

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 95/2023 OF 16TH NOVEMBER 2023

BETWEEN

IMPERIAL INVESTMENT KLIMITED.....APPLICANT

AND

THE ACCOUNTING OFFICER,

COMMISSION ON REVENUE ALLOCATION.....1ST RESPONDENT

COMMISSION ON REVENUE ALLOCATION.....2ND RESPONDENT

CORICOM LIMITED.....INTERESTED PARTY

Review against the decision of the Accounting Officer, Commission on Revenue Allocation relation to Tender No.CRA/PROC/OT/001/2023-2024 for the Proposed Office Partitioning Works on 28th, 29th and 30th Floors at Prism Towers for Commission on Revenue Allocation Offices.

BOARD MEMBERS PRESENT

- | | | |
|------------------------|---|-------------------|
| 1. Ms. Alice Oeri | - | Panel Chairperson |
| 2. Mr. Daniel Langat | - | Member |
| 3. CPA Alexander Musau | - | Member |

IN ATTENDANCE

- | | | |
|--------------------|---|-------------|
| Ms. Sarah Ayoo | - | Secretariat |
| Mr. Anthony Simiyu | - | Secretariat |

PRESENT BY INVITATION

APPLICANT

IMPERIAL INVESTMENT K LIMITED

Mr.Moriasi David

-Advocate, Diro Advocates LLP

RESPONDENTS

THE ACCOUNTING OFFICER, COMMISSION ON REVENUE ALLOCATION

COMMISSION ON REVENUE ALLOCATION

Ms. Sheila Yieke

-Legal Director, Commission on Revenue Allocation

CPA.James Katule

-CEO, Commission on Revenue Allocation

Ms. Angela Karuki

-Corporate Services Director, Commission on Revenue Allocation

Mr. Joseph Kuria

-ICT Director, Commission on Revenue Allocation

Mr. Geoffrey Ntoiki

-Procurement Department representative, Commission on Revenue Allocation

Ms. Faith Kako

-Procurement Department representative, Commission on Revenue Allocation

Ms.Selly Yagan

-Fiscal Affairs Deputy Director, Commission on Revenue Allocation

Ms. Emily Kimani

-Legal Manager, Commission on Revenue Allocation

INTERESTED PARTY**CORICOM LIMITED**

Mr. Austin Ayisi

-Advocate, Matheka Oketch & Company
Advocates

BACKGROUND OF THE DECISION**The Tendering Process**

1. The Commission on Revenue Allocation, the Procuring Entity together with the 1st Respondent herein, invited submission of sealed tenders in response to Tender No. CRA/PROC/OT/001/2023-2024/ for the Proposed Partitioning Works on 28th, 29th and 30th Floors at Prism Towers for Commission on Revenue Allocation using an open competitive tender method. The subject tender's submission deadline was Monday, 16th October 2023 at 12:00 noon.

Submission of Tenders and Tender Opening

2. According to the signed Tender Opening Minutes dated 16th October 2023, submitted under the Confidential File submitted by the Procuring Entity, the following 25 tenderers were recorded as having submitted their respective tenders in response to the subject tender by the tender submission deadline:

No.	Name of Tenderer
1.	Coricom Limited
2.	Escobar Kenya Limited
3.	Tripple N Capital Ventures
4.	Salto Limited

5.	Bullsons Agencies Limited
6.	Goma Azul Investment
7.	Resjos Enterprises Limited
8.	Marsh Builders Limited
9.	Ekaya Construction Company Limited
10.	Nightigale (EA) Limited
11.	Tykon Holdings
12.	Brookhill Projects Limited
13.	Imperial Investment
14.	Three N International Limited
15.	Hawaka General Contractors
16.	Extended Construction Limited
17.	Graynon Holdings
18.	Neoteric Development Solutions Limited
19.	Linked Investment Limited
20.	Regence Enterprises
21.	Hyson Green Limited
22.	Nelliwa Builders & Civil Engineers Limited
23.	Apache Limited
24.	Contralinks Solutions & Services
25.	Denkon Builders Company Limited

Evaluation of Tenders

3. The Respondent constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") to undertake an evaluation of the 25 tenders in the following 3 stages as captured in the Evaluation Report

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

Preliminary Evaluation

- 4. At this stage of the evaluation, the Evaluation Committee was required to examine the tenders using the criteria set out as Stage 1. Mandatory Requirements under Section III – EVALUATION AND QUALIFICATION CRITERIA on pages 39 to 41 of the Tender Document.
- 5. The evaluation was to be on Yes/No basis and tenderers who failed to meet any criteria outlined at this Stage would be disqualified from further evaluation.
- 6. At the end of the evaluation at this stage, 20 tenders including that of the Applicant were found unresponsive with only 5 tenders including that of the Interested Party qualifying for further evaluation at the Technical Evaluation Stage.

Technical Evaluation

- 7. At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the Criteria set out as Stage 2 Qualification Form Summary under Section III – EVALUATION AND QUALIFICATION CRITERIA on pages 42 to 47 of the Tender Document.

8. Tenderers were required to meet all the requirements outlined at this Stage and those who failed to meet any of them would be disqualified from further evaluation at the Financial Evaluation Stage.
9. At the end of the evaluation at this stage, 2 tenders were found unresponsive with only 3 tenders including that of the Interested Party qualifying for further evaluation at the Financial Evaluation Stage.

Financial Evaluation

10. At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the Criteria set out as Stage 3- Financial Evaluation under Section III– EVALUATION AND QUALIFICATION CRITERIA on page 48 of the Tender Document.
11. According to the Tender Document, the Evaluation Committee was to conduct verify the arithmetic entries in the Bill of Quantities while checking for consistency in the tendered sums and compare the tendered sums.
12. At the end of the evaluation at this stage, the Evaluation Committee found the Interested Party's tender as the lowest evaluated tender at Kshs. 117,011,951.

Due Diligence

13. The Evaluation Committee conducted Due Diligence on the Interested Party to validate the physical address of the tenderer as well the authenticity of the mandatory documents it had submitted as part of its tender documents. The findings of the due diligence were positive.

Evaluation Committee's Recommendation

14. Accordingly, the Evaluation Committee recommended the award of the subject tender to the Applicant at its tender sum of **Kenya Shillings Two One Hundred and Seventeen Million, Eleven Thousand, Nine Hundred and Fifty-One only (Kshs. 117,011,951.00)** inclusive of taxes.

Professional Opinion

15. In a Professional Opinion dated 3rd November 2023 (hereinafter referred to as the "Professional Opinion"), the Procuring Entity's Procurement Officer, Mr. Geoffrey Ntooki, reviewed the manner in which the subject procurement process was undertaken including the evaluation of tenders and agreed with the Evaluation Committee's recommendation for the award of the subject tender to the Interested Party.
16. On the same day, on 3rd November 2023, the 1st Respondent concurred with the Professional Opinion.

Notification to Tenderers

17. Accordingly, tenderers were notified of the outcome of the evaluation tenders submitted in response to the subject tender vide letters dated 3rd November 2023.

REQUEST FOR REVIEW

18. On 16th November 2023, the Applicant filed a Request for Review dated 16th November 2023 supported by an Affidavit sworn on 7th November 2023 by Abdinasir Adan Ibrahim, a Director at the Applicant, seeking the following orders from the Board in verbatim:

1. *An order for the reconsideration and review of the disqualification of Imperial Investment K Ltd's tender application, taking into account the points of contention raised herein.*
2. *An order for the reconstitution of the Evaluation Committee, ensuring it is fully constituted in accordance with the Procurement Law, and that all Evaluation Consultants are involved from the beginning of the process.*
3. *An order for a transparent, equitable, and open re-evaluation of Imperial Investment K Ltd's tender application*
4. *An order for comprehensive investigation into the alleged irregularities and discrepancies in the initial evaluation process, ensuring that such issues do not recur in future tenders.*
5. *An order for complete cancellation of the current tender process due to the aforementioned irregularities and discrepancies. This cancellation is requested on the grounds of maintaining the integrity and fairness of the procurement process.*
6. *Subsequently, we request an order for the commencement of a new tender process. This new process should be undertaken with a duly constituted Evaluation Committee and adhere strictly to the principles of transparency, fairness, and equity as stipulated by the Procurement Law.*

19. In a Notification of Appeal and a letter dated 16th November 2023, Mr. James Kilaka, the Acting Board Secretary of the Board notified the Respondent of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondent 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 Respondent was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 16th November 2023.
20. In response to the Request for Review, on 22nd November 2023, the Respondents filed a Letter dated 22nd November 2023. The Respondent also submitted the confidential documents in the subject tender pursuant to Section 67(3)(e) of the Act.
21. Vide letters dated 24th November 2023, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the subject Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within 3 days from 24th November 2023.
22. On 27th November 2023, the Acting Board Secretary, sent out to the parties a Hearing Notice dated 27th November 2023 notifying parties and all tenderers in the subject tender that the hearing of the instant

Request for Review would be by online hearing on 30th November 2023 at 12.00 noon through the link availed in the said Hearing Notice.

23. On 27th November 2023, the Respondents filed a Replying Affidavit sworn on 27th November 2023 by CPA James Katule, the Procuring Entity's CEO.
24. On the same day, 27th November 2023, the Interested Party filed its Written Submissions dated 27th November 2023 together with a Replying Affidavit sworn on 24th November 2023 by Titus Mutea B. Ntuchiu, the Interested Party's Managing Director.
25. On the morning of the hearing, on 30th November 2023, the Applicant filed a Notice of Appointment of Advocates and Written Submissions, both dated 28th November 2023 through the firm of Diro Advocates LLP.
26. Later on the same date, 30th November 2023 at 12:00 noon, parties through their respective Advocates joined the online hearing session.
27. The Board read out to the parties the documents that had been filed in the Request for Review and sought for parties' confirmation that those were the documents that had been filed and served upon them. Parties' Advocates confirmed having filed and been served with the said documents with Mr. Ayisi bringing to the attention of the Board that the Request served upon the Interested Party had a hanging paragraph 2.
28. Ms. Yieke confirmed that the Respondents had been served upon 2 sets of Requests for Review, both dated 16th November 2023 and that while one of them had hanging paragraph 2 the other one was complete in terms of its contents at paragraph 2.

29. Mr. Moriasi told the Board that he came on record for the Applicant subsequent to the service of the Request for Review and thus could not confirm the Request for Review that had been served upon parties when the Applicant was unrepresented.
30. The Board adjourned the session shortly before returning a Ruling that the Request for Review filed first i.e. the one that had a hanging paragraph 2 was the one to use in the matter as the subsequently filed one did not indicate that it was amending the initial one.
31. The Board also assigned to each party 10 minutes to highlight their case, with the Applicant going first, thereafter the Respondents and then the Interested Party. It was also directed that the Applicant would thereafter have an additional 5 minutes to offer any rejoinder on issues raised by the Respondents and Interested Party.

PARTIES SUBMISSIONS

Applicant's Submissions

32. Counsel for the Applicant, Mr. Moriasi indicated that the Applicant would be relying on its filed documents i.e. Request for Review dated 16th November 2023 and Written Submissions dated 28th November 2023.
33. He argued that the Applicant's tender was found non-responsive in respect of its submitted Form CON-2 on Litigation History. He argued that this reason was unreasonable and unjustifiable because though the Respondents suggest that the Litigation History Form had a fundamental error, the error was in fact a typographical error. Counsel argued that

the Form was duly submitted and filled save for the typographical error making reference to different Procuring Entity.

34. Counsel stated that the purpose of the Form was to ascertain whether a tenderer had any litigation history or non-performing contract. According to him, a perusal of the Applicant's form yields that the Applicant did not have any pending litigation history or non-performing contract.
35. Mr. Moriasi referred to Clause 30 under Section 1 of the Tender Document arguing that the clause gave room to the Procuring Entity to call on responsive tenders to provide additional information where required. He therefore questioned why the Procuring Entity did not invoke this provision and ask the Applicant to supply a properly addressed form.
36. Counsel also made an admission that the Applicant did not submit a CA Registration License but affirmed that it supplied a CA Compliance Certificate. He went on to question how it would be taken that the Applicant lacked a Registration License when it had a Compliance Certificate which can only be obtained when one has a Registration License. He therefore affirmed that the Applicant had a CA Registration License.
37. He submitted that no disadvantage would have befallen any tenderer if the Procuring Entity invoked Clause 30 above and inquired on whether the Applicant had a CA registration License.

38. Counsel further argued that the Evaluation Committee was not properly constituted while referring to a letter dated 31st October 2023 from Design Works Architects, a consultant for the subject tender. Mr. Moriasi contended that in the letter, the Project Consultants were complaining that they were being left out of the procurement process. He also pointed out that none of the parties in their responses to the Request for Review addressed this save for pointing out that the letter dated 31st October 2023 was confidential.

Respondents' Submissions

39. Counsel for the Respondent, Ms. Yieke submitted that the Request for Review was defective as some of its paragraphs were incomplete and unclear. She also sought leave to file Written Submissions subsequent to the hearing session.
40. She also submitted that the Applicant failed to properly fill Form CON-2 as it addressed the same to a different institution, Technical University of Mombasa and not the Commission on Revenue Allocation. This she submitted created confusion on whether the Applicant intended the form to form part of the subject tender or a separate tender.
41. Ms. Yieke further submitted that the bottom of the Compliance Certificate indicated that it was not a license but proof of compliance. Thus, she surmised that a Compliance Certificate could not stand in for a Registration License. Accordingly, she argued that since the Applicant did not supply as part of its tender, a CA Registration License, it could not qualify for further evaluation.

42. Counsel further submitted that the Applicant could make any adjustments to its tender before evaluation but upon commencement of evaluation, no further adjustments could be made.
43. She argued that under Regulation 29 of the Regulations 2020, quorum of the Evaluation Committee was 3 people and that in the present tender there was quorum in the constituted Evaluation Committee.
44. CPA Katule, the 1st Respondent added that the Applicant had made an admission of non-compliance with the mandatory requirement to supply a CA Registration License. He added that the process was above board.

Interested Party's Submissions

45. Counsel for the Interested Party, Mr. Ayisi, submitted that the Interested Party would be relying on the Replying Affidavit sworn on 24th November 2023 by Titus Mutea Ntuchiu as well as its Written Submissions dated 27th November 2023.
46. Counsel submitted that public procurement is characterized by formalities and that Applicant had made an admission that it failed to comply with a tender formality. He argued that Form CON-2 had to be properly filled as provided for under Clause 12 of the Tender Document.
47. Mr. Ayisi contended that for the Applicant in its CON-2 to refer to a different Procuring Entity and also different tender number, this was material deviation.
48. Counsel relying on ***Republic v Public Procurement Administrative Review Board & Anor; Premier Verification Quality Services***

(PVQS) Limited (Interested Party) Ex parte Tuv Austria Turk [2020] eKLR he urged that non-responsive tenders are to be excluded from further evaluation the moment their non-responsiveness is apparent.

49. Mr. Ayisi further indicated it was not open for the Applicant to allege that it made a typographical error as this would open ground for other non-responsive tenderers to equally claim typographical errors and this would frustrate the evaluation process.
50. He argued that under Section 79 and Regulation 74, the Procuring Entity should generally only consider responsive tenders and disqualify all non-responsive tenders
51. Counsel referred to clause 13 under Section III of the Tender Document and urged that any tenderer who failed on any of the requirements under the Mandatory Requirements would be disqualified from further evaluation. He pointed out that the Applicant admitted failing to comply with Mandatory Requirement No. 18 and thus were properly discontinued from the evaluation process.
52. He went ahead to indicate that the Applicant even provided a license in the name of its partner and not itself.
53. Mr. Ayisi referred to clause 29.4 of the Tender Document that if a tender is not responsive it shall be rejected and that the Applicant in bringing the instant Request for Review, was asking the Procuring Entity to be unfair to the other tenderers who endeavored to comply with the mandatory requirements. He added that the applicant was also asking

the Board to overlook Article 227 of the Constitution which underpins competition through requiring parties to comply with the formalities in the Tender Document.

54. He argued that the Respondent had demonstrated that there was a properly constituted Evaluation Committee which was quorate. Further that the Applicant did not lead evidence that there was no Evaluation Committee. Therefore, Counsel urged the Board to dismiss the Request for Review with costs.

Applicant's Rejoinder

55. In a brief rejoinder, Counsel for the Applicant, Mr. Morias reiterated that the letter dated 31st October 2023 by the Project Manager spoke to a flawed evaluation process. Counsel invited the Board to interrogate the contents of the letter.
56. He also made a request to the Board to be allowed to file Supplementary Written Submissions in the event the Board granted the Respondent's leave to file Written Submissions
57. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 16th November 2023 had to be determined by 6th December 2023. Therefore, the Board would communicate its decision on or before 6th December 2023 to all parties via email.

BOARD'S DECISION

58. The Board has considered all documents, oral submissions and pleadings together with confidential documents submitted to it pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination:

- I. ***Whether the Procuring Entity properly evaluated the Applicant's tender document submitted in response to the subject tender in accordance with Section 80 of the Act and the provisions of the Tender Document?***
- II. ***Whether the Procuring Entity's Evaluation Committee was properly constituted during the Evaluation of the tenders submitted in response to the subject tender?***
- III. ***What orders should the Board issue in the circumstance?***

Whether the Procuring Entity properly evaluated the Applicant's tender document submitted in response to the subject tender in accordance with Section 80 of the Act and the provisions of the Tender Document?

59. Counsel for the Applicant, Mr. Moriasi, submitted that the Applicant's tender was found non-responsive on account of a typographical error on its submitted Form CON-2 on Litigation History which referred to Technical University of Mombasa in place of Commission on Revenue Allocation. He argued the purpose of the Form was to ascertain whether a tenderer had any litigation history or non-performing contract and that According to him, a perusal of the Applicant's form yields that the Applicant did not have any pending litigation history or non-performing contract. He added that this typographical error would have been addressed by the Procuring Entity invoking Clause 30 under Section I of the Tender Document.

60. Mr. Mōriasi made an admission that though the Applicant did not submit a Communications Authority Registration License, it nonetheless submitted a Communications Authority Compliance Certificate which is only issued to holders of a Communications Authority Registration License. He therefore insisted that the Procuring Entity ought to have invoked clause 30 under Section I of the Tender Document to confirm whether the Applicant held a Communications Authority Registration License.
61. On the other hand, the Respondents and the Interested Party maintained that the evaluation process was above board. Counsel for the Respondents, Ms. Yieke submitted that the Applicant addressed Form CON-2 to a different institution, Technical University of Mombasa and not the Commission on Revenue Allocation. This she submitted created confusion on whether the Applicant intended the form to form part of the subject tender or a separate tender.
62. Ms. Yieke further submitted that a Communications Authority Compliance Certificate could not stand in for a Registration License. Accordingly, she argued that since the Applicant did not supply as part of its tender, a Communications Authority Registration License, it could not qualify for further evaluation. Counsel further submitted that the Applicant could make any adjustments to its tender before evaluation but upon commencement of evaluation, no further adjustments could be made.

63. Counsel for the Interested Party, Mr. Ayisi submitted that public procurement is characterized by formalities and that Applicant had made an admission that it failed to comply with a mandatory requirement. He urged that the Applicant's address to a different Procuring Entity in its Form CON-2 was a material deviation.
64. Counsel referred to clause 13 under Section III of the Tender Document and urged that any tenderer who failed on any of the requirements under the Mandatory Requirements would be disqualified from further evaluation. He pointed out that the Applicant admitted failing to comply with Mandatory Requirement No. 18 and thus were properly discontinued from the evaluation process.
65. From the foregoing rival positions, this Board is invited to inquire in to whether the Applicant's tender was properly disqualified from the subject tender.
66. Section 80 of the Act offers guidance on how an Evaluation Committee should proceed with the evaluation of tenders in the following terms:

"80. Evaluation of tenders

(1) The evaluation committee appointed by the accounting officer pursuant to section 46 of this 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."

67. Additionally, Section 79 of the Act offers clarity on the responsiveness of tenders in the following terms:

"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."

68. This Board is further guided by the dictum of the High Court in ***Republic v Public Procurement Administrative Review Board & 2 others Ex parte BABS Security Services Limited [2018] eKLR; Nairobi Miscellaneous Application No. 122 of 2018*** where the court while considering a judicial review application against a decision of this Board illuminated on the responsiveness of a tender under section 79 of the Act:

"19. It is a universally accepted principle of public procurement that bids which do not meet the minimum requirements as stipulated in a bid document are to be regarded as non-responsive and rejected without further consideration.[9] Briefly, the requirement of responsiveness

operates in the following manner:- a bid only qualifies as a responsive bid if it meets with all requirements as set out in the bid document. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements.[10] Bid formalities usually require timeous submission of formal bid documents such as tax clearance certificates, audited financial statements, accreditation with standard setting bodies, membership of professional bodies, proof of company registration, certified copies of identification documents and the like. Indeed, public procurement practically bristles with formalities which bidders often overlook at their peril.[11] Such formalities are usually listed in bid documents as mandatory requirements – in other words they are a sine qua non for further consideration in the evaluation process.[12] The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing or empowerment. Bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome.

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."

See also ***Nairobi High Court Judicial Review Misc. Application No. 407 of 2018; Republic v Public Procurement Administrative Review Board; Arid Contractors & General Supplies (Interested Party) Ex parte Meru University of Science & Technology [2019] eKLR.***

69. Drawing from the above, the Tender Document is the key guide in the evaluation of tenders submitted in response to any tender invitation. Further, for a tender to be deemed responsive in respect of any requirement, it must comply with the specification of the actual requirement as set out in the Tender Document.

70. Turning to the instant Request for Review, Mandatory Requirement Nos. 12 and 18 at pages 40 and 41 of the Tender Document provided as follows:

Stage 1. Mandatory Requirements

<i>ITEM</i>	<i>MANDATORY REQUIREMENT</i>	<i>YES/NO</i>
<i>MR1</i>	<i>...</i>	
<i>MR2</i>	<i>...</i>	
<i>MR12</i>	<i>Dully filled and signed Litigation History of the company (both court and arbitration)</i>	
<i>...</i>	<i>...</i>	
<i>MR18</i>	<i>Mandatory requirements for</i> <i>a) Electrical Subcontractor</i> <i>...</i> <i>...</i> <i>6.Valid Communication Authority registration license as a telecommunication contractor</i> <i>7.Valid Communication Authority compliance certificate as telecommunication contractor</i> <i>...</i> <i>...</i>	
	<i>RESPONSIVE/NON RESPONSIVE (N/NR)</i>	

Any bidder who fails in any of the above requirements shall not be evaluated further.

71. From the above it is apparent that Stage 1 of the evaluation process made provision for mandatory requirements that tenderers were required to comply with and non-compliance with any of the

requirements would lead to the disqualification of a tenderer from the subject tender.

72. Mandatory Requirement No. 12 above required Tenderers to submit as part of their tender a duly filled and signed Litigation history of the company for both its court and arbitration matters. The form to be filled was provided as Form CON-2 at page 57 of the Tender Document. The form is herein below reproduced:

1.3. FORM CON-2

Historical Contract Non-Performance, Pending Litigation and Litigation History

Tenderer's Name: _____

Date: _____

JV Member's Name: _____

ITT No. and title: _____

Non-Performed Contracts in accordance with Section III, Evaluation and Qualification Criteria

- ☐ ***Contract non-performance did not occur since 1st January [insert year] specified in Section III, Evaluation and Qualification Criteria, Sub-Factor 2.1***
- ☐ ***Contract(s) not performed sine 1st January [insert year] specified in Section III, Evaluation and Qualification Criteria, requirement 2.1***
- ☐ ***Contract(s) withdrawn since 1st January [insert year] specified in Section III, Evaluation and Qualification Criteria, requirement 2.1***

<i>Year</i>	<i>Non-performed portion of</i>	<i>Contract identification</i>	<i>Total contract amount (current value</i>

	<i>contract</i>		<i>currency, exchange rate and Kenya Shilling equivalent)</i>
<i>[insert year]</i>	<i>Insert amount and percentage</i>	<i>Contract Identification: [indicate complete contract name/ number, and any other identification] Name of Procuring Entity: [insert full name] Address of Procuring Entity:[insert street/city/country] Reason(s) for nonperformance:[indicate main reason(s)]</i>	<i>[insert amount]</i>

Pending Litigation, in accordance with Section III, Evaluation and Qualification Criteria

No pending litigation in accordance with Section III, Evaluation and Qualification Criteria, Sub-Factor 2.3.

Pending litigation in accordance with Section III and Qualification Criteria, Su-Factor 2.3 as indicated below.

<i>Year of dispute</i>	<i>Amount in dispute (currency)</i>	<i>Contract Identification</i>	<i>Total Contract Amount (currency) Kenya Shilling Equivalent</i>
---------------------------------------	--	---------------------------------------	--

			(exchange rate)
		Contract Identification: Name of Procuring Entity: Address of Procuring Entity: Matter in dispute Party who initiated dispute: Status of dispute	
		Contract Identification: Name of Procuring Entity: Address of Procuring Entity: Matter in dispute Party who initiated dispute: Status of dispute:	
Litigation History in accordance with Section III, Evaluation and Qualification Criteria			
No Litigation History in accordance with Section III, Evaluation and Qualification Criteria, Sub Factor 2.4			
Litigation History in accordance with Section III, Evaluation and Qualification Criteria, Sub-Factor 2.4 as indicated below.			
[insert year]	[insert percentage]	Contract Identification: [indicate complete contract name, number, and any other identification] Name of Procuring Entity: Address of Procuring Entity:	[insert amount]

		<p><i>[insert street/city/country]</i></p> <p><i>Matter in dispute: [indicate main issues in dispute]</i></p> <p><i>Party who initiated the dispute: [indicate "Procuring Entity" or "Contractor"]</i></p> <p><i>Reason(s) for Litigation and award decision [indicate main reason(s)]</i></p>	
--	--	--	--

Include details relating to potential bid-rigging practices such as previous occasions where tenders were withdrawn, joint bids with competitors, subcontracting work to unsuccessful tenderer, etc.

73. In terms of the Forms provided for under the Tender Document ITT No. 12 was clear that the blank spaces in the forms were to be duly filled:

"12. Form of Tender and Schedules

12.1 The Form of Tender and Schedules, including the Bill of Quantities, shall be prepared using the relevant forms furnished in Section IV, Tendering Forms. The forms shall be completed without any alterations to the text, and no substitutes shall be accepted except as provided under ITT 20.3. All blank spaces shall be filled with the information requested...

74. From the above provisions it is apparent that tenderers participating in the subject tender were required to fill the Form CON-2as part of their tenders. Further, any tenderer who failed to supply the information

requested for under the Form would be non-responsive to the Requirement under MR 12.

75. The Board has keenly studied the Applicant's original tender as submitted to the Procuring Entity and observed that its Form CON-2 ITT No. title line was filled as follows:

**"ITT No. and title: CRA/PROC/OT/001/2023-2024
PROPOSED RENOVATION WORKS FOR TECHNICAL
UNIVERSITY OF MOMBASA (MOMBASA AND KWALE
CAMPUS)**

76. The details filled by the Applicant above are erroneous as they refer to renovation works to be undertaken at a Procuring Entity different from the one in the subject tender. Whereas the Procuring Entity in the subject tender was the Commission on Revenue Allocation, the Applicant referred to Technical University of Mombasa. Further, whereas the subject tender involved partitioning works, the Applicant was referring to renovation works. During the hearing, the Applicant's Counsel, Mr. Moriasi made an admission that the above errors constituted typographical errors that could be cured by the Board invoking ITT No. 30.

77. ITT 30 provides as follows:

30 Non-material non-conformities

31.1 Provided that a tender is substantially responsive the Procuring Entity may waive any non-conformities in the tender.

31.2 Provided that a Tender is substantially responsive, the Procuring Entity may request that a tenderer submit the

necessary information or documentation, within a reasonable period of time, to rectify non-material non-conformities in the tender related to documentation requirements. Requesting information or documentation on such non-conformities shall not be related to any aspect of the price of the tender. Failure of the tenderer to comply with the request may result in the rejection of its tender.

31.3 Provided that a tender is substantially responsive, the Procuring Entity shall rectify quantifiable non-material non-conformities related to the Tender Price. To this effect, the Tender Price shall be adjusted, for comparison purposes only, to reflect the price of a missing or non-conforming item or component in the manner specified in the TDS.

78. The Board takes the view that tender descriptions with respect to both the Tender Number and Tender Name are critical components of any tender such that any error in description goes to the root of the tender. This is because of first, the element of competition that requires tenderers to be keen in the preparation of their tenders. Additionally, improper descriptions in tenders brings about confusion in terms of the actual tender being addressed in the improperly described documents.
79. In the present case, the Applicant addressed their Form CON-2 to a different Procuring Entity, Technical University of Mombasa and also described the tender to be involving renovation works in Kwale and Mombasa when in fact the subject tender involved Partitioning works of Prism Towers in Nairobi. We find that the error in the Applicant's Form CON-2 went to the root of the tender.

80. The Applicant was also disqualified from the subject tender for failure to supply a Communication Authority Registration License for its Electrical Subcontractor as required under Mandatory Requirement No. 18.
81. Under Mandatory Requirement No. 18 at page 41 of the Tender Document, as reproduced in the foregoing parts of this Decision, tenderers were required to supply in respect of their Electrical Subcontractors, a valid Communication Authority registration license as a telecommunication contractor. Accordingly, any tenderer who failed to include as part of its tender its Electrical Subcontractor's valid Communication Authority registration license as a telecommunication contractor would be disqualified.
82. The Applicant through its Counsel, Mr. Moriasi made an admission that it failed to submit the said registration license as part of its tender despite this being mandatory requirement. It therefore follows that on the Applicant's own admission, it did not comply with a mandatory requirement which attracted the consequence of disqualification from the subject tender. The Board cannot therefore fault the Evaluation Committee for disqualifying the Applicant on the basis of this ground.
83. We find difficulty in following the Applicant's argument that the Procuring Entity ought to have requested the Applicant to confirm and supply its Communications Authority Registration License since the Applicant had submitted a Communications Authority Compliance Certificate which is only issued to holders of valid Communications Authority Registration Licenses. We say so because the tender document, which is the key guide in the evaluation exercise, required

that both the Communications Authority License and Compliance Certificate be supplied and not for the Compliance Certificate to stand in for the Registration License. Further, as correctly pointed out by Counsel for the Respondents, Ms. Yieke, the Compliance Certificate indicates at its bottom that it is not proof of a Registration License. Additionally, public procurement espouses the principle of competition which requires that participating tenderers should compete on equal footing such that any non-compliance on any tender requirement calls for the automatic disqualification of the non-compliant tender.

84. In light of the above analysis, we find that the Procuring Entity properly evaluated the Applicant's tender document submitted in response to the subject tender in accordance with Section 80 of the Act and the provisions of the Tender Document.

Whether the Procuring Entity's Evaluation Committee was properly constituted during the Evaluation of the tenders submitted in response to the subject tender?

85. The Applicant assailed the evaluation process in the subject tender. According to the Applicant's Counsel, Mr. Moriasi, the Evaluation Committee was not properly constituted since in a letter dated 31st October 2023, Design Works Architects, a consultant for the subject tender, was complaining that they had been excluded from the evaluation process. He also pointed out that none of the parties in their responses to the Request for Review addressed this save for pointing out that the letter dated 31st October 2023 was confidential.

86. Counsel for the Respondents, Ms Yieke argued that under Regulation 29 of the Regulations 2020, quorum of the Evaluation Committee was 3 people and that in the present tender there was quorum in the constituted Evaluation Committee.
87. The Board is therefore invited to interrogate the composition of the Evaluation Committee within the context of the letter dated 31st October 2023 by Design Works Architects.
88. For starters, the Applicant did not attach as part of its documents the said letter dated 31st October 2023. However, from the Applicant's description the contents of the letter, it was argued that through the letter a consultant in the subject tender was complaining of being sidelined from the tender process. Just from this description, it is abundantly clear that this letter relates to the tender process and falls within confidential documents provided for under Section 67 of the Act which safeguards integrity of parties' tender documents in the following terms:

67. Confidentiality

(1) During or after procurement proceedings and subject to subsection (3), no procuring entity and no employee or agent of the procuring entity or member of a board, commission or committee of the procuring entity shall disclose the following—

(a) information relating to a procurement whose disclosure would impede law enforcement or whose disclosure would not be in the public interest;

(b) information relating to a procurement whose disclosure would prejudice legitimate commercial interests, intellectual property rights or inhibit fair competition;

(c) information relating to the evaluation, comparison or clarification of tenders, proposals or quotations; or

(d) the contents of tenders, proposals or quotations.

(2) For the purposes of subsection (1) an employee or agent or member of a board, commission or committee of the procuring entity shall sign a confidentiality declaration form as prescribed.

(3) This section does not prevent the disclosure of information if any of the following apply—

(a) the disclosure is to an authorized employee or agent of the procuring entity or a member of a board or committee of the procuring entity involved in the procurement proceedings;

(b) the disclosure is for the purpose of law enforcement;

(c) the disclosure is for the purpose of a review under Part XV or requirements under Part IV of this Act;

(d) the disclosure is pursuant to a court order; or

(e) the disclosure is made to the Authority or Review Board under this Act.

(4) Notwithstanding the provisions of subsection (3), the disclosure to an applicant seeking a review under Part XV shall constitute only the summary referred to in section 68 (2)(d)(iii).

(5) Any person who contravenes the provisions of this section commits an offence as stipulated in section 176(1)(f)

and shall be debarred and prohibited to work for a government entity or where the government holds shares, for a period of ten years.

89. From the above, it is clear that the Act upholds the confidentiality of confidential documents relating to public procurement. Specifically, the section prohibits the Procuring Entity and its officers and agents from disclosing of any procurement information that would (i) be against public interest; (ii) prejudice the legitimate commercial interest of tenderers; (iii) disclose the evaluation and comparison of tenders and (iv) the contents of tenders. The Act further creates an offence attracting criminal sanctions for any such disclosure.
90. This Board has also in its past Decisions affirmed that Requests for Review that are founded on confidential documents militate against public interest and are thus destined for dismissal as parties who breach the law should not be permitted to benefit from such breaches.
91. In ***PPARB Application No. 21 of 2015; Thwama Building Services v Tharaka Nithi County Government this Board*** while discussing Section 44 of the preceding statute to the present Act affirmed that Applicant's founding their Requests for Review on Confidential Documents in breach of procurement laws should not be allowed to benefit from such breach:
- "The Applicant while referring to the same undisclosed source then proceeded to state in paragraph 1.9 of the Request for Review that the Interested Party had been awarded the tender despite the fact that as per the tender requirement it had not provided: -***

a) A bid validity period which was sufficient

b) Litigation history

c) Proof of similar works

d) The bid was higher than the Applicant's

The Board wishes to observe that whereas items (a) and (d) above could be established at the tender opening meeting, items (b) and (c) could only be established upon an access to the successful bidder's tender document. The Board is therefore unable to accept the Applicant's argument that there was no disclosure of information and finds that contrary to the Applicant's submissions, there was in fact such a disclosure and reliance on what was clearly confidential information...

...It is therefore clear from the above provisions of the Act and the above authority that the issue of reliance on confidential information is a serious one and bears heavy consequences. The Applicant in this Request for Review and any other bidder are therefore warned that the Board will not in future allow reliance on confidential information as a basis for any Request for Review and will not hesitate to recommend sanctions against any bidder who breaches the provisions of the Act on confidentiality."

92. In ***PPARB Application No. 11 of 2016; Amro Insurance Brokers Limited v Kenya Wildlife Service*** this Board dismissed the Request for Review and referred the matter to the Anti-corruption authorities

after the Applicant was found to have based its case on confidential documents:

"The Board has looked at the Applicant's conduct in this application and finds the same to be gross and highly inappropriate. The Applicant's conduct of obtaining evaluation reports and other bidders tender and other confidential documents defeats the objectives of Article 227 and the objectives of Public Procurement and is not capable of any reasonable explanation. Such if allowed to occur will adversely affect completion, fair treatment to all bidders, it will diminish integrating reduce transparency and accountability and diminish public confidence in Procurement processes.

Owing to the gravity of this matter the Board finds that the Applicant's application cannot stand and therefore fails.

The Board further directs the Ethics and Anti-Corruption Commission and other relevant authorities to investigate the circumstances under which the Applicant in this Request for Review came into the possession of confidential documents including the tender documents belong to other bidders with a view of taking any such remedial action as it or they deem appropriate."

93. In the present case, it is not clear where the Applicant accessed the letter dated 31st October 2023 but what is clear is that the same contains information that the Applicant indicates relates to the evaluation of the tenders in the subject tender and thus confidential information under section 67 of the Act. In this regard, the Board shall

not consider this argument which is founded on a confidential document.

94. The Board has looked at the Minutes of the Evaluation Committee and observed that the Committee comprised of 6 members which number surpasses the minimum quorum of 3 members under Regulation 29 of the Regulations 2020. The Evaluation Committee was therefore quorate in the conduct of its evaluation.
95. In light of the above analysis, we find that the Procuring Entity's Evaluation Committee was properly constituted during the evaluation of the tenders submitted in response to the subject tender.

What orders the Board should grant in the circumstances?

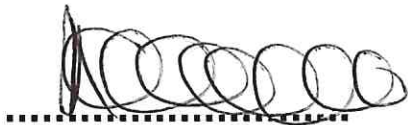
96. The Board has found that the Procuring Entity properly evaluated the Applicant's tender document submitted in response to the subject tender in accordance with Section 80 of the Act and the provisions of the Tender Document.
97. The Board has also found that the Procuring Entity's Evaluation Committee was properly constituted during the evaluation of the tenders submitted in response to the subject tender.
98. The upshot of our finding is that the Request for Review dated 16th November 2023 in respect of Tender No. CRA/PROC/OT/001/2023-2024 for Proposed Office Partitioning Works on 28th, 29th & 30th Floors at Prism Towers for Commission on Revenue Allocation fails in the following specific terms:

FINAL ORDERS

99. 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 16th November 2023:

- 1. The Request for Review dated 16th November 2023 be and is hereby dismissed.**
- 2. The Procuring Entity is at liberty to proceed with the Tender No. CRA/PROC/OT/001/2023-2024 for Proposed Office Partitioning Works on 28th, 29th & 30th Floors at Prism Towers for Commission on Revenue Allocation to its logical conclusion.**
- 3. Given the Board's finding above, each party shall bear its own costs.**

Dated at NAIROBI, this 6th Day of December 2023.

A stylized signature in black ink, consisting of a series of overlapping loops, positioned above a dotted line.

PANEL CHAIRPERSON

PPARB

A stylized signature in blue ink, appearing to read 'Aulana', positioned above a dotted line.

SECRETARY

PPARB