

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 71/2020 OF 5TH JUNE 2020 & APPLICATION
NO. 75/2020 OF 9TH JUNE 2020 (CONSOLIDATED)

BETWEEN

HIMILO CONSTRUCTION & SUPPLY LIMITED

IN JV WITH LINSCAN ADVANCED

PIPELINES & TANKS SERVICES.....1ST APPLICANT

AND

ROSEN EUROPE BV/BERNAGRO

KENYA LIMITED.....2ND APPLICANT

AND

THE ACCOUNTING OFFICER,

KENYA PIPELINE COMPANY LIMITED.....1ST RESPONDENT

KENYA PIPELINE COMPANY LIMITED.....2ND RESPONDENT

AND

T.D WILLIAMSON (U.K) LIMITED

IN JV WITH MIRANDA EAST AFRICA LIMITED.....3RD RESPONDENT

Review of the decision of the Kenya Pipeline Company with respect to Tender No. KPC/PU/003 – OT/19-20 for In-Line Inspection (ILI) and Material Grade Determination for Line 5 (Mombasa to Nairobi)

BOARD MEMBERS

1. Ms. Faith Waigwa

-Chairperson

2. Mr. Alfred Keriolale -Member
3. Ms. Phyllis Chepkemboi -Member

IN ATTENDANCE

1. Mr. Stanley Miheso -Holding brief for Secretary

BACKGROUND TO THE DECISION

The Kenya Pipeline Company Limited, (hereinafter referred to as "the Procuring Entity") invited sealed tenders from eligible service providers in response to Tender No. KPC/PU/003 – OT/19-20 for In-Line Inspection (ILI) and Material Grade Determination for Line 5 (Mombasa to Nairobi) (hereinafter referred to as "the subject tender"), on 17th March 2020. Bidders were instructed to download tender documents from the Procuring Entity's website at www.kpc.co.ke.

Bid Submission Deadline and Opening of Bids

The Procuring Entity received a total of six (6) bids by the closing date of 14th April 2020 and the bids were opened shortly thereafter in the presence of bidders and their representatives, which were recorded as follows: -

NO.	NAMES OF BIDDERS
1	Trans Asia Pipeline Services, FZE in Memorandum of Understanding with Mahathi

NO.	NAMES OF BIDDERS
	Infra East Africa Ltd
2	Sintmond Group Limited in subcontract agreement with NDT Global FZE
3	JV-Shandong KERUI Oilfield Service Group Co. Ltd in JV with Catrimec Services Limited Consortium
4	Himilo Construction & Supply Ltd in Joint Venture with Linscan Advanced Pipelines & Tanks Services
5	Rosen Europe Bv in partnership with Bernagro Kenya Ltd
6	T.D. Williamson (UK) Limited in Joint Venture with Miranda East Africa Limited

Evaluation of Bids

The Evaluation Committee conducted evaluation of bids between 20th and 24th April 2020 in the following three (3) stages: -

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

1. Preliminary Evaluation

At this stage of evaluation, bids were evaluated against the following mandatory requirements: -

The following documents must be placed in a separate envelope marked "MANDATORY REQUIREMENTS"

- a) Certificate of Incorporation/Registration (For both Foreign & Local Firms).
- b) Original Tender Security of USD.10,000.00 or equivalent in foreign currency and shall be from a bank Registered in Kenya or from an Insurance Company Approved by PPRA. Must be valid for 180 days from the date of tender opening.
- c) Valid KRA tax compliance certificate (For local firms).
- d) Signed declaration form (For both Local and Foreign Firms).
- e) Pre-tender Site visit certificate.

- This is a Re-tender; it is not mandatory to attend the site visit if you attended the previous site visit.
- Bidders who participated in the previous site visit must submit a copy of the site visit certificate.
- It is however mandatory for any new bidders to attend the site visit and must call ahead and schedule an appointment with Eng. Wilson Maritim-0722562695 the engineer will only be available between 25th and 27th of March 2020.

This is a specialized service; the client envisages that bidders will enter into partnership using one of the following arrangements:

- **FOR FOREIGN FIRMS PARTICIPATION AS LEAD/OR PARTNER:** Foreign tenderers must submit their bids in association with local firms. A Local participation of a minimum of 40% of contract value either on materials locally produced/assembled or on shareholding is required. Foreign firms MUST submit a Local Partnership Agreement. The purpose is to ensure sustainable promotion of local industry. **Foreign Firms must certify clause 1.3: (a) and (d). In addition, this arrangement MUST satisfy Clause on Eligibility – section 2.4 on its entirety as per the Tender Document.**
- **FOR LOCAL COMPANIES AS LEAD CONTRACTORS:** Local firms standing out as the LEAD CONTRACTOR and wishing to SUB-CONTRACT part of the work to FOREIGN FIRMS, a SUB-CONTRACTOR agreement shall be submitted. In addition shall fulfill the requirement under **clause 1.3 (a),(b),(c),(d), (e)** of the Tender Document .The LOCAL FIRM Shall also satisfy Clause on Eligibility :**2.4 (f) - (iv),(v),(vi) , (Vii) & (Viii)** of the Tender Document . **Foreign Firms sub-contracted MUST fulfill clause 1.3: (a), (d) and 2.4 (f) – (iv) under sub-contract arrangement.**
 - a) The Lead Contractor MUST submit Tool Manufacturer’s Authorization and License for the Software if not the manufacturer. Bidders will not be required to submit software license for Material Grade Determination**
 - b) Paginate and initialize all documents submitted.**
 - c) Duly filled and signed form of tender with price inclusive of all taxes.**

Each member of the evaluation committee evaluated each of the six bids individually to ascertain responsiveness to the eligibility and mandatory requirements.

The Evaluation Committee made the following observations:

Table 3: Summary of Mandatory Requirements evaluation		
No.	BIDDER	OBSERVATIONS
1	Trans Asia Pipeline Services, FZE in Memorandum of Understanding with Mahathi Infra East Africa Ltd	Trans Asia Pipeline Services, FZE in Memorandum of Understanding with Mahathi Infra East Africa Ltd complied with other mandatory requirements except three notarized and relevant degree certificates as required, instead only one was provided.
2	Sintmond Group Limited in subcontract agreement with NDT Global FZE	Complied with other mandatory requirements except: <ul style="list-style-type: none"> i. Did not provide relevant references for work executed in oil and gas installations ii. Provided only two notarized and relevant degree certificate instead of three as required.
3	JV-Shandong KERUI Oilfield Service Group Co. Ltd in JV with Catrimec Services Limited Consortium	Complied with other mandatory requirements except: <ul style="list-style-type: none"> i. Did not paginate all the documents as required. ii. Did not notarize relevant degree certificate as required.
4	Himilo Construction & Supply Ltd in Joint Venture with Linscan Advanced Pipelines & Tanks Services	Complied with other mandatory requirements except tender security that was Ksh.1Million which was less than the required USD10,000.00 since at the time of tender opening the CBK mean exchange rate was USD/Ksh.104.9. In addition, the tender document required the tender security be submitted in USD or equivalent Foreign Currency. This was not complied with.
5	Rosen Europe Bv in partnership with Bernagro Kenya Ltd	Complied with all mandatory requirements
6	T.D. Williamson (UK) Limited in Joint Venture	Complied with all mandatory requirements

Table 3: Summary of Mandatory Requirements evaluation		
No.	BIDDER	OBSERVATIONS
	with Miranda East Africa Limited	

The team then deliberated on individual evaluations and summarized the results of the Preliminary Evaluation as shown in the table below:

Bidder	<i>Bid Responsiveness</i>
1. Trans Asia Pipeline Services, FZE in Memorandum of Understanding with Mahathi Infra East Africa Ltd	Non-Responsive
2. Sintmond Group Limited in subcontract agreement with NDT Global FZE	Non-Responsive
3. JV-Shandong KERUI Oilfield Service Group Co. Ltd in JV with Catrimec Services Limited Consortium	Non-Responsive
4. Himilo Construction & Supply Ltd in JV with Linscan Advanced Pipelines & Tanks Services	Non-Responsive
5. Rosen Europe Bv in partnership agreement with Bernagro Kenya Ltd	Responsive
6. TD Williamson (UK) Limited in JV with Miranda East Africa Limited	Responsive

Bids from the following firms were found to be responsive and hence progressed to detailed technical evaluation:

1. Rosen Europe Bv in partnership with Bernagro Kenya Ltd (Bidder 5).
2. T.D. Williamson (UK) Limited in Joint Venture with Miranda East Africa Limited (Bidder 6).

2. Technical Evaluation

At this stage of evaluation, bids were evaluated against the technical criteria as outlined in the Tender Document as follows: -

	Technical Evaluation Criteria	Max. Points
1.0	Experience in similar works	Max. 45 Points
A.	Using high resolution intelligent magnetic flux leakage (MFL) or high-resolution ultrasonic thickness metal loss (UTML)	15 Points
	<p>Submission of evidence of having carried out the following:</p> <ul style="list-style-type: none"> i. In-Line inspection in the oil and gas industry in the use of any of the above-mentioned tools of 20years and above – 15points ii. In-Line inspection in the oil and gas industry in the use of any of the above-mentioned tools of between 10 and 14years – 10points iii. In-Line inspection in the oil and gas industry in the use of any of the above-mentioned tools of between 6 and 8years – 8points iv. In-Line inspection in the oil and gas industry in the use of any of the above-mentioned tools of between 1year and 5 years – 4points v. Less than 5years experience –0 point <p><i>Reference letters from previous clients shall be submitted as evidence. KPC reserves the right to verify the authenticity of the letters</i></p>	
B.	Using ultrasonic thickness (UT) crack detection	15 Points
	<p>Submission of evidence of having carried out the following:</p> <ul style="list-style-type: none"> i. In-Line inspection in the oil and gas industry in the use of Ultrasonic (UT) 	

	Technical Evaluation Criteria	Max. Points
	<p>Crack Detection tools of 5years and above – 15points</p> <p>ii. In-Line inspection in the oil and gas industry in the use of Ultrasonic (UT) Crack Detection tools of between 3 and 4years – 10points</p> <p>iii. In-Line inspection in the oil and gas industry in the use of Ultrasonic (UT) Crack Detection tools of between 2 and 3years – 5points</p> <p>iv. In-Line inspection in the oil and gas industry in the use of Ultrasonic (UT) Crack Detection tools of below 2 years – 0points</p> <p><i>Reference letters and completion certificates from previous clients shall be submitted as evidence. KPC reserves the right to verify the authenticity of the letters</i></p>	
C.	Using a suitable process to provide material grade determination	15 Points
	<p>Submission of evidence of having carried out the following:</p> <p>i. In-In-Line inspection in the oil and gas industry in the use of Material Grade Determination (MGD) tools of 5years and above – 15points</p> <p>ii. In-Line inspection in the oil and gas industry in the use of Material Grade Determination (MGD) tools of between 2 and 4years – 10points</p> <p>iii. In-Line inspection in the oil and gas industry in the use of Material Grade Determination (MGD) tools below 2 years – 0points</p> <p><i>Reference letters and completion certificates from previous clients shall be submitted as evidence. KPC reserves the right to verify the authenticity of the letters</i></p>	
2.0	Technical proposal for carrying out in-line inspection (ILI) for line 5 and material grade determination (MGD) for line 5	Max.30 Points
	Submit a complete works methodology relevant to the works in-hand covering ILI and the MGD (5 points, Otherwise 0)	

	Technical Evaluation Criteria	Max. Points
	Submit the type, sequence and the procedure for cleaning pigs and tracking- (5 points, otherwise 0)	
	Submit the type, sequence and procedure for running the instrument pigs and tracking. This should be accompanied with simple calculations determining time durations to run the pigs in each section and battery-life therein – (4 points, Otherwise 0)	
	Submit sample reporting templates for preliminary and final reports – (2 points, otherwise 0)	
	Submit specifications for the geometry inspection pig – (2 points, Otherwise 0)	
	Submit specifications for the MFL inspection pig – (3 points, Otherwise 0)	
	Submit specifications for the UT inspection pig – (3 points, Otherwise 0)	
	Submit specifications for the Material Grade Determination Inspection Tool – (4 points, Otherwise 0)	
	Submit a sample joint dig verification procedure on how to confirm the same from a presented report – (2 points, otherwise 0)	
3.0	Key personnel and their qualifications	Max.20 points
i.	Project Manager (on the site) (attach signed curriculum vitae and relevant certificates)	Max. 10
	A contractor that presents a Project Manager who has relevant technical knowledge, managerial skills in project management and suitable qualifications in any discipline in Engineering, with a minimum of 10 years’ work experience gets – 10points	
	A contractor that presents a Project Manager who has relevant Technical knowledge, managerial skills in project management and suitable qualifications in any discipline in Engineering, with a minimum of 5-10 years’ work experience gets – 5 points	
	A contractor that presents a Project Manager who has relevant Technical knowledge, managerial skills in project management and suitable qualifications in any discipline in Engineering, below 5 years’ work experience gets – 2 point	
	A contractor that does not present a Project Manager meeting any of the above criteria – 0 points	
ii.	Pipeline Defect Assessment/Analysis Expert (attach signed curriculum vitae and relevant certificates)	Max. 10

	Technical Evaluation Criteria	Max. Points
	A contractor that presents a suitably qualified expert possessing ANSI/ANST-ILI-PQ-2005 or later qualifications with more than 15 years' work experience gets – 10points	
	A contractor that presents a suitably qualified expert possessing ANSI/ANST-ILI-PQ-2005 or later qualifications with 10-15 years' work experience gets – 7points	
	A contractor that presents a suitably qualified expert possessing ANSI/ANST-ILI-PQ-2005 or later qualifications with less than 10 years' work experience gets – 4 points	
	A presented Pipeline Defect Assessment Expert possessing ANSI/ANST-ILI-PQ-2005 or later qualifications – 2 points	
	A contractor that does not present a Pipeline Defect Assessment Expert meeting (a), (b) or (c) above criteria – 0 points	
4.0	Financial capability	Max.5 points
	A contractor who submits certified copies of audited accounts for past three years with an annual turnover of USD 5 Million in each year or above gets – 5 points	
	A contractor who submits certified copies of audited accounts for the past three years with an annual turnover of USD 3-4.9 Million in each year gets – 3 points	
	A contractor who submits certified copies of audited accounts for the past three years with an annual turnover of below USD 3 Million in each year gets – 0 points	
	TOTAL	100

The technical evaluation criteria required that for a bidder to qualify and proceed to financial evaluation, bidders must achieve:

- Minimum overall mark of 70 points on the technical evaluation
- 100% score in criterion No. 2
- At least 50% score in each of the rest of the criteria

In the detailed technical evaluation, the Evaluation Committee noted as follows:

(i) M/s Rosen Europe Bv in partnership with Bernagro Kenya Ltd (Bidder 5) scored:

- 95 out of 100 overall points
- 100% score in criterion No. 2
- 89% in section 1.0, 100% in each of section 2.0, 3.0 and 4.0.

(ii) M/s T.D. Williamson (UK) Limited in Joint Venture with Miranda East Africa Limited (Bidder 6) scored:

- 100 out of 100 overall points
- 100% score in criterion No. 2
- 100% in each of section 1.0, 2.0, 3.0 and 4.0.

From the results of the detailed technical evaluation, Bidder No. 5 and Bidder No. 6 qualified for financial evaluation.

3. Financial Evaluation

This stage of evaluation was undertaken in compliance with the provisions and requirements of the Tender Document and in comparison, to the duly filled and signed form of tender as submitted by the bidders.

The Evaluation Committee observed the following:

- i. M/s Rosen Europe Bv in partnership with Bernagro Kenya Ltd (Bidder 5) had quoted a total of USD 3,993,750 inclusive of all taxes.
- ii. M/s T.D. Williamson (UK) Limited in Joint Venture with Miranda East Africa Limited (Bidder 6) had quoted a total of USD 3,369,497.32 inclusive of all taxes.

From the above observations, the Evaluation Committee noted that M/s T.D. Williamson (UK) Limited in Joint Venture with Miranda East Africa Limited (Bidder 6) was the lowest evaluated bidder at USD 3,369,497.32 inclusive of all taxes.

The Evaluation Committee's Recommendation

In view of the evaluation process, the Evaluation Committee recommended award of the subject tender to the lowest evaluated bidder **M/s T.D. Williamson (UK) Limited in Joint Venture with Miranda East Africa Limited (Bidder 6) at US Dollars Three Million, Three Hundred and Sixty Nine Thousand, Four Hundred and Ninety Seven and Thirty Two Cents (USD 3,369,497.32)** inclusive of all taxes.

Due Diligence

Pursuant to the Evaluation Committee's recommendation, the Acting General Manager (Supply Chain) sent the following enquiries on behalf of the evaluation committee:

a) A letter to TD Williamson (UK) Limited to confirm whether:

- TD Williamson (UK) Limited is in Joint Venture agreement with Miranda East Africa Ltd on a 49% to 51% works execution respectively, and
- T.D. Williamson (UK) Limited had a financial arrangement with Miranda East Africa Ltd to execute the works.

b) A letter to the Kenya National Chamber of Commerce & Industry to confirm existence and other company details of TD Williamson (UK) Limited and Miranda East Africa Ltd.

c) A letter to Comacon Limited to conform the nature of work that was executed for them by Miranda East Africa Ltd as per their reference letter in the bid documents, and whether the works were completed to their satisfaction.

d) A letter to Lunga Lunga Petroleum Co. Ltd to confirm the nature of work that was executed for them by Miranda East Africa Ltd as per their reference letter in the bid documents, and whether the works were completed to their satisfaction.

Results of the Due Diligence Exercise

1. TD Williamson (UK) Limited responded to the enquiry by confirming that:

- a) They are in Joint Venture agreement with Miranda East Africa Ltd on a 49% to 51% works execution respectively, and that
- b) They have a financial arrangement with Miranda East Africa Ltd to execute the works if awarded.

2. The Kenya National Chamber of Commerce & Industry responded to the enquiry and confirmed existence and other company details Miranda East Africa Ltd who are the lead partners in the JV with TD Williamson (UK) Limited.

3. Comacon Limited responded to the enquiry by confirming that Miranda East Africa Ltd provided them with NDT Services (Radiography X-Ray Testing) of welded joints during the project "850M Kipevu to Changanwe Oil Pipeline and that the service was offered 'to the expected standards and within schedule'.

4. Lunga Lunga Petroleum Co. Ltd responded to the enquiry by confirming that Miranda East Africa Ltd provided them with (a), Non-Destructive Testing (NDT) including Radiography Testing (RT-XRAY and IR) on 2No. Petroleum Tanks and associated piping, and (b), Tank Calibration Services

for 2No. Petroleum Storage Tanks and that they were satisfied with the successful performance of the contract by Miranda East Africa Ltd.

Conclusion of the Due Diligence Exercise

Arising from the responses to the due diligence enquiries as listed hereinabove, the Evaluation Committee determined that all responses from the bidder, the referees, and from the Kenya National Chamber of Commerce & Industry validated the information provided by the tenderers in the bid documents evaluated.

Recommendation

Following the results and the conclusion of the due diligence exercise, the Evaluation Committee affirmed its recommendation to the KPC Managing Director as contained in the technical & financial evaluation report, to consider awarding the tender to the lowest evaluated bidder **M/s T.D. Williamson (UK) Limited in Joint Venture with Miranda East Africa Limited (Bidder 6)** at their quoted price of **US Dollars Three Million, Three Hundred and Sixty Nine Thousand, Four Hundred and Ninety Seven and Thirty Two Cents (USD 3,369,497.32)** inclusive of all taxes.

Professional Opinion

Having reviewed the Evaluation Report, the Procuring Entity's Head of Supply Chain Management concurred with the Evaluation Committee's Recommendation of award to **M/s T.D. Williamson (UK) Limited in Joint Venture with Miranda East Africa Limited (Bidder 6)**, which recommendation was approved by the Procuring Entity's Accounting Officer on 19th May 2020.

REQUEST FOR REVIEW NO. 71/2020

M/s Himilo Construction & Supply Limited in Joint Venture with Linscan Advanced Pipelines & Tanks Services lodged Request for Review No. 71/2020 dated 4th June 2020 and filed on 5th June 2020, together with a Supporting Affidavit sworn on 4th June 2020 and filed on 5th June 2020 through the firm of Chepkuto Advocates.

In response, the Procuring Entity lodged a Statement of Reply sworn on 18th June 2020 and filed on 19th June 2020 through the firm of Kipkenda & Company Advocates.

M/s T.D Williamson (U.K) Limited in Joint Venture with Miranda East Africa Limited (hereinafter referred to as "the 3rd Respondent") lodged a Replying

Affidavit sworn on 15th June 2020 and filed on 17th June 2020 through the firm of Nyaanga & Mugisha Advocates.

M/s Himilo Construction & Supply Limited in Joint Venture with Linscan Advanced Pipelines & Tanks Services sought for the following orders in the Request for Review:-

- i. An order declaring that the Procuring Entity breached the provisions of the Public Procurement & Asset Disposal Act;*
- ii. An order declaring that the Tender Document was inconsistent and vague for failing to state the exact exchange rate applicable for the tender security;*
- iii. An order declaring that the letter of notification of award is irregular on account that the Procuring Entity relied on the CBK's exchange rate which is merely an indicative rate and does not regulate the forex exchange rate in Kenya;*
- iv. An order annulling/setting aside the notification of award of tender dated 26th May 2020;*
- v. An order directing for a re-evaluation process to be conducted which takes into account transparency and fairness;*
- vi. An order that costs of this application be awarded to the Applicant in any event.*

REQUEST FOR REVIEW NO. 75/2020

M/s Rosen Europe Bv Bernagro Kenya Limited lodged Request for Review No. 75/2020 dated 8th June 2020 and filed on 9th June 2020, together with a Statement dated and filed on even date, a Further Affidavit sworn on 22nd June 2020 and filed on 23rd June 2020 and Grounds of Opposition dated and filed on even date through the firm of Garane & Somane Advocates.

In response, the Procuring Entity lodged a Statement of Reply sworn on 18th June 2020 and filed on 19th June 2020 through the firm of Kipkenda & Company Advocates.

M/s T.D Williamson (U.K) Limited in Joint Venture with Miranda East Africa Limited (hereinafter referred to as "the 3rd Respondent") lodged a Replying Affidavit sworn on 17th June 2020 and filed on 18th June 2020 through the firm of Nyaanga & Mugisha Advocates.

M/s Rosen Europe Bv Bernagro Kenya Limited sought for the following orders in its Request for Review: -

- i. An order cancelling/annulling/setting aside the Respondent's/Procuring Entity's decision awarding Tender***

- No. KPC/PU/003 – OT/19-20 for In-Line Inspection (ILI) and Material Grade Determination for Line 5 (Mombasa to Nairobi) to the alleged successful bidder;***
- ii. An order cancelling/setting aside the Respondent's/Procuring Entity's Letter of Notification of Unsuccessful bid dated 26th May 2020 addressed to the Applicant herein in respect of Tender No. KPC/PU/003 – OT/19-20 for In-Line Inspection (ILI) and Material Grade Determination for Line 5 (Mombasa to Nairobi);***
- iii. An order substituting the Procuring Entity's decision with the decision of the Review Board and award the tender to the Applicant following a review of all the records of the procurement process (particularly the technical evaluation thereof) relating to Tender No. KPC/PU/003 – OT/19-20 for In-Line Inspection (ILI) and Material Grade Determination for Line 5 (Mombasa to Nairobi)***
- iv. Further and in the alternative and without prejudice to any of the other prayers sought herein, an order directing the Respondent to undertake fresh evaluation of all bids received in Tender No. KPC/PU/003 – OT/19-20 in strict adherence to the Tender Document, the Act and the Regulations and award the tender to the most technically responsive and lowest competitive bidder;***

- v. Further and in the alternative, an order nullifying the entire process and directing the Respondent to re-tender afresh;*
- vi. Such other or further relief or reliefs as the Board shall deem just and expedient;*
- vii. An order awarding the costs of the Request for Review to the Applicant.*

The Board is faced with a preliminary issue for its determination, as follows: -

Whether Request for Review No.71/2020 and Request for Review No.75/2020 should be consolidated pursuant to Regulation 82 of Public Procurement and Disposal Regulations, 2006

The Board observes that the tender in dispute in both **Request for Review No. 71/2020** and **Request for Review No. 75/2020** is the same.

Regulation 82 of Public Procurement and Disposal Regulations, 2006 provides as follows:

"Where two or more requests for review are instituted arising from the same tender or procurement procedure the Review Board may consolidate the requests and hear them as if they were one request for review."

The Board notes that in both requests the tender in dispute is the same, the Procuring Entity is the same and the grounds of review revolve around the same tender. The Board is satisfied that the two request for review applications meet the requirements for consolidation under Regulation 82 of the Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as "the 2006 Regulations").

The Board hereby consolidates **Request for Review No. 71/2020** and **Request for Review No. 75/2020** and proceeds to determine them as one Request for Review, with M/s Himilo Construction & Supply Limited in Joint Venture with Linscan Advanced Pipelines & Tanks Services as the 1st Applicant and M/s Rosen Europe Bv Bernagro Kenya Limited as the 2nd Applicant.

On 16th March 2020, the Board issued Circular No. 1/2020 and the same was published on the Public Procurement Regulatory Authority (hereinafter referred to as "the PPRA") website (www.ppra.go.ke) in recognition of the challenges posed by the COVID-19 pandemic and instituted certain

measures to restrict the number of representatives of parties that may appear before the Board during administrative review proceedings in line with the presidential directives on containment and treatment protocols to mitigate against the potential risks of the virus.

On 24th March 2020, the Board issued Circular No. 2/2020 further detailing the Board's administrative and contingency management plan to mitigate the COVID-19 disease. Through this circular, the Board dispensed with physical hearings and directed that all request for review applications shall be canvassed by way of written submissions.

The Board further cautioned all parties to adhere to the strict timelines as specified in its directive as the Board would strictly rely on the documentation filed before it within the timelines specified to render its decision within twenty one days of filing of the request for review in accordance with section 171 of the Public Procurement and Asset Disposal Act, No. 33 of 2015 (hereinafter referred to as "the Act").

The 1st Applicant filed Written Submissions dated and filed on 25th June 2020 whereas the 2nd Applicant filed Written Submissions dated and filed on 18th June 2020 and Supplementary Submissions dated and filed on 23rd June 2020.

The Procuring Entity filed Written Submissions dated and filed on 26th June 2020 and Written Submissions dated 24th June 2020 and filed on 25th June 2020.

Finally, the 3rd Respondent filed two Written Submissions dated and filed on 25th June 2020.

THE BOARD'S DECISION

The Board has considered each of the parties' cases, the documents filed before it, including confidential documents filed in accordance with section 67 (3) (e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") together with the written submissions by parties.

The Board has identified the following issues for determination in the consolidated Request for Review: -

- I. Whether the Procuring Entity evaluated the 1st Applicant's bid at Preliminary Evaluation in accordance with section 80 (2) of the Act, as read together with Article 227 (1) of***

the Constitution with respect to the following mandatory requirement: -

a) MR (b): Original Tender Security of USD. 10,000.00 Or equivalent in foreign currency and shall be from a bank Registered in Kenya or from an Insurance Company Approved by PPRA. Must be valid for 180 days from the date of tender opening.

II. Whether the Procuring Entity evaluated the successful bidder's bid at Technical Evaluation in accordance with section 80 (2) of the Act, as read together with Article 227 (1) of the Constitution with respect to the following technical criterion: -

a) Technical Evaluation Criterion No 2: Technical Proposal for Carrying Out In-Line Inspection (ILI) for Line 5 and Material Grade Determination (MGD) for Line 5

Before addressing our mind to the above issues for determination, the Board observes that the 2nd Applicant herein lodged Grounds of Opposition dated 22nd June 2020 and filed on 23rd June 2020 stating that the Procuring Entity's Affidavit dated 18th June 2020 and filed on 19th June 2020 and the 3rd Respondent's Replying Affidavit dated 17th June 2020 and filed on 18th June 2020 were filed outside the timelines stipulated in

Circular No.2/2020 dated 24th March 2020 and should therefore be struck out forthwith.

Through Circular No.2/2020, the Board dispensed with physical hearings and directed *inter alia* that upon notification and service of a request for review, an accounting officer of a procuring entity and/or any other respondent to the request for review shall file and submit to the Board's Secretary his/her memorandum of response and/or preliminary objection to the request for review within five (5) days of such service together with all documentation, including confidential documentation with respect to the procurement or asset disposal proceedings in issue.

This directive is in line with Regulation 77 (1) of the Public Procurement & Disposal Regulations, 2006 (hereinafter referred to as "the 2006 Regulations") which stipulates that: -

"A party notified under regulation 74 may file a preliminary objection to the hearing of the request for review to the Secretary of the Review Board within five days from the date of notification" [Emphasis by the Board]

Moreover, Regulation 74 (3) (b) of the 2006 Regulations provides that: -

"Upon being served with a notification of a request, the procuring entity shall: -

a).....;

b) within five days or such lesser period as may be specified by the Secretary in a particular case, submit to the Secretary a written memorandum of response to the reasons for the request together with such documents as the Secretary may specify

The Board observes that the 2nd Applicant lodged its Request for Review on 9th June 2020. The Board's courier collected the 2nd Applicant's Request for Review documents and served the Procuring Entity on the same date. Thereafter, on 19th June 2020, the Procuring Entity lodged a Statement of Reply which the Board notes was filed eight (8) days after the Procuring Entity was served with the Applicant's Request for Review.

The Board observes that the Procuring Entity offered no response to the 2nd Applicant's Grounds of Opposition in relation to its Statement of Reply filed on 19th of June 2020.

In the absence of any response from the Procuring Entity, the Board considers the averments of the 2nd Applicant to be unchallenged and finds

that the Procuring Entity's Statement of Reply filed on 19th June 2020 was filed three (3) days outside the timelines stipulated in Circular No. 2/2020 issued by the Board on 24th March 2020.

The question now before the Board is whether the 2nd Applicant suffered any prejudice as a result of the Procuring Entity's late filing of its Statement of Reply on 19th June 2020.

The Board observes that despite the Procuring Entity's late filing of its Statement of Reply on 19th June 2020, the 2nd Applicant was able to file a Further Affidavit and Supplementary Submissions both dated 22nd June 2020 and filed on 23rd June 2020, in response to the Procuring Entity's Statement of Reply filed on 19th June 2020.

It therefore follows that the 2nd Applicant had an opportunity to respond to the issues as raised in the Procuring Entity's Statement of Reply filed on 19th June 2020 and therefore in the Board's view, the 2nd Applicant suffered no prejudice.

In the Board's considered view, it is in the greater good and in the interest of fairness and justice for the Consolidated Request for Review application to proceed unimpeded, noting that all parties therein have been afforded

an opportunity to present their respective submissions in exercise of their right to a fair hearing as espoused under Article 50 (1) of the Constitution which states as follows: -

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

With respect to the 3rd Respondent's Replying Affidavit filed on 18th June 2020, we observe from the Board's Secretariat's Records that the 3rd Respondent was notified of the existence of the Request for Review Application No. 75/2020 on 12th June 2020. Thereafter, on 18th June 2020, the 3rd Respondent filed its Replying Affidavit which we note was filed before the Board four (4) days after the 3rd Respondent was notified of the existence of the Request for Review application.

In view of the foregoing, the Board finds that the 3rd Respondent's Replying Affidavit filed on 18th June 2020 was filed within the timelines stipulated in Circular No. 2/2020 issued by the Board on 24th March 2020.

Having dispensed with the above preliminary issue, the Board shall now address the main issues for determination.

Mandatory Requirement (b) of the Preliminary Evaluation Criteria on page 24 of the Tender Document provides as follows: -

"(b) Original Tender Security of USD 10,000.00 or equivalent in foreign currency and shall be from a bank Registered in Kenya or from an Insurance Company Approved by PPRA. Must be valid for 180 days from the date of tender opening"

According to this criterion, bidders were required to submit an original tender security of USD 10,000 or its equivalent in foreign currency from a bank registered in Kenya or from an insurance company approved by the Public Procurement and Regulatory Authority (hereinafter referred to as "PPRA"). Further, bidders were required to submit a tender security valid for 180 days from the date of tender opening.

The 1st Applicant contended that it submitted to the Procuring Entity a tender security amount of USD 10,000 in its Kenyan Currency equivalent of Kshs 1,000,000/- through its bank, Middle East Bank in compliance with the abovementioned mandatory requirement. However, on 29th May 2020, the 1st Applicant received a letter of unsuccessful bid from the Procuring Entity which read as follows:

"We refer to your tender for the above.

Following preliminary evaluation of the technical bids received, KPC regrets to inform you that your tender was successful due to the following:

The tender security submitted was Kshs 1 Million which is less than the required USD 10,000 required in the Tender Document, since at the time of tender opening the CBK mean exchange rate was USD/Kshs 104.9.

The tender was awarded to M/s T.D. Williamson (UK) Limited in Joint Venture with Miranda East Africa Limited at USD 3,369,497.32 inclusive of all taxes.

Kindly arrange for the collection of your Bid Bond from the office of the General Manager (Supply Chain) at our Nairobi Terminal Office, off Nanyuki Road, Industrial Area.

We thank you for taking time to participate in this tender.”

According to the above letter, the 1st Applicant's bid was disqualified by the Procuring Entity at Preliminary Evaluation on the basis that the 1st Applicant's tender security of Kshs 1,000,000/- was less than the required

USD 10,000 since at the time of tender opening the Central Bank of Kenya Mean Exchange Rate was USD/Kshs 104.9.

The 1st Applicant contended that the Procuring Entity's Tender Document did not specify the exact exchange rate to be used in determining the amount of tender security in Kenya Shillings. It was the 1st Applicant's submission that at the time it procured a bid bond from its bank the exchange rate was USD/Kshs 100.60 and its bank accepted an exchange rate of USD/Kshs 100.00 and subsequently issued the 1st Applicant a bid bond dated 10th February 2020 and a subsequent bid bond dated 31st March 2020 for the same amount.

It was the 1st Applicant's submission that the Procuring Entity's Tender Document stipulated that the tender security can either be provided in United States Dollars or an equivalent in foreign currency. In the 1st Applicant's view, the United States Dollar is the primary defining currency and any other currency of the world would be deemed as foreign with respect to the same.

According to the 1st Applicant, the Procuring Entity's Tender Document allowed for pricing in various currencies including the Kenya Shilling and therefore the 1st Applicant was within its rights to present its tender security in Kenya Shillings as opposed to the United States Dollar.

The 1st Applicant submitted that no entity in Kenya including the Central Bank of Kenya has the mandate to set exchange rates for trade with respect to the Kenya Shilling or any other foreign currency including the United States Dollar and therefore bidders are free to negotiate exchange rates with any bank of their choice. Further, the 1st Applicant submitted that exchange rates fluctuate and thus the Procuring Entity ought to have provided clear and concise information in its Tender Document with respect to the applicable exchange rate to avoid speculation and conjecture as had happened in this particular tender.

It was the 1st Applicant's submission that it was impractical and unrealistic for the Procuring Entity to expect that the 1st Applicant would be able to determine the Central Bank of Kenya's Mean Exchange rate on the date of the tender opening before presenting its bid and thus any deviation occasioned by fluctuation of currency to the disadvantage of the 1st Applicant did not go to the root of the tender process itself and should have been treated as a minor deviation by the Procuring Entity. The 1st Applicant therefore urged the Board to find that it complied with all the substantive requirements of the Tender Document including submission of a tender security and thus find that the 1st Applicant's bid submitted in response to the subject tender is responsive.

On its part, the Procuring Entity submitted that the 1st Applicant's bid was disqualified from further evaluation for failure to meet a mandatory requirement in view of the fact that the 1st Applicant submitted a tender security of Kshs 1,000,000/- which was less than the required USD 10,000 given that at the time of tender opening the Central Bank of Kenya Mean Exchange Rate was 1 USD/Kshs 105.9.

It was the Procuring Entity's submission that the form of tender security was stated in the Tender Document as an absolute value in line with section 61 (2) (b) of the Act. Further, the forex exchange rates released by the Central Bank of Kenya are an indicative rate and are meant to assist those exchanging currencies gauge the value of the shilling on any given day. In the Procuring Entity's view, it would be an absurdity for the Board to enter into the arena of financial institutions and mandate such institutions on the mode and criteria to be applied in setting forex exchange rates since these are well regulated by the Central Bank of Kenya.

According to the Procuring Entity, all bidders save for the 1st Applicant provided an original tender security of USD 10,000 or its equivalent in foreign currency and given that the 1st Applicant submitted its financial proposal in United States Dollars reveals a selective reading of the Tender Document by the 1st Applicant. The Procuring Entity thus urged the Board

to find that the 1st Applicant's Request for Review application was devoid of merit and dismiss the same with costs to the Procuring Entity.

On its part, the 3rd Respondent submitted that there was no provision in the Tender Document that allowed a bidder to provide its tender security in Kenya Shillings. In the 3rd Respondent's view, the tender security provided by the 1st Applicant was not in the form required in the Tender Document and thus the Procuring Entity rightfully disqualified the 1st Applicant's bid due to its failure to meet the stipulated threshold for submission of tender security.

According to the 3rd Respondent, the 1st Applicant did not request the Procuring Entity for any clarification with respect to this mandatory requirement prior to submitting its bid and in this regard therefore the Procuring Entity rightfully found the Applicant's bid unresponsive. The 3rd Respondent thus urged the Board to dismiss the 1st Applicant's Request for Review Application with costs.

In its determination of this issue, the Board first addressed its mind to the meaning of a 'tender security'.

A 'tender security' is defined under the interpretation section of the Act as follows: -

"...a guarantee required from tenderers by the procuring entity and provided to the procuring entity to secure the fulfilment of any obligation in the tender process and includes such arrangements as bank or insurance guarantees, surety bonds, standby letters of credit, cheques for which a bank is primarily liable, cash deposits, promissory notes and bills of exchange tender securing declaration, or other guarantees from institutions as may be prescribed"

A tender security is therefore a guarantee required from tenderers by a procuring entity to secure fulfilment of a bidder's obligations in a tender process. A tender security may include bank or insurance guarantees, surety bonds, standby letters of credit, cheques for which a bank is primarily liable, cash deposits, promissory notes, bills of exchange, tender securing declaration, or other guarantees from institutions.

Section 61 of the Act further provides that: -

"An accounting officer of a procuring entity may require that tender security be provided with tenders, subject to such requirements or limits as may be prescribed." [Emphasis by the Board]

The purpose of a tender security was explained in the case of **Petition No. 255 of 2016 Okiya Omtatah Okoiti & Another v National Transport and Safety Authority & 2 others [2017] eKLR** where the Honourable Justice Odunga held as follows: -

"In my view the performance bond or tender security is meant to ensure that in the event that the successful tenderer fails to perform the contract the procuring entity would be in a position to secure itself without the necessity of having to institute legal proceedings against an entity that may not be in a position to compensate the public for the loss. This must necessarily be in tandem with Article 227(1) of the Constitution which decrees that a State organ or any other public entity, when it contracts for goods or services, shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. Cost effectiveness in my view requires that as much as possible the procuring entity secures the public funds against any foreseeable risk of loss hence the need for financial security."

Accordingly, a tender security serves to protect a procuring entity in the event a successful tenderer fails to perform or execute the said tender. It further secures public funds in the event of any foreseeable risk or loss in

accordance with the principle of cost-effectiveness as espoused under Article 227 (1) of the Constitution.

Having established the meaning and purpose of a tender security, the Board examined the 1st Applicant's original bid and observes that the 1st Applicant submitted a bid bond issued by Middle East Bank of Kenya Limited on 31st March 2020 in the sum of KShs.1,000,000,000/- (Kenya Shillings One Million Only) valid until 10th of November 2020.

The Board proceeded to examine the Procuring Entity's confidential documents submitted to the Board in accordance with section 67 (3) (e) of the Act, and observes on page 12 of the Procuring Entity's Evaluation Report dated 28th April 2020 the Evaluation Committee's comments following preliminary evaluation of the 1st Applicant's tender was as follows: -

"Tender Security: The Tender Document required the tender security to be submitted in USD 10,000 or equivalent in foreign currency, in the names of both JV partners. The tender security bears the names of Himilo Construction & Supply Limited and Linscan Advanced Pipeline and Tanks Services. Even though the tender opening minutes dated 14th April 2020 under Minute 4 indicated that the bidder submitted tender security of USD 10,000 valid to 10th November 2020,

the evaluation committee confirmed that the tender security was Kshs 1 Million. The equivalent in USD at time of tender opening, using CBK mean rate of 1 USD = KES 105.9, was KES 1,059,000 hence bidder's tender security was less than the required – Non-compliant"

From the above excerpt, the Procuring Entity's Evaluation Committee converted the 1st Applicant's tender security of Kshs 1,000,000/- to United States Dollars using the CBK mean rate of 1 USD = KES 105.9 and determined that the 1st Applicant's tender security was less than the required tender security of USD 10,000. On this basis therefore, the Procuring Entity disqualified the Applicant's bid from further evaluation.

The Board observes that with respect to the subject tender, bidders were required to submit an original tender security of USD 10,000 or its equivalent in foreign currency from a bank registered in Kenya or from an insurance company approved by PPRA.

In its interpretation of this mandatory requirement, the Board considered the meaning of the term 'foreign currency' with respect to the Procuring Entity's Tender Document.

The Cambridge Dictionary defines 'foreign currency' as: -

"money from a country that is not your own"

From this definition, we can deduce that foreign currency is simply money of another country.

The Board examined the Procuring Entity's Tender Document and observes therein no specific definition of the term 'foreign currency'.

Nevertheless, the Board studied Clause 30.2 Performance Guarantee on page 23 of the Tender Document to understand the meaning of 'foreign currency' which provision reads as follows: -

"The Performance Security to be provided by the successful tenderer shall be an unconditional Bank Guarantee issued at the Employer's option by an established and a reputable Bank approved by the Employer and located in the Republic of Kenya and shall be divided into two elements namely, a performance security payable in foreign currencies (based upon the exchange rates determined in accordance with clause 35.4 of the Conditions of Contract) and a performance security payable in Kenya Shillings. The value of the two securities shall be in the same proportions of foreign and local currencies as requested in the form of foreign currency requirements." [Emphasis by the Board]

From the above provision, it can be inferred that there are two types of currencies applicable under the Tender Document; foreign currencies and Kenya Shillings or what is referred to in this particular provision as 'local currency'.

Furthermore, the Board examined the Procuring Entity's website that is www.kpc.co.ke and observes that the Procuring Entity, that is, Kenya Pipeline Company Limited, is a state corporation owned by the Kenya Government and situate in Kenya. Noting that the Tender Document was issued in Kenya by an entity based in Kenya, it is plausible to conclude that Kenya Shillings in this instance cannot be referred to as a foreign currency with respect to the subject tender but is in essence the local currency.

Applying this interpretation to the mandatory requirement in issue, the Board notes that any tender security given in Kenya Shillings was not in compliance with this mandatory requirement of the Tender Document.

To further buttress this point, the Board observes Clause 13.1 Tender Security on page 14 of the Tender Document which reads as follows: -

"The tenderer shall furnish as part of his tender, a Tender Security in the amount and form stated in the Appendix to Instructions to Tenderers"

Further, Clause 13 of the Appendix to Instructions To Tenderers on page 30 of the Tender Document provides as follows: -

"Amount of Tender Security is USD 10,000"

The Board observes the following proviso with respect to the Appendix to Instructions on page 30 of the Tender Document which reads as follows: -

"The following appendix to instructions to tenders shall complement or amend the provisions of the instructions to tenderers (Section II). Wherever there is a conflict between the provisions of the instructions to tenderers and the appendix, the provisions of the appendix to herein shall prevail over those of the instructions to tenderers"

Accordingly, where there is a conflict between the provisions of the instructions to tenderers and the appendix, the provisions of the appendix shall apply with respect to the Tender Document.

It is worth noting that the term 'conflict' in this instance as defined by the Merriam Webster Dictionary means: -

"to be different, opposed, or contradictory; to fail to be in agreement or accord"

On one hand, Mandatory Requirement (b) of the Preliminary Evaluation Criteria on page 24 of the Tender Document provided that bidders were required to submit an original tender security of USD 10,000 or its equivalent in foreign currency from a bank registered in Kenya or from an insurance company approved by PPRA. On the other hand, Clause 13 of the Appendix to Instructions To Tenderers on page 30 of the Tender Document provided that bidders were required to submit a tender security in the amount of USD 10,000.

It is the Board's view that a Tender Document should speak for itself and in order to give meaning to its provisions, a Tender Document should not be read in part, but should be read as a whole for a better interpretation of the provisions therein. This means that the provisions within a Tender Document should not be read in isolation and where a question arises as to the meaning of a certain provision, all the provisions within a Tender Document must be considered in light of the general purpose of the tender itself.

Having compared Mandatory Requirement (b) of the Preliminary Evaluation Criteria on page 24 of the Tender Document and Clause 13 of the Appendix to Instructions To Tenderers on page 30 of the Tender Document, this Board is of the view that due to the conflict between the two provisions that is the difference in the requirements of the two provisions, the latter

provision would prevail and thus bidders were required to submit a tender security in the amount of USD 10,000. This means that tender security was to be provided by bidders only in United States Dollars and not in any other currency.

However, if the Board were to agree with the 1st Applicant and deem Kenya Shilling to be a foreign currency with respect to the Procuring Entity's Tender Document, the question that would arise would be what rate of conversion would apply for a bidder who provides its tender security in foreign currency in accordance with Mandatory Requirement (b) of the Preliminary Evaluation Criteria on page 24 of the Tender Document.

With this in mind, the Board examined the Procuring Entity's Tender Document and observes therein Clause 25 Conversion to Single Currency on page 21 of the Tender Document which reads as follows: -

"25.1 For comparison of tenders, the tender price shall first be broken down into the respective amounts payable in various currencies by using the selling rate or rates of the Central Bank of Kenya ruling on the date of the submission of tenders.

25.2 The Employer will convert the amounts in various currencies in which the tender is payable (excluding provisional sums but including Dayworks where priced competitively) to Kenya Shillings at the selling rates stated in clause 25.1."

Further, Clause 11.3 Currencies of Tender and Payment on page 13 of the Tender Document provides as follows: -

"The rate or rates of exchange used for pricing the tender shall be selling rate or rates of the Central Bank ruling on the date thirty (30) days before the final date for the submission of tenders"

From the above two provisions, we observe that the conversion rates or rates of exchange provided for in the Tender Document applied with respect to 'pricing of the tender' or the 'tender price', which begs the question what is a 'tender price'?

The Board notes that the interpretation section of the Act defines a "tender" under section 2 in the following terms: -

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

Further, section 82 of the Act states that: -

"The tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be the subject of correction, adjustment or amendment in any way by any person or entity"

In view of the above provisions, the Board notes, in a procurement process, bidders submit a tender, that is, ***an offer in writing to supply goods, services or works at a price pursuant to an invitation to tender, request for quotation or proposal by a procuring entity.***

In that offer, bidders quote a tender sum, i.e. the price at which they undertake to execute or implement the tender if found successful. Pursuant to section 82 of the Act, this tender sum, that is quoted in a bidder's Form of Tender is absolute and final and is not subject to any correction, adjustment or amendment by a procuring entity.

In view of the foregoing, it is evident that a tender price and a tender security are two different components of a tender and the conversion rates provided for in the Tender Document applied with respect to the former, that is, the tender price and did not apply with respect to conversion of the amount of tender security submitted by a bidder in foreign currency.

This means that the Procuring Entity did not provide a rate of conversion with respect to tender security in its Tender Document and may explain why Clause 13 of the Appendix to Instructions To Tenderers with respect to tender security, amended Mandatory Requirement (b) of the Preliminary Evaluation Criteria on page 24 of the Tender Document from USD 10,000 or equivalent in foreign currency to only USD 10,000.

The Board examined the tender securities submitted by all the six (6) bidders in response to the subject tender and notes that all bidders, save for the Applicant, submitted their tender securities in United States Dollars.

In this regard therefore, the Board finds that the Procuring Entity conversion of the 1st Applicant's tender security of Kenya Shillings 1,000,000,000/- using a conversion rate that did not apply to a tender

security during the preliminary evaluation stage was contrary to the provisions of the Tender document.

The Board is cognizant of section 80 (2) of the Act which provides as follows: -

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

Accordingly, a procuring entity is required to evaluate and compare bids using the procedures and criteria set out in its tender document.

It is the Board's considered view that all tenderers who participated in the subject procurement process were duly guided by the provisions in the Procuring Entity's Tender Document and as such a legitimate expectation was created in the minds of all tenderers that the evaluation process would comply strictly with the Tender Document and that the tender securities submitted by tenderers would be considered and evaluated in accordance with the criteria provided in the Tender Document.

It is therefore the finding of this Board that the Procuring Entity did not evaluate the 1st Applicant's bid at Preliminary Evaluation stage in accordance with section 80 (2) of the Act, as read together with Article 227 (1) of the Constitution with respect to Mandatory Requirement (b) of

Clause 33.1 Preliminary Evaluation Criteria on page 24 of the Tender Document read together with Clause 13 of the Appendix to Instructions To Tenderers on page 30 of the Tender Document.

The Board will now proceed to the second issue framed for determination:

Technical Evaluation Criterion No 2 , that is, Technical Proposal for Carrying Out In-Line Inspection (ILI) for Line 5 and Material Grade Determination (MGD) for Line 5' provided as follows: -

"Submit a complete works methodology relevant to the works in-hand covering ILI and the MGD (5 points, Otherwise 0)

Submit the type, sequence and procedure for cleaning pigs and tracking (5 points, Otherwise 0)

Submit the type, sequence and procedure for running the instrument pigs and tracking. This should be accompanied with simple calculations determining time durations to run the pigs in each section and battery-life therein (4 points, Otherwise 0)

Submit sample reporting templates for preliminary and final reports (2 points, Otherwise 0)

Submit specifications for the geometry inspection pig (2 points, Otherwise 0)

Submit specifications for the MFL inspection pig (3 points, Otherwise 0)

Submit specifications for the UT inspection pig (3 points, Otherwise 0)

Submit specifications for the Material Grade Determination Inspection Tool (4 points, Otherwise 0)

Submit a sample joint dig verification procedure on how to confirm the same from a presented report (2 points, Otherwise 0).....

.....

Note:

In order to qualify in Technical Evaluation and proceed to financial evaluation, bidders must achieve: -

- i. Minimum overall mark of 70 points on the technical evaluation***
- ii. 100% score in criterion No. 2***
- iii. At least 50% score in each of the rest of the criteria”***

Accordingly, bidders were required to submit with respect to the aforementioned nine specifications in response to Technical Criterion No. 2 in the Tender Document. Furthermore, in order for a bidder to qualify in Technical Evaluation, bidders were required to attain a minimum overall mark of 70 points, score 100% with respect to Technical Criterion No. 2 and score at least 50% in each of the rest of the technical criteria.

The 2nd Applicant contended that due to its past engagements with the 3rd Respondent, the 2nd Applicant was of the view that the 3rd Respondent's bid document allegedly did not meet the following specifications under Technical Criterion No. 2 that is: -

"a) Submit a complete works methodology relevant to the works in-hand covering ILI and the MGD (5 points, Otherwise 0)

b) Submit specifications for the Material Grade Determination Inspection Tool (4 points, Otherwise 0)"

The 2nd Applicant submitted that according to the 3rd Respondent's '*Pipeline Pigging and Integrity Management Conference Paper*' (hereinafter referred to as "PPIMC paper"), the 3rd Respondent could not have met the Material Grade Determination Inspection Tool threshold stipulated under the Tender Document as the 3rd Respondent's process did not determine the material

grade of each spool but only groups pipe spools into populations with the same characteristics using their Multiple Dataset (MDS) and platform.

It was the 2nd Applicant's submission that the 3rd Respondent did not provide a Material Grade Determination of each pipe stool in line with the specifications of Item 1.4 on page 43 and 53 of the Tender Document but instead provided a methodology which uses an indirect measurement method which cannot deliver the anticipated results as per the requirements in the subject tender.

According to the 2nd Applicant, its own process did not need excavations for Material Grade Validation but in its view, the 3rd Respondent would have to do significantly more excavations in order to collect property data for every population of pipe stools determined by Multiple Data Set (MDS) inline inspection tool. In this regard therefore, the 2nd Applicant submitted that the Procuring Entity ought to have found that the 3rd Respondent's bid document was inconsistent with the Tender Document and disqualified its bid at Technical Evaluation.

In response, the Procuring Entity submitted that at technical evaluation both the 2nd Applicant's bid document and the 3rd Respondent's bid document met the technical requirements of the Tender Document with

each scoring the maximum points allocated to the following specifications:

-

"a) Submit a complete works methodology relevant to the works in-hand covering ILI and the MGD (5 points, Otherwise 0)

b) Submit specifications for the Material Grade Determination Inspection Tool (4 points, Otherwise 0)"

From the results of the detailed technical evaluation, the Procuring Entity submitted that both the 2nd Applicant and the 3rd Respondent proceeded to Financial Evaluation, where the 3rd Respondent was found to be the lowest evaluated bidder at a tender price of USD 3,369,497.32 inclusive of all taxes.

The Procuring Entity contended that the PPMIC paper referred to by the 2nd Applicant which allegedly impugned the technical competence of the 3rd Respondent was not only immaterial but irrelevant to the evaluation proceedings as the paper was published sometime in 2016, yet the subject tender was floated in 2020. Moreover, the Procuring Entity was only bound by law and the provisions of the Tender Document to evaluate all bids, including the 3rd Respondent's. It was therefore the Procuring Entity's submission that the 2nd Applicant's allegations with respect to the 3rd Respondent's bid was outside the scope of the evaluation process and that

in the Procuring Entity's view, the 2nd Applicant was attempting to evaluate the 3rd Respondent's bid using its own evaluation criteria.

On its part, the 3rd Respondent submitted that it is a leading provider of Inline Inspection and Material Grade Determination Services and is an inventor of patented Inline Inspection Technology Tools and Material Determination Tools and has continuously undertaken and developed new research in Inline Inspection and Material Grade Determination Technologies for the past 100 years. It therefore contended that the PPMIC paper referred to by the 2nd Respondent was published in 2016 and is therefore an outdated document with no evidentiary value in these proceedings and should therefore be ignored by this Board.

The 3rd Respondent submitted that it does provide Material Grade Determination of each pipe spools comprising the pipeline, all fittings and all girth welds meeting specification 1.4 on page 43 and 53 of the Tender Document. In any event, the Tender Document required bidders to provide a suitable process and not a specific process as alluded to by the 2nd Applicant to provide Material Grade Determination. It was therefore the 3rd Respondent's submission that the Procuring Entity complied with Article 227 of the Constitution and the Act in the technical evaluation of its bid.

Having considered submissions by all parties, the Board studied the 3rd Respondent's original bid and observes that with respect to Technical Criterion No. 2, '*Submit a complete works methodology relevant to the works in-hand covering ILI and the MGD (5 points, Otherwise 0)*' the 3rd Respondent in Part A of its Technical Proposal Documents submitted a 'Work Methodology for Inline Inspection' from page 2 to 102 of its bid document.

Further, in response to Technical Criterion No. 2, '*Submit specifications for the Material Grade Determination Inspection Tool (4 points, Otherwise 0)*' the 3rd Respondent provided detailed specifications of its Inspection Tool in Part A of its Technical Proposal Documents on page 44 to page 50 of its bid document.

The Board then proceeded to examine the Procuring Entity's Evaluation Report dated 28th April 2020 and observes that the Evaluation Committee noted the following on page 24 of the report with respect to Technical Criterion No. 2, '*Submit a complete works methodology relevant to the works in-hand covering ILI and the MGD (5 points, Otherwise 0)*' with respect to the 3rd Respondent's bid: -

"Williamson: Submitted comprehensive works methodology covering ILI and MGD. It covered the methodology of pipeline cleaning pig and instrumented tool runs (inspection

methodology) It indicated detailed method statement for pigging operations as well as method statement for pipeline positive material identification (PMI)”

With respect to Technical Criterion No. 2, 'Submit specifications for the Material Grade Determination Inspection Tool (4 points, Otherwise 0)' the Evaluation Committee noted as following on page 25 of the Evaluation Report with respect to the 3rd Respondent's bid: -

"Williamson submitted specifications for the Material Grade Determination Inspection tool. The submission indicated metal loss specifications, deformation specifications, suggested minimum trap dimensions and feature characterization and location. They further attached specifications for positive material identification (PMI) and tolerances."

Upon conclusion of the technical evaluation, the Evaluation Committee concluded as follows as captured on page 29 of the evaluation report: -

"M/s T.D. Williamson (UK) Limited in Joint Venture with Miranda East Africa Limited (Bidder 6) scored

- 100 out of 100 overall points***
- 100% score in criterion No. 2***

- **100% in each of section 1.0, 2.0, 3.0 and 4.0**

From the results of the detailed technical evaluation the following two bidders proceeded to financial evaluation: Bidder 6 and Bidder 5”

From the foregoing, it is evident that the Procuring Entity’s Evaluation Committee determined conclusively that the 3rd Respondent met the technical specifications as stipulated in the Tender Document, including Technical Criterion No. 2 as it awarded the 3rd Respondent full marks upon conclusion of technical evaluation.

The 2nd Applicant disputed the Procuring Entity’s evaluation of the 3rd Respondent’s bid and in its submissions, referred the Board to a PPMIC paper published by the 3rd Respondent which in its view demonstrates that the 3rd Respondent could not have met the Material Grade Determination Inspection Tool threshold stipulated under the Tender Document and therefore did not satisfy Technical Criterion No. 2. However, the Board notes, the 2nd Applicant did not submit any evidence or proof demonstrating that the 3rd Respondent used the said methodology referred to in the PPMIC paper in its bid documents submitted in response to the subject tender. The Board therefore cannot rely on the 2nd Applicant’s allegations in this regard to prove its assertions.

It is important to note that a procurement process is initiated by a procuring entity to address its specific procurement needs as articulated in its annual procurement plan. It therefore follows that a procuring entity is in a better position to assess what it needs in a particular procurement process and thus the Board cannot usurp the role of a procuring entity's evaluation committee and attempt to evaluate a particular bidder's bid.

Notably, the role of evaluation of tenders squarely lies with a procuring entity's evaluation committee. The Board's mandate is to hear, review and determine tendering disputes where a procuring entity is alleged to have breached a duty imposed on such procuring entity under the Act or Regulations, which breach is alleged to have caused an Applicant in a Request for Review to suffer or to risk suffering loss or damage.

The High Court in **Miscellaneous Civil Application 140 of 2019 Republic v Public Procurement Administrative Review Board; Accounting Officer, Kenya Rural Roads Authority & 2 others (Interested Parties) Ex Parte Roben Aberdare (K) Ltd [2019] eKLR**

"The starting point is that the bid documents required bidders to demonstrate capacity and competence. It provided that a bidder lists plant and equipment to be used in the project and proof of ownership. In strict adherence to

this requirement, the second Interested Party provided a list of the plant and equipment it desired to use in the project. The assault on this list as I understand it is two-fold. First, it listed equipment which was procured duty free. I have already dealt with this ground of attack in the above issue. Second, it is argued that it listed equipment it was not going to use in the project. With tremendous respect, this ground of attack is highly speculative. The core test is whether a bidder demonstrated capacity and competence. The Procuring Entity knew what it was looking for, and, it was satisfied that capacity and competence were established. There is nothing materially wrong or unreasonable for a bidder to provide a list of Plant and Equipment it owns to perform a contract, provided the Plant and Equipment is relevant to the work in question. Demonstrating capacity and competence is the key test.

In the abovementioned case, it was the High Court's view that a procuring entity in any procurement process is aware of what it is looking for and the core test in any procurement process is whether a bidder has demonstrated the necessary capacity and competence as required under the Tender Document to the satisfaction of the Procuring Entity.

In this instance, the Procuring Entity was satisfied that the 3rd Respondent had fully met the technical requirements as stipulated under the Tender Document, including Technical Criterion No. 2.

Accordingly, the Board finds that the Procuring Entity evaluated the 3rd Respondent' bid in accordance with section 80 (2) of the Act, as read together with Article 227 (1) of the Constitution with respect to Technical Evaluation Criterion No 2: Technical Proposal for Carrying Out In-Line Inspection (ILI) for Line 5 and Material Grade Determination (MGD) for Line 5.

The Board takes cognizance of section 173 (b) of the Act, which states that:-

“Upon completing a review, the Review Board may do any one or more of the following-

(a).....;

(b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings...”

Having found that the Procuring Entity did not evaluate the 1st Applicant's bid at Preliminary Evaluation Stage in accordance with section 80 (2) of the

Act, as read together with Article 227 (1) of the Constitution with respect to Mandatory Requirement (b) of Clause 33.1 Preliminary Evaluation Criteria on page 24 of the Tender Document read together with Clause 13 of the Appendix to Instructions To Tenderers on page 30 of the Tender Document, this Board is of the considered view that the Procuring Entity ought to conduct a re-evaluation of the 1st Applicant's bid at Preliminary Evaluation stage taking into consideration the findings of this Board and in accordance with the provisions of the Tender Document, the Act and the Constitution.

In totality, the grounds raised in the Request for Review filed by the 2nd Applicant fail, whereas the ground raised regarding the Procuring Entity's evaluation of the 1st Applicant's bid succeeds with respect to 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, No. 33 of 2015, the Board makes the following orders in this Consolidated Request for Review: -

- 1) The Procuring Entity's Letter of Notification of Award of Tender No. KPC/PU/003 – OT/19-20 for In-Line Inspection (ILI) and Material Grade Determination for Line 5 (Mombasa**

to Nairobi) addressed to M/s T.D. Williamson (UK) Limited in Joint Venture with Miranda East Africa Limited dated 26th May 2020, be and is hereby cancelled and set aside.

2) The Procuring Entity's Letter of Notification of Unsuccessful Bid with respect to Tender No. KPC/PU/003 – OT/19-20 for In-Line Inspection (ILI) and Material Grade Determination for Line 5 (Mombasa to Nairobi) addressed to M/s Himilo Construction & Supply Limited in JV with Linscan Advanced Pipelines & Tanks Services dated 26th May 2020, be and is hereby cancelled and set aside.

3) The Procuring Entity is hereby directed to re-admit the 1st Applicant's bid at the Preliminary Evaluation stage and conduct a re-evaluation at the Preliminary Evaluation Stage, with respect to Mandatory Requirement (b) of Clause 33.1 Preliminary Evaluation Criteria on page 24 of the Tender Document read together with Clause 13 of the Appendix to Instructions To Tenderers on page 30 of the Tender Document taking into consideration the Board's finding in this case, and proceed with the procurement process including the making of an award within fourteen (14) days from the date of this decision.

4) Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.

Dated at Nairobi on this 26th Day of June, 2020

CHAIRPERSON

SECRETARY

PPARB

PPARB