

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 127/2021 OF 15th OCTOBER 2021
BETWEEN

**CONTEMPORARY ENGINEERING
COMPANY LIMITED APPLICANT**
**THE ACCOUNTING OFFICER,
KONZA TECHNOPOLIS
DEVELOPMENT AUTHORITY 1ST RESPONDENT**
**KONZA TECHNOPOLIS
DEVELOPMENT AUTHORITY 2ND RESPONDENT**
**CENTRAL ELECTRICALS
INTERNATIONAL LIMITED 1ST INTERSTED PARTY**
MASTERPOWER SYSTEMS LIMITED 2ND INTERSTED PARTY

Review against the decision of the Accounting Officer of Konza Technopolis Development Authority in relation to Tender No. KoTDA/NC001/2021-2022 for Phase II-Electrical Installations and Associated Services.

BOARD MEMBERS

- | | |
|---------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Ms. Phyllis Chepkemboi | -Member |
| 3. Mr. Steven Oundo, OGW | -Member |
| 4. Dr. Paul Jilani | -Member |

5. Ms. Isabella Juma

-Member

IN ATTENDANCE

1. Mr. Philemon Kiprop -Holding brief for the 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/NC001/2021-2022 for Phase II-Electrical Installations and Associated Services (hereinafter referred to as the "subject tender") from qualified and eligible tenderers through an open tender advertised on the Government Advertising Agency (GAA) on 27th July 2021.

Tender Submission Deadline and Opening of Tenders

The 2nd Respondent received a total of eleven (11) tenders by the tender submission deadline of 19th August 2021 at 14:00 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 as follows:

- 1. Relcon Power Systems Limited**
- 2. Solutions General Limited**
- 3. M. J Vekaria Electronic Limited Engineers & Contractors**
- 4. Central Electricals International Limited**

- 5. Contemporary Engineering Co. Limited**
- 6. Philafe Engineering Limited**
- 7. Master Power Systems Limited**
- 8. Muga Electrical Contractors Limited**
- 9. Atomic Electronics**
- 10. Adrian Kenya Limited & Frejad Engineering Services Limited**
- 11. Sawarn Singh & Sons Limited**

Evaluation of Tenders

The 2nd Respondent's Evaluation Committee (hereinafter referred to as the "Evaluation Committee") evaluated tenders in the following stages: -

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

Preliminary Evaluation

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 this stage of evaluation, nine (9) tenders including the Applicant's tender were found non-responsive while two (2) tenders being the 1st and 2nd Interested

Parties' tenders were found responsive, thus proceeded to technical evaluation stage.

Detailed 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 where tenders were required to attain a pass-mark of 80% in order to proceed to the the next stage of evaluation. Both the 1st and 2nd Interested Parties' tenders were found responsive thus proceeded for financial evaluation.

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 1st Interested Party was found to have submitted the lowest evaluated tender at the tender sum of Kshs 305,948,072.35 (Kenya Shillings Three Hundred and Five Million, Nine Hundred and Forty-Eight Thousand and Seventy -Two and Thirty-Five Cents).

Recommendation

The Evaluation Committee recommended award of the subject tender to the 1st Interested Party having submitted the lowest evaluated responsive tender at its tender price of Kshs 305,948,072.35 (Kenya Shillings Three Hundred

and Five Million, Nine Hundred and Forty-Eight Thousand and Seventy-Two and Thirty-Five Cents).

Professional Opinion

In a Professional Opinion dated 4th October 2021, the 2nd Respondent's Manager, Supply Chain Management Division, one Mr. John Paul Okwiri, reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and concurred with the recommendations of the Evaluation Committee recommending the 1st Interested Party for award of the subject tender. The Accounting Officer approved the Professional Opinion.

Notification to Tenderers

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

REQUEST FOR REVIEW NO. 127 OF 2021

The Applicant lodged a Request for Review together with a Statement in Support of the Request for Review sworn by George Ochodo, the Applicant's Managing Director on 15th October 2021 and filed on even date and a Further

Statement sworn by George Ochodo on 4th November 2021 and filed on even date through the firm of S. S. Malonza Advocates LLP, seeking the following orders: -

- a. The decision of the Procuring Entity as communicated in the Notification of Regret dated 4th October 2021, awarding the tender to M/s Central Electrical International Limited be set aside;**
- b. The decision of the Procuring Entity communicated in the Notification of Regret dated 4th October 2021, rejecting the Applicant's bid be set aside;**
- c. The contract for Construction of the Proposed Konza Complex Facility Phase II: Electrical Engineering and Associated Services (the tender) be awarded to the Applicant.**
- d. In the alternative to prayer (c) above; The Procuring Entity be ordered to re-evaluate the tenders afresh in accordance with the tender documents and the law;**
- e. The Respondents be ordered to pay the costs of and incidental to these proceedings.**

Vide letters dated 15th October 2021 the Acting Board Secretary notified the 1st and 2nd Respondents of the existence of the Request for Review.

In response, the 1st and 2nd Respondents filed a Notice of Appointment of Advocates dated 25th October 2021 on 26th October 2021 together with a Statement of Reply sworn by John Paul Okwiri on 25th October 2021 on 26th October 2021 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 instant 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 tenderers in the subject tender with the Board's Circular No.2/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of Covid-19.

The 2nd Interested Party filed a Notice of Appointment of Advocates dated 1st November 2021 on 2nd November 2021 and a Reply to the Request for Review dated 3rd November 2021 and filed on even date through the firm of Mbugwa, Atudo & Macharia Advocates.

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 and list of authorities dated 3rd November 2021 on 4th November 2021 while the 2nd Interested Party filed written submissions and a list of authorities dated 4th November 2021 on even date.

Applicant's Case

The Applicant avers that it participated in the subject tender by submitting one original and one soft copy in a flash disk of its tender, in response to the subject tender. The Applicant's Managing Director, one George Ochodo, depones that during the opening of tenders, in the presence of all tenderers' representatives, the Respondents failed to avail the tender opening register which document is a mandatory requirement under the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), thus breaching sections 78(6) and (8) of the Act and Clause 20.4 of the Standard tender document on Tender opening.

The Applicant avers that it received a Notification Letter from the 1st Respondent dated 4th October 2021 informing it that its tender was unsuccessful, disclosing the 1st Interested Party as the successful tenderer because the 1st Interested Party submitted a tender that was most responsive technically and financially.

The reasons given for the Applicant's tender unsuccessfulness were (i) the Applicant failed to comply with the mandatory conditions and instructions expected from a tenderer under Clause 16.3 of the Instructions to Tenderers, which Clause provided for the complete tender to be without alterations, interlineations or erasures, except as necessary to correct errors made by the tenderer, in which case, such corrections be initialed by the person or persons signing the tender and (ii) the Applicant's tender document was not duly serialized-some pages of the bid document were serialized.

According the Applicant, its tender document fully adhered to Clause 16 of the Instructions to Tenderers because (a) its copy of the tender and Bills of Quantities appearing at pages 000314-000386 were typed, written in indelible ink and signed by authorized signatory on behalf of the Applicant, as evidenced at page 000386 of the Applicant's tender document and that all pages of the copy of its tender document and specifically the Bills of Quantities, where amendments were made, were properly initialed with the initials "**KO**" by the authorized signatory on behalf of the Applicant as required and stated under Clause 16.2 of Instructions to Tenderers and (b) the Applicant's complete tender together with alterations made to the Bills of Quantities, to correct errors made by the Applicant, were well initialed with the initials "**KO**" by the authorized signatory on behalf of the Applicant as was required and stated under Clause 16.3 of Instructions to Tenderers.

The Applicant further submits that, its tender document was properly bound, paginated and serialized (at the bottom right hand corner from No.000001-001324) without any loose documents as was required and stated in Section III Appendix to Instructions to Tenderers; Stage 1 Preliminary Evaluation-Mandatory Requirements, Conditions A and B and Regulation 74(1) of the Public procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "Regulations 2020").

It is for the foregoing reasons that the Applicant avers the Respondents did not assess, verify and evaluate its tender properly to determine its responsiveness and compliance and that the reasons given for disqualification of the Applicant's tender are false and solely designed to lock out the Applicant. It is the Applicant's averment that the Respondents, in disqualifying its tender at the preliminary evaluation stage breached section 3 and 80 of the Act, Regulation 74(1) of Regulations 2020, Articles 10, 27 and 227 of the Constitution of Kenya for failing to evaluate and compare the Applicant's tender using the procedures and criteria set out in the Tender Document and for failure to apply the evaluation criteria uniformly to all tenderers thus undertaking a process that is not fair, competitive and transparent.

It is the Applicant's averment that the 1st Interested Party ought not to have been awarded the subject tender because the 1st Interested Party submitted a tender security with a validity period of 150 days from the date of opening

of tenders instead of 210 days from the date of opening of tender. According to the Applicant, Clause 13.3 of the Standard tender document required the tender security and tender surety to be valid for at least 30 days beyond the tender validity period whilst Clause 13.4 of the Standard tender document required the Respondents to reject as non-responsive any tender not accompanied by an acceptable tender surety.

The Applicant further avers it is a mandatory requirement of the subject tender at page 4 of the tender document for the prices quoted to remain valid for 180 days from the date of opening of tenders. According to the Applicant, a reading of the mandatory requirements at page 4 of the tender document (under prices quoted) which required prices to remain valid for 180 days together with a reading of Clause 13.3 and 13.4 of the Standard tender document, the required validity period of the tender security for the subject tender is 210 days from date of opening of tenders.

That being the case, it is the Applicant's averment that the Respondents breached Section 79 of the Act, Regulations 74 and 75 of Regulations 2020 by awarding the subject tender to the 1st Interested Party yet the 1st Interested Party's tender security did not meet the mandatory requirements of the tender document.

The Applicant concludes by alleging that the Respondents acted in a manner contrary to the law by failing to disclose the tender price at which the 1st

Interested Party was awarded the subject tender and prays for the Board to cancel the award to the 1st Interested Party and grant it the award of the subject tender among other prayers.

1st and 2nd Respondents' Case

The Respondents contend that the subject tender was opened on 19th August 2021 at 14:00hrs as per the tender committee and minutes of the opening recorded. The Respondents proceed to annex a duly signed attendance register to the affidavit of John Paul Okwiri, the Manager, Supply Chain of the 2nd Respondent evidencing that it is not true that the Respondents breached Section 78(6) and (8) of the Act because the Applicant did not at any point in time make a request to the 1st Respondent seeking a copy of the tender opening register as provided for under section 78 (8) of the Act.

The Respondents contend that the Applicant's tender was eliminated at the preliminary mandatory stage as per Regulation 75 of Regulations 2020 and inline with section 87(3) of the Act, the reasons for the 2nd Respondent's decision were communicated to the Applicant in a letter dated 4th October 2021.

According to the Respondents, Section II (Instructions to Tenderers) of the Tender Document expressly made it mandatory for tenderers to comply with

the conditions and instructions provided therein and failure to do so would result in the rejection of a tender.

It is the Respondents contention that all pages of the tender where amendments have been made were to be initialed by a person or persons signing the tender and that a complete tender was to be without alterations, interlineations or erasures, except as necessary to correct errors made by the tenderer, in which case such corrections are to be initialed by the person or persons signing the tender as per Clause 16 of Section II (Instructions to Tenderers).

According to the Respondents, the 2nd Respondent's Evaluation Committee found the Applicant's tender failed to comply with the mandatory conditions of the tender as provided under Clause 16.3 of the Instructions to Tenderers and that a page in the Applicant's tender was not duly serialized.

The Respondents went ahead to define the words (a) 'alter' to mean to change something, usually slightly or to cause the characteristics of something to change; (b) 'interlineation' to mean an insertion of new language in between the lines of a pre-existing legal document, usually to clarify a provision, or address an afterthought or omission and (c) 'erasure' to mean the act of removing a mark by rubbing it using the Cambridge dictionary.

The Respondents invited the Board to carefully study the Applicant's tender and make the following observation (a) that almost all pages of the Applicant's tender contain the initials 'KO' at the bottom of each page regardless of whether they contain alterations or not, (b) the person signing the tender document containing alterations such as in pages 316, 317, 318, 319, 320, 322, 324, 357, 360, 361, 369, 373, 379, 383 & 386 initialed with letters 'KO' against the alterations in line with the mandatory tender requirement, however, (c) other pages containing alterations such as page 325, 333, 337, 341, 343, 358, 369, 375 and 378 were not initialed and (d) a page between the page numbered 332 and 333 was neither numbered nor serialized.

It is the Respondents contention that Regulation 74(1) of Regulations 2020 requires and evaluation committee to first conduct a preliminary evaluation to determine whether, among others, the tender has been submitted in the required format and serialized in accordance with section 74(1)(i) of the Act and that Regulation 75(1) of Regulations 2020 provides for rejection of all tenders that do not conform to requirements of Section 79 of the Act and Regulation 74 of Regulations 2020.

For the foregoing reasons, it is the Respondents contention that the Applicant's tender was rejected at the Preliminary Mandatory stage in line with Regulation 75(1) of Regulations 2020 and therefore, Regulation 76(1)

of Regulations 2020 was not applicable because the Applicant's tender could not proceed for technical evaluation.

It is the Respondents case that even though Clause 13.3 of the standard tender document required a tender security to be valid for at least 30 days beyond tender validity, Section III Appendix to Instructions to Tenderers on Tender Security, at Clause 6 added to Clause 13.1 and 13.2 of the Tender Document for the tender security to be as in the letter of invitation and that the letter of invitation comprised in Section I of the tender document required tenderers to provide a tender security valid for a period of 150 days from the date of opening of tender and that this mandatory requirement for preliminary evaluation was replicated in Condition M at Section III-Appendix to Instructions to Tenderers of the Tender Document.

According to the Respondents, had the Applicant's tender been deemed to have complied with the preliminary mandatory requirements, its financial proposal of Kshs.320,525,174.48 would still not have been the lowest evaluated price among the responsive tenders as can be gleaned from the Evaluation Report.

2nd Interested Party's Case

Mr. Prakash H. Modashiya, a director of the 2nd Interested Party deponed that the 2nd Interested Party received a notification of regret letter from the

2nd Respondent on or about 4th October 2021 informing it that the 1st Interested Party was the successful tenderer having submitted the most responsive tender technically and financially and that the Respondent has confirmed that the 1st Interested Party submitted a tender security for 150 days instead of 180 days at minimum which at the very onset is non responsive.

According to the 2nd Interested Party, one of the mandatory requirements under Chapter 9 Page 7 of the tender document (form of tender security) provided for the guarantee to remain in force up to and including thirty (30) days after the period of tender validity and that the mandatory requirements at page 4 of the tender document (invitation to tender document) provided for prices quoted to remain valid for 180 days from the date of tender opening. With this, it is the 2nd Interested Party's contention that the tender security required by the tender document was to be valid for 150 days.

At paragraph 16 of the 2nd Interested Party's Reply to the Request for Review, the 2nd Interested Party contends that it's not in dispute the tender security is for 150days and it's not in dispute the validity of the subject tender is 150 days but the tender surety must remain 30 days beyond the tender validity of 150 days which amounts to 180 days.

The 2nd Interested Party concluded by praying for the instant request for review to be allowed as prayed.

Applicant's rejoinder

The Applicant vide its further statement reiterated the contents of its statement in support of the request for review, denied all the allegations raised by the 1st and 2nd Respondents' in their Statement of Reply while reminding the Board of the provisions of Section 79 (2) of the Act which provides that responsiveness of a tender shall not be affected by minor deviations that do not materially depart from the requirements set out in the tender documents, or errors or oversights that can be corrected without affecting the substance of the tender.

BOARD'S DECISION

The Board has considered parties' pleadings, their respective supporting documentation, the written submissions and list of authorities including confidential documents submitted by the Respondents pursuant to Section 67(3) (e) of the Act and notes the following issues crystalize for determination:

- 1. Whether the Applicant's original tender satisfied the Mandatory Requirements set out in Stage 1 Preliminary Evaluation-Mandatory Requirements of Tender Evaluation Criteria of Section III of the Appendix To Instructions To Tenderers of the Tender Document read together with Clauses 10.1 and 16.3 of Section II of the Instructions to Tenderers of**

the Tender Document and Section 80(2) of the Act requiring submission of a well bound, paginated and serialized tender document without loose pages and initialisation of places in a tender where there are erasures and interlineations made, necessary to correct errors.

- 2. Whether the Interested Party's tender security with a validity period of 150 days from the date of opening of tenders i.e. 19th August 2021 satisfies the Mandatory Requirements M set out in Stage 1 Preliminary Evaluation-Mandatory Requirements of Tender Evaluation Criteria of Section III of the Appendix To Instructions To Tenderers of the Tender Document read together with Clauses 12.1, 13.1 and 13.3 of Section II of the Instructions To Tenderers of the Tender Document, Clauses 12.1 and Add to Clauses 13.1 and 13.2 of Section III of the Appendix To Instructions To Tenderers of the Tender Document, Section I of the Invitation for Tenders of the Tender Document, Form of Tender Security provided in the Tender Document and Section 80(2) of the Act.**
- 3. Whether the Notification Letters dated 4th October 2021 issued by the 1st Respondent to all unsuccessful tenderers complied with the provisions of Section 87 (3) of the Act as read together with Regulation 82 of Regulations 2020.**

The Board notes the allegation by the Applicant that the Respondents, at the time of opening of tenders, failed to avail the tender opening register for the

Applicant's representative to sign. It is the Applicant's view that if the tender opening register was prepared, it was prepared inexplicably by the 2nd Respondent after the tender opening stage as an afterthought.

Clause 20.1 and 20.4 of Section II of Instructions to Tenderers of the Tender Document provides for the 2nd Respondent to prepare a tender opening register and for tenderers' representatives who are present during opening of tenders to sign a register evidencing their attendance.

The Respondents annexed to their Statement of Reply a duly signed Attendance Register evidencing that the Applicant was represented by one, Christabel Ojuondo of 0725793585 and info@contemporary.eng.com during the opening of tenders on 19th August 2021. A mark that looks like a signature was made on the signature column against Christabel Ojuondo's name signifying that she did sign the Attendance Register for the opening of the subject tender.

Section 78(8) of the Act provides as follows:-

(8) The accounting officer of a procuring entity shall, on request, provide a copy of the tender opening register to a person submitting a tender.

The Board notes that an accounting officer of a procuring entity only avails a copy of a tender opening register upon request. No evidence was furnished to the Board to prove the Applicant made a request and the 1st Respondent declined to avail a copy of the tender opening register. In the circumstances, the Board finds there is sufficient evidence that the Attendance Register for the opening of tenders was availed to the Applicant's representative for signing on 19th August 2021 and the Respondents did not breach Section 78(6) and (8) of the Act.

On the first issue framed for determination the Board reviewed the confidential documents submitted before it and notes from a copy of a Notification Letter dated 4th October 2021, issued to the Applicant by the 1st Respondent, the Applicant was informed of the outcome of its tender as follows:

"After evaluation of your tender, we regret to inform you that the proposal submitted by M/s Contemporary Engineering Co. Limited was not successful because it did not meet the requirements of preliminary evaluation as follows:

- 1. The bid document submitted did not adhere to the requirements of Clause 16.3 of the tender instructions-Format and signing of tender, which states that "the complete tender shall be without alterations, interlineations or erasures, except as necessary to correct errors made by the tenderer, in***

which case such corrections shall be initialled by the person or persons signing the tender.”

2. The tender document was not dully serialized-some pages of the bid document were serialized.

The successful bidder is M/s Central Electricals International Limited who is the most responsive technically and financially evaluated bidder. The tender security shall be returned to you in due course.”

From the contents of the termination letter, the Applicant's tender was found non-responsive for not adhering to the provisions of Clause 16.3 of Section II of the Instructions to Tenderers of the Tender Document and for not serializing some pages of its tender.

It is the Applicant's view that the Respondents did not asses, verify and evaluate its tender properly to determine its responsiveness and compliance and that the reasons given for disqualification of the Applicant's tender are false and solely designed to lock out the Applicant. This is so because the Applicant avers that its tender fully adhered to Clause 16 of the Instructions to Tenderers and that all pages of the copy of its tender and specifically the Bills of Quantities, where amendments were made, were properly initialed with the initials "KO" by the authorized signatory on behalf of the Applicant as required under Clause 16.2 of Section II of the Instruction to Tenderers and the Applicant's complete tender together with alterations made to the

Bills of Quantities, to correct errors made by the Applicant, were well initialed with the initials "KO" by the authorized signatory on behalf of the Applicant as was required under Clause 16.3 of Section II of the Instructions to Tenderers.

The Applicant further avers that, it submitted its tender document properly bound, paginated and serialized (at the bottom right hand corner from No.000001-001324) without any loose documents as was required in Section III Appendix to Instructions to Tenderers; Stage 1 Preliminary Evaluation-Mandatory Requirements, Conditions A and B and Regulation 74(1) of the Regulations 2020.

The Respondents on the other hand invited the Board to carefully study the Applicant's tender and make the following observation (a) that almost all pages of the Applicant's tender contain the initials 'KO' at the bottom of each page regardless of whether they contain alterations or not, (b) the person signing the tender document containing alterations such as in pages 316, 317, 318, 319, 320, 322, 324, 357, 360, 361, 369, 373, 379, 383 & 386 initialed with letters 'KO' against the alterations in line with the mandatory tender requirement, however, (c) other pages containing alterations such as page 325, 333, 337, 341, 343, 358, 369, 375 and 378 were not initialed and (d) a page between the pages numbered 332 and 333 was neither numbered nor serialized.

The Board has carefully studied the blank Tender Document issued by the Respondents in the subject tender (hereinafter referred to as the 'Tender Document') and notes that Clause 16 of Section II. Instructions To Tenderers of the Tender Document provides as follows:

Format and Signing of Tenders

16.1 The tenderer shall prepare his tender as outlined in clause 9 above and mark appropriately one set "ORIGINAL" and the other "COPY".

16.2 The copy of the tender and Bills of Quantities shall be typed or written in indelible ink and shall be signed by a person or persons duly authorized to sign on behalf of the tenderer. All pages of the tender where amendments have been made shall be initialed by the person or persons signing the tender.

16.3 The complete tender shall be without alterations, interlineations or erasures, except as necessary to correct errors made by the tenderer, in which case such corrections shall be initialed by the person of persons signing the tender.

The import of the above provisions of the Tender Document is that tenderers were required to submit their tenders without any alterations except where it was necessary to correct any errors and where there were corrections, a tenderer ought to have initialed next to the correction.

The Board has studied the Applicant's original tender document and notes the Applicant made corrections on pages serialized as 000316, 000317, 000318, 000319, 000320, 000322, 000324, 000357, 000360, 000361, 000369, 000373, 000379, 000383 & 000386. The Applicant caused a mark of 'KO' be made against each correction on the aforementioned pages which mark is taken as initialization against the corrections.

However, the Applicant's original tender document pages serialized as 000325 (item 5 on the 5th column), 000333 (item 2 of the 5th column), 000337 (item 3 on the 6th column) , 000338 ((item 2 of the 5th column), (000341 (item 7 of the 5th column), 000343 (item 1 of the 6th column),,, 000358 (items 2 and 3 on the 5th column), 000375 (item 1 of the 5th column), 000378 (item 5 of the 6th column), and a section of 369 (insertion of the word 'PANASONIC' after an erasure) contained corrections and which corrections were not initialed by the letters 'KO', or by a person signing the tender or any other person for that purpose. All the above mentioned pages of the Applicant's original tender form part of the Bill of Quantities.

Noting that the Applicant initialed against some of the corrections and not others demonstrates that the Applicant was capable of putting the initials on every correction that it made, however, it chose not to do so on others. The Board finds the Applicant did not initial against some of the corrections it made in its original tender document contrary to what was required under

Clause 16.2 and 3 of Section II. Instructions to Tenderers of the Tender Document to its own detriment.

The Board further notes, serialization was a mandatory requirement provided in Stage 1 Preliminary Evaluation-Mandatory Requirements of Section III. Appendix To Instructions To Tenderers of the Tender Document 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)***
- B) Submission of well bound, paginated, and serialized bid documents without loose pages.***
- C)***
- D)***
- E)***
- F)***
- G)***
- H)***
- I)***

- J)
- K)
- L)
- M)
- N)
- O)
- P)
- Q)
- R)

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

Mandatory Requirement B required tenderers to submit a tender that is well bound, paginated and serialized without loose pages. If a tender fails to comply with any of the aforementioned conditions, then such a tender would not proceed for evaluation at the next evaluation stage but would instead be disqualified at the preliminary evaluation-mandatory requirements stage.

The Board observes the Applicant’s original tender document is well bound as one volume without loose pages. Various pages/documents forming part of the Applicant’s original tender document are paginated i.e. marked with numbers. The first page of the Applicant’s original tender document is

marked as 000001 on the bottom of the right hand side of the said first page and the last page is marked as 001324 on the bottom of the right hand side of the last page. However, the Board notes that a page between pages 000332 and 000333 of the Applicant's original tender document, though forming part of the Bill of Quantities referenced to as 8B/20 in the Bill of Quantities and having a Total for Bill No.4 of Kshs.8,091,784 is not paginated i.e. not marked with any number contrary to the Mandatory Requirement B of Stage 1. Preliminary Evaluation-Mandatory Requirements of Section III. Appendix To Instructions To Tenderers.

The essence of pagination and serialization and/or numbering in a sequence is to maintain the integrity of tender documents and where it is a mandatory requirement as in the instant case then a failure to comply with the mandatory requirement leads to a tender being disqualified. This was the position in ***Public Procurement Administrative Review Board Application No. 34 of 2021 Petro Oil Kenya Limited V The Accounting Officer, Kenya Ferry Services Ltd, Kenya Ferry Services Ltd and Galana Oil Kenya Limited*** where the Board held as follows;

"The Board observes that serialization of a bid document avoids the bid document from being tampered with in any way by any person or entity. It protects the sanctity of a bid document by ensuring that bidders are evaluated on the basis of the documents they submitted by the tender submission deadline and that no document is inserted or removed in favour of a non-compliant bidder to the

detriment of other bidders who choose to comply with the requirements of a procuring entity.

The Board observes that, the Applicant herein failed to serialize the first two pages of its original bid, repeated some of the numbers whilst serializing its bid (e.g. 2 which was repeated four times) and proceeded to introduce varied forms of serialization in its bid (e.g. 10.1, 10.2, 16.1 (a), 16.1 (b), 16.1 (c) etc). This was open to abuse in that nothing stopped the Procuring Entity either on its own volition or in collusion with the Applicant or any other bidder, from introducing a document in the Applicant's bid and numbering it as; 10.3 (which was not in the bid), or removing the page numbered 16.1 (c) in the Applicant's bid.

Accordingly, the Applicant herein failed to take into account the requirement of serialization when submitting its bid. Further, this was a mandatory requirement at the Preliminary Evaluation stage and the Applicant's failure to comply with the same meant that its bid could not be subjected to further evaluation. "

This position is supported by Section 79 of the Act which provides;

"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 a Tender Document. Therefore, the Applicant's original tender document having been found non-responsive at the Preliminary Evaluation-Mandatory Requirements stage could not have been evaluated further at the technical and financial evaluation stage.

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 (hereinafter referred to as Miscellaneous Civil Application No. 85 of 2018)** Justice Mativo stated as follows;

"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. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit

responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions.

Further to the above, 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 the High Court 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."

Going by the aforementioned holdings of the High Court, the Respondents are required to treat all tenderers fairly while evaluating their respective tenders. One way of ensuring fairness is observed, is by evaluating tenders

in accordance with the criteria set out in the tender document as required under Section 80(2) of the Act. In the instant request for review, it was a mandatory requirement to have tenders paginated and/or serialized. Failure to do any of the two would render the tender non-responsive. Being guided by the aforementioned holdings of the High Court, a mandatory requirement cannot be termed as a minor deviation so as to be waived. Mandatory requirements in a tender document must be complied with for fairness.

In the circumstances, the Board finds that the Applicant's original tender document did not satisfy the Mandatory Requirement B set out in Stage 1 Preliminary Evaluation-Mandatory Requirements of Tender Evaluation Criteria of Section III of the Appendix To Instructions To Tenderers of the Tender Document read together with Clauses 10.1 and 16.3 of Section II of the Instructions to Tenderers of the Tender Document and Section 80(2) of the Act requiring submission of a well bound, paginated and serialized tender document without loose pages and initialization of places in a tender where there are erasures and interlineations made, necessary to correct errors.

On the second issue framed for determination, the Applicant avers that the 1st Interested Party submitted a tender security that was not in conformity with the requirements of the Tender Document.

According to the Applicant, Clause 13.3 of the Standard tender document required the tender security and tender surety to be valid for at least 30 days

beyond the tender validity period whilst Clause 13.4 of the Standard tender document required the Respondents to reject as non-responsive any tender not accompanied by an acceptable tender surety and that it is a mandatory requirement of the subject tender at page 4 of the tender document for the prices quoted to remain valid for 180 days from the date of opening of tenders. According to the Applicant, a reading of the mandatory requirements at page 4 of the Tender Document (under prices quoted) which required prices to remain valid for 180 days together with a reading of Clause 13.3 and 13.4 of the Standard tender document, the required validity period of the tender security for the subject tender is 210 days from the date of opening of tenders.

That being the case, it is the Applicant's averment that the Respondents breached Section 79 of the Act, Regulations 74 and 75 of Regulations 2020 by awarding the subject tender to the 1st Interested Party yet the 1st Interested Party's tender security was valid for 150 days from the date of opening of the tenders

It is the Respondents case that even though Clause 13.3 of the standard tender document required a tender security to be valid at least 30 days beyond tender validity, Section III Appendix to Instructions to Tenderers on Tender Security, at Clause 6 added to Clause 13.1 and 13.2 of Tender document for the tender security to be as in the letter of invitation and that the letter of invitation comprised in Section I of the Tender Document

required tenderers to provide a tender security valid for a period of 150 days from the date of opening of tender and that this mandatory requirement for preliminary evaluation was replicated as Condition M at Section III-Appendix to Instructions to Tenderers.

According to the Respondents, had the Applicant's tender been deemed to have complied with the preliminary mandatory requirements, its financial proposal of Kshs.320,525,174.48 would still not have been the lowest evaluated price among the responsive tenders as can be gleaned from the Evaluation Report.

According to the 2nd Interested Party, one of the mandatory requirements under Chapter 9 Page 7 of the tender document (form of tender security) provided for the guarantee to remain in force up to and including thirty (30) days after the period of tender validity and that the mandatory requirements at page 4 of the tender document (invitation to tender document) provided for prices quoted to remain valid for 180 days from the date of tender opening. With this, it is the 2nd Interested Party's contention that the tender security required by the tender document was to be valid for 180 days.

The 2nd Interested Party contends that it's not in dispute that tender security is for 150days and it's not in dispute that the validity of the subject tender is 150 days but the tender surety must remain 30 days beyond the tender validity of 150 days which amounts to 180 days.

Section 80 (2) of the Act is prescriptive on how an evaluation committee is required to conduct evaluation and comparison of tenders as it provides 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 evaluation and comparison of tenders is required to be done using the procedures and criteria set out in the tender document.

The Tender Document provided the procedure and criteria for evaluation of tenders with respect to tender validity and tender security in the following clauses:

Clauses 12 and 13 of Section II. Instructions To Tenderers of the Tender Document:

Tender Validity

12.1 The tender shall remain valid and open for acceptance for a period of sixty (60) days from the specified date of tender opening or from the extended date of tender opening (in accordance with clause 7.4 here above) whichever is the later.

12.2.....

Tender Security

13.1The tenderer shall furnish as part of his tender, a Tender Security in the amount and form stated in the Appendix to Instructions to Tenderers.

13.....

13.3 The tender security shall be valid for at least thirty (30) days beyond the tender validity period.

The format of the Surety shall be in accordance with the sample form of Tender Surety included in these tender documents; other formats may be permitted subject to the prior approval of the Employer. The Tender Surety shall be valid for thirty (30) days beyond the tender validity period.

13.4 Any tender not accompanied by an acceptable Tender Surety will be rejected by the Employer as non-responsive.

13.5

13.6

The Form of Tender Security provided in the Tender Document and which form is referred to in Clause 13.3 of Section II. Instructions To Tenderers provides for the tender security to remain in force up to 30 days after the period of tender validity.

The Tender Document required tenderers to submit a tender security that was valid for 30 days beyond the tender validity period of 60 days from the

date of opening of tender and the format to be used should be in a form provided as tender surety in the Tender Document. Simply put, according to Instructions To Tenderers, the tender security should be valid for 90 days from the date of opening of tenders and should be in a format provided in the Tender Document. Further the 2nd Respondent is required to reject any tender not accompanied by an acceptable surety.

However, Clauses 5 and 6 of Section III of the Appendix To Instructions To Tenderers provide as follows with respect to tender validity and tender security:

1.....

2.....

3.....

4.....

5. CLAUSE 12.1

Change to read 'The tender shall remain valid and open for acceptance for a period of One Hundred and Fifty (150) days from the specified date of tender opening or

from the extended date of tender opening (in accordance with clause 7.4) whichever is the later..'

6. ADD TO CLAUSE 13.1 and 13.2

Tender surety will be required and the Tender Security shall be as in the letter of invitation.

7.....

8.....

9.....

10.....

11.....

12.....

13. TENDER EVALUATION CRITERIA

The following information for procurement of services shall complement or amend the provisions of the instructions to tenderers. Wherever there is a conflict between the provisions of the instructions to tenderers and the provisions of the Appendix, the provisions of the Appendix herein shall prevail over those of the instructions to tenderers.

.....

STAGE 1 PRELIMINARY EVALUATION – MANDATORY REQUIREMENTS

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.

B.

C.

D.

E.

F.

G.

H.

I.

J.

K.

L.

M. 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

N.

O.

P.

Q.

R.

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

A reading of the above provisions of the Tender Document shows the Appendix to Instructions to Tenderers amended the tender validity period to 150 days from 60 days from the date of opening of tenders and added that a tender surety is required and that the tender security shall be as in the letter of invitation. The Board notes of the use of the word tender security and tender surety interchangeably in the tender Document and is guided by section 2 of the Act on the definition of tender security as follows:

means a guarantee required from tenderers by the procuring entity and provided to the procuring entity to secure the fulfillment of any

obligation in the tender process and includes such arrangements as bank or insurance guarantees, surety bonds, standby letters of credit, cheques for which a bank is primarily liable, cash deposits, promissory notes and bills of exchange tender securing declaration, or other guarantees from institutions as may be prescribed;

This means that a tender security is a guarantee used to secure the fulfilment of any obligation in tender process and includes surety bonds. Procuring entities interchangeably use the words tender security, tender bonds, tender surety and surety bonds to mean one and the same thing.

On the other hand, the letter of invitation found in Section I. Invitation for Tenders at pages 2-4 of the Tender Document stipulates mandatory requirement 13 as follows:

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

Further, the letter of invitation at page 4 of the Tender Documents provided for the prices quoted to remain valid for 180 days from the date of tender opening.

A reading of Clauses 5 and 6 of Section III. Appendix to Instructions To Tenderers, Stage 1 . Preliminary Evaluation-Mandatory Requirements of Section III. Appendix To Instructions To Tenderers and mandatory requirement 13 in the letter of invitation of Section I. Invitation to Tender of the Tender Document on tender validity and tender security shows that the tender validity period for the subject tender should be 150 days from the date of opening of tenders and the tender security required should be valid for also 150 days from the date of opening of tender. However, the prices quoted are required to remain valid for 180 days.

At this juncture, it is important to differentiate between tender validity and tender security. Tender validity is the period within which a tender remains alive and once the validity period lapses a tender dies a natural death and an award cannot be made with respect to a dead tender, neither can a contract with respect to such a dead tender be entered into.

On the other hand, a tender security is a guarantee required by a procuring entity for a tenderer to secure the fulfillment of any obligation in the tender process prior to issuance of a performance guarantee in favor of a procuring entity, which performance guarantee is ordinarily issued on or before filing a contract following an award of a tender. A performance guarantee on the

other hand secures the fulfillment of any obligation in a procurement contract in favor of the procuring entity, this to us is evidence that a performance guarantee replaces a tender security after an award has been made and prior to the signing of a procurement contract.

In this case, if the tender validity is 150 days from the date of opening of tender then the tender is only alive for 150 days from the date of opening of tenders and a contract in the subject tender can only be made on or before the 15th day of January 2021, having noted that a performance guarantee issued on or before signing of a contract it is clear that the 2nd Respondent in the subject tender is not exposed in any way because the validity of the tender security and the tender validity period are set to expire on the same day that is 15th January 2021 and at that point the 2nd Respondent is expected to have signed a contract with a successful tenderer in the subject tender if no appeal is preferred by any tenderer against the decision of the 1st Respondent to award the subject tender and the procuring entities interest will be at that point be secured by a performance guarantee as opposed to a tender security.

Noting that the Appendix To Instructions To Tenderers complement or amend the provisions of Instructions To Tenderers and where there is a conflict between the provisions of the Instructions To Tenderers and the provisions of the Appendix To Instructions To Tenderers, the provisions of the Appendix To Instructions To Tenderers prevail over those of the Instructions To Tenderers.

Accordingly, and going by the provisions of the Appendix To Instructions To Tenderers that the tender security be as in the letter of invitation and the letter of invitation having indicated mandatory requirement 13 is for tenderers to provide a tender security that is valid for 150 days from the date of opening of tenders, the Board finds that tenderers were required to provide a tender security whose validity was 150 days from the date of opening of tenders.

We say so because, Section 80(2) of the Act requires evaluation and comparison of tenders to be done in accordance with the criteria and procedures set out in the Tender Document. The Tender Document's criteria for evaluation of tender securities provided by tenderers is outlined as mandatory requirement M of Stage 1. Preliminary Evaluation-Mandatory Requirements of Section III. Appendix To Instructions To Tenderers and requires the validity of the tender security to be 150 days from the date of opening of tenders. This criterion also falls under the Appendix To Instructions To Tenderers which takes precedence over the Instructions To Tenderers where there is conflict.

The Board has perused the 1st Interested Party's original tender document as submitted at tender opening and notes that in response to Mandatory Requirement M of Stage 1. Preliminary Evaluation-Mandatory Requirements of Section III. Appendix To Instructions To Tenderers submitted at page 103

of 1139 a tender security from APA Insurance in the sum of Kshs. 2,000,000.00 valid for a period of 150 days from 19th August 2021(which was the date of opening of tenders) and any demand in respect thereof is required to reach APA Insurance as the Guarantor not later than 16th January 2021.

Explain what is the use of a tender security and what is the use of a performance guarantee to show there is no exposure to the 2nd Respondent

In the circumstances, the Board finds the 1st Interested Party's tender security with a validity period of 150 days from the date of opening of tenders i.e. 19th August 2021 satisfies the Mandatory Requirement M set out in Stage 1 Preliminary Evaluation-Mandatory Requirements of Tender Evaluation Criteria of Section III of the Appendix To Instructions To Tenderers read together with Clauses 5 and 6 of Section III. Appendix To Instructions To Tenderers of the Tender Document and mandatory requirement 13 of Section I of the Invitation for Tenders of the Tender Document and Section 80(2) of the Act which prevail over Clauses 12.1, 13.1 and 13.3 of Section II of the Instructions To Tenderers of the Tender Document and the Form of Tender Security referred to in Clause 13.3 of Section II of the Instructions To Tenderers of the Tender Document as provided in the Tender Document.

On the third issue framed for determination on the letters of notification, 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 Regulations 2020 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."**

In view of the provisions of section 87 of the Act as read together with Regulation 82 of Regulations 2020, the Board observes that a procuring entity must notify, in writing, the tenderer who submitted the successful tender, that its tender was successful after tender evaluation. This section further requires that in the same breath, a procuring entity notifies other tenderers who participated in the subject tender that their respective tenders were not successful.

Moreover, a procuring entity's notification of unsuccessful tender to a tenderer should disclose the reason (s) why the tender of the unsuccessful tenderer was non-responsive. Further, a procuring entity should disclose the successful tenderer in a procurement process, including the successful tenderer's tender price and the reason why the successful tender's tender was found successful. The applicable reason to be given why the successful tender was found successful in the instant case should be that the tender of the successful bidder had the lowest evaluated price and the amount at which such award was made, must be stated.

The Board perused the confidential documents and notes that a copy of the Notification Letter referenced hereinbefore stated the reasons why the Applicant was disqualified and further provided as below:

"The successful bidder is M/s Central Electricals International Limited who is the most responsive technically and financially

evaluated bidder. The tender security shall be returned to you in due course."

The above provides the name of the successful tenderer but fails to disclose the tender price at which the subject tender was awarded.

Disclosure of the identity of a successful tenderer in addition to the amount at which a tender was awarded is central to the principle of transparency as outlined in Article 227 of the Constitution which provides;

"(1) 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."

This means all processes within a procurement system, including notification to unsuccessful bidders, must be conducted in a transparent manner. Having examined the contents of the Applicant's letter of notification dated 4th October 2021, it is evident that, amount at which the award of the subject tender was made to the Interested Party was not disclosed. Nothing could have been easier than to outline the amount at which the award was made to the 1st Interested Party in the Notification Letter dated 4th October 2021.

The Board therefore finds that the Applicant's letter of notification does not satisfy the threshold of section 87 (3) of the Act read together with

Regulation 82 of Regulations 2020 because the amount at which award was made to the Interested Party was not disclosed.

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.

Accordingly, the Board proceeds to make the following orders: -

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: -

- 1. The Notification Letters in Tender No. KoTDA/NC001/2021-2022 for Phase II-Electrical Installations and Associated Services dated 4th October 2021 addressed to the Applicant**

and all other unsuccessful tenderers, be and are hereby cancelled and set aside.

2. The Notification of Contract Award Letter in Tender No. KoTDA/NC001/2021-2022 for Phase II-Electrical Installations and Associated Services dated 4th October 2021 addressed to the 1st Interested Party, be and is hereby cancelled and set aside.
3. The 1st Respondent is hereby directed to notify all tenderers of the outcome of tender evaluation in Tender No. KoTDA/NC001/2021-2022 for Phase II-Electrical Installations and Associated Services in accordance with section 87 of the Act read 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


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CHAIRPERSON

PPARB


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SECRETARY

PPARB