

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 24/2021 OF 15TH FEBRUARY 2021

BETWEEN

MILICON'S LIMITED.....APPLICANT

AND

**THE ACCOUNTING OFFICER, THE SPORTS, ARTS
AND SOCIAL DEVELOPMENT FUND.....RESPONDENT**

Review against the decision of the Accounting Officer of Sports, Arts and Social Development Fund with respect to Tender No. SASDEF/T/PROC/002/2020-2021 for the Proposed Completion of Office Block (SASDEF Plaza) on L.R. No. 209/12386 for Sports, Arts and Social Development Fund at Upper Hill-Nairobi.

BOARD MEMBERS

- | | |
|--------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Dr. Paul Jilani | -Member |
| 3. Mr. Jackson Awele | -Member |
| 4. Ms. Rahab Chacha | -Member |
| 5. Eng. Mbiu Kimani, OGW | -Member |

IN ATTENDANCE

- | | |
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| 1. Mr. Stanley Miheso | -Holding brief for the Secretary |
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BACKGROUND TO THE DECISION

The Bidding Process

Sports, Arts and Social Development Fund (hereinafter referred to as the "Procuring Entity") invited sealed tenders for Tender No. SASDEF/T/PROC/002/2020-2021 for the Proposed Completion of Office Block (SASDEF Plaza) on L.R. No. 209/12386 for Sports, Arts and Social Development Fund at Upper Hill-Nairobi (hereinafter referred to as "the subject tender") through an advertisement published in the Daily Nation Newspaper on 8th December 2020 with an initial bid submission deadline of 22nd December 2020.

Bid Submission Deadline and Opening of Bids

The Procuring Entity issued an Addendum on 16th December 2020 extending the bid submission deadline to 5th January 2021. The Procuring Entity received a total of 18 bids by the bid submission deadline of 5th January 2021. The same were opened shortly thereafter in the presence of bidders' representatives by a Tender Opening Committee and recorded as follows: -

Bid No.	Name of Firm
1.	M/S China State Construction Eng. Corp. Ltd
2.	M/S Modern Precast (K) Ltd
3.	M/S Parbat Siyani Construction Ltd
4.	M/S N.K Brothers Ltd
5.	M/S Landmark Holdings Limited
6.	M/S Tulsi Construction Ltd
7.	M/S Blue Valley Enterprises Ltd
8.	M/S Milicon's Limited
9.	M/S Dinesh Construction Ltd
10.	M/S China Railway No. 10 Engineering Group Co., Ltd
11.	M/S Epco Builders Ltd
12.	M/S Kuverji Govind Patel & Sons Ltd (K.G. Patel & Sons Ltd)

Bid No.	Name of Firm
13.	M/S Vaghjiyani Enterprises Ltd
14.	M/S Nightigale Enterprises Ltd
15.	M/S Vee Enterprises Ltd
16.	M/S Lexis International Limited
17.	M/S Trax Kenya Ltd
18.	M/S Quest Civil Engineers Limited

Evaluation of Bids

Section III. Evaluation Criteria of the Tender Document stipulated that evaluation would be carried out in the following stages: -

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

The Evaluation Committee undertook evaluation as follows: -

1. Preliminary Evaluation

At this stage, the Evaluation Committee applied the criterion under Stage 1. Preliminary Evaluation of Section III. Tender Evaluation Criteria of the Tender Document, divided in two categories as follows: -

- Stage (i) -Mandatory Requirements for Main Contractor
- Stage (ii) -Mandatory Requirements for Domestic Sub-Contractor

According to the Tender Document, any non-responsive main contractor under Stage (i). Mandatory Requirements for Main Contractor, would not be evaluated further, including their sub-contractor. Further, any bidder (main contractor) whose sub-contractor is found non-responsive under Stage (ii).

Mandatory Requirements for Domestic Sub-contractor, would not proceed to Technical Evaluation.

Having subjected bidders to evaluation in the two categories of Preliminary Evaluation, the Evaluation Committee recorded the outcome of evaluation as follows: -

	Non-Responsive Bids	Responsive Bids
Stage (i) Main Contractors	14 bids were non-responsive	The following 4 bids were found responsive: - Bidder No. 6 (M/s Tulsi Construction Ltd Bidder No. 8 (M/s Milicon's Limited) Bidder No. 14 (M/s Nightigale Enterprises Ltd Bidder No. 15 (M/s Vee Vee Enterprises Ltd
Only the 4 responsive bidders after Stage (i) were subjected to evaluation under Stage (ii)		
Stage (ii) Sub-Contractors	3 bids were found non-responsive Bidder No. 6 (M/s Tulsi Construction Ltd Bidder No. 14 (M/s Nightigale Enterprises Ltd Bidder No. 15)M/s Vee Vee Enterprises Ltd	1 bid was found responsive Bidder No. 8 (M/s Milicon's Limited)

2. Error Check Analysis

Having found that Bidder No. 8 (M/s Milicon's Limited) was responsive at the end of Preliminary Evaluation, the Evaluation Committee subjected the said bidder to an error check analysis and recorded the results of the same as follows: -

Item	Bid Amount	Corrected Amount	Variance (Bid Amount – Corrected Amount)
Preliminaries	97,580,596.75	97,580,596.75	Nil
Volume 1 of 7	511,618,306.25	511,575,106.25	43,200.00

Item	Bid Amount	Corrected Amount	Variance (Bid Amount – Corrected Amount)
Volume 2 of 7	64,925,981.00	64,925,981.00	Nil
Volume 3 of 7	45,582,640.00	45,882,640.00	(300,000.00)
Volume 4 of 7	7,571,083.00	7,571,083.00	Nil
Volume 5 of 7	25,860,816.00	25,725,816.00	135,000.00
Volume 6 of 7	89,442,301.00	89,442,301.00	Nil
Volume 7 of 7	22,791,549.00	22,791,549.00	Nil
Provisional Sums	405,900,000.00	408,400,000.00	(2,500,000.00)
Total	1,271,273,273.00	1,273,895,073.00	2,621,800.00

The Evaluation Committee observed that the bid of M/s Milicon’s Limited had an arithmetic error totaling to Kshs. 2,621,800.00 and thus, considered the same to be a major deviation. Subsequently, the Evaluation Committee found the said bidder non-responsive and thus, did not subject the said bidder to Technical Evaluation.

Recommendation

The Evaluation Committee recommended that the subject procurement proceedings be terminated pursuant to section 63 (1) (f) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as “the Act”) because all evaluated tenders were non-responsive.

Professional Opinion

In a professional opinion dated 3rd February 2021, the Procuring Entity’s Manager, Supply Chain Management Services reviewed the manner in which the subject procurement process was undertaken including evaluation of

bids as outlined in the Evaluation Report dated 2nd February 2021. He advised the Procuring Entity's Accounting Officer to approve termination of the subject procurement proceedings as recommended by the Evaluation Committee because all evaluated tenders were non-responsive and to consider re-tendering. The Accounting Officer approved the said professional opinion on 3rd February 2021.

Notification to Bidders

The Procuring Entity prepared letters of notification of results dated 3rd February 2020 stating that the submission by the tenderers were not successful and thus, the Evaluation Committee recommended a re-tender because none of the bidders met the condition during evaluation at the mandatory stage. Further, in letters dated 12th February 2021, the Procuring Entity notified bidders of the reasons why their bids were non-responsive and further informed bidders that the subject procurement proceedings were terminated pursuant to section 63 (1) (f) of the Act because all evaluated tenders were non-responsive.

THE REQUEST FOR REVIEW

M/s Milicon's Limited (hereinafter referred to as "the Applicant") lodged a Request for Review dated 15th February 2021 and filed on even date together with a Supporting Affidavit sworn on 15th February 2021 and filed on even date and a Supplementary Affidavit sworn on 16th February 2021 and filed on even date, through the firm of Muthomi & Karanja Advocates, seeking the following orders: -

- i. An order annulling the Respondent's decision purporting to adjudge the Applicant's Tender non-responsive, communicated through the Notification Letter (back) dated 3^d February 2020;***
- ii. An order directing the Respondent to re-evaluate the Tender in strict compliance with the law and the criteria set out in the Tender Documents;***
- iii. In the alternative to (b) above, an order directing the Respondent to award the Tender to Milicon's Limited (i.e. the Applicant herein);***
- iv. An order directing the Respondent to reimburse the Applicant the costs of and incidental to this Request for Review; and***
- v. Such other, further, alternative and/or incidental Order(s) as the Honourable Board may deem just and expedient.***

In response, the Respondent, acting in person, lodged a Memorandum of Response dated 17th February 2021 and filed on 22nd February 2021 together with a Replying Affidavit sworn on 19th February 2021 and filed on 22nd February 2021 and a Further Affidavit sworn on 19th February 2021 and filed on 22nd February 2021.

Pursuant to the Board's Circular No. 2/2020 dated 24th March 2020 detailing the Board's administrative and contingency management plan to mitigate Covid-19 pandemic, the Board dispensed with physical hearings and directed that all request for review applications be canvassed by way of written submissions. Clause 1 at page 2 of the said Circular further specified that

pleadings and documents would be deemed as properly filed if they bear the official stamp of the Board.

Accordingly, the Applicant lodged written submissions dated 25th February 2021 and filed on even date. The Respondent did not file written submissions.

BOARD'S DECISION

The Board has considered each of the parties' pleadings together with the confidential documents submitted to it pursuant to section 67 (3) (e) of the Act and finds that the following issues call for determination: -

- I. Whether the Accounting Officer of the Procuring Entity terminated the subject procurement proceedings in accordance with the substantive and procedural requirements for termination of a tender specified in section 63 of the Act, thus ousting the jurisdiction of the Board**

Depending on the outcome of the above issue: -

- II. What are the appropriate reliefs to grant in the circumstances?**

Termination of procurement and asset disposal proceedings is governed by section 63 of the Act. Further, if such termination meets the requirements of

section 63 of the Act, the jurisdiction of this Board is ousted pursuant to section 167 (4) (b) of the Act which provides as follows: -

"The following matters shall not be subject to the review of procurement proceedings under subsection (1)—

(a);

(b) a termination of a procurement or asset disposal proceedings in accordance with section 62 of this Act"
[i.e. section 63 of the Act] Emphasis by the Board

In **Miscellaneous Civil Application No. 1260 of 2007, Republic v. Public Procurement Administrative Review Board & Another Ex parte Selex Sistemi Integrati (2008) eKLR** (hereinafter referred to as "the Selex Sistemi Integrati Case"), the court while determining the legality of sections 36 (6) and 100 (4) of the repealed Public Procurement and Disposal Act, 2005 (hereinafter referred to as "the Repealed Act") that dealt with termination of procurement proceedings held as follows: -

"I now wish to examine the issues for determination. The first issue is whether the Public Procurement and Disposal Act, 2005, section 100 (4) ousts the jurisdiction of the court in judicial review and to what extent the same ousts the jurisdiction of the Review Board. That question can be answered by a close scrutiny of section 36 (6) of the said Act which provides: -

"A termination under this section shall not be reviewed by the Review Board or a court."

In the literal sense, section 36 (6) quoted above purports to oust the jurisdiction of the court and the Review Board. The Court has to look into the ouster clause as well as the challenged decision to ensure that justice is not defeated. In our jurisdiction, the principle of proportionality is now part of our jurisprudence. In the case of *Smith v. East Elloe Rural District Council* [1965] AC 736 Lord Viscount Simonds stated as follows: -

"Anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal."

It is a well settled principle of law that statutory provisions tending to oust the jurisdiction of the Court should be construed strictly and narrowly... The court must look at the intention of Parliament in section 2 of the said Act which is inter alia, to promote the integrity and fairness as well as to increase transparency and accountability in Public Procurement Procedures.

To illustrate the point, the failure by the 2nd Respondent [i.e. the Procuring Entity] to render reasons for the decision to terminate the Applicant's tender makes the decision amenable to review by the Court since the giving of reasons is one of the fundamental tenets of the principle of natural justice. Secondly, the Review Board ought to have addressed its mind to the question whether the termination met the threshold under the Act, before finding that it lacks jurisdiction to entertain the case before it on the basis of a mere letter of termination furnished before it.

The court in the Selex Sistemi Integrati Case held that this Board (as was constituted then) had the duty to question whether a decision by a procuring entity terminating a tender met the threshold of section 100 (4) of the Repealed Act, and that the Board's jurisdiction was not ousted by mere existence of a letter of termination furnished before it.

Further, in **Judicial Review Miscellaneous Application No. 142 of 2018, Republic v. Public Procurement and Administrative Review Board & Another ex parte Kenya Veterinary Vaccines Production Institute (2018) eKLR** (hereinafter referred to as "JR No. 142 of 2018") it was held as follows: -

"The main question to be answered is whether the Respondent [Review Board] erred in finding it had jurisdiction

to entertain the Interested Party's Request for Review of the Applicant's decision to terminate the subject procurement...

A plain reading of section 167 (4) (b) is to the effect that a termination that is in accordance with section 63 of the Act is not subject to review. Therefore, there is a statutory pre-condition that first needs to be satisfied in the said subsection namely that the termination proceedings are conducted in accordance with the provisions of section 63 of the Act, and that the circumstances set out in section 63 were satisfied, before the jurisdiction of the Respondent can be ousted.

As has previously been held by this Court in Republic v Kenya National Highways Authority Ex Parte Adopt –A- Light Ltd [2018] eKLR and Republic v. Secretary of the Firearms Licensing Board & 2 others Ex parte Senator Johnson Muthama [2018] eKLR, it is for the public body which is the primary decision maker, [in this instance the Applicant as the procuring entity] to determine if the statutory pre-conditions and circumstances in section 63 exists before a procurement is to be terminated...

However, the Respondent [Review Board] and this Court as review courts have jurisdiction where there is a challenge as to whether or not the statutory precondition was satisfied,

and/or that there was a wrong finding made by the Applicant in this regard...

The Respondent [Review Board] was therefore within its jurisdiction and review powers, and was not in error, to interrogate the Applicant's Accounting Officer's conclusion as to the existence or otherwise of the conditions set out in section 63 of the Act, and particularly the reason given that there was no budgetary allocation for the procurement. This was also the holding by this Court (Mativo J.) in R v. Public Procurement Administrative Review Board & 2 Others Ex-parte Selex Sistemi Integrati which detailed the evidence that the Respondent would be required to consider while determining the propriety of a termination of a procurement process under the provisions of section 63 of the Act"

The Court in JR No. 142 of 2018 affirmed the decision of the Court in the *Selex Sistemi Integrati Case* that this Board has the obligation to first determine whether the statutory pre-conditions of section 63 of the Act have been satisfied to warrant termination of a procurement process, in order to make a determination whether the Board's jurisdiction is ousted by section 167 (4) (b) of the Act.

It is therefore important for this Board to determine whether the Procuring Entity terminated the subject tender in accordance with provisions of section 63 of the Act, which determination can only be made by interrogating the

reason cited by the Procuring Entity and whether or not the Procuring Entity satisfied the statutory pre-conditions for termination outlined in section 63 of the Act, which comprise of substantive and procedural requirements. The provisions relating to the Procuring Entity's termination of the subject procurement proceedings fall under section 63 (1) (f), 2, 3 and 4 of the Act which states as follows: -

"(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)

(b)

(c)

(d)

(e)

(f) all evaluated tenders were non-responsive;

(g)

(h)

(i)

(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.

At paragraph 1 of the Request for Review, the Applicant alleges that, the Respondent breached section 63 (1) (f), (4) and 87 (3) of the Act read together with Regulation 82 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "Regulations 2020") by failing to disclose the specific reason why the Applicant's tender was unsuccessful at the mandatory stage of evaluation of tenders in a letter dated 3rd February 2020. At paragraph 15 of its Supporting Affidavit, the Applicant cites the stages of evaluation of bids in the subject tender as outlined in Section III. Tender Evaluation Criteria of the Tender Document to support its view that it satisfied all the requirements for evaluation at the Preliminary/Mandatory Requirements, Technical and Financial Evaluation stages and thus, the Applicant is not agreeable with the general reason cited by the Procuring Entity for disqualifying the Applicant's bid. Having perused the Respondent's pleadings, the Applicant deponed at paragraph 2 of its Supplementary Affidavit that it received another letter of notification dated 12th February 2021, on 15th February 2021 at 12.25 pm. According to the Applicant, it

learnt from the letter dated 12th February 2021 that the Respondent terminated the subject procurement proceedings pursuant to section 63 (1) (f) of the Act because all tenders were non-responsive. The Applicant further deponed at paragraph 4 (c) of its Supplementary Affidavit that the letter dated 12th February 2021 informed it that its tender was disqualified at a third preliminary evaluation stage because its tender had an arithmetic error of Kshs. 2,621,800.00 which was a major deviation and thus the Applicant's tender was disqualified pursuant to Regulation 74 (2) of Regulations 2020. In contesting this reason, the Applicant deponed at paragraph 5 of its Supplementary Affidavit that the Tender Document did not set out a third preliminary evaluation stage and thus, this was an extrinsic evaluation criterion that violates section 80 (2) of the Act. Further, the Applicant deponed that its tender did not have arithmetic errors but even if it did, bidders are bound by the price in their Form of Tender pursuant to section 82 of the Act. It is therefore the Applicant's view that a tender cannot be treated as non-responsive because of arithmetic errors.

In response, the Respondent avers at paragraph 2 of his Memorandum of Response that upon recommendation by the Evaluation Committee, the subject tender was terminated pursuant to section 63 (1) (f) of the Act because all tenders were non-responsive. According to the Respondent, an initial notification was sent to all bidders on 9th February 2021 and a clarification of the same was later sent on 15th February 2021 in compliance with section 63 (4) of the Act. The Respondent disputed the Applicant's contention on breach of section 87 (3) of the Act and Regulation 82 of Regulations 2020 by stating there was no successful tender since the subject

procurement process was terminated. To explain the reason for termination of the subject tender, the Respondent stated at paragraph 5 and 6 of his Memorandum of Response that a major deviation of Kshs. 2,621,800.00 was found in the Applicant's tender upon examining the unit price and that pursuant to Regulation 74 (2) of Regulations 2020 read together with section 79 (2) (b) of the Act, the Applicant's tender was disqualified.

Having considered parties' pleadings, the Board observes that the Applicant's initial letter of notification is dated 3rd February 2020 and the same contains the following details: -

"Reference is made to the abovementioned subject matter

This is to notify you that your submission for the above tender was not successful. The recommendation by the Evaluation Committee is for Re-tender as none of the bidders met the condition during evaluation at the mandatory stage.

You may make arrangements to collect your tender security from the Supply Chain Management Services, 7th Floor Flamingo House, during normal working hours

On behalf of SASDEF, I wish to convey our appreciation for your interest in this activity and look forward to your further participation in future opportunities"

In the Board's view, the Procuring Entity erroneously dated the said letter as **3rd February 2020** instead of 3rd February 2021, because from the

confidential documents submitted to the Board, the Accounting Officer approved the recommendation in the professional opinion on 3rd February 2021.

In a letter dated 10th February 2021, the Applicant's Advocates wrote to the Respondent stating as follows: -

"The above matter refers

- 1. On or around 9th February 2020, you emailed a letter to our client (back) dated 3rd February 2020 (hereinafter the "notification letter)***
- 2. The notification letter states that our client's tender was unsuccessful because "none of the bidders met the condition during evaluation at the mandatory stage"; and***
- 3. The notification letter is incomplete and/or vague to the extent that it does not disclose the specific reason (s) why our client's tender was unsuccessful.***

Our client has instructed us to request from you, as we hereby do, the specific reason (s) why its tender was unsuccessful. We should be much obliged if you would kindly treat the request as extremely urgent, as our client needs the information to decide on the best course of action."

Subsequently thereafter, the Respondent addressed a letter dated 12th February 2021 to the Applicant (in response to the letter dated 10th February 2021 by the Applicant's Advocates) stating as follows: -

"Reference is made to the above mentioned tender

Reference is also made to a letter dated 10th February 2021 from your Advocates, Muthomi Karanja Advocates

This is to notify you that the tender proceedings were terminated subject to section 63 (1) (f) of the Public Procurement and Asset Disposal Act, 2015 for the reason that the evaluated tenders were non-responsive.

We also wish to notify you that subject to section 63 (4) of the Act, your tender was reported as non-responsive for not complying with the mandatory requirements as per the invitation to tender notice in the third preliminary evaluation stage.

In table 4, it was observed that your bid had an error totaling to Two Million, Six Hundred and Twenty-One Thousand, Eight-Hundred Kenya Shillings only (Kshs. 2,621,800.00) which is considered a major deviation subject to Regulation 74 (2) of the Public Procurement and Asset Disposal Regulations, 2020.

Regulation 74 (2) of the Public Procurement and Asset Disposal Regulations of 2020 provides that any errors in the submitted tender arising from a miscalculation of unit price, quantity, sub-total 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

We appreciate your interest in this activity and look forward to your further participation in future opportunities”

Having considered the contents of the two letters of notification cited hereinbefore, the Board observes that the letter dated 3rd February 2020 informed the Applicant of a general reason that “none of the bidders met the condition during evaluation at the mandatory stage” and thus, the Evaluation Committee recommended a retender. On the other hand, the letter dated 12th February 2021 informed the Applicant that the subject procurement proceedings were terminated pursuant to section 63 (1) (f) of the Act because evaluated tenders were non-responsive. Further, the Applicant was informed that its tender was non-responsive for not complying with the mandatory requirements as per the invitation to tender notice in the third preliminary evaluation stage.

At this point, the Board deems it necessary to address its mind on the evaluation criteria set out in the Tender Document vis-à-vis the manner in which evaluation of tenders was undertaken in the subject procurement proceedings.

Section III. Tender Evaluation Criteria of the Tender Document outlined the stages of evaluation of bids in the subject tender as follows: -

1. Preliminary Evaluation-in 2 stages;

i. Stage (i) for Main Contractor

- ii. Stage (ii) for Domestic Sub-Contractors.**
- 2. Technical Evaluation (Both Main Contractor and Domestic Sub-Contractors)**
- 3. Financial Evaluation.**

The Mandatory Requirements for Evaluation of the Main Contractor under Stage (i) of Preliminary Evaluation are 17 in number (that is, MR 1 to MR 17). According to the Tender Document, ***"any non-responsive bidder [at the end of Stage (i)] shall not be evaluated further including their domestic sub-contractors"*** [Emphasis by the Board]

Further, the Mandatory Requirements of Evaluation of Domestic Sub-Contractors are outlined as: -

- Volume 2 of 7-Electrical Installation Works (MR 1-6);
- Volume 3 of 7-Lifts Installation Works (MR 1-8);
- Volume 4 of 7-CCTV, MATV & Structured Cabling Installation Works (MR 1-7);
- Volume 5 of 7- Generator Installation Works (MR 1-6);
- Volume 6 of 7- Plumbing, Drainage, Fire Protection and Borehole Installation Works (MR 1-5); and
- Volume 7 of 7-Mechanical Ventilation Works (MR 1-5).

The Tender Document further stated that: -

"Any bidder whose sub-contractors are non-responsive at this stage (Stage (ii) Mandatory Requirements for Domestic Sub-

contractors) shall not be evaluated further [Emphasis by the Board]

The Board observes that upon concluding Stage (ii) Mandatory Requirements for Domestic Sub-Contractors, the Tender Document required the Evaluation Committee to proceed to evaluate bidders under Stage 2. Technical Evaluation of Section III. Tender Evaluation Criteria of the Tender Document The same is outlined as follows: -

"Evaluation of the Main Contractor and Domestic Sub-Contractor

Assessment for Eligibility

PARAMETER	MAXIMUM POINTS
(i) Key Personnel	12
(ii) Contract completed in the last 5 years	20
(iii) Schedule of on-going projects	3.5
(iv) Schedule of contractor's equipment and transport	12
(v) Technical Proposal checklist	15
(vi) Audited Financial Report for the last 5 years	15
(vii) Evidence of Financial Resources	20
(viii) Name, address and telephone of Banks	

(contractor to provide)

1

(ix) Litigation History

1.5

Bidders were required to achieve an overall minimum technical score of 75 points so as to proceed to Financial Evaluation. According to Stage 3. Financial Evaluation of Section III. Tender Evaluation Criteria of the Tender Document, Financial Evaluation would be undertaken in three stages as follows: -

a) Determination of the corrected sums;

b) Comparison of rates for major components of works; and

c) Consistency of the rates.

Thereafter, the Evaluation Committee would recommend the lowest evaluated tender price pursuant to Stage 4. Recommendation for Award of Section III. Tender Evaluation Criteria of the Tender Document, for award of the subject tender.

According to the Evaluation Report dated 2nd February 2021, the Evaluation Committee first subjected the 18 bids received by the tender submission deadline of 5th January 2021 to a preliminary evaluation under Stage (i) Mandatory Requirements for Main Contractor and recorded the outcome as follows: -

	Non-Responsive Bids	Responsive Bids
Stage (i) Main Contractors	14 bids were non-responsive	The following 4 bids were found responsive: - Bidder No. 6 (M/s Tulsi Construction Ltd Bidder No. 8 (M/s Milicon's Limited) Bidder No. 14 (M/s Nightigale Enterprises Ltd

	Bidder No. 15)M/s Vee Vee Enterprises Ltd
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Four (4) bidders were found responsive at the end of Stage (i). Mandatory Requirements for Main Contractor while the other fourteen (14) bidders were found non-responsive because the main contractors did not satisfy all requirements under Stage (i). Mandatory Requirements for Main Contractor and thus, their respective Domestic Sub-Contractors would not proceed to Stage (ii) for Domestic Sub-Contractors.

The remaining 4 bidders were subjected to evaluation under Stage (ii) for Domestic Sub-Contractors and the outcome was recorded as follows: -

Stage (ii) Sub-Contractors	3 bids were found non-responsive Bidder No. 6 (M/s Tulsi Construction Ltd Bidder No. 14 (M/s Nightigale Enterprises Ltd Bidder No. 15)M/s Vee Vee Enterprises Ltd	1 bid was found responsive Bidder No. 8 (M/s Milicon's Limited)
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Having found the Applicant's tender responsive at the preliminary evaluation stage, the Evaluation Committee subjected the Applicant's tender to what the Evaluation Committee refers to as an "**Error Check Analysis**" and the outcome of the same was recorded in Table 4 of the Evaluation Report dated 2nd February 2021 as follows: -

Item	Bid Amount	Corrected Amount	Variance (Bid Amount – Corrected Amount)
Preliminaries	97,580,596.75	97,580,596.75	Nil
Volume 1 of 7	511,618,306.25	511,575,106.25	43,200.00
Volume 2 of 7	64,925,981.00	64,925,981.00	Nil
Volume 3 of 7	45,582,640.00	45,882,640.00	(300,000.00)
Volume 4 of 7	7,571,083.00	7,571,083.00	Nil
Volume 5 of 7	25,860,816.00	25,725,816.00	135,000.00
Volume 6 of 7	89,442,301.00	89,442,301.00	Nil
Volume 7 of 7	22,791,549.00	22,791,549.00	Nil
Provisional Sums	405,900,000.00	408,400,000.00	(2,500,000.00)
Total	1,271,273,273.00	1,273,895,073.00	2,621,800.00

The Evaluation Committee observed that the Applicant's tender had an error totaling to Kshs. 2,621,800.00 and thus, considered the same to be a major deviation. Subsequently, the Evaluation Committee found the Applicant's bid non-responsive pursuant to Regulation 74 (2) of Regulations 2020. Thereafter, the Evaluation Committee recommended termination of the subject procurement proceedings pursuant to section 63 (1) (f) of the Act because in its view, all tenders were non-responsive.

From the foregoing, the Board observes that the Evaluation Committee conducted an **Error Check Analysis** on the Applicant's tender upon concluding evaluation under Stage (ii) of Preliminary Evaluation, yet the Tender Document required bidders found responsive at the end of Stage (ii) of Preliminary Evaluation to proceed to Stage 2. Technical Evaluation of Section III. Tender Evaluation Criteria of the Tender Document. Section 80 (2) of the Act, cited by the Applicant provides that: -

"The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents"

The above provision requires evaluation and comparison of tenders to be undertaken using the procedures and criteria set out in the tender documents. The procedures and criteria in this instance, required a tender that is responsive after preliminary evaluation to be subjected to Technical Evaluation and not an "**Error Check Analysis**" which was subsequently referred to as a "**third preliminary evaluation**" in the Applicant's letter of notification dated 12th February 2021.

It is the Board's considered finding that the Evaluation Committee applied extraneous criteria when evaluating the Applicant's tender contrary to section 80 (2) of the Act by introducing an **"Error Check Analysis"** or **"third preliminary evaluation"**, at the end of Stage (ii) of Preliminary Evaluation yet, Preliminary Evaluation only comprised of two limbs (that is, Stage (i) Mandatory Requirements for Main Contractor and Stage (ii) Mandatory Requirements for Domestic Sub-Contractor). The Applicant's tender ought to have proceeded to Technical Evaluation upon being found responsive at the end of the second limb of Preliminary Evaluation and should not have been subjected to an **"Error Check Analysis"**, after Preliminary Evaluation.

Having found the Applicant's tender ought to have proceeded to Technical Evaluation, it is important to establish the stage of evaluation where a bidder's tender sum is considered.

To address this question, the Board observes that the old dispensation on public procurement and asset disposal proceedings as was previously outlined in the repealed Public Procurement and Disposal Act, 2005 (hereinafter referred to as "the Repealed Act"), section 63 thereof, provided a procedure for correction of arithmetic errors as follows: -

"63. (1) The procuring entity may correct an arithmetic error in a tender.

(2) The procuring entity shall give prompt notice of the correction of an error to the person who submitted the tender.

- (3) *If the person who submitted the tender rejects the correction, the tender shall be rejected and the person's tender security shall be forfeited.***

Given section 63 of the Repealed Act allowed correction of errors, the Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as "the Repealed 2006 Regulations") recognized correction of arithmetic errors as one of the components for Financial Evaluation. Regulation 50 of the Repealed 2006 Regulations provided as follows: -

"50. (1) Upon completion of the technical evaluation under Regulation 49, 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, as read out at the bid opening;

(b) taking into account any corrections made by a procuring entity relating to arithmetic errors in a tender;

(c) taking into account any minor deviation from the requirements accepted by a procuring entity under section 64(2) (a) of the Act;

- (e) where applicable, converting all tenders to the same currency, using a uniform exchange rate prevailing at the date indicated in the tender documents;***
- (f) applying any discounts offered in the tender;***
- (g) applying any margin of preference indicated in the tender documents”***

Moving forward, the enactment of the Public Procurement and Asset Disposal Act No. 33 of 2015 changed the manner in which a tender sum ought to be treated. Section 82 of the Act provides that: -

“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”

Further, Regulation 77 of Regulations 2020 changed the manner in which financial evaluation is undertaken so as to arrive at the evaluated price of a tender. The said provision states as follows: -

“(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”***

Regulation 77 (2) (a) of Regulations 2020 provides that the first component of Financial Evaluation is taking the bid price in the tender form, because the tender sum as submitted in the Form of Tender is absolute and final and shall not be the subject of correction, adjustment or amendment in any way by any person or entity. Further, Regulation 77 of Regulations 2020 does not provide for correction of arithmetic errors (unlike Regulation 50 of the Repealed 2006 Regulations) so as to align itself with the provision under section 82 of the Act. Section 82 of the Act read together with Regulation 77 of Regulations 2020 shows a clear intention of the legislature to abolish correction of arithmetic errors during Financial Evaluation of tenders. Correction of Arithmetic errors is a procedure that belonged to the old dispensation under the Repealed Act and the Repealed 2006 Regulations and

is no longer applicable in the current regime introduced by section 82 of the Act read together with Regulation 77 of Regulations 2020.

It is the Board's considered view that the mischief the Act and Regulations 2020 has cured is a scenario where a bidder can quote a figure 'X' as its tender sum in the Form of Tender in anticipation of being the lowest evaluated bidder. However, upon realization that such a bidder is not the lowest evaluated bidder, it would collude with a procuring entity to correct arithmetic errors which it 'deliberately' created in its breakdown of prices (i.e. in the Bills of Quantities) so that upon correction, its tender sum is revised downwards, lower than the initial lowest bidder and be awarded the tender based on the corrected figure.

It is therefore evident that, from the onset, the Applicant's tender price (bid price) could only be considered during a Financial Evaluation, assuming the Applicant's tender was found responsive at the end of Technical Evaluation. During such exercise, no correction of errors would be undertaken on the Applicant's tender sum because any correction, adjustment and amendment is prohibited by section 82 of the Act and does not form part of the components of Financial Evaluation specified in Regulation 77 of Regulations 2020.

The Evaluation Committee found the Applicant's tender had an arithmetic error of Kshs. 2,621,800.00 that was treated as a major deviation pursuant to Regulation 74 (2) of Regulations 2020. This arithmetic error was discovered prematurely by introducing an extraneous criteria known as an

“Error Check Analysis” or **“third preliminary evaluation”** before evaluation at the Technical evaluation stage.

Be that as it may, the Board must now interrogate the Procuring Entity’s reason for termination of the subject procurement proceedings, which was cited after conclusion of an Error Check Analysis on the Applicant’s tender. The Procuring Entity relied on Regulation 74 (2) of Regulations 2020 to disqualify the Applicant’s tender. The said provision states as follows: -

“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”

Section 79 (2) (b) of the Act referenced above provides that: -

“79. (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); or

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

The Board observes that pursuant to section 79 (2) (b) of the Act, a responsive tender is not affected by errors or oversights that can be

corrected without affecting the substance of a tender. However, Regulation 74 (2) of Regulations 2020 views any errors from a miscalculation of unit price quantity subtotal and total bid price to be a major deviation that affects the substance of the tender and would lead to disqualification of the tender as non-responsive.

In considering the aforementioned provisions, the Board observes that Regulation 74 (2) of Regulations 2020 is subject to the provision of section 79 (2) (b) of the Act. In the article on **"Solicitors at Risk"** published in November 2013, Andrew Nickels explains the meaning of the phrase **"subject to"** in legal agreements and legislation as follows: -

"Subject to" looks ahead to the exception. It is used in a clause that is secondary to the clause it is expressed to be "subject to". It tells the reader which clause takes priority where there is an overlap"

In its **"Guide to Legislative Processes in Kenya"** published in 2015, the Kenya Law Reform Commission explains the relationship between subsidiary legislation and a primary legislation (that is, a Parent Act/Statute) as follows: -

"In other words, subsidiary legislation must conform to the primary legislation in all respects"

Thus, the Board deduces the meaning of **"subject to"** as applied in Regulation 74 (2) of Regulations 2020 to mean that Regulation 74 (2) of

Regulations 2020 must conform in all respects with section 79 (2) (b) of the Act because the primary legislation being the Act, takes priority over Regulations 2020.

Furthermore, section 31 (b) of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya provides that: -

"Where an Act confers power on an authority to make subsidiary legislation, the following provisions shall, unless a contrary intention appears, have effect with reference to the making of the subsidiary legislation—

(a)

(b) no subsidiary legislation shall be inconsistent with the provisions of an Act

Section 24 (2) of the Statutory Instruments Act No. 23 of 2013 further provides that: -

"statutory instrument (i.e. subsidiary legislation) shall not be inconsistent with the provisions of the enabling legislation, or of any Act, and the statutory instrument shall be void to the extent of the inconsistency" [Emphasis by the Board]

The Court in **Petition No. 20 of 2019, Victor Juma v Kenya School of Law & Council of Legal Education (Interested Party) [2020] eKLR** also addressed the legal relationship between a primary/parent legislation and a subsidiary legislation while comparing provisions of the Legal

Education (Accreditation and Quality Assurance) Regulations, 2016 and the Kenya School of Law Act, 2016 when it held as follows: -

"I see no reason why the provisions of a subsidiary legislation should override the express provisions of an Act of Parliament. It is therefore my finding that the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 are not applicable in this case, and the relevant legislative instrument to be applied is the KSL Act."

Given that subsidiary legislation should not be inconsistent with provisions of its enabling Act, when such an inconsistency arises, provisions of the Act supersede. Notably, section 180 of the Act provides that: -

"The Cabinet Secretary shall make Regulations for the better carrying out of the provisions of this Act and, without limiting the generality of the foregoing, may make Regulations to facilitate the implementation of this Act, and such regulations shall not take effect unless approved by Parliament pursuant to the Statutory Instruments Act, 2013"

Pursuant to section 180 of the Act, Regulations 2020 were made by the Cabinet Secretary of National Treasury and Planning and thus, Regulations 2020 cannot supersede its enabling Act.

Regulation 74 (2) of Regulations 2020 states that any errors 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 should lead to disqualification of a tender. On the other hand, section 79 (2)

(b) of the Act only permits errors or oversights that do not affect the substance of a tender to be declared responsive.

The Board has established certain errors or oversights can be corrected without affecting the substance of a tender. That notwithstanding, the tender sum remains the same and cannot be corrected, adjusted or amended in any way. This therefore means, any errors that leads to correction, adjustment or amendment of the tender sum is prohibited by section 82 of the Act. There is therefore an inconsistency between Regulation 74 (2) of Regulations 2020 and section 82 of the Act because any error that affects the tender sum cannot be corrected meaning, section 82 of the Act must prevail.

This explains why a tenderer is bound by its tender sum, therefore, a successful bidder ought to be prepared to implement a tender at its tender sum because award is made based on the tender sum specified in the Form of Tender.

These provisions support the Board's view that the Procuring Entity did not have leeway to correct arithmetic errors and term the same as a major deviation leading to disqualification of the Applicant's tender pursuant to Regulation 74 of Regulations 2020 without considering the import of section 79 (2) (b) and 82 of the Act.

Since the Act and Regulations 2020 do not recognize any process of correcting arithmetic errors, award of a tender ought to be made based on the tender sum. A successful tenderer is then required to accept the award made to it. If a successful tenderer discovers its tender had arithmetic errors

and refuses to accept an award that has been made based on its tender sum, then the Procuring Entity would proceed and award the tender to the next lowest evaluated tenderer at such tenderer's tender sum.

Assuming arithmetic errors are discovered during implementation of a tender, payment is made based on the tender sum in the successful tenderer's Form of Tender and such tenderer must provide all services, goods and works to the Procuring Entity at the tender sum specified in the Form of Tender. This will safeguard the Procuring Entity against instances where a tenderer submitted a figure X in the hopes of becoming the lowest evaluated tenderer and upon award of the tender to it, the tenderer signs a contract but demands payment of a higher amount because it asserts that it cannot implement the tender at the tender sum stated in its Form of Tender.

The Applicant submitted a tender sum of Kshs. 1,271,273,273.00. The Procuring Entity's corrected price after the Error Check Analysis on the Applicant's tender leads to an amount of Kshs. 1,273,895,073.00 (and a variance of Kshs. 2,621,800.00 indicated by the Evaluation Committee). If the Applicant proceeds to Financial Evaluation, it ought to be awarded the tender at its tender sum of Kshs. 1,271,273,273.00 and implement the subject tender at that price. The loss will be to the Applicant and not to the Procuring Entity, having found the Applicant must implement the subject tender at its tender sum.

Regulation 74 (2) of Regulations 2020 does not vest an automatic action for the Procuring Entity to find tenderers non-responsive as a result of arithmetic errors found in their bids because the said provision is subject to section 79 (2) (b) of the Act whilst taking into account how a tender sum ought to be treated pursuant to section 82 of the Act and the fact that correction of arithmetic errors does not form part of the components of Financial Evaluation specified in Regulation 77 of Regulations 2020. Evidently, the Evaluation Committee failed to take into consideration, the import of section 82 of the Act vis-à-vis Regulation 74 (2) of Regulations 2020.

The Board further notes that after disqualifying the Applicant's tender, the Evaluation Committee recommended termination of the subject procurement proceedings. This action, prompted the Board to consider the role of an Evaluation Committee as explained in the Act.

Section 46 (4) (a) of the Act states as follows: -

"An evaluation committee established under subsection (1), shall—

(a) deal with the technical and financial aspects of a procurement as well as the negotiation of the process including evaluation of bids, proposals for prequalification, registration lists, Expression of Interest and any other roles assigned to it."

On its part, Regulation 28 (2) of Regulations 2020 which provides as follows:-

"The accounting officer of a procuring entity shall appoint an evaluation committee for the purposes of carrying out the technical and financial evaluation of the tenders or proposals"

On the other hand, section 80 (4) of the Act states that: -

"The evaluation committee shall prepare an evaluation report containing a summary of the evaluation and comparison of tenders and shall submit the report to the person responsible for procurement for his or her review and recommendation"

The above provisions explain that an Evaluation Committee's role is to deal with the technical and financial aspects of bids, proposals for prequalification, registration lists, Expression of Interest and any other roles assigned to it. Upon conclusion of evaluation, the Evaluation Committee prepares an evaluation report containing a summary of evaluation and comparison of tenders.

Section 84 of the Act further states as follows: -

(1) The head of procurement function of a procuring entity shall, alongside the report to the evaluation committee as secretariat comments, review the tender evaluation report and provide a signed professional opinion to the accounting officer on the procurement or asset disposal proceedings.

(2) The professional opinion under sub-section (1) may provide guidance on the procurement proceeding in the event of dissenting opinions between tender evaluation and award recommendations.

(3) In making a decision to award a tender, the accounting officer shall take into account the views of the head of procurement in the signed professional opinion referred to in subsection (1).

From the above provision, the Board observes that the Head of Procurement function has the responsibility to review an evaluation report in order to give a professional opinion that serves the following functions: -

- a) Provide guidance on the procurement proceedings in the event of dissenting opinions between tender evaluation and award recommendations; and
- b) Guides an accounting officer in making a decision to award a tender.

On its part, Regulation 30 (f) of Regulations 2020 provides that: -

"30. In discharging the mandate provided for under the Act, members of the evaluation committee shall— (f) prepare a report on the analysis of the tenders availed and final ratings assigned to each tender and make recommendations and submit the report to the head of the procurement function"

Section 84 of the Act read together with Regulation 30 (f) of Regulations 2020 show that other than providing a summary of evaluation and comparison of tenders, an evaluation committee may also make recommendations and such recommendations ought to be on award of a tender, because the Professional Opinion ought to be a central aspect between tender evaluation and award recommendation. This is because, upon determining the lowest evaluated tenderer or the tenderer who submitted the tender with the highest total combined technical and financial score, an evaluation committee may recommend an award to that particular bidder in accordance with the award criteria spelt out in the Tender Document and the Act.

The Act considers the Head of Procurement function to be a person with the professional qualification capable of reviewing an evaluation report and recommending the appropriate action to be taken by the Accounting Officer. In the instant case, no award recommendation was made by the Evaluation Committee. Hence, the Evaluation Committee only had the obligation to provide a summary of evaluation and comparison of tenders in its Evaluation Report. In a scenario where all tenders are non-responsive after evaluation, the resulting action by an Evaluation Committee would be to bring this fact to the attention of the Accounting Officer, through the Head of Procurement function. The Head of procurement function would then review the evaluation report and issue a professional opinion recommending termination of the tender.

The Board has established the Evaluation Committee subjected the Applicant's tender to an "**Error Check Analysis**", prematurely and contrary to the procedures and criteria set out in Section III. Tender Evaluation Criteria of the Tender Document, as opposed to subjecting the Applicant's tender to Technical Evaluation. The Board has also established that, upon engaging in the said Error Check Analysis, the Evaluation Committee failed to take into consideration, the import of section 79 (2) (b) and 82 of the Act vis-à-vis Regulation 74 (2) of Regulations 2020. In essence, the Evaluation Committee should not have disqualified the Applicant's tender based on Regulation 74 (2) of Regulations 2020 which cannot supersede section 82 of the Act. It therefore follows that any action taken after such disqualification, such as (i) recommendation of termination of the subject tender, (ii) issuance of a professional opinion on termination of the tender pursuant to section 63 (1) (f) of the Act and (ii) approval of the same by the Respondent, were null and void ab initio.

That notwithstanding, this Board has an obligation to consider both substantive and procedural requirements for termination of a tender. In **PPARB Application No. 151 of 2020, Pinnie Agency Limited v. The Accounting Officer, Ministry of Transport, Infrastructure, Housing, Urban Development & Public Works, State Department for Housing & Urban Development**, the Board held at page 11 thereof as follows: -

"Failure to meet any requirements for termination; whether such a requirement is substantive or procedural in nature, would render such a termination null and void."

Similarly, in **Republic v. Public Procurement Administrative Review Board & another ex parte Kenya Veterinary Vaccines Production Institute (2018) eKLR**, the court held that: -

"In a nutshell therefore, the procuring entity is under duty to place sufficient reasons and evidence to justify and support the ground of termination of the procurement process under challenge. The Procuring Entity must in addition to providing sufficient evidence also demonstrate that it has complied with the substantive and procedural requirements set out under the provisions of section 63 of the Public Procurement and Asset Disposal Act, 2015"

Having considered the finding in the foregoing case, the Board notes that, in addition to citing any of the reasons listed in section 63 (1) of the Act, a procuring entity must also comply with the procedural requirements for termination of a tender specified in section 63 (2), (3) and (4) of the Act. Section 63 (2) and (3) of the Act gives the Procuring Entity an obligation to submit a written report on the termination to the Authority within fourteen days from the date of termination.

At paragraph 7 (ii) of its Replying Affidavit, the Respondent deponed that a written report was forwarded to the Public Procurement Regulatory Authority (hereinafter referred to as "the Authority") on 9th February 2021 informing the Authority that the subject tender was terminated pursuant to section 63 (1) (f) of the Act. The Board observes that the Respondent did not furnish

the Board with the alleged report in its pleadings or in the Procuring Entity's confidential file for the Board to peruse the contents of the alleged report and ascertain whether indeed the same was dispatched to the Authority within 14 days after termination of the subject procurement proceedings on 3rd February 2021. In essence, the Respondent failed to substantiate its allegation that a written report was furnished to the Authority on 9th February 2021 after termination of the subject procurement proceedings.

According to section 63 (4) of the Act, the Respondent has an obligation of notifying all persons who submitted tenders of the termination within fourteen days of termination and such notice shall contain the reason for termination. The Board observes that the Applicant received an initial letter of notification which stated that the Applicant's "***submission for the above tender was not successful. The recommendation by the Evaluation Committee is for Re-tender as none of the bidders met the conditions during evaluation at the mandatory stage***".

The Board observes that the Applicant attached an email extract to its Supplementary Affidavit in support of its allegation that it received another letter of notification of termination on 15th February 2021 at 12.52pm whose contents were already reproduced hereinbefore.

According to the Board's Appeals' Register and the Receiving Stamp on the face of the Applicant's Request for Review application containing an arrow showing the date and time when the said application was received, the Applicant filed its Request for Review at the Board's Registry Office on 15th February 2021 at 3.30pm. This therefore means, the Applicant received the

letter of notification of termination dated 15th February 2021 before its Request for Review was filed at the Board's Registry Office, thus, was notified of the said termination within 14 days from 3rd February 2021, being the date when the Respondent approved termination of the subject procurement proceedings. Even though the Board has found the Respondent's decision terminating the subject tender was unlawful, the Board would like to point out that the Respondent has an obligation of notifying tenderers of the specific reason why their respective tenders were found non-responsive (in instances where the ground under section 63 (1) (f) of the Act is cited) and the specific reason why a tender has been terminated to promote the principle of transparency under Article 227 (1) of the Constitution. This, in the Board's view, will ensure that the overriding objective of notification to bidders pursuant to section 63 (4) of the Act can be achieved. To that end, it is the Board's considered finding that section 87 (3) of the Act and Regulations 82 of Regulations 2020 would be applicable in a case where a tender has been awarded to a particular bidder.

Having found the Respondent failed to substantiate its allegation that a written report was furnished to the Authority on 9th February 2021 after termination of the subject procurement proceedings, the Board finds that the Procuring Entity did not satisfy the procedural requirements under section 63 (2) and (3) of the Act.

In totality of the first issue for determination, the Board finds that the Accounting Officer of the Procuring Entity failed to terminate the subject procurement proceedings in accordance with the substantive and procedural

requirements for termination specified in section 63 of the Act thus, the said termination is null and void. The effect of this finding is that the Board has jurisdiction to address the second issue framed for determination.

On the second issue for determination, having nullified the Accounting Officer's decision terminating the subject procurement proceedings, the Board must now identify the next step that the Respondent ought to have taken before he purported to terminate the subject tender. As already observed by the Board, the Applicant's tender ought to have proceeded to Technical Evaluation, because the procedures and criteria specified in Section III. Tender Evaluation Criteria of the Tender Document required a tender that is responsive at the end of Preliminary Evaluation, to be subjected to Technical Evaluation.

Assuming the Applicant's tender is found responsive at the end of Technical Evaluation, then the same ought to proceed to Stage 3. Financial Evaluation of the Tender Document. The Board would like to point out that Financial Evaluation is divided into three components listed in Section III. Tender Evaluation Criteria as; (a) Determination of the Corrected Tender Sums, (b) Comparison of Rates for major components of works and (c) Consistency of the rates.

With regards to Clause (a) Determination of Corrected Tender Sums, the Tender Document provides thus: -

(a) Determination of the corrected tender sums

The corrected tender sum for each bid shall be determined by-

- (1). Taking the bids price, as read out at the bid opening;***
- (2). Adjusting the tender sum by taking into account any correction made relating to arithmetic errors***

Arithmetic errors will be corrected by the Procuring Entity as follows: -

(i) if there is a discrepancy between the unit prices and the total price that is obtained by multiplying the unit price and quantity, the unit price shall prevail, and the total price shall be corrected, unless in the opinion of the Procuring Entity there is an obvious misplacement of the decimal point in the unit price, in which the total price as quoted shall govern and the unit price shall be corrected;

(ii) if there is an error in a total corresponding to the addition or subtraction of subtotals, the subtotals shall prevail and the total shall be corrected;

(iii) Where there is a discrepancy between the amounts in figures and in words, the amount in words will govern; and

(iv) The committee shall promptly write to the tenderer and if the tenderer rejects the correction, the tender shall be rejected and the tender security forfeited. If the tenderer accepts the correction, the error shall be considered in adjusting the tender sum.

(3) Adjusting the tender sum by taking into account any quantified minor deviations where applicable pursuant to Stage 2 (c) of this evaluation criteria) which were documented, quantified and accepted by a procuring entity (as described in Stage 2 of the Technical Evaluation of this criteria -Assessment of Deviations)

(4) Where applicable, converting all tenders to the same currency, using a uniform exchange rate prevailing at the date indicated in the tender documents;

(5) adjusting the tender sum by applying any discounts offered in the tender

(6) adjusting the tender sum by applying any margin of preference indicated in the tender documents.

The Board has already established any error that leads to correction, adjustment and amendment of the tender sum in any way is prohibited by section 82 of the Act. The Procuring Entity must therefore bear in mind that any process of determination of a corrected tender sum is tantamount to correction, adjustment and amendment of the tender sum contrary to section 82 of the Act and where such contradiction exists, the Act must prevail. The Respondent must ensure Financial Evaluation is carried out in accordance with the procedure specified in Regulation 77 of Regulations 2020 outlined hereinbefore, which procedure does not provide for correction, adjustment and amendment of the tender sum in any way.

In totality, the Request for Review succeeds in terms of the following specific orders: -

FINAL ORDERS

In exercise of the powers conferred upon it by section 173 of the Act, the Board makes the following orders in the Request for Review: -

- 1. The Accounting Officer of the Procuring Entity's letters of Notification of Results of the procurement proceedings in Tender No. SASDEF/T/PROC/002/2020-2021 for the Proposed Completion of Office Block (SASDEF Plaza) on L.R. No. 209/12386 for Sports, Arts and Social Development Fund at Upper Hill-Nairobi dated 3rd February 2020 addressed to all tenderers including the Applicant herein, be and are hereby cancelled and set aside.**
- 2. The Accounting Officer of the Procuring Entity's letters of Notification of Termination of the procurement proceedings in Tender No. SASDEF/T/PROC/002/2020-2021 for the Proposed Completion of Office Block (SASDEF Plaza) on L.R. No. 209/12386 for Sports, Arts and Social Development Fund at Upper Hill-Nairobi, dated 12th February 2021 addressed to all tenderers including the Applicant herein, be and are hereby cancelled and set aside.**
- 3. The Accounting Officer of the Procuring Entity is hereby ordered to direct the Evaluation Committee to reinstate the Applicant's tender at the Technical Evaluation Stage and**

conduct an evaluation at the Technical Evaluation Stage in accordance with Stage 2. Technical Evaluation of Section III. Tender Evaluation Criteria of the Tender Document read together with section 80 (2) of the Act.

- 4. Further to Order No. 3 above, the Accounting Officer is hereby ordered to ensure the subject procurement proceedings in Tender No. SASDEF/T/PROC/002/2020-2021 for the Proposed Completion of Office Block (SASDEF Plaza) on L.R. No. 209/12386 for Sports, Arts and Social Development Fund at Upper Hill-Nairobi proceeds to its logical conclusion, including the making of an award within fourteen (14) days from the date of this decision, taking into consideration the Board's findings in this Review.**
- 5. Given that the subject procurement proceedings have not been completed, each party shall bear their own costs in the Request for Review.**

Dated at Nairobi this 8th day of March 2021

CHAIRPERSON

SECRETARY

PPARB

PPARB