

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 76/2020 OF 10th JUNE 2020

BETWEEN

POWERGEN TECHNOLOGIES LIMITED.....APPLICANT

AND

ICT AUTHORITY.....1ST RESPONDENT

AND

DR. KATHERINE W. GETAO.....2ND RESPONDENT

Review against the decision of ICT Authority with respect to Tender No. OCT/PQ/01/2019-2020 for Prequalification of Suppliers for Supply, Installation and Maintenance of Aerial Optical Fiber.

BOARD MEMBERS

- | | |
|------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mr. Nicholas Mruttu | -Member |
| 3. Ms. Robi Chacha | -Member |

IN ATTENDANCE

- | | |
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| 1. Mr. Philemon Kiprop | -Holding brief for the Secretary |
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BACKGROUND TO THE DECISION

The Bidding Process

ICT Authority (hereinafter referred to as “the Procuring Entity”) advertised Tender No. OCT/PQ/01/2019-2020 for Prequalification of Suppliers for Supply, Installation and Maintenance of Aerial Optical Fiber (hereinafter referred to as “the subject tender”) on its Website and the Public Procurement Information Portal on 6th April 2020.

Bid Submission Deadline and Opening of bids

The Procuring Entity received a total of 14 No. of bidders by the bid submission deadline of 15th April 2020. The bids were opened shortly thereafter at the Procuring Entity’s Head Office, 12th Floor Teleposta Tower Kenyatta Avenue, Nairobi at 10.00am, in the presence of all bidders, by a Tender Opening Committee that recorded the bids submitted as follows: -

BIDDER NO	Bidder’s Name
1	M/s Quavatel Limited
12	M/s Semgil Fiber Solutions Ltd
13	M/s Kinde Engineering Works Ltd
14	M/s Sagemcom Limited
2	M/s Soliton Telmec,
6	M/s Masaba Services
3	M/s Egypro East Africa Limited
5	M/s Prime Telcoms Limited
4	M/s Alternate Communications Limited
11	M/s Detrix Communication
9	M/s Camusat Kenya,
7	M/s Adrian Kenya Limited
10	M/s Powergen Technologies Limited
8	M/s Linksoft Integrated Services (East Africa) Limited

Evaluation of Bids

Having appointed an Evaluation Committee, the 14 bids received were evaluated at the Mandatory Requirements Evaluation stage and a recommendation made at the end of evaluation regarding the bidders who have been prequalified in the subject tender.

Mandatory Requirements Evaluation

At this stage, the Evaluation Committee evaluated the bids against the mandatory requirements listed in Section II. Instructions to Candidates at page 9 of the Tender Document as follows: -

a) Statutory documents

- Valid Tax Compliance Certificate (TCC). The tax compliance certificate must be valid as at the date of tender opening;
- Registration certificate/ Certificate of incorporation;
- Valid trade license.

b) CR 12 certificate from the registrar of companies.

c) Confidential Business questionnaire duly filled and signed;

d) Anti-corruption affidavit signed and stamped by a Commissioner of Oaths;

e) Bidders must serialize all pages for each bid submitted from the first to the last page including any annexes;

f) Bidders must fill the Bio data form attached to this tender document in line with Executive Order No. 2 of 2018;

- g)** Provide copies of signed and stamped audited accounts for the company for the last three accounting years i.e. 2016, 2017 and 2018;
- h)** The Bidder must provide a valid ICT Authority ICTA Category 3 and above in Networks;
- i)** The Bidder must have a valid Communication Authority certification on Networks;
- j)** The bidder should provide evidence of having undertaken works of similar nature in the last five (5) years. At least 3 completed **similar projects**. Evidence includes certificate of completion;
- k)** Provide the firm profile;
- l)** Submit duly completed registration Form (1), (3), (4) (5), (7) and (8) attached in the tender document;
- m)** The bidder must give evidence of having a safety & health policy that covers the risks involved in undertaking projects of similar nature;
- n)** Staff assigned to this project must have the following: -
 - *Pole Climbing certificate from Kenya Power & Lighting Company or equivalent;*
 - *Must have relevant experience of at least two (2) years of cable stringing.*

At the end of evaluation, Bidder B4, B7, B8, B9, B10 and B11 were considered to be non-responsive.

Recommendation.

The Evaluation Committee recommended the following bidders to be prequalified having successfully met the mandatory requirements; B1, B2, B3, B5, B6, B12, B13 and B14 (M/s Quavatel Limited; M/s Semgil Fiber Solutions Ltd; M/s Kinde Engineering Works Ltd; M/s Sagemcom Limited; M/s Soliton Telmec; M/s Masaba Services; M/s Egypro East Africa Limited; M/s Prime Telcoms Limited respectively.

Professional Opinion

In a professional opinion dated 14th May 2020, the Procuring Entity's Manager, Supply Chain reviewed the Evaluation Report and took the view that the subject procurement process complied with the provisions of section 93 (1) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") which prescribes a procedure for prequalification. He further advised the Chief Executive Officer of the Procuring Entity to approve pre-qualification of the following firms: -

1. Quavatel Limited;
2. Soliton Telmec;
3. Egypro East Africa Limited;
4. Prime Telcoms Limited;
5. Masaba Services Limited;
6. Semgil Fiber Solutions;
7. Kinde Engineering Works Limited; and
8. Sagemcom Limited.

Notification

In letters dated 26th May 2020, the Procuring Entity notified all bidders of the outcome of their bids.

THE REQUEST FOR REVIEW

M/s Powergen Technologies Limited (hereinafter referred to as "the Applicant") lodged a Request for Review dated 9th June 2020 and filed on 10th June 2020 together with an Affidavit in Support of the Request for Review sworn and filed on even date and a Supplementary Affidavit sworn and filed on 19th June 2020, through the firm of Cheboi Kiprono Advocates, seeking the following orders: -

- 1. An order declaring that the Procuring Entity breached the provisions of the Public Procurement and Asset Disposal Act, 2015 and Article 47 and 227 of the Constitution;***
- 2. An order annulling in its entirety the decision to prequalify successful bidders and the entire prequalification proceedings in Tender Number ICTA/PQ/01/2019-for Prequalification of suppliers for Supply, Installation, and Maintenance of Aerial Optical fiber;***
- 3. An order declaring that the Tender Document required an equivalent of a Pole Climbing Certificate;***

- 4. An order directing the Procuring Entity to carry out fresh evaluation of the Tenders submitted in accordance with the Tender Document;***
- 5. An order directing the Procuring entity to pre-qualify the Applicant in the alternative to prayer 3 above;***
- 6. An order awarding costs of the Request for Review to the Applicant; and***
- 7. Any other relief that the Review Board deems fit to grant under the circumstances.***

In response, the Respondents lodged a Preliminary Objection dated and filed on 15th June 2020 together with a Replying Affidavit sworn and filed on even date through Pauline Wamoyo Kimotho Advocate.

On 16th 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 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. 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.

Accordingly, the Applicant lodged Written Submissions dated and filed on 19th June 2020 while the Respondents lodged its Written Submissions dated and filed on 15th June 2020.

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 Request for Review was filed outside the statutory timelines specified in section 167 (1) of the Act, thus ousting the jurisdiction of the Board.***

Depending on the determination of the above issue: -

II. Whether the Procuring Entity rightfully found the Applicant's bid non-responsive in accordance with the Mandatory Requirement (n) of Section II. Instructions to Candidates at page 9 of the Tender Document read together with section 79 (1) and 80 (2) of the Constitution.

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

The Respondents lodged a Preliminary Objection dated 15th June 2020 based on the following grounds: -

"THAT the Request for Review was not filed within the statutory fourteen (14) days period as required under the law, section 167 of the Public Procurement and Asset Disposal Act, 2015

THAT as such, the Public Procurement Administrative Review Board lacks the jurisdiction to entertain the Request for Review with the request having been filed out of the required statutory period.

THAT the Request for Review as filed is frivolous or vexatious"

In addressing the Respondents' Preliminary Objection, the Board observes that Sir Charles Newbold P, in the case of **Mukisa Biscuit Manufacturing**

Co. Ltd v. West End Distributors Ltd (1969) EA defined a preliminary objection by stating as follows: -

"a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact is to be ascertained or what is sought is the exercise of judicial discretion"

The question of what would constitute a proper preliminary objection was further addressed in **Attorney General of Tanzania v. African Network for Animal Welfare (ANAW) EACJ Appeal No. 3 of 2011** where the Appellate Division of the East African Court of Justice held that: -

"a preliminary objection could only be properly taken where what was involved was a pure point of law but that where there was any clash of facts, the production of evidence and assessment of testimony it should not be treated as a preliminary point. Rather, it becomes a substantive adjudication of the litigation on merits with evidence adduced, facts shifted, testimony weighed, witnesses called, examined and cross examined and a finding of fact made by the Court"

In all the cases cited above, the Board notes that courts emphasize that a preliminary objection ought to be based on a pure point of law and should

not be based on factual questions requiring evidence to prove the grounds raised in the preliminary objection.

The Board considered the parties' submissions on the preliminary objection raised by the Respondents and notes that at paragraph 7 of its Replying Affidavit and paragraph 8 of its Written Submissions, the Respondents submit that the Applicant vide a letter dated 26th May 2020, emailed and received by the Applicant on 27th May 2020 was informed that it was not successful as a result of the Applicant's failure to provide a Pole Climbing Certificate. In response to these submissions, the Applicant at paragraph 3 of its Written Submissions states that it received the letter of notification of unsuccessful bid dated 26th May 2020, on 27th May 2020.

From the foregoing submissions, the Board observes that it is common ground between parties to the Request for Review that the Respondent furnished the Applicant with a letter of notification of unsuccessful bid dated 26th May 2020, on 27th May 2020 via email. In essence, there is no dispute regarding the date when the Applicant received its letter of notification of unsuccessful bid, therefore the Respondents' Preliminary Objection raises a pure point of law that the Board must address at this earliest opportune moment.

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."

Similarly, in the case of **Kakuta Maimai Hamisi vs. Peris Pesi Tobiko & 2 Others (2013) eKLR**, the Court of Appeal emphasized on the centrality of the issue of jurisdiction and stated thus: -

"So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question best taken at inception. "

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 within the timelines specified in section 167 (1) of the Act, which provides as follows: -

"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"

Section 167 (1) of the Act specifies that a candidate or tenderer may approach this Board within fourteen (14) days of notification of award or

date of occurrence of an alleged breach of duty at any stage of the procurement process or disposal process.

The Respondents took the view that the Applicant ought to have filed its Request for Review by 9th June 2020. On the other hand, the Applicant refers the Board to section 57 of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya (hereinafter referred to as "the Interpretation and General Provisions Act") and Article 259 (5) of the Constitution to support its view that the Request for Review ought to have been filed by 10th June 2020 and since the instant Request for Review was filed on the said date, the same is within the period specified under section 167 (1) of the Act.

At this juncture, the Board deems it necessary to address its mind on the manner in which the fourteen (14) day statutory period specified in section 167 (1) of the Act is computed. Article 259 (5) of the Constitution that was cited by the Applicant provides as follows: -

"259 (1)

(2)

(3)

(4)

(5) In calculating time between two events or any purpose under this Constitution, if the time is expressed-

(a) as days, the day on which the first event occurs shall be excluded and the day by which the event occurs shall be included"

Further, section 57 (a) of the Interpretation and General Provisions Act provides that: -

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

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

In **Judicial Review No. 589 of 2017, Lordship Africa Limited v. Public Procurement Administrative Review Board & 2 Others (2018) eKLR**, the court held that: -

"Even assuming that the letters of notification were served on 4th August 2017, the 14 days given to an aggrieved party to lodge a request for review to the Review Board would have been until 18th August, 2017 and not 17th August, 2017, when the contract was signed. Time is computed excluding the first day and including the last day. It follows that the 17th August, 2017 fell on the 13th day. The Act [2015 Act] mandates that a

person who is dissatisfied with the decision of the procuring entity, or who may have suffered or risked suffering loss or damage due to breach of a duty imposed on a procuring entity may seek for administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed

It therefore follows that the first day in which an event happens is not included when computing time within which such event ought to have been undertaken. The event in this instance is receipt of a letter of notification of unsuccessful bid on 27th May 2020, which is an excluded day that is not reckoned (i.e. not counted) when determining the time within which filing a Request for Review ought to have been undertaken. The period of filing a Request for Review ought to be undertaken within 14 days as specified in section 167 (1) of the Act. Therefore, one starts counting such period from 28th May 2020. Evidently, the fourteenth day, being the last day within which the Applicant was required to file its Request for Review fell on 10th June 2020. The instant Request for Review was filed on 10th June 2020 and is therefore within the 14-day statutory period specified in section 167 (1) of the Act.

Accordingly, the Board finds that it has the jurisdiction to entertain the Request for Review, dismisses the Respondents' Preliminary Objection and

now proceeds to address the substantive issue raised in the Request for Review.

On the second issue for determination, the Board notes that, the Applicant received a letter of notification of unsuccessful bid dated 26th May 2020 with the following details: -

"This is to notify you that pursuant to section 95 of the Public Procurement and Asset Disposal Act, 2015, ICT Authority wishes to inform you that your proposal to be prequalified for Supply, Installation & Maintenance of Aerial Optical Fiber, Tender NO. ICTA/PQ/01/2019-2020 for the Financial Year 2019-2021 was unsuccessful for the following reasons: -

- ***You did not provide pole climbing certificate***

We thank you for participating in the tender and hope to do business with you in future"

Through this Request for Review, the Applicant challenged the decision of the Respondents in its bid. It is worth noting that the criterion under consideration is provided under Mandatory Requirement (n) of Section II. Instructions to Candidates at page 9 of the Tender Document as follows: -

"Staff assigned to this project must have the following: -

Pole Climbing certificate from Kenya Power & Lighting Company or equivalent

.....”

It is the Board's considered view that the criterion under consideration required bidders to provide a Certificate specifically showing that a person has undertaken training in Pole Climbing at Kenya Power and Lighting Company Limited or a Certificate specifically showing that a person has undertaken training in Pole Climbing offered by any other organization apart from Kenya Power and Lighting Company Limited, so long as the component of Pole Climbing is evident in such certificate.

The Board studied the Applicant's original bid and notes that at page 141 thereof, the Applicant attached a Certificate of Post Graduate Apprenticeship issued on 23rd September 1987 by Kenya Power and Lighting Company Limited to Mr. Jabez Opiyo Ouma for completing a one-year apprenticeship as an Electrical Engineer between 7th July 1986 to 30th June 1987 and that Mr. Jabez Opiyo Ouma obtained experience in the following areas: -

- *Distribution of Electrical Energy;*
- *Operations and Maintenance of Electrical Supply Systems;*
- *Protection of Electrical Supply Systems;*
- *Maintenance of Electrical Plant;*
- *Electronics;*
- *Communication and Control Systems; and*
- *Commercial and Development Undertaking.*

The Board observes that the Certificate of Post Graduate Apprenticeship issued on 23rd September 1987 to Mr. Jabez Opiyo Ouma does not specify Pole Climbing as one of the components covered in the training undertaken by Mr. Jabez Opiyo Ouma. The Board studied the Curriculum Vitae of Mr. Jabez Opiyo Ouma found at pages 138 to 139 of the Applicant's original bid but did not find any aspect on training in Pole Climbing.

It is also worth noting that, the Applicant made reference to a letter dated 17th June 2020 addressed to the Institute of Energy Studies & Research (KPLC Training School) to support its submission that it wrote to Kenya Power and Lighting Company Limited requesting confirmation that the Apprenticeship Certificate issued to Mr. Jabez Opiyo Ouma included training in Pole Climbing. The said letter is reproduced herein as follows: -

"We have two people in our employment and have an issue in Aerial Fiber tender we participated in, one of the engineers has an apprenticeship certificate while the other has a safety training that takes only one week

We request a letter confirming that an Apprenticeship certificate for Jabez Ouma (copy attached) is more acceptable and of a longer training period than the one for Joseph Ngoiyo (copy attached) that takes one week only

Furthermore, that KPLC will take the Apprenticeship Certificate more seriously on safety on pole climbing and

other safety measures in your power system than the training for one week”

In response to this letter, Kenya Power and Lighting Company Limited, through a letter dated 18th June 2020 stated as follows: -

"Confirmation of Training

We are in receipt of your letter dated 17th June 2020 on the subject matter

The Apprenticeship course was aimed at equipping Engineers with knowledge on all aspects of power distribution systems to enable them to work effectively for KPLC or other distribution companies.

The operation and maintenance section of the course included issues of Safety, Pole Climbing and working at heights”

According to the Applicant, the Certificate of Post Graduate Apprenticeship issued to Mr. Jabez Opiyo Ouma was therefore sufficient, as confirmed by Kenya Power and Lighting Company Limited in its letter dated 18th June 2020 therefore ought to have been found responsive under the criterion in issue.

In addressing the Applicant's contention, the Board finds it necessary to interrogate how evaluation is conducted at the Preliminary Evaluation Stage. Regulation 47 (1) of the Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as "the 2006 Regulations") provides that: -

- "(1) Upon opening of the tenders under section 60 of the Act, the evaluation committee shall first conduct a preliminary evaluation to determine whether-***
- (a) the tender has been submitted in the required format;***
 - (b) any tender security submitted is in the required form, amount and validity period;***
 - (c) the tender has been signed by the person lawfully authorized to do so;***
 - (d) the required number of copies of the tender have been submitted;***
 - (e) the tender is valid for the period required;***
 - (f) all required documents and information have been submitted; and***
 - (g) any required samples have been submitted"***

From the foregoing, the Board observes that Preliminary Evaluation involves the examination of documents and information provided by bidders at face

value without resorting to other information that is not contained in the original bid submitted by a bidder as at the tender submission deadline.

The letters dated 17th June 2020 and 18th June 2020 were not submitted to the Procuring Entity in the Applicant's original bid by the tender submission deadline of 15th April 2020. Further to this, section 80 (2) of the Act states that: -

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

An Evaluation Committee has the obligation to evaluate the documents submitted by bidders by the tender submission deadline using the procedures and criteria set out in the Tender Document. In doing so, such an evaluation committee does not resort to information not contained in a bidder's original bid and as a result, the Evaluation Committee in this instance could not by its own motion, contact any third party, such as Kenya Power and Lighting Company Limited to verify the nature of the training undertaken by Mr. Jabez Opiyo Ouma with respect to the Certificate of Post Graduate Apprenticeship outlined hereinbefore. This is because, preliminary evaluation of bids does not involve any process of confirmation or verification of documents submitted by bidders, by contacting third parties.

The Applicant had the option of contacting Kenya Power and Lighting Company Limited before 15th April 2020 which was the deadline for submitting tenders, seeking confirmation of the Certificate of Post Graduate Apprenticeship issued to Mr. Jabez Opiyo Ouma, and upon receiving a response, it ought to have attached the same to its bid before submitting the same to the Procuring Entity. In the absence of this information, the Evaluation Committee had no way of knowing that the Certificate of Post Graduate Apprenticeship issued to Mr. Jabez Opiyo Ouma included training in Pole Climbing.

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"

Section 79 (1) and 80 (2) of the Act guide a procuring entity during evaluation of bids. A bidder's failure to comply with mandatory requirements renders such a bidder non-responsive, since evaluation and comparison of bids is done using the procedures and criteria set out in the tender documents. Such procedures and criteria are applied to the documents submitted by bidders by the tender submission deadline.

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 the Evaluation Committee had no option but to render the Applicant's bid non-responsive.

It is worth noting that the Applicant referred the Board to section 83 (1) of the Act to support its view that the said provision allows for verification and confirmation of qualifications of a bidder and therefore the response from Kenya Power and Lighting Company Limited is sufficient to find the Applicant's bid responsive.

Section 83 of the Act provides as follows: -

"(1) An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act"

Section 83 (1) of the Act is very clear on the manner in which verification and confirmation of qualifications of a tenderer is conducted. Furthermore,

that provision specifies that such an exercise is a post-qualification exercise conducted only on the lowest evaluated bidder after tender evaluation, but prior to award of a tender.

It is not lost to the Board that the subject tender was a pre-qualification exercise and that after the Preliminary/Mandatory Requirements Evaluation Stage, bidders were recommended by the Evaluation Committee and pre-qualified to provide services in the subject tender after the Accounting Officer approved the Head of Procurement Function's Professional Opinion. However, a due diligence exercise could not have been conducted during Preliminary Evaluation (which is the stage at which the Applicant was found non-responsive) based on information that was not before the Evaluation Committee. If the Procuring Entity wished to conduct a due diligence exercise, it could only do so on bidders recommended for pre-qualification in the subject tender. The Applicant herein never made it past Preliminary Evaluation and was not recommended for pre-qualification in the subject tender based on the information and documents in the Applicant's original bid, submitted by the tender submission deadline. In particular, none of the Applicant's officers' Certificates and their respective Curriculum Vitae, including the Certificate of Post Graduate Apprenticeship dated 23rd September 1987 issued to Mr. Jabez Opiyo Ouma and his Curriculum Vitae demonstrate training in Pole Climbing.

Accordingly, the Board finds that the Procuring Entity rightfully found the Applicant's bid non-responsive in accordance with the Mandatory

Requirement (n) of Section II. Instructions to Candidates at page 9 of the Tender Document read together with section 79 (1) and 80 (2) of the Constitution.

In totality, the Request for Review fails and the Board proceeds to make the following 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 on 10th June 2020 by the Applicant herein with respect to Tender No. OCT/PQ/01/2019-2020 for Prequalification of Suppliers for Supply, Installation and Maintenance of Aerial Optical Fiber, be and is hereby dismissed.**
- 2. Each party shall bear its own costs in the Request for Review.**

Dated at Nairobi this 1st day of July 2020

CHAIRPERSON

SECRETARY

PPARB

PPARB