

**REPUBLIC OF KENYA**  
**IN THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW**  
**BOARD**  
**APPLICATION NO.24/2022 OF 16<sup>TH</sup> MARCH 2022**

**BETWEEN**

**SKEL SOLUTIONS LIMITED .....APPLICANT**

**AND**

**THE ACCOUNTING OFFICER,**

**THE KENYA WILDLIFE SERVICE..... 1<sup>ST</sup> RESPONDENT**

**KENYA WILDLIFE SERVICE..... 2<sup>ND</sup> RESPONDENT**

**THREE DEE EXHIBITION SERVICES .....INTERESTED PARTY**

Review against the decision of the Accounting Officer of the Kenya Wildlife Service with respect to Tender No.KWS/OT/BDM/29/2021-2022 for Designing, Building, Installation and Commissioning of a Bronze Elephant Sculpture "TIM" in Amboseli National Park.

**BOARD MEMBERS**

- |                        |              |
|------------------------|--------------|
| 1. Ms. Faith Waigwa    | -Chairperson |
| 2. Dr. Paul Jilani     | -Member      |
| 3. Mrs. Irene Kashindi | -Member      |
| 4. Mr. Nicholas Mruttu | -Member      |
| 5. Eng. Kimani Mbiu    | -Member      |

**IN ATTENDANCE**

Mr. Philemon Kiprop -Holding brief for the Acting Board Secretary

## **BACKGROUND OF AWARD**

### **The Tendering Process**

Kenya Wildlife Service (hereinafter referred to as "the Procuring Entity") invited tenders for an open national tender with respect to Tender No.KWS/OT/BDM/29/2021-2022 for Designing, Building, Installation and Commissioning of a Bronze Elephant Sculpture "TIM" in Amboseli National Park (hereinafter referred to as "the subject tender"). The tender was uploaded on the Procuring Entity's website [www.kws.go.ke](http://www.kws.go.ke) and PPIP's portal [www.tenders.go.ke](http://www.tenders.go.ke).

### **Tender Submission and Opening of Tenders**

The tenders were opened on 10<sup>th</sup> February 2022 by the tender opening committee appointed by the accounting officer in the presence of tenderers and their representatives.

Three (3) bidders submitted their tender documents within the bid submission deadline and which were opened by the Tender Opening Committee as follows:

1. MURRAY GRANT BRONZES LIMITED;
2. SKEL SOLUTIONS LIMITED; and
3. THREE DEE EXHIBITION SERVICES

### **Evaluation of Tenders**

An Evaluation Committee evaluated tenders in three stages, namely:

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

### **Preliminary Evaluation**

The Evaluation Committee noted that all the three tenderers did not paginate certain parts of their tenders. The Evaluation Committee deliberated on the issue and considered serialization as a minor deviation that does not affect the substance of the subject tender. Accordingly, all three tenders were deemed to be responsive to all mandatory requirements and thus proceeded to Technical evaluation.

### **Technical Evaluation**

The Evaluation Committee subjected tenders to a technical evaluation against the criteria outlined in the Tender Document.

According to Section 111 – of the Tender Document, the pass mark for technical scores was 75% and all the three tenders attained the pass mark therefore proceed for Financial Evaluation.

### **Financial Evaluation**

The Evaluation Committee subjected tenders to Financial Evaluation by ranking tenders according to their respective tender sum. The Interested Party's tender was ranked 1<sup>st</sup> for having provided a tender sum of

Kshs.44,620,000 whilst the Applicant's tender was ranked 2<sup>nd</sup> having provided a tender sum of Kshs.62,646,200.

### **Recommendation**

Based on the above evaluation process, the evaluation committee recommended the award of the subject tender to tenderer B3 – Three Dee Exhibition Services for being the lowest evaluated tenderer with a total tender price of Kshs.44, 620, 000 (Forty Four Million, Six Hundred and Twenty Thousand Only).

### **Professional Opinion**

In a Professional Opinion dated 2<sup>nd</sup> March 2022, the Procuring Entity's Assistant Director Supply Chain Management reviewed the process of how the subject procurement process was undertaken including the evaluation of tenders and concurred with the Evaluation Committee's recommendation on the award of the subject tender to tenderer B3 – Three Dee Exhibition Services for being the lowest evaluated bidder with a total tender sum of Kshs44, 620, 000 (Forty Four Million, Six Hundred and Twenty Thousand Only). He recommended that the Accounting Officer approves the Professional Opinion. The Accounting Officer approved the Professional Opinion on 2<sup>nd</sup> March 2022.

### **Letters of Notification**

Vide letters dated 3<sup>rd</sup> March 2022 the Procuring Entity notified all tenderers of the outcome of their respective tenders.

## **REQUEST FOR REVIEW**

M/s Skel Solutions Limited (hereinafter referred to as "the Applicant") lodged a Request for Review dated 16<sup>th</sup> March 2022 and filed on even date together with a Statement in Support of the Request for Review signed by George KibeNduati filed on 16<sup>th</sup> March 2022 through the firm of Oduor Henry Oduor seeking the following prayers;

***a) The decision of the Procuring Entity as communicated in the Letter Ref No. KWS/OT/BDM/29/2021-2022 dated 3<sup>d</sup> March,2022 Notification of Intention to Award directing the Three Dee Exhibition Services of P. O Box 103574-00100 Nairobi as the successful Bidder Contract Price Kenya Shillings Forty Four Million Six Hundred and Twenty Thousand Only(Kshs.44,620,000) .***

***i. The Procuring Entity has acted in contravention of Item No.17on the serialization of Tender Document, all pages of the Bid Document must be subsequently serialized in a single numerical format is mandatory and should MUST be met in order to proceed to the technical stage of the Evaluation process.***

***ii. The Procuring Entity has breached mandatory requirement they went ahead and subjected Bidder Three Dee Exhibition to evaluation stage and finally to financial comparison despite it had not met the Mandatory***

***requirement and Intended to Award them as Successful Tender***

***b) The Respondents be ordered to pay the costs of and incidental to these proceedings.***

***c) Any other or further relief as the Board may find appropriate to grant.***

In a Notification of Appeal and a letter dated 16<sup>th</sup> March 2022, the Acting Board Secretary of the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') notified the Respondents of the existence of the Request for Review and the suspension of procurement proceedings for the subject tender while forwarding to the Respondent a copy of the Request for Review together with the Board's Circular No.02/2020 dated 24<sup>th</sup> March 2020, detailing administrative and contingency measures to mitigate the spread of Covid-19. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within 5 days from 16<sup>th</sup> March 2022.

The Respondents opposed the Request for Review through a Memorandum of Response dated 23<sup>rd</sup> March 2022 and filed on 25<sup>th</sup> March 2022 accompanied by a Statement signed by George Wambua all filed through Esther Andisi Advocate. The Respondents pray that;

- a) The Applicant's claim together with the prayers as set out in the Request for Review dated 16<sup>th</sup> March 2022 be dismissed with costs.**
- b) The Interested Party be granted costs of this Review, and any further or other relief that this Board deems fit to grant.**

Vide letters dated 25<sup>th</sup> March 2022, the Acting Board Secretary notified all tenderers in the subject tender, via their respective addresses as provided by the Respondents, of the existence of the Request for Review while forwarding to tenderers a copy of the Request for Review together with the Board's Circular No.02/2020 dated 24<sup>th</sup> March 2020. Further, all tenderers were invited to submit to the Board any information and arguments about the subject tender within 3 days from 25<sup>th</sup> March 2022.

Pursuant to the Board's Circular No. 2/2020 dated 24<sup>th</sup> March 2020, detailing an administrative and contingency management plan to mitigate the effects of the COVID-19 pandemic, the Board dispensed with physical hearings and directed that all request for review applications shall be canvassed by way of written submissions. Clause 1 at page 2 of the said Circular further specified that pleadings and documents shall be deemed as properly filed if they bear the official stamp of the Board.

None of the parties filed submissions.

## **BOARD'S DECISION**

The Board has considered each party's case, the pleadings and the written submissions filed before it, including the confidential documents submitted by the Procuring Entity pursuant to Section 67(3) (e) of the Public Procurement and Asset Disposal Act, 2015 (herein after referred to as "the Act") and frames the issues for determination as follows;

- I. Whether the Procuring Entity evaluated the Applicants' and the Interested Party's tenders in accordance with the Tender Document as read with Section 80(2) of the Act.***
- II. What are the appropriate orders to grant in the circumstances?***

***Issue 1: Whether the Procuring Entity evaluated the Applicants' and the Interested Party's tenders in accordance with the Tender Document as read with Section 80(2) of the Act.***

The Applicant contends that the Interested Party did not meet mandatory requirement Number 17, on serialization of tender as per the Tender Document requirement. The Applicant added that the Procuring Entity acted in a manner contrary to the law and the Tender Document and for these reasons, the Applicant stands to suffer prejudice.

In response, the Procuring Entity averred that the subject tender was undertaken under a system that is fair, equitable, transparent, competitive and cost-effective, in line with stipulations of Article 227 of the Constitution

and Section 3 of the Act and is unassailable on the grounds foisted by the Applicant.

The Respondents added that the Applicant has not cogently demonstrated the allegation that the Respondents acted contrary to the law by awarding the Interested Party the subject tender.

The Procuring Entity further averred that the Evaluation Committee made the following observations at the evaluation stage;

- a) The Interested Party had failed to serialize pages of its tender
- b) The Applicant's tender also had glaring issues for want of serialization as follows: -
  - i) Sheets between pages 270 and 273 had double serialization (271 and 272).
  - ii) Page 001 and pages 250 – 265 had erasures (white-out) but were not countersigned by the person with the power of attorney contrary to condition 18 under the Qualification Form (8) in Section III (Evaluation Criteria) of the Tender Document
  - iii) The tender was not sequentially paginated (from page 66, the next page is 69, then back to page 67 followed by pages 68 and 70; Page 208 is followed by page 210)

The Respondents further stated that the Evaluation Committee was guided by the provisions of Section 79 of the Act on the responsiveness of tenders.

The Committee relied on Section 79 (2) and (3) in resolving that serialization was not a major deviation that materially deviated from the requirements set out in the Tender Document and decided to consider the Applicant's and the Interested Party's tenders.

The Procuring Entity added that in addition to the lapses in serialization on the Applicant's part, the Evaluation Committee further resolved to consider the Applicant's tender yet the model sculpture submitted by the Applicant did not comply with the measurements set out in the Tender Document.

The Respondents denied the Applicant's contention that it stands to suffer prejudice if the subject tender is awarded to the Interested Party on the ground that the Applicant's tender price of Kenya Shillings Sixty Two Million, Six Hundred and Forty-Six Thousand and Two Hundred (Kshs. 62,646,200/=) was 40.8% above the Respondents budget of Kenya Shillings Forty Four Million and Five Hundred Thousand (Kshs. 44,500,000/=). The Respondents contended that in the event the Interested Party was not awarded the Tender, the Applicant would be eliminated for want of sufficient funds.

The evaluation of public procurement tenders should be undertaken under the criteria set out in the Tender Document. This is captured in Section 80(2) of the Act which 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.*** [Emphasis added]

Considering the provisions of Section 80(2) of the Act, it is incumbent upon the Board to establish if the Procuring Entity evaluated the Applicant's tender according to the criteria set out in the Tender Document.

The relevant criteria is set out under Item 17 under the heading "Qualification Form" under the Tender Document and it provides as follows

***"Serialization of Tender Document: All the pages of the bid document MUST be sequentially serialized in a single numerical format."***

The requirement on serialization is also set out in clause 13 of the Instruction to Tenderers which provides as follows:

***"Documents Comprising the Tender***

*13.1 The Tender shall comprise the following:*

- a) Form of Tender prepared in accordance with ITT 14;*
- b) Schedules including priced Bill of Quantities, completed in accordance with ITT 14 and ITT 16;*
- c) Tender Security or Tender-Securing Declaration, in accordance with ITT 21.1;*
- d) Alternative Tender, if permissible, in accordance with ITT 15;*

- e) *Authorization: written confirmation authorizing the signatory of the Tender to commit the Tenderer, in accordance with ITT 22.3;*
- f) *Qualifications: documentary evidence in accordance with ITT 19 establishing the Tenderer's qualifications to perform the Contract if its Tender is accepted;*
- g) *Conformity: a technical proposal in accordance with ITT 18;*
- h) *Any other document required in the TDS.*

13.2 *In addition to the requirements under ITT 11.1, Tenders submitted by a JV shall include a copy of the Joint Venture Agreement entered into by all members. Alternatively, a letter of intent to execute a Joint Venture Agreement in the event of a successful Tender shall be signed by all members and submitted with the Tender, together with a copy of the proposed Agreement. **The Tenderer shall chronologically serialize pages of all tender documents submitted.***

Item 8 of the Invitation to tender also set out the requirement on serialization of the Tender Document as follows:

***"The Tenderer shall Sequentially Serialize all pages of the tender documents submitted in a single format."***

The Board notes that the Respondent has not disputed that the Interested Party's tender was not serialized and have indeed confirmed that it was not serialized. The Board notes from the confidential documents that

nonconformity concerning serialization of the Interested Party's tender document was as follows:

- a. One original bundle of documents was fully paginated
- b. The second bundle of documents was not paginated at all save for pages 1-9.

The Procuring Entity asserted that the Applicant's tender did not also conform to the requirement on serialization. The Board has considered the confidential documents submitted by the Procuring Entity and has indeed noted that there are lapses on pagination as follows:

- a. Page 66 is followed by page 69, then back to page 67 then from page 68 it proceeds to page 70;
- b. Page 208 is followed by page 210 ; and
- c. The Sheets between pages 270 and 273 have double serialization (271 and 272).

The evaluation report did not set out the lapses in serialization of the Applicant's tender as identified above.

The evaluation report made the following remarks concerning pagination of tenders:

***"The committee noted that the three bidders did not paginate all the their bids which should have included all the attachments submitted"***

***Bidder 1- Submitted a 278 paged document and photos separately which were not paginated***

***Bidder 2 – submitted a 322 paged document and photos separately which were not paginated***

***Bidder 3- submitted two documents-(i) 151 paged document that included photos and (ii) the tender document that was not paginated***

***The Evaluation Committee deliberated on the issue and considered serialization as a minor deviation that does not affect the substance of the tender.***

***Note: 1.All the three bids were found to be responsive to all the mandatory requirements and thus proceeded for further evaluation (Technical evaluation) Table 6 (b)."***

The Board has confirmed from the confidential documents that the photos were indeed not paginated as set out in the evaluation report. Item 15 of the Qualification criteria set out in the Tender Document required tenderers to submit ***"Four (4) A3 clear picture of Front, Rear, Left and Right View of 'TIM' sculpture."*** As already noted above, the tender comprised of documentary evidence establishing the tenderers' qualifications. As such, the photos formed part of the tender and ought to have been paginated according to the requirements for the serialization of tenders.

From the foregoing, it is evident that all the three tenderers did not comply with the requirement for serialization of their tenders.

The Respondents contended that the lapses in serialization were excusable minor deviations that did not materially change the substance of the tender in line with Section 79 of the Act.

The question on non-conformity concerning serialization of tender documents was considered by Ogola J in the case of **Republic v Public Procurement Administrative Review Board; Ex-parte Accounting Officer, Kenya Ports Authority & another; FCM Travel Solutions t/a Charleston Travel Limited & 3 others (Interested Parties) [2021] eKLR (Ogola J.)** (hereinafter "**the KPA case**") in which he stated as follows:

***46. Section 74 (1)(i) of the Public Procurement and Asset Disposal Act provides as follows:-***

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

- (a) the name and address of the procuring entity;***
- (b) the tender number assigned to the procurement proceedings by the procuring entity;***
- (c) a brief description of the goods, works or services being procured including the time limit for delivery or completion;***

- (d) an explanation of how to obtain the tender documents, including the amount of any fee, if any;*
  - (e) an explanation of where and when tenders shall be submitted and where and when the tenders shall be opened;*
  - (f) a statement that those submitting tenders or their representatives may attend the opening of tenders;*
  - (g) applicable preferences and reservations pursuant to this Act;*
  - (h) a declaration that the tender is only open to those who meet the requirements for eligibility;*
  - (i) requirement of serialisation of pages by the bidder for each bid submitted; and*
  - (j) any other requirement as may be prescribed.*
- (2) All tender documents shall be sent out to eligible bidders by recorded delivery."*

***47. In Republic v Public Procurement Administrative Review Board; Nairobi City Water & Sewerage Company Limited & another (Interested Parties) Ex parte Four way Construction Company Limited [2019] eKLR the court observed that;***

***"The ordinary meaning of serialisation is to publish or present something in the form of a serial. The Concise Oxford English Dictionary defines a serial as "consisting of, forming part of, or taking place in a series" and further defines "to serialise" as "to arrange***

*in a series". A "series" is on the other hand defined as "a number of similar or related things coming one after another". Therefore the ordinary meaning and interpretation of serialization of pages is that each page must be arranged and presented in a manner that it is evident that a page is coming after another page.*

*48. The court went further to state;*

*"For a purposive interpretation of the provisions of the law regarding serialisation of the pages of bid documents, one needs to consider the principles and objectives underlying public procurement law, which are stipulated under both under the Constitution and the Act. Article 227(1) of the Constitution in this regard provides that 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. Section 3 of the Act provides for the guiding principles of public procurement as follows:*

*"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. affirmative action programmes provided for under Articles 55 and 56;*
- d. principles of integrity under the Leadership and Integrity Act, 2012 (No. 19 of 2012);*
- e. the principles of public finance under Article 201;*
- f. the values and principles of public service as provided for under Article 232;*
- g. principles governing the procurement profession, international norms;*
- h. maximisation of value for money;*
- i. promotion of local industry, sustainable development and protection of the environment;*
- and*
- j. promotion of citizen contractors.”*

**49. In light of the foregoing, it becomes apparent to this court that the aspect of serialisation of each and every page of a bid document aims to promote fairness, equal treatment, good governance, transparency, accountability and to do away with discrimination. Failure to conform to this mandatory requirement, and/or exempt or give an opportunity to those who had not earlier on conformed to this mandatory requirement**

*translates to unequal and unfair treatment of other tenderers and it shall also encourage abuse of power and disregard of the law by not only bidders but also procuring entities.*

*50. I therefore find that despite the fact that serialisation was not a mandatory requirement in the ex-parte applicants tender document, it is a mandatory requirement under section 74 of the PPAD Act of 2015 and all bidders ought to have fully complied.*

*51. Section 79 of the PPAD Act of 2015 gives instances where a responsive tender shall not be affected. The said section reads as follows:*

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

*(2) A responsive tender shall not be affected by—*

*(a) minor deviations that do not materially depart from the requirements set out in the tender documents; or*

*(b) errors or oversights that can be corrected without affecting the substance of the tender.*

*(3) A deviation described in subsection (2) (a) shall—*

*(a) be quantified to the extent possible; and*

***(b) be taken into account in the evaluation and comparison of tenders.***

***52. That failure to serialise each and every page of a tender document cannot translate to a minor deviation from the laid down principles set down in law as explained hereinabove. It is my finding that the decision by the respondent directing the ex-parte applicants' to re-admit non-responsive bids is in contravention with the provisions of section 74 and 79 of the PPAD Act of 2015 and thus ultra vires."***

The court in the KPA case held that serialization of tenders is a mandatory requirement which all tenders must comply with along with other requirements set out under Section 74(1) for them to be considered responsive. The court also noted that the failure to serialize is not a minor deviation under Section 79 of the Act.

Based on the foregoing, the Board concludes that the Respondents erred in considering the non-conformity concerning serialization to be an excusable minor deviation. Given that all the three tenderers did not comply with the requirements on serialization, their tendersought to have been disqualified for being unresponsive at the preliminary stage.

The Procuring Entity contends that they waived another alleged nonconformity on the Applicant's part on the dimensions of the model

sculpture submitted by the Applicant. The Respondents contended that the measurements did not comply with the provisions of the Tender Document. The Applicant avers through its further affidavit that the Tender Document prescribed minimum dimensions and not maximum. The Board indeed observes that the miniature replica sample submitted by the Applicant is indeed bigger than those of the other tenderers.

Item 15 of the Qualification under the Tender Document however, provides as follows:

***"Miniature Replica Sample –submission of miniature replica sample the material should...with minimum dimension of length 30cm width;12cm,(width ) at belly height:22cm"***

The Board agrees with the Applicant that this requirement set the minimum but not maximum dimensions. Nothing however turns on this issue noting the findings above that all tenderers ought to have been considered unresponsive and further given that this issue did not form the basis of the Applicant's disqualification.

***Issue II: What are the appropriate orders to grant in the circumstances?***

The upshot of the determination in the above issue for determination is that the Request for Review is allowed for the reasons set out above. Considering the finding that all the tenderers did not comply on the

requirement on serialization of tenderdocuments, the appropriate order to grant is to cancel the entire subject tender and direct the Procuring Entity to retender afresh. Each party will bear their own costs.

**FINAL ORDERS**

In exercise of the powers conferred upon it by Section 173 of the Act, the Board makes the following orders in the Request for Review dated 16<sup>th</sup> March 2022: -

- 1. The procurement proceedings of Tender NO. KWS/OT/BDM/29/2021-2022 for Designing, Building, Installation and Commissioning of a Bronze Elephant Sculpture "TIM" in Amboseli National Park be and are hereby cancelled/terminated in its entirety.**
- 2. The 1<sup>st</sup> Respondent is hereby ordered to retender the Tender for Designing, Building, Installation and Commissioning of a Bronze Elephant Sculpture "TIM" in Amboseli National Park.**
- 3. Each party shall bear its own costs in the Request for Review**

**Dated at Nairobi, this 6<sup>th</sup> day of April 2022**



.....  
**CHAIRPERSON**  
**PPARB**



.....  
**SECRETARY**  
**PPARB**