

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 129/2019 OF 29<sup>TH</sup> OCTOBER 2019**

**BETWEEN**

**ISLAND HOMES DEVELOPERS**

**LIMITED.....APPLICANT**

**AND**

**KENYA PORTS AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**AND**

**DR. ARCH DANIEL MANDUKU,  
ACCOUNTING OFFICER**

**KENYA PORTS AUTHORITY.....2<sup>ND</sup> RESPONDENT**

**AND**

**WILFAK ENGINEERING LIMITED.....INTERESTED PARTY**

Review against the decision of Kenya Ports Authority dated 11<sup>th</sup> October 2019 with respect to Tender No. KPA/129/2018-19/PDM for Removal of Asbestos, Re-Roofing, Demolitions, Rain Water Harvesting, Solar Back-Up System and Associated Works at the Port of Mombasa.

**BOARD MEMBERS**

- |                         |              |
|-------------------------|--------------|
| 1. Ms. Faith Waigwa     | -Chairperson |
| 2. Mr. Ambrose O. Ngare | -Member      |
| 3. Dr. Joseph Gitari    | -Member      |

- 4. Ms. Phyllis Chepkemboi -Member
- 5. Ms. Rahab R. Chacha -Member

**IN ATTENDANCE**

- 1. Mr. Stanley Miheso -Holding brief for the Secretary
- 2. Ms. Maryanne Karanja - Secretariat

**PRESENT BY INVITATION**

**APPLICANT**

**-ISLAND HOMES DEVELOPERS LIMITED**

- 1. Mr. Gikandi Ngibuini -Advocate, Gikandi & Company Advocates
- 2. Mr. Mark Mwanzia -Advocate, Gikandi & Company Advocates
- 3. Mr. Davidson Ngibuini -Clerk, Gikandi & Company Advocates
- 4. Mr. Kibe Ngunji -Chief Executive Officer

**PROCURING ENTITY**

**-KENYA PORTS AUTHORITY**

- 1. Mr. Stephen Kyandih -Advocate

## **INTERESTED PARTIES**

### **A. WILFAK ENGINEERING LIMITED**

1. Mr. George Kamau -Advocate, Wambugu & Muriuki  
Advocates
2. Ms. Sylvia Waiganjo -Advocate, Wambugu & Muriuki  
Advocates

### **B. CHILSONS ENTERPRISES**

1. Mr. Antony Lwangu -Company Secretary

## **BACKGROUND TO THE DECISION**

Kenya Ports Authority (hereinafter referred to as “the Procuring Entity”) advertised Tender No. KPA/129/2018-19/PDM for Removal of Asbestos, Re-Roofing, Demolitions, Rain Water Harvesting, Solar Back-Up System and Associated Works at the Port of Mombasa (hereinafter referred to as “the subject tender”) on 16<sup>th</sup> April 2019.

### **Bid Submission Deadline and Opening of Bids**

The Procuring Entity received a total of 7 bids. The same were opened by a Tender Opening Committee. The Accounting Officer then appointed an Evaluation Committee who evaluated bids in three stages.

## Evaluation of Bids

### 1. Preliminary Evaluation

All bid submissions were subjected to the preliminary evaluation criteria as provided in Section 2.1, 2.3, 4, 16, 17 and 18 of Appendix to Instructions to Tenderers of the Tender Document to determine compliance to Mandatory Requirements. At the end of this stage, six bids were found non-responsive, hence did not proceed to Technical Evaluation.

### 2. Technical Evaluation

The bid of M/s Wilfak Engineering Ltd was subjected to the technical evaluation criteria as provided in Sections 16, 17 & 20 of the Tender document and awarded marks as summarized in the table below:-

No.	Evaluation Criteria	Wt. (%)	Marks awarded
1.	Evidence of previous experience. These shall be testimonials from past clients/employers, completion certificates, final certificates with names, addresses and telephone contacts of clients who may be contacted for further information on these contracts for each of the works provided. Such previous experience shall include all the following: - <b>(38 Marks)</b>	<b>38</b>	32
2.	Major items of construction equipment proposed to carry out the Contract and detail of whether they are owned, leased or to be hired <b>(provide evidence of ownership/ lease)</b> . The equipment should include but not be limited to the following functions <b>(24 marks)</b> :	<b>24</b>	10
3.	Qualifications and experience of key site management / technical personnel and their CVs and copies of certificates <b>(24 marks)</b> :	<b>24</b>	24
4.	Certified copies of Audited Financial reports for the last three (3) years 2015, 2016 and 2017 <b>(9 marks)</b> . a. <b>Liquidity ratios CA/CL <math>\geq</math> 2 = 3 marks</b> b. <b>Gearing ratios not more than 20% = 3 marks</b> c. <b>Profitability ratios 20% and above = 3 marks</b> <b>Marks will be awarded on the ratio indicated as an average for the three years as follows:</b> <b>Full marks for meeting requirement</b> <b>Zero (0) marks for not meeting requirement</b>	<b>9</b>	5

No.	Evaluation Criteria	Wt. (%)	Marks awarded
5.	Due Diligence; This will be carried out on bidders' premises, selected previous projects undertaken and the gazzeted disposal site <b>(5 marks)</b>	<b>5</b>	<b>5</b>
<b>Total Marks</b>		<b>100</b>	<b>76</b>

## Recommendation

The Evaluation Committee recommended M/s Wilfak Engineering Ltd to proceed for financial opening and evaluation having attained 76% in technical evaluation criteria, which is above the minimum pass mark of 75% required to proceed to the next stage of evaluation.

## Financial Opening

The financial opening was held on 8<sup>th</sup> August 2019 at the Procurement Conference Room starting at 1400Hours. The financial bid for M/s Wilfak Engineering Ltd, who qualified in the technical evaluation, was opened and the price quoted as read out in the Form of Tender as tabulated here below:-

No.	Name of Bidder	Total Amount Quoted VAT inclusive	Completion Period
1.	M/s Wilfak Engineering Ltd	Kshs. 1,217,499,220.34	180 Days

## Financial Evaluation

The Financial Evaluation was carried out by confirming the price quoted by M/s Wilfak Engineering Ltd, as indicated below:-

No.	Name of Bidder	Total Amount Quoted VAT inclusive	Completion Period
1.	M/s Wilfak Engineering Ltd	Kshs. 1,217,499,220.34	180 Days

## **Recommendation**

The Evaluation Committee recommended award of the subject tender to M/s Wilfak Engineering Ltd at their quoted price of Kshs. 1,217,499,220.34 VAT inclusive with a completion period of 180 Days for being the lowest evaluated bidder.

## **Professional Opinion**

Pursuant to section 84 (1) of the Act, the Secretariat, having reviewed the evaluation report and recommendations made therein, expressed his satisfaction that the process was done as per the provisions of the Act and concurred with the committee's recommendations. He also opined that the subject procurement satisfied the constitutional requirements of Article 227 (1) of the Constitution and statutory requirements of the Act. He thus advised the Accounting Officer to award the subject tender to M/s Wilfak Engineering Ltd at Kshs. 1,217,499,220.34, inclusive of VAT with a completion period of 180 days.

## **Notification**

In letters dated 11<sup>th</sup> October 2019, the Accounting Officer notified all the successful bidder and all other unsuccessful bidders of the outcome of their respective bids.

## **THE REQUEST FOR REVIEW**

M/s Island Homes Developers Limited (hereinafter referred to as "the Applicant") lodged this Request for Review that is dated 28<sup>th</sup> October 2019 and filed on 29<sup>th</sup> October 2019 together with a Supporting Affidavit sworn and filed on even date and a Supplementary Affidavit sworn and filed on 12<sup>th</sup> November 2019. In response, the Procuring Entity filed a Response to the Request for Review on 11<sup>th</sup> October 2019 together with an Affidavit in Support of the Request for Review sworn on 7<sup>th</sup> November 2019 but filed on 11<sup>th</sup> November 2019. The Interested Party lodged a Replying Affidavit sworn and filed on 11<sup>th</sup> November 2019.

The Applicant sought for the following orders in the Request for Review:-

- a) An order annulling the award of Tender No. KPA/129/2018-19/PDM for Removal of Asbestos, Re-Roofing, Demolitions, Rain Water Harvesting, Solar Back-Up System and Associated Works at the Port of Mombasa to the Interested Party, in its entirety and that the Respondents be directed to constitute a fresh procuring committee for the said tender and evaluate the Applicant's bid at the Financial stage; and***
- b) An order awarding costs to the Applicant.***

During the hearing, the Applicant was represented by Mr. Gikandi Ngibuini on behalf of the firm of Gikandi & Company Advocates, the Procuring Entity was represented by Mr. Stephen Kyandih while the Interested Party was represented by Mr. Goerge Kamau appearing together with Ms. Sylvia Waiganjo on behalf of the firm of Wambugu, Muriuki & Company Advocates.

## **PARTIES' SUBMISSIONS**

### **Applicant's Submissions**

In his submissions, Counsel for the Applicant, Mr. Gikandi, fully relied on the Request for Review, Supporting Affidavit and Supplementary Affidavit. Mr. Gikandi submitted that the Applicant was challenging the reasons why its bid was found non-responsive and submitted on the reasons as communicated in the letter of notification as follows:-

- **Participation in a mandatory second site visit.**

In this regard, Mr. Gikandi referred the Board to Annexure SC8 attached to the Procuring Entity's Replying Affidavit wherein according to Counsel, an employee of the Applicant signed the site visit attendance register. He however submitted that the date of the said site attendance register was not indicated but confirmed that the one attached to the Applicant's Request for Review is dated 7<sup>th</sup> May 2019.



Upon being referred by the Board to a register dated 7<sup>th</sup> May 2019, Counsel submitted that that is the same one the Applicant was supplied with and submitted that the said attendance register was the only register that bidders were supposed to sign.

Counsel submitted that the Applicant attended a second site visit on 21<sup>st</sup> June 2019 but that one Mr. Athanus Mwamba, an employee of the Procuring Entity informed bidders on the said date that there was no need to sign the second site visit attendance register if a bidder already signed the first site visit attendance register.

Mr. Gikandi referred the Board to the Applicant's Supplementary Affidavit and submitted that the Procuring Entity's register (i.e. the one attached to the Procuring Entity's Response which is the first site visit attendance register) was closed at number 48 and that the Interested Party's name does not appear in the said register which according to Mr. Gikandi, meant that the Interested Party did not attend the second mandatory site visit.

In his view, the Procuring Entity waived a mandatory requirement in favour of the Interested Party who was eventually awarded the tender despite its failure to satisfy a mandatory requirement of the Tender Document.

- **Pagination of bid document**

On the second reason why the Applicant's bid was found non-responsive, Mr. Gikandi submitted that the Applicant properly paginated its bid document.

To support this view, Mr. Gikandi directed the Board to the Applicant's original bid and submitted that some documents in the Applicant's bid were printed on the front side of the page and overleaf, such that the front side was given a page number without paginating the overleaf page, which were blank and did not need paginating.

In conclusion, Mr. Gikandi submitted that the failure of the Interested Party to attend the site visit on 7<sup>th</sup> May 2019 but being awarded the tender at a cost of 1.3 Billion Kenya Shillings was not cost-effective and contrary to section 3 and Article 10 and 227 of the Constitution. In his view, the Applicant's bid price was cost-effective and ought to have been awarded the tender.

### **Procuring Entity's Submissions**

In his submissions, Counsel for the Procuring Entity, Mr. Kyandih, fully relied on the Procuring Entity's Response and Replying Affidavit.

Mr. Kyandih submitted that the Applicant was served with a letter of notification dated 11<sup>th</sup> October 2019 which cited two reasons why the Applicant's bid was found non-responsive; the first one being, that the Applicant's bid was not numbered in the correct sequence that is:-

- Between pages 4 to 10;
- Between pages 24 and 29; and
- Between pages 29 and 32

Counsel submitted that proper sequencing of bid documents guarantees the integrity of the procurement process and prevents tampering of the bid document. In his view, a document having a reverse page printed and with no page number is susceptible to tampering. He referred the Board to clause 2.1 of the Tender Document which required all pages in the bid document to be paginated including all appendices and attachments, which requirement was not met as the Applicant failed to paginate its bid document in the correct sequence.

On the second reason why the Applicant's bid was found non-responsive, Mr. Kyandih submitted that the Procuring Entity issued Addendum No. 3 which made the second site visit a mandatory requirement owing to the change in the scope of works of the subject tender.

He made reference to the attachments to the Procuring Entity's Replying Affidavit which according to him was evidence of the first mandatory site

visit attendance register of 7<sup>th</sup> May 2019. Mr. Kyandih submitted that approximately 80 people attended the said visit and that it was not possible for the Procuring Entity to record 80 people on one attendance register, hence several pages of the attendance register were circulated for the persons present to sign. Upon enquiry by the Board, Mr. Kyandih submitted that candidates registered their names in loose papers which were circulated on the said first site visit.

In refuting the Applicant's submissions, Counsel submitted that no employee of the Procuring Entity informed bidders not to sign the second site visit attendance register. In his view, all communications in procurement and asset disposal proceedings are made in writing hence if no written communication was made to the Applicant then the Board ought not consider the Applicant's allegations.

Upon further enquiry by the Board, Mr. Kyandih maintained his position that the second site visit attendance register was submitted to the Board.

In conclusion, he urged the Board to dismiss the Request for Review with costs to the Procuring Entity.

## **Interested Party's Submissions**

Mr. Kamau, on behalf of the Interested Party associated himself with submissions by the Procuring Entity. He referred the Board to page 23 of the Tender Document which stated that failure to attend the site visit would lead to automatic disqualification of a bidder.

He submitted that the Interested Party had a Joint Venture Agreement with M/s Wilfak Engineering Limited and Marine Waste Collection Dealers dated 12<sup>th</sup> June 2019 submitted as part of the Interested Party's original bid. He further submitted that the representatives of the Interested Party's consortium attended the site visit.

Upon enquiry as to what document the Interested Party was referring to, Mr. Kamau submitted that the document he was referring to was availed to all bidders who attended the second mandatory site visit and that since the Applicant did not attend the second mandatory site visit, it did not have the said document.

According to Mr. Kamau any bidder who did not send their representative to the said visit, assuming it was a Joint Venture, then it did not meet the requirement of the Tender Document, that is, to attend the second mandatory site visit. He supported the Procuring Entity's submission that no oral communication is recognized in procurement and asset disposal

proceedings under the Act as section 64 of the Act is specific that communication must be in writing.

On the second reason why the Applicant's bid was found non-responsive, Mr. Kamau referred the Board to a part of the Applicant's original bid attached to the Applicant's Request for Review and submitted that the pages therein are evident that the Applicant failed to paginate its original bid in accordance with the requirement in the Tender Document.

He referred the Board to the definition of a page as stipulated in the Black's Law Dictionary, which states that "a page is one side of a leaf as of a book, manuscript or a letter". He then made reference to section 74 (1) (i) of the Act on serialization of pages which is a mandatory requirement, which was imposed therein to avoid instances where a bidder may collude with a procuring entity to introduce new documents to be considered during evaluation of that bidder's bid.

On his third issue, Mr. Kamau refuted the Applicant's allegation that since the Interested Party was not evaluated at the Financial stage with other bidders, then there was no competition. In Counsel's view, the Interested Party met the eligibility and mandatory requirement of the tender, hence proceeded to Financial Evaluation and was determined to be the lowest evaluated responsive tender. In that regard, he submitted that the subject

tender was awarded to the Interested Party in accordance with section 86 (1) (a) of the Act.

In conclusion, Counsel submitted that the Applicant failed to demonstrate any breach of duty by the Procuring Entity imposed by section 167 (1) of the Act and urged the Board to dismiss the Request for Review.

### **Applicant's Rejoinder**

In a rejoinder, Mr. Gikandi submitted that it is evident that the Procuring Entity failed to supply the second Mandatory site visit register. In his view, if that document exists, then it ought to have been found in the Procuring Entity's portal, failure to which, it was Mr. Gikandi's view that there was collusion between the Interested Party who submitted to have the said second site visit register, and the Procuring Entity who failed to avail the same on its website.

On his second issue, Mr. Gikandi maintained his submissions that the Interested Party's bid is not cost-effective and ought not to have been awarded the subject tender. Mr. Gikandi further submitted that the Procuring Entity, in its Replying Affidavit made reference to a register of 21<sup>st</sup> June 2019 but attached the register of 7<sup>th</sup> May 2019. In that regard, it was his view that the Procuring Entity committed the offence of perjury.

In conclusion, Counsel urged the Board to allow the prayers sought in the Request for Review with costs to the Applicant.

### **BOARD'S DECISION**

The Board has considered each of the parties' submissions, the documents filed before it, including confidential documents submitted pursuant to section 67 (3) (e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") and the oral submissions by all parties to the Request for Review.

The issue for determination is as follows:-

***Whether the Procuring Entity evaluated the Applicant's bid at the Preliminary Evaluation stage in accordance with the requirements of the Tender Document, sections 79 (1) and 80 (2) of the Act read together with Articles 201 (d) and 227 (1) of the Constitution.***

The Board now turns to address the above issue as follows:-

Arrowsmith, Linarelli and Wallace in their book, ***Regulating Public Procurement (2011)*** emphasize on the need by a procuring entity to



consider only conforming, compliant and responsive bids. An excerpt of the authors' book was cited with approval by Justice Mativo in **Judicial Review Miscellaneous Civil Application No. 140 of 2019, Republic v. Public Procurement Administrative Review Board & 3 others ex parte Roben Aberdare (K) Ltd**, as follows:-

***"In public procurement, it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, comply with tender conditions; a failure to do so would defeat the purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions."***

The Board notes that the above excerpt applies in all respects to the circumstances of the instant Request for Review.

The Applicant herein participated in the subject tender by returning its bid by the tender closing date of 16<sup>th</sup> July 2019. Consequently thereafter, the Procuring Entity constituted an Evaluation Committee to evaluate bids at the Preliminary, Technical and Financial Evaluation stages.

At the end of Preliminary Evaluation, six firms including the Applicant were disqualified from further evaluation as captured in the Procuring Entity's Technical Evaluation Report. Having concluded evaluation, the Procuring Entity's Managing Director notified all bidders of the outcome of their bids in letters dated 11<sup>th</sup> October 2019.

The Applicant received a letter of notification of unsuccessful bid dated 11<sup>th</sup> October 2019 notifying it of the results of evaluation on its bid. The said notification states as follows:-

***"...This is to inform you that pursuant to section 87 (3) of the Public Procurement and Asset Disposal Act, 2015, your bid was not successful because of the following reasons:-***

- i. Your Document was not numbered in the correct sequence i.e. between page 4 and page 10 some pages were not numbered, between page 24 and 29 some pages were not numbered, between page 29 and 32 NCA Contractors Annual Practicing License and NCA Certificate of Registration were not numbered;***
- ii. You did not sign site visit attendance register as evidence of having participated in the second mandatory site visit as provided in addendum no. 3..."***

The Applicant, through this Request for Review, challenged the two reasons why its bid was found non-responsive by the Procuring Entity. The Board

shall now determine whether the Procuring Entity's decision was made in accordance with provisions of the Tender Document, the Act and the Constitution in the following terms:-

During the hearing, the Interested Party urged the Board to consider whether the Applicant attended the first mandatory site visit as required in the Tender Document. The Board studied Clause (4) at page 23 of the Tender Document and noted the following regarding the mandatory site visit:-

***"A planned Mandatory site visit has been scheduled for Tuesday 7<sup>th</sup> May, 2019 from 1000hours. Interested and eligible candidates shall be required to gather at the Kenya Ports Procurement Conference Room, Mombasa. Non-attendance will lead to automatic disqualification. Prospective candidates (each partner in consortium) shall be required to sign a site visit attendance register as evidence of having participated in the site visit"***

The above provision made attendance of the site visit a mandatory requirement. In addition to this, each partner in consortium was required to sign the site visit attendance register as evidence of having participated in the site visit. This prompted the Board to determine whether the Applicant satisfied this criterion which was two-fold, that is, to attend a first site visit on 7<sup>th</sup> May 2019, a second site visit on 21<sup>st</sup> June 2019 pursuant to Addendum

No. 3 as indicated in the aforesaid notification of unsuccessful bid dated 11<sup>th</sup> October 2019 and that on each visit, prospective candidates (each partner in consortium) to sign a site visit attendance register.

**A.**

**i. First Mandatory Site Visit**

According to Clause 4 at page 23 of the Tender Document cited above, the Procuring Entity planned a first Mandatory site visit that took take place on 7<sup>th</sup> May 2019.

In order to determine whether the Applicant satisfied this requirement, the Board first established whether the Applicant bided as a consortium. At page 66 of its original bid, the Applicant attached a letter dated 9<sup>th</sup> May 2019 addressed to the Procuring Entity with the following details:-

***"SIGNED AGREEMENT BETWEEN ALL PARTNERS IN THE CONSORTIUM (TENDER NO. KPA/129/2018-2019/PDM)***

***We, Island Homes Developers Limited and Hyperteck Electrical Services Limited, hereby declare to be jointly and severally liable for the contract"***

At pages 24 to 28 of its original bid, the Applicant attached a Site Visit Attendance Register of a site visit held on 7<sup>th</sup> May 2019. The Board studied the said register and notes the following:-

- At entry No. 21, one Kibe Ngunye signed the register on behalf of Island Homes Developers Limited;
- At entry No. 42, one Nicerah Kanyakiri signed the register on behalf of HyperTeck Electrical Services Limited

The Board compared this register to the one submitted by the Procuring Entity dated 7<sup>th</sup> May 2019 as part of its confidential file and notes that, the entries in the register attached to the Applicant's bid and the entries in the register submitted by the Procuring Entity are similar. This is sufficient proof that the Applicant and its partner in the consortium both had representatives who attended the first Mandatory Site Visit.

The Board finds that the Applicant satisfied the requirement to attend a first Mandatory Site Visit on 7<sup>th</sup> May 2019 as stipulated under clause 4 at page 23 of the Tender Document.

## **ii. Second Mandatory Site Visit**

All parties to this Request for Review do not dispute the fact that vide Addendum No. 3 dated 13<sup>th</sup> June 2019, bidders were informed of a second Mandatory Site Visit in the following terms:-

***"There will be a second visit for the bidders to familiarize with the added scope of works on Friday, 21<sup>st</sup> June 2019. Bidders are requested to meet at the Procurement Conference Room,***

***located at New Service Area, near the Fire Station, KPA Headquarters, Mombasa at 9:00hrs. For clarity, this site visit is mandatory irrespective of whether a bidder attended the first site visit. (Mandatory)”***

The Board notes, that pursuant to section 75 (1) of the Act, ***“a procuring entity may amend the tender documents at any time before the deadline for submitting tenders by issuing an addendum without materially altering the substance of the original tender”***. Further, section 75 (4) of the Act states as follows:-

***“The addendum shall be deemed to be part of the tender documents.”***

This means that, by the Procuring Entity’s issuance of Addendum No. 3, bidders were required to attend a second mandatory site visit. However, the said addendum did not express that such bidders would be required to sign a site visit attendance register as evidence of having participated in the second site visit as was required in the first site visit. An inference can however be made that in order to provide evidence of having attended the second site visit, bidders ought to have signed an attendance register.

the mandatory requirement for all bidders to attend a second Mandatory site visit and to sign an attendance register as evidence of having attended the second site visit became part of the Tender Document.

The Board heard submissions by the Applicant that it attended the second Mandatory Site Visit, save that one Mr. Athanus Mwamba, a representative of the Procuring Entity, publicly announced that *"for any bidder who attended the first mandatory site visit, it was not necessary to sign the attendance register a second time"*.

However, the Applicant did not indicate the name of the person or persons who attended the second site visit on its behalf.

The Procuring Entity refuted these allegations and maintained its submissions that the Applicant failed to meet a mandatory requirement in the Tender Document and could not therefore make an assertion that a mandatory requirement in the Tender Document changed pursuant to an alleged verbal communication.

The Board observes that section 64 (1) of the Act provides that:-

***"All communications and enquiries between parties on procurement and asset disposal proceedings shall be in writing."***

The Act provides that communications and enquiries between a procuring entity and bidders must be reduced in writing for such communication to be legally binding. It is therefore our finding that, in the absence of any written communication, the Board cannot rely on the assertion that verbal communication to bidders had the effect of altering the requirement that bidders must attend a second Mandatory Site Visit and sign an attendance register. In our view, the requirement that all communication be reduced in writing explains why section 75 of the Act provides for the issuance of Addenda from a procuring entity to bidders when any communication is made during a procurement process.

The Procuring Entity herein adduced a Site Visit Attendance Register as part of its Response to the Request for Review. The Site Visit Attendance Register Form is dated 7<sup>th</sup> May 2019 which was the date for the first site visit and not the second site visit.

The Board studied the confidential file submitted to it by the Procuring Entity and notes that no second Mandatory Site Visit Attendance Register was submitted to the Board. During the hearing, the Board prompted the Procuring Entity that the confidential file submitted by it does not contain the second site visit attendance form. In response, Counsel for the Procuring Entity submitted that the same could be submitted at the end of the hearing.



This assertion is confirmation by Counsel for the Procuring Entity, that at the time of the hearing of the Request for Review, the second Mandatory Site Visit Attendance Register Form had not been submitted to the Board. Therefore, the Board was left with an assertion by the Applicant that it attended the second site visit and a contrary position taken by the Procuring Entity that the Applicant did not attend the second site visit.

On its part, the Interested Party made reference to a soft copy document while making its oral submissions to support its view that the said document was obtained after attending the second mandatory site visit. It was the Interested Party's case, that the said document contained evidence of bidders who attended the second site visit. However, this document was never supplied to the Board by the Interested Party.

The Board observes, no document was furnished before it to ascertain the bidders who attended the second site visit, thus a determination cannot be made to the detriment of the Applicant without conclusive evidence as to whether or not the Applicant attended the second site visit. The only issue that is certain is the Applicant's confirmation that it never signed the second Site Attendance Register Form since according to the Applicant, a representative of the Procuring Entity informed the Applicant that it was not necessary to sign the said form if a bidder already signed the first Site Visit Attendance Register.

The Interested Party and the Procuring Entity made reference to documents that were not supplied to the Board at the time the Board entertained the Request for Review, in their attempts to persuade the Board to consider their oral submissions to the detriment of the Applicant.

It is the Board's considered view that the Procuring Entity and the Interested Party offered no concrete evidence to support their allegations and such allegations cannot be used to the detriment of the Applicant.

The Board finds that the Procuring Entity unfairly evaluated the Applicant on this criterion.

Despite the foregoing findings, the Board would like to make an observation that the hearing of this Request for Review was scheduled for Tuesday, 12<sup>th</sup> November 2019 at 2.30 pm. Upon hearing all parties' cases and after the Applicant closed its case having made its submissions in a rejoinder, the Board informed parties of the date the decision would be rendered and closed its business by 4.45pm. At 5.50pm, the Procuring Entity sent a pdf document via email to the Board. This document is referred to as "**Site Visit Attendance Register of 21<sup>st</sup> June 2019**" and has no representation of the Applicant or M/s Hyperteck Electrical Services Limited. This confirms the Applicant's admission that it never signed the said register.

In a letter dated 29<sup>th</sup> October 2019, the Board Secretary informed the Managing Director of the Procuring Entity that the instant Request for Review was filed with the Board instructing him to submit all documents pertaining to this procurement process within 5 days from receipt of the said letter. However, as at 2.30 pm on 12<sup>th</sup> November 2019, the second Site Visit Attendance Register had not been furnished to the Board.

The Procuring Entity furnished this document after the Applicant closed its case and after the Board concluded the hearing of the Request for Review despite the Board Secretary having specifically instructed the Procuring Entity to submit all documents pertaining to this procurement process within 5 days upon receiving the letter dated 29<sup>th</sup> October 2019.

The above observation notwithstanding, it is the Board's considered view that once an Applicant closes its case after it has made its rejoinder, no further documentation or oral submissions are admissible as evidence before the Board. This Board must act with abundance of caution where a party elects to submit additional documentation once an Applicant has already closed its case through a rejoinder. We find that such documentation would prejudice the Applicant's right to have an opportunity to challenge the contents thereof in support of its case, therefore, the Board cannot rely on the said document in arriving at its decision.

## **B. Pagination of the Bid document in the proper sequence**

On this criterion, reference was made to specific pages of the Applicant's original bid that led the Procuring Entity to find that the said bid was not properly paginated. These include:-

- ***Between page 4 and page 10, some pages were not numbered;***
- ***Between page 24 and 29, some pages were not numbered;***
- ***Between page 29 and 32, NCA Contractors Annual Practicing License and NCA Certificate of Registration were not numbered.***

According to the Applicant, its bid was properly paginated, save that no page numbers were given for pages that were blank and overleaf. The Interested Party on its part, referred the Board to the Black's Law Dictionary (4<sup>th</sup> Edition) definition of 'a page' to support its view that the pages overleaf the Applicant's documents were still "pages" which ought to have been paginated by the Applicant. The failure to paginate all pages, whether overleaf or not, according to the Interested Party, meant that the Applicant failed to satisfy a mandatory requirement of the Tender Document.

In this instance, the Board studied the Tender Document and notes that the same required bidders to have all pages in the whole bid document numbered in the correct sequence.

Clause (ii) at page 24 of the Tender Document provides as follows:-

***"Envelope A shall have pages in the whole document numbered in the correct sequence including all appendixes and attachments (Mandatory)"***

This means, pages must be numbered in a particular order, such that page numbers would follow each other. For example, if a bidder starts to number pages as "1", it would be expected that the sequence for the next page would be "2", then "3" and so on.

The Board must however address a more important question, that is, what are the pages that a bidder ought to paginate? What if a bidder paginates a page that contains the information required by a procuring entity and does not paginate the page that is overleaf but does not contain information? Would this render such bidder non-responsive to the criterion of pagination as provided for in the Tender Document?

According to the Black's Law Dictionary, 4<sup>th</sup> Edition, "a page" means:-

***"a page is one side of a leaf as of a book, manuscript or a letter"***

This definition is supported by the Collins English Dictionary definition which states as follows:-

***"A page is one side of one of the pieces of paper in a book, magazine or newspaper."***

On its part, the Oxford Advanced Learners Dictionary, 8<sup>th</sup> Edition defines a serial as:-

***"arranged in a series"***

Having noted the definition of a page includes the overleaf pages, to form a series, a bidder ought to paginate all pages, (at least where the pages contain information) whether overleaf or not to create a proper series or sequence.

The Board observes that Courts have only interpreted the meaning of serialization and not pagination. We do note that these two are different, save that one cannot exist without the other, in the sense that, it is only once a bidder paginates its bid document, then there would be a sequence of numbers or letters thereby leading to serialization. The Court in **Judicial**

**Review Miscellaneous Application No. 312 of 2018, Republic v Public Procurement Administrative Review Board; Nairobi City Water & Sewerage Company Limited & another (Interested Parties) Ex parte Fourway Construction Company Limited [2019] eKLR** while considering the importance of serialization of a bid document, held as follows:-

***"The ordinary meaning of serialisation is to publish or present something in the form of a serial. The Concise Oxford English Dictionary defines a serial as "consisting of, forming part of, or taking place in a series" and further defines "to serialise" as "to arrange in a series". A "series" is on the other hand defined as "a number of similar or related things coming one after another". Therefore, the ordinary meaning and interpretation of serialization of pages is that each page must be arranged and presented in a manner that it is evident that a page is coming after another page***

***Serialization of the bid document is also a requirement set by law in relation to the contents of tender documents under section 74 (1)(i) of the Public Procurement and Asset Disposal Act (hereinafter "the Act"). The said section reads as follows:-***

***'74 (1) The accounting officer shall ensure the preparation of an invitation to tender that sets out the following—'***

***... requirement of serialisation of pages by the bidder for each bid submitted***

***Two key principles and objectives come to play in the requirement for serialisation of every page of a bid document. The first is that following laid down rules of procedure is an important aspect of fairness, non-discrimination and equal treatment...***

***Secondly, compliance with the requirement of serialisation of every page of a bid document is crucial for good governance, transparency, and accountability. Non-conformity with this requirement will be open to abuse by procuring entities and bidders, who can deliberately plant documents, and use the opportunity for correction to advance their own interests."***

Having noted that serialization is a mandatory requirement under section 74 (1) (i) of the Act, and having found that serialization cannot exist without pagination, it is the Board's considered view that the legislature must have considered the fact that for a series or sequence of pages to exist, then such pages must first be paginated. This explains why serialization is a mandatory requirement under section 74 (1) (i) of the Act, such that when a bidder begins paginating its bid as "1", it is expected that the series of pagination that this bid document would take is that the next page would be "2" then "3" and so on.



This therefore makes pagination of a bid document mandatory, in order for the requirement of serialization to be complied with.

The question before the Board, is whether the Applicant paginated the pages where the information required by the Procuring Entity can be found.

To answer this question, the Board first examined the manner in which the Applicant paginated its bid, particularly, the areas cited by the Procuring Entity and observes the following:-

- ***Between page 4 and page 10***

At page 4, the Applicant attached its Company Profile, which was a requirement at page 25 of the Tender Document. The Applicant's Company Profile runs through six pages. However, it is only one page and not the overleaf pages comprising of the Applicant's Company Profile, that is paginated.

Despite all pages of the Applicant's Company Profile containing a background of what services the Applicant offers, the Applicant elected to paginate each page but not the pages that were overleaf.

It is the Board's view that this being one of the mandatory documents comprising of the Applicant's bid and noting the fact that all pages including the ones overleaf, contained information that the Procuring Entity needed to take into consideration during evaluation, the Applicant ought to have paginated all pages where information describing its Company Profile could be found.

The Board finds that the Applicant failed to comply with the criterion on clause (ii) at page 24 of the Tender Document by failing to paginate pages comprising of its Company Profile.

- ***Between page 24 and 29***

At page 24 of its bid, the Applicant attached a Site Visit Attendance Register dated 7<sup>th</sup> May 2019, which was a requirement of clause 4 at page 23 of the Tender Document. This Site Visit Attendance Register runs through five pages of the Applicant's bid. However, each page (but not the pages overleaf), comprising of the Site Visit Attendance Register is paginated.

The Board finds that this being one of the mandatory documents required by the Procuring Entity, the Applicant failed to paginate all pages comprising of the Site Visit Attendance Register in accordance with clause 4 at page 23 of the Tender Document.

- ***Between page 29 and 32***

- At page 29, a list of the documents that are to be found in the pages that follow, that is, the National Construction Authority (NCA) Registration Certificate and NCA Practicing Licence;
- A Contractor's Annual Practicing licence evidencing that the Applicant is duly registered as a Building Works Contractor in Category NCA2 for a period of one year ending on 30<sup>th</sup> June 2020. However, the page at which this Licence appears is not paginated, despite the Licence being part of the mandatory documents required at page 25 of the Tender Document;
- A Certificate of Registration as a Building Works Contractor in Category NCA2 for a period of one year ending on 30<sup>th</sup> June 2022. However, the page at which this Certificate appears is not paginated, despite the Certificate being part of the mandatory documents required at page 25 of the Tender Document.

On this sub-issue, the Applicant failed to paginate its Contractor's Annual Practicing Licence and its NCA Certificate of Registration despite the two being mandatory documents required by the Procuring Entity.

The Board would like to note that the overleaf pages of these two documents are also not paginated. However, it is only the page containing the information required by a procuring entity, that must be paginated.

From the above analysis and findings, we do find that in all the three sub-issues of pagination identified hereinabove, the Applicant did not paginate the documents containing the information required by the Procuring Entity thereby failed to comply with the criterion under clause (ii) at page 24 of the Tender Document.

The Board observes that pagination of a bid document avoids the bid document from being tampered with in any way by any person or entity. It protects the sanctity of a bid document by ensuring that bidders are evaluated on the basis of the documents they submitted by the tender closing date and that no document is inserted or removed in favour of a non-compliant bidder to the detriment of other bidders who choose to comply with the requirements of a procuring entity.

The Applicant herein failed to take into account, the requirement of pagination of a bid document which gives effect to the mandatory requirement of serialization, when submitting its bid. This was a mandatory requirement at the Preliminary Evaluation stage and the Applicant's failure to comply with the same meant that its bid could not be subjected to further evaluation.

As regards eligibility and mandatory requirements, section 79 (1) of the Act provides that:-

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

Section 80 (2) of the Act further provides that:-

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

Sections 79 (1) and 80 (2) of the Act are very critical in any evaluation process as they provide guidance that the responsiveness of a bid is determined by the capability of such bid to meet eligibility and mandatory requirements, set out in the tender documents.

Even though the Board found that the Procuring Entity unfairly disqualified the Applicant on the requirement of a second Mandatory Site Visit, the failure by the Applicant to meet the mandatory requirement of pagination of its bid document means that it would still not proceed to other stages of evaluation upon conclusion of Preliminary Evaluation.

The Board notes, the Applicant cited Articles 10, 201 (d) and 227 of the Constitution to support its view that the award of the subject tender ought to have been made to it since the price at which the Procuring Entity awarded the tender to the Interested Party, that is, **Kshs. 1,217,499,220.34**, in the

Applicant's view, was not cost effective. The Applicant submitted that, had the tender been awarded to it, it would save tax payers' money.

Articles 201 (d) and 227 (1) of the Constitution, as cited by the Applicant provides that:-

**"201:        *The following principles shall guide all aspects of public finance in the Republic***

***...(d)public money shall be used in a prudent and responsible way"***

**227 (1)    *When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective***

The Board observes, that price, is not the only consideration by a procuring entity when determining the bidder to be awarded a tender. This explains why Preliminary and Technical Evaluation deal with responsiveness to eligibility and mandatory requirements including technical specifications as the first hurdle that bidders have to overcome in determining their responsiveness. In **Judicial Review Miscellaneous Civil Application No. 85 of 2018, Republic v. Public Procurement Administrative Review Board ex parte Meru University of Science & Technology & Another**, the court held as follows:-

***"...Indeed, public procurement practically bristles with formalities which bidders often overlook at their peril. Such formalities are usually listed in bid documents as mandatory requirements. The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing, empowerment or post qualification. Bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome.***

***In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing.***

It is worth noting that consideration of price is made during the last stage of evaluation, that is, Financial Evaluation, so that bidders first demonstrate their responsiveness to eligibility and mandatory requirements, including technical specifications. Therefore, a procuring entity cannot base its decision on award of a tender to a bidder who failed at Preliminary Evaluation simply because the bidder submitted a lower bid price.

Bidders should expect that their bids will be subjected to eligibility and mandatory requirements evaluation including technical specifications and it is only after qualifying in the aforementioned requirements that they proceed to an evaluation based on their bid price, to determine the lowest evaluated responsive tender. Award of a tender is then made to a bidder who has successfully passed the two hurdles at Preliminary and Technical Evaluation and is rightfully determined to be the lowest evaluated responsive bidder at Financial Evaluation.

The Applicant herein never made it to Technical Evaluation to be considered for Financial Evaluation where its bid could have been evaluated to determine if it would emerge the lowest evaluated responsive bidder for award of the subject tender.

It is the Board's finding that the Procuring Entity rightfully found the Applicant's bid non-responsive at the end of Preliminary Evaluation in so far



as the criterion of pagination of a bid document as outlined in Clause (ii) at page 24 of the Tender Document is concerned.

In totality, the Request for Review is hereby dismissed and the Board proceeds to order as follows:-

### **FINAL ORDERS**

In exercise of the powers conferred upon it by section 173 of the Public Procurement and Asset Disposal Act, 2015, the Board makes the following orders in the Request for Review:-

- 1. The Request for Review filed on 29<sup>th</sup> October 2019 with respect to Tender No. KPA/129/2018-19/PDM for Removal of Asbestos, Re-Roofing, Demolitions, Rain Water Harvesting, Solar Back-Up System and Associated Works at the Port of Mombasa, be and is hereby dismissed.**
- 2. Each party shall bear its own costs in the Request for Review.**

**Dated at Nairobi, this 19<sup>th</sup> day of November, 2019**

***Signed***

**CHAIRPERSON  
PPARB**

***Signed***

**SECRETARY  
PPARB**

**Delivered in the presence of:-**

- i.** Mr. Mwesigwa holding brief for Mr. Gikandi for the Applicant;
- ii.** Ms. Waiganjo holding brief for Mr. Kyandih for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and also appearing for the Interested Party.