

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 81/2025 OF 9TH JULY 2025

BETWEEN

JAYLON LOGISTICS LIMITED..... APPLICANT

AND

THE ACCOUNTING OFFICER,

AIC TAMBOIYO SECONDARY SCHOOL.....1ST RESPONDENT

AIC TAMBOIYO SECONDARY SCHOOL.....2ND RESPONDENT

Review against the decision of the Accounting Officer, AIC Tamboiyo Secondary School in relation to Tender No. CDF/LC/25/01 for Proposed Construction of a Laboratory Block.

BOARD MEMBERS PRESENT

- | | |
|-------------------------|--------------------|
| 1. Mr. Jackson Awele | -Panel Chairperson |
| 2. Ms. Jessica M'mbetsa | -Member |
| 3. Mr. Daniel Lagat | -Member |

IN ATTENDANCE

- | | |
|--------------------------|-------------------------------------|
| 1. Mr. Robert Kimani | - Holding brief for Board Secretary |
| 2. Ms. Christabel Kaunda | - Secretariat |

PRESENT BY INVITATION

APPLICANT

Mr. Sidney Biwot

JAYLON LOGISTICS LIMITED

Advocate, C & K Advocates LLP

RESPONDENTS

Mr. Philemon Kipkoech

THE ACCOUNTING OFFICER, AIC TAMBOIYO SECONDARY SCHOOL, AIC TAMBOIYO SECONDARY SCHOOL

Accounting Officer, AIC Tamboiyo Secondary School

BACKGROUND OF THE DECISION

The Tendering Process

1. AIC Tamboiyo Secondary School (hereinafter referred to as “the Procuring Entity”) invited eligible tenderers to submit tenders in response to Tender No. CDF/LC/25/01 for Proposed Construction of a Laboratory Block (hereinafter referred to as the “subject tender”) using an open national method of tendering and by way of an Invitation Notice dated 28th May 2025 with a submission deadline of 12th June 2025, on or before 4.00pm.

Tender Submission Deadline and Tender Opening

2. According to the Tender Opening Committee, seven (7) tenderers participated in response to the subject tender within the tender submission deadline of 12th June 2025.

3. The said seven (7) tenderers were recorded in the opening minutes for the subject tender dated 12th June 2025 (hereinafter referred to as “Tender Opening Minutes”) as follows:

Bid No	Name of Bidder
1.	Bula Technologies
2.	Josewood Lab Africa
3.	Rodify Logistics Limited
4.	Malabun Enterprise
5.	Jaylon Logistic Limited
6.	Mugunya Building Company
7.	Derono Wood Company

Evaluation of Tenders

5. A Tender Evaluation Committee (hereinafter referred to as the “Evaluation Committee”) as appointed by the 1st Respondent undertook evaluation of the seven (7) tenders in the following three stages as recorded in the Tender Evaluation Report (hereinafter referred to as the “Evaluation Report”):

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

Preliminary Evaluation

6. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out in Tender Invitation Notice

issued to bidders. Tenders were required to satisfy all the 7 mandatory requirements enumerated therein as well as show proof of works of similar magnitude and complexity undertaken within the past 3 years for CDF at this stage to qualify to proceed for evaluation at the Technical Evaluation Stage.

7. At the end of evaluation at this stage, five (5) bidders, including that submitted by the Applicant were found responsive thus proceeded for evaluation at the Technical Evaluation Stage.

Technical Evaluation

8. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out in the blank tender document. Tenders were required to attain a pass mark of 75% to proceed to the financial evaluation stage.
9. At the end of technical evaluation, all bidders, including the Applicant, were determined to be responsive and thus considered to be eligible to proceed to financial evaluation.

Financial Evaluation

10. The Evaluation Committee herein was required to examine tenders using the criteria as set out in the Tender Document. Out of the five (5) eligible bidders considered, one (1) bidder was disqualified for arithmetic errors while the remaining four (4) bidders were arranged in order from lowest to highest submitted bid prices.

11. It was then determined that the Applicant herein, having been found responsive at the preliminary evaluation stage and having attained the minimum threshold of 70% at the technical evaluation stage had quoted the lowest bid price of Kshs. 4,385,125.

Recommendation for Award

12. The Evaluation Committee recommended award of the subject tender to the Applicant being the lowest evaluated tenderer at the tender price of **Kenya Shillings Four Million Three Hundred and Eighty-Five Thousand One Hundred and Twenty-Five (Kshs. 4,385,125)** inclusive of all applicable taxes.

13. It was further recommended that due diligence be carried out before the Intention to Award and Professional Opinion were issued.

Professional Opinion

14. In a consultative meeting held on 24th June 2025 with the 2nd Respondent's Procurement Officer and County Public Works official in attendance, the meeting resolved that upon due diligence being conducted on the eligible bidders, it was established that both the lowest bidder, the Applicant herein, and the second lowest bidder had not met the criteria on works of similar complexity and magnitude.

15. It was further resolved that because there had been an oversight in evaluation of the mandatory criteria on works of similar complexity and magnitude, Notification Letters were to be sent out to all participant bidders informing them that the Tender would not be awarded and further, that the same would then be re-advertised.

Notification of Intention to Award

16. Parties were informed of the outcome of the tender evaluation process *vide* correspondence dated 23rd June 2025 sent out to parties to the effect that the subject tender had not been awarded because no bidder had met the required threshold as per the advertisement conditions.

REQUEST FOR REVIEW

17. The Procuring Entity thereafter proceeded to re-advertise the subject tender *vide* a Tender Re-Advertisement Invitation Notice dated 27th June 2025 inviting interested bidders to submit their bids on or before 3.00pm, 7th July 2025.

18. Dissatisfied with the outcome of the tender evaluation process and purported re-advertisement of the subject tender, the Applicant herein, on 9th July 2025 filed a Request for Review dated 4th July 2025 together with a Supporting Affidavit of even date sworn by Dennis Kiptoo Maiyo, its Managing Director, through the firm of Messrs. C&K Advocates LLP, seeking the following orders:

- a) That the termination of procurement proceedings notices dated 23rd June 2025 be and is hereby nullified and set aside;***
- b) That the Accounting Officer be and is hereby estopped from re-advertisement/Re-tendering or in any way commencing any other procurement proceeding in respect to the above tender;***
- c) That the Board finds the termination notice irregular and thus voidable;***
- d) That the Board directs that the Accounting Officer proceeds and award the tender to the lowest evaluated bidder;***
- e) That the Respondents herein be ordered to pay the costs incidental to this proceedings;***
- f) Such other relief that the board shall deem just and expedient to grant.***

19. In a Notification of Appeal and a letter dated 9th July 2025, Mr. James Kilaka, the Board Secretary notified the Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the Respondents 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.

20. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five days from 9th July 2025

21. The Board Secretary thereafter issued a Hearing Notice dated 18th July 2025 inviting the parties herein and all bidders by extension to the virtual hearing of the matter scheduled for Wednesday, 23rd July 2025 between 14.00 and 16.00 hours. However, the same did not proceed as scheduled but was instead adjourned severally to Friday, 25th July 2025 at 11.00am.
22. The Applicant thereafter on 23rd July 2025 filed their Written Submissions dated 22nd July 2025 together with their List and Bundle of Authorities equally dated 22nd July 2025.
23. On their part, the Respondents on 24th July 2025 filed their Memorandum of Response and annexures thereto dated 24th July 2025 and sworn by one Philemon Kipkoech on behalf of the Respondents.
24. When the Board convened for the hearing on Friday, 25th July 2025 at 11.00am, their respective Advocates represented the parties. The Board proceeded to give parties directions on the format, order and length of submission before it.
25. Parties were also informed that the instant Request for Review having been filed on 9th July 2025 was due to expire on 30th July 2025 and that the Board would communicate its decision on or before 30th July 2025 to all parties via email to their respective last known email addresses.

PARTIES SUBMISSIONS

Applicant's Submissions

26. Counsel for the Applicant, Mr. Biwot, began his submissions by giving a brief history and context of the subject tender. Counsel Mr. Biwot thereafter directed the Board's attention to the Tender Invitation Notice dated 23rd May 2025 and the list of mandatory requirements, among them the condition for proof of works of similar magnitude and complexity undertaken in the last three years for the CDF, in submitting that the Applicant had honoured the same through their submitted bid wherein they were able to demonstrate that they had constructed similar buildings of a similar nature in the same institution.
27. Counsel Mr. Biwot then submitted that the gist of the Applicant's Request for Review Application dated 4th July 2025 was its dissatisfaction with the Procuring Entity's choice in terminating the subject tender as communicated to parties *vide* Notification Letters dated 28th May 2025 because no bidder had met the required threshold as per the advertised conditions and that the same had been re-advertised.
28. Counsel Mr. Biwot then submitted that the Respondents' actions were done outside the required threshold of the provisions of Section 63 of the Public Procurement and Asset Disposal Act, Act No. 33 of 2015 (hereinafter referred to as 'the Act').

29. Counsel Mr. Biwot then submitted that as per the said provisions, there were about 9 requirements/conditions in which a tender could be terminated in line with the provisions of Article 227 of the Constitution of Kenya 2010, which Counsel further submitted required public authorities to make their tenders in an open, competitive and transparent manner.
30. Counsel Mr. Biwot further submitted that the Board had made several determinations on the same where it had come out clearly elaborating on the requirements of Section 63 of the Act such as in ***PPARB Application No. 50 of 2020*** where the Board therein quoted the Ruling in ***Republic vs Public Procurement Administrative Review Board & another ex-parte Kenya Veterinary Vaccines Production Institute (2018) eKLR*** wherein the Court had been of the view that the Procuring Entity had been under a duty to place sufficient reasons and evidence to justify and support the grounds for termination of a procurement process under challenge.
31. Counsel Mr. Biwot then submitted that the contents of the Termination Letter as shared by the Respondents did not establish any of the required and listed grounds for termination of a tender and or give any evidence to support the said claim that none of the bidders had in any event fulfilled or failed in meeting the requirements as per the advertisement conditions.

32. Counsel Mr. Biwot then submitted that the advertisement condition had not established the manner in which bidders were to meet the said condition with respect to building laboratories within the 2nd Respondent's premises but only provided that bidders ought to have constructed works of a similar magnitude and complexity for the CDF within the past three years, which according to the Applicant was open ended and subject to several interpretations.
33. Counsel Mr. Biwot also submitted that the Applicant also found fault in the manner in which the Respondents terminated the tender only to thereafter proceed to re-advertise the same just immediately 4 days after, as per the tender re-advertisement notice dated 27th June 2025, replicating the conditions required, including that one requiring bidders to show proof of works of similar magnitude and complexity being undertaken within a period of three years yet no sufficient reasons had been availed to demonstrate compliance with Section 63 with regard to providing evidence within 14 days that the tender had since been terminated.
34. Counsel Mr. Biwot also submitted that from the annexed documents submitted by the Respondents, the same had not been adduced. Counsel also directed the Board to its decision in ***PPARB Application No. 41 of 2023*** in placing reliance on the same, wherein he submitted the Board held that the conditions for termination of procurement proceedings under Section 63 of the Act were not cosmetic provisions of the law as the same gave effect to the provisions of Article 227 of the Constitution

of Kenya which demanded that a procurement system be fair, equitable, transparent, competitive and cost effective.

35. Counsel Mr. Biwot reiterated that accordingly, the Termination Letter issued to the Applicant had not given reasons as to why the procurement proceedings had been terminated and only informed parties that if they needed any further information they needed to contact the institution. Counsel Mr. Biwot also submitted that the said Termination Letter had not given any reasons that would assist bidders in preparing for the next round of bidding.

36. Counsel Mr. Biwot then submitted that the Procuring Entity had failed to submit cogent and sufficient evidence as was required under Section 63 of the Act to demonstrate that it had complied with the same, that is, both the procedural and substantive requirements of the same.

Respondent's Submissions

37. Mr. Kipkoech for the Respondents began his submission by stating that the actions of the Respondents were free, fair and justifiable in the circumstances. He added that the Respondents had advertised for submission for bids with respect to construction of a 45-capacity laboratory on 28th May 2025 and that the submitted bids were opened after 14 days to be subjected to evaluation.

38. Mr. Kipkoech then submitted that during evaluation, the Committee eliminated about some 3 of them and about 4 of the submitted bids

proceeded and during the ranking, it became clear that the Applicant emerged as the lowest evaluated bidder.

39. Mr. Kipkoech then added that it was during the award process as the Respondents were going through the documents is when they noticed that the Applicant had only constructed 2 laboratories and that the other bidders Rodifity and Josewood had only constructed classrooms and institutions while the bidder Bula had constructed some 3 laboratories and a classroom.

40. Mr. Kipkoech then added that with respect to the condition for works of similar magnitude and complexity, the Respondents interpreted it to be that construction of classrooms was simpler but with respect to constructing a laboratory there were the issues of tops, as well as gas and water pipes to contend with thus for a bidder to be awarded the tender it needed to have constructed a laboratory.

41. Mr. Kipkoech further submitted that the foregoing was what formed the basis for terminating the subject tender and that the same did not terminate the contract, only the process. He further added that all parties had been notified of the notification of the termination of the procurement process with further instruction to contact the 2nd Respondent in case they had any further questions.

42. Mr. Kipkoech further submitted that during the award process, the Respondents contacted the Applicant's Director and inquired whether

they had never done a laboratory to which the Director responded in the negative. He also submitted that the Respondents similarly then reached out to the 2nd lowest evaluated bidder for the same and received a similar response.

43. Mr. Kipkoech then submitted that the Respondents were not going to consider the 3rd and 4th bidders because the law only allowed the Procuring Entity to award either of the first two bidders if they qualified, which then formed the basis for termination as the Procuring Entity had been categorical in its requirements and the standard that was required. He then added that the standard could be inferred from the condition requiring proof of works of a similar magnitude and complexity to the standard of CDF.

44. Mr. Kipkoech then submitted that when the Respondents came to learn of the Appeal, they halted all other processes. He further added that as per the Respondents' perusal of the law, there was no specified time within which one could re-advertise and that it had been apparent that within the 14 days one could inform then re-advertise, which is why it was done 4 days after.

45. Mr. Kipkoech then submitted in reiterating that the Respondents were fair and did not have any interests and that they only wanted a bidder that would do the work to the standard of the laboratory they required.

APPLICANT'S REJOINDER

46. In rejoinder thereto, Counsel Mr. Biwot for the Applicant submitted on the advertisement notice that the Procuring Entity did not establish the standard or requirement they needed which was bidders who had previously constructed a school laboratory. Counsel further added that in that regard, the document as issued to the public was opened to scrutiny and interpretation in the manner they deemed fit to suit the said requirements of the said tender.
47. Counsel then submitted that the reasons adduced by the Procuring Entity were not communicated to the bidders when the said subject tender was terminated. Counsel further added that the only report to bidders was that if they required any further information they were to contact the school for reasons why the said tender was terminated.
48. Counsel then placed reliance on the decision by Hon. J. Mativo (as he then was) in ***Republic vs Public Procurement Administrative Review Board ex-parte Nairobi City Water and Sewerage Company vs Web tribe Limited t/a Jambopay Limited*** where the Court held that the question was not whether the best reason for termination had been provided but whether the reasons provided were sufficient for a reasonable tribunal or body to conclude on a balance of probabilities that the grounds relied on fell under any of the grounds listed under Section 63 of the Act.

49. Counsel Mr. Biwot submitted that in that event, the reasons adduced by the Procuring Entity before the Board did not lie within any of the reasons provided for under Section 63 of the Act and that if it were allowed to proceed on the same then most other Procuring Entities would have the privilege under the Act to fish out any reasons for termination of procurement in the event the provisions of Section 63 of the Act were disregarded.

50. Counsel Mr. Biwot further submitted that the foregoing would lead to an event where the provisions of Article 227 of the Constitution of Kenya 2010 would be violated and that bidders and citizens would not have a chance to question the motives and actions of any Procuring Entity.

51. Counsel then placed reliance on the Written Submissions filed in support of the Applicant's case in urging the Board to allow the Applicant's Request for Review as prayed.

CLARIFICATIONS

52. The Board inquired from the Respondents at what point during evaluation process did it become apparent to them that the Applicant had not fulfilled the condition for works of similar complexity and magnitude to which Mr. Kipkoech responded by stating that he had not sat in during the evaluation process thus was unsure of the same.

53. The Board then called upon Mr. Kipkoech for the Respondents to make a response to submission made that not all the requirements under Section 63 of the Act had been fulfilled with respect to termination of procurement proceedings and specifically the report under the provisions of Section 63(2). Mr. Kipkoech confirmed that he, as the 1st Respondent, had not issued any report as stipulated.
54. The Board then inquired from Counsel Mr. Biwot for the Applicant whether the Applicant in its consideration had met the specific requirement on construction of works of similar complexity and magnitude and if so, whether they had provided documentation in that regard.
55. Counsel Mr. Biwot submitted that whereas he did not have the said document with him, his client had confirmed compliance within their conversations and in any event, the 1st Respondent had confirmed the Applicant's compliance with the said specific requirement within his submissions before the Board.
56. The Board inquired from parties out of curiosity the manner in which the Notification Letters dated 23rd June 2025 were communicated to parties to which Mr. Kipkoech responded by stating that the same had been sent out via WhatsApp as an electronic means. Counsel Mr. Biwot in turn responded that the Applicant only saw the document on 26th June 2025 but could not give any particular answer as to why.

BOARD'S DECISION

57. The Board has considered each of the parties' cases, documents, pleadings, written submissions, authorities together with confidential documents submitted to the Board by the 1st Respondent pursuant to Section 67(3)(e) of the Act and finds the issues that arise for determination are:

- i. Whether the Applicant's bid was evaluated using the criteria laid out in the Subject Tender's blank Tender Document;***
- ii. Whether the Procuring Entity's decision to terminate the subject tender's procurement proceedings was in line with the provisions of Section 63 of the Act;***
- iii. What orders should the Board grant in the circumstances?***

The Board will now proceed to address the issues framed for determination as follows:

Whether the Applicant's bid was evaluated using the criteria laid out in the Subject Tender's blank Tender Document

58. As it held in its decision in ***PPARB Application No. 77 of 2025***, the Board understands the process of tender evaluation to entail a systematic assessment of bids received by a Procuring Entity in response to a tender to identify the most suitable supplier or contractor for a specific project or contract.

59. The Board further understands the evaluation process to involve comparing offers against pre-defined criteria, considering factors like price, quality, experience, and other relevant aspects, to determine the "best value" bid, which process ensures a fair and transparent selection of a provider that best meets the Procuring Entity's needs and objectives, all the while ensuring that the same adheres to the relevant provisions of the law thereto.

60. The Board further understands that results of the afore-described activity are thereafter captured in an Evaluation Report indicating the same in detail, at the end of it all the lowest successfully evaluated bidder is determined.

61. Turning to the matter at hand, the Board notes from the Tender Evaluation Minutes dated 20th June 2025 and Tender Evaluation Analysis Report forwarded to it by the 1st Respondent as Confidential Information in line with the provisions of Section 67 of the Act, that there was a measure of tender evaluation as carried out by the Procuring Entity's Evaluation Committee. However, the Board also notes that the process of tender evaluation must be structured and systematic if at all it is to achieve its purpose objectively.

62. The Board followed the Respondents' case at hearing, its pleadings filed in opposition to the Applicant's Request for Review Application and the Confidential Information supplied to it that the mandatory criteria relating to proof of works of similar magnitude and complexity within the

past three years for the CDF was actually considered at the award stage, rather than at the preliminary evaluation stage as was intended.

63. The Board further understands the Respondents' case on the same to be that upon conducting due diligence for the lowest and second lowest evaluated bidders and finding that neither of the two had completed a laboratory in line with the said requirement, that the same formed the basis upon which it elected to terminate procurement proceedings relating to the subject tender and thereafter re-advertise the same. The Board shall delve further into that at a later point in its decision.

64. Contrarily, the Board understands the Applicant's case to be that it was at all times compliant with the criteria as per the tender document and further, that the criterion itself was ambiguous and open to varied interpretation as it had not specifically spelt out the standard of the said laboratory that it wanted constructed by interested and participant bidders.

65. The Board notes from the Tender Invitation Notice of 28th May 2025 that there were seven (7) mandatory requirements and thereafter an eighth requirement which read as follows:

"In addition, the interested bidders must show proof of the following:

Works of similar magnitude and complexity undertaken in the last three years for the CDF"

66. The Board is of the considered view that both the Applicant and the Respondents erred in their respective viewing and understanding of the criterion, its place in the mandatory requirements and its evaluation as follows.

67. At the onset, the Board wishes to reiterate its position in ***PPARB Application No. 48 of 2020 – Xtranet Communications Limited vs The Accounting Officer, Agriculture and Food Authority & 2 Others*** on evaluation at the preliminary evaluation stage as follows:

"The Board notes that at the preliminary evaluation stage, the evaluation committee only evaluates documents and information on the face value, which documents were submitted by bidders in response to the Preliminary Evaluation criteria outlined in the Tender Document in determining their responsiveness.

The Procuring Entity will only have the option to verify such documents in a due diligence exercise conducted after Financial Evaluation has been concluded and recommendation of award made to the lowest evaluated responsive tenderer."

68. It thus follows with respect to the said criterion that at the Preliminary Evaluation Stage, bidders were only required to provide the same for consideration at face value, that is, whether the same had been provided

or not, with verification of the same only available at the due diligence stage and only with respect to the lowest evaluated responsive tenderer.

69. In this instance, the Board gathers that inquiry into the said criterion was made by the Evaluation Committee at the Award stage on both the Applicant and the second lowest evaluated bidder, Josewood Lab Africa, by way of telephone calls made to their respective Directors who both confirmed that neither of them had constructed a laboratory within the past three years for the CDF. The Board finds this improper procedure with regard to the manner in which the said criterion ought to have been evaluated.

70. The Board also finds contention with the evaluation stage in which the said criterion featured. The Board followed the argument by Respondents to the effect that it was imperative that the lowest successful bidder demonstrated that it had built similar project(s) to the one contemplated in the subject tender therefore demonstrating competency and capacity to carry out construction works of the 45-capacity school laboratory including but not limited to tops and the gas and water pipelines.

71. The Board is equally of the considered persuasion that if the said criterion was of such importance to the subject tender from a technical perspective then the same ought to have featured at the technical evaluation stage.

72. The Board holds that having the same at the technical evaluation stage would have accorded the Procuring Entity the opportunity to interrogate the submitted bids more keenly and evaluate the same on considered merits in terms of what it substantively wanted out of the procurement process.

73. The Board wishes to reiterate its finding in ***PPARB No. 81 of 2020, Tunasco Insaat Anonim Sirketi v The Accounting Officer, Kenya Medical Supplies Authority & China Railway No. 10 Engineering Group Co. Ltd*** in quoting Andrew Hiles in his book Business Continuity Management: Global Best Practice (Rothstein Publishing, 30 Sep 2014, 4th Edition), which defines the term **“Technical Specifications”** as follows:

“Technical specifications is that part of the tender documents which provides to the bidder technical details of the materials, plant and equipment, services, or site activities which the bidder is to supply if he becomes a successful bidder.

74. The Board in ***PPARB No. 81 of 2020, Tunasco Insaat [supra]*** further quoted Andrew Hiles in noting the importance of technical specifications as follows:

“The determination of the technical specifications is a crucial task during the development of the tender documents, because the success of the tender procedure in leading to the acquisition of the requested results (supplies, services or

constructions) at the right quality in the available time and within the available budget, depends on the technical specifications. For this reason, the technical specifications must be determined in such a way as to ensure both of the following two aims:

- ***The achievement of the desirable characteristics which are requested by the procuring entity;***
- ***The promotion of the broadest possible competition between the economic operators to tender for the contract so that the optimum cost is achieved and the conditions of transparency and equal treatment of candidates are ensured***

The technical specifications are the most important section of the tender document, both for the purchasing organization as well as for the bidders, since it is the specification which sets out precisely what characteristics are required from the materials, plant and equipment, services or site activities being sought by the purchasing organization.

Technical specifications clearly, accurately and completely describe in detail what the purchasing organization wants the successful bidder to supply. A clear, accurate and complete specification is the foundation of any purchase, and ensures

the best chance of getting what the purchasing organization wants.”

75. The Board therefore notes that the Procuring Entity would have been better placed listing the said criterion at the technical evaluation stage where it would have had the opportunity to critically assess all submitted bids on the proof of works submitted and thereafter make an informed decision on the same rather than where it was at the preliminary evaluation stage as all the Procuring Entity could do then was assess the same at face value.
76. The Board is therefore unable to accept the Respondents’ position that despite the wording of the criterion and where it appeared in the tender documents and procurement process, that their intention had been for parties to show proof that they had undertaken construction of school laboratories to a certain standard. The Board further faults them as being the makers of the Tender Document who knew the specific requirements of what they wanted, they should have categorically spelt the same out, rather than inferring the same without basis.
77. The Board finds that it became apparent at the hearing that what the Respondents were looking for out of the said criterion was comparability with previous projects, specifically, school laboratories, which placed participant bidders under prejudice as the said requirement and/or interpretation had not featured anywhere.

78. The Board is cognizant of the Court's pronouncement on the issue of evaluation of tenders in ***Public Procurement Administrative Review Board; Arid Contractors & General Supplies; Ex parte Meru University of Science & Technology; 2019 eKLR*** where Mativo J (as he then was) held as follows:

"79. For there to be fairness in the public procurement process as required under Article 227, all bids should be considered on the basis of their compliance with the terms of the solicitation documents, and a bid should not be rejected for reasons other than those specifically stipulated in the solicitation document.

82. The Evaluation Committee had no choice but to evaluate the bids in accordance with the eligibility and mandatory requirements of the Tender Documents by examining the documents before it...."

79. The Board thus finds that ideally, the Procuring Entity was precluded from rejecting bids based on their incorrect interpretation of the criterion in the Tender Invitation Notice.

80. The Board therefore finds that because the rationale in finding bids unresponsive was that the Applicant as lowest evaluated bidder and Josewood Lab Africa had not constructed laboratories as works of comparable magnitude and complexity, the Applicant's bid was not fairly evaluated using the criteria laid out in the tender documents.

Whether the Procuring Entity's decision to terminate the subject tender's procurement proceedings was in line with the provisions of Section 63 of the Act

81. The Board notes that the other key contention between is the purported termination of procurement proceedings by the Procuring Entity *vide* Notification Letters dated 23rd June 2025 and addressed to parties. For ease of reference, the Notification Letter addressed to the Applicant reads as follows:

***"AIC Tamboiyo Secondary School,
P.O. Box 187 – 30307, Mosoriot.***

TENDER AWARD NOTIFICATION

Date: 23/06/2025

TO: JAYLON LOGISTICS LIMITED,

P.O. Box 83, KAPSABET

Dear Sir/Madam,

**RE: TENDER AWARD - PROPOSED CONSTRUCTION OF A
LABORATORY**

TENDER NO: CDF/LC/25/01

I am writing to inform you that the above mentioned tender was not awarded because none of the bidders met the required threshold as per the advertisement condition.

The tender is hereby re-advertised. Thank you for your interest in working with us.

For further information, contact the school.

Thank you.

Yours faithfully,

[Signed]

***MR. PHILEMON KIPKOECH,
B.O.M. SECRETARY/PRINCIPAL,."***

82. The Board understands the Applicant's case to be that the Respondents' actions in terminating the subject tender's procurement proceedings fell outside the ambit of the provisions of Section 63 of the Act.

83. The Board further understands the Applicant's case to be that the contents of the Notification Letter dated 23rd June 2025 did not establish any of the listed grounds for termination of a tender nor had the Respondents given any evidence to support the said claim that none of the bidders had in any event fulfilled the requirements as per the advertisement conditions.

84. The Board further understands the Applicant's case to be that the Procuring Entity had been under a duty to place sufficient reasons and evidence to justify and support the grounds for termination of a procurement process under challenge.

85. The Board however understands the Respondents' case to be that its actions in terminating the subject tender's procurement proceedings had been free, fair and justifiable in the circumstances.
86. The Board further understands the Respondents' case to be that at the Award stage when it became apparent to it that both the lowest and second lowest evaluated bidders had failed to provide proof with respect to the preliminary criterion relating to works of similar magnitude and complexity, it was necessary to terminate the procurement proceeding and thereafter re-advertise.
87. Turning to the issue of termination of procurement proceedings, the Board notes that Section 63 of the Act speaks to termination of public procurement and asset disposal proceedings in the following terms:
- "(1) An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies—***
- (a) the subject procurement have been overtaken by—***
- (i) operation of law; or***
- (ii) substantial technological change;***
- (b) inadequate budgetary provision;***
- (c) no tender was received;***
- (d) there is evidence that prices of the bids are above market prices;***

(e) material governance issues have been detected;
(f) all evaluated tenders are non-responsive;
(g) force majeure;
(h) civil commotion, hostilities or an act of war; or
(i) upon receiving subsequent evidence of engagement in fraudulent or corrupt practices by the tenderer.

(2) An accounting officer who terminates procurement or asset disposal proceedings shall give the Authority a written report on the termination within fourteen days.

(3) A report under subsection (2) shall include the reasons for the termination.

(4) An accounting officer shall notify all persons who submitted tenders of the termination within fourteen days of termination and such notice shall contain the reason for termination."

88. Further to the foregoing, the Board is also aware of the position in ***Republic v Public Procurement & Administrative Review Board & 2 others Ex parte Applicant Dar-Yuksel-Ama [2022] KEHC 1172 (KLR)*** where the Trial Court held at paragraph 53 of its decision as follows:

"53 The pertinent question when a dispute over a procurement arises, and specifically the question whether the procuring entity was within the ambit of section 63 when terminating the process, is then, by who and at what stage

would the determination be made. In my view section 63 of the Act, if left unchecked, is prone to abuse by rogue accounting officers or procurement entities leading to erosion of the long fought for ethos of accountability in public procurement envisaged under Article 227 of the constitution. Where it is disputed whether the termination was proper, the Board must rise to the occasion and resolve the question within its mandate under Section 167 of the Act. Anything to the contrary would be a carte blanche to procuring entities to seek refuge in section 63 even when not deservedly so.”

89. The Board thus notes from the foregoing that for a Procuring Entity to be said to have terminated procurement proceedings in accordance with the law, demonstrating substantive and procedural compliance thereto, the following needs to happen:
- a. The termination must be based on any of the grounds under section 63(1) (a) to (i) of the Act;
 - b. The Accounting Officer must give a Written Report to the PPRA within 14 days of termination giving reasons for the termination; and
 - c. The Accounting Officer must, within 14 days of termination, give a written notice to the tenderers in the subject tender communicating the reasons for the termination.

90. The import of the foregoing is that essentially, the Accounting Officer of a Procuring Entity is under obligation to, within the confines of the law, provide sufficient reasons and evidence to justify, support the ground of termination of the procurement process under challenge, and ensure that procedural compliance.
91. Turning to the matter at hand, substantively, it was the Respondents' case that the reason for terminating the subject tender's procurement proceedings was that the lowest and second lowest evaluated tenderers were not responsive to the mandatory requirement on proof of works of similar magnitude and complexity. It was the Respondents' further case that according to them, they were prevented from considering the 3rd and 4th responsive bidders at the financial evaluation stage and in the circumstances could only settle for termination thereof.
92. The Board finds the afore-stated position to be legally incorrect for the reasons that firstly, there is no law that caps the number of responsive bids that can be considered for evaluation at a respective stage save for with respect to due diligence, limited solely to the lowest evaluated bidder, in line with the provisions of Section 83 of the Act.
93. Secondly, the Board notes that the reason provided by Section 63(1)(f) as a ground for termination proceedings is where **ALL** evaluated tenders are non-responsive. The Board notes that during the hearing it was the 1st Respondent's testimony that at the award ceremony, the 4th lowest evaluated bidder had been considered compliant with the said criterion.

94. In that regard, the Respondents could not have therefore been correct in stating that all the evaluated tenders were non-responsive in the face of an uncontroverted admission by the 1st Respondent that there had been a compliant bidder in terms of the Procuring Entity's interpretation of the said criterion.
95. The Board now turns to address the Respondents' compliance with the procedural requirements with respect to the purported termination of the subject tender.
96. The Board gathers from the Respondents' pleading as well as oral submission made on their behalf by the 1st Respondent that whereas the Procuring Entity had duly issued Notification Letters to the participant bidders, the Procuring Entity's Accounting Officer failed to prepare and share the requisite report in fulfilment of the provisions of Section 63(2) of the Act.
97. The Board thus finds that the Respondents were both substantively and procedurally non-compliant with respect to the provisions of Section 63 of the Act on termination of procurement proceedings relating to the subject tender.
98. The Board thus finds the purported termination of procurement proceedings by the Respondents improper. The upshot of the foregoing is that the Applicant's Request for Review Application succeeds in that regard.

What orders should the Board grant in the circumstances?

99. The Board finds that the Applicant's bid was not evaluated using the criteria as laid out in the subject tender's tender documents.

100. The Board also finds that the Procuring Entity's decision to terminate the subject tender's procurement proceedings was not in line with the provisions of Section 63 of the Act.

101. The upshot of these findings is that the instant Request for Review succeeds in terms of the final following orders:

FINAL ORDERS

102. 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:

- 1. The Notification Letters dated 23rd June 2025 addressed to bidders, including the Applicant herein, purporting to terminate Tender No. CDF/LC/25/01 for Proposed Construction of a Laboratory Block be and are hereby nullified and set aside ;**

- 2. The Tender Re-Advertisement Invitation Notice dated 27th June 2025 with respect to Tender No. CDF/LC/25/01 for Proposed Construction of a Laboratory Block be and is hereby nullified and set aside;**

3. The Procuring Entity is hereby directed to re-open the tendering process and thereafter re-invite all participant bidders for fresh re-evaluation at the Technical Evaluation Stage in accordance with the provisions of the Tender Document and taking into consideration the Board’s findings herein;

4. In view of the fact that the procurement process is not complete, each party shall bear its own costs in the Request for Review.

Dated at NAIROBI, this 30th day of July 2025.



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PANEL CHAIRPERSON
PPARB



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SECRETARY
PPARB