

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 88/2024 OF 4TH SEPTEMBER 2024

BETWEEN

LEIRDA ENERGY APPLICANT

AND

ACCOUNTING OFFICER,

GEOHERMAL DEVELOPMENT COMPANY 1ST RESPONDENT

GEOHERMAL DEVELOPMENT COMPANY.....2ND RESPONDENT

TRANSCORP POWER (EA) LIMITED INTERESTED PARTY

Review against the decision of the Accounting Officer, Geothermal Development Company in relation to Tender No. GDC/SHE/OT/050/2023-2024 for Supply & Delivery of Assorted Personal Protective Equipment

BOARD MEMBERS PRESENT

- | | | |
|------------------------|---|-------------------|
| 1. QS Hussein Were | - | Panel Chairperson |
| 2. CPA Alexander Musau | - | Member |
| 3. Eng. Lilian Ogombo | - | Member |

IN ATTENDANCE

PPARB No.88/2024
25th September 2024



1. Mr. Philemon Kiprop - Holding Brief for Acting Board Secretary
2. Ms. Evelyn Weru - Secretariat

PRESENT BY INVITATION

APPLICANT

LEIRDA ENERGY

1. Mr. Wamalwa - Advocate, Ricar Advocates
2. Ms. Rose Kariuki - Advocate, Ricar Advocates

RESPONDENT

ACCOUNTING OFFICER, GEOTHERMAL DEVELOPMENT COMPANY LIMITED & GEOTHERMAL DEVELOPMENT COMPANY LIMITED

1. Mr. Phillip Chemngorem h/b for
Ms. Agnes Muthengi - Advocate, GDC Limited
2. Mr. Justus Muhambi - Procurement Officer, GDC Limited

INTERESTED PARTY

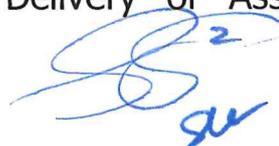
TRANSCORP POWER (EA) LIMITED

1. Mr. John Wekesa - Okoyo & Orina Advocates
2. Mr. Albert Oyugi - Director

BACKGROUND OF THE DECISION

The Tendering Process

1. Geothermal Development Company Limited, the Procuring Entity and 2nd Respondent herein, invited sealed bids in response to Tender No. GDC/SHE/OT/050/2023-2024 for Supply & Delivery of Assorted



Personal Protective Equipment Services (hereinafter referred to as the "subject tender"). Tendering was conducted under open competitive method (National). The tender was advertised on 19th March 2024 in *MyGov* publication, on the Procuring Entity's website www.gdc.co.ke and on the Public Procurement Information Portal (PPIP) website www.tenders.go.ke where the blank tender document issued to tenderers (hereinafter referred to as the 'Tender Document') was available for download.

2. The tender comprised of thirteen (13) schedules (lots), that is, Schedule A to Schedule M. The initial submission deadline was on 2nd April 2024 at 11.00 a.m.

Addenda

3. On various dates between 22nd March 2024 and 22nd April 2024 the Procuring Entity issued four (4) addenda while extending the tender submission deadline to 6th May 2024 at 11.00 a.m.

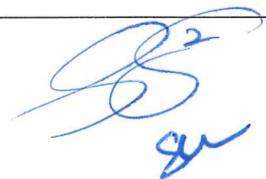
Submission of Tenders and Tender Opening

4. According to the Minutes of the tender opening held on 6th May 2024 and which Tender Opening Minutes were part of confidential documents furnished to the Public Procurement Administrative Review Board ("the Board") by the Procuring Entity pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), a total of twenty-five (25) tenders were submitted in response to the tender. The tenders were



opened in the presence of tenderers' representatives present, and were recorded as follows:

Bidder No.	Name of Bidder
1.	Marobe Business System
2.	Motion Industrial Ltd
3.	Armick Ltd
4.	Jegos Enterprises
5.	Jadah Global Services Ltd
6.	Njerchoy Enterprises
7.	Transcorp Power (EA) Ltd
8.	Riabaki Ventures
9.	Olivias Ventures
10.	Royal Oilfield Logistics Services & Supplies Ltd
11.	Mageric Enterprises
12.	Medow Group Ltd
13.	Leirda Energy
14.	Glosiam Ltd
15.	Hanash Industrial Contractors
16.	Fgee Technology Ltd
17.	Sareen Pharm Enterprises
18.	Danjai Enterprises Ltd
19.	Bixtron Safety Handlers Ltd
20.	Neknaj Holdings
21.	Danphis Enterprises Ltd
22.	Smart Bargain Ltd
23.	Almer Safety Ltd
24.	Zocom Ltd
25.	Sopelynk Merchants



Evaluation of Tenders

5. A Tender Evaluation Committee appointed by the Respondent undertook evaluation of the tenders. The evaluation was done in the following stages:

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

Preliminary Evaluation

6. The Evaluation Committee was required to examine tenders for responsiveness using the criteria set out under Preliminary/ Mandatory Evaluation Requirements/Criteria of Section III- Evaluation and Qualification Criteria at page 26 of the Tender Document. Tenderers were required to meet all the mandatory requirements at this stage to proceed to the technical evaluation stage.

7. Twenty-one (21) tenders were determined non-responsive while four (4) tenders, including the Applicant's and Interested Party's tender, were determined responsive and proceeded for Technical Evaluation as captured below:

Table 1 : Mandatory Evaluation - Responsive Bidders

Bidder No.	Bidder Name	Quoted Schedule
7	Transcorp Power (EA) Ltd	A,B,C



13	Leirda Energy	A, B, C, D, F and K
16	Fgee Technology Ltd	A
22	Smart Bargain Ltd	B and D

Technical Evaluation

8. The Evaluation Committee was required at this stage to examine tenders using the criteria set out under Technical Evaluation Requirements/Criteria of Section III- Evaluation and Qualification Criteria at page 27 of the Tender Document. Following the Technical Evaluation two (2) tenders were determined non-responsive while two (2) tenders, being the Applicant and Interested Party herein, were determined responsive in Schedule A, C and D and proceeded for financial evaluation.

9. The results of the Technical Evaluation were captured as follows:

Table 2: Technical Evaluation

Bidder No.	Bidder Name	Quoted Schedule
7	M/s Transcorp Power (EA) Ltd	A and C
13	M/s Leirda Energy	A, C and D

Financial Evaluation

10. The Evaluation Committee was required at this stage to examine tenders using the criteria set out under Financial Evaluation of Section III- Evaluation and Qualification Criteria at page 27 of the Tender Document. The lowest evaluated tender per complete



schedule in the subject tender inclusive of taxes and transport cost would be recommended for award.

11. Upon conclusion of the Financial Evaluation, the Evaluation Committee compared bids as follows:

The lowest bid quoted by the bidders qualified for each schedule as shown in table 6, 7 and 8 below;

Table 3 : Financial Evaluation - Schedule A (Rigger Boots)

No	Item	UoM	Qty	M/s Transcorp Power (EA)		M/s Leirda Energy	
				Unit[KShs]	Total[KShs]	Unit[USD]	Total [USD]
1	EU Size 36	PAA	2	31,000.00	62,000.00	282.00	564.00
2	EU Size 37	PAA	2	31,000.00	62,000.00	282.00	564.00
3	EU Size 38	PAA	8	31,000.00	248,000.00	282.00	2,256.00
4	EU Size 39	PAA	22	31,000.00	682,000.00	282.00	6,204.00
5	EU Size 40	PAA	26	31,000.00	806,000.00	282.00	7,332.00
6	EU Size 41	PAA	62	31,000.00	1,922,000.00	282.00	17,484.00
7	EU Size 42	PAA	103	31,000.00	3,193,000.00	282.00	29,046.00
8	EU Size 44	PAA	46	31,000.00	1,426,000.00	282.00	12,972.00
9	EU Size 45	PAA	25	31,000.00	775,000.00	282.00	7,050.00
10	EU Size 46	PAA	3	31,000.00	93,000.00	282.00	846.00
11	EU Size 47	PAA	1	31,000.00	31,000.00	282.00	282.00
Sub Total					9,300,000.00		84,600.00
16% VAT					1,488,000.00		13,536.00
Grand Total Cost Inclusive of 16% VAT & Transport Cost to GDC Menengai Stores					10,788,000.00		98,136.00

Bidder 7 - M/s Transcorp Power (EA) Ltd is the most responsive bidder for Schedule A.

Table 4 : Financial Evaluation - Schedule C (Steel Toe Gum Boot)

No.	Item Description	UoM	Qty	M/s Transcorp Power (EA)		M/s Leirda Energy	
				Unit [Kshs]	Total [Kshs]	Unit [USD]	Total [USD]
1	EU Size 36	PAA	2	5,550.00	11,100.00	49.00	98.00
2	EU Size 37	PAA	1	5,550.00	5,550.00	49.00	49.00
3	EU Size 38	PAA	5	5,550.00	27,750.00	49.00	245.00
4	EU Size 39	PAA	15	5,550.00	83,550.00	49.00	735.00
5	EU Size 40	PAA	17	5,550.00	94,350.00	49.00	833.00
6	EU Size 41	PAA	41	5,550.00	227,550.00	49.00	2009.00
7	EU Size 42	PAA	68	5,550.00	337,550.00	49.00	3332.00
8	EU Size 44	PAA	31	5,550.00	172,050.00	49.00	1519.00
9	EU Size 45	PAA	17	5,550.00	94,350.00	49.00	833.00
10	EU Size 46	PAA	2	5,550.00	11,100.00	49.00	98.00
11	EU Size 47	PAA	1	5,550.00	5,550.00	49.00	49.00
Sub Total					1,110,000.00		9800.00
16% VAT					177,600.00		1568.00
Grand Total Cost Inclusive of 16% VAT & Transport Cost to GDC Menengai Stores					1,287,600.00		11,368.00

Bidder 7 - M/s Transcorp Power (EA) Ltd is the most responsive bidder for Schedule C.

Table 5: Financial Evaluation – Schedule D (Hi-Vis All Weather Jacket)

No.	Item Description	UoM	Qty	M/s Leirda Energy	
				Unit [USD]	Total [USD]
1	Small (S)	PC	8	118.00	944.00
2	Medium (M)	PC	70	118.00	8,260.00
3	Large (L)	PC	117	118.00	13,806.00
4	Extra Large (XL)	PC	158	118.00	18,644.00
5	2 x Large (XXL)	PC	113	118.00	13,334.00

6	3 x Large (XXXL)	PC	28	118.00	3,304.00
7	4 x Large (XXXXL)	PC	3	118.00	354.00
8	5 x Large (XXXXL)	PC	2	118.00	236.00
9	6 x Large (XXXXL)	PC	1	118.00	118.00
Sub Total					59,000.00
16% VAT					9,440.00
Grand Total Cost Inclusive of 16% VAT & Transport Cost to GDC Menengai Stores					68,440.00

*USD Dollar rate to Kenyan Shillings is 133.05 as at 6th May, 2024

Bidder No 14 - M/s Leirda Energy is the most responsive bidder for Schedule D.

Evaluation Committee's Recommendation

12. The Evaluation Committee recommended award of the subject tender to the Applicant and Interested Party herein as follows:

- *M/s Transcorp Power (EA) Ltd for Schedule A (Rigger Boots) and Schedule C (Steel Toe Gum Boots) being the most responsive bidder at a total cost of Kshs. 12,075,600.00 (Twelve Million Seventy Five Thousand Six Hundred Kenya Shilling Only) inclusive of 16% VAT and transportation cost to Menengai Stores;*
- *M/s Leirda Energy for Schedule D (Hi-vis All Weather Jacket) being the most responsive bidder at a total cost of USD 68,440.00 (Sixty Eight Thousand Four Hundred and Forty United States Dollars Only)*



(Kshs. 9,105,942.00) inclusive of 16% VAT and transportation cost to Menengai Stores; and

- *Retender of Schedule B (Laced Boots), Schedule E (Industrial Rubber Gloves), Schedule F (Welder Gauntlet Gloves), Schedule G (Welder Apron), Schedule H (Auto Darkening Welding Shield), Schedule I (Full Face Respiratory Mask), Schedule J (Hazmat Suit), Schedule K (Full Brim Helmets), Schedule L (Front Brim Helmets) and Schedule M (Secure Fit Helmets) which were non-responsive.*

Professional Opinion

13. In a Professional Opinion dated 2nd August 2024, the Ag. Manager Supply Chain, Mr. Patrick Kapto, reviewed the procurement process and concurred with the recommendations of the Evaluation Committee.

14. The Professional Opinion was presented to the Procuring Entity's Accounting Officer, Mr. Paul K. Ngugi, who on 9th August 2024 approved award of Schedules A and C to the Interested Party and retendering of Schedules B, E, F, G, H, I, J, K, L, and M as recommended but declined to award Schedule D to the Applicant on the basis that its price was not competitive.

Notification to Tenderers



15. Tenderers were notified of the outcome of evaluation process *vide* letters dated 22nd August 2024.

REQUEST FOR REVIEW NO. 88 OF 2024

16. Leirda Energy, the Applicant herein, filed a Request for Review dated 4th August 2024 together with a Statement in Support of the Request for Review dated 4th September 2024 through Ricar Advocates seeking the following orders from the Board:

a) The Procuring Entity's Letter of Notification of Intention to Award Tender No. GDC/SHE/OT/050/2023-2024, Tender for Supply and Delivery Of Assorted Personal Protective Equipment which is dated 22nd August 2024 and addressed to M/s Leirda Energy Limited, be and is hereby cancelled and set aside.

b) The Procuring Entity's Letter of Notification of unsuccessful bid in respect of Tender No. GDC/SHE/OT/050/2023-2024, Tender For Supply And Delivery Of Assorted Personal Protective Equipment which is dated 22nd August 2024 and addressed to M/s Leirda Energy Limited, be and is hereby cancelled and set aside.

c) The Procuring Entity is hereby directed to conduct a fresh evaluation in strict accordance with the criteria contained

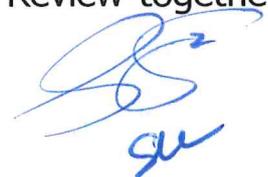


in the Tender Document and award the subject tender (Tender No. GDC/SHE/OT/050/2023-2024, Tender For Supply And Delivery Of Assorted Personal Protective Equipment) to the bidder determined to have submitted the lowest evaluated price in accordance with the Tender Document and section 86 (1) (a) of the Act.

d) The Procuring Entity is hereby ordered to pay the Applicant the costs of and incidental to this Request for Review; and

e) Such other, additional, further, incidental and/or alternative orders as the Honourable Board may deem just and expedient.

17. In a Notification of Appeal and a letter dated 4th September 2024, Mr. James Kilaka, the Acting 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 tender within five (5) days from 4th September 2024.

18. The Respondents filed, through Agnes Muthengi Advocates, a Notice of Appointment, a Memorandum of Response and a Supporting Affidavit sworn by Patrick Kapto, all dated 10th September 2024.

19. *Vide* email dated 13th September 2024, the Acting Board Secretary notified all tenderers in the subject tender of the existence of the Request for Review while forwarding to them the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. All tenderers were invited to submit to the Board any information and arguments concerning the tender within three (3) days.

20. *Vide* a Hearing Notice dated 13th September 2024, the Acting Board Secretary, notified parties and all tenderers of an online hearing of the instant Request for Review slated for 19th September 2024 at 11.00 a.m. through the link availed in the said Hearing Notice.

21. On 16th September 2024, the Interested Party filed through Okoyo & Orina Advocates a Notice of Appointment of Advocates dated 15th September 2024 and a Memorandum of Response dated 14th September 2024.



22. On 18th September 2024, the Interested Party filed Written Submissions dated 17th September 2024.
23. The Applicant filed on 19th September 2024 Written Submissions together with a List and Bundle of Authorities, dated 18th September 2024.
24. The Respondents also filed on 19th September 2024 Written Submissions dated 18th September 2024.
25. At the hearing on 19th September 2024 at 11:00 a.m., the Board asked parties to confirm pleadings filed in the instant Request for Review. Subsequently, parties were allocated time to highlight their respective cases and the Request for Review proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

Applicant's case

26. The Applicant, led by Ms. Kariuki, averred that it submitted its bid on 6th May 2024 with regard to 7 schedules being Schedules A, B, C, D, E, F, and K. She indicated that the Procuring Entity, in response to bidders' queries, replied to the effect that a bidder could quote for any number of schedules.
27. On the award criteria, the Applicant submitted that it was the Procuring Entity's response that the lowest evaluated price per



schedule would be recommended for award and each schedule would be awarded separately.

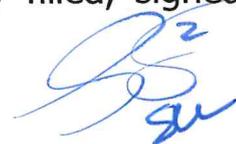
28. Ms. Kariuki submitted that the Applicant was issued with a notification letter on 22nd August 2024 informing it that it was unsuccessful in the subject tender having been disqualified at the Technical Evaluation stage, while listing other unsuccessful bidders and the Interested Party who was the successful bidder at Kshs. 12,075,600.00 although it failed to indicate the particular schedules awarded.

29. Counsel pointed out that the Interested Party had bid for only 3 schedules, being A, B, and C, at an overall sum of Kshs. 18,014,800.00 while the Applicant bid for 7 schedules at an overall sum of USD 244,992.00. As per the notification letter, Schedules B, D, E, F, G, H, I, J, K, L, and M were terminated while information on schedules A and C was missing.

30. Counsel further pointed out that according to a debrief letter issued to the Applicant, the explanation given by the Procuring Entity touched on only 4 schedules and was to the effect that the Applicant's tender was non-responsive and this deviated from the reasons issued in the notification letter indicating that the said schedules had been terminated.



31. Ms. Kariuki argued that the Board is required to take into consideration the legal implication of the word non-responsive versus termination in view of the fact that no explanation was given as to why particular schedules were terminated.
32. She made reference to the Procuring Entity's Response to the instant Request for Review which gave specific reasons for the disqualification of the Applicant's tender and why particular schedules were terminated in addition to the Professional Opinion that indicated that the Applicant was recommended for award in schedule D but the same was rejected by the 1st Respondent for the reason that it was not competitive.
33. Counsel indicated that the explanation given as to why the Applicant's tender price was considered not competitive was that it was above the market price compared to other bidders' prices and argued that the market price index is availed to the public by PPRA and items therein are standard goods and the particular items under Schedule D did not fall under this category. She further argued that despite the evaluation Committee's recommendation for award, the 1st Respondent ignored the evaluation process and his reason for rejecting the recommendation was untenable.
34. Counsel submitted that reconsideration of the Interested Party's bid took place despite the fact that it failed to meet the mandatory requirement requiring a bidder to submit a duly filled, signed and



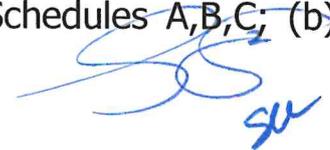
stamped price schedule which was considered to be a minor deviation and there was no particular reason given on why the Interested Party was awarded at a price lower than that read out at tender opening.

35. She questioned why other bidders were disqualified on account of non-compliance with the mandatory requirement requiring submission of a duly filled, signed and stamped price schedule yet the same was overlooked in evaluating the Interested Party's bid and submitted that this was favoritism and a clear intention to disqualify the Applicant despite its bid having qualified and proposed for award.

Respondents' case

36. The Respondents, led by Mr. Chemngorem, submitted that during evaluation, a poll by the Evaluation Committee concluded that the grounds for disqualifying the Interested Party amounted to a minor deviation in view of the fact that though the bidder did not include the total amount in its summary of the price schedule, the amount was clearly indicated in the Form of Tender and this oversight did not materially affect the substance or competitiveness of its bid. He further submitted that the decision was in accordance with Section 79(2)(a) &(b) of the Act which allows minor deviations that do not alter essential aspects of the tender.

37. He pointed out that 4 firms proceeded to the Technical Evaluation stage being (a) Transcorp Power (EA) Ltd in Schedules A,B,C; (b)



Leirda Energy in Schedules A, B, C, D, F and K; (c) Fgee Technology Ltd in Schedule A; and (d) Smart Bargain Ltd in Schedules B and D. He further pointed out that at the conclusion of the technical evaluation, the Applicant was found responsive in Schedule A, C, and D while the Interested Party was found responsive in Schedule A and C and progressed for financial evaluation.

38. Counsel submitted that at the Financial Evaluation, the Interested Party was found responsive in Schedules A and C at Kshs. 12,075,600.00 while the Applicant was found responsive in Schedule D at USD 68,440 which, when converted, amounted to Kshs. 9,105,942.00. He indicated that both bidders were recommended for award and a recommendation made for retendering of Schedules B, E, F, G, H, I, J,K, L, and M there being no responsive bidder.

39. He further indicated that pursuant to the Professional Opinion issued by the Head of Procurement, a recommendation was made for consideration of the Evaluation Committee's recommendations of award and retendering which were approved but the recommendation to award the Applicant Schedule D was rejected due to competitive concerns as the tender price was above market prices having been compared to other bidders especially Motion Limited and Smart Bargain Limited which revealed a big difference leading the 1st Respondent to reject the recommendation based on this comparative analysis. Counsel submitted that in the approval,



due to a clerical error, Schedules K, L, and M were inadvertently omitted.

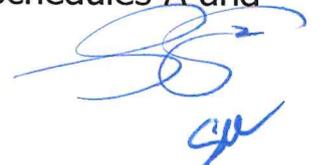
40. Mr. Chemngorem submitted that the Applicant was duly notified as evidence by the notification letter dated 22nd August 2024 including the decision to terminate the non-responsive schedules and, by mere deduction, it was clear that schedules A and C had been awarded to the Interested Party.

41. On the discrepancy on the Interested Party's price read out at tender opening and the amount awarded as indicated in the notification letter, counsel submitted that this was the total amount awarded for the responsive bid in schedules A and C. He further submitted that the Applicant's bid having been rejected, the 1st Respondent terminated the same pursuant to Section 63 of the Act on account of evidence of price being above market price.

Interested Party's case

42. The Interested Party, led by Mr. Wekesa relied on its documents filed before the Board and submitted that it bid for Schedules A, B, and C in the subject tender which totaled to Kshs. 18,014,800.00 and was notified of award of Schedules A and C at Kshs. Kshs. 12,075,600.00

43. Counsel referred to Section 80(2) of the Act and submitted that the Interested Party's bid was found most responsive in Schedules A and



C. On the issue of its price schedule, he pointed out that the amount in its Form of Tender which was final was the same figure on tabulation of the price indicated in its price schedule and in support of his argument, he referred to the holding in *R v Public Procurement Administrative Review Board & 2 others ex parte Research and Development Actions Limited (2017) eKLR*.

44. He urged the Board to uphold the decision of the Respondents in award of the subject tender to the Interested Party.

Applicant's Rejoinder

45. In a rejoinder, Mr. Wamalwa submitted that pursuant to Section 80 of the Act, evaluation of bids is guided by the criteria set out in the Tender Document and that it was not for the Applicant to deduce who was awarded schedules A and C as submitted by the Respondents since they were obligated to communicate the same.

46. With regard to the Interested Party's price schedule's deviation being regarded as a minor deviation, counsel pointed out that other bidders were disqualified for having not stamping or duly filling the said price schedule which raises a question on the treatment accorded to the Interested Party.

47. With regard to the issue of market prices raised by the Respondents, counsel submitted that market prices is a creature of statute as provided under Section 9 of the Act and PPRA sets these prices and



not parties who did not even qualify at the preliminary evaluation stage.

48. He further submitted that the procurement process was filled with contradictions and opaqueness contrary to the provisions of the Act and Article 227 of the Constitution and it was not clear why preferential treatment was given to the Interested Party.

49. At this juncture, Ms. Kariuki asked the Board to make a finding on whether Section 79 of the Act provides for minor deviations in regard to mandatory requirements and if minutes in regard to this decision were availed.

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

CLARIFICATIONS

51. The Board asked the Respondents to expound on the basis of using other bidder's tender prices to determine the market price to which Mr. Chemngorem submitted that using other bidders price schedules for purposes of the comparative analysis was the best approach noting the fundamental price difference of close to 3 or 4 Million shillings. He further submitted that the 1st Respondent deemed it important to get the feeling of the market price under Schedule D by using the other two bidder's prices.



52. On whether the decision to use other bidders tender prices to determine the market price was done by the Evaluation Committee or the 1st Respondent, Mr. Chemngorem confirmed that this was done by the 1st Respondent.
53. As to the areas of interest to the Applicant in the subject tender, Mr. Wamalwa submitted that the Applicant's bid quoted for 7 schedules yet reasons for its non-responsiveness were only issued for 3 schedules.
54. When asked to clarify if submission of a duly filled and stamped price schedule was a mandatory requirement, Mr. Chemngorem confirmed that this was a mandatory requirement and the Evaluation Committee took into consideration that Section 79 of the Act allows for minor deviations and as such, the Evaluation Committee resolved that the amount could be established from the Form of Tender that was similar on tabulation of the amount in the price schedule.
55. On whether a report was filed with the Director General PPRA on termination of some of the schedules in the subject tender and reasons given for the said termination, Mr. Justus Muhambi submitted that the reporting on the portal was done up to the evaluation and approval stage and on receipt of the Notification of Appeal from the Board Secretary, they halted the process. He indicated that the circular from PPRA introduced online posting on every stage of procurement handled and manual submissions would



no longer be carried out. He further confirmed that a circular cannot amend specific provisions of the Act.

56. When asked to clarify if it was successful in any of the 7 schedules it participated in, Mr, Wamalwa submitted that based on a self-evaluation, the Applicant believed that its bid was responsive and from the Respondents' responsive it was clear that its bid was responsive in Schedule D.

57. On the notification of intention to award issued by the Respondents, Ms. Kariuki submitted that the Applicant was given a blanket reason for its disqualification in the various schedules hence the Applicant could not tell which schedule was deemed non-responsive at the Technical Evaluation stage. She further submitted that the notification disclosed a general successful bidder without stating the specific schedules and reasons why it was deemed successful and no reasons were given for Schedules A, C and D. She indicated that the Applicant learnt of the termination of other schedules from the notification letter dated 22nd August 2024.

58. On his part, Mr. Chemngorem submitted that this may have been a clerical error noting from the Evaluation Report that the Applicant progressed to Financial Evaluation and was disqualified on competitive concerns.



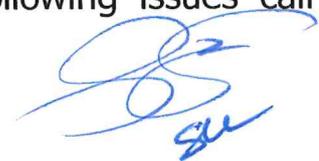
59. When asked what the Evaluation Committee specifically recommended in terms of award of the subject tender, Mr. Chemngorem submitted that the Evaluation Committee recommended award of Schedules A and C to the Interested Party and Schedule D to the Applicant and for retendering of Schedules B, E, F, G, H, I, J, K, L and M.

60. On whether the Professional opinion was at variance with the Evaluation Committee's recommendation of award in the subject tender, Mr. Chemngorem submitted that there was no variance save for the 1st Respondent rejecting the recommendation to award Schedule D to the Applicant. He indicated that there was no indication in the Professional Opinion that the 1st Respondent referred the matter back to the Evaluation Committee for deliberation.

61. At the conclusion of the hearing, the Board informed parties that the instant Request for Review having been filed on 4th September 2024 was due to expire on 25th September 2024 and the Board would communicate its decision on or before 25th September 2024 to all parties to the Request for Review via email.

BOARD'S DECISION

62. The Board has considered each of the parties' submissions and documents placed before it and find the following issues call for determination:



- i. Whether the Board has jurisdiction to hear and determine the instant Request for Review.*

In determining the first issue, the Board will make a determination on whether the allegation by the Applicant that the requirements and evaluation criteria in the subject tender had no bearing on the goods, works or services being procured is time barred for having been raised outside the statutory period of 14 days stipulated under Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020.

- ii. Whether the Procuring Entity's Accounting Officer acted in breach of the provisions of Section 80(2) of the Act in failing to uphold the recommendations of the evaluation committee with regard to the Applicant's tender.*
- iii. Whether the Procuring Entity failed to evaluate the Interested Party's tender in accordance with the evaluation criteria in the tender document thereby breaching the provisions of Section 80(2) of the Act.*
- iv. Whether the Procuring Entity terminated segments of the subject tender without regard to the provisions of Section 63 of the Act.*



- v. *Whether the Letter of Notification of Intention to Award dated 22nd August 2024 issued to the Applicant met the threshold required in Section 87(3) of the Act as read with Regulation 82 of Regulations 2020.*
- vi. *What orders the Board should grant in the circumstances*

As to whether the Board has jurisdiction to hear and determine the instant Request for Review

63 It is trite law that courts and decision making bodies should only act in cases where they have jurisdiction and when a question of jurisdiction arises, a Court or tribunal seized of a matter must as a matter of prudence inquire into it before doing anything concerning such a matter.

64 Black's Law Dictionary, *8th Edition*, defines jurisdiction as:

"... the power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties ... the power of courts to inquire into facts, apply the law, make decisions and declare judgment; The legal rights by which judges exercise their authority."



65 The celebrated Court of Appeal decision in ***The Owners of Motor Vessel "Lilian S" v Caltex Oil Kenya Limited [1989] eKLR; Mombasa Court of Appeal Civil Appeal No. 50 of 1989*** underscores the centrality of the principle of jurisdiction. In particular, Nyarangi JA, decreed:

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for continuation of proceedings pending evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction."

66 The Supreme Court added its voice on the source of jurisdiction of a court or other decision making body in the case **Samuel Kamau Macharia and another v Kenya Commercial Bank Ltd and 2 others [2012] eKLR; Supreme Court Application No. 2 of 2011** when it decreed that;

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it



by law. We agree with Counsel for the first and second Respondent in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings.”

67 This Board’s jurisdiction is provided for in Section 167 of the Act which provides for what can and cannot be subject to proceedings before the Board and Section 172 and 173 of the Act which provides for the Powers of the Board, as follows:

167. Request for a review

(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed. [Emphasis by the Board]

(2)

(3)

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



- (a) the choice of a procurement method;**
- (b) a termination of a procurement or asset disposal proceedings in accordance with Section 63 of this Act; and**
- (c) where a contract is signed in accordance with section 135 of this Act.**

168.

.....

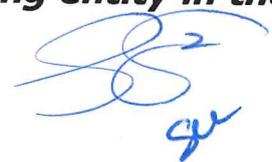
172. Dismissal of frivolous appeals

Review Board may dismiss with costs a request if it is of the opinion that the request is frivolous or vexatious or was solely for the purpose of delaying the procurement proceedings or performance of a contract and the applicant shall forfeit the deposit paid.

173. Powers of Review Board

Upon completing a review, the Review Board may do any one or more of the following—

- (a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;**
- (b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;**
- (c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;**



- (d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and***
(e) order termination of the procurement process and commencement of a new procurement process.

- 68 It therefore follows, for one to invoke the jurisdiction of the Board, they need to approach the Board as provided under Section 167 (1) of the Act. Section 167(1) of the Act, allows an aggrieved candidate or tenderer to seek administrative review within 14 days of (i) notification of award or (ii) date of occurrence of alleged breach of duty imposed on a procuring entity by the Act and Regulations 2020 at any stage of the procurement process in a manner prescribed.
- 69 The manner in which an aggrieved candidate or tenderer seeks administrative review is prescribed under Regulation 203 of Regulations 2020 read with the Fourteenth Schedule of Regulations 2020 which prescribes the format of the request for review as follows:

Regulation 203 - Request for a review:

(1) A request for review under section 167(1) of the Act shall be made in the Form set out in the Fourteenth Schedule of these Regulations.



(2) The request referred to in paragraph (1) shall—

(a)

(b)

(c) be made within fourteen days of —

(i) the occurrence of the breach complained of, where the request is made before the making of an award;

(ii) the notification under section 87 of the Act; or

(iii) the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder.

(d)

(3) Every request for review shall be filed with the Review Board Secretary upon payment of the requisite fees and refundable deposits.

(4)

70 Section 87 of the Act referred to in Regulation 203(2)(c)(ii) of Regulations 2020 provides as follows:

87. Notification of intention to enter into a contract



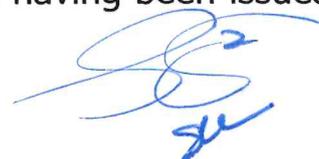
(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.

(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.

- 71 The above provisions show that an aggrieved candidate or tenderer invokes the jurisdiction of the Board by filing a request for review with the Board Secretary within 14 days of (i) occurrence of breach complained of, having taken place before an award is made, (ii) notification of intention to enter into a contract having been issued



or (iii) occurrence of breach complained of, having taken place after making of an award to the successful tenderer. Simply stated, an aggrieved candidate or tenderer can invoke the jurisdiction of the Board in three instances namely, (i) before a notification of intention to enter into a contract is made, (ii) when a notification of intention to enter into a contract is made and (iii) after a notification to enter into a contract has been made.

72 The option available for an aggrieved candidate or tenderer in the aforementioned three instances is determinant on when occurrence of breach complained of took place and should be within 14 days of such occurrence of breach.

73 Section 167 of the Act and Regulation 203 of the 2020 Regulations identifies the benchmark events for the running of time to be the date of notification of the award or date of occurrence of the breach complained of.

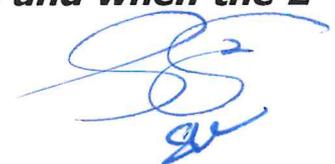
Whether the allegation by the Applicant that the requirements and evaluation criteria in the subject tender had no bearing on the goods, works or services being procured is time barred for having been raised outside the statutory period of 14 days stipulated under Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020;



74 The Applicant at ground 1 of the Request for Review contended that the Respondents used requirements and evaluation criteria in the subject tender that had no bearing on the goods, works or services being procured contrary to the express and implied provisions of the Act. In response, the Respondents indicated that this was incorrect and that the evaluation criteria of the subject tender was clearly outlined in the Tender Document and applied equally to all bidders.

75 This Board has severally held in the past that procurement proceedings are time bound and that a candidate or a tenderer who wishes to challenge a decision of a procuring entity with respect to a tender must come before the Board at the earliest, by using the earliest option available under Regulation 203(2)(c) of Regulations 2020 so as not to be accused of laches. In **Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Kemotrade Investment Limited [2018] eKLR** the High Court at paragraphs 65, 66 and 67 noted that to determine when time starts to run, such determination can only be made upon an examination of the alleged breach and when the aggrieved tenderer had knowledge of the said breach and held:

66. The answer then to the question when time started to run in the present application can only be reached upon an examination of the breach that was alleged by the 2nd Interested Party in its Request for Review, and when the 2nd



Interested Party had knowledge of the said breach. The said Request for Review was annexed as "Annexure CO4" to the 2nd Interested Party's replying affidavit. Paragraphs 2 to 4 of the said Request address the first breach that the 2nd Interested Party 's representative, one Charles Obon'go noted and notified the Chairman of the tender opening committee about at the tender opening, namely that the Applicant had not supplied the sample of 3m of the sleeve and mill certificate and had not been issue with a delivery note, and that the said Applicant sought to introduce the sample after the commencement of the tender opening.

67. It is not in dispute that the tender opening was on 10th November 2017 at 10.00 am, which all the parties attest to in their various affidavits. It is therefore evident that for this particular breach the 2nd Interested Party had knowledge of the same and admits to notifying the 1st Interested Party's tender opening committee of the same on 10th November 2017. Therefore, time for filing a review against this particular alleged breach started to run on 10th November 2017, and the Respondent had no jurisdiction to consider the alleged breach when it was included in the Request for Review filed on 21st February 2017, as the statutory period of filing for review of 14 days had long lapsed. Any decisions by the Respondent on the alleged breach were therefore ultra vires and null and void.



76 In the present case, it is not in contest that the Applicant was aware of the contents and provisions of the Tender Document at the time of obtaining the subject tender advertised on 19th March 2024 or before submission of its bid document on 6th May 2024. It nevertheless chose to participate in the tendering process and it is only after being notified that its bid was found non-responsive that it opted to challenge the requirements and evaluation criteria provided in the Tender Document.

77 In computing time, the Board is guided by Section 57 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya (hereinafter the IGPA) which provides as follows:

"57. Computation of time

In computing time for the purposes of a written law, unless the contrary intention appears—

(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;

(b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;



- (c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;**
- (d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time."**

78 In computing time when the Applicant should have sought administrative review before the Board with respect to challenging the requirements and evaluation criteria in the Tender Document, the 19th March 2024 is excluded being the day that the Applicant learnt of the occurrence of the alleged breach with respect to the requirements and evaluation criteria in the Tender Document as advertised. This means 14 day started running from 20th March 2024 and lapsed on 2nd April 2024. In essence, the Applicant had between 20th March 2024 to 2nd April 2024 to seek administrative review before the Board on this allegation.

79 Noting that the last addendum in the subject tender was issued on 22nd April 2024, assuming that the Applicant became aware of the alleged breach of duty by the Respondents on this date, the 22nd April 2024 is excluded being the day that the Applicant learnt of



the occurrence of the alleged breach with respect to the requirements and evaluation criteria in the Tender Document. This means that 14 days started running from 23rd April 2024 and lapsed on 6th May 2024. In essence, the Applicant had between 23rd April 2024 and 6th May 2024 to seek administrative review before the Board on this allegation. However, the Applicant opted to raise the aforesaid allegations in the instant Request for Review filed on 4th September 2024 and the same are therefore time barred and contrary to Section 167(1) of the Act read with Regulation 203 (2)(c)(i) of regulations 2020.

80 In the Board's considered view, the Applicant ought to have raised the allegation that requirements and evaluation criteria in the subject tender had no bearing on the goods, works or services being procured by virtue of Regulation 203(2)(c)(i) of Regulations 2020 noting that the occurrence of the alleged breach of duty by the Respondents complained of took place way before the tender closed and an award was made in the subject tender.

81 In the circumstances, the Board finds and holds that the allegations by the Applicant that the requirements and evaluation criteria in the subject tender had no bearing on the goods, works or services being procured are time barred for having been raised outside the statutory period of 14 days of occurrence of alleged breach of duty imposed on the Respondents by the Act in accordance with Section 167(1) of the Act read with Regulation



203(2)(c) of Regulations 2020 thus ousting the jurisdiction of the Board only to this extent.

82 This ground of the Applicant's preliminary objection therefore fails and is disallowed.

As to whether the Procuring Entity acted in breach of the provisions of Section 80(2) of the Act in failing to uphold the recommendations of the evaluation committee with regard to the Applicant's tender

83 It is the Applicant's case that it bid for 7 Schedules in the subject tender being A, B, C, D, E, F and K and that its bid document was responsive to all the eligibility requirements stipulated in the Tender Document. The Applicant submitted that vide debrief letter dated 28th August 2024, the Respondents informed it that its bid for Schedules B, E, F, and K were not responsive but failed to inform it of the outcome of evaluation of Schedules A, C, and D.

84 On their part, the Respondents submitted that evaluation of the subject tender was transparent, fair, equitable and competitive in line with Article 227(1) of the Constitution and in strict conformity with the Act. During the hearing, the Respondent submitted that in all the schedules that the Applicant participated in, it only progressed for financial evaluation in Schedule A, C and D and was recommended for award in Schedule D. However, the



recommendation for award was rejected by the 1st Respondent on the basis that a comparative analysis of its tender price as against other two bidders' tender prices revealed that the Applicant's tender price was not within the market price.

85 On its part, the Interested Party associated itself with the Respondents submissions and contended that the decision of the Respondents was fair and in accordance with the Act and Constitution.

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

Article 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)d)"



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

Section 80 - Evaluation of tender:

(1) "....."

(2) ***The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and,***

(3) ***.....;***"

88 Section 80(2) of the Act is clear on the requirement for 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. The Board's interpretation of a system that is fair is one that considers equal treatment of all tenders against criteria of evaluation known by all tenderers having been well laid out in the tender document.

89 The Board has carefully studied the Tender Document and notes that the criteria for evaluation of the subject tender was set out in Section III-Evaluation and Qualification Criteria at page 25 of 31.



90 Having perused the Applicant's letter of Notification dated 22nd August 2024, it is noted that the reason for disqualification of its bid was laid out as follows:

"Failed at the technical evaluation stage."

91 A perusal of the Evaluation Report submitted to the Board pursuant to Section 67(3)(e) of the Act, reveals that:

- i The Applicant's bid was found responsive at the Preliminary Evaluation Stage in the Schedules A, B, C, D, E, F, and K and progressed to Technical Evaluation.
- ii The Applicant's bid in Schedules B, E, F, and K was disqualified for the following reasons:
 - a) *Schedule B sample provided does not comply with GDC specifications as follows;*
 - *Brochure does not match sample provided - Hiax brochure for Kakswear sample.*
 - *Sample provided not rated to meet EN ISO 20345:2011 S3 HRO CI WR SRC standard.*
 - b) *Schedule E sample provided does not comply with GDC specifications as follows;*
 - *Data sheet/brochure not provided.*
 - *Sample provided not rated to meet EN 388-2.1.3.1 EN374 – ABKL standard.*
 - c) *Schedule F sample provided does not comply with GDC specifications as follows;*
 - *Sample provided not rate to meet EN 388 – 3.1.3.2X standard.*
 - d) *Schedule K sample provided does not comply with GDC specifications as follows;*
 - *Four point suspension with ratchet adjustment was not provided.*
 - *Chin strap not provided*



- *The Year of manufacture for the sample was 2010 contrary to the year of manufacture of ≥ 2020 required.*

- iii The Applicant's bid was found responsive at Technical Evaluation in Schedules A, C and D and progressed for Financial Evaluation.
- iv At the conclusion of Financial evaluation, the Applicant's bid in Schedule D was found most responsive and the Evaluation Committee recommended award of Schedule D to the Applicant.

92 According to the Professional Opinion presented to the 1st Respondent by the Head of Procurement, Mr. Patrick Kapto, he concurred with the recommendation to award Schedule D in the subject tender to the Applicant but this recommendation was rejected by the 1st Respondent on the ground that the Applicant's price was not competitive. It has emerged from these proceedings that the reason why this price was considered not competitive was due to a comparative analysis done against two other bidders' tender prices whose bids were not responsive and had not progressed for Financial Evaluation and a conclusion reached that the Applicant's tender price was above market price.

93 Observation is made of Section 9(m)(iii) of the Act which mandates the Public Procurement Regulatory Authority to create a central



repository or database that includes market prices of goods, services and works.

94 Section 54 of the Act provides for procurement pricing as follows:

(1)

(2) Standard goods, services and works with known market prices shall be procured at the prevailing market price.

(2A) The head of the procurement function shall carry out market surveys to inform the placing of orders or decision making on a procurement by the relevant awarding authority.

(2B)

(3) The Authority shall issue a quarterly market price index as reference guide to assist accounting officers make informed price decisions.

(4) Public officers involved in transactions in which standard goods, services and works are procured at unreasonably inflated prices shall, in addition to any other sanctions prescribed in this Act or the Regulations made thereunder, be required to pay the procuring entity for the loss resulting from their actions."

95 In essence standard goods, services and works with known market prices shall be procures at the prevailing market price and the head of procurement function is obligated to carry out market surveys to



- inform the placing of orders or decision making on a procurement by the awarding authority. Further, a quarterly market price index ought to be issued by PPRA as a reference guide to assist accounting officers in making informed price decisions.
- 96 It follows therefore that the 1st Respondent was required to be guided by the market price index issued by PPRA in making an informed decision as the prevailing price of goods procured under Schedule D in the subject tender and not to use other bidders' tender prices. Additionally, a market survey by the Procuring Entity's Head of Procurement would have informed the placing of orders or decision making in the subject tender.
- 97 An Evaluation Committee having conducted an evaluation of tenders is able to recommend a bidder for award of the tender in accordance with the award criteria set out in the tender document applicable to the method of procurement used by the Procuring Entity. It is our considered view that the 1st Respondent being dissatisfied with the Applicant's tender price ought to have directed the Evaluation Committee to carry out a re-evaluation of the same against established market prices and make a recommendation.
- 98 Considering all of the above, the Board finds that the Evaluation Committee acted within its mandate in recommending award of Schedule D of the subject tender to the Applicant, which



recommendation was upheld by the Procuring Entity's Head of Procurement in a Professional Opinion. The Board having found thus, is left with the inescapable conclusion that the Procuring Entity's Accounting Officer took on the role of the Evaluation Committee, which he should not have, and acted beyond his powers in disqualifying the Applicant's tender. In the circumstances, the Board finds and holds that the Procuring Entity's Accounting Officer, being the 1st Respondent herein, breached the provisions of Section 80 (2) of the Act.

99 Accordingly, this ground of review succeeds and is allowed.

As to whether the Procuring Entity failed to evaluate the Interested Party's tender in accordance with the evaluation criteria in the tender document thereby breaching the provisions of Section 80(2) of the Act

100 The Applicant contends that the Interested Party's bid in the subject tender ought to have been disqualified for not including the total amount in its price schedule the same way other bidders were disqualified for not having duly filled, signed and stamped their price schedules.

101 The Respondents countered that though the Interested Party did not include the total amount in the summary of the price schedule, the amount was clearly indicated in its Form of Tender and the



oversight did not materially affect the substance or competitiveness of its bid in view of Section 79(2)(a) and (b) of the Act which permits minor deviations that do not alter the essential aspects of the tender.

102 On its part, the Interested Party submitted that the amount in its Form of Tender which was a final price was the same figure on computation of the price indicated in its price schedule and as such, its bid was properly evaluated.

103 To determine this issue the Board notes that Section 79(1) of the Act, on the responsiveness of tenders, provides as follows:

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

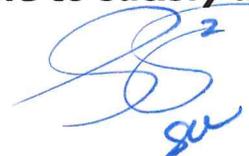
104 Clearly, a responsive tender is one that conforms to all the eligibility and mandatory requirements in the tender document. These eligibility and mandatory requirements were considered by the High Court in **Miscellaneous Civil Application 85 of 2018 Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/S AAKI Consultants Architects and Urban Designers**



(Interested Party) [2019] eKLR (hereinafter referred to as Miscellaneous Civil Application No. 85 of 2018) where it held:

"Briefly, the requirement of responsiveness operates in the following manner: - a bid only qualifies as a responsive bid if it meets 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. Indeed, public procurement practically bristles with formalities which bidders often overlook at their peril. 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. 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, empowerment or post qualification. 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....."

.....Mandatory criteria establish the basic requirement of the invitation. Any bidder that is unable to satisfy any



of these requirements is deemed to be incapable of performing the contract and is rejected. It is on the basis of the mandatory criteria that "competent" tenders are established..."

105 It follows that a responsive tender is one that meets all the mandatory requirements as set out in the Tender Document which are in essence the first hurdle that tenderers must overcome for further consideration in an evaluation process. These eligibility and mandatory requirements are mostly considered at the Preliminary Evaluation Stage. Tenderers found to be non-responsive are excluded from the bid process regardless of the merits of their tenders.

106 Further, Section 79 (2) and (3) of the Act provides as follows with respect to minor deviations:

"(2) A responsive tender shall not be affected by-
(a) minor deviations that do not materially depart from the requirements set out in the tender document; or
(b) errors or oversights that can be corrected without affecting the substance of the tender.
(3) A deviation described in subsection (2)(a) shall-
(a) be quantified to the extent possible; and
(b) be taken into account in the evaluation and comparison of tenders."



107 The import of the above provision is that responsiveness of a tender shall not be affected by any minor deviations that do not materially depart from the requirements set out in the Tender Document and that do not affect the substance of a tender. This provision details a minor deviation as one that can be quantified to the extent possible and shall be taken into account in the evaluation and comparison of tenders.

108 The High Court in **Miscellaneous Civil Application No. 85 of 2018** considered what amounts to a minor deviation and determined as follows:

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

In public procurement regulation it is a general rule that procuring entities should consider only conforming,



compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions.

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



tender; and (c) can be quantified, to the extent possible, and appropriately taken account of in the evaluation of tenders.

110 In the instant Request for Review, Mandatory Requirement 2 and 3 of the Preliminary/Mandatory Evaluation Requirements/Criteria at page 26 of the Tender Document provided as follows:

	<i>REQUIREMENT</i>
<i>2</i>	<i>Duly filled, Signed & Stamped Form of Tender in the format provide</i>
<i>3.</i>	<i>Dully filled, Signed & Stamped Price Schedules</i>
<i>.....</i>	<i>.....</i>

111 It is clear that a bidder was required to (a) submit a duly filled, signed, and stamped Form of Tender in the format provided, and (b) a duly filled, signed and stamped Price Schedules.

112 The Board notes that the Interested Party submitted a Form of Tender at page 8 to 10 of its bid document and Price Schedules at pages 13 to 26. It submitted a Summary of Price Schedules at page 26 of its bid document whereby it indicated the total amount for items in Schedule A, B and C but failed to indicate the total cost of the three schedules.



113 The Board further notes that the Interested Party's price schedules for the schedules tendered were properly filled with the correct figures and the same were signed and stamped with the total cost for Schedules A, B and C totaling to the same amount indicated in the Form of Tender upon computation. In the Board's considered view, failure to indicate the total figure did not go to the root of the tender and neither did it materially affect the Interested Party's tender price.

114 Consequently, the Board finds that the evaluation of the Interested Party's tender by the Procuring Entity's Evaluation Committee was done in accordance with the evaluation criteria in the tender document.

115 Accordingly, this ground of review fails and is disallowed.

As to whether the Procuring Entity terminated segments of the subject tender without regard to the provisions of Section 63 of the Act

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



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

(a);

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

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

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

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



In the literal sense, section 36 (6) quoted above purports to oust the jurisdiction of the court and the Review Board. The Court has to look into the ouster clause as well as the challenged decision to ensure that justice is not defeated. In our jurisdiction, the principle of proportionality is now part of our jurisprudence. In the case of *Smith v. East Elloe Rural District Council* [1965] AC 736 Lord Viscount Simonds stated as follows:

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

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



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

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

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



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

A plain reading of section 167 (4) (b) is to the effect that a termination that is in accordance with section 63 of the Act is not subject to review. Therefore, there is a statutory pre-condition that first needs to be satisfied in the said subsection namely that the termination proceedings are conducted in accordance with the provisions of section 63 of the Act, and that the circumstances set out in section 63 were satisfied, before the jurisdiction of the Respondent can be ousted.

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



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

The Respondent [Review Board] was therefore within its jurisdiction and review powers, and was not in error, to interrogate the Applicant's Accounting Officer's conclusion as to the existence or otherwise of the conditions set out in section 63 of the Act, and particularly the reason given that there was no budgetary allocation for the procurement. This was also the holding by this Court (Mativo J.) in R v Public Procurement Administrative Review Board & 2 Others Ex-parte Selex Sistemi Integrati which detailed the evidence that the Respondent would be required to consider while determining the propriety of a termination of a procurement process under the provisions of section 63 of the Act"

120 In ***Nairobi High Court Judicial Review Misc. Application No. 390 of 2018; R v Public Procurement Administrative Review Board & Ors Ex parte Kenya Revenue Authority***, the High Court considered a judicial review application challenging the decision of this Board. The Board dismissed a preliminary objection on grounds that it lacked jurisdiction to hear a Request for Review



before it on account of the fact that it related to the termination of a procurement process under section 63 of the Act. In dismissing the judicial review application, the Court affirmed that the Board has jurisdiction to first establish whether the preconditions for termination under section 63 of the Act have been met before downing its tools:

"33. A plain reading of Section 167(4) (b) of the Act is to the effect that a termination that is in accordance with section 63 of the Act is not subject to review. Therefore, there is a statutory pre-condition that first needs to be satisfied in the said sub-section namely that the termination proceedings are conducted in accordance with the provisions of section 63 of the Act, and that the circumstances set out in section 63 were satisfied, before the jurisdiction of the Respondent can be ousted...

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

121 It is therefore important for the Board to determine the legality, or lack thereof, of the Procuring Entity's decision terminating the procurement proceedings in the subject tender, which



determination can only be made by interrogating the reason cited for the impugned termination.

122 The Procuring Entity's submitted that termination of Schedules B, D, E, F, G, H, I, J,K, L and M in the subject tender was as a result of there being no responsive bid under the said schedules following evaluation of the same. According to the Evaluation Report, the Evaluation Committee recommended for retendering of Schedules B, D, E, F, G, H, I, J,K, L and M since none of the bidders were responsive.

123 This therefore means that the Procuring Entity's decision to terminate B, D, E, F, G, H, I, J, K, L and M was guided by provisions under Section 63(1)(f) of the Act. We note that Section 63 of the Act is instructive in the manner in which a procuring entity may terminate procurement or asset disposal proceedings and provides as follows:

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

(a) the subject procurement has been overtaken by—

(i) operation of law; or



- (ii) *substantial technological change;***
 - (b) *inadequate budgetary provision;***
 - (c) *no tender was received;***
 - (d) *there is evidence that prices of the bids are above market prices;***
 - (e) *material governance issues have been detected;***
 - (f) *all evaluated tenders are non-responsive;***
 - (g) *force majeure;***
 - (h) *civil commotion, hostilities or an act of war; or***
 - (i) *upon receiving subsequent evidence of engagement in fraudulent or corrupt practices by the tenderer.***
- (2) *An accounting officer who terminates procurement or asset disposal proceedings shall give the Authority a written report on the termination within fourteen days.***
- (3) *A report under subsection (2) shall include the reasons for the termination.***
- (4) *An accounting officer shall notify all persons who submitted tenders of the termination within fourteen***



days of termination and such notice shall contain the reason for termination."

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

125 In essence, Section 63 of the Act is instructive on termination of procurement proceedings being undertaken by an accounting officer of a procuring entity at any time before notification of award is made and such termination must only be effected if any of the pre-conditions enumerated in Section 63(1) (a) to (i) of the Act are present. Further, following such termination, an accounting officer is required to give the Public Procurement Regulatory Authority (hereinafter referred to as "the Authority") a written report on the termination with reasons and notify all tenderers, in writing, of the termination with reasons within fourteen (14) days of termination. These are the procedural statutory pre-conditions that must be



satisfied before a termination of procurement proceedings is deemed lawful.

126 Turning to the instant Request for Review, we note that despite the recommendation to terminate Schedules B, D, E, F, G, H, I, J,K, L and M in the subject tender and the same being approved by the 1st Respondent and indicated in the notification letters issued to bidders on 22nd August 2024, the Respondents failed to provide sufficient reasons to demonstrate that Schedules B, D, E, F, G, H, I, J,K, L and M were terminated due to all bids evaluated therein being non-responsive as stipulated under the Tender Document thus failing to satisfy the substantive statutory pre-conditions of termination of the procurement proceedings as contemplated in Section 63(1)(f) of the Act.

127 Additionally, despite the letters of notification dated 22nd August 2024 indicating that the aforementioned Schedules had been terminated, the said letters did not muster the threshold of a termination notice contemplated under Section 63(4) of the Act for failing to sufficiently give reasons pertaining to the alleged ground of termination due to all bids evaluated being non-responsive. The 1st Respondent also failed to file a Written Report on the termination of Schedules B, D, E, F, G, H, I, J,K, L and M in the subject tender addressed to the Director General of the Authority as contemplated under Section 63 (2) of the Act as read with PPRA Circular No. 4/2022 dated 1st July 2022 on Mandatory Reporting in



the PPIP Portal addressing the reasons for termination of the subject tender. As such, the procedural statutory pre-conditions that must be satisfied before a termination is deemed lawful as required by Section 63(2) & (3) of the Act have not been met by the Respondents.

128 Having established that the Respondents failed to satisfy both the substantive and procedural statutory pre-conditions of termination of procurement proceedings in line with Section 63 of the Act, the Board finds and holds that the Respondents failed to terminate the procurement proceedings of the subject tender in accordance with Section 63 of the Act.

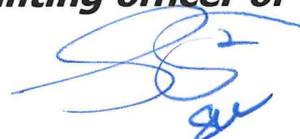
129 Accordingly, this ground of review succeeds and is allowed.

As to whether the Letter of Notification of Intention to Award dated 22nd August 2024 issued to the Applicant met the threshold required in Section 87(3) of the Act as read with Regulation 82 of Regulations 2020.

130 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:

Section 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."

131 Section 87 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.

132 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."***

133 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.

134 In **Judicial Review Miscellaneous Application No. 531 of 2015, Republic v Public Procurement Administrative Review Board & 2 others *ExParte* Akamai Creative Limited** (hereinafter referred to as "the Akamai Case") the High Court held as follows:

"In my view, Article 47 of the Constitution requires that parties to an administrative proceeding be furnished with the decision and the reasons thereof within a reasonable time in order to enable them decide on the next course of action. It is not merely sufficient to render a decision but to also furnish the reasons for the same. Accordingly, where an administrative body unreasonably delays in furnishing the parties with the decision and the reasons therefor when requested to do



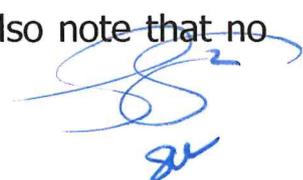
so, that action or inaction may well be contrary to the spirit of Article 47 aforesaid”

135 From the above case, the Board observes that the High Court was basically expounding on one of the rules of natural justice as provided for in Article 47 (2) of the Constitution which provides:

“If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action”

136 Basically, the rules of natural justice as provided for in Article 47 of the Constitution require that a procuring entity promptly notifies tenderers of the outcome of evaluation to afford an unsuccessful tenderer the opportunity to challenge such reasons if need be. Further, the Act does not require that an unsuccessful tenderer to seek clarification in order for the accounting officer to provide it with the outcome of evaluation or reasons leading to its disqualification in a tendering process.

137 Having carefully studied the Applicant’s letter of Notification of Intention to Award dated 22nd August 2024, the Board observes that the Interested Party was indicated as the successful bidder at Kshs. 12,075,600.00 inclusive of 16% V.A.T and Transport Costs to Menengai Stores with no indication of the Schedules in the subject tender that it was found to be successful in. We also note that no



reason was provided as to why the said tenderer was rendered successful.

138 From the reasons issued for disqualification of the Applicant's tender the Board notes that the Applicant was notified that its bid failed at the Technical Evaluation stage with no indication as to which Schedules in its bid document failed at the said Technical evaluation. More concerning is that from analysis of evaluation of the Applicant's tender hereinabove, it is noted that the reasons indicated in the Evaluation Report differ from what was communicated in the Applicant's notification letter on disqualification of its various Schedules in its bid document.

139 Additionally, the notification letter proceeded to indicate that Schedules B, D, E, F, G, H, I, J, K, L and M had been terminated with no accompanying reasons as to why the same were terminated.

140 It is therefore quite clear to the Board that the Respondents Letter of Notification of Intention to Award the subject tender dated 22nd August 2024 issued to the Applicant failed to meet the threshold required in Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020.

141 Accordingly, this ground of review succeeds and is allowed.



The nature of orders the Board should grant in the circumstances

- 142 It is the Board's finding that the allegations by the Applicant that the requirements and evaluation criteria in the subject tender had no bearing on the goods, works or services being procured are time barred for having been raised outside the statutory period of 14 days of occurrence of alleged breach of duty imposed on the Respondents by the Act, in accordance with Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020 thus ousting the jurisdiction of the Board only to this extent.
- 143 It is the Board's further finding that Procuring Entity's Accounting Officer acted in breach of the provisions of the Act read with Article 227(1) of the Constitution in disqualifying the Applicant's tender and that the Applicant was justified to be awarded Schedule D of the subject tender as recommended by the Evaluation Committee with concurrence of the Procuring Entity's Head of Procurement.
- 144 It is also the Board's finding that the evaluation and recommendation to award the subject tender to the Interested Party was done in accordance with the evaluation criteria in the tender document and the Act.
- 145 The Board has established that the termination of the procurement proceedings of the subject tender was irregular and in breach of Section 63 of the Act.



146 The Board has also established that the Respondents Letter of Notification of Intention to Award the subject tender dated 22nd August 2024 issued to the Applicant failed to meet the threshold required in Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020.

147 The upshot of the findings is that the instant Request for Review succeeds in the following terms:

FINAL ORDERS

148 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 this Request for Review:

A. The Letters of Notification of Intention to Award dated 22nd August 2024 addressed to the Interested Party, the Applicant and other unsuccessful bidders with respect to Tender No. GDC/SHE/OT/050/2023-2024 for Supply & Delivery of Assorted Personal Protective Equipment for Geothermal Development Company Limited, be and are hereby nullified and set aside.

B. The 1st Respondent is hereby directed to issue fresh letters of Notification of Intention to Award Schedule D of the subject tender to the Applicant as per the



recommendations of the evaluation committee, within seven (7) days from the date of this decision.

C. The 1st Respondent is hereby directed to issue fresh letters of Notification of Intention to Award Schedules A and C of the subject tender to the Interested Party as per the recommendations of the evaluation committee, within seven (7) days from the date of this decision.

D. Further to Orders B and C above, the Respondents are hereby directed to proceed with the procurement process of the subject tender in accordance with the law to its logical conclusion taking into consideration the Board's findings in this Request for Review.

E. In view of the fact that the procurement process is not complete, each party shall bear its own costs in the Request for Review.

Dated at NAIROBI this 25th Day of September 2024.



PANEL CHAIRPERSON

PPARB



SECRETARY

PPARB