

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 34/2020 OF 11TH MARCH 2020

BETWEEN

PETRO OIL KENYA LIMITED.....APPLICANT

AND

KENYA FERRY SERVICES LTD.....1ST RESPONDENT

AND

ACCOUNTING OFFICER,

KENYA FERRY SERVICES LTD.....2ND RESPONDENT

AND

GALANA OIL KENYA LIMITED.....3RD RESPONDENT

Review against the decision of the Accounting Officer of Kenya Ferry Services with respect to Tender No. KFS/DDF/01/01/2020 for the Supply and Delivery of Diesel for Ferries (Vendor Management Inventory System).

BOARD MEMBERS

- | | |
|-----------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mr. Ambrose Ogetto | -Member |
| 3. Dr. Joseph Gitari | -Member |

IN ATTENDANCE

- | | |
|---------------------|----------------------------------|
| 1. Mr. Philip Okumu | -Holding brief for the Secretary |
|---------------------|----------------------------------|

PRESENT BY INVITATION

APPLICANT

-PETRO OIL KENYA LIMITED

1. Mr. Gikandi Ngibuini

-Advocate, Gikandi & Company
Advocates

1ST AND 2ND RESPONDENTS

-KENYA FERRY SERVICES LIMITED

1. Mr. Daniel Musyoka

-Advocate, Murio, Mungai & Company
Advocates

3RD RESPONDENT

-GALANA OIL KENYA LIMITED

1. Mr. Donald Kipkorir

-Advocate, KTK Advocates

INTERESTED PARTY

EAST AFRICA GAS OIL LIMITED

1. Mr. Abdihadif Nur

-Procurement Manager

BACKGROUND TO THE DECISION

Kenya Ferry Services Limited (hereinafter referred to as “the Procuring Entity”) advertised Tender No. KFS/DDF/01/01/2020 for the Supply and Delivery of Diesel for Ferries (Vendor Management Inventory System)

(hereinafter referred to as “the subject tender”) in the Daily Nation on 7th January 2020 inviting sealed bids from eligible firms.

Bid Submission Deadline and Opening of Bids

The Procuring Entity received a total of 9No bids by the tender submission deadline of 23rd January 2020. The same were opened shortly thereafter in the presence of bidders’ representatives who chose to attend, and their details recorded in the Procuring Entity’s Tender Opening Minutes.

Evaluation of Bids

A Tender Evaluation Committee was appointed by the Managing Director who evaluated tender in the following three stages:-

- i.** Mandatory Requirements;
- ii.** Technical Evaluation; and
- iii.** Financial Evaluation.

1. Mandatory Requirements Evaluation

At this stage, the Evaluation Committee applied the evaluation criteria set out in Clause 2.22 read together with Part 1 of the Appendix to Instructions to Tenderers of the Tender Document. All the nine bidders were subjected to evaluation of the mandatory documents listed in the aforesaid provision.

Only four firms were found responsive at the end of Mandatory Requirements Evaluation as follows:-

- M/s Galana Oil Kenya Limited;
- M/s Kenol Kobil;
- M/s Oryx Energies; and
- Gulf Energy Holdings Ltd.

M/s Petro Oil Kenya Limited was found non-responsive for the following reason:-

- Some of the pages on the bid documents were not serialized e.g. the table of contents and the serialized pages is not sequentially done from the first to the last page. Pages 2, 15 and 20 had similar pages repeated severally and introduced a varied serialization profile.

2. Technical Evaluation

At this stage, the Evaluation Committee applied the criteria under Part 1 and 2. Technical/General Requirements of the Tender Document which required bidders to achieve a minimum technical score of 60% in order to proceed to Financial Evaluation. At the end of this stage, the four bidders achieved the following scores:-

Serial No.	Bidder	Score
1	Galana Oil Kenya Limited	84.67%
2	Kenol Kobil	51.67%
3	Oryx Energies	66.13%
4	Gulf Energy Holding Limited	62.73%

From the foregoing, M/s Kenol Kobil is the only bidder that did not achieve the minimum technical score and was therefore found non-responsive, whereas the rest were found eligible to proceed to Financial Evaluation.

3. Financial Evaluation

At this stage, the Evaluation Committee applied the criteria in Clause 2.26 of Section II. Instructions to Tenderers of the Tender Document which provided an Award Criteria of Lowest evaluated responsive tender upon conclusion of Financial Evaluation.

Recommendation

At the end of Financial Evaluation, the Evaluation Committee recommended award of the subject tender to M/s Galana Oil Kenya Limited at the price of Kshs. 93.44 per litre having been found to be the lowest evaluated bidder.

Professional Opinion

In a professional opinion dated 21st February 2020, the Procurement & Supplies Manager reviewed the Evaluation Report and stated that it was his informed opinion that the procurement met the minimum requirements of the Public Procurement and Asset Disposal Act, 2015. He advised the Managing Director to peruse the Evaluation Report and award the subject

tender as recommended by the Evaluation Committee. The said professional opinion was approved by the Managing Director on 21st February 2020.

Notification to Bidders

In letters dated 21st February 2020, all bidders who participated in the subject tender were notified of the outcome of their bids.

THE REQUEST FOR REVIEW

M/s Petro Oil Kenya Limited (hereinafter referred to as "the Applicant") lodged a Request for Review on 11th March 2020 together with a Statement in Support of the Request for Review.

In response, the Procuring Entity lodged a Notice of Preliminary Objection dated 23rd March 2020 (hereinafter referred to as "the Procuring Entity's Preliminary Objection") and a Memorandum of Response (hereinafter referred to as "the Procuring Entity's Response"). The 3rd Respondent also lodged a Memorandum of Response on 23rd March 2020 (hereinafter referred to as "the 3rd Respondent's Response") together with a Replying Affidavit on 20th March 2020 (hereinafter referred to as "the 3rd Respondent's Replying Affidavit"). M/s East African Gasoil Limited lodged a Response to the Request for Review in the form of a Letter addressed to the Board Secretary.

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

- a) An order directing the 1st and 2nd Respondents to produce the original copy of the minutes of the Tender Evaluation Committee and the tender document submitted by the successful bidder of the aforesaid tender;**
- b) An order declaring the entire decision made on 21st February 2020 by J. Cidiri, the Procurement & Supplies Manager, Kenya Ferry Services Ltd, null and void for being contra Section 87 (3) of the Public Procurement and Asset Disposal Act No. 33 of 2015;**
- c) Without prejudice and in the alternative to prayer (b) above, an order annulling the decision of the 1st and 2nd Respondent made on 21st February 2020 in respect of Tender No. KFS/DDF/01/01/2020 for the Supply and Delivery of Diesel for Ferries (Vendor Management Inventory System) in its entirety;**
- d) An order directing the 1st and 2nd Respondents to re-evaluate the bids submitted by parties with respect to Tender No. KFS/DDF/01/01/2020 for the Supply and Delivery of Diesel for Ferries (Vendor Management Inventory System);**
- e) In the alternative to prayer (d) above, an order directing the 1st and 2nd Respondents to retender afresh for the Supply and Delivery of Diesel for Ferries (Vendor Management Inventory System) at the Kenya Ferry Services Limited; and**
- f) An order awarding costs to the Applicant.**

The 1st and 2nd Respondents filed a Notice of Preliminary Objection dated 23rd March 2020 and another Notice of Preliminary Objection on 24th March 2020. The two Preliminary Objections filed by the 1st and 2nd Respondents came up for hearing on 24th March 2020.

Having found that it has the jurisdiction to entertain the Request for Review, the Board upheld the Notice of Preliminary Objection filed by the 1st and 2nd Respondents on 24th March 2020 in so far as Section 170 of the Act is concerned thereby striking out the 1st Respondent from being a party to the Request for Review. The Board further dismissed the Notice of Preliminary Objection filed by the 1st and 2nd Respondents filed on 23rd March 2020 together with the issue of jurisdiction raised at paragraph 10 of the 3rd Respondent's Response and paragraph 8 of the 3rd Respondent's Replying Affidavit; paragraphs 9 (n) and 12 of the 1st and 2nd Respondents' Response to the Request for Review.

The Board directed the 2nd Respondent and the 3rd Respondent to file and serve their respective Written Submissions by 5pm on Friday, the 27th day of March 2020 and that the Applicant may file its Supplementary Submissions by 5pm on Saturday, the 28th day of March 2020.

Accordingly, the Board dispensed with the hearing of the Request for Review, owing to the fact that the same would be canvassed by way of written submissions and directed that it shall render its decision via email to all

parties to the Request for Review on or before 1st April 2020 in light of the Board's Circular No 1/2020 dated 16th March 2020 and further direction issued vide Circular No. 2/2020 dated 24th March 2020 detailing the Board's administrative and contingency management plan to mitigate the Covid-19 disease.

BOARD'S DECISION

The Board has considered all the parties' written submissions, together with the confidential documents submitted to it pursuant to section 67 (3) (e) of the Act and finds that the following issues call for determination in the substantive Request for Review:-

- I. Whether the Procuring Entity rightfully evaluated the Applicant's bid at the Preliminary Evaluation Stage in accordance with Clause 1 (f) of the Appendix to Instructions to Tenderers of the Tender Document read together with section 74 (1) (i); 79 (1); and 80 (2) of the Act and Article 227 (1) of the Constitution;***
- II. Whether the letter of notification of unsuccessful bid issued to the Applicant was made in accordance with section 87 of the Act;***

In order to address the second issue, the Board shall make a determination on the following:-

- a) *Whether the Accounting Officer of the Procuring Entity ought to disclose the amount at which award of the subject tender was made to the 3rd Respondent when issuing notification letters to unsuccessful bidders; and*
- b) *Whether the Accounting Officer of the Procuring Entity delegate his authority to issue notification letters to the successful and unsuccessful bidders.*

III. Whether the Procuring Entity tampered with the Applicant's Financial Envelope having found the Applicant non-responsive at the end of Preliminary Evaluation.

Before addressing the above issues, the Board would like to make an observation that in their Response filed on 19th March 2020, the 1st and 2nd Respondents never challenged the *locus standi* of the Applicant under Section 167 (1) of the Act in terms of the question whether the Applicant has suffered loss as a result of the Procuring Entity's decision on its bid. The 1st and 2nd Respondents introduced this issue in their Closing Submissions that were filed pursuant to the orders of the Board granted on 24th March 2020 directing parties to file their Written Submissions. The Applicant therefore responded to the same in its Supplementary Submissions.

According to the Procuring Entity, the Applicant failed to demonstrate the loss that it has suffered as a result of its bid being declared non-responsive at the end of Preliminary Evaluation.

The Board having considered parties' submissions observes that at paragraph 9 of its Request for Review, the Applicant contended that it will suffer substantial loss since in the Applicant's view, "its bid has been declined illegally by the Procuring Entity." The Board observes that Section 167 (1) of the Act gives an aggrieved tenderer, such as the Applicant herein the right to seek administrative review if it is of the view that it has suffered or risks suffering loss as a result of an alleged breach of duty by a procuring entity.

Furthermore, this Board has a duty to address its mind on the question whether the Procuring Entity fairly evaluated the Applicant's bid at the Preliminary Evaluation Stage in so far as the criterion of serialization of bids is concerned as the same has been raised in the Applicant's Request for Review. The Applicant also challenges the manner in which letters of notification were issued by the Procuring Entity and it is therefore incumbent on this Board to determine whether or not the said letters of notification met the threshold of the Act and the Constitution.

Accordingly, the Board finds that the Applicant has satisfied the test of Section 167 (1) of the Act as it risks suffering loss in the event the Board finds that the Procuring Entity failed to adhere to the provisions of the Act

and the Constitution in so far as the issues raised by the Applicant in its Request for Review are concerned.

Having dispensed with the above preliminary issue, the Board shall now address the main issues in the substantive Request for Review as follows:-

On the first issue in the substantive Request for Review, the Board observes that the Applicant's letter of notification of unsuccessful bid dated 21st February 2020 contained the following details:-

"We refer to the above tender in which you participated

This is to notify you that your submission on the above mentioned tender was not responsive at the mandatory requirement due to the following reason/s

(i) Some of the pages on the bid document were not serialized e.g. the table of contents and the serialized pages is not sequentially done from first to the last page e.g. page 2 was repeated 4 times while pages 15 and 20 introduced a varied serialization profile

Based on the foregoing, your tender was not responsive..."

The Board observes that Clause 1 (f) of the Appendix to Instructions to Tenderers of the Tender Document provides for the criterion of serialization of pages in the following terms:-

"Bidder shall serialize all the pages for each bid submitted sequentially from the first to the last"

The Board studied the Applicant's original bid (i.e. Technical Submission-Envelope A) to establish the manner in which it responded to this criterion and notes that the Applicant began numbering its original bid from the third page thereof. The numbering of the said bid document was therefore reflected as follows:-

Document	Number/ Serialization Given
Company Profile (running through 4 pages)	2,2,2,2
Certificate of Incorporation	3
KRA PIN Certificate	4
KRA Tax Compliance Certificate	5
Petroleum Business Licence	6
Dully Completed Form of Tender	7
Confidential Business Questionnaire Form (running through 2 pages)	8,8
Tender Security	9
Email Registration	10.1
Certificate of Tenderer's Visit to Site	10.2
Declaration Form	11
Anti-Corruption Declaration Form	12
Undertaking of Compliance	13
Single Business Permit	14
Recommendation Letter from KENATRA Transporters Limited	15.1
Recommendation Letter from Wells Fargo	15.2

Document	Number/ Serialization Given
Recommendation letter from Echken Agencies Limited	15.3
Recommendation Letter from Relcon Power Systems Ltd	15.4
Recommendation Letter from Premium Trucks Limited	15.5
Mackenzie Maritime (EA) Ltd LPO (running through 3 pages)	16.1 (a), 16.1 (b), 16.1 (c)
Petrocom Ltd LPO	16.2 (a)
Petro Oil Kenya Ltd Invoice	16.2 (b)
PetroCom Ltd Purchase Order	16.2 (c)
Echkon Agencies Ltd Order (running through 3 pages)	16.3 (a), 16.3 (b), 16.3 (c)
Transport and Storage Agreement between Kenya Pipeline Company Limited and Petro Oil Kenya Limited (running through 3 pages)	17.1, 17.1, 17.1
Hospitality Agreement between Vivo Energy Ltd and Petro Oil Kenya Limited (running through 3 pages)	17.2, 17.2, 17.2
Transport Agreement between Ahmed Said and Petro Oil Kenya Ltd (running through 3 pages)	17.3, 17.3, 17.3
Proposed Methodology for the delivery and management of the fuel (running through 3 pages)	18.1, 18.1, 18.2
Petro Oil Fleet Sale Statement (running through 3 pages)	18.3, 18.3, 18.3
Petro Oil (K) Limited Health and Safety Environmental Policy	18.4,18.4, 18.4
Table 1-Specific Quality Requirements for automotive diesel fuel	19.1,19.1
Material Safety Data Sheet (running through 7 pages)	19.2, 19.2, 19.2, 19.2, 19.2, 19.2, 19.2
Financial Statements for the year ending 31 st December 2018 (running through 12 pages)	20.1, 20.1, 20.1, 20.1, 20.1,20.1, 20.1, 20.1, 20.1, 20.1, 20.1, 20.1,
Financial Statements for the year ending 31 st December 2017 (running through 22 pages)	20.2, 20.2

From the foregoing, the Board observes that the Applicant had varied ways of serializing its bid. The Court in **Judicial Review Miscellaneous Application No. 312 of 2018, Republic v Public Procurement Administrative Review Board; Nairobi City Water & Sewerage Company Limited & another (Interested Parties) Ex parte Fourway Construction Company Limited [2019] eKLR** (hereinafter referred to as "the Fourway Construction Case") while considering the importance of serialization of a bid document, held as follows:-

"The ordinary meaning of serialisation is to publish or present something in the form of a serial. The Concise Oxford English Dictionary defines a serial as "consisting of, forming part of, or taking place in a series" and further defines "to serialise" as "to arrange in a series". A "series" is on the other hand defined as a number of similar or related things coming one after another". Therefore, the ordinary meaning and interpretation of serialization of pages is that each page must be arranged and presented in a manner that it is evident that a page is coming after another page"

The Board having considered the definitions relied upon by the court in the Fourway Construction Case observes that in order for bidders to comply with the requirement of serialization, it must be seen that the numbering adopted by bidders creates a sequence. Such a sequence is arrived at by choosing

one type of serialization and using that same type of serialization from the beginning of the bid to the end in order to create a proper sequence.

It is therefore expected that a bidder who elects the method of serialization beginning with "1" from the first page, will proceed with the next page as "2", then "3", "4", "5" up to the end of the bid. A bidder is therefore not supposed to repeat numbers when serializing its bid even if one document, runs through several pages, such as the Applicant's Company Profile which runs through 3 pages.

Secondly, the Applicant in this instance also introduced a varied way of serializing its bid, in that upon using the sequence of "2", "3", "4", "5" and so on, it introduced a sequence of "10.1", "10.2" and so on, subsequently thereafter introduced a sequence of 16.1 (a), (b) (c), 16.2 (a), (b), (c), 16.3 (a), (b) (c) and so on.

The Board observes that the requirement of serialization is not only provided in the Procuring Entity's Tender Document, but also in Section 74 (1) (i) of the Act which provides as follows:-

"(1) The accounting officer shall ensure the preparation of an invitation to tender that sets out the following—

(a)

(b)

(c)

(d)

(e)

(f)

(g)

(h)

(i) requirement of serialisation of pages by the bidder for each bid submitted"

The Court in the Fourway Construction Case cited hereinabove when considering the above provision further held as follows:-

"Serialization of the bid document is also a requirement set by law in relation to the contents of tender documents under section 74 (1) (i) of the Public Procurement and Asset Disposal Act (hereinafter "the Act"). The said section reads as follows:-

'74 (1) The accounting officer shall ensure the preparation of an invitation to tender that sets out the following—'

... requirement of serialisation of pages by the bidder for each bid submitted

Two key principles and objectives come to play in the requirement for serialisation of every page of a bid document. The first is that following laid down rules of procedure is an important aspect of fairness, non-discrimination and equal treatment. Secondly, compliance with the requirement of serialisation of every page of a bid document is crucial for good governance, transparency, and accountability. Non-conformity with this requirement will be open to abuse by procuring entities and bidders, who can deliberately plant documents, and use the opportunity for correction to advance their own interests.

Further, the Court in **Judicial Review Case No. 56 of 2019, Island Homes Developers Limited v. Public Procurement Administrative Review Board; Kenya Ports Authority & 2 others (Interested Parties) [2020] eKLR** (hereinafter referred to as “the Island Homes Case”) while upholding this Board’s decision in **PPARB Application No. 129 of 2019, Island Homes Developers Limited v. Kenya Ports Authority & 2 Others**, on the question of serialization of bid documents, held as follows:-

“...From the foregoing, it is clear that failure by any tenderer to comply with the provisions of the above stated clauses would lead to automatic disqualification which means that the

tender will be marked as being non-responsive and would not pass the preliminary stage.

In my view, the requirement for pagination was in the present case indicated to be a mandatory requirement in the 2nd Interested Party's tender document, and it was indicated that a tenderer lacking in any of the requirements would be automatically disqualified. Disqualification means that the tenderer would not progress to the Technical evaluation stage as Section 80 (2) of the Act provides that the evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and since the Applicant had failed to meet that mandatory requirement under Clause (ii) at page 24 of the tender document, this meant that the Applicant tender would not have gone past the evaluation stage. See. Republic v Public Procurement Administrative Review Board & 2 others Ex-parte BABS Security Services Limited [2018] eKLR where it was held that...

"a bid only qualifies as a responsive bid if it meets with all requirements as set out in the bid document. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements."

Pagination of tender documents is a mandatory requirement under Section 74 of the Act, and failure to paginate every page even the overleaf pages cannot therefore be interpreted as a minor deviation from the requirements set out in the tender documents, and cannot fall within the exceptions provided for in Section 79 of the Act. See Republic vs Public Procurement Administrative Review Board & 3 Others Ex-parte Saracen Media Limited, (2018) eKLR where it was held that it is a universally accepted principle of public procurement that bids which do not meet the minimum requirements as stipulated in a bid document are to be registered as non-responsive and rejected without further consideration.

It is the finding of this Court that the Applicant's non-conformity with clause (ii) at page 24 of the tender document that required all the pages in the whole document to be numbered in the correct sequence was not a minor deviation. The deviation if allowed would undermine the underlying purpose of supplying information to bidders for the preparation of tenders, and would also amount to unfairness if some bidders were allowed to circumvent tender conditions."

The Board would like to make an observation that the Court in the Island Homes Case addressed its mind to the fact that serialization of a bid document is a mandatory requirement in Section 74 (1) (i) of the Act, in addition to finding that bidders also must paginate the pages that are overleaf in their bid document.

The Board having considered the finding of the High Court in the Island Homes Case, notes that pages that are overleaf in a bidder's bid are serialized when they contain information, and when the said overleaf pages do not contain information, they are not serialized.

This Board observes that serialization (including pages that are overleaf and containing information) create a proper sequence in a bidder's bid document and helps to avoid instances where documents are inserted into the bid or removed either by the Applicant colluding with the Procuring Entity, or the Procuring Entity itself to give a bidder an unfair advantage, or to discriminate against such bidder during evaluation.

Therefore, the finding in the Fourway Construction Case and the Island Homes Case support the Board's view that the legislature must have considered the fact that for a series or sequence of pages to exist, then such pages must first be serialized (including the pages that are overleaf and containing information). This explains why serialization is a mandatory requirement under section 74 (1) (i) of the Act, such that when a bidder

begins serializing its bid as "1" from the first page, it is expected that the series of pagination that this bid document would take is that the next page would be "2" then "3" and so on, until the last page of the bid.

The Board observes that serialization of a bid document avoids the bid document from being tampered with in any way by any person or entity. It protects the sanctity of a bid document by ensuring that bidders are evaluated on the basis of the documents they submitted by the tender submission deadline and that no document is inserted or removed in favour of a non-compliant bidder to the detriment of other bidders who choose to comply with the requirements of a procuring entity.

The Board observes that, the Applicant herein failed to serialize the first two pages of its original bid, repeated some of the numbers whilst serializing its bid (e.g. 2 which was repeated four times) and proceeded to introduce varied forms of serialization in its bid (e.g. 10.1, 10.2, 16.1 (a), 16.1 (b), 16.1 (c) etc). This was open to abuse in that nothing stopped the Procuring Entity either on its own volition or in collusion with the Applicant or any other bidder, from introducing a document in the Applicant's bid and numbering it as; 10.3 (which was not in the bid), or removing the page numbered 16.1 (c) in the Applicant's bid.

Accordingly, the Applicant herein failed to take into account the requirement of serialization when submitting its bid. Further, this was a mandatory

requirement at the Preliminary Evaluation stage and the Applicant's failure to comply with the same meant that its bid could not be subjected to further evaluation.

As regards eligibility and mandatory requirements, Section 79 (1) of the Act provides that:-

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

Further, Section 80 (2) of the Act further provides that:-

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

Sections 79 (1) and 80 (2) of the Act are very critical in any evaluation process as they provide guidance that the responsiveness of a bid is determined by the capability of such bid to meet eligibility and mandatory requirements set out in the tender documents.

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 Board is persuaded that the Procuring Entity fairly evaluated the Applicant’s bid with respect to the criterion of serialization Clause 1 (f) of the Appendix to Instructions to Tenderers of the Tender Document. The Applicant’s failure to meet the mandatory requirement of serialization at the Preliminary Evaluation Stage, meant that the Procuring Entity had no option but to find the Applicant’s bid non-responsive.

Accordingly, the Board finds that the Procuring Entity rightfully evaluated the Applicant’s bid at the Preliminary Evaluation Stage in accordance with Clause 1 (f) of the Appendix to Instructions to Tenderers of the Tender Document read together with Sections 74 (1) (i); 79 (1); 80 (2) of the Act and Article 227 (1) of the Constitution.

On the first limb of the second issue in the substantive Request for Review, the Board observes that at paragraph 5 of its Request for Review and paragraphs 15 and 16 of the Applicant’s Written Submissions, the Applicant took the view that the Procuring Entity’s failure to disclose the amount at which award of the subject tender was made to the 3rd Respondent rendered the letter of notification of unsuccessful bid to the Applicant invalid for breach of Section 87 of the Act.

In response to this averment, the Procuring Entity at paragraph 10 (g) of its Response took the view that the fact that the amount at which the tender was awarded to the successful bidder was not disclosed, does not prejudice the Applicant, since the Applicant was already informed of the reasons why its bid was found unsuccessful. At paragraph 6 of its Closing Submissions, the Procuring Entity avers that there is no requirement in law for it to disclose the amount at which award has been made to a bidder.

Having considered parties' submissions, the Board observes that 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"

Section 87 (3) of the Act requires the accounting officer of a procuring entity to inform unsuccessful bidders of the specific reasons why their bids were found unsuccessful and to disclose the successful bidder in the said notification. Disclosure of the successful bidder in the said notification satisfies one of the principles of public procurement processes enshrined in Article 227 (1) of the Constitution that provides for procurement of goods and services must be undertaken in a system that is transparent.

It is not lost to the Board that after a procuring entity enters into a contract with a successful bidder, such a contract is to be published for the public's consumption. The details of the contract would therefore be open to all including the amount at which award has been made to such a successful bidder.

The Board observes that the letter of notification addressed to the Applicant by the Procuring Entity contained the specific reason why the Applicant's bid was found non-responsive thereby enabling it to challenge the same by way of administrative review pursuant to Section 167 (1) of the Act. Furthermore, the Procuring Entity indicated that the tender was awarded to the 3rd Respondent as the lowest evaluated bidder.

It is evident from the foregoing that the Applicant suffered no prejudice having been informed of the specific reasons why its bid was found non-

responsive, in its letter of notification and the successful bidder disclosed thereof in accordance with Section 87 (3) of the Act.

Accordingly, the Board finds that the Procuring Entity fully complied with Section 87 (3) of the Act having informed the Applicant of the specific reasons why its bid was found non-responsive and disclosing the successful bidder thereof.

On the second limb of the second issue in the substantive Request for Review, the Applicant contended that the Procuring Entity failed to issue letters of notification in accordance with section 87 of the Act since the same were signed for the Procuring Entity's Managing Director (i.e. the Accounting Officer), by the Procuring Entity's Procurement and Supplies Manager.

The Board studied the letters of notification issued to all bidders who participated in the subject procurement process and notes that they were all signed for the Procuring Entity's Managing Director, by the Procuring Entity's Procurement and Supplies Manager.

According to Section 87 of the Act, an accounting officer of a procuring entity is the designated person that issues notification letters to the successful and unsuccessful bidders.

The question that the Board must now address is whether an accounting officer can delegate his authority to issue notification letters to the successful and unsuccessful bidders. Section 37 of the Interpretation and General Provisions Act provides that:-

"Where by or under an Act, powers are conferred or duties are imposed upon a Minister or a public officer, the President, in the case of a Minister, or the Minister, in the case of a public officer, may direct that, if from any cause the office of that Minister or public officer is vacant, or if during any period, owing to absence or inability to act from illness or any other cause, the Minister or public officer is unable to exercise the powers or perform the duties of his office, those powers shall be had and may be exercised and those duties shall be performed by a Minister designated by the President or by a person named by, or by the public officer holding an office designated by, the Minister; and thereupon the Minister, or the person or public officer, during that period, shall have and may exercise those powers and shall perform those duties, subject to such conditions, exceptions and qualifications as the President or the Minister may direct."

The above provision specifies that a public officer, such as the Accounting Officer herein may delegate his authority because of inability to act in certain circumstances. Further in **Judicial Review Miscellaneous Application**

No. 390 of 2018, Republic v. Public Procurement Administrative Review Board ex parte Kenya Revenue Authority (2019) eKLR (hereinafter referred to as the "Kenya Revenue Authority Case"), the court held as follows:-

"The person mandated to terminate the procurement proceedings (the tender) is the Accounting Officer. The same is provided under section 63 (1) of the Act.

The letter dated 16th August 2018 notifying all the 13 bidders that the tender had been terminated was signed by one Nicholas Njeru who was the Head of Procurement to the Ex-parte Applicant. The Ex-parte Applicant failed to demonstrate to the Review Board that Mr. Nicholas Njeru was indeed the Accounting officer referred under section 63 (1) of the Act or that he had acted with express authority of the Accounting officer in terminating the subject tender.

According to the Kenya Revenue Case, the court noted that the procuring entity needed to demonstrate either of the following:-

- *That the person who signed the letter terminating the tender was the accounting officer; or*
- *That the person who signed the said letter was acting with express authority of the Accounting Officer in terminating the subject tender.*

Having considered the finding in the Kenya Revenue Authority Case, together with the provision of Section 37 of the Interpretation and General Provisions Act, the Board observes that an accounting officer may delegate his authority to issue notification letters pursuant to Section 87 of the Act, save that such delegation must be in writing.

It is not lost to the Board that in exercise of his function as a public officer, the Accounting Officer is bound by principles of leadership and integrity under the Constitution and other legislations. Article 10 (2) (c) of the Constitution outlines national values and principles of governance that bind all State organs, State officers and public officers including "good governance, integrity, transparency and accountability". Article 232 (1) (e) of the Constitution puts it more strictly, that "*the values and principles of public service include accountability for administrative acts*".

Section 5 of the Public Service (Values and Principles) Act No. 1 A of 2015 further requires public officers to maintain high standards of professional ethics in that:-

"Section 5 (1) Every public officer shall maintain high standard of professional ethics

(2) For the purposes of sub-section (1), a public officer maintains high standards of professional ethics if that officer

- (a)
- (b)
- (c) **is transparent when executing that officer's functions;**
- (d) **can account for that officer's actions;**
- (e)
- (f)
- (g)
- (h) **observes the rule of law.**

From the above provisions, the Board notes that the Accounting Officer has the obligation to observe high standards of public service as he is held accountable for administrative acts, whether performed personally or through delegated authority.

The above provisions demonstrate that the Accounting Officer has power to delegate his authority, but he must still remain accountable for his actions and other actions undertaken by person to whom he has granted express authority to act on his behalf. To meet the national values and principles of governance, it is more efficient for the Accounting Officer to specify the tender for which the delegated authority is given to avert any abuse that

may occur without his knowledge. A general delegated authority is open to abuse and the person to whom the authority is delegated may use such delegated authority to undermine the Accounting Officer.

The Constitution and the aforementioned legislation gives responsibilities to all persons in the public service including the Procuring Entity's Accounting Officer to take necessary steps to ensure that his authority, when delegated, is specific and not open to any form of abuse.

It is the Board's finding that to achieve the underlying principles and national values of governance, the delegated authority by an accounting officer must be in writing and specific to a particular tender to avert abuse by the person to whom authority has been delegated, thus undermining the accounting officer.

With respect to delegation of authority, the Board finds that the Accounting Officer has the power to delegate his authority to issue letters of notification to the successful and unsuccessful bidders.

Turning to the instance case, the Board having studied the Procuring Entity's confidential file observes that the Procuring Entity's Accounting Officer addressed a letter dated 15th July 2016 to the Procuring Entity's Procurement and Supplies Manager stating as follows:-

"SUBJECT: PREPARATION OF ANNUAL PROCUREMENT AND DISPOSAL PLANS, ISSUANCE OF TENDER NOTICES, TENDER DOCUMENTS AND SIGNING LETTERS OF NOTIFICATIONS ON AWARD/REJECTION OR TERMINATION OF TENDERS

The Public Procurement and Asset Disposal Act of 2015 vests the authority of preparation of annual procurement and disposal plans, issuance of tender notices, tender documents and notifications on award of tenders (debriefing) on the Accounting Officer of the Procuring Entity

I hereby delegate to you the Procurement and Supplies Manager, the authority to perform the specific roles highlighted above on my behalf for prompt execution of tasks. This however shall be subject to my approval for each respective procurement process

In performance of these tasks you are reminded to exercise due diligence and ensure compliance with the Public Procurement and Asset Disposal Act, 2015, attendant Regulations as well as other statutory and legislative provisions.

[signature affixed]

Bakari H. Gowa

Managing Director"

The Board observes that the letter dated 15th July 2016 granted general delegated authority to the Procuring Entity's Procurement and Supplies Manager, noting that the tender for which the authority was given was not specified. The Accounting Officer of the Procuring Entity was however keen to specify that exercise of the authority delegated to the Procurement and Supplies Manager would be subject to approval by the Accounting Officer in each respective procurement process.

In a letter dated 21st February 2020, the Accounting Officer of the Procuring Entity wrote to the Procurement and Supplies Manager stating as follows:-

**"Subject: NOTIFICATION LETTERS TO SUCCESSFUL/
UNSUCCESSFUL BIDDERS- TENDER NO.
KFS/DDF/01/01/2020**

Reference is made to the approval of award of tender no. KFS/DDF/01/01/2020-Supply and Delivery of Diesel for ferries (Vendor Management Inventory System).

Proceed and issue letters of notification to M/s Galana Oil Kenya Limited being the lowest evaluated responsive bidder as per the tender award and other bidders who were not successful in the tender in line with Clause 87 of PPADA 2015 on my behalf"

The Board observes that in the letter dated 21st February 2020, the Accounting Officer granted the Procurement and Supplies Manager specific delegated authority to issue notification letters to the successful bidder and the unsuccessful bidders on behalf of the Accounting Officer in accordance with section 87 of the Act, having specified the subject tender, being the tender for which the specific delegated authority was granted.

Hence, the Procurement and Supplies Manager could only act to the extent of the said authority and the Managing Director would still remain accountable for administrative actions performed through the specific delegated authority given in the letter dated 21st February 2020.

In the circumstances, the Board finds in issuing letters of notification to the successful bidder and unsuccessful bidders, the Procurement and Supplies Manager acted under specific delegated authority granted to him by the Procuring Entity's Accounting Officer

In totality of the second issue in the substantive Request for Review, the Board finds that the Procuring Entity issued letters of notification to the successful and unsuccessful bidders in accordance with Section 87 of the Act.

On the third issue in the substantive Request for Review, the Board notes that the Applicant contended that upon being notified of the outcome of its bid, it received its Financial Bid from the Procuring Entity but the same was returned when already opened.

The Applicant annexed a photograph at page 58 of its Request for Review which it states is a photograph of the envelope which contained its Financial Bid. In the Applicant's view, the Procuring Entity used another envelope having opened the previous envelope containing the Applicant's Financial bid. The Procuring Entity refuted the Applicant's allegation and submitted that the Applicant's Financial Bid was returned unopened save that the Procuring Entity added a second envelope which has its letterhead in order to facilitate postage of the Applicant's Financial Bid.

From the foregoing submissions, the Board observes that there was no sufficient proof to support the Applicant's allegation that its Financial Bid was returned after it was already opened, in order to rebut the Procuring Entity's contention that the said envelope was returned unopened.

Further, the Board notes that Section 78 (10) and (11) of the Act provide that:-

"78 (10) The tender opening committee shall prepare tender opening minutes which shall set out—

(a) a record of the procedure followed in opening the tenders; and

(b) the particulars of those persons submitting tenders, or their representatives, who attended the opening of the tenders.

(11) To acknowledge that the minutes are true reflection of the proceedings held, each member of the tender opening committee shall—

(a) initial each page of the minutes;

(b) append his or her signature as well as initial to the final page of the minutes indicating their full name and designation”

As a result, the Board found it fit to study the Procuring Entity’s Original Minutes of the Financial Opening held on 18th February 2020 to establish what transpired on the date of the opening of Financial Envelopes, since the same ought to be a true reflection of the proceedings held during the Financial Opening of bids.

Having studied the Minutes of the Financial Opening held on 18th February 2020, the Board notes the following:-

"Financial Bid Opening

The Committee members opened the financial bids envelopes for the firms that qualified at technical evaluation stage. The

bids as per the form of tender were read out and recorded as follows:

	<i>Name of Bidder</i>	<i>Envelope Contents</i>	<i>Amount</i>
<i>1</i>	<i>Oryx Energies Ltd</i>	<i>.....</i>	<i>97.27 inclusive of VAT</i>
<i>2</i>	<i>Galana Oil Kenya Ltd</i>	<i>.....</i>	<i>93.44 inclusive of VAT</i>

...The opened documents were assigned numbers by the tender opening committee, stamped and initialed by the committee members.

There being no any other business the tender opening meeting ended at 1030 hours and submissions handed over to Procurement Secretariat”

The Board notes that it is only the bid of the 3rd Respondent and M/s Oryx Energies Ltd that were opened on 18th February 2020. There is no mention of the Applicant’s bid in the said minutes, noting that it is only bidders who were found responsive at the end of Technical Evaluation whose bids were of concern during Financial Opening.

The Applicant was found non-responsive at the end of Preliminary Evaluation and its bid did not proceed to Technical Evaluation. It is therefore not expected that the Procuring Entity would proceed to open the Financial

Envelope of a bidder who had already been found non-responsive at the end of Preliminary Evaluation.

In Civil Appeal No. 80 of 2016, Kipkebe Limited v Peterson Ondieki Tai [2016] eKLR, the Court of Appeal held that:-

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

The Court of Appeal in the above case appreciated the principle of the law of evidence that he who alleges must prove his case. The Applicant herein had the burden of proving its allegation that its bid was returned after it was already opened. This Board has established from the Procuring Entity's Minutes of Financial Opening that the Applicant's Financial Envelope was not among the bids opened on 18th February 2020.

This Board finds that the Applicant's allegation that its Financial Envelope was returned after the same was already opened by the Procuring Entity was challenged to the satisfaction of the Board, noting that the Minutes of the Financial Opening demonstrate that the Applicant's Financial Envelope was not amongst those opened on 18th March 2020.

At this juncture, it is worth noting that while making a determination of the 1st, 2nd and the 3rd Respondent's Preliminary Objections, the Board on 24th March 2020 found that the contract dated 9th March 2020 signed between the Procuring Entity and the 3rd Respondent was null and void having been entered into before the expiry of 14 days from the date when the Applicant received its letter of notification of unsuccessful bid.

Accordingly, and having found that all the grounds in the Request for Review have failed, it is important for the Procuring Entity to proceed and conclude the procurement process herein by entering into a contract with the 3rd Respondent in accordance with Section 135 of the Act.

In totality of the foregoing, 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 Request for Review filed by the Applicant on 11th March 2020 with respect to Tender No. KFS/DDF/01/01/2020 for the Supply and Delivery of Diesel for Ferries (Vendor Management Inventory System), be and is hereby dismissed.**

2. Each party shall bear its own costs in the Request for Review.

Dated at Nairobi this 1st day of April, 2020

**CHAIRPERSON
PPARB**

**SECRETARY
PPARB**