

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 34/2022 OF 20<sup>TH</sup> APRIL 2022**

**BETWEEN**

**DAR AL-HANDASAH CONSULTANTS**

**(SHAIR AND PARTNERS) in joint venture with**

**KURRENT TECHNOLOGIES LIMITED..... APPLICANT**

**AND**

**ACCOUNTING OFFICER,**

**KENYA PIPELINE COMPANY LIMITED..... 1<sup>ST</sup> RESPONDENT**

**KENYA PIPELINE COMPANY LIMITED..... 2<sup>ND</sup> RESPONDENT**

**R&E MODERN TECNOLOGIES LIMITED**

**in joint venture with**

**PETROCHEM ENGINEERING SERVICES..... INTERESTED PARTY**

Review against the decision of Kenya Pipeline Company Limited in respect to Tender No. KPC/PU-OT/241/PROJECTS/KPRL NBI/20-21for Consultancy Services for Detailed Engineering Designs for the Proposed LPG Import, Storage and Handling Facility at Changanwe Mombasa.

**BOARD MEMBERS**

- |                       |                    |
|-----------------------|--------------------|
| 1. Ms. Faith Waigwa   | - Chairperson      |
| 2. Mrs. Njeri Onyango | - Vice Chairperson |

3. Arch. Steven Oundo, OGW - Member
4. Mr. Ambrose Ogeto - Member
5. Mr. Nicholas Mruttu -Member

### **IN ATTENDANCE**

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

### **BACKGROUND TO THE DECISION**

#### **The Tendering Process**

Kenya Pipeline Company Limited, the 2<sup>nd</sup> Respondent herein, who is the Procuring Entity, invited sealed tenders from eligible candidates for, *inter alia*, Tender No. KPC/PU-OT/241/PROJECTS/KPRL NBI/20-21 for Consultancy Services for Detailed Engineering Designs for the Proposed LPG Import, Storage and Handling Facility at Changamwe Mombasa(hereinafter referred to as the 'subject tender')by way of a Request for Proposal tendering method through national open tender advertisement in MyGov Newspaper and the 2<sup>nd</sup> Respondent's website (www.kpc.co.ke)on 1<sup>st</sup> February 2022.

#### **Clarifications**

The 2<sup>nd</sup> Respondent issued several clarifications to various queries raised by candidates with respect to the subject tender which culminated with extension of the tender submission deadline of the subject tender to 17<sup>th</sup> March 2022.

## **Tender Submission Deadline and Opening**

The 2<sup>nd</sup> Respondent used electronic-procurement system to manage the tendering process in registering interested eligible candidates on the 2<sup>nd</sup> Respondent's Supplier Relationship Management (SRM) portal, issuing the blank tender document, clarifications to interested eligible candidates, submission of tenders to the 2<sup>nd</sup> Respondent by eligible tenderers and opening of tenders by the 2<sup>nd</sup> Respondent's Tender Opening Committee for the subject tender. Completed tenders by eligible tenderers were required to be submitted electronically in PDF format and uploaded on the SRM Collaboration Folder.

Twelve (12) candidates showed interest in participating in the the subject tender by registering on SRM. However, the 2<sup>nd</sup> Respondent received only six (6) tendersby the tender submission deadline of 17<sup>th</sup> March 2022 at 10.00am. The tenders were virtually opened shortly thereafter by a Tender Opening Committee appointed by the 1<sup>st</sup> Respondent in the presence of tenderers' representatives who chose to attend the opening either virtually or physically.The following tenderers were recorded as having submitted their respective tenders: -

<b>No.</b>	<b>Tenderer's ame</b>
1.	SMEC International Pty Limited
2.	R & E Modern Tecnologies Limited in JV with Petrochem Engineering Services
3.	Projectual LDA

4.	Dar-al-Handasah (Shair and Partners) in JV with Kurrent Technologies
5.	Projects Design Engineering & Consultancy with JV DNV and Northline
6.	SAGA Global Consultants

### **Evaluation of Tenders**

The subject tender was a two-envelope tender requiring tenderers to submit technical documents (mandatory documents, technical tender and all forms pertaining to the mandatory and technical tender) by uploading the same on to the technical collaboration folder and financial tender (requisite financial proposal standard forms, total tender price inclusive of all taxes and schedule of prices) by uploading the same on to the price collaboration folder.

A Tender Evaluation Committee appointed by the 1<sup>st</sup> Respondent (hereinafter referred to as the 'Evaluation Committee') evaluated tenders in three stages as captured in a Technical Evaluation Report dated and signed by members of the Evaluation Committee on 29<sup>th</sup> March 2022 (hereinafter referred to as the 'Technical Evaluation Report') and the Financial Evaluation Report signed by members of the Evaluation Committee on 14<sup>th</sup> April 2022. The three stages of evaluation were:

- i) Preliminary Evaluation;
- ii) Technical Evaluation; and
- iii) Financial Evaluation

Each member of the Evaluation Committee evaluated the tenders independently prior to sharing their findings for analysis.

### **Preliminary Evaluation**

At this stage of evaluation, the Evaluation Committee was required to evaluate tenders by applying the criteria set out at Clause 22.1 of Part C. Submission, Opening and Evaluation of Section 2. Data Sheet at page 23 of 87 of the blank tender document issued to interested eligible tenderers by the 2<sup>nd</sup> Respondent (hereinafter referred to as the 'Tender Document') read with Clause 22. Evaluation of Technical Proposals of Section 2. Instructions To Consultants and Data Sheet at page 13 and 14 of 87 of the Tender Document. Tenders required to meet all the preliminary and mandatory requirements at this stage to qualify to proceed to the next stage of evaluation.

At the end of evaluation at this stage, the Evaluation Committee determined five (5) tenders non-responsive while only one (1) tender was determined responsive. The Applicant's tender was among the five (5) tenders determined non-responsive thus did not progress to the next stage of evaluation. However, since the Interested Party's tender was the only tender determined responsive at this stage, it progressed to the next stage of evaluation.

### **Technical Evaluation**

At this stage of evaluation, the Evaluation Committee was required to evaluate tenders by applying the criteria set out at Clause 22.2 of Part C.

Submission, Opening and Evaluation of Section 2. Data Sheet at page 23 to 24 of 87 of the Tender Document read with Clause 22. Evaluation of Technical Proposals of Section 2. Instructions To Consultants and Data Sheet at page 13 and 14 of 87 of the Tender Document. Each criterion of evaluation at this stage was weighted and tenders required to attain a minimum technical score of 80% to proceed to the Financial Evaluation stage.

At the end of evaluation at this stage, the Evaluation Committee determined the Interested Party's tender responsive to proceed for financial opening and evaluation for having attained a technical score of 99.15%.

### **Re-evaluation of Tenders**

The Evaluation Committee re-evaluated tenders in three stages as captured in a Technical Re-Evaluation Report dated and signed by members of the Evaluation Committee on 4<sup>th</sup> April 2022 (hereinafter referred to as the 'Technical Re-Evaluation Report') and the Financial Evaluation Report signed by members of the Evaluation Committee on 14<sup>th</sup> April 2022 following the 2<sup>nd</sup> Respondent's General Manager, Supply Chain's advise. The three stages of re-evaluation were:

- i) Preliminary Re-Evaluation;
- ii) Technical Re-Evaluation; and
- iii) Financial Evaluation

Each member of the Evaluation Committee re-evaluated the tenders independently prior to sharing their findings for analysis.

### **Preliminary Re-Evaluation**

At this stage of re-evaluation, the Evaluation Committee was required to evaluate tenders by applying the criteria set out at Clause 22.1 of Part C. Submission, Opening and Evaluation of Section 2. Data Sheet at page 23 of 87 of the Tender Document read with Clause 22. Evaluation of Technical Proposals of Section 2. Instructions To Consultants and Data Sheet at page 13 and 14 of 87 of the Tender Document. Tenders required to meet all the preliminary and mandatory requirements at this stage to qualify to proceed to the next stage of re-evaluation.

At the end of re-evaluation at this stage, the Evaluation Committee determined four (4) tenders non-responsive while two (2) tenders were determined responsive. The Applicant's tender was among the four (4) tenders determined non-responsive thus did not progress to the next stage of re-evaluation. However, the Interested Party's tender was among the two (2) tenders determined responsive at this stage, thus progressed to the next stage of re-evaluation.

### **Technical Re-Evaluation**

At this stage of re-evaluation, the Evaluation Committee was required to evaluate tenders by applying the criteria set out at Clause 22.2 of Part C. Submission, Opening and Evaluation of Section 2. Data Sheet at page 23 to

24 of 87 of the Tender Document read with Clause 22. Evaluation of Technical Proposals of Section 2. Instructions To Consultants and Data Sheet at page 13 and 14 of 87 of the Tender Document. Each criterion of evaluation at this stage was weighted and tenders were required to attain a minimum technical score of 80% to proceed to the financial evaluation stage.

At the end of re-evaluation at this stage, the Evaluation Committee determined the Interested Party's tender as the only responsive tender to proceed for financial opening and financial evaluation for having attained a technical score of 99.15%.

### **Professional Opinion on Technical Re-Evaluation Report**

In a Professional Opinion, the General Manager, Supply Chain of the 2<sup>nd</sup> Respondent, having reviewed the Technical Re-Evaluation Report opined that the evaluation was carried out as per the provisions of Section 126 of the Act and proceeded to recommend to the Managing Director of the 2<sup>nd</sup> Respondent to note the contents of the Technical Re-evaluation Report and consider progressing the Interested Party for financial evaluation noting that financial opening was scheduled for 6<sup>th</sup> April 2022 on the SRM portal.

### **1<sup>st</sup> Notification to tenderers**

The 1<sup>st</sup> Respondent, vide letters dated 5<sup>th</sup> April 2022, notified unsuccessful tenderers that their respective tenders were non-responsive with reasons for their respective non-reponsiveness and that the opening of the financial

tender of the tender that qualified was scheduled for 6<sup>th</sup> April 2022 while inviting tenderers representatives for financial opening. The Interested Party was notified vide a letter dated 5<sup>th</sup> April 2022 by the 1<sup>st</sup> Respondent, that its tender attained the minimum qualifying mark of 80% to proceed for financial evaluation while being invited to arrange for its representative to attend the opening of its financial tender on 6<sup>th</sup> April 2022.

### **Financial Evaluation**

Only the Interested Party's financial tender was virtually opened on 6<sup>th</sup> April 2022 .

At this stage of evaluation, the Evaluation Committee was required to evaluate tenders by applying the criteria set out at Clause 25.2, 26.1 and 29.1 (QCBS only) of Part C.Submission, Opening and Evaluation of Section 2. Data Sheet at page 25 of 87 of the Tender Document. Tenders were required to have their technical and financial scores weighted and then combined as per the formula provided in the Tender Document.

At the end of evaluation at this stage, the Evaluation Committee determined the Interested Party's tender to be responsive having attained the total score of 99.23 using the Quality and Cost Based Selection (QCBS) having taken into account price negotiation based on a reduction of 1.5% of total reimbursable costs.

## **Recommendation**

The Evaluation Committee recommended award of the subject tender to the Interested Party at Kshs.197,634,023.00 inclusive of all taxes.

## **Professional Opinion on the Financial Evaluation Report**

In a Professional Opinion dated 19<sup>th</sup> April 2022, the Ag. General Manager, Supply Chain of the 2<sup>nd</sup> Respondent, having reviewed the Financial Evaluation Report opined that the evaluation was carried out as per the provisions of Section 126 of the Act and proceeded to recommend to the Managing Director of the 2<sup>nd</sup> Respondent to note the contents of the Financial Evaluation Report and consider awarding the subject tender to the Interested Party for Kshs.197,634,023.00 inclusive of all taxes.

## **REQUEST FOR REVIEW**

Dar Al-Handasah Consultants (Shair and Partners) in joint venture with Kurrent Technologies Limited, the Applicant herein, lodged a Request for Review dated 20<sup>th</sup> April 2022 and filed on 20<sup>th</sup> April 2022 together with a Supporting Affidavit sworn on 20<sup>th</sup> April 2022 by George Fares, a director of operations of the lead member of the Applicant's consortium, through the firm of Sigano&Omollo LLP Advocates seeking for the following orders: -

- a) The Respondents' decision and notification to the Interested Party in respect to the tender number KPC/PU-OT/241/PROJECTS/KPRLNBI/20-21 PROPOSED LPG IMPORT, STORAGE AND HANDLING FACILITY AT CHANGAMWE MOMBASA regarding the said***

***bidder's qualification to proceed to technical and financial evaluation be and is hereby annulled and set aside.***

***b) The decision and notification of unsuccessful bid dated 5<sup>th</sup> April 2022 and delivered via email on 6<sup>th</sup> April 2022 which was addressed to the Applicant in the subject tender number KPC/PU-OT/241/PROJECTS/KPRL NBI/20-21 PROPOSED LPG IMPORT, STORAGE AND HANDLING FACILITY AT CHANGAMWE ,MOMBASA) be and is hereby annulled and set aside.***

***c) The procuring entity be and is hereby directed to re-admit the Applicant's bid for re-evaluation at the Preliminary evaluation stage with respect to submission of list of directors by foreign company as set out in Clause 22.1(c) of Section 2. Data Sheet at page 23 of 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.***

In a Notification of Appeal and a letter dated 20<sup>th</sup> April 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 Respondents 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 20<sup>th</sup> April 2022.

On 28<sup>th</sup> April 2022, the Respondents filed their response to the Request for Review dated 26<sup>th</sup> April 2022 and a Replying Affidavit sworn by Maureen Mwenje, the 2<sup>nd</sup> Respondent's Acting General Manager, Supply Chain. Further, the Respondents 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 28<sup>th</sup> April 2022, the Acting Board Secretary notified all 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 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 on the subject tender within 3 days from 28<sup>th</sup> April 2022.

On 5<sup>th</sup> May 2022, the Interested Party filed a Replying Affidavit sworn on 4<sup>th</sup> May 2022 by Mr. Simon Omondi Abiero, a Director of the Interested Party

through the firm of Muiruri & Wachira Advocates. However, no other tenderer in the subject tender other than the Applicant and the Interested Party filed any pleadings or documents with respect to the subject tender in this review.

Pursuant to the Board's Circular No.2/2020 dated 24<sup>th</sup> 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 6<sup>th</sup> May 2022, the Interested Party filed its written submissions dated 6<sup>th</sup> May 2022.

### **APPLICANT'S CASE**

The Applicant avers that its consortium comprises highly qualified companies with long-standing and diverse multinational infrastructure experience and that it is aware Clause 22.1 of Section 2(a). Instructions to Consultants (ITC) provided that the 2<sup>nd</sup> Respondent's evaluation committee would evaluate the Technical Proposals that had passed the eligibility and mandatory criteria, on the basis of their responsiveness to the Terms of Reference and the RFP and that the eligibility and mandatory criteria would include, *inter alia*, any other criteria included in the Data Sheet. Further,

that Clause 22.1 of Section 2: Data Sheet required submission of Form CR12 by local firms and a list of the company's directors for foreign firms.

Based on the criteria for tender evaluation and the award criteria, the Applicant believes its tender was fully compliant with all the mandatory requirements and technical requirements set out in the Tender Document hence was substantially responsive. However, through a letter of notification dated 5<sup>th</sup> April 2022 and delivered via email on 6<sup>th</sup> April 2022, the Applicant avers it was notified by the 2<sup>nd</sup> Respondent that its tender was unsuccessful on the basis that one of its joint venture partner, Dar al-Handasah (Shair and Partners), had not submit a form CR12.

It is the Applicant's averment that as a foreign company, Dar al-Handasah (Shair and Partners) was only required by Clause 22.1 of Section 2: Data Sheet to submit a list of the company's directors and that indeed, Dar al-Handasah (Shair and Partners) submitted a list of directors at pages 360–362 of the Applicant's technical proposal hence duly complied with the requirements of Clause 22.1 of Section 2: Data Sheet of the Tender Document.

In the circumstances, the Applicant alleges that it is clear the Respondents applied extraneous evaluation criteria which were not provided for in the tender document to evaluate the Applicant's tender and further, alleges

that the notification dated 5<sup>th</sup> April 2022 was delivered through email on 6<sup>th</sup> April 2022 at 1:46pm yet the Respondents had required the Applicant to attend virtual opening of the financial proposals on 6<sup>th</sup> April 2022 at 2pm. Nevertheless, the Applicant avers that it is aware that at the opening of the financial proposals, only the Interested Party herein made it to the financial evaluation stage having ostensibly attained a technical score of 99.15%.

The Applicant alleges that in disqualifying its tender, the Respondents failed to comply with their obligations under the Act as well as the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020') and such disqualification ought to be reviewed on the following grounds: (a) the Respondents contravened Section 80(2) of the Act read with Regulation 118(1) of the Regulations 2020 by applying extraneous evaluation criteria in evaluating the Applicant's tender at preliminary evaluation stage, thereby departing from the evaluation criteria under Clause 22.1 of Section 2: Data Sheet which required submission of Form CR12 by local firms and a list of the company's directors by foreign firms; (b) the Evaluation Committee of the 2<sup>nd</sup> Respondent contravened its obligations under Regulation 30(a) of Regulations 2020 which obligates them to conduct the technical and financial evaluation of the tenders or proposals availed in strict adherence to the compliance and evaluation criteria set out in the tender documents; (c) the Respondents acted unfairly by disqualifying the Applicant based on purported ground that Dar al-Handasah (Shair and Partners) had not submitted a Form CR12 yet the mandatory evaluation criteria in Clause 22.1 of Section 2: Data

Sheet required foreign firms such as Dar al-Handasah (Shair and Partners) to only submit a list of the company's directors; (d) the Respondents acted irrationally by disqualifying the Applicant's tender based on purported ground that Dar al-Handasah (Shair and Partners) did not submit Form CR12 despite being aware that Dar al-Handasah Consultants (Shair and Partners) fully complied with the mandatory evaluation criteria in Clause 22.1 of Section 2: Data Sheet requiring it to submit a list of the company's directors as a foreign firm; (e) the Respondents failed to take account of relevant considerations namely that under Clause 22.1 of Section 2: Data Sheet, which required foreign tenderers to only submit a list of the company's directors; (f) the Respondents failed to comply with the evaluation criteria stipulated in Clause 22.1 of Section 2(a). Instructions to Consultants (ITC) pursuant to which the Applicant's tender which passed the eligibility and mandatory criteria set out thereunder ought to have progressed to technical evaluation.

According to the Applicant, the 1<sup>st</sup> Respondent bears the primary responsibility, by dint of Section 44(1) of the Act, to ensure that the 2<sup>nd</sup> Respondent complies with the provisions of the Act and Regulations 2020 when carrying out the procurement process and in the circumstances, the 1<sup>st</sup> Respondent has failed to ensure that the 2<sup>nd</sup> Respondent complies with the afore cited requirements of the Act and the rules thereunder when carrying out the evaluation of the Applicant's tender.

The Applicant alleges that it stands to suffer loss and prejudice due to failure by the 2<sup>nd</sup> Respondent to comply with the Act and the rules thereunder in conducting the subject tender and as a result the Applicant is bound to suffer loss and damage that includes: (a) lost income and profit that would have accrued to the Applicant from the award of the subject tender, considering that the Applicant has incurred substantial expenses towards preparation and submission of its tender and (b) the Applicant has been unfairly denied an opportunity to undertake the contract in the subject tender at the Applicant's reasonable minimum cost.

In view of the foregoing, the Applicant believes that the 2<sup>nd</sup> Respondent breached its obligations under the Act hence the 2<sup>nd</sup> Respondent's impugned decision in the subject tender ought to be reviewed and set aside as sought herein and in accordance with Section 7(2)(f), 7(2)(i) and Section 7(2)(n) of the Fair Administrative Action Act.

## **RESPONDENTS' RESPONSE**

The Respondents contend that the subject tender was floated by the 2<sup>nd</sup> Procuring Entity on 1<sup>st</sup> February 2022, as a two-envelope quality and cost based tender through the 2<sup>nd</sup> Respondent's e-procurement platform, SRM, pursuant to Section 64 of the Act and Regulations 49 to 63 of Regulations 2020. Further, that the subject tender was opened on 17<sup>th</sup> March 2022 wherein six (6) tenderers submitted their tenders electronically through the SRM system.

According to the Respondents, the Evaluation Committee deliberated on the Tender Document's mandatory requirements of six (6) tenders submitted in line with Sections 55 and 79 of the Act between 22<sup>nd</sup> – 25<sup>th</sup> March 2022, where one tenderer was found to be responsive and recommended to proceed to the next stage of Technical Evaluation. Further, that during evaluation of the mandatory requirements, the Applicant's tender was among tenders determined to be non-responsive since it did not meet the mandatory requirement of providing a CR12 form as was required for local firms.

According to the Respondents', upon conclusion of evaluation of tenders at the Technical Evaluation stage, the Evaluation Committee determined the Interested Party's tender to be substantially responsive and recommended the Interested Party to proceed to the final stage of financial evaluation. However, the 2<sup>nd</sup> Respondent's head of procurement function advised for re-evaluation of tenders for various reasons.

Thereafter, the Evaluation Committee carried out re-evaluation of the six (6) tenders on 4<sup>th</sup> April 2022 as directed by the 2<sup>nd</sup> Respondent's head of the procurement function and only two (2) tenderers were found to be substantially responsive to the mandatory and preliminary evaluation requirements and that during the re-evaluation, the Applicant's tender was still non-responsive as it had not complied with the mandatory requirement of providing a CR12 form for local firms because the Applicant had provided

proof of being registered in Kenya as a foreign company with a branch in Kenya complete with a physical address and by virtue of being registered with the Companies' registrar as being a foreign company with a branch in Kenya, the Applicant cannot identify itself as a foreign firm and therefore the requirements for local firms applied to them.

The Respondents contend that the Applicant was classified as a local firm for purposes of tendering under the Act by virtue of having registered their local branch with the registrar of companies and that during the evaluation of the Applicant's tender, the Evaluation Committee sought verbal clarification from the Registrar of Companies' office which confirmed that foreign companies with branches registered in Kenya under the Companies Act could be issued with CR12 forms upon application and that once the Applicant met the requirements of registration of its firm under the Kenyan law, it ought to have obtained the CR12 form.

The Respondents contend that the Applicant provided in its tender a local tax compliance certificate and PIN certificate from Kenya Revenue Authority which was a requirement for local firms further indicating that they are a local firm for purposes of the subject tender. According to the Respondents, international firms were required to provide Tax Compliance Certificates or their equivalent from their country of origin and if the Applicant was indeed an international firm for purposes of the subject

tender, it would have provided Tax Compliance Certificate equivalent from its country of origin.

Without prejudice to the aforementioned contention, the Respondents contend that the subject tender was advertised as a National Tender and therefore if the Applicant was an international firm as alleged, it would be disqualified for not being a local firm and therefore the Applicant can not be allowed to switch from being a local firm to an international firm in the same tender.

It is the Respondents contention that at the conclusion of re-evaluation at the the Technical Evaluation stage, the Evaluation Committee determined only the Interested Party's tender responsive and recommended the Interested Party's progression to financial evaluation and the entire technical and financial evaluation process was done in strict adherence to the compliance and evaluation criteria set out in the Tender Document and in accordance with the Act.

According to the Respondents, on 6<sup>th</sup> April 2022, the 2<sup>nd</sup> Respondent's head of procurement prepared a professional opinion recommending to the 1<sup>st</sup> Respondent the approval to progress the Interested Party to financial evaluation and the 1<sup>st</sup> Respondent approved the Interested Party's progression to financial evaluation on the same day while notifying all unsuccessful tenderers that their respective tenderers were non-responsive with reasons. The Interested Party's financial tender was opened and

evaluated on 6th April 2022, found to be responsive and the Interested Party was subsequently invited for negotiation of the tender price, which was concluded, and a specific amount agreed upon.

The Respondents contend that vide a letter dated 7<sup>th</sup> April 2022 the Applicant sought clarification from them on the reasons as to why their tender was found to be non-responsive and the Respondents responded through a letter dated 22<sup>nd</sup> April 2022 informing the Applicant that it did not provide the required CR12 form for local firms.

According to the Applicant, the need to urgently progress the tender process was informed by the adherence to strict timelines in line with Section 126(3) of the Act to evaluate and award the tender within 21 days. The delay having been occasioned by the time expended in responding to the queries that had been raised by tenderers and that the subject tender is a matter of great public interest as there is need to provide Kenyans with access to cheap LPG and the Applicant should not be allowed to scuffle the process due to its own selfish interests.

The Respondents contend that the orders sought by the Applicant are unfounded and cannot be granted as the Request for Review does not disclose a reasonable cause of action against the Respondents and in the circumstances, the Request for Review as drawn and filed is frivolous,

vexatious and unmerited and should be dismissed with costs to the Respondents.

### **INTERESTED PARTY'S RESPONSE**

The Interested Party contends that the Request for Review is fatally defective and the same ought to be struck out for the following reasons; (i) the affidavit in support of the Request for Review is deponed by one George Fares who claims to have been authorized by members of the Applicant's consortium to swear it on their behalf, (ii) however, no evidence has been annexed to the said affidavit to prove that the said deponent has the authority to swear the affidavit on behalf of the members of the Applicant's consortium; (iii) in light of the aforementioned averments, the affidavit in support of the Request for Review is defective and ought to be struck out forthwith for being presented by a person lacking legal authority/attorney to execute any document on behalf of the Applicant and (iv) the defectiveness of the affidavit in support of the Request for Review runs afoul of Regulation 203(2)(b) of Regulations 2020 rendering the entire Request for Review and the evidence in support thereof inadmissible.

Without prejudice to the aforementioned averments and in opposition to the Request for Review, the Interested Party contends that having complied with all the mandatory requirements specified in the Tender Document and considering itself capable of performing the subject tender, the Interested Party submitted its tender before the tender

submission deadline pursuant to an invitation to tender by the 2<sup>nd</sup> Respondent.

According to the Interested Party, the Applicant's tender having been determined non-responsive for failure to meet all the eligibility and mandatory requirements specified in the Tender Document could not proceed for evaluation past the preliminary evaluation stage.

The Interested Party contends that the mandate to conduct evaluation of tenders is competently placed on an evaluation committee appointed pursuant to Section 46 of the Act and the Interested Party believes that such mandate in the subject tender was exercised fairly, professionally and judiciously thus not open to re-evaluation by the Board or any other entity at the whims of a disgruntled unsuccessful tenderer.

According to the Interested Party, the Applicant is inviting the Board to usurp the mandate of the Evaluation Committee provided under Section 80 of the Act and re-admit a non-responsive tender.

It is the Interested Party's contention that it has expended huge resources in securing the necessary approvals and preparing/compiling its tender, therefore, it will incur huge economic loss if the procurement process is scuttled at this point.

According to the Interested Party, the project to be borne from the subject tender is meant to cure the challenge of lack of sufficient LPG storage and supply infrastructure which has resulted in the importation and handling of uneconomical batches of LPG, resulting in high retail prices. With this, the Interested Party contends that the project has huge public benefit especially when viewed against the current fuel shortage.

The Interested Party contends that the procurement process ought not to be interfered and/or scuttled without justifiable cause in view of the reasons canvassed hereinabove and the public interest stated bearing in mind that the evaluation was conducted in strict compliance with the criteria specified in the Tender Document and the Act.

Considering the foregoing, the Interested Party prays for dismissal of the Request for Review with costs.

## **BOARD'S DECISION**

The Board has considered each of the parties' cases, pleadings, documents, written submissions together with confidential documents submitted to the Board pursuant to Section 67 (3) (e) of the Act and finds that the following issues call for determination:

- I. Whether the Request for Review and the affidavit in support thereof should be struck out for being defective;**

Depending on the outcome of issue I;

- II. Whether the Applicant's technical tender was evaluated in accordance with the criteria for evaluation set out in the Tender Document with respect to submission of Form CR12 and submission of a valid tax compliance certificate.**
- III. What orders should the Board grant in the circumstances.**

**Whether the Request for Review and the affidavit in support thereof should be struck out for being defective.**

The Interested Party alleges that the Request for Review and the affidavit in support thereof should be struck out for being defective. According to the Interested Party, the Request for Review could only be lodged with the express authority of all the joint venture partners and in the absence of such authority, then the instant Request for Review is incompetent and ought to be struck out.

Further, the Interested Party asserts that the affidavit in support of the Request for Review is deponed by one George Fares who claims to have been authorized by members of the Applicant's consortium to swear the affidavit on their behalf yet no evidence has been annexed to the said affidavit to show that indeed the said deponent had authority to swear the

affidavit on behalf of the members of the Applicant's consortium. In the absence of such evidence, it is the Applicant's assertion that the said George Fares did not have the legal authority/attorney to lodge the instant Request for Review or indeed execute any document on behalf of the Applicant in respect of the instant review.

The Interested Party further asserts that once a party elects to present an affidavit in support of the Request for Review pursuant to Regulation 203(2)(b) of Regulations 2020, such affidavit ought to be sworn by a person with the requisite authority.

Accordingly, the Interested Party prays for the Board to reach a finding that the Supporting Affidavit sworn on 20<sup>th</sup> April 2022 by George Fares is defective, ought to be struck out forthwith for having been presented by a person lacking legal authority/attorney to execute any document on behalf of the Applicant and along the same lines, find that on account of the defective affidavit, the entire Request for Review and the evidence in support thereof is inadmissible.

The Interested Party relied on the Board's decision in PPARB Application No.26 of 2022 Associated Construction Co. (K) Limited v The Accounting Officer State Department of Fisheries, Aquaculture and the Blue Economy & Another.

The Applicant did not controvert this allegation neither did it attempt to provide evidence of George Fares having been authorized as a person with legal authority/attorney to institute the instant Request for Review on behalf of the Applicant (both joint venture partners of the Applicant) and/or to have authority on behalf of the Applicant to swear the affidavit in support of the instant Request for Review. Accordingly, the facts presented by the Interested Party on this issue remain uncontroverted.

In addressing this issue, we must first consider the import of Section 167 (1) of the Act and in so doing determine who is an applicant in administrative review and asset disposal proceedings and further determine whether there was authorization in the Applicant's tender issued to a person or entity to institute review proceedings before this Board, on behalf of the Applicant.

Section 167 (1) of the Act 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***

Section 167 (1) of the Act specifies that a request for review application may be lodged before this Board by a candidate or tenderer within fourteen (14) days of notification of award or date of occurrence of an alleged breach of duty at any stage of the procurement process or disposal process.

The interpretation section of the Act defines the term "candidate" and "tenderer" 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 this definition it is clear that a candidate in procurement proceedings is a person who, in response to an invitation to tender, obtains tender documents from a procuring entity; while a tenderer is a person who, having obtained a tender document, submits its tender to a procuring entity.

Section 170(a) of the Act provides as follows with respect to parties to a review:

***"The parties to a review shall be –***

***(a) The person who requested the review;***

We have established from Section 167(1) of the Act that only a tenderer or a candidate can seek administrative review and when read with Section 170(a) of the Act, such candidate or tenderer is an applicant in a review.

We have studied the Tender Document on eligibility of tenderers and we note that pursuant to Clause 6.2 of Section 2. Instructions To Consultants and Data Sheet at page 8 of 87 of the Tender Document read with Clause 6.2. of Section 2. Data Sheet at page 20 of 87, the 2<sup>nd</sup> Respondent considered eligible tenderers to include individual tenderers or joint ventures and consortium tenderers save for the maximum number of members of a joint venture or consortium would be three (3).

The Black's Law Dictionary defines a 'joint venture' as follows: -

**"an association of persons jointly undertaking some commercial enterprise"**

The Cambridge English Dictionary defines a 'Consortium' as: -

**“an organization of several businesses or banks joining together as a group for a shared purpose”**

In essence, according to the Tender Document, the 2<sup>nd</sup> Respondent considered eligible tenderers to be individual tenderers, an association of not more than three (3) persons jointly undertaking some commercial enterprise or an organization of not more than (3) three businesses joining together as a group for a shared purpose.

The Board examined the 2<sup>nd</sup> Respondent's confidential file submitted to the Board in accordance with Section 67 (3) (e) of the Act and observes that the 2<sup>nd</sup> Respondent received the six (6) tenders from the following tenderers by the tender submission deadline of 17<sup>th</sup> March 2022: -

“

- 1. SMEC International Pty Limited;***
- 2. R & E Modern Technologies Limited in JV with Petrochem Engineering Services;***
- 3. Projectual LDA;***

- 4. *Dar-al-Handasah (Shair and Partners) in JV with Kurrent Technologies;***
- 5. *Projects Design Engineering & Consultancy with JV DNV and Northline; and***
- 6. *SAGA Global Consultants”***

One of the six (6) tenderers who submitted a technical tender in response to the subject tender was Dar-al-Handasah (Shair and Partners) in joint venture with Kurrent Technologies, who is identified as the Applicant in the instant review.

It is therefore evident that the Applicant is a tenderer in the subject tender's procurement proceedings and thus should be able to lodge the Request for Review within the meaning of Section 2 read together with Section 167 (1) of the Act. However, the question that the Board seeks to answer is whether the member's of the Applicant's joint venture authorized the filing of the instant review.

We examined the Applicant's unincorporated joint venture agreement dated 22<sup>nd</sup> February 2022 which runs through pages 409 to 420 of the Applicant's tender and which forms part of the confidential documents submitted to us by the Respondents and observe Clause 2.1 thereof,

limited the purpose of the Applicant's joint venture to (a) entering into a contract as a resultant of the subject tender with the 2<sup>nd</sup> Respondent, if the Applicant is awarded the subject tender; (b) performing all the services to be undertaken for the contract that will arise from the subject tender by the joint venture under the contract as defined in the Applicant's submitted technical and financial tender.

We have further examined two power of attorneys with respect to the subject tender contained at pages 13 to 15 and 17 to 18 of the Applicant's tender and note as follows:

- In a power of attorney signed on 7<sup>th</sup> March 2022, one Talal Kamal Shair (donor) in his capacity commissioned to sign for Dar Al-Handasah Consultants (Shair and Partners) E. C. (Dar Al-Handasah and or the Company) registered at the Commercial Registrar of Bahrain appointed Georges Emile Fares (attorney) of Dar al-Handasah Consultants (Shair and Partners) as the donor's authorized representative and attorney in fact to act in the name, place and stead in any way which the donor could if the donor were personally present, with respect to the subject tender save there was no provision for the attorney to institute any administrative review proceedings or any other legal proceedings with respect to the subject tender.
- In a power of attorney given on 10<sup>th</sup> March 2022, Kurrent Technologies Limited (company) agreed Mr. George Fares

(representative) of Operations of M/S Dar al- Handasah Consultants (Shair and Partners) of Lebanon, Kenya and Tanzania to be true and lawful representative of the company and in the name of the company to do all or any of the following things related to the contract for the subject tender save there was no provision for the representative to institute any administrative review proceedings or any other legal proceedings with respect to the subject tender.

It is important to remind ourselves that filing of request for review application is usually done by a candidate or tenderer who wishes to approach the Board at any time when they learn of an alleged breach of duty by a procuring entity or when notified of the outcome of their tenders pursuant to Section 167 (1) of the Act. This right is exercised during the procurement process, since after the signing of a contract, a process called contract execution commences and tenderers would not have recourse before this Board once a contract has been signed in accordance with Section 135 of the Act.

The manner in which an aggrieved candidate or tenderer seeks administrative review is prescribed under Regulation 203 (2) (b) of Regulations 2020 which reads as follows: -

**“(2) The request referred to in paragraph (1) shall-**

(a) .....

**(b) be accompanied by such statements as the applicant considers necessary in support of its request;"**

Accordingly, the above regulation stipulates that a request for review shall be accompanied by such statements as the applicant considers necessary in support of its request.

The Board considered the use of the word "shall" in the abovementioned regulation and studied the High Court's interpretation of the same in **Miscellaneous Civil Application No. 52 of 2018 Republic v Public Procurement Administrative Review Board & 4 Others ex parte Britam Life Assurance Company Limited & Another (2018) eKLR** where it observed as follows: -

***"The word "shall" when used in a statutory provision imports a form of command or mandate. It is not permissive, it is mandatory. The word shall in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation. The Longman Dictionary of the English Language states that "shall" is used to express a command or exhortation or what is legally mandatory.***

***Regard must be had to the long established principles of statutory interpretation. At common law, there is a vast body of case law which deals with the distinction between statutory requirements that are peremptory or directory and, if peremptory, the consequences of non-compliance. Discussing the use of the word shall in statutory provision, Wessels JA laid down certain guidelines: -***

*".... Without pretending to make an exhaustive list I would suggest the following tests, not as comprehensive but as useful guides. The word 'shall' when used in a statute is rather to be construed as peremptory than as directory unless there are other circumstances which negate this construction...[55] - Standard Bank Ltd vs Van Rhyn (1925 AD 266)."*

***The above being the clear prescriptions of what constitutes a form of Request for Review, it cannot be said by any stretch of imagination that the third Respondent's letter was a competent Request for Review. It is a requirement that a Request for Review must state the reasons for the complaint, including any alleged breach of the Act or the Regulations. It must be accompanied by such statements as the applicant considers necessary in support of its request. Such statements would in my view enable the opposite party to adequately respond to the claim. It will enable the Board to frame issues for determination. ...."*** [Emphasis by the Board]

Going by the High Court's view, the use of the word 'shall' in Regulation 203 (2) (b) of the Regulations 2020 is to be construed as denoting a compulsory or mandatory obligation. In this regard therefore, it was a mandatory obligation for a request for review application to be accompanied by such statements as the applicant considers necessary in support of its request.

It is the Board's view that the use of the word 'necessary' in Regulation 203 (2) (b) of the Regulations 2020 does not imply that an applicant has the discretion to decide whether a request for review should or should not be accompanied by a statement in support. It rather denotes that an applicant has the discretion to determine the contents of the statement it ought to file in support of a request for review application. This is in light of the fact that a statement in support of a request for review application provides the evidence necessary to support the grounds as raised in a request for review and ought to be sworn and signed by an individual authorized to issue the said statement and possessed of the facts or the information that is deponed in the said statement in support of a request for review.

The Board studied the instant Request for Review and notes that the Applicant therein is identified as Dar Al-Handasah Consultants (Shair and

Partners) in joint venture with Kurrent Technologies Limited. This means, both members of the joint venture that is, Dar Al-Handasah Consultants (Shair and Partners) and Kurrent Technologies Limited must both be involved in the Request for Review and in doing so, must both expressly authorize the filing of a review application before this Board, noting that they submitted a technical and financial tender in response to the subject tender jointly as a joint venture.

The Board further examined the Applicant's Supporting Affidavit and notes that the same was sworn by George Fares described therein as the Director of Operations for Dar Al-Handasah Consultants (Shair and Partners), the lead member of the Applicant's consortium who we note is authorized to specific dealings of the subject tender save for instituting administrative review and or other legal proceedings with respect to the subject tender. Further, we note that George Fares has not provided evidence to demonstrate that he has authority to file a request for review application before this Board on behalf of the joint venture, who is the Applicant in the instant review, or on behalf of Dar Al-Handasah Consultants (Shair and Partners) and Kurrent Technologies Limited as joint venture partners. Moreover, it is evident that the Applicant's Supporting Affidavit was not sworn by an individual authorized to swear the said Supporting Affidavit on behalf of the joint venture (Applicant), contrary to Regulation 203 (2) (b) of Regulations 2020.

In the absence of proof to the contrary, it is evident that George Fares did not have authorization from Dar Al-Handasah Consultants (Shair and Partners) and Kurrent Technologies Limited to file the instant Request for Review application on behalf of the Applicant, being Dar Al-Handasah Consultants (Shair and Partners) in joint venture with Kurrent Technologies Limited, noting that in order to file a request for review application on behalf of the joint venture, authorization is required from both members to the joint venture that is, Dar Al-Handasah Consultants (Shair and Partners) in joint venture with Kurrent Technologies Limited.

In view of the foregoing, we find the instant Request for Review was not properly filed before this Board, noting that there was no evidence provided of authorization to file the Request for Review on behalf of the Applicant, this being, Dar Al-Handasah Consultants (Shair and Partners) in joint venture with Kurrent Technologies Limited and that there was no evidence that the person who swore the Supporting Affidavit was authorized to swear the Affidavit on behalf of the Applicant, being Dar Al-Handasah Consultants (Shair and Partners) in joint venture with Kurrent Technologies Limited, thus the Request for Review Application and its Supporting Affidavit is fatally defective.

The upshot of this finding is that the instant Request for Review and its Supporting Affidavit should be struck out for being fatally defective. In the

absence of request for Review having been struck out, there will be no Request for Review on record for the Board to hear and determine the other substantive issue framed for determination.

## **FINAL ORDERS**

In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review dated 20<sup>th</sup> April 2022: -

- 1. The Request for Review dated 20<sup>th</sup> April 2022 be and is hereby struck out .**
- 2. Given the findings herein, each party shall bear its own costs in the Request for Review.**

**Dated at Nairobi, this 11<sup>th</sup> Day of May 2022**



**CHAIRPERSON**

**PPARB**



**SECRETARY**

**PPARB**

