

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 31/2022 OF 19TH APRIL 2022

BETWEEN

**ENERGY METERS ASSEMBLERS &
MANUFACTURERS ASSOCIATION..... APPLICANT**

AND

**THE ACCOUNTING OFFICER/CEO,
KENYA POWER AND LIGHTING COMPANY PLC.....RESPONDENT**

Review against the decision of Kenya Power and Lighting Company PLC in respect to Tender No. KP1/9A.3/RT/05/21-22 for Supply & Delivery of Single Phase, Three Phase Postpaid & Prepaid Meters.

BOARD MEMBERS

- | | |
|----------------------------|--------------------|
| 1. Ms. Faith Waigwa | - Chairperson |
| 2. Mrs. Njeri Onyango | - Vice Chairperson |
| 3. Mr. Jackson Awele | - Member |
| 4. Qs. Hussein Were | - Member |
| 5. Arch. Steven Oundo, OGW | - Member |

IN ATTENDANCE

Mr. Stanley Miheso - Holding brief for Acting Board Secretary

BACKGROUND TO THE DECISION

The Tendering Process

Kenya Power & Lighting Company PLC (hereinafter referred to as the 'Procuring Entity'), relying on Section 102(1)(c) and (d) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act') and Regulation 89(8) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020'), notified interested prospective tenderers through an advertisement on its website (www.kplc.co.ke) on 14th March 2022, of its intention to procure single phase, three phase postpaid & prepaid large power & ordinary smart meters through restricted tender to a few-known suppliers and that the tender document for the said procurement would be published on 14th March 2022 to a limited number of prospective tenderers. Further, the Procuring Entity invited interested prospective tenderers who wanted to participate in the said procurement to obtain further information from VSimiyu@kplc.co.ke, PMuchori@kplc.co.ke or procurement@kplc.co.ke.

Following expression of interest by thirty-three (33) prospective tenderers, the Procuring Entity forwarded, to the said limited number of prospective tenderers who had shown interest and felt they had the capacity to participate in the said procurement, the tender document (hereinafter referred to as the 'Tender Document') for Tender No. KP1/9A.3/RT/05/21-22 for Supply & Delivery of Single Phase, Three Phase Postpaid & Prepaid Meters (hereinafter referred to as the 'subject tender') inviting the said thirty-three (33) prospective tenderers by way of Restricted Tendering method to submit their respective completed

tenders in electronic format on the Procuring Entity's (Central Office) e-procurement portal on or before 26th April 2022 at 10:00am (East African Time).

The thirty-three (33) prospective tenderers invited by the Procuring Entity to tender for the subject tender by way of Restricted Tendering included eleven (11) Kenyan firms but the Applicant was not one of the eleven (11) Kenyan firms. The said thirty-three (33) prospective tenderers invited by the Procuring Entity to tender for the subject tender were:

No.	Bidder's No.	Location
1.	Itron	South Africa
2.	Landis &Gyr	Europe
3.	Scheider Electric (K) Ltd	Europe
4.	Holley Metering Ltd	China
5.	Jiangsu Linyang Electronics Co. Ltd	China
6.	Wasion Group Ltd	China
7.	Ningbo Sanxin Electric Ltd	China
8.	Sagemcom SAS	Europe
9.	Kamstrup	Europe
10.	Hexing Electrical Co. Ltd	China
11.	Nuriflex	South Korea
12.	Shenzhen Star (China)	China
13.	Shenzhen Star (Kenya)	Kenya
14.	Inhemeter Africa Co. Ltd	Kenya
15.	Inhemeter Co. Ltd	China

16.	Smart Meter Technology Ltd	Kenya
17.	Magnate Ventures	Kenya
18.	EDMI	Singapore
19.	Elsewedy	Egypt
20.	Amotech East Africa Ltd	Kenya
21.	Tomag Enterprises Ltd	Kenya
22.	Gridspertise	Av. De Vilanova,12, 08018 Barcelona
23.	ZTE Corporation	China
24.	Ningbo Sangxing Medical & Electric	China
25.	Zuriel Ultimate Ventures	Kenya
26.	Focus Group	Kenya
27.	Alpha Systems Ltd	Kenya
28.	Propower Ltd	Kenya
29.	Elsewedy electric	Egypt
30.	ElsewedySedco	Egypt
31.	Iskraemeco	Egypt
32.	Tier Data Ltd	Kenya
33.	Elsewedy Electrometer Egypt	Egypt

Addendums

The Procuring Entity issued Addendum No. 1 dated 5th April 2022 (hereinafter referred to as the 'Addendum') amending several provisions of the Tender Document and clarifying queries received from prospective tenderers while extending the tender submission deadline to 3rd May 2022.

The Addendum introduced an online pre-bid meeting which was held on the 7th April 2022 and a further extension on the tender submission deadline to 10th May 2022 was made.

REQUEST FOR REVIEW

Energy Meters Assemblers & Manufacturers Association, the Applicant herein, lodged a Request for Review dated 8th April 2022 and filed on 19th April 2022 together with a Supporting Affidavit sworn on 8th April 2022 by William Gathecha Kabinga, a secretary of the Applicant, through the firm of Koceyo & Company Advocates seeking the following orders: -

- 1) The Respondent Tender No. KP1/9A.3/RT/05/21-22 FOR SUPPLY & DELIVERY OF SINGLE PHASE, THREE PHASE POSTPAID AND PREPAID METERS be quashed and/or tender clauses which has the effect of excluding the members of the Applicants from participating in the Tender be quashed.***
- 2) The Respondent be directed to restrict the tender No. KP1/9A.3/RT/05/21-22 FOR SUPPLY & DELIVERY OF SINGLE PHASE, THREE PHASE POSTPAID AND PREPAID METERS and/or advertise another Tender restricted to local Manufacturers and Assemblers as previously done upon removal of offending Clauses.***

In a Notification of Appeal and a letter dated 19th April 2022, the Acting Board Secretary of the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') notified the Respondent 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 24th March 2020, detailing administrative and contingency measures to mitigate the spread of Covid-19. Further, the Respondent was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within 5 days from 19th April 2022.

On 26th April 2022, the Respondent filed a Response to the Request for Review dated 22nd April 2022 through the Procuring Entity's inhouse counsel, Irene Walala, Advocate. Further, the Respondent submitted to the Board confidential information and documents with respect to the subject tender pursuant to Section 67(3)(e) of the Act.

Vide letters dated 26th April 2022, the Acting Board Secretary notified all the thirty-three (33) prospective tenderers in the subject tender, via their respective email addresses as provided by the Respondents, of the existence of the Request for Review while forwarding to the said prospective tenderers a copy of the Request for Review together with the Board's Circular No.02/2020 dated 24th March 2020. Further, all tenderers were invited to submit to the Board any information and arguments on the subject tender within 3 days from 26th April 2022.

Pursuant to the Board's Circular No.2/2020 dated 24th March 2020, the Board dispensed with physical hearings and directed all requests for

review applications be canvassed by way of written submissions. Clause 1 on page 2 of the said Circular directed that pleadings and documents would be deemed properly filed if they bore the Board's official stamp.

On 4th May 2022, the Respondent filed his Written Submission dated 28th April 2022 and on 5th May 2022, the Applicant filed its Written Submissions dated 4th May 2022. However, on 6th May 2022, the Respondent filed an Amended Written Submissions dated 5th May 2022.

THE APPLICANT'S CASE

The Applicant avers that it is a duly registered association comprising local Energy Meters Assemblers and Manufacturers who have since 2015 been the suppliers of energy meters to the Respondent through competitive tendering process over the years and that it is not in the business of, nor does it supply or generate power and has never signed any Power Purchase Agreement with the Respondent.

The Applicant is challenging certain provisions of the Tender Document alleging that they are unreasonable conditions which amount to discriminating tendering process to an exclusive international procurement model for the power distribution products as listed in the Respondent's Tender Invitation. According to the Applicant, the essence of the Tender Document and conditions is to edge out local manufacturers and assemblers, who have previously supplied the Respondent with energy meters, the subject of the tender, in favour of foreign international companies without just cause, reasonableness and

in breach of the Constitution of Kenya 2010 (hereinafter referred to as the 'Constitution'), the Act, Regulations 2020, the Kenya Government Strategy Policy on Buy Kenyan Build Kenya, Kenya Government Big 4 Agenda and the Respondent's own representations made to the Applicant.

The Applicant avers that the Respondent issued two separate press releases on 30th March 2015 and 28th April 2015, urging local investors to manufacture electrical materials while relaying the Respondent's strong desire to have manufacturers investing locally to cut on long lead times, notifying investors willing to set up manufacturing plants in Kenya that they stand to gain significantly in support of the Government's 'buy Kenyan build Kenya' plan and urging local manufacturers to participate in the supply of materials for the implementation of the multi-billion Last Mile Connectivity project.

The Applicant avers that on the representation made by the Respondent to the Applicant in respect to promotion of local manufacturing sector, members of the Applicant set out to establish manufacturing plants, machinery and equipment meeting the required certifications of the Respondent as well as the Kenya Bureau of Standards (hereinafter referred to as 'KEBS') Diamond mark of Quality for local manufactured and assembled goods and that the Applicant's members trained and employed highly skilled and qualified staff to run and manage the Plants.

According to the Applicant, the Respondent's previous tenders for supply of energy meters of 2017 and 2020, including the current running

tender, were competitively advertised and awarded to the Applicant's members and as a result, besides the Respondents getting quality energy meters at competitive rates, the Applicants manufacturing business immensely contributed to the manufacturing growth and employment opportunities in the Republic of Kenya in line with the Kenya Government Policy of promoting local manufacturing.

The Applicant avers that to ameliorate the high cost of power, the Government of Kenya established a Taskforce to undertake a comprehensive review and analysis of the terms of all power purchase agreements entered into by the Procuring Entity. However, the Applicant alleges that without being afforded an opportunity to be heard, the Taskforce recommended that the Procuring Entity designates specific goods of a high value/critical to sustainable service (e.g. transformers, sub-station equipment, meters, cables) to be procured from Original Equipment Manufacturers (OEMs) only and not assemblers. According to the Applicant, the effect of this recommendation, though out of context with the entire report and without any basis being laid down for it, was to roll back and defeat the earlier gains made in compliance with the Constitution, the Act, Regulations 2020, the Kenya Government Strategy Policy on Buy Kenya Build Kenya, Kenya Government Big 4 Agenda and the Respondent's own representations and was meant to exclude all the local assemblers and manufacturers in favour of foreign multinational companies yet the Applicant's quality of energy meters supplied have been satisfactory and competitively priced without any recorded nor implied complaints from the Respondent.

The Applicant alleges that the Respondent in a hurried manner to implement the Taskforce Report out of context and to achieve ulterior motives inserted conditions in the Tender Document whose net effect was to disqualify the members of the Applicant from participating in the subject tender and that the conditions in the Tender Document whose specifications were geared to lock out the members of the Applicant are as follows:

- (i) *Condition 8.2.1 **KP1/6C/4/1/TSP/14/011-2, KP1/13D/4/1/TSP/14/011-4 and KP1/13D/4/1/TSP/14/011-6** which requires a Minimum of 15 years technical specifications experience in manufacture of energy meter and which condition is unreasonable, impractical, discriminatory and meant to stifle and unfairly deny the members of the applicant the opportunity to participate in the tender because: (a) Almost all the meters used in Africa continent are using IEC standard, but some of the IEC standards doesn't even last for more than 10 years; (b) The Respondent has no known specific standard it can refer to indicate that 15 years' metering manufacturer experience is much more reliable than 5 or 10 years' experience; (c) As per Tender conditions, all specifications will be renewed in every 5 years and therefore, 15 years' experience doesn't form the basis of technical evaluation; and (d) As no Kenyan local meter manufacturers have lasted for 15 years because they only commenced their production 7 years ago upon representations from the Respondent. The condition*

is typically manipulated by certain entity to lock local manufacturers out.

- (ii) Condition 8.2.2 **KP1/6C/4/1/TSP/14/011-2, KP1/13D/4/1/TSP/14/011-4 and KP1/13D/4/1/TSP/14/011-6** which requires *The meters on offer shall have been in service and given reliable service for a minimum period of 8 years in at least two power utilities in at least 3 of the following continents/regions: a) Europe b) North America c) Africa d) Asia or South America e) Oceania(Australia). This condition is unreasonable, impractical, discriminatory and meant to stifle and unfairly deny the members of the applicant the opportunity to participate in the tender because: (a) DIN Rail Meters are mostly used in Africa, Europe and part of America Markets, majority of the America and Australia markets are using ANSI meters, hence this requirement would be impractical for all local manufacturers to meet (b) As meter performance is always the major concern of all utilities, and for KPLC, no better case serves them better than their own site meters operation condition. The Applicant is apprehensive this requirement is manipulated by certain entity to fight against local manufacturer as it doesn't emphasize on local supply record and local manufacturers can't supply to any other countries out of Kenya, (c) This requirement might pave the way for other manufacturers to supply to KPLC while their products have never been tested in Kenya. Possible high failure meter*

rates might occur and it would damage the interests of both KPLC and Kenyan people, which violates the prudent use of public funds as required by the Constitution.

(i) Condition *KP1/6C/4/1/TSP/14/011-2 (4.2.1.13)*

KP1/13D/4/1/TSP/14/011-4 (4.2.1.27)

KP1/13D/4/1/TSP/14/011-6 (4.2.1.26)

Which requires that the meter shall have a non-volatile memory capable of data storage and with long-term retention period of not less than 10 years or for the certified life of the meter or whichever is greater without an electrical supply being supplied to the meter. Further, the manufacturer shall provide Meter Accelerated Life Test(ALT) report (Life Expectancy test) report from a recognized ISO/IEC 17025 laboratory as per IEC 62059-31-1. This condition is unreasonable, impractical, discriminatory and meant to stifle and unfairly deny the members of the applicant the opportunity to participate in the tender because:(a) Meter Accelerated Life Test (ALT) report from recognized laboratories KEMA,NMi,UL is commonly used to identify the meter life duration while Reliability Prediction Report from SICEM can achieve the same function; (b) ALT test report normally requires at least half year to be issued as this specification is new and the products KPLC required are also brand new design, it's quite impossible for local manufacturers to get latest ALT report within bidding time to satisfy their needs. This requirement only favors those other manufacturers who already have them and it's highly possible that the specification is made by them; (c)If this

requirement is made for the great good of KPLC, enough time should be left for the members of the Applicant to prepare the ALT test report. As per the tender condition indicates now, the Applicant strongly believe the terms are manipulated to favor special group of manufacturers and possible corruption might be involved to violate the procurement laws and damage KPLC's overall interests.

The Applicant alleges that the decision by the Respondent to exclude the members of the Applicants from participating in the subject tender through imposition of discriminatory and unreasonable conditions is unconstitutional, illegal, unreasonable, irrational and driven by ulterior motives other than what the law provides and ought to be quashed by the Board because they violate (a) Article 10, 27, 227 of the Constitution on national values and principles on promoting local manufacturing (b) Section 3 (i) and (j) of the Act on promotion of local industry, sustainable development and protection of the environment and promotion of citizen contractors, (c) Sections 155 and 157 of the Act on preferential treatment on articles manufactured and materials and supplies wholly mined and produced in Kenya as well as manufactured articles materials and supplies also partially mined or produced in Kenya and where applicable have been assembled in Kenya (d) Section 155(5) of the Act, Regulations 143 and 144 (4) of Regulations 2020 for failure to prepare a report detailing the Respondent's inability to give preferences to the local manufactures and failure to obtain a waiver of the same by the National Treasury as is required by Regulations 2020. According to the Applicant, the Respondent's

Tender Document is therefore illegal, in violation of the law, irrational, null and void and ought to be quashed to protect the sanctity of the Laws of Kenya and Energy Act on local content.

Further, the Applicant alleges that it brought these violations and breaches to the attention of the Respondent who in violation of Article 47 of the Constitution and Section 4 and 5 of the Fair Administrative Action Act declined to respond to the concerns raised by the Applicant, particularly;- (a) the meaning of the word manufacturer as captured in its tender bearing in mind that the local players are assemblers who fall under the ambit and definition of Section 155 (3) (a) of the Act; (b) whether it has done a report detailing evidence of inability to locally procure the products as stated in the Tender Document noting that it never invited members of the Applicant on discussions on their ability to deliver; and (c) whether exclusive preference has been given to the local players noting that there is no indication that the funding is not 100% from national or county government or a Kenyan body.

The Applicant alleges that the actions of the Respondent will inevitably lead to loss and damages to the Applicant's factories and manufacturing plants, loss of employment and flooding of the local market with imported goods which are readily manufactured and assembled locally against the national principles and values in promotion of local manufacturing, Agenda 4 and Buy Kenyan Build Kenya principles.

In support of its arguments, the Applicant cited and relied on the case of **(a) Kenya Ports Authority & Another v Rhombus Construction Company Limited, Judicial Review Application Number E017 of 2021**, where the High Court upheld the decision of the Board on issues of discrimination in a tender document, **(b) Republic Procurement Administrative Review Board & 2 Others Ex Parte Niavana Agencies Limited; M/S Five Blocks Enterprises Ltd (Interested Party) [2021] eKLR** where the High Court explained the rationale for preferences and reservations and **(c) Republic v Public Procurement Administrative Review Board Ex-parte The Kenya Power & Lighting Company Limited, Miscellaneous Civil Application Number 36 of 2020** where the high Court pronounced itself on procurement complying with the Constitution and applicable law.

The Applicant finally avers that this Board is clothed with jurisdiction to hear and determine the instant Request for Review and that the Respondent has misapprehended the Request for Review because the Applicant is not arguing on the method of procurement but on the terms and conditions of the Tender Document that expressly lock out local manufacturers and the Applicant is not arguing on the method of procurement used, but rather on the terms and conditions in the Respondent's tender decision that purports to lock out local manufacturers.

RESPONDENT'S RESPONSE

The Respondent avers that it is a government agency and its operations are in the energy sector with its main mandate being, building and maintaining the power distribution and transmission network and retailing of electricity to its customers.

The Respondent contends that the subject tender arises from an intention to procure through limited tender which intention indicated that the Procuring Entity intended to procure the subject tender through Restricted Tender to few known suppliers and that following the expression of interest of thirty-three (33) prospective tenderers, the Procuring Entity forwarded the Tender Document to the said limited number of tenderers who had showed interest and felt they had the capacity to participate. The said prospective tenderers included both local and international firms.

According to the Respondent, the intention to procure sought to attract interest from prospective tenderers who were distinguished as top meter manufacturers (Tier 1) based on different surveys in the Market on the following areas;(a) the top manufacturers in each region (of the world), (b) total installed meters in the world since 1900 and the manufacturers of the meters, (c) life expectancy of meters – worldwide trend- (Meter failures), (d) Smart Meter Demand, New and Replacement in various countries and (e) forecasted demand of meters/ Meter demand cycles.

The Respondent issued an Addendum amending Tender Document and held a virtual pre-bid meeting with the invited prospective tenderers and/or their respective representatives on 7th April 2022to address

questions raised by prospective tenderers in reference to the Addendum and that the intention to procure together with the Tender Document set out the procurement method as Restricted Tendering.

In response to the instant Request for Review, the Respondent denies breaching Article 10, 27, 47 and 227 of the Constitution of Kenya, Sections 3(i) and (j), 155, 157 of the Act, Regulations 143 and 144 of Regulations 2020, Energy Act 2019 or Section 4 and 5 of the Fair Administrative Action Act as alleged or at all.

The Respondent contends that the procurement method applied was in accordance with Section 91 of the Act that allows the Procuring Entity to use any procurement procedure subject to fulfillment of the conditions set out in the Act for application of such procedure and that the subject tender was limited in accordance with Section 102 (c) & (d) of the Act, which provides for Restricted Tender method.

The Respondent contends that Section 157 (1) of the Act, provides for candidates to participate in procurement proceedings without discrimination except where participation is limited in accordance with this Act and Regulations 2020 and that Regulation 143 of Regulations 2020 stipulates that pursuant to Article 227(2) of the Constitution and Sections 155 and 157 of the Act, candidates should participate in the procurement proceedings without discrimination except where participation is limited in accordance with the Constitution, the Act and Regulations 2020.

The Respondent contends that (a) there are no offending clauses in the Tender Document as alleged; (b) Section 60(3)(a) of the Act requires that technical requirements shall conform to design, specification, functionality and performance; (c) Section 60(3)(b) of the Act requires that technical requirements in the Tender Document shall be based on national or international standards whichever is superior; (d) that the Applicant's members do not have exclusive rights for the supply of meters to the Procuring Entity; (e) that the Procuring Entity is committed to providing its customers with quality for energy sustainability as well as making the most economically viable decisions for the growth of its own business; and (f) the Respondent has not failed to promote the national values and principles and the local industry.

The Respondent denies (a) that the Tender Document has unreasonable, impractical with discriminatory criteria meant to deny the members of the Applicant opportunity to participate in the subject tender as alleged or at all (b) that the requirement for minimum of 15 years of technical specifications experience in manufacture of energy meters is unreasonable, impractical, discriminatory and not feasible for the Applicant's members (c) that the requirement for meters on offer to have been in service and given reliable service for a minimum period of 8 years in at least two power utilities in at least three of the following continents /regions i.e. Europe, North America, Africa, Asia or South America and Oceania is unreasonable, impractical, discriminatory and meant to unfairly deny the Applicant's members opportunity to participate in the tender since DIN Rail Meters are mostly used in Africa,

Europe and part of American markets and majority of America and Australia markets are using ANSI meters hence the requirement will be impractical for all local manufacturers to meet (d) that the requirement that meters shall have a non-volatile memory capable of data storage and with long-term retention period of not less than 10 years for the certified life of the meter or whichever is greater without an electrical supply being supplied to the meter and further, that the manufacture shall provide Meter Accelerated Life Test (ALT) report (Life Expectancy Test) report from a recognized ISO/IEC 17025 laboratory as per IEC 62059-31-1 was unreasonable, impractical, discriminatory and meant to unfairly deny the Applicant's members the opportunity to participate in the subject tender (e) that the criteria in the Tender Document was couched with the intention to lock out the Applicant's members and (f) that the Applicant will suffer any loss and damage as alleged or at all.

The Respondent further contends that (a) that the choice of procurement method as allowed by the Act satisfies the conditions under the Act for use of the Restricted tendering method, (b) the request by the Applicant seeks to delve into the choice of procurement method which is not a mandate of the Board as provided in Section 167 (4)(a) of the Act (c) the procurement process is fair and transparent (d) the Tender Document is fair and promotes competition.

Consequently, the Respondent contends that the instant Request for Review is bad in law, is improperly before the Board and shall raise a preliminary objection on the competence of this Request for Review on ground that the Board lacks jurisdiction to entertain the Request for

Review by virtue of the provisions of Section 167(4)(a) of the Act and that the Applicant's claim is defective before this Board, as they raise issues on the subject procurement method which is within the purview of the Procuring Entity and therefore, the Board should down its tools by dismissing the instant Request for Review with costs as it lacks the jurisdiction to entertain it.

The Respondent contends that the use of Restricted Tendering is based on the desire to reduce meter failures in single phase and three phase prepaid, so as to meet the Procuring Entity's customer needs on connectivity and that Tier 1(one) companies are generally the largest or the most technically-capable companies in the supply chain who have the skills and resources to supply the critical components that OEMs (original equipment manufacturer) need and they have established processes for managing suppliers in the tiers below them and in this case being those Tier 1(one) companies who are also STS certified.

Further, the Respondent contends that the justification to onboard international players and expand the specifications criteria is tied to the high failure rate of the meters supplied by the applicants' members and the Procuring Entity's internal policy which guides the Procuring Entity to attain best value from best suppliers. The Respondent further contends that, to keep abreast of progress in the industry, the Procuring Entity's Standards on meters are regularly reviewed and the Applicant cannot purport to rely on the standards of equipment required over 7 years ago and that the Procuring Entity's prepaid system is based on the STS certification.

In response to paragraph 14 of the Request for Review, the Respondent asserts that the contested clauses 8.2.1 & 8.2.2 were introduced to address the high rate of meter failures supplied by the Applicant's members and that the associated costs for meter failures on average for the last three years amount to over Kshs. 23,000,000 which leads to minting the tax payer's hard earned money in replacing the defective meters. The Respondent further contends that the Addendum, indicated that noting this was a restricted Tender, foreign Tenderers must complete a form to demonstrated the quotation fulfils the conditions of Local Labour, Sub-contracts from Local Sources, Local materials, use of Local Plant and Equipment and invited foreign tenderers to indicate how to fulfill the 40% local content rules to make sure they are successful participants.

The Respondent asserts that any media representations which may have allegedly been made by the Procuring Entity were made in good faith and were not intended to act as prejudicial obstacles to the legally laid down rules of public procurement process and were merely communication of the Procuring Entity's intention to support various government initiatives that promote local manufacturing and not an offer to enter into a legally binding contractual relationship with the Applicant.

The Respondent contends that the Applicant's accusation of the Procuring Entity using the Taskforce report to disqualify the Applicants members from participating in the tendering process are baseless, ridiculous, desperate attempts and hallucinations created to overstep the

legally laid out procurement procedures as the Taskforce Report has no bearing on the Tender Document.

The Respondent contends that the procurement method for the subject tender excludes the Request for Review under Section 167 (4) (a) effectively ousting the jurisdiction of this Honorable Board thus objects to the jurisdiction of the Honorable Board and prays that the Board down its tools by dismissing the instant Request for Review with costs as it lacks the jurisdiction to entertain and issues a notice that at the earliest opportunity it shall on the grounds stated hereinbefore object to the propriety of the Request for Review as filed against it.

In its Amended Written Submission, the Respondent contends that the Applicant has no *locus* to file the instant Request for Review because it is neither a candidate nor a tenderer in the subject tender as required under Section 167(1) of the Act and that there is no evidence of the instant Request for Review being accompanied by refundable deposit being 15% of the cost of the contract in accordance with Section 167(2) of the Act.

The Respondent prays for the dismissal of the Request for Review, a declaration that the Respondent progresses with the tender process and for costs of the review be awarded to the it.

BOARD'S DECISION

The Board has considered each of the parties' case, pleadings, documents, written submissions and confidential documents submitted

to the Board pursuant to Section 67 (3) (e) of the Act and finds that the following issues crystallize for determination: -

I. Whether the Board has jurisdiction to entertain the Request for Review filed by the Applicant challenging the provisions of the Tender Document with respect to the subject tender.

In order to address the first issue, the Board shall make a determination of the following sub-issues:-

a) Whether the Applicant has the requisite locus standi to approach this Board by dint of Section 167 (1) of the Act read with section 2 of the Act.

Depending on the determination of sub-issue (a) above:-

b) Whether the Request for Review was filed within the statutory period of 14 days after the alleged breach;

Depending on the determination of sub-issue (b) above:-

c) Whether the Request for Review required to be accompanied by a refundable deposit being 15% of the cost of the contract as provided for in Section 167 (2) of the Act;

Depending on the determination of sub-issue (c) above:-

d) Whether the Request for Review requires this Board to review the Procuring Entity's choice of procurement method thereby ousting the jurisdiction of this Board by dint of Section 167 (4) (a) of the Act;

Depending on the determination of the sub-issue (d) above:-

II. Whether the provisions of the Tender Document as outlined by the Applicant violate the provisions of the Constitution, the Act, and Regulations 2020.

We have carefully studied the Intention to Procure the subject tender through restricted tender and the Tender Document submitted to us as part of confidential documents by the Respondents pursuant to Section 67(3)(e) of the Act and note that the Respondent used restricted tendering method for the subject tender in accordance with Section 102(1)(c) and (d) of the Act read with Regulation 89(8) of Regulations 2020 by inviting thirty-three (33) prospective tenderers to tender for the subject tender and which thirty-three (33) prospective tenderers had expressed interest to tender for the subject tender pursuant to an intention to tender issued by Procuring Entity. It is these thirty-three (33) prospective tenderers who were invited to tender and issued with the Tender Document by the Respondent. With this in mind, we now proceed to address the issues framed for determination.

Whether the Applicant has the requisite locus standi to approach this Board by dint of section 167 (1) of the Act read with section 2 of the Act.

In its Amended Written Submissions, the Respondent contends that the Applicant having described itself as a duly registered Society was neither a candidate nor a tenderer in the subject tender's procurement thus lacked the *locus standi* to file the instant Request for Review. What this means is that the Respondent is challenging the Applicant's standing before the Board. We note the Applicant did not respond to this contention by the Respondent and the same remains uncontroverted.

We note that a question of whether or not the Applicant has the requisite *locus standi* to approach the Board as a candidate is a jurisdictional issue since it is not just any and every person that may move the Board or invoke the jurisdiction of the Board by way of a Request for Review under Section 167 (1) of the Act.

The Court in **Petition No. 237 of 2018, Philip Nyandieka (Suing on his own behalf and on behalf of the general public) v. National Government CDF- Bomachoge Borabu constituency [2019] eKLR** while considering the meaning of a "candidate" (and tenderer) under Section 2 of the Act had this to say:-

"Section 2 of the Act defines a "candidate" as "a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity". The said section defines a "tenderer" to mean "a

person who submitted a tender pursuant to an invitation by a public entity”.

This Court notes that the above provisions of the Act are restrictive on the persons who may approach the Board in the event of dissatisfaction with the tendering process and cannot overlook the disadvantage faced by the petitioner in as far as seeking a remedy before the said Board is concerned considering the fact that Section 167 (1) of the Act more or less closes the door to persons who do not fall within the meaning of a candidate and/or tenderer.

[Emphasis by the Board]

From the foregoing case, it is important for us to determine whether the Applicant satisfied the requirement of Section 167 (1) read together with Section 2 of the Act regarding persons who may approach this Board. The same being a jurisdictional issue affects the question whether or not the Board can entertain the substantive Request for Review; hence a determination on the Applicant’s standing before the Board ought to be made at the earliest opportune moment.

It is trite law that courts and decision making bodies can only act in cases where they have jurisdiction. In the Court of Appeal case of **The Owners of Motor Vessel “Lillian S” vs. Caltex Oil Kenya Limited (1989) KLR 1**, it was stated that jurisdiction is everything and without it, a court or any *other decision making body* has no power to make one more step the moment it holds that it has no jurisdiction.

Similarly, in the case of **Kakuta Maimai Hamisi vs. Peris Pesi Tobiko & 2 Others (2013) eKLR** the Court of Appeal emphasized on the centrality of the issue of jurisdiction and stated thus:-

"So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. "

The Supreme Court in the case of **Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Ltd and 2 Others, Civil Application No. 2 of 2011** pronounced itself regarding where the jurisdiction of a court or any other decision making body flows from. It held as follows:-

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with Counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings."

In Court of Appeal sitting at Kisumu in **Civil Application No.68 of 2020 Isaak v Samuel Kisiavuki [2021] eKLR**, Lady Justice

Nambuye held as follows on jurisdiction while citing **Nyarangi J.A. in owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ld [1989] eKLR:**

"Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.:

By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics.

Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given"

In light of the above exposition, I wish to reiterate that the position in law is therefore that a jurisdictional issue is a fundamental issue whether it is raised either by parties themselves or the Court suo motu, it has to be addressed first

before delving into the interrogation of the merits of issues that may be in controversy in a matter.”

The decision of the Supreme Court in *Samuel Kamau Macharia Case* is very critical in determining where the jurisdiction of this Board flows from. Our attention is drawn to Section 167 (1) of the Act which states as follows:-

“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.”

On the other hand, Section 2 of the Act provides that:-

***“Candidate” means a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity”* [Emphasis by the Board]**

The question whether or not the Applicant was a candidate in the subject tender’s procurement proceedings, rests solely on the interpretation of the term “candidate” under Section 2 of the Act. According to that provision, for one to be a candidate, such a person must have obtained a tender document from a public entity pursuant to an invitation notice by a procuring entity.

The Board observes that Parliament deemed it fit to specify that an invitation notice must be issued by a Procuring Entity meaning, a procuring entity desiring to procure goods and/or services would be the one placing an invitation notice. Secondly, the legislature used the words "pursuant to", which according to Black's Law Dictionary, 7th Edition means:-

"a term meaning to conform to something or something that is done in consequence of"

The Collins English Dictionary, 8th Edition defines the term "pursuant to" to mean:-

"In accordance with"

This therefore means that a candidate is a person who has obtained a tender document from a public entity in accordance with an invitation notice by a procuring entity.

Turning to the circumstances of the instant review, we have had sight of the Intention to procure the subject tender through restricted tender to few known suppliers by the Procuring Entity and note that the same was advertised on the Procuring Entity's website (www.kplc.co.ke) on 14th March 2022 in line with Regulation 89(8) of Regulations 2020. The said Intention to Procure indicated that Tender Documents would be published to a limited number of prospective tenderers and that prospective tenderers wanting to participate in the subject tender could obtain further information from the Procuring Entity. In essence, it was

clear from this Intention to Procure that the Procuring Entity was not going to issue the Tender Document to all and sundry but to few-known suppliers and/or a limited number of prospective tenderers.

The Intention to Procure through restricted tender reads as follows in part:-

"INTENTION TO PROCURE THROUGH LIMITED TENDER

The Kenya Power & Lighting Company PLC intends to procure the following through Restricted Tender to few-known suppliers.

.....

The tender document shall be published on Monday 14.03.2022 to a limited number of bidders.

Bidders interested and may want to participate can obtain further information from VSimiyu@kplc.co.ke, PMuchori@kplc.co.ke or procurement@kplc.co.ke.

This notice is issued in compliance to section 102(1)(c) and (d) of the Public Procurement and Asset Disposal Act, 2015 and Regulation 89(8) of Public Procurement and Asset Disposal Regulations 2020.

....."

Indeed, from a perusal of the confidential documents submitted to the Board by the Respondent pursuant to Section 67(3) (e) of the Act, we note that the Procuring Entity issued the Tender Document to and invited only thirty-three (33) prospective tenderers to tender for the subject tender. We have hereinbefore outlined the said thirty-three (33) prospective tenderers and which prospective tenderers had expressed interest to participate in the subject tender following the publication of the Intention to procure through restricted tender by the Procuring Entity.

We note that the Applicant was not one of the thirty-three (33) prospective tenderers who had expressed interest in participating in the subject tender and therefore the Procurement Entity did not issue the Applicant with the Tender Document nor did the Procurement Entity invite the Applicant to tender in the subject tender.

In the instant review, it is the Board's considered view that a candidate was a person who had expressed interest to participate in the subject tender following an Intention to Procure through restricted tender by the Procuring Entity and had subsequently been issued with the Tender Document by the Procuring Entity and invited to tender in the subject tender by the Procuring Entity. In essence, for one to be a candidate in the subject tender, being a restricted tender to known suppliers and/or to a limited number of prospective tenderers, such a candidate ought to at least have obtained the Tender Document from and have been invited to tender in the subject tender by the Procuring Entity.

This Board already established that the import of the word "pursuant to" as used in the definition of a candidate under Section 2 of the Act means that "a candidate obtains a tender document in accordance with the procedure provided by a procuring entity for obtaining such tender documents".

In essence, Section 2 of the Act cured the mischief whereby a person would obtain a tender document from somewhere else or from someone else, other than the procuring entity that issued the said tender document or such person would obtain the tender document from a procuring entity without following the procedure provided for obtaining the tender document.

We note that the Applicant described itself as a registered association comprising local Energy Meters Assemblers and Manufacturers and would like to distinguish the instant review from our decision in **PPARB Application No. 1 of 2020, Energy Sector Contractors Association v. Kenya Power & Lighting Company Limited & Another** (hereinafter referred to as "the KPLC Case") on our finding of who a candidate is when we held as follows:-

"From the above decisions, the Board notes that the Courts were alive to the fact that it is only candidates (persons who have obtained a procuring entity's tender document) and tenderers (persons who participate in the tendering process) that may approach this Board. From the definition provided in section 2 of the Act, for one to

be a candidate in a procurement proceeding or asset being disposed, what that person has to do is to obtain the tender documents from a public entity pursuant to an invitation notice by a procuring entity.

The Procuring Entity in this instance provided two methods that any person could have used to obtain the tender document, and the Applicant chose to exercise one of the two, that is, to download a copy of the Bidding Document applicable to the subject tender from the Procuring Entity's Official Website.

In all the scenarios cited by the Procuring Entity, the Board observes that none of them affect the jurisdiction of the Board to hear and determine an application before it where the Applicant has demonstrated it was a candidate in procurement proceedings initiated under the Act. The Applicant herein filed a copy of the Bidding Document and upon perusal, the same is a copy of the Bidding Document issued by the Procuring Entity in so far as the subject procurement process is concerned.

Accordingly, the Board finds that the Applicant has the locus standi as a candidate to file a Request for Review before this Board as required under section 167 (1) of the Act read together with section 2 of the Act."

It is worth noting that the circumstances in the KPLC Case differ from the circumstances of the instant review, in the sense that, the instructions given by the procuring entity in the KPLC Case was for tenderers to merely download the tender document or obtain a physical copy from the procuring entity's office and the tender, the subject of the KPLC's case, was made through open tender. No other procedure was given as a pre-condition to downloading the tender document or obtaining a physical copy of the same.

However, in the instant review, the Board has established that the instructions given by the Procuring Entity in the Intention to Procure through restricted tender is for prospective tenderers who may want to participate in the subject tender to seek further information from VSimiyu@kplc.co.ke, PMuchori@kplc.co.ke or procurement@kplc.co.ke and that the Tender Document was to be forwarded to a limited number of prospective tenderers by the Procuring Entity.

In **PPARB Application No. 30 of 2016, Achelis Material Handling Limited v. County Government of Kitui (hereinafter referred to as the County Government of Kitui's case)** the Board explained the meaning and import of the term "candidate" under Section 2 of the Act when it held as follows:-

"The law is therefore clear that a party to a Request for Review must first demonstrate that it made an attempt to participate in the procurement process by first and foremost obtaining the tender document. This is necessary to avoid a situation where anyone may choose to interfere

with a procurement process in jest or as an afterthought or to just settle scores. The threshold for candidature in this tender as set out by the law is that one must demonstrate they intended to participate in the tender by obtaining the tender document”

Having studied the decision in the County Government of Kitui Case, the Board while considering the above decision, did not address its mind to the manner and procedure that a procuring entity may specify for obtaining a tender document pursuant to an invitation notice by that procuring entity, since the applicant in the course of proceedings in the County Government of Kitui’s Case, admitted that it did not participate in that tender but claimed to have the requisite *locus standi* having submitted a tender in a related tender by the same procuring entity.

However, the Board found that a candidate must demonstrate its intention to participate in the tendering process. In our view, for a candidate to demonstrate its intention to participate in a procurement process, it would ensure that it complies with the manner and procedure for obtaining a tender document.

The Applicant has failed to demonstrate that it intended to participate in the subject tender and has equally failed to demonstrate that the Tender Document attached to its Request for Review was issued to it by the Procuring Entity as a prospective tenderer. Accordingly, the Applicant is not a candidate within the meaning of Section 2 read together with Section 167 (1) of the Act and therefore lacks the requisite *locus standi*

to bring an administrative review before the Board. For avoidance of doubt, the Applicant is also not a tenderer in the subject tender because its has not submitted a tender pursuant to an invitation by the Procuring Entity and in any case, we note the subject tender had not closed as at the time of filing the instant review because the tender submission deadline had further been extended to 10th May 2022 while the instant Request for Review was filed on 19th April 2022.

Having found that the Applicant is neither a candidate nor a tenderer under Section 2 read with Section 167 (1) of the Act,we find the Request for Review herein is fatally defective for having been filed by a person who lacks standing and/or audience before the Board and the Board lacks jurisdiction to hear and determine a fatally defective Request for Review.

With this, the Board must of necessity down its tools at this stage and will not proceed to address the other issues framed for determination.

The effect of this finding is that the Applicant's Request for Review is for striking out for want of jurisdiction and we hereby proceed to make the following specific orders:-

FINAL ORDERS

In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, 2015, the Board makes the following orders in the Request for Review dated 8th April 2022:-

1. The Request for Review dated 8th April 2022 and filed on 19th April 2022 be and is hereby struck.
2. The Procuring Entity is at liberty to proceed with the procurement process of the subject tender to its logical conclusion strictly in accordance with the applicable laws.
3. Given the findings herein, each party shall bear its own costs in the Request for Review.

Dated at Nairobi this 10th day of May 2022



.....
CHAIRPERSON
PPARB



.....
SECRETARY
PPARB