

**APPLICATION NO. 7/2025 OF 28<sup>TH</sup> JANUARY 2025**

**BOURICE CONSTRUCTION SERVICES.....APPLICANT**

**ACCOUNTING OFFICER,**

**MOLO ACADEMY PRIMARY SCHOOL.....1<sup>ST</sup> RESPONDENT****MOLO ACADEMY PRIMARY SCHOOL.....2<sup>ND</sup> RESPONDENT**

Dormitory.

## BOARD MEMBERS PRESENT

**Mr. Jackson Awele** Panel Chair

Dr. Susan Mambo	Member
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Mr. Stanslaus Kimani	Member
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## IN ATTENDANCE

Mr. Philemon Kiprop                      Secretariat

**Mr. Anthony Simiyu**

## **PRESENT BY INVITATION**

### **APPLICANT**

### **BOURICE CONSTRUCTION SERVICES**

Mr. Felix Mulaku

Advocate, Koome Muketha Advocates

### **RESPONDENTS**

### **ACCOUNTING OFFICER, MOLO ACADEMY**

### **PRIMARY SCHOOL**

### **MOLO ACADEMY PRIMARY SCHOOL**

Ms. Edna Kapsowe

Headteacher, Molo Academy Primary School

### **INTERESTED PARTY**

### **MONMWAS ENTERPRISES LIMITED**

Mr. Joseph Mwangi

Director, Monwas Enterprises Limited

## **BACKGROUND OF THE DECISION**

### **The Tendering Process**

1. Molo Academy Primary School (the Procuring Entity), together with the 1<sup>st</sup> Respondent herein, invited interested suppliers to submit their bids in response to Tender No. MAPS/B-DORM/001/2024-2027 for Supply of Labor for the Proposed Construction to Completion of 4 No. Storey Dormitory. It was an open (national) tender with a tender sub Emission deadline being set as 16<sup>th</sup> December 2024 at 1:00 p.m.

### **Submission of Bids and Tender Opening**

2. According to the Tender Opening Minutes dated 18<sup>th</sup> December 2024 under the Confidential File submitted by the Procuring Entity, the

following seven (7) bidders were recorded as having submitted their bids in response to the subject tender by the tender submission deadline.

#	Bidder
1.	<b>Monmwas Enterprises Limited</b>
2.	<b>Rover Rainbow Company Limited</b>
3.	<b>Pascoh Afrique Decor Limited</b>
4.	<b>Faib K Limited</b>
5.	<b>Bourice Construction Services Limited</b>
6.	<b>Cranberry Designers</b>
7.	<b>Vibrant Eagle Holdings</b>

### **Evaluation of Bids**

3. The 1<sup>st</sup> Respondent constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") to undertake an evaluation of the submitted bids in the following 4 stages in the subject tender as captured in the Evaluation Report
  - i. Preliminary Evaluation
  - ii. Technical Evaluation
  - iii. Financial Evaluation
  - iv. Combination of Technical and Financial Score

## **Preliminary Evaluation**

4. At this stage of the evaluation, the submitted bids were to be examined using the criteria set out as Stage 1- Determination of Responsiveness under Section III- Evaluation and Qualification Criteria at pages 26 to 27 of the blank Tender Document.
5. The evaluation was to be on a Yes/No basis and any bid that failed to meet any criterion outlined at this Stage would be disqualified from further evaluation.
6. The Evaluation Report is not clear on how the bidders sailed through at this stage of the evaluation.

## **Technical Evaluation**

7. At this stage of the evaluation, the bids successful at the Preliminary Evaluation Stage were to be examined using the criteria set out as Stage 2- Completeness of Tender Document under Section III- Evaluation and Qualification Criteria at pages 27 to 30 of the blank Tender Document.
8. Bids were to be evaluated against various requirements that carried a cumulative score of 100 marks. In order to qualify for further evaluation, a bid was required to garner at least 70 marks at this stage. Any bid that failed to meet a threshold of 70 marks requirement would be disqualified from further evaluation.

9. The Evaluation Report is not clear on how the bidders sailed through at this stage of the evaluation.

### **Financial Evaluation**

10. At this stage of the evaluation, the bids successful at the preceding Evaluation Stage were to be examined using the criteria set out as Stage 3- Financial Evaluation under Section III- Evaluation and Qualification Criteria at page 30 of the blank Tender Document.
11. Bids were to be evaluated through a comparison of their tender prices. The Evaluation Committee was to compute the average of all the tender prices in the bid qualifying for evaluation at this stage, while leaving out abnormally high and low tender sums. The abnormally high and low bids were those whose tender percentage deviation is 20% higher or lower than the average.
12. The Tender Document provided graduated scale showing the awardable marks for the different percentage of deviation. The Financial Score of any bid would be 20 multiplied by the lowest tender price and divided by the respective bid being considered.
13. The Financial Evaluation Report indicates that Pascoh Afrique Décor Ltd was ranked No. 1 being the bid with lowest tender price at Kshs. 7,658,220.

### **Combination of Technical and Financial Scores**

14. At this stage of the evaluation, the bids successful at the preceding Stage were to be examined using the criteria set out as Stage 4 Financial Score under Section III- Evaluation and Qualification Criteria page 32 of the blank Tender Document.
15. The total score for any bid would be arrived by summing the Technical Score with the Financial Score.
16. The Evaluation Reports do not indicate whether any such combination of scores was done.

### **Evaluation Committee's Recommendation**

17. The Evaluation Committee vide its undated Financial Evaluation Report recommended the award of the subject tender to Cranberry Designers at its tendered price of Kshs. 11,487,330.

### **Professional Opinion**

18. In a Professional Opinion 18<sup>th</sup> December 2024 (hereinafter referred to as the " the Professional Opinion") the Procuring Entity's Procurement Officer, Scolastica Njoroge, reviewed the manner in which the subject procurement process was undertaken and recommended the award of the subject tender to Cranberry Designers as per the Evaluation Committee's Report.

19. It is not apparent whether the Professional Opinion was approved but Notification Letters were subsequently issued to the bidders.

### **Notification to the bidders**

20. All the bidders in the subject tender were notified of the outcome of the evaluation exercise vide letters dated 9<sup>th</sup> January 2025. The letters do not indicate the name of the bidder who was awarded the subject tender

### **REQUEST FOR REVIEW**

21. On 28<sup>th</sup> January 2025, the Applicant herein through the firm NOW Advocates LLP filed a Request for Review dated 27<sup>th</sup> January 2025 supported by an Statement dated 27<sup>th</sup> January 2025 by Feisal Mohamed Abdi, a Director at the Applicant, seeking the following orders:

***a) The 1<sup>st</sup> Respondent furnishes the Applicant with a summary of the proceedings of the opening of bids, evaluation and comparison of the bids, due diligence report (if any) including the evaluation criteria used in evaluating bids in Tender No: KNBS/ONT/30/2023-2024 for Provision of Car Hire Services on as and when Required (AWR) Basis forthwith in accordance with Section 67(4) read with Section 68(2)(d)(iii) of the Public Procurement and Asset Disposal Act, Cap 412C;***

***b) The 1st Respondent's Regret Letter dated 9th January, 2025 notifying the Applicant of its unresponsiveness in***

***Tender No MAPS /B-DORM/001/2024-2027 for Supply of Labour for the Proposed Construction to Completion of 3 No. Storey Dormitory at Molo Academy Primary School be nullified.***

- c) The Applicant's tender be and is hereby readmitted for re-evaluation in respect of Tender No: MAPS /B-DORM/001/2024-2027 for Supply of Labour for the Proposed Construction to Completion of 3 No. Storey Dormitory at Molo Academy Primary School.***
- d) That re-evaluation in respect of Tender No: MAPS /B-DORM/001/2024-2027 for Supply of Labour for the Proposed Construction to Completion of 3 No. Storey Dormitory at Molo Academy Primary School be conducted to its logical conclusion.***
- e) The Respondents be compelled to pay to the Applicant the costs arising from, and incidental to, this Request for Review; and***
- f) Such other and further relief that this Board shall deem just and appropriate in ensuring that the ends of justice are fully met in the circumstances of this Request for Review.***



22. In a Notification of Appeal and a letter dated 28<sup>th</sup> January 2025, Mr. James Kilaka, the Ag. Board Secretary of the Board notified the Respondents of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondent a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the said Respondent was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 28<sup>th</sup> January 2025.
23. Thereafter, the Respondents forwarded to the Board the Confidential Documents but did not file any formal response to the Request for Review.
24. On 7<sup>th</sup> February 2025, 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 12<sup>th</sup> February 2025 at 11:00 a.m. through the link availed in the said Hearing Notice
25. When the Board convened for hearing on 12<sup>th</sup> February 2025 at 11:00 a.m. , all the parties herein save for the Respondents were represented by their various representatives. The Board adjourned the session with directions to the Secretariat to get in touch with the Respondents and inquire on their participation in the said hearing.

26. Thereafter the Board reconvened at 11:30 a.m. by which time, Ms.Kapsowe, the 1<sup>st</sup> Respondent had since joined the hearing on behalf of the Respondents.
27. The Board confirmed from its records that the only documents in its possession was the Request for Review and the documents submitted as part of the Confidential Documents. It also inquired from the Respondents whether they had filed any response to which question, Ms. Kapsowe, the 1<sup>st</sup> Respondent indicated she was not aware that the Respondents were required to file any response beyond the already submitted Confidential Documents. She therefore requested for time to file a response. Mr. Mwangi, who was the representative of the Interested Party equally sought for more time to file a response.
28. Counsel for the Applicant, Mr. Mulaku, indicated that both the Respondents and the Interested Party have all along been aware of the pendency of the proceedings and the scheduled hearing and therefore he was ready to proceed with the hearing as scheduled.
29. The Board retreated to deliberate on the request for adjournment to allow filing of responses to the Request for Review by the Respondents and the Interested Party. When the Board reconvened and midway into its directions allowing the Respondents and Interested Party to file their respective responses by 13<sup>th</sup> February 2025, Ms. Kapsowe for the Respondents and Mr. Mwangi for the Interested Party indicated that they

no longer wished to file their responses and that a decision be made in the matter on the basis of the Confidential Documents already with the Board. Accordingly, the Board gave the following directions:

- i. The day's hearing would proceed with the Applicant being the only party addressing the Board on its Request for Review in 10 minutes.
- ii. The Respondents and the Interested Party would be allowed to sit in and follow the proceedings, noting that none of the parties had filed a formal response to the Request for Review.

30. Below is a summary of Applicant's submissions before the Board

### **Applicant's Submissions**

31. Counsel for the Applicant, Mr. Mulaku, indicated that the Applicant was relying on its filed Request for Review. He argued that the Applicant considering itself as satisfying all the requirements in the Tender Document submitted a bid in the subject tender only to receive a Regret Letter dated 9<sup>th</sup> January 2025 indicating that its bid was unsuccessful. Counsel submitted that the said Regret Letter was in breach of Articles 201 and 227 of the Constitution of Kenya, 2010 as well as the Act and the Regulations 2020 as it did not disclose:
- i. The reasons for the Applicant's bid being disqualified;
  - ii. The identity of the successful bidder; and
  - iii. The price at which the successful bidder was awarded the subject tender

32. Mr. Mulaku argued that during the tender opening where the Applicant's representatives was present, the Applicant's bid was ranked as bearing the lowest tender price and thus the Applicant harbored a legitimate expectation that their bid would eventually be established as the lowest evaluated bid. Further, that in the event of disqualification of its bid, the Applicant expected at the very least to be informed of the reason for the disqualification.
33. Accordingly, the Applicant sought for the Request for Review to be allowed as prayed.
34. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 28<sup>th</sup> January 2025 had to be determined by 18<sup>th</sup> February 2025. Therefore, the Board would communicate its decision on or before 18<sup>th</sup> February 2025 to all parties via email.

### **BOARD'S DECISION**

35. The Board has considered all documents, submissions and pleadings together with confidential documents submitted to it pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination:

- I. ***Whether the Procuring Entity's Evaluation Committee properly evaluated the bids received in the subject tender***

***in accordance with the provisions of the Act and the Tender Document?***

II. ***Whether the Letters of Regret dated 9<sup>th</sup> January 2025 by the Respondents satisfy the requirements of a Notification of Intention to Award under Section 87 of the Act and Regulation 82 of the Regulations 2020?***

III. ***What orders should the Board issue in the circumstance?***

**Whether the Procuring Entity's Evaluation Committee properly evaluated the bids received in the subject tender in accordance with the provisions of the Act and the Tender Document?**

36. The Applicant instituted the present proceedings taking issue with the Respondents' disqualification of its bid without offering details on the said disqualification. Counsel for the Applicant, Mr. Mulaku indicated that the Applicant had a legitimate expectation to emerge as the successful bidder in the subject and that if this was not to be, the Applicant expected at the very least to be informed of the reasons for being disqualified from the procurement process in the subject tender.
37. Neither the Respondents nor the Interested Party filed any response to the Request for Review. The Board was keen on adjourning the hearing of 12<sup>th</sup> February 2025 to afford the parties room to file a response but the parties indicated that the matter proceeds on the basis of the documents in the Board's possession at the time of the hearing.

38. The Board is therefore at this stage invited to interrogate the Procuring Entity's Evaluation Committee's evaluation of the bids in the subject tender that culminated in the disqualification of the Applicant's bid .

39. For starters, Section 80 of the Act offers guidance on how an Evaluation Committee should proceed with the evaluation of bids in the following terms:

***"80. Evaluation of tenders***

***(1) The evaluation committee appointed by the accounting officer pursuant to section 46 of this Act, shall evaluate and compare the responsive tenders other than tenders rejected.***

***(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.***"

40. Additionally, Section 79 of the Act offers clarity on the responsiveness of bids in the following terms:

***"79. Responsiveness of tenders***

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

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

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

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

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

***a) be quantified to the extent possible; and***

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

41. This Board is further guided by 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 while considering a judicial review application against a decision of this Board illuminated on the responsiveness of a tender under section 79 of the Act:

**“19. It is a universally accepted principle of public procurement that bids which do not meet the minimum requirements as stipulated in a bid document are to be regarded as non-responsive and rejected without further consideration.[9] Briefly, the requirement of responsiveness operates in the following manner:- a bid only qualifies as a responsive bid if it meets with all requirements as set out in the bid document. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment**

**requirements.[10] Bid formalities usually require timeous submission of formal bid documents such as tax clearance certificates, audited financial statements, accreditation with standard setting bodies, membership of professional bodies, proof of company registration, certified copies of identification documents and the like. Indeed, public procurement practically bristles with formalities which bidders often overlook at their peril.[11] Such formalities are usually listed in bid documents as mandatory requirements – in other words they are a sine qua non for further consideration in the evaluation process.[12] The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing or empowerment. Bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome.**

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



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

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

42. Drawing from the above, (i) the Tender Document is the key guide in the evaluation of tenders submitted in response to any tender invitation; (ii) A tender is responsive only if satisfies all the eligibility and mandatory requirements in the Tender Document; (iii) Tenderers who overlook requirements under the Tender Document do so at their own peril as they stand to be disqualified notwithstanding the merit of their tenders; and (iv) Excusing non-responsive tenders from meeting certain requirements in the Tender Document undermines competition among tenderers and equally defeats the essence of these requirements being communicated to tenderers beforehand.
43. Turning to the present Request for Review, the Applicant received a Letter of Regret dated 9<sup>th</sup> January 2025 that does not on its face bear the reason(s) as to why its bid was unsuccessful.
44. The Board has however looked up the Technical Evaluation Report forming part of the Confidential File and notes that the Evaluation Committed made the following remarks in respect of the Applicant's bid:

***MOLO ACADEMY PRIMARY SCHOOL  
TECHNICAL EVALUATION REPORT***

***It was noted that:***

***1...***

***2...***

**3. Bourice Construction Service Ltd has no KRA Company Compliance Certificate instead has a personal KRA Compliance Certificate**

**4...**

**5...**

**6...**

**7...KR**

45. From the above, it would appear that the Applicant's bid was disqualified on account of submitting a personal KRA Compliance Certificate in place of a Company KRA Compliance Certificate.
46. The Board has keenly studied the blank Tender Document and noted that at page 26 of the document, part of the requirements at the Preliminary Evaluation Stage was for bidders to submit a valid tax compliance certificate:

***Stage 1- DETERMINATION OF RESPONSIVENESS***

***PRELIMINARY EXAMINATION***

***This stage of evaluation shall involve examination of the pre-qualification conditions as set out in the Tender Advert on Notice or Letter of Invitation to Tender and any other conditions stated in the bid document.***

***These conditions shall include, among other things, the following:***

- ...

- **Valid Tax Compliance Certificate**
- ***Certificate of Confirmation of Directors and Shareholding (CR12) for Limited Company (where applicable)***
- ***...***

***The tenderers who do not satisfy any of the above requirements shall be considered Non-responsive and their tenders will not be evaluated further.***

47. Accordingly, in the subject tender a bid that contained a valid tax compliance certificate would be responsive to the said mandatory requirement. Conversely, any bid that did not contain a valid tax compliance certificate would be considered as unresponsive and disqualified from further evaluation.
48. The Board has keenly perused the Applicant's original bid as forwarded by the Respondents, as part of the Confidential Documents and made the following observations:
- i. Page 12 of the Applicant's bid is a Certificate of Registration bearing on its face that the Applicant is Patrice Awuor Omolo's registered business name.
  - ii. Page 17 of the Applicant's bid is Tax Compliance Certificate for Patrice Awuor Omolo. The Certificate indicates on its face that it was valid for 12 months up to 4<sup>th</sup> June 2025.

49. Noting that the Tender Document did not limit the eligible bidders to limited liability companies, it would suffice for bidders with registered business names to submit their individual tax compliance certificates in respect of the requirement for valid tax compliance certificates. This is because a registered business name and its registered owner constitute one and the same person.
50. Accordingly, the Applicant's bid was therefore responsive to the mandatory requirement on submitting a valid tax compliance certificate. The Evaluation Committee therefore fell in error when it purported to record in its Technical Evaluation Report that the Applicant's bid was unresponsive in this regard.
51. The Board has equally noted a number of flaws in the manner in which the evaluation process in the subject tender was undertaken.
- i. Whereas pages 26 to 32 in the Tender Document outlined that the bids were to be evaluated in stages with only responsive bids qualifying for evaluation at subsequent stages, the Evaluation Committee departed from this:
    - a) From the Evaluation Reports forming part of the Confidential Documents, the results for each stage of evaluation are not clear as some stages such as the Preliminary and Technical Evaluation Stages appear to have been combined and carried out as a single stage. This is inconsistent with the provisions

of the Tender Documents as each stage contained a different set of requirements and thresholds for compliance.

b) The Evaluation Reports fail to offer details on the bids in terms of their transition from one stage to another. It is therefore unclear on the bids who qualified for evaluation at the different stages.

- ii. Whereas page 27 of the Tender Document was categorical that the failure of a bid to meet any of the Mandatory Requirements at the Preliminary Evaluation Stage, with the result that a bid was ultimately to be found as Responsive or Not Responsive, the Evaluation Committee departed from this. Instead of ultimately finding a non-compliant bid as non-responsive, the Evaluation Committee elected to assign 1 mark for each requirements and ultimately assigned a score to each bid showing the number of requirements it had satisfied. The Committee in this regard adopted an evaluation criterion not con
- iii. The Financial Evaluation Report equally bears recommendations that glaringly inconsistent and unexplained. Below is an excerpt of the Report for completeness of the record:

***"Recommendation***

- ***Monwas in the financial evaluation had bided Shs. 11,653,383 and placed at position 4 out of 7 while Cranberry had bided Kshs.11,487,330 and placed in position 3 out of 7.***

- ***To break the tie, it was agreed that the bid be awarded to Cranberry Designers whose bid was lower compared to Monmwas by Kshs.166,053”***

Notwithstanding the above, it would appear that the subject tender was awarded to Monwas Enterprises Limited and not Cranberry Designers as recommended by the . During introduction, Joseph Mwangi who introduced himself as a Director at Monwas Enterprises Limited indicated that their company was the successful bid. From the Regret Letters forming part of the Confidential Document, the Board did not sight Regret Letters addressed to Cranberry Designers and Monwas Limited and it is therefore unclear on who was ultimately awarded the subject tender.

52. In view of the foregoing, the Board finds that the Procuring Entity's Evaluation Committee did not properly evaluate the bids received in the subject tender in accordance with the provisions of the Act and the Tender Document.

**Whether the Letters of Regret dated 9<sup>th</sup> January 2025 by the Respondents satisfy the requirements of a Notification of Intention to Award under Section 87 of the Act and Regulation 82 of the Regulations 2020?**

53. Central to the Applicant's challenge to the procurement proceedings in the subject tender, was the Letter of Regret it received. According to

Counsel for the Applicant, Mr. Mulaku the said letters did not offer details on the successful bidder and the price at which the tender was awarded. Further, that the letter did not also disclose the reasons for the disqualification of the Applicant's bid.

54. The Board is therefore invited to consider the adequacy of the information relayed in the Letters of Regret dated 9<sup>th</sup> January 2025:
55. Section 87 of the Act outlines the contents of the notification of intention to enter into an award that should be sent to bidders communicating the evaluation outcome in the following terms:

***87. Notification of intention to enter into a contract***

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

***(2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.***

***(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.***



56. Regulation 82 of the 2020 Regulations offers further clarity by explaining the procedure for the notification under Section 87(3) of the Act in the following words:

**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.***

57. Drawing from Section 87 of the Act read with Regulation 82 of the Regulations 2020, it is apparent that:

- i. The Notification of Intention to Award must be in writing;
- ii. The Notification must disclose the identity of the bidder who submitted the successful bid.
- iii. The Notification must disclose the price at which the tender has been awarded to the successful bidder.
- iv. Both the successful bidder and the unsuccessful bidders must be notified of the evaluation outcomes simultaneously.
- v. The unsuccessful bidders must be notified of the reasons why their bids were unsuccessful.

vi. The Notifications must be issued before the expiry of the tender validity period.

58. From the above, it is apparent that the public procurement processes in this country are characterized by disclosures which are central to the principles of public procurement and public finance as they speak to transparency and accountability as enshrined in Article 228 and 232 of the Constitution of Kenya, 2020 This means all processes within a public procurement system, including the notification to unsuccessful bidders must be conducted in a transparent and accountable fashion.
59. Turning to the present case, the above information finds expression in Form No. 1 at pages 85 to 87 of the Tender Document which sets out the format for the Notification contemplated in the subject tender. Below are excerpts of the Form:

***Form No.1: Notification of Intention To Award***

***FORMAT***

***For the attention of Tenderer's Authorized Representative***

***Name: [insert Authorized Representative's name]***

***Address: [insert Authorized Representative's address]***

***Telephone: [insert Authorized Representatives' telephone/fax numbers]***

***Email Address: [insert Authorized Representative's email address]***

***IMPORTANT: insert the date that this Notification is transmitted to Tenderers. The Notification must be sent to all Tenderers simultaneously. This means on the same date and as close to the same time as possible]***

***Date of transmission: [email] on [date][local time]***

***This Notification is sent by [name and designation]***

***Procuring Entity: [insert name of Procuring Entity]***

***Project: [insert name of project]***

***Contract title: [insert name of the contract]***

***Country: [insert country where ITT is issued]***

***ITT No. [insert ITT reference number from the Procurement Plan]***

***This Notification of Intention to Award [Notification] notifies you of our decision to award the above contract. The transmission of this Notification begins the Standstill Period.***

***During the stand still period, you may:***

***Request a debriefing in relation to the evaluation of your tender***

***Submit a Procurement-related complaint in relation to the decision to award the contract.***

***The successful tenderer***

***Name of the successful tenderer\_\_\_\_\_***

***Address of the successful tenderer\_\_\_\_\_***

***Contract price of the successful tender Kenya Shillings\_\_\_\_\_***

***Other Tenderers***

***Names of all Tenderers that submitted a tender. If the Tender's prices was evaluated include the evaluated price as well as the tender price as read out. For tenders not evaluated, give one main reason the tender was unsuccessful***

<b><i>SNo</i></b>	<b><i>Name of Tender</i></b>	<b><i>Tender Price read out</i></b>	<b><i>Tender's evaluated price</i></b>	<b><i>One reason Why not Evaluated</i></b>

***How to request a debriefing***

***.....***

***How to make a complaint***

***...***

***Standstill period***

***...***

***If you have any questions regarding this Notification please do not hesitate to contact us***

***On behalf of the Procuring Entity:***

***Signature:***

***Name:***

***Title/Position:***

***Telephone***

***Email:***

60. The Regret Letter dated 9<sup>th</sup> February 2025 which the Respondents sent to the Applicant shall now be examined against the above format and the provisions as well as the provisions under Section 87 of the Act and Regulation 82 of the Regulations 2020. The said letter is herein reproduced for ease of reference:

***Our Ref: MAPS/TENDER/001/2025***

***Date: 9<sup>TH</sup> JANUARY  
2025***

***THRO'***

***THE BOARD OF MANAGEMENT***

***MOLO ACADEMY SCHOOL***

***P.O. BOX 131-20106***

***MOLO***

***Dear Sir/Madam,***

***RE: REGRET LETTER***

***Following the application for tender Ref No. MAPS/B-DORM/0012024-2027, we regret that Bourice Construction Services Ltd did not qualify for the tender.***

***Thank you for your participation.***

***Yours sincerely,***

***VEN. MARTIN KABIRU***

***SIGNED***

***BOM CHAIRPERSON***

***MADAM EDNAH KAPSOWE***

***SIGNED***

***BOM SECRETARY***

***MRS ELIZABETH KANGONGO***  
***PTA CHAIRPERSON***

***SIGNED***

***MR. GILBERT MAMWACHA***  
***JSS CHAIRPERSON***

***SIGNED***

61. From the above letter, the Board observes that:
- i. The letter does not take the format prescribed under Form 1 as prescribed at pages 85 to 87 of the Tender Document.
  - ii. The letter does not on its face bear the identity of the Applicant as the addressee but mentions the Applicant as an unsuccessful bidder in the subject tender.
  - iii. The letter does not disclose the reasons as to why the Applicant's bid was established as unsuccessful.
  - iv. The letter fails to disclose the identity of the successful bidder.
  - v. The letter equally fails to disclose the tender price at which the subject tender was awarded to the successful.
  - vi. The letter is signed by multiple officials instead of the Accounting Officer alone. The Headteacher as the Accounting Officer of the school is the only person meant to sign the letter.
  - vii. The rest of the Regret Letters for the other unsuccessful bidders are identical in format and content with the letter for the Applicant.

62. Going by the above, the Board finds that the Letters of Regret dated 9<sup>th</sup> January 2025 by the Respondents do not satisfy the requirements of a Notification of Intention to Award under Section 87 of the Act and Regulation 82 of the Regulations 2020. The said letters are lacking in terms of the information contemplated under the Act and Regulations as pointed above and equally depart from the format outlined in the Tender Document.
63. In view of the above, the irresistible conclusion is that the procurement process in the subject tender was riddled with numerous flaws and thus the outcome therefore cannot stand. In order to steer the evaluation process back on track the Board finds that a re-evaluation of the bids would be the appropriate remedy.

**What orders the Board should grant in the circumstances?**

64. The Board has found that the Procuring Entity's Evaluation Committee did not properly evaluate the bids received in the subject tender in accordance with the provisions of the Act and the Tender Document.
65. The Board has equally found that the Letters of Regret dated 9<sup>th</sup> January 2025 by the Respondents do not satisfy the requirements of a Notification of Intention to Award under Section 87 of the Act and Regulation 82 of the Regulations 2020.

66. The upshot of our finding is that the Request for Review dated 28th January 2025 in respect of Tender No. MAPS/B-DORM/001/2024-2027 for Supply of Labor for the Proposed Construction to Completion of 4 No. Storey Dormitory succeeds in the following specific terms:

### **FINAL ORDERS**

67. 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 the Request for Review dated 28<sup>th</sup> January 2025:

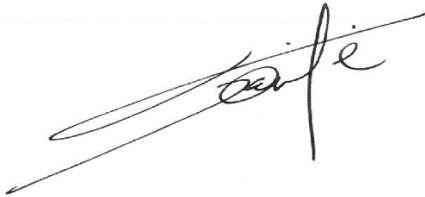
- 1. The Letters of Notification of award dated 9<sup>th</sup> January 2025 addressed to the Applicant and the rest of the unsuccessful bidders be and are hereby cancelled and set aside.**
- 2. The Letters of Notification of award dated 9<sup>th</sup> January 2025 addressed to the Interested Party be as the successful bidder be and is hereby set aside.**
- 3. The 1<sup>st</sup> Respondent be and is hereby directed to reconvene the Evaluation Committee for purposes of re-evaluating all bids received in Tender No. MAPS/B-DORM/001/2024-2027 for Supply of Labor for the Proposed Construction to Completion of 4 No. Storey Dormitory from the Preliminary Evaluation Stage while having regard to the Board's findings in this Decision.**



**4. All the bids received in respect of Tender No. MAPS/B-DORM/001/2024-2027 for Supply of Labor for the Proposed Construction to Completion of 4 No. Storey Dormitory be and are hereby re-admitted for evaluation from the Preliminary Evaluation Stage and conclusion of the procurement process including issuing an Notification of an Intention to Award to the successful bidder within 21 days from the date of this Decision.**

**5. Each party shall bear their costs.**

**Dated at NAIROBI, this 18<sup>th</sup> day of February 2025.**



.....  
**PANEL CHAIRPERSON**  
**PPARB**



.....  
**SECRETARY**  
**PPARB**