

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 91/2023 OF 9TH NOVEMBER 2023

BETWEEN

VIRTUAL ESSENCE LIMITED APPLICANT

AND

THE DIRECTOR/CHIEF EXECUTIVE OFFICER,

KENYA INSTITUTE OF CURRICULUM DEVELOPMENT. 1ST RESPONDENT

KENYA INSTITUTE OF CURRICULUM DEVELOPMENT. 2ND RESPONDENT

DALS LEARNING LIMITED INTERESTED PARTY

Review against the decision of the Director/Chief Executive Officer, Kenya Institute of Curriculum Development in relation to Tender No. KICD/02/ADM/2023-2024 for Provision of Interactive Digital Content for Competency Based Curriculum (CBC) for Grade 5 in 12 Learning Areas.

BOARD MEMBERS PRESENT

- | | | |
|-----------------------|---|-------------|
| 1. Mr. George Murugu | - | Chairperson |
| 2. Eng. Lilian Ogombo | - | Member |
| 3. Mr. Daniel Langat | - | Member |



IN ATTENDANCE

1. Ms. Sarah Ayoo -Holding Brief for the Board Secretary
2. Ms. Evelyn Weru - Secretariat

PRESENT BY INVITATION

APPLICANT

VIRTUAL ESSENCE LIMITED

- Ms. Waceke Thindigua -Advocate, Waceke Thindigua & Co.
Advocates

RESPONDENTS

THE DIRECTOR/CHIEF EXECUTIVE OFFICER, KENYA INSTITUTE OF CURRICULUM DEVELOPMENT & KENYA INSTITUTE OF CURRICULUMDEVELOPMENT

- Mr. Ongeru -Advocate, Kenya Institute of Curriculum Development

INTERESTED PARTY

DALS LEARNING LIMITED

1. Mr. Kiprono - Advocate, CK Advocates
2. Mr. Sang - Advocate h/b for Mr. Kiprono, CK Advocates

BACKGROUND OF THE DECISION

The Tendering Process

1. Kenya Institute of Curriculum Development, the Procuring Entity and the 2nd Respondent herein, invited interested, competent and eligible

tenderers to submit tenders in response to Tender No. KICD/02/ADM/2023-2024 for Provision of Interactive Digital Content for Competency Based Curriculum (CBC) for Grade 5 in 12 Learning Areas (hereinafter referred to as the "subject tender") by use of the open tendering method. The invitation was by way of an advertisement on the 2nd Respondent's website www.kicd.ac.ke where the blank tender document for the subject tender issued to tenderers by the 2nd Respondent (hereinafter referred to as the 'Tender Document') was available for download. The initial closing date of the subject tender was on Thursday, 7th September 2023 but was later on extended to 12th September 2023.

Submission of Tenders and Tender Opening

2. According to the Minutes of the subject tender's opening held on 12th September 2023 signed by members of the Tender Opening Committee on 12th September 2023 (hereinafter referred to as the 'Tender Opening Minutes') and which Tender Opening Minutes were part of confidential documents furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') by the 1st Respondent pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), a total of eight (8) tenders were submitted in response to the subject tender. The said eight (8) tenders were opened in the presence of tenderers' representatives present at the tender opening session, and were recorded as follows:

Bidder No.	Name
1.	One Planet Publishing and Media Services Limited
2.	Mwalimu Plus
3.	Moran (E.A) Publishers Limited
4.	Virtual Essence Limited
5.	Kenya Literature Bureau
6.	Dals Learning Limited
7.	Mountain Top Educational Publishers Limited
8.	Mwalimu Plus

Evaluation of Tenders

3. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1st Respondent undertook evaluation of the eight (8) tenders as captured in a Tender Evaluation Report for the subject tender signed by members of the Evaluation Committee on 12th October 2023 (hereinafter referred to as the "Evaluation Report") in the following stages:

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

Preliminary Evaluation

4. The Evaluation Committee carried out a Preliminary Evaluation and examined tenders for responsiveness using the criteria provided under

Stage 1- Preliminary Evaluation of Section III- Evaluation and Qualification Criteria at page 44 of 133 to page 46 of 133 of the Tender Document. Tenderers were required to meet all the mandatory requirements at this stage to proceed to the Technical Evaluation stage.

5. At the end of evaluation at this stage, two (2) tenders were determined non-responsive, including the Applicant's tender, while five (5) tenders, including the Interested Party's tender, were determined responsive and proceeded to Technical Evaluation.

Technical Evaluation

6. At this stage of evaluation, the Evaluation Committee examined tenders using the criteria set out under Stage 2 – Technical Evaluation of Section III- Evaluation and Qualification Criteria at page 46 of 133 to page 54 of 133 of the Tender Document. Tenders would be evaluated under three sub stages and were required to be checked for Compliance with Requirement on Minimum Specifications and to comply with the Technical Competence of the Bidder- Mandatory Technical Evaluation requirements. Any tender failing in these two sub-stages would not proceed for evaluation at the Technical Capacity/Experience of Bidders stage.
7. The maximum score attainable at the Technical Capacity/Experience of Bidders stage was seventy (70) marks and only bidders who attained fifty (50) marks and above would proceed to the Financial Evaluation stage.

8. At the end of evaluation at this stage, the five (5) tenderers were determined responsive to proceed to the Financial Evaluation stage as can be discerned from the Evaluation Report as follows:

- i Bidder 1 qualifies to proceed to the financial evaluation in the following areas; PHE, CRE and Art and Craft.*
- ii Bidder 2 qualifies to proceed to the financial evaluation in the following areas; Mathematics, English, Kiswahili, Science and Technology, Social Studies, CRE, IRE and Music.*
- iii Bidder 5 qualifies to proceed to the financial evaluation in the following learning areas; Mathematics, Science and Technology, and Agriculture.*
- iv Bidder 6 qualifies to proceed to the financial evaluation in the following learning areas; Mathematics, English, Science and Technology, Kiswahili, Social Studies, PHE, CRE, Agriculture, Art and Craft, Home Science, IRE, and Music.*
- v Bidder 7 qualifies to proceed to the financial evaluation in the following learning areas; Agriculture.*

Financial Evaluation

9. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Stage 3- Financial Evaluation of Section III- Evaluation and Qualification Criteria at page 55 of 133 to page 56 of 133 of the Tender Document. Bidders were

required to provide their unit prices per learning area as detailed in the Tender Document and evaluation would involve checking arithmetic errors and completeness of bids, ranking of the bids, establishing the tender with the lowest evaluated price, comparison of the lowest evaluated rate against the prevailing market rates, and carrying out due diligence.

10. At the end of evaluation at this stage, bids were ranked as follows:

Learning area	Unit cost in Ksh.				
	Bidder 1	Bidder 2	Bidder 5	Bidder 6	Bidder 7
English	-	9,282,000.00	-	4,560,000.00	-
Science & Technology	-	9,282,000.00	2,610,000.00	4,440,000.00	-
Kiswahili	-	9,282,000.00	-	4,560,000.00	-
Mathematics	-	11,600,000.00	2,750,000.00	4,450,000.00	-
Social Studies	-	5,800,000.00	-	4,478,000.00	-
Physical & Health Education	5,000,000.00		-	4,840,000.00	-
CRE	5,000,000.00	5,800,000.00	-	4,340,000.00	-
Agriculture	-		2,020,000.00	4,340,000.00	5,200,000.00
Art & Craft	5,000,000.00		-	4,382,000.00	-
Home Science	-		-	5,010,000.00	-
IRE	-	5,800,000.00	-	4,800,000.00	-
Music	-	5,800,000.00	-	4,800,000.00	-

Evaluation Committee's Recommendation

11. The Evaluation Committee recommended the following tenderers for award of the subject tender:

- i Kenya Literature Bureau

S/No	Learning Area	Unit price
1	Science & Technology	2,610,000.00
2	Mathematics	2,750,000.00
3	Agriculture	2,020,000.00
	Total cost	7,380,000.00

ii Dals Learning Ltd

S/NO	Learning Area	Unit price
1	English	4,560,000.00
2	Kiswahili	4,560,000.00
3	Social Studies	4,478,000.00
4	Physical & Health Education	4,840,000.00
5	CRE	4,340,000.00
6	Art & Craft	4,382,000.00
7	Home Science	5,010,000.00
8	IRE	4,800,000.00
9	Music	4,800,000.00
	Total cost	41,770,000.00

Professional Opinion

12. In a Professional Opinion dated 12th October 2023 (hereinafter referred to as the "Professional Opinion"), the Deputy Director, Supply Chain Management Services, Elly O Osir 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.

13. Thereafter, the Professional Opinion was approved on 12th October 2023.

Notification to Tenderers

14. Tenderers were notified of the outcome of evaluation of the subject tender vide letters of intention to award the subject tender dated 15th October 2023.

REQUEST FOR REVIEW NO. 91 OF 2023

15. On 9th November 2023, Virtual Essence Limited, the Applicant herein, filed a Request for Review dated 9th November 2023 together with a Supporting Affidavit sworn on 9th November 2023 by Michael Kabui Wachira, its Director (hereinafter referred to as the 'instant Request for Review') through Waceke Thindigua & Co. Advocates seeking the following orders from the Board in verbatim:

a) The Board do issue orders declaring the review herein as compliant with Section 167(1) of the Public Procurement and Assets Disposal Act (2015) and Article 222 of the Constitution. The request for review has been filed 9



days after receiving the letter declaring the Applicant's tender as unsuccessful.

b) The Board be pleased to annul and /or quash the decision of the Procuring Entity in awarding the tender to DALSLearning LIMITED.

c) The decision declaring the Applicant's tender as unsuccessful vide the procuring Entity's letter dated 12th October 2023 be set aside and/ or annulled.

d) The Board be pleased to direct the Procuring Entity to re-evaluate and determine the lowest and competitive bid from among the eligible bids.

e) The Board be pleased to review and consider the documents presented by the Applicant in place for a valid Business permit and consider the reasons advanced including the letter dated 24th October, 2023 issued by the Nairobi City County who are the issuing authority as pertains a Valid Business Permit as a minor deviation not materially affecting the tender.

f) The costs of this Review be awarded to the Applicant.

g) The Board be at liberty to make any other Order as may be applicable so that the ends of justice are effectively vindicated.

16. In a Notification of Appeal and a letter dated 9th November 2023, Mr. James Kilaka, the Acting Board Secretary of the Board notified the 1st and 2nd Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 9th November 2023.

17. *Vide* a letter dated 20th November 2023, the Acting Board Secretary notified the 1st and 2nd Respondent that the five (5) days within which they were required to submit a response in the matter lapsed on or about 16th November 2023 and urged them to comply with the Notification of Appeal served upon them on 9th November 2023 in view Regulation 205 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020').

18. On 21st November 2023, the Respondents filed a letter dated 20th November 2023 signed by Prof. Charles O. Ong'ondo, the 1st Respondent, in response to the instant Request for Review together with a file containing confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

19. *Vide* a Hearing Notice dated 20th November 2023, the Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the Request for Review slated for 23rd November 2023 at 2:00 PM, through the link availed in the said Hearing Notice.

20. On 23rd November 2023, the Interested Party filed through CK Advocates a Notice of Appointment of Advocates dated 23rd November 2023 and a Replying Affidavit, the Interested Party's (Dals Learning Limited) Response to the Request for Review sworn on 23rd November 2023 by Evans Kiplagat Rotich, its Chief Executive Officer.

21. When the matter came up for hearing on 23rd November 2023 at 2.00 p.m., the Board read out pleadings filed by parties in the matter and counsel for the Interested Party, Mr. Kiprono indicated that he had come on record an hour before the matter came up for hearing and had not served his pleadings upon the Applicant and the Respondents. When asked by the Board whether parties were comfortable with canvassing the matter by way of written submissions, counsel for the Applicant submitted that there was need to highlight the Applicant's case.

22. Having considered parties' submissions, the Board directed (a) the Interested Party to serve the Applicant and the Respondents with its Replying Affidavit within two (2) hours of conclusion of the hearing of the instant Request for Review, (b) the Applicant to file and serve a rejoinder to the Interested Party's Replying Affidavit by 9.00 a.m. on 24th November 2023, (c) the Respondents to file and serve its rejoinder to the Interested Party's Replying Affidavit by 3.00 p.m. on 24th November 2023, (d) parties to file and serve their written submissions by 10.00 a.m. on 27th November 2023, (e) the Applicant to serve the Interested Party with its complete annexures to the Request for Review, and (f) that the matter would proceed for hearing on Monday, 27th November 2023 at 4.30 p.m. Parties were cautioned to observe the timelines issued in filing their respective documents.

23. On 24th November 2023, the Applicant filed a Further Affidavit sworn on 23rd November 2023 by Michael Kabui Wachira.

24. On 27th November 2023, the Applicant filed Written Submissions dated 27th November 2023.

25. On 27th November 2023, the 1st and 2nd Respondent filed Written Submissions dated 27th November 2023 together with a List of Authorities dated 27th November 2023.

26. On 27th November 2023, the Interested Party filed Written Submissions dated 27th November 2023 together with a List and Digest of Authorities dated 27th November 2023.

27. When the matter came up for hearing on 27th November 2023, the Board read out the pleadings filed by parties in the matter and allocated time for each party to proceed and highlight its case. Counsel for the Interested Party, Mr. Sang pointed out to the Board that the Applicant's had failed to serve them with their annexures as directed by the Board on 23rd November 2023 and as such, they were not able to verify the said annexures. Counsel for the Applicant, Ms. Waceke, confirmed that the same had not been served and proceeded to serve the said annexures. Mr. Sang indicated that he would confirm receipt as the matter proceeds however asked the Board to note that he had not been served with the complete request for review as directed by the Board.

PARTIES' SUBMISSIONS

Applicant's Submissions

28. In her submissions, Ms. Waceke relied on the Request for Review Request for Review dated 9th November 2023 together with a Supporting Affidavit sworn on 9th November 2023 by Michael Kabui Wachira, Further Affidavit sworn on 23rd November 2023 by Michael Kabui Wachira, and Written Submissions dated 27th November 2023 that were filed before the Board.

29. Ms. Waceke submitted that the instant Request for Review was based on the fact that in awarding the Interested Party the subject tender, the Procuring Entity contravened the Mandatory Eligibility and Qualification Criteria being an express prerequisite of Section 79(1), 80 and 86 of the Act. She pointed out that in evaluating and awarding the subject tender, they contravened Article 227 of the Constitution.
30. According to counsel, Section 79 of the Act provided that due consideration should be given in declaring a bid as unsuccessful and this was not observed by the Procuring Entity. She submitted that the Applicant submitted in its bid an invoice and a receipt indicating payment for the business permit and the same ought to be considered as sufficient in the absence of a business permit.
31. Counsel submitted that the Applicant submitted all the mandatory documents required in the Tender Document and that the Applicant's tender had the lowest financial tender price and as such, it would have easily qualified for financial evaluation.
32. Counsel pressed on that Nairobi City County issued a letter indicating that it had a system error leading to failure to print the Business Permit. She indicated that failure to submit the Business permit was a minor deviation which does not go to the substance of the tender and but to the form and relied on the case of *R v PPARB & another Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex pater Tur Austria Turk (2020) eKLR* in support of her argument.

33. Ms. Waceke submitted that a tender is responsive if it conforms to all the eligibility and mandatory requirements and cannot be declared non-responsive on the basis of minor deviations that materially do not depart from the requirements set out in the Tender Document and as such failure by the Applicant to produce a business permit in view of the fact that they produced an invoice and receipt showing payment for the same is a minor deviation. She further submitted that a tender cannot be declared non-responsive due to minor deviation.

34. She pointed out that materially, the non-presentation of the Business Permit and presentation of the invoice and payment receipt showing that the Applicant had indeed paid for the said Business Permit does not materially depart from the requirements of the Tender Document. She further pointed out that there are errors and oversights that can be corrected without affecting the substance of the tender and relied on Section 29 of the Act which requires the procuring entity to call for more information and that the Procuring Entity did not seek any clarifications from the Applicant as the same would have been corrected.

35. Ms. Waceke submitted that a matter of form of a tender ought not to take precedent over the substance of a tender. Counsel further submitted that by the Board disqualifying the award in the subject tender issued to the Interested Party, it will not distinguish and take

away the said award from it since the Applicant qualifies for certain areas where the Interested Party did not qualify.

36. She urged the Board to allow the Request for Review as prayed.

Respondents' Submissions

37. In his submissions, Mr. Ongeri relied on the letter dated 20th November 2023 signed by Prof. Charles O. Ong'ondo, the confidential documents submitted to the Board pursuant to Section 67(3)(e) of the Act, Written Submissions dated 27th November 2023 and List of Authorities dated 27th November 2023 that were filed before the Board.

38. Mr. Ongeri submitted that page 44 of the Tender Document provided for evaluation of tenders and on preliminary evaluation, tenders would be examined to ensure they meet in all aspects the eligibility criteria and other mandatory requirements and tenders which did not pass the preliminary examination would be considered non-responsive and would not be considered for further evaluation. Counsel also referred the Board to Clause 42 on Award Criteria of the Tender Document.

39. He drew the Board's attention to Mandatory Requirement No. 4 of the Tender Document and submitted that tenderers were required to attach a copy of the valid county business permit. He proceeded to highlight the provisions of Article 227 of the Constitution and Section 79 of the Act and submitted that the Applicant in the instant Request

for Review had admitted that it did not attach a copy of a valid county business permit.

40. He submitted that the invitation by the Applicant to take the invoice and payment receipt for the said business permit as a substitute would defeat the ends of justice as regards evaluation of tenders. He referred the Board to Section 80(2) of the Act and stated that evaluation and comparison ought to be done using procedures and the criteria set out in the Tender Document.

41. Counsel submitted that the Tender Document did not provide an option for a tenderer to attach a copy of a valid business permit or an invoice or any form of any other document and that mandatory documents are the most basic of documents that a tender ought to submit.

42. In support of his argument, Mr.Ongeri relied on the holding in *R v PPARB & another Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex pater Tur Austria Turk (2020) eKLR* and submitted that it would be unfair to offer the Applicant any form of deviation as regards the evaluation of its tender.

43. He pressed on that ITT 6.1 at page 37 of the Tender Document provided for a bidder to seek clarifications from the procuring entity and none was sought by the Applicant.

44. Mr. Ongeri submitted that it is not clear whether to date a business permit was still difficult to generate. He further submitted that in respect to the letter referred to by the Applicant as having been issued by the Nairobi City County, it is clear from the confidential documents that evaluation of the subject tender ended on 12th October 2023 and the said document cannot be admitted after evaluation of tenders has been completed. Additionally, counsel pointed out that the tender having closed on 12th September 2023 and the said letter being dated 24th October 2023 means that it was not part of the documents submitted in the Applicant's bid.

45. Mr. Ongeri submitted that the argument by the Applicant to be awarded in areas it was competent in was strange as the Applicant cannot abrogate itself the mandate of evaluating and awarding itself the subject tender since it is up to the Procuring Entity to evaluate submitted bids as per Section 80 of the Act. He further submitted that a tenderer who fails at the preliminary evaluation stage cannot proceed to other stages of evaluation.

46. He urged the Board to dismiss the Request for Review with costs.

47. When asked by the Board to clarify on whether the Interested Party's tender had a copy of a valid Business Permit, Mr. Ongeri confirmed that the Interested Party had submitted a valid Business Permit by virtue of the fact that it was rendered successful at the Preliminary Evaluation

stage and proceeded through the other stages of evaluation to be awarded the subject tender.

Interested Party's Submissions

48. In his submissions, Mr. Sang relied on the Replying Affidavit sworn on 23rd November 2023 by Evans Kiplagat Rotich, Written Submissions dated 27th November 2023 and List and Digest of Authorities dated 27th November 2023 that were filed before the Board.

49. Mr. Sang associated himself with the submissions by the Respondents and submitted that Section 79 of the Act provides that a tender is responsive if it conforms to all eligibility and mandatory requirements of the Tender Document. Further that Section 80(2) of the Act provides that evaluation and comparison of tenders ought to be done using the criteria set out in the Tender Document.

50. He further submitted that it is the responsibility of all tenderers to comply with mandatory requirements set out in the Tender Document failure to which a tenderer would have itself to blame for non-compliance. Counsel relied on the holding in *Republic v Public Procurement Administrative Review Board Ex-parte Meru University of Science & Technology; M/s AAKI Consultants Architects and Urban Designers (Interested Party) (2019) eKLR* and pointed out that tenderers must comply with tender provisions, no bidder should be allowed to circumvent tender provisions to ensure fairness and competition on

equal footing and that bidders have a legitimate expectation that a procuring entity will comply with its tender conditions.

51. Mr. Sang further referred the Board to 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*.

52. Counsel submitted that the Applicant has admitted to have engaged the Procuring Entity during the tender evaluation process which was an admission of canvassing concerning the error on printing of business permit contrary to the law and pointed out the letter dated 24th October 2023.

53. Mr. Sang referred the Board to the holding in *PPARB No. 76 of 2022 Powergen Technologies Ltd v ICT Authority & Another* where the Board held that an Evaluation Committee has the obligation to evaluate the documents submitted by bidders by the tender submission deadline using the procedures and criteria set out in the Tender Document and in so doing, such an evaluation committee does not resort to information not contained in a bidder's original bid. He pointed out that the information pertaining reasons for the absence of the Applicant's business permit.

54. Counsel submitted that the Applicant had the option of contacting Nairobi City County before the deadline for submitting tenders seeking assistance regarding the issue with the printing of the business permit



and upon receiving a response, it ought to have attached the same to its bid before submitting the same to the Procuring Entity. As such, in the absence of this information, the Evaluation Committee had no knowledge of the letter dated 24th October 2023 and it was therefore not available during the evaluation and consideration of bids.

55. Mr. Sang submitted that the assertion by the Applicant that failure to comply with Mandatory Requirement No. 4 of the Tender Document ought to be treated as a minor deviation and cured under Section 79(2) of the Act is baseless and misguided since a bidder who fails to meet the mandatory requirements which have otherwise been met by other bidders cannot expect any preferential treatment and if its omissions or errors were to be ignored and the bid treated as responsive, this would go against the principle of fairness embodied in Article 227(1) of the Constitution. He referred the Board to the holding by Justice Ngaah in *R v Public Procurement Administrative Review Board Ex parte Internet Solutions Ltd; Kenya Airports Authority & 3 others (Interested Parties) (2021) eKLR*. He pressed on that the Procuring Entity was indeed rightful in finding the Applicant's bid non-responsive.

56. Counsel further submitted that the Interested Party's bid qualified as the lowest evaluated bid and its bid has not been faulted as it met all tender requirements hence award of the subject tender.

57. Mr. Sang submitted that the Applicant's grounds for review are misleading and meant to confuse and hoodwink the Board to its favor. He urged the Board to dismiss the Request for Review with costs.

Applicant's Rejoinder

58. In a rejoinder, Ms. Waceke submitted that the Request for Review relied on the provisions of Article 227 of the Constitution and Section 3 of the Act on the principles of fairness, equitable, transparent, competitive and cost-effective in tendering process.

59. On the issue of canvassing, she submitted that no section of the law was referred to by the Procuring Entity and the Interested Party to show that producing a letter when the process was ongoing was canvassing as canvassing is direct contact with the Procuring Entity.

60. Upon enquiry by the Board on why the Applicant waited until October to address the concerns of issuance of its business permit noting that the tender submissions deadline was in September and the Applicant had received the invoice in January paid for the same in April, Ms. Waceke submitted that the issue of the business permit has never come up since Nairobi City County and KRA officials go around for inspections and the Applicant has been producing the invoice and receipt to the satisfaction of the said officials and to date, the Applicant has been conducting business in the city and has not received any complaints on conducting business without the printed Business Permit. She further submitted that the Applicant has been following up on issuance of the

Business permit, and being in the business of tendering, it was issued with the letter by Nairobi City County which was dispatched on 27th October 2023 way after the tender submission deadline and by this time, the Applicant was not aware that it had been disqualified in the subject tender.

61. When asked by the Board to clarify that the Applicant did not submit a Business Permit but in its place submitted an invoice and payment receipt, Ms. Waceke confirmed that that was the position.

BOARD'S DECISION

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

- i Whether the Applicant's tender in response to the subject tender satisfied the Mandatory Requirement No. 4 of stage 1- Preliminary Evaluation at page 44 of 133 of the Tender Document;***
- ii What orders should the Board grant in the circumstances?***

Whether the Applicant's tender in response to the subject tender satisfied the Mandatory Requirement No. 4 of stage 1- Preliminary Evaluation at page 44 of 133 of the Tender Document.

63. We understand the Applicant's case on this issue to be that the Procuring Entity in awarding the subject tender to the Interested Party contravened the provisions of Article 227 of the Constitution and Sections 79, 80, and 86 of the Act. The Applicant contends that its tender met all the eligibility and mandatory requirements of the Tender Document and that the Procuring Entity ought to have given due consideration to provisions of Section 79(2) of the Act and its decision to disqualify the Applicant's tender was unjustifiable.

64. We understand the Respondents' response on this issue to be that the Applicant's tender failed to meet the mandatory requirements provided in the Tender document and was non-responsive as stipulated under Section 79(1) of the Act. The Respondents contend that they adhered to the set out evaluation criteria in the Tender Document and complied with the provisions of the Constitution and the Act.

65. On its part, the Interested Party associated itself with the Respondents submissions and submitted that the Applicant failed to meet the threshold on the requirements set out in the Tender Document to warrant it being issued the orders sought in the instant Request for Review.

66. Having considered parties' submissions herein, we note that objective of public procurement is to provide quality goods and services in a system that implements the principles specified in Article 227 of the Constitution which provides as follows:

"227. Procurement of public goods and services

(1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

(2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following –

a)

b)

c) and

d)"

67. Justice Mativo (as he then was) in **Nairobi High Court Misc. Application No. 60 of 2020; Republic v The Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020] eKLR** (hereinafter referred to as "Misc.



Application No. 60 of 2020”) spoke to the principles under Article 227 of the Constitution 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..."

68. The Board observes that the legislation contemplated in Article 227(2) of the Constitution is the Act. Section 3 of the Act underpin good governance, integrity, transparency and accountability as key pillars in public procurement and asset disposal proceedings and 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—

(a) the national values and principles provided for under Article 10;

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

(c) affirmative action programmes provided for under Articles 55 and 56;

(d) principles of integrity under the Leadership and Integrity Act, 2012 (No. 19 of 2012);

(e) the principles of public finance under Article 201;

(f) the values and principles of public service as provided for under Article 232;

(g) principles governing the procurement profession, international norms;

(h) maximisation of value for money;

(i) promotion of local industry, sustainable development and protection of the environment; and

(j) promotion of citizen contractors."

69. Section 58 of the Act requires a procuring entity to use a standard tender document which contains sufficient information and provides as follows:

"(1) An accounting officer of a procuring entity shall use a standard procurement and asset disposal documents issued by the Authority in all procurement and asset disposal proceedings.

"(2) The tender documents used by a procuring entity under subsection (1) shall contain sufficient information to allow fairness, equitability, transparency, cost-effectiveness and competition among those who may wish to submit their applications."

70. Further Section 60() provides as follows:

"(1) An accounting officer of a procuring entity shall prepare specific requirements relating to the goods, works or services being procured that are clear, that give a correct and complete description of what is to be procured and that allow for fair and open competition among those who may wish to participate in the procurement proceedings."

71. In the same vein, section 70 of the Act requires a procuring entity to use a standard tender document which contains sufficient information

to allow for fair competition among tenderers. Section 70(3) reads as follows:

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

72. Section 80 of the Act is instructive on how evaluation and comparison of tenders should be conducted by a procuring entity as follows:

"80. Evaluation of tender

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

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

regulation of fees chargeable for services rendered.

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

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

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

(4)"

73. Section 80(2) of the Act as indicated above requires the Evaluation Committee to evaluate and compare tenders in a system that is fair using the procedures and criteria set out in the Tender Document. A system that is fair is one that considers equal treatment of all tenders against a criteria of evaluation known by all tenderers since such criteria is well laid out for in a tender document issued to tenderers by a procuring entity. Section 80(3) of the Act requires for such evaluation criteria to be as objective and quantifiable to the extent possible and



to be applied in accordance with the procedures provided in a tender document.

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

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

(2) A responsive tender shall not be affected by—

(a) minor deviations that do not materially depart from the requirements set out in the tender documents; or

(b) errors or oversights that can be corrected without affecting the substance of the tender.

(3) A deviation described in subsection (2)(a) shall—

(a) be quantified to the extent possible; and

(b) be taken into account in the evaluation and comparison of tenders."

75. Responsiveness serves as an important first hurdle for tenderers to overcome. From the above provision, a tender only qualifies as a responsive tender if it meets all eligibility and mandatory requirements set out in the tender documents. In the case of **Republic v Public Procurement Administrative Review Board & another; Premier**

Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020] eKLR the High Court stated that:

"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."

76. The Board notes that Regulation 74(1) of Regulations 2020 provides that:

"74. Preliminary evaluation of open tender

- (1) Pursuant to section 80 of the Act and upon opening of tenders, the evaluation committee shall first conduct a preliminary evaluation to determine whether—***
- (a) a tenderer complies with all the eligibility requirements provided for under section 55 of the Act;***
 - (b) the tender has been submitted in the required format and serialized in accordance with section 74(1)(i) of the Act;***
 - (c) any tender security submitted is in the required form, amount and validity period, where applicable;***
 - (d) the tender has been duly signed by the person lawfully authorized to do so through the power of attorney;***
 - (e) the required number of copies of the tender have been submitted;***
 - (f) the tender is valid for the period required;***
 - (g) any required samples have been submitted; and***
 - (h) all required documents and information have been submitted.***

77. The import of the aforementioned provisions of the Act and case law is that mandatory requirements cannot be waived. In this instance, the Evaluation Committee was mandated to evaluate the Applicant's tender using the procedures and criteria set out in the Tender Document having regard to provisions of the Act and the Constitution. A laid out evaluation criteria must, to the extent possible, be objective and quantifiable.

78. The Board has carefully studied the Tender Document submitted by the 1st Respondent as part of the confidential documents pursuant to section 67(3)(e) of the Act and notes that Mandatory Requirement No. 4 of stage 1- Preliminary Evaluation at page 44 of 133 of the Tender Document provides as follows:

<i>NO</i>	<i>REQUIREMENT</i>	<i>PASS/FAIL</i>
<i>.....</i>	<i>.....</i>	
<i>MR 4</i>	<i>Must attach a copy of valid County Business Permit</i>	
<i>.....</i>	<i>.....</i>	

NOTE:

In preliminary evaluation stage, bids shall be evaluated on the basis of Pass/Fail. Any bid failing in any of the (preliminary) requirements will not proceed to the technical evaluation stage."

79. In essence, tenderers were required to comply with all the mandatory requirements at the Preliminary Evaluation stage for their respective tenders to proceed to the Technical Evaluation stage. If a tenderer did not satisfy even one of the mandatory requirements at the Preliminary Evaluation stage, its tender would be found non-responsive and would be disqualified from proceeding to the Technical Evaluation stage.
80. We note that according to the Evaluation Report, the Applicant was determined non-responsive at the Preliminary Evaluation stage because it did not provide a valid Business Permit and instead provided an invoice and a scanned copy of bank receipt.
81. Having perused the Applicant's original tender submitted to the Board as part of the confidential documents pursuant to Section 67(3)(e) of the Act in respect to the subject tender, we note that the Applicant submitted an Invoice from Nairobi City County dated 30th January 2023 and a bank slip from Co-operative Bank dated 19th April 2023.
82. During the hearing, counsel for the Applicant, Ms. Waceke, confirmed that indeed the Applicant did not submit a valid copy of County Business Permit as provided under Mandatory Requirement No. 4 of the Tender Document and argued that proof of payment of the same had been submitted and was sufficient since the issues of the missing Business Permit was occasioned by Nairobi City County as it had difficulties in generating and printing the said Business Permit. Ms. Waceke urged the Board to find that this was a minor deviation that can be cured

under Section 79(2) of the Act taking note of the letter issued by Nairobi City County dated 24th October 2023 which reads in part:

".....

Confirmation of Valid Business Permit 2023 for Virtual Essence Ltd

I am writing to confirm that Virtual Essence Ltd is in compliance with the Nairobi County business permit regulations. Based on the payment records and documentation provided, it has been verified that Virtual Essence duly paid for their Nairobi Business Permit on April 19,2023, at 12:07 p.m., due to reconciliatory backlog, they were unable to print out the permit.

The payment slip, Cooperative bank, bearing reference number BRF068R 1359801 and amount KES 40,200/- validly represents that Virtual Essence holds a current and valid business permit.

Unfortunately, due to the technical changes in portal payment gateways between NMS/KRA and NBS, the bank payments made earlier in the year and not reconciled, such as this one for Virtual Essence Ltd cannot be posted in the new account portal and thus the Business Permit cannot be printed out. The invoice and corresponding payment slip will continue to hold as valid Business Permit until the end of the year.



Virtual Essence has fulfilled its obligation in accordance with Nairobi County Council's regulations, and we acknowledge that their business permit is valid as of the mentioned payment date.

.....”

83. We note that the above letter dated 24th October 2023 was issued past the tender submission deadline of 12th September 2023 and having been issued on 24th October 2023, it was not part of the document submitted in the Applicant's original tender.

84. Section 79 (2) and (3) of the Act provides as follows with respect to minor deviations:

"(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 document; 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."

85. The import of the above provision is that responsiveness of a tender shall not be affected by any minor deviations that do not materially

depart from the requirements set out in the Tender Document and that do not affect the substance of a tender. This provision details a minor deviation as one that can be quantified to the extent possible and shall be taken into account in the evaluation and comparison of tenders.

86. In **Miscellaneous Civil Application 85 of 2018 Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR** the High Court considered what amounts to a minor deviation and determined as follows:

The term "acceptable tender" means any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document. A tender may be regarded as acceptable, even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the tender documents or if it contains errors or oversights that can be corrected without touching on the substance of the tender. Any such deviation shall be quantified, to the extent possible, and appropriately taken account of in the evaluation of tenders. A tender shall be rejected if it is not acceptable....

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.

87. It is evident that a procuring entity cannot waive a mandatory requirement or term it as a "minor deviation" since a mandatory requirement is instrumental in determining the responsiveness of a tender and is a first hurdle that a tender must overcome in order to be considered for further evaluation. It is clear from the foregoing case that a minor deviation (a) does not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the tender documents; (b) may be an error or oversight that can be corrected without touching on the substance of the tender; and (c) can

be quantified, to the extent possible, and appropriately taken account of in the evaluation of tenders.

88. In **Republic v Public Procurement Administrative Review Board ex parte Guardforce Group Limited; Pwani University & 2 Others (Interested Parties) [2021] eKLR** Justice E.K. Ogola, held that;

"...it becomes apparent to this court that the aspect of compliance with the mandatory requirement of the tender document aims to promote fairness, equal treatment, good governance, transparency, accountability and to do away with unfairness. Failure to conform to this mandatory requirement, and/or exempt or give an opportunity to those who had not earlier on conformed to this mandatory requirement translates to unequal and unfair treatment of other tenderers and, if allowed, may encourage abuse of power and disregard of the law by not only bidders, but also procuring entities."

89. Considering the above, we are left with the inevitable conclusion that the Applicant failed to comply with Mandatory Requirement No. 4 of stage 1- Preliminary Evaluation at page 44 of 133 of the Tender Document.

90. In the circumstances, the Board finds that the Applicant did not satisfy Mandatory Requirement No. 4 of stage 1- Preliminary Evaluation at page 44 of 133 of the Tender Document to proceed for evaluation at the Technical Evaluation stage.

What orders should the Board grant in the circumstances?

91. We have established that the Evaluation Committee evaluated the Applicant's tender in accordance with the provisions of the Tender Document, Section 80(2) of the Act and Article 227(1) of the Constitution. Consequently, it is only just and fair that we dismiss, which we hereby do, the instant Request for Review for lacking in merit.

92. The upshot of our findings is that the instant Request for Review fails.

FINAL ORDERS

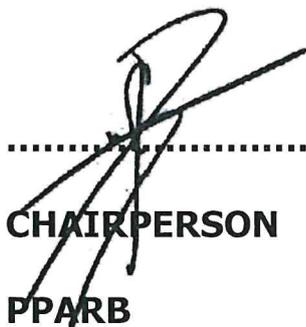
93. In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review dated 9th November 2023 and filed on even date:

A. The Request for Review dated 9th November 2023 and filed on even date be and is hereby dismissed.

B. The Respondents are hereby directed to proceed with the procurement proceedings of Tender No. KICD/02/ADM/2023-2024 for Provision of Interactive Digital Content for Competency Based Curriculum (CBC) for Grade 5 in 12 Learning Areas to its logical conclusion in accordance with the Tender Document, the Act, and the Constitution.

C. Each party shall bear its own costs in the Request for Review.

Dated at NAIROBI this 30th Day of November 2023.


.....
CHAIRPERSON
PPARB


.....
SECRETARY
PPARB



