

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 133/2020 OF 7TH OCTOBER 2020

BETWEEN

THE CONSORTIUM OF RENTCO

AFRICA LIMITED AND SPENOMATIC (K).....APPLICANT

AND

THE ACCOUNTING OFFICER,

MOI TEACHING AND REFERRAL HOSPITAL.....RESPONDENT

PHARMAKEN LIMITED..... INTERESTED PARTY

Review against the decision of The Accounting Officer, Moi Teaching and Referral Hospital with respect to Tender No. MTRH/RFP/1/2020-2021 For 'Sourcing of Boiler 4 Ton Water/Feed System on Leasing Agreement (Re-tender).

BOARD MEMBERS

- | | |
|----------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mr. Alfred Keriolale | -Member |
| 3. Arch. Steven Oundo, OGW | -Member |

IN ATTENDANCE

- | | |
|------------------------|------------------------------|
| 1. Mr. Philemon Kiprop | -Holding brief for Secretary |
|------------------------|------------------------------|

BACKGROUND TO THE DECISION

The Bidding Process

Moi Teaching and Referral Hospital (hereinafter referred to as "the Procuring Entity") invited eligible and interested bidders to submit proposals for Tender No. MTRH/RFP/1/2020-2021 For Sourcing of Boiler 4 Ton Water/Feed System on Leasing Agreement (Re-tender) (hereinafter referred to as "the subject tender") via an advertisement in the MyGov pull-out newspaper on 14th July 2020.

Bid Submission Deadline and Opening of bids

A total of six (6) bidders/firms submitted proposals and the same were opened on 11th September 2020 in the presence of bidders and their representatives who chose to attend and which bids were recorded as follows:

B. No	Co. Address	Tel and email	Directors	Tender security
RFP 1 B1	Star Rentals Ltd 2 nd FLOOR, Signon Complex, P.O. Box 19055-00501 Nairobi	Tel: 020-2636764 0704-104093 Email: osaina@starrentals.co.ke info@starrentals.co.ke	Edwin Kiplagat Ronoh Joseph Kipketer Koskey Suginon Group Limited Kencont Logistics Services Limited Meshack Torotich Kipturgo Zambuni Alun Shaun	Kenya Commercial Bank Limited Ksh.800,000/- -
RFP 1 B2	Energy Intelligence Africa Ltd P.O. Box 158-00618,	Tel: 0728-153000 0725-666141 Email: info@energyintelligenceafrica.com	Godfrey Marambe M. Robert Munga B. Doreen Nyakeraro O.	Credit Bank PLC Kshs. 800,000/-

B. No	Co. Address	Tel and email	Directors	Tender security
	Nairobi			
RFP 1 B3	Pharmake n Ltd 5 th Floor Links Plaza P.O. Box 95625-80106, Mombasa	Tel: 020-2040269 / 0717-685075 0726-849861/ 0733-944444 Email: msa@pharmaken.net	Samier Mohamedraza Muravvej Leonard Muriuki Njeru Mohamedraza Muravvej Seyed	I @ M Bank Limited Kshs.800,000 /-
RFP 1 B4	Rentco Africa Ltd Upper Hill Masaba road P.O. Box 20736-00100 Nairobi	0704-278808 0737-761270 Email; info@rentco.co.ke	Natasha Kanda Abigail Kanda Innocent Odhiambo Muganda Raymond Otieno Omondi Robert Kanda Nyasimi	Sidian Bank Ksh.800,000/ -
RFP 1 B5	Aqua Boil Contractor s Ltd Motor World Centre P.O. Box 58380-00200 Nairobi	Tel: 0722-553520 0722-334777 Email: info@aquaboil.co.ke mokanyeria@gmail.com	Moffat Kanyeria Kibuthu Nahashon Anyeria Mugo	Xplico Insurance Company Ltd Ksh.800,000/ -
RFP 1 B6	Robert Bosch East Africa Limited, 4 th Floor, Fedha Plaza, Westlands P.O. Box 856-00606, Nairobi	Tel: 0798-499657 0721-537668 Email: victor.mailu@bosch.com	Markus Thill Johannes VandanRughaniPiyus Alex Marentia Homan Robert Bosh InternationaleBeteiligung en AG Robert Bosch Investment Nederland B.V.	Kshs. 800,000/- Stanbic bank Kenya

Evaluation of Bids

The evaluation process was conducted in four stages:

1. Mandatory Requirements Evaluation;
2. Competency Evaluation;
3. Technical Evaluation;
4. Financial Evaluation.

1. Mandatory Requirements Evaluation

At this stage of evaluation, proposals submitted by bidders were subjected to an examination to confirm compliance with the following mandatory requirements:

No.	Mandatory Requirements
1.	Certificate of Incorporation or Registration.
2.	Valid Tax Compliance Certificate or equivalent.
3.	Valid Trade License or Single Business Permit or equivalent.
4.	Duly filled, signed and stamped form of tender.
5.	Completely filled, signed and stamped business questionnaire.
6.	Original bid bond of Ksh. 800,000/- or 8,000 US Dollars. Tender Securing Declaration form for entities belonging to YWPDs shall be required.
7.	Bidders must provide evidence of having supplied an oil run steam boiler of at least 4 ton and HFO vessel of at least 60m ³ by providing copies of orders or award letters from the current major clients.
8.	Submit either audited accounts for 2017 and 2018 or current bank statement for the last 6 month preceding tender opening date.
9.	Submit a valid license of the lead Engineer registered by Engineers Board of Kenya (EBK)
10.	NCA certification as a Specialist Contractor of at least NCA 4 or above.
11.	A sworn statement or declaration stating that: -
	a) The firm has not been debarred from participating in any public procurement by PPRA.
	b) No person related to the firm has any spouse or children working at M.T.R.H.
	c) The firm has not been engaged in any unethical, corrupt, collusive or fraudulent activities in public procurement matters.

No.	Mandatory Requirements
	d) The firm has not been declared bankrupt, insolvent and or under receivership.
	e) The firm is not guilty of any violation of fair employment law practices.
	f) Declaration that the firm will not engage in any corrupt or fraudulent practice.

Bidders were required to attain 100% compliance with the foregoing mandatory requirements to proceed to the next stage of evaluation. Failure to adhere to any of the listed mandatory requirements would lead to disqualification.

The Evaluation Committee observed as follows: -

- a) **B1** – Did not provide evidence of having supplied an oil run steam boiler of at least 4 ton and HFO vessel of at least 60m³ by providing copies of orders or award letters from the current major clients.
- b) **B2**– Did not submit evidence of having supplied an oil run steam boiler of at least 4 tons and HFO vessel of at least 60m³ by providing copies of orders or award letters from the current major clients.
- c) **B5** - Did not submit evidence of having supplied an oil run steam boiler of at least 4 tons and HFO vessel of at least 60m³ by providing copies of orders or award letters from the current major clients; No valid license of the lead Engineer registered by Engineers Board of Kenya (EBK) and no sworn statement or declaration stating **a** to **f** as indicated in the tender document.

Upon conclusion of this stage of evaluation, the Evaluation Committee found that Bidders **B3**, **B4** and **B6** submitted all mandatory requirements and thus qualified to proceed to the next stage of evaluation while Bidders **B1**, **B2** and **B5** did not qualify as they did not provide all mandatory requirements.

2. Competency Evaluation

At this stage of evaluation, bidders were required to provide the following documentary evidence: -

No.	Requirement	Marks	
1	Evidence of having performed similar leasing or outright purchase in at least two reputable organizations (attached any leasing evidence document)	1 And below Institutions	15
		3-4 institutions	20
		5 and above institutions	25
2	Capacity to install, maintain and sustain the boiler operation professionally (attach CV for your technical personnel. The lead Engineer to have valid license from EBK)	Certificate	15
		Diploma	20
		Degree	25
3	Evidence of the company having operated for at least 2 years carrying out specialized engineering works	2 – 3 years	15
		4 – 5 years	20
		5 years and above	25
4	Evidence of having capacity to procure the steam boiler and sustain it for at least one year (show available finance or promise by financial institution)	71 – 80 million	15
		81 – 90 million	20
		91 million and above	25
TOTAL		100	

The pass mark was 70% and bidders who attained 70 marks and above would proceed to technical evaluation.

The results were as follows: -

Bidder	Marks	Remarks
B3	100%	Qualified
B4	100%	Qualified
B6	100%	Qualified

Bidders **B3**, **B4** and **B6** met the 70% threshold and qualified for the next stage of evaluation.

3. Technical Evaluation

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

NO.	ITEM DESCRIPTION
A	STEAM BOILER
	- Complete burner assembly
	- internal water column
	- Two low water cutoffs and one high water level cutoff (probe type)
	- Water gauge assembly
	- Water gauge blow down
	- Stack adaptor
	- Low and high-water level alarm
	- Flame failure alarm
	- Operation pressure control
	- Two high limit pressure controls

NO.	ITEM DESCRIPTION
	<ul style="list-style-type: none"> - Two (2) Steam safety valves
	<ul style="list-style-type: none"> - Control panel – completely wired with wiring diagram & mounted pressure gauge
	<ul style="list-style-type: none"> - Flame programmer
	<ul style="list-style-type: none"> - Water stop valve
	<ul style="list-style-type: none"> - Blow down valves
	<ul style="list-style-type: none"> - Surface blow down connection and valve
	<ul style="list-style-type: none"> - Water check valve
	<ul style="list-style-type: none"> - Instruction manual
B	<p>2 DAY TANKS (Day water tank and a simplex steam heavy oil pre-heated tank)</p> <p>5000 litres day tanks to be installed on a false floor inside the boiler room raised to a height of 4 meter above the floor</p> <p>Other tank components:</p> <ul style="list-style-type: none"> - Material – Carbon steel - Pump and motor assembled and piped - Strainer and stuff off valve piped in line - Water level control with solenoid valve - Water site glass and valve assembly - 3 phase electrical panel box with CCT feed water – pump motor starters
C	<p>WATER RETURN SYSTEM</p> <ul style="list-style-type: none"> - Stand - pump and motor assembled and piped - strainer and shut off valve piped in line - 3 Phase Electrical panel box with CCT <p>pump motor starter and Hand-off auto switch and Lights, Horizontal pump(s)</p>
D	<p>BLOW OFF SEPARATOR</p> <ul style="list-style-type: none"> - 3x4 Hand hole for clean-out and inspection - Durable heavy gauge steel construction - Baffle plate design to absorb steam flash and pressure - Cold water inlet - Bottom drain opening for sludge removal <p>Large steam vent opening.</p>
E	<p>WATER SOFTENER</p> <ul style="list-style-type: none"> - Water softener complete with timed down flow brining saves salt and provides greater iron removal capacity - salt usage is fully adjustable with direct reading dial. - Automatic built in by pass for uninterrupted water service during

NO.	ITEM DESCRIPTION
	regeneration cycle. Control valve with programmable totalize set points for auto generation.
F	STEAM BOILER CHIMNEY INSTALLATION - Boiler chimney made of 5mm thick M.S plate rolled and welds to fit Height approximately 12m high, flanged at some intervals and painted with heat resistant aluminum paint, insulated and cladded
G	Transfer pumps as "MONO" complete with motor auto control panel
H	Cold oil filters.
I	2 HOT WATER CALORIFIER – LAUNDRY & KITCHEN 5000 liters standard hot water calorifier, vertical, cylindrical, made of 6mm thick M.S plate complete with; <ul style="list-style-type: none"> <li data-bbox="293 667 1394 745">- Copper heat battery <li data-bbox="293 745 1394 824">- Safety valve <li data-bbox="293 824 1394 902">- Temperature control <li data-bbox="293 902 1394 981">- Temperature gauge <li data-bbox="293 981 1394 1059">- Pressure gauge <li data-bbox="293 1059 1394 1137">- Hot water outlet gate valve <li data-bbox="293 1137 1394 1216">- Cold water inlet gate valve <li data-bbox="293 1216 1394 1294">- Hot water returns inlet gate valve <li data-bbox="293 1294 1394 1373">- Inspection man hole <li data-bbox="293 1373 1394 1451">- Steam inlet to the heater battery c/w steam globe valve <li data-bbox="293 1451 1394 1529">- 50mm thick fiber rock wool insulation <li data-bbox="293 1529 1394 1608">- Aluminum cladding <li data-bbox="293 1608 1394 1686">- Condensate outlet steam trap set and valves <li data-bbox="293 1686 1394 1771">- The calorifiers to be internally coated with 3 coats of epoxy paint and hydraulic tested to approval.
	PRESSURE REDUCING STATION TO 5000LTS HOT WATER CALORIFIERS
J	Temperature and steam flow control for the calorifier Steam thermostat temperature range 0-150 degrees Celsius complete with probe and pocket.

NO.	ITEM DESCRIPTION
	<p align="center">Steam and condensate pipe work and their insulation</p>
K	<p>PROVISION</p> <p>Allow for blow down extension and termination</p> <p>Allow for fuel pipe work insulation (lagging and cladding) from burner to the fuel storage tanks</p> <p>Allow for boiler & calorifier access ladders</p> <p>Allow for pipe brackets & bolts</p> <p>Allow for boiler electrical works</p>
L	<p><u>SPECIFICATIONS FOR WATER BOILER RESERVOIR TANKS AND ACCESSORIES.</u></p> <p>Tank capacity10,000 liters' x 6</p> <p>Tank material PVC, such as in KENTANK</p> <p>Maximum Diameter for a tank 260cm</p> <p>Maximum height280 cm</p> <p><u>Scope of works</u></p> <p>1. Supply, deliver, install, test and commission the above mentioned tanks, their piping and pumps as follows</p> <p> a) 6 (six) of the tanks to be install at the building top where the current tanks that serve the kitchen and laundry sit. Out of the six tanks, three will be connected to serve the purpose which the current installed tanks serve i.e. to supply water for use in kitchen, laundry and fire extinguisher. Inlet of the three tanks to be the inlet of the existing tanks.</p> <p> Remaining three tanks serve as boiler reservoir tanks and should be connected as such.</p> <p> The inlet of these three tanks to be from two sources</p> <p> i) From the kitchen/laundry tank inlet pipe.</p> <p> ii) A provision is made that will be used as an inlet from a main water tank that is currently under procurement process.</p> <p> All the 6 tanks to be isolatable, by way of valves, such that it is possible to prevent entry and /or exit of the tank content.</p> <p> Piping from these tanks is such as to feed the boiler day tank situated inside the mezzanine floor in the boiler room. Current pipe sizes to be maintained.</p> <p>2. Dis-assemble the existing tanks system to give way for the installation of the new incoming tanks system. The work to be in such a manner as to avoid disrupting kitchen/laundry service delivery as much as possible.</p>

The pass mark was 100%. Bidders who offered a steam boiler compliant with the desired technical specifications would qualify to proceed to financial evaluation and have their financial proposal opened on a date to be communicated.

The Evaluation Committee observed that Bidder **B6** did not submit a list of all required technical specifications for hot water calorifier namely;

- Safety valve
- Temperature control
- Temperature gauge
- Pressure gauge
- Inspection man hole
- Steam inlet to the heater battery c/w steam globe valve
- Condensate outlet steam trap set and valves

The results were as follows: -

Bidder	Remarks	Weight
B3	Qualified	100%
B4	Qualified	100%
B6	Not Qualified	0

Bidders **B3 and B4** met the required threshold of 100% and qualified to proceed for the next stage of evaluation.

4. Financial Evaluation

The Evaluation Committee undertook financial evaluation and observed that Bidder 3 and Bidder 4 provided both leasing and outright purchase proposals as shown below:

Leasing option

	B3 (Pharmaken Limited)	B4 (Rentco Africa Limited)
Commitment deposit	10,000,000.00	-
Monthly rental for 5 years	60,000,000.00	78,492,943.80
Fuel Tank and accessories including mechanical works	6,595,560.00	5,705,969.00
TOTAL	66,595,560.00	84,198,112.80
Percentage	100%	79.10%

Outright purchase

	B3 (Pharmaken Limited)	B4 (Rentco Africa Limited)
Cost of boiler	43,500,000.00	49,974,408.00
Maintenance fee for 5 years	2,250,000.00	2,370,060.00
Fuel Tank and accessories including mechanical works	6,595,560.00	5,705,969.00
TOTAL	52,345,560.00	58,050,437.00
Percentage	100%	90.18%

The Evaluation Committee's Recommendation

In view of the evaluation process, the Evaluation Committee recommended award of the subject tender to **M/s Pharmaken Limited** as the lowest technically responsive bidder on outright purchase option of Kshs. 52,345,560.00/- having scored 100%.

Professional Opinion

The Supply Chain Manager reviewed the Evaluation Report and concurred with the Evaluation Committee's recommendation of award, vide a Professional Opinion signed on 23rd September 2020.

The Chief Executive Officer of the Procuring Entity approved the Evaluation Committee's recommendation of award on 24th September 2020.

REQUEST FOR REVIEW NO. 133 OF 2020

M/s The Consortium of Rentco Africa Limited and Spenomatic (K) Limited (hereinafter referred to as "the Applicant"), lodged a Request for Review dated and filed on 7th October 2020 together with a Statement in Support of the Application for Review (hereinafter referred to as "the Applicant's Statement") dated and filed on even date through the firm of Sagana, Biriq & Company Advocates.

In response, the Procuring Entity lodged a Memorandum of Response dated 16th October 2020 and filed on 19th October 2020 (hereinafter referred to as 'the Procuring Entity's Response') through its Advocate, Mr Joshat Mutuma Kirima.

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

-

a. An order allowing the Request for Review;

- b. An order annulling the decision of the Procuring Entity through its letter dated 24th September 2020 that the Applicant had not been successful in Tender No. MTRH/RFP/1/2020-2021;***
- c. In the alternative, an order awarding the tender to the successful bidder following a re-evaluation of the Applicant's tender and the Tender Document;***
- d. An order directing and compelling the Public Procurement Regulatory Authority to conduct a procurement audit of the Procuring Entity and the Interested Party's records regarding the subject tender;***
- e. An order for costs of and/or incidental to this review be borne by the Procuring Entity;***
- f. Any other orders that deem just and fit in the circumstances.***

On 16th March 2020, the Board issued Circular No. 1/2020 and the same was published on the Public Procurement Regulatory Authority (hereinafter referred to as "the PPRA") website (www.ppra.go.ke) in recognition of the challenges posed by COVID-19 pandemic and instituted certain measures to restrict the number of representatives of parties that may appear before the Board during administrative review proceedings in line with the presidential directives on containment and treatment protocols to mitigate against the potential risks of the virus.

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

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

The Request for Review was lodged on 7th October 2020. The Procuring Entity was then served with the Request for Review on 8th October 2020. Thereafter, emails were sent to all bidders who participated in the subject tender, including the successful bidder, that is, the Interested Party, on 21st October 2020. However, the Interested Party did not file any pleadings in response to the Request for Review.

The Applicant, the Procuring Entity and the Interested Party did not file any Written Submissions.

BOARD'S DECISION

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

The issues that arise for determination are as follows: -

- I. Whether M/s Pharmaken Limited satisfied the mandatory requirements pursuant to Section III Terms of Reference on page 14 of the Request for Proposals Document to qualify for award of the subject tender;**
- II. Whether the Procuring Entity awarded the subject tender in accordance with Clause 2.8 of Section II Information to Consultants on page 12 of the Request for Proposals Document read together with section 80 (2) of the Act and Article 227 (1) of the Constitution**

The Board will now proceed to address the first issue framed for determination as follows: -

The Applicant in paragraph 21 of its Request for Review Application contended that the Interested Party could not have possibly met the mandatory requirements as set out in the Tender Document since it did not submit its bid as a consortium in line with Section III of the Tender Document. According to the Applicant, Section III of the Tender

Document required each partner to a consortium/joint venture to comply with the mandatory requirements as set out in the Tender Document before the joint venture could proceed for further evaluation. The Applicant contended that the Interested Party deals with pharmaceutical products and is not a leasing company and unless it submitted its bid as a consortium/joint venture it could not have met the mandatory requirements as set out in page 20-25 of the Tender Document.

On its part, the Procuring Entity submitted that the Interested Party participated in the subject procurement proceedings as M/s Pharmaken Limited and submitted in its proposal a legally constituted Joint Venture Agreement which it executed on 4th August 2020 with Henan Yuanda Boilers Corporation Limited who are equipment manufacturers. The Procuring Entity contended that the said Joint Venture Agreement provided that the Interested Party shall prepare and submit a bid in its name on behalf of the joint venture and the commercial and technical documents therein shall be construed as one single bid. According to the Procuring Entity, the Interested Party's Joint Venture Agreement was executed before a Commissioner for Oaths and was in its view legally constituted in accordance with the Request for Proposals Document.

To begin with, the Board observes that the subject tender is a Request for Proposals *'For Sourcing of Boiler 4 Ton Water/Feed System on Leasing Agreement Re-Tender'*. Further, the subject tender is a re-tender pursuant to the orders of this Board issued in **PPARB Application No. 136 of 2019 The Consortium of Rentco East**

Africa Limited and Spenomatic (K) Limited vs. The Accounting Officer, Moi Teaching and Referral Hospital and Pharmaken Limited.

The Board examined the Procuring Entity's Request for Proposals Document and observes on page 3 therein as follows: -

"Moi Teaching and Referral Hospital invites proposals for sourcing of Boiler 4 Ton Water/Feed System on Leasing Agreement from eligible candidates."

The question that now arises is who is an eligible candidate under the subject tender?

The Act defines a "tender" under section 2 in the following terms: -

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

The Board notes, in a procurement process, a candidate submits a tender, that is, ***an offer in writing to supply goods at a price, pursuant to a request for proposals by a procuring entity.***

Section 2 of the Act defines the terms "candidate" and "tenderer" as follows:

"candidate" means a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity;"

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

From this definition it is clear that a candidate in a tender process is a person when, in response to an invitation to tender, obtains tender documents from a procuring entity whereas a tenderer is a person who not only obtains tender documents but also submits a tender to the procuring entity.

The Cambridge Dictionary defines the term 'eligible' to mean: -

"having the necessary qualities or fulfilling the necessary conditions"

In view of the foregoing provisions, an eligible tenderer under the subject tender is considered to be a person, having the necessary qualities or fulfilling the necessary conditions to submit a proposal in writing to supply goods at a price, pursuant to a request for proposals.

Further, under Section III Terms of Reference on page 14 of the Request for Proposals Document, the Board observes as follows: -

"...The Hospital would like to invite interested and eligible candidates who must qualify by meeting the set criteria as provided by the Hospital by offering Steam Boiler 4 Ton water/feed system on leasing agreement.

.....Bidders may tender for this work as a Joint Venture that is legally constituted. If the Joint Venture has not been legally constituted at the time of tendering, the RFP shall give the names of all envisaged partners and scope of their roles in the tender and how payment shall be made to each of the partners. It should also be noted that each party of the Joint Venture will be required to pass stage one of evaluation which is MANDATORY REQUIREMENTS before the JV could be evaluated on the other stages.

Accordingly, bidders may submit a proposal in response to the subject tender as a Joint Venture. Further, each party of the Joint Venture will be required to pass the Mandatory Requirements Evaluation Stage before the Joint Venture can qualify to proceed for further evaluation.

Notably, the use of the word 'may' in the foregoing provision is discretionary and affords bidders the option to submit a proposal in response to the subject tender as a 'Joint Venture'.

At this juncture, it is necessary for the Board to determine the meaning of a Joint Venture?

The Black's Law Dictionary defines a 'joint venture' as follows: -

"an association of persons jointly undertaking some commercial enterprise"

In essence, according to the Procuring Entity's Request for Proposals Document, the Procuring Entity considered eligible tenderers to be either an 'Individual Tenderer' or 'an association of persons jointly undertaking some commercial enterprise', that is, a Joint Venture.

The Board examined the Procuring Entity's Tender Opening Minutes signed on 14th September 2020 and observes that by the tender submission deadline of 11th September 2020, the Procuring Entity received six (6) proposals in response to the subject tender from the following bidders: -

1. M/s Star Rentals
2. M/s Energy Intelligence Africa Limited
3. M/s Pharmaken Limited
4. M/s Rentco Africa Limited
5. M/s Aqua Boil Contractors Limited
6. M/s Robert Bosch East Africa Limited

The Board observes that the Interested Party, that is, M/s Pharmaken Limited submitted a proposal in response to the subject tender.

The Procuring Entity furnished the Board with all the original technical and financial proposals of all the six (6) bidders which forms part of the Procuring Entity's confidential file and the Board observes that the Interested Party submitted a technical and financial proposal in response to the subject tender.

The Board examined the original technical proposal submitted by the Interested Party and observes from its Form of Tender as contained on page 107 therein that the Interested Party, that is M/s Pharmaken Limited submitted a proposal *'to supply, deliver, install and commission 4 Ton Water/Feed Boiler on Leasing Agreement Re-Tender in conformity with the said tender documents...'*

On page 10 and 11, the Interested Party submitted a Joint Venture Agreement dated 4th August 2020 executed between the Interested Party and one Henan Yuanda Boiler Corporation Limited which states as follows: -

"Whereas the MOI TEACHING AND REFERRAL HOSPITAL invited PROPOSALS FOR SOURCING OF BOILER 4 TON WATER/FEED SYSTEM ON LEASING AGREEMENT RE-TENDER vide Tender No. MTRH/RFP/1/2020-2021 to be submitted by the 13th August 2020 and whereas the two companies have agreed as a Joint Venture to submit a bid:

Now this deed witnesseth as hereunder

- 1. That M/s PHARMAKEN LTD shall prepare and submit in its name and stead on behalf of the Joint Venture**
- 2. That the Request for Proposals For Sourcing of Boiler 4 Ton Water/Feed System on Leasing Agreement Re-tender shall be supported by Commercial and Technical documents from the respective companies of the Joint Venture shall be construed as one single bid.**
- 3. That in the event of the bid by the Joint Venture being successful, M/s PHARMAKEN LTD shall execute and endorse the necessary contract documents as shall be required by the purchasers.**
- 4. That this deed shall operate as authority to M/s PHARMAKEN LTD to offer the works listed in 2 above, a signatory and an integral partner in the Joint Venture.**
- 5. That M/s PHARMAKEN LTD hereby undertakes to prepare and submit a responsive bid in its name and stead on behalf of the Joint Venture hereinbefore mentioned.**
- 6. That this deed shall operate as authority to M/s Pharmakem LTD to offer the works listed in 2 above, a signatory and an integral partner in the Joint Venture.**
- 7. That M/s PHARMAKEN LTD and HENAN YUANDA BOILER CORPORATION LTD shall be liable jointly and severally for the execution of the Contract in accordance with the Contract terms.”**

Further, at page 12 of its original technical proposal, the Interested Party attached a Letter of Undertaking to Offer Technical Support dated 18th July 2020 signed by one Celia Mou, the Export Manager of Henan Yuanda Boiler Corporation Limited stating as follows: -

"..We are aware that Pharmaken Limited, 5th Floor, Links Plaza, Links Road, Nyali, Mombasa, Kenya will submit a proposal to MTRH for Sourcing of Boiler 4 Ton Water/Feed System on Leasing Agreement Re-Tender.

We hereby confirm that we have the expertise required in the execution of the project and that we shall be providing all the technical support to Pharmaken Ltd. Our scope includes production, supply, installation, commissioning, servicing and maintenance for the equipment under this proposal. Our technical staff who have handled projects of a similar nature will be available for this project."

Having considered the foregoing documents, the Board notes, the Interested Party entered into a joint venture agreement with one 'Henan Yuanda Boiler Corporation Limited' to submit a proposal in response to the subject tender.

According to the Joint Venture Agreement signed on 4th August 2020, the Interested Party, identified therein as the 'signatory and integral partner in the joint venture' would submit a proposal in response to the subject tender in its name on behalf of the joint venture. The other

party to the joint venture, that is, one 'Henan Yuanda Boiler Corporation Limited' would provide technical support to the Interested Party in the execution of the subject tender.

In this regard therefore, for all intents and purposes, the Interested Party participated in the subject procurement proceedings as a Joint Venture.

In view of this finding, the Board considered Section III Terms of Reference on page 14 of the Request for Proposals Document which expressly provides that where a bidder submits a bid/proposal as a legally constituted joint venture, **each** partner to a joint venture will be required to pass the Mandatory Requirements Evaluation Stage before the joint venture can qualify to proceed for further evaluation.

Noting that the Interested Party participated in the subject procurement process as a joint venture, the Procuring Entity was obligated to evaluate the documents submitted by both the Interested Party, and its joint venture partner, that is, Henan Yuanda Boiler Corporation Limited at the Mandatory Requirements Evaluation Stage, pursuant to Section III Terms of Reference on page 14 of the Request for Proposals Document.

The Board examined the Request for Proposals Document and observes from the Mandatory Requirements of the Evaluation Criteria outlined on

page 19 of the Tender Document that bidders were required to provide the following documents in their proposals, failure to which they would be disqualified from further evaluation: -

- i. Certificate of Incorporation or Registration.***
- ii. Valid Tax Compliance Certificate or equivalent.***
- iii. Valid Trade License or Single Business Permit or equivalent.***
- iv. Duly filled, signed and stamped form of tender.***
- v. Completely filled, signed and stamped business questionnaire.***
- vi. Original bid bond of Kshs. 800,000/- or 8,000 US Dollars. Tender Securing Declaration form for entities belonging to YWPDs shall be required.***
- vii. Bidders must provide evidence of having supplied an oil run steam boiler of at least 4 ton and HFO vessel of at least 60m³ by providing copies of orders or award letters from the current major clients.***
- viii. Submit either audited accounts for 2017 and 2018 or current bank statement for the last 6 month preceding tender opening date.***
- ix. Submit a valid license of the lead Engineer registered by Engineers Board of Kenya (EBK)***
- x. NCA certification as a Specialist Contractor of at least NCA 4 or above.***
- xi. A sworn statement or declaration stating that: -***

a) The firm has not been debarred from participating in any public procurement by PPRA.

b) No person related to the firm has any spouse or children working at M.T.R.H.

c) The firm has not been engaged in any unethical, corrupt, collusive or fraudulent activities in public procurement matters.

d) The firm has not been declared bankrupt, insolvent and or under receivership.

e) The firm is not guilty of any violation of fair employment law practices.

f) Declaration that the firm will not engage in any corrupt or fraudulent practice.

The Board examined the Interested Party's original technical proposal and observes that it supplied the following documents in response to the mandatory requirements as outlined on page 19 of the Request for Proposals Document: -

A. Certificate of Incorporation or Registration.

The Interested Party, provided on page 103 therein a certified copy of a Certificate of Incorporation dated 8th June 2005 issued to Pharmaken Limited by the Registrar of Companies and thus the Interested Party as one of the Joint Venture partners complied with this mandatory criterion.

However, the Interested Party's Joint Venture Partner, Henan Yuanda Boiler Corporation Limited, did not provide any documents in response to this criterion and thus did not comply with this mandatory requirement.

B. Valid Tax Compliance Certificate or equivalent.

The Interested Party, as one of the Joint Venture partners, provided on page 104 therein a certified copy of a Tax Compliance Certificate dated 4th November 2019 issued to Pharmaken Limited by the Kenya Revenue Authority and thus complied with this mandatory requirement.

The Interested Party's Joint Venture Partner, Henan Yuanda Boiler Corporation Limited, did not provide any documents in response to this criterion and thus failed to comply with the said mandatory requirement.

C. Valid Trade License or Single Business Permit or equivalent.

On page 105 therein, the Interested Party, as one of the Joint Venture partners, attached a County Government of Mombasa Single Business Permit for the period ending 31st December 2020 issued to Pharmaken Limited by the County Government of Mombasa.

Further, on page 106, the Interested Party attached a Nairobi City County Single Business Permit dated 16th January 2020 issued to Pharmaken Limited by the Nairobi City County

The Interested Party as one of the Joint Venture partners therefore complied with the mandatory criterion in issue.

However, the Interested Party's Joint Venture Partner, Henan Yuanda Boiler Corporation Limited, did not provide any documents in response to this criterion and therefore failed to comply with this mandatory requirement.

D. Duly filled, signed and stamped form of tender.

On page 107 therein, the Interested Party, as one of the Joint Venture partners, provided a Form of Tender dated 20th July 2020 and signed on 16th July 2020 indicating that the Interested Party is authorized to sign tender 'for and on behalf of Pharmaken Limited'. This clearly shows that the Form of Tender was signed and submitted on behalf of Pharmaken Limited instead of on behalf of the Joint Venture, that is, Pharmaken Limited and Henan Yuanda Boiler Corporation Limited.

In this regard therefore, the Joint Venture did not comply with this mandatory requirement.

E. Completely filled, signed and stamped business questionnaire.

On page 108 therein, the Interested Party, as one of the Joint Venture partners, attached a filled Confidential Business Questionnaire Form For Proposal dated 16th July 2020, signed and stamped using a Pharmaken Limited official stamp and thus complied with this mandatory criterion.

The Interested Party's Joint Venture Partner, Henan Yuanda Boiler Corporation Limited, did not provide any documents in response to this criterion and therefore failed to comply with the said mandatory requirement.

F. Original bid bond of Kshs. 800,000/- or 8,000 US Dollars. Tender Securing Declaration form for entities belonging to YWPDs shall be required.

On page 110, the Interested Party, as one of the Joint Venture Partners, attached a Tender Bond of Kshs 800,000 issued in its name by I&M Bank on 21st July 2020 valid no later than 9th January 2021.

Noting that the Procuring Entity only requires one valid bid bond with respect to a proposal submitted to it in response to the subject tender, the Interested Party and its Joint Venture Partner complied with this mandatory requirement.

G. Bidders must provide evidence of having supplied an oil run steam boiler of at least 4 ton and HFO vessel of at least 60m3 by providing copies of orders or award letters from the current major clients.

On page 113 – 146 therein, the Interested Party's Joint Venture Partner, Henan Yuanda Boiler Corporation Limited, provided a sale reference list within 10 years for supply of *interalia* steam boilers. However, it did not provide any evidence in form of copies of orders or award letters issued by the clients listed in its sale reference list and therefore failed to comply with the said mandatory criterion.

In response to this mandatory requirement, the Interested Party, as one of the Joint Venture partners, provided the following documents: -

- i. On page 148 – 151 – A document titled 'Evidence of similar supplies to Government – Medical Equipment, Fire Engines, Ambulances, and Garbage Truck';
- ii. On page 152 – A copy of a local purchase order dated 5th May 2020 issued to M/s Pharmaken Limited by Machakos County for '*Supply, Delivery, Installation and Commissioning and Training of Staff on the oxygen plant to be installed at the Machakos Level 5 Hospital*'
- iii. On page 153 – A copy of an undated local purchase order issued to M/s Pharmaken Limited by the County Government of Kilifi for '*Supply of Morgue Refrigerators*'.

- iv. On page 154 – A copy of a local purchase order dated 21st January 2015 issued to M/s Pharmaken Limited by the County Government of Kilifi for *'the supply of incubators'*.
- v. On page 155 - A copy of a local purchase order dated 21st January 2015 issued to M/s Pharmaken Limited by the County Government of Kilifi for *'the Supply and Delivery of Medical and Dental Chairs at Kilifi and Malindi Hospitals'*
- vi. On page 156 - A copy of a purchase order dated 24th November 2016 issued to M/s Pharmaken Limited by Gertrude's Children Hospital for supply of *'Dental chair Model: CAD 5 Plus Accessories in suction 38L CO'*
- vii. On page 157 - 158 – A copy of an award notification letter dated 27th February 2019 issued by the Ministry of Transport, Infrastructure, Public Works, Housing and Urban Development to Pharmaken Limited for the *'Supply of Ambulance, Diesel Propelled'*.
- viii. On page 159 - 160 - A copy of an award notification letter dated 27th February 2019 issued by the Ministry of Transport, Infrastructure, Public Works, Housing and Urban Development to Pharmaken Limited for the *'Supply of Firefighting Vehicle'*.
- ix. On page 161 - A copy of an award notification letter dated 20th September 2013 issued by the Government of Machakos County to Pharmaken Limited *'Supply, Deliver and Commission No. 70 Ambulances'*
- x. On page 162 and page 167 - A copy of a local purchase order dated 20th December 2013 issued to M/s Pharmaken Limited by

County Government of Nyamira – Health Services for *'Supply and Delivery, of a Toyota 4x4 Landcruiser Medical Emergency Ambulance as per attached specifications'*

- xi. On page 163 - A copy of an undated local purchase order issued to M/s Pharmaken Limited by The Chief Officer Ministry of Health Samburu County for *'Supply and Delivery of an Ambulance with vital Equipment Toyota Landcruiser'*
- xii. On page 164 – A copy of an undated local purchase order issued to M/s Pharmaken Limited by the County Government of Kilifi for *'Supply of Hospital Ambulances Diesel'*
- xiii. On page 165 – A copy of an undated local purchase order issued to M/s Pharmaken Limited by Nandi County for *'Supply of Life Support Ambulances';*
- xiv. On page 166 – A copy of a local purchase order dated 14th July 2014 issued to M/s Pharmaken Limited by the County Government of Bungoma for *'Supply of Advanced Life Support Ambulances'';*
- xv. On page 168 - 169 – A copy of an award notification letter dated 16th March 2015 issued by Kenya Ports Authority to Pharmaken Limited for *'Design, Manufacture, Supply, Testing and Commissioning of one (1) New Purpose Built Ambulance'*
- xvi. On page 170 - A copy of an award notification letter dated 24th June 2014 issued by the County Government of Kiambu to Pharmaken Limited for the *'Supply and Delivery of Ambulances'*
- xvii. On page 171 - A copy of an award notification letter dated 1st April 2015 issued by the County Government of Uasin Gishu to

Pharmaken Limited for the '*Supply and Delivery of Heavy Duty Hard Top Ambulance*'

- xviii. On page 172 - A copy of an undated local purchase order issued to M/s Pharmaken Limited by the County Government of Embu for the '*Supply and Delivery, of a Garbage Truck (Compactor Bin)*'
- xix. On page 173 – A copy of an award notification letter dated 21st February 2018 issued by the County Government of Bomet to Pharmaken Limited for the '*Purchase of Two Ambulances*';
- xx. On page 175 – A copy of a reference letter dated 28th June 2017 issued on behalf of Pharmaken Limited by the County Government of Machakos for the '*Supply, Delivery, Installation and Commissioning of an oxygen plant at Machakos Level 5 Hospital*'
- xxi. On page 176 – A copy of a reference letter dated 31st October 2020 issued on behalf of Pharmaken Limited by the County Government of Kilifi for the '*Supply, Delivery, Installation of Mortuary Refrigerator*'
- xxii. On page 177 – A copy of a reference letter dated 24th July 2018 issued on behalf of Pharmaken Limited by Kenya Ports Authority for the '*Supply of Pharmaceuticals, Medical and Diagnostic Equipment*';
- xxiii. On page 178 - A copy of a reference letter dated 7th November 2019 issued on behalf of Pharmaken Limited by Coast Province General Hospital for the '*Supply of Pharmaceuticals*';
- xxiv. On page 179 - A copy of a reference letter dated 5th November 2019 issued on behalf of Pharmaken Limited by Mewa Hospital for the '*Supply of Pharmaceutical Supplies*';

- xxv. On page 180 - A copy of a reference letter dated 9th November 2019 issued on behalf of Pharmaken Limited by Pandya Memorial Hospital for the '*Supply of Pharmaceuticals and Dental Materials*';
- xxvi. On page 181 - A copy of a reference letter dated 22nd July 2016 issued on behalf of Pharmaken Limited by Mombasa Hospital for the '*Supply of Drugs*';

From the foregoing, the Board observes that the Interested Party provided copies of eleven (11) purchase orders, seven (7) award notification letters and seven (7) reference letters from its clients. However, the documents provided were not with respect to an '*oil run steam boiler of at least 4 ton and HFO vessel of at least 60m³*' as required with respect to the mandatory requirement in issue and therefore the Interested Party, as one of the Joint Venture Partners, did not comply with this mandatory requirement.

H. Submit either audited accounts for 2017 and 2018 or current bank statement for the last 6 month preceding tender opening date.

In response to this criterion, the Interested Party, as one of the Joint Venture partners, provided the following: -

- i) On page 183 -202 – A certified copy of the Audited Report and Financial Statements for Pharmaken Limited for the year ending 2017;
- ii) On page 202 to 221 – A certified copy of the Audited Report and Financial Statements for Pharmaken Limited for the year ending 2018.

The Interested Party therefore complied with this mandatory requirement.

The Interested Party's Joint Venture Partner, Henan Yuanda Boiler Corporation Limited, did not provide any documents in response to this criterion and therefore failed to comply with the said mandatory requirement.

I. Submit a valid license of the lead Engineer registered by Engineers Board of Kenya (EBK)

In response to this criterion, the Interested Party, as one of the Joint Venture partners provided the following documents: -

- i. On page 222 – A certificate/licence of registration as a Graduate Engineer issued to one Stephen Nyangau (who is the lead engineer of the Interested Party) by the Engineers Board of Kenya on 18th February 2014
- ii. On page 223 – A Certificate of Attendance issued to one Stephen Nyangau (who is the lead engineer of the Interested Party) by the Institution of Engineers of Kenya for attendance and successful completion of the Contract Management Seminar, 2012;

In this regard therefore, the Interested Party complied with the mandatory requirement in issue.

Noting that this criterion refers to the lead engineer of the proposal submitted by the Interested Party as a Joint Venture, the Interested

Party's Joint Venture partner, Henan Yuanda Boiler Corporation Limited, also complied with this mandatory requirement.

J. NCA certification as a Specialist Contractor of at least NCA 4 or above.

In response to this criterion, the Interested Party, as one of the Joint Venture partners provided the following documents in its original technical proposal: -

- On page 227 – A Contractor Annual Practicing Licence for Category NCA3 issued to M/s Pharmaken Limited by the National Construction Authority on 5th August 2020, valid until 30th June 2021;
- On page 228 – A Certificate of Registration issued to M/s Pharmaken Limited for registration as a 'Mechanical Engineering Service Contractor', Category NCA 3 by the National Construction Authority on 20th December 2019, valid until 30th June 2022;
- On page 229 – A Contractor Annual Practicing License issued to M/s Pharmaken Limited for registration as a 'Road Works Contractor' Category NCA3 by the National Construction Authority on 5th August 2020 valid from 1st July 2020 to 30th June 2021;

From the foregoing, the Board notes, the Interested Party complied with the mandatory requirement in issue.

The Interested Party's Joint Venture Partner, Henan Yuanda Boiler Corporation Limited, did not provide any documents in response to this

criterion and therefore failed to comply with the said mandatory requirement.

K. A sworn statement or declaration stating that: -

a) The firm has not been debarred from participating in any public procurement by PPRA.

b) No person related to the firm has any spouse or children working at M.T.R.H.

c) The firm has not been engaged in any unethical, corrupt, collusive or fraudulent activities in public procurement matters.

d) The firm has not been declared bankrupt, insolvent and or under receivership.

e) The firm is not guilty of any violation of fair employment law practices.

f) Declaration that the firm will not engage in any corrupt or fraudulent practice.

In response to this criterion, the Interested Party, as one of the Joint Venture partners, provided the following documents: -

- On page 230, a sworn statement issued by Pharmaken Limited and addressed to the Chief Executive Officer of Moi Teaching and Referral Hospital declaring the following: -

a) That Pharmaken Limited has not been debarred from participating in public procurement

- b) That no person related to Pharmaken Limited has any spouse or children working at MTRH
 - c) That Pharmaken Limited has not been engaged in any unethical, corrupt, collusive or fraudulent activities in public procurement matters
 - d) That Pharmaken Limited has not been declared bankrupt, insolvent or under receivership
 - e) That Pharmaken Limited is not guilty of any violation of fair employment law practices
 - f) That Pharmaken Limited has not been involved in and will not be involved in corrupt and fraudulent practices regarding public procurement
- On page 231 - An anti-corruption declaration commitment/pledge issued and signed by one Mr. Mohammed Seyed Mohammed of Pharmaken Limited, and commissioned by one Ms Anne Wanjohi, a Commissioner of Oaths.

In view of the foregoing, the Board notes, the Interested Party complied with the mandatory requirement in issue.

However, the Interested Party's Joint Venture Partner, Henan Yuanda Boiler Corporation Limited, did not submit any documents in response to this criterion and thus failed to satisfy the said mandatory requirement.

In view of the foregoing, the Board finds that the Interested Party, as one of the Joint Venture partners failed to satisfy the following mandatory requirements:

- i. Duly filled, signed and stamped form of tender.
- ii. Bidders must provide evidence of having supplied an oil run steam boiler of at least 4 ton and HFO vessel of at least 60m³ by providing copies of orders or award letters from the current major clients.

The Interested Party's Joint Venture Partner, Henan Yuanda Boiler Corporation Limited, failed to satisfy the following mandatory requirements:

- i. Certificate of Incorporation or Registration.
- ii. Valid Tax Compliance Certificate or equivalent.
- iii. Valid Trade License or Single Business Permit or equivalent.
- iv. Duly filled, signed and stamped form of tender.
- v. Completely filled, signed and stamped business questionnaire.
- vi. Bidders must provide evidence of having supplied an oil run steam boiler of at least 4 ton and HFO vessel of at least 60m³ by providing copies of orders or award letters from the current major clients.
- vii. Submit either audited accounts for 2017 and 2018 or current bank statement for the last 6 month preceding tender opening date.

- viii. NCA certification as a Specialist Contractor of at least NCA 4 or above.
- ix. A sworn statement or declaration stating that: -
 - a) The firm has not been debarred from participating in any public procurement by PPRA.
 - b) No person related to the firm has any spouse or children working at M.T.R.H.
 - c) The firm has not been engaged in any unethical, corrupt, collusive or fraudulent activities in public procurement matters.
 - d) The firm has not been declared bankrupt, insolvent and or under receivership.
 - e) The firm is not guilty of any violation of fair employment law practices.
 - f) Declaration that the firm will not engage in any corrupt or fraudulent practice.

In totality of the foregoing, it therefore follows that the Interested Party as one of the Joint Venture Partners and the Interested Party's Joint Venture Partner, Henan Yuanda Boiler Corporation Limited, having failed to satisfy some of the mandatory requirements as stipulated on page 19 of the Request for Proposals Document, ought to have been disqualified from further evaluation upon conclusion of the Mandatory Requirements Evaluation Stage.

Notably, from the Procuring Entity's Evaluation Report signed on 22nd September 2020, the Board notes, the Interested Party was found responsive at the Mandatory Requirements Evaluation Stage and proceeded for further evaluation. Further, the Interested Party was recommended for award by the Procuring Entity's Evaluation Committee, which recommendation was approved by the Procuring Entity's Chief Executive Officer on 24th September 2020.

The Board is cognizant of section 79 of the Act which states as follows: -

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

Accordingly, a responsive tender is one that conforms to all the eligibility and mandatory requirements in the tender document.

These eligibility and mandatory requirements were considered by the Honourable Justice Mativo in **Miscellaneous Civil Application 85 of 2018 Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR**

"Briefly, the requirement of responsiveness operates in the following manner: - a bid only qualifies as a responsive bid if it meets all requirements as set out in the bid document. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or

functionality/technical, pricing and empowerment requirements. Indeed, public procurement practically bristles with formalities which bidders often overlook at their peril. Such formalities are usually listed in bid documents as mandatory requirements – in other words they are a sine qua non for further consideration in the evaluation process. The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing, empowerment or post qualification. Bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome.....

.....Mandatory criteria establish the basic requirement of the invitation. Any bidder that is unable to satisfy any of these requirements is deemed to be incapable of performing the contract and is rejected. It is on the basis of the mandatory criteria that "competent" tenders are established....."

Accordingly, a responsive bid is one that meets all the mandatory requirements as set out in the bid document which are in essence the first hurdle that bidders must overcome for further consideration in an evaluation process. A mandatory requirement is therefore a condition or formality that is listed in a tender document that must be met for a bid

to qualify for further evaluation. These mandatory requirements or what are often referred to as eligibility requirements are mostly considered at the Preliminary Evaluation Stage, after which the other stages of evaluation are conducted. Further, bidders found to be non-responsive on mandatory requirements are excluded from the bid process regardless of the merits of their bids.

From the foregoing, it is evident that a mandatory requirement cannot be waived by a procuring entity since a mandatory requirement is instrumental in determining the responsiveness of a bid and is the first hurdle a bid must overcome in order to be considered for further evaluation.

It is important for bidders to compete on an equal footing and therefore where a procuring entity waives a mandatory requirement in favour of only one bidder, the same runs contrary to the public procurement principles of fairness and equity as espoused under Article 227 (1) of the Constitution which states as follows: -

***"When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective."* [Emphasis by the Board]**

To buttress this point, the High Court in **Miscellaneous Civil Application 140 of 2019 Republic v Public Procurement Administrative Review Board; Accounting Officer, Kenya Rural**

Roads Authority & 2 others (Interested Parties) Ex Parte Roben Aberdare (K) Ltd [2019] eKLR stated as follows: -

"It is evident that compliance with the requirements for a valid tender process including terms and conditions set out in the bid documents, issued in accordance with the constitutional and legislative procurement framework, is thus legally required. These requirements are not merely internal prescripts that a bidder or the Respondent may disregard at whim. To hold otherwise would undermine the demands of equal treatment, transparency and efficiency under the Constitution. Mandatory requirements in bid document must be complied with. Deviations from mandatory bid requirements should not be permissible.

In the instant case, the Board has established that the Interested Party and its Joint Venture Partner did not comply with some of the mandatory requirements as stipulated on page 19 of the Request for Proposals Document in accordance with Section III Terms of Reference on page 14 of the Request for Proposals Document.

It is therefore the finding of this Board that the Interested Party did not satisfy some of the mandatory requirements as set out in the Request for Proposals Document pursuant to Section III Terms of Reference on page 14 of the Tender Document and therefore did not qualify for award of the subject tender.

On the second issue for determination, the Applicant contended that the Procuring Entity in determining the successful tenderer did not conduct financial evaluation with respect to the subject tender in accordance with Clause 2.8.4 of the Tender Document. According to the Applicant, Clause 2.8.4 provides for the formulae or method of ascertaining the successful tenderer at the Technical and Financial Evaluation Stages which formulae requires the Procuring Entity to rank the tenderers with respect to both their technical and financial scores using the weights indicated in the appendix to the Tender Document.

Contrary to the Applicant's submissions, the Procuring Entity contended that it did invoke the formulae as provided under Clause 2.8.3 and 2.8.4 in the Tender Document and in doing so determined that the Applicant scored 79.1% for leasing options and 90.18% for outright purchase option whereas the Interested Party scored 100% for both options. Noting that both the Interested Party and the Applicant scored 100% on the technical aspects, both bidders were equally ranked. The Procuring Entity contended that the Interested Party provided the lowest financial bid for both options and was ranked No. 1 whereas the Applicant was ranked No. 2 at the Financial Evaluation Stage.

At this juncture, the Board will first establish what is a Request for Proposals procurement?

The interpretation section of the Act defines procurement as: -

"the acquisition by purchase, rental, lease, hire purchase, license, tenancy, franchise, or by any other contractual means of any type of works, assets, services or goods including livestock or any combination and includes advisory, planning and processing in the supply chain system"

Accordingly, procurement is the acquisition of works, assets, services or goods by purchase, rental, lease, hire purchase, license, tenancy, franchise or by any other contractual means.

The Board studied section 91 of the Act which provides as follows: -

"(1) Open tendering shall be the preferred procurement method for procurement of goods, works and services.

(2) The procuring entity may use an alternative procurement procedure only if that procedure is allowed and satisfies the conditions under this Act for use of that method.

(3) Despite sub-sections (1) and (2) open tendering shall be adopted for procurement of goods, works and services for the threshold prescribed in the respective national and county Regulations."

Accordingly, procurement or the acquisition of works, assets, services or goods under the Act, shall be by open tendering. However, a procuring entity may use an alternative procurement procedure if that procedure is allowed and satisfies the conditions under this Act for use of that method.

Alternative procurement procedures that may be used by a procuring entity are stipulated under section 92 of the Act which provides as follows: -

"Subject to this Act and prescribed provisions, an accounting officer of a procuring entity shall procure goods, works or services by a method which may include any of the following—

(a) open tender;

(b) two-stage tendering;

(c) design competition;

(d) restricted tendering;

(e) direct procurement;

(f) request for quotations;

(g) electronic reverse auction;

(h) low value procurement;

(i) force account;

(j) competitive negotiations;

(k) request for proposals;

(l) framework agreements; and

(m) any other procurement method and procedure as prescribed in regulations and described in the tender documents."

From the above provision, the Board observes that one of the alternative procurement procedures that a procuring entity may employ includes a request for proposals.

In this regard, the Board studied section 116 of the Act which reads as follows: -

"(1) An accounting officer of a procuring entity may use a request for proposals for a procurement if—

(a) the procurement is of services or a combination of goods and services; and

(b) the services to be procured are advisory or otherwise of a predominately intellectual nature.

(2) Subject to any prescribed restrictions, a procuring entity may use a request for proposals in combination with other methods of procurement under this Act."

Accordingly, a request for proposals is an alternative procurement procedure or a method of procurement which may be employed by a procuring entity in two instances: -

a) where a procurement is of services or a combination of goods and services; and

(b) where the services to be procured are advisory or otherwise of a predominantly intellectual nature.

In accordance with section 118 of the Act, a procuring entity who employs the request for proposals method of procurement may—

"(a) request for proposals through advertisement;

(b) invite expression of interests or utilize the register provided for under section 57 of this Act.

(2) The accounting officer of a procuring entity shall invite proposals from only the persons who have been shortlisted as qualified to submit their tenders within a period as prescribed."

The Board observes, a procuring entity may request for proposals through an advertisement or alternatively request for proposals from its list of registered suppliers as provided under section 57 of the Act. Where a procuring entity does not have a list of registered suppliers, it may invite expressions of interests in order to shortlist persons qualified to submit proposals. Further, a procuring entity may also opt to invite proposals from persons shortlisted as qualified to submit their tenders within a period as prescribed.

Once a procuring entity receives proposals, it proceeds to evaluate the proposals received in accordance with section 124 of the Act which outlines various methods for evaluation of request for proposals.

The successful proposal according to section 127 of the Act shall be the proposal with ***"the highest score determined by an accounting officer in accordance with the procedure and criteria set out under section 86 of this Act."***

Notably, section 86 (1) (b) of the Act provides that a successful tender with respect to a request for proposal shall be: -

"the responsive proposal with the highest score determined by the procuring entity by combining, for each proposal, in accordance with the procedures and criteria set out in the request for proposals, the scores assigned to the technical and financial proposals where Request for Proposals method is used"

This means that the successful or responsive proposal shall be the one with the highest score determined by combining for each proposal the scores assigned to the technical and financial proposals in accordance with the procedures and criteria set out in the request for proposals unless there is only one proposal at the Financial Evaluation Stage.

Turning to the instant case, the Board observes that according to the Procuring Entity's Request for Proposals Document, the successful proposal shall be determined and selected using the formulae as outlined in Clause 2.8.3 of Section II Information to Consultants on page 11 of the Request for Proposals Document which reads as follows: -

"The formulae for determining the financial score (SF) unless an alternative formula is indicated in the appendix to information to tenderers shall be as follows:

$Sf = 100 \times Fm / F$ where Sf is the financial score; Fm is the lowest priced financial proposal and F is the price of the

proposal under consideration. The lowest fees quoted will be allocated the maximum score of 100.

Further Clause 2.8.4 of Section II Information to Consultants on page 12 of the Request for Proposals Document provides as follows: -

"The individual consultants' proposals will be ranked according to their combined technical (S_t) and financial (S_f) scores using the weights indicated in the appendix to the instructions to consultants.

Unless otherwise stated in the appendix to the instructions to consultants the formulae for the combined scores shall be as follows: -

$$S = S_t \times T \% + S_f \times P \%$$

Where S is the combined scores of technical and financial scores

S_t is the technical score, S_f is the financial score, T is the weight given to the technical proposal and P is the weight given to the financial proposal

Note $P + T$ will be equal to 100%

The individual consultant achieving the highest combined technical and financial score will be invited for negotiations."

In accordance with the above formulae, each proposal received by the Procuring Entity, subject to having been found responsive at the

Mandatory Requirements Evaluation Stage, the Competency Evaluation Stage and the Technical Evaluation Stage, shall be ranked according to its combined technical and financial scores and the firm/proposal achieving the highest combined technical and financial scores would be invited for negotiations.

The Board examined the Procuring Entity’s Evaluation Report signed on 22nd September 2020 and observes on page 12 thereof, two bidders, that is, the Applicant and the Interested Party were found responsive at the conclusion of Technical Evaluation having each scored 100%. The two bidders therefore qualified to proceed for Financial Evaluation.

At the Financial Evaluation Stage, the Applicant and the Interested Party, in their respective financial proposals provided both leasing and outright purchase options with respect to the subject tender which were evaluated by the Procuring Entity’s Evaluation Committee as follows: -

Leasing option

	B3 (Interested Party)	B4 (Applicant)
Commitment deposit	10,000,000.00	-
Monthly rental for 5 years	60,000,000.00	78,492,943.80
Fuel Tank and accessories including mechanical works	6,595,560.00	5,705,969.00
TOTAL	66,595,560.00	84,198,112.80
Percentage	100%	79.10%

Outright purchase

	B3	B4
Cost of boiler	43,500,000.00	49,974,408.00
Maintenance fee for 5 years	2,250,000.00	2,370,060.00

Fuel Tank and accessories including mechanical works	6,595,560.00	5,705,969.00
TOTAL	52,345,560.00	58,050,437.00
Percentage	100%	90.18%

Evidently, the Procuring Entity did not combine the technical and financial scores of the two bidders that qualified for the Financial Evaluation Stage. Upon examination of the Evaluation Report, the Board further notes that the Procuring Entity's Evaluation Committee proceeded to recommend award of the subject tender to the Interested Party as the 'lowest technically responsive bidder', yet a recommendation of award ought to be made to the bidder with the 'highest combined technical and financial score'.

In this regard therefore, the Board finds that the Procuring Entity did not award the subject tender in accordance with Clause 2.8 of Section II Information to Consultants on page 12 of the Request for Proposals Document read together with section 80 (2) of the Act and Article 227 (1) of the Constitution.

That notwithstanding the Board has established that the Interested Party and its Joint Venture Partner, Henan Yuanda Boiler Corporation Limited, did not satisfy some of the mandatory requirements as set out in the Request for Proposals Document pursuant to Section III Terms of Reference on page 14 of the Tender Document. Accordingly, the Interested Party's technical proposal ought to have been disqualified from further evaluation upon conclusion of the Mandatory Requirements

Evaluation Stage and therefore did not qualify for award of the subject tender.

In light of this finding, this Board is of the considered view that the Procuring Entity ought to apply the formulae as provided in Clause 2.8.3 and Clause 2.8.4 of Section II Information to Consultants on page 12 of the Request for Proposals Document in evaluating the proposals that were found responsive at the Technical Evaluation Stage and qualified for Financial Evaluation.

In this instance, the only other bidder that was found responsive at the Technical Evaluation Stage and qualified for Financial Evaluation is the Applicant.

The Board further considered the Applicant's submission that financial evaluation in the subject tender ought to have been undertaken with respect to bidders who were declared technically responsive and the successful bidder determined after a consideration of a margin of preference.

The interpretation section of the Act defines the term 'preference' as follows: -

"the right or opportunity to select a tenderer from an identified target group that is considered more desirable than another"

Preference is therefore the right or opportunity for a procuring entity to select a tenderer from a defined target group in procurement proceedings.

The Board notes, the subject tender is an international tender as indicated in Section I: Invitation to Tender in the Request for Proposals Document.

With respect to international tenders, section 89 (f) of the Act provides as follows: -

"If there will not be effective competition for a procurement unless foreign tenderers participate, the following shall apply—

(f) where local or citizen contractors participate they shall be entitled to preferences and reservations as set out in section 155"

Notably, section 2 of the Act defines a citizen contractor as: -

"a person or a firm wholly owned and controlled by persons who are citizens of Kenya"

In this regard therefore, citizen contractors or firms wholly owned and controlled by persons who are citizens of Kenya shall be entitled to preferences and reservations as set out in section 155 of the Act.

Further, Regulation 147 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "the 2020 Regulations") provides as follows:

"(1) A firm shall be qualified as –

(a) a local contractor if it is registered in Kenya and has above fifty-one percent (51%) Kenyan shareholding; or

(b) a citizen contractor if wholly owned and controlled by persons who are Kenyan citizens.

(2) A citizen contractor registered outside Kenya shall only be eligible to benefit from the preferences and reservations scheme when bidding in international tendering and competition."

Accordingly, citizen contractors registered outside Kenya are also eligible to benefit from preferences and reservations when bidding in international tenders.

The Board considered the types of preference and reservations schemes provided under the Act that may be applicable in this instance.

Section 155 of the Act provides as follows: -

"(1) Pursuant to Article 227(2) of the Constitution and despite any other provision of this Act or any other

legislation, all procuring entities shall comply with the provisions of this Part.

(2) Subject to availability and realisation of the applicable international or local standards, only such manufactured articles, materials or supplies wholly mined and produced in Kenya shall be subject to preferential procurement.

(3) Despite the provisions of subsection (1), preference shall be given to—

(a) manufactured articles, materials and supplies partially mined or produced in Kenya or where applicable have been assembled in Kenya; or

(b) firms where Kenyans are shareholders.

(4) The threshold for the provision under subsection (3) (b) shall be above fifty-one percent of Kenyan shareholders.

(5) Where a procuring entity seeks to procure items not wholly or partially manufactured in Kenya—

(a) the accounting officer shall cause a report to be prepared detailing evidence of inability to procure manufactured articles, materials and supplies wholly mined or produced in Kenya; and

(b) the procuring entity shall require successful bidders to cause technological transfer or create

employment opportunities as shall be prescribed in the Regulations."

The Board notes that the subject tender is for 'Sourcing of Boiler 4 Ton Water/Feed System' whereby bidders were required to provide both a leasing option or outright purchase option. In this regard therefore, if the goods being procured are wholly produced in Kenya, it shall be subject to preferential treatment. Further, bidders whose shareholding is 51% and above Kenyan shareholding shall qualify for preference under the Act.

Section 86 (2) of the Act further provides as follows: -

"For the avoidance of doubt, citizen contractors, or those entities in which Kenyan citizens own at least fifty-one per cent shares, shall be entitled to twenty percent of their total score in the evaluation, provided the entities or contractors have attained the minimum technical score."

A plain interpretation of section 86 (2) of the Act reveals that a margin of preference of 20% of the total score in evaluation is available to either; citizen contractors or entities in which Kenyan citizens own at least 51% shares, with a condition that such entities or contractors attain the minimum technical score.

Foreign contractors may also benefit from preference and reservations as provided for under Regulation 148 of the 2020 Regulations which provides as follows: -

"(1) A foreign contractor may benefit from a preference and reservation scheme where it enters into a joint venture or subcontracting arrangements, as evidenced by written agreement, with a firm that is registered in Kenya and where Kenyan citizens have majority shares.

(2) Where a citizen contractor has entered into contractual arrangements with a foreign contractor in accordance with paragraph (1), a ten percent (10%) margin of preference in the evaluated price of the tender shall be applied.

(3) A citizen contractor referred to in paragraph (2) of this regulation shall demonstrate technical capability and competence to perform.

Foreign contractors who enter into joint venture agreements with a firm registered in Kenya and where Kenyan citizens hold majority shareholding, are eligible to benefit from 10% margin of preference in the evaluated price of the tender, having demonstrated technical capability and competence to perform.

The question that now arises is how is preference or a margin of preference applied in procurement proceedings?

The Board has considered the manner in which Financial Evaluation is conducted when a Request for Proposal (RFP) method of procurement is used.

As mentioned hereinbefore, in a Request for Proposals Procurement, award of tender is based on the highest combined Technical and Financial scores of a bidder pursuant to section 86 (1) (b) of the Act.

Notably, the Procuring Entity's Request for Proposals Document does not expressly stipulate which preference scheme in the Act is applicable in the subject tender. Nevertheless, the Procuring Entity is obligated under section 155 (1) of the Act to apply the preferences and reservations stipulated under Part XII of the Act, in procurement proceedings, as applicable.

In this regard therefore, the applicable margin of preference is awarded to a bidder's combined total score or its tender price depending on the preference scheme applicable. After application of a margin of preference, bidders are thereafter ranked, and the bidder determined to have the highest combined score or the lowest tender price, is recommended for award based on the applicable award criteria.

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

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

(a).....;

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

The Board has established that the Interested Party did not satisfy some of the mandatory requirements as set out in the Request for Proposals Document pursuant to Section III Terms of Reference on page 14 of the Tender Document and thus did not qualify for award of the subject tender.

Further, the Board has established that the Procuring Entity did not award the subject tender in accordance with Clause 2.8 of Section II Information to Consultants on page 12 of the Request for Proposals Document read together with section 80 (2) of the Act and Article 227 (1) of the Constitution.

In this regard therefore, the Board finds it necessary to direct the Procuring Entity to re-admit the Applicant’s financial proposal at the Financial Evaluation Stage and conduct a re-evaluation of the Applicant’s Financial Proposal at the Financial Evaluation Stage in accordance with Clause 2.8 of Section II Information to Consultants on page 12 of the Request for Proposals Document read together with section 80 (2) of the Act and Article 227 (1) of the Constitution and proceed with the procurement proceedings to their logical conclusion, including making of

an award to the bidder with the highest combined technical and financial score, taking into consideration the findings of the Board herein.

Accordingly, the Board finds that the Request for Review Application succeeds with respect to the following specific orders: -.

FINAL ORDERS

In exercise of the powers conferred upon it by section 173 of the Public Procurement and Asset Disposal Act, 2015, the Board makes the following orders in the Request for Review: -

- 1. The Accounting Officer of the Procuring Entity's Letter of Notification to Enter into a Contract with respect to Tender No. MTRH/RFP/1/2020-2021 For Sourcing of Boiler 4 Ton Water/Feed System on Leasing Agreement (Re-tender) dated 24th September 2020 addressed to M/s Pharmaken Limited be and is hereby cancelled and set aside.**

- 2. The Accounting Officer of the Procuring Entity's Letters of Notification of Unsuccessful Bid with respect to Tender No. MTRH/RFP/1/2020-2021 For Sourcing of Boiler 4 Ton Water/Feed System on Leasing Agreement (Re-tender) dated 24th September 2020 and addressed to all unsuccessful bidders, including the Applicant herein, be and are hereby cancelled and set aside.**

3. The Accounting Officer of the Procuring Entity is hereby directed to re-admit the Applicant's financial proposal at the Financial Evaluation Stage and conduct a re-evaluation of the Applicant's financial proposal at the Financial Evaluation Stage in accordance with Clause 2.8 of Section II Information to Consultants on page 12 of the Request for Proposals Document read together with section 80 (2) of the Act and Article 227 (1) of the Constitution taking into consideration the findings of the Board herein.

4. Further to Order No. 3 above, the Accounting Officer of the Procuring Entity is hereby directed to proceed with the procurement process to its logical conclusion, including making of an award within fourteen (14) days from the date of this decision.

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

Dated at Nairobi, this 27th Day of October 2020



.....
CHAIRPERSON

PPARB



.....
SECRETARY

PPARB