

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 33/2021 OF 9TH MARCH 2021

BETWEEN
RHOMBUS CONSTRUCTION COMPANY LIMITED.....APPLICANT
AND
ACCOUNTING OFFICER, KENYA
PORTS AUTHORITY.....1ST RESPONDENT
KENYA PORTS AUTHORITY.....2ND RESPONDENT

Review against the decision of the Accounting Officer of Kenya Ports Authority in issuing a Tender Document with respect to Tender No. KPA/095/2020-21/TE for Supply, Installation, Testing and Commissioning of Four (4) New Ship to Shore Cranes.

BOARD MEMBERS

- | | |
|--------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mrs. Irene Kashindi | -Member |
| 3. Mr. Nicholas Mruttu | -Member |
| 4. Mr. Alfred Keriolale | -Member |
| 5. Eng. Mbiu Kimani, OGW | -Member |

IN ATTENDANCE

- | | |
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| 1. Mr. Philip Okumu | -Acting Board Secretary |
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BACKGROUND TO THE DECISION

The Bidding Process

Kenya Ports Authority (hereinafter referred to as “the Procuring Entity”) invited sealed tenders for Tender Document with respect to Tender No. KPA/095/2020-21/TE for Design, Manufacture, Supply, Test and Commission of Four (4) New Ship to Shore Gantry Cranes (hereinafter referred to as “the subject tender”) through an advertisement published in the Standard Newspaper and the Procuring Entity’s Website (www.kpa.co.ke) on 3rd December 2020 and the Lloyd’s List on 15th December 2020.

THE REQUEST FOR REVIEW

M/s Rhombus Construction Company Limited (hereinafter referred to as “the Applicant”) lodged a Request for Review dated 8th March 2021 and filed on 9th March 2021 together with a Supporting Affidavit sworn on 8th March 2021 and filed on 9th March 2021 through the firm of Sigano & Omollo LLP Advocates, seeking the following orders: -

- a) An order annulling and setting aside the procurement proceedings in Tender No. KPA/095/2020-21/TE – Design, Manufacture, Supply, Test and Commission Four (4) New Ship to Shore Gantry Cranes in their entirety;***
- b) An order directing the Accounting Officer of the Procuring Entity to commence the procurement proceedings in Tender No. KPA/095/2020-21/TE – Design, Manufacture, Supply, Test and Commission Four (4) New Ship to Shore Gantry afresh,***

taking into consideration the findings of the Review Board in these review proceedings;

c) Any other relief that the Board may deem fit and just to grant; and

d) An order awarding costs of the Review.

2.

Notification of Review and Suspension of Procurement Proceedings

Through a letter dated 9th March 2021, the Acting Board Secretary notified the Procuring Entity's Acting Managing Director that a Request for Review was filed with the Board in respect of the subject tender. The Acting Board Secretary also informed the Acting Managing Director that pursuant to the provisions of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act"), the subject procurement process should be suspended and that no contract should be signed with a successful tenderer until the Request for Review proceedings are finalized. This letter was received by the Procuring Entity on the same date of 9th March 2021, evidenced by the receiving stamp of the Procuring Entity's Head of Procurement and Supplies affixed on the face of the said letter.

According to the Minutes of a Meeting held on 9th March 2021, the Chairman of the Tender Opening Committee informed all tenderers' representatives present at the meeting, of the letter of notification from the Acting Board Secretary, thus informing all participants that the tender opening exercise would not proceed on 9th March 2021. He further directed that guidance would be given once the Board renders a decision in the Request for Review.

In response, the Respondents lodged a Response to the Request for Review dated 16th March 2021 and filed on 17th March 2021 together with a Supporting Affidavit sworn on 16th March 2021 and filed on 17th March 2021 through Addraya E. Dena Advocate.

Pursuant to the Board's Circular No. 2/2020 dated 24th March 2020 detailing the Board's administrative and contingency management plan to mitigate Covid-19 pandemic, the Board dispensed with physical hearings and directed that all request for review applications would 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. However, none of the parties to the instant Request for Review filed written submissions.

BOARD'S DECISION

After careful consideration of the parties' pleadings including confidential documents submitted pursuant to section 67 (3) (e) of the Act, this Board finds that the following issues call for determination: -

- I. Whether the subject procurement proceedings are governed by the Public Procurement and Asset Disposal Regulations, 2020 or the Public Procurement and Disposal Regulations, 2006.**
- II. Whether Clause 4 and 41 of the Tender Data Sheet of the Tender Document which exclude participation of Joint Ventures and application of preference and reservation**

schemes in the subject tender respectively, contravene the provisions of Article 227 (2) of the Constitution, section 3 (i) & (j), 70 (6) (e) (vi), 89 (f), 155, 157 (9), read together with Regulation 143, 144 and 148 (1) & (2) of the Public Procurement and Asset Disposal Regulations, 2020

III. Whether Addendum No. 1 issued by the Procuring Entity materially changed the scope of the subject tender in a substantial way in contravention of section 75 (1) of the Act.

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

On the first issue for determination, the Board observes that at paragraph 8 (a) of its Request for Review, the Applicant avers that the Respondents breached their obligations under the Act by stating in the Tender Document that eligibility of bidders in the subject procurement process shall be defined by the Public Procurement and Disposal Regulations, 2006 which have since been repealed and are non-existent. In response, the Respondents aver at paragraph 1 of their Response to the Request for Review that the Invitation of Tender provided in Clause 2 thereof that the subject procurement process would be conducted through competitive bidding procedures in line with the Act and the Public Procurement and Disposal Regulations 2020 being the governing legislation applicable in public procurement processes.

In determining this issue, the Board studied provisions of the Tender Document and notes that Clause 2 of the Invitation to Tender provides that:-

"Tendering will be conducted through the Competitive Bidding procedures specified in the Public Procurement and Asset Disposal Act, 2015 and the Public Procurement and Disposal Regulations, 2020"

On its part, Clause 3.2 of Section II. Instructions to Tenderers of the Tender Document provides as follows: -

"The invitation for Tenders is open to all suppliers as defined in the Public Procurement and Asset Disposal Act, 2015 and the Public Procurement and Disposal Regulations, 2006 except as provided hereinafter."

Having considered these two provisions, the Board observes that, on one hand, the Procuring Entity provided in Clause 2 of the Invitation to Tender of the Tender Document that the Public Procurement and Disposal Regulations, 2020 (hereinafter referred to as "Regulations 2020") would be applicable to the subject procurement process. On the other hand, the Procuring Entity stated in Clause 3.2 of Section II. Instructions to Tenderers of the Tender Document that the Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as "the 2006 Regulations") would apply to the subject tender.

The Board studied the provisions of Section III of the Tender Data Sheet of the Tender Document and notes that the same amended several provisions in the Instructions to Tenderers. Furthermore, bidders were cautioned on the following: -

"The following specific data for the goods to be procured shall complement, or amend the provisions in the Instructions to Tenderers (ITT). Whenever there is a conflict, the provisions herein shall prevail over those in ITT"

Despite having amended some provisions in the Instructions to Tenderers, the Tender Data Sheet did not amend Clause 3.2 of Section II. Instructions to Tenderers of the Tender Document, neither did it clarify the Regulations applicable to the subject procurement proceedings. Furthermore, no addendum was issued by the Procuring Entity clarifying the regulations that is applicable to the subject procurement proceedings. This in the Board's view, created confusion to bidders because Clause 2 of the Invitation to Tender of the Tender Document stated that Regulations 2020 would be applicable in the subject tender whereas Clause 3.2 of Section II. Instructions to Tenderers of the Tender Document stated the applicable regulations would be the 2006 Regulations.

It is worth noting that, through Gazette Notice No. 4957 (found in Vol. CXXII—No. 142 of Kenya Gazette of 10th July 2020, the Cabinet Secretary for the National Treasury stated as follows: -

***"THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT
(No.33 of 2015)***

***THE PUBLIC PROCUREMENT AND ASSET DISPOSAL
REGULATIONS***

(LN. No. 53 of 2020)

COMMENCEMENT

IT IS notified for the general information of the public that the Public Procurement and Asset Disposal Regulations, 2020 came into operation on the 2nd July, 2020 following the approval by Parliament under section 180 of the Act.

Dated the 9th July, 2020."

According to the said Gazette Notice, the commencement date for Regulations 2020 Regulations was 2nd July 2020, following approval by Parliament pursuant to section 180 of the Act, which provides as follows: -

"The Cabinet Secretary shall make Regulations for the better carrying out of the provisions of this Act and, without limiting the generality of the foregoing, may make Regulations to facilitate the implementation of this Act, and such regulations shall not take effect unless approved by Parliament pursuant to the Statutory Instruments Act, 2013"

Regulations 2020 came into force on 2nd July 2020 after approval by Parliament pursuant to the Statutory Instruments Act, 2013 as stated in Gazette Notice No. 4957 of 10th July 2020. Regulation 220 of the 2020 Regulations further provides as follows: -

"The Public Procurement and Disposal Regulations, 2006 are hereby revoked."

This means that as at 2nd July 2020, the 2006 Regulations stood revoked.

The subject procurement process was first advertised on 3rd December 2020 meaning that Regulations 2020 were already in force and thus applicable to the subject procurement process. It is therefore the Board's considered finding that the Procuring Entity ought to have taken this into consideration when preparing its Tender Document, rather than confuse bidders on the applicable regulations given the Procuring Entity's failure to amend Clause 3.2 of Section II. Instructions to Tenderers of the Tender Document in the Tender Data Sheet and/or issue an Addendum clarifying the regulations applicable to the subject procurement process.

The Board finds that the subject procurement proceedings is governed by Regulations 2020, thus Clause 3.2 of Section II. Instructions to Tenderers of the Tender Document in so far as the same makes reference to the Repealed 2006 Regulations, is not applicable in the circumstances.

On the second issue for determination, the Applicant averred at paragraph 8 (b) to (i) of its Request for Review that the Respondents contravened section 3 (b) of the Act by discriminating against citizen contractors having failed to give effect to section 155 of the Act which seeks to promote the local industry and citizen contractors. In the Applicant's view, the Respondents ought to have provided specific requirements in the Tender Document pursuant to section 60 (1) of the Act thus allowing open and fair competition among citizen contractors who wish to participate in the subject tender. To support its submission that preference and reservation schemes

are applicable to the subject procurement process, the Applicant further states that the Respondents contravened section 70 (6) (e) (vi) of the Act in failing to provide instructions on preparation and submission of tenders in the Tender Document so as to accommodate the preference and reservation schemes applicable to citizen contractors. While making reference to Regulation 77 (2) (d) and 144 of Regulations 2020, the Applicant stated that the Respondents failed to provide a mandatory evaluation criterion on transfer of skills and technology and application of margin of preference during financial evaluation. At paragraph 11 of its Supporting Affidavit, the Applicant deponed that the threshold for national preference provided in Clause 31 of Section II. Instructions to Tenderers of the Tender Document contravenes section 157 (8) (a) (ii) & (iii) of the Act read together with Regulation 163 of Regulations 2020. In the Applicant's view, discrimination of citizen contractors is further demonstrated by the Procuring Entity's action of restricting eligibility of tenderers in the subject tender to "manufacturers only" and prohibiting joint ventures.

In response, the Respondents aver at paragraph 2 to 10 of their Response to the Request for Review that pursuant to Clause 3.1 of the Instructions to Tenderers as modified by Clause 4 of the Tender Data Sheet of the Tender Document, eligible tenderers in the subject procurement proceedings are manufacturers of the Ship to Shore Gantry Cranes in the international market because the said equipments are specialized and are not manufactured in the local market. In addition to this, it is the Respondents' case that the subject procurement process complies with section 89 of the Act read together with Regulation 83 of Regulations 2020 save for the fact that there

are no local or citizen contractors manufacturing the tendered equipment. To support their submission that the requirements in the Tender Document meet the threshold of section 60 of the Act, the Respondents aver that they provided specific technical requirements that can be met by manufacturers of the Ship to Shore Gantry Cranes, because the Tender Document did not limit those requirements to a particular manufacturer or producer. The Respondent further state that preference and reservation schemes for citizen contractors are not applicable to the subject tender because the subject procurement falls outside the ambit of section 157 (8) (b) of the Act. To support this view, the Respondents reiterate that no local or citizen contractors manufacture Ship to Shore Gantry Cranes and that the Applicant has failed to demonstrate their ability to manufacture the said equipment.

As regards financial evaluation, the Respondents referred the Board to Clause 10 of the Tender Data Sheet to support their view that a financial evaluation criteria was clearly spelt out in the said provisions, which criteria conforms to Regulation 77 (2) of Regulations 2020, save that this being an international tender where no local and/or citizen contractors manufacture the said equipment, no margin of preference would be applicable during financial evaluation.

The Respondents further state that they have signed a performance contract that ensures promotion of local contractors. In the Respondents' view, their compliance with the guiding principles outlined in section 3 of the Act and the preference and reservation schemes stated in section 155 of the Act is attested by Reports from the Ministry of Trade, Industrialization and

Enterprise Development and annual procurement plans prepared by the Respondents.

Having considered parties' rival cases, the Board observes that Article 227 (2) (a) of the Constitution provides that:-

"An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following—

(a) categories of preference in the allocation of contracts"

The law contemplated under Article 227 (2) (a) is the Act.

The provisions on preference and reservation provided in the Act give effect to the guiding principles under section 3 (i) and (j) of the Act which state that: -

"Public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of the Constitution and relevant legislation—

(a) the national values and principles provided for under Article 10;

(b) the equality and freedom from discrimination provided for under Article 27 (c);

- (d)
- (e)
- (f)
- (g)
- (h)
- (i) **promotion of local industry, sustainable development and protection of the environment; and**
- (j) **promotion of citizen contractors."**

Further the national values and principles of governance under Article 10 of the Constitution, referenced in section 3 (a) of the Act as part of its guiding principles provide that: -

"(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

- (a) applies or interprets this Constitution;***
- (b) enacts, applies or interprets any law; or***
- (c) makes or implements public policy decisions.***

(2) The national values and principles of governance include—

- (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;***
- (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;***
- (c) good governance, integrity, transparency and accountability; and***
- (d) sustainable development.”***

It is the Board’s considered view that the principles of good-governance and accountability under Article 10 (2) (c) of the Constitution applies in public procurement processes and this can be implemented by affording local and citizen contractors, the benefits available under the Act, if they qualify for the same.

Section 70 (6) (e) (vi) of the Act provides that: -

“70 (6) The tender documents shall set out the following—

...(e) instructions for the preparation and submission of tenders including—

... (vi) the procurement function ensuring that where necessary, the preferences and reservations of the tender are clearly spelt out in the bidding documents”

Section 89 (f) of the Act provides that: -

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

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

Section 89 (f) of the Act expressly states that the provisions of section 155 of the Act will apply in international tendering and competition in order to afford local and citizen contractors the preferences and reservations set out in section 155 of the Act.

Further, Part XII of the Act outlines several preferences and reservation schemes. Section 155 which falls under Part XII of the Act provides that:-

155. Requirement for preferences and reservations

(1) Pursuant to Article 227 (2) of the Constitution and despite any other provision of this Act or any other legislation, all procuring entities shall comply with the provisions of this Part.

(2) Subject to availability and realization of the applicable international or local standards, only such manufactured articles, materials or supplies wholly mined and

produced in Kenya shall be subject to preferential procurement.

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

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

(b) firms where Kenyans are shareholders.

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

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

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

(b) the procuring entity shall require successful bidders to cause technological transfer or create employment opportunities as shall be prescribed in the Regulations.

Even though section 155 (2) of the Act provides that preferential treatment shall only apply to manufactured articles, materials or supplies that are

wholly mined and produced in Kenya, there is an exception to this rule under section 155 (3) (b) of the Act which states that preference shall be given to firms where Kenyans are shareholders.

The Procuring Entity stated in its pleadings that this was a tender that applied international bidding procedures hence the reason why it advertised for the same in an international site known as the Lloyd's list so as to attract manufacturers of Ship to Shore Gantry cranes from the international market. This being a tender that applied International Competitive Bidding Procedures, the Board observes that the Act provides for preference and reservation schemes applicable when such method is applied. Section 157 (9) of the Act provides that: -

"For the purpose of ensuring sustainable promotion of local industry, a procuring entity shall have in its tender documents a mandatory requirement as preliminary evaluation criteria for all foreign tenderers participating in international tenders to source at least forty percent of their supplies from citizen contractors prior to submitting a tender"

The above provision directs procuring entities to make provision in their tender documents as a mandatory requirement forming part of preliminary evaluation criteria, for all foreign tenderers participating in international tenders to source at least forty percent of their supplies from citizen contractors prior to submitting a tender. As explained in Regulation 165 of Regulations 2020 provides that supplies under section 157 (9) of the Act shall include goods works non consulting and consulting services.

When the provisions of section 70 (6) (e) (vi), 89 (f) & 155 of the Act are read together with section 157 (9) of the Act, it gives the impression that it is necessary (rather than discretionary) in international tendering and competition for a procuring entity to make provision in its tender document as a mandatory requirement forming part of preliminary evaluation criteria for all foreign tenderers participating in international tenders to source at least forty percent of their supplies from citizen contractors prior to submitting a tender.

The Board is also mindful of the provisions of Regulations 2020 that speak to preference and reservations under PART XII thereof. Regulations 143 and 144 of Regulations 2020 provide that: -

"143. Pursuant to Article 227 (2) of the Constitution and sections 155 and 157 of the Act candidates shall participate in the procurement proceedings without discrimination except where participation is limited in accordance with the Constitution the Act and these Regulations

**144. (1) An accounting officer shall and in accordance with section 155 (5) (b) of the Act ensure that a procuring entity's tender documents contain a mandatory requirement as preliminary evaluation criteria specifying that the successful bidder shall —
(a) transfer technology skills and knowledge**

through training mentoring and participation of Kenyan citizens

(b)

(2) In complying with the requirements of paragraph (1) an accounting officer shall ensure that the procuring entity's tender document contains a mandatory requirement specifying that all tenderers include in their tenders a local content plan for the transfer of technology

(3) The local content plan referred to under paragraph (1) shall include—

(a) positions reserved for employment of local citizens

(b) capacity building and competence development program for local citizens

(c) timeframes within which to provide employment opportunities

(d) demonstrable efforts for accelerated capacity building of Kenyan citizens

(e) succession planning and management

(f) a plan demonstrating linkages with local industries which ensures at least forty percent (40%) inputs are sourced from locally

manufactured articles materials and supplies partially mined or produced in Kenya or where applicable have been assembled in Kenya

Parliament enacted the provisions of section 70 (6) (e) (vi), 89 (f) & 155 of the Act including Part XII in general and the provisions of preference and reservation schemes in Regulations 2020 to give effect to Article 227 (2) (a) of the Constitution. Despite this, the Procuring Entity contended that preference and reservation schemes were not applicable in the subject procurement process, hence the same were excluded in its Tender Document.

The Applicant cited Clause 31 of Section II. Instructions to Tenderers of the Tender Document which provides that: -

"31. National Preference

31.1. In the evaluation of Tenders, the Procuring Entity shall apply exclusive preference to citizens of Kenya where:

- a) The funding is 100% from the Government of Kenya or a Kenyan body;***
- b) The amounts are below the prescribed threshold of Kshs. 50 million (or Kshs. 200 million for procurements of works);***

31.2. To qualify for the preference, the candidate shall provide evidence of eligibility by:

- a) Proving Kenyan citizenship by production of a Kenyan Identity Card; or***
- b) Providing proof of being a "citizen contractor" in terms of section 3(1) of the Act, i.e. being a natural person or an incorporated company wholly owned and controlled by persons who are citizens of Kenya.***

31.3. In the event of the Minister for Finance prescribing additional preference and/or reservation schemes, details will be given in the Tender Data Sheet."

However, pursuant to Clause 41 of the Tender Data Sheet, application of clause 31 of Section II. Instructions to Tenderers of the Tender Document was excluded as follows: -

"National/Other preference not applicable"

The provisions on preference give effect to the guiding principles under section 3 (i) and (j) of the Act which state that: -

"Public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of the Constitution and relevant legislation—

- (a) the national values and principles provided for under Article 10;***

- (b) *the equality and freedom from discrimination provided for under Article 27 (c)***;
- (d)**;
- (e)**;
- (f)**;
- (g)**;
- (h)**;
- (i) *promotion of local industry, sustainable development and protection of the environment; and***
- (j) *promotion of citizen contractors.***"

It is the Board's considered view, that the guiding principles on procurement in section 3 of the Act would serve no purpose if the same are excluded by a procuring entity in its procurement process despite express provisions of the Act requiring application of preference and reservations pursuant to section 155 of the Act. The principles under section 3 (i) and (j) of the Act ensure that local and citizen contractors are not discriminated against in international tenders where foreign contractors are likely to have an advantage as a result of their technical expertise.

Section 3 (b) of the Act cites the provisions on equality and freedom from discrimination provided for under Article 27 of the Constitution as being part of the guiding principles under the Act. Article 27 (1) of the Constitution stipulates that "*every person is equal before the law and has the right to*

equal protection and equal benefit of the law.” As relates procurement and asset disposal proceedings under the Act, local and citizen contractors are entitled to equal protection and benefit even when they participate in international tenders which attract participation of foreign contractors.

The Procuring Entity vehemently opposed application of a margin of preference and reservation schemes in the subject procurement process by stating that there is no manufacturer of the Ship to Shore Gantry Cranes in the Kenyan local market. The Respondents further stated that they have signed a performance contract that ensures promotion of local contractors but did not state with whom such performance contract was signed neither was the same furnished to the Board. In the Respondents’ view, compliance with the guiding principles outlined in section 3 of the Act and application of preference and reservation schemes stated in section 155 of the Act is attested by Reports from the Ministry of Trade, Industrialization and Enterprise Development and annual procurement plans prepared by the Respondents.

Having considered the provisions of preference and reservation schemes applicable in international tendering and competition, the Board finds that the Respondents’ allegations lack justifiable basis because section 157 (9) of the Act makes it mandatory for the Procuring Entity to make provision in its tender document as a mandatory requirement forming part of preliminary evaluation criteria, for all foreign tenderers participating in international tenders to source at least forty percent of their supplies from citizen contractors prior to submitting a tender. Furthermore, section 89 (f) of the

Act provides that provisions of section 155 of the Act shall apply in international tendering and competition in order to afford local and citizen contractors the preferences and reservations set out in section 155 of the Act.

It is not lost to the Board that Regulation 144 (1) and (4) of Regulations 2020 provide that: -

"(1) An accounting officer shall and in accordance with section 155 (5) (b) of the Act ensure that a procuring entity's tender documents contain a mandatory requirement as preliminary evaluation criteria specifying that the successful bidder shall —

(a) transfer technology skills and knowledge through training mentoring and participation of Kenyan citizens and

(b) reserve at least seventy-five percent (75%) employment opportunities for Kenyan citizens for works consultancy services and non-consultancy services of which not less than twenty percent (20%) shall be reserved for Kenyan professionals at management level

(2) In complying with the requirements of paragraph (1) an accounting officer shall ensure that the procuring entity's tender document contains a mandatory requirement specifying that all tenderers include in their tenders a local content plan for the transfer of technology"

(3)

(4) In circumstances where international tendering and competition does not meet the requirement of paragraph (1) an accounting officer shall cause a report to be prepared detailing evidence of the inability to meet this provision and measures to be undertaken to ensure compliance with this regulation and submit the report to the National Treasury to grant a waiver of the requirement"

From the above provision, the Procuring Entity had leeway of submitting a report to the National Treasury detailing evidence of inability to meet the requirements of Regulation 144 (1) of Regulations 2020, which we note, applies to transfer of skills and technology (an aspect of preference and reservation schemes). An application for this waiver, can only be made before preparation of a tender document, because without such waiver, the requirement for preference and reservations applicable in international tendering and competition inclusive of the aspect of transfer of technology ought to be specified in the Tender Document as a mandatory requirement forming part of preliminary evaluation criteria pursuant to provisions of the Act discussed hereinbefore read together with Regulation 144 (1) and (2) of Regulations 2020. In the instant case, the Board was not furnished with a letter from the National Treasury on waiver that may have been granted to the Procuring Entity prior to preparation of the Tender Document, pursuant to Regulation 144 (4) of Regulations 2020.

The Procuring Entity excluded application of preference and reservation schemes so as to hide behind an assertion that a performance contract is in place to ensure promotion of local contractors and compliance of section 3 and 155 of the Act. Even if the Board were to peruse the alleged annual procurement plans of the Procuring Entity and alleged reports from the Ministry of Trade, Industrialization and Enterprise Development (which were not furnished to the Board), the Board would still arrive at the same conclusion that the provisions of preference and reservation schemes discussed hereinbefore were applicable to the subject tender and ought to have been specified in the Tender Document. Allocation of a percentage of a procuring entity's procurement to preference and reservation through an annual procurement plan and budget is a responsibility vested upon the 1st Respondent pursuant to section 44 (2) (i) of the Act which states as follows:

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"44 (1) An accounting officer of a public entity shall be primarily responsible for ensuring that the public entity complies with the Act.

(2) In the performance of the responsibility under subsection (1), an accounting officer shall—

... (i) submit to the Authority the part in its procurement plan demonstrating application of preference and reservation schemes in relation to the procurement budget within sixty days after commencement of the financial year

Performance of the responsibility under section 44 (2) (i) of the Act does not give the 1st Respondent a window of excluding preference and reservation schemes applicable in international tendering and competition whose overriding objective is to promote the local industry and encourage participation of local and citizen contractors.

Turning to the issue of application of a margin of preference during evaluation, Regulation 77 (2) (d) of Regulations 2020 which deals with financial evaluation of tenders provides guidance that issues of margin of preference are considered during financial evaluation. The said provision states as follows: -

- "(1) Upon completion of the technical evaluation under Regulation 76 of these Regulations the evaluation committee shall conduct a financial evaluation and comparison to determine the evaluated price of each tender***
- (2) The evaluated price for each bid shall be determined by—***
- (a).....***
- (b).....***
- (c).....***
- (d) applying any margin of preference indicated in the tender document"***

It is evident from the above provision that the Tender Document ought to specify the margin of preference applicable so that the same can be applied during financial evaluation to bidders (local or citizen contractors) who qualify for the same.

The Board's determination of this issue would not be complete without addressing the import of the Procuring Entity's action of excluding participation of joint ventures in the subject tender, having stated that it is only manufacturers of the Ship to Shore Gantry Cranes who are eligible tenderers in the subject procurement process. This exclusion is specified in Clause 4 of the Tender Data Sheet of the Tender Document which reads as follows: -

"Tender is open to manufacturers only. Joint venture is not applicable"

Having considered each of the parties' cases on this issue, the Board notes that the term **"Joint Venture"** is defined by Thomas Thelford in his book, Construction Law Handbook (2007) as follows: -

"A contractual arrangement between two persons or companies in which resources are combined- be they equipment, expertise or finance with a view of making profit, but the two companies can remain separate legal entities."

From the above definition, the Board notes that two companies come together in a joint venture to pool resources together with a view of making profit. The two companies can opt to remain separate legal entities but enter

into a contractual arrangement. It is the Board's considered view that a joint venture gives companies an opportunity to enter new geographic markets, gain access to modern technology and gain new capacity and technical expertise. This would be advantageous to companies that do not have the technical expertise for a given procurement process. In such a scenario, local and citizen contractors are motivated to participate in international tenders because they would bid in joint venture with foreign contractors who may have the expertise that the local and citizen contractors do not possess.

As regards application of a margin of preference applicable to joint ventures or other type of contractual arrangement participating in international tendering and competition, Regulation 148 (1) and (2) of Regulations, 2020 states that: -

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

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

From the foregoing, Regulations 148 (1) and (2) of Regulations 2020 provide for preference schemes applicable to citizen contractors where a procuring

entity applies international competitive bidding procedures, such as is the case herein in order to achieve the guiding principles under section 3 (i) and (j) of the Act. It is a requirement that citizen contractors meet the threshold set for preferential treatment more so, to demonstrate their technical capability and competence to perform pursuant to Regulation 148 (3) of Regulations 2020

Preferential treatment is available to citizen contractors, whether bidding alone, or in joint venture with foreign contractors. In the instant case, excluding Joint Ventures from participating in the subject procurement process goes against the objectives of the Act and the Constitution in promoting citizen contractors.

Accordingly, the Board finds that Clause 4 and 41 of the Tender Data Sheet contravene the provisions of Article 227 (2) of the Constitution, section 3 (i) & (j), 70 (6) (e) (vi), 89 (f), 155, 157 (9) read together with Regulation 143,144 and 148 (1) & (2) of Regulations 2020.

On the third issue for determination, the Applicant deponed at paragraph 11 (h) of its Supporting Affidavit that, the Respondents contravened section 75 (1) of the Act by issuing Addendum No. 1 which in the Applicant's view, materially altered the substance of the original tender. To support this position, the Applicant referred the Board to the aforementioned Addendum marked as "**Exhibit EGK-02**" attached to the Request for Review.

In response, the Respondents aver at paragraph 12 of their Response to the Request for Review that Addendum No. 1 demarcated the scope of the

tender so as to separate disposal of existing equipment from the procurement of new equipment. According to the Respondents, even though the tender advertisement was initially for **“Design, Manufacture, Supply, Test and Commission of Four (4) New Ship to Shore Gantry Cranes”**, Addendum No. 1 revised and modified the tender to **“Supply, Installation, Testing and Commissioning of Four (4) New Ship to Shore Gantry Cranes.”** The Respondents explain that these changes were made following various enquiries by prospective bidders regarding the proposed trade in offer for the existing cranes which required pre-physical inspection of the cranes before giving an offer. According to the Respondents, they considered the challenges that would emanate from the trade in given the ongoing global Covid-19 pandemic. While concluding its submissions, the Respondents aver at paragraph 13 and 14 of their Response to the Request for Review that Addendum No. 1 did not alter the substance of the original tender in any material way because it maintained the material content of the Tender Document but only reduced the scope that required disposal and trade in of four existing cranes. The Respondents state that they considered the need for separation of disposal of old cranes from the purchase of new cranes to avoid reconditioning of parts during installation of the new Ship to Shore Gantry Cranes.

Having considered parties’ pleadings, the Board observes that Clause 1 of the Tender Data Sheet of the Tender Document described the subject tender as the procurement for **“Design, Manufacture, Supply, Test and Commission of Four (4) New Ship to Shore Gantry Cranes.”**

According to Clause 7.1.1 of Section VII. Technical Specifications of the Tender Document, a description of what the Procuring Entity is procuring is provided therein as follows: -

"The Kenya Ports Authority is inviting proposals from experienced and firms who have qualified and experienced engineers to design, fabricate, erect, assemble, install, paint, test, transport fully- built, commission and certify four (4 No.) Twin lift, 65 tonnes capacity under spreader, Post Panamax Ship-to-Shore Gantry Cranes and related equipment, parts and components."

Clause 7.2 of Section VII. Technical Specifications of the Tender Document, provides a description of the Scope of Work in the subject tender as follows:-

- (i) Design, Manufacture, Delivery, Test and Commission, 4 No. Ship to Shore Gantry Cranes. (Fully Erected at the manufacturers site).***
- (ii) Supply with all the necessary tools as provided in the technical specifications.***
- (iii) Two (2) years warranty for components (24 months).***
- (iv) Five (5) years warranty for the structure.***
- (v) Training of technicians/engineers on the repairs, maintenances, safety and operators on crane operations and safety as provided in the technical specifications.***

(vi) Cranes to be supplied with the following elaborative manuals both hard and soft copies, minimum 4 copies per equipment: -

- Maintenance manuals.***
- Operation manuals.***
- Repair manuals.***
- Installation manuals.***
- Parts manuals.***
- The drawings MUST have elaborate electric and hydraulic circuit diagrams.***

(vii) Supply of two (2No) spare spreaders

(viii) Provision of resident engineer(s) at the purchaser's site for six months after commissioning.

(ix) Supply of back up spares as specified in appendix 2 & 3

(x) Trade-in of the four existing cranes (STS1602, STS1702, STS1703 and STS1803)

On its part, Addendum No. 1 issued by the Procuring Entity stated as that:-

"Pursuant to Clause 10.1 of the Tender Document, the Authority hereby issues the following addendum: -

The scope of this tender has been revised to Supply, Installation, Testing and Commissioning of Four (4) New Ship to Shore Cranes.

The requirement for disposal and/or trade-in offer of the four existing cranes (STS1602, STS1702, STS1703 and STS1803)

is hereby deleted. This shall be issued as a separate tender to be issued shortly.

Bidders should however note that the execution of this project is dependent largely on successful disposal of the existing cranes due to space constraints and are therefore encouraged to participate in the tender and offer technically sound proposals to KPA”

It is worth noting that the Respondents; (i) revised the scope of the subject tender from “**Design, Manufacture, Supply, Test and Commission of Four (4) New Ship to Shore Gantry Cranes**” to “**Supply, Installation, Testing and Commissioning of Four (4) New Ship to Shore Cranes**”, (ii) deleted the scope of Trade-in of the four existing cranes (STS1602, STS1702, STS1703 and STS1803) and (ii) cautioned bidders that execution of the subject tender is dependent largely on successful disposal of the existing cranes. The Board observes that the Procuring Entity made this amendment whilst informing bidders that execution of the subject tender is dependent on successful disposal of the existing cranes.

It is the Board’s considered opinion that the Procuring Entity, having deleted the scope of Trade-in of the four existing cranes (STS1602, STS1702, STS1703 and STS1803) should not have directed bidders that execution of the subject tender is dependent largely on successful disposal of the existing cranes due to space constraints. Bidders ought to be informed in clear terms of the revised scope of the tender rather than be encouraged to submit technically sound proposals on a scope that has been removed.

Having reduced the scope of the subject tender from aspects of design and manufacturing while retaining **“Supply, Installation, Testing and Commissioning of Four (4) New Ship to Shore Cranes”**, the Procuring Entity had an obligation of issuing an addendum directing bidders to take into consideration, the implication of reduction of the scope when quoting their tender prices.

Bearing in mind that a procuring entity is better placed to know the needs of its specific user department, the Board finds that having reduced the scope of the subject tender from aspects of “design and manufacture” while retaining **“Supply, Installation, Testing and Commissioning of Four (4) New Ship to Shore Cranes”**, bidders should have been cautioned to take into consideration, the implication of the revised scope when quoting their tender prices.

It is the Board’s finding that reduction of the scope through Addendum No. 1 does not affect the substance in a materially way. That notwithstanding, bidders should have been cautioned to take into consideration, the implication of the revised scope when quoting their tender prices, rather than be encouraged to submit technically sound proposals on a scope that has been removed.

In determining the appropriate orders to issue in the circumstances, the Board has established that; (i) the subject procurement proceedings is governed by Regulations 2020, thus Clause 3.2 of Section II. Instructions to Tenderers of the Tender Document in so far as the same makes reference to the Repealed 2006 Regulations, is not applicable in the circumstances (ii)

Clause 4 and 41 of the Tender Data Sheet contravene the provisions of Article 227 (2) of the Constitution, section 3 (i) & (j), 70 (6) (e) (vi), 89 (f), 155, 157 (9) read together with Regulation 143,144 and 148 (1) & (2) of Regulations 2020 and (iii) Reduction of the scope through Addendum No. 1 does not affect the substance in a materially way even though bidders should have been cautioned to take into consideration, the implication of the revised scope when quoting their tender prices, rather than be encouraged to submit technically sound proposals on a scope that has been removed.

It is only fair that an addendum is issued remedying the following the areas identified by the Board to wit; a) amendment by removal of the Repealed 2006 Regulations in Clause 3.2 of Section II. Instructions to Tenderers of the Tender Document and substituting thereof Regulations 2020, (b) providing for Preference and Reservation Schemes applicable in law, (c) providing for Participation of Joint Ventures in the subject tender; and (d) deletion of the last paragraph of Addendum No. 1 dated 29th January 2021.

The Board is also alive to the fact that the Procuring Entity, having received a letter of notification from the Acting Board Secretary on 9th March 2021 notifying the Procuring Entity of the existence of the Request for Review and suspension of procurement proceedings pursuant to section 168 of the Act, did not open tenders on 9th March 2021.

It is therefore appropriate to direct the 1st Respondent to issue an Addendum addressing the issues addressed hereinbefore and to extend the tender submission deadline so that bidders can take such changes into account. The 1st Respondent ought to allow bidders to withdraw their bids (if they wish to

do so) in accordance with section 76 (1) of the Act before the new tender submission deadline and submit new bids, taking into consideration, the amendments that would be made to the Tender Document through an Addendum. Alternatively, the 1st Respondent ought to give bidders the option to elect to be bound by their already submitted bids, which will remain unopened until the new tender submission deadline.

In totality of the foregoing, the Request for Review succeeds in terms of the following specific 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 Accounting Officer of the Procuring Entity is hereby directed to issue an Addendum to the Tender Document applicable to the procurement proceedings in Tender No. KPA/095/2020-21/TE for Supply, Installation, Testing and Commissioning of Four (4) New Ship to Shore Cranes within fourteen (14) days from the date of this decision on the following aspects: -

a) Amendment by removal of the Public Procurement and Disposal Regulations, 2006 in Clause 3.2 of Section II. Instructions to Tenderers of the Tender Document and

substituting thereof the Public Procurement and Asset Disposal Regulations, 2020.

b) Provide for Preference and Reservation Schemes applicable in law;

c) Provide for Participation of Joint Ventures in the subject tender; and

d) Deletion of the last paragraph of Addendum No. 1 dated 29th January 2021.

2. The Accounting Officer is hereby directed to extend the tender submission deadline in Tender No. KPA/095/2020-21/TE for Supply, Installation, Testing and Commissioning of Four (4) New Ship to Shore Cranes for a further period of fourteen (14) days, a day after issuance of the Addendum referred to in Order No. 1 above.

3. The Accounting Officer of the Procuring Entity is hereby directed to allow bidders to withdraw their bids (if they wish to do so) pursuant to section 76 (1) of the Act before the tender submission deadline referred to in Order No. 2 and submit new bids, taking into consideration, the amendments that would be made to the Tender Document through an Addendum and/or give bidders the option to elect to be bound by their already submitted bids, which will remain unopened until the tender submission deadline referred to in Order No. 2 above.

- 4. Further to Order No. 1, 2 and 3 above, the Accounting Officer of the Procuring Entity is hereby directed to proceed with the procurement proceedings in Tender No. KPA/095/2020-21/TE for Supply, Installation, Testing and Commissioning of Four (4) New Ship to Shore Cranes to its logical conclusion, including the making of an award, taking into consideration, the Board's findings in this Review.**
- 5. Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.**

Dated at Nairobi this 29th day of March 2021

CHAIRPERSON

SECRETARY

PPARB

PPARB