

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 62/2024 OF 11TH JULY 2024

BETWEEN

SHAJELL INVESTMENTS LIMITED APPLICANT

AND

THE DIRECTOR GENERAL,

COMMUNICATIONS AUTHORITY OF KENYA RESPONDENT

KAPE INVESTMENT LIMITED INTERESTED PARTY

Review against the decision of the Director General, Communications Authority of Kenya in respect of Tender No. CA/SCM/OT/86/2023-2024 for Fabrication, Supply and Delivery of 20Ft Containers.

BOARD MEMBERS PRESENT

1. Mr. George Murugu, FCI Arb, I.P - Chairperson
2. QS. Hussein Were - Member
3. Mr. Stanslaus Kimani - Member

IN ATTENDANCE

Mr. James Kilaka - Ag. Board Secretary

Mr. Anthony Simiyu - Secretariat



PRESENT BY INVITATION

APPLICANT

SHAJELL INVESTMENT LIMITED

Mr. Mwangale

Advocate, A.E. Kiprono & Associates

RESPONDENT

**THE DIRECTOR GENERAL,
COMMUNICATIONS**

AUTHORITY OF KENYA

Mr. Kelvin Mbogo

Advocate, Robson Harris Advocates LLP

INTERESTED PARTY

KAPE INVESTMENT LIMITED

Mr. Kiprono

CK Advocates

BACKGROUND OF THE DECISION

The Tendering Process

1. Communications Authority of Kenya, the Procuring Entity together with the Respondent herein, vide an advert in the MyGov Publication, invited interested suppliers to submit their tenders in response to Tender No. CA/SCM/OT/86/2023-2024 for Fabrication, Supply and Delivery of 20FT Containers (herein "the subject tender"). The advert set the tender deadline as Friday, 24th May 2024 at 10:30 a.m.

Addenda

2. The Procuring Entity subsequently issued various addenda while offering clarifications in respect various inquiries that were made by various suppliers who expressed interested in participating in the tender. The



tender submission deadline was equally extended to 29th May 2024 at 10:30 a.m.

Submission of Tenders and Tender Opening

3. According to the signed Tender Opening Minutes dated 29th May 2024, submitted under the Confidential File submitted by the Procuring Entity, the following seventeen (17) tenderers were recorded as having submitted in response to the subject tender by the tender submission deadline:

#	Name of Tenderer
1.	Prime Quantifiers Kenya Limited
2.	Kape Investments Limited
3.	Chasse Technologies Enterprises
4.	Magson Kenya Limited
5.	Container Technologies Limited
6.	Acorp General Supplies
7.	Energia Engineering Limited
8.	Africalive Limited
9.	Gabriella Kennedy Investments Limited
10.	Sajucy Company Limited
11.	Hadboi Limited
12.	Cheriez Constructions Limited
13.	Finton Logistics Limited
14.	Megawatt Ingenieria Limited

15.	Shajell Investments Limited
16.	Javanrise Technologies Limited
17.	Philafe Limited

Evaluation of Tenders

4. The Respondent constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") to undertake an evaluation of the received tenders in the following 4 stages as captured in the Evaluation Report
 - i. Preliminary Evaluation
 - ii. Technical Compliance Evaluation
 - iii. Technical Capacity Evaluation
 - iv. Financial Evaluation

Preliminary Evaluation

5. At this stage of the evaluation, the submitted tenders were to be examined using the criteria set out as Preliminary examination for Determination of Responsiveness under Section III-Evaluation and Qualification Criteria at pages 28 to 29 of the Tender Document.
6. The evaluation was to be on a Pass/Fail basis and tenders that failed to meet any criterion outlined at this Stage would be disqualified from further evaluation.
7. At the end of the evaluation at this stage, 11 tenders were found non-responsive, with only 6 tenders including those of the Applicant and



Interested Party qualifying for further evaluation at the Technical Evaluation Stage.

Technical Compliance Evaluation

8. The Evaluation Committee was required at this stage to examine tenders successful at the Preliminary Stage using the criteria set out as B. Technical Compliance Evaluation under Section III-Evaluation and Qualification Criteria at pages 29 to 31 of the Tender Document.
9. The evaluation was to be on a Complied /Not Complied basis and tenders that failed to meet any criterion outlined at this Stage would be disqualified from further evaluation.
10. At the end of the evaluation at this stage, 5 tenders including that of the Applicant were found non-responsive, with only the Interested Party's tender qualifying for further evaluation at the Technical Capacity Evaluation Stage.

Technical Capacity Evaluation

11. The Evaluation Committee was required at this stage to examine tenders successful at the Technical Compliance Evaluation using the criteria set out as C. Technical Compliance Evaluation under Section III-Evaluation and Qualification Criteria at pages 31 to 32 of the Tender Document.
12. The evaluation was to be on a Complied /Not Complied basis and tenders that failed to meet any criterion outlined at this Stage would be disqualified from further evaluation.

13. At the end of the evaluation at this stage, the Interested Party's tender, the only tender evaluated at this stage was found responsive and thus qualified for further evaluation at the Financial Evaluation Stage.

Financial Evaluation

14. The Evaluation Committee was required at this stage to examine tenders successful at the Technical Evaluation Stage using the criteria set out as Price Evaluation under Section III Evaluation and Qualification Criteria of the Tender Document.
15. The Evaluation Committee was to compare the tender prices and rank them with the view of establishing the lowest evaluated tender. The successful tender would be that established to have the lowest tender price.
16. At the end of the evaluation at this stage it was established that the Interested Party's tender price of Kshs. 29,085,762.05, which was the only tender evaluated at this stage, was the lowest and the said amount was equally within the Procuring Entity's budget.

Evaluation Committee's Recommendation

17. The Evaluation Committee through a signed Evaluation Report forming part of the Confidential File, recommended the award of the subject tender to the Interested Party, at its tendered price of **Kenya Shillings Twenty-Nine Million, Eighty-Five Thousand, Seven Hundred and Sixty-Two and Five Cents (Kshs. 29,085,762.05)** inclusive of taxes.



Professional Opinion

18. In a Professional Opinion dated 19th June 2024 (hereinafter referred to as the "Professional Opinion") the Procuring Entity's Director, Supply Chain Management, Mr. Peter Mwangi, reviewed the manner in which the subject procurement process was undertaken including the evaluation of tenders and recommended the award of the subject tender to the Interested Party.
19. Subsequently on 21st June 2024, the Respondent concurred with the Professional Opinion.

Notification to Tenderers

20. Accordingly, the tenderers was notified of the outcome of the evaluation of the tenders in the subject tender vide letters dated 28th June 2024.

REQUEST FOR REVIEW

21. On 11th July 2024, the Applicant through the firm of A.E. Kiprono & Associates, filed a Request for Review dated 11th July 2024 supported by an affidavit sworn on 11th July 2024 by Hussein Mohamed Adan, a Director at the Applicant, seeking the following orders from the Board in verbatim:

a) An order annulling and setting aside the award of the Tender to Interested Party at the tender sum of Kshs.29,085,762.05.

b) An order quashing the Respondent's decision contained in the letter dated 28th June 2024 declaring the Applicant's bid unsuccessful.

c) A declaration that the Respondent unfairly evaluated the Applicant's bid at the technical compliance evaluation

stage.

d) An order directing the Respondent to re-instate and re-evaluate the Applicant's bid at the technical compliance evaluation stage taking into consideration the Board's directions in this application.

e) An order awarding costs of the request for review to the Applicant.

f) Any other relief that the Review Board deems fit to grant under the circumstances.

22. In a Notification of Appeal and a letter dated 11th July 2024, Mr. James Kilaka, the Acting Board Secretary of the Board notified the Respondent of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondent a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the said Respondent was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 11th July 2024.

23. On 16th July 2024, Respondent filed a Memorandum of Response in the form of a letter dated 16th July 2024 and equally forwarded the Confidential Documents under Section 67(4) of the Act.

24. Vide letters dated 16th July 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 3 days from 16th July 2024.

25. On 17th July 2024, the Respondent through the firm of Robson Harris Advocates LLP, filed a Notice of Appointment of Advocates and a Memorandum of Response, both dated 16th July 2024.
26. On 18th July 2024, Javanrise Technologies, a tenderer in the subject tender, filed a Letter dated 17th July 2024.
27. On 19th July 2024, the Interested Party, through the firm of CK Advocates filed a Notice of Appointment of Advocates dated 18th July 2024 together with a Replying Affidavit sworn on 19th July 2024 by Caroline Muia Mbugua, a Director at the Interested Party.
28. On the same day, 19th July 2024, the Acting Board Secretary, sent out to the parties a Hearing Notice notifying parties that the hearing of the instant Request for Review would be by online hearing on 24th July 2024 at 11:00 a.m. through the link availed in the said Hearing Notice.
29. On 22nd July 2024, the Applicant filed Written Submissions dated 22nd July 2024.
30. On the same day, 22nd July 2024, the Interested Party filed Written Submissions dated 22nd July 2024.



31. On the morning of 24th July 2024, the Respondent filed their Written Submissions dated 22nd July 2024. The Respondent's Counsel, Mr. Mbogo equally sent an email to the Board seeking the rescheduling of the hearing to 2:00 p.m. on the same day citing that he was appearing before the High Court in a separate matter and may not make it in time for the 11:00 hearing. The Board Secretary secured consensus of Counsel in the matter for the hearing to be rescheduled to 26th July 2024 at 9:00 a.m. Accordingly, the Board Secretary sent out fresh Hearing Notices rescheduling the hearing to 26th July 2024 at 9:00 a.m.
32. On 26th July 2024 at 9:00 a.m., when the Board convened for the online hearing, all the parties were represented by their various Advocates. The Board read out to the parties the documents filed by the parties and requested them to confirm if the same had been served upon them of which all responded in the affirmative.
33. The Board gave hearing directions and the order of address directing that each party would have 10 minutes to address it with the Applicant getting a right to offer a rejoinder to the address by the Respondent and the Interested Party.

PARTIES SUBMISSIONS

Applicant's Submissions

34. Counsel for the Applicant, Mr. Mwangale, indicated that he would be placing reliance on the Applicant's filed documents in the matter including the written submissions dated wherein counsel proffered the following submissions;



35. Counsel submitted that the reason the Procuring Entity's gave for the disqualification of the Applicant, that is, "failure to provide data sheets in relation to the specifications required to aid in the evaluation" was subjective, unfair and unreasonable and was intended to knock out the Applicant from the subject tender.
36. Mr. Mwangale urged that the Board is mandated under Section 28 of the Act to review by examining the evaluation process and coming up with its own findings. He thus invited the Board to review the decisions taken by the Procuring Entity in the subject tender.
37. He contended that the Applicant's tender complied with the requirements under Part B, Technical Compliance Evaluation, which required tenderers who indicated that they had complied with the Procuring Entity's technical requirements to provide an explanation of compliance with reference to the data sheets/brochures. He referred the Board to pages 282 to 305 of its original tender.
38. Mr. Mwangale argued that the Applicant additionally indicated in its original tender that it would comply with the Procuring Entity's technical compliance requirements and therefore the failure to provide data sheets or brochures is a minor deviation. He equally argued that the Procuring Entity did not for instance call for data sheets/brochures for very important components of the works i.e. main foundation works as well as the roof works.
39. Counsel argued that the failure to provide data sheets/brochures was a minor deviation that did not run to the core structure of the works under



the subject tender and that this was capable of being cured under Section 79(2) of the Act. Further, that Clause 29.1 of the Tender Document permitted the Procuring Entity to waive non-conformities in the Tender where a tender was substantially responsive.

40. He placed reliance on ***Republic v Public Procurement Administrative Review Board; Arid Contractors & General Supplies (Interested Party) Ex parte Meru University of Science & Technology [2019]eKLR*** and ***Republic v Public Procurement Administrative Review Board & anor; Ex parte Wilis Protocol & Concierge Services Limited [2021]eKLR*** for the argument that section 79(2) of the Act exists to excuse minor errors that do not affect the subject a tender.
41. Counsel equally contended that the Interested Party's tender sum of Kshs. 29,085,762.05 was higher compared to the Applicant's Kshs. 28,952,700 and thus the award of the subject tender to the Interested Party was in breach of clauses 38.1(b) and 40.1 of the Tender Document and Section 86(1)(a) of the Act as well as Regulation 77(3) of the Regulations 2020.
42. In sum, Counsel argued that the Procuring Entity was in breach of Section 44(1) of the Act for abdicating its responsibilities of ensuring compliance with provisions of the Tender Document, Sections 3,44(2), 46(4)(e), 79(1) and 80(2) of the Act.

Respondents' Submissions

43. Counsel for the Respondent, Mr. Mbogo, indicated that he would be placing reliance on the Respondent's filed documents in the matter.



44. He argued that Procuring Entity complied with the provisions of the Act, which constitutes the procurement system envisioned under Article 227(1) of the Constitution of Kenya, 2010. He argued that the Applicant was inviting the Board to overlook its non-compliance with specifications in the Tender Document.
45. According to Counsel ITT 33.1 of the Tender Document demanded evaluation based on criteria in the Tender Document and that Clause 2.2 Part B required tenderers to provide data sheets/ brochures for verification of compliance.
46. Further that Section 70 of the Act obligated the Accounting Officer to prepare tender documents that contain sufficient information to allow fair competition among those who wish to submit tenders. It was his contention that the Applicant did not at any point appear to suggest that the Tender Document lacked sufficient information.
47. He maintained that the Tender Document was categorical that the technical datasheets had to be provided lest a tender risked disqualification.
48. Mr. Mbogo argued that the Applicant's failure to provide the datasheets could not constitute a minor deviation as it was a non-compliance with a mandatory requirement. Further that evaluation can only be in accordance with the criteria outlined in the Tender Document. For this reliance was placed on the decisions in ***Republic v Public Procurement Administrative Review Board; Consortium of GBM Projects***

Limited and ERG Insaat Ticaret Ve Sanayi A.S. (Interested Party); National Irrigation Board Ex parte [2020]eKLR; Republic v Public Procurement Administrative Review Board & Ors Ex parte Roben Aberdare (K) Limited [2019]eKLR; Republic v Public Procurement Administrative Review Board & Ors Ex parte BABS Security Services Limited; Republic v Public Procurement Administrative Review Board & 20rs Ex parte Dar Yuksel Ama[2022]eKLR; PPARB Application No. 12 of 2023; Royal Taste Kitchen Limited v Managing Trustee National Social Security Fund & Ors

49. Counsel argued that eligibility and mandatory requirements are considered at the Preliminary and Technical Evaluation Stages before tenderers' tender prices are considered at the Financial Evaluation stage. He maintained that there was no allegation that there was any alteration of a tenderer's tender price.
50. In sum, he indicated that the evaluation process in the subject tender was carried out in accordance with the requirements under the Tender Document and the Act.

Interested Party's Submission

51. Counsel for the Interested Party, Mr. Kiprono, indicated that he would be placing reliance on the Interested Party's filed documents.
52. He argued that Section III of the Tender Document required the successful tender to be one substantially responsive to the requirements under the Tender Document and also offering the lowest evaluated cost



to the Procuring Entity. Further, that the Technical data sheets had to be supplied as failure to submit the same would lead to disqualification.

53. Counsel urged that under Section 79(1) of the Act, a tender is responsive only if it conforms to all eligibility and mandatory requirements in the tender documents. Further, that Section 80(2) of the Act commands that evaluation should be in accordance with the requirements stipulated in the Tender Document.
54. He urged tenders were under a duty to comply with the requirements in the Tender Document as this ensures tenderers compete on an equal footing. For this, reliance was placed on the decisions in ***Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/S AAKI Consultants Architects and Urban Designers (Interested Party) [2019]eKLR and Republic v Public Procurement Administrative Review Board; Arid Contractors & General Supplies (Interested Party) Ex parte Meru University of Science & Technology [2019]eKLR***
55. Counsel urged that the Applicant's failure to submit technical datasheets rendered their tender non-responsive and invited the Board not to disregard this fact.
56. He further argued that the Interested Party's tender was substantially responsive and the lowest evaluated tender. He maintained that the Applicant had not imputed any non-compliance with a mandatory requirement on the Interested Party and thus the Interested Party was correctly established as the successful tenderer in the subject tender.



57. Relying on the decision in *M'Bita Ntiro v Mbae Mwachia & anor [2018]eKLR* he argued that the Applicant failed to meet the threshold to warrant the reliefs in its Request for Review.

Applicant's Rejoinder

58. In his brief rejoinder, Counsel for the Applicant, Mr. Mwangale urged that the Applicant's tender was substantially responsive and ought to have been established as the successful tender. Further, that any non-compliance constituted a minor deviation that could be cured under Section 79(2) of the Act.

59. He equally maintained that the Applicant's tender price was much lower than the Interested Party's tender price.

CLARIFICATIONS

60. The Board inquired from the Applicant whether they submitted the technical data sheets to which Counsel for the Applicant, Mr. Mwangale answered in the negative.

61. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 11th July 2024 the same had to be determined by 1st August 2024. Therefore, the Board would communicate its decision on or before 1st August 2024 to all parties via email.



BOARD'S DECISION

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

- I. ***Whether the Procuring Entity's Evaluation Committee's disqualification of the Applicant from the subject tender was in line with the provisions of the Constitution of Kenya, 2010, the Act, the Regulations 2020 and the Tender Document?***
- II. ***Whether the Procuring Entity's Evaluation Committee's recommendation of the award of the subject tender to the 1st Interested Party was in line with the provisions of the Constitution of Kenya, 2010, the Act, the Regulations 2020 and the Tender Document?***
- III. ***What orders should the Board issue in the circumstance?***

Whether the Procuring Entity's Evaluation Committee's disqualification of the Applicant from the subject tender was in line with the provisions of the Constitution of Kenya, 2010, the Act, the Regulations 2020 and the Tender Document?

63. The Applicant instituted the instant Request for Review taking issue with the manner in which its tender was evaluated with the result that its tender was disqualified at the Technical Compliance Evaluation Stage on account of what was indicated as the failure to submit technical data sheets for verification of its compliance. Counsel for the Applicant, Mr. Mwangale, vide written and oral submissions that the Applicant's tender complied with the requirements under Part B, Technical Compliance Evaluation, which required tenderers who indicated that they had



complied with the Procuring Entity's technical requirements to provide an explanation of compliance with reference to the data sheets/brochures. He referred the Board to pages 282 to 305 of its original tender.

64. Counsel further urged that the Applicant had indicated that it would comply with the technical requirements and in the event of any non-compliance, the same constituted a minor deviation under Section 79(2) of the Act. He equally argued that the Procuring Entity did not for instance call for data sheets/brochures for very important components of the works i.e. main foundation works as well as the roof works.
65. On the other hand, the Respondent affirmed that the Applicant's tender was correctly disqualified at the Technical Compliance Evaluation stage upon the Evaluation Committee establishing that the Applicant's tender did not contain technical datasheets as required under Section III of the Tender Document. Counsel for the Respondent, Mr. Mbogo, submitted that the supply of the technical data sheets was a mandatory requirement under the Tender Document thus non-compliance warranted disqualification. He affirmed that the tender evaluation was carried out in accordance with the Act and Regulations and thus the Request for Review was unjustified in the circumstance.
66. The Interested Party took a common position with the Respondent, while affirming that it was rightfully identified as the successful tender. Mr. Kiprono maintained that the Interested Party satisfied all the requirements of the Tender Document, its tender was substantially responsive to the tender requirements and that it was equally the lowest evaluated tender. Counsel maintained that the Applicant appeared to



have failed to meet the requirement on providing technical data sheet when noncompliance with this requirement attracted disqualification from the subject tender. Counsel equally urged that no evidence had been tendered for its non-compliance with the requirements in the subject tender.

67. The Board is therefore at this stage invited to interrogate the Procuring Entity's Evaluation Committee's evaluation of the tenders in the subject tender that culminated in the disqualification of the Applicant's tender .
68. For starters, Section 80 of the Act offers guidance on how an Evaluation Committee should proceed with the evaluation of tenders in the following terms:

"80. Evaluation of tenders

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

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

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

"79. Responsiveness of tenders

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

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

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

“19. It is a universally accepted principle of public procurement that bids which do not meet the minimum requirements as stipulated in a bid document are to be regarded as non-responsive and rejected without further consideration.[9] Briefly, the requirement of responsiveness operates in the following manner:- a bid only qualifies as a responsive bid if it meets with all requirements as set out in the bid document. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment



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

20. In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some

bidder were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions.”

See also ***Nairobi High Court Judicial Review Misc. Application No. 407 of 2018; Republic v Public Procurement Administrative Review Board; Arid Contractors & General Supplies (Interested Party) Ex parte Meru University of Science & Technology [2019] eKLR; Republic v Public Procurement Administrative Review Board & anor; Ex parte Wilis Protocol & Concierge Services Limited [2021]eKLR;Re public v Public Procurement Administrative Review Board & Ors Ex parte Roben Aberdare (K) Limited [2019]eKLR***

71. Drawing from the above, (i) the Tender Document is the key guide in the evaluation of tenders submitted in response to any tender invitation; (ii) A tender is responsive only if satisfies all the eligibility and mandatory requirements in the Tender Document; (iii) Tenderers who overlook requirements under the Tender Document do so at their own peril as they stand to be disqualified notwithstanding the merit of their tenders; and (iv) Excusing non-responsive tenders from meeting certain requirements in the Tender Document undermines competition among tenderers and



equally defeats the essence of these requirements being communicated to tenderers beforehand.

72. Turning to the instant Request for Review, Clause B. Technical Compliance Evaluation under Section III -Evaluation and Qualification Criteria at page 29 is hereinafter reproduced for ease of reference:

B. Technical Compliance Evaluation

All the bids that pass the mandatory shall be subjected to a Technical Compliance Evaluation. The Procuring Entity shall evaluate the technical aspects of the tender to determine compliance with the Procuring Entity's requirements under Section V "Schedule Requirement" and whether the Tenders are substantially responsive to the Technical Specifications and other Requirements.

Where bidders indicate they have complied with the Authority's technical requirements, they MUST provide an explanation of compliance with reference to the data sheet/brochures with specific page numbers. The tenders that fail at the technical compliance evaluation will not be considered for the next evaluation stage.

The technical datasheets must be provided for verification of compliance with these Specification's failure of which will lead to disqualification.

73. The application of the above clause is what appears to be the subject of argument before the Board.

74. In the Board's view, the above clause makes apparent the following:

- i. All tenders that satisfied the requirements at the Preliminary Evaluation Stage qualified for evaluation at the Technical Compliance Evaluation Stage.
- ii. The Evaluation Committee was at the Technical Compliance Evaluation Stage to examine the tenders at that stage to establish whether they were substantially responsive to the technical specifications and other requirements in the Tender Document;
- iii. Where a tenderer indicated that they had been compliant with the technical requirements, it was mandatory for them to provide an explanation of compliance with reference to data sheet/brochures with specific page numbers;
- iv. Tenders that failed to comply with any of the requirements at the Technical Compliance Evaluation Stage would be disqualified; and
- v. It was mandatory for the tenderers to supply technical data sheets for verification of compliance and any tender that did not supply the same was bound to be disqualified on this account.

75. From the above it would follow that a tender would be deemed responsive to the above clause if (i) Where a tenderer indicated that they had been compliant with the technical requirements, they provided an explanation of compliance with reference to data sheet/brochures with specific page numbers and (ii) the tender equally contained technical data sheets. Conversely, any tender that either lacked an explanation of compliance with reference to data sheet/ brochures with specific page numbers or one that lacked technical data sheets was to be established as non-responsive with the consequential fate of disqualification from the subject tender.



76. During the hearing it was apparent that the Applicant's tender did not contain the technical data sheet as required under the Tender Document. Counsel for the Applicant, Mr. Mwangale admitted this fact. The Board equally, independently studied the Applicant's original tender as submitted to it by the Respondent as part of the Confidential Documents under Section 67(3)(e) of the Act established that indeed no such data sheets were submitted as part of the Applicant's tender.
77. The Tender Document was explicit as reproduced above that failure on the part of a tenderer to provide the technical data sheet as part of its tender would lead to its disqualification from the subject tender. The Applicant failed to comply with this requirement and was consequently disqualified in accordance with the clause of the Tender Document. We therefore find no fault on the part of the Evaluation Committee to have disqualified the Applicant on this account as the Committee was only giving effect to an express dictate of the Tender Document.
78. Counsel for the Applicant made a spirited argument that the Applicant had nonetheless made a statement in its tender of its commitment to comply with the Procuring Entity's technical requirements and that the failure to include the data sheets was a minor deviation capable of being excused under Section 79(2) of the Act. The Board finds great difficulty following this argument for at least 3 reasons.
- i. The Applicant's statement on compliance with the Procuring Entity's technical requirements was made towards compliance with only one of the requirements under the said clause. There was clear non-

compliance on the part of the Applicant in respect of the related requirement to supply technical datasheets for verification of compliance with the technical specifications.

- ii. The Tender Document made the supply of technical data sheets a mandatory requirement whose non-compliance called for disqualification. Accordingly, failure to comply with this requirement could not constitute a minor deviation excusable under Section 79(2) of the Act.
- iii. There exists a large body of case law including the ***BABS Security Case*** above that affirm that non-compliance with a mandatory requirement is not a minor deviation.

79. In view of the foregoing, the Board finds that the Procuring Entity's Evaluation Committee's disqualification of the Applicant from the subject tender was in line with the provisions of the Constitution of Kenya, 2010, the Act, the Regulations 2020 and the Tender Document.

Whether the Procuring Entity's Evaluation Committee's recommendation for the award of the subject tender to the Interested Party was in line with the provisions of the Constitution of Kenya, 2010, the Act, the Regulations 2020 and the Tender Document?

80. The Applicant equally took issue with the award of the subject tender to the Interested Party, when in fact the Interested Party's tender price was higher compared to the Applicant. Counsel for the Applicant, Mr. Mwangale urged that the tender was awarded to the Interested Party at the tender price of Kshs. 29,085,762.05 against the Applicant's lower



tender price of Kshs. 28,952,700. According to Counsel, the Applicant's tender was the lowest evaluated tender.

81. The Respondent maintained that the evaluation process leading to the award of the subject tender to the Interested Party was regular and carried out in compliance with the requirements of the Tender Document, Act and Regulations 2020. Counsel for the Respondent submitted that an award was to be made to the lowest evaluated tender and not just the lowest tender.
82. The Interested Party backed the Respondent's position affirming that it was responsive to the requirements under the Tender Document. Counsel for the Interested Party, Mr. Kiprono, argued that there was no imputation of non-responsiveness on the Interested Party's tender.
83. The Board is therefore invited to look in to the award of the subject tender to the Interested Party.
84. From the outset, the Board takes guidance from the ***BABS Security Case*** above where the High Court affirmed that a tender that has been found unresponsive to the mandatory requirements in a Tender Document does not qualify to proceed for price evaluation and expressed itself thus at page 4 paragraph 19:

The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing or empowerment. Bidders found to be

non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome.

85. From the above pronouncement it is apparent that the evaluation process is carried out in stages and where a tenderer is found unresponsive at the preceding stages they do not qualify for evaluation at the successive stages regardless of the merits of its bid. Accordingly, a tenderer who is disqualified at the initial stages does not qualify to have its tender compared with the rest of the tenders that advanced to the successive stages.
86. In the present case, the Board has already found that the Applicant was correctly disqualified from the subject tender at the Technical Compliance Evaluation Stage for failing to submit technical tender data sheets as part of its tender. Guided by the ***BABS Security Case*** above, this Board finds that the Applicant's tender price does not merit comparison with that of the Interested Party, since the Applicant's tender did not merit for evaluation at the Financial Evaluation Stage. It is only tenderers whose tenders that qualified for evaluation at the Financial Evaluation Stage that were to be compared with the Interested Party. However, in the subject tender, only the Interested Party's tender made it to the Financial Evaluation Stage and thus there was no other tender, whose tender price could be compared to that of the Interested Party so as to establish the lowest evaluated tender. From the Confidential File, the Board has established that the Procuring Entity had an approved budget of Kshs. 41,000,000/- for the subject tender and thus the Interested Party's tender price of Kshs. 29,085,762.05/- was regular.



87. Throughout the hearing, the Applicant did not impeach the qualifications of the Interested Party other than the Interested Party's tender price, which has already been addressed above. Absent any substantiated attack on the Interested Party's qualifications, the Board is ready to presume that the award of the subject tender to the Interested Party was regular in the circumstance. This finding mirrors that made by the Board in ***PPARB Application No. 19 of 2022; Madison General Insurance Kenya Limited v Lt. Col (RTD BN Njiriani, the Accounting Officer (KEBS) and CIC Insurance Limited :***

Turning to the circumstances of this instant Request for Review, we note that the same is entirely hinged on the Applicant's own industry knowledge that the Interested Party does not possess business permits covering major towns, specifically Nairobi, Mombasa, Kisumu, Nakuru and Eldoret. ..The Applicant has adduced no evidence whatsoever to support its allegation claiming that the burden of proof shifted to the Interested Party to demonstrate compliance with MR24.

We do not agree with the Applicant that the burden of proof has shifted to the Interested Party. We say so because, we have hereinbefore established that the burden of proof rests with he who alleges, and in this instant, the Applicant. Secondly, we have established that such burden of proof remains static throughout court proceedings, like the current proceedings before this Board, and it is only the evidential burden of proof that may shift to a respondent, in this instant the Respondent and the Interested Party, depending on the

nature and the effect. In the instant Request for Review, no evidence whatsoever has been adduced by the Applicant before the Board for the Board to assess whether or not the evidential burden of proof has shifted to the Respondent and Interested Party for them to disprove the Applicant's allegation.

88. The above decision of the Board was upheld by the Court of Appeal in ***CIC General Insurance Limited v Madison General Insurance Kenya Limited, PPARB, Lt Col. (Rtd) BN Njiriani, the Accounting Officer (KEBS)*** where the appellate court decreed that the evidential burden on a party's qualification lies with an Applicant filing a Request for Review before the Board:

"The person who makes such an allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already-discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue" [Cross and Tapper on Evidence, (Oxford University Press, 12th ed, 2010, page 124)]."

25. The fact that the respondent failed to give evidence to establish its claim that the appellant did not submit business permits to operate in the major towns mentioned above,



those allegations could not stand. Indeed, we find no basis for the learned Judge's decision to grant the orders sought by the respondent in its application for judicial review in the absence of any law shifting the burden of proof or otherwise requiring the appellant to give evidence to rebut the respondent's claim. In our considered view, the learned Judge misapplied the rules of evidence relating to the burden of proof and thereby reached a wrong conclusion.

26. Having carefully considered the record of appeal, the written and oral submissions of the respective learned counsel for the parties, the afore-cited statutory provisions and case law, we reach the conclusion that the appellant's appeal succeeds. Accordingly, we hereby order and direct that—

(a) the appellant's appeal be and is hereby allowed;

(b) the judgment of the High Court (A. K. Ndung'u) delivered on 28th April 2022 in High Court Judicial Review Misc. Application No. E039 of 2022 be and is hereby set aside;

(c) the decision of the Public Procurement Administrative Review Board delivered on 22nd March 2022 in Request for Review No. 19 of 2022 be and is hereby upheld;

89. In view of the foregoing, the Board finds that Procuring Entity's Evaluation Committee's recommendation for the award of the subject tender to the Interested Party was in line with the provisions of the Constitution of Kenya, 2010, the Act, the Regulations 2020 and the Tender Document.



90. The Board has equally found that the Procuring Entity's Evaluation Committee's recommendation for the award of the subject tender to the Interested Party was in line with the provisions of the Constitution of Kenya, 2010, the Act, the Regulations 2020 and the Tender Document

What orders the Board should grant in the circumstances?

91. The Board has found that that the Procuring Entity's Evaluation Committee's disqualification of the Applicant from the subject tender was in line with the provisions of the Constitution of Kenya, 2010, the Act, the Regulations 2020 and the Tender Document.

92. The upshot of our finding is that the Request for Review dated 11th July 2024 in respect of Tender No. CA/SCM/OT/86/2023-2024 for Fabrication, Supply and Delivery of 20FT Containers House fails in the following specific terms:

FINAL ORDERS

93. In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review dated 11th July 2024:

1. The Request for Review dated 11th July 2024 be and is hereby dismissed.

2. The Respondent be and is hereby directed to proceed with Tender No. CA/SCM/OT/86/2023-2024 for Fabrication, Supply and Delivery of 20FT Containers to its lawful and logical conclusion.



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

Dated at NAIROBI, this 1st Day of August 2024.


.....
CHAIRPERSON
PPARB


.....
SECRETARY
PPARB



