

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 81/2020 OF 18TH JUNE 2020

BETWEEN

TUNASCO INSAAT ANONIM SIRKETI.....APPLICANT

AND

THE ACCOUNTING OFFICER,

KENYA MEDICAL SUPPLIES AUTHORITY.....RESPONDENT

CHINA RAILWAY NO. 10 ENGINEERING GROUP

CO. LTD.....INTERESTED PARTY

Review against the decision of the Accounting Officer of Kenya Medical Supplies Authority communicated in the letter dated 12th June 2020 with respect to Tender No. KEMSA/CONST/OIT4/2019-2020 for Supply, Installation & Commissioning of Racking System & Associated Works.

BOARD MEMBERS

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|-------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mr. Alfred Keriolale | -Member |
| 3. Ms. Robi Chacha | -Member |

IN ATTENDANCE

- | | |
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| 1. Mr. Stanley Miheso | -Holding brief for the Secretary |
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BACKGROUND TO THE DECISION

The Bidding Process

Kenya Medical Supplies Authority (hereinafter referred to as “the Procuring Entity”) advertised Tender No. KEMSA/CONST/OIT4/2019-2020 for Supply, Installation & Commissioning of Racking System & Associated Works (hereinafter referred to as “the subject tender”) on MyGov Pull Out in the People’s Daily Newspaper on 14th April 2020 inviting sealed bids from eligible tenderers.

Bid Submission Deadline and Opening of Bids

Initially, the Procuring Entity had indicated a bid submission deadline of 5th May 2020 but the same was extended to 12th May 2020 vide a notice in the Standard Newspaper on 1st May 2020, having issued Addendum No. 1 dated 30th April 2020 in response to queries raised by prospective bidders in a pre-bid conference held at the Procuring Entity’s Office on 22nd April 2020 and other queries sent via email. The Procuring Entity received a total of sixteen (16) No. of bids by the bid submission deadline of 12th May 2020. The same were opened shortly thereafter by a Tender Opening Committee and recorded as follows: -

Bidder No.	Bidder Name
1	Volcanic Plumbing Works
2	China Railway No. 10 Engineering Group Co. Ltd JV Nelliwa Builders
3	Tunasco Insaat Anonim Sirketi
4	Achelis Material Handling Ltd.
5	Quest Civil Engineers Limited
6	China Wuyi Company Limited

Bidder No.	Bidder Name
7	China Jiangxi International Kenya Limited JV soil and water
8	Car & General Trading Limited JV Top Choice
9	Maranatha Property Consult Limited
10	Neelcon Construction Services Ltd JV Metco
11	Mashin Construction Company Limited
12	Shiffa Enterprises Ltd
13	Vaghjiyani Enterprises Ltd JV Taurus
14	Ashut Engineers Ltd JV Twiga
15	Lafey Construction Company Ltd
16	Landmark Holdings Limited

Evaluation of Bids

The Procuring Entity's Chief Executive Officer appointed an Evaluation Committee vide a memo dated 14th May 2020. The said Evaluation Committee conducted evaluation of bids in the subject tender in the following three stages: -

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

1. Mandatory Requirements Evaluation

At this stage, the Evaluation Committee applied the evaluation criteria outlined in Clause 1.4 of Section II. Instructions to Tenderers at page 10 of the Technical Bid read together with Stage 1. Mandatory Requirements of Section IV. Tender Evaluation Criteria at page 26 of the Technical Bid of the Document for the Supply, Installation & Commissioning of Racking System & Associated Works (hereinafter referred to as "the Tender Document") read

together with the changes introduced through Addendum No. 1 dated 30th April 2020. At the end of evaluation at this stage, the following ten (10) bidders were found to be responsive and therefore proceeded to the Technical Evaluation Stage: -

- a) Bidder No. 2: China Railway No. 10 Engineering Group Co. Ltd;
- b) Bidder No. 3: Tunasco Insaat Anonim Sirketi;
- c) Bidder No. 5: Quest Civil Engineers Limited;
- d) Bidder No. 6: China Wuyi Company Limited;
- e) Bidder No. 7: China Jiangxi International Kenya Limited;
- f) Bidder No. 9: Maranatha Property Consult Limited;
- g) Bidder No. 11: Mashin Construction Company Limited;
- h) Bidder No. 12: Shiffa Enterprises Limited;
- i) Bidder No. 13: Vaghjiyani Enterprises Limited; and
- j) Bidder No. 16: Landmark Holdings Limited.

2. Technical Evaluation

At this stage, the Evaluation Committee applied the criterion outlined in Clause 2.2 of Section II. Instructions to Tenderers at page 13 of the Technical Bid read together with Stage 2. Technical Evaluation of Section IV. Tender Evaluation Criteria at page 26 to 31 of the Technical Bid of the Tender Document which involved evaluation on; Compliance with Technical Specifications and Assessment of Deviations. Addendum No. 1 dated 30th April 2020 further clarified that bidders were required to achieve a minimum technical score of 70% in order to proceed to Financial Evaluation. Having subjected the remaining 10 bidders to a Technical Evaluation, the Evaluation Committee found that only one bidder (i.e. M/s China Railway No. 10

Engineering Group Co. Ltd) qualified for Financial Evaluation having achieved a minimum technical score of 83.80%.

3. Financial Evaluation

At this stage, the Evaluation Committee applied the criterion outlined in Stage 3. Financial Evaluation of Section IV. Tender Evaluation Criteria at page 31 to 32 of the Technical Bid of the Tender Document. Clause 2.64 of Section II. Instructions to Tenderers at page 14 of the Financial Bid of the Tender Document further specified that award of the subject tender would be made to the tenderer determined to be substantially responsive and has been determined to be the lowest evaluated tenderer, provided further that the tenderer is qualified to perform the contract satisfactorily. The Evaluation Committee noted that M/s China Railway No. 10 Engineering Group Co. Ltd was substantially responsive to the requirements outlined in the Tender Document and further submitted the lowest evaluated tender.

Recommendation

Pursuant to Clause 2.64 of Section II. Instructions to Tenderers at page 14 of the Financial Bid of the Tender Document, the Evaluation Committee recommended award of the subject tender to **M/s China Railway No. 10 Engineering Group Co. Ltd JV Nelliwa Builders & Civil Engineers Limited (in Joint Venture with M/s Nelliwa Builders & Civil Engineers Limited)** at its tender price of **Kshs. 959,598,728.86 (Nine Hundred and Fifty-Nine Million, Five Hundred and Ninety-Eight**

Thousand, Seven Hundred and Twenty-Eight and Eighty-Six cents only) inclusive of VAT.

Professional Opinion

In a Professional Opinion dated 10th June 2020, the Procuring Entity's Director, Procurement outlined the procurement process relating to the subject tender. He further reviewed the Evaluation Report dated 4th June 2020 and took the view that the evaluation process complied with provisions of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act"). As a result, he advised the Procuring Entity's Chief Executive Officer to consider awarding the subject tender to **M/s China Railway No. 10 Engineering Group Limited (in Joint Venture with M/s Nelliwa Builders & Civil Engineers Limited)** at its tender price of Kshs. 959,598,728.86 inclusive of VAT. The said professional opinion was approved by the Chief Executive Officer on 11th June 2020.

Notification to Bidders

In letters dated 12th June 2020, the Procuring Entity notified the successful bidder and the unsuccessful bidders of the outcome of their bids.

THE REQUEST FOR REVIEW

M/s Tunasco Insaat Anonim Sirketi (hereinafter referred to as “the Applicant”) lodged a Request for Review dated 17th June 2020 and filed on 18th June 2020 together with a Statement in Support of the Request for Review sworn and filed on even date, and a Further Statement in Response to the Respondent sworn and filed on 2nd July 2020 and a Further Statement in Response to the Interested Party sworn and filed on even date, through the firm of Gerivia Advocates LLP, seeking the following orders:-

- i. An order annulling and setting aside the Respondent’s decision awarding Tender Number KEMSA/CONST/OIT4/2019-2020 For Supply, Installation & Commissioning of Racking System & Associated Works;*
- ii. An order annulling and setting aside the Respondent’s decision (by way of the letter dated 12th June 2020) notifying the Applicant that it had not been successful in Tender Number KEMSA/CONST/OIT4/2019-2020 For Supply, Installation & Commissioning of Racking System & Associated Works;*
- iii. An order directing the Respondent to carry out a technical re-evaluation noting to observe and apply the procedures and criteria in the Tender Document as required by the Act at Section 80 (2);*
- iv. An order compelling the Respondent to pay to the Applicant the costs arising from/and incidental to this Application; and*

- v. ***Such and further orders as it may deem fit and appropriate in ensuring that the ends of justice are fully met in the circumstances of this Request for Review.***

In response, the Respondent lodged a Replying Affidavit sworn and filed on 26th June 2020, a Further Affidavit sworn on 6th July 2020 and filed on 7th July 2020 through the firm of Anne Munene & Company Advocates. On its part, the Interested Party lodged a Memorandum of Response dated and filed on 26th June 2020 together with a Statement in Support of its Response, which Statement was sworn and filed on even date, through the firm of Odiwuor Okelo & Co. Advocates.

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 2nd July 2020 together with a List of Authorities dated and filed on even date while the Respondent lodged its Written Submissions dated 6th July 2020 and filed on 7th July 2020 together with a List of Authorities dated and filed on even date. The Interested Party lodged its Written Submissions dated and filed on 8th July 2020.

BOARD'S DECISION

The Board has considered 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 issue calls for determination:

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Whether the Procuring Entity evaluated the Applicant's bid at the Technical Evaluation Stage in accordance with the criteria set out in the Tender Document read together with section 80 (2) of the Act and Article 227 (1) of the Constitution.

Before addressing the above issue, the Board would like to dispense with preliminary issues arising from the documentation filed before it by parties to the Request for Review.

The Respondent lodged a Further Affidavit sworn on 6th July 2020 and filed on 7th July 2020 (hereinafter referred to as "the Respondent's Further Affidavit"). By 7th July 2020, the Applicant had already made its rejoinder through a Further Statement in Response to the Respondent sworn and filed on 2nd July 2020 and a Further Statement in Response to the Interested Party sworn and filed on 2nd July 2020 together with the Applicant's Written Submissions dated and filed on 2nd July 2020. This means, the Respondent filed its Further Affidavit way after the Applicant had closed its case. This prompted the Applicant to address a letter dated 8th July 2020 to the Board Secretary stating as follows: -

"We refer to the above matter

We act for TUNASCO INSAAT ANONIM SIRKETI, the Applicant herein and wish to address you as hereunder:

- 1. Following the Board's directions issued via Circular No. 2 of 2020 (Ref. No. PPRA/ARB/01. Vol. 2 (114) dated 24th March 2020, the Applicant herein filed its Request for Review on 18th June 2020. The Respondent filed its Replying Affidavit on 26th June 2020 and served the same on the Applicant on 29th June 2020. The Interested***

Party filed its Memorandum of Response and served the same on the Applicant on 30th June 2020.

- 2. Further, and in compliance with the directions of the Board, the Applicant filed its Further Statements in response to the Respondent and Interested Party and its Written Submissions with a List of Authorities on 2nd June 2020. Soft copies were served on the Respondent and Interested Party's Advocate on 2nd July 2020 and the respective hard copies were served on the Advocates on 3^d July 2020.***
- 3. The Interested Party served a soft copy of its Written Submissions on 7th July 2020 and proceeded to deliver the hard copies for stamping by the Board on 8th July 2020.***
- 4. The Respondent filed a Further Affidavit and Written Submissions on 7th July 2020 and served soft copies of the same on 8th July 2020. The Board in the Circular referred to above directed that "The Accounting Officer of a Procuring Entity and/or any other Respondent to the Request for Review shall file his/her submissions within 3 days of service to him/her of the written submissions of the Applicant., the tenderer notified to be successful and/or such other persons as determined by PPARB.***

- 5. The Applicant being the party that filed the application herein, has the last right of reply (final argument in closing). In this regard, the Applicant objects to the filing by the respondent of a Further Affidavit) (responding to the Applicant's Further Statement) and requests the Board to expunge the Respondent's Further Affidavit from the record since by filing a Further Affidavit at this point in time, the Respondent is denying the Applicant its right to reply.***

- 6. The Respondent being a regular litigator before the PPARB, is fully aware that he has no right to issue a Further Affidavit. The actions of the Respondent reflect the manner in which the Procuring Entity has undertaken the entire procurement process, which is lacking in transparency and integrity and it pushes the limits of what is legally acceptable.***

- 7. To further illustrate the lack of transparency and integrity, the Tender Document, for instance:***
 - a) Had stated that the financial proposals would be opened separately but the Procuring Entity proceeded to open the financial proposals at the same time with the technical proposals to achieve certain mischievous ends; and***

b) Lacked clarity on the issue of preferences and reservations which are required by law;

c) Indicated that the tender is a Global Fund tender when it is a fully funded Government of Kenya Tender.

8. The instant action by the Respondent is indicative that the Respondent and Procuring Entity are clutching on straws, attempting to correct and/or salvage a process that is already tainted.

In conclusion, the Board should look at the entire tender process and if such process is lacking in transparency and integrity in any way, the Board should proceed to cancel the entire tender and order that the procurement process commence afresh.

The Board should also disregard and strike out any pleadings filed in disregard of the directions issued by the Board and out of time, including the Respondent's Further Affidavit that was filed on 8th July 2020 which is aimed at denying the Applicant a right of reply and thus fairness in the proceedings.

We trust that the Board will consider the Applicant's objection raised herein."

The Board observes that on 9th July 2020, the Respondent sent a letter addressed to the Board Secretary via email stating as follows: -

"We are in receipt of the Applicant's Advocates letter dated 8th July 2020 addressed to the Secretary of the Public Procurement Review Board and wish to respond as follows;

- 1. The Respondent was served by the Applicant the Further Statements in Response to the Respondent and its Written Submissions with a List of Authorities via email on 2nd July 2020 at 7.00pm and the Respondent filed its Further Affidavit and written submissions with a List of Authorities on 7th July 2020 and served the Applicant on 8th July 2020, which was within the stipulated time in compliance with Circular No. 2 of 2020 Ref. No PPRA/ARB/01. Vol. 1 (114);***
- 2. The Honourable Board will note that the Respondent's Further Affidavit only restricted itself to responding to the new issues raised by the Applicant's Further Statement. In the unlikely event that the Respondent's Further Affidavit is expunged from the record, the Applicant's Further Statements should also be expunged since it raised various new issues that were not in the Request for Review filed on 18th June 2020.***
- 3. The Respondent notes that the Board is a quasi-judicial body which is not bound by the strict rules of evidence***

as provided in Regulation 86 of the Public Procurement and Disposal Regulations, 2006 and therefore the Respondent's Further Affidavit is properly on record.

- 4. That the Applicant continues to mischievously introduce new issues in the aforesaid letter (which have no merit whatsoever) and therefore the contents should be completely disregarded.***

We urge the Board to determine the matter in accordance with the pleadings filed before it and ignore the Applicant's side shows contained in its letter"

On its part, the Interested Party addressed a letter dated 9th July 2020 to the Board Secretary and the same was sent to the Board's Secretariat email, with the following details: -

"We are in receipt of a copy of a letter to yourselves by the Applicant (Ref No. GA/PL/TNS/02/.1/CG/20) in the matter above

We wish to address you on the concerns it has raised in relation to the Respondent's Further Affidavit lodged with yourselves on 8th July 2020. We humbly note the following in this regard:

- 1) The Board, by dint of Regulation 86 of the Public Procurement & Disposal Regulations, 2006, are not***

bound by the strict rules of evidence. The Further Affidavit by the Respondent, in our opinion, would accord the Board the full picture of the circumstances relating to the impugned tendering process, and so enable it to fairly and objectively adjudicate on the issues raised. Expunging the same would occasion an injustice of the type which Article 159 (2) (d) of the Constitution sought to preempt.

2) The Applicant itself filed a Further Affidavit which introduced new issues not covered in the Applicant's Request for Review. We are of the firm conviction that the Applicant ought not to have raised new issues or a new ground for claim or made allegations inconsistent with those contained in the Request for Review in a manner that subjugates the other parties' right or reply to the issues.

3) The Respondent on 7th July 2020 was faced with the same inconvenience suffered by the Interested Party, occasioned the PPARB's decision to close offices by 1500h on 7th July 2020. The parties had no prior communication to this effect. We received the Respondent's pleadings on the following day.

It would therefore be unjust to accede to the contents of the Applicant's letter, and on the same breath admit to evidence the Applicant's Further Statement. We therefore

urge that you be very reluctant to employ the very severe remedy suggested to you by the Applicant, who in any event has not demonstrate prejudice occasioned by the Further Affidavit, or the alleged late filing by the Respondent”

Having considered the issues raised by the parties to the Request for Review, this Board is cognizant of Article 50 (1) of the Constitution which codifies the right to a fair hearing as follows: -

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

Article 50 (2) (c) of the Constitution states that: -

50 (1)

(2) Every person has the right to a fair trial, which includes the right—

(a)

(b)

(c) to have adequate time and facilities to prepare a defense

The Board issued Circular No. 2/2020 dated 24th March 2020 recognizing the right to a fair hearing under Article 50 (1) and (2) (c) of the Constitution available to parties to a Request for Review and in full recognition of the challenges caused by the Covid-19 pandemic which meant that the Board had to dispense with all physical hearings. It is a well-recognized procedure that once an applicant seeking a review of a procuring entity's decision has closed its case through a Further Response and Written Submissions, a respondent and an interested party have no right to a further reply.

The Respondent in this case filed a Replying Affidavit on 26th June 2020 and contends that it was served with the Applicant's Further Statement and the Applicant's Written Submissions on 2nd July 2020 at 7.00pm.

The Board notes that the Respondent and the Interested Party contend that the Applicant raised new issues in its Further Statement in Response to the Respondent and the Further Statement in Response to the Interested Party. This prompted the Board to study the two Further Statements filed by the Applicant. The Board observes that the Applicant's Further Statements are based on the Applicant's view that Clause 13 of Addendum No. 1 dated 30th April 2020 omitted the requirement for bidders to provide Manuals and Materials Certificates as described in the Tables attached and Bills of Quantities from the Mandatory Requirements. According to the Applicant's Further Statements, Clause 13 of Addendum No. 1 dated 30th April 2020 did not automatically mean that "Manuals and Materials Certificates as described

in the Tables attached and Bills of Quantities” would be considered at the Technical Evaluation Stage.

The Board observes that the Applicant cites Answers to Questions 8 and 9 of Addendum No. 1 dated 30th April 2020 to highlight some of the responses provided by the Respondent regarding the technical specifications of the racking system to be installed under the subject tender. However, the Applicant is not challenging the responses that were given by the Procuring Entity with respect to Answers provided by the Respondent to Questions 8 and 9 of Addendum No. 1 dated 30th April 2020.

It is the Board’s finding that the Applicant’s Further Statement in response to the Respondent and the Further Statement in response to the Interested Party do not raise new issues.

The only option that was available to the Respondent was to file Written Submissions to persuade the Board to decide in its favour by, explaining its case (both factually and legally) and to persuade the Board that the Respondent’s case ought to succeed. The Respondent’s Further Affidavit lodged at the Board’s office on 7th July 2020, was filed two days before the lapse of the twenty-one-day period specified in section 171 (1) of the Act, within which the Board must determine the Request for Review application. The Respondent and the Interested previously lodged their respective responses to the Request for Review on 26th June 2020 and were fully aware

of the Notice posted at the Board's office door regarding its operating hours between 9.00am and 3.00pm. In essence, the Respondent had no right to file a Further Affidavit once the Applicant closed its case. In any case, the Applicant would have no opportunity to respond to the Respondent's Further Affidavit.

The Respondent's action of filing a Further Affidavit when it has no further right of reply once the Applicant closed its case was unprocedural and further amounts to ignorance of the strict statutory timeline of 21 days provided in section 171 (1) of the Act within which the Board ought to consider each of the parties' pleadings and render a decision in the Request for Review.

Accordingly, the Respondent's Further Affidavit sworn on 6th July 2020 and filed on 7th July 2020 is hereby expunged from the record of the instant Request for Review proceedings.

The Board further notes that in the letter dated 8th July 2020, the Applicant raised three other issues with respect to contents of the Tender Document as follows: -

- a) Had stated that the financial proposals would be opened separately but the Procuring Entity proceeded to open the financial proposals at the same time with the technical proposals to achieve certain mischievous ends; and*

- b) Lacked clarity on the issue of preferences and reservations which are required by law;*
- c) Indicated that the tender is a Global Fund tender when it is a fully funded Government of Kenya Tender.*

The Board observes that, whereas the Applicant contends that the Respondent's action of filing a Further Affidavit means that the Respondent undertook the entire procurement process in an unfair manner, the Applicant raises new issues challenging the contents of the Tender Document, by way of a letter addressed to the Board Secretary, a day before expiry of the 21-day period under section 171 (1) of the Act within which the Request for Review must be determined. The threshold of Article 50 of the Constitution with respect to the right to a fair hearing applies to the Respondent as well as the Applicant and the Interested Party. In the instant scenario, the Respondent has no opportunity to respond to the new issues raised by the Applicant through a letter dated 8th July 2020 addressed to the Board Secretary challenging the contents of the Tender Document.

Furthermore, section 167 (1) of the Act is very clear that a candidate or tenderer aggrieved by the decision of a procuring entity may seek administrative review within fourteen (14) days from the date of notification of award or date of occurrence of the alleged breach at any stage of the procurement process.

On the first ground raised by the Applicant that "the financial proposals would be opened separately but the Procuring Entity proceeded to open the financial proposals at the same time with the technical proposals to achieve certain mischievous ends", the Board observes that the Applicant ought to have raised this issue at the time it learnt that the Procuring Entity opened the financial proposals at the same time with the technical proposals. However, the Applicant participated in the procurement process and never raised this issue after the tenders were opened on 12th May 2020 or fourteen days thereafter. Further, at the time the Applicant filed its Request for Review, this issue was not raised by the Applicant thus denying the Respondent and the Interested Party an opportunity to respond to the same. The Applicant only waited when one day is remaining for the 21-day period under section 171 of the Act to lapse for it to raise this issue.

Secondly, the Applicant's allegations that the Tender Document lacked clarity on the issue of preferences and reservations and that the Tender Document indicated the tender is a Global Fund tender when it is a fully funded Government of Kenya Tender, ought to have been raised by the tender submission deadline of 12th May 2020 or within fourteen days (14) thereafter. At the time the Applicant filed its Request for Review, this issue was not raised by the Applicant thus denying the Respondent and the Interested Party an opportunity to respond to the same. The Applicant only waited until one day is left for the 21-day period under section 171 of the Act to lapse for it to raise this issue.

In all the three scenarios, the Board notes that the Applicant raised three allegations outside the 14-day period specified under section 167 (1) of the Act. Furthermore, an applicant seeking administrative review before the Board may do so by way of a Request for Review and not by way of a letter addressed to the Board Secretary. The Board can only determine an application lodged before it by way of a Request for Review filed within the statutory timeline of 14 days specified under section 167 (1) of the Act. In the instance case, the Applicant's allegations in the letter dated 8th July 2020 are time barred.

Accordingly, the Board finds that it lacks the jurisdiction to entertain the issues raised by the Applicant challenging the contents of the Tender Document through a letter dated 8th July 2020 addressed to the Board Secretary.

This Board would like to remind procuring entities and aggrieved candidates/tenderers to be mindful of the timelines provided in Circular No. 2/2020 of 24th March 2020 read together with section 167 (1) and 171 (1) of the Act and conduct themselves in a manner that promotes the right to a fair hearing under Article 50 of the Constitution. It is unacceptable for parties to a request for review to ignore the timelines and procedure specified in the aforementioned provisions undermining the authority vested upon the Board pursuant to the Act.

Having dispensed with the above preliminary issues, the Board now proceeds to address the substantive issue framed for determination as follows: -

The Procuring Entity advertised an Open International Tender for Supply, Installation & Commissioning of Racking System & Associated Works, which will be implemented on LR No. 9042/176 located at Embakasi, Nairobi. A thorough study of the Tender Document reveals that the Racking System required by the Procuring Entity which will be installed by the successful tenderer, has specific technical specifications that a tenderer must comply with in order for such a tenderer to be substantially responsive and to be awarded the tender (in addition to other parameters considered during evaluation).

Clause B. Scope of Contract and Description of the Works of the Bill of Quantities at page 50 of the Technical Bid of the Tender Document states that "the Works in this contract comprise of the Construction and Commissioning of Rack Installations as specified in the Bills of Quantities".

The Board studied the Bills of Quantities running from pages 67 to 75 of the Financial Bid of the Tender Document and notes that the Procuring Entity provided a description of the Technical Specifications of the Racks to be installed under the subject tender and this description demonstrates that the racks are specially made and include; Single Storage Bay Racking (with in Powder Coated Galvanized Mild Steel), Double Storage Bay Racking (with in

Powder Coated Galvanized Steel Sections), Fork Lift Protective Railing (with in Powder Coated Galvanized Mild Steel Sections) and Flammable Goods Storage Racks-Double Storage Bay Racking (with in Powder Coated Galvanized Mild Steel Sections).

Section VIII of the Financial Bid of the Tender Document further provides the Floor Layout Drawings of the Racks, Drawings for the Single and Double Storage Rack Bays, Rack Sections and Drawings for the Flammable Goods Store. It is evident from the foregoing that the Racking System and Associated Works to be implemented in the subject tender are specially made to meet the Procuring Entity's needs, hence the reason why the same have unique technical specifications explained in the Tender Document.

The Board studied the confidential documents submitted to it pursuant to section 67 (3) (e) of the Act and notes that the Procuring entity held a Pre-Bid Conference at its Embakasi Office in Nairobi on 22nd April 2020 wherein bidders raised queries regarding provisions of the Tender Document and subsequently issued Addendum No. 1 dated 30th April 2020 in response to the said queries. Thereafter, 16 No. of bidders submitted their bids by the bid submission deadline of 12th May 2020. The Evaluation Committee evaluated the bids received by the Procuring Entity and subsequently, recommended award of the subject tender to the Interested Party herein. Thereafter, the Accounting Officer of the Procuring Entity awarded the

subject tender to the Interested Party vide a letter of notification of award dated 12th June 2020.

Pursuant to section 87 (3) of the Act, the Accounting Officer notified the Applicant of the outcome of its bid in a letter of notification of unsuccessful bid dated 12th June 2020 which contains the following details: -

"Reference is made to the above tender and advise that your bid was unsuccessful due to the following reason (s);

- ***Manuals and Materials Certificates provided were not in English Language and had no reference to the standards prescribed***

Further, be advised that the above tender was awarded as per attached schedule.

Please plan to collect your bid security from the procurement office after 14 days from the date of this letter

Thank you for the interested and participation in the tender"

The Applicant was aggrieved by the decision of the Procuring Entity on its bid, therefore lodged the instant Request for Review application. The Board considered parties' pleadings and notes that according to paragraphs 1 to 4 of the Request for Review, the Applicant contends that the Procuring Entity breached sections 3, 80 (2) of the Act and Article 227 (1) of the Constitution by evaluating the Applicant's bid using a criterion and procedure that is not

set out in the Tender Document. According to the Applicant, the Procuring Entity failed to ensure that bidders are treated fairly having failed to conduct evaluation in a manner that promotes integrity and fairness of the evaluation process.

The Applicant further contends at paragraph 2 of its Statement in Support of the Request for Review that the Procuring Entity issued Addendum No. 1 dated 30th April 2020 in line with section 75 (1) of the Act, which omitted the requirement for Manuals and Materials Certificates from the Tender Document and the criteria for evaluation. According to the Applicant, the inclusion of any Manuals in the Applicant's bid constituted an excess factor which ought not to have been taken into account during evaluation. At paragraph 17 of its Statement in Support of the Request for Review, the Applicant further submits as follows: -

- *That the Tender Document did not require submission of Manuals and Materials Certificates;*
- *That the Tender Document did not require submission of Manuals and Materials Certificates in the English language; and*
- *That the Tender Document did not require submission of Manuals and Materials Certificate referring to any standards.*

In the Applicant's view, there is absolutely no reason why its bid could not proceed past the mandatory stage (as its bid complied with all the mandatory requirements) and if the Procuring Entity had applied and/or used the criteria

provided in the Tender Document during Technical Evaluation it would not have found the Applicant's bid non-responsive based on a requirement that had been omitted thus making its reliance during evaluation amounting to application of an extrinsic criteria. At paragraph 19 of its Statement in Support of the Request for Review, the Applicant submits that its bid was unfairly evaluated at Technical Evaluation Stage through application of extrinsic criteria contrary to provisions of the Tender Document and the Act.

On its part, the Procuring Entity contends at paragraph 7 of its Replying Affidavit that the requirement to submit Manuals and Materials Certificates as described in the Tables and the Bill of Quantities had been omitted as a mandatory preliminary examination but that through Addendum No. 1 dated 30th April 2020 bidders were referred to Pages 7-8 in particular, paragraphs 10, 11 and 12 on Special Notes contained in the Tender Document. According to the Procuring Entity, Addendum No. 1 dated 30th April 2020 only removed the Manuals and Materials Certificates from the Mandatory preliminary examination requirements contained in Section II. Instructions to Tenderers at pages 10-11 of the Tender Document but retained the criteria under Technical Evaluation. The Procuring Entity further contends that all bidders were required to include comprehensive Manuals and Materials Certificates in response to the Specifications and Bills of Quantities under Technical Evaluation criteria of the Tender Document. In the Procuring Entity's view, the Applicant breached Clause 3.1 and Clause 2.17 of Section II. Instructions to Tenderers of the Tender Document since the Manuals and Materials Certificates provided by the Applicant were not in the English

Language and had no reference to the prescribed standards. At paragraph 28 of its Replying Affidavit, the Procuring Entity contends that the Applicant’s bid failed to meet the minimum technical score and as such could not be subjected to Financial Evaluation.

On its part, the Interested Party submits at paragraph 8 of its Memorandum of Response that the Applicant’s Request for Review challenges the Procuring Entity’s decision by alleging that the Manuals and Materials Certificate were not a requirement yet Clause 2.4 (e) of Section II. Instructions to Tenderers of the Tender Document cited Specifications as part of the requirements to be contained in Manuals and Materials Certificate submitted by bidders. According to the Interested Party, it was mandatory for bidders to prepare their bids in the English language, the same having been specified in Clause 2.7 and Clause 3.1 of Section II. Instructions to Tenderers of the Tender Document.

Having considered parties’ submissions, the Board observes that it is not in dispute that on 30th April 2020, the Procuring Entity issued Addendum No. 1 clarifying several provisions of the Tender Document including the following:

-

“Question No.		Response
13	All bidders are required to submit Manuals and Materials Certificates as described in the Tables	This item has been omitted from the mandatory requirements. Refer to attached documents (06.Technical bid pg.

	attached and Bills of Quantities	7-8 special notes;07.Technical bid pg. 11-21 instructions to tenderers)
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The Applicant took the view that Clause 13 of Addendum No. 1 dated 30th April 2020 removed the requirement to submit Manuals and Materials Certificates as described in the Tables attached and Bills of Quantities. Having considered the response provided by the Procuring Entity to this query, the Board notes that the Procuring Entity stated that the item was omitted from mandatory requirements and further referred bidders to "06. Technical bid pg. 7-8 special notes; 07. Technical bid page 11-21 instructions to tenderers". It is therefore important to establish what the Procuring Entity meant in stating that the requirement had been omitted from mandatory requirements and referring bidders to the aforementioned clauses of the Tender Document.

To address this question, the Board observes that Clause 1.4 (c). Mandatory Requirements of Section II. Instructions to Tenderers read together with Clause (c) under Stage I. Mandatory Requirements found in the Technical Bid of the Tender Document provides as follows: -

"Manuals and Materials Certificates as described in the Tables attached and Bills of Quantities- (applicable to all Bidders)"

It is worth noting that the two aforementioned clauses both cited Manuals and Materials Certificates as described in the Tables attached and Bills of

Quantities to be evaluated at the Mandatory Requirements Stage. Evidently, Section IV of the Technical Bid of the Tender Document outlined three stages of evaluation namely: -

- Stage 1. Mandatory Requirements;
- Stage 2. Technical Evaluation; and
- Stage 3. Financial Evaluation.

The Board is cognizant that the Mandatory Requirements Stage had ten (10) items outlined in Section IV of the Technical Bid at page 26 of the Tender Document to be evaluated as follows: -

- a) Certificate of Registration/Incorporation (Applicable to Bidders);*
- b) Valid Registration with National Construction Authority (NCA 1)- Applicable to All bidders except manufacturers who have joint ventures with a local who is NCA 1);*
- c) Manuals and Materials Certificates as described in the Tables attached and Bills of Quantities (Applicable to all Bidders);*
- d) Valid Tax Compliance Certificate – (Applicable to all Bidders);*
- e) Valid Tender Security of 150 days- (Applicable to all Bidders);*
- f) Duly Signed Anti-Corruption Declaration Form- (Applicable to all Bidders);*
- g) Duly signed non-debarment declaration form- (Applicable to all Bidders);*
- h) Pagination/Serialization of Tender Document- (Applicable to all Bidders);*
- i) Duly signed Form of Tender- (Applicable to all Bidders);*
- j) Certificate of Site Visit duly signed and stamped by the Procuring Entity- (Applicable to all Bidders).*

This means, before issuance of Addendum No. 1 dated 30th April 2020, Manuals and Materials Certificates as described in the Tables attached and Bills of Quantities would be evaluated in Stage 1. Mandatory Requirements found in the Technical Bid at page 26 of the Tender Document. However, Addendum No. 1 dated 30th April 2020 omitted this item from the Mandatory Requirements Evaluation Stage.

Having found that the Procuring Entity omitted item (c) from the 10 items outlined in Stage 1. Mandatory Requirements of the Tender Document, then the Procuring Entity would only consider the remaining 9 items listed under the Mandatory Requirements Stage during evaluation at the Mandatory Requirements Evaluation Stage. The Procuring Entity further referred bidders to "06. Technical bid pg. 7-8 special notes; 07. Technical bid page 11-21 instructions to tenderers". This prompted the Board to study the Tender Document to ascertain what is provided in the clauses that were cited by the Procuring Entity and the Board proceeds to note the following: -

Clause 7. Special Notes of the Technical Bid at page 7 of the Tender Document which is relevant to the issue under consideration states that: -

"7. Only Tenderers who score 70 points and above in the Technical Evaluation Stage shall qualify for further evaluation and consequently shall have their Financial Bids opened and thereafter evaluated in accordance with the Evaluation Criteria set out in these Tender

Documents. Those who score below 70 points shall be disqualified from further evaluation and their Financial Bids shall not be opened”

The Procuring Entity further referred bidders to page 8 of the Technical Bid of the Tender Document, which the Board notes only contains a sample Pre-Bid Site Visit Certificate which would be signed by the Procuring Entity’s Accounting Officer once a bidder attended the pre-bid meeting held on 22nd April 2020.

The Board observes that according to Clause 7. Special Notes of the Technical Bid at page 7 of the Tender Document referred to by the Procuring Entity in Addendum No. 1 dated 30th April 2020, it is only tenderers who score 70% and above at the Technical Evaluation Stage that would qualify for further evaluation.

The Procuring Entity omitted item (c). Manuals and Materials Certificates as described in the Tables attached and Bills of Quantities from the Mandatory Requirements listed in page 26 of the Technical Bid of the Tender Document. Further, bidders were referred to the clause specifying the technical score required to proceed to Financial Evaluation and page 11 to 21 of the Instructions to Tenderers of the Technical Bid of the Tender Document, which contain the following clauses that are relevant to the issue under consideration: -

Clause 2.1 of Section II. Instructions to Tenderers at page 13 of the Technical Bid of the Tender Document outlined the documents comprising the tender submitted by bidders as follows: -

"2.1. The complete set of tender document comprises the documents listed below and any addenda issued in accordance with Clause 2.4:

- a) These Instructions to Tenderers;***
- b) Form of Tender and Qualification Information;***
- c) Conditions of Contract;***
- d) Appendix to Conditions to Contract;***
- e) Specifications;***
- f) Drawings;***
- g) Bills of Quantities; and***
- h) Forms of Securities."***

Further, Clause 2.2 of Section II. Instructions to Tenderers at page 13 and 14 of the Technical Bid of the Tender Document instructed bidders to undertake the following: -

"The tenderer shall examine all Instructions, Forms to be filled and Specifications in the tender documents. Failure to furnish all information required by the tender documents, or submission of a tender not substantially responsive to the tendering documents in every respect will be at the tenderer's risk and may result in rejections of his tender"

Clause 3.1 of Section II. Instructions to Tenderers found at page 14 of the Technical Bid of the Tender Document stated that: -

"All documents relating to the tender and any correspondence shall be in English language"

Clause 3.13 of Section II. Instructions to Tenderers found at page 15 of the Technical Bid of the Tender Document also directed bidders that they needed to comply with the technical design indicated in the Drawings and Specifications as follows: -

"Tenderers shall submit offers that comply with the requirements of the tendering documents, including the basic technical design as indicated in the Drawings and Specifications. Alternatives will not be considered, unless specifically allowed in the invitation to tender. If so allowed, tenderers wishing to offer technical alternatives to the requirements of the tendering documents must also submit a tender that complies with the requirements of the tendering documents, including the basic technical design as indicated in the Drawings and Specifications. In addition to submitting the basic tender, the tenderer shall provide all information necessary for a complete evaluation of the alternative, including design, calculations, technical specifications, breakdown of prices, proposed construction methods and other relevant details."

Lastly, Clause 5.5 of Section II. Instructions to Tenderers found at page 15 of the Technical Bid of the Tender Document informed bidders of the manner in which evaluation would be conducted prior to the detailed evaluation of tenders.

The Board observes that Stage 2. Technical Evaluation of the Technical Bid at page 26 of the Tender Document states that: -

"The tender document will be examined based on Clause 2.2 of the Instructions to Tenderers which states as follows: -

In accordance with clause 2.2. of Instructions to Tenderers, tenderers will be required to provide evidence for eligibility of the award of the tender by satisfying the employer of their eligibility under sub-clause 2.1 of Instructions to Tenderers and their capability and adequacy of resources to effectively carry out the subject contract. In order to comply with provisions of clause 2.2 of Instructions to tenderers, the tenderers shall be required;

(a) To fill the Standard Forms provided in the bid document for the purposes of providing the required information. Tenderers may also attach the required information if they so desire;

(b) To supply equipment's/items which comply with the technical specifications set out in the bid document. In this regard, the bidders shall be required to submit relevant technical brochures/catalogues with the tender

document, highlighting the Catalogue Numbers of the proposed items. Such brochures/catalogues should indicate comprehensive relevant data of the proposed equipment/items which should include but not limited to the following:

- i. Standards of manufacture;**
- ii. Performance ratings/characteristics;**
- iii. Material of manufacture;**
- iv. Electrical power ratings; and**
- v. Any other necessary requirements (Specify)**

The bid will then be analyzed, using the information in the technical brochures, to determine compliance with general and Particular Specifications for the works as indicated in the tender document. The tenderer shall also fill in the Technical Schedule as specified in the tender document for Equipment and Items indicating the Country of Origin, Model/Make/Manufacturer and Catalogue numbers of the Items/Equipment's they propose to supply"

The Procuring Entity further provided the Items/Parameters to be evaluated at the Technical Evaluation Stage at page 27 of the Technical Bid of the Tender Document as follows: -

PARAMETER

MAXIMUM POINTS

- i. Presentation of Bid Document.....2***
- ii. Compliance with Technical Specifications.....30***
- iii. Key Personnel.....20***
- iv. Contract Completed in the last Ten (10) years.....20***
- v. Schedules of on-going projects.....3***
- vi. Schedules of contractor’s equipment.....28***
- vii. Audited Financial Report for the last 3 years.....15***
- viii. Evidence of Financial Resources.....15***
- ix. Name, Address and Telephone of Banks (Contractor to provide.....2***
- x. Compliance with warehouse completion time.....14***
- xi. Litigation History.....1***

In terms of the criterion on Compliance with Technical Specifications, the Procuring Entity provided a table at page 28 of the Technical Bid of the Tender Document detailing the manner in which scores would be awarded as follows: -

Item	Description	Raw points scored	Max. Point
1	Compliance with Technical Specifications -Full compliant.....30 Non-compliant.....0		

Item (ii) Compliance with Technical Specifications, outlined in Clause A of the Technical Bid at page 30 of the Tender Document required bidders to

submit relevant technical brochures/catalogues with the tender document, highlighting the Catalogue Numbers of the proposed items. The Tender Document further states that such brochures/catalogues should indicate comprehensive relevant data of the proposed equipment/items which should include: Standards of manufacture, Performance ratings/characteristics, Material of manufacture, Electrical power ratings and any other necessary requirements to be specified by bidders. Clause 6.11.1 of the Technical Specifications found at page 30 of the Financial Bid of the Tender Document further stated that: -

"These specifications [i.e. Technical Specifications] describe the basic requirements for equipment. Tenderers are requested to submit with their offers the detailed specifications, drawings, catalogues, etc. for the products they intend to supply"

The Technical Specifications mentioned in Clause 6.11.1 referenced hereinbefore provide Standards (at page 31 of the Financial Bid of the Tender Document) to be followed by bidders for design of the Racking System, the quality of Materials and Workmanship (at page 34 of the Financial Bid of the Tender Document) to be used in executing the subject tender.

The Board observes that the Procuring Entity emphasized that bidders ought to comply with technical specifications provided in the Tender Document and

this in the Board's view calls for a determination of why technical specification of a tender are an important factor to a procuring entity.

Andrew Hiles in his book **Business Continuity Management: Global Best Practice (Rothstein Publishing, 30 Sep 2014, 4th Edition)** defines the term **"Technical Specifications"** as follows: -

"Technical specifications is that part of the tender documents which provides to the bidder technical details of the materials, plant and equipment, services, or site activities which the bidder is to supply if he becomes a successful bidder."

The author further explains that: -

"The technical specifications represent contractual terms that the contractor shall implement in the contract. Obviously, technical specifications have a significant effect on cost of the contract as well as important parameters that determine the time needed for its implementation. The determination of the technical specifications is a crucial task during the development of the tender documents, because the success of the tender procedure in leading to the acquisition of the requested results (supplies, services or constructions) at the right quality in the available time and within the available budget, depends on the technical specifications. For this reason, the technical

specifications must be determined in such a way as to ensure both of the following two aims:

- ***The achievement of the desirable characteristics which are requested by the procuring entity;***
- ***The promotion of the broadest possible competition between the economic operators to tender for the contract so that the optimum cost is achieved and the conditions of transparency and equal treatment of candidates are ensured***

The technical specifications are the most important section of the tender document, both for the purchasing organization as well as for the bidders, since it is the specification which sets out precisely what characteristics are required from the materials, plant and equipment, services, or site activities being sought by the purchasing organization.

Technical specifications clearly, accurately and completely describe in detail what the purchasing organization wants the successful bidder to supply. A clear, accurate and complete specification is the foundation of any purchase, and ensures the best chance of getting what the purchasing organization wants. Whether the purchase is for a small simple item, or a large complex plant, or the activities to be performed at the

construction site, the technical specification needs to clearly outline the requirements to the bidder.”

From the foregoing, the Board observes that technical specifications provide the foundation of what a procuring entity is procuring when advertising a tender. As a result, a procuring entity's tender document ought to provide the technical specifications of what the procuring entity seeks to procure in a detailed and precise manner. Bidders have an obligation to demonstrate that they have met the technical specifications of what is being procured by a procuring entity.

Having studied the Tender Document applicable in the subject tender, the Board observes that, detailed technical specifications including standards and drawings are required by the procuring entity to implement the subject tender. Further, the Tender Document required bidders to provide brochures/catalogues indicating comprehensive relevant data of the proposed equipment/items which should include: Standards of manufacture, Performance ratings/characteristics, Material of manufacture, Electrical power ratings and any other necessary requirements to be specified by bidders to be evaluated under the item called **Compliance with Technical Specifications** at the Technical Evaluation Stage.

Having noted that Compliance with Technical Specifications provide a foundation of what the Procuring Entity is procuring in the subject tender, it

was therefore mandatory for bidders to adequately give a description of the technical specifications that correspond to the requirements in the subject tender in the catalogues and brochures provided by bidders.

The Procuring Entity informed the Applicant that **Manuals and Materials Certificates provided were not in English Language and had no reference to the standards prescribed.** In the Board's view, the Procuring Entity ought to have stated whether or not the Applicant provided catalogues and brochures. Furthermore, the Procuring Entity ought to have stated whether or not such catalogues and brochures if provided by the Applicant met the criterion on Compliance with Technical Specifications at the Technical Evaluation Stage.

From the Applicant's pleadings outlined hereinbefore, the Applicant appears to be uncertain of the stage at which its bid was found non-responsive. On one hand, the Applicant at paragraphs 18 of the Request for Review presumed that the Procuring Entity evaluated its bid and found it non-responsive based on a mandatory requirement at the Preliminary Evaluation Stage that was omitted by Clause 13 of Addendum No. 1 dated 30th April 2020. On the other hand, the Applicant at paragraph 19 of the Request for Review presumed that its bid was unfairly evaluated at the Technical Evaluation Stage through application of extrinsic criteria contrary to stipulations of the Tender Document and the Act.

The Board studied the Evaluation Report dated 4th June 2020 and notes that the Evaluation Committee only considered nine items outlined in Stage I. Mandatory Requirements of Section IV of the Technical Bid at page 26 of the Tender Document, because item (c). Manuals and Materials Certificates as described in the Tables attached and Bills of Quantities had been omitted from the Mandatory Requirements pursuant to Clause 13 of Addendum No. 1 dated 30th April 2020. The Applicant together with nine (9) other bidders were found responsive at the end of evaluation at the Mandatory Requirements Evaluation Stage based on the remaining 9 items listed at page 26 of the Technical Bid of the Tender Document.

At the Technical Evaluation Stage, one of the items for evaluation as already noted by the Board was Compliance with Technical Specifications wherein bidders ought to have provided brochures/catalogues indicating comprehensive relevant data of the proposed equipment/items which should include: Standards of manufacture, Performance ratings/characteristics, Material of manufacture, Electrical power ratings and any other necessary requirements to be specified by bidders.

This in the Board's view is sufficient evidence that the Procuring Entity would determine whether or not the brochures/catalogues provided by a bidder comply with the technical specifications described in the Tender Document at the Technical Evaluation Stage. In essence, the technical specifications of what the Procuring Entity is procuring under the subject tender would be

contained in the Brochures and Catalogues provided by a bidder and without this information, the Procuring Entity could not ascertain what equipment it is procuring from a particular bidder.

The Board observes that at page 000298 of the Applicant's original Technical bid is a Divider labelled as "**Products, Catalogs/Brochures and Specifications**". Immediately after the said divider, the Applicant attached a document running from pages 000299 to 000326 of its original Technical bid which contains drawings and writings. The said document is titled "**Dişarıda kalan ne varsa**" at page 000300 of the Applicant's Technical Bid and is written in a language that is not English.

The Board notes that the Applicant provided a Divider named as "**Products, Catalogs/Brochures and Specifications**" and subsequently thereafter attached a document that is not written in the English language even though Clause 3.1 of Section II. Instructions to Tenderers found at page 14 of the Technical Bid of the Tender Document specified that: -

"All documents relating to the tender and any correspondences shall be in English language"

It is evident that bidders were required to provide all documents relating to the tender and any correspondences in the English language. Hence, any brochures and catalogues that ought to demonstrate a bidder's compliance

with technical specifications of the Tender Document must be provided in the English language. From the said brochures and catalogues, the Procuring Entity would then be able to assess whether or not a bidder met the technical specifications of the Tender Document. In the instant case, the Procuring Entity had no way of ascertaining the product it would procure from the Applicant in order to install the Racking System required under the subject tender.

The Board studied the Evaluation Report dated 4th June 2020 and notes that the criterion of Compliance with Technical Specifications carried a total score of 30 points, but the Applicant achieved a score of 0 under this criterion. Further, the Applicant achieved an overall technical score of 89.78371 out of 142 points which translates to 63.23%, which does not meet the minimum technical score of 70% required to proceed to Financial Evaluation.

This Board is cognizant that page 30 of the Technical Bid of the Tender Document provides as follows: -

"Following the above analyses, where the proposed equipment is found not to conform to the stipulated specifications, the tender will be deemed Non-Responsive and will not be evaluated further"

It is the Board's considered view that the product proposed by a bidder must meet the technical specifications of the Tender Document and this was a critical requirement to the effect that a bidder's failure to meet the same would render such a bid non-responsive and the same would not be evaluated further. In essence, it would be immaterial for the Procuring Entity to consider the other sub-categories of technical evaluation (i.e. Presentation of the Bid, Key Personnel, Contract completed in the last Ten years, Ongoing projects and their values, Schedule of contractors equipment and transport, Financial Report, Litigation History and Work Program) even though a bidder already failed to satisfy the first item called Compliance with Technical Specifications where the brochures and catalogues provided by a bidder were evaluated against the technical specifications of the Tender Document.

The Board observes that the Evaluation Committee had no way of knowing whether the document provided by the Applicant (which is not in the English Language) complied with the technical specifications of the Tender Document and whether the Applicant met the prescribed standards required by the Procuring Entity.

The Board considered the authorities cited by the Applicant and notes that they are based on instances where a procuring entity applied extrinsic criteria in evaluating tenders. In **PPARB Application No. 46, 47, 48 and 50 of**

2013 (Consolidated), Unifree Duty Free & 3 Others v. Kenya Airports Authority, the Board held as follows: -

"The Board has perused the Tender Document and notes that there was no requirement for proof of incorporation of subsidiary companies where a bidder had attached documents for its subsidiaries as proof of experience as a master of concessionaire"

In **PPARB Application No. 79 of 2018, Finken Holding Limited v. Ministry of Agriculture & Irrigation, State Department of Livestock Smallholder Dairy Commercialization Programme (SDCP)**, the Board held as follows: -

"The Applicant herein was disqualified at the technical evaluation stage for failure to provide proof/evidence of workshop and secondly that it did not comply with the time schedule (work schedule) as it did not provide any

The Board has however looked at clauses 35.2, clause 36 of the instructions to bidders and the requirements of Section III of the tender document and notes that the provisions of Section III (1) (1.2) (a) and (b) expressly excluded the provisions of a work schedule as part of the evaluation criteria for this tender. The Board therefore finds that it was not a requirement of this tender that a bidder produces a work schedule"

The Board studied the finding in the above cases and notes that the circumstances therein are different from the instant Request for Review in that, the procuring entity in the above cases introduced a criterion during evaluation when the same were not provided in the Tender Document neither was there any addendum issued adding the same as criteria for evaluation. However, in the instant Request for Review, the Procuring Entity had the obligation to determine whether or not the brochures and catalogues provided by a bidder comply with the technical specifications described in the Tender Document at the Technical Evaluation Stage as opposed to the Mandatory Requirements Stage.

The Procuring Entity referred the Board to **Judicial Review Miscellaneous Application No. 103 of 2019, Republic v. Public Procurement Administrative Review Board & Another ex parte National Irrigation Board [2020]** eKLR, where the High Court held as follows at paragraph 151 thereof: -

"A distinction should be drawn between a material factor and the evidence needed to prove that factor. Regard must be had to the facts as whole in the context of the applicable legislation and the words 'acceptable tender' which involves consideration of the degree of compliance with tender conditions. Essentially, a failure to comply with prescribed conditions will result in a tender being disqualified..."

Having considered the finding of the court in the case cited hereinbefore, the Board observes that Compliance with technical specifications was a material factor that would assist the Procuring Entity determine what it is procuring from a bidder. This Board already outlined the Technical Specifications of the Racking System to be installed under the subject tender and noted that the same are specially made to meet the Procuring Entity's needs. The Applicant failed to comply with a material factor that goes to the root of the subject tender and the Procuring Entity had no option but to find the Applicant's bid non-responsive for non-compliance with technical specifications, which required no further evaluation, let alone allocating scores to a bidder.

The Board takes cognizance that section 80 (2) of the Act provide that: -

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

The above provision demonstrates that evaluation and comparison of bids is done using the procedures and criteria set out in the tender documents. In **Miscellaneous Application No. 407 of 2018, Republic v Public Procurement Administrative Review Board; Arid Contractors & General Supplies (Interested Party) Ex parte Meru University of Science & Technology [2019] eKLR**, the court held that: -

"An acceptable tender under the Act is any "tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document. Compliance with the requirements for a valid tender process, issued in accordance with the constitutional and legislative procurement framework, is thus legally required. These requirements are not merely internal prescripts that the Procuring Entity or the Review Board or even this court may disregard at whim. To hold otherwise would undermine the demands of equal treatment, transparency and efficiency under the Constitution."

The above case demonstrates that bidders have an obligation to meet specifications and conditions of a tender as set out in the Tender Document and such requirements should not be disregarded by a Procuring Entity or even this Board 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.

The Applicant failed to meet the criterion on Compliance with Technical Specifications at the Technical Evaluation Stage, having provided a document written in a language that is not in English despite the Tender Document expressly directing bidders to provide all their documentation in

the English language, hence the same could not be evaluated against the Technical Specifications of the Tender Document. Furthermore, the Applicant achieved an overall score of 63.23% which was below the minimum technical score of 70% required to proceed to Financial Evaluation. As a result, the Procuring entity had no option but to find the Applicant's bid non-responsive.

Accordingly, the Board finds that the Procuring Entity evaluated the Applicant's bid at the Technical Evaluation Stage in accordance with the Tender Document and the provisions of section 80 (2) and Article 227 (1) 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 18th June 2020 by the Applicant herein with respect to Tender No. KEMSA/CONST/OIT4/2019-2020 for Supply, Installation & Commissioning of Racking System & Associated Works, be and is hereby dismissed.**

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

Dated at Nairobi this 9th day of July 2020

CHAIRPERSON

SECRETARY

PPARB

PPARB