

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
(APPLICATION NO. 99/2021 AND APPLICATION NO. 100/2021)
(CONSOLIDATED)
BETWEEN

HARLEY'S LIMITED 1ST APPLICANT

SAI PHARMACEUTICAL LIMITED 2ND APPLICANT

AND

ACCOUNTING OFFICER,

KENYA POARTS AUTHORITY 1ST RESPONDENT

KENYA PORTS AUTHORITY 2ND RESPONDENT

CAPERINA ENTERPRISES LTD 1ST INTERESTED PARTY

IN-VITRO DIAGNOSTICS (EA) LTD 2ND INTERESTED PARTY

(Review against the decision of Kenya Ports Authority dated the 21st day of June 2021 in the matter of Tender No. KPA/071/2020-21/MS for Supply of Laboratory, Nursing and Surgical Items)

BOARD MEMBERS

1. Ms. Faith Waigwa - Chairperson

- | | |
|---------------------------|----------|
| 2. Dr. Paul Jilani | - Member |
| 3. Mr. Alfred Keriolale | -Member |
| 4. Ms. Isabella Juma, CPA | -Member |

IN ATTENDANCE

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

The Tendering Process

Kenya Ports Authority (hereinafter referred to as the "Procuring Entity") invited tenders for Tender No. KPA/071/2020-21/MS for Supply of Laboratory, Nursing and Surgical Items (hereinafter referred to as the "subject tender") through an invitation to tender notice published in the Standard Newspaper on Thursday 3rd December 2020, on the Procuring Entity's website (www.kpa.co.ke) and in the Public Procurement Information Portal (<http://www.tenders.go.ke/>) using the open national tendering method.

Tender Submission Deadline and Tender Opening

The tender submission deadline was 12th January 2021. A total of forty nine (49) tenders were received by the tender submission deadline, opened on

the same date and the following tenderers were recorded as having submitted their tenders:

1. M/s. Madhun Pharmacy Laboratory Services.
2. M/s. Kenton Consulting Ltd.
3. M/s. In – Vitro Diagnostic EA Ltd.
4. M/s. Steha Holdings Ltd.
5. M/s. Surgisel Ltd.
6. M/s. Astique Ventures.
7. M/s. Physical Therapy Services Ltd.
8. M/s. Kenzuri Africa Ltd.
9. M/s. kenruss Medics Ltd.
10. M/s. Topline Surgical Ltd.
11. M/s. Travotech Agencies Ltd.
12. M/s. Bell Industries Ltd.
13. M/s. The Scientific Group (K) Ltd.
14. M/s. Jason Myers Ltd.
15. M/s. Ultralab EA Ltd.
16. M/s. Tyline Care Systems
17. M/s. Sai Pharmaceuticals Ltd.
18. M/s. Bomeni Chemist.
19. M/s. Makupa Chemist Ltd.

20. M/s. Highridge Pharmaceuticals Ltd
21. M/s. Phillips Pharmaceuticals Ltd
22. M/s. MacNaughton Ltd.
23. M/s. Numedical Ltd.
24. M/s. Clinical Precision Ltd.
25. M/s. Pyramid Pharma Ltd.
26. M/s. Citadel Pharmaceutical Ltd
27. M/s. Unisel Pharma (K) Ltd
28. M/s. Harley's Ltd.
29. M/s. Medix (E.A) Ltd.
30. M/s. Chemoquip Ltd.
31. M/s. Caperina Enterprises Ltd.
32. M/s. Interglobe Holdings Ltd.
33. M/s. Bioscope Laboratory Supplies.
34. M/s. Milestep Medical & Surgical Supplies Ltd.
35. M/s. Steplabs Technicals Services.
36. M/s. Blue Bell Care Ltd.
37. M/s. Nairobi Enterprises Ltd
38. M/s. Indepth Scientific Company Ltd.
39. M/s. Surgipath Services.
40. M/s. Statim Pharmaceuticals.

41. M/s. Rezeneb Logistics.
42. M/s. Philips Healthcare.
43. M/s. Alpha Medical Manufacturers.
44. M/s. Chem-labs Ltd.
45. M/s. Human Quality Assessment Services.
46. M/s. Surgipharm Ltd.
47. M/s. Synthecon Kenya Ltd.
48. M/s. Microbiology E.A
49. M/s. Laborex Kenya Ltd.

Evaluation of Tenders

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

1. Preliminary Examination;
2. Technical Evaluation; and
3. Financial Evaluation.

Preliminary Evaluation/Tender Responsiveness

At this stage of evaluation, the Evaluation Committee applied the evaluation criteria as provided in Clause 2.17 [1-5 and i (a-j) (ii-xii) of the Appendix to

Instructions to Tenderers at page 23-25 of the Tender Document. Upon evaluating and comparing the tenders thirty-nine (39) tenders were found non-responsive for failure to adhere to all mandatory requirements. Ten (10) tenders were found responsive thus proceeded to Technical Evaluation stage.

Technical Evaluation

At this stage of evaluation, the Evaluation Committee applied the evaluation criteria as provided in Clause 2.22 & 2.24 [ii(1-6)] of the Appendix to Instructions to Tenderers at page 25-26 of the Tender Document. Tenders were required to attain a pass mark of 75% to qualify for financial opening. At the end of this stage, eight (8) tenders were found non-responsive while two (2) tenders were found responsive having attained the pass mark of 75 % required to qualify for financial evaluation. The tenderers whose tenders attained the pass mark of 75% at this stage were the 1st and 2nd Interested Party.

Financial Evaluation

On 14th April 2021, the financial envelopes submitted by the 1st and 2nd Interested Parties were opened. Only the 2nd Interested Party was represented at the opening of the financial envelopes. At this stage the Evaluation Committee proceeded with the financial evaluation.

Recommendations

The Evaluation Committee recommended award of 327 out of 376 laboratory items to the 2nd Interested Party and 52 out of 805 nursing and surgical

items (surgical) to the 1st Interested Party being the tenderers who submitted the lowest evaluated responsive tenders in the said items.

Professional Opinion

In a professional opinion dated 31st May 2021 (hereinafter referred to as the "Professional Opinion"), the Head of Procurement and Supplies, one Cosmas G. Makori, reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders. He opined the subject procurement had satisfied the Constitutional and the Public Procurement and Assets Disposal Act, 2015 (hereinafter referred to as the "Act") requirements and therefore recommended the award of the subject tender per item to the 1st and 2nd Interested Parties at their quoted unit prices in accordance with the recommendation of the Evaluation Committee. The Professional Opinion was approved by the Head of Procurement and Supplies on 4th June 2021

Notification to Tenderers

Vide letters dated 21st June 2021, the Procuring Entity notified all tenderers of the outcome of their respective bids.

REQUEST FOR REVIEW NO. 99/2021

The 1st Applicant, lodged a Request for Review dated 5th July 2021 together with a Supporting Affidavit sworn by Nishil Haria a director of the 1st Applicant on 5th July 2021 and filed on 6th July 2021 and a Supplementary

Affidavit sworn by Nishil Haria on 21st July 2021 and filed on 22nd July 2021 through the firm of Sigano & Omollo LLP, seeking orders as paraphrased herein below that:

- a) The notification of award of the subject tender to the 1st and 2nd Interested Parties be annulled and set aside.***

- b) The notification of unsuccessful bid dated 21st June 2021 and delivered via email on 22nd June 2021 which was addressed to the 1st Applicant and any other bidder in the subject procurement proceedings in the subject tender be annulled and set aside.***

- c) The procuring entity be directed to re-admit the 1st Applicant's bid for technical and financial evaluation in accordance with the criteria contained in the tender document.***

- d) Any other relief that the Board may deem fit and just to grant pursuant to section 11(1) of the Fair Administrative Action Act.***

- e) Costs of the Review.***

The 1st and 2nd Respondents filed a Memorandum of Response dated 16th July 2021 on 21st July 2021. The 2nd Respondent also filed a Relying Affidavit sworn by Daniel Amunyunzu on 16th July 2021 on 21st July 2021 through the firm of Turasha J. Kinyanjui Advocates. The 1st Interested Party filed a

Memorandum of Response dated 22nd July 2021 and filed on even date through the firm of Humphrey & Company LLP, the 2nd Interested Party did not file any response to the Request for Review. The Applicant file their Written Submissions dated 21st July 2021 and filed on 22nd July 2021, through the Firm of Sigano Omollo LLP. The 1st and 2nd Respondents and the 1st and 2nd Interested Parties, did not file their Written Submissions.

The Acting Board Secretary notified all tenderers through a letter dated 6th July 2021 of the existence of Request for Review No.99/2021 inviting such tenderers to file their response on the same. However, the 2nd Interested Party did not file any response in support or in opposition of the Request for Review No.99/2021.

The Acting Board Secretary furnished all tenderers with the Board's Circular No. 2/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of Covid-19 pandemic. Pursuant to the Board's Circular No.2/2020, the Board dispensed with physical hearings and directed that all request 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 1st Applicant filed Written Submissions together with a list and bundle of authorities dated 21st July 2021 on 22nd July 2021. The 1st Interested Party

filed a Memorandum of Response dated 22nd July 2021 and filed it on even date, through the Firm of Humphrey & Company LLP. The 2nd Respondent did not file their Response. The Respondents and the 1st and 2nd Interested Parties did not file any written submissions.

REQUEST FOR REVIEW NO. 100/2021

The 2nd Applicant filed a Request for Review dated 5th July 2021 together with a Supporting Affidavit sworn by Dr. Bhavesh Kotecha, a director of the 2nd Applicant on 5th July 2021 on 6th July 2021 through the firm of Sigano Omollo LLP seeking orders paraphrased herein below that:

- a) The notification of award of the subject tender to the 1st and 2nd Interested Parties be and annulled and set aside.***

- b) The notification of unsuccessful bid dated 21st June 2021 and delivered via email on 22nd June 2021 which was addressed to the Applicant and any other bidder in the subject procurement proceedings in the subject tender be annulled and set aside.***

- c) The procuring entity be directed to re-admit the Applicant's bid for technical and financial evaluation in accordance with the criteria contained in the tender document.***

d) Any other relief that the Board may deem fit and just to grant pursuant to section 11(1) of the Fair Administrative Action Act.

e) Costs of the Review.

The 1st and 2nd Respondents filed a Memorandum of Response dated 16th July 2021 on 21st July 2021 and a Replying Affidavit sworn by Daniel Amunyunzu the Head of Procurement and Supplies of the 2nd Respondent on 16th July 2021 and filed on 21st July 2021 through the firm of Turasha J. Kinyanjui Advocates. The 1st Interested Party filed a Memorandum of Response dated 23rd July 2021 and filed on 27th July 27, 2021 through the firm of Humphrey & Company LLP.

The Board Secretary notified all tenderers through a letter dated 19th July 2021 of the existence of Request for Review No. 100 of 2021 inviting such tenderers to file their response on the same. The 2nd Interested Party did not file any response in support or in opposition of the Request for Review No. 100/2021.

M/s Nairobi Enterprises Limited one of the tenderers in the subject tender filed a letter with the Board dated 23rd July 2021 and received on 23rd July 2021 complaining about the grounds for rejection of their tender not being valid and have written to the Procuring Entity but they are yet to receive the award notification from them. M/s Nairobi Enterprises Limited did not file a request for review and they did not also respond to either Request for Review No. 99/2021 or No. 100/2021.

The Acting Board Secretary furnished all tenderers with the Board's Circular No. 2/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of Covid-19 pandemic. Pursuant to the Board's Circular No.2/2020 dated 24th March 2020, the Board dispensed with physical hearings and directed that all Request 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 2nd Applicant filed Written Submissions together with a list and bundle of authorities dated 21st July 2021 and filed on 22nd July 2021. The 1st and 2nd Respondents and the 1st and 2nd Interested Parties did not file any written submissions.

CONSOLIDATION OF REQUEST FOR REVIEW APPLICATION NO. 99/2021 AND NO.100/2021

Request for Review No. 99/2021 filed by the 1st Applicant and Request for Review No. 100/2021 filed by the 2nd Applicant relate to the same subject tender and are against the same Respondents (the 1st and 2nd Respondents) and same Interested Parties (1st and 2nd Interested Party). The Board observes that the 1st and 2nd Applicants were tenderers in the subject tender.

The Board has addressed its mind on whether the circumstances in both Request for Review No. 99/2021 and Request for Review No.100/2021 justify consolidation of the two Request for Review applications to proceed as one Request for Review application. In addressing this question, the Board considered Regulation 215 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "Regulations 2020") which provides as follows: -

"Where two or more requests for review are instituted arising from the same tender or procurement proceeding the Review Board may consolidate the requests and hear them as if they were one request for review"

In **Petition No. 14 of 2013, Law Society of Kenya v. Center for Human Rights and Democracy and 12 Others (2014) eKLR**, the Supreme Court of Kenya observed as follows: -

"the essence of consolidation of suits is to facilitate the efficient and expeditious disposal of disputes, and to provide a framework for a fair and impartial dispensation of justice to the parties."

Having considered the meaning and purpose of consolidation of matters as discussed hereinabove, this Board observes that in procurement proceedings, an accounting officer of a procuring entity has the primary responsibility under Section 44 (1) of the Act of ensuring a procuring entity

complies with the Act. In doing so, the accounting officer must ensure compliance with any directions given to them by this Board pursuant to Section 173 (b) of the Act with respect to anything to be done or redone in procurement or disposal proceedings.

In order to save costs, time and effort and to ensure there is clear and unambiguous directions to the accounting officer of a procuring entity on the manner in which a procurement process ought to proceed, the Board found it convenient to consolidate the two request for review applications to proceed as one Request for Review pursuant to Regulation 215 of Regulations 2020.

The Applicant in the Request for Review No. 99/2021 was joined as the 1st Applicant, whilst the Applicant in the Request for Review No. 100/2021 was joined as the 2nd Applicant. The 1st and 2nd Respondents and the 1st and 2nd Interested Parties in both Request for Review No.99/2021 and Request for Review No.100/2021 are the same and as such remain as they are in the consolidated Request for Review.

Consequently, parties to the consolidated Request for Review shall be identified as follows:

- Harley’s Limited 1st Applicant**
- Sai Pharmaceuticals Ltd 2nd Applicant**

Accounting Officer, Kenya Ports Authority 1st Respondent
Kenya Ports Authority 2nd Respondent
Caperina Enterprises Ltd 1st Interested Party
In-Vitro Diagnostics (EA) Ltd 2nd Interested Party

BOARD'S DECISION

After careful consideration of the parties' pleadings, written submissions, list and bundle of authorities and confidential documents submitted to the Board pursuant to Section 67 (3) (e) of the Act, the Board finds that the following issues crystallize for determination: -

- 1. Whether the consolidated Request for Review was filed within the statutory period of 14 days prescribed under section 167(1) of the Act;**

Depending on the outcome of the first issue;

- 2. Whether the 1st and 2nd Applicants have the *locus standi* to institute the consolidate Request for Review before the Board;**

Depending on the outcome of the second issue;

3. Whether the 1st and 2nd Applicants' tender were evaluated in accordance with section 80 (2) of the Act read together with clause 2.17 [2 and 5] of the Instructions to Tenderers Reference of the Appendix to Instructions to Tenderers at page 23 of the Tender Document.

The Board would like to dispense with a preliminary issue before embarking on the issues framed for determination. Nairobi Enterprises Limited one of the tenderers in the subject tender filed a letter with the Board complaining of the reasons why its tender was found non-responsive. The Board notes that the said complaint was not filed in accordance with section 167 of the Act as a Request for Review and the same was an attempt by Nairobi Enterprises Limited to seek a review through the backdoor without incurring the fees required for filing of the same. In the circumstances, the Board has no jurisdiction to entertain the complaint by Nairobi Enterprises Limited and shall refrain from pronouncing itself on the same.

On the first issue framed for determination, the 1st and 2nd Respondents contend that the 1st and 2nd Applicant filed the consolidated Request for Review out of time and the 1st and 2nd Applicant are therefore time barred from seeking review of the award of the subject tender. The 1st and 2nd Respondents support their contention by stating that the consolidated

Request for Review was filed on 6th July 2021, which according to the 1st and 2nd Respondents was 15 days after the notification of award was communicated to all tenderers, contrary to Section 167(1) of the Act, which prescribes a 14- day window period to seek administrative review.

The 1st and 2nd Applicants contend that contrary to the Respondents' averment that the consolidated Request for Review is time barred, the 1st and 2nd Applicants were notified of the outcome of the evaluation process on vide an email of 22nd June 2021 in which a letter of notification dated 21st June 2021 was attached thereto. The 1st and 2nd Applicants attached a copy of the the email of 22nd June 2021 in their Supplementary Affidavit evidencing the date when and how the letter of notification dated 21st June 2021 was delivered to the 1st and 2nd Applicant. The Board notes that the Respondents have not controverted the assertion by the 1st and 2nd Applicants of having received their letters of notification on 22nd June 2021 via email. Upon perusal of the said email of 22nd June 2021 and in the absence of a contrary position that the 1st and 2nd Respondent were notified of the outcome of evaluation of the subject tender via email on 22nd JUNE 2021, the Board finds the 1st and 2nd Applicant were notified of the outcome of the evaluation of the subject tender via email on 22nd June 2021.

The Board has also considered the provisions of Section 167 (1) of the Act as follows:

167.(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.

It is worth noting that this Section states that the tenderer may seek administrative review within fourteen (14) days of the notification of award. In this context, the 1st Applicant was a tenderer in the Subject Tender who was notified of the award via email on 22nd June 2021. From this date the 14 statutory days required for one to have filed for review were expiring on 6th July 2021 the exact same date when the Request for Review No. 99/2021 and the Request for Review No. 100/2021 were file in the Board. The Board is therefore satisfied that we have jurisdiction to adjudicate this matter and the issue is settled that the both instant Requests for Review were filed within 14 days, the statutory period required under Section 167 (1) of the Act. To this end, the Respondents' claim that both Requests for Review were filed out of time and that the Board lacks jurisdiction to adjudicate, lacks merit and therefore fails.

On the second issue as to whether the 1st and 2nd Applicant have no Locus Standi, at paragraph 29 (b) of the 1st and 2nd Respondents' Memorandum of Response, they aver that the 1st and 2nd Applicants have no Locus Standi to file the instant Request for Review, as contemplated in Section 167 (1) of

the Act, since they failed to comply at the preliminary evaluation stage in the suit tender, reasons for which were outlined and communicated to the Applicant vide a letter dated 21st June 2021.

In computing time to establish whether the 1st and 2nd Applicant filed the consolidated Request for Review within 14 days of notification of award, the Board is guided by section 57 (1)(a) of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya (hereinafter referred to as the "IGPA") which provides as follows:-

Computation of time

In computing time for the purposes of a written law, unless the contrary intention appears—

(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;

Taking into consideration the above provision of IGPA, in computation of the 14 days from the date of notification of award within which the 1st and 2nd Applicants were required to file the consolidated Request for Review, the Board observes that the 14 days period started running on the 23rd day of June 2021 (having omitted the 22nd day of June 2021 as the day when the

1st and 2nd Applicants were notified of the outcome of evaluation of the subject tender) and ends on the 6th day of July 2021.

In the circumstances and because the consolidated Request for Review was filed on 6th July 2021, the 1st and 2nd Applicants filed the consolidated Request for Review on the 14th day after they had been notified of the outcome of evaluation of the subject tender.

Accordingly, the Board finds the consolidated Request for Review was filed within the statutory period of 14 days prescribed under section 167(1) of the Act.

On the second issue framed for determination, the Board considered that provisions of Section 167 (1) hereinbefore quoted and notes that it is only a candidate or tenderer who has locus to file a request for review before the Board and such a candidate or a tenderer must claim to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by the Act of Regulations 2020.

The Board is guided by the meaning assigned to a candidate and a tenderer pursuant to Section 2 of the Act as follows:

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

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

From the above provisions of the Act, the Board deduces that a candidate is a person who after an invitation to tender notice has been issued to by a procuring entity, such a person obtains a tender document in the manner indicated in such an invitation notice.

On the other hand, a tenderer is a candidate who submits back his or her tender in the manner prescribed by a procuring entity in an invitation for the same.

The Board has already established hereinbefore that the 1st and 2nd Applicants were tenderers in the subject tender when justifying consolidation of Request for Review No.99/2021 and Request for Review 100/2021. The 1st and 2nd Applicants have averred that as a result of the Respondents' failure to comply with their obligations under the Act, the 1st and 2nd Applicants are bound to suffer loss and damage that includes (i) loss of income and profit that would have accrued to the 1st and 2nd Applicants from

the award of the subject tender, considering that the Applicants had incurred substantial expenses towards preparation and submission of their tenders in the subject tender and (ii) that the Applicants have been unfairly denied an opportunity to undertake the contract in the subject tender at their reasonable minimum cost.

In this context therefore, the Board finds that the 1st and 2nd Applicants being tenderers in the subject tender and having claimed that they risk suffering loss of income and profit have the locus standi to institute and prosecute the consolidated Request for Review in accordance with Section 167(1) of the Act.

On the third issue framed for determination, the Board will address the same in in two dimensions: first on the requirement of all tenderers to paginate their tenders and secondly, on the requirement of tenderers to submit a power of attorney.

With respect to pagination of tenders by tenderers, the Board notes that the Applicants contend that Clause 2.17 of the Appendix to Instructions to Tenderers required tenderers to number their tender documents starting from the table of contents and this did not include the cover page. The Respondents on the other hand contend that the 1st Applicant contravened clause 2.22.4 and was deemed to be non-responsive as the first page and green pages (used as dividers) of the 1st Applicant's tender were not

numbered whilst the 2nd Applicant's first page of the Applicant's tender was not numbered. The Applicants averred that their respective tenders were properly paginated and serialized in compliance with the provisions of Section 74 (1) (i) of the Act which provides as follows:

(1) The accounting officer shall ensure the preparation of an invitation to tender that sets out the following —

(a)...

(b).....

(c).....

(d).....

(e).....

(f).....

(g).....

(h)....

(i) requirement of serialisation of pages by the bidder for each bid submitted; and

(2).....

Section 80(2) of the Act requires the Evaluation Committee to evaluate tenders in accordance with the procedures and criteria set out in the tender document and 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 Tender Document for the subject tender set out a criteria for evaluation that run from pages 23 to 26 of the Tender Document. Some of the mandatory requirements of the subject tender were found in the criteria spelt out in clause 2.17 the Instructions to Tenderers Reference of 2 and 5 of the Appendix to Instructions to Tenderers at page 23 of the Tender Document which provide as follows: -

2. Shall have pages in the whole document numbered in the correct sequence starting from table of contents including all appendixes, and attachments (Mandatory).

5. Shall be signed (where signatures are required) by a duly authorized representative of the firm or any other officer appointed and evidenced by a Power of Attorney (Mandatory).

The above provisions of the Tender Document required tenderers to mandatorily number all documents forming part of their respective tenders in the correct sequence from table of contents including appendixes and attachments. In other words, there was no requirement to number a

document forming part of a tender where such a document precedes a table of contents.

Secondly, tenders were mandatorily required to submit a power of attorney that would provide evidence of a tenderer's representative duly authorized to sign such a tenderer's tender where signatures were required. In other words, the procuring entity was to confirm who is the authorized signatory of a tenderer from a power of attorney submitted by such a tenderer.

The Board has carefully perused the 1st and 2nd Applicants original tender documents and notes that the 1st Applicant numbered its tender document save for the cover page and the green dividers in the Applicant's tender whilst the 2nd Applicant numbered its tender document save only for the cover page. The Board notes that both the 1st and 2nd Applicants' tender documents' cover pages preceded their respective table of contents and the same were not required to be numbered as indicated in the provisions of the Tender document spelt out in clause 2.17 of the Instructions to Tenderers Reference of 2 of the Appendix to Instructions to Tenderers at page 23 of the Tender Document as quoted hereinbefore. Accordingly, in finding the 1st and 2nd Applicants' respective tenders non-responsive because the cover pages thereof were not numbered, the Board finds the Evaluation Committee did not evaluate the 1st and 2nd Applicants' respective tenders in accordance with the criteria spelt out in the Tender Document.

The Collins English Dictionary defines an attachment as follows: -

being an extra document that is added to another document

With respect to the green page dividers found in the 1st Applicant's tender, the board finds the same were documents added in the 1st Applicant's tender to inform an evaluator of what to expect as the next document after the green page dividers. These green page dividers that were not numbered in the Board's considered opinion were attachments in the 1st Applicant's tender document and were required to be numbered as required in the criteria spelt out in the Tender Document and quoted hereinbefore.

In PPARB Application No.129 of 2019 **Island Homes Developers vs. Kenya Ports Authority & 2 others Review Application No. 129 of 2019** which was upheld by Justice Ogola at the High Court sitting in Mombasa in **Island Homes Developers Limited VS Public Procurement Administration Review Board, Kenya Ports Authority & 2 others [2020] eKLR** the Board elucidated the purpose and significance of serialization and pagination of bid documents as follows:

'Pagination 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 closing date and that no document is

inserted or removed in favour of a noncompliant bidder to the detriment of other bidders who choose to comply with the requirements of a procuring entity.'

In the circumstances and taking into consideration the principle of fairness enshrined in Article 227(1) of the Act, the Board finds the Evaluation Committee lawfully found the 1st Applicant's tender non-responsive for failure by the 1st Applicant to number the green page dividers which were attachments in the 1st Applicant tender and formed part of the 1st Applicant's tender.

On the second dimension of the third issue framed for determination, the 1st Applicant contends that the Respondents contravened Section 80 (2) of the Act by applying extraneous criteria relating to duration of validity of the Applicant's power of attorney, which was not set out in the tender document, to disqualify the 1st Applicant's tender. In response the Respondents denied applying extraneous criteria relating to duration of validity of the 1st Applicant's power of attorney during evaluation of tenders. The Respondents contend that all criteria, processes and procedures for evaluation under the subject tender were dully followed, applied to all tenderers and strict adherence to the provision of the tender document and the Act were observed. The Respondents contended that the Tender Document clearly indicated the contract envisaged in the subject tender was to be for a period of three (3) years as specified in the Special conditions of contract at Clause

3.10 of the tender Document, yet the 1st Applicant submitted a power of attorney for a period of one (1) year contrary to the intended contract term of three (3) years, to the dissatisfaction of the tender document.

The 1st averred that Clause 3.10 of the Instructions to Tenderers on the Special Conditions of the Contract, is silent on the requirements of a power of attorney hence could not be lawfully relied upon, as an evaluation criterion to disqualify the 1st Applicant's tender.

The Board has already hereinbefore held that the Tender Document required all tenderers to submit a power of attorney that would provide evidence of a tenderer's representative duly authorized to sign such a tenderer's tender where signatures were required in which the procuring entity was to confirm who the authorized signatory of a tenderer was from a power of attorney submitted by such a tenderer. The Respondents have not furnished the Board with any provision of the Tender Document that required tenderers to provide a power of attorney that had a validity of 3 or any other number of years. The only requirement of the Tender Document as a mandatory criterion for evaluation was for tenderers to submit a power of attorney.

The Board has perused the 1st Applicant's original tender and notes that the 1st Applicant submitted a power of attorney at page 481 of its original tender which reads as follows:

"POWER OF ATTORNEY

THIS POWER OF ATTORNEY is made and is effective from this 19th day of October Two Thousand and Twenty.

BETWEEN

1. HARLEY'S LIMITED (hereinafter referred to as "the Doner"), a limited liability company incorporated and existing under the laws of Kenya whose principal place of business is Harley's Building, 63, Westlands Roa, Nairobi, LR No. 209/2113 and f P.O. Box 42718-00100, Nairobi, Kenya.

AND

2. PETER OTIENO OGONDA (hereinafter referred to as "the Attorney") of Kenya National Identity Card Number 8745704 and P.O. Box 30620-00100 Nairobi.

WHEREAS

The Donor has vested in the Attorney the power and Authority to act, deal, negotiate and sign all documents in the name of the Donor and for the benefit of the Donor concerning all the present and future acts pertaining to all the tenders submitted by the Donor to KENYA PORTS AUTHORITY.

1. KNOW ALL MEN BY THESE PRESENTS, that this power of attorney is given by the Donor to the Attorney and that the Donor hereby

appoints the Attorney to be its Attorney and lawful agent and to do in the Donor's name and on its behalf to:

- a. Exercise or perform any power, duty or obligation whatsoever that the Donor now has or may hereafter acquire, relating to dealing and signing on behalf of the Donor, all the documents, contracts and any related documents in respect to all the tenders submitted by and on behalf of HARLEY'S LIMITED to KENYA PORTS AUTHORITY
 - b. Do everything necessary in exercising any of the powers granted here and to do all such acts or things which the Attorney may deem necessary, expedient or desirable in connection herewith.
- 2.** All acts, powers exercised, duties and obligations performed and documents signed in relation to the power of attorney by the Attorney shall be as good, valid and effectual to all intents and purposes whatsoever as if the same had been executed, performed, signed, sealed, delivered, made or given by the Donor.
- 3.**
- Name by Mr. Nashil Asvin Kumar Haria in his capacity as Operations Director of HARLEY'S LIMITED, therefore duly authorized on this 19th day of October 2020.

4. The Power of Attorney shall unless revoked by the Donor in writing remain in force for a period of one year from the date hereof.

IT IS HEREBY DECLARED THAT: All instruments and documents which in accordance with the Laws of the Republic of Kenya capable of being signed by an agent on behalf of the Donor shall be signed by the above Attorney.

IN WITNESS WHEREOF the parties hereto have executed this Power of Attorney on the day and year hereinabove written.”

From the wording of the aforementioned power of attorney, the Board notes that the requirement that tenderers ought to submit a power of attorney to the Procuring Entity, was so that they could know who would be signing on behalf of the tenderer. As such, noting that the 1st Applicant’s power of attorney clearly stipulated the person who would sign on behalf of the Applicant with respect to the subject tender, the same served the purpose required by the procuring entity.

In the circumstances, the Board finds the Evaluation Committee did not evaluate the Applicant’s tender in accordance with criteria set out for evaluation with respect to providing of a power of attorney. However, since the 1st Applicant was lawfully found non-responsive for not numbering the green page dividers in its original tender document, the Board finds that it

will amount to a zero sum game to readmit the 1st Applicant's bid for re-evaluation of its power of attorney because it has already failed on a mandatory requirement with respect to numbering of attachments in its original tender and can therefore not proceed for further evaluation.

With respect to the 2nd Applicant's original tender, the Board has found it was not lawfully evaluated with respect to the cover page of its original tender not being numbered yet the Tender Document did not require numbering of a cover page that preceded Table of Contents. In the circumstances, the Board finds it fair to re-admit the 2nd Applicant's tender at the Preliminary Examination stage of evaluation for re-evaluation on only the numbering of the Tender Document.

Accordingly, the Board finds that the consolidated 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: -

- 1. The 1st Respondent's letters' of notification with respect to Tender No. KPA/071/2020-21/MS for Supply of Laboratory, Nursing and Surgical Items issued to all the Applicants and all other unsuccessful tenderers be and are hereby cancelled and set aside.**

2. The 1st Respondent's letters' of notification with respect to Tender No. KPA/071/2020-21/MS for Supply of Laboratory, Nursing and Surgical Items issued to the 1st and 2nd Interested Parties be and are hereby cancelled and set aside.
3. The 1st Respondent is hereby directed to re-admit the 2nd Applicant's tender and all other tenders at the Preliminary Examination stage of evaluation and re-evaluate all tenders at the Preliminary Examination stage of evaluation with respect to only numbering of the tender document as set out in clause 2.17 [2] of the Instructions to Tenderers Reference of the Appendix to Instructions to Tenderers at page 23 taking into account the Board's findings in this decision.
4. Further to Order 3, the Procuring Entity is hereby directed to proceed with the procurement proceedings to logical conclusion including the making of an award within 14 days from the date of this decision.
5. Given that the procurement proceedings of the subject tender are not complete; each party shall bear its own costs of the Request for Review.

Dated at Nairobi this 27th day of July 2021



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CHAIRPERSON

PPARB



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SECRETARY

PPARB

