

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 24/2025 FILED ON 11TH MARCH 2025

BETWEEN

**JIJENGE PRECAST & CONSTRUCTION
LIMITED.....APPLICANT**

AND

**PRINCIPAL SECRETARY, STATE DEPARTMENT
OF HOUSING AND URBAN DEVELOPMENT.....1ST RESPONDENT**

**STATE DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT.....2ND RESPONDENT**

AND

JASIR CONTRACTORS LIMITED.....INTERESTED PARTY

Review against the decision of the Principal Secretary, State Department of Housing and Urban Development, in relation to Tender No. MLPWHUD/HUD/AHP/ 416/2023-2024 – Proposed Construction of the Loitoktok AHP Project in Kajiado South Constituency, Kajiado County with Associated Infrastructure.

BOARD MEMBERS PRESENT

| | |
|---------------------|-------------------|
| Mr. Joshua Kiptoo | Panel Chairperson |
| Eng. Lilian Ogombo | Member |
| Mr. Alexander Musau | Member |

IN ATTENDANCE

Mr. James Kilaka

Acting Board Secretary

Mr. Erickson Nani

Secretariat

PRESENT BY INVITATION

APPLICANT

**JIJENGE PRECAST & CONSTRUCTION
LIMITED**

Mr. Edward Ratemo

Advocate, ROM Law Advocates LLP

RESPONDENTS

**PRINICIPAL SECRETARY, STATE
DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT
STATE DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT**

Mr. John Maina

State Department of Housing and Urban
Development

BACKGROUND OF THE DECISION

THE TENDERING PROCESS

1. The State Department of Housing and Urban Development (hereinafter referred to as the "Procuring Entity"), in collaboration with the Principal Secretary of the State Department of Housing and Urban Development (hereinafter referred to as the "1st Respondent"), invited sealed tenders through the open tendering method in response to Tender No. MLPWHUD/HUD/AHP/416/2023-2024 – Proposed Construction of the Loitoktok Affordable Housing Project (AHP) in Kajiado South Constituency, Kajiado County, with Associated Infrastructure (hereinafter referred to as the "subject tender"). The

tender document for the subject tender (hereinafter referred to as the "Tender Document") was made available for download on the Procuring Entity's official website: <https://housingandurban.go.ke/tenders/>. Interested bidders were invited to apply for pre-qualification under the specified tender. In accordance with the instructions contained in the Invitation to Tender on page 7 of the Tender Document, bidders were required to submit their bid documents to the address provided therein. The initial deadline for submission of bids was set for 8th August 2024 at 9:00 a.m.

Addenda

2. The Public Procurement Administrative Review Board (hereinafter referred to as the "Board") did not have sight of any addenda, as these were not included in the confidential documents submitted by the Respondents pursuant to section 63(3)(e) of the Public Procurement and Asset Disposal Act (hereinafter referred to as the "Act"). However, the Evaluation Report dated 6th December 2024 (hereinafter referred to as the "Evaluation Report"), which formed part of the confidential documents submitted to the Board, indicates that a total of eight addenda were issued, one of which extended the submission deadline to 24th September 2024.

Submission of Bids and Tender Opening

3. According to the Tender Opening Minutes dated 24th September 2024,

which were submitted to the Board as part of the confidential documents, five (5) bidders were recorded as having submitted their bids by the tender submission deadline. The tenders were opened in the presence of the tenderers' representatives during the tender opening session and were recorded as follows:

| # | Bidder |
|----|-------------------------------|
| 1. | Landmark Holdings Limited |
| 2. | Jasir Contractors Limited |
| 3. | Frontier Engineering Limited |
| 4. | Parklane Construction Limited |
| 5. | Jijenge Precast Co. Limited |

Evaluation of Bids

4. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee"), appointed by the 1st Respondent, evaluated the five (5) tenders as documented in the Evaluation Report. The report, prepared for the subject tender, was signed by the members of the Evaluation Committee at the following stage:
 - i. Preliminary Stage
 - ii. Technical Stage
 - iii. Financial Evaluation

Preliminary Evaluation

5. The Evaluation Committee was required to assess the tenders for responsiveness based on the criteria set out in Section III – Evaluation and Qualification Criteria, found on pages 31 to 32 of the Tender Document. Only tenders that met all mandatory requirements at this stage would proceed to Technical Evaluation.
6. At the conclusion of this evaluation stage, two (2) tenders were deemed non-responsive, while three (3), including the Applicant's tender, met the requirements and were declared responsive. Only the responsive tenders proceeded to the Technical Evaluation stage.

Technical Evaluation

7. The Evaluation Committee was required to assess the tenders for responsiveness based on the Technical Evaluation Criteria outlined in Section III – Evaluation and Qualification Criteria, found on pages 31 to 37 of the Tender Document. To proceed to the Financial Evaluation stage, tenders had to achieve a minimum score of 70 points.
8. At the end of evaluation at this stage, all the three (3) tenders that were found responsive at the Preliminary Evaluation stage scored more than the required minimum of 70 points at this stage of evaluation therefore determined responsive thus qualified to proceed for evaluation at the Financial Evaluation stage.

Financial Evaluation

9. The Evaluation Committee was required to assess the tenders for responsiveness based on the Financial Evaluation criteria outlined in Section III – Evaluation and Qualification Criteria, found on pages 34 and 35 of the Tender Document. The tender would be awarded to the bidder with the lowest evaluated tender sum.
10. At the conclusion of this evaluation stage, two (2) tenders, including the Applicant's, were deemed non-responsive. Only one (1) tender, submitted by the Interested Party, was found to be responsive. As the lowest evaluated bid, it was recommended for award.

Evaluation Committee's Recommendation

11. The Evaluation Committee recommended awarding the subject tender to the Interested Party, Jasir Contractors Limited, as the lowest responsive evaluated bidder at a tender sum of Kenya Shillings Two Billion, One Hundred Seventy-Nine Million, Four Hundred Twenty-Three Thousand, Two Hundred Fifty-Four and Fifty-Eight Cents (KES 2,179,423,254.58). The Evaluation Report further indicates that the recommendation was subject to confirmation of the bidder's qualifications during the post-qualification exercise, pursuant to Section 83 of the Act.

Due Diligence

12. In its Evaluation Report on page 28, the Evaluation Committee recommended conducting due diligence on the Interested Party as the

lowest responsive evaluated bidder. A due diligence report is said to have been prepared, as referenced in the Response on Appeal regarding Tender No. MLPWHUD/HUD/AHP/416/2023-2024 – Proposed Construction of the Loitoktok Affordable Housing Project (AHP) in Kajiado South Constituency, Kajiado County, dated 21st March 2025 (hereinafter referred to as the "Response on Appeal"), filed by the Respondents. However, the Board did not have sight of this report, as it was not included in the confidential documents submitted.

Professional Opinion Report

13. In a Professional Opinion dated 8th January 2025 (hereinafter referred to as the "Professional Opinion") and submitted as part of the confidential documents, the Head of Supply Chain Management, Mr. John Maina, reviewed the procurement process for the subject tender, including the evaluation of tenders and the award recommendation. He concurred with the Evaluation Committee's recommendation to award the tender to the Interested Party as the lowest responsive evaluated bidder at a tender sum of Kenya Shillings Two Billion, One Hundred Seventy-Nine Million, Four Hundred Twenty-Three Thousand, Two Hundred Fifty-Four and Fifty-Eight Cents (KES 2,179,423,254.58).
14. The 1st Respondent approved the Professional Opinion as recommended on 24th January 2025.

Notification to Tenderers

15. Tenderers were notified of the evaluation outcome through Letters of Notification of Award dated 24th January 2025, signed by the 1st Respondent. According to the Response on Appeal, these letters were dispatched to all bidders via email on 30th January 2025.
16. Subsequently, a Letter of Award dated 4th March 2025, submitted as part of the confidential documents, was issued on the same date. According to the Response on Appeal, the Interested Party accepted the award through a letter dated 6th March 2025.

REQUEST FOR REVIEW

17. On 11th March 2025, the Applicant, through the firm of ROM Law Advocates LLP, filed a Request for Review dated 10th March 2025. The filing was accompanied by an Authority to Swear Affidavit dated 10th March 2025, a Verifying Affidavit sworn on the same date by Paul Maina Karobia, the Applicant's Director, and a Supporting Affidavit also sworn by Paul Maina Karobia on 10th March 2025. The Applicant sought the following orders:

a) The 1st and 2nd Respondents' decision contained in the letter of notification dated 24th January 2025 disqualifying the Applicant's bid with respect to Tender No. MLPWHUD/HUD/AHP/416/2023-2024 – PROPOSED CONSTRUCTION OF THE LOITOKTOK AFFORDABLE

HOUSING PROJECT (AHP) IN KAJIADO SOUTH CONSTITUENCY, KAJIADO COUNTY, WITH ASSOCIATED INFRASTRUCTURE be and is hereby nullified and/or set aside.

b) The 1st and 2nd Respondents' decision contained in the Letter of Notification dated 24th January 2025 awarding Tender No. MLPWHUD/HUD/AHP/416/2023-2024 – PROPOSED CONSTRUCTION OF THE LOITOKTOK AFFORDABLE HOUSING PROJECT (AHP) IN KAJIADO SOUTH CONSTITUENCY, KAJIADO COUNTY, WITH ASSOCIATED INFRASTRUCTURE to the Interested Party be and is hereby nullified and/or set aside.

c) An Order be and is hereby issued directing the 1st and 2nd Respondents' to award the Tender to the Applicant as the lowest evaluated responsive bid as per the Tender Evaluation criteria.

d) In the alternative, an Order be and is hereby issued directing the 1st and 2nd Respondents' to re-admit the Applicant into evaluation in Tender No. MLPWHUD/HUD/AHP/416/2023-2024 – PROPOSED CONSTRUCTION OF THE LOITOKTOK AFFORDABLE HOUSING PROJECT (AHP) IN KAJIADO SOUTH CONSTITUENCY, KAJIADO COUNTY, WITH ASSOCIATED INFRASTRUCTURE and re-evaluate the Applicant's

Tender in accordance with the provisions of the Tender document, Constitution, the PPADA, 2015 and the PPADA Regulations, 2020.

e) An order be and is hereby issued extending the tender validity period for a further Thirty (30) Days.

f) The 1st and 2nd Respondents be and is hereby ordered to pay the costs of and incidental to these proceedings; and

g) Such other or further reliefs as this Board shall deem just and expedient.

18. In a Notification of Appeal and a letter dated 11th March 2025, Mr. James Kilaka, the Acting Secretary of the Board, informed the Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender. The letter also forwarded a copy of the Request for Review to the Procuring Entity, along with the Board's Circular No. 02/2020 dated 24th March 2020, which outlined administrative and contingency measures to mitigate the spread of COVID-19. Additionally, the Respondents were directed to submit a response to the Request for Review, along with confidential documents related to the tender, within five (5) days from 11th March 2025.

19. On 11th March 2025, the Acting Board Secretary notified all bidders in the subject tender via email about the pending Request for Review. A

copy of the Request for Review and the Board's Circular No. 02/2020 dated 24th March 2020 was forwarded to all tenderers. Bidders were invited to submit any relevant information or arguments regarding the tender within three (3) days.

20. On 21st March 2025, the Acting Board Secretary issued a Hearing Notice informing the parties that the hearing of the Request for Review would be held virtually on 26th March 2025 at 11:00 AM via the provided link.
21. On 25th March 2025, the Respondents filed the Response on Appeal and submitted the Confidential Documents to the Board in compliance with Section 67(3) of the Act.
22. On 26th March 2025, after the hearing had concluded, the Applicant, with the Board's leave, filed Written Submissions dated 26th March 2025, along with a List of Authorities dated 25th March 2025.
23. On 27th March 2025, after the hearing on 26th March 2025, the Interested Party, through the firm of ASA & ASA Associates Advocates, filed a Replying Affidavit sworn by its Director, Jasper Ireri Mbungu, on the same date.
24. When the Board convened for the hearing on 26th March 2025 at 11:00 AM, the Applicant was represented by its Advocates on record, while the Respondents were jointly represented by John Maina, the Head of Supply Chain Management of the Procuring Entity.

25. Before the hearing commenced, Counsel for the Applicant, Mr. Ratemo, informed the Board that he had not been served with any documents in response to the Request for Review. In response, Mr. Maina apologized for the non-service, and the Board directed that the documents be served immediately. Counsel for the Applicant then requested a ten-minute adjournment to review the Response on Appeal, which the Board granted.
26. After the brief adjournment, the Board allocated time to the parties for their respective submissions.

PARTIES SUBMISSIONS

Applicant's Submissions

27. Counsel for the Applicant began by outlining the tendering process. He submitted that, through a Letter of Notification of Intention to Award dated 24th January 2025 and collected by the Applicant on 5th March 2025, the Applicant was informed of the tender process and the 1st Respondent's decision to award the tender to the Interested Party at a bid sum of KES 2,179,423,354 (Kenya Shillings Two Billion, One Hundred and Seventy-Nine Million, Four Hundred and Twenty-Three Thousand, Three Hundred and Fifty-Four).
28. Counsel submitted that the Applicant was disqualified for the following reasons: having an incorrect Bill of Quantities (hereinafter referred to as "BoQ") page for foul drainage, which indicated "1st Floor to 14th Floor" instead of "1st Floor to 10th Floor"; altering the item for "2BR Market Item B Ditto 25mmØ (Pipe Works)" from LM 20 to LM 15; and

modifying "Sanitary Fittings Item C for Kitchen Sinks" from 105 sets to 160.

29. Counsel submitted that the Respondents declared the Applicant's tender unresponsive due to an alleged error in the Bill of Quantities (BoQ) for foul drainage, which stated "1st to 14th Floor" instead of "1st to 10th Floor." He argued that the Applicant had submitted a duly completed Tender Document reflecting a total cost of KES 2,607,840 for the 1st to 14th Floor. Therefore, he contended that the discrepancy was merely a typographical error that did not materially alter the submitted figure.
30. Regarding the second ground for disqualification, Counsel argued that the Applicant's response aligned with the direct requirements of the Tender and, therefore, should not have been a basis for disqualification.
31. Regarding the third ground for disqualification, Counsel submitted that it was merely a typographical error that did not materially alter or significantly deviate from the substance of the tender.
32. Counsel relied on ***Republic v Public Procurement Administrative Review Board & another; Ex parte: Willis Protocol & Concierge Services Limited*** [2021] eKLR to elaborate on the import of Section 79(2)(b) of the Act. He argued that the Court, in this case, emphasized that the provision allows for minor errors in bid submissions or compliance with eligibility and other mandatory requirements in tender documents. Additionally, Counsel cited ***Republic v Public***

Procurement Administrative Review Board; Arid Contractors & General Supplies (Interested Party) Ex parte Meru University of Science & Technology [2019] KEHC 1935 (KLR) in support of this argument.

33. Counsel argued that the Applicant's bid complied with the provisions of Section 79 of the Act and met all the mandatory requirements, thus qualifying as responsive.

Respondent's Submissions

34. Mr. Maina began by outlining the various stages of the tender evaluation process. He submitted that the Applicant performed well at the Technical Evaluation stage, scoring 98%, demonstrating that there was no prejudice in the assessment of the Applicant's bid.
35. Mr. Maina argued that the Applicant failed to meet the criteria at the Financial Evaluation stage due to non-compliance with the requirement for completeness of the Bill of Quantities (BoQ). He stated that the BoQ section of the submitted tender document had to remain as issued, with no alterations, additions, or qualifications of any kind by the tenderer. He further contended that, in line with ITT 31, any such modifications would be deemed a material deviation, leading to disqualification.
36. Mr. Maina asserted that the evaluation criteria had been clearly communicated to all bidders from the outset, and the Applicant's failure to adhere to it resulted in disqualification. He further emphasized that

the Procuring Entity strictly followed the evaluation criteria as outlined in the Tender Document.

Interested Party's Submissions

37. Although the Interested Party did not attend the hearing, the Board acknowledges that they filed a Replying Affidavit sworn by Jasper Ileri Mbungu, the Director of the Interested Party, on 27th March 2025, in response to the Request for Review.
38. In the Replying Affidavit, the Interested Party asserted that the tender evaluation process was conducted in accordance with the criteria outlined in the Tender Document. He maintained that the award of the tender to the Interested Party by the Respondents was the result of a competitive, fair, and transparent process conducted in adherence to due process.
39. The Interested Party asserted that the Tender Document outlined mandatory requirements that bidders had to fulfill to be deemed responsive. He argued that the accuracy and completeness of the Bill of Quantities were integral in determining whether a bidder satisfied the financial evaluation. He further contended that any alterations to the Bill of Quantities should automatically result in the disqualification of a bidder.

Applicant's Rejoinder

40. Counsel for the Applicant stated that he had no rejoinder.

CLARIFICATIONS

41. The Board sought clarification from the Respondents on whether the variations in the Applicant's tender affected the tender price. In response, Mr. Maina stated that they did, as a comparison with other bidders would reveal differences in quantities, ultimately impacting the tender price.
42. The Board sought clarification from the Applicant's Counsel on whether the variations in the Applicant's tender affected the tender price. In response, Counsel maintained that the deviations did not alter the tender price. He further stated that the difference between the bid price submitted by the Interested Party and that of the Applicant was Kenya Shillings Sixty-Three Million (KES 63,000,000). He emphasized that the deviations did not confer any advantage to the Applicant or disadvantage to the other bidders.
43. The Board further sought clarification from the Applicant's Counsel on whether the Applicant had complied with the Financial Evaluation criteria. The Applicant's Counsel affirmed compliance, adding that the deviations were minor and could be remedied under Section 79(2)(b) of the Act.
44. The Board sought clarification from Mr. Maina on whether the bid price, as stated in the Form of Tender, could be altered without involving the bidder. In response, he affirmed that the bid price could not be changed.

BOARD'S DECISION

45. The Board has reviewed all documents, submissions, pleadings, and confidential materials submitted pursuant to Section 67(3)(e) of the Act. The following issues arise for determination:

A. Whether the Procuring Entity evaluated the Applicant's bid at the Financial Evaluation stage in strict compliance with the Act, Regulations and the Constitution.

B. What orders the Board should issue in the circumstances.

Whether the Procuring Entity evaluated the Applicant's bid at the Financial Evaluation stage in compliance with the Act, Regulations and the Constitution.

46. The Applicant contends that it was the lowest evaluated bidder for the subject tender, as its bid was compliant and responsive within the meaning of Section 79 of the Act. The Applicant argues that the Procuring Entity violated Article 227 of the Constitution, as well as Sections 79 and 80(2) of the Act, by failing to adhere to the evaluation criteria set out in the Tender Document and by disqualifying its tender at the Financial Evaluation stage. The Applicant urges the Board to examine its original tender submission and confirm that it complied with the requirements of the Tender Document.

47. In response, the Respondents assert that they strictly adhered to the

evaluation criteria set out in the Tender Document and complied with the provisions of the Act and the Constitution. They maintain that the Applicant was not the lowest evaluated bidder, as alleged, since it failed to meet certain mandatory criteria at the Financial Evaluation stage.

48. The objective of public procurement is to ensure the provision of quality goods and services within a framework that upholds the principles enshrined in Article 227 of the Constitution, which states as follows:

227. Procurement of public goods and services

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.

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

a...

b...

49. Section 80 of the Act provides guidance on the evaluation and comparison of tenders by a Procuring Entity as follows:

80. Evaluation of Tender

(1) The evaluation committee appointed by the accounting officer pursuant to section 46 of the 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,...

(3) 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

(4)

50. Section 80(2) of the Act mandates the Evaluation Committee to evaluate and compare tenders fairly, using the procedures and criteria set out in the Tender Document. The Board interprets a fair system as one that ensures equal treatment of all tenders based on evaluation criteria that are transparently outlined in the tender document issued by the Procuring Entity. Additionally, Section 80(3) requires that such

evaluation criteria be as objective and quantifiable as possible and applied strictly in accordance with the procedures specified in the tender document.

51. The Applicant in the present Request for Review is aggrieved by the Letter of Notification of Award dated 24th January 2025, addressed to the Applicant. The letter, particularly in the section detailing the reasons for disqualification, states as follows:

Your bid was unsuccessful because of the following reasons;

- ***The You had a wrong BoQ page for foul drainage which read (1st floor to 14th Floor) instead of Foul Drainage (1st Floor to 10th Floor)***
- ***You altered the item for 2br Market item B ditto 25mmo (pipe works) from LM 20 to LM 15.***
- ***You altered Sanitary fittings and accessories item C for kitchen sinks from 105 sets to 160.***

52. From the contents of the letter, as well as the respective pleadings and submissions of the parties, it is undisputed that the Applicant's tender responsive to Mandatory and Technical requirement of the tender but was disqualified at the Financial Evaluation stage.

53. The Board takes cognizance of Section 86 of the Act, which outlines the criteria for determining a successful tender as follows:

"(1) The successful tender shall be the one who meets any one of the following as specified in the tender document—

(a) the tender with the lowest evaluated price;

(b) the responsive proposal with the highest score determined by the procuring entity by combining, for each proposal, in accordance with the procedures and criteria set out in the request for proposals, the scores assigned to the technical and financial proposals where Request for Proposals method is used;

(c) the tender with the lowest evaluated total cost of ownership; or

(d) the specifically the highest technical score, where a tender is to be evaluated based on procedures regulated by an Act of Parliament which provides guidelines for arriving at applicable professional charges: Provided that the provisions of this subsection shall not apply to section 141 of this Act.

(2) For the avoidance of doubt, citizen contractors, or those entities in which Kenyan citizens own at least fifty-one per cent shares, shall be entitled to twenty percent of their total score in the evaluation, provided the entities or contractors have attained the minimum technical score.

54. Regulation 77 of the Regulations, 2020, sets out the framework for Financial Evaluation as follows:

77. Financial evaluation

(1) Upon completion of the technical evaluation under

regulation 76 of these Regulations, the evaluation committee shall conduct a financial evaluation and comparison to determine the evaluated price of each tender.

(2) The evaluated price for each bid shall be determined by—

(a) taking the bid price in the tender form;

(b) taking into account any minor deviation from the requirements accepted by a procuring entity under section 79(2)(a) of the Act;

(c) where applicable, converting all tenders to the same currency, using the Central Bank of Kenya exchange rate prevailing at the tender opening date;

(d) applying any margin of preference indicated in the tender document.

(3) Tenders shall be ranked according to their evaluated price and the successful tender shall be in accordance with the provisions of section 86 of the Act.

55. The above Regulation 77 of the Regulations, introduces steps for **arriving at the evaluated price of a tender** during Financial Evaluation. This is due to the fact that, inevitably, a bid may contain arithmetic errors, minor deviations, and there may be need to convert tenders to the same currency using the prevailing exchange rates, to apply discounts offered by a tender and to apply a margin of preference as specified in the Tender Document and as required by the Act.

56. Based on the aforementioned provisions, an evaluation committee, upon completing the preliminary and technical evaluation stages, must conduct the financial evaluation by comparing the evaluated price of each tender. In doing so, the committee must adhere to factors listed in Regulation 77 of the Regulations in conducting financial evaluations of the Applicant's evaluated price.
57. The Board must now determine whether the evaluation and comparison of tenders, including the Applicant's, were conducted in accordance with the evaluation criteria set out in the Tender Document, the Act, and the Constitution in awarding the successful bidders.
58. Section 58 of the Act mandates a procuring entity to utilize a standard tender document that contains sufficient information and states as follows:

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

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

59. Further, Section 60(1) provides as follows:

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

60. Similarly, Section 70 of the Act mandates a procuring entity to use a standard tender document containing sufficient information to ensure fair competition among tenderers. Section 70(3) states as follows:

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

61. Upon careful examination of the Tender Document, it is evident that the evaluation procedure and criteria for the tender in question are outlined in Section III – Evaluation and Qualification Criteria.

62. The Financial Evaluation criteria are set out on pages 34 and 35 of the Tender Document as follows:

Financial Evaluation:

Financial Evaluation shall comprise of the following:

- (a) ***Completeness of the Bills of Quantities: The Bills of Quantities section of the submitted Tender Document must be complete as issued, with no alteration, addition or qualification of any kind whatsoever made by the Tenderer to the text of the document. Any alterations, additions or qualifications shall be considered as material deviations as per ITT 31 and shall lead to Disqualification.***

- (b) ***Examination of unit rates: Each bid shall be subjected to an evaluation of unit rates. Bids shall be assessed to confirm uniformity and consistency in rates of similar individual line items. Bids not meeting this criterion shall be disqualified and error checks shall not be undertaken.***

- (c) ***Error checks: Successful bids from the examination of unit rates shall be evaluated for arithmetic errors. All arbitrary additions to the tender document shall be considered as arithmetic errors. An assessment of the bids taking into consideration the Tender Sum, corrections relating to arithmetic errors and any discounts offered shall be done to determine the bids' Evaluated Tender Sum.***

- (d) ***Conformance with the estimated cost: The estimate for the project is Kshs 2,236,699,233.88 with a plinth area of 54,286.00 Sqm. The development cost (all-inclusive for the built-up structures and all the external works) shall be up to Kshs.42,000 per square metre based on the plinth areas.***

TENDERERS FAILING TO COMPLY WITH THIS REQUIREMENT SHALL BE DISQUALIFIED.

- (e) ***Ranking of the bids: Ranking of the bids using their Evaluated Tender Sums shall be undertaken. The ranking shall be used to determine the bid with the Lowest Evaluated Tender sum, which shall be considered for award.***

63. From the above criteria, it is evident that the completeness of the BoQ without alteration was a key evaluation criterion (requirement (a)). A further provision provided however that all arbitrary additions to the tender document shall be considered as arithmetic errors. The critical question therefore before the Board is whether any deviation from this requirement constitutes a material deviation. In addressing this issue, the Board acknowledges that bidders at this stage have already passed the preliminary and technical evaluation stages.

64. The Board has examined the Evaluation Report submitted as part of the confidential documents and notes that the reasons for the Applicant's

disqualification align with those stated in the Letter of Notification of Award. Upon reviewing the Applicant's bid, the Board confirms that it contained a discrepancy in the BoQ page for foul drainage, which was indicated as (1st Floor to 14th Floor) instead of (1st Floor to 10th Floor). Additionally, the Applicant altered sanitary fittings and accessories, specifically Item C for kitchen sinks, from 105 sets to 160.

65. However, upon reviewing the second reason for disqualification, the Board examined both the Tender Document and the Applicant's bid and confirmed that the Applicant had complied with the provisions of the Tender Document. Consequently, this ground for disqualification is unfounded and cannot be sustained.
66. Regarding the remaining two grounds for disqualification—namely, the incorrect BoQ page for foul drainage, which stated (1st Floor to 14th Floor) instead of (1st Floor to 10th Floor), and the alteration of sanitary fittings and accessories item C for kitchen sinks from 105 sets to 160—the Applicant conceded to these discrepancies but contended that they constituted minor deviations rectifiable under Section 79(2)(b) of the Act. The Applicant argued that its bid had already been deemed responsive, having satisfied all mandatory requirements at the preliminary and technical evaluation stages. In contrast, the Respondents maintained that the Applicant's bid failed to meet the mandatory requirements at the Financial Evaluation stage, asserting that the deviations were material and could not be considered minor, thereby justifying the bid's disqualification.
67. The Board is guided by the principles of fairness, transparency, and

equal treatment as enshrined in the Public Procurement and Asset Disposal Act, 2015. Section 80 of the Act requires the Evaluation Committee to apply criteria uniformly. Further, Regulation 74 of the Public Procurement Regulations mandates that all bidders be treated fairly and consistently. The central issue for determination is whether the Procuring Entity applied evaluation criteria fairly and consistently in compliance with the Public Procurement and Asset Disposal Act, 2015 (PPADA)

68. The Board took the liberty to determine how the overall evaluation process was undertaken and considered the Interested party bid submitted pursuant to Section 67 of the Act and to determine whether the evaluation process was conducted fairly, the following key areas of comparison are examined:

| Bidder | Errors Noted | Boards Findings |
|--|--|--|
| Applicant (Jijenge precast & construction Ltd) | - Discrepancy in BoQ for foul drainage (1st Floor to 14th instead of 1st to 10th).and modifying "Sanitary Fittings Item C for Kitchen Sinks" from 105 sets to 160, both conceded by the Applicant | Disqualified for the modification & discrepancy of the tender BOQ. |
| Interested Party /successful Bidder (Jasir Contractors Ltd) | <p>- Modification, discrepancy & omission in the tender BOQ.</p> <p>Case in Point;</p> <p>-Omission of Serial pg. 851(Items No. A,B,C,D,E,F & G of Block B) hence missing from the submitted BOQ.</p> <p>- Multiple rate discrepancies across pages (e.g., rates for the same item differ across pages).</p> <p>Case in Point;</p> <ol style="list-style-type: none"> 1) On the Builders work BLOCK A Serial page no 826, the rates given on item no. B is 450 which is not uniform to that of page 847 of BLOCK A WITH SHOPS which is given as 400 under the same item description. 2) On the same Builders work BLOCK A | <p>Allowed to proceed despite; alteration/ommission of the tender BOQ and clear rate inconsistencies across multiple pages.</p> <p>N/B As indicated on Pages 34 & 35 under Financial Evaluation of the tender document, mandatory requirement that:</p> <p>"Examination of unit rates: Each bid shall be subjected to an evaluation of unit rates. Bids shall be assessed to confirm uniformity and</p> |

| | | |
|--|---|--|
| | <p>Serial page no 826, the rates given on item no. C is 2200 which is not uniform to that of page 847 of BLOCK A WITH SHOPS which is given as 350 under the same item description.</p> <p>3) On the same Builders work BLOCK A Serial page no. 821, the rates given on item no. B is 1600 which is not uniform to that of page 842 of BLOCK A WITH SHOPS which is given as 500 under the same item description.</p> | <p>consistency in rates of similar individual line items. Bids not meeting this criterion shall be disqualified and error checks shall not be undertaken."</p> <p>Violation of the principle of equal treatment</p> |
|--|---|--|

69. The Board observes that the Procuring Entity disqualified the Applicant due to modification/inconsistencies in the BoQ, yet the interested Party/successful bidder, exhibited multiple discrepancies, including omission/alteration in its BoQ, and more specifically, rates for the same line item differ across pages as listed in the above table, contrary to financial evaluation requirement (b) that "Examination of unit rates: Each bid **shall be** subjected to an evaluation of unit rates. Bids shall be assessed to confirm uniformity and consistency in rates of similar individual line items. Bids not meeting this criterion shall be disqualified and error checks shall not be undertaken."
70. Notably, the Evaluation Report provided no justification as to why the successful bidder's errors, alteration, omissions and commissions were overlooked while the Applicant's bid was deemed non-responsive for lesser discrepancies, the differential treatment resulted in an unfair advantage to one bidder.
71. The responsiveness of tenders is governed by Section 79 of the Act,

which provides as follows:

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

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

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

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

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

(a) be quantified to the extent possible; and

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

72. Section 79(2)(b) of the Act stipulates that a responsive tender **SHALL NOT** be disqualified due to errors or oversights that can be corrected without altering the substance of the tender.

73. Regarding errors affecting the tender price, Regulation 74(2) of the Regulations 2020 provides:

Subject to section 79(2)(b) of the Act, any errors in the submitted tender arising from a miscalculation of unit price, quantity, subtotal and total bid price shall be considered as a major deviation that affects the substance of the tender

and shall lead to disqualification of the tender as non-responsive.

74. Essentially, Regulation 74(2) of the Regulations 2020 mandates that any error arising from a miscalculation of the unit price, quantity, subtotal, or total bid price constitutes a major deviation that affects the substance of the tender, leading to its disqualification for non-responsiveness. However, this provision is subject to Section 79(2)(b) of the Act and must be read in conjunction with Section 82 of the Act.
75. There is a clear inconsistency, as Regulation 74(2) of the Regulations 2020 mandates disqualification for any error, whereas Section 79(2)(b) of the Act allows for the correction of errors and oversights that do not affect the substance of a responsive tender. Accordingly, Regulation 74(2) of Regulations 2020 should be applied subject to Section 79(2)(b) of the Act.
76. As a subsidiary legislation, Regulation 74(2) of the Regulations 2020 cannot override the express provisions of Section 79(2)(b) of the Act, which takes precedence.
77. Notably, Section 82 of the Act provides:

The tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be the subject of correction, adjustment or amendment in any way by any person or entity.

78. The implication of the above provision is that the tender sum, as read out at the tender opening, is absolute and final, and cannot be corrected, adjusted, or amended by any person or entity.
79. A tenderer is bound by the tender sum submitted in the Form of Tender, which remains unchanged and cannot be corrected, even if errors or oversights are identified or rectified under Section 79(2)(b) of the Act.
80. The Board has consistently upheld in previous decisions that the tender sum is absolute and cannot be altered. In **PPARB Application No. 42 of 2017, Surestep Systems and Solutions Limited vs. Industrial and Commercial Development Corporation**, the Board reaffirmed its stance in **PPARB Application No. 38 of 2019, Alfatech Contractors Limited vs. Kenya National Highways Authority**, emphasizing the significance and primacy of the Form of Tender in any tender process in the following words:

The Board holds that the form of tender is the document which the offer is communicated to specified employer. It is the offer that the procuring entity would consider an either accept or reject. The Board finds that the form of tender is a very vital document which communicates every essential information based on which a contract is created. The provision of section 82 of the Act, are couched in mandatory terms and leaves no room for any other interpretation. The tender sum for the successful bidder as

read out and as recorded at the tender opening was Kshs. 34,166,398.13/- and was not subject to any variation whatsoever pursuant to the prohibition contained in section 82 of the Act.

81. Regulation 74(2) of the Regulations 2020, being subject to Section 79(2)(b) of the Act, does not grant the Procuring Entity an automatic right to declare tenderers non-responsive solely due to errors in their tenders. This must be considered in light of how a tender sum is treated under Section 82 of the Act.

82. In ***PPARB Application No. 64 of 2022 Com Twenty One Limited v The Director General Communication Authority of Kenya***, the Board compared the provisions of the repealed Public Procurement and Disposal Act, 2005 and the repealed Public Procurement and Disposal Regulations, 2006 against the provisions of the 2015 Act and the 2020 Regulations and reiterated in its decision that ***"Regulation 74 (2) of the 2020 Regulations which contradicts Section 82 of the Act, does not vest an automatic action for the Procuring Entity to find a tender non-responsive. Where provisions of the 2020 Regulations and by extension, the Tender Document contradict the 2015 Act, the 2015 Act must and will prevail.***

83. The Board further held:

Our analysis above and having traced the old dispensation under the Repealed 2005 Act and the Repealed 2006 Regulations which is now inapplicable as per the current

dispensation, it is the Board's considered finding that the Procuring Entity ought not to have undertaken any correction of arithmetic errors on the Applicant's List of items for Lot 1 and Lot 2 of the subject tender as part of Financial Evaluation.

What the Procuring Entity ought to have done is to seek the concurrence of the bidder, the Applicant herein, in writing pursuant to Section 64 of the Act as to whether it is still bound by its tender sum noting the arithmetic errors observed in Lot 1 and Lot 2. Any communication in writing to the Applicant would alert the Applicant to the errors noted and a response in writing, would confirm whether or not the Applicant is still willing to be bound by its tender sum.

If the Applicant denies to be bound by its tender sum or abandons its tender sum, then it would be disqualified. If the Applicant agrees to be bound by its tender sum and is found to be the lowest evaluated bidder, based on the Applicant's evaluated price, an award of the subject tender would be made to it at the amount quoted in the Form of Tender which in this case is a sum of KES 161,599,698.80 (One Hundred and Sixty-One Million, Five Hundred and Ninety-Nine Thousand, Six Hundred and Ninety-Eight Kenya Shillings and Eighty Cents) and the Applicant would be required to execute the tender(CA/PROC/OT/99/2021-2022 for Supply, Delivery, Installation and Commissioning

of Local Area Network (LAN) for Selected National Police Service (NPS) Stations) to the expectation of the Procuring Entity.

84. Similar position of the Board on this issue was in ***PPARB Application No. 104 of 2022 Dignity Traders Limited v Accounting Officer, Kenya Maritime Authority & Another and PPARB Application No. 14 of 2023 Shaanxi Investment Limited v Accounting Officer, Kenya National Highways Authority & Another.***
85. The implication of the above analysis is that not every error should automatically result in the disqualification of a tender. Only errors that affect the substance of a tender and cannot be remedied under Section 79(2) of the Act warrant disqualification.
86. Having stated the above, the question remains whether the errors noted in the Applicant's bid are significant enough to affect the substance of the subject tender. The Board's response to this is in the negative. The identified errors do not, in any way, alter the substance of the tender.
87. Firstly, the Applicant had already achieved high scores in the previous evaluation stages, notably scoring 98% at the Technical Evaluation stage, demonstrating compliance with the substantive requirements of the tender. Secondly, the law does not prescribe a mandatory checklist at the Financial Evaluation stage, as such requirements are assessed during the preliminary evaluation. As previously noted, Regulation 77

of the Regulations, 2020, limits the Evaluation Committee's role at this stage to determining the evaluated price of each tender.

88. In ***Miscellaneous Civil Application No. 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 Court held as follows:

Briefly, the requirement of responsiveness operates in the following manner: - a bid only qualifies as a responsive bid if it meets 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. Indeed, public procurement practically bristles with formalities which bidders often overlook at their peril. 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. 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, empowerment or post qualification. 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.....

...Mandatory criteria establish the basic requirement of the invitation. Any bidder that is unable to satisfy any of these requirements is deemed to be incapable of performing the contract and is rejected. It is on the basis of the mandatory criteria that "competent" tenders are established...."

89. The above decision underscores the importance of mandatory requirements as the initial threshold that bidders must meet. It also affirms the standard practice in public procurement, where bids are first assessed for compliance with responsiveness criteria before being subjected to further evaluation on aspects such as functionality, pricing, empowerment, or post-qualification. Bidders who fail to meet the responsiveness criteria are disqualified from the process, irrespective of the merits of their bids.
90. The Board observes that any bidder who progresses to the Financial Evaluation stage must have already satisfied the mandatory requirements in the preceding stages. At this stage, Regulation 77 of the Regulations, 2020, confines the Evaluation Committee's focus to the assessment of the bid price.
91. In light of the foregoing analysis, the Board concludes that the Evaluation Committee erred in law by failing to consider the provisions of Section 79(2) of the Act regarding minor deviations in the Applicant's bid. The Committee improperly elevated these minor deviations to a

standard not contemplated by law, particularly Regulation 77 of the Regulations, 2020, which outlines the proper approach to Financial Evaluation.

92. Furthermore, the Board concludes that the Evaluation Committee erred in law by failing to uphold the principles of fairness, transparency, and equal treatment as enshrined in the Act. Section 80 of the Act requires the Evaluation Committee to apply evaluation criteria uniformly, while Regulation 74 of the Regulations 2020 mandates fair and consistent treatment of all bidders. The Committee disqualified the Applicant based on modifications and inconsistencies in the BoQ, yet the Interested Party/successful bidder exhibited multiple discrepancies, including omissions/alterations and inconsistencies in unit rates in its BoQ.

What orders the Board should issue in the circumstance.

93. The Board finds that the Procuring Entity failed to evaluate the Applicant's bid at the Financial Evaluation stage in accordance with the procedures and criteria prescribed under Sections 79(2) and 80(2) of the Act, as well as Regulation 77 of the Regulations, 2020.
94. The Board further established that while the Applicant's bid was disqualified for discrepancies in the Bill of Quantities, the Interested Party/successful bidder, had multiple inconsistencies in rate uniformity and glaring alteration on its bid. Despite the discrepancies, the Procuring Entity found the successful bidder responsive while disqualifying the Applicant for similar or lesser deviations.

95. Consequently, the Request for Review dated 17th March, 2025, concerning Tender No. MLPWHUD/HUD/AHP/ 416/2023-2024 – Proposed Construction of the Loitoktok AHP Project in Kajiado South Constituency, Kajiado County with Associated Infrastructure., is hereby allowed on the following specific terms:

FINAL ORDERS

96. In the exercise of the powers conferred upon it by section 173 of the Act, the Board makes the following orders in the Request for Review dated 10th March 2025:

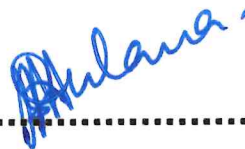
- 1. The letters of Notification of Intention to Award dated 24th January 2025 issued by the 1st Respondent to the successful bidder M/s Jagir with respect to Tender No. MLPWHUD/HUD/AHP/ 416/2023-2024 – Proposed Construction of the Loitoktok AHP Project in Kajiado South Constituency, Kajiado County with Associated Infrastructure be and is hereby cancelled and set aside;**
- 2. The Procuring Entity's Notification Letter of unsuccessful bid of Tender No. MLPWHUD/HUD/AHP/ 416/2023-2024 – Proposed Construction of the Loitoktok AHP Project in Kajiado South Constituency, Kajiado County with Associated Infrastructure, dated 24th January 2025 and addressed to the Applicant and to other bidders, be and are**

hereby cancelled and set aside.

3. The Procuring Entity is hereby directed to conduct a re-evaluation of the Applicant's bid at the Financial Evaluation stage together with other bidders who made to financial evaluation stage, taking into consideration the Board's finding in this case, and proceed with the procurement process to its logical conclusion including the making of an award within twenty-one (21) days from the date of this decision;
4. Each party shall bear its own costs of the proceedings.

Dated at NAIROBI, this

1st day of April 2025.



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PANEL CHAIRPERSON

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SECRETARY

PPARB

PPARB