

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 24/2024 OF 15TH MARCH 2024

BETWEEN

AWELO INVESTMENTS LIMITED APPLICANT

AND

THE ACCOUNTING OFFICER,

UGUNJA TECHNICAL & VOCATIONAL COLLEGE RESPONDENT

Review against the decision of the Accounting Officer, Ugunja Technical & Vocational College in relation to Tender No. SC/MOE/SCMS/UJTVC/001/2023 – 2024 for Proposed Construction of Workshop Block Phase IA at Ugunja Technical and Vocational College.

BOARD MEMBERS PRESENT

- | | |
|------------------------------|-------------|
| 1. Mr. George Murugu FCI Arb | Chairperson |
| 2. Eng. Lilian Ogombo | Member |
| 3. Mr. Jackson Awele | Member |

IN ATTENDANCE

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

PRESENT BY INVITATION

APPLICANT

AWELO INVESTMENTS LIMITED

1. Mr. Collins Osumba Advocate, WSM Advocates LLP
2. Mr. Samora Marshel Advocate, WSM Advocates LLP

RESPONDENTS

THE ACCOUNTING OFFICER, UGUNJA TECHNICAL & VOCATIONAL COLLEGE

1. Ms. MaryAnne Omondi Advocate, Office of the Attorney General
2. Ms. Audrey Monica Atieno Odhiambo Principal, Ugunja Technical & Vocational College

BACKGROUND OF THE DECISION

The Tendering Process

1. Ugunja Technical and Vocational College, the Procuring Entity herein, invited sealed tenders on 12th January 2024 from qualified and interested tenderers in response to Tender No. SC/MOE/SCMS/UJTVC/001/2023 – 2024 for Proposed Construction of Workshop Block Phase IA at Ugunja Technical and Vocational College (hereinafter referred to as the "subject tender"). The subject tender's submission deadline was scheduled for 31st January 2024 at 10.00 a.m.

Submission of Tenders and Tender Opening

2. According to the Tender Opening Register and the Minutes of the subject tender's opening held on 31st January 2024 signed by members of the Tender Opening Committee on 31st January 2024 (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 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 nine (9) tenders were submitted in response to the subject tender. The said nine (9) tenders were opened in the presence of tenderers' representatives present at the tender opening session, and were recorded as follows:

No.	Name of Tenderer
1.	Smartways Holdings Limited
2.	Samaha Company Limited
3.	Freco General Contractors Limited
4.	Celex Company Limited
5.	Awelo Investments Limited
6.	Dictum Agencies Limited
7.	Yala Multipurpose Enterprise Ltd
8.	Hillstake Logistics Limited

9.	Wasker Enterprise Limited
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Evaluation of Tenders

3. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the Respondent undertook evaluation of the nine (9) tenders as captured in an Evaluation Report for the subject tender signed by members of the Evaluation Committee on 5th February 2024 (hereinafter referred to as the "Evaluation Report") in the following stages:

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

Preliminary Evaluation

4. At this stage of evaluation, the Evaluation Committee was required to carry out a Preliminary Evaluation and examine tenders for responsiveness using the criteria provided under Clause 2 Preliminary examination for Determination of Responsiveness of Section III-Evaluation and Qualification Criteria 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, six (6) tenders were determined non-responsive while three (3) tenders were determined responsive and proceeded to Technical Evaluation.

Technical Evaluation

6. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria provided under Clause 3 Technical Evaluation Criteria of Section III- Evaluation and Qualification Criteria of the Tender Document. Any bid found to be non-responsive at this stage would be disqualified from proceeding to Financial Evaluation.
7. At the end of evaluation at this stage, the three (3) tenders were determined non-responsive and did not progress further.

Financial Evaluation

8. At this stage of evaluation, the Evaluation Committee was required to apply the criteria provided under Clause 4 Financial Evaluation of Section III- Evaluation and Qualification Criteria of the Tender Document. The tender with the lowest evaluated price would be considered for award.
9. No tender made it to this stage of evaluation.

Evaluation Committee's Recommendation

10. The Evaluation Committee recommended the subject tender to be re-advertised.

Professional Opinion

11. In a Professional Opinion dated 29th February 2024 (hereinafter referred to as the "Professional Opinion"), Mr. Joshua K.O. Okoth reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and concurred with the recommendations of the Evaluation Committee and recommended that the procurement proceedings in the subject tender be terminated in line with Section 63(1)(f) of the Act.

12. Thereafter, the Respondent herein, approved the Professional Opinion on 29th February 2024.

Notification to Tenderers

13. Tenderers were notified of the outcome of evaluation of the subject tender vide letters of termination of procurement proceedings in the subject tender dated 4th March 2024 signed by the Respondent.

REQUEST FOR REVIEW NO. 24 OF 2024

14. On 15th March 2023, Awelo Investments Limited, the Applicant herein, filed a Request for Review dated 14th March 2024 together with a Supporting Affidavit sworn on 14th March 2024 by Erish Awino, its Sole Director (hereinafter referred to as the 'instant Request for Review') through the firm of WSM Advocates LLP seeking the following orders from the Board in verbatim:

- a) THAT the Respondent's letter Ref: UJTVC/ADM/PRO/XC/4/3/24(5) dated 4th March, 2024 notifying the Applicant that the Tender had been terminated be set aside in its entirety.**
- b) THAT the Respondent be directed to re-admit the Applicant's bid and to re-evaluate the Applicant's bid noting to observe the provisions of section 79(1) and (2) of the Public Procurement and Assets Disposal Act.**
- c) THAT upon grant of prayer (a) and (b) above, the Honourable Review Board be pleased to order that the Applicant's bid had complied with both the Preliminary Examination Technical Responsiveness stage and the System Requirements stage and direct the Respondent to evaluate the Applicant's bid to its logical conclusion and thereafter declare the Applicant as the successful Tenderer.**
- d) THAT upon granting prayer 3 above, the Honourable Review Board be pleased to order the Respondent to issue the Applicant with a notification of successful tender in compliance with the letter and spirit of section 87(1) of the Act.**

e) THAT the Honourable Review Board be pleased to make such other or further orders at it may deem just, expedient, and appropriate in ensuring that the ends of justice are fully met in the circumstances of this Request for Review.

f) THAT the Respondents be compelled to pay to the Applicant the costs arising from and incidental to this Request for Review.

15. In a Notification of Appeal and a letter dated 15th March 2024, 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 15th March 2024.

16. On 20th March 2024, the Respondent filed through Callen Masaka Principal Litigation Counsel, Attorney General Chambers a Memorandum of Appearance dated 19th March 2024, a Response to the Request for Review dated 19th March 2024, a confidential report dated

19th March 2024 and signed by the Respondent together with the confidential documents concerning the subject tender pursuant to section 67(3)(e) of the Act.

17. Vide letters dated 21st March 2024, 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 three (3) days.

18. Vide a Hearing Notice dated 22nd March 2024, the Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the Request for Review slated for 28th March 2024 at 2.30 p.m., through the link availed in the said Hearing Notice.

19. On 26th March 2024, the Applicant filed through its advocates Written Submissions dated 26th March 2024.

20. At the hearing on 28th March 2024, the Board confirmed pleadings filed in the matter and allocated parties time to highlight their respective cases. Thus, the instant Request for Review proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

Applicant's Submission

21. In his submissions, counsel for the Applicant, Mr. Osumba submitted that the Applicant's contention is that its bid was not evaluated in a manner that is fair, transparent, and equitable pursuant to Section 227 of the Constitution.

22. Counsel submitted that Section 80(2) of the Act requires that bids are evaluated and compared as per the procedures and requirements set out in the Tender Document and referred the Board to the provisions under Clause 3 Technical Evaluation Criteria of Section III- Evaluation and Qualification Criteria of the Tender Document. He pointed out that bidders were required to submit a power of attorney required to be on a letter head of the bidder, to be signed by the majority shareholder of the company and to be accompanied by an acceptance of the donee.

23. Counsel further submitted that according to the Respondents, the Applicant's bid failed at the Technical Evaluation stage for want of a power of attorney in the proper format and drew the Board's attention to annexure EO-4 in the Applicant's Supporting Affidavit containing the observations of the Evaluation Committee detailing the reasons why the Applicant was found non-responsive.

24. Mr. Osumba submitted that it is apparent from the observations of the Evaluation Committee that the Applicant provided a power of attorney

dated 24th January 2024 even though it was not in the format set out in the Tender Document. He pressed on that the said power of attorney was accompanied by a letter of even date and a CR 12 confirming that the Applicant was owned by Erish Awino as the sole director and admittedly, the power of attorney submitted by the Applicant was not on a letter head and was not accompanied by an acceptance from the donee and the question that the Board is called to determine is whether those omissions were non-material and could have been cured under the provisions of the Tender Document and the Act.

25. Mr. Osumba drew the Board's attention to ITT 31.0 of the Tender Document which provided for Determination of Responsiveness of bids and in particular ITT 31.2 of the Tender Document on what would constitute a material deviation. He further referred the Board to ITT 32.0 of the Tender Document providing for Non-Material non-conformities of bids. Counsel argued that failure by the Applicant to strictly provide a power of attorney that was on a letter head was a minor deviation that ought to have been cured under ITT 32 of the Tender Document.

26. Counsel submitted that a minor deviation was defined by the High Court in *Republic v Public Procurement Administrative Review Board & Another Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex parte TUV Austria Turk (2020) eKLR* as one that is merely a matter of form and not of substance and pertains to some immaterial defect in a bid or variation of a bid from the exact

requirements of the invitation that can be corrected or waived without being prejudicial to other bidders. He further submitted that failure to provide a power of attorney on the letterhead of the Applicant or having it accepted by the donee could not in any way have affected the quantity, quality or delivery of the works that the Respondent tendered for and as such, these were minor deviations that should have been cured pursuant to the provisions of the Tender Document and sections 79(1) and (2) of the Act.

27. Counsel referred the Board to paragraph 19 of the Applicant's Written Submissions and argued that the High Court declared that a procuring entity may consider a tender as responsive even if it contains minor deviations so long as the said deviations do not materially alter substantially or materially the characteristics or conditions of the Tender Document.

28. At this juncture, Mr. Marshel submitted that Section 80(3) of the Act providing for the procedure and criteria for evaluation of tenders indicate that the criteria ought to be objective and quantifiable. He pointed out that the matter in contention was the power of attorney that was submitted by the Applicant and questioned the objective of having a power of attorney and whether the power of attorney submitted served the purpose and intention as required by the Tender Document.

29. Mr. Marshel referred the Board to Section 63(1)(f) of the Act relied upon by the Procuring Entity in terminating the subject tender and the provisions of Regulation 48(2) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020') requiring an accounting officer to give a written report to the Public Procurement Regulatory Authority (hereinafter referred to as 'the Authority') and submitted that the Respondent failed to comply with the said requirements since no report and reasons were given to the Authority as to why the subject tender was declared non-responsive.

Respondent's Submissions

30. In her submissions, Ms. Odhiambo gave a brief background pertaining to the tendering process of the subject tender which entailed receipt of funding for the said project, preparation of the bid document, advertisement of the subject tender, tender opening and evaluation of submitted bids. She indicated that she received the Evaluation Report and Professional Opinion recommending re-advertisement of the subject tender and in approving the same, was guided by the law. She further indicated that she received correspondence to suspend the procurement proceedings in the subject tender on 15th March 2024 from the Board and that everything pertaining to the subject tender was posted on the Public Procurement Information Portal and every document pertaining to the subject tender was submitted to the Board.

31. At this juncture, counsel for the Respondent, Ms. Omondi submitted that the subject tender was terminated by virtue of it being non-responsive in accordance with Section 63 of the Act allowing the Respondent to terminate the procurement proceedings on the ground that no bid that was submitted in the subject tender was responsive.
32. She referred the Board to the provisions of Section 79(1) of the Act and argued that upon evaluation of the Applicant's tender, the Evaluation Committee established that the Applicant's Power of Attorney as submitted was not acceptable as per the requirements of the Tender Document and the Applicant did not issue an acceptance letter of the power of attorney. Counsel argued that a company is different entity from its directors and by requiring an acceptance letter, the donee accepts the power to act in accordance to the power donated. She pressed on that in the current circumstances. The donee did not accept the powers donated to it by the Applicant hence the Respondent was not in a position to accept the submitted power of attorney.
33. She further argued that the postal address as detailed in the power of attorney were different from the postal address indicated in the Applicant's CR 12 and as such, the Applicant's power of attorney had a lot of inconsistencies which justifies its disqualification. Counsel submitted that the Procuring Entity is a government entity which is required to award compliant bidders who comply to the requirements in the Tender Document.

34. Ms. Omondi further submitted that Section 60 of the Act requires a Tender Document to provide specific requirements to bidders which includes technical requirements and as such the provision for a power of attorney in the Tender Document was a technical requirement set as a mandatory requirement and failure by the Applicant to comply with the said requirement resulted to its disqualification.

35. She pointed out that the prayers sought by the Applicant in the instant Request for Review were not practical since upon cancellation of the subject tender, the Procuring Entity re-advertised the said tender and the Applicant has not re-applied for the same being an opportunity for the Applicant to correct its mistake.

36. When asked by the Board to confirm if the procurement proceedings with respect to the subject tender had been suspended, counsel submitted that the subject tender had been re-advertised on 12th March 2024 prior to filing of the instant Request for Review and the Respondent had accepted several bids prior to receipt of the notification of appeal on 15th March 2024 suspending the procurement proceedings in the subject tender and communication was issued on the Procuring Entity's website and on PPIP on suspension of the procurement process.

37. When asked to clarify to the Board as to whether reasons for non-responsiveness of bidders including the Applicant were indicated in the

letter of termination, counsel submitted that the Respondent did not indicate the specific reasons and details for each bidder's non-responsiveness.

Applicant's Rejoinder

38. In a rejoinder, counsel for the Applicant, Mr. Osumba submitted that section 79(1) of the Act cannot be read in isolation and has to be read together with section 79(2) of the Act. He further submitted that the contention that the Applicant's tender did not comply with the mandatory requirements in the Tender Document is negated by the provisions of Section 79(2) of the Act which provides that in case of deviations, responsiveness of a tender shall not be affected.

39. He pointed out that from the Respondent's submission, it had admitted to accepting tenders in the subject tender yet procurement proceedings had been suspended upon filing of the instant Request for Review.

40. He urged the Board to allow the Request for Review as prayed.

41. When asked by the Board to clarify whether the requirement for furnishing a power of attorney was mandatory or permissive, counsel submitted that the said requirement was provided under the Technical Evaluation stage and not at the Mandatory Evaluation stage and as such, the Applicant met all the requirements at the Mandatory Evaluation stage and as such, it was not a mandatory requirement. He further submitted that the Tender Document cannot prevail over the

Act and that Section 79(2) of the Act states that a responsive tender shall not be affected by minor deviations and as such, the Procuring Entity is allowed to overlook minor deviations as long as the tender is responsive and it can exercise its discretion on a case by case basis. Counsel pointed out that Regulation 75(2) of the Act provides that classification of a deviation ought to be treated uniformly and none had been presented before the Board.

42. When asked to clarify whether the Applicant provided a letter of acceptance of donation of the power of attorney, counsel submitted that this was a requirement and indicated that failure to have an acceptance from the donee amounted to a minor deviation that ought not to have affected the Applicant's tender responsiveness taking note of the fact that the Applicant was a sole proprietorship.
43. Counsel confirmed to the Board that the Power of Attorney was not on the Applicant's letterhead and argued that there may be a contention on the form of the acceptance letter noting the Applicant's forwarding letter and as such, objectively it can be said that there was an acceptance letter by the donee but subjectively, there was no acceptance letter. He further invited the Board to find that the Tender Document ought to be read wholesomely and that the Procuring Entity could request a bidder to submit for documents to cure non-conformities in its bid where the bid was substantially responsive.

44. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 15th March 2024 was due to expire on 5th April 2024 and that the Board would communicate its decision on or before 5th April 2024 to all parties to the Request for Review via email.

BOARD'S DECISION

45. 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.

A. Whether the Procuring Entity's Evaluation Committee in disqualifying the Applicant's tender at the Technical Evaluation stage acted in breach of the provisions of the Tender Document, Sections 79 & 80 of the Act and Article 227(1) of the Constitution;

B. Whether the Procuring Entity terminated the subject tender in accordance with Section 63 of the Act;

C. What orders should the Board grant in the circumstances?

Whether the Procuring Entity's Evaluation Committee in disqualifying the Applicant's tender at the Technical Evaluation stage acted in breach of the provisions of the Tender Document, Sections 79 & 80 of the Act and Article 227(1) of the Constitution;

46. The Applicant contends that the Respondent erred in law by declaring its tender non-responsive despite its tender being technically qualified and substantially responsive. It is the Applicant's case that failure to submit its Power of Attorney in the described format provided under the provisions of the Tender Document was an oversight and a minor deviation that does not materially depart from the requirements of the Tender Document and was curable under Section 79(2)(b) of the Act.

47. On the other hand, it is the Respondents case that the Applicant's tender failed to meet a mandatory technical 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.

48. The Board notes that the objective of public procurement is to provide quality goods and services in a system that implements the principles specified in Article 227 of the Constitution which provides as follows:

"227. Procurement of public goods and services

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

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

- a)
- b)
- c) **and**
- d) ”
- e)

49. The Board observes that the legislation contemplated in Article 227(2) of the Constitution is the Act. Section 80 of the Act is instructive on how evaluation and comparison of tenders should be conducted by a procuring entity as follows:

"80. Evaluation of tender

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

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

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

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

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

(4)

50. 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.

51. 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."

52. Having carefully studied the Tender Document submitted by the Respondent as part of the confidential documents pursuant to Section 67(3)(e) of the Act we note that Clause 3: Technical Evaluation of Section III- Evaluation and Qualification Criteria of the Tender Document provided as follows:

<i>Technical Requirement</i>	<i>Description</i>	<i>Bidders' Response</i>	<i>Remarks (Complaint/ Not Compliant)</i>
<i>.....</i>	<i>.....</i>		
<i>Power of Attorney</i>	<i>This MUST be in the form of a</i>		

	<p><i>letter issued by the company to their legal representative. It must be on the letterhead of the company signed by the majority shareholding director. It must be accompanied with an acceptance from the person so appointed.</i></p>		
<p>.....</p>	<p>.....</p>		

53. From the above, we note that it was mandatory for a tenderer to submit a Power of Attorney (a) in the form of a letter issued by the company to their legal representative, (b) on the letterhead of the company, (c) signed by the majority shareholding, and (d) accompanied with an acceptance from the person so appointed.

54. It is not in contest that the Applicant submitted a Power of Attorney which was not in the described format provided under Clause 3: Technical Evaluation of Section III- Evaluation and Qualification Criteria of the Tender Document.

55. What is in contest is whether the non-conformity of the Power of Attorney submitted by the Applicant in the subject tender can be treated as a minor deviation pursuant to Section 79(2) of the Act.

56. 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."

57. 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 other mandatory requirements set out in the tender documents. Notably, 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. Section 79(2) of the Act 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.

58. 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."

59. 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.

60. The provisions for submission of a Power of Attorney under Clause 3: Technical Evaluation of Section III- Evaluation and Qualification Criteria of the Tender Document are set in mandatory terms. Tenderers were required to be compliant so as to progress to the next stage of evaluation as provided in the Tender Document. It is not lost to us that all the three (3) responsive tenderers at the Technical Evaluation stage, including the Applicant were disqualified for having failed to comply with the technical requirement to provide the Power of Attorney in the required format as detailed under Clause 3: Technical Evaluation of Section III- Evaluation and Qualification Criteria of the Tender Document.

61. 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."

62. Considering the above, we are not persuaded by the Applicant's argument to consider the non-conformity in its bid document as immaterial and to find that its tender was substantially responsive as doing so would affect the competitive position of other tenders. The Board is left with the inevitable conclusion that the Applicant failed to comply with Technical Requirement for submission of a Power of Attorney under Clause 3: Technical Evaluation of Section III- Evaluation and Qualification Criteria of the Tender Document.

63. In the circumstances, the Board finds that the Applicant did not satisfy with Technical Mandatory Requirement for submission of a Power of Attorney under Clause 3: Technical Evaluation of Section III- Evaluation

and Qualification Criteria of the Tender Document to proceed for further evaluation at the Financial Evaluation stage.

Whether the Procuring Entity terminated the subject tender in accordance with Section 63 of the Act;

64. The Applicant contends that the Respondent prematurely invoked the provisions of Section 63(1)(f) of the Act in terminating the subject tender and failed to issue a written report to the Public Procurement Regulatory Authority (hereinafter referred to as "the Authority") with reasons for termination of the subject tender.

65. On the other hand, the Respondent contends that termination of the subject tender was done in line with the provisions of Section 63 of the Act there being no responsive tenderer in the subject tender and that tenderers were duly notified and a report filed with the Authority.

66. Termination of procurement proceedings is governed by Section 63 of the Act, which stipulates that when a termination of procurement and asset disposal proceedings meets the threshold of the said provision, the jurisdiction of this Board is ousted by virtue of section 167 (4) (b) of the Act which provides as follows: -

"The following matters shall not be subject to the review of procurement proceedings under subsection (1)—

(a)

(b) a termination of a procurement or asset disposal proceedings in accordance with section 63 of this Act [Emphasis by the Board]

67. In the case of **Miscellaneous Civil Application No. 1260 of 2007, Republic v. Public Procurement Administrative Review Board & Another Ex parte Selex Sistemi Integrati (2008) eKLR**, the High Court while determining the legality of sections 36 (6) and 100 (4) of the repealed Public Procurement and Disposal Act, 2005 that dealt with termination of procurement proceedings held as follows:

"I now wish to examine the issues for determination. The first issue is whether the Public Procurement and Disposal Act, 2005, s 100 (4) ousts the jurisdiction of the court in judicial review and to what extent the same ousts the jurisdiction of the Review Board. That question can be answered by a close scrutiny of section 36 (6) of the said Act which provides:

"A termination under this section shall not be reviewed by the Review Board or a court."

In the literal sense, section 36 (6) quoted above purports to oust the jurisdiction of the court and the Review Board. The Court has to look into the ouster clause as well as the challenged decision to ensure that justice is not defeated. In our jurisdiction, the principle of proportionality is now part of our jurisprudence. In the case of Smith v. East Elloe Rural

District Council [1965] AC 736 Lord Viscount Simonds stated as follows:

"Anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal."

It is a well settled principle of law that statutory provisions tending to oust the jurisdiction of the Court should be construed strictly and narrowly... The court must look at the intention of Parliament in section 2 of the said Act which is inter alia, to promote the integrity and fairness as well as to increase transparency and accountability in Public Procurement Procedures.

To illustrate the point, the failure by the 2nd Respondent to render reasons for the decision to terminate the Applicant's tender makes the decision amenable to review by the Court since the giving of reasons is one of the fundamental tenets of the principle of natural justice. Secondly, the Review Board ought to have addressed its mind to the question whether the termination met the threshold under the Act, before finding

that it lacks jurisdiction to entertain the case before it, on the basis of a mere letter of termination furnished before it.

68. The court in the *Selex Sistemi Integrati* case cited above, held that the Board has the duty to question whether a decision by a procuring entity terminating a tender meets the threshold of Section 63 of the Act, and that this Board's jurisdiction is not ousted by the mere fact of the existence of a letter of notification terminating procurement proceedings.

69. Further, in **Judicial Review Miscellaneous Application No. 142 of 2018, Republic v. Public Procurement and Administrative Review Board & Another ex parte Kenya Veterinary Vaccines Production Institute(2018) eKLR** (hereinafter referred to as "JR No. 142 of 2018") the High Court held as follows:

"The main question to be answered is whether the Respondent [Review Board] erred in finding it had jurisdiction to entertain the Interested Party's Request for Review of the Applicant's decision to terminate the subject procurement..."

A plain reading of section 167 (4) (b) is to the effect that a termination that is in accordance with section 63 of the Act is not subject to review. Therefore, there is a statutory pre-condition that first needs to be satisfied in the said sub-

section namely that the termination proceedings are conducted in accordance with the provisions of section 63 of the Act, and that the circumstances set out in section 63 were satisfied, before the jurisdiction of the Respondent can be ousted.

As has previously been held by this Court in Republic v Kenya National Highways Authority Ex Parte Adopt –A- Light Ltd [2018] eKLR and Republic v. Secretary of the Firearms Licensing Board & 2 others Ex parte Senator Johnson Muthama [2018] eKLR, it is for the public body which is the primary decision maker, [in this instance the Applicant as the procuring entity] to determine if the statutory pre-conditions and circumstances in section 63 exists before a procurement is to be terminated...

However, the Respondent [Review Board] and this Court as review courts have jurisdiction where there is a challenge as to whether or not the statutory precondition was satisfied, and/or that there was a wrong finding made by the Applicant in this regard...

The Respondent [Review Board] was therefore within its jurisdiction and review powers, and was not in error, to

interrogate the Applicant's Accounting Officer's conclusion as to the existence or otherwise of the conditions set out in section 63 of the Act, and particularly the reason given that there was no budgetary allocation for the procurement. This was also the holding by this Court (Mativo J.) in R v Public Procurement Administrative Review Board & 2 Others Ex-parte Selex Sistemi Integrati which detailed the evidence that the Respondent would be required to consider while determining the propriety of a termination of a procurement process under the provisions of section 63 of the Act

70. In **Nairobi High Court Judicial Review Misc. Application No. 390 of 2018; R v Public Procurement Administrative Review Board & Ors Ex parte Kenya Revenue Authority**, the High Court considered a judicial review application challenging the decision of this Board. The Board dismissed a preliminary objection on grounds that it lacked jurisdiction to hear a Request for Review before it on account of the fact that it related to the termination of a procurement process under section 63 of the Act. In dismissing the judicial review application, the Court affirmed that the Board has jurisdiction to first establish whether the preconditions for termination under section 63 of the Act have been met before downing its tools:

"33. A plain reading of Section 167(4) (b) of the Act is to the effect that a termination that is in accordance with section 63

of the Act is not subject to review. Therefore, there is a statutory pre-condition that first needs to be satisfied in the said sub-section namely that the termination proceedings are conducted in accordance with the provisions of section 63 of the Act, and that the circumstances set out in section 63 were satisfied, before the jurisdiction of the Respondent can be ousted...

See also Nairobi High Court Judicial Review Misc. Application No. 117 of 2020; Parliamentary Service Commission v Public Procurement Administrative Review Board &Ors v Aprim Consultants

71. It is therefore important for the Board to determine the legality, or lack thereof, of the Procuring Entity's decision terminating the procurement proceedings in the subject tender, which determination can only be made by interrogating the reason cited for the impugned termination. It is only then, that a determination whether or not the Board has jurisdiction can be made.

72. We note from the Evaluation Report that the Evaluation Committee recommended that the subject tender be re-advertised since there was no bidder who had qualified to be recommended for award of the subject tender since the three (3) tenders that had progressed to the Technical Evaluation stage were rendered non-responsive having failed to comply with the mandatory technical requirement set out under

Clause 3: Technical Evaluation of Section III- Evaluation and Qualification Criteria of the Tender Document.

73. It was on this basis that the Respondent proceeded to terminate the subject tender vide letters dated 4th March 2024 which read in part as follows:

".....
The aim of this letter, therefore, and in full observance of Section 63(1)(f) of the Public Procurement and Asset Disposal Act, 2015, is to inform you that the proceedings for the above works, for which you submitted your bid for consideration, has been terminated. A fresh bidding process will be commenced in due course and you are invited to take part again.

....."

74. Having considered parties' pleadings and submissions in the instant Request for Review and the confidential file submitted by the 1st Respondent to the Board pursuant to Section 67(3)(e) of the Act, the question that comes up for this Board's determination is whether the Procuring Entity's decision to terminate the subject tender on the basis of Section 63(1)(f) of the Act is justified.

75. Section 63 of the Act is instructive in the manner in which a procuring entity may terminate procurement or asset disposal proceedings and provides as follows:

"(1) An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies—

(a) the subject procurement has been overtaken by—

(i) operation of law; or

(ii) substantial technological change;

(b) inadequate budgetary provision;

(c) no tender was received;

(d) there is evidence that prices of the bids are above market prices;

(e) material governance issues have been detected;

(f) all evaluated tenders are non-responsive;

(g) force majeure;

(h) civil commotion, hostilities or an act of war; or

(i) upon receiving subsequent evidence of engagement in fraudulent or corrupt practices by the tenderer.

- (2) An accounting officer who terminates procurement or asset disposal proceedings shall give the Authority a written report on the termination within fourteen days.**
- (3) A report under subsection (2) shall include the reasons for the termination.**
- (4) An accounting officer shall notify all persons who submitted tenders of the termination within fourteen days of termination and such notice shall contain the reason for termination."**

76. Section 63 (1) of the Act stipulates that termination of procurement proceedings is only done by an accounting officer prior to notification of award of a tender and when any of the pre-conditions listed in subsection (a) to (i) exist. Additionally, Section 63 (2), (3), and (4) outlines the procedure to be followed by a procuring entity when terminating a tender. It is trite law that for the termination of procurement proceedings to pass the legal muster, a procuring entity must demonstrate compliance with both the substantive and procedural requirements under Section 63 of the Act.

77. In essence, Section 63 of the Act is instructive on termination of procurement proceedings being undertaken by an accounting officer of a procuring entity at any time before notification of award is made and such termination must only be effected if any of the pre-conditions enumerated in Section 63(1) (a) to (i) of the Act are present. This is the substantive statutory pre-condition that must be satisfied before a

termination of procurement proceedings is deemed lawful. Further, following such termination, an accounting officer is required to give the Authority a written report on the termination with reasons and notify all tenderers, in writing, of the termination with reasons within fourteen (14) days of termination. These are the procedural statutory pre-conditions that must be satisfied before a termination of procurement proceedings is deemed lawful.

78. In **Republic v Public Procurement Administrative Review Board; Leeds Equipment & Systems Limited (interested Party); Ex parte Kenya Veterinary Vaccines Production Institute [2018] eKLR** the High Court held that:

"In a nutshell therefore and based on the above-cited cases where the decision of a procuring entity to terminate procurement process is challenged before the Board the procuring entity is to place sufficient reasons and evidence before the Board to justify and support the ground of termination of the procurement process under challenge. The procuring entity must in addition to providing sufficient evidence also demonstrate that it has complied with the substantive and procedural requirements set out under the provisions of Section 63 of the Act". [Emphasis by the Board]

On the substantive requirements for termination of procurement proceedings in the subject tender;

79. Section 63(1)(f) of the Act as cited hereinbefore stipulates that one of the grounds that a procuring entity may rely on to justify its termination of a tender is if all the evaluated tenders in the subject tender are non-responsive.

80. Superior courts in this country have previously warned against the growing trend of procuring entity's reproducing the grounds of termination under Section 63 of the Act without any further information. In **Republic v Public Procurement Administrative Review Board Exparte Nairobi City & Sewerage Company; Webtribe Limited t/a Jambopay Limited (Interested Party) [2019] eKLR; Nairobi High Court Judicial Review Application 437 of 2018** the High Court considered a judicial review application challenging the decision of this Board that had found that the Procuring Entity irregularly terminated the tender under consideration. In dismissing the judicial review application, the High Court sounded a warning to procuring entities that mere recitation of grounds of termination of a tender under Section 63 of the Act without information establishing the alleged ground of termination is insufficient to justify such termination:

"45. The mere recitation of the statutory language, as has happened in this case is not sufficient to establish the grounds or sufficient reasons. The reasons for the

termination must provide sufficient information to bring the grounds within the provisions of the law. This is because the tender process and in particular, the termination, must be done in a transparent and accountable and legal manner as the law demands. This is because the question whether the information put forward is sufficient to place the termination within the ambit of the law will be determined by the nature of the reasons given. The question is not whether the best reasons to justify termination has been provided, but whether the reasons provided are sufficient for a reasonable tribunal or body to conclude, on the probabilities, that the grounds relied upon fall within any of the grounds under section 63 of the Act. If it does, then the party so claiming has discharged its burden under section 63"

81. From the above holding, which is binding on this Board, public procurement processes, including termination or cancellation of a public tender, should be done in an open and transparent manner and mere recitation of the statutory language under Section 63 of the Act does not suffice. In our considered view, fairness and transparency during termination of procurement proceedings require as of necessity that an accounting officer of a procuring entity should not only recite the statutory language as reasons for termination but also provide real and tangible reasons backed with sufficient evidence for such

termination. With this information and evidence, aggrieved tenderers will critically weigh their options on whether to challenge or not to challenge such a termination in light of being in possession of sufficient evidence of the reasons for such termination.

82. In the case of **Kenya Akiba Micro Financing Limited v Ezekiel Chebii & 14 Others (2012) eKLR**, the High Court held:

"Section 112 of the Evidence Act Chapter 80 of the Laws of Kenya provides:

'In civil proceedings, when any fact especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.'

Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of Kimotho –vs-KCB (2003) 1EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession."

83. Having carefully studied the confidential documents submitted to the Board by the Respondent pursuant to Section 67(3)(e) of the Act, we

have established that none of the tenderers were responsive in the subject tender.

84. In the circumstances, we find and hold that the Respondent fulfilled the substantive requirements for the termination of the procurement proceedings in the subject tender as required under Section 63(1)(f) of the Act and aforesaid authorities having provided sufficient evidence of non-responsiveness of all evaluated tenders in the subject tender.

With regard to procedural requirements for termination of procurement proceedings in the subject tender;

85. We note from the confidential documents that all tenderers in the subject tender were notified of termination of the procurement proceedings in the subject tender vide letters dated 4th March 2024. However, the said letters do not muster the threshold of termination notice contemplated under Section 63(4) of the Act for failing to sufficiently give reasons pertaining to the alleged ground of termination due to non-responsiveness of all evaluated tenders in the subject tender. The Respondent only informed tenderers that the procurement proceedings in the subject tender had been terminated in full observance of Section 63(1)(f) of the Act without laying down the reasons why each tenderer's bid document was considered non-responsive and the stage of evaluation at which the bidder was disqualified. This is further buttressed by the fact that the Applicant had to follow up on the reasons why its tender was rendered non-

responsive as seen at paragraphs 8 and 9 of its Supporting Affidavit sworn on 14th March 2024 by Erish Awino where it sought for reasons for disqualification of its tender and the Respondent's response to its enquiry where it forwarded a copy of the Evaluation report vide a letter dated 7th March 2024 on the reason for disqualification of the Applicant's tender.

86. We also note from the confidential file a termination letter dated 4th March 2024 addressed to the Director General of the Authority whose wordings are similar to the letters of notification of termination of the subject tender issued to bidders on 4th March 2024. It appears that the intention of the Respondent was for the said letter to be deemed as the written report on termination given to the Authority as contemplated under Section 63(2) & (3) of the Act. However, the same fails to meet the threshold of the report contemplated under Section 63(2) & (3) of the Act read together with PPRA Circular No. 4/2022 dated 1st July 2022 on Mandatory Reporting in the PPIP Portal as it does not address the reasons for termination of the subject tender.

87. Despite submissions by the Respondent that the report on termination was uploaded on the PPIP portal, this Board has neither had sight of the same on the said portal nor seen any print out adduced by the Respondent of the duly uploaded report and the reasons for termination of the subject tender. As such, the procedural statutory pre-conditions that must be satisfied before a termination is deemed

lawful as required by Section 63(2) & (3) of the Act have not been met by the Respondent.

88. Having established that the Respondents met the substantive statutory pre-conditions of termination of procurement proceedings in line with Section 63(1)(f) of the Act but failed to satisfy the procedural statutory pre-conditions of termination of procurement proceedings in line with Section 63(2), (3), & (4) of the Act, the Board finds and holds that the Respondent failed to terminate the procurement proceedings of the subject tender in accordance with Section 63 of the Act. As such. The Board's jurisdiction to hear and determine the instant Request for Review has not been ousted by dint of Section 167(4)(b) of the Act.

What orders should the Board grant in the circumstances?

89. We have found that termination of the procurement proceedings in the subject tender did not meet the procedural statutory pre-conditions of termination of procurement proceedings in line with Section 63(2), (3), & (4) of the Act. We deem it fit to direct the Respondent to issue both the Authority and tenderers in the subject tender with proper letters of termination of the subject tender detailing reasons for disqualification of their tenders and reasons for termination of the procurement proceedings of the subject tender in line with Section 63(1)(f) of the Act.

FINAL ORDERS

90. 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 final orders in respect of the Request for Review dated 14th March 2024 and filed on 15th March 2023:

A. The Letters of Notification of termination of procurement proceedings dated 4th March 2024 with respect to Tender No. SC/MOE/SCMS/UJTVC/001/2023 – 2024 for Proposed Construction of Workshop Block Phase IA at Ugunja Technical and Vocational College, issued to all tenderers by the Respondent be and are hereby cancelled and set aside.

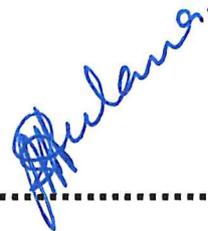
B. The Respondent is hereby ordered to issue lawful letters of notification of termination of procurement proceedings with respect to Tender No. SC/MOE/SCMS/UJTVC/001/2023 – 2024 for Proposed Construction of Workshop Block Phase IA at Ugunja Technical and Vocational College advertised on 12th January 2024 to all tenderers in the subject tender in accordance with Section 87 and 63 of the Act in addition to issuing a written report to the Authority in accordance with section 63(2) and (3) of the Act within fourteen (14) days

of the date hereof taking into consideration the Board's findings in this Request for Review.

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

Dated at NAIROBI this 5th Day of April 2024.


.....
CHAIRPERSON
PPARB


.....
SECRETARY
PPARB



