

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 10/2016 OF 16<sup>TH</sup>FEBRUARY, 2016**

**AND**

**APPLICATION NO. 12/2016 OF 23<sup>RD</sup>FEBRUARY, 2016**

**BETWEEN**

**J.K. CONSTRUCTION LIMITED ..... Applicant**

**MOUNT KENYA LIMITED ..... Applicant**

**AND**

**KIIRUA TECHNICAL TRAINING INSTITUTE ..... Procuring Entity**

Reviews against the decision of Kiirua Technical Training Institute in the Matter of Tender No. MOEST/TVET/114/2014-2015 for Proposed Erection and Completion of Twin Workshop, Classrooms and Office Block at Laikipia West Training Institute.

**BOARD MEMBERS PRESENT**

- |    |                         |                       |
|----|-------------------------|-----------------------|
| 1. | Mrs. Josephine Mong'are | - Member in the Chair |
| 2. | Mr. Peter Ondieki       | - Member              |
| 3. | Mr. Nelson Orgut        | - Member              |
| 4. | Mr. Hussein Were        | - Member              |
| 5. | Eng. Weche Okubo        | - Member              |

## IN ATTENDANCE

1. Mr. Philip Okumu -Board Secretariat
2. Ms. Shelmith Miano -Board Secretariat

## PRESENT BY INVITATION

### **Applicant10/2016 -J.K Construction Limited**

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1. James Karanja - Managing Director
2. Paul Kanari - Administrator
3. Mary Ndirangu - Management Consultant

### **Applicant 12/2016 -Mt. Kenya Limited**

1. Stephen Gitonga - Advocate
2. Oindo Anyango - Pupil
3. Fredrick Wambugu - Representative
4. Maxwell Wachira - Representative
5. George Gacheru - Representative

### **Procuring Entity-Kiirua Technical Training Institute**

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1. Daniel Mugambi - Principal

### **Interested Parties:**

1. Nelko Misati - Advocate, KAH Investments Ltd
2. Noah Mogire - Student, KAH
3. Mohamed Ahmed - Manager, KAH Investments Ltd
4. Mohamed Siyad Adan - Project Manager, KAH Investments

## **BOARD'S DECISION**

Upon hearing the representations of the parties and the interested candidates before the Board and upon considering the information and all the documents before it, the Board decides as follows:

## **BACKGROUND OF AWARD**

The Ministry of Education, Science & Technology (MOEST) invited bids for a National Open Tender for the construction of various Technical Training Institutes (TTIs) all over the country amongst them the proposed Technical Training Institute, Laikipia West in Laikipia County. The tender the subject of this request for review was mentored by Kiirua Technical Training Institute, which carried out the procurement process and was hence the Procuring Entity.

## **Request For Review No. 54/2015**

The tender No MOEST/TVET/114/2014-2015 for the Proposed Erection and Completion, Classrooms and Office Block for Laikipia West Technical Training Institute was re-tendered in the *Daily Nation* on Monday 10<sup>th</sup> August 2015 and *The Standard* newspapers on 14<sup>th</sup> August, 2015 by the Ministry of Education Science and Technology (MOEST). The tender closing and opening date was 8<sup>th</sup>September 2015. Fourteen (14) bidders, submitted their bids at the tender opening date of 8<sup>th</sup>September, 2015.

The Procuring Entity's tender evaluation committee evaluated the tenders and recommended award to Messrs KAH Investments Ltd which

recommendation was upheld by the tender committee on 15<sup>th</sup> October 2015. Messrs Jasir Contractors Limited challenged the decision of the Procuring Entity in the Request for Review No. 54/2015 which was filed with the Board on 23<sup>rd</sup> October 2015. The Board rendered a decision on the matter on 18<sup>th</sup> November, 2015 and ordered the Procuring Entity to prepare and issue a fresh tender document that is clear and without contradictions within 15 days of the decision in respect of the same works.

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**Re-tendering of Tender No. MOEST/TVET/114/2014-2015:**

The Procuring Entity invited fresh tenders for Tender No. MOEST/TVET/114/2014-2015 for the Proposed Erection and Completion, Classrooms and Office Block for Laikipia West Technical Training Institute as ordered by the Board in PPARB Case No. 54/2015. The tender closing and opening date was 12<sup>th</sup> January 2016. Nine firms submitted with tendertender amounts quoted as follows:-

1) M/s Plan & Trend EA Ltd	Kshs. 72,634,295.00
2) M/s Mount Kenya Ltd	Kshs. 52,104,429.00
3) M/s Mjengo & Allied Ltd	Kshs. 52,001,984.50
4) M/s J. K. Construction Ltd	Kshs. 56,263,877.00
5) M/s KAH Investments Ltd	Kshs. 57,192,308.00
6) M/s Radius Systems Ltd	Kshs. 54,396,975.00
7) M/s Corban Construction Ltd	Kshs. 50,694,650.00
8) M/s Blage Contractor Ltd	Kshs. 53,377,790.00
9) M/s Colombia Developers Ltd	Kshs. 55,471,853.00

## TENDER EVALUATION

The Evaluation Committee of the Procuring Entity met on 22<sup>nd</sup> January, 2016 and carried out the evaluation of the Tender. The tender was evaluated in four stages: stage one was determination of responsiveness, stage two was technical evaluation, stage three was financial evaluation and stage four was computation of the final score.

### Tender Responsiveness

The Committee determined the responsiveness of the tenders using the following criteria:-

- a) Certificate of Registration with the National Construction Authority
- b) Submission of valid Bid Bond of Kshs. 1 million
- c) Tax Compliance Certificate
- d) Duly filled Form of Tender
- e) Company Profile
- f) Proof of Payment for purchase of the Tender Document
- g) Class of Licence of Subcontractors.

The following four bidders did not qualify for further evaluation for the cited reasons and were not therefore evaluated beyond the Preliminary Evaluation stage:

1. Plan & Trend EA Ltd provided a Bid Bond of Kshs. 800,000
2. Radius Systems Ltd provided a Bid Bond of Kshs. 600,000
3. The subcontractor for Mjengo & Allied Ltd did not provide the ERC Certificate
4. The subcontractor for Radius Systems Ltd did not provide the NCA7 Registration Certificate from National Construction Authority.

### Technical Evaluation

Tenders were analysed to determine compliance with General and Particular specifications for the works. The bidder was required to fill in the Technical Schedule for equipment and items indicating country of origin, model/make/manufacturer of the item they propose to supply. A maximum score of 50 marks was assigned for this section. The tender evaluation committee evaluated the six tenders that qualified at stage one for technical evaluation and assigned all of them the maximum score of 50 marks.

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### Financial Evaluation

The Evaluation Committee evaluated the bids for financials in two parts: the deviation from the estimate and the financial score. On the deviation, the Committee analysed each bid based on the deviation from the engineer's estimate of Kshs 57,684,768.00. The tender sums of the qualifying bidders and the engineer's estimate were to be reduced by omitting PC sums, Provisional Sums and Contingency from the respective amounts. The average of the adjusted tender sums so obtained was to be calculated. The deviation of the reduced amounts in respect of each bidder from the average was then to be worked out as a percentage of the average and scores allocated to a maximum of 30.

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On the financial score the Evaluation Committee determined the score by comparing the tender sums from all responsive bidders using the formula

$$F_s = 20 \times F_m/F$$

Where  $F_s$  is the financial score,  $F_m$  is the lowest priced responsive financial bid and  $F$  is the price of the bid under consideration.

The financial score was to be allocated a maximum of 20%.

The Evaluation Committee performed the Financial Evaluation as follows:

Bidder No.	Bidder Name	Computation of Financial Score	Fs
1.	Mount Kenya	$20 \times \frac{52,104,429}{57,684,768} = 18.1$	18.1
2.	J. K. Construction	$20 \times \frac{56,263,877}{57,684,768} = 19.5$	19.5
3.	KAH Investment	$20 \times \frac{57,192,308}{57,684,768} = 19.8$	19.8
4.	Corban Construction	$20 \times \frac{50,694,650}{57,684,768} = 17.5$	17.5
5.	Blage Contractor Ltd	$20 \times \frac{53,377,790}{57,684,768} = 18.5$	18.5
6.	Colombia Developers	$20 \times \frac{55,471,853}{57,684,768} = 19.2$	19.2

### Final Score

In order to get the total score the Evaluation Committee was to combine the Technical Score + Tender Sum Comparison + Financial Score

That is,  $T_s + TSC + F_s$

The lowest responsive bidder with a score 75% and above was to be recommended for award.

No.	Bidder Name	Scores
1.	Mount Kenya	$50 + 30 + 18.1 = 98.1$
2.	J. K. Construction	$50 + 28.5 + 19.5 = 98.0$

3.	KAH Investment	50	+	30	+	19.8	=	98.8
4.	Corban Construction	50	+	21	+	17.5	=	88.5
5.	Blage Contractor Ltd	50	+	25.5	+	18.5	=	94.0
6.	Colombia Developers	50	+	28.5	+	19.2	=	97.7

### **Recommendation**

The Evaluation Committee noted that M/s KAH Investment scored 98.8 which was above the 75% as required for one to be awarded the tender as per the guidelines. The Evaluation Committee thus recommended that M/s KAH Investment be awarded the tender.

### **TENDER COMMITTEE'S DECISION**

The Procuring Entity's Tender Committee at its meeting of 9<sup>th</sup> February, 2016 approved the recommendation of the tender evaluation committee and awarded Tender No. MOEST/TVET/114/2014-2015 for the Proposed Erection and Completion, Classrooms and Office Block for Laikipia West Technical Training Institute to M/s KAH Investments Limited.

### **REQUESTS FOR REVIEW NO. 10/2016 & 12/2016**

Two Requests for Review were lodged in the Matter of Tender No. MOEST/TVET/114/2014-2015 for Proposed Erection & Completion of Twin Workshop, Classrooms & Office Block for Laikipia West Technical Training Institute. M/s J. K. Construction Limited, the first Applicant, whose address



for purposes of these proceedings is Post Office Box 965-10400, Nanyuki, filed Request for Review No. 10/2016 on 16<sup>th</sup> February, 2016. M/s Mount Kenya Limited, the second Applicant, whose address for purposes of these proceedings is Post Office Box 76817-00200, Nairobi, filed Request for Review No. 12/2016 on 23<sup>rd</sup> February, 2016.

The two Requests for Review relate to the same tender and the parties are the same. For efficiency, the Board consolidated the two requests under Regulation 82 of the Regulations and proceeded to hear them as one request for review. However during the hearing, counsel for the Applicant in the Request for Review No. 12/2016 applied to withdraw its request. Since no party objected to the withdrawal the Board allowed the Applicant to withdraw Request for Review No. 12/2016. The Applicant in the withdrawn Request for Review however elected to retain its right to participate in the proceedings as an Interested Party.

The Review now left before the Board for determination is Request for Review No. 10/2016 filed on 16<sup>th</sup> February 2016 in which the Applicant sought the following orders:

- 1. That the Procuring Entity suspend the procurement process forthwith until the Review is concluded and determined;*
- 2. That the Board rescinds the decision to award the tender to the alleged successful tenderer;*
- 3. That in view of the recurrent flawed tender evaluation process presided by the Procuring Entity, the Board constitute an Independent Tender Evaluation Committee to carry out the re-evaluation of the two tenders of the Applicant and the alleged successful tenderer strictly in accordance*

*with the advertisements and the given Tender Evaluation criteria in order to determine the real winner between the two tenderers;*

*4. That subsequent to Item (3) above, the determined winner be awarded the Contract forthwith to mitigate unnecessary delays and disruption of the Project for the good of the people of Laikipia County and the Government's devolution development policies;*

*5. That Kiirua Technical Institute shall meet the costs of the Review.*

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The Applicant raised five grounds in support of the request for review. The grounds were reproduced in the Applicant's arguments herein. At the hearing, the Applicant consolidated and argued the grounds into the following broad grounds: -

1. That the Applicant submitted a responsive open tender of Kshs 56,253,877.00 strictly in accordance with the tender advertisements and the Tender Evaluation Criteria given in the Tender against the Engineer's estimates of Kshs 57,684,768 and subsequently qualified for the detailed evaluation in accordance with the Tender Document, Regulation 47 of the Legal Notice 174 and Clause 64 of the Public Procurement and Disposal Act, 2005;
2. That the Applicant duly emerged the lowest evaluated price thus the successful tenderer under the provisions of Clause 6.1, Tender Evaluation Criteria of the Tender Documents and Clause 66 of the Act;

3. That the decision to award the tender to the alleged successful tender on the basis of the alleged highest scores in pure disregard of the Tender Evaluation Criteria, Tender Document and the Act was unlawful, abusive of the tendering process and breach of a duty imposed on the Procuring Entity by the Act and that the Applicant is likely to suffer loss and discrimination;
4. That the composition of the tender evaluation committee without incorporating the end-user, Laikipia County Government was improper and merely constituted with an intent and purpose to skew the outcome of the tender process in favour of the alleged successful tender for the second time;
5. That in view of the documentary evidence of the requisite supportive documents submitted with the Applicant's tender and given under the List of Tender Documents, experience in similar works and construction of structures, personnel, owned equipment, certified credit facility of 60% of the tender price, etc. it was apparent that neither the Applicant or the successful bidder would have scored such high marks of 98% and above with such stringent evaluation criteria. However, the Applicant averred that he confidently scored above the requisite 75% and was thus the lowest evaluated tenderer.

The parties to the review were represented by Mr. James Karanja, the Managing Director for J.K. Construction, appearing in person; Mr. Daniel Mugambi, the Principal of Kiirua Technical Training Institute also appeared in person; Mr. Stephen Gitonga, advocate Mt. Kenya Ltd, 1<sup>st</sup> Interested Party; and Mr. Nelko Misati, advocate for KAH Investments Ltd, the 2<sup>nd</sup> Interested Party.

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### **THE APPLICANT'S CASE**

The Applicant submitted in its first three grounds of the request for review that it submitted a responsive open tender of Kshs. 56,263,877.00 in accordance with the tender advertisement and the Tender Evaluation Criteria given in the tender against the Engineer's Estimate of Kshs. 57,684,768. The Applicant further avers that it subsequently qualified for the detailed evaluation in accordance with the Tender Document, Regulation 47 of the Legal Notice 174 and Clause 64 of the Public Procurement & Disposal Act, 2005 ("the Act"). It alleged that its bid duly emerged as the lowest evaluated tender price and thus the successful tenderer under the provisions of Clause 6.1, Tender Evaluation Criteria of the Tender Document and Section 66 of the Act.

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The Applicant argued that the decision to award the tender to the successful bidder on the basis of the alleged highest score in disregard to the Tender Evaluation criteria, the Tender Document and the Act was unlawful, abusive of the tendering process and a breach of duty imposed on the Procuring Entity by the Act and that the Applicant was likely to suffer loss and discrimination.

On ground four of the request for review, the Applicant averred that the composition of the Tender Evaluation Committee without incorporating the Laikipia County Government, the alleged end-user, was improper and merely constituted with an intent and purpose to skew the outcome of the tender process in favour of the successful bidder for the second time.

The Applicant submitted on ground five of the request for review that in view of the stringent evaluation it would not have been possible for the Applicant to score such a high mark of 98% but that it would have scored at least 75%.

#### **PROCURING ENTITY'S RESPONSE**

In response to the Applicant's first three grounds of the request for review, the Procuring Entity admitted that the Applicant, indeed, submitted a tender of Kshs. 56,263,877.00/= which was well within the engineer's estimate of Kshs 57,684,768/=. The bid, according to the Procuring Entity, was however not the lowest bid and that the lowest priced bidder was M/s Corban Construction Limited who quoted Kshs. 50,694,650 and that several other bidders submitted bids of lower amounts than that of the Applicant. It submitted further that the Applicant's bid proceeded to the Technical Evaluation stage in which bidders were awarded scores appropriate to their capacity and that the Applicant was awarded a financial score of 19.5 and a final total score of 98%, which was lower than the final scores awarded to the successful bidder of 98.8% and to M/s Mount Kenya Ltd of 98.1%. The Procuring Entity averred that the Applicant's bid emerged third and therefore could not have been awarded the tender. The Procuring Entity

denied that there was any abuse of the tendering process and stated that there were no unlawful acts committed, nor breach of duty by the Procuring Entity as alleged.

The Procuring Entity, in response to ground four of the request for review denied that the composition of the Tender Evaluation Committee was improper and merely constituted with an intent and purpose to skew the outcome of the tender process in favour of the successful bidder. It averred that there was no law which required the participation of the Government of Laikipia County in the tendering process for the said project.

The Procuring Entity defended the high scores obtained by the bidders stating that they came about due to the fact that the exercise was a repeat of a previous one whose results had been cancelled and since the participants had participated in the first exercise, they were all aware of the process and the requirements and therefore all bidders put their best foot forward hence the high scores.

In conclusion the Procuring Entity prayed that the Applicant's Request for Review be dismissed and for orders:-

- a) THAT the tendering process for the tender subject matter of these proceedings was properly conducted in accordance with the provisions of the law and the tendering evaluation criteria;
- b) THAT KAH Investment was properly and legally declared the winner of the tender having attained the highest final score amongst the successful bidders after the conclusion of the tendering process;

- c) THAT no sufficient ground or special reason had arisen for the Public Procurement Administrative Review Board to interfere with the results of the tender;
- d) THAT the procuring Entity be permitted to enter into contract with the declared winner so that works on the said project may commence;
- e) THAT the Applicant, JK Construction Limited be condemned to meet the cost of the proceedings.

### **THE INTERESTED PARTIES' RESPONSES**

Mr. Nelko Misati for KAH Investments Ltd, the First interested Party averred that the request for review by the Applicant did not disclose cause of action and that the same was frivolous, vexatious and calculated to embarrass and prejudice the first Interested Party. It averred further that the evaluation criteria which was used was fair and that all the parties were subjected to the same and that nobody should complain. It also associated itself with the Procuring Entity's submissions. In conclusion, the first Interested Party submitted that it was fully qualified to be awarded the contract under Section 31 (3) of the Act and proceeded to urge the Board to dismiss it.

Mr. Stephen Gitonga for Mt. Kenya Limited, the second Interested Party averred that the ideals of procurement law are to promote transparent and fair competition. He averred further that if the formula and procedure that were applied were so opaque as to leave a doubt as its propriety, he would urge the Board, which is empowered by the new and old Act to re-evaluate and, of its own motion, test the formula applied as submitted and the process

that was applied to arrive at whatever scores were given to the tenderers and should the Board find that there was a breach or any tune of unfairness, to have no hesitation in setting aside the decision of the Procuring Entity.

### **THE APPLICANT'S REPLY**

In reply the Applicant stated that the evaluation on responsiveness was not done in accordance with tender evaluation criteria. It added that arithmetic errors which were a prerequisite to go to the next tender were not looked at in this tender as provided for under stage 3 of the evaluation. The comparison required the deduction of provisional sums and the contingencies before you could arrive on the weightings and that, to the Applicant's understanding, was not done.

### **THE BOARD'S FINDINGS**

The Board, having considered the submissions made by the parties and examined all the documents that were submitted to it, identified the following issues for determination in this Request for Review:

- (i) *Whether the Procuring Entity failed to evaluate the tenders in accordance with the evaluation criteria set out in the tender document contrary to the provisions of Section 66 (2) of the Act.*
- (ii) *Whether the Procuring Entity failed to award the tender to the Applicant being the lowest evaluated bidder, in breach of the provisions of Sections 66 (4) of the Act.*



The Board now proceeds to determine each of the issues framed for determination as follows:

1. **As to whether the Procuring Entity failed to evaluate the tenders in accordance with the evaluation criteria set out in the tender document contrary to the provisions of Section 66 (2) of the Act.**

The Board has perused the documents provided and observes that the tender number MOEST/TVET/114/2014-2015 for Proposed Erection & Completion of Twin Workshop, Classrooms & Offices' Block (2-Storey) for Laikipia West Technical Training Institute was a re-tender as a result of orders from an earlier Board decision in Application No. 54/2015 of 23<sup>rd</sup> October, 2015. In that decision the Board allowed the request for review and ordered the Procuring Entity to prepare and issue a fresh tender document that is clear and without contradictions within 15 days of the decision in respect of the same works.

The Board notes that the Procuring Entity invited fresh bids with a new tender document. The tender document provided for evaluation criteria at pages A-17 to A-24 of the Appendix to Instructions to Tenderers. Bids were to be evaluated in four stages of tender responsiveness; technical evaluation; financial evaluation; and final score. Six bidders out of the nine who tendered qualified at stage one. The six also obtained a full 50 marks at the second stage of technical evaluation. At stage three of financial evaluation, bidders were scored on the following criteria:

Tender sums: (The tender sums of bidders, who qualify at Stage 3A and the engineer's estimates, shall be reduced by omitting PC sums, provisional sums and contingency from the respective amounts. The average of the adjusted tender sums so obtained shall be calculated. The deviation of the reduced amounts in respect of each bidder from the average shall be worked out as a percentage of the average (Rounded off to one decimal point) and scores allocated as follows:

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- Deviation of between 0% and 1% - 30 marks
  - Deviation of between 1.1% and 2% - 28.5 marks
  - Deviation of between 2.1% and 3% - 27 marks
  - Deviation of between 3.1% and 4% - 25.5 marks
  - Deviation of between 4.1% and 5% - 24 marks
  - Deviation of between 5.1% and 6% - 22.5 marks
  - Deviation of between 6.1% and 7% - 21 marks
  - Deviation of between 7.1% and 8% - 19.5 marks
  - Deviation of between 8.1% and 9% - 18 marks
  - Deviation of between 9.1% and 10% - 16.5 marks
  - Deviation of between 10.1% and 11% - 15 marks
  - Deviation of between 11.1% and 12% - 13.5 marks
  - Deviation of between 12.1% and 13% - 12 marks
  - Deviation of between 13.1% and 14% - 10.5 marks
  - Deviation of between 14.1% and 15% - 9 marks
  - Deviation of between 15.1% and 16% - 7.5 marks
  - Deviation of between 16.1% and 17% - 6 marks
  - Deviation of between 17.1% and 18% - 4.5 marks
  - Deviation of between 18.1% and 19% - 3 marks
  - Deviation of between 19.1% and 20% - 1.5 marks
  - Deviation of between 20.1% and above - 0 marks
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Bidder No.	Bidder Name	Less: PC & Provisional sums	Deviation from average	% Deviation	Marks
Mount Kenya	52,104,429.00	49,604,429.00	2,579,810	4.95%	24.0
J. K. Construction	56,263,877.00	53,763,877.00	1,579,638	3.03%	27.0
KAH Investment	57,192,308.00	54,692,308.00	2,508,069	4.80%	24.0
Corban Construction	50,694,650.00	48,194,650.00	3,989,589	7.65%	19.5
Blage Contractor	53,377,790.00	50,877,790.00	1,306,449	2.50%	27.0
Colombia Developers	55,471,853.00	52,971,853.00	787,614	1.51%	28.5
Engineer's estimate	57,684,768.00	55,184,768.00	3,000,529	5.75%	22.5
Total		365,289,675.00			
Average		52,184,239.00			

The Board notes that the evaluation committee of the Procuring Entity applied the wrong formula from the one stated in the tender document and resulted in incorrect scores awarded to the bidders.

The Board observes that upon applying the formula for calculating the financial score;

$$F_s = 20 \times F_m / F$$

*Where  $F_s$  is the financial Score,  $F_m$  is the lowest priced responsive financial bid and  $F$  is the price of the bid under consideration, the result is as in the table below:*

Bidder Name	Computation of Financial Score	Fs
Mount Kenya	$20 \times \frac{50,694,650}{52,104,429} = 19.5$	19.5
J. K. Construction	$20 \times \frac{50,694,650}{56,263,877} = 18.0$	18.0
KAH Investment	$20 \times \frac{50,694,650}{57,192,308} = 17.7$	17.7
Corban Construction	$20 \times \frac{50,694,650}{50,694,650} = 20.0$	20.0
Blage Contractor Ltd	$20 \times \frac{50,694,650}{53,377,790} = 19.0$	19.0
Colombia Developers	$20 \times \frac{50,694,650}{55,471,853} = 18.3$	18.3

The Board further notes that the Procurement Entity did not apply the above formula correctly. The evaluation carried out by the Procuring Entity did not exactly apply this formula but a different one which amounted to as follows:

$$"Fs = 20 \times F/ Fm$$

*Where Fs is the financial Score, Fm is the lowest priced responsive financial bid and F is the price of the bid under consideration. "*

This, the Board notes, gave different scores to the bidders than they would have had had the correct formula in the Tender Document been used during evaluation. The formula when applied correctly, gave the scores contained in the above table.

From the score for deviation and the financial score, the Board notes that the final score, calculated with the formula,

Technical Score + Tender Sum Comparison + Financial Score

That is,  $T_s + TSC + F_s$

Gives the result in the table below:

No.	Bidder Name	Scores
1.	Mount Kenya	50 + 24.0 + 19.5 = 93.5
2.	J. K. Construction	50 + 27.0 + 18.0 = 95.0
3.	KAH Investment	50 + 24.0 + 17.7 = 91.7
4.	Corban Construction	50 + 19.5 + 20.0 = 89.5
5.	Blage Contractors Ltd	50 + 27.0 + 19.0 = 96.0
6.	Colombia Developers	50 + 28.5 + 18.3 = 96.8

The Board observes that applying the evaluation criteria in the tender document the bidder with the highest score at 96.8% is M/s Colombia Developers.

The Board takes cognizance of the requirements of Section 66 of the Act which states as follows:-

*Section 66 "(1) The procuring entity shall evaluate and compare the responsive tenders other than tenders rejected under section 63(3).*

*(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and no other criteria shall be used.*

*(3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2) –*

*(a) the criteria must, to the extent possible, be objective and quantifiable; and*

*(b) each criterion must be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality and service for the purpose of evaluation.*

*(4) The successful tender shall be the tender with the lowest evaluated price.”*

The Board finds and holds that the Procuring Entity failed to apply the evaluation criteria set out in the tender document in breach of Section 66 () of the Act. This ground of the request for review therefore succeeds.

**2. As to whether the Procuring Entity failed to award the tender to the Applicant being the lowest evaluated bidder in breach of the provisions of Section 66 (4) of the Act.**

The Board has observed in its findings in the first ground identified for determination that applying the criteria for evaluation stated in the tender document, the bidders scored as follows:

No.	Bidder Name	Total Score
1.	Colombia Developers	96.8

2.	Blage Contractors Ltd	96.0
3.	J. K. Construction	95.0
4.	Mount Kenya Ltd	93.5
5.	KAH Investment	91.7
6.	Corban Construction	89.7

The Applicant, M/S J.K Construction scored a total of 95 behind M/S Colombia Developers and M/s Blage Contractors Ltd. Section 66 (4) of the Act states that the successful tender shall be the tender with the lowest evaluated price. The Board finds that the Applicant was not the lowest evaluated bidder. The tender with the lowest evaluated price is M/S Colombia Developers. This ground of review therefore fails.

### **FINAL ORDERS**

In view of all the above findings and in the exercise of the powers conferred upon it by the Provisions of Section 173 of the Public Procurement and Asset Disposal Act No.33 of 2015, the Board makes the following orders on this Request for Review:-

1. *The request for review succeeds and is hereby allowed.*
2. *The award of the tender to Messrs KAH Investments is hereby annulled.*
3. *In view of the fact that this request for review is the second one before the Board in respect of the same tender, the Board substitutes the*

*decision of the Procuring Entity with the decision of the Board and awards Tender No. MOEST/TVET/114/2014-2015 for the Proposed Erection and Completion, Classrooms and Office Block for Laikipia West Technical Training Institute to the lowest evaluated bidder, Messrs Colombia Developers Ltd.*

*4. The Procuring Entity is ordered to award the tender as directed herein and complete the procurement process within 15 days.*

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*5. In view of the fact that both parties were partially successful the Board makes no order as to costs.*

Dated at Nairobi on this 8<sup>th</sup> day of March, 2016

  
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**CHAIRMAN**

**PPARB**

  
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**SECRETARY**

**PPARB**