

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 33/2020 OF 10<sup>TH</sup> MARCH 2020**

**BETWEEN**

**BROWETT TRADING CO. LIMITED.....APPLICANT**

**AND**

**THE ACCOUNTING OFFICER,  
KENYA ELECTRICAL GENERATING  
COMPANY PLC.....1<sup>ST</sup> RESPONDENT**

**AND**

**KENYA ELECTRICAL GENERATING  
COMPANY PLC.....2<sup>ND</sup> RESPONDENT**

**AND**

**SUDI CHEMICAL INDUSTRIES  
LIMITED.....INTERESTED PARTY**

Review against the decision of the Accounting Officer of Kenya Electrical Generating Company PLC declaring the tender for the Applicant unsuccessful with respect to Tender No. KGN-GDD-116-2019 for the Supply of Liquid Drilling Detergent for Geothermal Development Division.

**BOARD MEMBERS**

- |                       |              |
|-----------------------|--------------|
| 1. Ms. Faith Waigwa   | -Chairperson |
| 2. Mr. Ambrose Ogetto | -Member      |

3. Dr. Joseph Gitari -Member

### **IN ATTENDANCE**

1. Mr. Philemon Kiprop -Holding brief for the Secretary

### **PRESENT BY INVITATION**

#### **INTERESTED PARTIES**

##### **A. SUDI CHEMICAL INDUSTRIES LIMITED**

1. Mr. Mutemi E. J -Advocate, M. Mutemi & Company Advocates

2. Mr. Hemanshu Roy -Managing Director

##### **B. STEVECO CHEMICALS (E.A) LIMITED**

1. Mr. Mbogo S. Kariuki -Chief Executive Officer

### **BACKGROUND TO THE DECISION**

#### **The Bidding Process**

Kenya Electrical Generating Company Plc (hereinafter referred to as "the Procuring Entity") advertised Tender No. KGN-GDD-116-2019 for Supply of Liquid Drilling Detergent for Geothermal Development Division (hereinafter referred to as "the subject tender") in the Government Pull-out Newspaper through open tender on 1<sup>st</sup> October 2019. The tender was open to Citizen Contractors.

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

The Procuring Entity received a total of 10 bids by the tender submission deadline of 31<sup>st</sup> October 2019. The same were opened shortly thereafter at 2.30pm by a Tender Opening Committee in the presence of bidder representative who chose to attend. The bids were recorded as follows:-

| <b>No.</b> | <b>Firm</b>                       |
|------------|-----------------------------------|
| 1          | Kontariza Technologies Ltd        |
| 2          | Power Parts Kenya Ltd             |
| 3          | Browett Trading Co. Ltd.          |
| 4          | Lynntec Chemicals                 |
| 5          | Steveco Chemicals                 |
| 6          | Synergy Power Systems Ltd         |
| 7          | Century Automobiles Nairobi Ltd   |
| 8          | ApiAVen Premier International Ltd |
| 9          | RamjiHaribhai Devani Ltd          |
| 10         | Sudi Chemicals Ltd                |

## **Evaluation of Bids**

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

- a) Preliminary/Mandatory Evaluation;
- b) Technical Evaluation; and
- c) Financial Evaluation

### **1. Preliminary/Mandatory Evaluation**

At this stage, the Evaluation Committee applied the criterion listed under Clause 2.24.4 (A) of the Appendix to Instructions to Tenderers of the Tender Document. At the end of this stage, nine (9) firms were found responsive to

the mandatory requirements therefore considered for Technical Evaluation. One (1) firm was disqualified due to the reasons shown below:-

| <b>Op no.</b> | <b>Firm</b>             | <b>Reasons for Disqualification</b>   |
|---------------|-------------------------|---|
| 2             | Browett Trading Co. Ltd | <ul style="list-style-type: none"> <li>Has only submitted Audited financial statement for 2018. Requirement was to submit statements for 2017 and 2018</li> </ul> |

## **2. Technical Evaluation**

At this stage, the Evaluation Committee applied the criterion listed under Clause 2.24.4 (B) of the Appendix to Instructions to Tenderers of the Tender Document. Bids were examined for compliance with the technical qualifications as provided in the Tender Document.

The nine (9) bidders that passed the Preliminary Evaluation Stage were invited to submit their samples for testing at the Olkaria Geochemistry Laboratory, as per the requirements of the Tender Document. Detergent samples were therefore submitted for testing on 27<sup>th</sup> November 2019 at Stima Plaza, and thereafter coded to ensure confidentiality during the testing process. One firm did not submit a sample for analysis on time as per the set terms, and was therefore not considered for further Technical Evaluation. Eight (8) firms that submitted their samples were given codes A, B, C, D, E, F, G, H that were then used as the reference during the laboratory testing.

The laboratory testing began on 28<sup>th</sup> November 2019 at the Olkaria Geochemistry laboratory in the presence of invited bidders.

The final results were declared on 19<sup>th</sup> December 2019 after the sludge test and only one bidder, M/s Steveco Chemicals EA Ltd, witnessed the results of the sludge test. The final results were submitted for decoding to the on 20<sup>th</sup> December 2019 and the codes revealed on 27<sup>th</sup> December 2019 after the testing process. At the end of Technical Evaluation, only one (1) firm, M/s Sudi Chemical Industries Ltd, met all the technical specifications as set out in the Tender Document and proceeded for Financial Evaluation, whereas the other firms were found non-responsive therefore ineligible to be considered for further evaluation.

### **3. Financial Evaluation**

At this stage, the Evaluation Committee applied the criterion listed under Clause 2.24.4 (C) of the Appendix to Instructions to Tenderers of the Tender Document wherein award of the subject tender would be based on the lowest evaluated bidder. The Evaluation Committee found that M/s Sudi Chemical Industries Ltd to be the lowest evaluated bidder in the subject tender.

### **Recommendation**

The Evaluation Committee recommended that the subject tender be awarded to M/s Sudi Chemical Industries Ltd at their quoted price of 60,900,000.00 inclusive of VAT.

## **Professional Opinion**

In a Professional Opinion dated 16<sup>th</sup> January 2020, the Supply Chain Director of the Procuring Entity reviewed the Evaluation Report expressing his satisfaction that the procurement process met the requirements of the Public Procurement and Asset Disposal Act, 2015 and urged the Accounting Officer to approve the Evaluation Committee's recommendation that the subject tender be awarded to M/s Sudi Chemical Industries Ltd at their quoted price of 60,900,000.00 inclusive of VAT. The Managing Director and CEO of the Procuring Entity approved the said professional opinion on 30<sup>th</sup> January 2020.

## **Notification to Bidders**

In letters dated 27<sup>th</sup> February 2020, all bidders who participated in the subject tender were informed of the outcome of their bids.

## **THE REQUEST FOR REVIEW**

M/s Browett Trading Company Limited (hereinafter referred to as "the Applicant") lodged a Request for Review dated 9<sup>th</sup> March 2020 and filed on 10<sup>th</sup> March 2020 together with a Statement in Support of the Request for Review sworn and filed on even date and Written Submissions dated and filed on 23<sup>rd</sup> March 2020. In response, the Procuring Entity lodged a Memorandum of Response dated and filed on 13<sup>th</sup> March 2020 and Written Submissions dated 23<sup>rd</sup> March 2020. M/s Century Automobiles addressed a

letter dated 23<sup>rd</sup> March 2020 to the Secretary to the Board in response to the Request for Review, whereas M/s Steveco Chemicals Ltd addressed a letter dated 10<sup>th</sup> March 2020 to the Board in response to the Request for Review.

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

- a) An order nullifying the award to M/s Sudi Chemical Industries Limited;***
- b) An order cancelling Tender No. KGN-GDD-116-2019 for the Supply of Liquid Drilling Detergent for Geothermal Development Division in its entirety; and***
- c) An order awarding costs for the Review.***

On 18<sup>th</sup> March 2020, the firm of Ameli Inyangu & Partners Advocates representing the Applicant addressed a letter to the Board requesting the Board to consider proceeding with the Request for Review by way of Written Submissions and further copied the said letter to the firm of Coulson Harney LLP Advocates, who are acting on behalf of the Respondents in this Request for Review proceedings. The Applicant's Advocates also made reference to Circular No 1/2020 dated 16<sup>th</sup> March 2020 issued by the Board detailing the Board's administrative and contingency management plan to mitigate the Covid-19 disease.

Subsequently on 20<sup>th</sup> March 2020, the Respondents' Advocates addressed a letter to the Board aligning themselves with the suggestion of the Applicant's Advocates and further requested that the decision of the Board in the Request for Review be issued to all parties' advocates, via email. On the same date of 20<sup>th</sup> March 2020, the Secretary to the Board addressed a letter to the Applicant and Procuring Entity allowing the said parties to file Written Submissions via email (i.e. [pparb@ppra.go.ke](mailto:pparb@ppra.go.ke).) before the hearing date of 24<sup>th</sup> March 2020, which had already been scheduled by the Board.

When the Request for Review came up for hearing on 24<sup>th</sup> March 2020, it is only the Interested Party and another unsuccessful bidder, that is, M/s Steveco Chemicals Ltd that were present for the hearing. This can be understood noting that the Applicant and the Procuring Entity already made a request that the Board proceeds by way of written submissions, which request was granted by the Board as stated hereinbefore.

The Interested Party and M/s Steveco Chemicals Ltd confirmed that they received all pleadings filed by the Applicant and the Procuring Entity. They therefore requested for time to file and serve their responses and Written Submissions by 26<sup>th</sup> March 2020. Having considered the said application, the Board granted the same, dispensed with the hearing of the Request for Review and directed that it will render its decision based on the documents filed before it by 5.00pm on 26<sup>th</sup> March 2020 and forward the final decision

via email to all parties to the Request for Review on or before 31<sup>st</sup> March 2020.

On 25<sup>th</sup> March 2020, the Interested Party (M/s Sudi Chemical Industries Limited) filed its Memorandum of Response together with Written Submissions which are both dated 25<sup>th</sup> March 2020 and also sent soft copies of the same via the Board's Secretariat email, [pparb@ppra.go.ke](mailto:pparb@ppra.go.ke) on 27<sup>th</sup> March 2020. M/s Steveco Chemicals Ltd did not file a response or written submissions in support or in opposition of the Request for Review.

### **BOARD'S DECISION**

The Board has considered each of the parties' pleadings together with the 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 finds that the following issues call for determination:-

- I. Whether the Request for Review was filed outside the statutory period under Section 167 (1) of the Act, thus ousting the jurisdiction of the Board;***

Depending on the determination of the first issue:-

***II. Whether the Procuring Entity fairly evaluated the Applicant's bid at the Preliminary Evaluation Stage with respect to the criterion provided under Bullet 7 of Clause 2.24.4 (A) introduced in the Appendix to Instructions to Tenderers of the Tender Document read together with Section 79 (1) and 80 (2) of the Act and Article 227 (1) of the Constitution.***

***III. Whether the Board has jurisdiction to make a determination on the following:-***

*Whether Clause 2.19.5 and Clause 2.19.6 of the Instructions to Tenderers of the Tender Document offend the provisions of Section 70 (6) (j) read together with Section 63 of the Act*

Depending on the determination of the above issue:-

***IV. Whether Clause 2.19.5 and Clause 2.19.6 of the Instructions to Tenderers of the Tender Document offend the provisions of Section 70 (6) (j) read together with Section 63 of the Act.***

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

The question whether courts and other decision making bodies can entertain matters that are before them has been addressed in previous decisions of our courts.

In the famous case of **The Owners of Motor Vessel 'Lillian 'S' vs Caltex Oil Kenya Ltd 1989 K.L.R 1**, Justice Nyarangi held that:-

***"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."***

Similarly, in the case of **Kakuta Maimai Hamisi vs. Peris Pesi Tobiko & 2 Others (2013) eKLR** (hereinafter referred to as "Kakuta Mamai Case") 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 best taken at inception. "***

To determine the jurisdiction of this Board to entertain the Request for Review, it is important to establish from what such jurisdiction flows. In the case of **Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Ltd and 2 Others, Civil Application No. 2 of 2011** the Supreme Court held that:

***"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. "***

It is important at this point to note that this Board is a creature of statute. Section 27 (1) of the Act provides that:-

***"27. Establishment of the Public Procurement Administrative Review Board***

***(1) There shall be a central independent procurement appeals review board to be known as the Public Procurement Administrative Review Board as an unincorporated Board."***

Further, Section 28 of the Act provides that:-

**"28. Functions and powers of the Review Board**

**(1) The functions of the Review Board shall be—**

**(a) reviewing, hearing and determining tendering and asset disposal disputes; and**

**(b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law."**

The dispute before the Board relates to the correct number of days prescribed by written law within which an aggrieved applicant ought to lodge its Request for Review application.

All parties to the Request for Review are in agreement that the Applicant was served with its letter of notification of unsuccessful bid on 27<sup>th</sup> February 2020. At paragraph 5 of its Statement in Support of the Request for Review and paragraph 5 of its Written Submissions, the Applicant contends that it received the letter of notification of unsuccessful bid on 27<sup>th</sup> February 2020. This fact is confirmed by the Procuring Entity, who at paragraph 12 of its Written Submissions avers as follows:-

***"It is not disputed that the decision was communicated to the Applicant on 27<sup>th</sup> February 2020. This means that the***

***Applicant had until on or before 5<sup>th</sup> March 2020 to file the Request...***

However, parties have different views on the number of days within which a Request for Review ought to be filed before this Board by an aggrieved candidate or tenderer.

According to the Procuring Entity, a Request for Review ought to be filed within 7 days from the date of notification of unsuccessful bid. To support this view, the Procuring Entity at paragraph 11 of its Written Submissions referred the Board to Regulation 73 (1) (c) of the Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as "the 2006 Regulations") to support its view that the Applicant ought to have filed its Request for Review within 7 days from the date it received the letter of notification.

The Applicant took a different view and reiterated at paragraph 4 of its written submissions that a Request for Review is filed within 14 days as specified in Section 167 (1) of the Act.

The Board having considered parties' written submissions and other pleadings, observes that Section 93 (1) of the Repealed Public Procurement

and Disposal Act, 2005 (hereinafter referred to as "the Repealed Act") previously provided that:-

***"Subject to the provisions of this Part, any candidate 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 as in such manner as may be prescribed."***

Further, Section 2 of the Repealed Act defined the term "Prescribed" as follows:-

***"prescribed" means prescribed by regulation under this Act"***

This therefore means that the manner in which a candidate was supposed to seek administrative review was to be prescribed by Regulations made pursuant to the Repealed Act. As a result, when the 2006 Regulations were made, Regulation 73 thereof provided as follows:-

***"73. (1) A request for review under the Act shall be made in Form RB 1 set out in the Fourth Schedule to these Regulations.***

***(2) The request referred to in paragraph (1) shall-***

***(a) state the reasons for the complaint, including any alleged breach of the Act or these Regulations;***

- (b) be accompanied by such statements as the applicant considers necessary in support of its request;***
  - (c) be made within fourteen days of-***
    - (i) the occurrence of the breach complained of where the request is made before the making of an award; or***
    - (ii) the notification under Sections 67 or 83 of Act***
  - (d) be submitted in fifteen bound copies and a soft copy, pages of which shall be consecutively numbered;***
  - (e) be accompanied by the fees set out in Part II of the Fourth Schedule which shall not be refundable.***
- (3) Every request for review shall be filed with the Secretary of the Review Board upon payment of the requisite fees.***
- (4) The Secretary shall acknowledge filing of the request for review."***

Since the period within which a candidate was to approach this Board was to be prescribed by Regulations, Regulation 73 (2) (c) of the 2006 Regulations prescribed a period of fourteen days within which a candidate

could approach this Board. Moving forward, vide **Legal Notice No. 106 of 18<sup>th</sup> June 2013, the Cabinet Secretary for the National Treasury issued the Public Procurement and Disposal (Amendment) Regulations, 2013 (hereinafter referred to as "the 2013 Amendment Regulations")** amending some of the provisions in the Repealed Act. Regulation 20 of the 2013 Amendment Regulations provided as follows:-

***"Regulation 72 of the principal Regulations is amended in paragraph (2) by-***

***(a) deleting the word "fourteen" appearing in subparagraph (c) and substituting thereof the word "seven"...***

As a result, the period within which a candidate could approach the Board was reduced from fourteen days to seven days of:-

- a) the occurrence of the breach complained of where the request is made before the making of an award; or*
- b) the notification of award under 67 or 83 of the Repealed Act*

Later on, Parliament enacted the Public Procurement and Asset Disposal Act No. 33 of 2015, which came into force on 7<sup>th</sup> January 2016. Section 167 (1) of the 2015 Act provides that:-

***"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"***

It is important at this point to note that Section 167 (1) of the Act introduced several aspects that were not covered in the Repealed Act. Firstly, a "tenderer" was introduced as one of the parties who could lodge a Request for Review and the meaning of a tenderer provided in Section 2 of the Act whereas the same was not covered in Section 93 (1) read together with Section 2 of the Repealed Act. Secondly, the number of days within which a candidate or tenderer may approach this Board was specified to be fourteen (14) days. Thirdly, the Act made the fourteen days applicable for the two options available to an aggrieved candidate or tenderer for approaching this Board and did not make a distinction that occurrence of breach is only discovered before the making of an award as stated in Regulation 73 (2) (c) (i) of the 2006 Regulations.

Notably, Section 180 of the Act gives the Cabinet Secretary the power to:-

***"...make Regulations for the better carrying out of the provisions of this Act and, without limiting the generality of the foregoing, may make Regulations to facilitate the implementation of this Act, and such regulations shall not take effect unless approved by Parliament pursuant to the Statutory Instruments Act, 2013."***

Despite the requirement of Section 180 above, no Regulations have been made pursuant to the 2015 Act. It is therefore not lost to the Board that, in the absence of new Regulations under the 2015 Act, the 2006 Regulations as amended by the 2013 Amendment Regulations are still applicable, until such time as the Cabinet Secretary will pass new Regulations, thereby repealing the ones in force.

This brings us to the question, what then happens when provisions in the 2006 Regulations and the 2013 Amendment Regulations contradict provisions of the 2015 Act? Section 31 (b) of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya (hereinafter referred to as "the Interpretation and General Provisions Act") provides guidance on this aspect as it states:-

***"Where an Act confers power on an authority to make subsidiary legislation, the following provisions shall, unless a contrary intention appears, have effect with reference to the making of the subsidiary legislation—***

**(a) .....**

**(b) no subsidiary legislation shall be inconsistent with the provisions of an Act;"**

Further, Section 3 of the Interpretation and General Provisions Act, defines subsidiary legislation to mean:-

***"any legislative provision (including a transfer or delegation of powers or duties) made in exercise of a power in that behalf conferred by a written law, by way of by-law, notice, order, proclamation, regulation, rule, rule of court or other instrument"***

From the foregoing definition, the Board observes that the 2006 Regulations and the 2013 Amendment Regulations fall under the category of subsidiary legislation, the same having been made by the Cabinet Secretary of the National Treasury in exercise of the powers that were conferred upon him by Section 140 of the Repealed Act (which is worded in a similar way as Section 180 of the Act). Therefore, the requirement that the two subsidiary legislations should not be inconsistency with an Act, means that, where there is such inconsistency, the provisions of the 2015 Act will prevail.

As a result, the Board finds that the period within which a candidate or tenderer may approach this Board by way of administrative review is

fourteen (14) days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as provided for in Section 167 (1) of the Act.

Given that all parties are in agreement that the Applicant was notified of the outcome of its bid on 27<sup>th</sup> February 2020, this Board is guided by Section 57 (a) of the Interpretation and General Provisions Act, regarding computation of time. The said provision states as follows:-

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

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

Applying the above provision to the instant case, the Board observes that 27<sup>th</sup> February 2020 is excluded in the computation of time, meaning that the fourteen-day period within which the Applicant ought to have approached this Board started running on 28<sup>th</sup> February 2020 up to 12<sup>th</sup> March 2020. The Applicant's Request for Review was filed on 10<sup>th</sup> March 2020 and the same is therefore within the statutory period of fourteen days specified in 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 address the substantive issues framed for determination.

On the second issue, the Board observes that in the letter of notification of unsuccessful bid dated 27<sup>th</sup> February 2020 the Applicant was notified of the following:-

***"We refer to the above tender...opened on 31<sup>st</sup> October 2019. We wish to advise that your company was not successful due to the following reason (s):***

***1. Your firm did not meet the following mandatory requirements as stipulated in the tender document***

***(a) You only submitted Audited Financial Statement for 2018.***

***Requirement was to submit statements for 2017 and 2018"***

The Board studied the clauses in the Tender Document, and notes that Bullet 7 of Clause 2.24.4 (A) as introduced in the Appendix to Instructions to Tenderers of the Tender Document provided for this criterion as follows:-

***"(A) Mandatory Preliminary Evaluation Criteria***

***...Audited Financial Statements over the last two (2) years (2017 & 2018)”***

Further, Clause 2.22.4 of Section II. Instructions to Tenderers of the Tender Document provides that:-

***"Prior to the detailed evaluation, pursuant to paragraph 2.23, the Procuring Entity will determine the substantial responsiveness of each tender to the tender documents. For purposes of these paragraphs, a substantially responsive tender is one, which conforms to all the terms and condition of the tender documents without material deviations. The Procuring Entity's determination of a tender's responsiveness is to be based on the contents of the tender itself without recourse to extrinsic evidence"***

The above provisions demonstrate that the criterion of Audited Financial Statements of 2017 and 2018 was a mandatory criterion, meaning that the bidders had the obligation to comply with the same. Hence, the Procuring Entity would only consider a bid that is substantially responsive to the above criterion, in addition to other mandatory requirements at the Preliminary Evaluation Stage.

The Interested Party referred the Board to Clause 2.4.2 of Section II. Instructions to Tenderers of the Tender Document which provides that:-

***"The Tenderer is expected to examine all instructions, forms, terms and specifications in the tender document. Failure to furnish all information required by the tender document or to submit a tender not substantially responsive to the tender documents in all respect will be at the tenderer's risk and may result in the rejection of its tender"***

According to the above provision, bidders had the obligation to examine all instructions, forms, terms and specifications in the Tender Document and provide all documents and information required by the Procuring Entity.

In response to the criterion under Bullet 7 of Clause 2.24.4 (A) introduced in the Appendix to Instructions to Tenderers of the Tender Document, the Applicant at pages 27 to 41 of its original bid provided Audited Financial Statements for the year ending 31<sup>st</sup> December 2018. The Applicant does not dispute the fact that the Financial Statements of 2017 were not attached to its original bid. To explain this, the Applicant in its written submissions averred that it was incorporated in 2017 and only began its business in 2018, therefore could not have submitted audited financial statements for the year ending 2017. In the Applicant's view, this requirement was therefore discriminatory to it.

The Procuring Entity on its part averred in its written submissions that the subject tender was an open tender open to all eligible bidders who chose to participate. Accordingly, the Procuring Entity provided minimum eligibility and mandatory requirements that it required and that the Applicant participated in the subject tender knowing that it could not meet the requirement of audited financial statements.

The Board having considered parties' submissions, proceeds to make the following findings:-

Section 60 (1) and (2) of the Act states that:-

- "(1) An accounting officer of a procuring entity shall prepare specific requirements relating to the goods, works or services being procured that are clear, that give a correct and complete description of what is to be procured and that allow for fair and open competition among those who may wish to participate in the procurement proceedings.***
- (2) The specific requirements shall include all the procuring entity's technical requirements with respect to the goods, works or services being procured."***

From the above provision, the accounting officer of a procuring entity has the obligation to prepare specific requirements relating to goods, works or services being procured, as long as such requirements are clear, give a correct and complete description of what is being procured and allow for fair and open competition among those who may wish to participate in the procurement proceeding.

This Board's duty is to address its mind on the question whether the requirement to provide Audited Financial Statements for the year 2017 and 2018 met the threshold of Section 60 (1) and (2) of the Act. It is worth noting and as stated by the Procuring Entity, the subject tender was an open tender where any firm was allowed to participate. This therefore means that, a firm had the obligation to first examine the bare minimum eligibility and mandatory criteria provided by the Procuring Entity against its level of experience, before submitting a bid in response to the Procuring Entity's Invitation Notice.

In the Board's view, the Procuring Entity was very likely to receive bids from firms that have audited financial statements for 2017 and 2018, noting that this was an open tender, open to all and sundry. This requirement was clear and it gave a correct description of what the Procuring Entity desired and could therefore facilitate open and fair competition.

The Applicant contended that the said requirement was discriminatory to it, having been incorporated in 2017. However, the Procuring Entity urged the Board to consider the meaning of the word "discrimination" in order to establish what amounts to discrimination.

The Procuring Entity referred the Board to the Court's finding in **Petition No. 36 of 2018, Jacqueline Okeyo Manani & 5 Others v. Attorney General & Another (2018) eKLR** where the court cited with approval the decision in **Peter Waweri v. Republic (2006) eKLR** where the court addressed its mind on what may amount to discrimination when it held as follows:-

***"Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions whereby persons of one such description are subjected to restrictions to which persons of another description are not made subject or have accorded privileges or advantages which are not accorded to persons of another such description... Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age sex ... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured"***

Further, the Black's Law Dictionary, 7<sup>th</sup> Edition defines discrimination as:-

***"The act of denying rights, benefits, justice, equitable treatment, or access to facilities available to all others, to an individual or group of people because of their race, age, gender, handicap or other defining characteristic"***

From the foregoing, the Board observes that discrimination arises where different treatment is given to different persons. Therefore, rights, benefits, justice, equitable treatment or access to facilities available to all others, is denied to a particular person or group of persons because of their race, age, gender, handicap or other defining characteristic.

Having established that a procuring entity has the obligation to provide specific requirements that promote open and fair competition, the Board is of the considered view that discrimination would arise in a scenario where despite having provided a mandatory requirement in the Tender Document, the Procuring Entity goes ahead to give a particular bidder or bidders different treatment during evaluation, because of their race, age, gender or other defining characteristic.

For example, discrimination would arise in a scenario where the Procuring Entity would have found a bidder responsive yet that bidder only provided audited financial statements for one of the years, instead of both 2017 and 2018, mainly because in that scenario the Procuring Entity was more interested in the defining characteristic of such a bidder, instead of

concerning itself with the question whether such a bidder has met the mandatory requirement of Audited Financial Statements.

The Board studied all the 10 original bids submitted to it pursuant to Section 67 (3) (e) of the Act and notes that nine bidders provided audited financial statements for 2017 and 2018, while the Applicant only provided audited financial statements for the year ending 31<sup>st</sup> December 2018. It is the Board's considered view that, all bidders were subjected to the same evaluation criteria, the bare minimum eligibility and mandatory requirements having been disclosed in the Tender Document.

This Board is not in the very least persuaded that there was any discrimination to the Applicant in so far as the criterion under consideration is concerned. It is evident that what the Applicant desires is to be given a favourable treatment despite its failure to meet this requirement to the detriment of all other bidders who chose to comply with the same, given it was a mandatory requirement at the Preliminary Evaluation Stage.

It is also worth noting that Clause 2.5 of Section II. Instructions to Tenderers of the Tender Document provides that:-

***"A prospective tenderer requiring any clarification of the tender documents may notify the Procuring Entity in writing or by post at the entity's address indicated in the Invitation to***

***Tender. The Procuring Entity will respond in writing to any request for clarification of the tender documents, which it receives not later than seven (7) days prior to the deadline for submission of tenders, prescribed by the Procuring Entity. Written copies of the procuring Entities response (including an explanation of the query but without identifying the source of inquiry will be sent to all prospective tenderers that have received the tender document”***

The Procuring Entity referred the Board to **Miscellaneous Civil Application No. 85 of 2018, Republic v. Public Procurement Administrative Review Board ex parte Meru University of Science & Technology & Another (2019) eKLR** where it was held as follows:-

***“It is beyond argument that our procurement law provides for compliance with tender conditions ‘in all respects’...it may in given circumstances be fair to ask a bidder to explain an ambiguity in its tender; it may be fair to allow a bidder to correct an obvious mistake; it may, particularly in a complex tender, be fair to ask for clarification or details required for its proper evaluation. Whatever is done may not cause the process to lose the attribute of fairness or the attributes of transparency, competitiveness and cost effectiveness”***

From the above case, the Board observes that the court was giving instances where a procuring entity may facilitate proper evaluation of the tenders before it, one of which includes a bidder seeking clarification (before the tender submission deadline) or a procuring entity seeking clarification to assist in the evaluation and comparison of tenders, but that when a clarification is sought by the Procuring Entity, it should not change the terms of the tender submitted by a bidder.

In the instant case, Clause 2.5 of Section II. Instructions to Tenderers of the Tender Document gave the Applicant a right to seek clarification from the Procuring Entity, if the Applicant was of the view that the requirement of audited financial statements could be adjusted to allow it submit only 2018 audited financial statements. The Procuring Entity would have the discretion to modify this requirement before the tender submission deadline, if it was of the view that submitting 2018 audited financial statements would still meet its needs as the user of the services being tendered. Failure to seek clarification before the tender submission deadline is sufficient evidence that the Applicant was comfortable with the requirement as stipulated in the Tender Document.

Thereafter, the Applicant subjected itself to the criteria set out in the Tender Document and only challenged the same because its bid was found non-responsive. Had the Procuring Entity given the Applicant favourable treatment, allowed it to proceed to Technical Evaluation and awarded the

tender to the Applicant at the end of Financial Evaluation, this Board has no doubt that the Applicant would not have raised an issue of discrimination even though the Procuring Entity would have in such circumstances blatantly favoured the Applicant against other bidders.

The Applicant cited the decision of the Court in **Civil Appeal No. 63 of 2017, Al Ghurair Printing and Publishing LLC v. Coalition for Reforms and Democracy & 2 Others (2017) eKLR** where the court held that:-

***"In my view, the learned judge cannot be faulted for his view that the award of the tender ought to have taken into account the current legislative framework. I do not understand the judge to have been saying that the Election Laws Amendment Act (ELAA) should have been applied retrospectively; he merely stated that it was "unreasonable on the part of the IEBC to have proceeded with the contract in light of the new legal development." In other words, the award of the contract, which was post the amendments to the Elections Act, 2011, had to take into consideration the provisions of the ELAA, especially as regards the poll registers and use of technology. Finally, did the public interest mitigate against the grant of the orders sought? I do not think so. I am in agreement with the learned Judge that contravention of the Constitution or a statute cannot be justified on the plea of***

***public interest... public interest can never override constitutionalism”***

Having considered the finding of the Court of Appeal in the above case, the Board observes that the court was dealing with the question whether the procuring entity took into account statutory provisions in addition to the requirements of the tender document in awarding the tender. 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. Having studied the Procuring Entity's confidential documents, the Board is persuaded that the above statutory provisions were taken into account by the Procuring Entity herein when evaluating the criterion of Audited Financial Statements of 2017 and 2018, noting that it is only bids that met all the mandatory requirements at the Preliminary Evaluation that proceeded to Technical Evaluation.

**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.

Article 227 (1) of the Constitution codifies the principles that guide public procurement as follows:-

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

The Applicant did not adduce any evidence demonstrating that the above principles were not applied by the Procuring Entity when evaluating the criterion under consideration. The requirement of Audited Financial Statements for 2017 and 2018 was a mandatory requirement and the Applicant's failure to meet the same means that the Procuring Entity had no choice but to find the Applicant's bid non-responsive at the end of Preliminary Evaluation.

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 Bullet 7 of Clause 2.24.4 (A) as introduced in the Appendix to Instructions to Tenderers of the Tender Document read together with the provisions of Section 79 (1) and 80 (2) of the Act and Article 227 (1) of the Constitution.

On the third issue, the Board observes that the Applicant challenged the provisions of Clause 2.19.5 and Clause 2.19.6 of Section II. Instructions to Tenderers of the Tender Document which provide as follows:-

**"2.19.5: The Procuring Entity may at any time terminate procurement proceedings before contract award and shall not be liable to any person for the termination**

**2.19.6: The Procuring Entity shall give prompt notice of the termination to the tenderers and on request give its reasons for termination within 14 days of receiving the request from any tenderer"**

In the Applicant's view, these provisions offend Section 70 (6) (j) read together with Section 63 of the Act which provide that:-

**"Section 70 (1).....**

**(2) .....**

**(3) .....**

**(4) .....**

**(5) .....**

**(6) The tender documents shall set out the following—**

**(a) .....**

**(b) .....**

**(c) .....**

- (d) .....**
- (e) .....**
- (f) .....**
- (g) .....**
- (h) .....**
- (i) .....**
- (j) a statement that the accounting officer of a procuring entity may, at any time terminate the procurement proceedings without entering into a contract in accordance with Section 63 of the Act"**

**Section 63 (1) An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies—**

**(a) the subject procurement have been overtaken by—**

**(i) operation of law; or**

**(ii) substantial technological change;**

**(b) inadequate budgetary provision;**

**(c) no tender was received;**

- (d) there is evidence that prices of the bids are above market prices;*
  - (e) material governance issues have been detected;*
  - (f) all evaluated tenders are non-responsive;*
  - (g) force majeure;*
  - (h) civil commotion, hostilities or an act of war; or*
  - (i) upon receiving subsequent evidence of engagement in fraudulent or corrupt practices by the tenderer.*
- (2) An accounting officer who terminates procurement or asset disposal proceedings shall give the Authority a written report on the termination within fourteen days.*
- (3) A report under subsection (2) shall include the reasons for the termination.*
- (4) An accounting officer shall notify all persons who submitted tenders of the termination within fourteen days of termination and such notice shall contain the reason for termination.*

It is evident that the Applicant is challenging the contents of a Tender Document, which it obtained by the tender submission deadline of 31<sup>st</sup> October 2019, studied the same and submitted its tender in response to the Procuring Entity's Invitation Notice.

The Board already noted hereinbefore that Section 167 (1) of the Act provides for fourteen days within which an aggrieved candidate or tenderer may approach this Board when it learns of an alleged breach of duty by a procuring entity at any stage of the procurement process or asset disposal process. It was never the intention of the legislature that aggrieved candidates or tenderers abuse the options provided under that provision, especially in this instance where the Applicant was capable of challenging the contents of the Tender Document before the tender submission deadline of 31<sup>st</sup> October 2019, or fourteen days thereafter.

The Court in **Civil Suit No. 27 of 2006, John Mburu v. Consolidated Bank of Kenya (2015) eKLR** cited with approval the finding made in **Moorgate Mercantile Co. Limited v. Twitchings [1976] 1 Q.B. 225** where Lord Justice Denning held as follows:-

***"The principle upon which estoppel is founded is that the law should not permit an unjust departure by a party from an assumption of fact which he caused another party to adopt or accept for the purpose of their legal relations"***

The Applicant in this instance, accepted the requirements of Clause 2.19.5 and Clause 2.19.6 of Section II. Instructions to Tenderers of the Tender Document, having submitted a tender by the tender submission deadline without challenging the said provisions fourteen days thereafter. It is a well-established principle of equity that ***"equity aids the vigilant, not the***

***indolent***". The Applicant slept on its right to challenge the contents of the Tender Document, participated in the procurement process, and is therefore estopped from doing the same so late in the day outside the statutory period under Section 167 (1) of the Act.

The Board finds, the Applicant's contention that Clause 2.19.5 and Clause 2.19.6 of Section II. Instructions to Tenderers of the Tender Document offend Section 70 (6) (j) read together with Section 63 of the Act has been raised outside the statutory period provided in Section 167 (1) of the Act, thereby depriving this Board of jurisdiction to entertain the same.

Accordingly, the Board proceeds to down its tools at this point with respect to the third issue framed for determination.

In totality, the Request for Review is hereby dismissed and the Board makes 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 Request for Review dated 9<sup>th</sup> March 2020 and filed by the Applicant on 10<sup>th</sup> March 2020 with respect to Tender No. KGN-GDD-116-2019 for the Supply of Liquid Drilling Detergent for Geothermal Development Division, be and is hereby dismissed.**
- 2. Each party shall bear its own costs in the Request for Review.**

**Dated at Nairobi, this 31<sup>st</sup> day of March 2020**

**CHAIRPERSON  
PPARB**

**SECRETARY  
PPARB**