

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 111/2024 OF 7TH NOVEMBER 2024

BETWEEN

BOTTOM-UP ECONOMIC MODEL LIMITED.....APPLICANT
AND
DIRECTOR GENERAL, SPORTS KENYA.....1ST RESPONDENT
SPORTS KENYA.....2ND RESPONDENT
DAGAT INVESTMENTS.....INTERESTED PARTY

Review against the decision of the Accounting Officer, Sports Kenya in respect of Tender No. SK/DOA/001/2024-2024-2025 for Disposal of Scrap Metal at Moi International Sports Centre.

BOARD MEMBERS PRESENT

1. Mr. George Murugu FCI Arb & IP - Chairperson
2. CPA Alexander Musau - Member
3. Mr. Stanslaus Kimani - Member

IN ATTENDANCE

Mr. Philemon Kiprop - Secretariat
Mr. Anthony Simiyu - Secretariat



PRESENT BY INVITATION

APPLICANT

BOTTOM-UP ECONOMIC MODEL LIMITED

Mr. Allan Mulama

Advocate, CK Advocates

RESPONDENTS

**ACCOUNTING OFFICER, SPORTS KENYA
SPORTS KENYA**

Ms. Daisy Kariuki

In-house Counsel, Sports Kenya

Mr. Fredrick Muema

Chief Supply Management Officer, Sports
Kenya

INTERESTED PARTY

DAGAT INVESTMENTS

Mr. Ndumu Kimani

Ndumu Kimani & Company Advocates

BACKGROUND OF THE DECISION

The Tendering Process

1. Sports Kenya, the Procuring Entity together with the 1st Respondent herein, vide an advert in MyGov Publication, the Procuring Entity's website (www.sportskenya.org) and the PPIP Portal (www.tenders.go.ke) invited interested suppliers to submit their bids in response to Tender No. SK/DOA/001/2024-2024-2025 for Disposal of Scrap Metal at Moi International Sports Centre through an Open Tender method. The Tender Document stipulated a mandatory site visit scheduled for 9th October 2024 and the tender submission deadline was set as 16th October 2024 at 11:00 a.m.



Submission of Bids and Tender Opening

2. According to the Tender Opening Minutes dated 16th October 2024 under the Confidential File submitted by the Procuring Entity, the following sixteen (16) bidders were recorded as having submitted their bids in response to the subject tender by the tender submission deadline:

| # | Name of Bidder |
|-----|------------------------------|
| 1. | Geemo Firm Ltd |
| 2. | Mwema Steel & Company Ltd |
| 3. | Eldo Scrap Metal Ltd |
| 4. | Nickyal Enterprises Ltd |
| 5. | Gatu Enterprises Ltd |
| 6. | Johowaha Enterprises |
| 7. | Mac Steel Scrap Dealer |
| 8. | Elantos Enterprises |
| 9. | Imara Steel Mills |
| 10. | Steel & Allied Merchants Ltd |
| 11. | Bottom-Up Economic Model Ltd |
| 12. | Maxfol Enterprises Ltd |
| 13. | Angem Investments Ltd |
| 14. | Dagat Investments |
| 15. | Shallian Enterprises Ltd |
| 16. | Wellys Investments Ltd |



Evaluation of Tenders

3. The 1st Respondent constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") to undertake an evaluation of the received bids in the following 2 stages as captured in the Evaluation Report
 - i. Preliminary Evaluation
 - ii. Financial Evaluation

Preliminary Evaluation

4. At this stage of the evaluation, the submitted bids were to be examined using the criteria set out as Preliminary/Mandatory Evaluation Requirements/Criteria at page 12 of the Tender Document.
5. The evaluation was to be on a Yes/No basis and bids that failed to meet any criterion outlined at this Stage would be disqualified from further evaluation.
6. At the end of the evaluation at this stage, 15 bids were established as being unresponsive with only 1 bid i.e. the Interested Party's bid qualifying for further evaluation at the Financial Evaluation Stage.

Financial Evaluation

7. The Evaluation Committee was required at this stage to examine bids successful at the Preliminary Stage using the criteria set out as Stage 2: Financial Evaluation at pages 12 to 13 of the Tender Document.



8. The evaluation was to be on the basis of a comparison of tender prices indicated in the bids for each Lot. The successful bid in respect of any Lot would be that established as bearing the highest evaluated tender price under the respective Lot subject to the reserve price.

9. At the end of the evaluation at this stage, the Interested Party's bid was established as having the highest evaluated tender price in respect of all the Lots, noting that it was the only bidder whose bid qualified for evaluation at the Financial Evaluation Stage. Its tender prices for the 3 Lots under the subject tender were as follows:

| Lot | Item Description | Reserve Price per kg (Kshs) | Interested Party's price per kg (Kshs) | Interested Party's tender price (Kshs) |
|-------|----------------------------|-----------------------------|--|--|
| Lot 1 | Scrap Steel Metal | 60 | 63 | 44,100,000 |
| Lot 2 | Scrap Iron Sheets | 35 | 42 | 840,000 |
| Lot 3 | Scrap Door & window Grills | 60 | 63 | 315,000 |
| Total | | | | 45,255,000 |

Evaluation Committee's 1st Recommendation

10. The Evaluation Report dated 24th October 2024 indicates that Evaluation Committee recommended the award of the subject tender to the Interested Party at a total tender price of **Kenya Shillings Forty-Five Million, Two Hundred and Fifty-Five Thousand (Kshs. 45,255,000) for all the 3 Lots.**

Professional Opinion

11. In a Professional Opinion dated 24th October 2024 (hereinafter referred to as the "the Professional Opinion") the Procuring Entity's Chief Supply Chain Management Officer, Mr. Fredrick Muema reviewed the manner in which the subject procurement process was undertaken including the evaluation of bids and recommended the award of the subject tender to the Interested Party as proposed by the Evaluation Committee.
12. The Professional Opinion was subsequently approved by the 1st Respondent on the same day, 24th October 2024.

Notification to Bidders

13. Accordingly, the bidders were notified of the outcome of the evaluation of the tenders in the subject tender vide letters dated 24th October 2024.

REQUEST FOR REVIEW

14. On 7th November 2024, the Applicant through the firm of CK Advocates filed a Request for Review dated 7th November 2024 supported by an affidavit sworn on 7th November 2024 by John Kiboi, a Director at the Applicant, seeking the following orders from the Board in verbatim:

- a) The Respondents' decision in the tender as communicated to the Applicant in the letter dated 24th October 2024 and received by the Applicant on 29th October 2024 in the matter of Tender for Disposal of Scrap Metal at Moi International Sports Centre Tender No. SK/DOA/001-202(hereinafter referred to as the "Tender" be annulled.*
- b) The procurement proceedings leading to the decision by the Respondents to award the Interested Party the 2024*



in the matter of Tender for Disposal of Scrap Metal at Moi International Sports Centre Tender No. SK/DOA/001-202 hereinafter referred to as the "Tender" be reviewed and this Honourable Board be pleased to direct the Respondents to readmit and reevaluate the Applicant's bid in the financial stage and proceed to make an award in a manner that strictly complies with the provisions of the public procurement laws.

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

d) Any other relief that the Honourable Board deems fit to grant having regard to the circumstances of this case in order to give effect to the Board's orders.

15. In a Notification of Appeal and a letter dated 7th November 2024, Mr. James Kilaka, the Ag. Board Secretary of the Board notified the Respondents 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 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 said Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 7th November 2024.

16. On 11th November 2024, the Respondents herein, through the 1st Respondent, filed a Memorandum of Response of even date. The said



Respondents equally forwarded to the Board the Confidential Documents under Section 67(3) of the Public Procurement and Asset Disposal Act (hereinafter "the Act").

17. Vide letters dated 12th November 2024, the Acting Board Secretary notified all the bidders who participated in the subject tender via email, of the existence of the subject Request for Review while forwarding to them a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. The bidders were invited to submit to the Board any information and arguments concerning the subject tender within 3 days from 11th November 2024.
18. On 19th November 2024, the Interested Party filed an affidavit sworn on 18th November 2024 by David Gathendu Murai, the Interested Party's Proprietor.
19. On the same day, 19th November 2024, the Applicants filed Written Submissions and a Bundle of Authorities, both dated 19th November 2024.
20. Later on the same day, 19th November 2024, the Ag. 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 20th November 2024 at 11:00 a.m. through the link availed in the said Hearing Notice.
21. On the same day, 19th November 2024 at 1:55 p.m., the Applicant's Advocates, CK Advocates, wrote an email to the Board Secretary requesting for the hearing to be rescheduled to 20th November 2024 at 2:30 p.m. to accommodate the Applicant's Advocates to attend to a



matter at the High Court in Mombasa. The Board Secretary acceded to this request and rescheduled the hearing to 20th November 2024 at 2:30 p.m.

22. On 20th November 2024 at 8:54 a.m. the Board received a letter from the Interested Party's Advocates, Ndumu Kimani Advocates, seeking an adjournment of the hearing pointing out that they had a scheduled hearing before the Environment and Land Court on the same day at 3:00 p.m. and the Interested Party was also desirous of filing their Written Submissions.
23. On 20th October 2024 at 2:30 p.m., when the Board convened for the online hearing, all parties save for the Interested Party, were present and represented by their respective Advocates.
24. Counsel for the Applicant, Mr. Mulama indicated that he was in receipt of an email from the Interested Party's Advocate, indicating that Mr. Kimani would be unable to proceed with the hearing at the scheduled time owing to late receipt of the Memorandum of Response as well as the fact that he had a scheduled hearing before the Environment and Land Court at the same time the present proceedings was scheduled for hearing. Further, that Mr. Kimani would be seeking 3 days to file the Interested Party's Written Submissions.
25. While Counsel for the Applicant was still addressing the Board, Counsel for the Interested Party, Mr. Kimani joined the online session. Mr. Kimani addressed the Board indicating that he wished to withdraw his earlier position as communicated through email. He indicated that he no longer wished to file Written Submissions and that upon perusal of the



Respondents' Memorandum of Response, he was ready to proceed with the hearing of the Request for Review as earlier scheduled.

26. The Board therefore read through a list of the documents filed in the matter and asked parties to confirm having filed and been served the said documents, to which Counsel responded in the affirmative.
27. The Board therefore gave the following directions on the order of address:
 - i. The Applicant would start by arguing the Request for Review within 10 minutes.
 - ii. The Respondents would then offer a response within 10 minutes;
 - iii. The Applicant would then close by way of rejoinder in 1 minute.

PARTIES SUBMISSIONS

Applicant's Submissions

28. Counsel for the Applicant, Mr. Mulama, elected to fully rely on the Applicant's filed Written Submissions while indicating that he intended to utilize his time for purposes of offering any rejoinder to the submissions by the rest of the parties.
29. Below is a summary of the Applicant's case as can be discerned from its filed Written Submissions.
30. The Applicant contends that its bid was erroneously disqualified from the subject tender at the Preliminary Evaluation Stage. According to the Applicant, it paginated and serialized its bid and thus could not be disqualified on account of failure to paginate and serialize its bid. Further



that it submitted a duly completed bank details form as required under the Tender Document.

31. It was argued that the Tender Document indicated that the award criteria required the successful bid to be that offering the highest tender price subject to the reserve price. Further that Applicant submitted a bid with a tender price of Kshs. 46,970,000 which was higher than the Interested Party's Kshs. 45,255,000 and thus offering more revenue to the Procuring Entity.
32. The Applicant maintains that its bid was responsive within the meaning of Section 79 of the Act and placed reliance on ***Republic v PPARB & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex parte Tuv Austria Turk [2020] eKLR*** for the proposition that a bid that contains minor informalities is not to be considered unresponsive. The Board was urged to invoke Section 79(2) and (3) of the Act and find the requirement for the provision of bank details was misaligned in the context of asset disposal proceedings since it was for the successful bidder to make payments to the Procuring Entity and not vice-versa.
33. Further reliance was placed on ***Republic v Public Procurement Administrative Review Board & 2 Others Ex parte Coast Water Services Board & another [2016]eKLR*** for the proposition that procedural fairness requires that affected individuals to be afforded an opportunity to present their case. The Applicant contended that they had established a case for the interference with the Respondents' decision to award the subject tender to the Interested Party.



Respondents' Submissions

34. Counsel for the Respondents, Ms. Kariuki, equally indicated that she was fully relying on the Respondents' Memorandum of Response.
35. Below is a summary of the Respondents' case as can be discerned from their Memorandum of Response:
36. The Respondents contend that following the invitation of suppliers to submit their bids in respect of the subject tender, 16 bids including that of the Applicant were received and subjected to Preliminary Evaluation. Further that the Applicant's bid was among those that were disqualified at the Preliminary Evaluation Stage. Specifically, the Applicant's bid was disqualified for 2 reasons i.e. (i) Its bid document was not paginated but serialized and not initialed and (ii) that the tender bank details form was also not provided.
37. The Respondents contend that only the Interested Party's bid qualified for evaluation at the Financial Evaluation Stage and being the only bid evaluated at this Stage, it was the highest evaluated bid whose tender price was above the reserve price and thus the successful bid. Therefore, the Interested Party's bid was properly arrived at as the successful bid.
38. According to the Respondents, the subject tender was conducted in accordance with the Act and Regulations 2020. The evaluation was carried out on the basis of the evaluation criteria set out in the Tender Document and all unsuccessful bidders were duly notified of the reasons for their being unsuccessful.



39. They maintain that the Applicant failed to meet Mandatory Requirements No. 4, 7 and 12 and that non-compliance with these requirements could not be deemed as a minor deviation. Accordingly, they urged the Board to dismiss the Request for Review.

Interested Party's Submissions

40. Counsel for the Interested Party, Mr. Kimani, placed reliance on the Interested Party's filed Replying Affidavit. He submitted that the Respondents complied with the law in disqualifying the Applicant who from the Respondents' response, failed to comply with mandatory requirements set out in the Tender Document. He therefore urged the Board to dismiss the Request for Review.

Applicant's Rejoinder

41. In a brief rejoinder, Counsel for the Applicant, Mr. Mulama contended that the Applicant submitted its bank details and urged the Board to verify this. Equally, that its bid was paginated as required by the Tender Document. Accordingly, he placed reliance on Section 79(2)(a) (b) of the Act while urging the Board to overlook minor deviations in the Applicant's bid.

CLARIFICATIONS

42. The Board sought clarity from the Applicant on the specific aspects of its bid that it was inviting the Board to deem as a minor deviation. However, Counsel for the Applicant Mr. Mulama could not offer clarity on this citing that he was not well conversant with the matter having received



instructions on the Request for Review on the day the matter was scheduled for hearing day.

43. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 7th November 2024 had to be determined by 28th November 2024. Therefore, the Board would communicate its decision on or before 28th November 2024 to all parties via email.

BOARD'S DECISION

44. 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 Applicant's bid was properly disqualified from the subject tender at the Preliminary Evaluation Stage in accordance with the Act and the Tender Document?***
- II. ***What orders should the Board issue in the circumstance?***

Whether the Applicant's bid was properly disqualified from the subject tender at the Preliminary Evaluation Stage in accordance with the Act and the Tender Document?

45. The Applicant instituted the present Request for Review challenging its disqualification from the subject tender at the Preliminary Evaluation Stage. According to the Applicant, its bid ought to have been the successful bid as its tender price was higher than that of the Interested Party and thus offering more revenue to the Procuring Entity. Further that the Applicant submitted a responsive bid and any non-compliance on their



part constituted a minor deviation on their part and thus excusable under Section 79 of the Act.

46. In contrast, the Respondents took the view that the Applicant's bid was properly disqualified at the Preliminary Evaluation Stage for being unresponsive to Mandatory Requirements No. 4, 7 and 12. The Respondents maintained that the Interested Party's bid was the only bid that passed the Preliminary Evaluation Stage and qualified for evaluation at the Financial Evaluation Stage where it was subsequently established as having offered a tender price that was above the reserve price. Accordingly, the Respondents posited that the award of the subject tender to the Interested Party was done in accordance with the Act and Regulations 2020.
47. The Interested Party supported the Respondents' position and argued that the Interested Party submitted a responsive bid and thus were properly awarded the subject tender. They equally contended that the Respondents properly disqualified the Applicant from the subject tender noting that it would appear that the Applicant's bid was unresponsive to certain mandatory requirements stipulated in the Tender Document.
48. Flowing from the above rival positions, the Board is invited to interrogate the circumstances surrounding the disqualification of the Applicant's bid from the subject tender at the Preliminary Evaluation Stage.
49. The Board has sighted **Annexure JK-1**, a Notification Letter dated 24th 2024 by the Respondents and addressed to the Applicant, annexed to the affidavit of John Kiboi in support of the Request for Review. A copy of the



letter is also in the Confidential File and is hereinafter reproduced for completeness of the record:

REF: SKPPAD/426/VOL.VII9149 24th October 2024

Bottom-Up Economic Model Limited

(Address details withheld)

RE: NOTIFICATION OF INTENTION TO AWARD

DATE OF TRANSMISSION: 25th October 2024

This Notification is sent by email/hand delivery

| | |
|--------------------------|---|
| Procuring Entity: | Sports Kenya |
| Project: | Disposal of Scrap Metal at Moi International Sports Centre |
| ITT No: | SK/DOA/001/2024-2025 |

This Notification of Intention To Award (Notification)

Notifies you of our decision to award the above contract.

The transmission of this Notification begins the Standstill

Period. During the Standstill Period, you may:

- Request a debriefing in relation to the evaluation of your Tender, and/or***
- Submit a Procurement-related Complaint in relation to the decision to award the contract***



The Successful Tenderer

| | |
|--------------------|---|
| Name: | <i>Dagat Investments</i> |
| Address: | <i>(Details withheld)</i> |
| Tender Sum: | <i>A Tender sum of Kshs. 45,255,000.00</i> |

Other Tenderers

| <i>S/No.</i> | <i>Firm</i> | <i>Tender Sum</i> |
|---------------------|--------------------|--------------------------|
| <i>1</i> | <i>..</i> | <i>...</i> |
| <i>...</i> | <i>...</i> | <i>...</i> |
| <i>14</i> | <i>..</i> | <i>...</i> |

Your bid was not successful due to the following reasons;

- 1. Your bid document was not paginated nor initialized but serialized***
- 2. Tender bank details form was not provided***

...

On behalf of the Procuring Entity

Signed

PIUS METTO

DIRECTOR GENERAL

50. From the above letter, it is apparent that the Respondents disqualified the Applicant's bid from the subject tender for the reasons that:
- i. The Applicant's bid was neither paginated nor initialized but serialized; and
 - ii. The Applicant failed to submit the Tender bank details form as part of its bid.



51. The Board is consequently called to interrogate the validity of the above reasons that ultimately led to the disqualification of the Applicant's bid from the evaluation process in respect of the subject tender.

52. For starters, Section 80 of the Act offers guidance on how an Evaluation Committee should proceed with the evaluation of bids 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."

53. On its part Section 79 of the Act speaks to the responsiveness of a bid in the following terms:

79. Responsiveness of tenders

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

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

(a) minor deviations that do not materially depart from the requirements set out in the tender documents; or



(b) errors or oversights that can be corrected without affecting the substance of the tender.

(3) A deviation described in subsection (2)(a) shall—

(a) be quantified to the extent possible; and

(b) be taken into account in the evaluation and comparison of tenders.

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

"19. It is a universally accepted principle of public procurement that bids which do not meet the minimum requirements as stipulated in a bid document are to be regarded as non-responsive and rejected without further consideration.[9] Briefly, the requirement of responsiveness operates in the following manner:- a bid only qualifies as a responsive bid if it meets with all requirements as set out in the bid document. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements.[10] Bid formalities usually require timeous submission of formal bid documents such as tax clearance certificates, audited financial statements, accreditation with standard setting bodies, membership of professional bodies,



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

20. In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions.



Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions.”

See also ***Nairobi High Court Judicial Review Misc. Application No. 407 of 2018; Republic v Public Procurement Administrative Review Board; Arid Contractors & General Supplies (Interested Party) Ex parte Meru University of Science & Technology [2019] eKLR; Republic v Public Procurement Administrative Review Board & anor; Ex parte Wilis Protocol & Concierge Services Limited [2021]eKLR; Republic v Public Procurement Administrative Review Board & Ors Ex parte Roben Aberdare (K) Limited [2019]eKLR; Republic v Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex parte Tuv Austria Turk 2020 eKLR***

55. Drawing from the above, the Tender Document is the key guide in the evaluation of bids submitted in response to any tender invitation. Further, for a bid to be deemed responsive in respect of any requirement, it must comply with the specification of the actual requirement as set out in the Tender Document.
56. Turning to the present Request for Review, whereas the Applicant contends that they submitted a responsive bid, the Respondents counter this by arguing that the Applicant’s bid was unresponsive to Mandatory Requirements No. 4, 7 and 12.



57. The said Mandatory Requirements are to be found at page 12 of the Tender Document and are hereinbelow reproduced for ease of reference:

PRELIMINARY/MANDATORY EVALUATION CRITERIA

| | DESCRIPTION | YES/NO |
|--|--|---------------|
| MR 1 | ... | |
| ... | ... | |
| MR 4 | <i>The Tender MUST be submitted in the required format, paginated and serialized sequentially on each page of the bid submitted</i> | |
| ... | ... | |
| MR 7 | <i>Must be submitted original and a copy of the tender document, well paginated, serialized and initialed on every page</i> | |
| ... | ... | |
| MR 12 | <i>The bidder must attach Dully filled, signed tender bank details form</i> | |
| ... | ... | |
| MR 20 | ... | |
| <i>Pursuant to Section 80 of the Public Procurement and Asset Disposal Act, 2015 any tender not meeting the mandatory and other eligibility criteria will not proceed to Financial Evaluation Stage</i> | | |

58. From the above, it is apparent the Tender Document had a Preliminary Evaluation Criteria with 20 mandatory requirements and that a bid that failed to meet any of the requirements would stand disqualified.
59. The Board will now proceed to analyze the Applicant's bids alongside Mandatory Requirements No. 4, 7 and 12 in turn:

Compliance with Mandatory Requirement No. 4

60. From the Tender Document, Mandatory Requirement No. 4 required bidders to:
- i. Submit their bids in the required format; and
 - ii. Paginate and sequentially serialize all pages of their bids.
61. It would therefore follow that bids that were in the specified format as well as paginated and sequentially serialized on all pages were responsive to Mandatory Requirement No. 4. Conversely, any bid that failed to meet any of the above would be deemed unresponsive to Mandatory Requirement No. 4.
62. The Board has independently studied the Applicant's original bid as forwarded to it by the Respondents as part of the Confidential Documents in the subject tender and observed that:
- i. The Applicant's bid contains 136 pages;
 - ii. All the 136 pages in the Applicant's bid are sequentially paginated from Page 0001 to Page 0136
63. From the above, the Board is satisfied that the Applicant's bid satisfied Mandatory Requirement No. 4 as it was in the prescribed format and was



equally sequentially paginated on all its pages. We therefore find fault on the part of the Respondents for suggesting that the Applicant's bid was unresponsive to Mandatory Requirement No. 4.

Compliance with Mandatory Requirement No. 7

64. From the Tender Document, Mandatory Requirement No. 7 required bidders to:

- i. Submit both an original and copy of their bid;
- ii. The bid was to be paginated and serialized on every page; and
- iii. The bid was to be initialed.

The Cambridge Online Dictionary (accessed on 27th November 2024) defines "initial" as "**the first letter of a name, especially when used to represent the whole name".**

65. It would therefore follow that bids that were submitted in both their original and copy versions and equally paginated, serialized and initialed on all pages were responsive to Mandatory Requirement No. 7. Conversely, any bid that failed to meet any of the above would be deemed unresponsive to Mandatory Requirement No. 7.

66. The Board has keenly studied the Applicant's bid and noted:

- i. The Applicant submitted both the original and copy versions of its bid;
- ii. All the 136 pages in the Applicant's bid are sequentially paginated from Page 0001 to Page 0136;
- iii. None of the pages of the Applicant's bid was initialized as none bore the Applicants first letters of its names.



- iv. Some pages of the Applicant's bid bear a stamp with the Applicant's name and address while others do not bear the stamp.
67. In the Board's view, the Applicant's bid was unresponsive to Mandatory Requirement No. 7 as it was not initialized on any of its 136 pages. The Requirements at the Preliminary Evaluation Stage were expressed to be mandatory requirements that attracted disqualification in the event a bid was found unresponsive to any of the requirements. Accordingly, the Board finds no fault on the part of the Respondents for disqualifying the Applicant's bid on account of non-compliance with Mandatory Requirement No. 7.

Compliance with Mandatory Requirement No. 12

68. From the Tender Document, Mandatory Requirement No. 12 required bidders to attach a dully filled and signed tender bank details form as part of their bid.
69. The Tender Document did not itself prescribe the format that the tender bank details form would take and thus it was open for bidders to adopt their desired formats for the said form.
70. Accordingly, bids that contained a dully filled and signed bank details form were responsive to Mandatory Requirement No. 7. Conversely, any bid that did not contain a dully filled and signed bank details form would be deemed unresponsive to Mandatory Requirement No. 7.



71. Though the Applicant's contended that they had supplied the bank details form, they did not point the Board to the page of its bid bearing the said form. Nonetheless the Board has keenly studied all the 136 pages of the Applicant's original bid but has not seen any bank details form.
72. We equally observed that the Applicant filed Written Submissions whose paragraphs 13 and 14 indicates that the Applicant found the requirement to provide bank details misaligned in the subject tender as it constituted an asset disposal proceedings which by nature involves the successful bidder paying out money to the Procuring Entity and not vice-versa. Unfortunate for the Applicant, it is time-barred under Section 167 of the Act with respect to this argument noting that it had 14 days from the date of knowledge of this mandatory requirement to challenge the requirement in the Tender Document. It would be disingenuous on the part of the Applicant to participate in the subject tender under the knowledge of the existence of the said mandatory requirement and only to purport to challenge the requirement after being disqualified for non-compliance with the requirement.
73. In the Board's view, the Applicant's bid was unresponsive to Mandatory Requirement No. 12 for not having a bank details form as part of the bid. Section 79(2) of the Act on minor deviation cannot come to the aid of the Applicant noting that the requirement in question is a mandatory requirement which the Court in ***Republic v Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020] eKLR*** held that non-compliance with a mandatory



requirement cannot be deemed a minor deviation. We therefore cannot fault the Respondents for disqualifying the Applicant's bid for not having a bank details form.

74. In view of the foregoing analysis, save for compliance with Requirement No. 4, the Board finds that the Applicant's bid was properly disqualified from the subject tender at the Preliminary Evaluation Stage in accordance with the Act and the Tender Document.

What orders the Board should grant in the circumstances?

75. The Board has found that the Applicant's bid was properly disqualified from the subject tender at the Preliminary Evaluation Stage in accordance with the Act and the Tender Document.
76. The upshot of our finding is that the Request for Review dated 7th November 2024 in respect of Tender No. SK/DOA/001/2024-2024-2025 for Disposal of Scrap Metal at Moi International Sports Centre fails in the following specific terms:

FINAL ORDERS

77. In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review dated 7th November 2024:

- 1. The Request for Review dated 7th November 2024 be and is hereby dismissed.**



2. The 1st Respondent be and is hereby directed to oversee Tender No. SK/DOA/001/2024-2024-2025 for Disposal of Scrap Metal at Moi International Sports Centre to its logical and lawful conclusion.

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

Dated at NAIROBI, this 28th Day of November 2024.


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CHAIRPERSON
PPARB


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SECRETARY
PPARB

