

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 126/2021 OF 15th OCTOBER 2021
BETWEEN

NUAIR TECHNOLOGIES LIMITED APPLICANT
THE CHIEF EXECUTIVE OFFICER,
KONZA TECHNOPSIS DEVELOPMENT
AUTHORITY 1ST RESPONDENT
KONZA TECHNOPSIS DEVELOPMENT
AUTHORITY 2ND RESPONDENT
FARM AIR CONDITIONING & REFRIGERATION
ENGINEERS LIMITED INTERESTED PARTY

Review against the decision of the Chief Executive Officer of Konza Technopolis Development Authority in relation to Tender No. KoTDA/NC003/2021-2022 for Phase II-Air-Conditioning and Mechanical Ventilation Installations.

BOARD MEMBERS

- | | |
|--------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mr. Ambrose Ngare | -Member |
| 3. Eng. Mbiu Kimani, OGW | -Member |
| 4. Ms. Rahab Robi | -Member |

5. Qs. Hussein Were

-Member

IN ATTENDANCE

1. Mr. Philip Okumu

-Acting Board Secretary

BACKGROUND TO THE DECISION

The Tendering Process

Konza Technopolis Development Authority, the 2nd Respondent herein, invited sealed tenders for Tender No. KoTDA/NC003/2021-2022 for Phase II-Air-Conditioning and Mechanical Ventilation Installations for the Konza Complex Conference Facility (hereinafter referred to as “the subject tender”) from qualified and eligible tenderers through open tender advertised on Government Advertising Agency (GAA) on 27th July 2021.

Tender Submission Deadline and Opening of Tenders

The Procuring Entity received a total of nine (9) tenders by the tender submission deadline of 19th August 2021 at 1400 hrs. The tenders were opened shortly thereafter by a tender opening committee in the presence of tenderers’ representatives and the following tenderers were recorded as having submitted their respective tenders:

1. Snowpeak Refrigeration and General Contractors Ltd

2. Trident Plumbers Limited

- 3. Farm Air Conditioning and Refrigeration Eng. Ltd**
- 4. Hall Equatorial Limited**
- 5. Seven Fourteen Ltd**
- 6. Ozone Cool Investment Ltd**
- 7. Glosec Systems Limited**
- 8. Anthopic Mechanical Eng. Services Limited**
- 9. Nuair Technologies Limited**

Evaluation of Bids

The Procuring Entity's Evaluation Committee (hereinafter referred to as the "Evaluation Committee") evaluated bids in the following stages: -

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

Preliminary Evaluation- Mandatory Requirements

At this stage, the Evaluation Committee applied the criteria outlined in Stage 1 Preliminary Evaluation-Mandatory Requirements of Section III. Appendix To Instructions To Tenderers of the Tender Document. At the end of evaluation at this stage, six (6) tenders including the Applicant's tender were found non-responsive while three (3) tenders including the Interested Party's tender were found responsive, thus proceeded to the technical evaluation stage.

Technical Evaluation

At this stage, the Evaluation Committee applied the criteria outlined in Stage 2 Technical Evaluation of Section III. Appendix To Instructions To Tenderers of the Tender Document. Tenders were required to attain a pass mark of 80% in order to be evaluated at the next stage of evaluation. At the end of evaluation at this stage, two (2) tenders were found non-responsive while one (1) tender, that is, the Interested Party's tender was found responsive, thus eligible to proceed to the next stage of evaluation having scored 90.4%.

Financial Evaluation

At this stage, the Evaluation Committee applied the criteria outlined in Stage 3 Financial Evaluation of Section III of the Appendix To Instructions To Tenderers of the Tender Document. The Interested Party's tender was found to be technically responsive with the lowest evaluated tender price of Kshs 123,300,999.00.

Recommendation

The Evaluation Committee recommended award of the subject tender to the Interested Party having submitted the lowest evaluated responsive tender at its tender price of Kshs 123,300,999.00 (Kenya Shillings One Hundred and Twenty-Three Million, Three Hundred Thousand, Nine Hundred and Ninety-Nine Shillings).

Professional Opinion

In a Professional Opinion dated 4th October 2021, the Procuring Entity's Manager, Supply Chain Management Division reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders, he concurred with the recommendations of the Evaluation Committee and recommended the Interested Party for award of the subject tender. The Accounting Officer approved the Professional Opinion.

Notification to Bidders

In letters dated 4th October 2021, the 1st Respondent notified all tenderers of the outcome of their respective tenders.

REQUEST FOR REVIEW NO. 126 OF 2021

The Applicant lodged a Request for Review together with a Statement in Support of the Request for Review dated 15th October 2021 on even date and a Response to the 1st and 2nd Respondents' Statement of Reply sworn by Daniel Nyango Kiplimo on 1st November 2021 and filed on even date through the firm of CK Advocates, seeking the following orders: -

- (a) The 1st Respondent's decision as communicated to the Applicant in the letter dated 4th October 2021 be set aside;**
- (b) Any letter of award of tender arising from Tender No. KoTDA/NC003/2021-2022 for Construction of the proposed Konza Complex Conference Facility Phase II: Air-Conditioning**

and Mechanical Ventilation Installations (hereinafter the 'Tender') issued by the 1st Respondent to Farm Air Conditioning & Refrigeration Engineers Limited be declared null and void.

- (c) The procurement proceedings leading to the decision by the 1st Respondent to award Tender No. KoTDA/NC003/2021-2022 for Construction of the proposed Konza Complex Conference Facility Phase II: Air-Conditioning and Mechanical Ventilation Installations hereinafter the 'Tender') to Farm Air Conditioning & Refrigeration Engineers Limited be reviewed and the Board be pleased to direct the 1st Respondent to readmit the Applicant's bid for Preliminary, Technical and Financial re-evaluation and proceed to make an award in a manner that complies with the provisions of the law.**
- (d) In the alternative but without prejudice to the above request for re-evaluation prayer (c) hereinabove, the entire tender process be and is hereby annulled in its entirety and the 1st Respondent compelled to commence a fresh procurement with respect to Tender No. KoTDA/NC003/2021-2022 for Construction of the proposed Konza Complex Conference Facility Phase II: Air-Conditioning and Mechanical Ventilation Installations (hereinafter the 'Tender') which procurement process shall accord with the established law and procedures.**
- (e) The Respondents be ordered to pay the costs of and incidental to these proceedings.**

(f) Any other relief that the Honourable Board deems fit to grant, having regard to the circumstances of this case in order to give effect to the Board's orders.

Vide letters dated 15th October 2021 the Acting Board Secretary notified the Respondents of the existence of the Request for Review.

In response, on 26th October 2021, the Respondents filed a 1st & 2nd Respondent's Statement of Reply sworn by John Paul Okwiri, the Manager, Supply Chain of the 2nd Respondent, on 25th October 2021 and a Supplementary Affidavit dated 5th November 2021 on even date through the firm of Kipkenda & Company Advocates.

Vide letters dated 26th October 2021, the Acting Board Secretary notified tenderers in the subject tender of the existence of the Request for Review while inviting them to supply the Board with any information and arguments touching on the subject tender. Further, the Acting Board Secretary furnished all tenderers with the Board's Circular No.2/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of Covid-19. None of the unsuccessful tenderers filed any response either in support or in opposition to the instant Request for Review.

Pursuant to the Board's Circular No. 2/2020 dated 24th March 2020, the Board dispensed with physical hearings and directed all requests for review applications be canvassed by way of written submissions. Clause 1 at page

2 of the said Circular further specified that pleadings and documents would be deemed as properly filed if they bear the official stamp of the Board.

The Applicant filed Written Submissions dated 1st November 2021 and filed on even date while the Respondents filed Written Submissions dated 5th November 2021 on even date.

APPLICANT'S CASE

The Applicant avers that it participated in the subject tender and that at the opening of the subject tender by the 2nd Respondent its tender sum of Kshs. 79,219,447 was read out as the lowest among nine (9) tenders that were submitted with respect to the subject tender.

The Applicant avers that vide a notification of regret letter dated 4th October 2021 and received through email on 8th October 2021, it was informed that its tender was unsuccessful because (a) the manufacture's letter of authority for proposed air conditioning and mechanical ventilation equipment to be supplied was not from the certified vendor of the manufacturer that is Eurovent Energy Efficient Systems; and (b) evidence of having completed minimum three projects of similar magnitude and complexity in the last six years was not provided.

According to the Applicant, it submitted a compliant tender which fully complied with mandatory requirements of Clause D of Stage 1 of Preliminary

Evaluation- Mandatory Requirements of the Appendix to Instructions to Tenderers of tender document. It's the Applicant's averment that it fully complied with this mandatory requirement by providing the documents and information reflected in its tender at pages MN0163, MN0307 and MN0308. It is the Applicant's further averment that at page MN0163 of its tender, it presented a manufacturer's letter of authority from G.I Industrial Holding /G. I Middle East who are the distributors and manufacturers of CLINT/NOVAIR Air conditioning products which are from the certified vendor Eurovent Energy Efficient Systems.

According to the Applicant, it submitted a compliant tender which fully complied with mandatory requirements of Clause E of stage 1 of Preliminary Evaluation- Mandatory Requirements of the Appendix to Instructions to Tenderers of the tender document. It's the Applicant's averment that it fully complied with this mandatory requirement by providing documents and information reflected in the Applicant's tender at pages MN0232-MN0253. It's the Applicant's further averment that at pages MN0232-MN0253 of its tender it presented evidence of two purchase orders from Safaricom and one purchase order from Airtel of similar magnitude of projects done in the last six years.

The Applicant takes issue with the notification of regret letter dated 4th October 2021 for not disclosing at how much the tender was awarded to the Interested Party, which then offends section 87(3) of the Act.

Due to the forgoing, the Applicant avers that the Respondents are in breach of Articles 10, 27,35, 227 and 232 of the Constitution for failure to promote fair competition and ensure that all tenderers are treated fairly and equally, thus failing to promote integrity and fairness of the procedures of public procurement. The Applicant further avers that the Respondents are in breach of sections 79, 80(2)(3), 86 and 87 of the Act for failure to declare its tender as the lowest most responsive tender because its tender was compliant with the mandatory requirements. Instead, the Respondents applied a procedure for evaluation and a criterion that was not stipulated in the tender document resulting to unfairly disqualifying the Applicant at the preliminary evaluation stage.

Finally, the Applicant avers that John Paul Okwiri, the Manager, Supply Chain of the 2nd Respondent and the person who swore the 1st & 2nd Respondents' Statement of Reply is not a party to the proceedings herein as enshrined in section 170 of the Act, therefore lacks the *locus standi* to participate in the instant Requests for Review proceedings in the absence of proof of having written authority from the Respondents. It is the Applicant's averment that Paul Okwiri is the Manager, Supply Chain Office and not the Accounting Officer and there is no evidence to prove that he is the Accounting officer, appointed by the Cabinet Secretary, thus, all the documents filed by John Paul Okwiri should be disregarded for lack of requisite authority.

RESPONDENT'S CASE

The Respondents contend that the evaluation and comparison of tenders in the subject tender was done using the procedures and criteria set out in the tender document and was objective and quantifiable as per statutory requirements. It is the Respondents contention that the Applicant was disqualified at the preliminary mandatory stage as per Regulation 75 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as the 'Regulations 2020') for failure to provide an acceptable and admissible manufacturer's letter of authority for proposed air-conditioning and mechanical ventilation equipment to be supplied-certified Eurovent Energy Efficient Systems, which was a mandatory requirement under Clause D of Stage 1 of Preliminary Evaluation- Mandatory Requirements of the Appendix to Instructions to Tenderers of tender document. Further, that the Applicant was also disqualified at the preliminary mandatory stage because it had no evidence of a single project of similar magnitude and complexity to the subject tender completed in the last six years which was a requirement in Clause E of Stage 1 of Preliminary Evaluation- Mandatory Requirements of the Appendix to Instructions to Tenderers of tender document.

The Respondents relied on the Cambridge dictionary to define (a) complete- to mean to complete doing something; (b) magnitude- to mean the large size or importance of something; (c) complexity- to mean the state of having many parts and being difficult to understand or find an answer.

It is the Respondents contention that section 86 of the Act refers to the lowest evaluated price and not merely the lowest price. According to the Respondents, this means the lowest price must go through and pass all other stages of evaluation to be determined the lowest evaluated price. It is the Respondents contention that the Applicant has not discharged its burden of proving breach of duty imposed on the Respondents as envisaged under section 167(1) of the Act, that the instant Request for Review does not discharge a single ground for review and that the same should be dismissed with costs.

BOARD'S DECISION

The Board has considered parties' pleadings, their respective supporting documentation and written submissions filed before it, including confidential documents submitted by the Respondents pursuant to section 67(3) (e) of the Public Procurement and Asset Disposal Act 2015 (hereinafter referred to as "the Act") and notes the following issues crystalize for determination:

- 1. Whether the Applicant's tender satisfied the mandatory requirements of:**
 - a. Clause D of Stage 1 of Preliminary Evaluation-Mandatory Requirements of Section III of the Appendix To Instructions To Tenderers of the Tender Document-Manufacturer letter of Authority for proposed Air-**

- Conditioning and Mechanical Ventilation equipment to be supplied. Certified Eurovent Energy Efficient systems;**
- b. Clause E of Stage 1 of Preliminary Evaluation-Mandatory Requirements of Section III of the Appendix To Instructions To Tenderers of the Tender Document-Have completed minimum three projects of similar magnitude and complexity in the last six years;**

2. Whether the 1st Respondent's Notification Letters dated 4th October 2021 issued to unsuccessful tenderers were issued in accordance with Section 87 of the Act as read together with Regulation 82 of the Public Procurement and Asset Disposal Regulations 2020 (hereinafter "Regulations 2020")

As a preliminary issue the Board notes the averments of the Applicant that Mr. John Paul Okwiri has no *locus standi* to sign the documents filed by the Respondents because he is not a party to the Request for Review and has not attached any evidence that he has the authority to do so. Indeed, he is not a party to the Request for Review, because the Applicant rightly joined the Chief Executive Officer, Konza Technopolis Development Authority as the Accounting Officer/1st Respondent and Konza Technopolis Development Authority as the Procuring Entity/ 2nd Respondent, however, he is an employee of the 2nd Respondent who swore the Respondents Response in the instant request for review on their behalf. On the issue of his authority to sign the documents on behalf of the Respondents, the Board has

previously held in Public Procurement Administrative Review Board Application No. 120 of 2021 The Consortium of Tsk Electronica Y Eletricidad S. A & Ansaldo Energia V Kenya Electricity Generating Company PLC that;

“The Board also is of the view that failure to file the authority at the time of filing the Application or review does not necessarily render the Application incompetent.”

In reaching the above position the Board relied on a decision by Justice Ngetich on failure to file authority in **J N (Minor suing through her mother and next friend R N M) v Francis Githinji & another [2019] eKLR** which states as follows;

"22. Further, it is important to look at the intention of the legislature. As expressed in the above case, the reason for the law to make it a requirement for a minor to act through next friend, is minor's incapacity to bind himself to be liable for costs or any other legal responsibility as the court may direct.

23. It is trite law that a minor has no capacity to enter into legal transactions. I believe that legal position may have informed the legislature in coming up with the legal provision. The provision ensures that a person capable of taking up responsibility is involved from the onset in the suit. The requirement of the person's consent/authority is intended to rule out situations where a party's name is dragged in a suit without his/her authority. This addresses

the issue of likelihood of denial of responsibility/liability arising in the event adverse orders are made by court against a minor.

24. In this case, the person who was initially named plaintiff is next friend. Her authority to act as next friend was filed at the earliest opportunity. From record, it comes out clearly as unintended mistake on procedure, which was corrected without delay.

25. Whereas I do agree that laws and procedural rules are not made in vain, my view is that, they are not cast in stone either; more especially in situation where the resulting effect is denial justice at the expense of technicalities. My finding is that the trial magistrate erred in striking out the plaintiff's plaint."

The Board also reviewed the decision in civil suit number 893 of 2010 whereby Justice Odunga in **Leo Investments Limited Vs Trident Insurance Company Limited [2014] eKLR** stated as follows;

"Clearly from the ongoing provision, nowhere is it required that the authority given to the deponent of the verifying Affidavit be filed. The failure to file the same may be ground for seeking particulars assuming that the said authority does not form part of the Plaintiff's bundle of documents which commonsense dictates it should. Of course if a suit is filed without a resolution of a corporation, it may attract some consequences. The mere failure to file the same with the Plaint does not invalidate the suit. I associate myself with the decision of Kimaru J in Republic vs Registrar

General and 13 others Misc. Application No 67 of 2005 [2005] eKLR and hold that the position in law is that such a resolution by the Board of Directors of a company may be filed any time before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. Its absence, is therefore not fatal to the suit.”

From the aforementioned cases it is therefore clear to the Board that where there is no mandatory requirement to file authority to file the resolution with the Application the position can be regularized by the filing of the said consent/authority/resolution subsequent to the filing of the Suit/Application and the holdings in the above cases can be applied in the present circumstances where the Procuring Entity has filed a letter of Authority dated 2nd November 2021 on 5th November 2021, signed by the Chief Executive Officer Konza Technopolis Development Authority, which gives authority to Mr. John Paul Okwiri, The Manager, Supply Chain Management Division to appear in these proceedings as a witness and depone all filings made before the Review Board on behalf of Konza Technopolis Development Authority. Thus, while he himself is not a party to the proceedings he is dully authorized to sign all documents pertaining to the Request for Review on behalf of the Respondents consequently the Board will not disregard the documents filed by the Respondents.

Having reviewed the documents submitted before it by the parties herein the Board notes that the Notification Letter dated 4th October 2021 addressed to the Applicant *inter alia* stated as follows;

“.....

After evaluation of your proposal, we regret to inform you that the proposal submitted by M/s Nuair Technologies Ltd was not successful because it did not meet the requirements of preliminary evaluation as follows:

- 1. The Manufacturer’s letter of Authority for proposed Air-Conditioning and Mechanical Ventilation equipment to be supplied was not from the certified vendor of the Manufacturer that is, Eurovent Energy Efficient Systems.**

- 2. Evidence to have completed minimum three projects of similar magnitude and complexity in the last six years was not provided.**

The successful bidder is M/s Farm Air Conditioning & Refrigeration Engineers Ltd who is the most responsive technically and financially evaluated bidder. The tender security shall be returned to you in due course.

.....”

The aforementioned Notification Letter gives reasons as to why the Applicant's tender was not successful namely, (i) the Applicant provided a manufacturer's letter of authority for the product to be supplied to the Respondents that was not from the certified vendor of the manufacturer. The certified vendor of the manufacturer being Eurovent Energy Efficient Systems. (ii) the Applicant did not provide evidence that it had completed a minimum of three projects of similar magnitude and complexity to the subject tender in the last six years.

The Board has carefully studied the Evaluation Report signed by all the members of the evaluation committee on 20th September 2021, which evaluation report was submitted to the Board as part of the confidential documents from the Respondents and notes that, the evaluation committee disqualified the Applicant's tender at Stage 1: Preliminary Evaluation while noting that the Applicant did not provide a letter of authority against MR4 and did not provide any project of similar magnitude and complexity against MR5. We note MR 4 was referring to Clause D of Stage 1 of Preliminary Evaluation-Mandatory Requirements of Section III of the Appendix To Instructions To Tenderers of the Tender Document-Manufacturer letter of Authority for proposed Air-Conditioning and Mechanical Ventilation equipment to be supplied. Certified Eurovent Energy Efficient systems. On the other hand, MR5 was with reference to Clause E of Stage 1 of Preliminary Evaluation-Mandatory Requirements of Section III of the Appendix To Instructions To Tenderers of the Tender Document-Have completed

minimum three projects of similar magnitude and complexity in the last six years.

Section 80(2) of the Act is instructive on how an evaluation committee should carry out evaluation and comparison of tenders as follows:

"The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered. "

The Board carefully studied the blank tender document for the subject tender issued by the Respondents to establish the criteria that the evaluation committee ought to have employed in evaluating the Applicant's tender at Stage 1 of Preliminary Evaluation-Mandatory Requirements of Section III of the Appendix To Instructions To Tenderers of the Tender Document which reads as follows:

"This stage of evaluation shall involve examination of the pre-qualification conditions as set out in the Tender Advertisement Notice or Letter of Invitation to Tender and any other conditions stated in the bid document. These conditions will include submission of the following mandatory documents:

- A) Submission of One Original and One Soft Copy in a Flash disk or CD of all tender documents in plain sealed envelopes.***
- B) Submission of properly bound, paginated and serialized tender documents without loose pages.***
- C) Class NCA1 registration and current valid practising license as Air-Conditioning and Mechanical Ventilation Installation Sub-Contractor with the National Construction Authority. All certificate copies must be certified by Commissioner for Oaths.***
- D) Manufacturer letter of Authority for proposed Air-Conditioning and Mechanical Ventilation equipment to be supplied. Certified Eurovent Energy Efficient systems.***
- E) Have completed minimum three projects of similar magnitude and complexity in the last six years.***
- F) Provide evidence of financial, personnel and equipment capability necessary for carrying out the works. G) Provide Copies of Company Registration Certificate, current valid Tax Compliance Certificate, Valid Business Permit, PIN and VAT Registration Certificates. All copies must be certified by Commissioner for Oaths.***
- H) Provide Copy of Current valid CR12 certificate certified by Commissioner for Oaths.***
- I) Provide a Bid Security in form of Bank Guarantee or Bid Bond from an Insurance company approved by Public Procurement***

Regulatory Authority (PPRA) in the amount as tabulated above and valid for 150 days from date of opening of tender

J) Dully filled Form of Tender in the format provided in Bid Document.

K) Provide Litigation History (both court and arbitration cases) and satisfactorily complete Confidential Business Questionnaire & Declaration form.

L) Meet all statutory requirements as per Public Procurement and Asset Disposal Act, 2015

M) Audited Accounts for the last three (3) financial years (2018, 2019, 2020). Audited accounts must be certified by a registered/certified accountant with current and valid practicing license.

N) Provide all information requested in the Clause 2.3 (a-f) of instruction to Tenderers in the tender documents.

The tenderers who do not satisfy any of the above requirements shall be considered Non-Responsive and their tenders will not be evaluated further."

The import of the provisions of the above listed mandatory requirements D and E is that the Applicant was required to provide (i) a manufacturer letter of authority for proposed air-conditioning and mechanical ventilation equipment to be supplied together with certification by Eurovent Energy

Efficient systems and (ii) proof of completion of a minimum of three projects of similar magnitude and complexity in the last six years.

The Board further carefully studied the Applicant's original tender as submitted at tender opening which tender was forwarded to the Board by the Respondent's pursuant to section 67(3)(e) of the Act and notes that in response to the mandatory requirement D listed hereinbefore, the Applicant provided at page MN0163 a certified true copy of the original of Letter of Authorization from GI Middle East dated 16th August 2021 addressed to whom so ever it may concern in relation to the subject tender stating *inter alia*;

"Whereas G.I Industrial holding / G.I Middle East, who are established and reputable distributors and manufacturers of CLINT / NOVAIR Air conditioning products having factories at Italy do hereby authorize

M/s Nuair Technologies Ltd

P.O Box 5322-00200

Nairobi, Kenya

to submit a tender, and subsequently negotiate and sign the Contract with you against Parliament tender for the above goods manufactured by us.

....."

At page MN0307 and MN0308 the Applicant provided a Eurovent Certificate No.15.05.002 issued on 28th June 2021 and valid until 30th September 2021 granted on May 12, 2015 evidencing the participant as G.I Industrial Holdings SpA in Italy issued according to the certification rules ECP AHU-Air Handling Unit and with the Trade Name being Novair.

In essence, even though the Applicant submitted a letter of authorization reproduced on the letterhead of GI Middle East, the same letter of authorization by GI Middle East made reference to both G. I. Industrial holding and G. I. Middle East as manufacturers of Clint/Novair air conditioning products. Further, the aforementioned Eurovent Certificate was issued for a participant named G.I. Industrial Holding SpA whose address is in Italy according to certification rules of air handling unit for the trade name Novair.

It is the Board's view that the common factor across the board when one looks at the letter of authorization and Eurovent Certification is G. I. Industrial Holding having been mentioned in both the letter of authorization and in the Eurovent Certificate. If there was any doubt on the authenticity of the letter of authorization vis-a vis the Eurovent certification, it's the Board's view that such authenticity was not an issue to be established/resolved at the Preliminary Mandatory evaluation stage but at the Post Qualification/Due diligence stage where the Respondents would have sought to confirm and verify the authenticity of the letter of

authorization prior to awarding the tender to the Applicant if the Applicant had been recommended for award. It is the Board’s view that at the preliminary mandatory evaluation stage, the evaluation committee is required to confirm that the documents and their respective contents required at that stage have been provided on the face value. As to whether the contents of such mandatory documents are acceptable due to their authenticity is a matter for Due Diligence provided under section 83 of the Act in which due diligence exercise would be conducted after a tender has been recommended for an award upon passing preliminary/mandatory, technical and financial evaluation stages but prior to an award being made.

Accordingly, we find the Applicant satisfied Clause D of Stage 1 of Preliminary Evaluation-Mandatory Requirements of Section III of the Appendix To Instructions To Tenderers of the Tender Document.

The Board further carefully studied the Applicant’s original tender as submitted at tender opening and which tender was forwarded to the Board by the Respondent’s pursuant to section 67(3)(e) of the Act and notes that in response to the mandatory requirement E, the Applicant provided at page MN0156 a list of eight projects in a form titled ‘Schedule of Completed Air-Conditioning and Mechanical Ventilation Installations Works Carried Out By The Tenderer In The Last Eight Years’ as follows:

	DESCRIPTION OF WORKS AND CLIENT	TOTAL VALUE OF WORKS	CONTRACT PERIOD (YEARS)	YEAR COMPLETE D
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		(KSHS)		
1.	Cooling upgrades at Safaricom Regional Network	<i>84,560,133.13</i>	<i>1 year</i>	<i>14/05/2017</i>
2.	Supply, Installation & Commissioning of Precision Units at Kenya School of Monetary Studies	<i>7,211,622.56</i>	<i>1 Year</i>	<i>31/08/2018</i>
3.	Supply, Installation & Commissioning of Precision Cooling Units at KPLC Primary Data Centre	<i>15,641,418.60</i>	<i>1 year</i>	<i>2016</i>
4.	Supply, Installation & Commissioning of Air Conditioners at Mwewe Data Centre	<i>35,111,159.83</i>	<i>1 year</i>	<i>2020</i>
5.	Supply, Installation & Commissioning of Cooling Units at Safaricom Data Centres	<i>1,047,395.56 (USD)</i>	<i>2 years</i>	<i>2019</i>
6.	Supply, Installation & Commissioning of Air Conditioners at Stanbic Bank Mlolongo Data Centre	<i>13,147,670.86</i>	<i>6 months</i>	<i>2017</i>
7.	Supply, Installation & Maintenance of Air Conditioners at CBK Head Office & Pension	<i>8,990,998.00</i>	<i>3 years</i>	<i>2020</i>

	House			
8.	Supply, Installation & Commissioning of Data Centre Equipment at Airtel Seychelles	394,796.95 (USD)	1 year	2021

As already indicated herein above mandatory requirement Clause E of Stage 1 of Preliminary Evaluation-Mandatory Requirements of Section III of the Appendix To Instructions To Tenderers of the Tender Document required the Applicant to provide evidence of at least three projects that were (i) of similar magnitude with the subject tender; (ii) similar complexity with the subject tender (iii) completed in the last six years.

In Item 4 of Table 1: Assessment of Eligibility of the Tender Document, the proof required of tenderers for contracts completed was for projects of Kshs.75 Million and above and this would be proven either in terms of completion certificate, certified final account or client's letter of authority.

This Board has in the past defined similar projects to mean projects that are alike but not necessarily the same as held by the Board in ***Public Procurement Administrative Review Board Application No. 141 of 2020, Riang International Group Limited V Central Rift Valley Works Development Agency*** as follows;

"It is the interpretation of this Board that 'similar works' will include works that are alike but not necessarily identical to the scope of works as outlined by the Procuring Entity under the subject tender."

The Cambridge dictionary describes magnitude as *'the large size or importance of something'* and complexity as *'the state of having many parts and being difficult to understand'*. Therefore, within the context of Procurement, Magnitude and Complexity would mean the nature, scope and value of a project as defined in the Organization of American States Procurement Handbook.

From the foregoing, it is the Board's view that a project similar in magnitude and complexity to the project of the subject tender is one that is alike but not exactly the same to the subject tender and one whose value is equal to or above Kshs.75 Million and whose complexity is equal to or greater than air-conditioning and mechanical ventilation installation services. Any project that fails any of the above conditions would not be considered a project that is completed in that last six years and one that is similar in magnitude and complexity to the subject tender.

A cursory look at the eight projects listed at page MN0156 of the Applicant's original tender in which the Applicant claims to be completed projects in the last eight years, on the face value, only the (i) cooling upgrades at Safaricom Regional network project valued at Kshs.84,560,133.13 completed on 14th May 2017 and (ii) supply, installation & commissioning of cooling units at Safaricom Data Centres valued at USD 1,047,395.56 completed in 2019 can be said to be projects of the magnitude of a value of Kshs.75 Million and above as envisaged in the tender document. All the other six projects listed by the Applicant as completed projects are valued approximately at Kshs.40 Million and below, thus not similar in magnitude to the project of the subject tender.

The Applicant has restated that the Airtel project listed by them fits the bill with respect to a completed project within the last six years and which project is similar in magnitude and complexity. However, we, do, note the said Airtel project was valued at USD 394,796.95 which is approximately Kshs. 39,479,695 at an exchange rate of 1USD:100KSHS. This therefore falls short of the similar magnitude value threshold of Kshs.75Million and above. Without even going further to establish whether there is evidence of the aforementioned two Safaricom projects having been completed by way of accompanying completion certificate or certified final account or client's letter of authority, it is evident that the Applicant fell short of one project that was of a similar magnitude of the value of Kshs.75 Million and above. On this account alone, the Applicant failed to satisfy the requirement in Clause E of Stage 1 of Preliminary Evaluation-Mandatory Requirements of

Section III of the Appendix To Instructions To Tenderers of the Tender Document for failure to provide evidence of at least three projects that were (i) of similar magnitude with the subject tender; (ii) similar complexity with the subject tender and (iii) completed in the last six years.

At paragraph 38 and 48 of his decision in ***Miscellaneous Civil Application No. 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***, the Honourable Justice Mativo, addressed the importance of requirements in the tender document whilst stating as follows:

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"38. In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions.

.....

48. Evaluation criteria are the standards and measures used to determine how satisfactorily a proposal has addressed the requirement identified in the request for proposals. Suppliers either meet or not meet mandatory criteria. 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.

The import of the above is that tenders which fail to meet the mandatory requirements cannot be evaluated in the next stages of evaluation. Therefore, the evaluation committee had no choice but to disqualify the Applicant's tender as a non-conforming tender for failure to satisfy mandatory requirement under Clause E of Stage 1 of Preliminary Evaluation-Mandatory Requirements of Section III of the Appendix To Instructions To Tenderers of the Tender Document.

In totality of the first issue framed for determination, it is the Board's finding that Applicant did not satisfy Clause E of Stage 1 of Preliminary Evaluation-Mandatory Requirements of Section III of the Appendix To Instructions To Tenderers of the Tender Document for failure to provide at least three completed projects of similar magnitude and complexity in the last six years.

On the second issue framed for determination, the Applicant challenged the notification letter of unsuccessful tender dated 4th October 2021 issued to it by the 1st Respondent on one ground. In the Applicant's view, the notification

letter does not meet the requirements of section 87 (3) of the Act because the same did not disclose the tender sum quoted by the successful tenderer.

Section 87 of the Act provides as follows: -

"(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.

(2)

(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.

Further, Regulation 82 of the 2020 Regulations provides as follows: -

"(1) The notification to the unsuccessful bidder under section 87 (3) of the Act, shall be in writing and shall be made at the same time the successful bidder is notified.

(2) For greater certainty, the reason to be disclosed to the unsuccessful bidder shall only relate to their respective bids.

(3) The notification in this regulation shall include the name of the successful bidder, the tender price and the reason why

the bid was successful in accordance with section 86 (1) of the Act. “[Emphasis by Board]

In view of the provisions of section 87 (3) of the Act as read together with Regulation 82 of Regulations 2020, the Board observes that an accounting officer of a procuring entity must notify, in writing, the tenderer who submitted the successful tender, that its tender was successful before the expiry of the tender validity period. Simultaneously, while notifying the successful tenderer, an accounting officer of a procuring entity notifies other unsuccessful tenderers of their unsuccessfulness, giving reasons why such tenderers are unsuccessful, disclosing who the successful tenderer is, why such a tenderer is successful in line with section 86(1) of the Act and lastly at what price is the successful tenderer awarded the tender. These reasons and disclosures are central to the principles of public procurement and public finance of transparency and accountability enshrined in Article 227 and 232 of the Constitution of Kenya. This means all processes within a public procurement system, including notification to unsuccessful tenderers, must be conducted in a transparent manner. The Board perused the confidential documents and notes the notification letters issued by the 1st Respondent to all unsuccessful tenderers in the subject tender disclosed the reasons why such tenderers were unsuccessful, that the Interested Party was the successful tenderer and why the Interested Party was successful but did not disclose at how much the subject tender was awarded to the Interested Party.

The Board therefore finds that the 1st Respondent's notification letters to all unsuccessful tenderers in the subject tender dated 4th October 2021 does not satisfy the threshold of section 87 (3) of the Act read together with Regulation 82 of Regulations 2020 for failure to disclose the amount at which the subject tender was awarded to the Interested Party.

In totality of the foregoing, the Request for Review succeeds only in respect to the Board's finding that the 1st Respondent's notification letters issued to all unsuccessful tenderers dated 4th October 2021, do not satisfy the threshold of section 87 (3) of the Act read together with Regulation 82 of Regulations 2020. Since section 87 of the Act requires unsuccessful tenderers to be notified of the outcome of their respective tenders at the same time the successful tenderer is notified, the Board deems it fit to nullify the 1st Respondent's notification of contract award letter issued to the Interested Party dated 4th October 2021 when nullifying the 1st Respondent's notification letters issued to unsuccessful tenderers dated 4th October 2021 to enable all tenderers to be notified of the outcome of their tenders simultaneously.

FINAL ORDERS

In exercise of the powers conferred upon it by section 173 of the Act, the Board makes the following orders in the Request for Review dated 15th October 2021: -

- 1. The 1st Respondent's Notification Letters in Tender No. KoTDA/NC003/2021-2022 for Phase II-Air-Conditioning and**

Mechanical Ventilation Installations dated 4th October 2021 addressed to the Applicant and all other unsuccessful tenderers, be and are hereby cancelled and set aside.

2. The 1st Respondent's Notification of Contract Award Letter in Tender No. KoTDA/NC003/2021-2022 for Phase II-Air-Conditioning and Mechanical Ventilation Installations dated 4th October 2021 addressed to the Interested Party, be and is hereby cancelled and set aside.

3. The Accounting Officer of the Procuring Entity is hereby directed to notify all tenderers of the outcome of tender evaluation in Tender No. KoTDA/NC003/2021-2022 for Phase II-Air-Conditioning and Mechanical Ventilation Installations in accordance with section 87 of the Act read together with Regulation 82 of Regulations 2020 within seven (7) days from the date of this decision taking into consideration the Board's findings in this Review.

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

Dated at Nairobi this 5th day of November 2021

**CHAIRPERSON
PPARB**

**SECRETARY
PPARB**