

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 118/2024 OF 22ND NOVEMBER 2024

BETWEEN

KANYAREH INVESTMENT COMPANY LIMITED APPLICANT

AND

THE ACCOUNTING OFFICER,

KAPSABET GIRLS HIGH SCHOOL 1ST RESPONDENT

KAPSABET GIRLS HIGH SCHOOL 2ND RESPONDENT

INTERBUILD K. LTD INTERESTED PARTY

Review against the decision of the Accounting Officer Kapsabet Girls High School in relation to Tender No. KGHS/DP/01/2024/2025 for Proposed Construction of a Three Storey Dormitory Block, Phase 1 & 2 at Kapsabet Girls High School

BOARD MEMBERS PRESENT

- | | |
|-------------------------|---------------------|
| 1. QS Hussein Were | - Panel Chairperson |
| 2. Ms. Jessica M'mbetsa | - 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 **KANYAREH** **INVESTMENT** **COMPANY**
LIMITED

Ms. Munyu - Advocate, Koome Muketha Advocates

1ST & 2ND RESPONDENT **THE ACCOUNTING OFFICER,**
KAPSABET GIRLS HIGH SCHOOL &
KAPSABET GIRLS HIGH SCHOOL

1. Mrs. Mary Kiprop - Principal Kapsabet Girls High School
2. Dr. Kiplimo Arap Lagat - Chair, Board of Management Kapsabet Girls High School
3. Mr. Obadiah Mutten - Procurement Officer, Kapsabet Boys High School
3. Ms. Rose Rono - Finance Officer Kapsabet Girls High School

INTERESTED PARTY **INTERBUILD K. LTD**

Mr. Duncan Kiprono - Advocate, CK Advocates

BACKGROUND OF THE DECISION

The Tendering Process

1. Kapsabet Girls High School, the Procuring Entity and 2nd Respondent herein invited sealed tenders in response to Tender No. KGHS/DP/01/2024/2025 for Proposed Construction of a Three Storey Dormitory Block, Phase 1 & 2 at Kapsabet Girls High School

Decision No. 118/2024:
13th December, 2024:



(hereinafter, "the subject tender"). The invitation was by way of an advertisement on 1st October 2024 published in *The Daily Nation* newspaper. The blank tender document (hereinafter, "the Tender Document") was available at the premises of the Procuring Entity. The tender submission deadline was 15th October 2024.

Submission of Tenders and Tender Opening

2. According to the Tender Opening Minutes which were part of confidential documents furnished to the Public Procurement Administrative Review Board (hereinafter, "the Board") by the Respondent pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter, "the Act"), a total of twenty-seven (27) tenders were submitted, as follows:

No.	Name
1.	Barbola Company Ltd
2.	Kalibin Building Construction
3.	Kenzam Engineering Company Ltd
4.	Dominion Developers
5.	Njonjoro EA Ltd
6.	Jenga Solutions Ltd
7.	Bowen Building Construction Ltd
8.	Bamco International Ltd
9.	Vernacular (V-LAR) Designs Ltd
10.	Miliki Development Company Ltd



11.	Kiron Construction Company Ltd
12.	Mabac Enterprises Ltd
13.	Neelcon Construction Services
14.	Swiftmove Logistics
15.	Interbuild Engineering Ltd
16.	Sava Construction Ltd
17.	Elman Quality Company Ltd
18.	Laila Investment Ltd
19.	MuFrank Builders Ltd
20.	Perma Structural Engineering Ltd
21.	Shamim Investment
22.	Eldo Builders
23.	Lantana Africa Ltd
24.	Kanyareh Investments Ltd
25.	Ginard Construction Co. Ltd
26.	Gateweb Express Ltd
27.	Nomic

Evaluation of Tenders

3. A Tender Evaluation Committee appointed by the Respondent undertook evaluation of the tenders in the following stages:

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



Preliminary Evaluation

4. The Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Stage 1: Preliminary Examination of Section III- Evaluation and Qualification Criteria of the Tender Document. Tenderers were required to meet all the mandatory requirements at this stage.
5. Fifteen (15) tenders, including the Applicant's tender, were determined non-responsive while twelve (12) tenders were determined responsive and proceeded to technical evaluation.

Technical Evaluation

6. The Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Stage 2: Technical Evaluation Criteria of Section III- Evaluation and Qualification Criteria of the Tender Document. Tenderers were required to score 70 points and above.
7. Seven (7) tenders were determined non-responsive while five (5) tenders were determined responsive and proceeded to Financial Evaluation.

Financial Evaluation

8. The Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Stage 3 - Financial Evaluation Criteria of Section III- Evaluation and Qualification Criteria of



the Tender Document. Evaluation at this stage would involve checking for arithmetic errors, comparison of rates and consistency of the rates.

9. At the end of evaluation, bids were ranked as follows:

RANK	S/NO.	Bidder's Name
<i>1</i>	<i>B15</i>	<i>Interbuild Engineering Limited</i>
<i>2</i>	<i>B14</i>	<i>Swift Move Logistics Limited</i>
<i>3</i>	<i>B21</i>	<i>Shamim Investment Company LTD</i>
<i>4</i>	<i>B7</i>	<i>Bowen Contractors Limited</i>
<i>5</i>	<i>B13</i>	<i>Neelcon Construction Services</i>

Due Diligence

10. The Evaluation Committee was required to carry out due diligence using the criteria provided under Stage 5 – Due Diligence of Section III- Evaluation and Qualification Criteria of the Tender Document. Due Diligence was required to be conducted on the lowest evaluated bidder so as to confirm the information provided in its tender document and obtain the confidential references from firms provided by the said bidder.

11. According to the Due Diligence Report signed by members of the Evaluation Committee on 24th October 2024, due diligence was conducted on the five (5) bidders who had progressed to the Financial Evaluation stage and based of the findings, two bidders were considered for award, as follows:

Pos./ Rank	Serial No.		Bidder's Name
<i>1</i>	<i>B15</i>	<i>58,280,935</i>	<i>Interbuild Engineering Limited</i>
<i>2</i>	<i>B21</i>	<i>59,646,031</i>	<i>Shamim Investment Company Ltd</i>



Evaluation Committee's Recommendation

12. The Evaluation Committee recommended award of the tender to M/s Interbuild Engineering Limited at a price of Kenya Shillings Fifty-Eight Million Two Hundred and Eighty Thousand Nine Hundred and Thirty-Five and Ninety-Five cents (Kshs. 58,280,935.95) only.

Professional Opinion

13. In a Professional Opinion dated 25th October 2024, Mr. Obadiah Muten, the Procurement Officer of Kapsabet Boys High School reviewed the manner in which the procurement process was undertaken including evaluation of tenders and concurred with the Evaluation Committee's recommendation to award the subject tender to M/s Interbuild Engineering Limited at a price of Kenya Shillings Fifty-Eight Million Two Hundred and Eighty Thousand Nine Hundred and Thirty-Five and Ninety-Five cents (Kshs. 58,280,935.95) only.

14. The Professional Opinion was approved by the 1st Respondent, Mrs. Mary Kiprop, on 28th October 2024.

Notification to Tenderers

15. Tenderers were notified of the outcome of evaluation of the subject tender vide letters dated 8th November 2024.

16. Being dissatisfied with the decision of the 1st Respondent, the Applicant filed this Request for Review on 22nd November, 2024.



REQUEST FOR REVIEW NO. 118 OF 2024

17. On 22nd November 2024, Kanyareh Investment Company Limited, the Applicant herein, filed a Request for Review dated 21st November 2024 together with a Supporting Affidavit sworn by Abdikher Hassan Kanyareh on 21st November 2024 (hereinafter, "the instant Request for Review") through Chepkuto Advocates seeking the following orders of the Board:

- a) A declaration that the Procurement Entity breached the requirements under the Tender Document.***
- b) A declaration that the Procurement Entity breached the provisions of the Public Procurement and Asset Disposal Act, 2015:***
- c) A declaration that the Procurement Entity breached Article 227(1) of the Constitution, 2010.***
- d) An order do issue compelling the Procuring Entity to fairly re-evaluate the Applicant's bid together with that of the Interested Party.***
- e) An order do issue terminating any contract entered into by the Procuring Entity until the logical conclusion of this matter.***
- f) The costs of this application be awarded to the Applicant in any event.***



18. In a Notification of Appeal and a letter dated 22nd 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 22nd November 2024.
19. On 27th November 2024, the 1st and 2nd Respondents filed through Mrs. Mary Kiprop a Response to Appeal of even date together with confidential documents submitted pursuant to Section 67(3)(e) of the Act.
20. *Vide* letters dated 28st November 2024, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. All tenderers were invited to submit to the Board any information and arguments concerning the tender within three (3) days.



21. *Vide* a Hearing Notice dated 29th November 2024, the Acting Board Secretary, notified parties and all tenderers of an online hearing of the instant Request for Review slated for 6th December 2024 at 2.30 p.m. through the link availed in the said Hearing Notice.
22. On 3rd December 2024, the Interested Party filed through CK Advocates a Notice of Appointment of Advocates dated 29th November 2024, the Interested Party's Replying Affidavit dated 21st November 2024 sworn by Newton Tarus on 29th November 2024, Written Submissions dated 2nd December 2024 and the Interested Party's List and Digest of Authorities dated 2nd December 2024.
23. On 6th December 2024, the Applicant filed Written Submissions of even date.
24. At the hearing on 6th December 2024, the Board read out the pleadings filed by parties in the matter and allocated time for parties to highlight their respective cases. Thus, the instant Request for Review proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

Applicant's submissions

25. In her submissions, counsel for the Applicant, Ms. Munyu relied on the documents filed by the Applicant before the Board.



26. The Applicant submitted that although segments of its bid document indicated Kipsigis Girls High School instead of Kapsabet Girls High School, the Confidential Business Questionnaire that was filled, signed and stamped by the Applicant indicated the correct client's name as Kapsabet Girls High School.
27. It submitted further that the failure to indicate the correct client's name in the Applicant's bid document ought to be considered as a minor deviation that does not alter the material substance of the tender as per Section 79(2) and (3) of the Act and referred to the holding in *Republic v Public Procurement Administrative Review Board & Another; Premier Verification Quality Services (PVQS) Misc. Civil Application No. 60 of 2020*.
28. It also submitted that indicating the wrong client's name was a minor deviation that could be corrected without being prejudicial to other bidders and it would be to the advantage of the Procuring Entity since the Applicant's bid price was cost-effective as compared to the Interested Party's bid price. It added that correction of the error committed by the Applicant in indicating the wrong client name was not prejudicial to other bidders since that was not a material non-conformity that would give the Applicant an advantage over other bidders.
29. The Applicant argued that its bid did not contain any errors arising from miscalculation of unit price or the total bid price that would lead to its



disqualification and that its tender complied with all the mandatory requirements.

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

1st and 2nd Respondents' submissions

31. In their submissions, Mr. Mutten, Mrs Kiprop and Ms Rono relied on the documents filed by the Respondents before the Board.

32. Mr. Mutten submitted that during the preliminary evaluation, the Evaluation Committee noted that the Applicant's Form of Tender was not dully filled and that the Certificate of Independent Tender Determination was addressed to Kipsigis Girls High School instead of the Procuring Entity.

33. He pointed out that the Pre-Contract Agreement between the Applicant as the main contractor and its sub-contractor for electrical works, Adawa Investment Company Limited, was addressed to Kipsigis Girls High School. He further pointed out that the Bank's Letter of Authorization submitted in the Applicant's bid from Sidian Bank was also addressed to Kipsigis Girls High School.

34. Mr. Mutten averred that under the work methodology in the Applicant's bid document, the client was indicated as Kipsigis Girls High School and that the self-declaration forms/duly filled anti-corruption declaration commitment pledge form made reference to Kipsigis Girls High School.



He averred further that the methodology for Nema, OSH and NCA Regulations and issues as submitted in the Applicant's bid were addressed to Kipsigis Girls High School instead of the Procuring Entity.

35. He argued that the error in the Applicant's bid document could not be deemed to be a minor deviation and that the Evaluation Committee was fair in evaluating the subject tender.

36. He urged the Board to dismiss the instant Request for Review with costs.

37. On her part, Ms. Rono stated that the errors in the Applicant's bid had been admitted and were not a minor deviation as alleged. She stated further that the Procuring Entity evaluated the subject tender in a fair and transparent manner and in compliance with the evaluation criteria provided in the Tender Document.

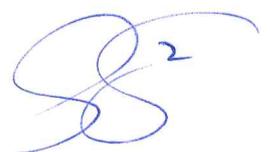
38. Ms. Rono indicated that it would be unfair to other bidders if the Applicant was allowed to correct errors in its bid document.

39. Buttressing submissions made by her colleagues, Mrs. Kiprop contended that the procurement process in the subject tender was competitive and in view of the errors identified in the Applicant's bid, it was rightfully disqualified and could not progress for further evaluation.

Interested Party's submissions

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40. In his submissions, counsel for the Interested Party, Mr. Kiprono relied on the documents filed by the Interested Party before the Board in the instant Request for Review.
41. The Interested Party associated itself with submissions made by the Respondents. Referring to Article 227 of the Constitution and Sections 58 and 70 of the Act the Interested Party submitted that it was the responsibility of all tenderers to submit bids that demonstrated their eligibility, capability, qualifications, and adequacy of resources to effectively deliver the work in accordance with the 13 mandatory requirements outlined in the Tender Document.
42. It submitted further that the Procuring Entity rightfully found the Applicant's bid non-responsiveness on account of failure to meet the stipulated mandatory requirements as read with Sections 79 (1) and 80 (2) of the Act and that those could not be regarded as minor deviations.
43. In support of this argument, it referred to the holdings in *Republic v Public Procurement Administrative Review Board ex parte Meru University of Science & Technology; M/s AAKI Consultants Architects and Urban Designers (Interested Party) (2019)* and *Republic v Public Procurement Administrative Review Board; Arid Contractors & General Supplies (Interested Party) ex parte Meru University of Science & Technology, and PPARB Application No. 111 of 2024*.
44. The Interested Party urged the Board to dismiss the Request for Review with costs.



Clarifications

45. Asked to expound on the Letter of Authorization from Sidian Bank supplied in the Applicant's bid document and addressed to Kipsigis Girls High School instead of the Procuring Entity is a minor deviation, Ms. Munyu stated that the security guarantee from Sidian Bank was correctly addressed to the Procuring Entity and being the main form, any error with regard to the authorization letter could be corrected once a follow up was done with the bank. She pointed out that the error regarding the client's name ought to be deemed as a minor deviation.
46. Ms. Munyu, response to another question, stated that the correction of a minor non-conformity in its bid document would not prejudice other bidders nor give an unfair advantage to the Applicant.
47. As to the specific evaluation criteria that the Applicant was deemed to have flouted, Ms. Rono submitted that the Applicant's bid failed to comply with Mandatory Requirements No. 9 and 10 in the Tender Document in view of the fact that the information filled therein was addressed to a different procuring entity.
48. On due diligence, Mr. Kiprono confirmed that the Interested Party underwent the due diligence exercise carried out by the Procuring Entity.
49. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review was due to expire on 13th December 2024 and that the Board would communicate its decision on or before 13th December 2024 via email.



BOARD'S DECISION

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

- A. Whether the Procuring Entity failed to evaluate the Applicant's tender in accordance with the Tender Document in breach of the provisions of Sections 79 and 80 (2) of the Act.*
- B. Whether the letter of Notification dated 8th November 2024 addressed to the Applicant met the threshold required in Section 87 (3) of the Act read with Regulations 2020;*
- C. What orders should the Board grant in the circumstances?*

As to whether the Procuring Entity failed to evaluate the Applicant's tender in accordance with the Tender Document in breach of the provisions of Sections 79 and 80(2) of the Act

51. The circumstances of this Request for Review are that the Applicant was among 27 bidders who submitted tenders on or before 15th October 2024 in response to Tender No. KGHS/DP/01/2024/2025 for Proposed Construction of a Three Storeyed Dormitory Block, Phase 1 & 2 at Kapsabet Girls High School.



52. The Applicant's tender was disqualified at the preliminary evaluation stage and, *vide* notification letter dated 8th November 2024, which stated:

"...You are however unsuccessful due to;

➤ The confidential business questionnaire filled, signed and stamped indicated client as Kipsigis Girls instead of Kapsabet Girls high school...."

53. Dissatisfied with the decision of the Procuring Entity, the Applicant approached the Board in the instant Request for Review.

54. The Board understands the Applicant's case on this issue to be that its tender was substantially responsive to the requirements of the Tender Document and that the failure to indicate the correct name of the Procuring Entity in various segments of its bid document ought to be deemed as a minor deviation pursuant to Section 79 (2) of the Act and as such, the decision to disqualify its bid as communicated in the letter of notification dated 8th November 2024 was unjustified.

55. It is the Board's understanding of the Respondents' case that the Applicant's tender was non-responsive having failed to meet various mandatory requirements of the Tender Document and that the failure to address the correct name of the Procuring Entity in various segments of its bid document cannot be termed as a minor deviation. The Respondents contend that they adhered to the evaluation criteria set



out in the Tender Document and complied with the provisions of the Act and the Constitution.

56. On its part, the Interested Party associated itself with the Respondents submissions and added that the Applicant failed to meet the threshold on the requirements set out in the Tender Document to warrant it being issued the orders sought in the instant Request for Review.

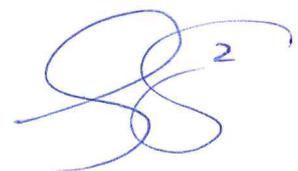
57. The question that has arisen is whether the Applicant's tender was properly evaluated resulting in its disqualification. To answer this question the Board takes cognisance of the relevant laws. Firstly, the objective of public procurement is to provide quality goods and services in a system that implements the principles specified in Article 227 of the Constitution, which provides as follows:

Article 227 - Procurement of public goods and services,

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

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

Section 80 - Evaluation of tenders,



- (1) ***"The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, ..."***
- (2) ***The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)-***
- (a) ***The criteria shall, to the extent possible, be objective and quantifiable;***
- (b) ***each criterion shall be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality, time and service for the purpose of evaluation; and...."***

59. Section 80(2) of the Act is clear on the requirement for the Evaluation Committee to evaluate and compare tenders in a system that is fair using the procedures and criteria set out in the Tender Document. 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 the tender document.

60. Section 79 of the Act provides for responsiveness of tenders as follows:

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



61. Responsiveness serves as an important first hurdle for tenderers to overcome. From the above provision, a tender only qualifies as a responsive tender if it meets all eligibility and mandatory requirements set out in the tender documents. In the case of **Republic v Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020] eKLR** the High Court stated:

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



in that all bidders are required to tender on the same work and to the same terms and conditions."

62. Regulation 74(1) of Regulations 2020 provides that:

Regulation 74 - Preliminary evaluation of open tender,

"(1) Pursuant to section 80 of the Act and upon opening of tenders, the evaluation committee shall first conduct a preliminary evaluation to determine whether—

(a) a tenderer complies with all the eligibility requirements provided for under section 55 of the Act;"

63. The import of the aforementioned provisions of the Act, Regulations and case law is that mandatory requirements cannot be waived. In the subject tender, the Evaluation Committee was mandated to evaluate tenders using the procedures and criteria set out in the Tender Document.

64. A look at the Tender Document shows that the evaluation procedure and criteria is set out at Section III- Evaluation and Qualification Criteria. Examination of the Applicant's bid shows the following with regard to mandatory requirements:

MR 6 Duly filled, signed, and stamped Form of Tender



65. A bidder was required to submit a duly filled, signed and stamped Form of Tender. The instructions to tenderers on the Form of Tender at page 66 of the Tender Document were as follows:

"5. FORM OF TENDER

INSTRUCTIONS TO TENDERERS

i) The Tenderer must prepare this Form of Tender on stationery with its letterhead clearly showing the Tenderer's complete name and business address.

ii) All italicized text is to help Tenderer in preparing this form.

iii) Tenderer must complete and sign CERTIFICATE OF INDEPENDENT TENDER DETERMINATION and the SELF DECLARATION OF THE TENDERER attached to this Form of Tender.

iv) The Form of Tender shall include the following Forms duly completed and signed by the Tenderer.

- *Tenderer's Eligibility-Confidential Business Questionnaire***
- *Certificate of Independent Tender Determination***
- *Self-Declaration of the Tenderer...*"**

66. For the Form of Tender to be considered duly filled, a bidder was required to complete and sign (a) the Certificate of Independent Tender Determination, (b) Tenderer's Eligibility – Confidential Business Questionnaire, (c) Self-Declaration of the Tender.



67. The Applicant submitted at page 071 of its bid a Certificate of Independent Tender Determination whereby it indicated the Procuring Entity as Kipsigis Girls High School.

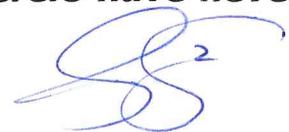
MR 9 Duly filled, Signed, and Stamped Confidential Business Questionnaire

68. The Applicant submitted at pages 068 to 070 a duly filled, signed and stamped Confidential Business Questionnaire and thus complied with this mandatory requirement.

MR-11 The main contractor shall attach a duly signed and stamped pre-contract agreement to work together with the Domestic Sub-Contractor Not Joint Venture if awarded the tender (where applicable). The agreement should be signed by both parties for it to be valid.

69. The Applicant submitted at pages 674 to 677 of its bid document a pre-contract agreement between itself as the main contractor (Kanyareh Investment Company Limited) and the domestic sub-contractor for Electrical Works (Adawa Investment Company Limited) dated 11th October 2024 and addressed to Kipsigis Girls High School and not the Procuring Entity.

MR-12 Written declaration letter signed and stamped by an attorney/Commissioner of oaths that the tenderers have never



and shall note [sp] engage in any corrupt, fraudulent practices in the procurement proceedings /Duly filled anti-corruption Declaration commitment pledge form.

70. The Applicant submitted Self Declaration Forms at pages 406 to 408 of its bid document and its Declaration of Integrity and Non-Debarment for the subject tender dated 11th October 2024, the Self Declaration Form was addressed to Kipsigis Girls High School. In addition, the said declaration was not signed and stamped by an attorney/Commissioner of oaths.
71. Additionally, the Applicant submitted at page 405 of its bid document a Bank Authorization letter to Sidian Bank Head Office authorizing Kipsigis Girls High School and not the Procuring Entity to contact the said bank for purposes of authenticating information contained in its bid with regard to the subject tender.
72. The Applicant submitted a Work Methodology and a Methodology for NEMA, OSH and NCA Regulations and Issues at pages 356 to 401 whereby it indicated the client as Kipsigis Girls High School.
73. During the hearing, counsel for the Applicant, Ms. Munyi, submitted that the Applicant, under various segments of its bid document, erred by referencing Kipsigis Girls High School instead of Kapsabet Girls High School. Ms. Munyi argued that this error was a minor deviation or informality that did not materially alter the Applicant's tender and if



corrected, it would not give the Applicant an unfair advantage over other tenderers in the subject tender.

74. In addressing whether the errors committed by the Applicant in its bid document can be deemed as minor deviations, the Board has considered Section 79 (2) and (3) of the Act which provides as follows:

"(2) A responsive tender shall not be affected by-
(a) minor deviations that do not materially depart from the requirements set out in the tender document; or
(b) errors or oversights that can be corrected without affecting the substance of the tender.

(3) A deviation described in subsection (2)(a) shall-
(a) be quantified to the extent possible; and
(b) be taken into account in the evaluation and comparison of tenders."

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



76. In **Miscellaneous Civil Application 85 of 2018 Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR** the High Court considered what amounts to a minor deviation and determined as follows:

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

In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions;



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

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



78. In the tender subject of this Request for Review the Board notes that the Applicant addressed Kipsigis Girls High School in the following documents it submitted in its bid for the subject tender:

- a) Certificate of Independent Tender Determination (MR6)
- b) Pre-contract agreement between Applicant as the main contractor and the domestic sub-contractor for Electrical Works dated 11th October 2024 (MR11).
- c) Declaration of Integrity and Non-Debarment Self Declaration Form (MR12).
- d) The said declaration was not signed and stamped by an attorney/Commissioner of oaths (MR12).
- e) Bank Authorization letter to Sidian Bank Head Office authorizing Kipsigis Girls High School to contact the said bank for purposes of authenticating information contained in its bid.
- f) Work Methodology and a Methodology for NEMA, OSH and NCA Regulations and Issues (MR12).

79. The Board has severally stated the prime position the Form of Tender occupies in the tender process. It is the document through which a tenderer communicates its intentions to a procuring entity. It often communicates the tender amount and other important information about the tender. The tender stated in the Form of Tender cannot be altered in any way save as provided for within the tender document. In



other words, the Form of Tender is sacrosanct. The information contained therein cannot be taken lightly.

80. In the instant Request for Review, the Form of Tender communicated the intention of the Applicant and a procuring entity, Kipsigis Girls High School and not Kapsabet Girls High School. In the Board's considered view, the said Kipsigis Girls High School named in the Applicant's Form of Tender as a procuring entity is alien to the subject tender. By addressing the wrong procuring entity, the Applicant's mistake cannot be deemed to be a minor deviation and, in the Board's view, the Applicant cannot be deemed to have duly filled the Form of Tender.

81. Equally the Applicant failed to submit key documents in the required format to the Procuring Entity and these include,

- a) Certificate of Independent Tender Determination (MR6)
- b) Pre-contract agreement between Applicant as the main contractor and the domestic sub-contractor for Electrical Works dated 11th October 2024 (MR11).
- c) Declaration of Integrity and Non-Debarment Self Declaration Form (MR12).
- d) The said declaration was not signed and stamped by an attorney/Commissioner of oaths (MR12).
- e) Bank Authorization letter to Sidian Bank Head Office authorizing Kipsigis Girls High School to contact the said bank for purposes of authenticating information contained in its bid.



- f) Work Methodology and a Methodology for NEMA, OSH and NCA Regulations and Issues (MR12).

82. Considering the foregoing, the Board finds that the Evaluation Committee evaluated the Applicant's tender in accordance with the provisions of the Tender Document and therefore in compliance with the provisions of Section 80(2) of the Act and Article 227(1) of the Constitution.

83. This ground of review therefore fails and is disallowed.

As to whether the letter of Notification dated 8th November 2024 addressed to the Applicant met the threshold required in Section 87(3) of the Act read with Regulations 2020;

84. Section 87 of the Act is instructive on how notification of the outcome of evaluation of the successful and unsuccessful tenderers should be conducted by a procuring entity and provides as follows:

"(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..."

85. 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.

86. 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.”

87. 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.

88. The Board has established from the Applicant's notification letter dated 8th November 2024 that it was informed that its tender was unsuccessful for the reason that its confidential business questionnaire



indicated the client as Kipsigis Girls High School instead of Kapsabet Girls High School, the Procuring Entity herein. However, a review of the Applicant's Confidential Business Questionnaire submitted at page 068 to 070 reveals that it was duly filled, signed and stamped and addressed to the Procuring Entity. It is therefore clear that the reason given for disqualification of the Applicant's bid in the subject tender was not correct.

89. Based on the findings under issue 1 above, the Applicant failed to comply with the following:

- i Mandatory Requirement No. 6 of the Tender Document since it indicated the Procuring Entity as Kipsigis Girls High School and not the Procuring Entity in the Certificate of Independent Tender Determination;
- ii Mandatory Requirement No. 11 of the Tender Document by addressing its pre-contract agreement dated 11th October 2024 between the main contractor (Kanyareh Investment Company Limited) and the domestic sub-contractor for Electrical Works (Adawa Investment Company Limited) to Kipsigis Girls High School and not the Procuring Entity.
- iii Mandatory Requirement No. 12 of the Tender Document by addressing its Declaration of Integrity and Non-Debarment for the subject tender dated 11th October 2024 to Kipsigis Girls High School and not the Procuring Entity in addition to failing to ensure



that the said declaration was signed and stamped by an attorney/Commissioner of oaths.

- iv Submitting a Bank Authorization letter to Sidian Bank Head Office authorizing Kipsigis Girls High School and not the Procuring Entity to contact the said bank for purposes of authenticating information contained in its bid with regard to the subject tender.
- v Submitting a Work Methodology and a Methodology for NEMA, OSH and NCA Regulations indicating the client as Kipsigis Girls High School and not the Procuring Entity.

90. In view of the foregoing, the Board finds that the letter of Notification dated 8th November 2024 addressed to the Applicant failed to meet the threshold required in Section 87(3) of the Act read with Regulations 2020 and proceeds to allow this ground of review.

91. The Board notes further to allowing this ground of review that the Applicant has become aware, during the instant Request for Review, of the reasons as to why its tender was unsuccessful. The reasons confirm that the Applicant's bid was not responsive to the mandatory requirements of the tender document and, in the Board's view, it will not change anything if the correct reasons were given.

92. Accordingly, the Board shall not issue any orders on this ground of review.



What orders the Board should grant in the circumstances?

93. The Board has found that the Applicant's notification letter dated 8th November 2024 failed to provide the correct reasons as to why the Applicant's tender was unsuccessful. However, during this Request for Review the Applicant has become aware of the reasons of its disqualification which will not change the status quo and, as such, the Board will not issue further orders.

94. The Board has established that the Procuring Entity's Evaluation Committee evaluated the Applicant's tender in accordance with the Tender Document and therefore in compliance with the provisions of Section 80(2) of the Act and Article 227(1) of the Constitution and disqualified it for failure to comply with mandatory requirements of the Tender Document.

95. Consequently, it is just and fair to dismiss the Request for Review for lacking in merit.

FINAL ORDERS

96. 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 Request for Review dated 21st November 2024 and filed on 22nd November 2024 in respect of Tender No. KGHS/DP/01/2024/2025 for Proposed Construction of a Three Storey Dormitory Block, Phase 1& 2 at Kapsabet Girls High School be and is hereby dismissed.

B. The 1st and 2nd Respondents are hereby directed to proceed with the procurement process of the subject tender to its logical conclusion.

C. In view of the outcome of the Request for Review, each party shall bear its own costs in the Request for Review.

Dated at NAIROBI this 13th Day of December 2024.



PANEL CHAIRPERSON

PPARB



SECRETARY

PPARB