

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATIONS NO. 144 AND 145 OF 9TH DECEMBER 2019
(CONSOLIDATED)

BETWEEN

CONTINENTAL TRANSFORMERS (EA)

LIMITED.....1ST APPLICANT

AND

NAIROBI TRANSFORMERS &

MANUFACTURES E. A. LTD.....2ND APPLICANT

AND

**THE MANAGING DIRECTOR AND CHIEF EXECUTIVE OFFICER,
KENYA POWER & LIGHTING COMPANY**

LTDRESPONDENT

AND

**MAHASHAKTI KENYA LTD.....1ST INTERESTED
PARTY**

AND

PAN AFRICA TRANSFORMERS & SWITCH

GEARS LTD.....2ND INTERESTED PARTY

AND

YOCEAN GROUP LTD.....3RD INTERESTED PARTY

Review against the decision of the Accounting Officer of Kenya Power and
Lighting Company Limited in respect of Tender No.

KP1/9A.2/OT/59/NM/18-19 for Provision of Distribution Transformer Repair Services.

BOARD MEMBERS

1. Ms. Faith Waigwa -Chairperson
2. Mr. Alfred Keriolale -Member
3. Mr. Steven Oundo, OGW -Member

IN ATTENDANCE

1. Mr. Philip Okumu -Holding brief for the Secretary
2. Maryanne Karanja - Secretariat

PRESENT BY INVITATION

1ST APPLICANT AND 2ND APPLICANTS

1. Mr. Wathuta -Advocate, Kiragu Wathuta & Company Advocates
2. Ms. Mwaura -Lawyer, Kiragu Wathuta & Company Advocates

PROCURING ENTITY

-KENYA POWER & LIGHTING COMPANY LTD

1. Ms Kirui -Advocate
2. Mr. Justus Ododa -Advocate

INTERESTED PARTIES

1ST, 2ND AND 3RD INTERESTED PARTIES

1. George Kamau -Advocate, Wambugu Muriuki
Company Advocates
2. Sylvia Waiganjo -Advocate, Wambugu Muriuki
Company Advocates

OTHER INTERESTED PARTY

EMPOWER TRANSFORMERS LTD

1. Eng. Kigera -Chief Executive Officer

BACKGROUND TO THE DECISION

The Bidding Process

Kenya Power and Lighting Company (hereinafter referred to as “the Procuring Entity”) advertised Tender Number KP1/9A.2/OT/59/NM/18-19 for provision of repair of distribution transformer services (local firms only) (hereinafter referred to as “the subject tender”) on 2nd July 2019.

Bid Submission Deadline and Opening of Bids

The Tender closed on 13th August 2019 at 10.00 am and was opened on the same day with Nine (9) bidders submitting their bids.

Evaluation of Bids

The Evaluation Committee was appointed by the Managing Director & CEO, to evaluate the subject tender in the following stages:-

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

1. Preliminary Evaluation.

Preliminary evaluation was done as per clause 3.29 of Section III. Instructions to Tenderers of the Tender document. Out of Nine (9) firms that submitted their bids, three (3) firms were non responsive at the preliminary evaluation stage and were therefore not recommended to proceed to the preliminary Technical evaluation stage.

2. Technical Evaluation

Out of six (6) firms that were qualified after Preliminary Evaluation, three (3) bidders failed to meet the minimum score of Seventy-Five (75) Marks in the Detailed Technical Evaluation. The scores achieved by bidders are summarized hereinbelow:-

Particulars	Tanel ec Kenya Limite	Pan Africa Transform ers & switchgear	Yocean (GROU P) Ltd	Mahasha kti Kenya Limited	Nairobi Transforme r Manufactur	Continenta I Transform ers (EA)
--------------------	--	--	------------------------------------	--	--	--

	d	Ltd			ers	Limited
Total Score out of 100	24	96	86	95	70	69

3. Financial Evaluation

All three (3) firms that proceeded to Financial Evaluation were found responsive at the end of financial evaluation stage.

Recommendation

In view of the above, Evaluation Committee recommended award of the subject tender to the following three successful bidders:-

1. Pan Africa Transformers & switchgear Ltd
2. Yocean (Group) Ltd
3. Mahashakti Kenya Limited

Professional Opinion

In her professional opinion dated 26th October 2019, the Acting General Manager, Supply Chain, expressed her satisfaction that the subject procurement process met the threshold under the Constitution and the Public Procurement and Asset Disposal Act, 2015. She advised the Managing Director and CEO of the Procuring Entity to award the subject tender to the following bidders:-

- Pan Africa Transformers & SwitchGear Ltd;
- Yocean (GROUP) Ltd
- Mahashakti Kenya Limited

Award and Notification

The Procuring Entity's Managing Director and CEO, having reviewed the Professional Opinion dated 26th October 2019, approved the same and bidders were notified of the outcome of their respective bids on 20th November 2019 and 21st November 2019.

REQUEST FOR REVIEW NO. 144 OF 2019

M/s Continental Transformers (EA) Limited lodged a Request for Review on 9th December 2019 seeking the following orders:-

- a) An order annulling the Procuring Entity's decision purporting to reject the Applicant's bid;**
- b) An order declaring the purported evaluation process conducted on the Applicant's bid by the Respondent is grossly unfair, unreasonable and fails to comply with provisions of the law as well as requirements set out in the Tender Document;**
- c) An order directing the Procuring Entity to carry out a re-evaluation of the Applicant's bid;**

- d) An order directing the Procuring Entity to pay the costs of and incidental to this Request for Review;**
- e) Such other additional further, incidental and/or alternative orders as the Honourable Board may deem fit, just and expedient.**

REQUEST FOR REVIEW NO. 145 OF 2019

M/s Nairobi Transformers Manufacturers (EA) Company Limited lodged a Request for Review on the same date of 9th December 2019 seeking the following orders:-

- a) An order annulling the Procuring Entity's decision purporting to reject the Applicant's bid;**
- b) An order declaring the purported evaluation process conducted on the Applicant's bid by the Respondent is grossly unfair, unreasonable and fails to comply with provisions of the law as well as requirements set out in the Tender Document;**
- c) An order directing the Procuring Entity to carry out a re-evaluation of the Applicant's bid;**
- d) An order directing the Procuring Entity to pay the costs of and incidental to this Request for Review;**

e) Such other additional further, incidental and/or alternative orders as the Honourable Board may deem fit, just and expedient.

CONSOLIDATION OF THE TWO REQUEST FOR REVIEW APPLICATIONS

When the two Request for Review applications came up for hearing, the Board observed that both applications arise from the same tender, that is, Tender No. KP1/9A.2/OT/59/NM/18-19 for Provision of Distribution Transformer Repair Services, being procured by the same Procuring Entity.

As a result, the Board, in giving directions as to how the two Request for Review applications would proceed, addressed its mind to the provision of Regulation 82 of the Public Procurement and Disposal Regulations, 2006, which provides as follows:-

"Where two or more requests for review are instituted arising from the same tender or procurement procedure the Review Board may consolidate the requests and hear them as if they were one request for review."

There being no objection from any of the parties present for the hearing, the Board consolidated Request for Review No. 144 of 2019 with Request for Review No. 145 of 2019 as one Request for Review application.

Henceforth, the parties to the consolidated Request for Review were identified as follows:-

- i.** Continental Transformers (EA) Limited -"1st Applicant"
- ii.** Nairobi Transformers Manufacturers (EA) Company Limited -"2nd Applicant"
- iii.** The Managing Director and Chief Executive Officer, Kenya Power and Lighting Company Limited -"1st Respondent"
- iv.** Mahashakti Kenya Limited -"1st Interested Party"
- v.** Pan Africa Transformers & Switch Gears Ltd -"2nd Interested Party"
- vi.** Yocean Group Limited -"3rd Interested Party"

During the hearing of the Request for Review, the 1st and 2nd Applicants were represented by Mr. Wathuta on behalf of the firm of Kiragu Wathuta & Company Advocates, the Respondent was represented by Ms. Kirui appearing together with Mr. Ododa, the 1st, 2nd and 3rd Interested Parties were represented by Mr. Kamau appearing together with Ms. Waiganjo on behalf of the firm of Wambugu Muriuki Advocates. M/s Empower Transformers Limited was represented by its Chief Executive Officer, Eng. Kigera.

PRELIMINARY ISSUE

When the Request for Review came up for hearing, all parties submitted that they were ready to proceed with the matter. The Chief Executive

Officer of M/s Empower Transformer Limited, Eng. Kigeru submitted that he was also ready to proceed with the hearing of the Request for Review.

Upon hearing submissions by the Applicants, the Procuring Entity, and the Interested Party, the Board allowed Eng. Kigeru an opportunity to address it on the subject procurement process. However, Eng. Kigeru submitted that he was aggrieved by the Procuring Entity's decision on its bid.

The Board noted that Eng. Kigeru sought to exercise the right to administrative review under section 167 (1) of the Act, despite the fact that he had not lodged a Request for Review challenging the Procuring Entity's decision on its bid. The Board further noted that the letter dated 9th December 2019 notifying all bidders of the existence of the Request for Review required them to submit information that would assist in the determination of this matter.

Having considered the fact that Eng. Kigeru failed to move the Board by way of a Request for Review to challenge the Procuring Entity's decision on the bid of M/s Empower Transformers Ltd, the Board directed Eng. Kigeru to address it on matters touching on the law, in so far as the subject procurement process and not on the Procuring Entity's alleged breach of duty in evaluating the bid of M/s Empower Transformers Ltd. However, Eng. Kigeru chose not to address the Board.

PARTIES' SUBMISSIONS

1st and 2nd Applicant's Submissions

In his submissions, Counsel for the Applicants, Mr. Wathuta, fully relied on the Consolidated Request for Review application and the Applicants' Statements attached thereto.

Mr. Wathuta submitted that in view of the Board having consolidated the two Request for Review applications, he would like the Board to note that both applications raise similar grounds.

On his first ground, Mr. Wathuta submitted that the Tender Document required bidders to provide certified copies of academic documents. He pointed out that despite the Applicant having satisfied this requirement, the Applicant's letter of notification informed it that authentication of academic certificates by Commissioner of Oaths was done on the translation and not on the original certificate. While refuting the Procuring Entity's reason for disqualifying the Applicant on this criterion, Mr. Wathuta took the view that the Procuring Entity ought to have considered the translated copy certified in its bid since the same satisfies this criterion.

On his second ground, Counsel submitted that the Applicant was disqualified for the reason that its workshop area of 600 metres was less

than 1300m² required in the Tender Document. In the Applicant's view, the Procuring Entity did not ascertain the actual measurements of the Applicant's workshop since no measurements were taken. In his view, the actual workshop area for the 1st Applicant is 2428m² and that for the 2nd Applicant, its workshop area is more than 1300m². Upon enquiry by the Board, Counsel submitted that this criterion was provided for in clause 6.22 at page 71 of the Tender Document.

On his third ground, Counsel submitted that pursuant to clause 6.2 at page 72 of the Tender Document, the Procuring Entity required bidders to attach a Higher National Diploma (HND). He submitted that the 2nd Applicant provided a diploma certificate which was not a higher national diploma and ought to have been awarded a zero, and not to be disqualified by the Procuring Entity.

On his fourth ground, Mr. Wathuta sought to demonstrate that the 2nd Applicant met the requirement of experience of workshop supervisor and testing engineer. In doing so, Counsel submitted that the workshop supervisors of the 1st and 2nd Applicants was less than 3 years and ought to have marked one mark each and not a zero.

On his fifth ground, Mr. Wathuta took the view that the Applicant would only lose 4 marks under this criterion, given the documents the two bidders provided of their experience.

On the sixth ground, Counsel urged the Board to interrogate the documents provided by both Applicants, since in his view, the Applicants had more than 2 years' experience in handling similar works as the one contemplated in the subject tender. He further submitted that even the successful bidders did not have the level of experience of more than 2 years, and urged the Board to interrogate their original bids.

Mr. Wathuta then referred the Board to section 86 (2) of the Act and submitted that the Procuring Entity failed to subject the Applicants' bids to a margin of preference during Technical Evaluation. In his view, the Applicants ought to have been awarded an additional 20% score to the total score awarded to them during Technical Evaluation. Upon being directed by the Board that the margin of preference under section 86 (2) of the Act can only be applied when a bidder meets the minimum technical score, Counsel took the view that had the Procuring Entity rightfully evaluated the Applicants' bids, they would have met the minimum technical score of 75% and would therefore qualify for the score of 20% as a margin of preference during technical evaluation.

Counsel then referred the Board to the letter of notification issued to the 1st Applicant and challenged the reasons why the 1st Applicant was found non-responsive as follows:-

Counsel submitted that it is not in dispute that the tender security provided by the 1st Applicant would lapse on 8th March 2020 and that the tender security was valid for 180 days from tender opening plus an additional 30 days. He further submitted that the expected date of tender opening was 8th August 2019. However, on 5th August 2019, the Procuring Entity issued an Addendum extending the tender opening date for a further period of 5 days to 13th August 2019. However, the Applicant only got to learn of this extension when it went for the tender opening ceremony with the assumption that it was on 8th August 2019. Counsel then submitted that after 8th August 2019, what followed was a weekend and there was no time to seek extension of its tender security, despite having attempted to do so on 12th August 2019 but such attempt was not successful.

Upon enquiry by the Board as to whether the 1st Applicant sought clarification, Counsel submitted that by the time the Applicant got to know of the extension, there was no time to seek clarification from the Procuring Entity. On the other hand, he submitted that the 2nd Applicant's tender security was not affected as it had submitted one that had longer days prior to expiry compared to the one submitted by the 1st Applicant.

On further enquiry, Counsel submitted that the 1st Applicant only realised on the evening of 12th August 2019 that it was incapable of submitting its tender security. As to what prayer the 1st Applicant would therefore seek from the Board as regards its tender security, Counsel submitted that the

Board should allow the 1st Applicant two working days to obtain an extension of its tender security and that the one submitted before the tender opening date be taken as valid.

On his next ground, that is, the qualifications and skills of at least 4 other transformers repair staff, Counsel submitted that this criterion is captured in clause 8 at page 72 of the Tender Document. Counsel submitted that the 1st Applicant submitted documents to support its qualifications in this criterion and could only lose 2 marks. In totality, he urged the Board to find that both Applicants would have achieved the minimum technical score of 75% to proceed to financial evaluation.

Counsel further urged the Board to address its mind to the question whether the subject procurement was conducted in accordance with the Constitution and the Act, and allow the Request for Review application as prayed by the Applicants.

Respondent's Submissions

In her submissions, Counsel for the Respondent, Ms. Kirui, fully relied on the Responses to the consolidated Request for Review applications and documents attached thereto.

On her first ground, Counsel submitted that the Procuring Entity carried out a confirmatory visit and established that the 2nd Applicant's Workshop area was less than 1300 square metres. She further submitted that on the said visit, the Evaluation Committee took the measurements of the 2nd Applicant's Workshop during a confirmatory visit after Technical Evaluation and established that the 2nd Applicant's workshop area was less than 1300 square meters.

As to the professional certificates of the 2nd Applicant, Counsel submitted that the 2nd Applicant failed to provide degree certificates and Higher national diploma certificates of its Workshop Supervisor and Testing Engineer, hence did not meet the criterion under clause 6.2.2 of the Tender Document. On the experience of the aforementioned two personnel, Counsel submitted that the 2nd Applicant provided CVs but failed to provide recommendation letters as supporting documentation.

On other qualifications of transformer repair staff of the 2nd Applicant, Ms. Kirui made reference to three personnel identified in the 2nd Applicant's bid and submitted that the said persons did not meet the minimum level of experience of one year required by the Procuring Entity.

On Company Experience, Ms. Kirui submitted that the 2nd Applicant was awarded 5 marks under this criterion, since the experience of the Applicant was 2 years in works relevant to the subject tender.

Counsel then made reference to the ground of Authentication of certificates and submitted that since the 2nd Applicant only certified a copy of the translated copy of its original academic certificates, instead of the original, it was not awarded marks under this criterion.

On application of a margin of preference, Counsel submitted that section 86 (2) of the Act is clear that it is only a bidder who has attained the minimum technical score that would be subjected to such preferential treatment and upon satisfying the 51% shareholding threshold under that provisions.

In summary, she submitted that the 2nd Applicant failed to meet the requirements at the Technical Evaluation hence was disqualified from further evaluation.

With respect to the 1st Applicant, Ms. Kirui made the following submissions:-

On the issue of tender security, Counsel submitted that despite the 1st Applicant having failed to provide a tender security that was 30 days beyond the tender validity period, its bid was successful upon conclusion of Preliminary Evaluation and subjected to Technical Evaluation.

On the 1st Applicant's Workshop space, Counsel submitted that during a confirmatory visit, the Evaluation Committee confirmed that the workshop area of the 1st Applicant is 680 square meters, which was less than the required 1300 square meters.

On the professional certificates of the Workshop Supervisor and Testing Engineer of the 1st Applicant, Counsel submitted that the 1st Applicant failed to attach their respective degree certificates and higher national diploma hence did not meet the requirement under clause 6.2.2 of the Tender Document. According to Counsel, the Testing Engineer submitted an advance diploma in Information Technology which was not relevant to the works of the subject tender.

On Company Experience, she urged the Board to note that the 1st Applicant's bid indicated that it had experience of 2 years and was awarded the requisite 5 marks under the said criterion.

In her conclusion, she submitted that both Applicants failed to demonstrate to the Board how they suffered prejudice given that they did not meet the requirements of the Tender Document, and therefore urged the Board to dismiss the Request for Review.

Interested Parties' Submissions

In his submissions, Counsel for the 1st, 2nd and 3rd Interested Parties, Mr. Kamau, fully relied on the respective Responses of the Interested Parties in the Request for Review.

Mr. Kamau fully associated himself with submissions of the Respondent and submitted that in respect of professional certificate, it was the Interested Parties' view that whatever language a bidder submitted its professional certificates, the original certificates, ought to have been certified.

Counsel then referred the Board to page 17 of the Tender Document to support his view that the Respondent was well within its right to ascertain the workshop space of the Applicants herein to assist in the evaluation and comparison of tenders.

He then submitted that the Applicants' diploma certificates could not qualify as higher national diploma certificates thus both Applicants failed to meet the criterion under clause 6.2.2 of the Tender Document. Upon enquiry by the Board as to whether professional certificates may include other certificates that are not necessarily higher national diplomas, Counsel

maintained his submission that the Applicants had the obligation to provide degree certificates and higher national diplomas.

As regards the issue of tender security of the 1st Applicant, Mr. Kamau referred the Board to clause 3.25 of Section III. Instructions to Tenderers of the Tender Document and submitted that before the deadline for submission of tenders, the Applicant was at liberty to withdraw its bid and submit another tender security but failed to do so. He further submitted that the Board cannot issue orders for bidders to change the terms and contents of their tenders to the detriment of other bidders who chose to comply with tender conditions.

In conclusion, Counsel submitted that the Applicants failed to demonstrate how the Respondent violated the provisions of Article 227 (1) of the Constitution in carrying out the subject procurement process, thus urged the Board to dismiss the Request for Review and award costs to the Interested Parties.

Applicant's Rejoinder

In a rejoinder, Mr. Wathuta submitted that the Respondent did not adduce evidence in the form of a report of how it arrived at the workshop area of the Applicants during its confirmatory visit. He maintained his submissions that the Applicants were not visited by the Respondent.

With respect to the Professional Certificates of both Applicants, Mr. Wathuta urged the Board to re-examine the bids of the aforementioned Applicants together with the bids of the Interested Parties, since in his view, the Interested Parties are new companies with personnel who could not have met the requirements in the Tender Document. He also contended that the Interested Parties could not have met the years of experience required in the Tender Document.

Counsel drew the Board's attention to the Invitation to Tender of the Tender Document wherein the Procuring Entity would engage a contractor for the next 3 years once the tender is awarded to a successful bidder. In his view, this would make it difficult for other bidders to have an opportunity to provide the said services since no opportunity would be available to any bidder for the next 3 years. In essence, Counsel took the view that the Procuring Entity's procurement process failed to meet the threshold under the Act, and that such a flawed process cannot be allowed to continue with an unqualified bidder awarded the tender to execute works in the subject tender for the next 3 years.

Upon enquiry by the Board, Mr. Wathuta confirmed that should the Board find the evaluation process failed to meet the threshold under the Act, the Board should order a re-evaluation process.

In conclusion, Counsel urged the Board to allow the Consolidated Request for Review as prayed by the Applicants.

BOARD'S DECISION

The Board has considered each of the parties' cases, the documents before it, including confidential documents submitted to it 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 of parties to the Request for Review.

The issue that calls for determination is as follows:-

Whether the Procuring Entity evaluated the 1st Applicant's bid and the 2nd Applicant's bid in accordance with the criteria set out in the Tender Document, the Act and the Constitution.

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

The Applicants herein having participated in the subject procurement proceedings, were notified by the Procuring Entity of the outcome of their bids in their respective letters dated 20th November 2019. As a result, the Applicants challenged the reasons cited in the aforementioned letters.

The Board having considered each of the parties' submissions on the issue framed for determination proceeds to make the following findings:-

The 1st Applicant received a letter of notification dated 20th November 2019 with the following details:-

"We refer to your tender dated 2nd July 2019 for provision of repair of distribution transformer services (Local Firms Only), Tender No. KP1/9A.2/OT/59/NM/18-19 and regret to inform you that following evaluation, your tender was not successful. Your company failed to meet the minimum score of 75% marks. The brief reasons are as follows:-

- 1. The bidder submitted a tender security whose expiry is one 08.03.2020. This does not cover the tender validity period of 180 days plus the additional 30 days as required in the tender document;***
- 2. The actual workshop space is less than 1300 square meters***

- 3. The workshop supervisor has no degree or HND. There is no recommendation letter attached to support previous employer's experience;**
- 4. Testing Engineer has a diploma as opposed to the required degree and/or HND. Less than 3 years' experience with the bidder and not recommendation letter from previous employers;**
- 5. Under qualifications and skills of at least four (4) other transformer repair staff, there was no academic or professional certificates attached;**
- 6. The oldest job that bidder has done is dated 27.09.2017. This is less than 2 years to the closing date of the tender (13.08.2019) ..."**

The 2nd Applicant received a letter of notification of unsuccessful bid dated 20th November 2019 with the following details:-

"We refer to your tender dated 2nd July 2019 for provision of repair of distribution transformer services (Local Firms Only), Tender No. KP1/9A.2/OT/59/NM/18-19 and regret to inform you that following evaluation, your tender was not successful. Your company failed to meet the minimum score of 75% marks. The brief reasons are as follows:-

- 1. The actual workshop area is 20m * 30m=600m. This is less than 1300sq meters;**

- 2. The bidder attached the graduation certificate for Diploma for workshop supervisor and Testing Engineer as opposed to a higher national diploma (HND);***
- 3. Authentication by the commissioner of oaths for the certificates was done on translation instead of original certificate;***
- 4. Experience for workshop supervisor and testing Engineer is less than 3 years. There was no recommendation letter from their previous employers to support more experience in previous employment;***
- 5. Only one employee had more than 1-year experience. The rest had less than one year and no recommendation letters from previous employer in transformer repairs to support the experience mentioned in their CVs;***
- 6. The oldest job that bidder has done is dated 08.09.2017. This is less than 2 years to the closing date of the tender (13.08.2019) ...”***

The Board interrogated the reasons why the 1st Applicant's bid and the 2nd Applicant's bid were found non-responsive with a view of establishing whether or not the Procuring Entity fairly evaluated the 1st Applicant and the 2nd Applicant and noted the following:-

i. Tender Security

Clause 3.20.5 of Section III. Instructions to Tenderers of the Tender Document provides as follows:-

"The Tender Security shall be valid for thirty (30) days beyond the validity of the tender"

On its part, clause 3.21.1 of Section III. Instructions to Tenderers of the Tender Document states that:-

"Tenders shall remain valid for 180 days after the date of tender opening as specified in the Invitation to Tender or as otherwise may be prescribed by KPLC pursuant to paragraph 3.24..."

The Board notes that the Procuring Entity vide Addendum No. 2 dated 1st August 2019 extended the deadline for submission of tenders from 8th August 2019 as had been notified to bidders vide Addendum No. 1 dated 19th July 2019, to 13th August 2019.

From the above provisions of the Tender Document, the tender securities provided by bidders were required to be valid for a further period of 30 days from the date of expiry of the tender validity. Noting that tender validity period started running the moment tenders were opened on 13th August 2019 at 10.30 am, the same would expire on 9th February 2020 being 180 days after tender opening.

The Board studied the 1st Applicant's original bid and notes that the 5th paragraph of its tender security dated 6th August 2019, issued by Credit Bank indicated that it is valid till 8th March 2020.

During the hearing, the 1st Applicant contended that there was no time to seek clarifications with respect to the validity of tender security, since in its view, it only learnt that the tender opening date was extended to 13th August 2019, when it visited the Procuring Entity's premises on 8th August 2019 having presumed that the tender opening date was still 8th August 2019.

In the 1st Applicant's view, as at 8th August 2019, which fell on a Thursday, the 1st Applicant could not secure another tender security and submit its bid by 13th August 2019 which fell on a Tuesday. As a result, it never sought clarification from the Procuring Entity with respect to the validity of its tender security.

Clause 3.8.2 of Section III. Instructions to Tenderers of the Tender Document states that:-

"Amendment (s) (hereinafter referred to or otherwise known as Addendum) will be published and accessible to all prospective tenderers on the KPLC's tendering portal"

With this in mind, it is the Board's view that the 1st Applicant's contention that it learnt of the tender opening date of 13th August 2019 on 8th August 2019, thus unable to seek clarifications from the Procuring Entity is a lame excuse, since, had the Applicant viewed the Procuring Entity's tendering portal, it would have learnt that Addendum No. 2 was issued on 1st August 2019, extending the tender closing date to 13th August 2019. Hence, the 1st Applicant had at least 12 days within which it would have either sought clarifications from the Procuring Entity on validity of tender security or modified or withdrawn its bid with a view to extend the validity of its tender security and/or submit a bid that was compliant.

The Board notes that section 76 (2) of the Act states that:-

"After the deadline for submitting tenders, a person who submitted a tender shall not change, or offer to change the terms of that tender."

Clause 3.25.1 of Section III. Instructions to Tenderers of the Tender Document further states that:-

"The Tenderer may modify or withdraw its Tender after it has submitted, provided that the modification, including substitution or withdrawal of the Tender is received by KPLC prior to the deadline prescribed for submission of tenders"

The Act and the Tender Document precludes a tenderer from changing or offering to change the terms of its tender after the deadline for submission of tenders. The 1st Applicant had up to 13th August 2019 to comply with tender requirements including the validity of its tender security and cannot be granted an opportunity to modify its bid after the tender closed on 13th August 2019.

The Board finds that the Procuring Entity had no option but to evaluate the 1st Applicant's bid based on the tender security submitted by the 1st Applicant prior to the deadline for submission of tenders and rightfully disqualified the 1st Applicant on this criterion.

The Board notes that, though the 1st Applicant did not qualify at the Preliminary Evaluation stage, the Procuring Entity unprocedurally proceeded to evaluate the 1st Applicant's bid at the Technical Evaluation stage. Accordingly, the Board shall proceed to interrogate the Procuring Entity's findings with respect to the 1st Applicant's bid at the Technical Evaluation stage.

ii. Workshop Area/Space

Item 2 (1) of Table 1 of Clause 6.2.2 of Section VI. Evaluation Criteria of the Tender Document required bidders to provide the following:-

"Workshop space (Indicate sq. meters) -5 marks

Over 1300 sq. meters and above -5 marks

Less than 1300 sq. meters -1 mark"

In response to this criterion, the 1st Applicant provided drawings subdivided in the following three components:-

- Stores assembly, winding and welding section;
- Open yard for storage of tanks;
- Workshop, tanking and testing lab

The 1st Applicant further indicated that its total area of yard is 0.6 acres and provided a further drawing of 160 square meters. It is not clear what the workshop area is, from the following components and total area of yard provided by the 1st Applicant. On the other hand, the Procuring Entity submitted that upon conducting a confirmatory visit, it established the workshop space of the 1st Applicant to be 680 square meters. However, no minutes of the confirmatory visit were furnished to the Board for interrogation.

Accordingly, the Board finds, there is uncertainty as to the Workshop Space based on the 1st Applicant's bid and there being no confirmatory visit

minutes by the Procuring Entity, the Procuring Entity's submissions remain unsubstantiated.

The Board finds that the Procuring Entity unfairly evaluated the 1st Applicant's bid on this criterion in which the 1st Applicant was awarded a score of 1 mark.

In response to this criterion, the 2nd Applicant at page 175 of its original bid provided details of factory space including size of oven, provision for lifting cranes and other loading and unloading arrangements together with drawings and indicated as follows:-

"factory space is 1849 square meters"

The Procuring Entity submitted that through a confirmatory visit, it was able to ascertain that the workshop area of the 2nd Applicant was less than 1300 square meters though the Board notes that no confirmatory visit minutes were furnished by the Procuring Entity to substantiate this.

According to the Evaluation Report, the 2nd Applicant was awarded 1 mark under this criterion, yet the Tender Document indicated that workshop area of over 1300 square meters would attract 5 marks.

It is therefore the Board's view that the Procuring Entity unfairly evaluated the 2nd Applicant on this criterion by awarding it 1 mark.

At this point, the Board would like to address the peculiar manner in which Technical Evaluation was carried out on the 1st and 2nd Applicant's bid with respect to a confirmatory visit.

Clause 3.31.1 of Section III. Instructions to Tenderers of the Tender Document provides as follows:-

"KPLC will further evaluate and compare the tenders that have been determined to be substantially responsive in compliance to the Technical Evaluation Criteria as set out in the Tender Document"

Item 2 (1) of Table 1 of Section VI. Evaluation Criteria of the Tender Document with respect to the detailed technical evaluation criteria provides as follows:-

<i>"Workshop space (Indicate sq. meters)</i>	<i>-5 marks</i>
<i>Over 1300 sq. meters and above</i>	<i>-5 marks</i>
<i>Less than 1300 sq. meters</i>	<i>-1 mark"</i>

Clause 3.36 of Section III. Instructions to Tenderers of the Tender Document provides as follows:-

"3.36.1 KPLC may confirm to its satisfaction whether the tenderer that is selected as having submitted a tenderer is compliant/responsive and qualifies to be appointed to perform any eventual assignment satisfactorily

3.36.2 The confirmation will take into account the tenderer's financial, technical and performance capabilities. It will be based upon an examination of the documentary evidence of the tenderer's qualifications submitted by the tenderer, pursuant to paragraphs 3.14 and 3.16 as well as confirmation of such other information as KPLC deems necessary and appropriate. This may include office and other facilities inspection and audits"

Note 4 of Section VI. Evaluation Criteria of the Tender Document provides for KPLC to carry out due diligence ascertain suitability and competence of bidders to offer the services. Such inspection is to include, but not limited to:-

- **Checking the physical office of the bidders**

- ***Verification of all statutory documents, checking of relevant equipments, handling of waste, including confirmation of details stated on forwarded documents, and whether they correspond to physical details. These shall include and are not limited to production capacity, tools and equipment, space, certificates etc***

Section 83 of the Act states as follows:-

"(1) An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act.

(2) The conduct of due diligence under subsection (1) may include obtaining confidential references from persons with whom the tenderer has had prior engagement.

(3) To acknowledge that the report is a true reflection of the proceedings held, each member who was part of the due diligence by the evaluation committee shall—

(a) initial each page of the report; and

(b) append his or her signature as well as their full name and designation.

From the above provisions of the Act and the Tender Document, any confirmatory visit by the Procuring Entity in respect of the 1st and 2nd Applicant's bid should only have been done after Financial Evaluation to confirm and verify the qualifications of the 1st and 2nd Applicants including confirmation and verification of their respective workshops once the 1st and 2nd Applicants were recommended for an award but prior to approval of the award in accordance with section 83 of the Act read together with clause 3.36 of Section III. Instructions to Tenderers and Note 4 of Section VI. Evaluation Criteria of the Tender Document.

It is therefore the Board's finding that the Procuring Entity unfairly evaluated the 1st and 2nd Applicants' respective bids on this criterion.

iii. Workshop Supervisor's and Test Supervisor's Qualifications

Item 8 (I) (a) of Table 1 of Clause 6.2.2 of Section VI. Evaluation Criteria of the Tender Document provides as follows:-

"Qualifications and skills of key staff (Provide certificates and CVs of each

1. Workshop Production Supervisor (1)

a) Qualification (Maximum 3 marks)

Degree in a relevant field -3marks

HND in the relevant field -1 mark"

In response to this criterion, the 1st Applicant proposed a Workshop Supervisor, with a Diploma Certificate in Computer Electronics Engineering issued on 17th December 2015.

The 1st Applicant also provided evidence of the following:-

- Certificate of Proficiency in Electrical Fitter issued by Kenya Power and Lighting Company on 28th August 1987;
- Certificate of Participation in a course on Power and Distribution Transformer Practice between May to June 2012

Neither of the documents mentioned hereinabove is a degree certificate of a higher national diploma certificate, hence the Evaluation Committee awarded the 1st Applicant a score of zero on this criterion.

It is the Board's finding that the Procuring Entity fairly evaluated the 1st Applicant on this criterion since the Workshop Supervisor neither had a degree certificate nor a higher national diploma in a relevant field as required in the Tender Document.

In response to this criterion, the 2nd Applicant attached the following:-

- A Graduation Certificate in Machine Manufacturing issued on 28th June 2004;
- A certified Technical Certificate in Electrical Repair issued by the People's Republic of China on 16th April 2006

Similarly, the Evaluation Committee awarded the 2nd Applicant a score of zero under this criterion and the Board finds that the Procuring Entity fairly evaluated the 2nd Applicant on this criterion since the Workshop Supervisor neither had a degree certificate nor a higher national diploma in a relevant field.

Item 8 (II) (a) of Table 1 of Clause 6.2.2 of Section VI. Evaluation Criteria of the Tender Document provides as follows:-

"Qualifications and skills of key staff (Provide certificates and CVS of each

1. Quality Control and test supervisor (1)

a) Qualification (Maximum 3 marks)

Degree in a relevant field -3marks

HND in the relevant field -1 mark'

In response to this criterion, the 1st Applicant proposed a Testing Engineer with an Advanced Diploma in Information Technology having studied the following components:-

- Fundamentals of Information Technology;
- OS, DOS and Windows;
- HTML

The Procuring Entity contended that this qualification was not relevant to the qualifications of a Testing Engineer. According to the Evaluation Report, the 1st Applicant was awarded a score of zero on this criterion.

It is the Board's considered view, that the Procuring Entity being the beneficiary of the services to be executed in the subject tender, it would be better placed to determine whether or not an Advanced Diploma in Information Technology is relevant to the qualifications of a Testing Engineer.

The Board finds that the Procuring Entity fairly evaluated the 1st Applicant on this criterion.

iv. Qualifications of at least four (4) other transformer repair staff

Item 8 of Clause 6.2.2 of Section VI. Evaluation of the Tender Document provides as follows:-

"Qualifications and skills of at least four other transformer repair staff

(Provide certificates and CV of each) -4 marks (1 mark for each meeting the criteria)

-Minimum Qualification -Craft Electrical

-Minimum Experience -1 year"

In response to this criterion, the 1st Applicant provided the following:-

a) Wilfred Kipendok

- A Curriculum Vitae stating he has a Higher Diploma in Electrical Engineering (Power Option) and has worked for the 1st Applicant from January 2017;
- A Diploma Certificate in Electrical Engineering issued on 25th November 2011.

b) Pasuram Ray

- A Curriculum Vitae with no academic qualification details in respect to the works of the subject tender but that he has worked for the 1st Applicant since January 2017.

c) Peter Njoroge

- A Curriculum Vitae stating that he has a Diploma in Electrical Engineering and has worked for the 1st Applicant since January 2017.

d) Joseph Kamau

- A Curriculum Vitae stating that he has a Diploma in Electrical and Electronics Engineering

The Board studied the 1st Applicant's bid and notes that it is only one of its staff, that is, Wilfred Kipendok whose CV was supported by a Diploma Certificate in Electrical Engineering. The 1st Applicant did not provide any professional certificates of the other staff proposed to execute the subject tender.

According to the Evaluation Report, the 1st Applicant was awarded a score of zero under this criterion.

It is the Board's finding that the Procuring Entity ought to have at least awarded some score to the 1st Applicant with respect to Wilfred Kipendok Curriculum Vitae and Diploma Certificate.

It is the Board's finding that the Procuring Entity unfairly evaluated the 1st Applicant under this criterion.

In response to this criterion, the 2nd Applicant provided the following:-

a) Naftali Thuranira

- A Curriculum Vitae showing he is a Transformer Repair Technician and has been in employment with the 2nd Applicant for 2 years and 3 months;
- A diploma certificate in electrical engineering issued on 29th September 2015

b) Daniel Muli

- A Curriculum Vitae showing he is a Transformer Repair Technician and has worked as employee of the Applicant since June 2018;
- A University Degree in Mechanical Engineering issued on 21st December 2017

c) Newton Okenye

- A Curriculum Vitae showing he is a Transformer Technician who has been working in employment for the Applicant since June 2018;
- A Diploma in Electrical Engineering

According to the Evaluation Report, the 2nd Applicant was awarded a total score of 4 marks under this criterion which was the maximum score a bidder could attain under this criterion yet the 2nd Applicant had only provided for 3 other staff and each staff was to be awarded 1 mark for each meeting the criteria.

It is the Board's finding that the Procuring Entity generously awarded a score of 4 marks to the 2nd Applicant yet the 2nd Applicant only provided for 3 other staff and therefore the evaluation of the 2nd Applicant's bid in comparison to other bidders was unfair under this criterion.

v. Workshop Supervisor and Test Engineer's Experience

Item 8 (I) (b) of Table 1 of Clause 6.2.2 of Section VI. Evaluation Criteria of the Tender Document provides as follows:-

"Experience (maximum 3 marks)

- Above 5 years in transformer repairs -3 marks***
- 3 to 5 years in transformer repairs -2 marks***
- Less than 3 years in transformer repairs -1 mark"***

In response to this criterion, the 1st Applicant attached the following:-

- A Curriculum Vitae of James Mwaura with a Diploma in Computer Electronic Engineering and has worked since January 2017 but did not provide recommendation letters

The Board finds that the Procuring Entity generously awarded the 1st Applicant 1 marks on this criterion on the basis of a Curriculum Vitae yet the experience was not supported by recommendation letter for its Workshop Supervisor as required under Notes to Table 1 (4.1) which provided ...***whatever is stated in the CV must be supported by recommendation letters or other testimonials***

In response to this criterion, the 2nd Applicant attached the following:-

- The CV of Xu Hoggang as its Workshop Production Supervisor indicating his earliest experience as from 2008 as Rewinding Manager in charge of transformer rewinding at Han Xong Xin Shan Transformer Company Limited, China;
- A certified translation of a Graduation Certificate for Xu Hoggang in Machine Manufacturing issued on 28th June 2004

The Board notes, the Workshop Supervisor indicates that he has experience as a Rewinding Manager in charge of transformer rewinding since 2008. However, this experience was not supported by a

recommendation letter as required under Note to Table 1 (4.1) of Section VI. Evaluation Criteria of the Tender Document.

Accordingly, the Board finds that the Procuring Entity generously evaluated the 2nd Applicant 1 mark under this criterion noting that it did not provide recommendation letters to support its experience as under Note to Table 1 (4.1) of Section VI. Evaluation Criteria of the Tender Document.

vi. Company's Experience

Item 9 of Table (1) of Clause 6.2.2 of Section VI. Evaluation Criteria of the Tender Document provides as follows:-

"Proof of Bidding Firm's Experience in transformer repairs in Kenya (Provide Documentary evidence)

Above 3 years -16 marks

2-3 years -10 marks

Below 2 years -5 marks"

The Procuring Entity contended that the 1st Applicant has undertaken relevant works, the earliest being 27th September 2017, which is less than 2 years to the closing date of the tender, that is, 13th August 2019.

The Board having studied the 1st Applicant's original bid notes that, in response to this criterion, the 1st Applicant provided the following:-

- A recommendation letter dated 17th July 2017 issued by Rural Electrification Authority to the 1st Applicant stating that the 1st Applicant was one of the companies pre-qualified to repair transformers since December 2016;
- A contract dated 6th February 2018 between Rural Electrification Authority and the 1st Applicant for repair of 49 faulty distribution transformers;
- A contract dated 12th September 2018 between Rural Electrification Authority and the 1st Applicant for repair of 7 faulty distribution transformers;
- A contract dated 5th November 2018 between Rural Electrification Authority and the 1st Applicant for Supply and Delivery of Conductors and Stay Wires;
- A contract dated 6th February 2018 between Rural Electrification Authority and the 1st Applicant for repair of 78 faulty distribution transformers.

The Board observes that the recommendation letter dated 17th July 2017, being the earliest of the documents demonstrating the 1st Applicant's qualifications, was issued by Rural Electrification Authority showing that the 1st Applicant was one of the companies pre-qualified to repair transformers

since December 2016. This means, the Applicant had experience of 2 years and 7 months in transformer repairs as at 13th August 2019, being the tender closing date of the subject tender.

According to the Evaluation Report, the Applicant was awarded a score of 5 marks instead of the 10 marks being the score allocated for the level of experience between 2 to 3 years.

It is the Board's finding that the Procuring Entity unfairly evaluated the 1st Applicant under this criterion

In respect of the 2nd Applicant, the Board makes the following observations:-

The Procuring Entity submitted that contrary to the 2nd Applicant's assertion that it was not awarded a score under this criterion, the Procuring Entity awarded the 2nd Applicant a score of 5 marks for having demonstrated 2 years' experience based on the relevant work done by the 2nd Applicant in relation to the works to be executed in the subject tender.

The Board having studied the 2nd Applicant's bid notes that at page 70 of its original bid, the 2nd Applicant states that it was established in 2016, but that it started the business of manufacture and repair of distribution transformers since September 2017. This means that as at the tender closing date of 13th August 2019, the 2nd Applicant had experience of 1 year and 11 months in the works to be executed in the subject tender.

It is the Board's finding that the Procuring Entity fairly evaluated the 2nd Applicant under this criterion since its experience could only earn it the maximum score of 5 marks, which was awarded to it during evaluation.

vii. Authentication by the Commissioner of oaths for the certificates

Clause 23 (e) of Section IV. Schedule of Requirements at page 34 of the Tender Document which provides as follows:-

"Details of qualified engineer including photo, cv and certified copies of professional and academic certificates (certified by commissioner for oaths/notary public)"

Clause 3 of Notes to Table 1 of Section VI, Evaluation Criteria of the Tender Document provides as follows:-

"3.1 Wherever certified copies are requested or acceptable to KPLC, the certification must be original.

3.2 A photocopy of a certified copy may not be accepted.

3.3. An electronic scanned copy of an original certified copy may be accepted.

3.4 A photocopy of any electronically scanned copy may not be accepted

The above two mentioned provisions of the Tender Document require an original certified copy to be electronically scanned to the Procuring Entity for such a document to be accepted.

The Board notes that the Certificate for the 2nd Applicant's Test Engineer was certified but not for the 2nd Applicant's Workshop Supervisor. However, both had been awarded a zero in this criterion. However, none of these two personnel had degree certificates or higher national diploma and were therefore fairly evaluated by the Procuring Entity.

The Board would like to make an observation that the Procuring Entity submitted that despite the 1st Applicant not having provided the required

tender security, its bid was subjected to Technical Evaluation. This therefore made it necessary for the Board to interrogate the reasons why the Applicant's bid was found non-responsive at the end of Technical Evaluation. This would protect the 1st Applicant's right to administrative review under section 167 (1) of the Act and to have an adjudicative forum determine whether a procuring entity's decision on an aggrieved bidder's bid was justified.

However, the provisions of the Tender Document provide guidance on the correct evaluation stage for considering the 1st Applicant's tender security.

According to the Tender Document, clause 6.1.1 of Section VI. Evaluation Criteria provides as follows:-

"Submission of copy of a valid tender security, adequacy and in the format prescribed in ITT"

From the Tender Document, submission of a valid tender security was a criterion for consideration during Preliminary Evaluation and not Technical Evaluation.

Having determined that the Procuring Entity could only evaluate the 1st Applicant based on the documents provided before the tender closing date, it is the Board's finding that the Applicant ought to have been found non-responsive after Preliminary Evaluation for failure to provide a tender security that is valid up to 10th March 2020 and should not have been subjected to Technical Evaluation.

Accordingly, the grounds raised in the Request for Review with respect to the 1st Applicant are hereby dismissed.

In totality of the issues raised in respect of 2nd Applicant, the Board finds that the Procuring Entity unfairly evaluated the two bidders in respect of the following criteria:-

- Item 2 (1) of Table 1 of Clause 6.2.2 of Section VI. Evaluation Criteria of the Tender Document (i.e. Workshop Space);
- Item 8 (III) of Table 1 of Clause 6.2.2 of Section VI. Evaluation Criteria of the Tender Document (i.e. Qualifications and Skills of at least four (4) other transformer repair staff).

The Board observes that Counsel for the Applicants submitted that the Applicants ought to have achieved the minimum technical score and if that was the case, to be subjected to a margin of preference under section 86

(2) of the Act. According to Counsel, the Procuring Entity, in its evaluation on the Applicants failed to take the provisions of section 86 (2) of the Act, into account.

The Board notes that section 86 (2) of the Act provides as follows:-

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

Section 86 (2) of the Act provides for a margin of preference entitled to 20% of their total score in evaluation for entities in which Kenyan citizens own at least fifty-one percent shares. However, this preferential treatment can only be given if a bidder achieves the minimum technical score during evaluation.

The Board would like to note that the Applicants herein, during evaluation did not meet the minimum technical score of 75% previously determined by the Procuring Entity. However, had the Applicants achieved the minimum technical score, then the provisions of section 86 (2) of the Act would be taken into account, if the threshold of 51% shareholding is satisfied.

Even if the Board found that the Applicants were unfairly evaluated in some of the criteria under the Tender Document, the role of re-evaluation of tenders and application of a margin of preference is left to the Evaluation Committee.

The Board further makes an observation that Counsel for the Applicants previously raised an issue concerning the designated person that ought to sign notification letters issued to bidders. No party had the opportunity to address the Board in exercise of their right to a fair hearing in so far as the issue of signing of notification letters is concerned, because Counsel for the Applicants abandoned this issue in the course of proceedings before this Board. We therefore do not wish to belabour on the same.

In totality, the Board holds that the Consolidated 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 Public Procurement and Asset Disposal Act, 2015, the Board makes the following orders in the Consolidated Request for Review:-

- 1. The Procuring Entity's Letter of Notification of Award of Tender No. KP1/9A.2/OT/59/NM/18-19 for Provision of Distribution Transformer Repair Services dated 21st November 2019 addressed to M/s Yocean (Group) Limited, be and is hereby cancelled and set aside.**
- 2. The Procuring Entity's Letter of Notification of Award dated 21st November 2019 with respect to Tender No. KP1/9A.2/OT/59/NM/18-19 for Provision of Distribution Transformer Repair Services addressed to M/s Pan Africa Transformers & SwitchGears Limited, be and is hereby cancelled and set aside.**
- 3. The Procuring Entity's Letter of Notification of Award dated 21st November 2019 with respect to Tender No. KP1/9A.2/OT/59/NM/18-19 for Provision of Distribution Transformer Repair Services addressed to M/s Mahashakti Kenya Limited, be and is hereby cancelled and set aside.**
- 4. The Procuring Entity's Letter of Notification of Unsuccessful bid dated 20th November 2019 with respect Tender No. KP1/9A.2/OT/59/NM/18-19 for Provision of Distribution Transformer Repair Services addressed to the 2nd Applicant herein, be and is hereby cancelled and set aside.**

For avoidance of doubt, the Procuring Entity's Letter of Notification of Unsuccessful bid with respect to Tender No. KP1/9A.2/OT/59/NM/18-19 for Provision of Distribution

Transformer Repair Services addressed to the 1st Applicant, be and is hereby upheld.

5. The Procuring Entity is hereby directed to re-instate the 2nd Applicant's bid at the Technical Evaluation stage and re-evaluate the 2nd Applicant's bid at the Technical Evaluation stage only with respect to the following specific criteria:-

- Item 2 (1) of Table 1 of Clause 6.2.2 of Section VI. Evaluation Criteria of the Tender Document (i.e. Workshop Space);**
- Item 8 (III) of Table 1 of Clause 6.2.2 of Section VI. Evaluation Criteria of the Tender Document (i.e. Qualifications and Skills of at least four (4) other transformer repair staff).**

6. Further to order no. 5 above, the Procuring Entity is hereby directed to complete the procurement process to its logical conclusion including the making of an award within twenty-one (21) days from the date of this decision, taking into consideration the Board's findings in this case.

7. Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.

Dated at Nairobi, this 24th day of December 2019

.....

**CHAIRPERSON
PPARB**

.....

**SECRETARY
PPARB**