

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 28/2020 OF 26TH FEBRUARY 2020

BETWEEN

EMPOWER TRANSFORMERS &

SWITCHGEAR LIMITED.....APPLICANT

AND

THE ACCOUNTING OFFICER

RURAL ELECTRIFICATION & RENEWABLE ENERGY

CORPORATION.....1ST RESPONDENT

AND

RURAL ELECTRIFICATION & RENEWABLE ENERGY

CORPORATION2ND RESPONDENT

Review against the decision of the Accounting Officer of Rural Electrification & Renewable Energy Corporation with respect to Tender No. 1000000318 for the Supply of Transformers-Local Manufacturers Only.

BOARD MEMBERS

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

IN ATTENDANCE

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

PRESENT BY INVITATION

APPLICANT

-EMPOWER TRANSFORMERS & SWITCHGEAR LIMITED

1. Mr. Kibe Mungai

-Advocate, Kinoti & Kibe Company
Advocates

1ST AND 2ND RESPONDENT

-RURAL ELECTRIFICATION & RENEWABLE ENERGY CORPORATION

1. Ms. Sharon Tugee

-Advocate

INTERESTED PARTIES

A. YOCEAN GROUP LTD

1. Mr. Anthony Omweri

-H R & Admin Manager

B. PAN AFRICAN TRANSFORMERS

1. Mr. Boit Barnabas

-Manager

BACKGROUND TO THE DECISION

The Bidding Process

Rural Electrification & Renewable Energy Corporation (hereinafter referred to as "the Procuring Entity") advertised Tender No. 1000000318 for the Supply of Transformers-Local Manufacturers Only (hereinafter referred to as "the subject tender") in the local dailies on 1st October 2019.

Bid Submission Deadline and Opening of Bids

Given that the Procuring Entity used an e-procurement system, the 8 tenders received by the bid submission deadline of 7th November 2019 were opened online on the same date in the presence of bidders' representatives.

Evaluation of Bids

Having appointed an Evaluation Committee, the 8 bids were evaluated in the following stages:-

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

1. Preliminary Evaluation

At this stage, the Evaluation Committee confirmed whether or not bidders submitted the mandatory documents listed in Part 1. Preliminary Evaluation of Section VI. Summary of Evaluation Process at pages 29 to 30 of the Tender Document. At the end of this stage, two bidders were found non-responsive whereas 6 bidders proceeded to Technical Evaluation.

2. Technical Evaluation

At this stage, the Procuring Entity evaluated the bidders against the criteria outlined in Part II. Technical Evaluation Criteria of Section VI. Summary of Evaluation Process at page 30 of the Tender Document. At the end of this

stage, 3 bidders were found non-responsive whereas the remaining 3 bidders proceeded to Financial Evaluation.

3. Financial Evaluation

At this stage, the Evaluation Committee evaluated bidders against the criteria outlined in Part III. Financial Evaluation Criteria of Section VI. Summary of Evaluation Process at page 31 of the Tender Document.

Recommendation

At the end of Financial Evaluation, the Evaluation Committee recommended award of the subject tender as follows:-

- Lot 1- M/s Mahashakti Limited;
- Lot 2- M/s Pan Africa Transformers & SwitchGear Limited;
- Lot 3- M/s Yocean Group (K) Limited

Professional Opinion

In his professional opinion dated 10th January 2020, the Manager, Procurement expressed his satisfaction that the procurement process met the requirements of the Public Procurement and Asset Disposal Act, 2015 and further reviewed the Evaluation Report. He concurred with the recommendation by the Evaluation Committee and therefore urged the Chief Executive Officer to award the subject tender in the respective lots as

recommended. The Chief Executive Officer approved the said professional opinion.

Notification to Bidders

In letters dated 10th February 2020, all successful and unsuccessful bidders were notified of the outcome of their bids.

THE REQUEST FOR REVIEW

M/s Empower Transformers & Switchgear Limited (hereinafter referred to as "the Applicant") lodged a Request for Review dated and filed on 26th February 2020 together with a Supporting Statement sworn on 24th February 2020 and filed on even date and a Supplementary Affidavit in Support of the Request for Review sworn on 12th March 2020 and filed on 13th March 2020. In response, the Procuring Entity filed a Replying Affidavit sworn and filed on 3rd March 2020 (hereinafter referred to as "the Procuring Entity's Response").

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

- a. An order annulling the decision of the Procuring Entity awarding the subject tender to the successful bidders;***
- b. An order directing the Procuring Entity to re-evaluate Tender No. 1000000318 for the Supply of Transformers-Local***

Manufacturers Only in compliance with the provisions of the Constitution, the Public Procurement and Asset Disposal Act, 2015, the Regulations therein and the Tender Document issued by the Procuring Entity;

c. In the alternative to prayer (b) above, the entire procurement process herein be annulled and the Respondents be ordered to retender for the supply of the goods which were the subject matter of this tender;

d. An order awarding the costs of the review to the Applicant; and

e. Any other relief that this Board may deem fit and just to grant.

During the hearing, the Applicant was represented by Mr. Kibe Mungai on behalf of the firm of Kinoti, Kibe & Company Advocates while the Procuring Entity was represented by Ms. Sharon Tugge.

PARTIES' SUBMISSIONS

Applicant's Submissions

In his submissions, Counsel for the Applicant, Mr. Mungai, fully relied on the Request for Review, the Applicant's Statement and Supplementary Affidavit.

Counsel began by stating that the main relief sought by the Applicant in the Request for Review is for the decision of the Procuring Entity awarding the

tender to be annulled and that if such an order is merited, then the Board should order a re-evaluation of the bids received by the Procuring Entity.

On his first issue, Counsel submitted that the Procuring Entity cited one of the reasons why the Applicant's bid was found non-responsive as being, provision of Test Results that belong to a manufacturer known as **Ningbo Tianan Transformers Ltd** based in China. In response to this reason, Counsel submitted that **Ningbo Tianan Transformers Ltd** was only a technical partner to the Applicant and that the Applicant who is 100% locally owned company is the manufacturer and that all that information was set out in the Applicant's bid. He further submitted that the nature of the relationship between the Applicant and **Ningbo Tianan Transformers Ltd** was explained in the Applicant's bid.

On his second issue, Counsel submitted that the question whether the Applicant provided a valid ISO Certification has been abandoned by the Procuring Entity in its Replying Affidavit and therefore did not challenged the same anymore.

Counsel therefore moved to his third issue, that is, the requirement to provide a PIN certificate. He submitted that the Applicant annexed a PIN Certificate to its pleadings. He further took the view that if a bidder submitted a Tax Compliance Certificate, it means all taxes have been paid by such bidder.

On his fourth issue, Counsel submitted that the Procuring Entity required bidders to submit a Warranty valid for 5 years. To effect this, he submitted that the Procuring Entity provided a Standard Form to be filled by bidders when specifying the warranty period. He further submitted that when completing the said form, the Applicant indicated 1 year instead of 5 years. In his view, this was a typing error that should not have been used to find the Applicant non-responsive. Upon enquiry by the Board as to how the Evaluation Committee would have known the Applicant made a typing error when indicating the years of the warranty, Mr. Mungai submitted that since this was a Standard Form for providing Warranty, the Evaluation Committee should have known that the intention of the Applicant was to indicate 5 years and not 1 year.

Upon being referred to the Board that the Tender Document specified the requirement as a New Generation PIN Certificate with both VAT and Income Tax Obligations, Counsel confirmed that the said document was not submitted to the Procuring Entity in the Applicant's bid but that the Applicant had carried the document at the hearing and would like to submit the same as part of its pleadings.

On his fifth issue, Counsel submitted that the successful bidders in the subject tender are not citizen contractors. He therefore invited the Board to examine the CR 12 of the 3 successful bidders to establish his position that all the 3 successful bidders are owned by foreign companies. He took the

view that for purposes of procurement laws, the Procuring Entity ought to have been more concerned about the shareholding of these companies to determine whether or not they are citizen contractors.

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

Procuring Entity's Submissions

In her submissions, Counsel for the Procuring Entity, Ms. Sharon Tugee, fully relied on the Procuring Entity's Response and urged the Board to consider the confidential documents filed to it pursuant to section 67 (3) (e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act").

Counsel began her submissions by responding to the issue of preference and reservations under part XII of the Act. According to Counsel, the subject tender was reserved for local manufacturers only in the sense that the bidding companies as well as the source of the goods ought to have their source as Kenya. She relied on the definition of locally produced products or service under section 2 of the Act. Turning to section 157 (8) of the Act, Counsel submitted that the Procuring Entity is 100% government owned.

She further submitted that this contributes to the reason why the Applicant was found non-responsive at the end of Preliminary Evaluation Stage having submitted Test Reports belonging to a company based in China and manufacturing goods in China. Upon enquiry by the Board, Counsel submitted that preference is applied at the Preliminary Evaluation Stage. She however took a different view that preference and reservation can be applied at the Technical Evaluation Stage and further reiterated that the successful bidders are entities registered in Kenya and fully owned by Kenyan citizens.

On the issue of Warranty, Counsel submitted that indeed if the Applicant had a typing error of 1 year, then this typing error worked to the detriment of the Applicant which had the effect of the Applicant's Warranty being valid for only 1 year and not 5 years as required by the Procuring Entity. She also submitted that the Applicant failed to provide the New Generation PIN Certificate with both Income Tax and VAT obligations.

On the issue of Valid ISO Certification of KEBS standardization mark, Counsel confirmed that the Procuring Entity abandoned this issue since the Applicant provided a valid document to demonstrate the same.

In conclusion, she urged the Board to dismiss the Request for Review.

Applicant's Rejoinder

Mr. Mungai reiterated that the CR 12 of the successful bidders will demonstrate that the successful bidders are not fully owned by Kenyans as the majority of their ownership is by non-Kenyans. Upon enquiry by the Board he confirmed that Clause 6.1.2 of the Tender Document required bidders to submit the CR 12 as one of the mandatory documents at the Preliminary Evaluation Stage.

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 Act and the oral submissions made by parties on the hearing date.

The issues for determination are as follows:-

- I. Whether the Procuring Entity issued a letter of notification of unsuccessful bid to the Applicant in accordance with section 87 (3) of the Act;***
- II. Whether the Procuring Entity rightfully evaluated the Applicant's bid at the Preliminary Evaluation Stage in accordance with Part 1. Preliminary Evaluation of Section VI.***

of the Tender Document read together with the provisions of section 79 (1) and 80 (2) of the Act;

III. Whether the Procuring Entity excluded preferences and reservation schemes provided for in section 86 (2) and Part XII of the Act, from their application in the subject tender; and

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

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

On the first issue, the Board observes that, during his oral submissions, Counsel for the Applicant, Mr. Mungai submitted that he would fully rely on the Request for Review in terms of the grounds raised therein challenging the Procuring Entity's decision on its bid, the Applicant's Statement and Supplementary Affidavit. One of the grounds raised at paragraph 3 of the Request for Review is as follows:-

"On or about 13th February 2020, the Respondents sent a letter to the Applicant notifying the Applicant that they were unsuccessful while giving their reasons thereof. In the said letter, the Respondent further did not state who the successful bidder was in violation of the provisions of section 87 (3) of the Act"

In response to this averment, the Procuring Entity averred as follows at paragraph 7 of its Replying Affidavit:-

"THAT the details of successful bidders were uploaded on REREC website (copy attached) (Annexed and Marked as JO3 is a copy of the details of the successful bidders"

The Applicant's letter of notification of unsuccessful bid dated 10th February 2020 only informed the Applicant of the specific reasons why its bid was found unsuccessful, but did not disclose the bidders who were determined to be successful.

Having considered parties' pleadings, the Board deems it necessary to address the manner in which notification of unsuccessful bid ought to be issued to bidders. Section 87 of the Act states as follows:-

"(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.

(2)

(3) 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."

From the foregoing, it is evident that when notifying unsuccessful bidders of the outcome of their bids, the Procuring Entity has the obligation to disclose the successful bidder in accordance with section 87 (3) of the Act. The rationale for this requirement is to adhere to the principle of transparency which is one of the principles that guide public procurement processes as outlined in Article 227 (1) of the Constitution. This provisions states that:-

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

The Board studied the Procuring Entity's Annexure JO3 attached to its Replying Affidavit which contains details of the three successful bidders in the subject tender, their directors and the amount at which the respective awards were made to them. These details were uploaded on the Procuring Entity's Website which is open to the public. A click on the Procuring Entity's Website (i.e. rerec.co.ke) directs one to a pdf document under Contract Awards, which contains the same details outlined in Annexure JO3. It is

however not clear from the said Website when these Contract Awards were published on the Procuring Entity's Website.

That notwithstanding, it is evident that by publishing the awards made in the subject tender on its Website, the Procuring Entity complied with section 138 (1) of the Act which states as follows:-

"138. Publication of procurement contract

(1) The accounting officer of a procuring entity shall publish and publicise all contract awards on their notice boards at conspicuous places, and website if available within a period as prescribed."

It is the Board's considered view that by disclosing the successful bidders on its website the Procuring Entity complied with section 138 (1) of the Act, despite its omission to disclose the successful bidders in the Applicant's letter of notification. By publishing the successful bidders on its website, the Applicant already learnt of the identity of the successful bidders and the amounts at which award of the subject tender was made to them in the respective lots. This explains the reason why the Applicant urged the Board to interrogate the CR 12 extracts attached to the original bids of the three successful bidders to determine whether or not they are owned by Kenyan Citizens or by foreigners.

In essence, the Applicant suffered no prejudice by the Procuring Entity's failure to disclose the successful bidders in the Applicant's letter of notification, noting that the Applicant was notified of the specific reasons why its bid was found unsuccessful thereby enabling it to challenge those reasons by way of administrative review pursuant to section 167 (1) of the Act.

Whereas the Procuring Entity complied with section 138 (1) of the Act, in the Board's view, the Procuring Entity had an obligation to fully comply with section 87 (3) of the Act by disclosing the successful bidders in the letter of notification of unsuccessful bid issued to unsuccessful bidders.

Accordingly, the Board finds that the Procuring Entity partly complied with the requirement of section 87 (3) of the Act because it failed to disclose the successful bidders in the letter of notification of unsuccessful bid issued to the Applicant, but was able to apply the principle of transparency whilst complying with section 138 (1) of the Act.

On the second issue, the Board observes that the Applicant's letter of notification of unsuccessful bid dated 10th February 2020 states as follows:-

"We recently received and reviewed your Tender RFX 1000000318 for Supply and Delivery of Distribution of

Transformers and we regret to inform you that you were not successful

You failed at the preliminary stage due to the following reasons:-

- ***The Test Report submitted belong to a manufacturer Ningbo Tian Transformers Co. Ltd) based in China***
- ***No valid ISO Certification or KEBS Standardization Mark***
- ***PIN Certification lacks VAT obligation***
- ***Provided Warranty for 1 year; requirement was 5 years... ”***

During the hearing, the Procuring Entity confirmed that the Applicant complied with the requirement of provisions **“a Valid ISO Certification or KEBS Standardization Mark”** thereby signifying that this criterion did not form part of the reasons why the Applicant’s bid was found non-responsive at the end of Preliminary Evaluation. Given that the Procuring Entity conceded that the Applicant satisfied this criterion, the Applicant only challenged the other three reasons which the Board now proceeds to address as follows:-

a. Test Reports

Clause 6.1.12 of Section VI. Summary of Evaluation Process of the Tender Document provides as follows:-

"Submission of Copies of relevant Type Test Certificates and their Reports not more than 3 years old from the date of tender closing and from the designated bodies"

In response to this criterion, the Applicant submitted in its original bid, Test Reports conducted by a manufacturer called **M/s Ningbo Tian An Transformer Co. Ltd** (hereinafter referred to as "M/s Tian An"). Counsel for the Applicant confirmed this fact during the hearing and further explained that **M/s Tian An** is the Applicant's Technical Partner.

This prompted the Board to study the Applicant's bid to determine the relationship between the Applicant and **M/s Tian An**. At page 2 of the Applicant's original bid, the Applicant attached a "**Commercial Agreement for technical support for Distribution Transformer Factory in Nairobi, Kenya**". At clause 1. Rights and Obligations of parties to the said Agreement, it is stated as follows:-

"Party A (Ningbo Tianan Electric) shall provide Party B (Empower Transformers Ltd) with technical guidance and personnel training required for the establishment of the power distribution transformer factory"

At page 8 of the Applicant's bid is another **"Agreement for technical support for Distribution Transformer Factory in Nairobi, Kenya"** wherein it is stated at Clause 5 as follows:-

"The initial product will be put into the market, the type test of the transformer is required, and these work need to be arranged in advance after the project is determined

Type test requires strictly both to the product and the initial production conditions of the factory, generally speaking, since it cannot meet the requirement of type test of the product at starting time, we will use Tianans Type Test reports till the Factory gets its own"

From the foregoing, the Board observes, the Applicant indicated that **M/s Tian An** would provide it with technical guidance and personnel training required for the establishment of the power distribution transformer factory. Further, the Applicant was allowed to use the Type Test Reports of **M/s Tian An**.

The Board notes, the Tender Document specified under Clause 3.2.1 of the Appendix to Instructions to Tenderers of the Tender Document that Eligible Tenderers are:-

"Local Manufacturers Only, not less than 4 months old from registration are eligible to apply"

Further, Clause 3.13.3 (c) and (d) of Section III. Instructions to Tenderers of the Tender Document provides as follows:-

"The documentary evidence of the Tenderer's qualifications to perform the contract if its Tender is accepted shall be established to REREC's satisfaction

(a);

(b);

(c) That the tenderer has the technical and production capability necessary to perform the contract.

(d) That, in the case of a Tenderer not doing business within Kenya, the Tenderer is or will be (if awarded the contract) represented by an agent in Kenya equipped and able to carry out the Tenderer's maintenance, repair, spare parts and stocking obligations prescribed in the Conditions of Contract and or Technical Specifications"

These two provisions were modified by the Appendix to Instructions to Tenderers to the extent of the following:-

"The following information regarding the particulars of the tender shall complement and or amend the provisions of the Instructions to Tenderers hereinafter abbreviated as ITT. Wherever there is a conflict between the provisions of the ITT

and the Appendix, the provisions of the Appendix herein shall prevail

8. 3.13.3 (c) and (d) Documents of evidence of eligibility

These shall include Type Test certificate and other quality certificates'

From the foregoing, the Board observes that Clause 3.13.3 (c) and (d) of Section III. Instructions to Tenderers as amended in the Appendix to Instructions to Tenderers of the Tender Document made it an obligation for tenderers to demonstrate their technical and production capability necessary to perform the contract including their Type tests.

The second limb of this requirement was amended to the effect that in case of a tenderer not doing business in Kenya, the tenderer must be represented by an agent in Kenya equipped and able to carry out the Tenderer's maintenance, repair, spare parts and stocking obligations prescribed in the Conditions of Contract and or Technical Specifications, and such technical specifications includes the Type Tests.

It is therefore the Board's considered view that, the Applicant (being the tenderer) ought to have provided its own Type Test Reports to demonstrate its technical and production capability to perform the contract, or in the alternative indicated that, if it is a tenderer not doing business in Kenya, it is

represented by an agent well equipped to carry out the tenderer's maintenance, repair, spare parts and stocking obligations including Type Tests. Accordingly, the Type Tests carried out by the tenderer's agent (on behalf of the tenderer) would be submitted in that tenderer's bid.

In this instance, the Applicant did not submit its own Type Test Reports.

The Applicant attached a Certificate of Incorporation in its original bid demonstrating that it is a company registered as a Private Limited Company and doing business in Kenya. Despite this, the Applicant did not bid in Joint Venture with **M/s Tian An** therefore, **M/s Tian An** is not a tenderer in the subject procurement process.

In this instance, **M/s Tian An** is not a tenderer in the subject procurement process and the mere fact that an agreement exists allowing the Applicant to use the Type Test Reports of **M/s Tian An** does not meet the requirement of Clause 3.13.3 (c) and (d) of Section III. Instructions to Tenderers of the Tender Document, which required the tenderer itself to demonstrate its technical and production capabilities to perform the contract including Type Test Reports. This criterion did not require Type Test Reports from a technical partner (as referred to by the Applicant) who was not a tenderer.

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

b. PIN Certificate with both VAT & Income Tax Obligations

Clause 6.1.2 (b) of Section VI. Summary of Evaluation Process of the Tender Document provides as follows:-

"New Generation PIN Certificate with both VAT & Income Tax Obligations"

During the hearing, Counsel for the Applicant confirmed that the Applicant submitted a KRA PIN Certificate with respect to Income Tax and further that the Applicant submitted a KRA Tax Compliance Certificate. These two documents can be found at pages 3 and 4 of the Applicant's original bid with the following details:-

- At page 3 thereof, a KRA PIN Certificate dated 13th April 2018 with the Tax Obligation Registration Details specified as **"Income Tax"**;
- At page 4 thereof, a KRA Tax Compliance Certificate dated 15th April 2019.

During the hearing, Counsel for the Applicant submitted that the Applicant attached its **"New Generation PIN Certificate with both VAT and Income Tax Obligations"** to its pleadings and would like the Board to find that the Applicant satisfied this criterion as it obtained the said Certificate.

Upon enquiry by the Board, Counsel confirmed that the **“New Generation PIN Certificate with both VAT and Income Tax Obligations”** was not attached to the Applicant’s original bid.

This Board observes that section 76 of the Act states that:-

- (1) Before the deadline for submitting tenders, a person who submitted a tender may only change or withdraw it in accordance with the following—***
 - (a) the change or withdrawal shall be in writing; and***
 - (b) the change or withdrawal shall be submitted before the deadline for submitting tenders and in accordance with the procedures for submitting tenders.***
- (2) After the deadline for submitting tenders, a person who submitted a tender shall not change, or offer to change the terms of that tender”***

From the above provision, after the deadline for submission of tenders, a person is precluded from changing, or offering to change the terms of its tender. This means, as at the tender submission deadline of 7th November 2019, a bidder who participated in the subject tender could not change or offer to change the terms of its tender. The effect of this is that an evaluation

committee only relies on the documents in a bidder's bid that were submitted before the tender submission deadline.

When a Request for Review is filed before this Board, a procuring entity has the obligation to submit all documents pertaining to the procurement process in accordance with section 67 (1) and (3) of the Act which states as follows:-

"67 (1) During or after procurement proceedings and subject to subsection (3), no procuring entity and no employee or agent of the procuring entity or member of a board, commission or committee of the procuring entity shall disclose the following—

(a);

(b);

(c) information relating to the evaluation, comparison or clarification of tenders, proposals or quotations; or

(d) the contents of tenders, proposals or quotations"

67 (3) This section does not prevent the disclosure of information if any of the following apply—

(a);

(b);

(c);

(d)

(e) the disclosure is made to the Authority or Review Board under this Act

From the foregoing, the Board obtains confidential documents from a procuring entity, including tenders (that is, all original bids of all bidders who participated in the procurement process) submitted to that procuring entity prior to the deadline for submission of tenders, in order to make a determination based on the documents that were before such a procuring entity's evaluation committee.

Accordingly, a bidder cannot therefore offer to supply documentation in response to a criterion to a procuring entity, past the tender submission deadline or when proceedings are pending before this Board. The Applicant, in the Board's view, wishes that this Board treats it differently from the manner in which other bidders were treated in this evaluation process.

The main purpose of supplying information to bidders through a procuring entity's tender document is to ensure that such bidders comply with the tender conditions contained in that tender document. It is also expected that a procuring entity's evaluation committee will stick to the procedures and criteria set out in the tender document without favouring one particular bidder over the others.

All bidders in this procurement process were subjected to the same evaluation criteria, the requirements of the Procuring Entity's Tender Document having been disclosed to them. The Applicant now wishes that an exception be given to it for its failure to comply with all the rules of a game it participated in with full knowledge of the rules and the consequences of the failure to comply with such rules. The Applicant is well aware that its fellow competitors were subjected to the same rules as itself, and that all players in a football field must be given an opportunity to compete on an equal footing.

The Applicant's prayer for the rules of this game to be modified to its advantage at the ninetieth minute after the referee has blown his whistle in our view, goes against core principles under Article 227 (1) of the Constitution that, procurement of goods and services must be undertaken in a system that is fair, equitable, transparent, competitive and cost-effective.

The Applicant's request that it be allowed to furnish this Board with its **"New Generation PIN Certificate with both VAT and Income Tax Obligations"** after it admitted that the same was not attached in its original bid, amounts to sufficient proof that the Applicant failed to satisfy this criterion.

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

c. Manufacturer's Warranty

Clause 6.1.11 of Section VI. Summary of Evaluation Process of the Tender Document provides for this criterion as follows:-

"Submission of Manufacturer's Warranty stamped and signed"

At page 53 of the Tender Document, a Manufacturer's Warranty Form was provided for bidders to duly complete the same and attach in their original bids. The Board deems it necessary to reproduce the said form as it appears in the Tender Document, as follows:-

MANUFACTURER'S WARRANTY FORM

To be submitted on Manufacturer's Letterhead

To:

Rural Electrification and Renewable Energy Corporation

Ground Floor, Kawi House, South C, Off Red Cross Road, behind Boma Hotel

P.O Box 34585-00100

Nairobi,

Kenya

RE: MANUFACTURER'S WARRANTY FOR GOODS REQUIRED UNDER TENDER NO.....TO BE SUPPLIED BY.....(indicate your name or the supplier you have authorized

WE HEREBY WARRANT THAT:

- (a) The goods to be supplied under the contract are new, unused, of the most recent or current specification and incorporate all recent improvements in design and materials unless provided otherwise in the Tender.
- (b) The goods in the Tenderer's bid have no defect arising from manufacture, materials or workmanship or from any act or omission of the Tenderer that may develop under normal use of the goods under the conditions obtaining in Kenya

The Warranty will remain valid for five (5) years after the goods, or any portion thereof as the case may be, have been delivered to the final destination indicated in the contract

DATED THIS.....DAY OF.....20.....

.....
 Signature of duly authorized person for and on behalf of the Manufacturer

.....
 Name and Capacity of duly authorized person signing on behalf of the Manufacturer

NOTES TO TENDERERS AND MANUFACTURERS

1. Only a competent person in the service of the Manufacturer should sign this letter of authority.
2. Provide full contact details including physical address, email, telephone numbers and the website on the Warranty

Further, Clause 3.16.2 of the Appendix to Instructions to Tenderers of the Tender Document confirmed the Warranty Period to be:-

"This warranty period shall be five (5) years from the date of manufacture as specified in the Specifications"

In response to this criterion, the Applicant provided the following in its original bid:-

Empower Transformers Ltd

Karai, Dagoretti

Tel: 0722529350

P.O Box 19975-00202

Fax: 254 20 3861996 Nairobi

Kenya

Email:- info@empowertx.co.ke

skigera@empowertx.co.ke

MANUFACTURER'S WARRANTY FORM

To:

Rural Electrification and Renewable Energy Corporation

Ground Floor, Kawi House, South C, Off Red Cross Road, behind Boma Hotel

P.O Box 34585-00100

Nairobi,

Kenya

RE: MANUFACTURER'S WARRANTY FOR GOODS REQUIRED UNDER TENDER NO 1000000318 TO BE SUPPLIED BY EMPOWERS TRANSFORMERS LTD

WE HEREBY WARRANT THAT:

- (a) The goods to be supplied under the contract are new, unused, of the most recent or current specification and incorporate all recent improvements in design and materials unless provided otherwise in the Tender.
- (b) The goods in the Tenderer's bid have no defect arising from manufacture, materials or workmanship or from any act or omission of the Tenderer that may develop under normal use of the goods under the conditions obtaining in Kenya

The Warranty will remain valid for one (1) year after the goods, or any portion thereof as the case may be, have been delivered to the final destination indicated in the contract

DATED THIS 1st DAY OF November 2019

[signature affixed]

.....
Signature of duly authorized person for and on behalf of the Manufacturer

Name and Capacity of duly authorized person signing on behalf of the Manufacturer

Eng. Steven Njoroge Kigera -CEO

NOTES TO TENDERERS AND MANUFACTURERS

1. Only a competent person in the service of the Manufacturer should sign this letter of authority.
2. Provide full contact details including physical address, email, telephone numbers and the website on the Warranty

The Applicant's contention is that it erroneously indicated the Warranty Period as One (1) year instead of Five (5) years as indicated in the Sample Manufacturer's Warranty Form in the Procuring Entity's Tender Document. In the Applicant's view, since this was a form that was being completed by bidders, its alleged inadvertent error ought not to have rendered its bid non-responsive on this criterion.

Having considered parties' submissions, the Board is not persuaded that the Applicant inadvertently wrote "one" in words and repeated this as (1) in figures, when indicating its Manufacturer's Warranty. Furthermore, the Applicant had the obligation to study this requirement keenly as provided for in the Tender Document and to exercise abundance of caution when preparing its bid.

This in the Board's view is the second instance where the Applicant wishes to be treated differently from the way other bidders were treated during evaluation. The Board studied the original bids of the other bidders who proceeded to Technical Evaluation and notes that, whereas they were all keen to indicate the period of Warranty as five (5) years, the Applicant did not comply with this requirement and wishes that it be given a favourable treatment from those bidders who chose to comply with this requirement.

The only option that the Applicant had was, to withdraw its bid before the tender submission deadline, correct the alleged error and submit a modified

bid before the tender submission deadline. In the circumstances, the Evaluation Committee had the obligation to study the documents and information provided by bidders against the criterion as provided in the Tender Document. Therefore, the Applicant has itself to blame for its failure to comply with a mandatory requirement and cannot at this stage plead that it made a **"typing error"** as a defence.

In the circumstances, the Board finds that the Applicant failed to provide a Manufacturer's Warranty valid for 5 years from the date of manufacture as specified in the Specifications as required in Clause 6.1.11 of Section VI. Summary of Evaluation Process of the Tender Document, therefore the Procuring Entity rightfully evaluated the Applicant's bid on this criterion.

The Board takes cognizance that section 79 (1) and 80 (2) of the Act provide that:-

"Section 79 (1) ***A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents.***

Section 80 (2) ***The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents"***

The above provisions demonstrate that evaluation and comparison of bids is done using the procedures and criteria set out in the tender documents. In addition to this, a bidder's failure to comply with mandatory requirements renders such a bidder non-responsive. Clause 6.1 of Section VI. Summary of Evaluation Process of the Tender Document further provided that:-

"Tenders shall proceed to the Technical Stage only if they qualify in compliance with Part 1 above, Preliminary Evaluation under Paragraph 3.28"

Accordingly, the Applicant's failure to comply with all mandatory requirements at the Preliminary Evaluation Stage, means that it could not proceed to Technical Evaluation and the Evaluation Committee had no option but to render the Applicant's bid non-responsive.

In **Miscellaneous Application No. 407 of 2018, Republic v Public Procurement Administrative Review Board; Arid Contractors & General Supplies (Interested Party) Ex parte Meru University of Science & Technology [2019] eKLR**, the court held that:-

"An acceptable tender under the Act is any "tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document. Compliance with the requirements for a valid tender process, issued in

accordance with the constitutional and legislative procurement framework, is thus legally required. These requirements are not merely internal prescripts that the Procuring Entity or the Review Board or even this court may disregard at whim. To hold otherwise would undermine the demands of equal treatment, transparency and efficiency under the Constitution.”

The above case demonstrates that bidders have an obligation to meet mandatory requirements in a Tender Document and such requirements should not be disregarded by a Procuring Entity, this Board or even courts when determining whether or not a bidder has complied with such requirements. Such a determination is made with a view of ensuring equal treatment of bidders, transparency and efficiency of the procurement process in accordance with the Constitution.

In totality of the second issue, the Board finds that the Procuring Entity rightfully evaluated the Applicant’s bid at the Preliminary Evaluation Stage in accordance with Part 1. Preliminary Evaluation of Section VI. of the Tender Document and the provisions of section 79 (1) and 80 (2) of the Act.

On the third issue, the Board observes that the Applicant contended that the Procuring Entity’s Tender Document excluded Part XII. Preferences and Reservation in Procurement of the Act from application in the subject tender.

Counsel further submitted that the Applicant ought to have been given exclusive preference since it is a citizen contractor wholly owned by Kenyan citizens.

The Board observes that the subject tender was reserved for “Local Manufacturers Only” as can be seen from the name of the tender itself. This is reiterated at Clause 3.2.1 of the Appendix to Instructions to Tenderers of the Tender Document as follows:-

“Eligible Tenderers Local Manufacturers Only, not less than 4 months old from registration are eligible to apply”

In determining the meaning of “Local Manufacturers”, the Board notes that, the 2015 Act does not define the term “Local Manufacturers”. However, Locally produced product or service is defined as:-

“goods and services that are manufactured in Kenya by firms that are registered and undertaking their business in Kenya”

From the above definition, it can be said that a local manufacturer is a firm that is registered and undertaking its business of provision of goods and services in Kenya. Accordingly, the manufactured products or service would originate from Kenya. Clause 3.3.1 of the Appendix to Instructions to Tenderers of the Tender Document supports this position as it states as follows:-

"Origin of Eligible goods Kenya"

Section 2 of the Act defines preference as:-

"the right or opportunity to select a tenderer from an identified target group that is considered more desirable than another"

Further, the term "reservations" is defined by section 2 of the Act as:-

"exclusive preference to procure goods, works, and services set aside to a defined target group of tenderers within a specified threshold or region"

This definition supports the Board's view that the subject tender was reserved, that is set aside for a defined target group known as "Local Manufacturers" (that is, firms that are registered and undertaking business in Kenya) as the Procuring Entity's preferred group.

It is worth noting that Clause 3.32 of the Appendix to Instructions to Tenderers of the Tender Document provides as follows:-

"Exclusive Preferences

***Not Applicable, reserved for
locals"***

Having considered the definition of "Exclusive Preference", the Board observes that the nature of the tender itself demonstrates that an identified target group (that is, Local Manufacturers) were already considered to be the Procuring Entity's preferred group. It was therefore unnecessary for the Procuring Entity to indicate that exclusive preference would not apply when it already preferred local manufacturers as an identified target group as opposed to other groups.

This Board notes that the Procuring Entity did not exclude application of other preference and reservation schemes found in the Act. Therefore, the question that the Board must address at this juncture is whether other types of preference and reservation schemes would be applicable during evaluation even after the Procuring Entity already applied a reservation scheme.

To address this, the Board studied the provisions on preference and reservation schemes under Part XII of the Act, specifically, section 157 (8) of the Act provides guidance on how preference and reservations are applied as follows:-

"Section 157 (8) In applying the preferences and reservations under this section—

(a) exclusive preferences shall be given to citizens of Kenya where—

(i) the funding is 100% from the national government or county government or a Kenyan body; and

(ii) the amounts are below the prescribed threshold;

(iii) the prescribed threshold for exclusive preference shall be above five hundred million shillings;

(b) a prescribed margin of preference shall be given—

(i) in the evaluation of tenders to candidates offering goods manufactured, assembled, mined, extracted or grown in Kenya; or

(ii) works, goods and services where a preference may be applied depending on the percentage of shareholding of the locals on a graduating scale as prescribed.

From the foregoing, for exclusive preference (that is given to citizens of Kenya) to apply, firstly, the funding must be 100% from the National Government or County Government or a Kenyan body. Secondly, the amounts must be below the prescribed threshold. The prescribed threshold of Five Hundred Million Shillings mentioned in section 157 (8) (iii) of the Act was amended by Regulation 5 of the Public Procurement and Disposal (Amendment) Regulations, 2013 which provides as follows:-

"The principal Regulations are amended by deleting regulation 13 and substituting thereof the following new regulation:-

"13. For the purposes of section 39 (8) (a) (ii) [which is section 157 (8) (a) (ii) of the 2015 Act], the threshold below which exclusive preference shall be given to citizen contractors, shall be the sum of:-

- (a) One billion shillings for procurements in respect of road works, construction materials and other materials used in transmission and conduction of electricity of which the material is made in Kenya***
- (b) five hundred million shillings for procurements in respect of other works;***
- (c) one hundred million shillings for procurements in respect of goods; and***

(d) fifty million shillings for procurements in respect of services”

Accordingly, the prescribed threshold for road works, construction materials and other materials used in conduction of electricity of which material is made in Kenya would be below One Billion shillings. Therefore, for exclusive preference to apply to citizen contractors in the subject tender, the funding must be 100% from the National Government, County Government or a Kenyan body and the prescribed threshold must be below One Billion Shillings.

The Procuring Entity’s confidential file did not provide an estimate of the value of the subject tender. However, the tender was awarded at the following prices:-

Lot	Bidder	Amount (Kshs)
1	Mahashakti (K) Ltd	68,496,451.40
2	PanAfrica Transformers & SwitchGears	69,370,598.98
3	Yocean Group Limited	69,475,711.80

From the above, the Board observes that the value of the tender is below One Billion Kenya Shillings. Further to this, Counsel for the Procuring Entity submitted that the Procuring Entity is 100% owned by the National Government. Therefore, preference to citizen contractors would ordinarily apply to the subject tender provided the prescribed threshold is met.

It is not lost to the Board that Regulation 18 of the Public Procurement and Disposal (Preference and Reservations) Regulations, 2011 (hereinafter referred to as "the 2011 Regulations") states that:-

"Where a candidate is entitled to more than one preference scheme, the scheme with the highest advantage to the tenderer shall be applied"

It is the Board's considered view that, during evaluation, it may be noted that one bidder qualifies for more than one preference scheme. In those circumstances, such a bidder would be subjected to the scheme with the highest advantage. A good example is section 157 (8) (b) of the Act where a margin of preference is given depending on the percentage of shareholding of the locals on a graduating scale prescribed in the 2011 Regulations that a citizen contractor may benefit from. Such a citizen contractor could also benefit from the preference scheme under section 86 (2) of the Act which states as follows:-

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

In those instances, a procuring entity should subject a citizen contractor to the scheme with the highest advantage if such citizen contractor meets the threshold for the scheme.

This Board observes that Regulation 17 of the 2011 Regulations provides as follows:-

"Regulation 17 Single Preferences
A candidate shall be entitled to tender for one preference and reservation scheme at a time in a procurement proceeding

According to section 2 of the Act, "tender" means:-

"an offer in writing by a candidate to supply goods, services or works at a price; or to acquire or dispose stores, equipment or other assets at a price, pursuant to an invitation to tender, request for quotation or proposal by a procuring entity"

The above provision in the Board's view directs that a tenderer can only submit an offer to a procuring entity with respect to one preference and reservation scheme at a time in a procurement proceeding.

The Act and Regulations are silent on the question whether bidders who have benefited from a Reservation Scheme as Local Manufacturers can still benefit from a preference scheme (during evaluation) if they meet the threshold for citizen shareholding, noting that a bidder can be a local contractor and still be a citizen contractor. Regulation 7 of the 2011 Regulations provides that:-

Section 7: A firm shall be qualified as-

(a) a local contractor, if it is registered in Kenya;

or

(b) a citizen contractor, if its owners and shareholders are Kenyan citizens

Further, section 2 of the Act defines a citizen contractor as:-

"a person or a firm wholly owned and controlled by persons who are citizens of Kenya"

Even though the Act and Regulations do not expressly state whether or not bidders who have benefited from a Reservation Scheme as Local Manufacturers can still benefit from a preference scheme (during evaluation) if they meet the threshold for citizen shareholding, the answer to this question can be determined by considering the guiding principles in public procurement provided in section 3 of the Act as follows:-

"Public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of the Constitution and relevant legislation—

- (a)***;
- (b)***;
- (c)***;
- (d)***;
- (e)***;
- (f)***;
- (g)***;
- (h)***;
- (i) promotion of local industry, sustainable development and protection of the environment;***
and
- (j) promotion of citizen contractors.***"

According to section 3 (i) and (j) of the Act, promotion of the local industry as well as promotion of citizen contractors form part of the guiding principles under the Act. This provision supports the Board’s earlier observation that, even though the subject tender was reserved for local manufacturers, citizen contractors would also be entitled to a preference scheme (during evaluation) if they qualify for it.

The rationale behind this as the Board understands it, is to cure a scenario where some local manufacturers are found to be owned and controlled by foreigners. Such local manufacturers would bid for a tender reserved for local manufacturers and qualify to that extent because they are registered in Kenya and undertaking manufacturing activities in Kenya. During evaluation, a local manufacturer, who is also a citizen contractor may not have a chance to win a tender unless it is afforded a preference scheme with the highest advantage to it.

The Board studied the bids submitted by the successful bidders to establish whether they are local manufacturers alongside the nature of their shareholding and notes the following:-

1. Mahashakti Kenya Limited

- At page 2 of its original bid, a Certificate of Incorporation under the repealed Companies Act, Chapter 486, Laws of Kenya on 26th August 2015;
- At page 12 of its original bid, a Confidential Business Questionnaire Form showing that it undertakes the Business of Repair and Manufacture of Distribution and Power Transformers in Kenya;
- At page 23 of its original bid, a single Business Permit issued by Mavoko Sub-County to undertake Manufacture and Repairs of Transformers in Kenya;

- At page 3 of its original bid, a CR 12 extract from the Companies Registry as at 8th October 2019 with the following details:-

Name	Description	Country	Shares
Sun Mara Energy Ltd	Shareholder		Ordinary 40
Mahashakti Energy Ltd	Shareholder		Ordinary 60
Singhal Sachin	Director	India	Ordinary 0
Nidhi Rana	Director	Kenya	Ordinary 0
Kansal Piyush	Director	Kenya	Ordinary 0
Kulvinder Singh Rana	Director	Kenya	Ordinary 0

From the foregoing, the Board observes that M/s Mahashakti Limited is a Local Contractor in addition to being a local manufacturer registered and undertaking its manufacturing activities in Kenya. However, the Kenyan citizens who are directors in the said company do not own shares. In the Board's view, M/s Mahashakti Limited fails to meet the definition of a citizen contractor and since it is an entity where Kenyan citizens do not own shares, it would not be entitled to a preference scheme.

2. Pan Africa Transformers & Switchgears Ltd

- At page 2 of its original bid, a Certificate of Incorporation as a Limited Company under the repealed Companies Act, chapter 486, Laws of Kenya on 30th September 2014;
- At page 15 of its original bid, a Confidential Business Questionnaire Form showing that the company is registered in

Kenya and undertakes Manufacturing and Repairs of Distribution Transformers;

- At page 3 of its original bid, a CR12 extract from the Companies Registry as at 15th October 2019 showing that the total number of shares are 300,000 shares and that Kenyans own at least 150,000 shares which translates to 50% as follows:-

Name	Description	Country	Shares
Emirates Technical Services Limited	Shareholder		Ordinary 75000
Chirag Rohit Patel	Director	India	Ordinary 0
Boston Investments Limited	Shareholder		Ordinary 75000
Seema Chandrakant Jasbhai Patel	Director/ Shareholder	Kenya	Ordinary 75000
Faryd Abdulrazak Sheikh	Director	Kenya	
Boby Thomas	Director/ Shareholder	Kenya	Ordinary 75000

From the foregoing, the Board observes that M/s Pan Africa Transformers & SwitchGears Limited is a Local Contractor in addition to being a local manufacturer registered and undertaking its manufacturing activities in Kenya. However, the Kenyan citizens own at least 150,000 shares which translates to 50%. In the Board's view, M/s Pan Africa Transformers & SwitchGears Limited would not be entitled as it does not meet the threshold of a citizen contractor under section 2 of the Act, and is also not an entity

with at least 51% Kenyan Citizen shareholding to benefit from the preference scheme provided in section 86 (2) of the Act.

3. Yocean Group Limited

- In its original bid, a Confidential Business Questionnaire Form showing that the company is registered in Kenya and undertaking the business of Manufacturing, Repair and Maintenance of Transmission and Powered Transformers;
- In its original bid, a Certificate of Incorporation as a Limited Company under the repealed Companies Act, Chapter 486, Laws of Kenya on 2nd November 2011;
- In its original bid, a single Business Permit granted to the company by Nairobi City County to undertake the business of Manufacture of Transformers;
- In its original bid, a CR 12 extract from the Companies Registry as at 4th November 2019 showing that the majority shareholders are of Chinese Nationality as follows;

Name	Description	Country	Shares
Hu Tao	Shareholder		Ordinary: 600
Yu Yang	Director/Shareholder	China	Ordinary 1
Zhu Jie	Director/Shareholder	China	Ordinary 9399

The Board observes that M/s Yocean Group Limited is wholly owned and controlled by Chinese even though it meets the definition of a local contractor, in addition to being a local manufacturer registered and

undertaking manufacturing activities in Kenya. However, M/s Yocean Group Limited would not be entitled to any of the preference schemes in the Act.

The Board studied the Evaluation Report and notes that the three successful bidders were the only bidders who made it to Financial Evaluation and were not subjected to preferential treatment, noting that none of them qualified for the same.

Further, the Applicant’s CR 12 extract from the Companies Registry as at 15th October 2019 has the following details:-

Name	Description	Country	Shares
Empower Installation Contractors Ltd	Shareholder	Kenya	Ordinary 30000
Stephen Njoroge Kigera	Director/ Shareholder	Kenya	Ordinary 30000
Teresa Wangari Kigera	Director/ Shareholder	Kenya	Ordinary 30000

From the foregoing, the Board notes that at least two-thirds (i.e. 67%) of the Applicant is owned by Kenyan citizens. It is not certain whether M/s Empower Installation Contractors Ltd is also wholly owned and controlled by Kenyan citizens, since the Applicant did not attach the CR 12 extract of M/s Empower Installation Contractors Ltd.

That notwithstanding, it is important to note that having established that the Applicant was rightfully found non-responsive at the end of Preliminary Evaluation, the Applicant could not therefore be subjected to the preference schemes under the Act, since such schemes are not applied at the Preliminary Evaluation Stage but once a bidder has qualified after the Technical Evaluation Stage.

In totality of the third issue, the Board finds that the Procuring Entity did not exclude application of other preference and reservation schemes under section 86 (2) read together with Part XII of the Act and no preference and reservation scheme could be afforded to the Applicant who was rightfully found non-responsive at the end of Preliminary Evaluation.

In determining the appropriate orders to issue in the circumstances, the Board observes that having found that the Procuring Entity rightfully evaluated the Applicant's bid and that the successful bidders were awarded the tender in accordance with the Act, the Board finds it just that the Procuring Entity be allowed to proceed with the procurement process to its logical conclusion.

In totality, the Request for Review is hereby dismissed and the Board proceeds to make 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 Letter of Notification of Unsuccessful bid dated 10th February 2020 with respect to Tender No. 1000000318 for the Supply of Transformers-Local Manufacturers Only addressed to the Applicant herein, be and is hereby upheld.**
- 2. The Letter of Notification of Award dated 10th February 2020 with respect to Lot 1 of Tender No. 1000000318 for the Supply of Transformers-Local Manufacturers Only addressed to M/s Mahashakti (Kenya) Limited, be and is hereby upheld.**
- 3. The Letter of Notification of Award dated 10th February 2020 with respect to Lot 2 of Tender No. 1000000318 for the Supply of Transformers-Local Manufacturers Only addressed to M/s Pan Africa Transformers & Switchgears Limited, be and is hereby upheld.**
- 4. The Letter of Notification of Award dated 10th February 2020 with respect to Lot 3 of Tender No. 1000000318 for the Supply of Transformers-Local Manufacturers Only**

addressed to M/s Yocean Group Limited, be and is hereby upheld

- 5. The Procuring Entity is at liberty to proceed with the procurement process to its logical conclusion.**
- 6. Each party shall bear its own costs in the Request for Review**

Dated at Nairobi this 18th day of March 2020

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CHAIRPERSON

PPARB

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SECRETARY

PPARB

Delivered in the presence of:-

- i.** Mr. Miano holding brief for Mr. Mungai for the Applicant;
- ii.** Ms. Tugee for the Respondents;
- iii.** Mr. Boit, Manager for M/s PanAfrica Transformers & SwitchGears Limited; and
- iv.** Mr. Omweri, Human Resources Manager for M/s Yocean Group Limited.