

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 14/2023 OF 15<sup>TH</sup>MARCH 2023**

**BETWEEN**

**SHAANXI INVESTMENT LIMITED.....APPLICANT**

**AND**

**ACCOUNTING OFFICER,**

**KENYA NATIONAL HIGHWAYS AUTHORITY .....1<sup>ST</sup> RESPONDENT**

**KENYA NATIONAL HIGHWAYS AUTHORITY .....2<sup>ND</sup> RESPONDENT**

**JUVENILE CONTRACTORS LIMITED.....INTERESTED PARTY**

Review against the decision of the Accounting Officer, Kenya National Highways Authority in relation to Tender No. KeNHA/R2/117/2022 for Performance Based Contract for the Maintenance of Chepsonoi-Kapsabet (B12) Road.

**BOARD MEMBERS PRESENT**

- |                        |   |             |
|------------------------|---|-------------|
| 1. Ms. Faith Waigwa    | - | Chairperson |
| 2. Mrs. Irene Kashindi | - | Member      |
| 3. Dr. Paul Jilani     | - | Member      |

**IN ATTENDANCE**

Ms. Sarah Ayoo

- Secretariat

## **PRESENT BY INVITATION**

**APPLICANT - SHAANXI INVESTMENT LIMITED**

Ms. Kosgey - Advocate, Gachie Mwanza & Company Advocates

**RESPONDENTS -ACCOUNTING OFFICER, KENYA NATIONAL  
HIGHWAYS AUTHORITY**

**KENYA NATIONAL HIGHWAYS AUTHORITY**

Mr. Muganda -Advocate, Sagana Biriq & Company Advocates

## **THE INTERESTED PARTY- JUVENILE CONTRACTORS LIMITED**

Mr. Musungu - Advocate, Musungu, Miriti & Naliaka Advocates-  
LLP

## **BACKGROUND OF THE DECISION**

### **The Tendering Process**

Kenya National Highways Authority, the Procuring Entity and the 2<sup>nd</sup> Respondent herein, invited sealed tenders in response to Tender No. KeNHA/R2/117/2022 for Performance Based Contract for the Maintenance of Chepsonoi-Kapsabet (B12) Road (hereinafter referred to as the "subject tender") using an open method of tendering reserved for women. The

invitation was by way of an advertisement on 13<sup>th</sup> December 2023 on MyGov publication, the 2<sup>nd</sup> Respondent's website [www.kenha.co.ke](http://www.kenha.co.ke) and the Public Procurement Information Portal [www.tenders.go.ke](http://www.tenders.go.ke). The subject tender's submission deadline was Thursday, 12<sup>th</sup> January 2023 at 11.00 a.m.

### **Clarifications**

On 23<sup>rd</sup> December 2023 the 2<sup>nd</sup> Respondent issued Clarification No. 1 to all prospective tenderers notifying them of PPRA guidelines on special groups being allocated a minimum of 30% of all tenderers awarded within a financial year.

On 5<sup>th</sup> January 2023 the 2<sup>nd</sup> Respondent issued Clarification No. 2 to all prospective tenderers on the Engineers estimate that had not been provided and validity of practicing licenses for Engineers and auditors.

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

According to the Tender Opening Minutes signed by members of the 2<sup>nd</sup> Respondent's Tender Opening Committee on 12<sup>th</sup> January 2023, a total of twenty-one (21) tenderers submitted their tenders. The said twenty-one (21) tenders were opened in the presence of tenderers' representatives who attended the tender opening session and were recorded as having submitted their respective tenders in response to the subject tender within the tender submission deadline as follows:

<b>No.</b>	<b>Name of Tenderer</b>
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1.	Pacific General Works Ltd
2.	Loysons Investment
3.	Suze Ltd
4.	Prime Course Ltd
5.	Janeal Kimche
6.	Bymet Building Contractors Ltd
7.	Lesma Engineering
8.	Corrie Multi-Systems Ltd
9.	Kaptumo Auto Agencies Ltd
10.	Shaanxi Investment Ltd
11.	Juvenile Contractors Ltd
12.	Monlinks Investments Ltd
13.	Cloud Connect East Africa Ltd
14.	Quaint Holdings Ltd
15.	Vijay Ltd
16.	Durdur Construction co. Ltd
17.	Lunaden Enterprises Ltd
18.	Raken Ltd
19.	Dalagi Investment Ltd
20.	Flolizz Contractors Ltd
21.	Blue Grain Investment Co. Ltd

## **Evaluation of Tenders**

The 1<sup>st</sup> Respondent constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") to undertake an evaluation of the twenty-one (21) tenders in the following three stages as captured in an Evaluation Report signed by members of the Evaluation Committee on 3<sup>1st</sup> January 2023:

- i. Preliminary Evaluation (Mandatory)
- ii. Technical Evaluation
- iii. Financial Evaluation

### **Preliminary Evaluation**

At this stage of evaluation, the Evaluation Committee was required to evaluate the tenders using the criteria set out in Clause 2 Preliminary examination and determination of responsiveness under Section IV-Evaluation and Qualification Criteria at page 37 of the blank tender document issued to prospective tenderers by the Respondents (hereinafter referred to as the 'Tender Document') read with Clause A. Preliminary Evaluation of Qualification Criteria under Section IV-Evaluation and Qualification Criteria at page 40 to 42 of the Tender Document. Tenders required to meet, *inter alia*, in all respects the eligibility criteria and failure to pass this stage would render a tender non-responsive and not to be considered further.

At the end of the evaluation at this stage, eighteen (18) tenders including the Applicant's tender, were determined non-responsive while three (3) tenders which included the Interested Party's tender were determined

responsive. Only the responsive tenders proceeded for evaluation at the Technical Evaluation Stage.

### **Technical Evaluation**

At this stage of evaluation, the Evaluation Committee was required to evaluate the tenders using the Criteria set out as Clause 3. Assessment of adequacy of Technical Proposal with Requirements under Section IV-Evaluation and Qualification Criteria at page 37 and 38 of the Tender Document read with Clause B. Technical Evaluation of Qualification Criteria under Section IV-Evaluation and Qualification Criteria under Section IV-Evaluation and Qualification Criteria at pages 42 and 48 of the Tender Document. Tenders required to score a minimum of 75% at the technical evaluation stage to qualify for evaluation at the Financial Evaluation Stage.

At the end of evaluation at this stage, all the three (3) tenders that were determined responsive at the Preliminary Evaluation stage scored more than the required minimum of 75% at this stage of evaluation therefore determined responsive thus qualified to proceed for evaluation at the Financial Evaluation Stage.

### **Financial Evaluation**

At this stage of evaluation, the Evaluation Committee was required to evaluate tenders as outlined under the criteria set out as Clause C. Financial Evaluation Stage of Qualification Criteria under Section IV - Evaluation and Qualification Criteria at page 48 and 49 of the Tender Document.

At the end of evaluation at this stage, the Interested Party's tender was determined to be the successful tender for having the lowest evaluated price as indicated in the Evaluation Report at page 416 and 420 of the confidential documents submitted to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') by the Respondents pursuant to Section 67(3)(e) of the Public Procurement Asset and Disposal Act, 2015 (hereinafter referred to as the 'Act').

### **Due Diligence**

The Evaluation Committee in its Evaluation Report dated and signed on 31<sup>st</sup> March 2023 at page 420 of the Confidential file recommended due diligence to be conducted on the Interested Party as the lowest evaluated tenderer.

Clause D. Post-Qualification of Qualification Criteria under Section IV-Evaluation and Qualification Criteria under Section IV-Evaluation and Qualification Criteria at page 49 of the Tender Document granted the 1<sup>st</sup> Respondent the discretion to verify the documents provided by a tenderer with the issuing authority.

The Procuring Entity provided a Due diligence report dated and signed by the Evaluation Committee on 23<sup>rd</sup> February 2023 at pages 422 to 450 of the Confidential File. The scope of the due diligence included experience of the contractors, equipment holding; proposed key staff; online check of Tax Compliance Certificate, Particulars of CR-12, National Construction Authority

Certificate, standing of accountant who signed financial reports, EBK practitioner's licenses, AGPO certificate.

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

The Evaluation Committee in its Due diligence report at page 450 of the Confidential file recommended award of the subject tender to the Interested Party at the tender price of Kenya Shillings Two Hundred and Six Million, Six Hundred and Seventy-Four Thousand, Five Hundred and Sixty-Six and Eighty Cents only (Kshs. 206,674,566.80) for a contract period of 24 months for being the lowest evaluated tender that had passed the due diligence test.

### **Professional Opinion**

In a Professional Opinion dated 23<sup>rd</sup> March 2023 (hereinafter referred to as the "Professional Opinion"), the Deputy Director, Supply Chain Management, Ms. Levina Wanyonyi, reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and noted that the same complied with the provisions of the Act thus recommended the award of the subject tender to the Interested Party as per the recommendations of the Evaluation Committee.

Thereafter, the 1<sup>st</sup> Respondent approved the award of the subject tender to the Interested Party by scribbling on the face of the Professional Opinion the words 'Approved Ndungu' and dating 23<sup>rd</sup> February 2023.

## **Notification to Tenderers**

Tenderers were notified of the outcome of evaluation of the subject tender vide letters of Notification of Intention to Award dated 3<sup>rd</sup> March 2023 signed by the 1<sup>st</sup> Respondent, Eng. K. Ndungu.

## **REQUEST FOR REVIEW**

On 15<sup>th</sup> March 2023, the Applicant filed a Request for Review dated 14<sup>th</sup> March 2023 together with Applicant's Statement in support of the Request for Review signed by Mary Muchoki, a Director of the Applicant, on 14<sup>th</sup> March 2023 and Applicant's Affidavit in Support of the Request for Review sworn by Mary Muchoki on 14<sup>th</sup> March 2023 through the firm of Gachie Mwanza & Company Advocates seeking the following orders in verbatim:

- a) The Respondent's Letter of Notification of Unsuccessful bid dated 2<sup>nd</sup> March 2023 and received by the Applicant on 6<sup>th</sup> March 2023 with respect to Tender No. KeNHA/R2/117/2023 be cancelled and set aside;*
- b) An order nullifying the decision of the Respondent to award Tender No. KeNHA/R2/117/2023 to Interested Party;*
- c) The Board be pleased to review all records of the procurement process (particularly preliminary, technical and financial evaluation thereof) relating to Tender No.*

***KeNHA/R2/117/2023 do substitute the decision of the Review Board for the decision of the Respondent and award the Tender to the Applicant;***

***d) The Respondent be ordered to sign a contract with the Applicant in accordance with the Tender and the decision of the Board;***

***e) Further and in the alternative, the entire tender process be nullified and the Respondent be ordered to re-tender afresh.***

***f) The Respondent be and is hereby ordered to pay the costs of an incidental to these proceedings; and***

***g) Such other or further relief or reliefs as this board shall deem just and expedient.***

In a Notification of Appeal and a letter dated 15<sup>th</sup> March 2023, Mr. James Kilaka, the Acting Board Secretary of the Board notified the 1<sup>st</sup> and 2<sup>nd</sup> Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the

said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five days from 15<sup>th</sup> March 2023.

On 22<sup>nd</sup> March 2023, in response to the Request for Review, the Respondents, through the firm of Sagana Biriq & Company Advocates filed a Notice of Appointment of Advocates dated 20<sup>th</sup> March 2023 and the 1<sup>st</sup> & 2<sup>nd</sup> Respondents Replying affidavit sworn by Eng. Joan Otike, the 2<sup>nd</sup> Respondent's Assistant Director (Highway Design and Safety), on 20<sup>th</sup> March 2023. The Respondents also submitted to the Board a confidential file containing confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

Vide letters dated 22<sup>nd</sup> March 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 24<sup>th</sup> March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within 3 days from 22<sup>nd</sup> March 2023.

On 24<sup>th</sup> March 2023 the Interested Party through the firm of Musungu, Miriti & Naliaka Advocates-LLP filed a Notice of Appointment of Advocates dated 24<sup>th</sup> March 2023 together with the Interested Party's Replying Affidavit sworn by Mukhtar Haji Dakane, a Director of the Interested Party, on 24<sup>th</sup> March 2023.

Vide a Hearing Notice dated 24<sup>th</sup> March 2023, the Acting Board Secretary, notified parties and all tenderers in the subject tender that the hearing of the instant Request for Review will be by online hearing on 30<sup>th</sup> March 2023 at 12:00 noon., through the link availed in the said Hearing Notice.

On 24<sup>th</sup> March 2023 the Applicant filed a Further Affidavit sworn by Mary Muchoki on 21<sup>st</sup> March 2023 together with the Applicant's Written Submissions dated 24<sup>th</sup> March 2023.

On 30<sup>th</sup> March 2023, the 1<sup>st</sup> & 2<sup>nd</sup> Respondents filed their Written Submissions dated 29<sup>th</sup> March 2023 together with their List and Bundle of Authorities dated 29<sup>th</sup> March 2023. On the same day of 30<sup>th</sup> March 2023, the Interested Party filed its Witten Submissions dated 29<sup>th</sup> March 2023 together with its List of Authorities dated 29<sup>th</sup> March 2023.

During the online hearing on 30<sup>th</sup> March 2023, all the parties were represented with each highlighting their already filed Written Submissions.

## **PARTIES' SUBMISSIONS**

### **Applicant's Submissions**

During the online hearing, Counsel for the Applicant, Ms. Kosgey relied on the pleadings and documents filed by the Applicant i.e. Request for Review dated 14<sup>th</sup> March 2023, Statement in Support of the Request for Review dated 14<sup>th</sup> March 2023, Affidavit in Support of the Request for Review sworn on 14<sup>th</sup> March 2023 by Mary Muchoki, Further Affidavit sworn on 21<sup>st</sup> March 2023 by Mary Muchoki and the Applicant's Written Submissions dated 24<sup>th</sup> March 2023.

Ms. Kosgey submitted that the following reasons provided by the Respondents in a Notification of Reject marked as annexure MM3 were unfair and an unprocedural rejection of the Applicant's tender:

- i. Amount carried forward for rehabilitation works in the summary was not the same as that transferred to BOQ summary i.e. the total summary for rehabilitation works is Kshs. 159,762,064.00 but on the BOQ summary is 159,767,064.00.
- ii. Form PER2 -for Site Agent was not in the prescribed format and was not signed by the authorized representative.
- iii. Alterations on the serial numbers between page 160 and 189 were not countersigned
- iv. Alterations on bill items 20-70-001, 20-70-002, 20-50-01022-80-012 not countersigned.

Ms. Kosgey submitted that each of the reasons above were in breach of Sections 3 and 79 of the Act as well as Article 227 of the Constitution.

Ms. Kosgey did not contest that there was an arithmetic error on the total summary for rehabilitation works. She indicated that there was a discrepancy of Kshs. 5,000/= between what the Applicant quoted in the total summary and that which it transferred to the Bill of Quantities. She submitted that this however did not amount to a major deviation as contended by the Respondents and Interested Party. Counsel for the Applicant relied on this Board's decision in PPARB Application No. 104 of 2022 and argued that Regulation 74(2) of the Public procurement and Asset Disposal Regulation, 2020 (hereinafter referred to as Regulation 2020) does not vest an automatic action for disqualification by a procuring entity of a tenderer as a result of an arithmetic error in its tender. She further submitted that Regulation 74(2) of Regulation 2020 is subject to Section 79(2) and 82 of the Act. She submitted that the deviation was minor within the meaning Section 79 of the Act. Counsel for the Applicant referred to Section II of the Tender Document on what amounts to a substantive responsive tender, material deviation and submitted that the Tender Document listed that which amounted to material deviation and that none of the reasons mentioned above qualifies as material deviation under the tender document. Counsel thus submitted that the arithmetic error has a legal exception under Section 79 of the Act.

On the Form PER 2, Counsel for the Applicant submitted that it was not a mandatory requirement under the Tender Document. Counsel for the

Applicant further submitted that the preliminary requirements are set out in the Tender Document and Form PER 2 was not one of them and thus it was not a substantive issue as to render the Applicant's tender non-responsive. She added that the Applicant did provide details of the site agent including his dated resume and certification on his qualification.

On alteration of the serialization, Ms. Kosgey submitted that the Applicant's tender was serialized. However, she submitted that there was no alteration on the serialization but a correction of numbers. Counsel for the Applicant referred the Board to pages 160 to 189 of the Applicant's tender and pointed out that the writings on the said pages were mere corrections of the numbers and not alterations. Counsel for the Applicant submitted that there is a distinction between alterations and corrections. According to Counsel for the Applicant, an alteration changes the entire language or meaning to a document. She submitted that this was not the case with the Applicant's tender.

On the alterations on the bill items, Ms. Kosgey denied that there were alterations on bill items 20-70-001, 20-70-002, 20-50-010222-80—012 which had been Exhibited as Annexure JM-4 to the Respondents' Replying Affidavit and put the Respondents to strict proof thereof. Counsel for the Applicant therefore argued that there was thus no need of countersigning as there were no alterations.

Ms. Kosgey further invited the Board to review the tenders submitted by other tenderers in the subject tender to confirm if all of them were subjected to the strict rules that the Applicant was subjected to.

Counsel for the Applicant further submitted that the Applicant was the lowest tenderer and the Applicant's tender was also responsive and thus invited the Board to review the Respondents' decision and award the subject tender to the Applicant.

The Board sought clarity from Ms. Kosgey as to the stage when the Form PER2 -for Site Agent was required for evaluation. Ms. Kosgey responded that the said form was required at the Technical stage but from the Respondents' Replying Affidavit, the Applicant appeared to have been disqualified at the Preliminary Evaluation stage.

### **Respondents' Submissions**

Counsel for the Respondents, Mr. Muganda relied on the documents filed by the Respondents i.e. 1<sup>st</sup> & 2<sup>nd</sup> Respondents Replying Affidavit sworn on 20<sup>th</sup> March 2023 by Eng. Joan Otike, Confidential file containing confidential documents regarding the subject tender, 1<sup>st</sup> & 2<sup>nd</sup> Respondents' Written Submissions and Bundle of Authorities both dated 29<sup>th</sup> March 2023.

Mr. Muganda started by pointing out that the Applicant's Counsel had made an express admission that all the grounds for rejecting the Applicant's tender were factual.

Mr. Muganda submitted that the Applicant's Bill of Quantity bore a different figure (Kshs. 159,767,064.00) from that in the total summary for rehabilitation works (Kshs. 159,762,064.00). Counsel for the Respondents submitted that this was an express variation. Counsel for the Respondents submitted that with these different two figures the Respondents would struggle to choose which figure to go by in respect of the Applicant's tender as the two figures amount to two separate tenders.

On the Form PER2, Mr. Muganda invited the Board to review page 16 of the Tender Document. Counsel for the Respondent read out clause 14 and submitted that it required that all forms provided had to be completed. Mr. Muganda further referred to ITT on page 42 of the Tender Document at clause 19 which required tenderers to initialize and fill all the forms provided. Counsel for the Respondents submitted that it was not open for the Applicant to elect that which to comply with and that not to as the Tender Document was express on the documents to be completed in the subject tender. Counsel for the Respondent referred to the annexure JN2 which he pointed out was at variance with the provided Form PER2. Counsel for the Respondent submitted that the provision of a form in different format from the one provided for under the Tender Document was a valid ground for the disqualification of the Applicant.

On alterations, Mr. Muganda submitted that courts have previously pronounced themselves on what alterations amount to. Counsel indicated that the Tender Document was availed to all tenderers who wished to

participate in the subject tender and thus they were alive to the requirements. Counsel referred to Clause 14 on page 16 of the Tender Document which indicates that the Tender Document was to be chronologically serialized. Counsel further referred to Instruction To Tenderers clause 19 on Preliminary Evaluation which required tenderers to own alterations to their tenders by way of countersigning against the alterations. Counsel for the Respondents then pointed out that annexure JM3 had alterations that had admittedly not been countersigned. Counsel for the Respondents referred the Board to the Preliminary Evaluation on mandatory requirements and indicated that tenderers were required to provide annual returns for the last 2 years. On this Counsel for the Respondents invited the Board to look up the Applicant's year of incorporation.

Still on alterations, Counsel for the Respondents referred to annexure JM-4 and pointed out that it had alterations that were not owned by way of countersigning. He submitted that the Respondents were bound to comply with the express provisions of the Tender Document and that uniformity required of it, was to apply fairness.

Counsel for the Respondents added that Regulation 74 of Regulations 2020 speak to formatting and serialization as being a mandatory requirement. Section 79 of the Act alludes to errors and alterations exceptions when a tender conforms to mandatory requirements.

Counsel for the Respondents referred the Board to the High Court decision in Nairobi High Court Misc. Application No. 19 of 2020; Republic v Public

Procurement Administrative Review Board Ex-parte Accounting Officer Kenya Ports Authority which stated that serialization was a legal requirement. Counsel drew parity from the decision and indicated that the fact that serialization was important meant any alteration of the serialization was equally important as to warrant being countersigned.

Mr. Muganda submitted that though fairness required the Respondents to strictly adhere to the requirements under the Tender Document, the Applicant is seeking to be treated differently in departure from the provisions of the Tender Document.

Counsel for the Respondents submitted that only responsive tenders are allowed to move to the next stage of evaluation and the Applicant through its Counsel had admitted errors in the Applicant's tender which disqualified it from moving to the next stage.

Counsel for the Respondent referred the Board to the decision in Nairobi High Court Misc. Application No. 60 of 2020; Republic v Public Procurement Administrative Review Board & another Ex-parte Tuv Austria Turk at paragraphs 38, 39 and 40 and submitted that uniformity and fairness calls for strict adherence to the requirements under the Tender Document. He relied on Nairobi High Court Misc Application No. 122 of 2018; Republic v Public Procurement Administrative Review Board & Ors Ex-parte BABS Security Services Limited paragraph 18 on Section 79 of the Act on the definition of responsiveness of a tender. He also relied on JR Misc.

Application No. 103 of 2019 paras 128 and 129 on what amounts to compliance and non-compliance with tender requirements.

Mr. Muganda submitted that Regulation 74 of Regulations 2020 and Section 80 of the Act speak to what a procuring entity must consider during evaluation and there is no wriggle room to relax any requirement in the Tender Document. Counsel for the Respondent invited the Board to consider the breaches by the Applicant disqualify its tender in the subject tender. He further sought for the dismissal of the instant Request for Review and cited that the Applicant had not imputed that the Respondents had breached any law.

The Board sought clarity on the Applicant's figure as indicated in its form of tender for which Mr. Muganda indicated that there was no form of tender.

The Board also sought clarity on the criteria in relation to Form PER-2 as well as the stage at which the 2<sup>nd</sup> Respondent evaluated the said form. Mr. Muganda referred the Board to clause 19 at page 42 of the Tender Document and indicated that all the documents were to be duly filled and signed and this was evaluated at the Preliminary Evaluation stage.

The Board also sought to know whether uniformity and fairness was applied in respect of evaluation of the other tenders especially on the grounds for which the Applicant was disqualified and Mr. Muganda replied in the affirmative. Counsel went further to refer the Board to the Evaluation Report submitted as part of the confidential documents from which it would find out

that some tenderers were equally disqualified on similar grounds as the Applicant. Mr. Muganda invited the Board to study and/or peruse the confidential documents to confirm that the Respondents evaluated tenders in a uniform and fair manner.

The Board also sought clarity on the figure that was read out at tender opening stage with respect to the Applicant's tender to which Mr. Muganda indicated the figure as Kshs.159,762,064.00 at page 226 and sought for the Applicant's Counsel to verify this during rejoinder.

### **Interested Party's Submissions**

Counsel for the Interested Party, Mr. Musungu relied on the pleadings and documents filed by the Interested Party i.e. Replying affidavit sworn on 24h March 2023 by Mukhtar Haji Dakane, Written Submissions and Bundle of Authorities dated 29<sup>th</sup> March 2023.

Mr. Musungu submitted that the Applicant did not impugn any document that had been submitted in the subject tender by the Interested Party to warrant rescinding the award of tender to the Interested Party.

It was Counsel's submission that Section 74(1) of the Act requires the Accounting Officer to ensure serialization is done in the tenders and that this is echoed in Regulation 71 of the Regulations 2020 as well as the Tender Document. Counsel for the Interested Party submitted that in that regard the requirement for serialization of the pages of the tender was a mandatory requirement

Mr. Musungu submitted that for a party to deviate from that requirement and expect a procuring entity to waive that requirement in their favour only to suit them goes against the basic tenets of public procurement. Counsel for the Interested Party relied on the decision in Nairobi High Court Misc. Application No. 312 of 2018; Republic v Public Procurement Administrative Review Board & Ors Ex-parte Nairobi City Water Sewerage where the court weighed in and explained the rationale for serialization and why it is a mandatory requirement. Counsel for the Interested Party submitted that for the Applicant to require the Board or 2<sup>nd</sup> Respondent to exercise unfettered discretion and allow its non-compliance with the mandatory requirements of the Tender Document would defeat the purpose of public procurement as this will leave the evaluation to the whims of the 2<sup>nd</sup> Respondent.

Counsel invited the Board to find that once a requirement is provided for as a mandatory requirement, then the 2<sup>nd</sup> Respondent does not have the discretion to deem it otherwise. He added that for mandatory requirements to be waived in favour of the Applicant or any tenderer, compliant tenderers will be prejudiced. Thus, for Applicant to be allowed to get away with non-compliance will prejudice the Interested Party and all other tenderers who participated in the subject tender and were compliant.

The Board sought Counsel's position on the Applicant's submission that the corrections on the serialization did not require countersigning. Mr. Musungu indicated that the alleged corrections were in fact alterations and that this required countersigning.

## **Applicant's Rejoinder**

In a rejoinder, Ms. Kosgey, submitted to the Board that the Applicant's tender sum read out during the tender opening was 199,945,794.24. Thereafter, she referred the Board to its Decision in Application No. 104 of 2022; County Builders Limited v Principal Secretary, Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works, State Department of Housing and Urban Development and Nairobi High Court Misc App. No. 60 of 2020; Republic v Public Procurement Administrative Review Board Ex-parte Tuv Austria Turk on what amounts to a minor deviation. She submitted that the arithmetic error was a minor deviation that did not affect the final evaluated sum that was submitted and read out which amount is final as per Section 82 of the Act.

On Form PER2, Ms. Kosgey referred the Board to the Tender Document Clause B Technical Evaluation Stage. Counsel submitted that what was rendered as mandatory at the Technical Evaluation Stage as per clause 6 was the certificate of the site agent, which certificate the Applicant submitted as part of its tender. Counsel for the Applicant submitted that Form PER 2 was not a mandatory form. Counsel for the Applicant further referred to page 5 of the Tender Document submitting that it listed the mandatory requirements and that neither the Respondents nor the Interested Party had alleged that the Applicant did not fulfill any of these requirements.

On alterations, Ms. Kosgey submitted that serialization was done and that corrections made on the Applicant's tender are authentic as each of the

concerned pages bears a stamp and the signature of a Director of the Applicant and thus the corrections are owned.

Counsel for the Applicant submitted that Annexure JM4 had no alterations this obviated the need for any countersigning. She therefore requested that the prayers listed in the Request for Review to be granted.

At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 15<sup>th</sup> March 2023 had to be determined by 5<sup>th</sup> April 2023 and that the Board would communicate its decision on or before 5<sup>th</sup> April 2023 to all parties via email.

### **BOARD'S DECISION**

The Board has considered each of the parties' cases, documents, pleadings, oral and written submissions, authorities together with confidential documents submitted to the Board by the 2<sup>nd</sup> Respondent pursuant to Section 67(3)(e) of the Act and finds that the following issues call for determination.

- 1. Whether the 2<sup>nd</sup> Respondent's Evaluation Committee evaluated the Applicant's tender in accordance with Section 80 of the Act and Article 227(1) of the Constitution.**
  
- 2. What orders should the Board grant in the circumstances?**

**Whether the 2<sup>nd</sup> Respondent's Evaluation Committee evaluated the Applicant's tender in accordance with Section 80 of the Act and Article 227(1) of the Constitution.**

At paragraph 8 of its Request for Review dated 14<sup>th</sup> March 2023 and during the hearing, the Applicant submitted, *inter alia*, that the reasons given for disqualification of its tender were unfair and unprocedural. On its part, the Respondents at paragraph 36 of the Replying Affidavit sworn by Eng. Joan Otike Assistant Director (Highway Design and Safety) on 20<sup>th</sup> March 2023 and during the hearing, submitted, *inter alia*, that the procurement process of the subject tender was conducted with strict adherence to the Act, Regulations 2020 and that the Respondents accorded equality and fairness to all tenderers. The Interested Party on its part, at paragraph 18 of the Replying Affidavit sworn by Mukhtar Haji Dakane on 24<sup>th</sup> March 2023 and during the hearing submitted, *inter alia*, that the Respondents are under the law and the Tender Document enjoined to strictly evaluate tenders as per the Act and the Tender Document to ensure fairness in the evaluation criteria by applying uniformly the terms of law and terms of the Tender Document without any bias to any tenderer.

We note that all parties are in agreement that evaluation of tenders need to comply with the provisions of the Act and should be carried out in a fair manner to all tenderers.

Article 227(1) of the Constitution of Kenya, 2010 (hereinafter referred to as the 'Constitution') provides the overarching principles of public procurement

to be observed by State organs or any other public entity, such as the 2<sup>nd</sup> Respondent herein, when contracting for goods or services.

Article 227(1) of the Constitution provides as follows:

***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.***

The High Court in ***Nairobi High Court Misc. Application No. 60 of 2020; Republic v The Public Procurement Administrative Review Board & Ors v Ex-parte Tuv Austria Turk*** spoke to the principles under Article 227 of the Constitution and held as follows:

***"45. Article 227 of the Constitution provides that when procuring entities contract for goods or services they must comply with the principles of fairness, equity, transparency, competitiveness and cost-effectiveness. For there to be fairness in the public procurement process, all bids should be considered on the basis of their compliance with the terms of the solicitation documents, and a bid should not be rejected for reasons other than those specifically stipulated in the solicitation document.***

***46. However, there is a need to appreciate the difference between formal shortcomings, which go to the heart of the process, and the elevation of matters of subsidiary importance to a level, which determines the fate of the tender. The Evaluation Committee has a***

***duty to act fairly. However, fairness must be decided on the circumstances of each case.”***

The Act, was established, *inter alia*, to give effect to Article 227 of the Constitution. Section 3 of the Act provides for the guiding principles to be observed by State organs and public entities, such as the 2<sup>nd</sup> Respondent, in matters public procurement and asset disposal and is the primary legislation on matters public procurement and asset disposal.

Section 3(b) of the Act provides as follows:

***Public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of the Constitution and relevant legislation-***

***(b) the equality and freedom from discrimination provided under Article 27;***

Section 80 of the Act outlines how an evaluation committee should conduct evaluation of tenders. Specifically, Section 80 (2) of the Act requires evaluation and comparison of tenders to be conducted using the procedures and criteria set out in a tender document.

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

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

Section 79 (1) of the Act provides as follows on responsiveness of tenders:

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

In ***Nairobi High Court Misc. Application No. 112 of 2018; Republic v Public Procurement Administrative Review Board Ex-parte BABS Security Services [2018]eKLR*** the High Court affirmed that as a general rule procuring entities should consider only responsive tenders:

***“20. 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.***

From the forgoing provisions of the Constitution, the Act and case law it is clear that an evaluation committee of a procuring entity when evaluating tenders must conduct such evaluation in accordance with a system that is fair, equitable, transparent, competitive and cost-effective, being guided by the values and principles of equality and freedom from discrimination, while using the procedures and criteria set out in a tender document.

Turning to the circumstances of the instant Request for Review, the Tender Document provided the procedures and criteria for evaluation of tenders at Section IV-Evaluation and Qualification Criteria running from page 37 to 51 of the Tender Document.

Clause 1.2 of Section IV-Evaluation and Qualification Criteria at page 37 of the Tender Document, *inter alia*, provides as follows:

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

\*\*\*\*\*

***The Procuring Entity shall use the criteria and methodologies listed in this Section to evaluate tenders and arrive at the Lowest Evaluated Tender.....”***

From the foregoing provisions of the Tender Document, the Act, the Constitution and case law, it is clear that the Evaluation Committee of the 2<sup>nd</sup> Respondent was required to evaluate and compare tenders with respect to the subject tender using the procedures and criteria set out in Section IV-Evaluation and Qualification Criteria running from page 37 to 51 of the Tender Document while being guided by the constitutional principles of fairness, equitability, transparency, competitiveness, cost-effectiveness, equality and freedom from discrimination.

Having established the manner in which the Evaluation Committee of the 2<sup>nd</sup> Respondent was required to evaluate and compare tenders, we shall now proceed to address the question whether evaluation of the Applicant’s tender and comparison of tenders was done in the manner we have outlined and established hereinbefore. In addressing this, we shall address such evaluation and comparison of tenders limited to only the four reasons given for disqualification of the Applicant’s tender.

- a. Amount carried forward for rehabilitation works in the summary was not the same as that transferred to BOQ summary. I.e the total summary for rehabilitation works is Kshs.159,762,064.00 but on the BOQ summary is Kshs.159,767,064.00**

The Applicant decried that the Respondents unfairly disqualified its tender for giving conflicting figures in respect of the rehabilitation works item.

During the hearing, Counsel for the Applicant admitted the variance of Kshs.5,000.00 in the amount captured for rehabilitation works under the rehabilitation works summary and the Bill of Quantities summary terming it as a minor deviation that could find exception under Section 79(2) and 82 of the Act.

However, the Respondents held a different view as expressed through their Counsel. Counsel for the Respondents submitted that under Regulation 74(2) of the Regulations 2020 any errors in the submitted tender arising from miscalculation of unit price shall be considered a major deviation and shall lead to disqualification. Therefore, Counsel for the Respondents took the view that the Applicant's input of two different figures for rehabilitation works in the rehabilitation works summary and the Bill of Quantities summary amounted to a major deviation that warranted the Applicant's disqualification in respect of the subject tender.

We note that the Applicant's tender was determined non-responsive at the preliminary evaluation stage as captured in the Evaluation Report at page 408 of the confidential documents submitted to the Board pursuant to Section 67(3)(e) of the Act by the Respondents.

Regulation 74(2) of the Regulations 2020 cited by Counsel for the Respondents provides as follows:

***(2) Subject to section 79(2)(b) of the Act, any errors in the submitted tender arising from a miscalculation of unit price, quantity, subtotal and total bid price shall be considered as a major deviation that affects the substance of the tender and shall lead to disqualification of the tender as non-responsive.***

The import of this Regulation 74(2) of Regulations 2020 is that it is subject to the provisions of Section 79(2)(b) of the Act.

Section 79 of the Act provides as follows:

***79. Responsiveness of tenders***

***(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.**

Our interpretation of the above provisions is that minor deviations from tender requirements that do not affect the substance of a tender cannot be a cause for the disqualification of a tender.

This Board in its Decision in ***PPARB Application No. 144 of 2020; County Builders Limited v Principal Secretary, Ministry of Transport, Infrastructure, Housing, Urban Development and Public works, State Department of Housing and Urban Development*** at page 43 to 44 held that arithmetic errors in tenders are not an automatic license for disqualification of a tenderer:

***"The Board has established certain errors or oversights can be corrected without affecting the substance of a tender. That notwithstanding, the tender remains the same and cannot be corrected even if errors or oversights (which are not necessarily arithmetic errors in a tender) may be identified or corrected pursuant to Section 79(2)(b) of the Act. This explains why a tenderer is bound by its tender sum hence ought to be prepared to***

***implement a tender at its tender sum because award is made based on that tender sum. These provisions support the Board's view that the Procuring Entity did not have leeway to apply Regulation 74 of Regulations 2020 without considering provisions of section 79(2) (b) and 82 of the Act.***

***Accordingly, the Board finds that Regulation 74(2) of Regulations 2020 does not vest an automatic action for the Procuring Entity to find tenderers non-responsive as a result of arithmetic errors found in their bids during Financial Evaluation because the said provision is subject to section 79(2) (b) of the Act while taking into account how a tender sum ought to be treated under Section 82 of the Act."***

The Applicant's tender sum of Kshs. 199,945,794.24 was the amount read out and captured in the Minutes of Tender Opening dated and signed by the members of the Tender Opening Committee on 12<sup>th</sup> January 2023. This is the same amount in the Applicant's Form of Tender at page 59 of the Applicant's original tender.

Section 82 of the Act bars correction, revision, adjustment or amendment of tender sum save for where the method for procurement is direct, competitive negotiations and framework contracting with multiple awards.

Section 82 of the Act provides as follows:

***"82. Correction, revision, adjustment or amendment of tender***

***(1) Subject to subsection (2) of this section, the tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be the subject of correction, revision, adjustment or amendment in any way by any person entity.***

***(2) For avoidance of doubt, the provisions of subsection (1) shall not apply to sections 103, 131 and 141 of this Act”***

It therefore follows that the difference in figures for the rehabilitation works in the rehabilitation works summary and Bill of Quantities Summary does not affect the Applicant’s tender sum of Kshs.199,945,794.24. Accordingly, we do not agree with the Respondents’ submission that the two amounts on rehabilitation works made it difficult for the Evaluation Committee to determine which amount represented the Applicant’s tender sum. The sum of Kshs.199,945,794.24 having been read out and recorded during the Tender Opening is the Applicant’s tender amount for purposes of evaluation and this amount is final and not subject to be changed.

**b. Form PER 2- for Site Agent was not in the prescribed format and was not signed by the authorized representatives**

The Applicant took issue with the Respondents’ reason for disqualifying its tender because the Applicant did not fill Form PER 2- for its proposed site agent in the prescribed format and the same was not signed by the authorized representatives. Counsel for the Applicant referred the Board to Page 5 of the Tender Documents. The Qualification for Tendering provided

at Section 1: Invitation To Tender at page 5 of the Tender Document provided as follows:

***"The following MUST be submitted together with the bid:***

- 1. Copy of Certificate of incorporation***
- 2. Copy of Valid Annual Practising License with the National Construction Authority in the classes specified above.***
- 3. Copy of Valid Tax Compliance Certificate***
- 4. Copy of recent CR12 form (Issued within the last six 6 months from the Tender Opening Date)***
- 5. Copy of Valid Registration Certificate for Access to Government Procurement Opportunities – (AGPO) in the category of [WOMEN] as specified in the Tender Notice.***
- 6. Bidders shall sequentially serialise all pages of each tender submitted. A guide note on serialization is outlined in the notes below***
- 7. A copy of PBC Certificate for at least one of the Directors"***

It was the Applicant's position that Form PER 2- for Site Agent was not among the mandatory requirements listed at page 5 of the Tender Document and thus failure to use the form would not of itself render the Applicant's tender non-responsive.

Counsel for the Respondents, took a different view. He submitted that the form was a mandatory requirement at the preliminary evaluation stage.

Counsel for the Respondent attached Form PER-2 as prescribed by the Tender Document as well as the Format adopted by the Applicant as annexure "JN2" to the Affidavit of Eng. Joan Otiike.

We agree with the assertion of the Applicant to the extent that Form PER 2- was not a mandatory document not because it was not listed as a mandatory document under Section 1: Invitation To Tenders at page 5 of the Tender Document as alleged by the Applicant but because it was not specifically listed under criteria for evaluation provided in Clause A. Preliminary Evaluation under Qualification Criteria in Section IV- Evaluation and Qualification Criteria at page 37 to 42 of the Tender Document which criteria merely mentioned relevant forms without defining what relevant is or stipulating the specific relevant forms.

Form PER 2- was provided at Item 7. Contractor's Representative and Key Personnel of Clause B Technical Evaluation under Qualification Criteria in Section IV- Evaluation and Qualification Criteria at page 45 of the Tender Document which provides as follows:

<b><i>Item No.</i></b>	<b><i>Qualification Subject</i></b>	<b><i>Qualification Requirement</i></b>	<b><i>Document To be Completed /provided by Tenderer</i></b>	<b><i>For Procuring Entity's Use (Qualification met or Not Met)</i></b>

7.	<b>Contractor's Representative and Key Personnel</b>	<b>Curriculum Vitae (CVs) of the Proposed Key Staff must be presented in the provided format and duly signed by the proposed individual. Copies of certificates and Annual Practicing Licences (for Engineers) and Academic Certificates for all staff is mandatory;</b>	<b>Schedule F (Form PER 1 and PER 2)</b>	<b>10 Marks</b>
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The import of the above is that the 2<sup>nd</sup> Respondent's Evaluation Committee was to consider Form PER 2- during the Technical Evaluation stage and in evaluating tenders, this Form PER 2 would be allocated marks.

To this end, disqualifying the Applicant's tender on account of Form PER 2- for Site Agent for not being in the prescribed form and for not being signed by the authorized representative at the Preliminary Evaluation stage was

unfair to the Applicant and contrary to the provisions of the Tender Document as established hereinbefore.

**c. Alterations on serial numbers between page 160 and 189 were not countersigned.**

During the hearing, Counsel for the Applicant denied that there were alterations of serialization on pages 160 to 189 of the Applicant's tender and submitted that the writings on the serialization were mere corrections.

Counsel for the Respondents and Interested Party submitted that the writings on the serialization on the Applicant's tender at page 160 to 189 were alterations which, under the Act and Tender Document, required to be countersigned by the Applicant. They submitted that the said alterations were not countersigned and thus the Applicant breached the provisions of both the Act and the Tender Document.

Section 74(1)(i) of the Act makes provision for serialization of tender documents as follows:

***74. Invitation to tender***

***(1) The accounting officer shall ensure the preparation of an invitation to tender that sets out the following—***

***...***

***(i) requirement of serialization of pages by the bidder for each bid submitted; and...***

The High Court in ***Republic v Public Procurement Administrative Review Board & Ors Ex-parte Kenya Ports Authority [2020] eKLR*** held as follows with respect to serialization as a mandatory requirement even in cases where a tender document does not provide for the same:

***"49. In light of the foregoing, it becomes apparent to this court that the aspect of serialisation of each and every page of a bid document aims to promote fairness, equal treatment, good governance, transparency, accountability and to do away with discrimination. Failure to conform to this mandatory requirement, and/or exempt or give an opportunity to those who had not earlier on conformed to this mandatory requirement translates to unequal and unfair treatment of other tenderers and it shall also encourage abuse of power and disregard of the law by not only bidders but also procuring entities.***

***50. I therefore find that despite the fact that serialisation was not a mandatory requirement in the ex-parte applicants tender document, it is a mandatory requirement under section 74 of the PPAD Act of 2015 and all bidders ought to have fully complied.***

The High Court in **Republic v Public Administrative Review Board & Ors Ex-parte Fourway Construction Company Limited [2019] eKLR** held as follows;

***"49. The requirement of serialization was in the present case indicated to be a mandatory requirement in the 1<sup>st</sup> Interested Party's tender document, and it was indicated in tender document that a firm lacking in any of the requirements would be dropped at the preliminary stage and would not progress to the Technical evaluation stage. It is also a mandatory requirement under section 74 of the Act, and failure to serialise every page cannot therefore be interpreted as a minor deviation from the requirements set out in the tender documents, and cannot fall within the exceptions provided for in section 79. It is also evident that the discretion given by section 79 to waive a requirement that has not been conformed with only applies where that conformity can be corrected without causing prejudice to the other bidders, or is quantifiable, which is not the case with the requirement of serialization of every page because of the objective of the requirement and attendant risks of non-conformity that have been explained in the foregoing.***

Turning to the subject tender, Items No. 18. Serialisation of the Bid and 19. Completeness of Tender Document of Clause A. Preliminary Evaluation under Qualification Criteria in Section IV- Evaluation and Qualification Criteria at page 41 and 42 of the Tender Document provide as follows:

<b><i>Item No.</i></b>	<b><i>Qualification Subject</i></b>	<b><i>Qualification Requirement</i></b>	<b><i>Document to complete</i></b>	<b><i>For Procuring Entity's Use (Qualification met or Not Met)</i></b>
<b><i>18.</i></b>	<b><i>Serialization of the Bid</i></b>	<b><i>Bidders shall sequentially serialize all pages of each tender submitted. Any written Pages or document attached or inserted Documents MUST be sequentially serialized</i></b>	<b><i>The Serializatio n MUST be numerically sequential starting from Numeric 1.</i></b>	
<b><i>19.</i></b>	<b><i>Completeness of tender document</i></b>	<b><i>The person or persons signing the bid shall initial all pages where the</i></b>		

		<p><b><i>entries have been made.</i></b></p> <p><b><i>Bidders shall own all alterations made to the tender document.</i></b></p> <p><b><i>Bidders shall duly fill all relevant forms/schedule s provided for in the document that requires entries</i></b></p>	
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From the foregoing provisions of the Tender Document, it was a mandatory requirement for tenderers to serialise their respective tenders. Further, any alterations on a tenderer’s tender had to be countersigned.

We have looked at pages 160 to 189 of the Applicant’s original tender and note the writings on the serialization. It appears that the person who was serializing the pages on the Applicant’s tender by hand noticed that they had made a mistake in the serialization having omitted paginating page 161 by

instead paginating page 162 immediately after paginating page 160 and in a bid to rectify this, overwrote new page numbers on the old ones starting from what was initially marked as page 162 and now marked as page 161 after overwriting (1) on (2) at the same page. Counsel for the Applicant submitted that the new writings were mere corrections while Counsel for the Respondents maintained that the writings were alterations and thus ought to have been countersigned.

The Black's Law Dictionary 9<sup>th</sup> Edition defines "correction" in the following words:

***Generally, the act or an instance of making right what is wrong***

The Black's Law Dictionary 9<sup>th</sup> Edition also offers a definition of the word "alteration" in the following words:

***An act done to an instrument, after its execution, whereby its meaning or language is changed;***

From our reading of the above definitions, we are of the considered opinion that both correction and alteration relate to the changing of something that was previously in existence. In the context of tenders, it would extend to changing dates, tender amounts etc. Accordingly, we are not convinced by the arguments of Counsel for the Applicant that the writings on the previous serialization at pages 160 to 189 of the Applicant's tender were not

alterations. We say so because, taking an example of the page that had previously been marked 162 and is now marked 161 (with 1 overwritten on 2) clearly changes the meaning of that page from page 162 to page 161. Correction or otherwise, the effect of the writings was to change the previous page numbers and this is tantamount to an alteration that ought to have been countersigned as per the provisions of the Tender Document.

We further are not convinced by the submissions of the Counsel for the Applicant that the Applicant countersigned the alterations on the serialization as none of the alterations in the Applicant's tender at pages 160 to 189 has been countersigned next to each of the alterations. The Applicant cannot rely on the fact that it signed and stamped all pages of its tender from page 1 to 517 to suggest that it countersigned the alterations yet other pages of the its tender where no alterations had been made had been stamped and signed. We say so because at page 268 and 269 of the Applicant's tender, the Applicant stamped and countersigned against Bill item 20-70-007 and 22-67-004 on the amount that had been altered despite having stamped and countersigned towards the foot of page 268 and 269. In essence, the Applicant stamped and countersigned twice on each page 268 and 269 despite there being no alterations on serialization/paginations of page 268 and 269.

Failure to countersign the alterations at pages 160 to 189 of the Applicant's tender was not in conformity with the provisions of Item No. 19. Completeness of Tender Document of Clause A. Preliminary Evaluation

under Qualification Criteria in Section IV- Evaluation and Qualification Criteria at page 42 of the Tender Document.

**d. Alterations on bill items 20-70-001, 20-70-002, 20-50-012022-80-012**

During the hearing, Counsel for the Applicant denied that any alterations existed on the said Bill items. This Board was therefore called upon to review the Applicant's tender to verify this.

The Board had a chance to examine annexure JN-4 annexed to the affidavit of Eng. Joan Otike as well as the original tender submitted by the Applicant in respect of the subject tender and noted some alterations in the figures under Items 20-50-001, 20-70-001.

Under Bill Item 20-50-001 in the fifth column, it is discernable that the number 8 was overwritten on the number 5 in the number 8000. Under Bill Item 20-70-001 in the fifth column it is discernable that the number 4 was overwritten on the number 2 in the number 14000. There is no countersigning on any of the said alterations

Failure to countersign the alterations under Bill Item 20-50-001 and 20-70-001 at page 268 of the Applicant's tender was not in conformity with the provisions of Item No. 19. Completeness of Tender Document of Clause A.

Preliminary Evaluation under Qualification Criteria in Section IV- Evaluation and Qualification Criteria at page 42 of the Tender Document.

We have established that in some instances, the 2<sup>nd</sup> Respondent's Evaluation Committee did not evaluate the Applicant's tender in accordance with the procedures and criteria for evaluation provided in Section IV-Evaluation and Qualification Criteria of the Tender Document while in another 2 instances, we have established that the Applicant's tender did not comply with the procedures and criteria for evaluation provided in Section IV- Evaluation and Qualification Criteria of the Tender Document. This means that in some instances, the 2<sup>nd</sup> Respondent's Evaluation Committee used extraneous factors not provided in the criteria for evaluation in the Tender Document when evaluating the Applicant's tender contrary to the provisions of Section 80(2) of the Act.

During the hearing, Counsel for the Applicant argued that the Applicant's tender had been subjected to very strict rules and invited the Board to independently review the tenders submitted by other tenderers to verify if they too were subjected to the same strict rules by the Respondents. The Board enquired from the Respondents their position on this issue and Mr. Muganda submitted that the Respondents applied the criteria for evaluation uniformly to all tenderers when evaluating tenders. Mr. Muganda further invited the Board to confirm from the confidential file/documentation that indeed the Respondents applied the criteria set out for evaluation when evaluating tenders.

The Board independently studied the Evaluation Report submitted as part of the confidential file as well as the original tender documents submitted by other tenderers with respect to only the four reasons given for disqualification of the Applicant's tender to establish whether the criteria used to disqualify the Applicant's tender was uniformly applied to other tenderers. The Board's observations were as follows:

Table 2: Results of Evaluation for Responsiveness of bidders as per the Evaluation Report

S/No	Completeness and responsiveness Criteria	Requirement	Bidder no. 2	Bidder no. 5	Bidder no. 8	Bidder no. 10	Bidder no. 11	Bidder no. 12	Bidder no. 16
20	Filling of schedules/forms in the schedules	~ <b>FORM EXP - 4.1</b> General Construction Experience properly filled & signed	Y	Y	Y	Y	Y	Y	Y
		~ <b>FORM EXP - 4.2 (A)</b> Specific Construction And Contract Management Experience properly filled & signed	Y	Y	Y	Y	Y	Y	Y
		~ <b>FORM EXP - 4.2 (B)</b> Construction Experience In Key Activities properly filled & signed	Y	Y	Y	Y	Y	Y	Y
		~ <b>Schedule F:</b>	Y	Y	Y	Y	Y	Y	Y

S/No	Completeness and responsiveness Criteria	Requirement	Bidder no. 2	Bidder no. 5	Bidder no. 8	Bidder no. 10	Bidder no. 11	Bidder no. 12	Bidder no. 16
		~ <b>Form PER 1:</b> Key Personnel Schedule properly filled & signed							
		~ <b>Form PER 2 :</b> Resume and Declaration properly filled & signed	Y	Y	Y	X	Y	Y	Y
21	Priced Bill of Quantities	~ Fill all rates, and amounts,	Y	Y	X	X	Y	Y	Y
		~ NO Alterations of the Quantities accepted,							
		~ All bidders own Corrections must be Countersigned							
		~ NO Errors noted in the Bills of Quantities							
23	Completeness of tender document	~ All pages with entries (Typed or hand written) must be initialed.	Y	Y	Y	X	Y	Y	Y
		~ Any alterations made in the tender document must be countersigned							

Bidder No.	Name of Bidder	Bid Price/Kshs
2.	Loysons Investment	216,133,282.20
5.	Janeal Kimche Ltd	233,989,770.70
8	Corrie Multi-Systems Ltd	230,660,182.60
10	Shaanxi Investment Ltd	199,945,794.24
11.	Juvenile Contractors Ltd	206,674,566.80
12.	Monlinks Investments Ltd	221,501,105.64
16.	Durdur Construction Co. Ltd	229,739,583.40

S/No	Completeness and responsiveness Criteria	Requirement	Bidder no. 2	Bidder no. 5	Bidder no. 8	Bidder no. 10	Bidder no. 11	Bidder no. 12	Bidder no. 16
		~ Director(s) bidding under different companies should not participate in more than two tenders	Y	Y	Y	Y	Y	Y	Y
<b>OVERALL REMARKS</b>			<b>Y</b>	<b>X</b>	<b>X</b>	<b>X</b>	<b>Y</b>	<b>Y</b>	<b>X</b>

**KEY: Y – Pass X – Fail**

Bidder No.	Name of Bidder	Criteria No.20 Filling of schedules/forms in the schedules	Priced Bill of Quantities	Completeness of tender document	Board's Observation
2.	Loysons Investment	alteration in FORM EXP 4.1 and FORM CON-3 which scrutiny will reveal some correction	-	-At pages 76 is alteration/correction no countersigning was done -pages 84 ,412&413 also	- Despite this was found responsive at preliminary

				- All pages with entries (Typed or hand written) must be initialed.-eg 340,356,358,448 &492 the above pages are with entries not initialed	evaluation stage
5.	Janeal Kimche Ltd	Information in relation to address not provided Not signed by representative -Schedule G & H not duly filed	Alterations on bill items 01-50-007, 01-80-020, 15-50-001, 16-80-001 not countersigned yet not found non responsive	- Alterations on serial numbers between page 21 ,25,58 not countersigned -All with entries with alteration not counter signed or not initialed pages ,59,66,67,69 and some page number ineligible	Not found non responsive on this pagination alteration -was also not found non responsive for failing to counter sign alteration in its bid - was not disqualified on Form PER 2 yet not duly filled. However, was non-responsive overall at preliminary evaluation stage
8	Corrie Multi-Systems Ltd	Form PER 1-not duly filed - Form PER 2-for Site Agent text and the form altered not in prescribed manner	Alterations on bill items 22-80-014, not countersigned Yet not found non responsive	- Alterations on serial numbers between page 21 ,25,58 not countersigned	Non responsive overall at preliminary evaluation stage
10	Shaanxi Investment Ltd				Non responsive overall at preliminary

					evaluation stage
11.	Juvenile Contractors Ltd	- Form PER 2 is modified. /altered in terms of the text for example (pages 0140-0147		- at pages 0104 is an element of alteration /correction that is FORM EXP-4.2(B)	Despite this, was found responsive at preliminary evaluation stage
12.	Monlinks Investments Ltd	typed in Form <b>PER -2</b> . The pages have not been initial 601-603 being those of site agent – further that of the foreman was not initial <b>yet he was found responsive and considered at financial evaluation stage</b>		- failed to initial /sign or stamp some page more specifically pages which introduces the Section of its bid -. Some documents in relation with its past experience were dully paginated but were not stamped nor initialled for example pages 509 to 541 of the its bid.	Despite this, was found responsive at preliminary evaluation stage
16	Durdur Construction Co. Ltd	- Form PER 2- for Site Agent not duly filed	-alteration on form EXP 4.1 not countersigned and 4.2(A)		Non responsive overall at preliminary evaluation stage

From the foregoing it is clear that the 2<sup>nd</sup> Respondent's Evaluation Committee did not uniformly apply the criteria for evaluation at the Preliminary Evaluation stage to all tenders. In essence, the evaluation of tenders by the 2<sup>nd</sup> Respondent's Evaluation Committee was not fair and was not guided by the values and principles of equality and freedom from discrimination of tenderers.

In totality of the first issue framed for determination, we find that the 2<sup>nd</sup> Respondent's Evaluation Committee **did not** evaluate the Applicant's tender in accordance with Section 80 of the Act read with Article 227(1) of the Constitution.

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

We have found that the evaluation of the Applicant's tender was not done in accordance with Section 80 of the Act read with Article 227(1) of the Constitution. Since the Applicant's tender was determined non-responsive by the 2<sup>nd</sup> Respondent's Evaluation Committee at the Preliminary Evaluation Stage, the Applicant cannot be awarded the subject tender before its tender is subjected to all the stages of evaluation as prescribed in the Tender Document. To this end, the just thing to do is for the Applicant's tender to be re-admitted for evaluation at the Preliminary Evaluation stage in accordance with the provisions of Section 80 of the Act read with Article 227(1) of the Constitution for re-evaluation. To effectively do so, we find it just to nullify the award to the Interested Party and the communication of regret to all unsuccessful tenderers in the subject tender. This will enable all tenders to be re-admitted at the Preliminary Evaluation stage in readiness for re-evaluation at the Preliminary Evaluation stage in accordance with Section 80 read with Article 227(1) of the Constitution.

The upshot of our decision is that the instant Request for Review succeeds only to the extent 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 14<sup>th</sup> March 2023:

- 1. The Notification of Intention to Award Tender No.KeNHA/R2/117/2022 for Performance Based Contract for Maintenance of Chepsonoi-Kapsabet (B12) Road dated 3<sup>rd</sup> March 2023 issued to the Interested Party by the 1<sup>st</sup> Respondent be and is hereby nullified and set aside.**
- 2. The Notification of Intention to Award Tender No.KeNHA/R2/117/2022 for Performance Based Contract for Maintenance of Chepsonoi-Kapsabet (B12) Road dated 3<sup>rd</sup> March 2023 issued to the Applicant and all other unsuccessful tenderers by the 1<sup>st</sup> Respondent be and is hereby nullified and set aside.**
- 3. The 1<sup>st</sup> Respondent is hereby ordered to direct the 2<sup>nd</sup> Respondent's Evaluation Criteria to re-admit all tenderers' tenders to the Preliminary Evaluation stage and conduct a re-evaluation of all tenders at the Preliminary Evaluation stage in accordance with Section 80 of the Public Procurement Asset and Disposal Act, 2015 read with Article 227 of the Constitution taking into consideration our findings in this decision.**
- 4. Further to Order 3, the 1<sup>st</sup> Respondent is hereby ordered to proceed with the procurement process to its logical conclusion within fourteen (14) days from the date hereof.**

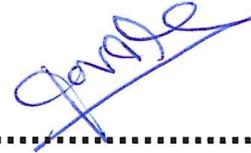
5. Given the procurement process for the subject tender is not complete, each party shall bear its own costs for the Request for Review.

Dated at NAIROBI, this 5<sup>th</sup> Day of April 2023.



.....  
**CHAIRPERSON**

**PPARB**



.....  
**SECRETARY**

**PPARB**

