

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 38/2024 OF 7TH MAY 2024

BETWEEN

MODERN PRECAST (K) LIMITED APPLICANT

AND

ACCOUNTING OFFICER,

SPORTS KENYA 1ST RESPONDENT

SPORTS KENYA 2ND RESPONDENT

Review against the decision of the Accounting Officer, Sports Kenya in relation to Tender No. SK/EOI/002/2023-2024 for Expression of Interest (EOI) for Design and Build the Proposed Busia Stadium and Siagonjo Sports Grounds

BOARD MEMBERS PRESENT

- | | | |
|-------------------------------|---|-------------|
| 1. Mr. George Murugu, FCI Arb | - | Chairperson |
| 2. Mr. Daniel Langat | - | Member |
| 3. Dr. Susan Mambo | - | Member |

IN ATTENDANCE

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

PRESENT BY INVITATION

APPLICANT

Mr. Kimutai Rotich

MODERN PRECAST (K) LIMITED

- Advocate, Nyaanga & Mugisha Advocates

RESPONDENTS

Mr. Jamal

ACCOUNTING OFFICER, SPORTS KENYA & SPORTS KENYA

-Advocate, Jamal Bake & Associates
Advocates

BACKGROUND OF THE DECISION

The Tendering Process

1. Sports Kenya, the Procuring Entity and 2nd Respondent herein invited qualified and interested firms to express their interest in response to Tender No. SK/EOI/002/2023-2024 for Expression of Interest (EOI) for Design and Build the Proposed Busia Stadium and Siagonjo Sports Grounds (hereinafter referred to as the "subject tender"). The invitation was by way of an advertisement on both 11th January 2024 and 16th January 2024 on My Gov Publication, the Procuring Entity's website www.sportskenya.org and on the Public Procurement Information Portal (PPIP) website www.tenders.go.ke where the blank tender document for the subject tender issued to tenderers (hereinafter referred to as the 'Tender Document') was available for

download. The tender's submission deadline was scheduled on 31st January 2024 at 11.00 a.m.

Submission of Tenders and Tender Opening

2. According to the Minutes of the subject tender's opening held on 31st January 2024 signed by members of the Tender Opening Committee (hereinafter referred to as the 'Tender Opening Minutes') and which Tender Opening Minutes were part of confidential documents furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') by the 1st Respondent pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), a total of thirteen (13) tenders were submitted in response to the subject tender. The thirteen (13) tenders were opened in the presence of tenderers' representatives present at the tender opening session, and were recorded as follows:

Bidder No.	Name
1.	Home Fix Limited
2.	Modern Precast (K) Limited
3.	Milicon's Limited
4.	Tejaswini Builders Limited
5.	Orascom Construction

6.	Tulsi Construction Limited
7.	Adsite Limited
8.	Brickehaus Limited
9.	Sogea Satom
10.	Changjian Africa Construction Development Company Limited
11.	The Arab Contractors Cosman Ahmed Osman and Company
12.	Wilkori Building and Civil Engineering Contractors Company Limited
13.	Atticspace Architects Ltd

Evaluation of Tenders

3. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1st Respondent undertook evaluation of the thirteen (13) tenders as captured in an Evaluation Report for the subject tender dated 3rd April 2024 and signed by members of the Evaluation Committee (hereinafter referred to as the "Evaluation Report") in the following stage:

- i Preliminary/ Mandatory Evaluation

Preliminary/Mandatory Evaluation

4. The Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Section 4, 5, 6 and as provided in Table A: Mandatory Requirements for Evaluation of the Tender Document. Tenderers were required to meet all the mandatory

requirements at this stage to proceed for registration and prequalification of the subject tender.

5. At the end of evaluation at this stage nine (9) tenders were determined non-responsive, including the Applicant's tender, while four (4) tenders were determined responsive and were recommended for prequalification and consideration for issuance of a Request for Proposal for the subject tender.

Evaluation Committee's Recommendation

6. The Evaluation Committee recommended prequalification and consideration for issuance of a Request for Proposal for the subject tender to the following bidders:

<i>Bidder Number</i>	<i>Bidder Name</i>
<i>03</i>	<i>Milicon's Limited</i>
<i>06</i>	<i>Tulsi Construction Limited</i>
<i>10</i>	<i>Changjian Africa Construction Development Company Limited</i>
<i>12</i>	<i>Wilkori Building and Civil Engineering Contractors Company Limited</i>

Professional Opinion

7. In a Professional Opinion, as an Internal Memo dated 3rd April 2024 (hereinafter referred to as the "Professional Opinion"), the Principal Supply Chain Management Officer, Mr. Fredrick Muema, reviewed the



manner in which the subject procurement process was undertaken including evaluation of tenders and concurred with the recommendations of the Evaluation Committee with respect to bidders recommended for prequalification and consideration for issuance of a Request for Proposal for the subject tender.

Notification to Tenderers

8. Tenderers were notified of the outcome of evaluation of the subject tender vide letters dated 15th April 2024.

REQUEST FOR REVIEW NO. 38 OF 2024

9. On 7th May 2024, Modern Precast (K) Limited, the Applicant herein filed a Request for Review dated 7th May 2024 together with a Supporting Affidavit sworn on 7th May 2024 by Chandresh Babariya, its Managing Director (hereinafter referred to as the 'instant Request for Review') through Nyaanga & Mugisha Advocates seeking the following orders from the Board in verbatim:

a) An order be and is hereby issued nullifying, cancelling and/or setting aside the Respondents' decision contained in the Letter of Notification dated 15th April 2024 and received on 26th April 2024 in relation to the application for Pre-Qualification for Design and Build

***the Proposed Busia Stadium and Siagonjo Grounds –
EOI Reference No. SK/EOI/002/2023-2024.***

- b) An order be and is hereby issued declaring that the Applicant's letter dated 15th April 2024 and received on 26th April 2024 in relation to the application for Pre-Qualification for Design and Build the Proposed Busia Stadium and Siagonjo Grounds – EOI Reference No. SK/EOI/002/2023-2024 is non-compliant with section 87 (3) as read together with section 95 of the Public Procurement and Asset Disposal Act 2015.***
- c) An order be and is hereby issued declaring that the Applicant's pre-qualification bid in relation to the application for Pre-Qualification for Design and Build the Proposed Busia Stadium and Siagonjo Grounds – EOI Reference No. SK/EOI/002/2023-2024 was fully compliant and responsive.***
- d) An order be and is hereby issued compelling the 1st and 2nd Respondents to re-admit the Applicant's bid in relation to the application for Pre-Qualification for Design and Build the Proposed Busia Stadium and Siagonjo Grounds – EOI Reference No. SK/EOI/002/2023-2024 for purposes of being re-evaluated, approved and/or pre-qualified.***

e) An order be and is hereby issued compelling the 1st and 2nd Respondents to invite the Applicant to submit a Bill of Quantities (BQ) containing technical and financial proposals for the Design and Build the Proposed Busia Stadium and Siagonjo Grounds – EOI Reference No. SK/EOI/002/2023-2024 for consideration and awarding of the tender.

f) The Respondents be ordered to pay the costs of and incidental to these proceedings.

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

10. In a Notification of Appeal and a letter dated 7th May 2024, Mr. James Kilaka, the Acting Board Secretary of the Board notified the 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 7th May 2024.

11. On 13th May 2024, the Respondents filed through Jamal Bake & Associates Advocates a Memorandum of Response dated 13th May 2024 together with confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.
12. *Vide* email dated 13th May 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.
13. *Vide* a Hearing Notice dated 13th May 2024, the Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the instant Request for Review slated for 16th May 2024 at 11.00 a.m., through the link availed in the said Hearing Notice.
14. On 15th May 2024, the Applicant filed through its advocates a Reply to the Respondents' Memorandum of Response dated 15th May 2024 together with Written Submissions dated 15th May 2024 and List and Bundle of Authorities dated 15th May 2024.
15. On 17th May 2024, the Respondents filed through their advocates Written Submissions dated 17th May 2024 together with a List of Authorities dated 17th May 2024.

16. At the hearing of the instant Request for Review on 16th May 2024, the Board read out the pleadings filed by parties in the matter and allocated time for parties to highlight their respective cases. Thus the instant Request for Review proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

Applicant's Submissions

17. In his submissions, counsel for the Applicant, Mr. Kimutai, relied on the Request for Review dated 7th May 2024 together with a Supporting Affidavit sworn on 7th May 2024 by Chandresh Babariya, Reply to the Respondents' Memorandum of Response dated 15th May 2024 together with Written Submissions dated 15th May 2024 and List and Bundle of Authorities dated 15th May 2024 filed before the Board.

18. Mr. Kimutai submitted that the main reason that the Respondent was challenging the Applicant's *locus standi* as raised at paragraphs 25 and 27 of the Respondent's Memorandum of Response is that the Applicant failed to demonstrate loss and damages suffered or that has been suffered as a result of breach of duty by the Procuring Entity. He further submitted that Section 167 of the Act anticipates that any claimant or any applicant must claim at least to have suffered or risk suffering loss or damages and referred the Board to the Court of Appeal decision in *Mombasa Civil Appeal No. 131 of 2018 James Ayodi t/a Betoyo Contractors & Another vs Elroba Enterprises Ltd & Another (2019) eKLR* (hereinafter referred to as "the James Oyondi case"). He

argued that the threshold is that one must at least claim to have suffered loss and damage and pointed to paragraph 24 of the Request for Review replicated at paragraph 27 of the Applicant's Supporting Affidavit where the Applicant had particularized loss and damages suffered as a result of breach of duty by the Procuring Entity. In support of his arguments, counsel referred the Board to the holding in *PPARB Application No. 33 of 2024 Agile Business Solutions Limited v Accounting Officer, Nuclear Power & Energy Agency (NUPEA) & Another* and reiterated that the Board has jurisdiction and the Applicant has *locus standi* before the Board.

19. On the substantive issues in the Request for Review, Counsel submitted that the Applicant was unfairly dismissed on the ground that it did not provide the name of its contact person contrary to Mandatory Requirement No. 6 of the Tender Document which required bidders to provide a company profile indicating the contact details which include physical address, telephone number, e-mail and contact person.

20. Mr. Kimutai pointed out that the Applicant in its bid document provided its contact person as Chandresh Babariya together with an email and contact both in the company profile submitted and duly filled by the Applicant together with a CV of the said contact person. He pressed on that the claim by the Respondent was untrue and referred the Board to the provisions of Sections 79, 80, 93, and 94 of the Act which mandates the Procuring Entity evaluate tenders using the criteria provided in the prequalification document and that by

disqualifying the Applicant's tender, the Procuring Entity went contrary to the said provisions as well as the constitutional provisions at Article 227 of the Constitution which dictates that Procuring Entities are required to conduct procurement process in a fair, equitable, transparent and competitive manner.

21. Counsel submitted that the Tender Document did not require bidders to submit a Power of Attorney contrary to the averments made by the Respondents in their response to the instant Request for Review that bidders were required to submit a Power of Attorney which was apparently used as an evaluation criterion in disqualifying its bid document among other bidders and in awarding the four unnamed successful bidders. He argued that the Procuring Entity had no right to disregard the provisions of the Tender Document and award the subject tender using criteria not provided in the Tender Document. In support of his argument, Mr. Kimutai referred the Board to the holdings by the High Court in *R v Public Procurement Administrative Review Board Ex parte Kenya Power & Lighting Company Limited; Energy Sectors Contractors Association & another (Interested Parties) [2020] eKLR* and *R v Public Procurement Administrative Review Board & 3 others Ex-parte Furniture Elegance Limited [2017] eKLR*.

22. Counsel submitted that the Procuring Entity in its letter of notification failed to disclose the successful bidders who were prequalified to proceed to the next stage of the procurement together with reasons as to why they were deemed successful. Counsel referred the Board

to the provisions of Section 87(3) and 170 of the Act together with its letter of notification dated 15th April 2024 and sent on 26th April 2024 and argued that the said letter fell short of the mandatory requirements stipulated in the Act since it ought to contain reasons for disqualification of the unsuccessful bidder, names and details of the successful bidder, reasons for awarding or prequalifying the successful bidder, advise on the standstill period of 14 days, advise on the right to request a debrief, and advise to the unsuccessful bidder of the right to complain before the Public Procurement Regulatory Authority (hereinafter referred to as "the Authority") or file a request for review before the Board.

23. Mr. Kimutai further submitted that by keeping the successful bidders and reasons for their prequalification in secrecy, the Respondents denied the Applicant the right to challenge the reasons for prequalification, which as discovered in the Memorandum of Response, includes use of extrinsic requirement of submission by bidders of a power of attorney.

24. Mr. Kimutai urged the Board to allow the instant Request for Review as prayed.

Respondents' submissions

25. In his submissions, counsel for the Respondents, Mr. Jamal relied on the Memorandum of Response dated 13th May 2024 together with

confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act filed before the Board.

26. Mr. Jamal submitted that thirteen (13) bids were received in the subject tender and following evaluation of the same, four bidders were found responsive. He pointed out that bids are first evaluated for compliance with mandatory requirements which the Applicant failed to meet since its bid did not conform to clause 4(iv) and 6(6) of the Tender Document which required the Applicant to provide its company profile indicating contact details including physical address, telephone number, email and contact person on behalf of the bidder.

27. He acknowledged that the Applicant did provide its company profile which however did not bear the name of the contact person and as such, the Applicant's bid was non-responsive pursuant to Section 79(1), 80, 93, 94, 95 and 102 of the Act. Counsel invited the Board to scrutinize pages 35 to 72 of the Applicant's original bid document where the company profile was annexed and to also note that the Applicant did not fill out the Suppliers Registration Population form at page 12 of its bid document.

28. Mr. Jamal submitted that the Evaluation Committee applied the evaluation criteria at clause 4.4 and 6.6 of the Terms of Expression of Interest of the Tender Document and rightfully found that the Applicant's bid was non-responsive. He further submitted that Section 94(5) of the Act affords the Applicant latitude to seek clarification

where the instructions in the Tender Document are ambiguous and as such, if the Applicant was not sure of where the place the details of its contact person, then it ought to have sought clarification from the Procuring Entity.

29. Counsel submitted that failure by a tenderer to comply with the requirements of the bid document would defeat the purpose of supplying information to bidders for preparation of their bid documents. He further submitted that Section 79(1) & (2) of the Act allows the Evaluation Committee to make some adjustments to accommodate bidders where they provided information which is slightly at variance with the Tender Document.

30. Mr. Jamal submitted that where bidders did not provide contact details, the Procuring entity took into consideration the Power of Attorney in substitute of the details of the contact person since the donee in the Power of Attorney has the capacity to deliver on the task entrusted and can easily be contacted for purposes of communication or clarifications. Counsel pointed out that the Applicant neither provided the name of the contact person nor a power of attorney in its bid document and refereed the Board to paragraph 21 of the Respondents Memorandum of Response where the Respondents had set out reasons why the requirement of a contact person was crucial.

31. On the issue of non-compliance with provisions of Section 87(3) of the Act raised by the Applicant, Counsel submitted that there was no

inordinate delay in conveying the letter of notification to the Applicant in view of the number of bidders in the subject tender and the fact that some bidders including the Applicant had failed to provide the details of the contact person and as such, it was difficult to dispatch the notification letters. He further submitted that notification ought to be made within the period the tender is set to lapse and in the instant case, the tender validity period is yet to lapse.

32. Mr. Jamal submitted Section 87(3) of the Act was not applicable in the instant case as the tender process was still alive at the preliminary stage and is yet to be completed. As such, counsel argued that the applicable provisions in the present case was Section 95(4) of the Act which does not require the Procuring Entity to disclose the names of prequalified bidders and reasons for prequalification.

33. On the issue of whether the Applicant has *locus standi* before the Board raised at paragraphs 25 and 27 of the Respondents Memorandum of Response, Counsel asked the Board to disregard the same and instead zero in on the substantive issues raised in the instant Request for Review.

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

35. When asked by the Board to clarify whether the Power of Attorney was a mandatory requirement in the Tender Document and if the

contact details of the Applicant had been provided on any of the documents submitted by the Applicant, Mr. Jamal submitted that the Power of Attorney was not one of the mandatory requirements but in line with Section 79(2) of the Act it was considered in lieu of the details of the contact person. He further submitted that clause 4.4 and 6.6 of the Tender Document was clear on the details that were required to be submitted by a bidder and that under Clause 6.6 of the Tender Document, what was required was the contact details of the contact person on behalf of the bidder and that the CR 12 submitted by the Applicant having only indicated the details of the contact person cannot verify who the contact person is on behalf of the bidder and that the Applicant had not keyed in the details of its contact person in the Confidential Business Questionnaire or anywhere else in its bid document. Counsel also pointed out that no debriefing meeting took place between the Applicant and the Respondents.

36. Counsel reiterated that pursuant to Section 79(1) & (2) of the Act, the Evaluation Committee upon realizing that bidders had provided their contact details but failed to provide details of their contact person deemed this to be a minor deviation and instead of disqualifying such bidders resulted to consider the power of attorney submitted in the bid documents as the donee has the grasp of issues that may come up in the tender.

37. When asked by the Board to expound to whom the Applicant's letter of notification was sent to and the reasons for delay in dispatching the

notification letter, counsel indicated that the email forwarding the letter of notification was sent to Chandresh Babariya but the letter of notification was addressed to the Applicant. He further indicated that the delay was occasioned by the several factors such as the number of bidders in the subject tender, the voluminous documents provided which required the Procuring Entity to establish if a contact person had been provide and as such, the delay in conveying the said notification letters was not inordinate.

Applicant's Rejoinder

38. In a rejoinder, Mr. Kimutai referred the Board to the Applicant's Exhibit marked CB-3 indicating that the Procuring Entity sent out the notification letter via email on 26th April 2024 to Chandresh Babariya whose contact details were provided.
39. Counsel submitted that pursuant to Section 75 of the Act, an amendment to the Tender Document is only done through an addendum and can only be done before the tender submission deadline and as such consideration of the Power of Attorney without an addendum was a nullity as the said modification was done after close of tenders and during evaluation.
40. On the issue of delay in conveying the letters of notification, counsel argued that the delay of 11 days was unreasonable given that the Applicant's contact details had been provided and that procurement processes are strict with regard to adherence to timelines. He referred

the Board to the Court of Appeal decision in *Civil Appeal E012 of 2024 Sinopec International Petroleum Service Corporation v Public Procurement Administrative Review Board & 3 others* where it was held that the decision to award a tender constitutes an administrative action and it follows that the provisions of the Fair Administrative Action Act apply to the process and the holding by the High Court in *Judicial review Miscellaneous Application No. 531 of 2015 Republic v Public Procurement Administrative Review Board & 2 others Ex parte Akamai Creative Limited* where the court stated that where an administrative body unreasonably delays in furnishing the parties with the decision and the reasons thereof when requested to do so, that action or inaction is contrary to the spirit of Article 47 of the Act.

41. When asked by the Board to clarify whether there is an award of the subject tender, Counsel clarified that in a situation such as in the instant case where four (4) bidders were prequalified to the next stage, this in itself was an award in terms of the expression of interest and prequalification but there is no award on finality as there were other stages to be considered. Counsel submitted that Section 95 of the Act requires the Procuring Entity to notify the candidates who have been qualified and the reasons for prequalification. He further submitted that in respect of Section 87(3) of the Act, the same cannot be read in isolation and ought to be read harmoniously so as to give effectiveness in terms of what is an award.

42. Mr. Kimutai urged the Board to scrutinize the Applicant's Company Profile together with its Confidential Business Questionnaire submitted in the Applicant's bid document where the name of Chandresh Babariya together with his email and telephone number were provided being a clear indication that the Respondent's submissions were a misrepresentation of facts. He acknowledged that there cannot be a deviation in complying with a mandatory requirement and that the Applicant met the mandatory requirements in the subject tender. Counsel submitted that there was no specified format within which the information was required to be provided which was why the Applicant provided the said information in the Company Profile, the CV and the CR12.

43. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 7th May 2024 was due to expire on 28th May 2024 and the Board would communicate its decision on or before 28th May 2024 to all parties to the Request for Review via email.

BOARD'S DECISION

44. 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 2nd Respondent's Evaluation Committee evaluated the Applicant's tender with respect to Mandatory Requirement 6 at the Preliminary/Mandatory Evaluation stage in accordance with the provisions of the Tender Document as read with Section 79 and 80(2) of the Act;

B. Whether the Letter of Notification dated 15th April 2024 issued to the Applicant in the subject tender was proper;

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

Whether the 2nd Respondent's Evaluation Committee evaluated the Applicant's tender with respect to Mandatory Requirement 6 at the Preliminary/Mandatory Evaluation stage in accordance with the provisions of the Tender Document as read with Section 79 and 80(2) of the Act;

45. We understand the Applicant's case on this issue to be that its tender met all the eligibility and mandatory requirements of the Tender Document and that the decision to disqualify its tender at the Preliminary Evaluation stage on the ground that it did not provide the name of its contact person nor a power of attorney on behalf of its company was outrageous, illogical, discriminatory, unjustifiable and unfair given that there was no mandatory requirement in the Tender Document requiring bidders to submit a power of attorney. The Applicant contends that the Respondents applied an extrinsic

evaluation criterion in disqualifying its bid document contrary to the provisions of the Constitution, the Act and Regulations 2020.

46. We understand the Respondents' response on this issue to be that the Tender Document and the Evaluation Committee complied with provisions of the Constitution, the Act, Regulations 2020 and the Tender Document was utilized in evaluation of bids submitted in the subject tender. During the hearing, counsel for the Respondents, Mr. Jamal submitted that though submission of a power of attorney by bidders was not a mandatory requirement, the Evaluation Committee has the leeway to consider and accept or admit a power of attorney where a bidder had failed to provide a name and details of its contact person. Counsel argued that the Applicant was non-responsive in the subject tender as it neither provided in its bid document the name of its contact person as required under Mandatory Requirement No. 6 of the Tender Document nor a power of attorney.

47. Having considered parties' submissions herein, we note 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)"**

48. Justice Mativo (as he then was) in **Nairobi High Court Misc. Application No. 60 of 2020; Republic v The Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020] eKLR** (hereinafter referred to as "Misc. Application No. 60 of 2020") spoke to the principles under Article 227 of the Constitution as follows:

"45. Article 227 of the Constitution provides that when procuring entities contract for goods or services they must comply with the principles of fairness, equity, transparency, competitiveness and cost-effectiveness. For there to be fairness in the public procurement process, all bids should be considered on the basis of

their compliance with the terms of the solicitation documents, and a bid should not be rejected for reasons other than those specifically stipulated in the solicitation document."

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

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

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

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

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

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

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

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

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

(h) maximisation of value for money;

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

(j) promotion of citizen contractors."

50. Section 93 of the Act provides for prequalification as follows:

(1) Subject to provisions of subsection (2), an accounting officer of a procuring entity where applicable, may conduct a pre-qualification procedure as a basic procedure prior to adopting an alternative procurement method other than open tender for the purpose of identifying the best few qualified firms for the subject procurement.

(2) Pre-qualification shall be for complex and specialized goods, works and services.

(3) In conducting a pre-qualification procedure an accounting officer of a procuring entity shall publish an invitation notice to candidates to submit applications to be pre-qualified.

~~reference to~~ (4) ~~The invitation referred to in paragraph (2) shall~~
include -

~~reference to~~ (a) ~~the name, address and contact details of the~~
~~procuring entity;~~

(b) *outline of the procurement requirement, including
the nature and quantity of goods, works or services and
the location and timetable for delivery or performance of
the contract;*

(c) *statement of the key requirements and criteria to
pre-qualify;*

(d) *instructions on obtaining the pre-qualification
documents, including any price payable and the
language of the documents; and*

(e) *instructions on the location and deadline for
submission of applications to pre-qualify;*

(f) *applicable preferences and reservations or any
conditions arising from the related policy;*

(g) *declaration that it is open to bidders who meet the
eligibility criteria; and*

(h) *requirement that only bidders with capacity to
perform can apply.*

51. Further Section 94 of the Act provides for pre-qualification documents as follows:

"(1) An accounting officer of a procuring entity shall promptly issue pre-qualification documents to all candidates who request them and shall maintain a record of all candidates to whom documents are issued.

(2) The pre-qualification document shall contain all the information specified in section 93 and any other information necessary for the potential candidates to prepare and submit applications to be pre-qualified.

(3) Without prejudice to the generality of paragraph (2), such information shall include —

(a) the name, address and contact details of the procuring entity;

(b) details of the procurement requirements, including the nature and quantity of goods, works or services and the location and timetable for delivery or performance of the contract;

(c) instructions on the preparation of applications to pre-qualify, including any standard forms to be submitted and the documentary evidence and information required from candidates;

(d) instructions on the sealing, labelling and submission of applications to pre-qualify, including the location and deadline for submission; and

(e) information on how applications will be evaluated.

(4) The accounting officer of a procuring entity shall allow the candidates at least fourteen days to prepare and submit their applications to be pre-qualified.

(5) The accounting officer of a procuring entity shall promptly respond to all requests for any clarification relating to the pre-qualification document where such requests are received before the deadline for submission.

52. In the same vein, section 70 of the Act requires a procuring entity to use a standard tender document which contains sufficient information to allow for fair competition among tenderers. Section 70(3) reads as follows:

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

53. 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) *....."*

54. 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.

55. 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"

56. Responsiveness serves as an important first hurdle for tenderers to overcome. From the above provision, a tender only qualifies as a responsive tender if it meets all eligibility and mandatory requirements set out in the tender documents. In the case of **Miscellaneous Civil Application No. 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 held that:

"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."

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

"74. Preliminary evaluation of open tender

(1) Pursuant to section 80 of the Act and upon opening of tenders, the evaluation committee shall first conduct a preliminary evaluation to determine whether—

(a) a tenderer complies with all the eligibility requirements provided for under section 55 of the Act;

(b) the tender has been submitted in the required format and serialized in accordance with section 74(1)(i) of the Act;

(c) any tender security submitted is in the required form, amount and validity period, where applicable;

(d) the tender has been duly signed by the person lawfully authorized to do so through the power of attorney;

(e) the required number of copies of the tender have been submitted;

(f) the tender is valid for the period required;

(g) any required samples have been submitted; and

(h) all required documents and information have been submitted.

58. The import of the aforementioned provisions of the Act and case law is that mandatory requirements cannot be waived. **In this instance, the Evaluation Committee was mandated to evaluate the Applicant's tender together with all other tenders submitted in the subject tender using the procedures and criteria set out in the Tender Document having regard to provisions of the Act and the Constitution.**

59. Turning to the circumstances in the instant Request for Review, we note that the Applicant was notified in a notification letter dated 15th April 2024 that its bid in the subject tender was unsuccessful as follows:

".....

We take this opportunity to thank you for bidding in the above Expression of Interest. However, we regret to inform you that your proposal document was not successful because;

- You did not provide the name of the contact person nor the power of attorney on behalf of your company***

We wish to thank you for showing interest in doing business with Sports Kenya and look forward to being of service to you in future.

....."



60. We note that the parameters of evaluation of tenders in the subject tender is set out under Clause 4. Qualification of Bidders and Clause 6: Evaluation Criteria of the Tender Document.

61. Clause 4. Qualification of Bidders of the Tender Document reads as follows:

"Sports Kenya invites interested contractors (individual or consortium) who are familiar with the Sports industry to express their interest in providing the services by submitting information on their commercial and technical capability. In the case of a consortium, the lead agency may express their interest on behalf of the consortium. The Expression of Interest (EOI) MUST be accompanied by certified copies (where necessary) of the following documents in English:

- I. Copies of certificate of incorporation/business registration (certified copy)***
- II. Copies of PIN and Tac compliance certificates (certified copy)***
- III. Relevant Business operating licenses (certified copy)***
- IV. A copy of the company profile (certified copy)***
- V. Further demonstration of the capability to deliver the services, including: Resource capability (human, financial etc)***

- VI. Experience in designing and constructing sports facilities (all list of such facilities and locations)**
- VII. Proposed technology**

Shortlisting of bidders for subsequent processes shall be based on the above information."

62. Further, Clause 6. Evaluation Criteria of the Tender Document reads as follows:

"The Expression on Interest received will be evaluated in accordance with the set criteria in the section 4, 5 and as provided in the Table below: -

Table A: Mandatory Requirements for Evaluation

No.	Criteria	Requirement Yes/No
1.	<i>Valid Tax Compliance Certificate from Kenya Revenue Authority</i>	
2.	<i>Certificate of Incorporation/Business Registration</i>	
3.	<i>CR 12 for Limited companies issued within the last one year</i>	
4.	<i>Duly filled, signed and stamped Self-Declaration</i>	

	<i>letter that the firm has not been debarred from participating in Public Procurement and Asset Disposal Act, 2015 – SD1</i>	
5.	<i>Duly filled, signed and stamped Self-Declaration that the firm/ tenderer will not engage in any corrupt or fraudulent practice – SD 2</i>	
6.	<i>Company Profile of the firm indicating the contact details including physical address, telephone</i>	

.....

Note; Eligible bidders who meet all the mandatory requirements to proceed for Registration for the design and building of the proposed Busia Stadium and the Siagonjo Sports grounds. "

63. In essence, a tenderer was required to comply with the requirements under Clause 4. Qualification of Bidders and Clause 6. Evaluation Criteria of the Tender Document to qualify for prequalification in the subject tender. The Evaluation Committee was required to evaluate the Applicant's tender and ensure that it met, *inter alia*, Clause 4 (IV) under the Qualification of Bidders in the Tender Document which

required bidders to submit a copy of the company profile in addition to Mandatory Requirement No. 6 under Table A: Mandatory Requirements for Evaluation under Clause 6 of the Tender document which required a bidder to provide its Company Profile wherein it indicated its contact details including its physical address, telephone number, email and contact person on its behalf.

64. With this background on the evaluation criteria, we shall now proceed to determine whether the Evaluation Committee evaluated the Applicant's tender with respect to Mandatory Requirement 6 at the Preliminary/Mandatory Evaluation stage in accordance with the provisions of the Tender Document as read with Section 79 and 80(2) of the Act by examining the Applicant's original tender submitted to the 2nd Respondent against the Evaluation Report, both documents forming part of the confidential documents submitted to the Board by the 1st Respondent pursuant to Section 67(3)(e) of the Act.

65. According to the Evaluation Report, we note that the Applicant in addition to other bidders in the subject tender was disqualified at the Preliminary/Mandatory Evaluation stage as follows:

"2.3 Reasons for non-responsiveness in the Tender for Design and Build the Proposed Kamariny Stadium and Iten Training Grounds; SK/EOI/001/2023-2024;

<i>Bidder No.</i>	<i>Reasons for non-responsiveness</i>
<i>Bidder 3</i>	<i>.....</i>

	<i>Did not provide the name of the contact person nor the power of attorney on behalf of the bidder.</i>
Bidder 4	<p>.....</p> <p>.....</p> <p><i>Did not provide the name of the contact person nor the power of attorney on behalf of the bidder.</i></p> <p>.....</p> <p>.....</p>
.....
Bidder 15	<i>Did not provide the name of the contact person nor the power of attorney on behalf of the bidder</i>
.....

2.4 Reasons for non-responsiveness in the Tender for Design and Build the Proposed Busia Stadium and Siagonjo Training Grounds; SK/EOI/002/2023-2024;

<i>Bidder No.</i>	<i>Reasons for non-responsiveness</i>
.....
Bidder 2	<i>Did not provide the name of the contact person nor the power of attorney on behalf of the bidder.</i>

.....
Bidder 7	<p>.....</p> <p><i>Did not provide the name of the contact person nor the power of attorney on behalf of the bidder</i></p>
.....

66. During the hearing, counsel for the Applicant Mr. Kimutai submitted that the Applicant provided its company profile in its bid document which included its CR 12 and the Curriculum Vitae of its contact person indicated as Chandresh Babariya of email address, modernprecast2011@gmail.com and telephone number 0734743333. Mr. Kimutai further submitted that the contact person's details were also duly filled in the Applicant's Confidential Business Questionnaire. In the same vein, counsel submitted that the notification letter dated 15th April 2024 was communicated vide email of 26th April to the contact details of Chandresh Babariya and urged the Board to note that there was no format or manner specified in the Tender Document on how a bidder was required to provide the details of company profile or the contact person and that it was open to bidders to provide the company profile and information pertaining to physical address, telephone number, email and contact person in their own way.

67. On the other hand, counsel for the Respondent, Mr. Jamal submitted that the Applicant did not avail any details of its contact person in its bid document and that from the Applicant's company profile submitted

at pages 32 to 77 of its bid document, no email and contact person on behalf of the Applicant was provided and what was provided was the Applicant's contact details as the bidder. Counsel admitted that there was no mandatory requirement for a bidder to submit a power of attorney and that the Evaluation Committee considered and or accepted a power of attorney submitted in a bid document where a tenderer had failed to provide the name and details of its contact person.

68. Having carefully studied the Applicant's original bid document submitted by the 1st Respondent to the Board pursuant to Section 67(3) of the Act, the Board notes that in response to Mandatory Requirement No. 6 of the Tender Document, the Applicant submitted at pages 34 to 72 of its bid a company profile though it failed to categorically state the details of who its contact person was thereon. From a close look at the Applicant's Confidential Business Questionnaire at page 12 of its bid document, we do however note that the Applicant filled in the said questionnaire indicating its contact person as Chandresh Babariya.

69. The Board has also scrutinized the shortlisted bidders original bid documents submitted by the 1st Respondent to the Board pursuant to Section 67(3) of the Act and note as follows:

Busia Stadium & Siagonjo Training Grounds

Bidder No.	What was submitted
B03	<ul style="list-style-type: none"> • Company Profile submitted at pages 348 to 684 of its bid document. • No indication of the contact person on behalf of the bidder in the Company Profile. • Details of contact person, Sai P. Parchiri, indicated in the Confidential Business Questionnaire submitted at page 60 to 66 of bid document. • A Power of Attorney submitted at page 45-49 of bid document.
B06	<ul style="list-style-type: none"> • Company Profile submitted at pages 74 to 87 of its bid document. • No indication of the contact person on behalf of the bidder in the Company Profile. • Details of contact person, Suryakant B. Patel, indicated in the Confidential Business Questionnaire submitted at page 13 of bid document. • A Power of Attorney submitted at page 106-108 of bid document.

B10	<ul style="list-style-type: none"> • Company Profile submitted at pages 20 to 52 of its bid document. • No indication of the contact person on behalf of the bidder in the Company Profile. • Details of contact person, Wu Shihuang, indicated in the Confidential Business Questionnaire submitted at page 67 of bid document. • A Power of Attorney submitted at page 17 of bid document.
B12	<ul style="list-style-type: none"> • Company Profile submitted at pages 22 to 46 of its bid document. • Indicated the name of the contact person on behalf of the bidder in the Company Profile at page 24 as Akber Jamal together with telephone and Email Address details. • Details of contact person, Akber Jamar, indicated in the Confidential Business Questionnaire submitted at page 12 of bid document. • No Power of Attorney spotted in bid document.



Proposed Kamariny Stadium & Iten Training Grounds and

Bidder No.	What was submitted
B01	<ul style="list-style-type: none"> • Company Profile submitted at pages 15 to 59 of its bid document. • No indication of the contact person on behalf of the bidder in the Company Profile. • Details of contact person, Wu Shihuang, indicated in the Confidential Business Questionnaire submitted in its bid document. • A Power of Attorney submitted at page 16-17 of bid document.
B02	<ul style="list-style-type: none"> • Company Profile submitted at pages 8 to 62 of its bid document. • Indicated contact person on behalf of the bidder at page 8 of its bid document and wrote <i>see attached</i> Company Profile on the same page which was annexed as from page 9.
B06	<ul style="list-style-type: none"> • Company Profile submitted at pages 22 of its bid document and contact person indicated at page 24 as Akber Jamal together with Telephone Number and Email Address • Details of contact person, Akber Jamal also indicated in the Confidential Business

	Questionnaire submitted in its bid document at page 12.
B08	<ul style="list-style-type: none"> • Company Profile submitted at pages 63 to 76 of its bid document. • No indication of the contact person on behalf of the bidder in the Company Profile. • Details of contact person, Suryakant B. Patel, indicated in the Confidential Business Questionnaire submitted at page 13 of bid document. • A Power of Attorney submitted at page 77 to 79 of bid document.
B09	<ul style="list-style-type: none"> • Company Profile submitted at pages 338 to 673 of its bid document. • No indication of the contact person on behalf of the bidder in the Company Profile. • Details of contact person, Sai P. Parchiri, indicated in the Confidential Business Questionnaire submitted at page 51 to 57 of bid document. • A Power of Attorney submitted at page 582 to 590 of bid document.
B16	<ul style="list-style-type: none"> • Company Profile submitted at pages 119 to 156 of its bid document and contact person indicated

	<p>at page 163 on a separate sheet after the company profile</p> <ul style="list-style-type: none"> • Power of Attorney submitted at page 11 to 16 of bid document indicating authorized representative as Wang Wei
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70. From the foregoing, it is our considered view that the evaluation criteria introduced by the Evaluation Committee during evaluation of the subject tender on availability of a Power of Attorney in the bidder's bid document to substitute failure by a bidder to provide contact details in its company profile was extrinsic since it was not provided for in the Tender Document and was not a requirement from the onset. As such, bidders were not aware that their bid documents would be subjected to the said criteria which was not only unfair but contrary to the principle of transparency envisioned under Article 227(1) of the Constitution.

71. Additionally, in progressing bidders who had failed to adhere to Mandatory Requirement No. 6 of the Tender Document, the Evaluation Committee acted in an unfair manner as this favoured certain bidders over others contrary to Article 47(1) of the Constitution which provides for procedural fairness as follows:

"(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."

72. In **Judicial Review Miscellaneous Application No. 36 of 2016 Republic v National Police Service Commission Exparte Daniel Chacha Chacha [2016] eKLR** the court while addressing the elements of procedural fairness referred to the case by the Supreme Court in **Baker v. Canada (Minister of Citizenship & Immigration) 2 S.C.R. 817 6** where it was held that:

"The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions."

53. The Court further emphasized that procedural fairness is flexible and entirely dependent on context. In order to determine the degree of procedural fairness owed in a given case, the court set out five factors to be considered: (1) The nature of the decision being made and the process followed in making it; (2) The nature of the statutory scheme and the term of the statute pursuant to which the body operates; (3) The importance

of the decision to the affected person; (4) The presence of any legitimate expectations; and (5) The choice of procedure made by the decision-maker.

73. It is important to note that the Act provides for the responsibilities of the Evaluation Committee under Section 46 of the Act and Section 46(4) of the Act provides as follows:

"(4) An evaluation committee established under subsection (1), shall—

(a) deal with the technical and financial aspects of a procurement as well as the negotiation of the process including evaluation of bids, proposals for prequalification, registration lists, Expression of Interest and any other roles assigned to it;

(b) consist of between three and five members appointed on a rotational basis comprising heads of user department and two other departments or their representatives and where necessary, procured consultants or professionals, who shall advise on the evaluation of the tender documents and give a recommendation on the same to the committee within a reasonable time;

(c) have as its secretary, the person in charge of the procurement function or an officer from the procurement

function appointed, in writing, by the head of procurement function;

(d) complete the procurement process for which it was appointed and no new committee shall be appointed on the same issue unless the one handling the issue has been procedurally disbanded;

(e) adopt a process that shall ensure the evaluation process utilized adheres to Articles 201(d) and 227(1) of the Constitution."

74. In view of the above provisions, it is the responsibility of the Evaluation Committee to ensure that the evaluation process utilized adheres to Article 201(d) and 227(1) of the Constitution, the Act and requirements stipulated in the Tender Document.

75. From the foregoing we find that the 2nd Respondent's Evaluation Committee **failed** to evaluate the Applicant's tender together with all other tenders submitted in the subject tender with respect to Mandatory Requirement 6 at the Preliminary/Mandatory Evaluation stage in accordance with the provisions of the Tender Document as read with Section 79 and 80(2) of the Act.

Whether the Letter of Notification dated 15th April 2024 issued to the Applicant in the subject tender was proper;

76. The Applicant contends that the notification letter dated 15th April 2024 sent vide email on 26th April 2024 falls short of the mandatory requirements in the Tender Document, Article 47 of the Constitution as read with Sections 87(3) and 95 of the Act since there was a delay of 10 days in dispatching the same and that the said notification failed to disclose the names of successful bidders and the reasons for pre-qualification.

77. On the other hand, the Respondents contend that the delay in dispatching the letters of notification was occasioned by the sheer volume of documents that the Evaluation Committee had to review considering that some bidders had failed to provide details of their contact persons and there was difficulty in tracing the relevant contact information so as to dispatch the said notification letters. The Respondents further contend that Section 87(3) of the Act read with Regulation 82 of Regulations 2020 do not apply since the tender process is still alive at the preliminary stage and is yet to be completed and as such, the applicable provision is Section 95(4) of the Act which does not require the Procuring Entity to disclose the names of prequalified bidders and reasons for prequalification in the notification letter.

78. We note that Section 87 of the Act is instructive on how notification of the outcome of evaluation of the successful and unsuccessful tenderers should be conducted by a procuring entity and provides as follows:

"87. Notification of intention to enter into a contract

(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.

(2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.

(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.

(4) For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security."

79. Section 87 of the Act recognizes that notification of the outcome of evaluation of a tender is made in writing by an accounting officer of a procuring entity. Further, the notification of the outcome of evaluation ought to be done simultaneously to the successful tenderer(s) and the unsuccessful tenderer(s). A disclosure of who is evaluated as the successful tenderer is made to the unsuccessful tenderer with reasons thereof in the same notification of the outcome of evaluation.

80. The procedure for notification under Section 87(3) of the Act is explained by Regulation 82 of Regulations 2020 which provides as follows:

"82. Notification of intention to enter into a contract

- (1) The notification to the unsuccessful bidder under Section 87(3) of the Act, shall be in writing and shall be made at the same time the successful bidder is notified.***
- (2) For greater certainty, the reason to be disclosed to the unsuccessful bidder shall only relate to their respective bids.***
- (3) The notification in this regulation shall include the name of the successful bidder, the tender price and the reason why the bid was successful in accordance with Section 86(1) of the Act."***

81. In view of the provisions of Section 87 of the Act read with Regulation 82 of Regulations 2020, the Board observes an accounting officer of a procuring entity must notify, in writing, the tenderer who submitted the successful tender, that its tender was successful before the expiry of the tender validity period. Simultaneously, while notifying the successful tenderer, an accounting officer of a procuring entity notifies other unsuccessful tenderers of their unsuccessfulness, giving reasons why such tenderers are unsuccessful, disclosing who the successful tenderer is, why such a tenderer is successful in line with Section 86(1) of the Act and at what price is the successful tenderer awarded the tender. These reasons and disclosures are central to the principles of public procurement and public finance of transparency and accountability enshrined in Article 227 and 232 of the Constitution. This means all processes within a public procurement system, including notification to unsuccessful tenderers must be conducted in a transparent manner.

82. We also take cognizance of the provisions of Section 95 of the Act which provides for approval of pre-qualified candidates as follows:

(1) The evaluation committee shall, in writing, record the results of its evaluation of applications for pre-qualification using the evaluation criteria in the pre-qualification documents and shall state which candidates were found to be qualified and the reasons why any candidates were not qualified.

(2) The record of results prepared under subsection (1) shall be submitted with recommendations of the evaluation committee and the professional opinion of the head of procurement function to the accounting officer for approval.

(3) A procuring entity shall invite tenders from only the approved persons who have been pre-qualified.

(4) A procuring entity shall notify every candidate who submitted an application for pre-qualification but did not qualify."

83. It is not in contest that the Applicant's notification letter dated 15th April 2024 did not contain the names of the successful/ prequalified bidders and neither did it contain reasons for prequalification of the said bidders. We note that the subject tender is an Expression of Interest that would eventually progress to a Request for Proposal and as such, evaluation was still ongoing in view of Section 95(3) and (4) of the Act since the Procuring Entity is required to invite tenders from only the approved persons who have been pre-qualified and to notify bidders whose application did not qualify.

84. *In the circumstances, considering that the instant proceedings concerned an expression of interest, the applicable provisions as regards letters of notification was Section 95 (3) and (4) of the Act.*

Under the said provision, a letter of notification need not disclose the successful bidders and the reasons for pre-qualification. Subject to our findings on the evaluation process, the letter of notification issued by the Respondent was otherwise in the circumstances compliant.

What orders should the Board grant in the circumstances?

85. We have established that the Letter of Notification dated 15th April 2024 issued to the Applicant in the subject tender was proper.
86. We have also established that the Respondents had an obligation to evaluate submitted tenders in the subject tender using the criteria set out in the Tender Document and that the 2nd Respondent's Evaluation Committee failed to evaluate the Applicant's tender together with all other tenders submitted in the subject tender with respect to Mandatory Requirement 6 at the Preliminary/Mandatory Evaluation stage in accordance with the provisions of the Tender Document as read with Section 79 and 80(2) of the Act.
87. Having found that the Applicant's tender together with all other tenders submitted in the subject tender were not properly evaluated, any action undertaken thereafter emanating from an unfair and unlawful evaluation cannot be allowed to stand because such actions are consequently null and void.

88. The Board deems it fit and proper to order the 1st Respondent to direct the Evaluation Committee to conduct a fresh evaluation of all tenders submitted in the subject tender with respect to Mandatory Requirement 6 at the Preliminary/Mandatory Evaluation stage strictly adhering to the provisions of the Tender Document, the Act, Regulations 2020 and the Constitution while taking into consideration the findings of this Board in this Request for Review.

89. The upshot of our findings is that the instant Request for Review succeeds with respect to the following specific orders:

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 orders in the Request for Review dated 7th May 2024 and filed on even date:

A. The Letters of Notification dated 15th April 2024 addressed to all successful bidders with respect to Tender No. SK/EOI/002/2023-2024 for Expression of Interest (EOI) for Design and Build the Proposed Busia Stadium and Siagonjo Sports Grounds be and is hereby nullified and set aside.

B. The Letters of Notification dated 15th April 2024 addressed to all unsuccessful bidders with respect to Tender No. SK/EOI/002/2023-2024 for Expression of Interest (EOI) for Design and Build the Proposed Busia Stadium and Siagonjo Sports Grounds be and is hereby nullified and set aside.


C. The 1st Respondent is hereby ordered to direct the Evaluation Committee to conduct a fresh evaluation of all tenders submitted in response to Tender No. SK/EOI/002/2023-2024 for Expression of Interest (EOI) for Design and Build the Proposed Busia Stadium and Siagonjo Sports Grounds with respect to Mandatory Requirement 6 at the Preliminary/Mandatory Evaluation stage strictly adhering to the provisions of the Tender Document, the Act, Regulations 2020 and the Constitution while taking into consideration the findings of this Board in this Request for Review.

D. Further to Order No. C above, the Respondents are hereby directed to proceed with the procurement process to its logical conclusion including the making of

an award to the successful tenderer within thirty (30) days from the date of this decision.

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

Dated at NAIROBI this 28th Day of May 2024.


.....
CHAIRPERSON
PPARB


.....
SECRETARY
PPARB

