

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 20/2020 OF 10TH FEBRUARY 2020

BETWEEN

LONGJIAN ROAD & BRIDGE CO. LTD.....APPLICANT

AND

THE ACCOUNTING OFFICER,

KENYA NATIONAL HIGHWAYS AUTHORITY.....RESPONDENT

AND

CHINA RAILWAY SEVENTH GROUP COMPANY

LIMITED.....INTERESTED PARTY

Review against the decision of the Accounting Officer of Kenya National Highways Authority with respect to Tender No. KeNHA/2219/2019 for the Construction to Mau Road Lot 1B: Kiambu County Section.

BOARD MEMBERS

- | | |
|----------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Dr. Joseph Gitari | -Member |
| 3. Mr. Alfred Keriolale | -Member |
| 4. Arch. Steven Oundo, OGW | -Member |

IN ATTENDANCE

- | | |
|-----------------------|----------------------------------|
| 1. Mr. Stanley Miheso | -Holding brief for the Secretary |
|-----------------------|----------------------------------|

2. Ms. Maryanne Karanja -Secretariat

PRESENT BY INVITATION

APPLICANT

**-LONGJIAN ROAD & BRIDGE
COMPANY LTD**

- | | |
|------------------------|--------------------------------------|
| 1. Mr. George Kamau | -Advocate, Wambugu Muriuki Advocates |
| 2. Ms. Sylvia Waiganjo | -Advocate, Wambugu Muriuki Advocates |
| 3. Mr. Francis Kabuchu | -Wambugu Muriuki Advocates |
| 4. Mr. Cau Ray | -Officer |
| 5. Mr. Shang Jin | |

PROCURING ENTITY

**-KENYA NATIONAL HIGHWAYS
AUTHORITY**

- | | |
|----------------------------|--|
| 1. Mr. James Ochieng Oduor | -Advocate, TripleOKlaw Advocates |
| 2. Mrs. Marysheila Oduor | -Advocate, TripleOKlaw Advocates |
| 3. Mr. Alex Nyororo | -Advocate, TripleOKlaw Advocates |
| 4. Mr. Jonny Omondi | -Advocate |
| 5. Mr. Gitari Muiruri | -Senior Supply Chain Management
Officer |
| 6. Mr. Richard Otieno | -Engineer |

INTERESTED PARTIES

**A. CHINA RAILWAY SEVENTH GROUP COMPANY
LIMITED**

- | | |
|---------------------|----------|
| 1. Mr. Elisha Oreta | -Partner |
|---------------------|----------|

- | | |
|---------------------|-----------------------------|
| 2. Ms. Susan Munene | -Geriwa Advocates |
| 3. Mr. John Misere | -Oluoch-Olunya & Associates |
| 4. Mr. Ben Olunya | -Oluoch-Olunya & Associates |
| 5. Gerry Steven | -Oluoch-Olunya & Associates |
| 6. Mr. Dong Junna | -Managing Director |

C. CHINA WU YI CO. LTD

- | | |
|---------------------|-----------|
| 1. Mr. Jairus Atuti | -Engineer |
|---------------------|-----------|

BACKGROUND TO THE DECISION

Kenya National Highways Authority (hereinafter referred to as “the Procuring Entity”) advertised Tender No. KeNHA/2219/2019 for the Construction to Mau Road Lot 1B: Kiambu County Section (hereinafter referred to as “the subject tender”) on MyGov Publication Website on 1st October 2019 inviting eligible firms (Firms registered under NCA 1 category or equivalent for international firms) to bid for the said tender. The same was uploaded on the Procuring Entity’s Website and PPIP portal.

Bid Submission Deadline and Opening of Bids

The Procuring Entity received a total of 12No bids by the tender submission deadline of 14th November 2019 and the same were opened shortly thereafter at the Procuring Entity’s Headquarters in the presence of bidders’ representatives who chose to attend.

Evaluation of Bids

The Director General appointed an evaluation committee vide a Memo Ref:KeNHA/08/TEC/Vol.11 (63) dated 18th November 2019 which evaluated bids in the following stages:-

- i.** Responsiveness of Bids;
- ii.** Technical Evaluation;
- iii.** Financial Evaluation.

1. Responsiveness of Bids

At this stage, the Evaluation Committee applied the Eligibility criteria on Section III. Instructions to Bidders at page 33 to 34 of the Tender Document. At the end of this stage, 4No bidders listed below were found non-responsive therefore not subjected to Technical Evaluation:-

- i.** Bidder No. 2, H. Young & Co. (E.A) Ltd;
- ii.** Bidder No. 8. China Jiangxi International Kenya Ltd (CJIKL) in Joint Venture with China Jiangxi International Economic and Technical Cooperation Co. Ltd (CJIC);
- iii.** Bidder No. 9, Stecol Corporation; and
- iv.** Bidder No. 11, Longjian Road and Bridge Co. Ltd

Eight bidders were found responsive therefore proceeded to Technical Evaluation.

2. Technical Evaluation

At this stage, the Evaluation Committee applied the criteria under Section III. Instructions to Tenderers at pages 35 to 43 of the Tender Document. It was noted that Bidder No 10, Intex Construction Ltd did not provide Engineers Board of Kenya Registration Certificate; Mr. Udaya Prakash only provided EBK Application Receipt while Mr. Madalana Veugopal did not provide any. Secondly, the proposed Bitumen Technical, Mr. Virendra Shrivatsava and Proposed Concrete Technician, Mr. Patel Kumar provided certificates in Mechanical Engineering instead of Civil Engineering as required.

Seven out of Eight bidders who were subjected to Technical Evaluation met the requirements under this stage.

3. Financial Evaluation

At this stage, the Evaluation Committee ranked bidders in accordance with their tender sums, such that the bidder with the lowest evaluated tender price was ranked No. 1.

3.1. Analysis of Lowest Priced Bidder at Tender Opening, M/s Longjian Roadand Bridge Co. Ltd

At page 32 of the Evaluation Report, the Evaluation Committee noted as follows:-

"Despite failing at the preliminary stage, Bidder No. 8, M/s Longjian Road and Bridge Co. Ltd would not have proceeded to Financial Evaluation Stage due to the following reasons:-

- The Bidder did not demonstrate evidence on ownership, lease or purchase of the following equipment***

***i. Primary/Secondary Crusher Unit/Power Screen
Min capacity-150t/hr-200t/hr-1No***

ii. Concrete Batching plant Min Cap. 20m³/hr-1No

***iii. Asphalt Concrete batching plant 150-200ton/hr-
1No***

iv. Pneumatic single and multiple compressor-1No

v. Concrete Poker Vibrator-3No

vi. Compactor-1No

vii. Diesel Generator (Min 15 KVA)-1No

viii. Rock Drill (Min 1.5M/Min)

(Only photographs were attached instead of Invoice, Lease Agreement, Bill of Lading or Import Declaration Form)

- The Bidder provided the following Equipment logbooks that were registered under M/s China Longjian Engineering Pty and not M/s Longjian Road and Bridge Company Ltd.***

i. 6x4 Tipper Trucks Payload 16-20 tonnes-16No;

ii. Dump Trucks- 2 No

- iii. Flatbed Lorries- 2 No.*
- iv. Concrete Mixer Truck-2No.*
- v. Trench Excavator-1No.*
- vi. Pulvimixer 300-350HP-2No*
- vii. Backhoe Loader*
- viii. Double drum vibrating pedestrian roller”*

Recommendation

The Evaluation Committee proceeded to recommend **M/s China Railway Seventh Group Co. Ltd**, being the bidder determined to have submitted the lowest evaluated bid for award of the subject tender.

Due Diligence

According to the Due Diligence Report dated 13th January 2020, the Evaluation Committee conducted a due diligence exercise on **M/s China Railway Seventh Group Co. Ltd**, and finally recommended the said bidder for award of the subject tender having passed the due diligence stage.

Professional Opinion

In the professional opinion dated 15th January 2020, the Deputy Director, Supply Chain Management expressed his satisfaction with the procurement process, reviewed the Evaluation Report and Due Diligence Report thereby

advising the Director-General of the Procuring Entity to award the subject tender to **M/s China Railway Seventh Group Co. Ltd at Kshs. 4,550,482,479.84.** The said professional opinion was approved on 27th January 2020.

Notification to Bidders

In letters dated 28th January 2020, the Director General of the Procuring Entity notified successful and unsuccessful bidders of the outcome of their bids.

THE REQUEST FOR REVIEW

M/s Longjian Road & Bridge Co. Ltd (hereinafter referred to as "the Applicant") lodged a Request for Review dated 22nd January 2020 and filed on 23rd January 2020 together with a Statement in Support of the Request for Review sworn and filed on even date, a Further Statement filed on 24th February 2020 and Written Submissions dated and filed on 24th February 2020. The Applicant sought for the following orders in the Request for Review:-

- a) An order annulling and setting aside the Respondent's decision awarding Tender No. KeNHA/2219/2019 for the Construction to Mau Mau Road Lot 1B: Kiambu County Section to China Civil Engineering Construction Ltd;***

- b) An order annulling and setting aside the Respondent's decision notifying the Applicant that it had not been successful in Tender No. KeNHA/2219/2019 for the Construction to Mau Mau Road Lot 1B: Kiambu County Section vide the letter dated 30th December 2019;***
- c) An order directing the Procuring Entity to accept bids issued in strict compliance to the requirements of the tender;***
- d) An order directing the Accounting Officer of the Procuring Entity to redo anything within the entire procurement process found to not have been properly done to ensure compliance with the law;***
- e) An order compelling the Respondent to pay costs to the Applicant arising from/and incidental to this Application; and***
- f) Such and further orders as the Board may deem fit and appropriate in ensuring that the ends of justice are fully met in the circumstances of this Request for Review.***

During the hearing, the Applicant was represented by Mr. George Kamau appearing together with Ms. Sylvia Waiganjo on behalf of the firm of Wambugu Muriuki Advocates, the Procuring Entity was represented by Mr. James Ochieng on behalf of the firm of TripleOKLaw Advocates while the Interested Party was represented by Mr. Ben Olunya on behalf of the firm of the firm of Oluoch Olunya & Associates Advocates.

PARTIES' SUBMISSIONS

Applicant's Submissions

In his submissions, Counsel for the Applicant, Mr. George Kamau, fully relied on the Request for Review, the Applicant's Statement in Support of the Request for Review, the Further Statement and Written Submissions.

Mr. Kamau began by giving a background to the procurement process and further submitted that the Applicant's tender price at tender opening was Kshs. 4,376,653,579.19 whereas the Interested Party submitted at tender price of Kshs. 4,550,482,479.84 which amounts translate to a difference of Kshs. 173,828,900.65.

Counsel further referred the Board to the letter of notification dated 28th January 2020 which was received by the Procuring Entity which contained the reasons why the Applicant's bid. The first one being, that the Applicant submitted a bid security expiring on 9th April 2020 instead of 10th April 2020. Secondly, that the Applicant provided a Power of Attorney issued by Mr. Kang Guangdong wherein the signature affixed therein differs from all signatures in the Applicant's tender. Thirdly, that the Applicant failed to demonstrate ownership, lease or purchase of the equipments listed in the

Applicant's letter of notification. On the second limb of the third reason, that the some of the equipments belong to China Longjian Engineering Pty Ltd and not the Applicant.

Regarding the List of Equipments, Counsel submitted that despite the Applicant having been disqualified at the Preliminary Evaluation Stage, because of the first and second reasons listed hereinabove, the Applicant's bid was still subjected to evaluation in so far as its equipments are concerned, which he opined ought to have been considered during Technical Evaluation.

As regards, the bid security submitted by the Applicant, Counsel directed the Board to page 53 of the Tender Document which contained Bidding Forms of the Tender Document, specifically, the Form that bidders were to fill when submitting their bid securities. In that regard, he submitted that the Tender Document required bidders to submit a bid that **"will remain in force up to and including 28 days after the expiry of bid validity"**. He further submitted that the bid validity period was specified at Clause 22 of Section III. Instructions to Tenderers of the Tender Document as 120 days from the date of tender opening of 14th November 2019.

Mr. Kamau then referred the Board Regulation 42 of the Public Procurement and Disposal Regulation, 2006 which states that the tender validity period shall be stated in calendar days from tender opening. Counsel then pointed out that the Procuring Entity based its argument on

section 57 (a) of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya which makes provision on computation of time. In that regard, Mr. Kamau took the view that in computing time with respect to the tender validity period, the same is not written law, yet section 57 (a) of the Interpretation and General Provisions Act applies to computing time for purposes of written law. He further submitted that a tender validity period is not defined in written law, but by a procuring entity, and that when computing time for purposes of written law the Board would be referring to timelines specified in the 2015 Act.

On his second argument, Mr. Kamau submitted that even if the Board would assume that section 57 (a) of the Interpretation and General Provisions Act applies in this instance, there is a clear contrary intention in the Tender Document, which required the tender validity period to start running on 14th November 2019 at 11.01am, and not the next day. To support this view, Counsel urged the Board to study the Applicant's Further Statement on the manner in which the Applicant computed the tender validity period. In conclusion, Counsel submitted that the Procuring Entity erroneously calculated the period when the tender validity period of the subject tender would lapse, thereby arriving at an erroneous date when the Applicant's tender security would lapse. He therefore submitted that in the Applicant's view, its tender security was valid as the same would expire on 9th April 2020.

On the issue of Power of Attorney submitted by the Applicant, Counsel submitted that at pages 50 and 51 of the Tender Document, the Procuring Entity provided the Power of Attorney and Alternate Power of Attorney to be duly completed by bidders. In his view, the main Power of Attorney ought to have been capable of what the Alternate Power of Attorney provided by bidders would do.

In that regard, he submitted that the Applicant committed to the subject tender as required by the Procuring Entity, therefore met the requirement of providing a power of attorney committing the bidder to the subject tender. Having submitted that the Applicant met all the requirements at Preliminary Evaluation, including the two requirements on tender security and power of attorney, Mr. Kamau submitted that the Applicant's bid was therefore responsive to proceed to Technical Evaluation. He further took the view that, at the Technical Evaluation stage, the evaluation process therein ought to have been objective and quantifiable in that each item under that stage ought to have been given a weight (in the form of scores) and not on a YES/NO basis.

He then referred to paragraphs 39 of the Procuring Entity's Response and 40 of the Procuring Entity's Replying Affidavit which in his view, represent the Procuring Entity's assertion that scores were awarded during Technical Evaluation therefore since the Applicant was informed that it never submitted some equipment, there ought to have been some scores

attached to what the Applicant provided. He took the view that a bidder cannot be disqualified for failure to provide some documentation at the Technical Evaluation stage, but that such a bidder ought to be denied the scores for its failure to provide the documents required to support its qualifications at the Technical Evaluation stage. Counsel referred the Board to page 279 of its List of Authorities which contains the decision of the Board in **PPARB Application No. 79 of 2018, Finken Holding limited v. Ministry of Agriculture & Irrigation, State Department of Livestock Smallholder Dairy Commercialization Programme (SDCP)**.

Counsel then referred the Board to the criteria of Major Item of Plant to be used on the Proposed Contract, at page 41 of the Tender Document which in his view required bidders to indicate core plant and equipment necessary for undertaking the project in the subject tender and a second requirement was for bidders to show proof of ownership. He then referred the Board to a dictionary meaning of the word indicate to mean; point out or show that something is true or exists. He referred to section 80 of the Act and took the view that, since bidders were told to indicate the core plant and equipment proposed to execute the subject tender, such a requirement ought to have earned the Applicant some score.

He then took the view that since bidders were further required to give an undertaking that the list of equipment indicated were sufficient, suitable,

adequate and in good working condition. In his view, such a requirement to give an undertaking ought to have earned the Applicant some score.

Counsel submitted that the Procuring Entity required all equipments to be owned by bidders. This in his view, would lock out bidders who were capable to leasing equipment to execute the subject tender and invited the Board to study the Interested Party's bid with a view of establishing whether or not it met this requirement.

Counsel then referred the Board to page 1197 of the Applicant's bid which contained a photo of a Primary/Secondary Crusher. Upon enquiry by the Board, Counsel admitted that the Applicant did not provide proof of ownership of the said crusher but that since the Applicant provided a Schedule describing the said equipment, it ought to have earned some marks during Technical Evaluation. At page 1300 to 1321 of the Applicant's bid, he submitted that the Board would find details of 20 Tank Tippers together with logbooks showing the tippers are registered in the Applicant's name and 16 Tank Tippers in the name of China Longjian Pty Engineering Ltd. He submitted that the Procuring Entity failed to consider the 20 Tippers registered in the Applicant's name and only disqualified the Applicant on the basis of the 16 Tippers in the name of China Longjian Pty Engineering Ltd.

On further enquiry by the Board, Counsel admitted that the Tender Document did not contain minimum technical score but that the Board should study the Procuring Entity's confidential file to confirm whether or not scores were attached during evaluation at the Technical stage. Counsel referred the Board to the decision of **PPARB Application Nos. 46, 47, 48 & 50 of 2013 (Consolidated), Unifree Duty Free & 3 Others v. Kenya Airports Authority**, specifically at page 408 of the Applicant's List of Authorities where the Board held that a procuring entity ought to use the standard tender documents. However, Counsel at the same time urged the Board to direct the Procuring Entity to subject the Applicant's bid to Financial Evaluation.

On the issue of use of public money, Counsel referred the Board to the last paragraph at page 55 of the decision in **PPARB Application Nos. 46, 47, 48 & 50 of 2013 (Consolidated), Unifree Duty Free & 3 Others v. Kenya Airports Authority** and submitted that the Procuring Entity herein failed to adhere to the principles of public finance, among them, prudent use of public money as stipulated in Article 201 (d) of the Constitution by awarding the subject tender to the Interested Party whose bid price is approximately over Kshs. 177 Million more than that of the Applicant.

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

Procuring Entity's Submissions

In his submissions, Counsel for the Procuring Entity, James Ochieng' fully relied on the Procuring Entity's Response, Replying Affidavit and Written Submissions. From the onset, Counsel submitted that the Procuring Entity carried out the subject procurement process in a system that is fair, equitable, transparent and competitive in accordance with the Constitution and the 2015 Act. He took the view that the Applicant is under a misconception that the Procuring Entity ought not to have carried out an examination of the documents submitted by the Applicant in response to the Tender Advertisement in order to ascertain the essential validity of the said documents.

According to Mr. Ochieng', the Procuring Entity herein first undertook an Essential Validity test and that any bidder that failed to meet this test was not subjected to Technical and Financial Evaluation stages. He submitted that the Applicant's bid was not responsive after a simple examination conducted to determine its Essential Validity. Counsel referred the Board to paragraphs 5.1 to 5.13 of the Procuring Entity's Written Submissions which deals with the issue of Essential Validity.

On the issue of the bid security submitted by the Applicant, Counsel submitted that all bidders were aware that the bid security ought to have been 28 days beyond the tender validity period. He further added that the issue before the Board relates to computation of time in order to establish

when the tender validity period would lapse, thereafter to establish when the tender security submitted by bidders ought to lapse. He submitted that the Applicant's assertion that the tender submission deadline of 14th November 2019 ought to be included when computing time, is misleading. In his view, section 57 (a) of the Interpretation and General Provisions Act requires the day when an event happens to be excluded from computation of time. He took the view that there is no distinction in computation of time when it comes to written law or the doing of a duty and that section 57 (a) of the Interpretation and General Provisions Act applies in all instances when computing time. He referred the Board to paragraphs 5.9, 5.15 and 5.17 of the Procuring Entity's Written Submissions on this issue. Accordingly, Counsel submitted that the Applicant ought to have submitted a bid security that expires on 10th April 2020 and not 9th April 2020.

On the issue of Power of Attorney, Counsel submitted that the Applicant submitted a Power of Attorney issued by one Mr. Kang Guadong who did not donate the said Power of Attorney to Mr. Yan Kexin named in the Applicant's Alternate Power of Attorney and was therefore not authorized to sign the Applicant's bid.

On the criteria on equipments, Counsel submitted that the Applicant ought to have demonstrated ownership of the same, but that it failed to do so. He then made reference to the 16 Tippers provided by the Applicant and submitted that the Applicant failed to demonstrate ownership of the same

and since it did not submit a Joint Venture, it could not use equipments belonging to China Longjian Engineering Pty Ltd.

On the issue of the allegation that the Procuring Entity failed to use Standard Tender Documents, Counsel submitted that the Applicant failed to seek clarifications on the provisions in the said Tender Document. He further took the view that the Applicant ought to have sought clarification on the evaluation criteria that the Procuring Entity would use at the Technical Evaluation stage.

On the issue of price, Counsel submitted that when a bidder fails to meet the criteria set out in the Tender Document for purposes of evaluation at the essential validity stage, such a bidder cannot claim that it ought to have been awarded the tender because it had the lowest bid price. On enquiry by the Board, Mr. Ochieng' submitted that Essential Validity stage refers to Preliminary Evaluation.

In conclusion, he urged the Board to dismiss the Request for Review as the same lacks merit.

Interested Party's Submissions

In his submissions, Counsel for the Interested Party, Mr. Ben Olunya, fully relied on the Interested Party's Response, Written Submissions together

with the List of Authorities and further associated himself with submissions made by the Procuring Entity.

Counsel submitted that there was no proper Request for Review before the Board for the reason that the Supporting Statement filed together with the Applicant's Request for Review is signed by one Mr. Zang Chiengming on 6th February 2020 and is not one of the persons authorized by the Applicant company. On the other hand, he submitted that the Applicant's Further Statement is signed by one Mr. ZangJia on 24th February 2020 and that the Special Power of Attorney donating powers to him to sign is attached therein.

He therefore submitted that the fact that the Applicant failed to attach a Power of Attorney donating powers to Mr. Zang Chiengming to sign the Applicant's Supporting Statement shows that this person signed the said document without authority, therefore making the Request for Review improperly filed before the Board.

On the second limb on the issue of Power of Attorney required in the Tender Document, Counsel referred the Board to Claus 5.1 at page 15 of the Tender Document which required bidders to submit a power of attorney committing a bidder and that no specific format was given but that the content of the same is specified therein, which the Applicant failed to adhere to.

On applicability of section 57 (a) of the Interpretation and General Provisions Act, Counsel submitted that the 2015 Act is written law hence by dint of section 4 of the Act, all aspects of the procurement process are subject to application of the 2015 Act. He further referred to the decision in **Republic v. Public Procurement Administrative Review Board & 3 others ex parte Syner-Chemie Limited (2018) eKLR** where the court held that the Interpretation and General Provisions Act applied to the 2015 Act.

In conclusion, he urged the Board to dismiss the Request for Review as the same lacks merit.

Applicant's Rejoinder

In a rejoinder, Mr. Kamau submitted that the criteria referred to by the Procuring Entity as Essential Validity was neither objective nor quantifiable. Upon being prompted by the Board that Counsel for the Procuring Entity admitted that Essential Validity is similar to Preliminary Evaluation, Mr. Kamau submitted that from the Procuring Entity's submissions there seems to be no clear distinction between preliminary responsiveness and technical evaluation.

On the issue of computation of time, Counsel maintained his submission that section 57 (a) of the Interpretation and General Provisions Act ceases

to apply where there is a contrary intention in a provision. He submitted that if the time is computed from 15th November 2019, it would mean that bidders could withdraw their bids on 14th November 2019 if that day is excluded from computation of time.

On the Power of Attorney submitted in response to the criterion in the Tender Document, Mr. Kamau Clause 13.2 of the Tender Document made it an obligation for bidders to submit a Power of Attorney and Alternate Power of Attorney which the Applicant did. Regarding the Tippers submitted in the Applicant's bid, Mr. Kamau maintained his submissions that some weight ought to have been given to the ones owned by the Applicant.

Counsel further submitted that the Interested Party raised the issue regarding the Applicant's Statement in Support of the Request for Review on the hearing date of 26th February 2020 when the Applicant has not had the opportunity to respond to the same. That notwithstanding, he submitted that this issue is in the nature of a preliminary objection and the same ought to have been raised five days after notification of the existence of the Request for Review in accordance with Regulation 77 (1) of the Public Procurement and Disposal Regulations, 2006. He further explained that the Power of Attorney in the Applicant's bid does not extend to filing of Request for Review applications and stated that Mr. Zang Chiengming who signed the Applicant's Statement is an officer of the Applicant

company. Thirdly, Counsel submitted that Mr. Zang Jia is also an officer of the Applicant hence was given authority to sign the Applicant's Further Statement.

In conclusion, Counsel reiterated that the Request for Review be allowed as prayed by the Applicant.

BOARD'S DECISION

The Board has considered each of the parties' cases, the documentation filed 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 oral submissions of the parties.

The issues for determination are as follows: -

- I. Whether the Interested Party's allegation that the Applicant's Statement in Support of the Request for Review sworn on 6th February 2020 and filed on 10th February 2020 was signed by a person that was not authorized by the Applicant, is properly raised before the Board;***

II. Whether the Procuring Entity rightfully found the Applicant's bid non-responsive in accordance with section 79 (1) and 80 (2) of the Act for the following reasons:-

- a) That the Bid Security provided by the Applicant expires on 9th April 2020 instead of 10th April 2020;
- b) That the signature of the authorized person issued with Power of Attorney i.e. Mr. Kang Guadong, differs from all signatures signed in the Applicant's bid.

III. Whether the Procuring Entity ought to have subjected the Applicant's bid to an Analysis of the List of Equipments submitted by the Applicant, upon concluding Financial Evaluation but before recommending the bidder to be awarded the subject tender; and

IV. What are the appropriate orders to grant in the circumstances?

On the first issue for determination, the Board notes that the Interested Party's Written Submissions dated 25th February 2020 and filed on 26th February 2020 challenges the Applicant's Statement in Support of the Request for Review (hereinafter referred to as "the Applicant's Supporting Statement") filed together with the Applicant's Request for Review in that the Applicant's Supporting Statement was signed by a person who was not authorized by the Applicant. According to Counsel for the Interested Party,

no proper Request for Review was filed before this Board with respect to the subject tender for the aforesaid reason.

At paragraph 3 (a) to 5 of the Interested Party's Written Submissions, it is averred as follows:-

"3. It is the Interested Party's submissions that the issues for determination are;

(a) Whether the Applicant's Request for Review is properly filed and before this Board

(b)

(c)

4. It is the Interested Party's submission that the instant application for Request for Review as filed by the Applicant is defective and therefore should be struck out for the following reasons

a) The Request for Review Application together with the Statement in Support of Request for Review were not duly signed by the duly authorized person to sign for and on behalf of the Applicant Company.

b) There is no evidence of any power of attorney donating powers to Mr. Zhang Chengming, the person who signed the Statement in Support of the Request for Review

5. The Applicant herein therefore lacks proper audience to be before this Board. We therefore urge that the Request for Review be struck out with costs”

In response to submissions made by the Interested Party, Counsel for the Applicant took the view that the Interested Party ought to have filed a Preliminary Objection within five days from the date of notification of the hearing of this Request for Review as required by Regulation 77 (1) of the Public Procurement and Disposal Regulations, 2006 (amended 2013) (hereinafter referred to as “the 2006 Regulations”). He further submitted that the Applicant was not given adequate time to explain why Mr. Zhang Chengmings signed the Applicant’s Supporting Statement.

Having considered parties’ submissions, the Board deems it necessary to address the Applicant’s assertion that this issue ought to have been raised by way of a preliminary objection filed in accordance with Regulation 77 (1) of the Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as “the 2006 Regulations”).

It is worth noting that the nature of Preliminary Objections was explained in the case of **Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Limited [1969] EA 696**, as follows:-

"So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit."

It was further stated that:

"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion

The Board observes that firstly, preliminary objections ought to raise a pure point of law, which if argued as a preliminary point, is capable of disposing of the suit, or in this case, the Request for Review application. As a matter of principle, it was therefore appropriate for the Interested Party to challenge the Applicant's Supporting Statement by raising a preliminary objection. The Board would then proceed to determine whether or not such a preliminary objection is premised on uncontroverted facts therefore raising pure points of law.

Secondly, the Board is alive to the fact that Regulation 77 (1) of the 2006 Regulations gives timelines for filing a preliminary objection and any response to the same. The said provision states as follows:-

"77. (1) A party notified under Regulation 74 may file a preliminary objection to the hearing of the request for review to the Secretary of the Review Board within five days from the date of notification.

(2) The preliminary objection filed under paragraph (1) shall set out the grounds upon which it is based on and shall be served on the applicant at least one day before the hearing.

(3) The applicant may file a reply to the preliminary objection before the time of the hearing of the request"

It is the Board's considered view that, these timelines were set for a purpose, the most important one being, to afford a party whose application is being challenged by way of a preliminary objection, to have adequate time and opportunity to respond to such an objection.

This procedure is based on one of the principles of natural justice; that a person's right to a fair hearing ought to be protected by a decision making body. The court in **Miscellaneous Application No. 36 of 2016,**

Republic v National Police Service Commission Exparte Daniel Chacha [2016] eKLR when citing with approval the decision in **Baker v. Canada (Minister of Citizenship & Immigration) 2 S.C.R. 817 6** held that:-

"A recent articulation of the elements of procedural fairness in the administrative law context was provided by the Supreme Court of Canada as follows:-"

"The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions."

Therefore, the principles of natural justice concern procedural fairness and ensure a fair decision is reached by an objective decision maker. Maintaining procedural fairness protects the rights of individuals and enhances public confidence in the process. The ingredients of fairness or natural justice that must guide all administrative decisions are, firstly, that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision-maker; secondly, that no one ought to be a judge in his or her case

and this is the requirement that the deciding authority must be unbiased when according the hearing or making the decision; and thirdly, that an administrative decision must be based upon logical proof or evidence material.”

In the instant case, the Board observes that initially, the Interested Party filed a Memorandum of Response to the Request for Review on 19th February 2020. Upon perusal of the said response, the Board notes that the Interested Party only responded to the issues raised by the Applicant in its Request for Review but did not take issue with the person signing the Applicant's Supporting Statement.

Further, when the Request for Review first came up for hearing on 20th February 2020, the Applicant applied for adjournment in order to file a Further Statement in Support of the Request for Review. Having heard parties' submissions on the Applicant's application for adjournment, the Board allowed the same in terms of the following orders:-

- a) The Applicant is directed to file and serve its Further Statement in support of the Request for Review and written submissions by 5.00pm on the 24th day of February 2020.***
- b) The Procuring Entity and the successful bidder are hereby directed to file and serve their written submissions by 5.00pm on 25th February 2020.***

c) Hearing of the matter is stood over to 1.00pm on 26th February 2020 and the same shall proceed by way of highlighting of submissions.

d) The Applicant shall bear the cost of adjournment amounting to Kshs. 10,000/-

The Board observes that on 24th February 2020, the Applicant filed its Written Submissions and Further Statement in Support of the Request for Review. On its part, the Interested Party filed its Written Submissions on 26th February 2020, a few hours before the hearing, challenging the Applicant's Supporting Statement for the first time, even though the Board directed the Interested Party to file its Written Submissions on 25th February 2020.

In essence, the Applicant did not have an opportunity to respond by way of pleadings to the new issue raised in the Interested Party's Written Submissions regarding the person who signed the Applicant's Statement in Support of the Request for Review, noting that the Interested Party's Written Submissions were only filed on 26th February 2020, which was the hearing date of the Request for Review.

Assuming the Interested Party filed a preliminary objection within five days from the date it was notified of the existence of the Request for Review, the Applicant would have had opportunity to respond to the said objection before the hearing date of 26th February 2020. By 26th February 2020,

which was the hearing date and the date when the Interested Party's Written Submissions were filed, the Applicant had already filed a Further Statement in Support of the Request for Review and Written Submissions on 24th February 2020 (as directed by the Board), hence did not have an opportunity to respond (by way of pleadings) to the new issue raised by the Interested Party.

Article 50 of the Constitution provides that:-

"(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body

(2) Every person has the right to a fair trial, which includes the right—

(a)

(b)

(c) to have adequate time and facilities to prepare a defence;

(d)

(e)

(f)

(g)

(h)

(i)

- (j)
- (k) **to adduce and challenge evidence”**

Even if the Interested Party did not file a preliminary objection as was expected in this instance and assuming it challenged the Applicant’s Supporting Statement in its Response, the Applicant still maintains the right to be afforded sufficient time and opportunity to prepare a defence supporting the reasons why Mr. Zhang Chengming signed its Supporting Statement. In this instance, the Interested Party filed its Written Submissions on the hearing date of 26th February 2020, instead of 25th February 2020 contrary to the directions given by this Board, raising an issue that was not previously raised in its Memorandum of Response to the Request for Review, thereby defeating the Applicant’s right to a fair hearing provided for in Article 50 (1) and (2) of the Constitution.

In order to uphold substantive justice, this Board shall not allow the Interested Party to defeat the Applicant’s right to a fair hearing by raising a new issue challenging the Applicant’s Supporting Statement on the date of the hearing.

Accordingly, the Board finds that the Applicant did not have adequate time and opportunity to defend its case regarding the question whether or not the Statement in Support of the Request for Review sworn on 6th February 2020 and filed on 10th February 2020 was signed by a person that was authorized by the Applicant. Accordingly, the Interested Party’s assertion that the Applicant’s Request for Review is not properly before this Board

was not properly raised before the Board by the Interested Party noting that the same was raised in the Interested Party's Written Submissions which were filed out of time, leaving the Applicant with no room to rebut the allegations therein.

On the second issue framed for determination, the Board having heard parties' submissions, proceeds to address the issue under consideration in the following two limbs:-

a) Bid Security

All parties to the Request for Review are in agreement that the tender validity period of the subject tender is 120 days. However, the contention before the Board is with respect to the date when the tender validity period of 120 days ought to have started running, in order to determine the period when the bid security, (i.e. 28 days after the tender validity period) submitted by bidders should lapse.

According to Clause 16.1 of Section II. Instructions to Tenderers of the Tender Document, it is stated as follows:-

"The bid shall remain valid and open for acceptance for a period of 120 days from the specified date of bid opening specified in Clause 22 or from the extended date of tender opening, whichever is later"

Clause 22 referenced above provides that:-

"Bids must be received by the Employer at the address specified in Sub-Clause 21.2 not later than the time and date indicated in the invitation to Bid/Tender Notice"

Clause 13 of Section I. Invitation to Tender of the Tender Document previously specified the tender submission deadline as 31st October 2019. However, this period was extended to 14th November 2019 vide Addendum No. 1 dated 23rd October 2019.

As regards bid security, Clause 12 of Section I. Invitation to Tender of the Tender Document provides as follows:-

"The bids must be accompanied by a bid security of Kshs. 30,000,000.00 (Kenya Shillings Thirty Million Only) in form of a bank guarantee only from a reputable bank. In case the Guarantee is from a Foreign Bank, the Bidder shall be required to furnish the Authority with a written confirmation authenticating the guarantee by a correspondent local bank"

Further, the Form of Bid Security provided in Section IV. Bidding Forms at page 53 of the Tender Document states that:-

"This guarantee will remain in force up to and including twenty-eight (28) days after the date of expiration of the bid validity, as stated in the Instructions to Bidders"

In addressing the question when the tender validity period of the subject tender shall lapse, the Board observes, the Applicant took the view that the tender validity period would start running on the tender submission deadline of 14th November 2019, because of the use of the word "from" under Clause 16.1 of Section II. Instructions to Tenderers of the Tender Document. To support this view, Counsel for the Applicant advanced two arguments; firstly, that section 57 (a) of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya (hereinafter referred to as the "IGPA") applies when computing time specified in written law. In that regard, Counsel took the view that a tender document issued by a procuring entity is not "written law", hence, section 57 (a) of the IGPA does not apply when computing the date when the tender validity period of the subject tender would start running. Counsel then gave examples of periods that are specified in the 2015 Act that guide the procurement process, which in his view would be guided by section 57 (a) of the IGPA as they are contained in a written law (i.e. the 2015 Act).

Secondly, Counsel for the Applicant advanced the argument that even if the Board were to find section 57 (a) of the IGPA applicable in this

instance, then a contrary intention appears, in the sense that, Clause 16.1 of Section II. Instructions to Tenderers of the Tender Document specified that the tender validity period would start running on the tender submission deadline of 14th November 2019.

Counsel for the Procuring Entity and the Interested Party refuted these arguments. According to the Procuring Entity, section 57 (a) of the IGPA applies when computing time for purposes of a written law or in determining the obligation placed on a person or entity in fulfilling duties bestowed upon such person or entity by the law. In his view, a period of days from the happening of an event or the doing of an act or thing is deemed to be exclusive of the day on which the event happens or the act or thing is done.

On his part, Counsel for the Interested Party submitted that the 2015 Act guides all aspects of the procurement process, therefore the IGPA cannot be excluded when computing time. To support this view, Counsel for the Interested Party relied on the case of **Republic v. Public Procurement Administrative Review Board and 3 others ex-parte Syner-Chemie Ltd** in his submissions.

The Board having considered parties' submissions on the import of section 57 (a) of the IGPA, deems it necessary to interrogate the said provision, which states as follows:-

"In computing time for the purposes of a written law, unless the contrary intention appears—

- (a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done"***

It is evident that the introductory clause of section 57 of IGPA, indicates that the purpose of the said provision is to compute time for purposes of a written law. Section 3 of the IGPA defines the term "written law" as:-

"written law" means—

- (a) an Act of Parliament for the time being in force;***
- (b) an applied law;***
- (c) any subsidiary legislation for the time being in force; or***
- (d) any county legislation as defined in Article 260 of the Constitution"***

Further, applied law is defined under section 3 of the IGPA as:-

"applied law" means—

- (a) an Act of the legislature of another country, or an Order in Council of the United Kingdom;***

(b) subsidiary legislation made under any of the foregoing, which is for the time being in force in Kenya

It is certain from the above two definitions that, the IGPA applies to written law (including applied law) when computing time pursuant to section 57 of the IGPA. Further, the court in **Miscellaneous Judicial Review Application No. 371 of 2016, Republic v. Public Procurement Administrative Review Board & 3 Others (2018) eKLR**, (hereinafter referred to as "the KEMSA Case") which was cited by the Interested Party had occasion to address the applicability of the IGPA to written law, in particular, the 2015 Act. In addressing that issue, the Court cited with approval, the decision in **Republic vs. Public Procurement & Asset Disposal Administrative Review Board & 4 Others ex parte J. Knieriem BV [2016] KLR** and further held as follows:-

" I have considered the issues raised herein. This Court dealt with the issue of the applicability of the provisions of the Interpretation and General Provisions Act to the provisions of Public Procurement and Asset Disposals Act in Republic vs. Public Procurement & Asset Disposal Administrative Review Board & 4 Others ex parte J. Knieriem BV [2016] KLR as follows:

"According to the preamble to the Interpretation and General Provisions Act, it is:

An Act of Parliament to make provision in regard to the construction, application and interpretation of written law, to make certain general provisions with regard to such law and for other like purposes.

It is therefore my view and I so find that section 57 of the Interpretation and General Provisions Act, applies to the timelines under Public Procurement and Asset Disposal Act and in particular section 175(1) thereof and hence the date of the decision is excluded from the reckoning of time.

It follows that the provisions of the Interpretation and General Provisions Act as relate to time apply with equal force to the provisions of the Public Procurement and Asset Disposals Act, 2015”

From the KEMSA case, it is worth noting that, the court emphasized that the IGPA applies to written law, and specifically in relation to time, the provisions under the 2015 Act. In the KEMSA Case, the court was dealing with applicability of the IGPA (in general) to the 2015 Act and section 57 (a) of IGPA specifically to computation of timelines under the 2015 Act. Notably, the court in the KEMSA Case was dealing with one of the timelines under the 2015 Act, that is, fourteen days specified in section 175 (1) thereof within which a party may lodge Judicial Review proceedings at the High Court from the date of this Board’s decision.

This therefore leads the Board to consider the question whether the tender validity period, is a timeline specified under the 2015 Act. A thorough study of the 2015 Act reveals that none of the provisions therein provide for a tender validity period. In essence, the tender validity period is not a standard pre-determined date that could have been imposed by Parliament in the 2015 Act. This is because, a procuring entity specifies a number of days known as the tender validity period when issuing its tender documents since it is capable of estimating the appropriate time when the procurement process would run.

Since the tender validity period is determined by a procuring entity, section 88 of the Act took cognizance that it is a procuring entity that should be the one extending that period before it lapses. The said provisions states as follows:-

"88. Extension of tender validity period

- (1) Before the expiry of the period during which tenders shall remain valid the accounting officer of a procuring entity may extend that period.***
- (2) The accounting officer of a procuring entity shall give in writing notice of an extension under subsection (1) to each person who submitted a tender.***

(3) An extension under subsection (1) shall be restricted to not more than thirtydays and may only be done once.”

Having established that the tender validity period is determined by a procuring entity in its tender documents and having noted that tender documents do not fall in the category of written law, the Board finds that section 57 (a) of the IGPA does not apply when computing time for purposes of timelines specified in a tender document.

Even if the Board were to consider the Procuring Entity’s and Interested Party’s arguments that section 57 (a) of the IGPA applies to computing the tender validity period specified in the Tender Document, Clause 16.1 of Section II. Instructions to Tenderers, specified a contrary intention in that, the tender validity period would run for 120 days from 14th November 2019. Section 57 of the IGPA anticipates that there may be instances where a contrary intention appears, such that the first day when an event happens would not be excluded from computation of time.

This Board in several occasions when computing the tender validity period, considered the intention of a procuring entity in its tender document regarding when such period would start running. In **PPARB Application No. 133 of 2019, Med Marine Kilavuzluk ve Romorkor Hizmetleri Ins. San. VE TIC. A.S v. The Accounting Officer, Kenya Ports**

Authority & Another(hereinafter referred to as “the Med Marine Case”, the Board observed that:-

"Tender validity period is 90 days after the tender submission deadlinespecified in the Tender Document read together with clause 8 of Addendum No. 5 dated 7th June 2019"

Similarly, in **PPARB Application No. 123 of 2019, The Gardens and Weddings Centre Ltd v. The Accounting Officer, Nakuru County Government-The Rift Valley Provincial Hospital & Another**, the Board noted the following:-

"Tender Validity Period is 120 days after date of tender opening as specified in clause 2.13.1 of the Tender Document"

From the foregoing authorities, the Board interrogated the intention of the procuring entities in their respective tender documents wherein the tender validity period would start running a day after the tender submission deadline. In this instance, a contrary intention appears from the one expressed in section 57 (a) of the IGPA and it is therefore the Board’s finding that the tender validity period of the subject tender started running on 14th November 2019. Accordingly, 120 days from 14th November 2019 will lapse on 12th March 2020.

Section IV. Bidding Forms at page 53 of the Tender Document required bidders to provide a bid security that would remain in force up to and including twenty-eight (28) days after the date of expiration of the bid validity. This means, bidders were to provide a bid security that would run for 28 days after 12th March 2020. Accordingly, the period of bid security would run up to 9th April 2020.

From the documentation before the Board, the Applicant at page 051 of its original bid, provided a Bid Security (Bank Guarantee) as indicated in the letter dated 4th November 2019 addressed to the Procuring Entity herein for the sum of Kshs. 30,000,000/- stating as follows:-

"This Guarantee will remain in force up to and including twenty-eight (28) days after the date of expiration of the bid validity, as stated in the instructions to bidders, but in any case this guarantee will expire not later than April 09, 2020"

From the analysis made hereinbefore, the Board observes that the Applicant provided a bid security that complies with Clause 12 of Section I. Invitation to Tender read together with Section IV. Bidding Forms at page 53 of the Tender Document as the same is valid for 28 days after 12th March 2020 and will lapse on 9th April 2020, thus satisfied this criterion.

Accordingly, the Board finds that the Procuring Entity unfairly evaluated the Applicant's bid under this criterion.

b) Power of Attorney

Clause 5.1 (a) of Section II. Instructions to Tenderers of the Tender Document provides as follows:-

"5.1. Bidders shall as part of their bid:

(a) Submit a written power of attorney authorizing the signatory of the bid to commit the bidder"

On its part, Clause 13.1 of Section II. Instructions to Tenderers of the Tender Document lists the documents comprising the bid as follows:-

"The bid to be prepared by the bidder shall comprise dully-filled in/completed

1. Letter of Bid

2. Schedule of Adjustment Data

3. Form of Written Power of Attorney

....."

From the foregoing, the Board observes that Clause 5.1 (a) of Section II. Instructions to Tenderers of the Tender Document required bidders to provide a Written Power of Attorney authorizing the signatory of the bid to commit the bidder. The Procuring Entity went further to specify a written power of attorney as one of the documents comprising the bid submitted by a bidder.

In response to this criterion, the Applicant at page 519 of its original bid, provided a Power of Attorney dated 15th July 2019 which states as follows:-

"KNOW ALL MEN BY THESE PRESENTS THAT, I, Shang Yunlong, Chairman of Board of and legally representing Long Jian Road and Bridge Co. Ltd (LRBC) with the registered head office at No. 109 Songshan Road, Nangang District, Harbin City, Heilongjiang province, China, am desirous of appointing a proper and competent person as our attorney in the Republic of Kenya

Hence, I, the undersigned, have made, nominated and appointed and by this Power of Attorney, do make, nominate and appoint Mr. Kang Guodong (holding Chinese passport...) General Manager of Kenya Office of Long Jian Bridge Co. Ltd, the true and lawful attorney in the Republic of Kenya, to act for the following purposes:

- ***To develop our business in Kenya;***

- ***To open all official accounts both of foreign and local currencies or deposit in recognized banks and to handle all relevant matters thereto;***
- ***To negotiate and cooperate with other firms, sign related contract under authorization;***
- ***To sign and submit pre-qualification, bidding and proposal documents;***
- ***To handle all relevant matters as necessary for the above issues;***

This Power of Attorney shall be valid up to December 31, 2020 from the date of signing or until expressly revoked by me and shall revoke and supersede all and/or any previous power of attorney made to the said attorney

The signature of the, said Attorney is as under:

Kang Guadong: [signature affixed]

[signature affixed]

Shang Yunlong

Chairman of Board Legal Representative

Long Jian Road and Bridge Co. Ltd"

Further, Section IV. Bidding Forms of the Tender Document provided a Form of Written Power of Attorney in the following format:-

FORM OF WRITTEN POWER OF ATTORNEY

The Bidder shall state here below the name (s) and address of his representative (s) who is/are authorized to receive on his behalf correspondences in connection with the bid

Name of Bidder's Representative in Block Letters

The Company Director

(Address of Bidder's Representative)

(Signature of Bidder's Representative)

Alternate:

(Name of Bidder's Representative in Block Letters)

The Alternate, given Power of Attorney

(Address of Bidder's Representative)

Signature of Bidder's Representative

The Applicant at page 005 of its original bid reproduced the Form of Written Power of Attorney at Section IV. Bidding Forms of the Tender Document duly completing the same with the following details:-

FORM OF WRITTEN POWER OF ATTORNEY

The Bidder shall state here below the name (s) and address of his representative who is/are authorized to receive on his behalf correspondence in connection with the Bid.

KANG GUADONG General Director

Name of Bidder's Representative in Block Letters
The Company Director

**IVYLAND PARK HOUSE, CONVENT ROAD, STAREHE
DISTRICT, NAIROBI**

(Address of Bidder's Representative)

[signature affixed]

(Signature of Bidder's Representative)

Alternate:

YAN KEXIN Business Manager

(Name of Bidder's Representative in Block Letters)

The Alternate, given Power of Attorney

**IVYLAND PARK HOUSE, CONVENT ROAD, STAREHE
DISTRICT, NAIROBI**

(Address of Bidder's Representative)

**[signature affixed] and
[official stamp of the Applicant]**

Signature of Bidder's Representative

The Board notes that the Procuring Entity's contention is that:-

"The signatures of the Authorized Person issued with Power of Attorney i.e. Mr. Kang Guadong, differs from all signatures signed in the tender document

It is evident that the Procuring Entity does not dispute the fact that Mr. Kang Guadong was given authority by the Applicant to act on its behalf with respect to the matters specified in the written power of attorney dated 15th July 2019. Further, the Written Form of Power of Attorney under Section IV. Bidding Forms of the Tender Document gave bidders leeway to provide an Alternate Power of Attorney when it came to specifying a person authorized to receive correspondences in connection with the bidder, which form the Applicant duly completed and attached to its original bid.

Therefore, the Applicant responded to this criterion as specified by the Procuring Entity. This Board cannot therefore compare signatures neither can it give an expert opinion regarding the said signatures in order to establish which signature belongs to which person, yet it is evident that the Applicant provided a signatory as Mr. Kang Guadong with authorization to commit the Applicant to its bid as required by Clause 5.1 (a) of Section II. Instructions to Tenderers of the Tender Document and even specified the purpose of the power of attorney given to Mr. Kang Guadong. The Applicant further specified a Written Power of Attorney in accordance with Section IV. Bidding Forms of the Tender Document wherein Mr. Kang Guadong is identified as the Applicant's representative and an Alternate Power of Attorney identifying Mr. Yan Kexin as the Applicant's Representative.

The Procuring Entity did not adduce evidence demonstrating that the signatures in the Applicant's Power of Attorney do not belong to the person to which authority was granted, to act on behalf of the Applicant. Furthermore, the validity of signatures in the Power of Attorney did not form part of the criteria for evaluation.

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

At this point, it is important for this Board to explain the rationale behind responsiveness of a tender. Section 79 (1) of the Act defines a responsive tender as follows:-

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

A procuring entity has a further obligation to stick to the criteria and procedures provided in its tender document, when evaluating tenders. Section 80 (2) of the Act states that:-

"The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered."

In **Miscellaneous Application No. 118 of 2019, Republic v Public Procurement Administrative Review Board; Kenya Medical Supplies Authority (KEMSA) (Interested Party) Ex parte Emcure Pharmaceuticals Limited [2019] eKLR**, the court held that:-

"A proper construction of section 79 (1) of the law on procurement shows that the requirement of responsiveness operates in the following manner:- a bid only qualifies as a

responsive bid if it meets with all requirements as set out in the bid documents...

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 – in other words, they are a sine qua non for further consideration in the evaluation process [Emphasis by the Board]

As rightly put by the court in the above case, mandatory requirements are absolutely necessary (i.e. sine qua non) for further consideration in the evaluation process. The Applicant met the mandatory requirements at the Preliminary Evaluation stage and was therefore eligible to proceed to the next stage of evaluation.

In totality of issue No. 2 above, the Board finds that the Procuring Entity failed to evaluate the Applicant's bid at the Preliminary Evaluation stage accordance with section 79 (1) and 80 (2) of the Act.

On the third issue, the Board makes an observation that the two criteria addressed herein above were considered during the evaluation stage of **"Responsiveness of Bids"** as specified by the Procuring Entity at pages 6 to 14 of the Evaluation Report signed on 10th December 2019. At this

stage, the Evaluation Committee confirmed whether or not bidders provided the mandatory documents containing the information specified at pages 33 to 34 of the Tender Document. During the hearing, Counsel for the Procuring Entity referred to this stage as "**Essential Validity**" but on further enquiry by the Board, confirmed that the said stage is similar to Preliminary Evaluation.

Regulation 47 of the 2006 Regulations provides that a preliminary evaluation is carried out to establish the following:-

"47. (1) Upon opening of the tenders under section 60 of the Act, the evaluation committee shall first conduct a preliminary evaluation to determine whether-

(a) the tender has been submitted in the required format;

(b) any tender security submitted is in the required form, amount and validity period;

(c) the tender has been signed by the person lawfully authorised to do so;

(d) the required number of copies of the tender have been submitted;

(e) the tender is valid for the period required;

(f) all required documents and information have been submitted; and

(g) any required samples have been submitted.

(2) The evaluation committee shall reject tenders, which do not satisfy the requirements set out in paragraph (1)."

Regulation 47 (2) of the 2006 Regulations demonstrates that tenders which do not meet the mandatory requirements at the Preliminary Evaluation stage are rejected (i.e. found non-responsive). Therefore, it is not expected that evaluation of such tenders will continue in the next stages of evaluation.

At page 13 of the Evaluation Report signed on 10th December 2019, the Evaluation Committee noted the following upon concluding Preliminary Evaluation:-

"...iv. Bidder No. 11-Longjian Road and Bridged Co. Ltd

- Bid Security provided expires on 9/04/2020 instead of 10/04/2020 as required;***
- The signature of the authorized person issued with Power of Attorney, Mr. Kang Guadong differs from all signatures on the tender document***

Based on the above notes, the following four (4) bidders were found to be non-responsive and therefore not subjected to the Technical Evaluation:

Table 4: Non-Responsive Bidder for Preliminary & Responsiveness

<i>Bidder No.</i>	<i>Bidder Name</i>
<i>2</i>	<i>H. Young & Co. (E.A) Ltd</i>
<i>8</i>	<i>China Jiangxi International Kenya Ltd in JV with China Jiangxi International Economic and Technical Cooperation Co. Ltd</i>
<i>9</i>	<i>Stecol Corporation</i>
<i>11</i>	<i>Longjian Road and Bridge Co. Ltd</i>

Despite having stated the Applicant was among four other bidders not subjected to Technical Evaluation, the Procuring Entity addressed a letter of notification of unsuccessful bid dated 28th January 2020 to the Applicant which contains two other reasons why the Applicant’s bid was found non-responsive, apart from the two reasons dealing with bid security and power of attorney which were evaluated at the Preliminary Evaluation Stage. Upon studying the two reasons other reasons, the Board notes that they relate to criteria that was considered at the Technical Evaluation stage and not Preliminary Evaluation stage.

This prompted the Board to study the Evaluation Report to interrogate the reason why the Applicant’s bid was subjected to further evaluation.

Pages 18 to 29 of the Evaluation Report contains the results of Technical Evaluation, however, the Applicant is not among the bidders who were evaluated at the Technical Evaluation stage. Further, pages 29 to 32 of the Evaluation Report contains the results of Financial Evaluation wherein the Applicant is not among the bidders subjected to evaluation at that stage.

That notwithstanding, upon concluding Financial Evaluation and before recommending the bidder to be awarded the subject tender, the Evaluation Committee at Clause 9.4 of the Evaluation Report conducted what it calls an **“Analysis of Lowest Priced Bidder at Tender Opening, M/s Longjian Road and Bridge Co. Ltd”** and noted the following:-

“The Committee noted that despite failing at the preliminary stage, Bidder No. 11-M/s Longjian Road and Bridge would not have proceeded to the Financial Evaluation Stage due to the following reasons:-

- The Bidder did not demonstrate evidence on ownership, lease or purchase of the following equipment***

ix. Primary/Secondary Crusher Unit/Power Screen

Min capacity-150t/hr-200t/hr-1No

x. Concrete Batching plant Min Cap. 20m³/hr-1No

xi. Asphalt Concrete batching plant 150-200ton/hr-1No

xii. Pneumativ single and multiple compressor-1No

xiii. Concrete Poker Vibrator-3No

xiv. Compactor-1No

xv. Diesel Generator (Min 15 KVA)-1No

xvi. Rock Drill (Min 1.5M/Min)

(Only photographs were attached instead of Invoice, Lease Agreement, Bill of Lading or Import Declaration Form)

- ***The Bidder provided the following Equipment logbooks that were registered under M/s China Longjian Engineering Pty and not M/s Longjian Road and Bridge Company Ltd.***

ix. 6x4 Tipper Trucks Payload 16-20 tonnes-16No;

x. Dump Trucks- 2 No

xi. Flatbed Lorries- 2 No.

xii. Concrete Mixer Truck-2No.

xiii. Trench Excavator-1No.

xiv. Pulvimixer 300-350HP-2No

xv. Backhoe Loader

xvi. Double drum vibrating pedestrian roller”

The Board notes, the Evaluation Committee elected to conduct an analysis of the equipments proposed by the Applicant to execute the subject tender just because the Applicant had the lowest priced bid at tender opening.

This Board wonders whether the Procuring Entity would have considered awarding the tender to the Applicant if it met the minimum requirements as relates to the equipments required to execute the subject tender, which the Procuring Entity opted to analyze and not consider any other criterion at the Technical Evaluation stage when it came to analyzing the Applicant's technical capacity.

If that was the case, then it means the Procuring Entity was more concerned about the equipments of the bidder who submitted the lowest bid price, as opposed to awarding the tender to the bidder who met the mandatory requirements at the Preliminary and Technical Evaluation and finally determining such bidder to be the lowest evaluated bidder. The court in **Judicial Review No. 106 of 2014, Republic v Public Procurement Administrative Review Board & 3 others Ex-Parte Olive Telecommunication PVT Limited [2014] eKLR**, while considering the issue of award of a tender based on the lowest evaluated bid held as follows:-

"the documents before the Board demonstrated the manner in which the lowest evaluated price was to be reached and the same documents also showed that the lowest evaluated price awarded was reached in that manner...There is no requirement in the Act, the Regulations and the tender document, requiring a procuring entity to award a tender at

the price set in the form of tender without carrying out bid evaluation'

It is worth noting that Article 227 (1) of the Constitution cites principles that guide public procurement process. The said provision states:-

"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"

Procurement of goods and services in a cost-effective manner is one out of five principles that guide public procurement. The principles of fairness, equitability, transparency and competitiveness dictate that bidders are subjected to the same evaluation criteria so that they compete on an equal footing for award of a tender. Therefore, the price a bidder quoted in its Form of Tender is not the sole consideration for award of a tender. This explains why consideration of price is done at the last stage of evaluation after bidders already demonstrated their responsiveness to eligibility and mandatory requirements (including technical specifications) of a tender document.

If indeed the Applicant failed to demonstrate its responsiveness to mandatory requirements at the Preliminary Evaluation Stage, an analysis of the equipments the Applicant proposed should not have been conducted and immediately after Financial Evaluation but before recommending the

bidder to be awarded the subject tender, noting that the Applicant was never subject to a complete Technical Evaluation as captured at pages 18 to 29 of the Evaluation Report.

It is the Board's finding that such an analysis of the equipments submitted by the Applicant where the Applicant never qualified for evaluation at the Technical and Financial Evaluation stages, was unprocedural.

In a letter dated 28th January 2020, the Procuring Entity notified the Applicant of the outcome of its bid specifying the two criteria considered during Preliminary Evaluation, in which the Procuring Entity found the Applicant's bid non-responsive. The said letter of notification also contained the reasons captured in Clause 9.4 of the Evaluation Report regarding the analysis conducted on the equipments proposed by the Applicant.

Having found that the Procuring Entity unprocedurally subjected the Applicant's bid to an analysis of equipments required at the Technical Evaluation stage, it is the Board's considered view that the Applicant ought to be given an opportunity for its bid to be re-evaluated at that stage. This is because, as earlier observed, the Applicant satisfied the requirements of Bid Security and Power of Attorney which were evaluated at the Preliminary Evaluation stage. Further to this, the Evaluation Committee did not take issue with the other categories considered during Preliminary Evaluation of the Applicant's bid.

Article 227 (1) of the Constitution cited hereinbefore dictates that a procuring entity treats all bidders fairly when undertaking its procurement process and such a process includes evaluation and comparison of tenders. This Board would like to reiterate that the Constitution and the Act does not require an Evaluation Committee to undertake an analysis on a bidder who submitted the lowest bid price before determining the bidder to be recommended for award of a tender.

Having found that the Applicant met the requirements of tender security and power of attorney at the Preliminary Evaluation stage, it is evident that the Evaluation Committee will arrive at the same conclusion as the Board, that the Applicant's bid ought to be given a chance to compete on a fair level ground with other bidders who made it to the Technical Evaluation stage.

The Board finds that the principle of fairness under Article 227 (1) of the Constitution dictates that the Applicant be given an opportunity to compete on an equal footing with other bidders who made it to Technical Evaluation and not to be analyzed separately on its own, upon conclusion of Financial Evaluation.

The Board would like to note that the Applicant challenged the Tender Document in two respects. Firstly, that the Procuring Entity failed to use the standard tender documents provided by the Public Procurement Regulatory Authority. Secondly, that the Procuring Entity ought to have conducted Technical Evaluation using the scoring method.

On the first argument advanced by the Applicant, the Board observes that the Applicant participated in the subject procurement process as a candidate by obtaining the Tender Document and returning a bid in response to the Procuring Entity's Advertisement Notice thereby becoming a tenderer.

Clause 10.1 of Section II. Instructions to Tenderers of the Tender Document gave bidders a right to seek clarifications from the Procuring Entity. The said provision states:-

"The prospective bidder requiring any clarification of the bidding documents may notify the Employer in writing or by cable at the Employer's mailing address indicated in the Bidding Data

The Employer will respond in writing to any request for clarification that he receives earlier than 7 days prior to the deadline for the submission of bids..."

The Applicant had a right to seek clarification from the Procuring Entity regarding issuance of the Tender Document used in this procurement process. However, the Applicant only waited until its bid was found non-responsive to raise an issue with the tender document after subjecting itself to the said procurement process that used the Tender Document, which the Applicant is now challenging.

It is a well-established doctrine of equity that “**equity aids the vigilant and not the indolent**”. This principle requires a party seeking any relief that can be granted by a court or any other decision making body to exercise its right when such right becomes available to it.

The Board finds that the Applicant ought to have sought clarification from the Procuring Entity or even approach this Board before subjecting itself to the subject procurement process, and not to wait until it has been declared non-responsive to challenge the Tender Document used in the subject procurement process.

The Applicant also took the view that the Procuring Entity ought to have used the scoring method when undertaking Technical Evaluation. The Board notes that the Tender Document did not specify that the scoring method would be used during Technical Evaluation.

However, at paragraph 39 of its Response and paragraph 40 of its Replying Affidavit, the Procuring Entity averred as follows:-

"The Respondent submits that the technical evaluation was conducted on the responsive bids and marks awarded to the same"

The Board further studied pages 14 to 29 of the Evaluation Report and notes that contrary to the Procuring Entity's assertion, the Evaluation Committee used the "YES/NO" criteria to confirm whether or not bidders met the mandatory minimum requirements at the Technical Evaluation stage.

The Applicant referred the Board to the decision in **PPARB Application No. 79 of 2018, Finken Holding Limited v. Ministry of Agriculture & Irrigation, State Department of Livestock Smallholder Dairy Commercialization Programme (SDCP)** where the Board held as follows:-

"Further to the above and even assuming for arguments sake that a work schedule was a requirement of this tender for the purposes of evaluation, the Procuring Entity could not disqualify the applicant or any other bidder at the technical evaluation stage based on absence of a work schedule..."

It is only the absence of a mandatory requirement or a bidder's failure to attain the minimum technical score that can render a bidder's tender non-responsive. Where a requirement is not mandatory or where no minimum technical score pass mark is set out, a bidder cannot be declared non-responsive at the technical evaluation stage"

From the foregoing case, it was held that where a requirement is not mandatory or where no minimum technical scores is set out, a bidder cannot be declared non-responsive at the technical evaluation stage.

It is worth noting that section 80 (3) of the Act provides that:-

"The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)—

(a) the criteria shall, to the extent possible, be objective and quantifiable"

It is therefore the Board's considered view that evaluation at the Technical Evaluation Stage should be carried out in accordance with the Tender Document and the Act.

In determining the appropriate orders to issue in the circumstances, this Board already established that the Procuring Entity unprocedurally conducted an analysis of the equipments provided by the Applicant upon

concluding its Financial Evaluation and before recommending the bidder to be awarded the tender. Further, the Applicant met the two criteria in issue at the Preliminary Evaluation stage, and the Procuring Entity did not take issue with other categories when evaluating the Applicant's bid at the Preliminary Evaluation stage. Therefore, it would amount to wastage of public resources to direct the Procuring Entity to conduct a fresh evaluation at the Preliminary Evaluation stage only to arrive at the conclusion that the Applicant should proceed to Technical Evaluation.

In the circumstances, the Board finds that the Procuring Entity ought to re-admit the Applicant's bid at the Technical Evaluation stage and conduct a re-evaluation of all bidders who made it to the Technical Evaluation stage. In doing so, the Procuring Entity has the obligation to apply criteria that is objective and quantifiable in accordance with section 80 (3) of the Act.

In totality of the foregoing, the Board allows the Request for Review 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 Request for Review:-

- 1. The Procuring Entity's Letter of Notification of Award dated 28th January 2020 addressed to M/s China Railway Seventh Group Company Limited with respect to Tender No. KeNHA/2219/2019 for the Construction to Mau Mau Road Lot 1B: Kiambu County Section, be and is hereby cancelled and set aside**
- 2. The Procuring Entity's Letter of Notification of unsuccessful bid dated 28th January 2020 addressed to the Applicant herein with respect of the subject tender, be and is hereby cancelled and set aside.**
- 3. The Procuring Entity is hereby directed to re-instate the Applicant's bid at the Technical Evaluation stage and conduct a re-evaluation at the Technical Evaluation stage of the Applicant's bid together with all other bidders who made it to the Technical Evaluation stage and conclude the procurement process including the making of an award within fourteen (14) days from the date of this decision, taking into consideration the Board's findings in this case.**
- 4. 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 2nd day of March 2020

CHAIRPERSON

SECRETARY

PPARB

PPARB

Delivered in the presence of:-

- i.** Ms. Sylvia Waiganjo for the Applicant;
- ii.** Mrs. Marysheila Oduor for the Respondent; and
- iii.** Mr. Dong Junxia, Managing Director of the Interested Party.