

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 112/2024 OF 8TH NOVEMBER 2024

BETWEEN

GLADICK ENTERPRISES LIMITED APPLICANT

AND

THE ACCOUNTING OFFICER,

WIKITOO PRIMARY AND JUNIOR

SECONDARY SCHOOL 1ST RESPONDENT

WIKITOO PRIMARY AND JUNIOR SECONDARY

SCHOOL 2ND RESPONDENT

STATE DEPARTMENT OF BASIC EDUCATION 3RD RESPONDENT

VEJOSSY COMPANY LIMITED 4TH RESPONDENT

Review against the decision of the Accounting Officer Wikitoo Primary and Junior Secondary School in relation to Tender No. WIKJSS/01/2024 for Construction of a Grade 9 Classroom

BOARD MEMBERS PRESENT

1. Mr. George Murugu, FCI Arb, I.P - Chairperson
2. Eng. Lilian Ogombo - Member
3. Mr. Daniel Langat - Member



IN ATTENDANCE

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

PRESENT BY INVITATION

APPLICANT

GLADICK ENTERPRISES LIMITED

Mr. Dickson Kyalo Muthui - Director

1ST & 2ND RESPONDENT

**THE ACCOUNTING OFFICER,
WIKITOO PRIMARY AND JUNIOR
SECONDARY SCHOOL & WIKITOO
PRIMARY AND JUNIOR SECONDARY
SCHOOL**

Mr. Jones M. Ngovi - Headteacher/BOM Secretary

3RD RESPONDENT

**STATE DEPARTMENT OF BASIC
EDUCATION**

N/A

4TH RESPONDENT

VEJOSSY COMPANY LIMITED

N/A



BACKGROUND OF THE DECISION

The Tendering Process

1. Vide a Public Notice dated 7th October 2024, Wikitoo Junior Secondary invited applications from interested contractors and suppliers in response to Tender No. WIKJSS/01/2024 for Construction of a Grade 9 Classroom (hereinafter referred to as "the subject tender"). Interested bidders were requested to collect the blank tender document (hereinafter referred to as the 'Tender Document') from the head teacher's office during working hours from Monday to Friday and pay a non-refundable application fee of Kshs. 1000. The subject tender's submission deadline was on 23rd October 2024 and opening of the sealed bids would be done on 24th October 2024 at Migwani DCC's board room at 10:00 a.m.

Submission of Tenders and Tender Opening

2. According to the Wikitoo Junior School Infrastructure Committee Meeting Minutes dated 24th October 2024 (hereinafter referred to as "the Procuring Entity's SIC Minutes") which form part of confidential documents furnished to the Public Procurement Administrative Review Board by the 1st Respondent pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), the agenda comprised of opening of tenders, evaluation of tender and award of tenders.




3. A total of seven (7) tenders were submitted in response to the tender. The tenders were opened in the presence of tenderers' representatives present, and were:

Bidder No.	Name
1.	Zakujeni Contractors
2.	Mwatemu Engineering
3.	Batosh Company Limited
4.	Gladick Enterprises
5.	Mutio Building Contractors
6.	Sot Gardens
7.	Vejosy Company Limited

Evaluation of Tenders

4. According to the Procuring Entity's SIC Minutes bids submitted by the seven (7) bidders were checked for binding and pagination, availability of documents, tender price quoted, scored and ranked as follows:

SN	CONTRACTOR	MARKS
1.	Zakujeni Contractors	7
2.	Mwatemu Engineering	6
3.	Batosh Company Limited	6
4.	Gladick Enterprises	6

5.	Mutio Building Contractors	5
6.	Sot Gardens	4
7.	Vejosy Company Limited	3

5. Members present resolved to award the subject tender to Vejosy Company Limited having scored 7/7 marks and the 1st Respondent was instructed to notify bidders of the outcome of evaluation of the subject tender.

Notification to Tenderers

6. Tenderers were notified of the outcome of evaluation of the subject tender vide letters dated 25th October 2024.

REQUEST FOR REVIEW NO. 112 OF 2024

7. On 8th November 2024, Gladick Enterprises Limited, the Applicant herein, filed a Request for Review dated 7th November 2024 together with an Applicant's Supporting Affidavit sworn by Dickson Kyalo Muthui on 7th November 2024 (hereinafter referred to as "the instant Request for Review") seeking the following orders from the Board:

a) The regret letter dated 25-October-2024 and issued to Gladick Enterprises Limited be and it's hereby set aside.

b) The award of tender Ref No. WIKJSS/01/2024 Construction of Grade 9 Classroom Wikitoo Junior




Secondary School issued to Vejossy Company Ltd be and its hereby set aside.

c) The tendering process conducted for Tender Ref No. WIKJSS/01/2024 Construction of Grade 9 Classroom Wikitoo Junior Secondary School be and its hereby set aside.

d) The tendering process for Tender Ref No. WIKJSS/01/2024 Construction of a Grade 9 Classroom be commenced again.

e) The tender opening and evaluation process be conducted in the presence of more than three committee members;

f) The tender opening be conducted in the presence of the regional procurement officer and public officer.

g) The tender be awarded to most qualified bidder as per the advertisement.

h) Costs of the Application be awarded to the Applicant.

i) Any other order the Honourable Board may deem fit.



8. In a Notification of Appeal and a letter dated 8th November 2024, Mr. James Kilaka, the Acting Secretary of the Board notified the 1st and 2nd Respondents of the filing of the Request for Review and the suspension of the procurement proceedings of the subject tender, while forwarding to the said Procuring Entity 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 Procuring Entity was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 8th November 2024.

9. *Vide* a Hearing Notice dated 19th November 2024, the Acting Board Secretary, notified parties and all tenderers of an online hearing of the instant Request for Review slated for 21st November 2024 at 11:00 a.m. through the link availed in the said Hearing Notice.

10. At the hearing on 21st November 2024, the Board read out the pleadings filed by parties in the matter and having considered technical challenges experienced by the Applicant and the 1st and 2nd Respondents failure to file their response directed (a) that the matter be canvassed by way of written submissions, (b) the 1st and 2nd Respondents to file and serve their response to the Request for Review and Written Submissions by 4.00 p.m. on 22nd November 2024, (c) the Applicant to file and serve a further affidavit, if need be, together with Written Submissions by 12.00 noon on 25th November 2024. Parties were cautioned to adhere to the




strict timelines as specified in the Board's directions since the Board would rely strictly on the documentation filed before it in rendering its decision.

11. Parties were also informed that the instant Request for Review having been filed on 8th November 2024 was due to expire on 29th November 2024 and that the Board would communicate its decision on or before 29th November 2024 to all parties to the Request for Review via email.

12. On 25th November 2024 the 1st and 2nd Respondents filed through Mr. Ngovi a response in the form of a letter together with some confidential documents submitted pursuant to Section 67(3)(e) of the Act.

13. The Applicant did not file a further response nor written submissions in the matter.

14. The 1st and 2nd Respondents did not file written submissions in the matter.

15. The 3rd and 4th Respondents did not file any pleadings in the matter.

PARTIES' SUBMISSIONS

Applicant's case

16. The Applicant contends that the Procuring Entity breached the provisions of the Act by disqualifying it on a ground that was not part of the requirements set out in the tender advertisement.



17. It further contends that the Procuring Entity breached Section 78(1) of the Act by opening the subject tender in the presence of less than three members and by proceeding to conduct evaluation in the absence of the regional public works and procurement officer.

18. It is the Applicant's contention that it unfairly and unprocedurally awarded the subject tender to the 4th Respondent and breached the provisions of Section 86(1) of the Act by failing to adhere to the guidelines set out in the Tender Document.

19. The Applicant avers that the Procuring Entity's decision was made in bad faith and was marred with malice and personal interest geared to disadvantage the outright successful tenderer. It prays for the instant Request for Review to be allowed as prayed.

1st and 2nd Respondents' case

20. According to the 1st and 2nd Respondents, the evaluation process consisted of numerous basic requirements used as a way of evaluating bids including the Applicant's tender.

21. The 1st and 2nd Respondents referred the Board to the Evaluation Score Sheet Schedule and aver that after scrutiny of bids submitted only three bidders were found responsive, including the Applicant herein and apologized for giving a wrong reason for disqualification of the Applicant. It is their case that the 4th Respondent was awarded the subject tender having emerged as the most responsive lowest evaluated bidder.




22. With regard to the absence of a regional public works officer and regional procurement officer, the 1st and 2nd Respondent contend that as per the Ministry Guidelines, the sub-county public works officer was present i.e Mr. Paul Kiome as evidence by the Evaluation Score Sheet and the Procuring Entity's SIC Minutes and that the Ministry Guidelines on who to form the committee had not included a procurement officer.

23. The 1st and 2nd Respondents further contend that any shortcoming in the procurement process in the subject tender if any is as a result of a limit in the knowledge of procurement though the Ministry Guidelines were followed to the letter.

24. Mr. Ngovi indicated that the instant Request for Review was received on the 20th November 2024 while works had progressed up to roofing level.

BOARD'S DECISION

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

A. Whether the procurement process in the subject tender adhered to the provisions of the Act and Regulations 2020 as read with Article 227(1) of the Constitution.



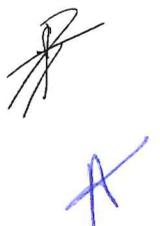
B. What orders should the Board grant in the circumstances?

Whether the procurement process in the subject tender adhered to the provisions of the Act and Regulations 2020 as read with Article 227(1) of the Constitution

26. We understand the Applicant's case to be that the 1st and 2nd Respondents in disqualifying its bid document failed to adhere to the requirements of the Tender Document, the Act and the Constitution. The Applicant contends that the Evaluation Committee was unfair in award of the subject tender and breached the provisions of Section 78(1) and 86(1) of the Act.

27. In response, the 1st and 2nd Respondents contend that they adhered to the Ministry Guidelines in evaluation and award of the subject tender and that any shortcomings were as a result of a limited knowledge in procurement. They further contend that the 4th Respondent was awarded the subject tender having emerged as the most responsive lowest evaluated bidder and admitted to having issued a wrong reason for the disqualification of the Applicant's bid.

28. Having considered parties' pleadings, submissions and part of the confidential documents submitted by the 1st and 2nd Respondents, the Board observes that this is a classic case of everything that can go wrong in public procurement.

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

"227. Procurement of public goods and services

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

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

- a)***
- b)***
- c) and***
- d)"***

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



"45. Article 227 of the Constitution provides that when procuring entities contract for goods or services they must comply with the principles of fairness, equity, transparency, competitiveness and cost-effectiveness. For there to be fairness in the public procurement process, all bids should be considered on the basis of their compliance with the terms of the solicitation documents, and a bid should not be rejected for reasons other than those specifically stipulated in the solicitation document."

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

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

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

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




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

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

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

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

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

(h) maximisation of value for money;

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

(j) promotion of citizen contractors.”

32. Efficient good governance in public procurement proceedings provides tenderers with an assurance that public procurement and asset disposal processes are operating effectively and efficiently. Such processes are also underpinned by broader principles such as the rule of law, integrity, transparency and accountability amongst others.

33. The Applicant in the instant Request for Review is aggrieved by the regret letter dated 25th October 2024 addressed and sent to it by Mr. Ngovi which reads in part as follows:



"....."

RE: REGRET LETTER (TENDER NO: WIKJSS/01/2024)

Reference is made to the above tender which you participated. We wish to inform you that the tender has been concluded. However, we regret to inform you that you were not successful due to the following reasons:

1. No evidence of personnel/machines.

We thank you for showing interest to work with us.

....."

34. According to the above notification letter, the Applicant's tender was disqualified for having not provided any evidence of personnel/machines. We note that Mr. Ngovi in his response apologized for giving a wrong reason for disqualification of the Applicant's bid.

35. The Board is cognizant of provisions of Section 87 of the Act which 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:

"(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."

36. 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.

37. 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.”***

38. In view of the provisions of Section 87 of the Act read with Regulation 82 of Regulations 2020, the Board observes that 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.

39. From the notification of regret letter addressed to the Applicant, there is no indication of who the successful bidder is in the subject tender, the price at which it was awarded the subject tender and why it was successful. More concerning is that the 1st Respondent has admitted in his response that he issued the Applicant with a wrong reason on why its bid was disqualified.

40. It is therefore quite clear to the Board that the 1st Respondent's letter of Notification of Regret dated 25th October 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.

41. As to commencement of the procurement proceedings in the subject tender, the Applicant at paragraph 3 of the Applicant's Supporting Affidavit sworn by Dickson Kyalo Muthui on 7th November 2024 depones that the Procuring Entity advertised the subject tender vide a copy of public notice advertisement attached and marked as exhibit DKM2 whereby interested applicants were requested to collect tender documents from the head teacher's office during the working hours from Monday to Friday and pay a non-refundable application fee of Kshs. 1000.



42. However, neither the Applicant nor the 1st and 2nd Respondents have availed a copy of the blank tender document in the subject tender to the Board and as such, we have not had a chance to study the same. In breach of Section 67(3)(e) of the Act, the 1st Respondent failed to submit to the Board crucial documents relating to the procurement process in the subject tender such as a copy of the blank tender documents and bids submitted by the various tenderers who participated in the subject tender.

43. The 1st Respondent is cautioned to note the provisions of Regulation 205 of Regulations 2020 which state:

"(1) The Secretary shall, immediately after the filing of the request under regulation 203, serve a notice thereof to the accounting officer of a procuring entity in accordance with section 168 of the Act.

(2) The notification of the filing of the request for review and suspension of procurement proceedings shall be communicated, in writing, by the Review Board Secretary

(3) Upon being served with a notice of a request for review, the accounting officer of a procuring entity shall within five days or such lesser period as may be stated by the Secretary in a particular case, submit to the Secretary a written memorandum of response to the



request for review together with such documents as may be specified.

(4) An accounting officer of a procuring entity who fails to submit the document within the stipulated period under paragraph (3), commits an offence and shall be liable to a fine not exceeding four million shillings or to imprisonment for a term not exceeding ten years, or to both.

(5) The Review Board Secretary shall immediately notify all other parties to the review upon receipt of such documents from a procuring entity under paragraph (3)."

44. In essence, the Board's Secretary serves a notice to the accounting officer of a procuring entity in accordance with Section 168 of the Act upon receipt of a request for review. Upon service of the notice of the request for review, **the accounting officer is under an obligation to file a response together with all confidential document in the procurement proceedings within five days of the notice or such lesser period as may be specified. Failure by the accounting officer to submit a response and documents requested within the stipulated time is an offence which attracts a fine not exceeding four million shillings or imprisonment for a term not exceeding ten years or both.**



45. Additionally, Regulation 205 (3) & (4) of Regulations 2020 seeks to cure the mischief where procuring entities delay in submitting responses to allegations by candidates and tenderers of breach of a duty imposed by the Act or Regulations considering the limited timelines within which administrative reviews ought to be heard and determined or altogether fail to respond or submit confidential documents thus frustrating the Board in reviewing and determining administrative reviews.

46. On the issue of the blank tender document, Section 58 of the Act requires a procuring entity to use a standard tender document while undertaking public procurement which contains sufficient information and provides as follows:

"(1) An accounting officer of a procuring entity shall use a standard procurement and asset disposal documents issued by the Authority in all procurement and asset disposal proceedings.

(2) The tender documents used by a procuring entity under subsection (1) shall contain sufficient information to allow fairness, equitability, transparency, cost-effectiveness and competition among those who may wish to submit their applications."

47. The Authority referred to under Section 58 of the Act is the Public Procurement Regulatory Authority established under Section 8 of the Act



whose functions under Section 9 include, *inter alia*, (a) to prepare, issue and publicise standard public procurement and asset disposal documents and formats to be used by public entities, such as the Procuring Entity herein, and other stakeholders and (b) to provide advice and technical support upon request.

48. Further Section 60(1) of the Act provides:

"(1) An accounting officer of a procuring entity shall prepare specific requirements relating to the goods, works or services being procured that are clear, that give a correct and complete description of what is to be procured and that allow for fair and open competition among those who may wish to participate in the procurement proceedings."

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

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



50. In essence, in undertaking the procurement process in the subject tender, the Procuring Entity is under an obligation to ensure that the subject tender complies with Section 58, 60(1), and 70 of the Act by being drafted and set out in the standard tender document/ format provided by the Authority as can be accessed on its website <https://ppra.go.ke/standard-tender-documents/>. This is regardless of the Ministry Guidelines that the Procuring Entity alleges to have complied with and been guided by in the procurement process in the subject tender.

51. As to the tender opening of the subject tender, the Board takes cognizance of Section 78 of the Act which provides as follows:

"Section 78 - Opening of tenders:

(1) An accounting officer of a procuring entity shall appoint a tender opening committee specifically for the procurement in accordance with the following requirements and such other requirements as may be prescribed—

(a) the committee shall have at least three members;
and

(b) at least one of the members shall not be directly involved in the processing or evaluation of the tenders.

(2) Any bid withdrawn in writing shall not be eligible for evaluation or consideration in the tender process.



(3) Immediately after the deadline for submitting tenders, the tender opening committee shall open all tenders received before that deadline.

(4) Those submitting tenders or their representatives may attend the opening of tenders.

(5) The tender opening committee shall assign an identification number to each tender and record the number of pages received.

(6) As each tender is opened, the following shall be read out loud and recorded in a document to be called the tender opening register—

(a) the name of the person submitting the tender;

(b) the total price, where applicable including any modifications or discounts received before the deadline for submitting tenders except as may be prescribed; and

(c) if applicable, what has been given as tender security.

(7) No tenderer shall be disqualified by the procuring entity during opening of tenders.

(8) The accounting officer of a procuring entity shall, on request, provide a copy of the tender opening register to a person submitting a tender.

(9) Each member of the tender opening committee shall—



(a) sign each tender on one or more pages as determined by the tender opening committee; and

(b) initial, in each tender, against the quotation of the price and any modifications or discounts, where applicable.

(10) The tender opening committee shall prepare tender opening minutes which shall set out—

(a) a record of the procedure followed in opening the tenders; and

(b) the particulars of those persons submitting tenders, or their representatives, who attended the opening of the tenders.

(11) To acknowledge that the minutes are true reflection of the proceedings held, each member of the tender opening committee shall—

(a) initial each page of the minutes;

(b) append his or her signature as well as initial to the final page of the minutes indicating their full name and designation.

(12) A person who causes the physical loss of tender documents provided for under this section commits an offence.”

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52. Interpretation of the above provisions of Section 78 of the Act is *inter alia* that (a) the accounting officer of a procuring entity shall appoint a tender opening committee consisting of at least three (3) members, (b) immediately after the tender submission deadline, the tender opening committee shall open all tenders received before that deadline, (c) tenderers or their representatives may attend the opening of tenders, (d) no tenderer shall be disqualified by the procuring entity during opening of tenders, (e) the tender opening committee shall assign an identification number to each tender and record the number of pages received, (f) at the tender opening the name of the bidder, the tender price and where applicable the tender security shall be read out loud and recorded in the tender opening register, (g) each member of the tender opening shall sign and initial each tender received, (h) the tender opening committee shall prepare tender opening minutes which set out the procedure followed at the opening and particulars of persons submitting bids, or their representatives who attended the opening of tenders and (i) each member of the tender opening committee shall initial each page of the minutes and sign the final page of the tender opening minutes.

53. In comparing the above provisions of Section 78 of the Act against the proceedings that took place with regard to opening of the subject tender, we note that:

- i The 1st Respondent did not avail any letter showing appointment of the members of the tender opening committee pursuant to Section 78(1) of the Act;



- ii The subject tender having closed on 23rd October 2024 was opened one day later by members of the Wikitoo Junior School Infrastructure Committee on 24th October 2024 and this is clearly not a tender opening committee appointed by the 1st Respondent.
- iii The 1st Respondent did not avail any letter showing appointment of the members of an ad hoc evaluation committee pursuant to Section 46 of the Act.
- iv The same members present during opening of the bids submitted in the subject tender proceeded to evaluate the bids and recommend award to the 4th Respondent.
- v No documentation has been availed to show that bids were assigned identification numbers and that the name of the bidder, the tender price and where applicable the tender security were read out loud and recorded in a tender opening register.
- vi No documentation has been availed to show that members of a tender opening committee signed and initialed each tender submitted in the subject tender.
- vii No evidence with regard to tender opening minutes having been prepared and signed by members of a tender opening committee has been presented before the Board.

54. To this end, the 1st and 2nd Respondents breached provisions under Section 78 of the Act on opening of tenders submitted in the subject tender.




55. With regard to evaluation of tenders, Section 46 of the Act provides for the Evaluation Committee as follows:

Section 46. Evaluation Committee

(1) An Accounting officer shall ensure that an ad hoc evaluation committee is established in accordance with this Act and Regulations made thereunder and from within the members of staff, with the relevant expertise.

(2) In establishing the ad hoc evaluation committee referred to in subsection (1) above, the procuring entity that is a State Department or a County Department, shall do so in consultation with the Cabinet Secretary or the County Executive Committee member responsible for that entity, as the case may be.

(3) Despite subsection (1), where technical expertise is required from outside the organisation, such expertise may be obtained from other procuring entities or procured to join the committee, on recommendation, in writing, by the head of the procurement function, and the committee shall be appointed by the accounting officer, in writing.

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

(a) deal with the technical and financial aspects of a procurement as well as the negotiation of the process including evaluation of bids, proposals for



prequalification, registration lists, Expression of Interest and any other roles assigned to it;

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

(c) have as its secretary, the person in charge of the procurement function or an officer from the procurement function appointed, in writing, by the head of procurement function;

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

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

(5) For greater certainty a procuring entity shall where a member of the ad hoc evaluation committee contravenes any provisions of this Act, institute disciplinary measures in accordance with the procuring entity's disciplinary measures and the provisions of this Act.



(6) Deleted by Act No. 32 of 2022, s. 10(b).

(7) Subject to this Act, the evaluation committee may invite external technical experts who are not employees of the organisation to assist in matters that need specific technical expertise. (8) Notwithstanding the provisions in this section, the Cabinet Secretary may prescribe other procedures for evaluating low value procurements below specified thresholds.

56. In essence, the 1st Respondent was required to ensure that an ad hoc evaluation committee is established per the Act for purposes of evaluation of the subject tender. It is imperative to note that such an evaluation committee, subject to the Act, may invite external technical experts who are not employees of the Procuring Entity to assist in matters that need specific technical expertise.

57. In comparing the above provisions of Section 46 of the Act against the procurement proceedings in the subject tender, we note that the 1st and 2nd Respondents have not availed any documentation evidencing establishment of an ad hoc evaluation committee for purposes of evaluation of the subject tender. Bids submitted were evaluated by members of the Wikitoo Junior School Infrastructure Committee on 24th October 2024 whose establishment remains unknown.

58. Section 80 of the Act is instructive on how evaluation and comparison of tenders should be conducted by a procuring entity as follows:



"80. Evaluation of tender

(1)

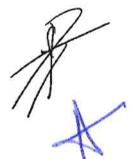
(2) *The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and,*

(3); and

(4)"

59. Section 80(2) of the Act as indicated above requires the Evaluation Committee to evaluate and compare tenders in a system that is fair using the procedures and criteria set out in the Tender Document. A system that is fair is one that considers equal treatment of all tenders against a criteria of evaluation known by all tenderers since such criteria is well laid out for in a tender document issued to tenderers by a procuring entity. Section 80(3) of the Act requires for such evaluation criteria to be as objective and quantifiable to the extent possible and to be applied in accordance with the procedures provided in a tender document.

60. Turning to the circumstances in the instant Request for Review, we note that attached to the 1st and 2nd Respondent's response is an Evaluation Score Sheet dated 24th October detailing the requirements against which the bids submitted in the subject tender were compared against and



scores awarded to each bidder. As we have already stated hereinabove, the 1st Respondent failed to avail the blank tender document and bids submitted in the subject tender for purposes of review by the Board so as to establish the tender requirements and if bids were evaluated against the said requirements.

61. The 1st Respondent in addition to its response only availed to the Board (a) KPEEL Project Highlights, (b) the Evaluation Score Sheet – Mwingi West Subcounty dated 24th October 2024, (c) Minutes of Wikitoo Junior School Infrastructure Committee Meeting held on 24/10/2024 at Migwani Doc' Boardroom, (d) Notification of award letter dated 25th October 2024 and regret letters dated 25th October 2024, and (e) Acceptance Letter dated 28th October 2024.

62. Additionally, the 1st Respondent failed to avail to the Board the Professional Opinion prepared pursuant to Section 84 of the Act which provides for provision of a professional opinion by the head of procurement function to the accounting officer as follows:

"(1) The head of procurement function of a procuring entity shall, alongside the report to the evaluation committee as secretariat comments, review the tender evaluation report and provide a signed professional opinion to the accounting officer on the procurement or asset disposal proceedings.



(2) The professional opinion under sub-section (1) may provide guidance on the procurement proceeding in the event of dissenting opinions between tender evaluation and award recommendations.

(3) In making a decision to award a tender, the accounting officer shall take into account the views of the head of procurement in the signed professional opinion referred to in subsection (1)."

63. This therefore means that the 1st Respondent was not guided by any Professional Opinion in award of the subject tender to the 4th Respondent contrary to the provisions of the Act.

64. An averment was made by Mr. Ngovi in his response to the Request for Review to the effect that he was notified of the instant Request for Review on 20th November 2024 while the works in regard to the subject tender had progressed up to roofing level. This can be interpreted to mean that upon award of the subject tender to the 4th Respondent on 25th October 2024 and acceptance on 28th November 2024, parties proceeded to enter into a procurement contract.

65. It is imperative to note that Section 135 of the Act provides for creation of procurement contracts as follows:




135. Creation of procurement contracts

(1) The existence of a contract shall be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract shall be signed by the accounting officer or an officer authorized in writing by the accounting officer of the procuring entity and the successful tenderer.

(2) An accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications that emanate from the procurement proceedings.

(3) The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period.

(4) No contract is formed between the person submitting the successful tender and the accounting officer of a procuring entity until the written contract is signed by the parties.

(5) An accounting officer of a procuring entity shall not enter into a contract with any person or firm unless an award has been made and where a contract has been



signed without the authority of the accounting officer, such a contract shall be invalid.

(6) The tender documents shall be the basis of all procurement contracts and shall, constitute at a minimum—

(a) Contract Agreement Form;

(b) Tender Form;

(c) price schedule or bills of quantities submitted by the tenderer;

(d) Schedule of Requirements;

(e) Technical Specifications;

(f) General Conditions of Contract;

(g) Special Conditions of Contract;

(h) Notification of Award.

(7) A person who contravenes the provisions of this section commits an offence."

66. The pre-conditions of signing a procurement contract under Section 135 are, *inter alia* (a) such a procurement contract must be in writing, (b) signed by an accounting officer or an officer authorized in writing by an accounting officer of a procuring entity and the successful tenderer and (c) a procurement contract must be signed within the tender validity



period but not earlier than fourteen days have elapsed following the giving of a notification of award.

67. Once again while comparing the above provisions of Section 135 of the Act against the procurement proceedings in the subject tender we note that the 1st Respondent failed to avail to the Board a written and duly signed procurement contract by both the 1st Respondent and the 4th Respondent taking note of the fact that pursuant to Section 135(4) of the Act, no contract is formed between the person submitting the successful tender and the accounting officer until a written contract is signed by parties in accordance with the Act.

68. In view of the foregoing, it is clear to the Board that the 1st and 2nd Respondents failed to adhere to the provisions of the Act and Regulations 2020 as read with Article 227(1) of the Constitution in the procurement proceedings in the subject tender.

What orders the Board should grant in the circumstances?

69. We have established that the 1st and 2nd Respondents failed to adhere to the provisions of the Act, Regulations 2020 read with Article 227(1) of the Constitution in the procurement proceedings in the subject tender.

70. Section 176 of the Act provides for prohibitions and offences as follows:

176. Prohibitions and offences

(1) A person shall not—



- (a) obstruct or hinder a person carrying out a duty or function or exercising a power under this Act;***
- (b) knowingly lie to or mislead a person carrying out a duty or function or exercising a power under this Act;***
- (c) delay without justifiable cause the opening or evaluation of tenders, the awarding of contract beyond the prescribed period or payment of contractors beyond contractual period and contractual performance obligations;***
- (d) unduly influence or exert pressure on any member of an opening committee evaluation committee and disposal committee or on any employee or agent of a procuring entity or the accounting officer to take a particular action which favours or tends to favour a particular tenderer;***
- (e) open any sealed tender, including such tenders electronically submitted and any document required to be sealed, or divulge their contents prior to the appointed time for the public opening of the tender or documents except for tenders inadvertently opened under section 77(6);***
- (f) divulge confidential information under section 67;***
- (g) inappropriately influence tender evaluations;***
- (h) split procurements contrary to section 54 of the Act;***
- (i) commit a fraudulent act;***



(j) knowingly withholds the notification of award to a successful tenderer; (k) knowingly withholds notification to unsuccessful tenderer;

(l) sign a contract contrary to the requirements of this Act or Regulations made thereunder; or

(m) contravene a lawful order of the Authority given under Part IV or the Review Board under Part XV.

(2) A person who contravenes the provisions of subsection (1) of this section, commits an offence and shall be liable upon conviction— (a) if the person is a natural person, to a fine not exceeding four million shillings or to imprisonment for a term not exceeding ten years, or to both; (b) if the person is a body corporate, to a fine not exceeding ten million shillings.

(3).....

71. Further Regulation 223 of Regulations 2020 provides for prohibitions and sanctions as follows:

223. Prohibitions and sanctions (1) Subject to the provisions of section 176 of the Act, a public officer of a procuring entity shall not— (a) fail to maintain procurement, inventory and asset disposal records as provided under section 68 of the Act and these Regulations;



(b) vary or amend a procurement or asset disposal contract contrary to section 139 of the Act;

(c) procure goods, works, or services at unreasonably inflated prices beyond the indicative market survey;

(d) breach the rules on specific procurement requirements or skewed or tailored technical specifications as provided under section 60 of the Act;

(e) fail to safeguard and manage inventory, stores and assets of a procuring entity as provided under section 162 of the Act; or

(f) inappropriately dispose of public assets without adhering to Part XIV of the Act.

(2) A person who contravenes any provisions under paragraph (1) or the code of ethics prepared by the Authority under section 181 of the Act commits an offence under the Act and these Regulations.

(3) Where a person is convicted for any offence under the Act and these Regulations, the assets or resources lost may be recovered.

(4)



72. Section 173 of the Act donates wide discretionary powers to the Board and provides as follows:

"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."

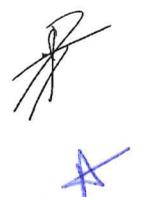


73. This Board is called to safeguard, promote and protect the rule of law and ensure the integrity of procurement proceedings by public entities in upholding the national values and principles espoused in Article 10, 201, 227(1) of the Constitution. Having established that the 1st and 2nd Respondents conducted the procurement of the subject tender using a system that was unfair to the Applicant and other bidders contrary to the provisions of Article 227(1) of the Constitution, the Act and Regulations 2020, it would be logical to expect the Applicant and other bidders to be allowed to submit their bids for evaluation in accordance with the provisions of the Act and Regulations 2020. The just thing to do is for us to terminate the procurement process of the subject tender and order commencement of a new procurement process to be supervised by the Director General of the Public Procurement Regulatory Authority to ensure compliance with the provisions of the Act, Regulations 2020 and Article 227 of the Constitution pursuant to Section 9(1)(a), 17(2) and 34 of the Act.

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

FINAL ORDERS

75. 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 letter of Notification of Award dated 25th October 2024 with respect to Tender No. WIKJSS/01/2024 for Construction of a Grade 9 Classroom be and is hereby nullified and set aside.**
- B. The letters of Regret dated 25th October 2024 with respect to Tender No. WIKJSS/01/2024 for Construction of a Grade 9 Classroom addressed to the Applicant and to all other unsuccessful tenderers be and are hereby nullified and set aside.**
- C. The 1st Respondent is hereby ordered to re-advertise and commence a new procurement process for Construction of a Grade 9 Classroom within seven (7) days of this decision taking into consideration the Boards findings in this Request for Review.**
- D. Further to Order C above, the Acting Board Secretary is hereby directed to furnish the Director General of the Public Procurement Regulatory Authority with this decision for purposes of following up on the 1st and 2nd Respondents' compliance with the Orders of the Board herein pursuant to Section 9(1)(a), 17(2) and 34 of the Act.**



E. In the event of any breach of Order C and D above, the Public Procurement Regulatory Authority be at liberty to exercise its powers under Section 35, 36, 37 and 38 of the Act.

F. Given the findings herein, each party shall bear its own costs in the Request for Review.

Dated at NAIROBI this 29th Day of November 2024.


.....
CHAIRPERSON
PPARB


.....
SECRETARY
PPARB

