

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 72/2020 OF 8<sup>TH</sup> JUNE 2020**

**BETWEEN**

**VACONO ALUMINIUM COVER GMBH,  
PHILAFE ENGINEERING CO. LTD, DALTON ENTEPRISES  
LTD.....1<sup>ST</sup> APPLICANT**

**AND**

**THE ACCOUNTING OFFICER,  
KENYA PIPELINE COMPANY LIMITED.....1<sup>ST</sup> RESPONDENT  
KENYA PIPELINE COMPANY LIMITED.....2<sup>ND</sup> RESPONDENT**

**AND**

**WELD-CON ENGINEERING & CONSTRUCTION  
LIMITED.....INTERESTED PARTY**

Review against the decision of the Accounting Officer of Kenya Pipeline Company Limited with respect to Tender No. KPC/PU/008-OT/18-19 for Tank Repair and Installation of Aluminium Dome Roof on Tank 11 TK-201.

**BOARD MEMBERS**

- |                            |                  |
|----------------------------|------------------|
| 1. Arch. Steven Oundo, OGW | -Member Chairing |
| 2. Ms. Phyllis Chepkemboi  | -Member          |
| 3. Dr. Joseph Gitari       | -Member          |

## **IN ATTENDANCE**

1. Mr. Philip Okumu

-Holding brief for the Secretary

## **BACKGROUND TO THE DECISION**

### **The Bidding Process**

#### **A. February 2019 Advertisement**

Kenya Pipeline Company Limited (hereinafter referred to as “the Procuring Entity”) previously advertised Tender No. KPC/PU/008-OT/18-19 for Tank Repair and Installation of Aluminium Dome Roof on Tank 11 TK-201 at PS 10 in print media and the Procuring Entity’s website on 12<sup>th</sup> February 2019. The Procuring Entity received a total of 5 No of bids by the tender submission deadline of 5<sup>th</sup> March 2019 and the same were opened by a Tender Opening Committee.

An Evaluation Committee was appointed on 6<sup>th</sup> March 2019 by the Procuring Entity’s Managing Director and the said Evaluation Committee conducted evaluation in three stages namely; Mandatory Requirements/Preliminary Evaluation, Technical Evaluation and Financial Evaluation. At the end of evaluation, the Evaluation Committee recommended award of the subject tender to **M/s Vacono Aluminium Covers in Joint Venture with Philafe Engineering Co. Ltd and Catrimec Services Ltd at their tender sum of Kshs. 183,910,377.64.** A Professional Opinion was prepared by the Procuring Entity’s Head of Procurement function on 21<sup>st</sup> May

2019 who urged the Managing Director to consider awarding the tender to the aforementioned bidder as recommended by the Evaluation Committee. The said professional opinion was approved by the Procuring Entity's Managing Director on 22<sup>nd</sup> May 2019. Thereafter, all bidders were notified of the outcome of their bids in letters dated 24<sup>th</sup> May 2019.

### **REQUEST FOR REVIEW NO. 59/2019**

M/s Weld-Con Limited lodged Request for Review No. 59/2019 on 7<sup>th</sup> June 2019 seeking the following orders: -

- 1. An order nullifying the decision of the Procuring Entity;***
- 2. An order directing the Procuring Entity to tender afresh and conform with the Public Procurement and Asset Disposal Act, 2015 and the Constitution of Kenya; and***
- 3. An order directing the Procuring Entity to pay the costs of the Request for Review.***

The Board having considered each of the parties' cases in Request for Review No. 59/2019, directed as follows: -

- 1. The entire procurement process for Tender No. KPC/PU/008-OT/18-19 for Tank Repair and Installation of Aluminium Dome Roof on Tank 11 TK-201 at PS 10 (including the notification of award dated 24<sup>th</sup> May 2019 addressed to M/s Vacono Aluminium Covers in JV with Philafe Engineering Ltd**

**& Catrimec Services and notification of unsuccessful bid dated 24<sup>th</sup> May 2019 addressed to M/s Weld-Con Limited) is hereby nullified.**

- 2. The Procuring Entity is hereby directed to tender afresh for the Repair and Installation of Aluminium Dome Roof on Tank 11 TK-201 at PS 10 within fourteen (14) days from the date of this decision.**
- 3. Each party shall bear its own costs.**

## **B. January 2020 Advertisement**

The Procuring Entity advertised Tender No. KPC/PU/008-OT/18-19 for Tank Repair and Installation of Aluminium Dome Roof on Tank 11 TK-201 in January 2020. According to the documentation furnished to the Board, there is a letter of notification of termination of Tender for Tank Repair and Installation of Aluminium Dome Roof on Tank 11 TK-201 at Nairobi Terminal-No. KPC/PU/008-OT/18-19 dated 13<sup>th</sup> March 2020 addressed to the Director General, Public Procurement Regulatory Authority and letters dated 9<sup>th</sup> March 2020 addressed to bidders.

## **C. March 2020 Advertisement**

On 17<sup>th</sup> March 2020, the Procuring Entity advertised Tender No. KPC/PU/008-OT/18-19 for Tank Repair and Installation of Aluminium Dome Roof on Tank 11 TK-201 (hereinafter referred to as "the subject tender") on MyGov Publication Website inviting sealed bids from eligible bidders.

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

The Procuring Entity received a total of 6 No. of bids by the bid submission deadline of 7<sup>th</sup> April 2020. The same were opened shortly thereafter by a Tender Opening Committee at the Procuring Entity's Head Office in the presence of bidders' representatives and recorded as follows: -

Bidder Name
1. Eagle Power Services in J/V with Mechanical Works & Tanks
2. Belgravia Construction Ltd, Belgravia Services Ltd
3. Lex Oil Field Solutions Kenya in J/V with EPCM Consultants South Africa
4. AEA Ltd in J/V with Civicon Ltd
5. Vacono Aluminium Covers in J/V with Philafe Engineering & Dalton Enterprises Ltd
6. Weld Con Engineering and Construction Ltd

## **Evaluation of Bids**

The Procuring Entity's Managing Director appointed an Evaluation Committee vide Memo dated 9<sup>th</sup> April 2020. The said Evaluation Committee conducted evaluation of bids in the subject tender in the following three stages: -

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

### **1. Preliminary Evaluation**

At this stage, the Evaluation Committee applied the criteria outlined in Clause 1.3 of Part I. Invitation to Tender at page 6 and 7 to 29 of the Document for Tank Repair and Installation of Aluminium Dome Roof on Tank 11 TK-201

issued in March 2020 (hereinafter referred to as “the Tender Document”) read together with Clause 33.1 of the Instructions to Tenderers at page 27 to 29 of the Tender Document. At the end of evaluation at this stage, the Evaluation Committee found only two bidders responsive, that is, M/s Lex Oil Field in J/V with EPCM and M/s Weld-Con Ltd and were therefore the only bidders who proceeded to Technical Evaluation.

## 2. Technical Evaluation

At this stage, the Evaluation Committee applied the criteria outlined in Clause 26 and Clause 33 of the Instructions to Tenderers of the Tender Document, which require bidder to attain a minimum overall pass mark of 70% and score at least 50% on criterion under Clause 1 (i), 1(ii), 1(iii) and 1(iv), Clause 3; a score of 100% on Clause 3 (f) of the Instructions to Tenderers of the Tender Document in order to proceed to Financial Evaluation. At the end of Technical Evaluation, the scores awarded to the two remaining bidders was recorded as follows:-

<b>Summary of Technical Scores</b>						
		Lex Oil Field			Weldcon	
	<b>Criterion</b>	<b>Max Score</b>	<b>Score</b>	<b>%</b>	<b>Score</b>	<b>%</b>
1	Experience and Past Performance	<b>27</b>	6	22	27	100
2	Financial Capability	<b>10</b>	9	90	9	90
3	Qualification and Experience of Key Personnel	<b>17</b>	12	71	17	100
4	Construction Plant & Equipment Availability	<b>20</b>	15	75	20	100
5	Methodology of Works	<b>18</b>	18	100	18	100
6	Quality Control Plan	<b>8</b>	4	50	8	100
	<b>Total</b>	<b>100</b>	<b>64</b>	<b>64%</b>	<b>99</b>	<b>99%</b>

From the foregoing, the Evaluation Committee observed that both bidders achieved the minimum technical score and were therefore eligible to proceed to Financial Evaluation.

### **3. Financial Evaluation**

At this stage, the Evaluation Committee applied the criterion under Clause 35. 1 of the Instructions to Tenderers at page 33 of the Tender Document which required the Evaluation Committee to examine the tender prices submitted by bidders and recommended award of the subject tender to the lowest evaluated bidder.

### **Recommendation**

At the end of Financial Evaluation, the Evaluation Committee found that M/s Weldcon Engineering and Construction Ltd submitted the lowest evaluated bid therefore recommended award of the subject tender to the said bidder at Kshs. 152,337,513.89 inclusive of VAT.

### **Due Diligence**

Clause 35.3 of the Instructions to Tenderers at page 33 of the Tender Document provided that the Procuring Entity may confirm the qualifications of the tenderer who submitted the lowest evaluated responsive tender. Accordingly, the Evaluation Committee addressed letters dated 30<sup>th</sup> April 2020, the Procuring Entity wrote various clients of M/s WeldCon Engineering

& Construction Ltd to confirm their qualifications and capacity to execute the subject tender and received positive responses on 5<sup>th</sup> May 2020.

### **Professional Opinion**

In a Professional Opinion dated 7<sup>th</sup> May 2020, the Procuring Entity's Acting General Manager, Supply Chain, received the Evaluation Report dated 29<sup>th</sup> April 2020 and further noted the results of the due diligence exercise. She opined that the procurement process met the provisions of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") and urged the Procuring Entity's Managing Director to approve award of the subject tender to M/s WeldCon Engineering & Construction Ltd at its tender sum of Kshs. 152,337,513.89 inclusive of VAT. The Managing Director approved the said professional opinion on 11<sup>th</sup> May 2020.

### **Notification to Bidders**

In letters dated 26<sup>th</sup> May 2020, the Procuring Entity's Managing Director notified the successful bidder and all other unsuccessful bidders of the outcome of their bids.

### **REQUEST FOR REVIEW NO. 72 OF 2020**

M/s Vacono Aluminium Covers GMBH, Philafe Engineering Co. Ltd, Dalton Enterprises Ltd (hereinafter referred to as "the Applicant") lodged a Request for Review dated and filed on 9<sup>th</sup> June 2020 together with a Statement sworn



and filed on even date and a Supporting Affidavit sworn and filed on even date, through the firm of Ong'anda & Associates Advocates, seeking the following orders: -

- 1. An order declaring the determination of the Applicant's bid non-responsive in Tender No. KPC/PU/008-OT/18-19, Tank Repair and Installation of Aluminium Dome Roof Tank on Tank 11 TK-201, illegal, null and void;***
- 2. An order setting aside the Procuring Entity's decision declaring the Applicant non-responsive as set out in the letter dated 26<sup>th</sup> May 2020;***
- 3. An order substituting the Procuring Entity's decision with the Board's decision that the Applicant complied with the mandatory requirement of submitting an NCA1 mechanical;***
- 4. An order setting aside the Procuring Entity's decision terminating Tender No. KPC/PU/008-OT/18-19, Tank Repair and Installation of Aluminium Dome Roof Tank on Tank 11 TK-201 of January 2020;***
- 5. An order directing the Procuring Entity to re-evaluate the bids in accordance with the law and findings of the Board; and***
- 6. An order awarding costs of the Request for Review to the Applicant.***

On 16<sup>th</sup> March 2020, the Board issued Circular No. 1/2020 and the same was published on the Public Procurement Regulatory Authority's website

(www.ppra.go.ke) in recognition of the challenges posed by the COVID-19 pandemic. Through the said Circular, the Board 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 24<sup>th</sup> 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. Clause 1 at page 2 of the said Circular further specified that pleadings and documents shall be deemed as properly filed if they bear the official stamp of the Board.

On 23<sup>rd</sup> June 2020, the Request for Review came up for deliberation before the Board, wherein the Board noted that the Board Secretary addressed a letter dated 8<sup>th</sup> June 2020 to the Procuring Entity notifying it of the Request for Review and further directing it to submit in 11 bound copies a response to the Request for Review within 5 days from 8<sup>th</sup> June 2020 together with all the confidential documents pertaining to the procurement process in the subject tender as required by section 67 (3) (e) of the Act

As at 23<sup>rd</sup> June 2020, the Procuring Entity had not filed its Response to the Request for Review and the confidential documents pertaining to the subject procurement process as directed by the Board Secretary. The Interested Party filed a Notice of Appointment of the firm of Coulson Harney, LLP Advocates to act on its behalf in the Request for Review on 19<sup>th</sup> June 2020 and sent an unsigned Replying Affidavit on Friday, 19<sup>th</sup> June 2020. On Saturday, 20<sup>th</sup> June 2020, the Interested Party sent a Replying Affidavit sworn on 20<sup>th</sup> June 2020 via email, but did not file its Replying Affidavit as directed in Clause 1 at page 2 of the Circular No. 2/2020 of 24<sup>th</sup> March 2020.

Having considered the documentation before it, and in exercise of the powers conferred upon it by section 173 of the Act, the Board on 23<sup>rd</sup> June 2020, issued the following orders: -

- 1. The Procuring Entity is hereby directed to file and serve its Response to the Request for Review by 5.00pm on Wednesday, the 24<sup>th</sup> day of June 2020.**
- 2. The Procuring Entity is hereby directed to file to the Board all the confidential documents relating to Tender No. KPC/PU/008-OT/18-19, Tank Repair and Installation of Aluminium Dome Roof Tank on Tank 11 TK-201 by 10.00 am on Thursday, the 25<sup>th</sup> day of June 2020.**
- 3. The Interested Party is hereby directed to file its Replying Affidavit with the Board and serve all parties to the Request**

**for Review by 12.00 pm on Wednesday, the 24<sup>th</sup> day of June 2020.**

**4. The Applicant is at liberty to file and serve a Further Statement in Support of its Request for Review by 10.00 am on Thursday, the 25<sup>th</sup> day of June 2020.**

**5. All parties are at liberty to file and serve their written submissions by 10.00 am on Thursday, the 25<sup>th</sup> day of June 2020.**

**6. The Board's deliberation of this Request for Review is stood over to 1.30pm on Thursday, the 25<sup>th</sup> day of June 2020.**

**7. Costs shall be in the cause.**

Accordingly, the Applicant lodged its Written Submissions dated and filed on 25<sup>th</sup> June 2020 while the Procuring Entity lodged a Response to the Request for Review sworn on 24<sup>th</sup> June 2020 and filed on 25<sup>th</sup> June 2020 together with Written Submissions dated and filed on 25<sup>th</sup> June 2020, through the firm of Rachier & Amollo, LLP Advocates and the confidential document pertaining to the subject procurement process. The Interested Party lodged its Replying Affidavit sworn on 20<sup>th</sup> June 2020 and filed on 23<sup>rd</sup> June 2020 through the firm of Coulson Harney LLP.

## **BOARD'S DECISION**

The Board has considered all the pleadings and written submissions filed before it, including the confidential documents submitted to it pursuant to section 67 (3) (e) of the Act and finds that the following issues call for determination: -

***I. Whether the Applicant has the requisite locus standi under section 167 (1) of the Act;***

Depending on the determination of the above issue: -

***II. Whether the Applicant's allegation that the Procuring Entity failed to terminate Tender No. KPC/PU/008-OT/18-19 for Tank Repair and Installation of Aluminium Dome Roof on Tank 11 TK-201 at PS 10 advertised in January 2020 in accordance with section 63 of the Act, has been raised within the statutory period under section 167 (1) of the Act;***

Depending on the determination of Issue No. (ii) above: -

***III. Whether the Procuring Entity terminated Tender No. KPC/PU/008-OT/18-19 for Tank Repair and Installation of***

***Aluminium Dome Roof on Tank 11 TK-201 at PS 10 advertised in January 2020 in accordance with section 63 of the Act, thus ousting the jurisdiction of the Board.***

***IV. Whether the Applicant's allegation that the Addendum issued on 26<sup>th</sup> March 2020 breached section 75 of the Act, has been raised within the statutory period under section 167 (1) of the Act;***

Depending on the determination of Issue No. (IV) above: -

***V. Whether the Procuring Entity issued the Addendum dated 26<sup>th</sup> March 2020 in accordance with section 75 of the Act; and***

***VI. Whether the Procuring Entity evaluated the Applicant's bid at the Preliminary Evaluation Stage in accordance with Clause 1.3 (i) of Part 1. Invitation to Tender and Clause 1.3 (e) of Part I. Invitation to Tender at page 6 of the Tender Document, read together with sections 79 (1) and 80 (2) of the Act.***

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

It has well been an enunciated principle that jurisdiction is everything, following the decision in **The Owners of Motor Vessel 'Lillian 'S' vs Caltex Oil Kenya Ltd 1989 K.L.R 1**, where Justice Nyarangi held that: -

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

Further in **Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Ltd and 2 Others, Civil Application No. 2 of 2011**, the court had occasion to interrogate the instruments that arrogate jurisdiction to courts and other decision making bodies. The court held as follows: -

***"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."***

This Board is a creature of statute owing to the provision of Section 27 (1) of the Act which provides that: -

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

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

Further, Section 28 of the Act provides as follows: -

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

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

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

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

The above provisions demonstrate that the Board is a specialized, central independent procurement appeals review board with its main function being reviewing, hearing and determining tendering and asset disposal disputes. To invoke the jurisdiction of this Board, a party must file its Request for Review in accordance with section 167 (1) of the Act, which provides that: -



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

The Board observes that at paragraph 24 to 35 of the Interested Party's Replying Affidavit, it is stated as follows: -

***"Following the completion of the tender process and the notification to both the successful bidder and the unsuccessful bidders, the main partner in the Applicant's joint venture reached out to the Interested Party with a view to seeing whether there was any scope to work together***

***The approach was made by the Senior Vice President of Sales at Vacono Aluminium Cover GMBH, Michael Jentsch, who sent an email to the Operation Director of the Interested Party on 27<sup>th</sup> March 2020***

***In the exchange of emails, and in particular emails dated 15<sup>th</sup> June 2020, the said Mr. Jentsch indicated that Vacono had in the past gotten two approvals from the 2<sup>nd</sup> Respondent, but that "its local agents had made mistakes"***

***Whilst Vacono's offer to supply the materials was being considered these proceedings challenging the tender award were filed and the Interested Party queried the same in a response to Vacono given the discussions that were ongoing on potential supply***

***Mr. Jentsch expressed surprised to learn that Vacono's local agents had filed these review proceeding without authority or mandate and he expressed displeasure with the fact that these proceedings were even instituted***

***It is clear from the said unsolicited communications from Vacono that the filing of these proceedings by the Applicants does not have the support of the main partner in the joint venture at all***

***I now produced at page 2 of Exhibit "AB1" a true copy of the said email from Mr. Jentsch of Vacono as sent to the Interested Party***

***On the basis of these confirmations from one member of the Applicant joint venture itself, it is clear that this Honourable Review Board ought to declare these review proceedings frivolous and vexatious and dismiss such proceedings with costs in accordance with section 172 of the Public Procurement and Asset Disposal Act***

***I am advised by our advocates on record, and verily believe the same to be true, that any application for review must be***

***filed by a party who has a clearly defined interest in the process. In accordance with section 167 (1) of the Public Procurement and Asset Disposal Act, 2015, such a party should be a candidate or tenderer***

The Board studied the emails referenced by the Interested Party in its Replying Affidavit as Exhibit AB1 and notes that the same are communications between one Mr. Alim Bhanji of email [abhanji@weld-con.com](mailto:abhanji@weld-con.com) to one Mr. Jentsch Michael of email [Michael.Jentsch@vacono.com](mailto:Michael.Jentsch@vacono.com) with other persons copied in the said emails including; Mr. Adam Jin ([ajin@weld-con.com](mailto:ajin@weld-con.com)) and Mr. Zaher Bhanji ([zbhanji@weld-con.com](mailto:zbhanji@weld-con.com)) as follows:-

***From: Jentsch, Michael***

***To: Alim Bhanji***

***Cc: Adam Jin, Zaher Bhanji***

***Subject: AW: KPC TK-201/OFFER....***

***Date: Monday, 15<sup>th</sup> June 2020 14:46:28***

*Dear Alim,*

*We never went to court against the end-user and I also cannot remember we went to court against the tank builder*

*We are not aware that our contact went to court in our name*

*In addition, I confirm to KPC on 18.02.20 that our agent used a not Vacono authorized letter*

*We are really unhappy with this agent in Kenya*

*Kind regards*

*Michael*

**Von: Alim Bhanji [<mailto:abhanji@weld-con.com>]**

**Gesendet: Monday, 15 Jun 2020 13.25**

**An: Jentsch, Michael [Michael.Jentsch@vacono.com](mailto:Michael.Jentsch@vacono.com)**

**Cc: Adam Jin [ajin@weld-con.com](mailto:ajin@weld-con.com); Zaher Bhanji [zbhanji@weld-con.com](mailto:zbhanji@weld-con.com)**

*Dear Michael,*

*Your Local agent has gone to the procurement courts to argue that they were unlawfully disqualified.*

*As Vacono is the main bidder for your consortium this means that it is Vacono who is taking KPC to court over this matter. Were you aware of this?*

*I am not sure how this will affect Vacono's relationship with KPC in the future?*

*Thanks and regards*

***On Mon, Jun 15, 2020 at 2.18;***

*Dear Alim, I do not know what means PPOA. We have sent authorization letters to our local contacts but they failed with KPC-see attached*

*Kind regards,*

*Michael*

In response to the Interested Party's allegations, the Applicant also attached email communications between Mr. Jentsch Michael ([Michael.Jentsch@vacono.com](mailto:Michael.Jentsch@vacono.com)) to Mr. Godfrey Kiprono Cheruiyot ([cheruiyotgodfrey@gmail.com](mailto:cheruiyotgodfrey@gmail.com)) stating as follows:-

***Fwd: TENDER FOR REPAIR & INSTALLATION OF ALUMINIUM DOME ROOF FOR TANK 11-TK-201***

***Godfrey Kiprono Cheruiyot <[cheruiyotgodfrey@gmail.com](mailto:cheruiyotgodfrey@gmail.com)> Wed, Jun 24, 2020 at 1.02 am***

***To: [onganda@ongandalaw.com](mailto:onganda@ongandalaw.com)***

***.....Forwarded message.....***

***From: Jentsch, Michael <[Michael.Jentsch@vacono.com](mailto:Michael.Jentsch@vacono.com)>***

***Date: Wed, June 24, 2020, 12.44***

***Subject: AW: TENDER FOR REPAIR & INSTALLATION OF ALUMINIUM DOME ROOF FOR TANK 11-TK-201***

*Dear Godfrey,*

*Thank you for your information regarding the KPC project for Tank 11-TK-201*

*Vacono is not requesting withdrawal of the appeal and we are fully with our partner in Kenya you have bided within the JV*

*Kind regards,*

*Michael Jentsch*

*Senior Vice President Sales*

*Vacono Aluminium Covers GMBH*

*Tel: +49-7623-71786-55*

*[Michael.jentsch@vacono.com](mailto:Michael.jentsch@vacono.com)*

*[www.vacono.com](http://www.vacono.com)*

Having considered the email correspondences adduced by the Applicant and the Interested Party, it is important to note that this Board cannot rely on the said emails to substantially conclude whether or not the representative of M/s Vacono Aluminium Covers GMBH had authority to file the instant Request for Review, even though a representative of M/s Vacono Aluminium Covers GMBH states that they are not requesting a withdrawal of the instant Request for Review.

In determining the Applicant's locus standi, this Board must first address its mind on the import of section 167 (1) of the Act and further determine whether there was authorization in the Applicant's original bid issued to a person to act on behalf of the Joint Venture Partnership in the subject procurement process.

Firstly, section 167 (1) of the Act provides that a candidate or a tenderer who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process.

Section 2 of the Act provides that: -

***"tenderer" means a person who submitted a tender pursuant to an invitation by a public entity"***

The Board studied the Tender Opening Minutes dated 7<sup>th</sup> April 2020 and notes that M/s Vacono Aluminium Covers GMBH submitted a bid in Joint Venture with M/s Philafe Engineering Ltd and M/s Dalton Enterprises Ltd therefore meets the definition of a tenderer under section 167 (1) of the Act.

Secondly, at page 33 of its original bid, the Applicant attached a Joint Venture Agreement dated 18<sup>th</sup> January 2020. At Clause 4 thereof, it is stated as follows: -

***"This Joint Venture Agreement is entered into this 18<sup>th</sup> January 2020 between***

***Vacono Aluminium Covers GMBH....***

***And***

***Dalton Enterprises Ltd***

***And***

***Philafe Engineering Ltd"***

***Referred herein singularly and collectively as "Party" or "Parties" respectively***

***.....***

***The Parties Hereby Covenant as follows: -***

***(1) .....***;

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

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

***(4) To jointly submit the Tender under the name of the Lead Partner, M/s Vacono Aluminium Covers GMBH***

Further, at page 3 of its original bid, the Applicant attached a Letter of Authorization dated 18<sup>th</sup> February 2020 issued on the letterhead of M/s Vacono Aluminium Covers GMBH signed by one Mr. Gunter Goldel, Chief Operating Officer and Mr. Michael Jentsch, Senior Vice President, Sale, who are officers of M/s Vacono Aluminium Covers GMBH, stating as follows: -

***TENDER FOR TANK REPAIR & INSTALLATION OF ALUMINIUM DOME ROOF FOR TANK 11-TK-201 AT PS10 TENDER NO. KPC/PU/008-OT/18-19***

*Dear ladies and gentlemen,*

*We confirm that Mr. Godfrey Kiprono Cheruiyot ID 20167493 is our representative for Kenya to act on behalf of Vacono and especially the current tender KPC/PU/008-OT/18-19*

*This letter is valid for one year after issuing date*

*Thanking you and assuring our best services at all times*



Having considered the Applicant's Joint Venture Agreement dated 18<sup>th</sup> February 2020 and the Letter of Authorization dated the same day, the Board notes that M/s Vacono Aluminium Covers GMBH is the Lead partner in the Applicant's Joint Venture. Further, M/s Vacono Aluminium Covers GMBH, being the Lead Partner in the Joint Venture granted specific authorization to Mr. Godfrey Kiprono Cheruiyot to act in the subject tender. It is also worth noting that, the Lead Partner's authorization is a representation of what the other members in the joint venture partnership have consented to, since the other two partners authorized M/s Vacono Aluminium Covers GMBH to submit a bid on behalf of the Joint Venture partnership.

Filing of Request for Review applications is usually done by candidates or tenderers who wish to approach the Board at any time when they learn of an alleged breach of duty by a Procuring Entity or when notified of the outcome of their bids. This right is exercised during the procurement process, because after signing of a contract, a process called contract execution begins and tenderers would not have recourse to this Board after a contract has been signed in accordance with section 135 (3) of the Act.

This therefore means, Mr. Godfrey Kiprono Cheruiyot acts under authorization given by M/s Vacono Aluminium Covers GMBH, the Lead Partner that represents the Joint Venture Partnership in all matters pertaining to the subject procurement process and this includes filing of Request for Review applications

The Board studied the Applicant's Statement in Support of the Request for Review, the Applicant's Supporting Affidavit and Further Statement in Support of the Request for Review and notes that they are all sworn by Mr. Godfrey Kiprono Cheruiyot.

Even though there is no evidence that the emails mentioned hereinbefore are authentic, there is sufficient evidence in the Applicant's original bid that Mr. Godfrey Kiprono Cheruiyot had authority from the Lead Partner in the Joint Venture to act in relation to the subject tender, and this includes filing of Request for Review applications, a right available to candidates and tenderers during a procurement process, since no bidder would have recourse before this Board once a contract is signed in accordance with section 135 (3) of the Act. In the Board's view, what the Lead Partner authorized is a clear representation of the wishes of the other partners in the joint venture.

Accordingly, the Board finds that the Applicant has the requisite locus standi under section 167 (1) of the Act and authority that was duly granted by the Lead Partner (the Lead Partner in the Joint Venture acting on behalf of the Joint Venture Partners) allowing the representative in Kenya to act in the subject procurement process, including filing of Request for Review applications.

On the second issue, the Applicant contended that the Procuring Entity breached the provisions of section 63 of the Act since in the Applicant's view, the Procuring Entity failed to follow the procedure stipulated under that provision in terminating Tender No. KPC/PU/008-OT/18-19 for Tank Repair and Installation of Aluminium Dome Roof on Tank 11 TK-201 at PS 10 advertised in January 2020 and further failed to notify the Applicant of such termination.

At paragraph 6 to 8 of its Request for Review, the Applicant submits that the Procuring Entity did not provide any valid reasons on the status of the re-tendering process initiated in January 2020 and that no report was ever given to the Public Procurement Regulatory Authority. At paragraph 19 of its Supporting Statement, the Applicant submits that it participated in the third tender (i.e. the subject tender) which is substantially similar to the other previous tenders advertised by the Procuring Entity, but that the Procuring Entity initiated procurement of the subject tender without lawfully terminating the tender advertised in January 2020 and notifying the Applicant of the same. The Applicant further submits at paragraph 7 of its Further Statement that it only learnt of the purported termination through the successful bidder's response (i.e. the Interested Party) and as such the Applicant had no way of challenging the termination in the absence of notification from the Procuring Entity.

On its part, the Procuring Entity at paragraph 4 of its Response to the Request for Review submits that it complied with the provisions of section 63 in terminating the tender advertised in January 2020 and further referred the Board to letters dated 9<sup>th</sup> March 2020 and submit that the same were issued to all bidders. Accordingly, the Procuring Entity takes the view that this Board lacks jurisdiction to entertain the complaint raised by the Applicant of a termination that was concluded on 9<sup>th</sup> March 2020.

In its Replying Affidavit, the Interested Party at paragraph 9 thereof states that it submitted its bid in the tender advertised in January 2020 and it is aware that the same was terminated in March 2020. Thereafter, a formal letter was sent to all bidders who participated in the tender advertised in January 2020 through letters dated 9<sup>th</sup> March 2020. According to the Interested Party, if the allegations of the Applicant are true that it was never notified of termination of the tender advertised in January 2020, then it should have raised the same instead of participating in the tender advertised in March 2020 (i.e. the subject tender), and only raising the allegation of an unlawful termination because it was not awarded the subject tender. At paragraph 11 of its Replying Affidavit, the Interested Party takes the view that the Applicant's complaint on termination of the tender advertised in January 2020 has been raised outside the timelines provided in section 167 (1) of the Act.

Having considered parties' submissions, this Board is cognizant of the fact that **Tender No. KPC/PU/008-OT/18-19 for Tank Repair and Installation of Aluminium Dome Roof on Tank 11 TK-201** has a long history going back to 12<sup>th</sup> February 2019 when the same was first advertised (hereinafter referred to as "the February Tender"). M/s Weld-Con Limited previously lodged Request for Review No. 59/2019 before this Board challenging the Procuring Entity's decision and this Board on 21<sup>st</sup> June 2019 ordered the Procuring Entity to retender for the **Repair and Installation of Aluminium Dome Roof on Tank 11 TK-201**.

Thereafter, the Procuring Entity advertised **Tender No. KPC/PU/008-OT/18-19 for Tank Repair and Installation of Aluminium Dome Roof on Tank 11 TK-201** in January 2020 (hereinafter referred to as "the January Tender"). From the parties' submissions, it is alleged that the January Tender was terminated. On 17<sup>th</sup> March 2020, the Procuring Entity again advertised **Tender No. KPC/PU/008-OT/18-19 for Tank Repair and Installation of Aluminium Dome Roof on Tank 11 TK-201** which is the subject tender, now before this Board. For purposes of clarity and determination of the second issue, we shall refer to the subject tender as "the March Tender".

It is worth noting that, the Applicant at all times, participated in the February Tender and was the successful bidder when the same was awarded as can be seen from the documentation and proceedings in **PPARB Application**

**No. 59 of 2019, Weld-Con Ltd v. the Accounting Officer, Kenya Pipeline Company Limited & 2 Others.** The Applicant also participated in the January Tender and the March Tender as admitted at paragraph 19 of its Statement in Support of the Request for Review.

The Applicant saw the March Tender advertised on 17<sup>th</sup> March 2020 thereafter obtained the Tender Document and came across Clause 1.1 of Part 1. Invitation to Tender which clearly described the Tender Name of the March Tender as **Tender for Repair and Installation of Aluminium Dome Roof on Tank 11 TK-201**. The Tender Document further stated at Clause 1.3 (h) of Part I. Invitation to Tender that: -

***"Pre-tender Site Visit, to be held at Nairobi Terminal***

- ***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. Daniel Nthakyo....the engineer will only be available between 25<sup>th</sup> and 27<sup>th</sup> March 2020"***

These two provisions basically alerted bidders that the Procuring Entity, through the March Tender, is procuring (i.e. retendering) for the same

services it previously tenderer for, through the January Tender and that it was likely that bidders who participated in the January Tender already had Site Visit Certificates because they attended the site visit organized in the January Tender. Therefore, it would be sufficient for such bidders to attach the January Tender Site Visit Certificate to the bid submitted in response to the March Tender, because a site visit helps bidders to familiarize with the nature and scope of the works to be implemented in a tender.

This therefore means, a bidder who participated in the January Tender, such as the Applicant, familiarized itself with the nature of works in the January Tender, obtained a Site Visit Certificate that would be applicable in the March Tender and would therefore be alive to the fact that the Procuring Entity, through the March Tender, is procuring for the same services advertised through the January Tender. We say so because, at page 31 of the Applicant's original bid is a Site Visit Certificate issued by the Procuring Entity on **21<sup>st</sup> January 2020** to a representative of one of the Applicant's Joint Venture partners, Mr. Isaac Bowen from M/s Philafe Engineering Limited and this is clearly another instance where the Applicant knew for a fact that the March Tender is substantially similar to the January Tender.

Thereafter, the Applicant submitted its bid by the tender submission deadline of 7<sup>th</sup> April 2020 and now wants the Board to believe that at all times nothing ever prompted it to enquire about the fate of the January Tender, but could

only do so after the outcome of the March Tender was made to it through the letter of notification of unsuccessful bid dated 26<sup>th</sup> May 2020.

The Applicant has made submissions before this Board that since it was never notified of the termination by the Procuring Entity with reasons, it could not therefore challenge the same before the Board. Even assuming this argument is true, the Board wonders what then prompted the Applicant to file a Request for Review alleging the Procuring Entity's failure to follow the procedure under section 63 of the Act, yet it has not received any letter of notification by the time it was filing the instant Request for Review. In its attempts to mislead this Board, the Applicant submits at paragraph 7 of its Further Statement filed on 25<sup>th</sup> June 2020 that it only learnt of the purported termination through the successful bidder's response filed on 23<sup>rd</sup> June 2020. Interestingly, the Applicant had already cited unlawful termination of the January Tender as one of the grounds of its Request for Review filed on **8<sup>th</sup> June 2020**.

It is important at this juncture to carefully examine the import of section 167 (1) of the Act, specifically, with respect to the timelines provided therein for approaching this Board. The said provision states that an aggrieved candidate or tenderer who has suffered or risks suffering, loss or damage due to the breach of a duty imposed on a procuring entity may seek administrative review within fourteen days of notification of award or date



of occurrence of the alleged breach at any stage of the procurement process, or disposal process.

The Board would like to make an observation that the fourteen-day statutory period under section 167 (1) of the Act ensures that candidates and tenderers exercise their right to administrative review in good time, so that by the time the Board has completed a review, a procurement process can continue without undue delay. That's why a candidate or a tenderer may approach this Board at the early stages of a procurement process when such candidate or tenderer learns of an alleged breach of duty by a Procuring Entity. It was therefore not the intention of the legislature for bidders to wait until they receive letters of notification of the outcome of their bids, even though they already learnt of an alleged breach before evaluation has been completed and before notification of the outcome of evaluation has been done by a procuring entity.

Having noted the sequence of events in the subject procurement process and the Applicant's own admission that it participated in the January and March Tenders, the Board observes that applying the reasonable man test, any serious bidder who has participated in a procurement process and notes that the same has been re-tendered through the March Tender as was the case herein, would first wonder what the fate of the January Tender was. Such a person would be motivated to enquire from the Procuring Entity about

the fate of the January Tender after the March Tender was advertised or even approach this Board.

In **Judicial Review Case No. 21 of 2015, Republic v Public Procurement Administrative Review Board & 2 others [2015] eKLR**, the High Court while considering the purpose of the statutory timeline imposed under section 167 (1) of the Act held as follows: -

**"The jurisdiction of the Board is only available where an application for review has been filed within 14 days from the date of the delivery of the results of the tender process or from the date of the occurrence of an alleged breach where the tender process has not been concluded. The Board has no jurisdiction to hear anything filed outside fourteen days..."**

**The timelines in the PP&DA [that is, the 2015 Act] were set for a purpose. Proceedings touching on procurement matters ought to be heard and determined without undue delay. Once a party fails to move the Board within the time set by the Act, the jurisdiction of the Board is extinguished in so far as the particular procurement is concerned..."**

**[Emphasis by the Board]**

The Board concurs with the High Court's finding in the above case and would hasten to add that the period set under section 167 (1) of the Act is a

statutory timeline which must be adhered to by an aggrieved candidate or tenderer. It provides an opportunity within which an aggrieved candidate or tenderer may exercise its right to administrative review to challenge a procurement process in view of a breach of duty by a procuring entity as soon as the breach occurs so that once the Board dispenses with a review application, the procurement process can proceed to its logical conclusion for the public good.

This Board has noted the rising number of bidders who abuse the options under section 167 (1) of the Act, whereby they learn of an alleged breach of duty during the early stages of a procurement process but such bidders wait for the outcome of their bids, and if such outcome is not favourable, they feel motivated to file a case against a procuring entity, raising complaints that could have been raised at any stage before evaluation is concluded.

The Applicant herein could have approached the Board after 17<sup>th</sup> March 2020 when the March Tender was advertised or fourteen days thereafter having noted that the Procuring Entity is re-tendering for the same services previously tendered through the January Tender. It is a well-established principle that "Equity aids the vigilant and not the indolent". Equity has never come to the aid of the indolent such as the Applicant herein, who sat on its right to administrative review. The Applicant waited patiently for the outcome of its bid and is similar to a player in a battlefield who participates

in a game and only complains about the game after it has lost to an opponent. The Applicant already ignored the fate of the January Tender by participating in the March Tender up to the time it was notified of the outcome of the March Tender and is now estopped from raising an issue with the January Tender so late in the day.

Accordingly, the Board finds that it lacks jurisdiction to address the question whether the Procuring Entity terminated Tender No. KPC/PU/008-OT/18-19 for Tank Repair and Installation of Aluminium Dome Roof on Tank 11 TK-201 at PS 10 advertised in January 2020 in accordance with section 63 of the Act. The effect of this finding is that the Board shall not address the third issue for determination and now moves to the fourth issue framed for determination.

On the fourth issue, the Board observes that the Applicant took the view that the Procuring Entity breached section 76 of the Act in issuing the Addendum dated 26<sup>th</sup> March 2020 that substantially altered the substance of the subject tender. According to the Applicant, the Procuring Entity removed a mandatory requirement for bidders to provide NCA1 electrical which materially interfered with the scope of works in the subject tender and that such an amendment gave an advantage to certain bidders to the detriment of the Applicant.

At paragraphs 30 to 35 of its Written Submissions, the Procuring Entity submits that amendments to the Tender Document were made in response to queries made by bidders and that the Procuring Entity exercised its discretion under section 75 of the Act in amending the Tender Document. The Procuring Entity further states that the removal of the NCA1 Electrical Certificate requirement did not materially affect the substance of the subject tender and such action was in the Applicant’s favour since, according to the Procuring Entity, the Joint Venture Partners did not provide the same in the Applicant’s original bid.

The Interested Party on the other hand states at paragraph 18 of its Replying Affidavit that the Applicant saw the Addendum issued on 26<sup>th</sup> March 2020 but still participated in the subject tender with full knowledge of the same and urged the Board to also note that the Bill of Quantities in the Tender Document demonstrate that there is little to no electrical work that is involved in the works being tendered, hence the NCA1 Electrical Certificate requirement was superfluous.

Having considered parties’ submissions, the Board would like to simply reiterate that the Applicant had full knowledge of the Addendum issued on 26<sup>th</sup> March 2020 which provided at Clause 3 thereof as follows: -

	<b><i>Bidders’ Query</i></b>	<b><i>KPC Response</i></b>
<b><i>1</i></b>	<b><i>.....</i></b>	<b><i>.....</i></b>
<b><i>2</i></b>	<b><i>.....</i></b>	<b><i>.....</i></b>
<b><i>3</i></b>	<b><i>Mandatory Requirements for submission for NCA 1 Electrical</i></b>	<b><i>This requirement is expunged</i></b>

The Applicant participated in the subject procurement process by submitting its bid by the tender submission deadline of 7<sup>th</sup> April 2020 and never challenged the Addendum dated 26<sup>th</sup> March 2020 in accordance with section 167 (1) of the Act. The Applicant ought to have approached this Board within fourteen (14) days after 26<sup>th</sup> March 2020 and this period lapsed on 9<sup>th</sup> April 2020. The Applicant only challenged the Addendum issued on 26<sup>th</sup> March 2020 through the instant Request for Review that was filed on 8<sup>th</sup> June 2020 and the same is outside the statutory period under section 167 (1) of the Act.

Accordingly, the Board finds that it lacks jurisdiction to entertain the Applicant's allegation that the Procuring Entity issued the Addendum dated 26<sup>th</sup> March 2020 in contravention of section 75 of the Act, therefore shall not address the fifth issue framed for determination.

On the last issue, the Board observes that the criterion under Clause 1.3 (e) of Part I. Invitation to Tender at page 6 of the Tender Document forms the substantive issue raised by the Applicant in the Request for Review. The Applicant received a letter of notification of unsuccessful bid dated 26<sup>th</sup> May 2020 with the following details: -

***"We refer to your tender for the above  
Following preliminary evaluation of the proposals received,  
KPC regrets to inform you that your tender was non-***

***responsive because M/s Dalton Enterprises did not submit a NCA 1 Mechanical as required in Clause 1.3 (e) of the Invitation to Tenders ..."***

Having considered parties' submissions, the Board observes that Clause 1.3 (e) of Part I. Invitation to Tender at page 6 of the Tender Document provides as follows: -

***"For local firms they are required to produce Valid NCA 1 certificate for Mechanical Works and valid NCA1 for Electrical Works. The certificates shall be traceable to National Construction Authority of Kenya website, otherwise lead to disqualification"***

Pursuant to Clause 3 of the Addendum dated 26<sup>th</sup> March 2020, the component of NCA 1 Certificate for Electrical Works was removed therefore bidders were only required to provide NCA 1 Certificate for Mechanical Works.

The Board further studied the Tender Document and notes that Clause 1.3 (i) of Part 1. Invitation to Tender of the Tender Document further provided as follows:-

***"EITHER: In the event of participation by Foreign Firms, a local participation of a minimum of 40% of contract value...."***

***Foreign Firms must submit a Local Partnership Agreement and section of works to be handled by each of the partners as per the format provided under Part 5***

***The Local Partnership agreement may be a Joint Venture, a Memorandum of Understanding (MOU) or any other form of agreement signed by all the parties involved. ALL THE LOCAL PARTNERS MUST SUBMIT mandatory documents detailed under (a), (c), (d) and (e) hereinabove. Percentage of the sections of works to be undertaken SHALL be demonstrated as shown in the Format Part 5***

***OR: In the event of participation by LOCAL FIRMS, a Local Partnership Agreement MUST be submitted. The local partnership agreement may be a Joint Venture, a Memorandum of Understanding (MOU) or any other form of agreement signed by all the parties involved. ALL THE LOCAL PARTNERS MUST SUBMIT mandatory documents detailed under (b), (f), (g) and (h) hereinabove***

The Board having considered the requirement under Clause 1.3 (i) of Part 1. Invitation to Tender of the Tender Document proceeds to make the following findings: -



- Foreign firms were required to submit Local Partnership Agreement in the form of a Joint Venture Agreement or Memorandum of understanding provided the local partners in the partnership submit the following mandatory documents highlighted in bold: -

***a) Certificate of Incorporation/Registration (Local firms and/or equivalent for foreign firms) for documents written in any other language other than English, must be accompanied by interpretation in English Language and certified by commissioner for oaths;***

b) .....

***c) Valid KRA Tax Compliance certificate (For local firms)***

***d) Signed declaration form (For both local and foreign firms;***

***e) For local firms they are required to produce Valid NCA1 certificate for Mechanical Works...The Certificate shall be traceable to National Construction Authority of Kenya website, otherwise will lead to disqualification***

- Local firms were required to submit Local Partnership Agreement in the form of a Joint Venture Agreement or Memorandum of understanding provided the local partners in the partnership submit the following mandatory documents highlighted in bold: -

***(b) Original Tender Security of Kes 200,000.00 from a bank registered in Kenya or from an Insurance***

***foreign currency. Valid for 180 days from the date of tender opening***

- (f) Original Letter of Authorization from the Manufacturer of Aluminium Dome Roof if bidder is not the Manufacturer (The letter must be presented in the manufacturer's letter head) (as this is a re-tender, a bidder who participated in the previous tender shall submit an original or a copy of the letter submitted in the previous tender)***
- (g) Original letter of authorization from the manufacturer of internal floating roof (Full contact IFR type) if Bidder is not the manufacturer. (As this is a re-tender, a bidder who participated in the previous tender shall submit an original or a copy of the letter submitted in the previous tender)***
- (h) Pre-tender Site Visit Certificate to be held at Nairobi Terminal***
  - This is a retender; 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. Daniel***

***Nthakyo....the Engineer will only be available  
between 25<sup>th</sup> and 27<sup>th</sup> March 2020***

Having considered the foregoing requirements, the Board studied the Applicant's original bid and notes that: -

- *At page 5 of its original bid, the Applicant attached the Certificate of Registration of M/s Vacono Aluminium Covers GMBH, with a certified translation of the said Certificate at page 6 thereof showing that M/s Vacono Aluminium Covers GMBH is registered as a taxable person under the Ministry of Finance Lorrach, Rheinfelden, Germany on 30<sup>th</sup> October 2014;*
- *At page 7 of its original bid, the Applicant attached a Certificate of Incorporation issued to M/s Philafe Engineering Ltd by the Registrar of Companies in Kenya under the repealed Companies Act, Chapter 486, Laws of Kenya on 27<sup>th</sup> November 1995; and*
- *At page 8 of its original bid, the Applicant attached a Certificate of Incorporation issued to M/s Dalton Enterprises Ltd by the Registrar of Companies in Kenya under the repealed Companies Act, Chapter 486, Laws of Kenya on 22<sup>nd</sup> March 2010.*

From the foregoing, the Board observes that the Applicant comprises of one foreign firm registered in Germany, that is, M/s Vacono Aluminium Cover GMBH and two other local firms, that is, M/s Philafe Engineering Ltd and M/s Dalton Enterprises Ltd which are registered in Kenya. M/s Vacono Aluminium

Cover GMBH is a foreign firm that submitted its Joint Venture Partnership Agreement with the other two local firms, to wit, M/s Philafe Engineering Ltd and M/s Dalton Enterprises Ltd.

Accordingly, the Board finds that the requirement under Clause 1.3 (i) of Part 1. Invitation to Tender of the Tender Document that, **ALL THE LOCAL PARTNERS MUST SUBMIT mandatory documents detailed under (a), (c), (d) and (e) hereinabove** applied to M/s Philafe Engineering Ltd and M/s Dalton Enterprises Ltd since they are local partners that bid with a Foreign Firm. In essence, M/s Philafe Engineering Ltd and M/s Dalton Enterprises Ltd were both required to comply with Clause 1.3 (e) of Part I. Invitation to Tender at page 6 of the Tender Document, since the two are both local partners within the meaning of Clause 1.3 (i) of Part 1. Invitation to Tender of the Tender Document.

The Board studied the Applicant's original bid and notes that in response to the requirement under Clause 1.3 (i) of Part 1. Invitation to Tender read together with Clause 1.3 (e) of Part I. Invitation to Tender at page 6 of the Tender Document, the Applicant provided the following: -

- *At page 22 of its original bid [similar to the certificate attached at page 24 of the Applicant's original bid], a Contractor Annual Practicing License issued by National Construction Authority on 9<sup>th</sup> July 2019 to M/s Philafe Engineering Ltd as having been duly licensed as a*

*Mechanical Engineering Service Contractor under NCA1 Category valid up to 30<sup>th</sup> June 2020; and*

- *At page 23 of its original bid [similar to the certificate attached at page 25 of the Applicant's original bid], a Certificate of Registration issued by National Construction Authority on 9<sup>th</sup> July 2019 as having been duly registered as a Mechanical Engineering Service Contractor under NCA1 Category valid up to 30<sup>th</sup> June 2022.*

The Board studied the Applicant's original bid in its entirety but did not find an NCA1 Certificate for Mechanical Works issued to M/s Dalton Enterprises Ltd. Section 79 (1) of the Act on responsiveness of tenders provides that: -

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

Further to this, section 80 (2) of the Act that:-

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

The above provisions demonstrate that evaluation and comparison of bids is done using the procedures and criteria set out in the tender documents. In addition to this, a bidder's failure to comply with mandatory requirements renders such a bidder non-responsive. The Tender Document at Clause 1.3 (i) of Part 1. Invitation to Tender of the Tender Document clearly stated that

Clause 1.3 (e) of Part I. Invitation to Tender applied to all local partners bidding with foreign firms. The Applicant's Joint Venture comprised of two local partners who had the obligation to provide their respective NCA 1 Certificate for Mechanical Works, a mandatory requirement that was not met by M/s Dalton Enterprises Ltd.

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 mandatory requirements in the Tender Document 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 Article 227 (1) of the Constitution which provides as follows: -

***"When a State Organ or public entity contract for goods and services it shall do so in a system that is fair, equitable, transparent, competitive and cost-effective"***

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

Accordingly, the Board finds that the Procuring Entity evaluated the Applicant's bid in accordance with Clause 1.3 (i) of Part 1. Invitation to Tender and Clause 1.3 (e) of Part I. Invitation to Tender at page 6 of the Tender Document, read together with sections 79 (1) and 80 (2) of the Act.

In totality, the Request for Review is hereby dismissed in terms of 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 8<sup>th</sup> June 2020 with respect to Tender No. KPC/PU/008-OT/18-19 for Tank Repair and Installation of Aluminium Dome Roof on Tank 11 TK-201, be and is hereby dismissed.**
- 2. Each party shall bear its own costs in the Request for Review.**

**Dated at Nairobi this 29<sup>th</sup> day of June 2020**

**CHAIRPERSON**

**SECRETARY**

**PPARB**

**PPARB**