

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 38/2022 OF 27<sup>TH</sup> APRIL, 2022**

**BETWEEN**

**H. YOUNG & COMPANY (EA) LTD.....APPLICANT**

**AND**

**THE ACCOUNTING OFFICER,**

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

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

**AND**

**COMACON LTD JV GULF ENERGY LTD.....INTERESTED PARTY**

Review against the decision of the Accounting Officer of Kenya Pipeline Company Limited in the matter of Tender No KPC-PU-OT-087-PROJECTS-NBI-21-22 for Connectivity of KPRL Port Reitz Tank Farm to Line 5 KOT.

**BOARD MEMBERS**

- |                        |                    |
|------------------------|--------------------|
| 1. Ms. Faith Waigwa    | -Chairperson       |
| 2. Mrs. Njeri Onyango  | - Vice Chairperson |
| Qs. Hussein Were       | -Member            |
| 3. Mrs. Irene Kashindi | -Member            |
| 5. Ms. Rahab Chacha    | -Member            |

## **IN ATTENDANCE**

Mr. Philemon Kiprop

-Holding brief for Acting Board Secretary

## **BACKGROUND TO THE DECISION**

### **Introduction**

The Kenya Pipeline Company Limited (KPCL) (hereinafter referred to as "the Procuring Entity") intends to procure works for engineering, procurement, construction for the connectivity of KPRL Port Reitz Tank Farm to Line 5, KOT (hereinafter referred to as "the subject tender").

### **The Tendering Process**

The Tender was floated through KPCL's e-procurement platform, on 22<sup>nd</sup> March 2022 inviting tenders from eligible Contractors. The procurement was done through Open Tender.

### **Tender Submission**

Tenders were received and opened on 1<sup>st</sup> April, 2022 at 10:30 am. Five tenderers submitted their tenders electronically through the electronic system which were recorded as follows:

<b>S/No</b>	<b>Name of Bidder</b>	<b>Postal address</b>	<b>Bid price Kshs</b>
1.	Adrian Kenya Ltd JV Kohasa Engineering Ltd		1,346,148,717.00
2.	Southern Engineering Co. Ltd	P. O. Box 84162-80100 Mombasa	1,021,917,441.00
3.	China Petroleum Pipeline Engineering Co. Ltd		1,443,301,511.75

S/No	Name of Bidder	Postal address	Bid price Kshs
4.	Comacon Ltd JV Gulf Energy Ltd	P.O. Box 275-00507 Nairobi	1,081,835,314.00
5.	H. Young & Co. (East Africa) Ltd		1,096,732,341.00

## **TENDER EVALUATION**

The Procuring Entity's Tender Evaluation Committee evaluated the tenders through three stages of:

- Preliminary Evaluation
- Technical Evaluation
- Financial Evaluation

### **Preliminary Evaluation**

All the five tenders complied with the mandatory requirements of the tender at the preliminary evaluation stage and progressed to Technical Evaluation.

### **Technical Evaluation**

Three tenders were deemed to be substantially responsive at technical evaluation and were recommended to proceed to financial evaluation. The responsive tenders at technical evaluation stage were the Applicant, the Interested Party and M/s China Petroleum Pipeline Engineering Company Limited.

### **Financial Evaluation**

The evaluation committee compared the costs of the three tendersto determine the tender with the lowest evaluated cost. The prices quoted, inclusive of VAT, were as follows:

- H. Young & Company (East Africa) Ltd's Kshs. 1,096,732,341.00
- Comacon Limited JV Gulf Energy Ltd'sKshs. 1,081,835,314.00
- China Petroleum Pipeline Eng. Co. Ltd's Kshs. 1,447,301,511.75.

Comacon Limited JV Gulf Energy Ltd's financial tender was found to be the lowest evaluated tender.

### **Recommendation**

The Evaluation Committee having found that the Messrs Comacon Limited JV Gulf Energy Limited's financial tender was the lowest, recommended it for award at a sum of **Kshs. 1,081,835,314.00**(Kenya Shillings One Billion and Eighty-One Million Eight Hundred and Thirty-Five Thousand Three Hundred and Fourteen Only).

### **Professional Opinion**

In a Professional Opinion signed by the Acting General Manager, Supply Chain Management on 11<sup>th</sup> April, 2022 the Head of Procurement of the Procuring Entity opined that the procurement process complied with the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act') and recommended for approval of award of the subject tender to the JV of M/s Comacon Limited and Gulf Energy Limitedof P.O Box 275-00507, Nairobi.The Accounting Officer approved the award.



### **Notification of Award**

Messrs H. Young & Company (East Africa)Limited(the Applicant herein), was disqualified at the financial evaluation stage. In a letter of notification dated 14<sup>th</sup>April 2022, the Applicant was notified that its tender was unsuccessful. The letter read in part as follows:

***"Following detailed financial evaluation, the amount was not the lowest evaluated bidder."***

Following the letter of notification dated 14<sup>th</sup> April, 2022 the Applicant filed this Request for Review with the Public Procurement Administrative Review Board (hereinafter referred to as the'Board').

### **REQUEST FOR REVIEW NO. 38/2022**

M/s H. Young & Company (East Africa) Limited, the Applicant herein, lodged a Request for Review dated 27<sup>th</sup> April 2022 and filed on even date together with a Statement in Support of the Request for Review signed on 27<sup>th</sup>April 2022 by Paul Murage, theMarketing Manager of the Applicantand a Further Statement in Support of the Request for Review signed on 13<sup>th</sup> May 2022 and filed on even date through the firm of Gerivia Advocates LLP, sought for the following orders of the Board:

- a. The 1<sup>st</sup> Respondent's decision to award Tender Number KPC-PU-OT-087-PROJECTS-NBI-21-22; Tender for Connectivity of KPRL Port Reitz Tank Farm to Line 5 KOT to the Interested Party be annulled and set aside;***

- b. The 1<sup>st</sup> Respondent's letter dated 13<sup>th</sup> April 2022 notifying the Applicant that it had not been successful in Tender Number KPC-PU-OT-087-PROJECTS-NBI-21-22; Tender for Connectivity of KPRL Port Reitz Tank Farm to Line 5 KOT be annulled and set aside;*
- c. A declaration that the 2<sup>nd</sup> Respondent failed to evaluate the Applicant's bid at the financial evaluation stage in accordance with the criteria and procedures under the provisions of the Act and in particular Sections 3, 86 (1) (a), 86 (2), 155 and 157 of the Act, Regulations 77, 147 and 148 and Articles 10 and 227 of the Constitution;*
- d. The 2<sup>nd</sup> Respondent be directed to re-admit the Applicant's bid at the financial evaluation stage and to carry out a re-evaluation noting to observe and apply the provisions and criteria under the Act at Sections 3, 86 (1) (a), 86 (2), 89, 155 and 157 of the Act, Regulations 147 and 148 and Articles 10 and 227 of the Constitution;*
- e. A declaration that the Applicant as a citizen contractor is entitled to a margin of preference of 20% on its tender sum for the purpose of evaluation and award of the subject Tender in accordance with the provisions of Section 86 of the Act.*
- f. The Board in exercise of its discretion, to review the manner in which the Interested Party's bid was evaluated at the*

***preliminary, technical and financial evaluation stages and should the Board find that the Interested Party had not met the criteria under the Tender Document, the Act and the Regulations, direct the Respondents to re-evaluate the Interested Party in accordance with the law and nullify the notification of intention to award the Tender to it;***

- g. Scrutinize how the evaluation process was conducted and give directions to the Respondents to redo or correct anything within the entire procurement process found to not have been done in compliance with the law;***
- h. The Respondents be compelled to pay to the Applicant the costs arising from/and incidental to this Application; and***
- i. The Board to make such and further orders as it may deem fit and appropriate in ensuring that the ends of justice are fully met in the circumstances of this Request for Review.***

In a Notification of Appeal and a letter dated 27<sup>th</sup> April 2022, the Acting Board Secretary notified the Respondent of the existence of the Request for Review and the suspension of procurement proceedings for the subject tender while forwarding to the Respondent a copy of the Request for Review together with the Board's Circular No.02/2020 dated 24<sup>th</sup> March 2020, detailing administrative and contingency measures to mitigate the spread of Covid-19. Further, the Respondent was requested to submit a



response to the Request for Review together with confidential documents concerning the subject tender within 5 days from 27<sup>th</sup> April 2022.

On 10<sup>th</sup> May 2022, the Respondent filed a Response to the Request for Review signed on 9<sup>th</sup> May 2022 a Replying Affidavit sworn on 9<sup>th</sup> May 2022 by Maureen Mwenje, the Acting General Manager of the Procuring Entity's Supply Chain Division. 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 11<sup>th</sup> May 2022, the Acting Board Secretary notified all tenderers (including the Interested Party herein) 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 11<sup>th</sup> May 2022.

On 17<sup>th</sup> May 2022, the firm of Caroline Oduor & Associates filed a Notice of Appointment to act on behalf of Comacon Limited JV Gulf Energy Ltd, the Interested Party. On the same date, the Interested Party filed its Replying Affidavit sworn on 17<sup>th</sup> May 2022 by Francis Koome Njogu, the Group Chief Executive Officer of Gulf Energy Limited a joint venture partner with



Comacom Limited. Another tenderer namely, Southern Engineering Company Limited filed its statement in support of the Request for Review signed on 13<sup>th</sup> May 2022 by Oruganti Vijayavenkata Satyanarayana the Commercial Manager for Southern Engineering Company Ltd and filed on 16<sup>th</sup> May 2022 through the firm of Gitonga Kalawa Advocates.

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

On 13<sup>th</sup> May 2022, the Applicant filed written submissions dated 13<sup>th</sup> May 2022.

We note that the Interested Party filed its response to the instant Request for Review when the Board had already retreated to write its determination on the instant review which was also a day to the deadline within which the Board is required under Section 171 of the Act to complete the instant review. In the circumstances and noting that we are constrained for time, we find that it will be unfair for us to consider the Interested Party's response to the instant Request for Review without affording the Applicant

an opportunity to respond to especially the factual issues raised in the Interested Party's response. For that reason, we shall not consider the Interested Party's response in making our determination in the instant review.

### **BOARD'S DECISION**

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

- i. Whether the Procuring Entity erred in failing to apply a margin of preference of 20% under Section 86(2) of the Act on the Applicant's tender.***
- ii. Whether the Interested Party was awarded the tender despite not having met the evaluation criteria set under the Tender Document in breach of the Provisions of Section 80 (2) of the Act.***

The Board now turns to address the issues framed for determination in this Request for Review.

**Whether the Procuring Entity erred in failing to apply a margin of preference of 20% under Section 86(2) of the Act on the Applicant's tender.**

The Applicant submitted in support of this ground of review that the Procuring Entity breached the Act through the un-procedural and illegal selection of a successful tenderer and subsequent issuance of a notification of intention toward Tender to the Interested Party without application of the margin of preference requirements under the Act.

It submitted further that the Procuring Entity breached the provisions of Part XII of the Act on Preferences and Reservations and Section 155 of the Act which requires all procuring entities to adhere to the provisions of Part XII of the Act by attempting to oust those provisions in the conduct of these procurement proceedings contrary to the clear provisions of the Constitution and the Act.

It also submitted that the Respondents breached the provisions of Section 157 of the Act by failing to apply the prescribed margin of preference to eligible bidders' contrary to the provisions of Section 157 (8) (b) (ii) of the Act which requires that a prescribed margin of preference be given to works, goods and services and that such preference be applied depending on percentage shareholding of locals on a graduating scale as prescribed.

The Applicant averred that the Respondents breached the provisions of Section 2 of the Act as read together with Regulations 147 and 148 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter "the Regulations 2020") by failing to consider the meaning and import of the terms "local contractor", "citizen contractor" and "foreign contractor" on the application of margin of preference regardless of the classification of the tender as national or international.

It averred further that the Respondent, by issuing the Notification of Intention to award the contract for the Tender to the Interested Party through his letter dated 13th April 2022, acted in breach of Sections 3, 86(1) (a) and 86 (2), 89, 155 and 157 of the Act and Articles 10 and 227(1) of the Constitution.

In response the Procuring Entity stated that the entire procurement process was done in an open and fair manner and that the Interested Party was validly determined to be the tenderer with the most responsive bid with the lowest evaluated bid price.

It stated further that the Respondents clearly indicated in the tender document that no preference margin would be applicable in the evaluation of the bids. The Applicant was well aware that no preference was going to be applied in the tender when submitting their bid and therefore it is improper for them to claim that the evaluation was unfair and illegal.



It also stated that considering the technical evaluation criteria under the subject tender was not score based, it was practically impossible to apply the provisions of Section 86(2) of the Act.

The Procuring Entity argued that the Applicant had misinterpreted the provisions of 86(2) of the Act by claiming that they are entitled to the Application of a 20% margin of preference in their financial evaluation when, in fact, the 20% margin of preference provided for under Section 86(2) of the Act is applicable at the technical evaluation stage and not at the financial evaluation stage.

It also argued that applying the provisions of Section 86(2) of the Act at the financial evaluation stage would be improper as this would defeat the entire purpose of financial evaluation which is to ensure that the lowest quoted bid is awarded the contract to ensure prudent utilization of public resources.

The Procuring Entity argued further that the margin of preference provided under Regulation 77 of the Regulations is not a mandatory requirement as the same provides for any margin of preference indicated in the tender document. Since no margin of preference was provided in the tender document, the same cannot be applied.

It went on to argue that the Act under section 157(4) outlines the categories of persons or groups that are eligible for reservations or preferences and that the Applicant did not belong to any of the categories or groups.

It was the contention of the Procuring Entity that Section 157 (8)(a) provides that preferences are not applicable in procurements where the amounts are above the prescribed threshold of Kshs. 500,000,000/=. This procurement being valued to be over Kshs1 Billion, preferences cannot be applied.

The Procuring Entity stated that being the party that needed the services under the subject tender, it was well within its mandate and prerogative to make changes to the tender requirements as and when it deems fit.

The question that arises from the arguments on both sides of the review is whether the Applicant is entitled to a margin of preference.

To answer the above questions, the Board first wishes to put into context the terms central to this dispute. The review revolves around the application of the preference and reservation schemes and the role played by citizen contractors. Section 2 of the Act defines "preference" and "citizen contractor" as follows:

***"Preference" means the right or opportunity to select a tenderer from an identified target group that is considered more desirable than another.***

***"Citizen Contractor" means a person or a firm wholly owned and controlled by persons who are citizens of Kenya;***

Before attempting to determinewhether the Applicant was entitled to a margin of preference in the subject tender, the Board first wishes to establish if there was a preference scheme in the first place in the tender document that the Procuring Entity was supposed to apply.

The Board has heard the Procuring Entity's submission that it clearly indicated in the tender documents that no preference margin would be applicable in the evaluation of the bids and that the Applicant was well aware when submitting their bid that no preference was going to be applied in the tender and therefore it is improper for the Applicant to claim that the evaluation was unfair and illegal.

The Board has perused the tender document and observed the following provisions contained therein:

**Margin of Preference**

*36.1 "A margin of preference may be allowed on locally*

*manufactured goods (plant and equipment) only when the contract is open to international tendering, where the tender is likely to attract foreign goods and where the contract exceeds the threshold specified in the Regulations.*

*36.2A margin of preference shall not be allowed unless it is specified so in the **TDS**.*

*36.3 Contracts procured on basis of international tendering and competition shall not be subject to reservations exclusive/ specific groups under women, youth and persons living with disability.*

*36.4 Where it is intended to reserve a contract to a specific group of businesses (these groups are Small and Medium Enterprises, Women Enterprises, Youth Enterprises and Enterprises of persons living with disability, as the case may be), and who are appropriately registered as such by a competent authority, a procuring entity shall ensure that the invitation to tender specifically indicates that only businesses or firms belonging to the specified group are eligible to tender. Tender shall be reserved to only one group. If not so stated in the Tender documents, the invitation to tender will be open to all interested tenderers.*



## **SECTION II - TENDER DATA SHEET**

<b>ITT 36.2</b>	A margin of preference <b><u>shall not be</u></b> allowed.
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## ***SECTION III - EVALUATION AND QUALIFICATION CRITERIA***

### **1. MARGIN OF PREFERENCE-Not Applicable**

The Board has weighed the Procuring Entity's submissions against the provisions of the Act. Section 86 (2) of the Act states as follows:

***"For the avoidance of doubt, citizen contractors, or those entities in which Kenyan citizens own at least fifty-one per cent shares, shall be entitled to twenty percent of their total score in the evaluation, provided the entities or contractors have attained the minimum technical score."***

A plain interpretation of section 86 (2) of the Act reveals that a margin of preference of 20% of the total score in evaluation is available to either; citizen contractors, or entities in which Kenyan citizens own at least 51% shares, with a condition that such entities or contractors attain the minimum technical score.

The Board has considered the manner in which evaluation of tenders is conducted when the Request for Proposal (RFP) method is used and observes that: -

- In the RFP method of tendering, award of tender is based on the highest combined Technical and Financial scores of a bidder pursuant to section 86 (1) (b) of the Act;
- To apply section 86 (2) of the Act, a citizen contractor or entities in which Kenyan citizens own at least 51% shares, would first be awarded 20% score to their technical score, when such bidder is at the Technical Evaluation stage, subject to such a bidder meeting the minimum technical score;
- After that, an evaluation at the Financial stage will be based on a combined technical (new technical score after 20% preferential treatment) and financial score, in the hope that the bidder who was afforded preferential treatment achieves a higher combined technical and financial score than other bidders not subjected to preferential treatment under section 86 (2) of the Act.

In an open tender, where an RFP tendering method is not used and such is the case in the subject tender, the margin of preference under section 86 (2) of the Act would be approached as follows: -

- Scores are awarded at the Technical Evaluation stage whereas consideration of bidders' quoted amount is made at the Financial Evaluation stage to recommend an award based on the criterion for

lowest evaluated tender price pursuant to section 86 (1) (a) of the Act;

- The margin of preference under section 86 (2) of the Act would also be considered at the Technical Evaluation stage subject to a bidder achieving a minimum technical score;
- The 20% margin of preference may still not assist a bidder in an open tender where a Request for Proposal tendering method is not used in cases where even after preferential treatment, another bidder (not subjected to preferential treatment) is the lowest evaluated bidder at the Financial Evaluation stage;
- In certain circumstances during evaluation of open tenders where an RFP tendering method is not used and after preferential treatment is applied in favour of a bidder at the Technical stage, two bidders may still submit a similar tender amount which is the lowest tender amount. In these circumstances, an Evaluation Committee may revert back to the technical score achieved by the bidder after preferential treatment was applied to such bidder, and compare such score with the bidder not subjected to preferential treatment, in order to recommend the bidder with a higher technical score for award of tender.

It is the Board's finding that a margin of preference under section 86 (2) of the Act is advantageous in a Request for Proposal tender since it is applied at the Technical Evaluation stage. In an open tender where a Request for Proposal method of tendering is not used, the preference margin of 20%

may not assist a bidder who has already qualified at the technical evaluation stage.

Having established that the tender subject of this Request for Review was an open tender where an RFP tendering method was not used and no scores were assigned, the Board holds that a margin of preference under Section 86(2) of the Act was not applicable to the Applicant because the subject tender did not provide for assigning of scores at the technical or financial evaluation stages and the Evaluation Committee did not assign any scores during evaluation of tenders at the technical and financial evaluation stages.

The Board now turns to the application of preference and reservations provisions of Part XII of the Act. Section 157 (8) provides as follows: -

***"In applying the preferences and reservations under this section-***

***(a) exclusive preferences shall be given to citizens of Kenya where-***

- i. the funding is 100% from the national government or county government or a Kenyan body; and***
- ii. the amounts are below the prescribed threshold***
- iii. the prescribed threshold for exclusive preference shall be above five hundred million shillings;***

***(b) a prescribed margin of preference shall be given-***



- i. in the evaluation of tenders to candidates offering goods manufactured, assembled, mined, extracted or grown in Kenya; or*
- ii. works, goods and services where a preference may be applied depending on the percentage of shareholding of the locals on a graduating scale as prescribed."*

While the Act does not expressly define the term "exclusive preference", section 2 of the Act provides that "reservation" means: -

***"Exclusive preference to procure goods, works, and services set aside to a defined target group of tenderers within a specified threshold or region"***

In order to understand the applicability of section 157 (8) (a) of the Act, the Board studied Regulation 163 of the 2020 Regulations which provides that:

***"For the purposes of section 157 (8) (a) of the Act, the threshold up to which exclusive preference shall be given to citizen contractors shall be –***

- (a) one billion shillings for procurements in respect of works, construction materials and other materials which are made in Kenya; and***
- (b) five hundred million shillings for procurements in respect of goods and services."***

The subject tender, as can be seen on the top of the Tender Document dated March 2022 and the Invitation to Tender advertisement, applied the open national tender method of procurement. The Board however notes that the same section 157 (8) (a) of the Act provides for exclusive preference. In the case of procurement in respect of works, construction materials and other materials of which this tender applies, the threshold is one billion Kenya shillings. From the perusal of confidential documents supplied to it, the Board notes that the Procuring Entity budget for the tender is Kshs 1,195,481,382.26 inclusive of VAT. The Applicant submitted a tender of Kenya shillings 1,096,732,341.00. it is clear from both the Procuring Entity's budget and the Applicant bid that the tender is above the prescribed threshold for exclusive preference. In the circumstances, the Board finds that Section 157(8)(a) of the Act is not applicable to subject tender.

Turning to the prescribed margin of preference under section 157 (8) (b) (i) and (ii) of the Act, the Board makes reference to the enabling Regulations 164 which provides as follows:

***"For the purposes of section 157 (8) (b) of the Act, the margin of preference for international tendering and competition pursuant to section 89 of the Act shall be –***

- (a) twenty percent (20%) margin of preference of the evaluated price of the tender given to candidates offering goods manufactured, mined, extracted, grown, assembled or semi-processed in Kenya and the percentage of shareholding of Kenyan citizens is more than fifty percent (50%);***
- (b) fifteen percent (15%) margin of preference of the evaluated price of the tender given to candidates offering goods manufactured, mined, extracted, grown, assembled or semi-processed in Kenya;***
- (c) ten percent (10%) margin of preference of the evaluated price of the tender, where the percentage of shareholding of Kenyan citizens is more than fifty percent (50%);***
- (d) eight percent (8%) margin of preference of the evaluated price of the tender, where the percentage of shareholding of Kenyan citizens is less than fifty percent (50%) but above twenty percent (20%); and***

***(e) six percent (6%) margin of preference of the evaluated price of the tender, where the percentage of shareholding of Kenyan citizens is above five percent (5%) and less than twenty percent (20%).***

We have established that the subject tender was a national open tender for works, construction materials and other materials. However, we note that Regulation 164 of Regulations 2020 on the prescribed graduating scale depending on percentage of shareholding of the locals under Section 157(8) (b) (ii) of the Act applies to international tenders and competition pursuant to Section 89 of the Act. For this reason, the subject tender being a national open tender and not international tender and competition, it is the finding of the Board that the prescribed graduating scale depending on percentage of shareholding of the locals under Regulation 164 of Regulations 2020 read with Section 157(8)(b)(ii) of the Act does not apply to the subject tender.

Given the foregoing, we find that the Procuring Entity did not err in failing to apply a margin of preference of 20% provided under Section 86(2) of the Act on the Applicant's tender.

***Whether the Interested Party was awarded the tender despite not having met the evaluation criteria set under the Tender Document in breach of the Provisions of Section 80 (2) of the Act.***



The Applicant urged the Board, in exercise of its discretion, to review the manner in which the Interested Party's bid was evaluated at the preliminary, technical and financial stages. Specifically, it urged the Board to determine if the Interested Party met all the preliminary/mandatory and technical criteria under the Tender Document, lowering of the requirements, removal of margin of preference, disqualification of bidders due to arithmetic errors, removal of NCA and EPPRA certificate requirements.

The Applicant at Paragraph 42 of its further statement invited the Board to review the Interested Party's bid to confirm whether it met the Technical Evaluation Criteria on Cash Flow Projections and the Acid Test Ratios as provided in page 48 of the Tender, item 3 (b) and 3 (c). This section states as follows:

- a. Joint ventures were required to provide an aggregate (combined) of the construction turnover for the joint venture partners, with required proof in the form of audited and duly certified accounts.

According to the Applicant:

- i. The turnover was to be a combined turnover for both members of the joint venture. It was not enough if the turnover was only provided by one of the joint venture partners.

ii. The turnover was to be construction turnover. For purposes of this requirement, turnover obtained in other sectors such as in oil importation or retail or any other unrelated areas besides construction would not suffice.

iii. The use of the word must and noting that the requirement was to be evaluated on a RESPONSIVE/NON-RESPONSIVE basis, indicates it is a mandatory technical requirement which could not be waived. Failure to meet the requirement would lead to disqualification.

iv. The notes on page 51 of the Tender at the end of the Technical Evaluation Criteria stated as follows:

ONLY BIDS THAT FULLY COMPLY WITH THE TECHNICAL EVALUATION CRITERIA SHALL PROGRESS TO THE FINANCIAL EVALUATION STAGE. (Emphasis in Tender)

b. Based on the information provided regarding the Interested Party's eligibility, experience and competence and the evidence provided such as the NCA contractor search results and evidence from other sources, according to the Applicant, it is evident that Gulf Energy Limited is not registered as a contractor with NCA or EPRA and its main activities are in oil importation and retail.

c. It follows that Gulf Energy has no construction experience as a contractor since as a company registered in Kenya since 2005, it would have been impossible and illegal to obtain construction experience without the NCA and EPRA certifications.

d. How then did the Interested Party meet this requirement of an aggregate (combined) of the construction turnover for the joint venture partners?

e. Bidders were to meet the Acid Test Ratio of 1:1 for the last three years. It would follow that for this requirement, only the audited accounts for Comacon Limited would be used to meet this criterion based on construction work.

f. From the Applicant's experience with Comacon Limited as its subcontractor over the last two years, the Applicant has reasonable grounds to believe that Comacon Limited may not have met this Acid Test Ratio of 1:1 criterion and invites the Board to review the Interested Party's bid to establish whether it met this mandatory technical requirement.

g. The Applicant states that based on the analysis and evidence presented above, there is good reason to believe that the Interested Party did not meet technical requirement No. 3 (b) and 3 (c) on page 48 of the Tender Document and invites the Board to evaluate the Interested Party's bid to check if it met this criterion and if it did not, order the Procuring Entity to disqualify the Interested Party's bid for failure to meet a mandatory technical requirement.

In conclusion, the Applicant asserted that should the Board find that the Interested Party had not met the criteria under the tender document, the Act and the Regulations, it should direct the Procuring Entity to re-evaluate the Interested Party in accordance with the law and nullify the notification of intention to award the Tender to it.

The Procuring Entity in response submitted that the Applicant had not disclosed any breach committed by the Procuring Entity throughout the entire procurement process and instead sought to have the Review Board to go on a fact-finding expedition to look for errors or misgivings which do not exist.

The Board finds itself faced with the question as to whether the Interested Party was properly evaluated at all the stages of the tender evaluation process. To resolve this question, the Board notes that upon receipt of the Request for Review on 27<sup>th</sup> April 2022 the Secretariat to the Review Board called for all the documents concerned with the subject procurement. Among the documents submitted to the Board was tender evaluation report which is part of confidential documents submitted to the Board pursuant to section 67 (3) (e) of the Act.

The Board observes that the tender evaluation report and other confidential documents submitted to it are for purposes of confirming the allegations of the parties to the review as set out in the parties' respective



cases. The Board observes further that the confidential documents in its possession are not used for the purpose of aiding any party to the review.

In the instant ground for review the Applicant has alleged breach of the Act by the Procuring Entity for issuing the letter of notification of award to the Interested Party who did not, according to the Applicant, meet the evaluation criteria set out in the tender document. The Applicant has gone further and invited the Board to scrutinize the Interested Party's tender to affirm the said disqualifying marks.

The Board wishes to re-state the cardinal rule of justice that he who alleges proves. The Applicant herein made serious allegations against the Interested Party. For those allegations to carry weight, the Applicant needed to go further and provide the Board with evidence which it did not. In the absence of such evidence the Applicant's assertions against the Interested Party are merely speculative. The Board finds that the allegations are unproven and this ground of review therefore fails noting that the Board cannot convert itself into an evaluation committee to conduct evaluation of the Applicant's tender.

In totality of the foregoing, this Request for Review fails in terms of the following orders:

## **FINAL ORDERS**

In exercise of the powers conferred upon it by Section 173 of the Act, the Board makes the following orders in the Request for Review: -

- 1. The Request for Review dated 27<sup>th</sup> April, 2022 and filed on 27<sup>th</sup> April, 2022 in respect to Tender No. KPC-PU-OT-087-PROJECTS-NBI-21-22; Tender for Connectivity of KPRL Port Reitz Tank Farm to Line 5 KOT be and is hereby dismissed .**
- 2. The Procuring Entity is at liberty to proceed with procurement process to its logical conclusion in accordance with the applicable laws.**
- 3. Given the findings herein, each party shall bear its own costs of the Request for Review.**

**Dated at Nairobi, this 17<sup>th</sup> day of May, 2022.**



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**CHAIRPERSON**

**PPARB**



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**SECRETARY**

**PPARB**