

BACKGROUND OF THE DECISION

The Tendering Process

1. Rongo University, the Procuring Entity herein, *vide* an advert in MyGov Publication, the Procuring Entity's website (www.rongovarsity.ac.ke) and the PPIP Portal (www.tenders.go.ke) invited interested suppliers registered under the Women AGPO Category to submit bids in the form of a Technical and Financial Proposal in response to Tender No. RU/CSP/004/2024-2025 for Provision of Project Consultancy Services for Proposed Construction of Tuition and Science Laboratory Block through an Open Tender method. The tender submission deadline was set as 31st October 2024 at 10:00 a.m.

Submission of Bids and Tender Opening

2. According to the Tender Opening Register dated 31st October 2024 under the Confidential File submitted by the Procuring Entity, the following two (2) bidders were recorded as having submitted their bids in response to the subject tender by the tender submission deadline:

#	Name of Bidder
1.	Skylon Designs Limited
2.	Brickehaus Limited & Grandscale Builders Limited

Evaluation of Tenders

3. The Evaluation Committee to undertake an evaluation of the received bids in the following 3 stages as captured in the Evaluation Report
 - i. Preliminary Evaluation
 - ii. Technical Evaluation
 - iii. Financial Evaluation

Preliminary Evaluation

4. The submitted bids were to be examined using the criteria set out as 22. Evaluation of Technical Proposals under Section 2. Instructions to Consultants and Data Sheet at page 17 of the Tender Document. Further evaluation criteria was set out as clause 22.1 under Section 2(B). Data Sheet at pages 25 to 26 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.
6. At the end of the evaluation at this stage, the 2 bids were established as responsive and thus qualified for further evaluation.

Technical Evaluation

7. The bids were to be examined using the criteria set out as clause 22.2 Technical Evaluation Attributes under Section 2(B). Data Sheet at pages 26 to 27 of the Tender Document.

8. The bids were to be evaluated against requirements that carried a cumulative score of 100 marks. In order for a bid to qualify for evaluation at the Financial Evaluation Stage they were to garner a minimum score of 75 marks.
9. According to the Evaluation Committee's Technical Evaluation Report dated 6th November 2024, both the Applicant's bid and Interested Parties' joint bid mustered the 75 marks threshold and thus qualified for further evaluation at the Technical Evaluation Stage.

Financial Evaluation

10. The Evaluation Committee was required at this stage to examine bids using the criteria set out as Clause 29.1 under Section 2(B). Data Sheet at pages 26 to 27 of the Tender Document.
11. The evaluation was to be on the basis of a comparison of the combined weighted Financial and Technical Scores of the bids. The successful bid would be the one bearing the highest combined weighted Financial and Technical Scores. The lowest evaluated bid would garner the maximum Financial Score while other bid's score would be established by multiplying 100 by lowest evaluated bid price and then divided by the bid whose price was under consideration.
12. The Interested Parties' joint bid was established as bearing the lowest evaluated price and thus assigned the maximum financial score. Further since both the Applicant's bid and the Interested Parties' joint bid scored

95 marks at the Technical Evaluation Stage, they had a similar weighted Technical Score, with the result that the Interested Parties' joint bid's combined scores was higher than that of the Applicant.

Evaluation Committee's Recommendation

13. The Financial Evaluation Report dated 8th November 2024 indicates that Evaluation Committee recommended the award of the subject tender to the Interested Parties who were in a Joint Venture at a total tender price of **Kenya Shillings Twenty-Five Million, Seven Hundred and Fifty-Two Thousand (Kshs.25,752,000) inclusive of all taxes.**

Professional Opinion

14. In a Professional Opinion dated 11th November 2024 the Procuring Entity's Procurement Officer, Mr. Titus Ochieng' Ndonga reviewed the manner in which the subject procurement process was undertaken and recommended the award of the subject tender to the Interested Party as proposed by the Evaluation Committee.
15. The Professional Opinion was subsequently approved by the 1st Respondent, Prof. Samuel Gudu on the same day, 11th November 2024.

Notification to Bidders

16. Accordingly, the bidders were notified of the outcome of the evaluation of the tenders in the subject tender vide letters dated 11th November 2024.

REQUEST FOR REVIEW

17. The Applicant herein through the firm of Mukele Moni & Company Advocates filed a Request for Review dated and filed on 22nd November 2024 supported by an Affidavit sworn on even date by Humphrey Hasuwo, the Applicant's Managing Director, seeking the following orders:
- a) The Respondents' decision contained in its Notification of Intention to award dated 11th November 2024, Tender No. RU/CSP/004/2024-2025 Tender for Provision of Project Consultancy Services for Proposed Construction of Tuition and Science Laboratory Block, notifying the Applicant was unsuccessful be set aside and/or nullified;***
 - b) The Respondent's decision contained in its Notification of Intention to award dated 11th day of November, 2024, Tender No. RU/CSP/004/2024-2025 Tender for Provision of Project Consultancy Services for Proposed Construction of Tuition and Science Laboratory Block, to the 1st and 2nd Interested Parties be set aside, vacated and/or nullified;***
 - c) The Public Procurement Administrative Review Board reviews the scores entered by the Procuring Entity, the tender documents and awards the Tender No. RU/CSP/004/2024-2025 Tender for Provision of Project Consultancy Services for Proposed Construction of Tuition and Science Laboratory Block, to the Applicant.***
 - d) In the alternative, the 2nd Respondent be ordered to sign a contract with the Applicant in accordance with the tender***

- documents and the decision of The Public Procurement Administrative Review Board.***
- e) The Public Procurement Administrative Review Board substitutes the decision by the Procurement Entity made on 11th day of November, 2024 with a decision awarding the Tender No. RU/CSP/004/2024-2025 Tender for Provision of Project Consultancy Services for Proposed Construction of Tuition and Science Laboratory Block, to the Applicant.***
- f) The Applicant be awarded damages for loss suffered following the illegal award of the tender by the Respondents to the 1st and 2nd Interested Parties pursuant to Section 167(1) of the Public Procurement and Asset Disposal Act.***
- g) The Applicant be awarded costs for this Review application.***
- h) Such other or further relief as the Review Board shall deem fit and just to grant.***

18. On 26th November 2024, the Respondents, through the firm of Manyonge Wanyama & Associates LLP, filed the Respondents Replying Affidavit sworn on even date by Titus Ochieng Ndong'a, the Respondent's Procurement Officer.
19. Vide letters dated 27th 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 27th November 2024 but none responded to this invitation.

20. On 29th 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 5th December 2024 at 11:00 a.m. through the link availed in the said Hearing Notice.
21. On 2nd December 2024, the Board Secretary received a letter from Counsel for the Respondents, Mr. Wanyama, requesting for the hearing to be rescheduled to either 4th December 2024 or 9th December 2024 as he was engaged in the burial preparations for Dr. Mutubwa- Advocate.
22. On 3rd December 2024, the Board Secretary received another letter from Counsel for the Applicant, Mr. Mukele, requesting for the hearing to be rescheduled to 10th December 2024 as he was equally participating in the burial preparations for Dr. Mutubwa-Advocate.
23. The Board Secretary upon consulting the Board sent out a fresh Hearing Notice notifying parties that the hearing of the instant Request for Review would be by online hearing on the rescheduled date of 9th December 2024 at 2:30 p.m. through the link availed in the said Hearing Notice.

24. On 9th December 2024, the Applicant filed Written Submissions and a Bundle of Authorities, both dated 6th December 2024.
25. On the same day, 9th December 2024 the Respondents filed a Bundle of Authorities.
26. When the Board convened on 9th December 2024 at 2:30 p.m. the parties confirmed having filed and served the said documents. Counsel present equally confirmed their readiness to proceed with the online hearing.
27. Accordingly, the Board then gave the following directions on the order of address:
 - i. The Applicant would start by arguing the Request for Review within 15 minutes.
 - ii. The Respondents would then offer a response within 15 minutes;
 - iii. Thereafter the Applicant would close by way of rejoinder in 5 minutes

PARTIES SUBMISSIONS

Applicant's Submissions

28. Counsel for the Applicant, Mr. Mukele, indicated that the Applicant would be placing reliance on its filed documents in the matter.

29. Relying on Section 79(1) of the Act and the court decisions in ***Republic v Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex parte Tuv Austria Turk [2020]eKLR*** and ***Sinopec International Petroleum Service Corporation v Public Procurement Administrative Review Board & 3 Others; Civil Appeal E012 of 2024***, Counsel argued that a Procuring Entity should only consider responsive bids.
30. He argued that whereas the Applicant submitted a responsive bid, the Interested Parties did not. Counsel argued that the Interested Parties joint bid was unresponsive to the mandatory requirements set out in the Tender Document. He contended that the 1st Interested Party did not submit an AGPO (Women Category) Certificate as required under Mandatory Requirement No. 12 of the Data Sheet. Further, that the Respondents had through paragraph 19 of their Replying Affidavit admitted that its only the 2nd Interested Party who had submitted its AGPO (Women Category) Certificate.
31. Relying on Article 56(1) of the Constitution of Kenya, 2010 and the decisions in ***Centre for Minority Rights Development (CEMIRIDE) & 2 other v Attorney General & 2 others; Independent Electoral and Boundaries Commission [2022]eKLR*** and ***Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & another [2011]eKLR*** Mr. Mukele argued the AGPO program is an

affirmative action program designed to enable the special categories (women, youth and persons with disability) to access government procurement opportunities. Further that the Interested Parties in submitting a bid under a Joint Venture could not circumvent this requirement by only submitting the 2nd Interested Party's AGPO (Women Category) Certificate. In the circumstance, the Applicant faulted the Respondents for proceeding to award the subject tender to the Interested Parties in the face of non-compliance with a mandatory requirement in the Tender Document.

32. The Applicant relied on this Board's definition of a joint venture in ***Rhombus Construction Company Limited v the Accounting Officer, Kenya Ports Authority & another; PPARB Application No. 94 of 2021***. Mr. Mukele contended that though the Interested Parties submitted their bid under a Joint Venture, they remained separate companies and each of these companies ought to meet the mandatory requirement in the subject tender. Further that though the Competition Authority of Kenya Joint Venture Guidelines 2021 recognizes the place of joint ventures, this does not extend to by-passing tender requirements. He maintained that the Interested Parties appear to have entered into a Joint Venture Agreement under collusion to create an unfair competitive advantage in breach of Section 21 of the Competition Act.
33. Mr. Mukele submitted that under Regulation 120(1) of the Regulations 2020, Technical Proposals should be opened before Financial Proposals

and where a bidder's Technical Proposal is non-responsive, their Financial Proposal cannot be considered. He therefore argued that since the 1st Interested Party did not submit an AGPO (Women Category) Certificate, the joint bid by the Interested Party was non-responsive and ought to have been disqualified.

34. Counsel gave the example of having a valid tax compliance certificate. According to him, in the context of joint ventures, all the joint venture partners must have their separate tax compliance certificates as one joint venture partner cannot rely on the certificate of another partner as proof that the joint venture wields a valid tax compliance certificate.
35. Mr. Mukele went on to contend that the Respondents averment at paragraph 21 of their Replying Affidavit that it relied on the bid documents of Amazon Consultants Limited, Mankan Consulting Engineers Limited and Infraplus Exceptional Engineering Limited was based on a misrepresentation.
36. Further that the Interested Party's non-compliance with a mandatory requirement could not be deemed a minor deviation under Section 79(2). For this reliance was placed on ***Nomads Construction Company Limited v Kenya National Highways Authority & M/S Northern Frontier Enterprises; PPARB Application No. 1 of 2017*** and Sinopec International Petroleum Services Corporation v Public Procurement Administrative Review Board & 3 Others.

37. The Applicant argued that it harboured a legitimate expectation that the Respondents would comply with their own Tender Document. However, it would appear that the Respondents disregarded the mandatory requirements in the Tender Document by awarding the subject tender to the Interested Party when it was apparent that they failed to submit an AGPO (Women Category) Certificate. It was argued this constituted an irregularity.
38. Counsel equally argued that the 2nd Interested Party was ineligible to participate in the subject tender for the reason that it was not a registered professional consulting firm.
39. He argued that under section 5 (k) of the Architects and Quantity Surveyors Act the Board of Registration of Architects and Quantity Surveyors (BORAQS) has power to make by laws and in exercise of this power a Code of Professional Conduct for Architects and Quantity Surveyors . This Code requires for one to practice as a consulting firm they had to be registered with the Board. it was argued that the 2nd Interested Party was not registered with BORAQS and therefore ineligible to practice as a professional consulting firm and to participate in the subject tender.

40. He contended that the Respondents could not argue that the registration of the 1st Interested Party with BORAQS exempted the 2nd Interested Party from such registration as to be eligible to participate in the tender.
41. Relying on section 55(1)(a) and (c) of the Act it was argued that the 2nd Respondent having failed to satisfy the professional requirements of a consulting firm, was ineligible to participate in the subject tender. The Applicant therefore asked the Board to allow the Request for Review as prayed.

Respondents' Submissions

42. Counsel for the Respondents, Mr. Wanyama, indicated that the Respondents would place reliance on its filed documents.
43. According to Counsel it was erroneous on the part of the Applicant to misrepresent facts on the tax compliance status of the Interested Parties. He Clarified that both Interested Parties held valid Tax Compliance Certificates and these were to be found at pages 000020 and 000097 of their joint bid.
44. He further submitted that the Applicant misapprehended the place of Joint Ventures in the public procurement space. According to Counsel the Respondent in carrying out the procurement process in subject tender adhered to the Constitution, Act and Regulations 2020 including the

advertisement, appointment of the Evaluation Committee, evaluation, issuance of Professional Opinion and eventual award.

45. Mr. Wanyama contended that paragraph 6(3) in the Tender Document and clause 6.2 in the Data Sheet contemplated a bid could be submitted under a joint venture with a maximum of 2 firms. Further that it was only at the point of execution of the contract that a joint venture firm was required to obtain exemption from the Competition Authority. Therefore, according to the Respondents, the present Request for Review was misplaced.
46. Counsel further clarified that even though Grandscale Builders Limited was not registered by BORAQS its joint venture partner, Brickehaus Limited was registered.
47. He further indicated that whereas Brickehaus Limited did not submit an AGPO Certificate, its joint venture partner, Grandscale Builders Limited submitted one at page 96 of their bid.
48. Mr. Wanyama relied on PPARB Application No. 94 of 2021 on what constitutes a joint venture and that the same was meant to afford the sharing of equipment, expertise and finance. According to Counsel, joint venture partners come together with the objective of enhancing their chances of success

49. Counsel equally clarified that both the Applicant and Interested Parties participated in the site visit but this was done on separate dates.

Applicant's Rejoinder

50. In a brief rejoinder, Counsel for the Applicant, Mr. Mukele, indicated that the Respondents appeared to have misunderstood the Request for Review. He indicated that the Applicant's reference to the Tax Compliance Certificates was an analogy to depict that absence of an AGPO Certificate by 1st Interested Party made it ineligible to participate in the subject tender.
51. Counsel further indicated that the decision cited by the Respondents was distinguishable from the present case as it did not deal with the qualifications of individual joint venture partners. Further that whereas a joint venture serves to enhance the chances of success of a jointly submitted bid, it does not take away the requirement for the individual joint venture partners to comply with mandatory requirements.

CLARIFICATIONS

52. The Board sought clarity from the Applicant on whether the subject tender was reserved for a special AGPO Category group to which the Applicant confirmed that it was reserved for firms registered under the Women Category of AGPO.

53. Asked whether Joint Venture partners had to be drawn from the same line of business and industry and whether it was open for partners to be drawn from different industries, counsel for the Applicant, Mr. Mukele indicated that this was dependent on a number of factors but in the present case, the Tender requirement for approval from the Competition Authority signifies that the partners were from the same industry.
54. The Board tasked put the Applicant to task to explain how it got the information that Grandscale Builders Limited was not a registered professional consulting firm. Counsel for the Applicant Mr. Mukele confirmed that this information was obtained through a search on BORAQS official website.
55. The Respondents were put to task to explain the line of business that Grandscale Builders Limited were engaged in and whether they were also in the construction sector. Counsel for the Respondents, Mr. Wanyama confirmed that the said Joint Venture Partner was an Architectural firm and that Brickehaus Limited was equally an Architectural firm.
56. The Board asked the Respondents to clarify on whether the Joint Venture Agreement between the Interested Parties had been made available in the proceedings as well as their response to the allegation that the Interested Parties joint venture presented a conflict of interest. Counsel for the Respondents, Mr. Wanyama confirmed that this was available at page 7 of the Interested Parties joint bid. Further that there was no

conflict as the joint venture was only aimed at enhancing the qualifications of the bidders.

57. The Board sought to understand from the Respondents how the site visit was conducted in terms of notices and dates when this was done. Counsel for the Respondents indicated that the bidders were invited for site visit on different dates.
58. The Board further asked whether it was a requirement for bidders to choose a day for the site visit. Counsel for the Respondents, Mr. Wanyama indicated that under the Tender Document it was for a bidder to confirm availability for the site visit.
59. The Board sought further clarity from the Respondents on whether it was contemplated that the successful firm would be involved in the design and supervision of the construction of the building forming the subject of the bid. Counsel for the Respondents, Mr. Wanyama confirmed that the successful firm was to design the building and supervise its construction but it was intended that a separate tender would be advertised to identify a Contractor to undertake the actual construction.
60. The Board invited the parties to clarify in who between Grandscale Builders Limited and Brickehaus Limited was the appropriate party to the present proceedings. Counsel for the Applicant, Mr. Wanyama indicated it was Brickehaus Limited, noting that it was designated as the Lead

Partner in the Joint Venture. On his part Counsel for the Applicant, Mr. Mukele, indicated both parties were appropriate as they submitted a joint bid under a Joint Venture Agreement.

61. The Board asked the Respondents to confirm what would have been the state of compliance of the Interested Parties bid in the event one of them lacked a Tax Compliance Certificate. Counsel for the Respondents, Mr. Wanyama indicated they would be non-responsive as it was not open for any of the joint venture partners to bypass mandatory requirements.
62. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 22nd November 2024 had to be determined by 13th December 2024. Therefore, the Board would communicate its decision on or before 13th December 2024 to all parties via email.

BOARD'S DECISION

63. The Board has considered all documents and submissions placed before it and finds the following issues call for determination:
 - i. *Whether the Procuring Entity improperly evaluated the Interested Parties' joint bid with regard to reservation contrary to the provisions of Section 80(2) of the Act.*
 - ii. *Whether the 2nd Interested Party was not eligible to participate in the subject tender.*

- iii. *Whether the Procuring Entity improperly evaluated the Interested Parties' joint bid with regard to site visit in breach of the provisions of Section 80(2) of the Act.*
- iv. *What orders should the Board issue in the circumstance?*

As to whether the Procuring Entity improperly evaluated the Interested Parties' joint bid contrary to the provisions of Section 80(2) of the Act.

- 64. The Applicant, in bringing the present Request for Review, took issue with the Respondent's award of the subject tender to the Interested Parties alleging that the procurement process was skewed as these parties' joint bid did not comply with Mandatory Requirement No. 12.
- 65. The Applicant submitted that whereas Mandatory Requirement No. 12 required all participating firms to supply their AGPO (Women Category) Certificates, the 1st Interested Party, Brickehaus Limited did not supply an AGPO Certificate. He argued that the Evaluation Committee should have disqualified the Interested Parties' joint bid upon establishing that one of the joint venture partners i.e. Brickehaus Limited did not submit an AGPO (Women Category) Certificate.
- 66. On the opposing side, the Respondents took the view that the evaluation process was above board and in compliance with the Constitution of Kenya 2010, the Act and the Regulations 2020.

67. Counsel for the Respondents Mr. Wanyama argued that since the subject tender permitted joint ventures, the joint bid by the Interested Parties was evaluated as a single bid. Further, that even though Brickehaus Limited did not submit an AGPO (Women Category) Certificate, its joint venture partner, Grandscale Builders Limited submitted one. According to Counsel the submission of the Certificate by Grandscale Builders Limited was adequate in terms of the joint bid complying with Mandatory Requirement No. 12.
68. Drawing from the above divergent positions, the Board is called upon to address the adequacy of the Interested Parties' bid in compliance with Mandatory Requirement No. 12 under the Tender Document.
69. Section 80 of the Act offers guidance on how an Evaluation Committee should proceed with the evaluation of bids. It states:
- "80. Evaluation of tenders***
(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."
70. Section 79 of the Act speaks to the responsiveness of a bid as follows:

79. Responsiveness of tenders

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

71. Specific for proposals Section 126 of the Act offers the following guidance:

126. Evaluation of proposals

(1) An evaluation committee of a procuring entity shall examine the proposals received in accordance with the request for proposals.

72. The Board draws further guidance from the dictum of the High Court in **Republic v Public Procurement Administrative Review Board & 2 others Exparte BABS Security Services Limited [2018] eKLR; Nairobi Miscellaneous Application No. 122 of 2018** where the court 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.

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

73. Drawing from the above, the Tender Document is the key guide in the evaluation of bids. 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.

74. A perusal of the Tender Document's Clause 22 under Section 2. Instructions to Consultants and Data Sheet at Page 17 of the Tender Document provides:

22 Evaluation of Technical Proposals

22.1 The Procuring Entity's evaluation committee shall evaluate the Technical Proposals that have passed the eligibility and mandatory criteria, on the basis of their responsiveness to the Terms of Reference and the RFP. The eligibility and mandatory criteria shall include the following and any other that may include in the Data Sheet.

a), b), c) ...

d)The Technical Proposal is complete with all the forms and required documentary evidence submitted.

75. The said Mandatory Requirement No. 12 is found at clause 22.1 under Section 2(B) Data Sheet at page 26 of the Tender Document and states:

MR 12 - Submit a Valid Copy of AGPO Certificate for Women from National Treasury. The certificate shall be verified online to confirm validity

76. It is clear that the subject tender was reserved for firms listed under the AGPO (Women Category). This is equally confirmed from the advertisement through *MyGov* Publication of 22nd October 2024 and below is an excerpt of the tender invitation:

Rongo University invites eligible and interested bidders to participate in the following tenders:

<i>S.No</i>	<i>Tender No.</i>	<i>Tender Description</i>	<i>Tender security</i>	<i>Eligibility</i>	<i>Closing Date</i>
<i>1.</i>	<i>RU/CSP/004/2024-2025</i>	<i>Provision of Project Consultancy Services for Proposed Construction of Tuition and Science Laboratory Block</i>	<i>N/A</i>	<i>Women</i>	<i>31/10/2024</i>

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77. It is therefore clear from the foregoing that firms eligible to participate were those falling under the AGPO (Women Category). Mandatory Requirement No. 12 required bidders to submit a copy of their AGPO (Women Category) Certificate from the National Treasury to be deemed as responsive to this Mandatory Requirement. Conversely, a bid that did not contain the bidder's AGPO (Women Category) Certificate would be deemed as non-responsive.
78. The Board has studied the Interested Parties' joint bid and observes:
- (i) The 1st and 2nd Interested Parties submitted their bid under Joint Venture Agreement found at page 00007 of the joint bid.
 - (ii) The 2nd Interested Party i.e. Grandscale Builders Limited submitted their AGPO (Women Category) Certificate found at page 000096 of the joint bid.
 - (iii) The joint bid does not have any AGPO (Women Category) Certificate for the 1st Interested Party i.e. Brickehaus Limited.
79. The Board notes that the Interested Parties only submitted an AGPO (Women Category) Certificate for one of its joint venture partners i.e. Grandscale Builders Limited. Counsel for the Respondents, Mr. Wanyama submitted that no AGPO Certificate was submitted by Brickehaus Limited but since the bid was submitted as a joint bid, the submitted AGPO

Certificate by Grandscale Builder satisfied Mandatory Requirement No. 12. The Board finds difficulty with this argument for the reasons that:

- a) The eligibility of firms to participate in the subject tender was hinged on their falling under AGPO (Women Category). Bidders were required to confirm their eligibility to participate in the tender through submission of their AGPO (Women Category) Certificates.
 - b) Formation of joint ventures should not be for the purpose of circumventing the tender requirement that the tender was reserved for a special group. It would defeat the purpose of reservations if firms from marginalized groups were allowed to get into joint ventures with firms that do not fall under the marginalized groups to enhance their competitive position in respect of reserved tenders.
 - c) During the clarifications session Mr. Wanyama for the Respondents admitted that it was not permissible for only one of the Interested Parties to submit a Tax Compliance Certificate in the subject tender as each of the joint venture partners was required to submit its own Tax Compliance Certificate. The same argument could be extended to cover for the absence of its joint venture partner's AGPO Certificate.
80. The Board observes that submission of an AGPO (Women Category) Certificate was a mandatory requirement. Accordingly, it was not open for the Evaluation Committee to waive this requirement in respect of any bid, including the joint bid of the Interested Parties.

81. In view of the foregoing, the Board finds that the Respondents did not properly evaluate the Interested Parties' joint bid in respect of compliance with Mandatory requirement No. 12 on AGPO (Women Category) Certificates and thereby breached the provisions of Section 80 (2) of the Act and Article 227 of the Constitution.
82. Accordingly, this ground of review succeeds and is allowed.

As to whether the 2nd Interested Party was not eligible to participate in the subject tender.

83. The Applicant equally challenged the eligibility of the 2nd Interested Party to participate in the tender. According to the Applicant, the 2nd Interested Party did not satisfy the professional requirement for registration with BORAQS as a professional consulting firm and thus lacked the legal capacity to enter into contract with respect to the subject tender.
84. On the other end, the Respondents affirmed that the 2nd Interested Party was eligible to participate in the subject tender under a joint venture. Counsel for the Respondents Mr. Wanyama contended that whereas the 2nd Interested Party (Grandscale Builders Limited) was not registered with BORAQS, its joint venture partner, Brickehaus Limited was registered with BORAQS as a professional consulting firm. In the circumstances and understanding that the Interested Parties were in a joint venture, the joint

bid was responsive to Mandatory Requirement No. 11 of the Tender Document which required submission of a current practicing license from BORAQS for the Lead Consulting firm. According to Counsel, since Brickehaus Limited was designated as the Lead Consultant of the joint venture, the absence of registration by Grandscale Builders Limited did not matter.

85. Drawing from the above, the Board is invited to pronounce itself on the eligibility of Grandscale Builders Limited to participate in the subject tender.
86. The Board is cognizant of the provisions of Section 55 of the Act requiring that only eligible bidders are allowed to participate in a procurement process:

55. Eligibility to bid

(1) A person is eligible to bid for a contract in procurement or an asset being disposed, only if the person satisfies the following criteria—

(a) the person has the legal capacity to enter into a contract for procurement or asset disposal;

(b) ...

(c) the person, if a member of a regulated profession, has satisfied all the professional requirements;

87. From the above, a person is eligible to bid only if they have the legal capacity to enter into a contract and where they are a member of a regulated profession they have satisfied all the professional requirements.
88. The Respondents in their invitation to interested suppliers invited qualified consultants to submit their bids in respect of the subject tender which was on consultancy services.
89. Clause a (d) under Section 2. Instruction to Consultants and Data Sheet at page 7 of the Tender Document defines Consultant as:

"Consultant" means a legally-established professional consulting firm or an entity that may provide or provides services to the Procuring Entity under the Contract.

90. Clause 2.2 under Section 2. Instruction to Consultants and Data Sheet at page 8 of the Tender Document makes an expression on who the tender invitation was meant for:

The Consultant are invited to submit a Technical Proposal and a Financial Proposal , for consulting services required for the assignment named in the Data Sheet. The Proposal will be the basis for negotiating and ultimately signing the Contract with the Selected Consultant.

91. From the foregoing provisions, the Tender Document contemplated that the invitation to participate in the bid was made to legally established professional consulting firms. Further, from the nature of consultancy services in question, laws and regulations under built environment find application by virtue of Section 55(1)(c) of the Act. Specifically the Architects and Quantity Surveyors Act, Cap 525 finds application.
92. Section 4 of the Architects and Surveyors Act establishes the Board of Registration of Architects and Quantity Surveyors (**BORAQS**) and Section 5(k) grants BORAQS power to make bylaws in respect of persons registered under the said Act practicing as limited liability companies.
93. *Vide* Gazette Notice No. 11032 dated 30th August 2024 BORAQS published the Code of Professional Conduct of Architects and Quantity Surveyors whose clause 6 reads:

Limited Liability Companies

6. A registered person may practice as a limited liability company as hereunder—

(a) Upon registration of the company with the Business

Registration Service, the company directors who in every case shall be registered persons shall apply for the registration of their company with the Board;

(b) Registered persons shall furnish the Board with all particulars of all directors of the company;

(c) The applicant shall provide such other information about their company as the Board may require;

(d) The applicant shall pay an application fee as prescribed by the Board;

(e) Registered persons forming limited liability companies shall be subject to all relevant provisions of the Act.

94. From the above it is apparent that in order for a person registered under the Architects and Quantity Surveyors Act to practice as a limited liability company, the company must be registered with BORAQS.
95. The Applicant produced as **Exhibits HH2 and HH3** annexed to the affidavit of Humphrey Hasuwo, a computer printout of a search on the BORAQS official website www.boraqs.or.ke showing that:
- a) There was a registered Architectural firm in the name of Brickehaus Limited (the 1st Interested Party)
 - b) There was no registered Architectural firm bearing the name of Grand Scale Builders Limited (2nd Interested Party).
96. By its very nature the built environment has multiple players including professional consultants such as Architects and Quantity Surveyors who supervise the construction works. The built environment equally has Contractors who in most cases are businessmen and women carrying out the actual construction works. For good reason there exists a dichotomy between the Professional Consultants and Contractors. Whereas the Professional Consultants design the works to be carried and supervises

the construction works, the Contractors construct the designed works. With separation of roles between the Professional Consultant and the Contractor there is a reduced conflict of interest that would otherwise have been apparent if the design and construction works were to be done by the same person. Contractors as business people are motivated by profits and this is likely to negatively impact a project if the role was to be merged with that of a Professional Consultant designing the actual works.

97. Turning to the subject tender, from the tender invitation, it is apparent that the invitation was made to Consultants who the Tender Document defined as legally-established professional consulting firms or entities. Admittedly, the 2nd Interested Party does not qualify as a Consultant as it is not registered with BORAQS as a professional consulting firm. We therefore find that in the circumstances it was by itself ineligible to participate in the subject tender as it does not qualify as a "Consultant" within the definition given.
98. The Respondents, through Mr. Wanyama, argued that the Interested Parties joint bid was responsive on account of the fact that it was submitted under a joint venture with the 1st Interested Party who was registered with BORAQS. He further contended that Mandatory Requirement No. 11 only required submission of the current practicing certificate from BORAQS for the Lead Consultant Firm. In the Board's view this argument is unpersuasive for the reason that the tender invitation in the subject tender was made to "Consultants" and the 2nd Interested Party

does not qualify as a "Consultant" within the description of the Tender Document. Therefore, it was not open for the 2nd Interested Party to circumvent this invitation by getting into a joint venture with the 1st Interested Party who qualifies as a Consultant.

99. In the circumstances, the Board finds that the 2nd Interested Party was ineligible to participate in the subject tender.

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

As to whether the Procuring Entity improperly evaluated the Interested Parties' joint bid with regard to site visit in breach of the provisions of Section 80(2) of the Act.

101. The Applicant made a complaint that Interested Parties did not satisfy Mandatory Requirement No. 14 on submission of a site visit certificate. According to Counsel for the Applicant, Mr. Mukele, the Applicant had tendered in evidence Exhibit HH4, a Certificate in the form of a Site visit attendance register for 29th October 2024 in which the Interested Parties did not feature.

102. The Respondents maintained that the Interested Parties participated in the site visit and did in fact submit their Site attendance certificate as part of their joint bid in compliance with Mandatory Requirement No. 14. Counsel for the Respondents Mr. Wanyama argued that the site visit was

conducted on different days and that the Interested Parties were represented during the site visit as per the annexed **Exhibit TON-9(a)**.

103. The Board is invited to interrogate modalities of the site visit as envisioned in the Tender Document.

104. Mandatory Requirement No. 14 under Section 2(B) Data Sheet at page 26 of the Tender Document contemplated a site visit in the following terms:

MR14 - Evidence of Attendance to the site visit. (Attach copy of site visit certificate issued on site)

105. Drawing from the above it was mandatory for a bidder to attend a site visit. This is because Requirement No. 14 made it mandatory for a bid to contain the certificate issued to a bidder during its site visit.

106. The Board has studied the Interested Parties' joint bid and made the following observations:

- a) Page 000004 of the Interested Parties' joint bid contains a Certificate in the form of a Site Attendance Register for 24th October 2024 which is identical to the one produced as **Exhibit TON-9(a)**.

- b) The said Site Attendance Register shows that the Interested Parties were represented at the site visit by Phelix Okoth and Dennis Omimo
- c) The said Site Attendance Register shows that during the site visit of 24th October 2024, there were 3 other firms whose representatives were present.

107. The Board has also studied the Tender Document and noted that there was no specific clause that provided the timelines and modalities under which the intended site visit was to be conducted. It would appear from the Site Attendance Registers presented before the Board that the bidders conducted the site visits on diverse dates. Whereas the Interested Parties and 3 other interested firms carried out the site visit on 24th October 2024, the Applicant carried out theirs on 29th October 2024 as evidenced by the various Site visit attendance registers.

108. From the above, the Board is satisfied that the Interested Parties' bid was responsive to Mandatory Requirement No. 14. The said Requirement called for submission of a Site visit Certificate and the Interested Parties furnished theirs at page 000004 of their joint bid and were therefore responsive.

109. In the absence of specific provision on how the site visit was to be conducted, the Board finds that the Respondents properly evaluated the

Interested Parties' joint bid in respect of compliance with Mandatory requirement No. 14 on site visits.

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

What orders the Board should grant in the circumstances

111. The Board has found that Respondents did not properly evaluate the Interested Parties' joint bid in respect of compliance with Mandatory requirement on reservation (MR12). Since the Interested Parties' joint bid DID Not meet Mandatory requirement No. 12 on AGPO (Women Category) Certificates and thereby breached the provisions of Section 80 (2) of the Act and Article 227 of the Constitution and thus non responsive.

112. The Board has also found that the 2nd Interested Party was ineligible to participate in the subject tender.

113. Equally, we have found that the Respondents properly evaluated the Interested Parties' joint bid in respect of compliance with Mandatory requirement on site visit (MR14) on site visit.

114. The upshot of our finding is that the Request for Review succeeds in the following specific terms:

FINAL ORDERS

115. In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2025, the Board makes the following orders in this Request for Review:

- 1. The Letters of Notification dated 11th November 2024 and addressed to all bidders, including the Applicant and the Interested Parties in respect of Tender No. RU/CSP/004/2024-2025 for Provision of Project Consultancy Services for Proposed Construction of Tuition and Science Laboratory Block for Rongo University, be and are hereby cancelled and set aside.**

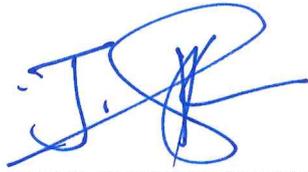
- 2. The 1st Respondent be and is hereby directed to re-constitute tender evaluation committee to make recommendation of award to the next responsive proposal with the highest score with respect to Tender No. RU/CSP/004/2024-2025 for Provision of Project Consultancy Services for Proposed Construction of Tuition and Science Laboratory Block for Rongo University taking into consideration the Board's findings in this Decision.**

- 3. For avoidance of doubt, the re-evaluation ordered in 3 above and the conclusion of the procurement process, including the making of an award, shall be completed within 30 days from**

date of this decision and not before the expiry of the 14 day statutory period.

- 4. Since the procurement process of the subject tender is not complete, each party shall bear its own costs of review,**

Dated at NAIROBI, this 13th day of December 2024.



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**PANEL CHAIRPERSON
PPARB**



**SECRETARY
PPARB**