

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 22/2020 OF 12TH FEBRUARY 2020

BETWEEN

METSEC CABLES LIMITED.....APPLICANT

AND

**KENYA POWER AND LIGHTING COMPANY
LIMITED.....1ST RESPONDENT**

AND

**THE ACCOUNTING OFFICER,
KENYA POWER AND LIGHTING COMPANY
LIMITED.....2ND RESPONDENT**

Review against the decision of Kenya Power and Lighting Company Limited with respect to Tender No. KP1/9A.3/OT/03/19-20 for the Supply of Surge Arresters 33KV 10A Composite, Surge Arresters 220KV 10A and Fuse Cut Out LV Overhead Service 400A.

BOARD MEMBERS

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

IN ATTENDANCE

1. Mr. Philemon Kiprop -Holding brief for the Secretary
2. Ms. Judy Maina -Secretariat

PRESENT BY INVITATION

1. Mr. Gideon Muturi -Advocate, J. M Waiganjo Advocates
- 2 Mr. Morris Maina -Advocate, J. M Waiganjo Advocates
3. Mr. Norman Njenga -Sales Manager
4. Mr. Timothy Mathenge -Sales

PROCURING ENTITY

-KENYA POWER & LIGHTING COMPANY LIMITED

1. Mr. Lawson Ondieki -Advocate, Dentons Hamilton, Harrison & Mathews Advocates
2. Ms. Leah Kiarie -Advocate, Dentons Hamilton, Harrison & Mathews Advocates
3. Mr. Alefiyah Mohamed -Trainee Lawyer, Dentons Hamilton, Harrison & Mathews Advocates
4. Mr. Mamali Sadiq -Supply Chain Management Officer

BACKGROUND TO THE DECISION

Introduction

Kenya Power and Lighting Company Limited (hereinafter referred to as “the Procuring Entity”) proposed the purchase of 220 KV, Overhead LV Service cut outs 400A and 33KV Arresters which are first line of defence against surges and faults on transmission and distribution lines. Their primary role is to protect substation and line equipment in the systems from transient overvoltage caused by internal or external events.

The Bidding Process

Tender No. KP1/9A.3/OT/03/19-20 for the Supply of Surge Arresters 33KV 10A Composite, Surge Arresters 220KV 10A and Fuse Cut Out LV Overhead Service 400A (hereinafter referred to as “the subject tender”) was advertised on 15th October 2019 in the local dailies, the Procuring Entity’s e-procurement portal and Website.

Bid Submission Deadline and Opening of Bids

Following bidders’ request for clarification, the tender submission was extended to 14th November 2019 and opened shortly thereafter at the Procuring Entity’s Auditorium in Stima Plaza. The Procuring Entity received a total of 21 bids.

Evaluation of Bids

Having appointed an Evaluation Committee, the 21 bids received by the Procuring Entity were evaluated in the following key stages:-

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

1. Preliminary Technical Evaluation

Evaluation at this stage was undertaken as per Clause 6.2 of Section VI of the Document for the Supply of Surge Arresters 33KV 10A Composite, Surge Arresters 220KV 10A and Fuse Cut Out LV Overhead Service 400A (hereinafter referred to as "the Tender Document") to verify the following information:-

- ISO 9001:2015 Certificate;
- Type Test certificate and their reports/Test certificates and their reports;
- Manufacturer's Authorization;
- Manufacturer's Warranty;
- Catalogues and/or Brochures;
- Manufacturer's Drawings;
- Submission of Samples; and
- Schedule of Guaranteed Particulars as per Technical Specifications

At the end of this stage, 3 bidders were found non-responsive on the items listed above due to the following reasons:-

No.	Bidder	33kv Surge Arrester 10kA	220 KV Surge Arrester 10KA	Overhead LV Service Cut out 400A
1	M/s Harrowden Company Ltd	Type Test Certificates & Reports were for a different manufacturer other than the bidder's manufacturer	compliant	No quote
2	M/s Merwanje General Supplies Ltd	Compliant	The bidder did not submit Type Test Reports for 220 KV Surge Arresters	Compliant
3	M/s Wings Enterprise Ltd	Compliant		Type Test Certificates & Reports were for a different manufacturer other than the bidders

2. Detailed Technical Evaluation

Evaluation at this stage was carried out in accordance with Part of Clause 6.2.1 and 6.2.2 of Section VI of the Tender Document. Out of ten bidders for 33kv Surge Arresters, three bidders were found responsive to detailed technical evaluation and therefore qualified to proceed to Financial Evaluation. The remaining 7 bidders were found non-responsive.

Secondly, out of 7 bidders for the 220kv Surge Arresters, one (1) bidders was found responsive to Detailed Technical Evaluation and therefore qualified to proceed to the Financial Evaluation Stage. The remaining six bidders were found non-responsive. Thirdly, out of 4 bidders for Overhead LV Service Cutout 400A, two bidders were found responsive to Detailed Technical Evaluation therefore qualified to proceed to Financial Evaluation while the remaining two bidders were disqualified from further evaluation.

3. Financial Evaluation

Evaluation was carried out in accordance with Clause 6.3.1 under Part III of Section VI of the Tender Document. A price analysis for the three items being procured under the subject tender was tabulated as follows:-

No	Supplier/Bidder	Unit Price DDP/DAP Exclusive VAT Kshs		
		33KV Surge Arresters	220KV Surge Arresters	Overhead LV Service Cutout 400A
1	Reer Akim Ltd	19,482.76	Non-compliant	No quote
2	Alan Dick Company Ltd	6,298.28	Non-complaint	Non-Compliant
3	Electechnique Power Ltd	4,055.00	Non-complaint	Non-Compliant
4	Harrowden Company Ltd	Non-Compliant	271,206.90	No Quote
5	Lomas & Lomas Ltd	Non-Compliant	Non-Compliant	2,997.00
6	Mayleen K. Ltd	Non-Compliant	Non-Compliant	2,678.45

Recommendation

The Evaluation Committee recommended award of the subject tender as follows:-

1. M/s Electechnique Power Ltd (Manufacturer-Dalian Tucheng International Co. Ltd)

KPLC Code	Item Description	Quantity	Unit (Kshs. Excl)	Price VAT	Total Kshs VAT Excl	Price Excl
117608	33KV Surge Arresters	3239		4,055.00		13,134,145.00
	Total Price Kshs. VAT Exclusive					13,134,145.00
				16% VTA		2,101,463.20
				Total Kshs. Inclusive	Price VAT	15,235,608.20

2. M/s Harrowden Company Ltd (Manufacturer-Zhejiang Haivo Electrical Co. Ltd)

KPLC Code	Item Description	Quantity	Unit (Kshs. Excl)	Price VAT	Total Kshs VAT Excl	Price Excl
117650	220KV Surge Arresters	33		271,206.90		8,949,837.70
	Total Price Kshs. VAT Exclusive					8,949,837.70
				16% VTA		1,431,972.43
				Total Kshs. Inclusive	Price VAT	10,381,800.13

3. M/s Mayleen K Ltd

KPLC Code	Item Description	Quantity	Unit (Kshs. Excl)	Price VAT	Total Kshs VAT Excl	Price Excl
117650	Overhead LV Service Cutout 400A	15,078		2,678.45		40,385,643.10
	Total Price Kshs. VAT Exclusive					40,385,643.10
				16% VTA		6,461,702.29
				Total Kshs. Inclusive	Price VAT	46,847,346.00

Due Diligence

The Evaluation Committee carried out a due diligence exercise comprising of:-

- i.** Factory Audit; to assist in evaluating the technology used in comparison to the requirements. Manufacturing facilities and production capability of the manufacturer shall be evaluated;
- ii.** Inspection in at least 2 utilities where the manufacturer has successfully supplied these Surge Arresters. This will help to check the functional status and performance of the same.

Professional Opinion

On 13th January 2020, the Ag. General Manager, Supply Chain, reviewed the Evaluation Report advising the Accounting Officer to award the subject tender to the bidders listed above in the respective items. The said professional opinion was approved on 14th January 2020.

Notification to Bidders

In letters dated 20th January 2020, the Managing Director & CEO of the Procuring Entity notified successful and unsuccessful bidders of the outcome of their bids.

THE REQUEST FOR REVIEW

M/s Metsec Cables Limited (hereinafter referred to as "the Applicant") lodged a Request for Review on 12th February 2020 together with a Statement in Support of the Request for Review sworn and filed on 12th February 2020 and a Further Statement in Support of the Request for Review sworn and filed on 25th February 2020. The Applicant sought for the following orders:-

- a) An order annulling and setting aside the Respondent's decision awarding Tender No. KP1/9A.3/OT/03/19-20 for the Supply of Surge Arresters 33KV 10A Composite, Surge Arresters 220KV 10A and Fuse Cut Out LV Overhead Service 400A to the alleged successful bidders;***
- b) An order substituting the decision of the Board for the decision of the Respondent upon reviewing all records of the procurement process (particularly the technical and financial evaluation thereof relating to Tender No. KP1/9A.3/OT/03/19-20 for the Supply of Surge Arresters 33KV 10A Composite, Surge Arresters 220KV 10A and Fuse Cut Out LV Overhead Service 400A;***
- c) An order directing the Respondent to sign a contract with the Applicant in accordance with the Tender and the decision of the Board;***
- d) Further and in the alternative, an order nullifying the entire procurement process and directing the Respondent to re-tender afresh;***

- e) An order directing the Respondents to pay the costs of and incidental to these proceedings; and*
- f) Such or further relief or reliefs as the Board shall deem just and expedient.*

During the hearing, the Applicant was represented by Mr. Gideon Muturi on behalf of the firm of J. M Waiganjo Advocates, while the Procuring Entity was represented by Mr. Lawson Ondieki on behalf of the firm of Dentons Hamilton, Harrison & Mathews Advocates.

PARTIES' SUBMISSIONS

Applicant's Submissions

In his submissions, Counsel for the Applicant, Mr. Gideon Muturi relied on the Request for Review, the Applicant's Statement and Further Statement together with Written Submissions.

Counsel submitted that the Tender Document had three categories for the Surge Arrestors being procured by the Procuring Entity; **KPLC Code 117608, Surge Arresters 33KV 10A, KPLC Code 117650, Surge Arresters 220KV 10A, KPLC Code 183203 Fuse Cut Out Lv Overhead Service 400A**. He submitted that the Applicant was only challenging **KPLC Code 117608, Surge Arresters 33KV 10A** and not the other categories.

Counsel noted that the Procuring Entity raised an issue of jurisdiction on the basis that the Applicant was served with the letter of notification on 27th January 2020. He however submitted that the Applicant was notified of the outcome on 29th January 2020 and not 27th January 2020 as averred by the Procuring Entity. He further referred to the Affidavit filed by the Procuring Entity which avers that the Applicant was notified via email on 27th January 2020. He submitted that the Procuring Entity's Affidavit was filed without leave of the Board and further that the Applicant attached its letter of notification to its Statement, which indicates that the Applicant's letter of notification was received on 29th January 2020 and not 27th January 2020.

Counsel referred to paragraph 5 of the Procuring Entity's Affidavit wherein it is averred that the Applicant was served via an email of metsec-info@doshigroup.com and stated that the same does not belong to the Applicant and that the correct email of the Applicant is info@doshigroup.com. For the foregoing reasons, he urged the Board to find that the Request for Review filed on 12th February 2020 was within the 14-day statutory period under section 167 (1) of the Act, since the Applicant was served on 27th January 2020.

On the second issue, Counsel took note of the Procuring Entity's prayer that the documents marked as HD2 and HD 3 attached to the Applicant's Further Statement, be expunged. He submitted that these documents could not be expunged and that a formal application ought to have been made by the

Procuring Entity or that a preliminary objection ought to have been raised by the Procuring Entity. He submitted that the two documents; HD2 and HD3 are relevant because they relate to the same product that is subject of proceedings before the Board with respect to the technical specifications of the Surge Arrester being procured by the Procuring Entity. He further submitted that the two aforementioned documents expound on the specifications of the Surge Arrester and how they match IEC requirements, IEC 60099-4 which was the standard to be applied in the subject procurement process.

According to Mr. Muturi, the Applicant was a successful bidder in a previous award granted to it by the Procuring Entity and that before the Applicant could supply the products to the Procuring Entity, the Applicant explained to the Procuring Entity the standards and specifications of the Surge Arrester. The Applicant's manufacturer, TE Connectivity explained to the Procuring Entity the product's characteristics, highlighted differences between the Guaranteed Technical Particulars and the Procuring Entity's Power Distribution Specifications for the Surge Arresters.

As part of the specifications, Counsel submitted that TE Connectivity explained the technical aspects of the standards, vis a vis the Kenya Power distribution system requirements and that the Procuring Entity accepted the explanations given to it by the Applicant's manufacturer regarding the said Surge Arresters. Counsel took the view that the explanations provided in

HD2 and HD3 are so central in assisting the Board to understand the IEC Standards required by the Procuring Entity in the subject tender. He further submitted that the Procuring Entity does not deny that those documents were sent to it neither do they deny those documents were validity filed before the Board. He therefore urged the Board to admit the said documents to be used in these proceedings in order for it to understand the technical specifications in the subject procurement process.

On the third issue, Counsel first submitted that the Applicant's tender was responsive in accordance with section 79 (1) of the Act. He referred the Board to page 30 of the Tender Document at Clause 6.1 thereof and submitted that the Procuring Entity specified that the responsiveness of a bid would be determined at the Preliminary Evaluation Stage and that the Applicant's tender was substantially responsive therefore was subjected to Technical Evaluation.

Counsel then submitted that Technical Evaluation comprised of 2 limbs; Technical Evaluation and Detailed Technical Evaluation. He took the view that the Applicant met the requirements at the Detailed Technical Evaluation and ought to have been found responsive. To support this view, he relied on the case of **Republic v. Public Procurement Administrative Review Board ex parte Barbs Security** which dealt with the issue of responsiveness of bids.

Counsel made reference to the Applicant's letter of notification wherein 7 reasons why the Applicant's bid was found non-responsive are outlined therein. He further submitted that the Procuring Entity in its Response, admitted that two of the reasons stated therein were erroneously stated since they do not include the reasons why the Applicant's bid was found non-responsive. These are reasons are **(c), Pollution Level as per IEC TS 60815 not stated and reason (e) Steep current impulse protective level, max KV as per IEC 60099-5 not compliant.**

On the first reason why the Applicant's bid was found non-responsive i.e. **Maximum Duration of Earth Fault, seconds not stated**, Counsel referred the Board to a document known as "Product Data Sheet" attached to the Request for Review. He submitted that a table on Power Frequency Voltage gives a graph which reflected the requirement on **Maximum Duration of Earth Fault**. He further submitted that the Applicant attached Test Reports in this regard which when compared with the graph, the time indicated therein is below 3 seconds. He further submitted that bidders were required to have submitted a Surge Arrester Voltage of 40KV whose corresponding time is 3 seconds as indicated in the graph. He further submitted that on the Applicant's duly completed Guaranteed Technical Particulars, it indicated "Compliant" since, its Test Reports and Product Data Sheet would demonstrate the compliance talked about by the Applicant in its GTPs.

Counsel then moved to Reason **(d) Continuous Operating Voltage, KV rms not compliant** and referred the Board to the Applicant's GTP where it indicated 10KV as per IEC 60099-4. He submitted that there was a typographical error since it ought to have been indicated as 29KV and not 10KV. To support his submissions, he referred the Board to the OCP2 Series on the Applicant's Product Data Sheet indicates 29KV. According to Mr. Muturi, what the Applicant indicated in its GTP was an erroneous entry which does not affect the substance of the Applicant's tender given that its Product Data Sheet indicates 29KV. Counsel further submitted that the Tender Document required 28.8KV but that submitting 29KV still complies with this requirement. On further enquiry by the Board, Counsel clarified that 9.6KV indicated in the Tender Document is for 11KV whereas 28.8KV is for the **KPLC Code 117608, Surge Arresters 33KV 10A.**

Counsel then moved to **reason (f) Operating Duty Characteristics, not compliant and reason (g) Pressure Relief Withstand capability, not compliant**, as indicated in the Applicant's letter of notification. Counsel submitted that the requirements indicated in these two requirements cannot be achieved scientifically. Counsel submitted that the Procuring Entity required Discharge Class 2 product and that as per the independent test reports submitted by the Applicant, as per IEC requirement 60099-4, the Operating Duty Characteristic can only reach a maximum of 400Amperes and that this was one of the issues explained by the Applicant's manufacturer in the attachment found in the Applicant's Further Statement. Upon enquiry by the Board, Counsel submitted that the Applicant provided a product that

has a maximum of 400Amps as the same is the maximum achievable under Discharge Class 2. He further urged the Board to confirm whether or not the successful bidder submitted Operating Duty Characteristic under Discharge Class 2 for 900Amps. In his view, Class 2 could only go to a maximum of 440Amps and that to reach 900 Amps, one would have to graduate to a higher Discharge Class.

Regarding **reason (g) Pressure Relief Withstand capability, not compliant**, Counsel submitted that the Applicant met this requirement as per IEC 60099-4 of 2Kmps for 1 second at 10,000 or 20,000 discharge current and that the same was explained to the Procuring Entity by the Applicant's manufacturer. Counsel submitted that the 2KA indicated in the Tender Document on the requirement is a standard. Counsel submitted that a bidder would indicated values in their GTPs are proposed by the Procuring Entity to mislead the Procuring Entity when their test results could contain contrary figures/values. In the Applicant's view, some of these values were complicated such that a bidder ought not to have merely stated them in the GTP but to provide supporting documentation. He termed the Applicant's failure to state values in some sub-categories as a minor deviation which did not affect the substance of the Applicant's tender.

Counsel further submitted that the Applicant urges the Board to ensure that the Evaluation process is fairly and uniformly applied to bidders without

exception and that the Applicant was not challenging the contents of the Tender Document.

In conclusion, he urged the Board to allow the prayers sought in the Request for Review.

Procuring Entity's Submissions

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

Mr. Ondieki structured his response into three main issues as follows:-

- i. Whether the Board has jurisdiction to entertain the Request for Review;*
- ii. Whether the documents attached to the Applicant's Request for Review as HD2 and HD3 ought to be expunged by the Board; and*
- iii. Whether the Applicant's bid was responsive at the Detailed Technical Evaluation Stage.*

On the first issue of jurisdiction, Mr. Ondieki made reference to the Affidavit sworn by Mr. Martin Ngewa, the Procuring Entity's Supply Chain Assistant deponing that an advance copy of the notification letter was sent to the

Applicant on 27th January 2020. He further submitted that the said Affidavit explains the difficulty in retrieving the email sent to the Applicant on the said date of 27th January 2020. He further submitted that the Applicant's Managing Director, Mr. Hemal Doshi depones in the Applicant's Further Statement that the Applicant collected the letter of notification on 29th January 2020 but does not deny that an advance email was sent to the Applicant. On his third point, Counsel submitted that the Applicant disowned the email address it provided to the Procuring Entity for purposes of communication and that the said email address can be found in the Applicant's confidential business questionnaire submitted in its original bid. He therefore urged the Board to find that the Applicant was notified of the outcome of its bid via email on 27th January 2020 therefore rendering the Request for Review filed on 12th February 2020 out of time. He submitted that the Board lacks jurisdiction to entertain the Request for Review by dint of section 167 (1) of the Act.

Regarding the documents annexed to the Applicant's Further Statement as the second issue framed by Mr. Ondieki, Counsel made reference to the documents marked as HD2 and HD 3 and gave an explanation of the role of the Procuring Entity in conducting an evaluation of the bids received by it, in accordance with section 80 (2) of the Act. Counsel submitted that, that provision gives the Evaluation Committee the responsibility to evaluate and compare tenders in accordance with the procedures and criteria set out in the tender documents. He further submitted that the documents HD2 and HD3 were not documents required by the Procuring Entity in the blank

Tender Document. While making reference to the letter dated 7th March 2016 annexed as HD2, Counsel submitted that the same talks about the manufacturer TE Connectivity giving comments on clarifications made after award of the previous tender to the Applicant but before supply of the product mentioned therein. In Counsel's view, post-award documents of a different tender have no relation to the manner in which a procuring entity is supposed to evaluate bids in another tender. He submitted that those clarifications are with respect to a different Tender Document, not before the Board for its consideration. He urged the Board to disregard and expunge the said documents from the record of proceedings before the Board.

Counsel referred the Board to Clause 2. References at Page 95 of the Procuring Entity's bundle of documents which according to him informed bidders of the IEC 60099-4 Standard. He submitted that the Procuring Entity further informed bidders that "the documents referred to therein (IEC 60099-4 requirements among others), was referred to during preparation of the technical specifications and that in case of conflict, the requirements of the specifications set in the Tender Document shall take precedence".

Counsel then referred to the Note under page 101 of the Tender Document which states as follows:-

"Deviations from the values on Table 1. System Requirements (found at Clause 4.1.2 at page 97 of the Procuring Entity's bundle of documents) shall clearly be declared by the

manufacturer in the table of Guaranteed Technical Particulars (GTP) in Annex A at the time of bidding for purposes of tender evaluation. Manufacturers shall be required to declare all the offered values in Table 1”

He submitted that the Applicant indicated figures that do not meet the system requirements without attaching a list of deviations, therefore was not compliant. Counsel then sought to differentiate between responsiveness of bids and compliance of a bid. In his view, the Applicant was not compliant to the requirements at the Detailed Technical Evaluation stage. In his view, responsiveness of bids is determined at the Preliminary Evaluation Stage, whereas a bid is determined to be compliant or non-compliant to tender requirements at the Technical Evaluation Stage.

Turning to the Applicant’s Letter of Notification of unsuccessful bid, Mr. Ondieki made reference to the first reason **(a) Maximum Duration of Earth Fault, seconds not stated**, and further directed the Board to [age 107 of the Procuring Entity’s bundle of documents which sets out the Guaranteed Technical Particulars. At Clause 4.1.2 of Annex A. Schedule of Guaranteed Technical Particulars which required bidders to “state values” whereas the Applicant responded to this requirement by indicating “compliant” when the Procuring Entity required bidders to state a value of less than or equal to 3 seconds (≤ 3 seconds). Counsel submitted that by

simply stating “compliant”, the Procuring Entity was not in a position to compare the Applicant’s tender with other bidders.

On reason **(b) Earth Fault Factor as per IEC 60099-4, not stated**, he submitted that the Applicant failed to state the values as required by the Procuring Entity. On reason **(d) Continuous Operating Voltage, KV rms, not compliant**, he submitted that the Applicant indicated 10kv as per IEC 60099-4 whereas the GTP required 28.8KV. Counsel submitted that the Procuring Entity was to evaluate figures provided in the GTP in accordance with section 80 (2) of the Act. In his view, the Applicant had a duty to ensure the figures stated in the GTP are correct and accurate.

On reason **(f) Operating Duty Characteristics, not compliant** and **(g) Pressure relief withstand, not compliant**, Mr. Ondieki submitted that the Applicant seems to admit that the Tender Document was defective and it ought to have challenged the same with the Procuring Entity or approach the Board by dint of section 167 (1) of the Act. To support his submission, he referred to the case of **Republic v. PPARB ex parte CNBC North East Refineries and Chemical Engineering** which in his view established the importance of having clear tender document. He submitted that the Applicant set out values that deviated from the minimum requirements set by the Procuring Entity in so far as reasons (f) and (g) are concerned. He further submitted that the Applicant failed to complete a schedule setting out the deviations for purposes of evaluation, which is failed to do.

Counsel submitted that other bidders met the requirements which the Applicant is not challenging by alleging that they cannot be achieved scientifically. Upon being prompted by the Board that the Applicant desires all bidders to be evaluated fairly, he submitted that the argument advanced by the Applicant that some requirements (such as (f) and (g)) cannot be achieved scientifically is misleading to the Board since some bidders achieved the said requirements.

Counsel then made reference to prayer (c) of the Request for Review and submitted that the Applicant urges the Board to direct the Procuring Entity to enter a contract with it. According to Counsel, a bidder that failed after Technical Evaluation cannot benefit from such an order when it did not even make it Financial Evaluation. Upon enquiry by the Board on the requirement to proceed to Financial Evaluation, Counsel referred the Board to Clause 6.2.2 at page 41 of the Tender Document. He further submitted that attaching documents when what was required to be stated as values in the GTP, was not stated by the Applicant, does not amount to a minor deviation, but that the same renders the Applicant's bid non-responsive.

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

Applicant's Rejoinder

On the Applicant's prayer (c) in the Request for Review, Mr. Muturi submitted that the Applicant does not seek to be awarded the tender without being evaluated at the Financial Evaluation stage. He submitted that should the Board find that the Applicant met all the requirements at the Detailed Technical Evaluation, then the Board may evaluate the Applicant's Financial Proposal as the documents were filed with the Board. Upon being prompted that the obligation to undertake an evaluation (or re-evaluation) rests with the Evaluation Committee, Counsel reiterated his submission that the Board may re-evaluate the Applicant's bid. He however took a further view that should the Board find that the documents ought to be taken back to the Procuring Entity for a re-evaluation, the Applicant would be comfortable with such an order.

On the issue of jurisdiction of the Board to entertain the Request for Review, Mr. Muturi submitted that the evidence submitted by the Applicant that it received its letter of notification on 27th January 2020 is uncontroverted. He further submitted that the said Affidavit of the Procuring Entity was filed without leave of the Board neither did it pray for the said Affidavit to be admitted by the Board.

Counsel reiterated his submission that before a successful bidder ships for the product, an assessment is carried out with a view of ascertaining whether or not the product can work with the electrical system in Kenya. On the issue

of Stating Values, Counsel submitted that it is only at the Preliminary Evaluation Stage that a Procuring Entity would be evaluating what is stated by bidders, but that the Technical Evaluation ought to be concerned with what is provided as supporting documentation to the technical specifications provided in the Tender Document. He further submitted that the Procuring Entity ought to have sought clarification from the Applicant by dint of section 81 of the Act, in respect of confirming the specifications provided by a bidder in support of what is noted in the bidder's GTP.

In conclusion, Counsel urged the Board to consider the documentation provided before it and allow the Request for Review 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 Applicant filed its Request for Review outside the statutory period specified in section 167 (1) of the Act, thus ousting the jurisdiction of this Board***

Depending on the determination of the above issue:-

- II. Whether the letters attached to the Applicant's Further Statement ought to be expunged from the Request for Review proceedings before this Board;***
- III. Whether the Procuring Entity evaluated the Applicant's bid at the Detailed Technical Evaluation stage in accordance with Clause 6.2.2 of Section VI. Evaluation Criteria of the Tender Document read together with section 80 (2) of the Act and Article 227 (1) of the Constitution; and***
- IV. What are the appropriate orders to grant in the circumstances?***

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

Courts and decision making bodies can only act when they have jurisdiction to entertain a matter that is before them. This has been the holding in several decisions of our courts. In the Court of Appeal case of **The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) KLR 1**, it was stated that jurisdiction is everything and without it, a court or any *other decision making body* has no power to make one more step the moment it holds that it has no jurisdiction.

Similarly, in the case of **Kakuta Maimai Hamisi vs. Peris Pesi Tobiko & 2 Others (2013) eKLR** the Court of Appeal emphasized on the centrality of the issue of jurisdiction and stated thus:-

"So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. "

The Supreme Court in the case of **Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Ltd and 2 Others, Civil Application No. 2 of 2011** pronounced itself regarding where the jurisdiction of a court or any other decision making body flows from. It held as follows:-

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with Counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings."

It is therefore important at this point for the Board to establish whether or not it has jurisdiction to determine the issues raised in the substantive Request for Review application.

The jurisdiction of this Board is derived from section 167 (1) of the Act which provides as follows:-

"Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed"

Section 167 (1) of the Act gives an aggrieved candidate or tenderer the right to seek administrative review within fourteen days of notification of award or date of occurrence of an alleged breach of duty by a procuring entity at any stage of the procurement process, or disposal process.

The Procuring Entity contended that the Board lacks jurisdiction to entertain the Request for Review, since in the Procuring Entity's view, the same was filed outside the fourteen-day period specified in section 167 (1) of the Act.

To support this view, Counsel for the Procuring Entity submitted that the letter of notification of unsuccessful bid dated 20th January 2020 was sent to the Applicant on **27th January 2020**. The Applicant on the other hand contended that it was notified of the outcome of its bid on **29th January 2020** and not **27th January 2020** as alleged by the Procuring Entity.

Having considered parties' submissions, the Board notes that the dispute herein relates to the date when the Procuring Entity notified the Applicant of the outcome of its bid, in order to ascertain the date when the fourteen-day period started running.

In order to support its position that the Applicant was notified on 27th January 2020, the Procuring Entity relied on an Affidavit sworn on 26th February 2020 and filed with the Board on the same date by the Procuring Entity's Senior Supply Chain Assistant, who depones as follows:-

- "4. With respect to the applicant, I was to send the letter dated 20th January 2020 notifying the Applicant that its bid was unsuccessful. I received the letters on Friday, 24th January 2020 in the evening as it had to go through the 2nd Respondent's internal procedures which take time.***
- 5. On Monday, 27th January 2020, I sent the letters dated 20th January 2020 by email to the Applicant. I sent the***

letter to metsec-info@doshigroup.com. This email was provided as part of the applicant's contact details.

- 6. I thereafter archived my emails as I was running out of space in my inbox. It is standard practice for us to archive our emails when our inboxes are full. I have tried to access the email sent to the Applicant in our archives but I have not been successful.***
- 7. The applicant was duly notified of its unsuccessful bid on 27th January 2020.***
- 8. The facts deponed to herein above are within my knowledge and true"***

The Board observes that the Applicant raised three issues while opposing the Procuring Entity's submission regarding the date when the Applicant was notified of the outcome of its bid as follows:-

Firstly, the Applicant contended that the Affidavit sworn by the Procuring Entity's Supply Chain Assistant on 26th February 2020 was filed without leave of the Board.

The Request for Review first came up for hearing on 25th February 2020 wherein Counsel for the Applicant applied for an adjournment. The Board

having heard parties' submissions on the said application ordered as follows:-

- i. The Applicant is hereby directed to file and serve its Written Submissions by 5pm on 26th February 2020;***
- ii. The Procuring Entity is at liberty to file and serve its Supplementary Submissions by 5pm on 27th February 2020;***
- iii. The hearing of the Request for Review is stood over to 12 noon on 28th February 2020 and the same shall proceed by way of highlighting of submissions.***
- iv. The Applicant shall bear the cost of adjournment amounting to Kshs. 10,000/- to be paid on or before the hearing date.***

From the foregoing, the Procuring Entity was only directed to file Supplementary Submissions, if need be, by 5pm on 27th February 2020. The Procuring Entity never sought leave of the Board to file an Affidavit, but proceeded to file the same.

During the hearing, the Procuring Entity submitted that by the time it filed a Response to the Request for Review on 19th February 2020, it was not in a position to fully support its allegation that the Applicant was served on 27th January 2020, since it was still trying to retrieve the email that was sent to the Applicant on that date, but to no avail. Hence, on 26th February 2020, the Procuring Entity found it necessary to file a sworn Affidavit explaining that an advance copy of the Applicant's notification letter was sent to it on

27th January 2020, save that the Supply Chain Assistant had already archived his emails and the same could not be retrieved, for the Board to be furnished with the same.

It is true that the Procuring Entity never sought leave to file its Affidavit when the Request for Review first came up for hearing on 25th February 2020, but still proceeded to file the same on 26th February 2020. At the same time, it is also evident that the Procuring Entity's Affidavit was served upon the Applicant at least before the hearing date of 28th February 2020. This explains why the Applicant, in its effort to defend its position that it was served by the Procuring Entity on 29th January 2020 already had sight of the Procuring Entity's Affidavit thereby introduced evidence (in the form of its Official Stamp affixed on the letter of notification) to demonstrate that the notification letter was received at its offices on **29th January 2020**.

In essence, the Applicant had sufficient time and opportunity to respond to the allegations in the Procuring Entity's Affidavit. In doing so, the Applicant controverted the averments made in the Procuring Entity Affidavit, therefore the said Affidavit did not conclusively settle the allegation that the Applicant was served with its letter of notification on 27th January 2020.

Given that the date when the Procuring Entity alleges to be the date when it served the Applicant with the letter of notification, is controverted, this

Board shall now turn to address the question regarding the person to whom the burden of proof lies.

In **Civil Appeal No. 80 of 2015, Kipkebe Limited v Peterson Ondieki Tai [2016] eKLR**, the court while considering the question of burden of proof held as follows:-

"It is trite law in evidence that he who asserts must prove his case. No evidence was adduced by the plaintiff. In such cases, the burden of proof lies with whoever would want the court to find in his favour in support of what he claims."

The Procuring Entity is the one that raised an objection against this Board's jurisdiction and had the obligation to discharge that burden to the satisfaction of this Board. Applying the principle in the above case to the instant Request for Review, the Procuring Entity wishes that this Board be persuaded by its allegation that its Senior Supply Chain Assistant sent the letter of notification dated 20th January 2020 to the Applicant via email on **27th January 2020** and not **29th January 2020**.

Further in **Election Petition No. 1 of 2017, Boniface Muisyo Nguli v. Independent Electoral and Boundaries Commission & 2 others [2018] eKLR**, (hereinafter referred to as "the IEBC Case") the court while

considering allegations raised in an Affidavit and that the allegations were controverted held as follows:-

"In his petition and the supporting affidavit, he equally alleges that there was bribery and intimidation of voters, which fact has been denied by the Respondents. However, no evidence was adduced during the hearing of the petition to confirm this. As the law requires, one who alleges a fact must prove it. This was not done and hence I find that it is not proven as required."

According to the IEBC Case, when a party makes an allegation in an Affidavit and the same is controverted by another party, the burden of proof lies on the party making the allegation. Such a party has the obligation to provide sufficient evidence to support the allegation. In this instance, the Procuring Entity had the obligation to furnish the Board with the email it alleges to have sent to the Applicant on **27th January 2020** and not 29th January 2020. This burden of proof was not discharged by the Procuring Entity throughout the Request for Review proceedings to the satisfaction of the Board but instead the Procuring Entity alleged that it archived its emails thus couldn't retrieve the email in question.

From the foregoing, the Board is persuaded by the Applicant's position based on evidence (in the form of the Applicant's Official Stamp affixed on the letter of notification) to demonstrate that the notification letter was received by

the Applicant on **29th January 2020**. Section 57 (a) of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya, states as follows regarding computation of time:-

"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"

This means, 29th January 2020 is excluded from the computation of time within which the Applicant ought to have approached this Board. The fourteen-day period under section 167 (1) of the Act started running on 30th January 2020 and lapsed on 12th February 2020. The Applicant filed its Request for Review on the fourteenth-day, that is, 12th February 2020 thus within the statutory period under section 167 (1) of the Act.

Accordingly, the Board finds that it has the jurisdiction to entertain the Request for Review and shall now proceed to entertain the substantive issues framed for determination.

On the second issue for determination, the Applicant attached the following to its Further Statement in Support of the Request for Review:-

- *A letter dated 7th March 2016, written on the letter head of Metsec Wiring Africa and addressed to the Procuring Entity (the same is marked as HD 2 in the Applicant's Further Statement);*
- *Another letter dated 7th March 2016, written on the letter dated TE Connectivity Limerick and addressed to the Procuring Entity (the same is marked as HD 2 in the Applicant's Further Statement);*
- *A letter dated 11th March 2016 written on the letterhead of the Procuring Entity and addressed to M/s Metsec Cables Limited (the same is marked as HD 2 in the Applicant's Further Statement);*
- *A letter dated 5th January 2018 written on the letterhead of the Procuring Entity and addressed to M/s TE Connectivity Solutions GmbH indicating that the aforementioned company has successfully supplied surge diverters since 2015 to the Procuring Entity via distribution channel partner, M/s Metsec Cables Limited*

In its Written Submissions, the Procuring Entity avers that:-

- "5. The applicant has sought to introduce documents annexed as HD2 and HD3 attached to its further statement in support of the request for review. These documents do not relate to the tender but make reference to other past procurement proceedings***
- 6. The present request for review relates to the tender and we urge the Public Procurement Administrative Review***

Board (the Board) to only consider documents submitted with respect to the tender

- 7. We also urge the Board to strike out all documents submitted by the applicant that do not relate to the tender as these documents are not relevant to the present procurement proceedings”***

The Applicant took the view that the information contained in Annexure HD2 and HD3 are relevant to this Request for Review, since they relate to the same product (i.e. Surge Arrester) that is subject of the instant procurement process. Counsel for the Applicant submitted that the Applicant was a successful bidder in a previous tender for the supply of the same product being tendered by the Procuring Entity in the subject procurement process and that before supply of the said product in that previous award, the Applicant explained standards and specifications of the product to the Procuring Entity, in their correspondences.

Counsel for the Applicant while referring the Board to the letter dated 11th March 2016 marked as annexure HD2 submitted that the Procuring Entity accepted the explanations provided by the Applicant regarding the technical specifications of the product proposed to be supplied in the previous award to the Applicant and approved the said product.

The Board having considered the Applicant's submissions on the implication of the correspondence letters marked as HD2 and HD3 and attached to the Applicant's Further Statement, together with the Procuring Entity's submission that the said letters ought to be expunged, proceeds to make the following findings:-

The Board observes that in view of the correspondences between the Applicant's manufacturer, the Applicant and the Procuring Entity, Counsel for the Applicant referred the Board to Table 4.1.2 of the Tender Document and took the view that the class of the products required by the Procuring Entity fall under a standard referred to as IEC 60099-4.

This information was adduced by the Applicant in order for the Board to understand the technical aspects of the Surge Arrester that is to be supplied to the Procuring Entity in the subject tender.

The Board observes that during evaluation, the correspondences between the Applicant, the Procuring Entity and the Applicant's manufacturer, were not before the Evaluation Committee for purposes of conducting an evaluation and comparison of the Applicant's bid. Section 80 (2) of the Act gives an Evaluation Committee the responsibility to conduct "*the evaluation and comparison using the procedures and criteria set out in the tender documents*". In doing so, an evaluation committee confines itself to the documents submitted by a bidder in its original bid.

Furthermore, the correspondences adduced by the Applicant are with respect to a previous award of a different tender and before supply of the products in that previous tender. The said previous tender is not being challenged before the Board and the Tender Document used in that previous tender was not adduced for the Board to compare the technical specifications in that tender with the one in the subject tender.

Nothing prevents a party from supplying information to the Board regarding the technical aspects of a tender with a view of assisting the Board in understanding such technical aspects. However, this Board notes that the Evaluation Committee relies on documentation provided by a bidder in its original bid when conducting evaluation. The Board finds there is no harm in it using such information for purposes of understanding technical aspects save that such information ought not be used by the Board in determining whether or not the Procuring Entity rightfully found the Applicant's bid non-responsive.

Accordingly, the Board declines to expunge Annexures HD2 and HD3 from the record of the request for review proceedings before it.

On the third issue for determination, the Applicant referred the Board to Section IV. Schedule of Requirements/Delivery Schedule at page 28 of the Tender Document which provides three (3) categories containing the description of goods/products (that is, the Surge Arresters) required by the Procuring Entity as follows:-

"Part A-Brief Schedule of Details on Goods Required

For Supply of Surge Arresters 33KV 10A Composite, Surge Arresters 220KV 10A and Fuse Cut Out LV Overhead Service 400A

Tender No. KP1/9A.3/OT/03/19-20

Item No.	KPLC Code	Brief Description	Unit of Measure	Quantity	Tick
1	117608	Surge Arresters 33KV 10 A Composite	Pc	3239	
	117650	Surge Arresters 220KV 10A	Pc	33	
2	183203	Fuse Cutout LV Overhead Service 400A	Pc	15078	

The Tender Document gave three categories of the Surge Arresters to be supplied to the Procuring Entity as outlined hereinabove. It is important to point out that the Applicant's Request for Review only challenges "**Item No. 1, KPLC Code 117608, Surge Arresters 33KV 10A Composite**" whereas the rest of the items are not subject of review proceedings before this Board.

The Board notes that Part II. Technical Evaluation Criteria of the Tender Document had two limbs, the first having been outlined under Clause 6.2.1 thereof as follows:-

"6.2.1 Evaluation of the following technical information against tender requirements and specifications:-

6.2.1.1 For goods manufactured outside Kenya, applicable relevant valid ISO 9001 certification

6.2.1.2 For goods manufactured in Kenya-valid KEBS Mark of Quality Certificate or KEBS Standardization Mark Certificate

6.2.1.3 Type Test Certificates and their Reports or Test Certificates and their Reports from the designated bodies for full compliance with Tender Specifications

6.2.1.4 The accreditation certificate for the testing laboratory to ISO/IEC 17025

6.2.1.5 Manufacturer's Authorization

6.2.1.6 As contained in the following documents

a) Manufacturer's Warranty

b) Catalogues and/or Manufacturer's Drawings

c) Schedule of Guaranteed Technical Particulars as per Technical Specifications

Tenders will proceed to the Detailed Technical Stage only if they qualify in compliance with Part II, Clause 6.2.1 above, and Preliminary Evaluation under Paragraph 3.28”

Upon concluding the first limb of Technical Evaluation, a Detailed Technical Evaluation would then be carried out in accordance with Clause 6.2.2 of Part II. Technical Evaluation Criteria at pages 32 to 33 of the Tender Document which states as follows:-

“6.2.2 Detailed Technical Evaluation

- (a) The Schedule of Guaranteed Technical Particulars (GTP) shall be evaluated against Tender Specifications to confirm compliance of the goods and services to the specifications and evaluation of any deviations and exceptions declared by the Tenderer***
- (b) Evaluation of compliance of submitted samples (where required) to technical specifications.***
- (c) Identifying and determining any deviation (s) from the requirements; errors and oversights***

Tenderers will proceed to Financial Evaluation stage only if they qualify in compliance with Parts I and II i.e. Preliminary and Technical stages”

The Applicant received a letter of notification dated 20th January 2020, which outlined the following reasons why the Procuring Entity found the Applicant's bid non-responsive:-

"We refer to the above tender and regret to inform you that following evaluation, your tender is unsuccessful. It is therefore not accepted. The brief reasons are as follows:-

- a) Maximum duration of earth fault, seconds not stated***
- b) Earth fault factor as per IEC 60099-4 not stated***
- c) Pollution level as per IEC TS 60815 not stated***
- d) Continuous operating voltage, KV rms not compliant***
- e) Steep current impulse protective level, max KV as per IEC 60099-5 not compliant***
- f) Operating duty characteristics not compliant***
- g) Pressure relief withstand capability not comp***

***The successful bidders were: M/s Harrowden Company Ltd
M/s Electechnique Power Ltd
M/s Mayleen K Ltd"***

During the hearing, the Procuring Entity submitted that it erroneously included reasons (c) and (e) outlined hereinabove in the Applicant's letter of

notification and that the same do not form part of the reasons why the Applicant's bid was found non-responsive.

The Board would like to point out that section 87 (3) of the Act states as follows:-

"When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof"

Further, Article 47 of the Constitution states that:-

- "(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**
- (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action"**

Section 87 (3) of the Act, read together with Article 47 (1) of the Constitution give a procuring entity the obligation to inform bidders of the reasons why their bids were non-responsive, in order for them to challenge such reasons

by way of administrative review, if they wish to do so. It is the Board's considered view that such reasons ought to be specific and the correct reasons why a bidder was found non-responsive. In this instance, the Procuring Entity admits that reasons (c) and (e) were erroneously included in the Applicant's letter of notification thus misleading the Applicant. Nonetheless, the Board would like to reiterate that the Procuring Entity ought to exercise abundance of caution not to mislead bidders on the reasons why their bids were found non-responsive to forestall unnecessary Request for Reviews being lodged at the Board.

Given that the Procuring Entity, at the hearing of the Request for Review, admitted that reasons (c) and (e) were erroneously included in the Applicant's letter of notification, the Applicant only prosecuted its review on reasons (a), (b), (d), (f) and (g) provided in its letter of notification. Accordingly, the Board shall only address the aforesaid 5 reasons which are controverted and which fall under the Detailed Technical Evaluation stage.

The Board would like to make an observation that in its Evaluation Report, the Procuring Entity explained the main purpose of procuring the Surge Arresters under the subject tender as follows:-

"It is proposed to purchase the 220 KV, Overhead LV Service cut outs 400A and 33KV Arresters which are first line of defence against surges and faults on transmission and

distribution lines. Their primary role is to protect substation and line equipment in the systems from transient overvoltage caused by internal or external events

Further, H. Brooke Stauffer, in the book, **User's Guide to the National Electrical Code, 2005** explains the meaning and importance of Surge Arresters as follows:-

"Surge arresters are voltage limiting devices used to protect electrical insulation from voltage spikes in a power system. Similar to how a fuse functions to protect an electrical system from damage due to overcurrent conditions, the job of a surge arrester is to protect the system from damage due to overvoltage conditions"

From the foregoing, the understanding of the main function that a Surge Arrester undertakes, is to protect substations and line equipments in systems from transient overvoltage (damage) caused by internal or external events (i.e overvoltage conditions).

With this in mind, the Board now proceeds to consider the sub-categories in the Detailed Technical Evaluation that have now been challenged by the Applicant:-

i. Maximum Duration of earth fault

Table 1. System Requirements under Clause 4.1.2 at page 97 of the Procuring Entity’s bundle of documents identified the technical specifications of the system requirement for maximum duration of earth fault as follows:-

Particulars	Requirements
.....
Maximum duration of earth fault	≤ 3 seconds

Further, Annex A: Schedule of Guaranteed Technical Particulars for offered Surge Diverters at page 107 of the Procuring Entity’s bundle of documents provided as follows:-

"(to be filled and signed by the Manufacturer and submitted together with relevant copies of the Manufacturer’s catalogues, brochures, drawings, technical data, sales records for past five years, four customer reference letters, details of manufacturing capacity, the manufacturer’s experience, copies of complete type test reports and accreditation certificate to ISO/IEC 17025 for the third party testing laboratory for tender evaluation, all in English Language

Tender No.....

Bidder’s Name and address.....

<i>Clause</i>	<i>Description and KPLC requirements</i>	<i>Bidder’s Offer</i>

1	.....	.....
2	.....	.....
3	.....	.....
4	.....	.....
4.1	.....	.....
4.1.1	.....	.....
4.1.2	.....	.....

	Maximum duration of earth fault	State Values

In response to this criterion, the Board was referred to the document attached to the Applicant’s Request for Review found after the Divider named as **“Metsec Cables Guaranteed Technical Particulars Offered on Tender”**, wherein the Applicant completed the above table as follows:-

Clause	Description and KPLC requirement	Bidder’s Offer
.....
	Maximum duration on earth fault	Compliant

During the hearing, Counsel for the Applicant submitted that the Applicant completed the table under Annex A by stating that the product proposed to be supplied is “compliant” with the requirement of maximum duration of earth fault, and additionally provided the Product Data Sheet for the **“Bowthorpe EMP- OCP2 Series”** that the Applicant proposed to supply to the Procuring Entity.

Accordingly, Counsel for the Applicant referred the Board to the document that is found after the Divider named as **“Product Data Sheet, OCP2-29,**

33KV-10A Product”. At the foot of the said document is a graph indicating Power Frequency voltage versus time. On the horizontal side of the graph, intervals of time are indicates as: 1 second, 10 seconds, 100 seconds, 1,000 seconds and 10,000 seconds. On the vertical side of the graph intervals of Voltage are indicated as 29KV, 31.9KV, 34.8KV, 37.7KV. 40.6KV, 43.5KV and 46.4KV. It was the Applicant’s contention that according to the said graph, 40KV corresponds to 3 seconds and therefore this met the requirement at page 97 of the Procuring Entity’s bundle of documents.

The Board would like to note that the Tender Document required bidders to provide a Surge Arrester with a maximum duration of earth fault as: less than or equal to 3 seconds. Having noted the main role of a Surge Arrester, for a Surge Arrester to effectively protect a system from damage due to overvoltage, the duration of earth fault ought to take the least duration of time. Such a Surge Arrester would work best if it can provide electrical insulation in the least duration of time (i.e. 1 second) but not past 3 seconds.

From a cursory look at the graph found in the OCP2 Product Data Sheet submitted by the Applicant, one cannot with certainty assert that 40KV corresponds to 3 seconds as alleged by the Applicant. As a matter of fact, the Applicant’s Product Data Sheet further indicates that:-

“1 sec, TOV is 41.5KV

100 Sec TOV is 37.4”

It is therefore the Board’s considered view, that the Applicant failed to satisfy the Board that it met this criterion by merely making reference to a graph that does not with certainty demonstrate that the duration of time indicated therein corresponds to the Maximum Duration of Earth Fault required by the Procuring Entity as being less than or equal to 3 seconds.

Accordingly, the Board finds that the Evaluation Committee rightfully evaluated the Applicant’s bid under this criterion.

ii. Earth Fault Factor as per IEC 60099-4

Table 1. System Requirements under Clause 4.1.2 at page 97 of the Procuring Entity’s bundle of documents identified the technical specifications of the system requirement for Earth Fault Factor as per IEC 60099-4 as follows:-

Particulars	Requirements
.....
.....
Earth Fault Factor as per IEC 60099-4	1.4

Further, Annex A: Schedule of Guaranteed Technical Particulars for offered Surge Diverters at page 107 of the Procuring Entity’s bundle of documents provided as follows:-

Clause	Description and KPLC requirements	Bidder’s Offer
.....
	Earth Fault Factor as per IEC 60099-4	State values

In response to this criterion, the Board was referred to the document attached to the Applicant’s Request for Review found after the Divider named as **“Metsec Cables Guaranteed Technical Particulars Offered on Tender”**, wherein the Applicant completed the above table as follows:-

Clause	Description and KPLC requirements	Bidder’s Offer
.....
	Earth Fault Factor as per IEC 60099-4	Compliant

Despite indicating ‘Compliant’ in its GTP, the Board observes that the Applicant further stated in its Request for Review as follows:-

“Earth Fault Factor is applicable to the utility network and not the arrester. This should be at 1.2-1.4 if operating a directly earthed system”

Since the Applicant was of the opinion that Earth Fault Factor is applicable to utility network and not the Surge Arrester, it did not provide any values corresponding to Earth Fault Factor for its proposed Surge Arrester.

During the hearing, the Applicant did not adduce evidence before the Board to support its averment that the Earth Fault Factor requirement as per IEC 60099-4 is applicable to the utility network and not the Surge Arrester being procured by the Procuring Entity and in issue before the Board (i.e. KPLC Code 117608, Surge Arrester 33Kv 10A Composite).

It is the Board's considered view that, the Procuring Entity was well informed for it to have included the requirement of Earth Fault Factor as per IEC 60099-4 in its Tender Document especially in this instance where an International standard is used. Therefore, if a tenderer disputes the Earth Fault Factor requirement, it must prove its contrary view to the satisfaction of the Board, which the Applicant failed to do in this instance.

Accordingly, the Board finds that the Applicant's assertion that the requirement of Earth Fault Factor as per IEC 60099-4 ought not to have been applicable to the Surge Arrester required by the Procuring Entity, was not proved to the satisfaction of the Board and its failure to indicate values based on its assertion that Earth Fault Factor does not apply to Surge Arresters is at the Applicant's own disadvantage.

iii. Maximum Continuous Operating Voltage

Table 4. Technical Protective data for Surge Arrester of Clause 4.3 at page 100 of the Procuring Entity's bundle of documents provides as follows:-

Guaranteed protective data for Arrester			
Description		Requirement	
.....			
.....			
Maximum continuous operating voltage, $\sqrt{\text{rms}}$	As per IEC 60099-4, Uc	9.6	28.8

Further, Annex A: Schedule of Guaranteed Technical Particulars for offered Surge Diverters at page 107 of the Procuring Entity's bundle of documents provided as follows:-

Clause	Description and KPLC requirements	Bidder's Offer
.....
	Maximum Continuous Operating Voltage, $\sqrt{\text{rms}}$	State values

As can be seen from Table 1. System Requirements under Clause 4.1.2 at page 97 of the Procuring Entity’s bundle of documents, the Discharge Class as per IEC 60099-4 was specified therein as “**Class 2**”. The Board observes that during the hearing, Counsel for the Applicant admitted that the Tender Document required a maximum continuous operating voltage of 28.8kV but that the Applicant indicated a continuous operating voltage of 29.9Kv.

The document after the Divider named as “**Product Data Sheet OCP2-29, 33KV-10KA Product**”, attached to the Applicant’s Request for Review indicates the Continuous Operating Voltage as:- “**Uc: 29kV**”. During the hearing, Counsel for the Applicant submitted that the continuous operating voltage amounting to Uc:29kV was erroneously indicated in the said document found after the Divider named as “Product Data Sheet OCP2-29, 33KV-10KA Product”.

Upon studying the Applicant’s bid in its entirety, the Board notes that the Applicant attached a document on the letterhead of its manufacturer, that is TE connectivity titled, “**Bowthorpe EMP LV/HV Outdoor Surge Arresters**” wherein the continuous operating voltage is indicated at page 11 thereof as follows:-

OCP2 Standard electrical data

OCP2	U continuous kV (r.m.s)
3	3
4	4
5	5
6	6
8	8

9	9
10	10
12	12
15	15
18	18
20	20
21	21
22	22
24	24
29	29

From the above table, the Board observes that the maximum continuous operating voltage indicated is **29kV (r.m.s)** corresponding to the figure specified in the document after the Divider named as “**Product Data Sheet OCP2-29, 33KV-10KA Product**”, attached to the Applicant’s Request for Review.

The Board studied the bid submitted by the successful bidder, M/s Electechnique Power Ltd and notes that for the Surge Arrester 33KV 10 A, the successful bidder indicated the maximum continuous operating voltage as 28.8kV but this maximum continuous operating voltage corresponds with Discharge Class 1, and not Discharge Class 2 required by the Procuring Entity with respect to the Surge Arrester under consideration.

This Board observes that the Applicant provided that the Maximum Continuous Operating Voltage of its proposed product is 29kV, but did not indicate for which Discharge Class, its figure of 29Kv belongs to.

That notwithstanding, the Board notes that the successful bidder under this category indicated that 28.8kV corresponds to Discharge Class 1. The question whether or not bidders could satisfy this criterion if the Maximum Continuous Operating Voltage is 29kV or whether the Procuring Entity would still be comfortable with a product that has a Maximum Continuous Operating Voltage as 28.8kV but for Discharge Class 1, should be left with the Evaluation Committee in an evaluation, noting that the successful bidder proposed 28.8kV but for Discharge Class 1.

Article 227 (1) of the Constitution provides that:-

"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"

Article 227 (1) of the Constitution requires the Procuring Entity to procure for goods and services in a system that is, among other principles, fair to all bidders participating in such a procurement process. The Procuring Entity treated the Applicant and the successful bidder differently when evaluating the two bidders under this criterion noting that the successful bidder proposed 28.8kV but for Discharge Class 1 and was still found responsive.

Accordingly, the Board finds that the Procuring Entity failed to evaluate the Applicant under this criterion in accordance with the principle of fairness provided under Article 227 (1) of the Constitution, for the reason that the successful bidder was given a favourable treatment for proposing a Surge Arrester of Maximum Continuous Operating Voltage under Discharge Class 1, yet the Tender Document specified Surge Arrester under Discharge Class 2.

iv. Operating Duty Characteristics

Page 101 of the Procuring Entity’s bundle of documents identified this criterion as follows:-

Guaranteed protective data for Arrester		
Description		Requirement
.....
Operating duty characteristics (Discharge current withstand)	Two 4/10 μ s current wave (Ur), kA	100
	Low current at 2000us, kApk	900
	Discharge tolerance	5

In response to this criterion, the Applicant provided the following as indicated in the document after the Divider marked as **“Metsec Cables Guaranteed Technical Particulars Offered on Tender”**:-

Guaranteed protective data for Arrester		
Description		Requirement
.....

Operating duty characteristics (Discharge current withstand)	Two 4/10 μ s current wave (Ur), kA	2 x 100Ka
	Low current at 2000 μ s, kApk	Approx. 440A
	Discharge tolerance	All tolerances as per IEC 60099-4

The Board having compared what the Applicant indicated in the attachment to the Request for Review found after the Divider marked as “**Metsec Cables Guaranteed Technical Particulars Offered on Tender**”, to what is indicated in its original bid notes the following:-

Page 10 of the document titled as “**Bowthorpe EMPLV/MV Outdoor Surge Arresters**” which is on the letterhead of the Applicant’s manufacturer (TE Connectivity) indicates that:-

OCP2M/ML Open Cage Polymeric Surge Arresters –Class 2

Application

Protection of MV networks, sensitive equipment and substations from lightning and switching surge related over-voltages in areas with relatively high iso-keraunic levels

Generic technical data

OCP2 M/ML series	26-41kV Uc
Rated discharge current (8/20 μ s)	10kA
Line discharge class 2 according to	IEC 60099-4
Operating duty impulse withstand current (4/10μs)	100kA
Long duration current impulse (2000μs)	530A

High current short circuit: (pre-failing method) (Safe non-shattering failure mode)	40kA	
Energy	2 Long duration impulses	6.0kJ/kVUc
Service conditions	Ambient temperature	- 60°C to + 60°C

The Applicant provided another table with the following technical specifications at page 12 of the document titled as “**Bowthorpe EMPLV/MV Outdoor Surge Arresters**” which is on the letterhead of the Applicant’s manufacturer:-

OCP2M/ML Open Cage Polymeric Surge Arresters –Class 2

Application

Protection of MV networks, sensitive equipment and substations from lightning and switching surge related over-voltages in areas with relatively high iso-keranic levels

Generic technical data

OCP2 M/ML series	26-41kV Uc	
Rated discharge current (8/20µs)	10kA	
Line discharge class 2 according to	IEC 60099-4	
Operating duty impulse withstand current (4/10µs)	100kA	
Long duration current impulse (2000µs)	530A	
High current short circuit: (pre-failing method) (Safe non-shattering failure mode)	40kA	
Energy	2 Long duration impulses	6.0kJ/kVUc

Service conditions	Ambient temperature	- 60°C to + 60°C
--------------------	---------------------	------------------

The above notwithstanding, the Applicant also provided the following at page 15 of its Switching Surge Operating Duty Test Report dated 29th April 2004:-

Long duration current impulse application

oscillogram	Impulse	Charging voltage	Residual voltage	Discharge current	energy
No.	No.	kV	kV	A	kJ
36	1	14.80	12,62	440	14,24
37	2	14.85	12,62	445	14,45

From the foregoing, the Board notes that the Document submitted on the letterhead of the Applicant's manufacturer indicates Long duration current impulse (2000µs) as **530A**, whereas the Test Report referred to by the Applicant indicates a discharge current of **440A**.

During the hearing, the Applicant argued that in order to achieve the Low current at 2000µs KAPK of 900A specified for the Operating Duty Characteristics in the Tender Document, one would have to propose a Surge Arrester under a higher Discharge Class. The Applicant averred in its Request for Review that:-

"The KPLC value stated exceeds requirements of Class 2 products for operating duty test that are specified by the IEC 60099-4 standard. A requirement of 900kA long duration current amplitude in the Operating Duty test exceeds the

energy requirement of Class 4 or even Class 5 surge arresters that are used on high voltage substations and not MV distribution systems”

In the Applicant’s view, Discharge Class 2 can only have a Surge Arrester with an Operating Duty Characteristic of Approximately 440A, as indicated in its Guaranteed Technical Particulars.

The Board would like to reiterate that, the Procuring Entity must have included the requirement of Operating Duty Characteristic as **900A** (under Low current at 2000µs, kApk) since it is the user of the Surge Arrester and better placed to know the specifications of what it requires. Therefore, if a tenderer disputes the technical specifications of the Surge Arrester, it must prove its contrary view to the satisfaction of the Board, which the Applicant failed to do in this instance.

The Board’s role is to ensure bidders are treated fairly during an evaluation, for instance, confirming whether or not the bidder determined to be successful was able to meet this requirement. If the successful bidder was capable of satisfying the technical specifications in the Tender Document regarding the Operating Duty Characteristics, then the Applicant’s assertion that no bidder is capable of submitting a Surge Arrester with Operating Duty Characteristics under Discharge Class 2 that goes beyond 440A, is unfounded.

To ascertain whether or not the successful bidder satisfied this criterion, the Board studied the bid submitted by M/s Electechnique Power Ltd and notes that a Test Report No. 17P0337-S, contains the operating duty test submitted by the successful bidder at page 19 thereof. The Board observes an entry therein corresponding with **(4/10µs) current wave** required in the Tender Document whose results are as follows:-

Operating Duty Test

(4/10µs) high current impulse withstand	The first current value (kA)	101.90	100.78	100.37
	The second current value (kA)	100.68	101.79	101.09

However, in its Guaranteed Technical Particulars, the successful bidder indicated the following:-

Guaranteed protective data for Arrester		
Description		Requirement
.....
Operating duty characteristics (Discharge current withstand)	Two 4/10 µs current wave (Ur), kA	100
	Low current at 2000µs, kApk	900
	Discharge tolerance	5%

The Board studied the entirety of the Operating Duty Test submitted by the successful bidder and did not find an entry corresponding to **Low current at 2000µs, kApk** in order to ascertain whether or not the successful bidder proposed a product under Discharge Class 2, that met the requirement of **900A**. It appears that the Evaluation Committee relied on the entries in the Guaranteed Technical Particulars (GTP) submitted by the successful bidder even though its Operating Duty Test Report does not demonstrate what informed the entry of 900A in the successful bidder's GTP.

It is the Board's considered view that the Evaluation Committee ought to have ascertained that what the successful bidder has indicated in its GTP reflects its Operating Duty Test Report. The principle of fairness under Article 227 (1) of the Constitution dictates that all bidders are treated fairly with respect to all criteria considered during evaluation.

Accordingly, the Board's finds that the Procuring Entity failed to ascertain that the entry made in the successful bidder's GTP for **Low current at 2000µs, kApk under Discharge Class 2 as 900A**, corresponds with what the Operating Duty Test Report submitted by the Successful bidder provided.

v. Pressure Relief Withstand

Page 101 of the Procuring Entity's bundle of documents identified this criterion as follows:-

Guaranteed protective data for Arrester		
Description		Requirement
.....
Pressure Relief Withstand (Short Circuit)	High symmetrical RMS (A), duration (s)	20kA at 0.2s
	Low symmetrical RMS (A), duration (s)	2kA at 1s
	Assymetrical peak	50kA at 0.2s

In response to this criterion, the Applicant provided the following as indicated in the document after the Divider marked as **“Metsec Cables Guaranteed Technical Particulars Offered on Tender”**:-

Guaranteed protective data for Arrester		
Description		Requirement
.....
Pressure Relief Withstand (Short Circuit)	High symmetrical RMS (A), duration (s)	40kA, 0.2s
	Low symmetrical RMS (A), duration (s)	600A, 1s
	Assymetrical peak	121kA

To support the entry in its Guaranteed Technical Particulars, the Applicant referred the Board to the Short Circuit Test Report that can be found after the Divider marked as **“Short Circuit Test CESI A4/522781”**, attached to its Request for Review. At page 4 of the said Report, the following test results are indicated:-

“Rated characteristics of the tested object assigned by the Client

Metal oxide surge arrester		
Pressure relief class		
High current	For 0,2s	40,0kA
Low current	For 1,0s	0,60kA

From the foregoing the Board observes the following:-

- *The Tender Document required a High symmetrical duration of 20kA at 0.2s whereas the Applicant proposed **40kA at 0,2s**;*
- *The Tender Document required a Low symmetrical duration of 2kA at 1s while the Applicant proposed **60kA at 1s***
- *The Tender Document required Asymmetrical peak of 50kA at 0.2s whereas the Applicant did not indicate the same.*

It is the Board’s considered view that the Applicant failed to fully satisfy this criterion as specified in the Tender Document.

Accordingly, the Board finds that the Procuring Entity rightfully evaluated the Applicant under this criterion.

From the foregoing, the Board observes that the Procuring Entity took the view that since the Applicant did not state values as required in its Guaranteed Technical Particulars but that it indicated **“compliant”**, in some

of the criterion considered hereinabove, the Applicant's bid was non-responsive.

It is the Board's considered view that the test results ought to have been considered in so far as they do not materially change the substance of the Applicant's tender. This is because, at Clause 5. Tests and Inspection of Annex A. Schedule of Guaranteed Technical Particulars for Offered Insulators of the Tender Document, it is stated as follows:-

"5.1: Type tests, sampling tests and routine tests shall be done in accordance with the requirements of IEC 60099-4, IEC 60587, IEE std C62.11, IEEE std.592 and this specification. It shall be the responsibility of the supplier to perform or to have performed all the tests specified

5.2: Copies of Type Test Certificates & Type Test Report issued by a third party testing laboratory that is accredited to ISO/IEC 17025 shall be submitted with the tender for the purpose of technical evaluation. A copy of the accreditation certificate to ISO/IEC 17025 for the testing laboratory shall also be submitted (all in English Language)

5.3: Copies of type test reports to be submitted with the tender (by bidder) for evaluation shall be as per Table 3 of IEC 60099-4 tests and as stated:

a) Insulation withstand of the arrester housing

- b) Residual voltage tests***
- c) Long duration current impulse withstand tests***
- d) Operation duty tests***
 - (i) Accelerated ageing tests***
 - (ii) Verification of thermal section***
 - (ii) Switching surge operating duty test***
- e) Pressure Relief tests***
- f) Test of Arrester disconnectors/fault indicators***
- g) Artificial pollution tests***
- h) Partial Discharge Tests***
- i) Seal Leakage Tests***
- j) Current Distribution tests***
- k) Temporary Overvoltage tests***
- l) Radio interference voltage (RIV)''***

The Procuring Entity supplied this information to bidders with the intention that they would take the information into account when preparing their bids. This means, the Procuring Entity had the obligation to consider the Type Test Reports provided by all bidders, including the Applicant and the successful bidder to verify the information stated in their respective Guaranteed Technical Particulars. Clause 5.2 cited above of Annex A. Schedule of Guaranteed Technical Particulars for Offered Insulators of the Tender Document specified that these Type Test Reports would be used for purposes of technical evaluation. Section 80 (2) of the Act further states as follows:-

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

This provision supports the Board's view that the Procuring Entity had the obligation to confine itself to the procedures and criteria set out in the Tender Document, including the assurance given to bidders that the Test Reports they provided would be considered during Technical Evaluation. The question that the Procuring Entity ought to have concerned itself with, is whether the test reports submitted by all bidders including the Applicant and the successful bidder provide for the values required by the Procuring Entity in each of the criterion considered hereinabove, with a view of verifying whether or not the Applicant was "compliant" in the categories it asserts to be compliant.

Such a step in the Board's view would not have changed the substance of the Applicant's tender, neither would it give the Applicant any advantage over other bidders. Further, by examining the successful bidder's Type Test Reports, the Procuring Entity would have had the opportunity to verify what the successful bidder stated in its GTP in comparison to what its Type Test Reports state, but not merely take the values stated in the successful bidder's GTP to be the gospel truth.

In totality of the third issue, the Board finds that the Procuring Entity failed to evaluate the Applicant's bid at the Detailed Technical Evaluation stage in

accordance with Clause 6.2.2 of Section VI. Evaluation Criteria of the Tender Document read together with section 80 (2) of the Act and Article 227 (1) of the Constitution.

In determining the appropriate reliefs to grant as the fourth issue for determination, the Board notes that Clause 6.2.2 at page 33 of the Tender Document provided that:-

"Tenderers will proceed to Financial Evaluation stage only if they qualify in compliance with Parts I and II, i.e. Preliminary and Technical stages"

The Board has established that the Procuring Entity failed to treat the successful bidder's bid the same way as that of the Applicant with respect to the following criteria:-

- a) Maximum Continuous Operating Voltage under Table 2. Technical Protective data for Surge Arrester at Clause 4.3 of Annex A. Schedule of Guaranteed Technical Particulars for Offered Insulators; and**
- b) Operating Duty Characteristics (Discharge Current Withstand) under Table 2. Technical Protective data for Surge Arrester at Clause 4.3 of Annex A. Schedule of Guaranteed Technical Particulars for Offered Insulators.**

The Applicant urged this Board to establish whether or not bidders were treated fairly in the evaluation conducted by the Procuring Entity. Hence, the

Evaluation Committee ought to be given an opportunity to properly discharge its obligation under section 80 (2) of the Act and Article 227 (1) of the Constitution cited hereinabove by treating the Applicant's and successful bidder's bid fairly, in a re-evaluation at the Detailed Technical Evaluation Stage. It is only after the bidders satisfy the criteria at the Detailed Technical Evaluation Stage, then they shall proceed to Financial Evaluation as stated in Clause 6.2.2 at page 33 of the Tender Document.

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

FINAL ORDERS

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

- 1. The Letter of Notification of Award dated 20th January 2020 addressed to M/s Electechnique Power Ltd with respect to Tender No. KP1/9A.3/OT/03/19-20 for the Supply of Surge Arresters 33KV 10A Composite, Surge Arresters 220KV 10A and Fuse Cut Out LV Overhead Service 400A, in specific Item, KPLC Code 117608, Surge Arresters 33KV 10A Composite, be and is hereby cancelled and set aside.**
- 2. The Letter of Notification of unsuccessful bid dated 20th January 2020 addressed to the Applicant herein with respect**

to the subject tender in specific Item, KPLC Code 117608, Surge Arresters 33KV 10A Composite, be and is hereby cancelled and set aside.

3. The Procuring Entity is hereby directed to re-instate the Applicant's bid and that of the successful bidder at the Detailed Technical Evaluation stage together with all other bidders who made it to the Detailed Technical Evaluation stage, and conduct a re-evaluation at the Detailed Technical Evaluation stage, with respect to the following specific criterion under the specific Item, KPLC Code 11768, Surge Arresters 33KV 10A Composite:-

a) Maximum Continuous Operating Voltage under Table 2. Technical Protective data for Surge Arrester at Clause 4.3 of Annex A. Schedule of Guaranteed Technical Particulars for Offered Insulators of the Tender Document; and

b) Operating Duty Characteristics (Discharge Current Withstand) under Table 2. Technical Protective data for Surge Arrester at Clause 4.3 of Annex A. Schedule of Guaranteed Technical Particulars for Offered Insulators of the Tender Document.

4. For the avoidance of doubt, the Procuring Entity is at liberty to proceed with the procurement process to its logical

conclusion in so far as the following categories listed in Section V. Price Schedule for Goods of the Tender Document are concerned:-

- a) KPLC Code 117650- Surge Arresters 220 kV 10A; and**
- b) KPLC Code 183203-Fuse Cutout LV Overhead Service 400A**

5. Further to Order No. 3 above, the Procuring Entity is hereby directed to complete the subject procurement process with respect to KPLC Code 117608-Surge Arrester 33kV 10A Composite to its logical conclusion including the making of an award within fourteen (14) days from the date of receipt of the signed decision of the Board, taking into consideration the Board's findings in this case.

6. 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 4th Day of March 2020.

-CHAIRPERSON

SECRETARY

PPARB

PPARB

Delivered in the presence of:-

- i. Mr. Mburu holding brief for Mr. Muturi for the Applicant;
- ii. Mr. Ondieki for the Respondents;
- iii. No appearance made for Electechnique Ltd.