

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 35/2022 OF 22ND APRIL 2022

BETWEEN

PAN AFRICA TRANSFORMERS &

SWITCHGEARSLIMITED.....1ST APPLICANT

NAIROBI TRANSFORMER

MANUFACTURERS (E.A.) CO. LTD.....2ND APPLICANT

EMPOWER TRANSFORMERS LTD.....3RD APPLICANT

YOCEAN (GROUP) LTD.....4TH APPLICANT

MAHASHAKTI KENYA LTD.....5TH APPLICANT

AND

MANAGING DIRECTOR & CHIEF EXECUTIVE OFFICER,

KENYA POWER & LIGHTING COMPANY PLC.....1ST RESPONDENT

KENYA POWER & LIGHTING COMPANY PLC.....2ND RESPONDENT

Review of the Kenya Power and Lighting Company's advertisement dated March, 2022 in the matter of Tender Number KP1/9A.3/OT/028/21-22 for Supply of Distribution Transformers (Manufacturers only)

BOARD MEMBERS

1. Ms. Faith Waigwa

- Chairperson

2. Mrs. Njeri Onyango - Vice Chairperson
3. Mr. Jackson Awele - Member
4. Arch. Steven Oundo, OGW - Member
5. Ms. Rahab Chacha - Member

IN ATTENDANCE

Mr. Philemon Kiprop

BACKGROUND TO THE DECISION

Kenya Power & Lighting Company PLC, the Procuring Entity and the 2nd Respondent herein invited sealed tenders from interested eligible tenderers for Tender No. KP1/9A.3/OT/028/21-22 for Supply of Distribution Transformers (Manufacturers only) (hereinafter referred to as the 'subject tender') by way of open tendering method through advertisement in MyGov Newspaper, the People Daily Newspaper and the 2nd Respondent's website (www.kplc.co.ke) on 8th March 2022. Further, the advertisement notified interested tenderers that the blank tender document for the subject tender (hereinafter referred to as the 'Tender Document') could be obtained from the 2nd Respondent's website from 10th March 2022.

Addendums

The 2nd Respondent issued Addendum No. 1 dated 17th March 2022, amending the date of the pre-tender conference from 18th March 2022 at 10:00 am to 22nd March 2022 at 10:00 am.

Subsequently, the 2nd Respondent issued Addendum No. 2 dated 25th March 2022 amending the provisions of the Tender Document prohibiting joint ventures to allowing for the same while limiting joint ventures to 2 manufacturers only. This addendum also did away with the requirement for type test certificates of less than or equal to 5 years old prior to the date of the tender document and further extended the tender closing date to 19th April 2022 at 10:00 am.

The 2nd Respondent issued Addendum No.3 dated 11th April 2022 which introduced a formula for the actual unit prices for the official purchase order (LPO); in addition to previous/current manufacturers, opened up eligibility to participate in the subject tender to new manufacturers who were still being appraised by the 2nd Respondent; introduced and allowed for application of a margin of preference and responded to various clarifications sought by prospective tenderers while further extending the tender closing date to 26th April 2022.

The 2nd Respondent issued Addendum No.4 dated 22nd April 2022 further extending the tender closing date to 29th April 2022.

Pre-Bid Meeting

The 2nd Respondent held a pre-bid meeting on 22nd March 2022 wherein the 1st, 2nd and 3rd Applicants' representatives were in attendance among others.

REQUEST FOR REVIEW

Pan Africa Transformers & Switchgears Limited, Nairobi Transformer Manufacturers (E.A.) Co. Ltd, Empower Transformers Ltd, Yocean (Group) Ltd and Mahashakti Kenya Ltd being the 1st, 2nd, 3rd, 4th and 5th Applicants respectively, jointly lodged a Request for Review dated 22nd April 2022 and filed on even date together with the 1st, 2nd, 3rd, 4th, and 5th Applicants' respective Affidavits in Support of Request for Review, each sworn on 22nd April 2022 by Bobby Thomas a director of the 1st Applicant, Peter Thuo Njenga a director of the 2nd Applicant, Stephen Kigera a director of the 3rd Applicant, Yang Yu a director of the 4th Applicant and Sachin Singhal a director of the 5th Applicant and a Further Affidavit sworn on 9th May 2022 by Bobby Thomas and filed on 10th May 2022, through the firm of H & K Law Advocates seeking the following orders:-

- (a) A declaration that the Tender Document in respect of Tender Number KP1/9A.3/OT/028/21-22 for Supply of Distribution Transformers (Manufacturers only) violates, and falls short of the provisions of Articles 10 and 227 of the Constitution of Kenya, and the Public Procurement and Asset Disposal Act;***
- (b) An order annulling and setting aside the 2nd Respondent's Tender Document dated 11th March 2022 and the subsequent Addendums dated 17th March 2022, 25th March 2022, and 11th April 2022 in respect of Tender Number KP1/9A.3/OT/028/21-22 for Supply of Distribution Transformers (Manufacturers Only);***

- (c) An order directing the 1st Respondent to prepare another Tender Document in strict compliance with the provisions of Articles 10 and 227 of the Constitution of Kenya, and the Public Procurement and Assets Disposal Act, and restricted to local manufacturers as previously done upon removal of the offending clauses;***
- (d) Any other or further relief or reliefs as the Board shall deem just and expedient; and***
- (e) The costs of this Review be borne by the 2nd Respondent.***

In a Notification of Appeal and a letter dated 22nd 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. 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 22nd April 2022.

On 4th May 2022, the Respondents filed a Notice of Appointment dated 4th May 2022 appointing one Justus Odada Advocate, the 2nd Respondent's in-house counsel, to act on their behalf in this review and a Respondents

Response to the Request for Review dated 4th May 2022. 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 Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act').

Vide letters dated 5th May 2022, the Acting Board Secretary notified three prospective tenderers namely, Tanelec Kenya Ltd/Tanelec Ltd, Alfa Ltd and Hitachi Energy Ltd who had attended the pre-bid meeting of 22nd March 2022 together with the 1st, 2nd and 3rd Applicants 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 24th March 2020 detailing administrative and contingency measures to mitigate the spread of Covid-19. Further, the three prospective tenderers were invited to submit to the Board any information and arguments on the subject tender within 3 days from 5th May 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 10th May 2022, the 1st, 2nd, 3rd, 4th and 5th Applicants jointly filed their Written Submission dated 9th May 2022.

THE APPLICANTS' CASE

The Applicants aver that they deployed much of their resources towards improving their manufacturing technology since 30th March 2015 when the 2nd Respondent's then Chief Executive Officer, Dr. Ben Chumo, issued a press release while addressing the Annual Energy Management Awards Ceremony hosted by Kenya Association of Manufacturers (KAM), encouraging local investors to manufacture electrical materials for supply to the 2nd Respondent. Further, the Applicants being the target audience of the 2nd Respondent's own representations of 2015 and the unambiguous provisions of the Constitution of Kenya, 2010 (hereinafter referred to as the 'Constitution'), the Act, Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020'), the Kenya Government Strategy Policy on Buy Kenyan Build Kenya and Kenya Government Big 4 Agenda all geared towards promotion of local manufacturing, set out to establish manufacturing plants, machinery and equipment meeting the required certifications of the 2nd Respondent as well as the type tests reports and the Kenya Bureau of Standards (hereinafter referred to as 'KEBS') Diamond mark of Quality for local manufactured and assembled goods, as well as training and manufacturing highly and qualified staff to run and manage the plants.

According to the Applicants, the Respondent's previous tenders for supply of distribution transformers of 2017 to 2020 were competitively advertised

and awarded to the Applicants' and as a result, besides the Respondent getting quality distribution transformers 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.

It is the Applicants' case that the Tender Document dated 11th March 2022 and uploaded on the 2nd Respondent's website was subsequently subjected to amendments vide Addenda dated 17th March 2022, 25th March 2022 and 11th April 2022.

According to the Applicants, the Tender Document opened up the subject tender to foreign tenderers without disclosing any reasons for the decision thus violating the principle of legality which dictates that there must be a rational connection between a decision taken and the purpose for which the decision was taken. Further, that the Applicants have supplied the Respondents with transformers without any complaints from the Respondents as to the quality or failures, and thus the sudden change in policy to incorporate foreign tenderers without stakeholders engagement was unwarranted and unreasonable. To this end, the Applicants' cited Justice Mativo in a High Court case of **Republic v Commissioner of Domestic Taxes Ex Parte Fleur Investments Limited [2020] eKLR** where he held that the essence of the principle of legality is for public

bodies, no matter how well intentioned, too only do what the law empowers them to do.

Additionally, the Applicants aver that the actions of the Respondents to favour foreign manufacturers over local manufacturers and assemblers violates Article 10 of the Constitution on National Values and Principles to promote local manufacturing. The Applicants argue that even if Clause 3 of the Addendum dated 11th April 2022 clarified that the subject tender was open to participation by new manufacturers who are still being appraised by the 2nd Respondent, the same was not helpful in light of the 10-year minimum manufacturing experience requirement or submission of at least one completion certificate from the 2nd Respondent designed to lock out any new local manufacturers as the chance to ever start and meet these requirements are unavailable to new manufacturers, thus discriminatory and in blatant violation of the principles of fairness, equity and competitiveness under Article 227 of the Constitution. Further, that the criteria for submitting names of similar goods and reference letters or completion certificates confirming completion of orders on schedule by tenderers was unrealistic and discriminatory for new local manufacturers as none of them could meet this requirement which was in violation of Section 157 of the Act that dictates that candidates should participate in procurement proceedings without discrimination.

The Applicants aver that the Respondents have breached; (i) Section 89 of the Act for failure to demonstrate there will not be effective competition for the supply of tendered goods unless foreign tenderers participate before resorting to international tendering considering the tender had always been closed to international tenderers; (ii) Section 155(5) of the Act and Regulation 144(4) of Regulations 2020 for failure to prepare a report detailing its inability to give preferences to local manufacturers and to obtain a waiver of the same by the National Treasury as is required by Regulations 2020. Further, that by opening the subject tender to foreign tenderers, the Respondents violated the principle of promotion of local industry, sustainable development and promotion of citizen contractors under Section 3(i) and (j) of the Act, Regulations 2020, the Kenya Government Strategy policy on Buy Kenyan, Build Kenya and Kenya Government Big 4 Agenda. To this end, the Applicants cited **Republic v Public Procurement Administrative Review Board & 2 others Ex parte Niavana Agencies Limited; M/S Five Blocks Enterprises Ltd (Interested Party) [2021] eKLR** where the Court held that the idea behind preferences and reservations is to promote locally manufactured goods or available services resulting to promoting local industry. With this, the Applicants argue that the Tender Document is illegal, in violation of the law, irrational, null and void and ought to be quashed to protect the sanctity of Laws of Kenya.

The Applicants aver that some technical specifications for Oil and Surge Arrestors were uploaded four working days before tender closure which did

not give tenderers reasonable and sufficient time to comply and meet the Tender Document's obligations as provided under Section 1 clause 7.3 of the Tender Document.

The Applicants aver that the award criteria potentially allows for one tenderer to be awarded all the 7 lots (which in the Applicants view need further unbundling) thus unfairly disadvantaging, discriminating and/or unfairly edging out other tenderers who would otherwise benefit if the allocation was diversified and that the Addendum of 25th March 2022 gave an unfair advantage to foreign manufacturers over the local manufacturers who would be compliant in all aspects upon entering a joint venture with local companies.

The Applicant alleged that the technical requirements of the Tender Document are not fair, effective and viable for the following reasons: *(a) the requirement of use of copper as a winding material is not viable because the quality is not superior and copper transformer prices are generally much higher than aluminium transformers, prone to vandalism and the Respondents ought not to have tied the manufacturers down to copper material without considering the benefits of using aluminium winding material considering that Kenya produces neither copper nor aluminium; (b) the removal of the requirement of the Type Test Certificates/ reports being not more than five years vide the Addendum does not meet the test of effectiveness since older than five years type test certificates/reports are unlikely to ensure design compliance to the*

reference standards;(c) the introduction of requirement of different Type Test for single and three phase ought to have been discussed with the stakeholders before implementation, and it would have been fair and equitable to accord the existing manufacturers a grace period of 12 months to comply with the changes; and (d) opening up tendering to foreign manufacturers is unfair to the local manufacturers who had made significant progress to develop prototype transformers on the advice of the 2nd Respondent with a view to enhance local capacity.

The Applicants alleged that the foregoing issues were raised by them to the 2nd Respondent who merely answered vide Addendum of 11th April 2022 asking the manufacturers to comply with the Tender Document.

The Applicants allege that the condition in ITT 16.2 (c) allows for foreign tenderers to be represented by an agent in Kenya so as to carry out maintenance, repair, spare parts and stocking obligations prescribed in the Conditions of the Contract and or in the Technical Specifications which makes it difficult for the 2nd Respondent to enforce the 60 months' warranty since there won't be a binding and enforceable contract between the agent and the 2nd Respondent rendering the procurement process ineffective, inequitable and unaccountable. Further, the Applicants hold that if the international tenderers can engage the local players to carry out maintenance, repair, spare parts and stocking obligations, then the Applicants can as well supply the new transformers as they have done before.

The Applicants allege that there is no criteria and/or basis for ensuring compliance with evaluation Criteria Part I Mandatory Conditions CI 2.1.1 1 (f), which provides for the requirement of 40% of local content from goods manufactured or assembled in Kenya.

The Applicants allege that the tender requirements are skewed, unfair, unreasonable and meant to shut out local citizens and local manufacturers from competitively participating or having a fair opportunity to compete in the subject tender and as a result of the Respondents' breach of their statutory duties, the Applicants risk suffering loss and damage to the Applicants' factories and manufacturing plants, loss of employment and flooding of the local market with imported transformers which are readily manufactured and assembled locally and that this Board has jurisdiction to administratively review the decision of the 2nd Respondent having had the Request brought timeously, in good faith and in the interest of justice and public interest.

The Applicants rely on the following further case law to support their case; (i) **Kenya Ports Authority & another (Ex-parte Applicants) v Public Procurement Administrative Review Board; Rhombus Construction Company Limited (Interested Party) [2021] eKLR**, where the court upheld this Board's decision of reviewing a procuring entity's decision to amend a tender document that had added amendments that did not promote participation of citizen contractors; and (ii) **James**

Nyasora Nyarangi & 3 Others v Attorney General [2008] eKLR on discrimination involving an element of unfavourable bias.

THE RESPONDENTS' CASE

The Respondents contend that the subject tender was advertised on 8th March 2022 on MyGov publication and People's Daily and was set to close on 29th April 2022. However, the 2nd Respondent suspended the subject tender's procurement process pursuant to the Board's letter dated 22nd April 2022.

In response to the instant Request for Review, the Respondents contend that page 1 of the Tender Document clarified that the subject tender is an open tender which allows any eligible tenderer to tender, does not limit the Applicants participation and denies that the Tender Document violates the principle of legality and Article 10 of the Constitution confirming that the same has been crafted to enable the public to obtain transformers of merchantable quality, reliable, and fit for purpose.

The Respondents contend that they have fully complied with the provisions of Section 89 of the Act in addition to the requirements under Kenyan law on international standards or standards widely used in international trade even though the Applicants failed to demonstrate how the Respondents violated Section 89 of the Act.

The Respondents deny that they have violated the principle of promotion of local industry under Section 3 of the Act, Regulations 2020, the Kenya Government Strategy Policy on Buy Kenyan, Build Kenya and the Kenya Government Big 4 Agenda. To the contrary, the Respondents contend that Section 91 (1) of the Act recognizes open tendering as the preferred procurement method for procurement of goods, works and services. In the alternative and without prejudice to the foregoing, the Respondents contend that Clause 2.1.11 (f) at page 34 of the Tender Document makes it a mandatory requirement for any prospective tenderer to provide evidence of 40% local content which corresponds with Section 157(8) of the Act and Regulation 144(3)(f) of Regulations 2020 and Addendum 3 provided for an application of a 20% margin of preference to be evaluated on prices for Kenyan manufacturers and a 10% margin of preference for joint ventures between a local and foreign manufacturer.

The Respondents contend that transformers are specialized goods and do not fall under the category of items wholly mined or produced in Kenya thus Section 155(5) of the Act is not applicable and therefore the Respondents are not in breach of the same.

The Respondents contend that the technical specifications for oil and surge arrestors were uploaded in the Respondent's tendering portal on 20th April 2022 and the tender closing date was extended on 22nd April 2022 to 29th April 2022 at 14:00hrs vide Addendum No.4 in compliance with Regulation 83 of Regulations 2020.

The Respondents further contend that the Applicants have in no way demonstrated how the 10-year minimum manufacturing experience requirement or the requirement for submission of at least one completion certificate from the 2nd Respondent is illegal and how the same affects the Applicants.

The Respondents contend that prior to the year 2017, they sourced transformers from over 20 manufacturers globally and only introduced Kenyan based manufacturers to the 2nd Respondents in the year 2017, of which the Respondents currently have contracts with 6 Kenyan manufacturers. The Respondents further contend that of the 6 Kenyan manufacturers, 3 of them have breached their contractual obligations leading to shortages of transformers.

The Respondents contend that transformers are highly technical and specialized equipment whose performance must be tested for the period specialized in the technical specifications in the Tender Document. Accordingly, the Respondents hold that the requirement necessitating a Supplier Performance Evaluation and Submission of Reference Letters/ Completion Certificates are mandatory for all technical items procured by the 2nd Respondent and insist on the importance of having the tender evaluated per the criterion in the Tender Document owing to the Respondent's duty of ensuring reliable power supply to the public.

The Respondents deny the Applicant's allegation that the Tender Document possesses a potential danger of awarding all 7 lots to one tenderer and contend that ITT 40 (c) on page 32 of the Tender Document stipulates that no one tenderer will be awarded more than one lot.

The Respondents contends that the change in Addendum number 2 dated 25th March 2022 to include joint ventures between manufacturers was not discriminatory, and was in fact requested for by tenderers present in the pre-bid meeting held on 22nd March 2022 attended by 5 local manufacturers. Further, that the said amendments were necessary because there are no local manufacturers with the capacity of wholly manufacturing a transformer so joint ventures would enhance local manufacturers capacity.

The Respondents contend that the technical requirements are fair and are necessary for the Respondents distribution transformers and public for the following reasons:(a) copper has a better tensile strength and melting point than aluminum hence better fault handling capacity, transformers with aluminum windings are bigger and heavier posing challenges in installation of the same in existing structures and there is no evidence that vandalism of transformers has reduced with utilization of aluminum windings; (b) type tests are to ensure that the designs of equipment on offer complies with the reference standards in the Tender Document; (c) Different Type Tests are to ensure compliance with the specifications and confirm that the transformers are fit for purpose; and opening up the subject tender to foreign manufacturers facilitates competition and ensures

that the Respondents procure the best goods which are fit for purpose, reliable, less prone to breakdowns, cost effective and safe for public consumption.

The Respondents contend that they clarified all issues raised in the pre-bid meeting through addendum number 3 dated 11th April 2022 uploaded on their website and that the terms of the Tender Document will bind all suppliers who will enter into contracts with the 2nd Respondent therefore, the Applicants retain discretion to engage any manufacturer and put forth their proposals through joint ventures so as to be compliant to the terms and conditions of the Tender Document.

In light of the foregoing, the Respondents contend that the requirements in the Tender Document are reasonable, fair and crafted to competitively procure standard transformers fit for the Respondents' distribution network yet support local tenderers.

Consequently, the Respondents contend that they have not breached any statutory duty and that the Applicants have failed to demonstrate the alleged breaches. To this end, the Respondents urge the Board to dismiss the instant Request for Review with costs to the Respondents and further pray that a declaration be issued that the procurement process is lawful and ought to progress.

BOARD'S DECISION

The Board has considered each of the parties' case, pleadings, documents, written submissions and confidential documents submitted to the Board by the Respondents pursuant to Section 67 (3) (e) of the Act and finds that the following issues crystalize for determination: -

I. Whether the Tender Document violates the law by technically locking out local manufacturers;

In determining the first issue, the Board will make a determination on the following sub-issues;

- a) Whether the issue of opening up of the subject tender to participation by foreign manufacturers through open tendering method instead of restricted tendering method to local manufacturers in violation of the principle of legality is a matter subject to review of procurement proceedings under Section 167(1) of the Act; and
- b) Whether the provisions of the Tender Document outrightly deny any preference and reservations to local and citizen contractors thus discriminating against them in violation of the principle of promotion of local industry and promotion of citizen contractors.

II. Whether the Respondents in amending the Tender Document complied with the provisions of Section

75(5) of the Act on extension of the tender closing date to allow amendments of the Tender Document to be taken into account in the preparation or amendment of tenders; and

III. What orders should the Board grant in the circumstances.

We have carefully studied the Tender Document submitted to us by the Respondents as part of, and together with other, confidential documents pursuant to Section 67(3)(e) of the Act and note that the subject tender was floated by the Respondents by way of an open tendering method in an advertisement in MyGov publication and People Daily Newspaper on 8th March 2022 inviting eligible interested manufacturers to tender for supply of distribution transformers. Further, the said Tender Document provided for seven (7) lots of different item description and quantities. With this in mind, we now proceed to address the issues framed for determination.

Whether the Tender Document violates the law by technically locking out local manufacturers.

- a) Whether the issue of opening up of the subject tender to participation by foreign manufacturers through open tendering method instead of restricted tendering method to local manufacturers in violation of the principle of legality is a matter subject to review of procurement proceedings under Section 167(1) of the Act;

We understand the Applicants case to be, that tenders similar to the subject tender were in the past and as a matter of custom a preserve of and restricted to participation by, and awarded to, local manufacturers. However, the Respondents have now changed such custom and opened up the subject tender to foreign manufacturers using an open tendering method. The Applicant is aggrieved by this action thus alleges violation of the principle of legality by the Respondents for failure to disclose the reason for such action, explanation or reasoning thereto. According to the Applicant, the principle of legality requires the Respondents to do what the law empowers them to do for there must be a rational connection between a decision taken and the purpose for which such decision is taken but the Respondents have instead opened up the subject tender to participation by foreign manufacturers instead of restricting the same to participation by local manufacturers. The Applicant prays for annulment and setting aside of the Tender Document and for the 1st Respondent to be directed to prepare another tender document restricted to local manufacturers.

On their part, the Respondents contend that page 1 of the Tender Document clarifies that the subject tender is an open tender inviting tenders from any interested eligible manufacturer which in essence does not limit participation of the Applicants or any other local eligible manufacturer thus the Applicants are free to participate in the subject tender and in any event Section 91(1) of the Act recognizes open tendering

as the preferred procurement method for procurement of goods, works and services.

We note the real bone of contention is the method of procurement. The Applicant wants the subject tender to be restricted to participation by eligible local manufacturers instead of it being an open tender for any eligible manufacturer whether local or foreign to participate in.

Section 92(a) and (d) of the Act recognizes both open tender and restricted tendering as methods of procurement as it provides as follows:

92. Methods of procurement

Subject to this Act and prescribed provisions, an accounting officer of a procuring entity shall procure goods, works or services by a method which may include any of the following-

- (a) Open tender;***
- (b)***
- (c)***
- (d) Restricted tendering.***

However, Section 167 (4)(a) read with Section 167(1) of the Act divests this Board of its jurisdiction in a matter touching on choice of procurement method as it provides as follows:

167. Request for a review

(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or

damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.

(2)

(3)

(4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)-

(a) The choice of a procurement method;

To the extent that the Applicants seek to have the choice of procurement method of the subject tender change from open tender method to restricted tendering method, we find the same is not subject to review of procurement proceedings under Section 167(1) of the Act thus divesting this Board of its jurisdiction. In essence, the Board lacks jurisdiction to determine only this issue that is hinged on choice of procurement method.

b) Whether the provisions of the Tender Document provide for an application of a margin of preference in favour of local and citizen contractors and whether the Tender Document upholds the principle of promotion of local industry and promotion of citizen contractors.

We understand the Applicants case to be, that the provisions of the Tender Document were couched to lock out local manufacturers in violation of the principal of promotion of local industry and citizen contractors under Section 3(i) and (j) of the Act.

The Applicants seem to believe that since the subject tender is open to participation by foreign manufacturers in addition to local manufacturers, the same was floated using international tendering and competition under Section 89 of the Act and therefore, the Respondents ought to have demonstrated that there would be no effective competition unless foreign tenderers participate before resorting to international tendering. On their part, the Respondents contend that the Applicants have not demonstrated in any way how the Respondents violated Section 89 of the Act. We have carefully studied the Applicants' Request for Review including the Affidavits in Support thereof and Further Affidavit and we do agree with the Respondents that this allegation by the Applicant remains unsubstantiated since no proof of violation of Section 89 of the Act was demonstrated by the Applicant or any evidence tendered before the Board to prove the same.

According to the Applicants, there was breach of Section 155(5) of the Act read with Regulation 144(4) of Regulations 2020 by the Respondents for failure to prepare a report detailing inability to give preferences and reservations to local manufacturers and for failure to obtain a waiver of the same from the National Treasury. On their part, the Respondents contend

that they are not in breach of Section 155(5)(b) of the Act read with Regulation 144(4) of Regulations 2020 because transformers are specialized goods and do not fall under the category of items wholly mined or produced in Kenya therefore Section 155(5) of the Act is not applicable. We understand the Applicant to be saying that there are no preferences and reservations provided in the Tender document save for a mandatory condition requiring 40% local content form for goods manufactured/assembled in Kenya. However, we note that the Tender Document actually provided for application of a margin of preference and also allowed joint ventures to participate in the subject tender. Clause 2.1.11 (f) of Part 1 – Preliminary Evaluation Criteria of Section III – Evaluation and Qualification Criteria at page 34 of the Tender Document provided for submission of a duly filled 40% Local Content form for goods manufactured/assembled in Kenya to be completed by foreign manufacturer's/tenderers and which form was provided at page 72 of the Tender Document. Vide Addendum No.2 dated 25th March 2022, the Respondents amended the Tender Document to allow for joint ventures and which joint ventures were to be limited between 2 manufacturers. Further, vide Addendum No.3 dated 11th April 2022, the Respondents amended the Tender Document to allow for application of a margin of preference as follows:

4. ITT 32.3 MARGIN OF PREFERENCE

In accordance with Section 157(2) of the Act, all prospective tenderers are hereby informed that the margin of preference shall be applied as follows:

- i) Pursuant to Regulations 164(a) of Regulations 2020, a Twenty Percent (20%) margin of preference of the evaluated price of the tender given to tenderers offering goods manufactured in Kenya and the percentage of shareholding of Kenyan citizen is more than fifty percent (50%).***
- ii) Pursuant to Regulation 148(2) of the Regulations 2020; where a citizen manufacturer has entered into a contractual arrangement with a foreign manufacturer in accordance with Regulation 148(1) of Regulations 2020, a ten percent (10%) margin of preference in the evaluated price of the tender shall be applied.***

NOTE: Only one margin of preference will be applied based on the tenderers qualifications and eligibility.

From the foregoing, we find that the Respondents provided for preference and reservations in the subject tender.

The Applicant also interpreted the provisions of the Tender Document and understood the same to mean that there is a possibility of one tenderer being awarded all the 7 lots in the subject tender to one tenderer edging

out other tenderers yet the 7 lots were impracticable and complex requiring further unbundling of the subject tender. We note that the Applicants never demonstrated how much further, the subject tender could be unbundled beyond the 7 lots. Further, we find that it is not true that one tenderer is likely to be awarded all the 7 lots. This is because by Sub-clause c) of Clause ITT40 of Section II -Tender Data Sheet (TDS) at page 32 of the Tender Document, the same bars any one tenderer from being allocated more than one lot.

Further, the Applicants are crying foul that various technical requirements of the Tender Document are unfair, not effective and not viable as follows: (a) the Respondents ought not to have tied the manufacturers down to copper as winding material without considering the benefits of using aluminum considering Kenya does not produce neither copper nor aluminum (b) type test certificates/reports older than 5 years are unlikely to ensure design compliance to the reference standards (c) requirement of different type tests for single and three phase ought to have been discussed with stakeholders to allow stakeholders a grace period of 12 months to comply with the changes (d) the requirement of 10 years minimum manufacturing experience or submission of at least one completion certificate from the 2nd Respondent was discriminatory against new local manufacturers because they cannot meet this requirement. On their part, the Respondents contend that (a) copper has better tensile strength and melting point than aluminum hence better fault handling capability and there is no evidence that has been adduced by the

Applicants that vandalism of transformers has reduced with utilization of aluminium windings, (b) type tests are to ensure that the designs of the equipment on offer complies with the reference standards in the Tender Document, (c) different type tests are to ensure compliance with the specifications and confirm that the transformers are fit for purpose. The mandate to prepare specific requirements relating to goods, works and services being procured rests with an accounting officer of a procuring entity as provided under Section 60(1) of the Act. Such specific requirements include technical requirements that (a) conform to design, specification, functionality and performance, (b) are based on national or international standards whichever is superior, (c) factor in the life of the item among other requirements stipulated in Section 60(3) of the Act. In our considered view the Applicants cannot dictate the specific requirements technical or otherwise to be set in the subject tender because doing so will be akin to a student setting his/her own exam. The Respondents are best suited and do understand the need of the 2nd Respondents and the 1st Respondent is better placed to prepare the specific requirements for the subject tender.

In the circumstances we find that the provisions of the Tender Document provide for an application of a margin of preference in favour of local and citizen contractors and the same upholds the principle of promotion of local industry and promotion of citizen contractors.

In totality of the first issue framed for determination, the Tender Document does not violate the law and does not technically lock out local manufacturers.

Whether the Respondents in amending the Tender Document complied with the provisions of Section 75(5) of the Act on extension of the tender closing date to allow amendments of the Tender Document to be taken into account in the preparation or amendment of tenders.

The Applicants are aggrieved that technical specifications for Oil Surge Arrestors were uploaded four days before tender closure which did not give tenderers reasonable and sufficient time to comply and meet the same. Section 75(1) read with Section 75(4) of the Act allows the Respondents to amend the Tender Document at any time before the deadline for submitting tenders by issuing an addendum without materially altering the substance of the original tender save where the Tender Document is amended when the time remaining before the deadline for submitting tenders is less than one third of the time allowed for preparation of tenders, the 1st Respondent shall extend the deadline as necessary to allow amendment of the Tender Document to be taken into account in the preparation or amendment of tenders. The subject tender was advertised on 8th March 2021 with a closing date of 4th April 2022. The time allowed for preparation of tenders was 27 days exclusive of the 8th March 2022 pursuant to Section 57(a) of the Interpretation of General Provisions Act,

Cap 2 of the Laws of Kenya. One third of 27 days is 9 days. Therefore, the latest an Addendum would be issued to amend the Tender Document was at least 9 days before the tender closing date. We note that the Respondents have admitted having uploaded the technical specifications for oil and surge arrestors in the 2nd Respondent's tendering portal on 20th April 2022 when the tender was scheduled to close on 26th April 2022, the closing date having severally been extended. This was literally 6 days to the tender closing date which period fell short with 3 days. The Respondents contend that on 22nd April 2022, vide Addendum No.24 they extended the tender closing date to 29th April 2022. However, the instant Request for Review was filed on the same day of 22nd April 2022 thus suspended the procurement proceedings of the subject tender pursuant to Section 168 of the Act. To the extent that the procurement proceedings of the subject tender were suspended on 22nd April 2022, the Respondents had no legal mandate to extend the tender closing date from 26th April 2022 to 29th April 2022. Accordingly, we find the tender closing date as extended vide Addendum No.4 of 22nd April 2022 null and void. In essence, the Respondents in amending the Tender Document did not comply with the provisions of Section 75(5) of the Act on extension of the tender closing date to allow amendments of the Tender Document to be taken into account in the preparation or amendment of tenders.

What orders should the Board grant in the circumstances.

We have hereinbefore held that the provisions of the Tender Document do not violate the law and the same do not technically lock out local

manufacturers. We have also held that the purported extension of the tender closing date from 26th April 2022 to 29th April 2022 was null and void. In the circumstances we find it just to order the 1st Respondent to extend the tender closing date with a further 14 days from the date hereof to enable interested eligible tenderers to take into account any amendments to the Tender Document in preparation of their respective tenders.

The upshot of our findings herein is that the Request for Review succeeds only to the extent of the 1st Respondent being directed to further extend the tender closing date.

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 22nd April 2022: -

- 1. The 1st Respondent is hereby ordered to extend the tender closing date for the subject tender with a further 14 days from the date of this decision.**
- 2. Further to order 1, the Respondents are hereby ordered to proceed with the procurement proceedings 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 13th day of May 2022



.....
CHAIRPERSON
PPARB



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SECRETARY
PPARB