This section contains the criteria that the Employer shall use to evaluate tender and qualify tenderers.....*

Evaluation and contract award criteria

The Procuring Entity shall use the criteria and methodologies listed in this Section to evaluate tenders and arrive at the Lowest Evaluated Tender. The tender that (i) meets the

qualification criteria, (ii) has been determined to be substantially responsive to the Tender Documents, and (iii) is determined to have the Lowest Evaluated Tender price shall be selected for award of contract.”

This therefore means that the Evaluation Committee was required to only consider the evaluation criteria expressly provided under Section III- Evaluation and Qualification Criteria of the Tender Document and in this case, the specific criteria provided under Clause 2 (a) to (l) of Section III- Evaluation and Qualification Criteria.

It is therefore our considered view that a tenderer ought to only have availed the subcontractor's required documentation where it was expressly stated under the conditions in Clause 2 (b) and (c) of Preliminary examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 24 and 25 of the Tender Document and not under any of the other sub-clauses under Clause 2. If the Tender Document required subcontractors to avail the documents under the conditions in Clause 2 (d), (e), (f), and (g) of Preliminary examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 24 and 25 of the Tender Document then it would expressly state as much as it did in Clause 2 (b) and (c) of Preliminary examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 24 and 25 of the Tender Document.

Whether the Procuring Entity's Evaluation Committee evaluated and compared tenders in the subject tender with respect to the criteria set out under Clause 2 Preliminary examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 24 and 25 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 submitted that its tender satisfied all the requirements of the Tender Document and that the Procuring Entity breached section 80 of the Act by evaluating its tender based on a criterion not set out in the Tender Document.

The Respondent contend that the Applicant's tender failed to comply with the criteria set out under Clause 2(d) to (g) of Preliminary examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 24 and 25 of the Tender Document which relates to statutory eligibility for the main contractor and all sub-contractors to comply with section 55(2) of the Act. In support of the Respondent's argument, the Interested Party contend that the Applicant failed to demonstrate how the Evaluation Committee used a criteria that was not objective or quantifiable in evaluating its tender.

The Board notes that the objective of public procurement is to provide quality goods and services in a system that implements the principles specified in Article 227 of the Constitution which provides 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 70 of the Act requires a procuring entity to use a standard tender document which contains sufficient information to allow for fair competition among tenderers. Section 70(3) reads 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 note that the Respondent at paragraph 4 of its Memorandum of Response to the Request for Review contends that the minimum conditions for the main contractor and all sub-contractors set out in Clause 2 are pursuant to Section 55 of the Act and as such, the Applicant's failure to submit the required documents under Clause 2(d) to (g) was contrary to section 55(1) and (2) of the Act.

Section 55(1) and (2) of the Act reads as follows:

"55. Eligibility to bid

(1) A person is eligible to bid for a contract in procurement or an asset being disposed, only if the person satisfies the following criteria—

(a) the person has the legal capacity to enter into a contract for procurement or asset disposal;

(b) the person is not insolvent, in receivership, bankrupt or in the process of being wound up;

(c) the person, if a member of a regulated profession, has satisfied all the professional requirements;

(d) the procuring entity is not precluded from entering into the contract with the person under section 38 of this Act;

(e) the person and his or her sub-contractor, if any, is not debarred from participating in procurement proceedings under Part IV of this Act;

(f) the person has fulfilled tax obligations;

(g) the person has not been convicted of corrupt or fraudulent practices; and

(h) is not guilty of any serious violation of fair employment laws and practices.

(2) A person or consortium shall be considered ineligible to bid, where in case of a corporation, private company, partnership or other body, the person or consortium, their

spouse, child or sub-contractor has substantial or controlling interest and is found to be in contravention of the provisions of subsection (1)(e), (f), (g) and (h)."

We note that section 55 of the Act lays out the conditions that must be met by a tenderer to be considered eligible to tender. Section 55(2) of the Act is instructive on ineligibility of a tenderer to tender in any tender where a tender having a subcontractor who has substantial or controlling interest is found to have contravened Section 55(1) (e), (f), (g,) and (h) of the Act. In essence, a procuring entity is required to find that a tenderer is ineligible to tender where it has established that its subcontractor holds a substantial or controlling interest and further finds that the said subcontractor has either been debarred, has unfulfilled tax obligations, has been convicted of corrupt or fraudulent practices and is guilty of serious violation of fair employment laws and practices. We note that the provisions under section 55 of the Act are required to be satisfied by any tenderer who submits their tender pursuant to an invitation by a procuring entity since subcontractors do not tender and are not tenderers.

Turning to the instant Request for Review, having carefully studied the Evaluation Report submitted to the Board as part of the confidential documents, we note that there is no finding in the Evaluation Report upon evaluation of the Applicant's tender that established that (a) the Applicant's sub-contractors held a substantial or controlling interest in the Applicant's

tender, and (b) that the Applicant's sub- contractors had been found to have contravened Section 55(1) (e), (f), (g,) and (h) of the Act on account of failing to furnish the requirements set out in Clause 2(d) to (g) of Preliminary examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 24 and 25 of the Tender Document. It is our considered view that failure to avail the said requirements cannot be inferred to mean that the subcontractors had either been debarred, had unfulfilled tax obligations, had been convicted of corrupt or fraudulent practices and were guilty of serious violation of fair employment laws and practices to justify rendering the Applicant's tender non-responsive for having failed to furnish the requirements of its subcontractors listed under Clause 2(d) to (g). On the contrary, the Applicant, being the tenderer in the subject tender, furnished its documents in compliance with the conditions set out in Clause 2 (d) to (g) of Preliminary examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 24 and 25 of the 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 High 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.”***

We have established that the Applicant's tender was determined non-responsive at the Preliminary Evaluation stage for having failed to furnish the requirements under Clause 2(d) to (g) of Preliminary examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 24 and 25 of the Tender Document.

The Respondent submitted that seven (7) out of the nine (9) tenderers who participated in the subject tender complied or attempted to comply with the criteria under Clause 2(d) to (g) of Preliminary examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 24 and 25 of the Tender Document. From the Evaluation Report, we note that four (4) of the non-responsive tenderers' tenders (namely, Magic General Contractors, Dantax Enterprises Ltd, Laguno Construction Company Ltd, and Tulisi Construction Ltd) were determined

non-responsive for having failed to comply with one or more of the criterion provided under Clause 2(d) to (g) of Preliminary examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 24 and 25 of the Tender Document. The tender submitted by Procost Ideas Ltd was determined non-responsive for having failed to comply with the criterion under Clause 2(g) and (k) of Preliminary examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 24 and 25 of the Tender Document, the tender submitted by Jedy General Contractors was determined non-responsive for having failed to comply with the criteria under Clause 2 (b) and (g) of Preliminary examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 24 and 25 of the Tender Document while the tender submitted by Alymran Investment Ltd was determined non-responsive for having failed to comply with the criterion under Clause 2 (b) and (c) of Preliminary examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 24 and 25 of the Tender Document. Only the Interested Party's tender was determined responsive at the Preliminary Evaluation stage and proceeded for evaluation at the Technical Evaluation stage. Having carefully studied the Interested Party's tender we note that the Interested party furnished the requirements for its Domestic Mechanical Subcontractor for Mechanical Works and its Domestic Electrical Subcontractor for Electrical Works listed under Clause 2(d) to (g) at page 577 to 775 of its tender.

Considering that majority of tenderers in the subject tender were determined non-responsive on account of the evaluation criteria under Clause 2 (d) to (g) of Preliminary examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 24 and 25 of the Tender Document relating to their sub-contractors' documents, we are of the view that the Evaluation Committee used extraneous evaluation criteria in evaluating and comparing tenders in the subject tender with regard to requirements submitted by tenderers on account of their subcontractors. The Board is guided by the holding in **Zachariah Wagunza & Another vs. Office of the Registrar Academic Kenyatta University & 2 Others [2013] eKLR** where the High Court held that:

"Concerning irrelevant considerations, where a body takes account of irrelevant considerations, any decision arrived at becomes unlawful. Unlawful behavior might be constituted by (i) an outright refusal to consider the relevant matter; (ii) a misdirection on a point of law; (iii) taking into account some wholly irrelevant or extraneous consideration; and (iv) wholly omitting to take into account a relevant consideration."

Consequently, we find the Procuring Entity's Evaluation Committee evaluated and compared tenders in the subject tender at Clause 2 of Preliminary examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 24 and 25 of the Tender Document using an unfair manner contrary to the evaluation criteria set out under Clause 2

Preliminary examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 24 and 25 of the Tender Document with regard to tenderers and their subcontractors read with Regulation 74 of Regulations 2020, Section 79 and 80(2) of the Act and Article 227(1) of the Constitution.

What orders should the Board grant in the circumstances?

We have established the interpretation by the Procuring Entity's Evaluation Committee of Clause 2 Preliminary examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 24 and 25 of the Tender Document to be unfair and contrary to the evaluation criteria set out under Clause 2 Preliminary examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 24 and 25 of the Tender Document with regard to requirements pertaining to tenderers and their subcontractors.

We deem it just and fit to order the Respondent to direct the Evaluation Committee to re-admit the Applicant's tender and all other tenders found to be non-responsive at the Preliminary Evaluation stage **only** on account of failure to submit subcontractors' documents provided under Clause 2 (d), (e), (f), and (g) of Preliminary examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 24 and 25 of the Tender Document and proceed for re-evaluation at the Technical Evaluation stage taking into consideration the findings of this

Board and the provisions of the Act and the Tender Document. For avoidance of doubt, a tenderer found non-responsive on account of failure to submit its subcontractors' documents under Clause 2 (d), (e), (f), and (g) of Preliminary examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 24 and 25 of the Tender Document **in addition** to failure to satisfy any other requirements under Clause 2 of Preliminary examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 24 and 25 of the Tender Document cannot proceed to the Technical Evaluation stage.

The upshot of our decision is that the instant Request for Review succeeds in terms of 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 15th January 2023 and filed on 17th January 2023:

- 1. The Letter of Notification of Intention to Enter into Contract dated 3rd January 2023 issued by the Respondent and addressed to the Interested Party with respect to Tender No. PU/OT/12/2022/2023 for Proposed Erection and Completion of School of**

Agriculture Complex- Phase I at Pwani University, be and is hereby nullified and set aside.

- 2. The Letters of Notification of Tender Evaluation Results (Regret) of Tender No. PU/OT/12/2022/2023 for Proposed Erection and Completion of School of Agriculture Complex- Phase I at Pwani University dated 3rd January 2023 issued by the Respondent to the Applicant and all other unsuccessful tenderers, be and are hereby nullified and set aside.**

- 3. The Respondent is hereby ordered to direct the Procuring Entity's Evaluation Committee to admit the Applicant's tender, together with all other tenders that were determined non responsive at the Preliminary Evaluation stage of evaluation only on account of non-compliance with regard to subcontractors' documents in Clause 2 (d), (e), (f) and (g) of Preliminary examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 24 and 25 of the Tender Document, to the Technical Evaluation stage for re-evaluation together with the Interested Party's tender at the Technical Evaluation stage taking into consideration the Board's findings in this Request for Review.**

4. Further to Order No. 3, the Respondent is hereby ordered, to proceed with the procurement process of Tender No. PU/OT/12/2022/2023 for Proposed Erection and Completion of School of Agriculture Complex- Phase I at Pwani University to its logical conclusion within fourteen (14) days of this decision in accordance with the provisions of the Tender Document, Regulations 2020, the Act and the Constitution.

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

Dated at NAIROBI, this 7th Day of February 2023.

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CHAIRPERSON

PPARB

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SECRETARY

PPARB