

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 92/2022 OF 26TH JANUARY 2023

BETWEEN

GILBI CONSTRUCTION COMPANY LIMITED APPLICANT

AND

THE ACCOUNTING OFFICER,

ANTI-COUNTERFEIT AUTHORITY 1ST RESPONDENT

ANTI-COUNTERFEIT AUTHORITY 2ND RESPONDENT

M/S PURPLE DOT INTERNATIONAL LIMITED . INTERESTED PARTY

Notice of Motion dated 26th January 2023 in Request for Review No.92 of 2022 against the decision of the Accounting Officer, Anti-Counterfeit Authority in relation to Tender No. A.C.A./OT/006/2021-2022 for 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. Ms. Sarah Ayoo - Secretariat
- 2. Ms. Maureen Kinyundo - Secretariat

PRESENT BY INVITATION

APPLICANT - **GILBI CONSTRUCTION COMPANY LIMITED**

Ms. Kiambati - Advocate, Chepkuto Advocates

RESPONDENTS - **THE ACCOUNTING OFFICER,
ANTI-COUNTERFEIT AUTHORITY &
ANTI-COUNTERFEIT AUTHORITY**

Mr. J.O. Adera - Advocate & Director Legal Services and
Corporate Secretary

INTERESTED PARTY - **PURPLE DOT INTERNATIONAL LIMITED**

Mr. Waithaka Ngaruiya - Advocate, Waithaka & Associates

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 for 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, on the 2nd Respondent's website (www.aca.go.ke) and (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.	62,500,000.00

				77,160.00/ SQM	
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 set out 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 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.

At the end of evaluation at this stage, two (2) tenders were determined non-responsive and the other seven (7) tenders, which included the Applicant's and the Athi River Housing Co. Ltd tenders, were determined responsive.

The tenders that were determined 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 determined non-responsive, which included the Applicant's tenders, and two (2) tenders, submitted by Athi River Housing Co. Ltd, were determined 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 tenderers 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 Athi River Housing Co. Ltd 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 Athi River Housing Co. Ltd 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 NO. 92 OF 2022 FILED ON 21ST OCTOBER 2022

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. ACA/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.

The Board considered the parties' pleadings, documents, written submissions, the list and bundle of authorities together with the confidential documents submitted by the Respondents to the Board pursuant to Section 67(3)(e) of the Act and found the following issues called 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?

On the first issue framed for determination, the Board found 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.

On the second issue framed for determination, this Board having found that the Applicant's tender No. 1A and 1B were not properly evaluated ordered 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 the Board and the provisions of the Act and the Tender Document.

On 11th November 2022 the Board issued the following orders with respect to the Request for Review No. 92 of 2022 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

NOTICE OF MOTION DATED 9TH DECEMBER 2022 IN REQUEST FOR REVIEW NO. 92 OF 2022

On 9th December 2022, the Applicant herein filed under Certificate of Urgency dated 9th December 2022 a Notice of Motion application dated 9th December 2022 together with a Supporting Affidavit sworn by John Maina-Ng'ang'a, its Sales Manager, on 9th December 2022 through the firm of Chepkuto Advocates, seeking the following orders:

a) THAT the application be certified as urgent and service thereof be dispensed with in the first instance;

b) THAT this Honourable Board be pleased to issue an extension of the tender validity period pending the completion of the procurement process and issuance of the award to the successful bidder;

- c) THAT this Honourable Board be pleased to issue a declaration that the Procurement Entity breached the provisions of Article 227(1) of the Constitution and Sections 175(1) and 176(6) of the Public Procurement and Disposal Act;***
- d) THAT the Procuring Entity be compelled to award the tender to the Applicant, being the lowest evaluated bidder;***
- e) THAT in the alternative, this Honourable Board be pleased to issue an order directing the Respondents to complete and release the outcome of the procurement process in regard to the subject tender and issue an award to the lowest evaluated bidder forthwith;***
- f) THAT the Respondents be compelled to pay the costs to the Applicant arising from/and incidental to this Application; and***
- g) THAT 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.***

The Board considered the parties' pleadings, together with the confidential documents submitted by the 1st Respondent to the Board pursuant to Section 67(3)(e) of the Act and found the following issues called for determination:

1. Whether the Board has jurisdiction to hear and determine the instant Notice of Motion Application;

2. Whether the Applicant has locus standi before the Board;

3. Whether the 1st and 2nd Respondents complied with the Orders of the Board as contained in the Decision of the Board dated 11th November 2022 in Request for Review No. 92 of 2022;

4. Whether there is need for the subject tender's validity period to be extended;

5. What Orders should the Board grant in the circumstances?

On the first issue framed for determination, this Board upon construing the Respondents objection to the hearing and determination of the Notice of Motion Application dated 9th December 2022 on the ground that it lacked jurisdiction to hear and determine the said application found that it had powers to extend the tender validity period of the subject tender and as such had jurisdiction to hear and determine the issues raised in the Notice of Motion Application pertaining to extension of the subject tender's validity period.

On the second issue framed for determination, this Board noted that the Respondents challenged the standing of the Applicant in their Preliminary Objection yet failed to support the Preliminary Objection and found that the Applicant as a tenderer had the *locus standi* to move it.

On the third issue framed for determination, this Board found that the Respondents did not comply with the Orders of the Board dated 11th November 2022 in Request for Review No. 92 of 2022.

On the fourth issue framed for determination, this Board in light of the provisions of section 88 and 173 of the Act deemed it fit and just to extend the subject tender's validity period by a further sixty (60) days from 10th December 2022 and directed the 1st Respondent to issue written notifications to tenderers in the subject tender notifying them of extension of the subject tender's validity period for a further sixty (60) days from 10th December 2022.

On the fifth issue framed for determination, this Board dismissed the Preliminary Objection contained in the Respondent's Notice of Preliminary Objection dated 21st December 2022 and filed on 23th December 2022 for lacking in merit, ordered the Respondents to comply with its orders dated 11th November 2022 in Request for Review No. 92 of 2022 and directed the Acting Board Secretary to furnish the Director General of the Public Procurement Regulatory Authority with its decision in Notice of Motion

Application dated 9th December 2022 for purposes of following up on the Respondents' compliance with the orders of this Board as contained in the Decision dated 11th November 2022 in Request for Review No. 92 of 2022.

On 30th December 2022 and in exercise of the powers conferred upon it under the Act, the Board made the following orders with respect to the Notice of Motion Application dated 9th December 2022:

- 1. The Preliminary Objection contained in the Respondents' Notice of Preliminary Objection dated 21st December 2022 and filed on 23th December 2022 be and is hereby dismissed.***

- 2. The tender validity period of Tender No. A.C.A./OT/006/2021-2022 for Purchase of Two (2) Go-Downs in Nairobi be and is hereby extended for a further sixty (60) days from 10th December 2022.***

- 3. Further to Order No. 2 above, the 1st Respondent is hereby directed to issue written notifications to tenderers in the subject tender notifying them of extension of the tender validity period of Tender No. A.C.A./OT/006/2021-2022 for Purchase of Two (2) Go-Downs in Nairobi for a further sixty (60) days from 10th December 2022.***

4. The 1st and 2nd Respondents are hereby ordered to comply with the orders of the Board issued on 11th November 2022 in Request for Review No. 92 of 2022 within fourteen (14) days from the date of this decision.

5. The Acting Board Secretary is hereby directed to furnish the Director General of the Public Procurement Regulatory Authority with this decision for purposes of following up on the Respondents' compliance with the Orders of the Board as contained in the Decision of the Board dated 11th November 2022 in Request for Review No. 92 of 2022.

6. Given that the procurement process for the subject tender is not complete, each party shall bear its own cost in the Notice of Motion.

RE-EVALUATION

In view of the Board's orders dated 11th November 2022 in Request for Review No. 92 of 2022, a re-evaluation Committee was appointed by the 1st Respondent vide Memo dated 25th November 2022 and the Applicant's tender was re-admitted to the Technical Evaluation stage. At the time of Re-evaluation, tenderer No. 6 had sold its Go-Down as was noted in the Re-Evaluation Report.

Technical Re-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, six (6) tenders were found to be 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 Re-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 tenderers 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. 2, the Interested Party herein, was the lowest evaluated tenderer having quoted Kshs 48,100.00 per SQM totalling to Kenya Shillings Thirty-Seven Million, Nine Hundred and Ninety-Nine Thousand (Kshs. 37,999,000.00) only per Go-Down inclusive of all applicable taxed as follows:

Tender No.	Tenderer	Floor Are	Cost per square metre	Total Cost	Rank
2A	M/s Purple Dot International Ltd	790	48,100.00	37,999,000.00	1
2B	M/s Purple Dot International Ltd	790	48,100.00	37,999,000.00	
TOTAL				75,998,000.00	

Re-Evaluation Committee's Recommendation

The Re-Evaluation Committee recommended the Interested Party to be considered for valuation of the Go-Downs by the State Department for Lands, award of the subject tender to it at a cost of **Kenya Shillings Thirty-**

Seven Million, Nine Hundred and Ninety-Nine Thousand (Kshs. 37,999,000.00) only per Go-Down totaling to Kenya Shillings Seventy-Five Million Nine Hundred and Ninety-Eight Thousand (Kshs. 75,998,000.00) 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, and for structural integrity checks for the two Go-Downs to be undertaken owing to visible cracks.

Second Professional Opinion

In a Professional Opinion dated 11th January 2023 (hereinafter referred to as the "Second Professional Opinion"), the Acting Head of Procurement, Effie Aluoch, 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, Dr. Robi Mbugua Njoroge, the Executive Director and 1st Respondent herein approved the Professional Opinion on 12th January 2023.

Notification to Tenderers

Tenderers were notified of the outcome of evaluation of the subject tender vide letters dated 12th January 2023.

NOTICE OF MOTION DATED 26TH JANUARY 2023 IN REQUEST FOR REVIEW NO. 92 OF 2022

On 26th January 2023, the Applicant herein filed a Notice of Motion application dated 26th January 2023 together with a Supporting Affidavit sworn by John Maina Ng'ang'a, its Sales Manager, on 26th January 2023 through the firm of Chepkuto Advocates, seeking the following orders:

- 1. THAT this Honorable Board be pleased to issue a declaration that the Procurement Entity breached the provisions of Article 227(1) of the Constitution and Sections 79(1), 80(2) and 175(1) of the Public Procurement and Disposal Act;***

- 2. THAT this Honorable Board be pleased to order that the decision of the Procuring Entity to award the Tender to the Interested Party be annulled and set aside;***

- 3. THAT the Procuring Entity be compelled to award the tender to the Applicant, being the lowest evaluated bidder;***

- 4. THAT the Board be pleased to annul any contract that may have been entered into by the Respondents and the Interested Party...;***

5. THAT the Board be pleased to halt any implementation of any such contract entered into between the Respondents and Interested Party;

6. THAT the Respondents be compelled to pay the costs to the Applicant arising from/and incidental to this Application; and

7. THAT 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 a Notification of Notice of Motion and a letter dated 26th January 2023, Mr. James Kilaka, the Acting Board Secretary of the Public Procurement Administrative Review Board (hereinafter referred to as "the Board") notified the Respondents and Interested Party of the filing of the Notice of Motion and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondents and Interested Party a copy of the Notice of Motion together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondents were requested to submit a response to the Notice of Motion together with confidential documents concerning the subject tender within five days from 26th January 2023.

Vide letters dated 27th 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 27th January 2023.

On 1st February 2023, the Interested Party filed a Notice of Appointment dated 31st January 2023 and an undated Affidavit in Opposition to the Review sworn by Jiten Kerai, its General Manager, through the firm of Waithaka & Associates Advocates.

In opposition to the Notice of Motion, the 1st and 2nd Respondents on 2nd February 2023 filed, through J.O. Adera Advocate, a Replying Affidavit sworn by Dr. Robi Mbugua Njoroge on 2nd February 2023 and submitted to the Board confidential documents in the subject tender pursuant to section 67(3)(e) of the Act.

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 2nd 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 Tuesday, 7th February 2023 at 12:00 noon, through the link availed in the said Hearing Notice.

On 4th February 2023, Athi River Housing Company Limited sent an email to the Board forwarding several documents in response to the Notification of Notice of Motion dated 27th January 2023 and the letter dated 27th January 2023.

PARTIES' SUBMISSIONS

Applicant's submissions

During the online hearing, Counsel for the Applicant, Ms. Kiambati, reiterated the orders sought by the Applicant in the Notice of Motion Application filed on 26th January 2023 and submitted that the main ground of the Notice of Motion application is failure by the 2nd Respondent to adhere to the Board's orders issued on 11th November 2022 explicitly directing the 1st Respondent

to re-admit and re-evaluate the Applicant's tender at the Technical Evaluation stage despite there being no Judicial Review application filed at the High Court rendering the Board's decision final and binding.

Ms. Kiambati submitted that the Technical Evaluation stage was to be conducted in three main stages as provided at page 11 under paragraph b) of the Tender Document and that under stage one, tenderers were required to score 30 out of 60 marks. Under stage two, site visit was to be conducted and scoring would be out of 40 marks and a tenderer was required to get a combined score of at least 70 out of 100 marks from the first and second stage for them to proceed to the third stage of the technical evaluation.

Ms. Kiambati submitted that the Tender Document at page 11 under paragraph b) provided that only tenderers who qualified in stage 3 would proceed to the Financial Evaluation stage and that the Board in its decision of 11th November 2022 at page 6 as well as page 54 acknowledged the three stages of the Technical Evaluation. Ms. Kiambati further submitted that the Board in its decision of 11th November 2022 directed the 1st Respondent to ensure that the Applicant's tender was re-evaluated under all three stages at the Technical Evaluation stage.

Ms. Kiambati submitted that section 80(2) of the Act provides that evaluation is to be conducted based on the criteria set out in the Tender Document and that the 2nd Respondent was bound by these provisions of

section 80(2) of the Act hence it cannot purport to have awarded the subject tender to the Interested Party yet the Interested Party in its affidavit acknowledged at paragraph 9 that it underwent all the stages enumerated under the Technical Evaluation stage including the structural, architectural or other specialist works and integrity checks and was picked out as the most responsive tender. Counsel for the Applicant further submitted that Article 227(1) of the Constitution mandated the 2nd Respondent to ensure that the procurement process was fair and competitive yet the 2nd Respondent applied two different assessment criteria on the subject tender thus discriminating the Applicant and a breach of section 3(d) of the Act.

Ms. Kiambati submitted that the Applicant received communication, via email, from the 2nd Respondent on Saturday, 3rd December 2022 and on 29th November 2022 wherein the 2nd Respondent indicated that it would send representatives to the Applicant's site and Go-Downs in order for them to conduct site visit, which was one of the requirements under the Technical Evaluation stage. However, there was no communication nor has there been any Structural, Architectural or other Specialist Works Integrity Check by the 2nd Respondent on the Applicant's premises. In Counsel's view, the fact that the subject tender has been awarded to the Interested Party without completion of the tendering process goes against Article 227(1) of the Constitution and is contrary to the Board's decision of 11th November 2022.

Ms. Kiambati relied on the holding by Justice Mativo in Republic v Public Procurement Administrative Review Board; Arid Contractors & General Supplies (Interested Party) Ex parte Meru University of Science & Technology [2019] eKLR to buttress her arguments in support of the Applicant's case and submitted that it was unlawful for the Respondents to award the subject tender yet evaluation was not completed and the Applicant's tender was not subjected to stage three of evaluation at the Technical Evaluation stage.

Ms. Kiambati submitted that the Interested Party was not eligible and lacked capacity to enter into a procurement contract under the Act for award of the subject tender since it was not the real proprietor of the property on which the Go-Downs, the subject of which the award had been conferred, were situated. Ms. Kiambati further submitted that pursuant to section 83 (1) of the Act, the 2nd Respondent was under an obligation to conduct due diligence after evaluation of tenders and prior to award of the subject tender to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender. Hence, the 2nd Respondent was bound to undertake an official search from the Registrar of Lands as part of its due diligence.

Respondents' Submissions

Mr. Adera on behalf of the respondents submitted that the Respondents, in opposition to the Notice of Motion Application, filed their response by way of a Replying Affidavit sworn by Dr. Robi Mbugua Njoroge on 1st February 2023.

Mr. Adera submitted that the Respondents complied with the decision of the Board rendered on 11th November 2022 at the Technical Evaluation stage and adhered to the evaluation criteria set out in the Tender Document.

Mr. Adera submitted that under the Technical Evaluation, there was a criteria for stage one and a criteria for stage two but the Tender Document did not have any set criteria for stage three. Mr. Adera further submitted that under the Tender Document, there was no objective and measurable criteria for stage three and consequently, no tenderer was subjected to stage three and every tenderer who scored the minimum 70% at stage one and stage two proceeded to the final stage of evaluation.

Mr. Adera submitted that the Respondents having not applied the criteria to every tenderer was consistent with the provisions of the Tender Document and was not discriminative nor in violation of any provisions of the law.

Mr. Adera further submitted that the prayers sought by the Applicant were not available to them since based on the Respondents' Affidavit, the Applicant was not the lowest tenderer noting that the difference between the Applicant and the Interested Party for one Go-Down was Kenya Shillings 12,000,000.00 and since the Interested Party had the lowest tender compared to the Applicant, there is no basis for the Applicant to claim that

it is entitled to award of the subject tender being the lowest evaluated tenderer.

Mr. Adera conceded that no tenderer was subjected to stage three of the Technical Evaluation stage and submitted that the Applicant cannot be awarded the subject tender because of that failure by the Respondents. Mr. Adera submitted that the provisions relied upon by the Applicant were not available to them as they related to different issues not applicable to the particular facts and circumstances of the instant application.

Mr. Adera submitted that the Applicant was relying on the ground that the Interested Party was not eligible since it was not the proprietor of the subject property in its tender yet this was a mandatory requirement that the Board had acknowledged in its decision dated 11th November 2022 that the Respondents had complied with and was the reason the Board directed that the Respondents to proceed from the Technical Evaluation stage.

Mr. Adera re-iterated that the 2nd Respondent complied with the Board's decision and the Tender Document and where no criteria was provided, no tenderer was subjected to it proving the Respondents' consistency. Mr. Adera requested for the application to be dismissed and for the 2nd Respondent to be allowed to proceed with the tendering process to its logical conclusion.

Upon enquiry by the Board on whether the Respondents complied with the order to complete the tendering process within 14 days of the Board's decision, Mr. Adera in response submitted that the Board's decision of 30th December 2022 extended that period and that it was common ground between the Applicant, the Respondents and the Interested Party that the Technical Evaluation and the physical site visit was done on 6th January 2023 which was six (6) days from the date of the Board's order extending the period hence according to the Respondents, this was conducted within time as extended by the Board in its decision of 30th December 2022.

Upon enquiry by the Board on whether subleases were for 99 years, Mr. Adera responded in the Affirmative. Upon further request by the Board to clarify whether the relationship between Interested Party as lessee and the Head Lessor was of tenant/landlord or one that conferred a proprietary interest in the property and being a long term lease what interest was being conferred, Mr. Adera responded that this was not what would be referred to as a long term lease but a proprietary right looking at the law as it then was. Mr. Adera further submitted that the recent amendment on sectional properties entitled parties to individual titles and one of the documents presented by the Interested Party was an official search from the Ministry of Lands on the particular property and part of the due diligence undertaken by the Respondents confirmed that the Interested Party had made applications for individual titles hence in their view, this was not a lease.

Interested Party's submissions

Counsel for the Interested Party, Mr. Waithaka, submitted that the Interested Party filed an Affidavit in opposition to the Notice of Motion application sworn by Jiten Kerai on 1st February 2023 and filed on the same day and submitted that the Interested Party was opposed to the Notice of Motion Application in its entirety.

On the issue of ownership and capacity to contract, Mr. Waithaka submitted that the Interested Party annexed in its Affidavit leases and subleases of their properties and the relationship between the Interested Party and the Lessee was one of ownership because the Lessor was the Interested Party and was transferring the Go-Downs to itself and since it had many Go-Downs at the same place, it was transferring each of them separately to itself and would eventually transfer to any other entity. Mr Waithaka submitted that the transfer was passing of the remainder of the lease term that is given by the Government hence was not a tenancy since it was passing interest in its entirety subject to rules prescribed. Mr. Waithaka further submitted that the Interested Party had applied for individual titles for each Go-down.

Mr. Waithaka submitted that the Tender document at page 12 provided for drawings and that on 3rd December 2022, the Interested Party received an email indicating that a team of engineers would pay a visit to their site which in the Interested Party's understanding these were specialized works.

Mr. Waithaka submitted that the Technical Evaluation that required the experts to participate was done on all tenderers, that all tenderers were invited to send representatives when the site visit was being conducted, and that the Applicant never protested on being treated differently, if at all, and ought to have raised such issue, hence its claim is not genuine and is for dismissal.

Mr. Waithaka submitted that the Applicant did not state what was not adhered to in the Technical Evaluation by the 2nd Respondent and that it did not challenge any provision on the Technical Evaluation in the Tender Document. Mr. Waithaka further submitted that the Interested Party should not be dragged into issues between the Applicant and other tenderers in other tender processes.

Mr. Waithaka submitted that the Interested Party's tender complied with provisions of the Tender Document and was fairly awarded the subject tender and as such prayed for the Board to find it necessary to close the tendering process of the subject tender. Counsel was of the view that the Applicant believed it had to be awarded the subject tender and it ought to take cognizance of the fact that competition dictated that one did not have to have their way all the time. Mr. Waithaka prayed for dismissal of the Notice of Motion application and for the 2nd Respondent to proceed and sign the contract with the Interested Party.

Applicant's rejoinder

In a rejoinder, Ms. Kiambati submitted that the Tender Document at page 11 under paragraph b) expressly provided that the Technical Evaluation stage would be undertaken in three (3) stages and only tenderers who qualified in stage three being Structural Architectural and other specialist Works and Integrity Checks would proceed to the Financial Evaluation stage.

Ms. Kiambati reiterated that the Applicant was never invited for any structural or integrity checks and it was new to it that tenderers were invited for such checks. Ms. Kiambati submitted that the Applicant filed the instant Notice of Motion application expressly to bring its grievances before the Board rightfully so under the Act and Constitution. Ms. Kiambati further submitted that the counsel for the Respondents was misleading the Board by stating that Structural Architectural and other specialist Works and Integrity Checks were not done on any tender yet the Interested Party had admitted to have undergone the said checks set out as stage three of the Technical Evaluation proving lack of fairness and competitiveness in the procurement process since the Applicant was not subjected to stage three of the Technical Evaluation.

Ms. Kiambati submitted that the Respondents didn't adhere to the Board's orders specifically Order No. 3 on admitting and re-evaluating the Applicant's

tender hence the 2nd Respondent cannot purport to award the subject tender having failed to complete all requirements in the Tender Document.

Upon enquiry by the Board on whether the Applicant made it to the Financial Evaluation stage, Ms. Kiambati in response submitted that the letter of award confirmed that the Applicant made it to the Financial Evaluation stage. On further enquiry by the Board on whether the Applicant wanted to be taken back to the Technical Evaluation stage, Ms. Kiambati in response indicated that if the whole process was wrong, parties ought not to move forward. Counsel further clarified to the Board that the Structural Architectural and Specialist Integrity Check which was not done fell under the third stage of the Technical Evaluation.

On enquiry by the Board on what other parts of the Board's decision, other than the Orders, that the 2nd Respondents breached, Counsel for the Applicant did not point out any other part of the Board's decision delivered on 11th November 2022.

At the conclusion of the online hearing, the Board through its Chairperson, informed parties that the Notice of Motion application was due to expire on 16th February 2023 and that the Board would render its decision on or before 16th February 2023 by communicating the same to parties via email on or before 16th February 2023.

BOARD'S DECISION

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

- 1. Whether the Respondents complied with the orders of the Board dated 11th November 2022 in Request for Review No. 92 of 2022;**
- 2. Whether the Interested Party has the legal capacity to enter into a contract for the subject tender with the 2nd Respondent with respect to allegations made by the Applicant that it did not own the Go-Downs in its tender and in view of section 55 of the Act in the event the Interested Party is determined to be the successful tenderer.**
- 3. What Orders should the Board grant in the circumstances?**

Before addressing the issues framed for determination, the Board would like to dispense with one preliminary issue arising from the proceedings before it.

During the online hearing, Mr. Adera on behalf of the Respondents was requested by the Board to clarify on an allegation made in his email dated 31st January 2023 sent to the Board Secretary at 12:41 p.m. indicating at the last paragraph of his email that the Board had a pre-determined outcome in the matter. The said email which was displayed on screen to parties by the Secretariat reads as follows:

"....."

Dear Sir/Madam,

I refer to the above matter and to your email of today purportedly intimating that we are out of time in filing a response. The trail of email speaks for itself.

I have looked at your Circular and we have 5 days to file a response. We were served on Friday, 27.1.2023 at 10:56 AM and 5 days in terms of Section 57 of the Interpretation and General Provisions Act ends on Friday, 3.2.2023.

I fail to understand the logic behind your email. Be that as it may, this is the third application in this matter and we are determined this time round to move to the High Court in case of any mischief. I take your email as pure mischief. I have called your office for a clarification and you have rudely disconnected the call on learning I am calling from ACA.

We shall file our response within 5 days, by 3.2.2023 and pick it up from there. It is good you have done this email which is totally out of order and it will be very useful in the High Court.

Why the Board should be in a hurry to make a determination even before time to file our response has lapsed is a clear indication of a pre-determined outcome.

Regards,

J. O. Adera”

Mr. Adera submitted that his email was in response to an email sent by the Board on 31st January 2023 at 11:11 a.m. which was displayed on screen to parties by the Secretariat and reads as follows:

".....

Dear Sir

A reminder,

Kindly submit your response of the above referenced subject matter earlier sent to your office which is overdue to enable the Board to make a determination.

Your quick response is a waited.

Thank You.

For Board Secretary

Public Procurement Administrative Review Board

KISM Towers

Ngong Road

P O Box 58535-00200

NAIROBI

Tel No. 3244000

Website: www.ppra.go.ke

.....”

Mr. Adera submitted that the email sent to the Respondents was out of order in view of the provisions of the Board’s Circular No.02/2022 dated 24th March 2020, which provided that the Respondents had five (5) days to file their response yet the Board’s email of 31st January 2023 was sent one day after notification of the Notice of Motion application insinuating that the five (5) days within which the Respondents were required to file a response had lapsed and the Respondents were out of time to file their response which was an indication to the Respondents that somebody was engaging in some mischief.

On the face of it, the Board observes that the email from the Board Secretary sent to the Respondents shows that it was a reminder to the Respondents to submit their response to the Board, having already been notified of filing of the Notice of Motion Application by the Applicant. We have perused the Board's file in this matter and note that the said file was opened on 26th January 2023 when the Applicant filed the instant Notice of Motion application. We further note from the Board's file that on 26th January 2022 the Acting Board Secretary sent to the Respondents, via email, a Notification of Notice of Motion dated 26th January 2023 and a letter dated 26th January 2023 informing the Respondents of filing of the Notice of Motion application and requesting them to submit their response within five (5) days from the 26th January 2023.

We note that the email sent to the Respondents by the Board Secretary on 31st January 2023 served as a reminder to the Respondents requesting them to comply with the notification sent on 26th January 2023 and to file with the Board their response to the Notice of Motion application together with confidential documents in the subject tender pursuant to section 67(3)(e) of the Act. Essentially, the Board Secretariat was only overly enthusiastic in stating that the five (5) days from the 26th January 2023 had lapsed and Mr. Adera's email in response was out of order and uncalled for by concluding that the Board had made up its mind on this matter as no information was given implying that the Board had already arrived at a determination in the

instant matter. The Board is of the considered view that it would have been much better if the Respondents had brought to the Board Secretary's attention that, in their opinion, they were still within time to file a response together with the requested confidential documents instead of responding with the allegation that the Board had a pre-determined outcome in the instant Notice of Motion Application even before the Respondents had filed their response.

Consequently, we find that the Respondents allegation that the Board had a pre-determined outcome in the instant Notice of Motion Application dated 26th January 2023 is unfounded and unsupported and Counsel for the Respondents was out of order in making such an allegation.

Having disposed of the above preliminary aspect, the Board now proceeds to address the substantive issues framed for determination in the instant Notice of Motion Application dated 26th January 2023.

Whether the Respondents complied with the orders of the Board dated 11th November 2022 in Request for Review No. 92 of 2022.

The Applicant alleges that the Respondents breached sections 175(1) and (6) of the Act read with Article 227(1) of the Constitution for failure to comply with the orders of the Board issued on 11th November 2022 in Request for Review No. 92 of 2022 in that they (a) failed to ensure that the Applicant's

tender was re-admitted and completely re-evaluated at the Technical Evaluation stage in accordance with the provisions of the Tender Document; (b) failed to award the subject tender to the Applicant being the lowest evaluated tenderer; (c) prejudiced the Applicant's legitimate expectation that they would comply with orders of the Board; and (d) undermined the effect of the orders of the Board contrary to principles espoused in Article 10 (2) of the Constitution which include good governance, integrity, transparency, accountability and respect for the rule of law.

The Applicant submitted that it received a call from the 2nd Respondent on 13th January 2023 requesting it to pick its letter of notification dated 12th January 2023 which informed it that its tender was unsuccessful for reasons that it was ranked 2nd at the Financial Evaluation stage.

The Applicant submitted that the 2nd Respondent's Evaluation Committee was under a duty to re-evaluate its Go-Downs at the Technical Evaluation stage, which evaluation was to take place in three stages as set out on page 11 of the Tender Document. The Applicant further submitted that the first stage was marked out of 60 wherein tenderers were required to score at least 30 marks in order for them to progress to the second stage being the site visit. This latter stage was scored out of 40 marks and tenderers who obtained a total of at least 70 marks would then proceed to the third stage of the evaluation which encompassed a Structural, Architectural and other Specialist Works Integrity check.

It is the Applicant's case that the 2nd Respondent re-admitted its tender and proceeded to re-evaluate it at the Technical Evaluation stage but only carried out a site visit and did not carry out any Structural, Architectural or Other Specialist Works Integrity check as provided in the Tender Document. Hence, up until the 13th January 2023 when it was invited to collect its notification letter, it had not received any communication from the Respondents regarding conduct of the Structural, Architectural or Other Specialist Works Integrity check. The Applicant submitted that this Board acknowledged in its decision of 11th November 2022 that the Technical Evaluation stage was broken down into three (3) tiers which the Evaluation Committee had to follow in order for the award to be issued.

The Respondents in opposition to the Notice of Motion Application dated 26th January 2023 submitted that they complied with the Board's orders issued on 11th November 2022 in Request for Review No. 92 of 2022 and on 30th December 2022 in Notice of Motion Application dated 9th December 2022. The Respondents submitted that Technical Re-evaluation was conducted pursuant to the Board's decision of 11th November 2022. However, the Respondents submitted that there was no specific criteria at the Technical Evaluation stage for Structural, Architectural or Other Specialist Works Integrity check and the Evaluation Committee was under no obligation to undertake any Structural, Architectural or Other Specialist Works Integrity check as alleged by the Applicant and doing so would be introducing a criteria

that was not part of the Technical Evaluation requirements. The Respondent further submitted that none of the tenderers underwent any Structural, Architectural or Other Specialist Works Integrity check at the Technical Evaluation stage.

Contrary to what the Respondents submitted, the Interested Party submitted that the Respondents conducted the Technical Evaluation in accordance with the Tender Document including carrying out Structural, Architectural or Other Specialist Works Integrity check to pick the most responsive tender.

Having considered parties' submissions and filed pleadings, we note that Order No. 3 at page 59 of the Board's decision in Request for Review No. 92 of 2022 dated 11th November 2022 ordered ***the 1st Respondent herein 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 the Request for review.***

Further to Order No. 3 above, Order No. 4 at page 60 of the Board's decision ordered the Respondents ***to proceed with the procurement process to its logical conclusion including the making of an award to the successful tenderer within 14 days from the date of the decision.***

It is not in dispute that the Applicant herein filed a Notice of Motion application dated 9th December 2022 seeking for extension of the subject tender's validity period and for the Board to direct the Respondents to comply with the orders issued in Request for Review No. 92 of 2022 dated 11th November 2022 since the Respondents had failed to conclude the procurement process and award the subject tender to the successful tenderer within 14 days from the date of the Board's decision.

By a Decision of the Board dated 30th December 2022 in the Notice of Motion application dated 9th December 2022 the Board, *inter alia*, extended the subject tender's validity period for a further sixty (60) days from 10th December 2022 and under Order No. 4 at page 35 of the Decision of the Board dated 30th December 2022 ordered ***"The 1st and 2nd Respondents are hereby ordered to comply with the orders of the Board issued on 11th November 2022 in Request for Review No. 92 of 2022 within fourteen (14) days from the date of this decision."***

It is worth noting that pursuant to Order No. 3 at page 59 of the Decision of the Board dated 11th November 2022 in Request for Review No. 92 of 2022, the Board specifically ordered the 1st Respondent to direct the Evaluation Committee to (a) re-admit the Applicant's tender at the Technical Evaluation stage; (b) re-evaluate the Applicant's tender at the Technical Evaluation stage together with all other tenders that made it to the Technical Evaluation

stage; (c) to conduct the re-evaluation in accordance with the provisions of the Tender Document, the Act, Regulations 2020 and Constitution while taking into consideration the Board's findings in the said Request for Review.

Further, we observe that the Board at page 28 to 31 of its decision dated 11th November 2022 in Request for Review No. 92 of 2022 while determining the issue of ***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*** held as follows with respect to the criteria for evaluation of the subject tender at the Technical Evaluation stage:

"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 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>

1,115 square meters	697 sq. mts.- 883 sq. mts. Below 697 sq. mts.	20 marks 0 marks	
Go-down to be located within Nairobi and its environs (The reference point will be the ACA HQ)	Below 15 kms 15kms- 35kms Above 35 kms	15 marks 10 marks 5 marks	15 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

	<i>Be in a secure environment with a perimeter wall and a gate</i>	<i>10 marks</i>	
	<i>Have adequate parking and offloading space</i>	<i>10 marks</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.
.....”**

From the above, it is evident that the Board took cognizance of the provisions of the Tender Document and established that (a) a tender was required to be evaluated in three stages at the Technical Evaluation stage; (b) during Technical Evaluation, a tender 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; (c) tenders who scored a combined score of 70 marks and above would proceed to stage three for Structural, Architectural and other Specialist Works Integrity check and (d) tenderers who qualified in stage three would proceed to Financial Evaluation. It was therefore an integral part of the Technical Evaluation stage that tenderers who scored 70 marks and above would undergo the Structural, Architectural and other Specialist Works Integrity check before proceeding for Financial Evaluation.

We have carefully studied the Re-Evaluation report signed by members of the Re-Evaluation Committee on 11th January 2023 submitted as part of the confidential documents submitted to the Board pursuant to section 67(3)(e) of the Act and note that the Re-Evaluation Committee was appointed by the

1st Respondent vide memo Ref: ACA/PROC/5 VOL. 2 (114) dated 25th November 2022 to re-evaluate the Applicant's tender at the Technical Evaluation stage together with all other tenders that made it to the Technical Evaluation stage.

We further note from the Re-Evaluation report under the heading "**Technical Re-evaluation**", that re-evaluation was undertaken in two stages being (a) stage one where tenders were required to score above 30 out of 60 marks to qualify for further evaluation and (b) stage two being the site visit as indicated at page 12 of Clause II Technical Evaluation of Evaluation Criteria of Section II- Instructions To Tenderers of the Tender Document.

The Board notes from the Re-evaluation Report under the scoring of stage two that stage two was described to involve Structural, Architectural, Specialist Works and Integrity checks and that a detailed report of the said Structural, Architectural and Specialist works had been attached to the Re-evaluation report. We however note that this was an incorrect description of what stage two involved since the same had been indicated at page 12 of Clause II Technical Evaluation of Evaluation Criteria of Section II- Instructions To Tenderers of the Tender Document to involve a site visit that was supposed to establish if a tenderer's Go-Down (a) had power, water, and sewerage connection; (b) was in a secure environment with a perimeter wall and a gate; (c) had adequate parking and offloading space; (d) had

good road accessibility; and (e) had provisions for office space, washrooms and a kitchen. We further note that the Respondents have not availed to the Board as part of the confidential documents the said detailed report of the said Structural, Architectural and Specialist works to support evaluation under stage three at the Technical Evaluation stage. This confirms the submission by Counsel for the Respondents, Mr. Adera, that the Re-Evaluation Committee did not conduct evaluation of tenders under stage three at the Technical Evaluation stage.

The Board observes that attached to the Re-evaluation Report is a Report from Ministry of Lands, Public Works, Housing and Urban Development State Department for Public Works dated 10th January 2023 being a Site Inspection Report carried out only at the Interested Party's Go Downs. As such, it is evident that no other tenderer's Go-Downs were inspected by the Ministry of Lands, Public Works, Housing and Urban Development State Department for Public Works before award of the subject tender.

From the foregoing, it is the Board's considered view that the Respondents partially complied with the Boards orders dated 11th November 2022 in Request for Review No. 92 of 2022 by re-admitting the Applicant's tender to the Technical Evaluation stage.

However, the Board finds that the Respondents failed to re-evaluate the Applicant's tender and all other tenders that made it to the Technical

Evaluation stage in three (3) stages as explicitly provided for in the Board's decision dated 11th November 2022 in Request for Review No. 92 of 2022 and under 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 by resolving to re-evaluate tenders at the Technical Evaluation stage in stage one and stage two while exempting stage three being the Structural, Architectural and other Specialist Works Integrity check. We are alive to the fact that stage 3 of the Technical Evaluation stage does not require scoring but a check must be done for the Structural, Architectural and other Specialist Works on tenderers Go-Downs and this will satisfy the integrity of the said Go-Downs.

The Board notes that there were no stay orders issued against the Board's decision dated 11th November 2022 in Request for Review No. 92 of 2022 nor was there any Judicial Review application envisioned under section 175 of the Act directing the Respondents not to comply with the Board's orders and proceed to exempt stage three at the Technical Evaluation stage. This disregard by the Respondents to evaluate tenders under stage three of the Technical Evaluation stage cannot be allowed because it will be up for misuse by a procuring entity in an instance where if a procuring entity is interested in awarding a tender to a particular tenderer, and such tenderer is not responsive to a criteria provided in a tender document, it would mean that the procuring entity will waive that criteria for all other tenderers to allow the said tenderer to pass that evaluation stage. For example, if Tenderer A does not have 10 years' experience in offering service A, a procuring entity

would simply misuse its power by waiving the requirement for a tenderer to have 10 years' experience in offering service A and not require other tenderers to have 10 years' experience in offering Service A just to allow Tenderer A to move to the next stage of evaluation.

In the circumstances, we find and hold that the Respondents partially failed to comply with the orders of the Board issued on 11th November 2022 in Request for Review No. 92 of 2022.

Whether the Interested Party has the legal capacity to enter into a contract for the subject tender with the 2nd Respondent with respect to allegations made by the Applicant that it did not own the Go-Downs in its tender and in view of section 55 of the Act in the event the Interested Party is determined to be the successful tenderer..

The Applicant submits that the Interested Party lacks the capacity to enter into a procurement contract with the 2nd Respondent under the Act for the reason that the Interested Party is not the real proprietor of the property on which the Go-Downs are situated and the subject of which the award of the subject tender has been conferred. The Applicant at paragraph 34 of the Supporting Affidavit sworn by John Maina Ng'ang'a on 26th January 2023 annexed and marked as "JMN-10" a copy of Certificate of Title No. I.R 211279 being Land Reference Number 10426/361 (original number

10426/352) as delineated on Land Survey Plan Number 431281 (hereinafter referred to as "Certificate of Title")

The Respondent submitted that capacity to contract was a mandatory requirement under stage one of the tendering process and that the Board acknowledged in its decision dated 11th November 2022 in Request for Review No. 92 of 2023 that the Mandatory requirements had been satisfied when it directed for re-evaluation to be conducted at the Technical Evaluation stage. The Respondents at paragraph 18 and 19 of the Replying Affidavit of Dr. Robi Mbugua Njoroge sworn on 2nd February 2023 deponed that the Interested Party was a lessee of Warehouse Nos. H16 and H17 indicated on the Certificate of Title as entry No. 36 and 37 appearing in the subject tender as tender no. 2A and 2B in the evaluation. The Respondents further deponed at paragraph 20 of their Replying Affidavit that the Interested Party held a 99 years lease from 1st February 1997 for warehouse no. H16 and a 99-year lease for warehouse no. H17 from 1st November 1997 which makes it a proprietor capable of contracting.

The Interested Party submitted that it had legal capacity to enter into a contract with the 2nd Respondent since its interest was one of a lessor and that it owned many Go-Downs in the property indicated in the Certificate of Title and was in the process of transferring the Go-downs in the subject tender to itself and any other interested party. The Interested Party further submitted that it had applied for individual titles for Go-Downs 2A and 2B

and had annexed and marked as JK4 being copies of the sub-Leases for the said Go-Downs in its Affidavit sworn by Jiten Kerai.

Section 55 of the Act provides for a tenderer's eligibility to tender and provides for a tenderer's legal capacity to enter into a contract under subsection (1) (a) 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 Board notes that the copy of the official search of the Certificate of Title was issued on 24th January 2023, which was after the close of the subject tender. The Certificate of Title indicates that the interest held in the property is a Leasehold Interest for a term of 99 years from 1st February 1997. We note that the Head Lessor is the Government of Kenya and that Entry No. 2 in the Certificate of Title reveals that a transfer of Lease was done from Chigwell Holdings Limited to Purple Dot International Limited for Kshs. 73,800,000/- under Presentation Number 1591 and registered on 11th December 2019. Thereafter, several Leases were registered for various

Warehouses erected by the Interested Party over the premises in the Certificate of Title recorded as entries No. 3 to 38 and a Transfer of Reversionary Interest made to Graylands IV Management Company Limited for Kshs. 40,000/- on 31st August 2022.

The Board has studied the Tender Document and notes that mandatory requirement no. 8 of Clause I Mandatory Requirements of Evaluation Criteria of Section II: Instructions to Tenderers at page 11 of the Tender Document required tenders to submit a copy of the title documents. We note that the type of interest held in the title documents was not specified. We have also carefully studied the Evaluation Report submitted to the Board as part of confidential documents and note that the Evaluation Committee at page 6 and 7 of the Evaluation Report indicated that the Interested Party had provided copies of title document.

We have carefully studied the Interested Party's tender submitted to the Board pursuant to Section 67 (3) (e) of the Act and note that the title documents referred to by the Evaluation Committee were (a) the submitted Long Term Lease dated 10th May 2022 for Tender No. 2A for Warehouse No. H15 was registered on 23rd May 2022 under Presentation No.1783 and under Title Number I.R 246517/1 (b) the submitted Long Term Lease dated 10th May 2022 for Tender No. 2B for Warehouse No. H16 was registered on 23rd May 2022 under Presentation No.1784 and under Title Number I.R 246518/1 (c) the Lessor in both Leases was Purple Dot International Limited (d) the

Lessee in both Leases was Purple Dot International Limited (e) the Interested Party as Lessor erected on the premises in the Certificate of Title thirty six (36) warehouses and the development was named Graylands Phase IV and (f) the Interested Party as Lessor incorporated a Management Company known as Graylands IV Management Company with the intention of the said company managing the Lease.

From the foregoing, the Board notes that the Interested Party was the registered owner of the premises comprised in the Certificate of Title and held a Leasehold interest over the said premises as Lessee from the Government of Kenya and having erected warehouses on the said premises in addition to incorporating a Management Company granted a Lease over itself over warehouse H15 and H16 being the Go-Downs in the Interested Party's tender in the subject tender.

From the foregoing, it is the Board's considered view that the Interested Party is the registered owner as Lessee and holds a Leasehold interest in Go-Downs No.H15 and H16 and is hence real proprietor of the said Go-Downs. As such, we find that the Interested Party has the legal capacity to enter into a contract for the subject tender with the 2nd Respondent pursuant to section 55 of the Act in the event it is determined to be the successful tenderer.

What orders should the Board grant in the circumstances?

We have found that the Respondents partially complied with the Orders of the Board dated 11th November 2022 in Request for Review no. 92 of 2022 by re-admitting the Applicant's tender at the Technical Evaluation stage but failed to evaluate the Applicant's tender together with all other tenders that made it to the Technical Evaluation stage in three (3) stages as explicitly provided for in the Board's decision dated 11th November 2022 in Request for Review No. 92 of 2022 and under 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 since the Respondents resolved to re-evaluate tenders at the Technical Evaluation stage in stage one and stage two while exempting stage three being Structural, Architectural and other Specialist Works Integrity check.

We have also found that the Interested Party has the legal capacity to enter into a contract for the subject tender with the 2nd Respondent in line with section 55 of the Act in the event it is determined to be the successful tenderer.

Having held that the Respondents did not partially comply with the Orders of the Board dated 11th November 2022 in Request for Review No. 92 of 2022, we deem it just and fair to cancel and nullify the letter of Notification of Intention to Award the subject tender dated 12th January 2023 and letters issued to the Applicant and other unsuccessful tenderers dated 12th January

2023 and order the Respondents to proceed to evaluate the Applicant's tender and all other tenders that were successful at stage two of the Technical Evaluation at stage three being Structural, Architectural and other Specialist Works Integrity check and conclude the procurement process within 14 days in accordance with the provisions of the Tender Document, the Act, Regulations 2020 and the Constitution while taking into consideration the Board's findings herein.

By a Decision of the Board dated 30th December 2022 in the Notice of Motion application dated 9th December 2022 in Request for Review No. 92 of 2022 the Board, *inter alia*, extended the subject tender's validity period for a further sixty (60) days from 10th December 2022. The sixty (60) days from 10th December 2022 were scheduled to lapse on 8th February 2023 during the pendency of the instant Notice of Motion application filed on 26th January 2023. It is only just and fair that the Board extends the subject tender's validity period for a further sixty (60) days from 8th February 2023 to enable the 2nd Respondent to comply with the decision of the Board herein.

The upshot of our decision is that the instant Notice of Motion Application 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 Notice of Motion dated 26th January 2023:

- 1. The Letter of Notification of Intention to Award the Interested Party dated 12th January 2023 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 to the Applicant and other unsuccessful tenderers dated 12th January 2023 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 admit the Applicant's tender at stage three of the Technical Evaluation stage and proceed to conduct an evaluation of the Applicant's tender at stage three of the Technical Evaluation stage together with all other tenders that were responsive at stage two of 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 herein.

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. The tender validity period of Tender No. A.C.A./OT/006/2021-2022 for Purchase of Two (2) Go-Downs in Nairobi be and is hereby extended for a further sixty (60) days from 8th February 2023.
6. Given that the procurement process for the subject tender is not complete, each party shall bear its own cost in the Notice of Motion.

Dated at NAIROBI, this 15th Day of February 2023.



.....
CHAIRPERSON

PPARB



.....
SECRETARY

PPARB

