

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 45/2022 OF 20TH MAY, 2022

BETWEEN

- 1. INHEMETER AFRICA COMPANY LIMITED**
- 2. SMART METERS TECHNOLOGY LIMITED**
- 3. SHENZHEN STAR INSTRUMENT COMPANY LIMITED**
- 4. MAGNATE VENTURES**

LIMITED.....APPLICANTS

VERSUS

THE ACCOUNTING OFFICER/CEO

KENYA POWER AND LIGHTING COMPANY

Plc.....RESPONDENT

Request for Review against the decision of the Accounting Officer Kenya Power and Lighting Company in relation to Tender No **KP1/9A.3/RT/05/21-22-** for supply and delivery of single phase, three phase post-paid and pre-paid meters.

BOARD MEMBERS

- | | |
|-----------------------|--------------------|
| 1. Ms. Faith Waigwa | - Chairperson |
| 2. Mrs. Njeri Onyango | - Vice Chairperson |
| 3. Mr. Jackson Awele | - Member |

- 4. Qs. Hussein Were - Member
- 5. Arch. Steve Oundo ,OGW - Member

BACKGROUND OF AWARD

The Tendering Process

The Kenya Power and Lighting Company (hereinafter referred to as the "Procuring Entity") invited eligible and interested bidders to submit expression of interest in respect to tender number **KPI/9A.3/RT/05/21-22**(hereinafter referred to as the "subject tender") through a Notice of Intention to procure, advertised in the Procuring Entity's website (<https://www.kplc.co.ke>) on 14th March,2022,for supply and delivery of single phase, three phase post-paid and pre-paid meters.

Addendum

The Procuring Entity issued Addendum No. 1 dated 5th April, 2022 making amendments to the principal tender documents. The Procuring Entity made amendments to the following provisions to the Tender document through the Addendum:

1. **Section Ii- Tender Data Sheet (TDS)**
2. **Section Iii-Evaluation And Qualification Criteria**

Pre-bid Meeting

Invited bidders were notified via the Addendum of 5th April, 2022 of a mandatory pre bid meeting to be held on 7th April, 2022, virtually. Attendance of the pre-bid meeting was part of the evaluation process.

Tender submission

By a notice issued in compliance to Section 102 (1) (c) and (d) of the Act and Regulation 89 (8) of the Regulations 2020, the Procurement Entity by way of intention to procure invited a limited number of bidders to show interest in participating in the Tender.

The Respondent received a total of Thirty-Three (33) Bids from both local and International Firms. The Procuring Entity then forwarded the Tender Document to the said limited number of bidders who had shown interest and who were deemed to have the capacity to participate.

The following tenderers were recorded as having submitted their intentions to participate and were issued with tender documents:

No.	Name	Location	Email
1	Itron	South Africa	Casandra.martinez@itron.com
2	Landis & Gyr	Europe	patrick.jordan@landisgyr.com asaph.pHEME@landisgyr.com
3	Scheider Electric (k) Ltd	Europe	alfrednjoroge@se.com sharon.mwaghoti@se.com
4	Holley Metering Ltd.	China	overseas@holley.cn

5	Jiangsu Linyang Electronics co.,Ltd.	China	marketing@linyang.com
6	Waison Group Ltd	China	marketing@waison.com
7	Ningbo Sanxin Electric Ltd	China	info@overseas.sanxing.com
8	Sagemcom SAS	Europe	Boubacar.diandy@sagemcom.com
9	Kamstrup	Europe	pvh@kamstrup.com / lazb@kamstrup.com
10	Hexing Electrical Co Ltd	China	market@hxgroup.com / yuan.niu@hxgroup.com
11	Nuriflex	South Korea	famu@utilitypartners.co.ke
12	Shenzhen Star (Kenya)	China	Levin@sztar.com
13	Shenzhen Star (Kenya)	Kenya	info@sztar.co.ke
14	Inhemeter Co Ltd	Kenya	africa@inhemeter.com
15	Inhemeter Co Ltd	China	info@inhegroup.com
16	Smart Technology Ltd	Kenya	info@smartmetertech.co.ke
17	Magnate Ventures	Kenya	Linet.oyuga@magnateventures.com
18	EDMI	Singapore	Musab.lafi@edmi-metres.com
19	Elsewedy	Egypt	rowad@sewedy.com
20	Amotech East	Kenya	mugezi@amotech.africa.com

	Africa Ltd		
21	Tomag Enterprises Ltd	Kenya	info@tomag.co.ke
22	Gridspertise	Barcelona	Carlos.oros@enel.com
23	ZTE Corporation	China	Yu.peng50@zte.com.cn
24	Ningbo Sangxing Medical & Electric	China	info@overseas.sanxing.com
25	Zuriel Ultimate Ventures	Kenya	info@zurielultimateventures.co.ke
26	Focus Group	Kenya	
27	Alpha Systems Ltd	Kenya	naomi@alphasystems.co.ke
28	Propower Ltd	Kenya	info@propower.co.ke
29	Elsewedy electric	Egypt	rawad@sewedy.com.eg
30	Elsewedy Sedco	Egypt	amr.zaky@elsewedy.com
31	Iskraemeco	Egypt	amr.zaky@elsewedy.com
32	Tier Data Ltd	Kenya	info@tierdata.co.ke
33	Elsewedy Electrometer	Egypt	amr.zaky@elsewedy.com

The Applicants herein are among the thirty-three (33) firms that received tender documents.

REQUEST FOR REVIEW

The Request for Review was lodged by M/s Inhemeter Africa Company Limited, Smart Meters Technology Limited, Shenzhen Star Instrument Company Limited and Magnate Ventures Limited, on 20th May, 2022 in the matter of tender No.KP1/9A.3/RT/05/21-22 for the Supply & Delivery of Single Phase, Three Phase Post Paid & Prepaid Meters.

The Applicants seek for the following orders:

- 1. The Respondent Tender No. KP1/9A.3/RT/05/21-22 FOR SUPPLY & DELIVERY OF SINGLE PHASE, THREE PHASE POSTPAID AND PREPAID METERS be quashed, annuled and/or tender clauses which has the effect of disqualifying the Applicants from participating in the Tender be quashed.***
- 2. The Respondent be directed to restrict the tender No. KP1/9A.3/RT/05/21-22 FOR SUPPLY & DELIVERY OF SINGLE PHASE, THREE PHASE POSTPAID AND PREPAID METERS and/or advertise another Tender restricted to local Manufacturers and Assemblers as previously done upon removal of the offending Clauses.***
- 3. An order directing the Respondent to comply with the law on preference and reservations in favour of local suppliers as set out in the Constitution, the Public Procurement and***

***Asset Disposal Act, 2015 and the Public Procurement and
Asset Disposal Regulations, 2020..***

On its part the Respondent requested for the following prayers from the Board:-

- a) To dismiss the Applicants' Request for Review with costs to the Respondent;
- b) A declaration be issued that the procurement process is lawful and ought to progress.
- c) Costs of this Review be awarded to the Respondent.

Pursuant to the Board's Circular No. 2/2020 dated 24th 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 specifies that pleadings and documents would be deemed as properly filed if they bear the official stamp of the Board.

APPLICANT'S CASE

The Applicants aver that the Procuring Entity invited bids by restricted tender and further provided unreasonable conditions of Tender which amounts to discriminating tendering process to an exclusive international procurement model for the power distribution products as listed in the Respondent's Tender Invitation.

The Applicants aver that the essence of the Tender document and conditions is to edge out local manufacturers and assemblers who have all been supplying the Respondent with the energy meters in favour of foreign international companies.

The Applicants were among the candidates whom the Respondent sent the invitation to tender as stated in the preceding paragraph via their respective email addresses. The Applicants are Kenyan local companies dealing in local assembling and manufacturing of the Meters, the subject of the impugned Tender.

The Applicants state that around 29th March, 2021 so to ameliorate the high costs of power, the Government of Kenya established a Taskforce on the Review of Power Purchases Agreements (PPAS) with clearly defined terms of reference. However, in excess of its jurisdiction and complete deviation from its primary terms of Reference and without affording the Applicants an opportunity to be heard, the Taskforce made a one line recommendation at page 148 paragraph 12.4.1(g) of its Report to the effect that;-

"(g). KPLC to designate specific goods of a high value/critical to sustainable service (e.g. transformers, sub-station equipment, meters, cables) to be procured from Original Equipment Manufacturers (OEMs) only and not assemblers".

The effect of this recommendation was to roll back and defeat the earlier gains made and exclude all the local assemblers and manufacturers in

favour of foreign multinational companies yet the Applicants quality of energy meters supplied have been satisfactory and competitively priced without any recorded nor implied complaints from the Respondent.

The Applicants states that the Respondent in a hurried manner to implement the Taskforce Report out of context and to achieve ulterior motives inserted conditions in the impugned Tender whose net effect is to disqualify the members of the Applicants from participating in the Tender.

The conditions in the Tender whose specifications are geared to lock out the members of the Applicants are as follows:-

- (i) Condition 8.2.1 KP1/6C/4/1/TSP/14/011-2, KP1/13D/4/1/TSP/14/011-4 and KP1/13D/4/1/TSP/14/011-6 which requires a Minimum of 15 years technical specifications experience in manufacture of energy meter. This condition is unreasonable, impractical, and discriminatory and meant to stifle and unfairly deny the members of the Applicants the opportunity to participate in the tender.**
- (ii) Condition 8.2.2 KP1/6C/4/1/TSP/14/011-2, KP1/13D/4/1/TSP/14/011-4 and KP1/13D/4/1/TSP/14/011-6 which requires that the meters on offer shall have been in service and given reliable service for a minimum period of 8 years in at least two power utilities in at least 3 of the following continents/regions: a) Europe b) North America c) Africa d) Asia or South America e) Oceania(Australia). This condition is unreasonable, impractical,**

discriminatory and meant to stifle and unfairly deny the members of the Applicants the opportunity to participate in the tender.

(iii) Condition KP1/6C/4/1/TSP/14/011-2 (4.2.1.13), KP1/13D/4/1/TSP/14/011-4 (4.2.1.27) and KP1/13D/4/1/TSP/14/011-6 (4.2.1.26) - Which requires that the meter shall have a non-volatile memory capable of data storage and with long-term retention period of not less than 10 years or for the certified life of the meter or whichever is greater without an electrical supply being supplied to the meter. Further, the manufacturer shall provide Meter Accelerated Life Test (ALT) report (Life Expectancy test) report form a recognized ISO/IEC 17025 laboratory as per IEC 62059-31-1. This condition is unreasonable, impractical, discriminatory and meant to stifle and unfairly deny the members of the Applicants the opportunity to participate in the tender.

RESPONDENT'S CASE

In response, the Respondent avers that the procurement method applied is in accordance with the Section 91 of the Act which allows the Procuring Entity to use any procurement procedure subject to fulfilment of the conditions set out in the Act for application of such procedure.

The Respondent avers that the subject tender is limited in accordance with Sections 102(c) and (d) of the Act, which provides for the same under the Restricted tender method.

The Respondent states that Section 89 of the Act and Regulations 36 of the Regulations, 2020 permits International Tenders such as this.

The Respondent avers that there are no offending clauses in the Bidding Document as alleged and Section 60(3) (a) of the Act required that the technical requirements conform to design, specification, functionality and performance and Section 60(3)(b) of the Act requires that the technical requirements in the Bidding Document to be based on national or international standards whichever is superior. Further the Applicants do not have exclusive rights for the supply of meters to the Procuring Entity.

The Respondent avers that the Procuring Entity is committed to providing its customers with quality for energy sustainability as well as making the most economically viable decisions for the growth of its own business and it has not failed to promote the national values and principles and the local industry.

The Respondent denies that the Bidding Document requires unreasonable, impractical, discriminatory criteria which is meant to deny the Applicants opportunity to participate in the tender as alleged or at all.

The Respondent further avers that the choice of procurement method as allowed by the Act satisfies the conditions under the Act for use of the restricted tendering method. The respondent avers that use of the

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

Further the Respondent avers that the justification to on board international players and expand the specifications criteria is tied to the high failure rate of the meters supplied by the local assemblers and the Procuring Entity's internal policy which guides that the procuring Entity should attain best value from best suppliers.

The Respondent avers that, to keep abreast of progress in the industry, the Procuring Entity's Standards on meters are regularly reviewed and the Applicants cannot purport to rely on the standards of equipment required over 7 years ago. The Respondent asserts that the Procuring Entity's prepaid system is based on the STS certification. The meters on the subject tender are to be STS certified with a manufacturer's code of 2 digits. Currently the Procuring Entity's prepaid vending system only supports vending for manufacturers whose manufacturer's codes are only 2 digits until it will be upgraded to new version. All the local manufacturers/assemblers have no STS certification and thus always

partner with their mother companies which have STS certification to meet the requirements. For instance, the Respondent gives the following examples of local manufacturers/assembler who have partnered with International manufacturers;

Local assembler/ Manufacturer	STS Manufacturers Code used	Owner Of the STS Manufacturers Code	Remarks
Inhemeter Africa	37	Shenzhen Inhemeter Co., Ltd- China	Manufacturing/ Assembling in partnership/license with Shenzhen Inhemeter Co., Ltd- China
Magnet Ventures	54	Shenzhen Clou Electronic., Ltd – China	Manufacturing/ Assembling in partnership/ license with Shenzhen Shenzhen Clou Electronic., Ltd - China
Hexing Kenya	14	Hexing Electrical – China	Manufacturing/ Assembling in partnership/ license with Hexing Electrical – China
Shenzhen Star Kenya	22	Shenzhen Star Instrument - China	Manufacturing/ Assembling in partnership/ license with Shenzhen Star Instrument - China

Local assembler/ Manufacturer	STS Manufacturers Code used	Owner Of the STS Manufacturers Code	Remarks
Smart Meter Technology	54/92	Shenzhen Inhemeter Co., Ltd- China / Hangzhou Xili Watthour Meter Manufacture Co., Ltd – China	Manufacturing/ Assembling in partnership/ license with Shenzhen Inhemeter Co., Ltd- China / Hangzhou Xili Watthour Meter Manufacture Co., Ltd – China
Yocean	45	Ningbo Sanxing Electric Co. LTD	Manufacturing/ Assembling in partnership/license with Ningbo Sanxing Electric Co. LTD

The Respondent asserts that the contested clauses 8.2.1 & 8.2.2 were introduced to address the high rate of meter failures supplied by the local manufacturers/assemblers. The associated costs for meter failures on average for the last three years amount to over Kshs 23,000,000 which leads to minting the tax payer’s hard earned money in replacing the defective meters.

The Respondent asserts that any media representations which may have allegedly been made by the procuring entity were made in good faith and were not intended to act as prejudicial obstacles to the legally laid down rules of the public procurement process.

The Respondent avers that the Applicants accusation of the Procuring Entity using the Taskforce report to disqualify the local assemblers/manufacturers from participating in the tendering process are baseless, ridiculous, desperate attempts and hallucinations created to overstep the legally laid out procurement procedures as the Taskforce Report has no bearing on the Tender Document.

APPLICANT'S SUBMISSIONS

The Applicants submits that the Respondent has refused to delete/amend the offending clauses in the Tender document and is thus in breach of the law and Constitution.

The Applicants submits that the essence of the conditions in the Tender document is to edge out local manufacturers/assemblers. The Applicant further submits that the decision taken by the Respondent not only offends the law but also its own policies.

The Applicants submit that in 2015, the then Chief Executive Officer of the Procuring Entity had pledged to support local manufacturers and industries and therefore its decision to prioritise international bidders goes against its own proclamations.

The Applicants also state that the Respondent is in breach of the Constitution of Kenya 2010, the Public Procurement and Asset Disposal Regulations 2020, the Kenya Government Strategy Policy on Buy Kenya Build Kenya, Kenya Big 4 Government Agenda and the Respondent's own representations made to the Applicants in respect to promotion of local manufacturing sector.

The Applicants further submit that their previous tender for supply of energy meters of 2017 and 2020 have been competitively advertised and awarded to the Applicants and other local assemblers/manufacturers exclusively.

The Applicants in their submissions allege discrimination upon local manufacturers/ Assemblers by the Procuring Entity's tender specifications. The conditions whose specifications are contested by the Applicant are as follows:

- (iv) Condition 8.2.1 KP1/6C/4/1/TSP/14/011-2, KP1/13D/4/1/TSP/14/011-4 and KP1/13D/4/1/TSP/14/011-6 which requires a Minimum of 15 years technical specifications experience in manufacture of energy meter. This condition is unreasonable, impractical, discriminatory and meant to stifle and unfairly deny the members of the Applicants the opportunity to participate in the tender.**

(v) Condition 8.2.2 KP1/6C/4/1/TSP/14/011-2, KP1/13D/4/1/TSP/14/011-4 and KP1/13D/4/1/TSP/14/011-6 which requires that the meters on offer shall have been in service and given reliable service for a minimum period of 8 years in at least two power utilities in at least 3 of the following continents/regions: a) Europe b) North America c) Africa d) Asia or South America e) Oceania(Australia). This condition is unreasonable, impractical, discriminatory and meant to stifle and unfairly deny the members of the Applicants the opportunity to participate in the tender.

(vi) Condition KP1/6C/4/1/TSP/14/011-2 (4.2.1.13), KP1/13D/4/1/TSP/14/011-4 (4.2.1.27) and KP1/13D/4/1/TSP/14/011-6 (4.2.1.26) - Which requires that the meter shall have a non-volatile memory capable of data storage and with long-term retention period of not less than 10 years or for the certified life of the meter or whichever is greater without an electrical supply being supplied to the meter. Further, the manufacturer shall provide Meter Accelerated Life Test(ALT) report (Life Expectancy test) report form a recognized ISO/IEC 17025 laboratory as per IEC 62059-31-1. This condition is unreasonable, impractical, discriminatory and meant to stifle and unfairly deny the members of the Applicants the opportunity to participate in the tender.

The Applicants in their submissions aver that the actions by the Respondent to favour foreign manufacturers over local manufacturers violates article 10 of the Constitution of Kenya on National values and principles to promote local manufacturing and Article 27 of the Constitution as it discriminates local manufacturers and favours foreign manufacturers.

The Applicants further submit that the actions by the Respondent also violates Section 3 (i) and (j) of the of the Public Procurement and Disposal Act which aim at promotion of local industries as one of its guiding principles. The Applicants in their submissions also contend that the actions of the Respondent violates Sections 155 and 157 of the Public Procurement and Asset Disposal Act which provides for preferential treatment on articles manufactured and materials and supplies wholly mined and produced in Kenya.

The Applicants also state that the Respondent violated the law as it failed to prepare a report detailing the inability of the Applicants to procure the manufactured articles locally.

The Applicants contend that they are candidates to the subject tender and are within the meaning of Section 2 as read together with Section 167 (1) of the Act and therefore have Locus Standi to bring an Administrative Review before the Board.

The Applicants urge the Board to quash and/or annul the decision of Kenya Power and Lighting Company.

RESPONDENT'S SUBMISSIONS

The Procuring Entity that is Kenya Power and Lighting Company submits that it opted for International Tendering which is in line with Section 89 of the Public Procurement and Asset Disposal Act. The Procuring Entity further submits that it restricted the tendering process in accordance with Section 102 (1) c) and (d) of the Act.

The Procuring Entity further submits that its choice of procurement method is discretionary and it therefore opted to restrict its tender due to the high failure in the single and three phase metres supplied by local manufacturers/assemblers.

The Procuring Entity states that it invited bidders for a pre-bid meeting whose purpose was to address questions raised by the bidders in reference to the addendum No.1 dated 5th April, 2022. Consequently, the Respondent advised that the tender closing date was rescheduled to Tuesday, 10th May 2022.

The Procuring Entity submits that this Request for Review is time barred as the law requires that a party seeking administrative review, must apply to the Review Board within 14 days after being notified of the award; or within 14 days after the date of the occurrence of the alleged breach at any stage of the procurement process.

According to the Procuring Entity, the Request for Review could only have been competently brought within 14 days after the date of the occurrence of the alleged breach. This could not have been later than 29th March 2022 as the tender document was shared with the applicants on 15th March 2022.

The Procuring Entity submits that the Request for Review was filed on 20th May, 2022 which is over one and a half months of the stipulated time. the Procuring Entity in their submissions states that Section 167(1) is definitive that the Request for Review must be filed within 14 days after the date of the occurrence of the alleged breach.

The Procuring Entity also submits that that the Request for Review dated 19th May 2022 and the corresponding supporting affidavit sworn on 19th May 2022 are defective. The Procuring Entity states that the Request for Review has not been accompanied by any written authorization by the other Co-Applicants nor is the affidavit sworn by the Managing Director of the 1st Applicant duly authorized under the seal of the company as stipulated by the Civil Procedure Rules, 2010. The Procuring Entity has relied upon the following provisions in the Civil Procedure Rules:- Order 1 Rule 13; Order 4 Rule 1(3) & (4) and Order 9 Rule 2 of the Civil Procedure Rules, 2010.

The Procuring Entity in their submissions avers that the Applicants have not complied with Section 167(2) which requires that a Request for Review shall be accompanied by such refundable deposit as may be prescribed in the regulations, and such deposit shall not be less than ten per cent of the cost of the contract.

The Procuring Entity further contends that the Board lacks the requisite jurisdiction to entertain the Appeal. The Procuring Entity justifies this claim by stating that that under Section 70(4) of the Act, it is the accounting officer of the Respondent who is responsible for the preparation of the

tender documents in consultation with the user and other relevant departments. The Procuring Entity further stated that the choice of procurement method is precluded from Review since the choice of procurement is the prerogative of the procuring entity.

The Procuring Entity further states that the Request for Review by the Applicants is Res Judicata as the Applicants suit against the Respondent is on the same subject matter in **PPARB Application No. 31 of 2022, Energy Meters Assemblies & Manufacturers Association vs. KPLC** where the Review Board issued a ruling striking out the Applicant's Request for Review dated 8th April 2022 vide a ruling dated 10th May 2022. The Procuring Entity submits that this Application would amount to an abuse of court process.

The Procuring Entity submits that its tender was fair, competitive and transparent. The Respondent states that it published its tender on its website on 14th March, 2022 pursuant to the provisions of Section 89 of the PPADA (which permits international tendering and competition) and having satisfied the conditions set out in the PPADA under Section 102 on restricted tendering. The Procuring Entity further states that eleven (11) out of the Thirty-three companies that submitted their bids were Kenyan companies and therefore the process cannot be said to be exclusively targeting International bidders.

The Respondent further states that they have in the past applied restricted tendering method to local assemblers/manufacturers. The Procuring Entity further claim that they have experienced high failure rate of specific meters

supplied by the Applicant's members leading to losses of over Kshs 23,000,000 which has invariably eaten into the Respondent's Finances. The Procuring Entity justifies its decision to enlist International bidders is based on the desire to reduce the meter failures in single phase and three phase prepaid, so as to meet its customers' needs on connectivity.

The Procuring Entity also claim that the Applicants are not truthful in their claims that they cannot the required specifications as the Kenya Power and Lighting Company because interested bidders are allowed to enter into Joint Ventures Agreements in order for such bidders to attain the specifications and conditions of the tender. The said provision for Joint Ventures is not conditional as to the form and structure that it should take.

The Procuring Entity submits that the technical specifications were not geared towards locking the Applicant from the Tender as the conditions set out in the impugned tender are developed to suit the particular needs of the Procuring Entity and are not meant to stifle and/or lock out any bidder, local or international. The said specifications are developed and updated in order to keep abreast of the progress in the energy industry.

Lastly, the Procuring Entity submits that any representations allegedly made by the Respondent were made out of good faith and were not intended to form any contractual relationship with the Applicants herein. The allegations made by the Applicants fall short of the basic ingredients of a contractual relationship being offer and acceptance. Further, no duty is owed to the Applicants with regard to the alleged declarations/representations.

BOARD'S DECISION

The Board having considered each of the parties case, the pleadings, documents in support of respective positions, the written submissions and the confidential documents submitted to the Board pursuant to Section 67 (3) (e) of the Act finds that the following issues arise for determination:

I. Whether or not Application is competently filed before the Board and whether the Board has jurisdiction to entertain the Request for Review filed by the Applicants challenging the provisions of the Tender Document in the subject Tender in regard to the following sub-issues

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

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

b) Whether the Request for Review required to be accompanied by a refundable deposit being 15 % of the Cost of the Contract as provided for in Section 167 (2) of the Act?

Depending on the Determination of sub-issue (b) above

c) Whether or not the Request for Review is competent based on the provisions of the Civil Procedure Rules (CPR)?

Depending on the determination of sub issue (c) above

d) Whether the Request for Review requires the Board to Review the Procuring Entity's choice of Procurement method, contrary to Section 167 (4) (a) of the Act?

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

e) Whether the Application for Review and matters set out therein are Res Judicata?

Depending on the determination of the issues above?

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

The Board has reviewed the intention to procure the subject tender through restricted tender as well as the Tender Document submitted to the Board as part of the confidential documents by the Procuring Entity in accordance with Section 67 (3) (a) of the Act. It is noted that the Procuring Entity elected to proceed by way of Restricted tender method in accordance with Section 102 (1) (c) and (d) of the Act as read with together with Regulation 89 (8) of Regulations 2020 and invited a select number of prospective tenderers to show interest in bidding for the subject tender. Response was received from thirty-three (33) prospective tenderers who expressed interest to tender for the subject tender following an intention to tender issued by the Procuring Entity. It is these Thirty-Three (33) prospective tenderers that were invited to tender and

issued with the Tender Document by the Procuring Entity. The Tender document was issued on 15th March, 2022 via email.

On 5th April, 2022 the Procuring Entity issued an Addendum No 1 to the said tender document (hereinafter referred to as the Addendum) amending several provisions of the Tender Documents and clarifying queries received from prospective tenders while extending the tender submission deadline to 3rd May, 2022.

The Addendum, also made it mandatory for all the invited tenderers to attend a pre-bid meeting scheduled for 7th April, 2022. Minutes of the said meeting show that there were both in person and online attendance. The meeting was called to order at 10.00am and those in attendance were allowed to ask their questions and answers were provided. The specific questions and answers given are captured in the minutes some of which are pertinent to this Application and shall be referred to below.

The Respondent has raised an objection that the Request for Review offends the provisions of Section 167 (1) of the Act in that the matter is time barred as the Application has been filed outside the fourteen (14) days period provided for in the Act.

The Applicant describe themselves as among the candidates whom the Respondent sent invitation to tender as stated above which invitation was received via their email addresses. They are Kenyan local companies dealing with local assembling and manufacturing of meters the subject of the impugned tender. At paragraph 3 of the Request for Review, the Applicants state that they received the Tender through the Respondent's

portal and that being candidates they through their umbrella association sought from the Respondent to remove offending clauses in the Tender documents which had the net effect of discriminating the Applicants as local manufacturers/assemblers but the Respondent declined thus necessitating this Request for Review.

It is clear that all the Applicants participated and responded to the intention to procure and were thereafter invited to bid and supplied with the Tender document of the subject tender. From the records available particularly annexure 2A of the Supporting Affidavit to the Request for Review it is noted that the Tender Document was transmitted to the Thirty-three (33) bidders by way of an email issued by Mr. Kithaka Kinyua of email address jkithaka@kplc.co.ke on 15th March, 2022 at 7.55pm the Applicants concede that they obtained the Tender documents. It is also apparent that a number of queries were raised by the candidates/tenderers leading to issuance of Addendum Number 1 of 5th April 2022 wherein the Procuring Entity amended a number of the provisions of the tender document while making clarification and confirmations on some of the specifications some of which are now being contested by the Applicants. The said addendum set out to respond and make clarifications on issues or questions that had been raised by bidders who had received the tender document. It also contained a Clause 5 on pre bid meeting as follows;

5. PREBID MEETING

Invited bidders are notified that there will be a Mandatory Pre-bid meeting on Thursday 7th April, 2022 from 10am. A virtual (zoom) link will be provided to all bidders on email at least a day before the scheduled date. Attendance to this pre-bid meeting is MANDATORY and will form part of the evaluation process. Participants shall forward their email addresses to Vsimiyu@klc.co.ke, for facilitation

The questions raised by bidders and clarifications on technical specifications and standards of items in the tender document during the Pre bid meeting were captured in meeting records of the meeting and are set out in numerical order. The pertinent issues to this Review Application are items

<p>13</p>	<p>LOCAL CONTENT (40% RULE): Pursuant to the provisions in the Public Procurement and Disposal Act 2015, a foreign Tenderer must complete the form to demonstrate that the quotation fulfils this condition: *Local Labour* Sub contracts from local sources * Local materials* Use of Local plant and Equipment* Add any other items As an invited foreign Tenderer, please kindly suggest how to fulfil the 40% local content rules to make sure the foreign tenderer can be successfully participants</p>	<p>This is a restricted tender in accordance with Section 102 (b) of the PPADA 2015 and therefore not applicable for this tender</p>
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14	<p>Further, the manufacturer shall provide Meter Accelerated Life Test (ALT) report (Life Expectancy Test) report from a recognized ISO/JEC 17025 accredited laboratory as per IEC 62059-31-1.</p> <p>This certificate takes at least two months to make. It is impossible to finish it before deadline.</p> <p>1) Please clarify if submission is mandatory and if it can be submitted after awarded and before delivery</p> <p>2) Please clarify if "Reliability Prediction Report" is acceptable during submission.</p>	Meet requirement

From the minutes of the pre-bid meeting held on 7th April, 2022 which are contained in the confidential documents obtained from the Procuring Entity, it shows that the technical specification questions were raised and clarifications were made to those questions raised by bidders in reference to the tender document and addendum Number 1 of 5th April 2022. Some of the issues that arose touching on this Application for Review as set out in the minutes are:-

	Description	Bidders Question	KPLC Response
1	<p>KP1/6C/4/1/TSP/14/011-2</p> <p>KP1/13D/4/1/TSP/14/011-4</p> <p>KP1/13D/4/1/TSP/14/011-6</p> <p>8.2.1 The meter manufacturer shall have a minimum of 15 years of experience in the manufacturer energy meters.</p> <p>Tender Document (P38/119) Table 2</p> <p>Capacity Declaration Form</p>	<p>As per the tender document, the commercial part requires minimum 3 years of manufacturing experience while the technical specification requires minimum of 15 years of manufacturing experience.</p> <p>For your kind of information:</p> <p>1. Almost all the meters used in Africa continent are using IEC standard, but some of the IEC standards doesn't even last for more than 10 years.</p>	<p>8.2.1" The meter manufacturer shall have a minimum of 15 years of experience in the manufacture of energy meters"</p> <p>1. IEC standards define technical requirements while KPLC specifications define both technical and non-technical requirements. Manufacturing experience is</p>

		<p>2. May we know which specific standard it can refer to indicate that 15 years' metering manufacturer experience is much more reliable than 5 or 10 years' experience?</p> <p>3. As all specification will be renewed in every 5 years, 15 years' experience doesn't form the basis of technical evaluation.</p> <p>Thus we kindly request the manufacturing experience to be in conform with commercial term, which is (from date plant was established) Minimum</p>	<p>non-technical requirement.</p> <p>2. The requirement in the clause 8.2.1 is a non-technical requirement and therefore cannot be based on IEC standards</p> <p>3. Neither the specification nor the tender documents has mentioned specification review duration intervals.</p>
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		3years	
5	<p>KPI/6C/4/1/TSP/14/011-2 (4.2.1.13)</p> <p>KPI/13D/4/1/TSP/14/011-4 (4.2.1.27)</p> <p>KPI/13D/4/1/TSP/14/011-6 (4.2.1.26)</p> <p>The meter shall have a non-volatile memory capable of data storage and with long term retention period of not less than 10 years or the certified life of the meter or whichever is greater without an electrical supply being supplied to the meter. Further the manufacturer shall have provide Meter Accelerated Life Test (ALT) report (Life Expectancy Test) report from a recognized</p>	<p>Meter Accelerated Life Test (ALT) report from recognized Laboratories KEMA, NMi, UL is commonly used to identify the meter life duration while our current reliability Prediction Report can also prove the same which follows the standard IEC 62059-41: Reliability prediction. ALT test report normally requires at least half a year to be issued, as this specification is new and the products you required are also brand new design, it's quite impossible to get latest ALT report within bidding time to satisfy your needs. This may</p>	<p>Meter Accelerated Test (ATL) is a standard test that is enlisted as one of the meter tests done by any accredited labs.</p> <p>While the submitted of Reliability Prediction Report will be reviewed for assessment of its test coverage, it shall not substitute the requirement for Meter Accelerated</p>

	ISO/IEC 17025 laboratory as per IEC 62059-31-1	lead to unfair competition between manufacturers as violates the PPRA laws. Thus we kindly request you may accept Reliability Prediction Report from the third-party laboratory	Test Report (ALT) Past Accelerated Test Report (ALT) for similar/same series metres will be considered.
7	<p>KP1/13D/4/1/TSP/14/0/11-4</p> <p>KP1/13D/4/1/TSP/14/0 11 6</p> <p>4.2.4.1.2 The meters shall be capable of profiling multiple channels of energy, demand (KVA, KW, KVAr), voltage, current power factor, harmonics, for a period of at least six (6) months for 60</p>	<p>The meter's accuracy meets that it will not be influenced by harmonics according to standard IEC 62053-21 table 8 of the section 8.2. while harmonics and THD detection are normally for transformer operated meters, like CT meter. As per the specification, direct connected meters are needed in this project, thus the</p>	

	<p>minutes data intervals.</p> <p>4.2.9.3 The meters shall provide Total Harmonic Distortion (THD) event detection at least up to the 10a harmonic with analysis for usual system conditions.</p>	<p>functions of harmonics and THD detection are not applicable for relevant products. Please kindly confirm if functions of harmonics and THD detection can be erased from original document.</p>	
14	Sample requirement	Can the samples be submitted after 2 weeks of tender close?	Samples shall be delivered to KPLC –Supply Chain Office – 3 rd Floor Stima Plaza on or before the tender closing date. They shall be received and recorded in procurement section by the

			persons handling this tender.
15	LOCAL CONTENT (40% RULE):	<p>LOCAL CONTENT (40% RULE): Pursuant to the provisions in the Public Procurement and Disposal Act, 2015, a Foreign Tenderer must complete the form to demonstrate that the quotation fulfils this condition. *Local Labour* Sub contracts from Local sources* Local materials* use of local plant and Equipment* Add any other items</p> <p>As an invited foreign tenderer, please kindly suggest how to fulfil the 40% local content rules to make sure the foreign</p>	

		tenderer can be successfully participants.	
16	Tender submission Deadline	Sample making requires time since it's a new specification. Shipping of the sample from the country of manufacture can take at least 3 weeks can the tender be extended?	The new tender closing date is Tuesday, May 10, 2022

The Applicants in the current Application complain that some specifications in the Tender document are geared towards locking out local manufacturer/assemblers such as the Applicants. The specific issues taken are contained at paragraph 17 of the Application as follows

17. That the conditions in the Tender whose specifications are geared to lock out the Applicants are as follows:

(i) Condition 8.2.1 KP1/6C/4/1/TSP/14/011-2, KP1/13D/4/1/TSP/14/011-4 and

KP1/13D/4/1/TSP/14/011-6 which requires a Minimum of 15 years technical specifications experience in manufacture of energy meter. This condition is unreasonable, impractical,

discriminatory and meant to stifle and unfairly deny the members of the Applicants the opportunity to participate in the tender because:

- a) Almost all the meters used in Africa continent are using IEC standard, but some of the IEC standards doesn't even last for more than 10 years.***
- b) The Respondent has no known specific standard it can refer to indicate that 15 years' metering manufacturer experience is much more reliable than 5 or 10 years' experience?***
- c) As per Tender conditions, all specifications will be renewed in every 5 years and therefore, 15 years' experience doesn't form the basis of technical evaluation.***
- d) As no Kenyan local meter manufacturers have lasted for 15 years because they only commenced their production 7 years ago upon representations from the Respondent. The condition is typically manipulated by certain entity to lock local manufacturers out.***

(ii) Condition 8.2.2 KP1/6C/4/1/TSP/14/011-2, KP1/13D/4/1/TSP/14/011-4 and KP1/13D/4/1/TSP/14/011-6 which requires The meters on offer shall have been in service and given reliable service for a minimum period of 8 years in at least

two power utilities in at least 3 of the following continents/regions: a) Europe b) North America c) Africa d) Asia or South America e) Oceania(Australia). This condition is unreasonable, impractical, discriminatory and meant to stifle and unfairly deny the members of the Applicants the opportunity to participate in the tender because:

a) DIN Rail Meters are mostly used in Africa, Europe and part of America Markets, majority of the America and Australia markets are using ANSI meters, hence this requirement would be impractical for all local manufacturers to meet.

b) As meter performance is always the major concern of all utilities, and for KPLC, no better case serves them better than their own site meters operation condition. The Applicants are apprehensive this requirement is manipulated by certain entity to fight against local manufacturer as it doesn't emphasize on local supply record and local manufacturers can't supply to any other countries out of Kenya.

c) This requirement might pave the way for other manufacturers to supply to KPLC while their products have never been tested in Kenya. Possible high failure meter rates might occur and it would damage the interests of both KPLC and Kenyan people, which

violates the prudent use of public funds as required by the Constitution.

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

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

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

Which requires that the meter shall have a non-volatile memory capable of data storage and with long-term retention period of not less than 10 years or for the certified life of the meter or whichever is greater without an electrical supply being supplied to the meter. Further, the manufacturer shall provide Meter Accelerated Life Test(ALT) report (Life Expectancy test) report from a recognized ISO/IEC 17025 laboratory as per IEC 6205931-1. This condition is unreasonable, impractical, discriminatory and meant to stifle and unfairly deny the members of the Applicants the opportunity to participate in the tender because:

a) Meter Accelerated Life Test (ALT) report from recognized laboratories KEMA,NMi,UL is commonly used to identify the meter life duration while Reliability Prediction Report from SICEM can achieve the same function.

b) ALT test report normally requires at least half year to be issued as this specification is new and the products KPLC required are also brand new design, it's quite impossible for local manufacturers to get latest

ALT report within bidding time to satisfy their needs. This requirement only favors those other manufacturers who already have them and it's highly possible that the specification is made by them.

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

The Applicants also complain that the provisions of the tender document and the specifications are such that they are deliberately geared to benefit certain foreign manufacturers to the exclusion of the local dealers. That the definition and meaning of the word "manufacturer" as captured in the Tender Document tells it all as the Local players are assemblers. Therefore, the Tender Document clearly offends Section 155 (3) of the Act and Article 227 of the Constitution which states

227. Procurement of Public goods and services

- (1) *When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.*
- (2) *An Act of Parliament shall prescribe a framework within which*

policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following--

- (a) categories of preference in the allocation of contracts;*
- (b) the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination;*
- (c) sanctions against contractors that have not performed according to professionally regulated procedures, contractual agreements or legislation; and*
- (d) sanctions against persons who have defaulted on their tax obligations, or have been guilty of corrupt practices or serious violations of fair employment laws and practices.*

Section 155 of the Act on the other hand provides as follows:-

155. Requirement for preferences and reservations

(1)

(2)

(3) Despite the provisions of subsection (1), preference shall be given to—

(a) manufactured articles, materials and supplies partially mined or produced in Kenya or where applicable have been assembled in Kenya; or

(b) firms where Kenyans are shareholders.

(4)

(5)

(a)

(b)

At paragraphs 28 and 33 of the Supporting Affidavit of William Gatheca Kabinga sworn on 19th May, 2022 the deponent states as follows :-

28. That in response to queries raised by candidates in relation to the 40% Local Content Rule, the Respondent in response thereto clarified at paragraph 13, that being a restricted tender the Local Content Rule did not apply, which clarification was a misapplication of the Law, unconstitutional, unreasonable and unlawful since the requirements of Local content is in furtherance of Article 227 of The Constitution and cannot be ousted by an Act of Parliament.

33. That the Applicants brought these violations and breaches to the attention of the Respondent who in violation of Article 47 of the Constitution and Section 4 and 4 of the Fair Administrative Action Act declined to respond to the concerns raised by the Applicants, particularly;-

i. The meaning of the word manufacturer as captured in its tender bearing in mind that the

local players are assemblers who fall under the ambit and definition of Section 155 (3) (a) of the Public Procurement and Asset Disposal Act

- ii. Whether it have done a report detailing evidence of inability to locally procure the products as stated in the Tender noting that it have never invited members of the Applicants on discussions on their ability to deliver;*
- iii. Whether exclusive preference has been given to the local players noting that there is no indication that the funding is not from national or county government or a Kenyan body.*

(I now produce and annex herein and marked WG11 a copy of the complaint to the Applicants which they are yet to respond to date)

The document referred to in paragraph 33 above, is the letter issued by **ENERGY METERS ASSEMBLERS & MANUFACTURERS ASSOCIATION** dated 22nd March, 2022 at page 485 of the Applicants documents. The said letter is addressed to the A.G Managing Director & CEO of the Procuring Entity is as follows:-

Dear Madam,

RE: EXCLUSIVE PARTNERSHIP WITH KENYA POWER AND LIGHTING COMPANY AND INTERNATIONAL PLAYERS

CONTRARY TO THE BIG FOUR AGENDA AND THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT

We refer to the above matter and our letter dated 3^d March, 2022 and received by yourselves on 4th March 2022.

Vide the Tender letter KP1/9A.3/RT/05/21-22 you have invited bids and restricted the tender by placing the words "RESTRICTED TENDER" and further by stating that the Tender is limited to "MANUFACTURERS ONLY" which confirms our earlier process that you are in the process of carrying out and implementing an exclusive international procurement model for the power distribution products as listed in your Tender Invitation.

We note that this goes against the local content as provided for in the Energy Act No. 1 of 2019 as well as the Public Procurement and Asset Disposal Act 2015. The Public Procurement and Asset Disposal Act 2015, Section 155 clearly provides for preferential treatment on article manufactured and materials and supplies wholly mined and produced in Kenya as well as manufactured and materials and supplies wholly mined and produced in Kenya and where applicable have been assembled in Kenya.

Further the Public Procurement and Asset Disposal Act provides that for an entity to procure items not wholly or partially manufactured in Kenya a report shall be done detailing evidence of inability to procure the manufactured articles, materials and supplies wholly mined or produced in Kenya and where the funding is 100% from the national

or county government or a Kenyan body, exclusive preferences shall be given to the citizens of Kenya.

In light of the above, we seek your clarification on the above issues raised and particularly:

- i. The meaning of the word Manufacturer as captured in your tender bearing in mind that the local players are assemblers who fall under the ambit and definition of Section 155 (3) (a) of the Public Procurement and Asset Disposal Act*
- ii. Whether you have done a report detailing evidence of inability to locally procure the products as stated in the Tender noting that you have never invited us on discussions on our ability to deliver:*
- iii. Whether exclusive preferences has been given to the local players noting that there is no indication that the funding is not from national or county government or a Kenyan body.*

We reiterate the contents of our letter dated 3^d March, 2022 that Kenya Power vide a new release dated 30th March, 2015 (a copy of which we enclose herewith), urged local investors to invest in manufacture of meters locally. That further the Buy Kenya Build Kenya Strategy of 2017 focusses on consumption of locally produced goods to enable enhance Kenya's competitiveness and makes reference to the preferential treatment provided for under the Public Procurement and Asset Disposal Act 2015.

It is under the Buy Kenya Build Kenya Strategy of 2017 that you had promised to support those who invest in the manufacture of metres locally

and further you had promised that Kenya Power research and development team would continuously work with us to ensure we meet your requirements that may vary from time to time due to technological changes and advancements.

Regrettably, you have never invited us for any consultative meeting needless to point out that we have invested in plant, machinery, equipment and employed and trained staff. If you take the direction of exclusive international procurement our factories will be redundant and we will be forced to lay off staff at a very expensive and protracted labor costs.

We will appreciate if you could review your position and invite us to work with yourselves to meet your requirements.

Yours Faithfully

Energy Meters Assemblers and Manufacturers Association

The Board takes note that the issue raised in the said letter are also the same issues raised and dealt with under Addendum Number 1 of 5th April, 2022 and also dealt with in the pre-bid meeting of 7th April, 2022. Section 167 (1) of the Act and Regulation 203 of the Regulations 2020 provide 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.

On its part, Regulation 203 (2) of the Regulations 2020 provides as follows:-

203. (1)

(2) The request referred to in paragraph (1) shall—

- (a) State the reasons for the complaint, including any alleged breach of the Constitution, the Act or these Regulations;**
- (b) Be accompanied by such statements as the applicant considers necessary in support of its request;**
- (c) Be made within fourteen days of—**
 - (i) the occurrence of the breach complained of, where the request is made before the making of an award;**
 - (ii) the notification under section 87 of the Act; or**
 - (iii) the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder.**

(d)

3).....

4).....

The Board has previously had occasion to make determination in regard to the provision of Section 167 (1). The Board has taken the position that, an Applicant should approach the Board with an Application for Review at the earliest moment the alleged breach comes to his attention (learns of the breach) and that time for filing the Request shall be reckoned from such date of discovery/ learning of the breach.

It is trite law that the courts and decision making bodies can only act in cases where they have jurisdiction Nyarangi JA stated as follows in the *locus classicus* case of ***The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited [1989] eKLR:***

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction." [Emphasis added]

Similarly, in the case of **Kakuta Maimai Hamisi vs. Peris Pesi Tobiko & 2 Others [2013] eKLR** the Court of Appeal emphasized the importance of the issue of jurisdiction and stated that:

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

It therefore behoves the Board to determine whether it has jurisdiction to entertain the Request for Review.

The Supreme Court in the case of **Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Ltd and 2 Others [2012] eKLR** pronounced itself regarding where the source of jurisdiction of a court or any other decision as follows: -

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law..."

In **JUDICIAL REVIEW APPLICATION NO. MISC. E064 OF 2021: REPUBLIC VS PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD & ANOTHER EXPARTE** in Paragraphs 38 and 43, the Learned Judge stated as follows:-

38. An ordinary reading of section 167(1) of the Act shows that that there are two instances when time will start to run for purposes of filing a request for review with the 1st Respondent. These are the date of notification of the award, or the date of occurrence of the alleged breach at any stage of the procurement process or disposal process.

Paragraph 43 and 44 of the decision further states as follows

43. A reading of the grounds in shows that the ex parte Applicant was aggrieved by tender technical evaluation process and the application of the technical criteria and scores therein, which it stated did not meet the threshold expressed in the Act and Constitution. Therefore, the relevant act when time started to run for these grounds in the ex parte Applicant's Request for Review was when it was notified of the outcome of the tender evaluation process which was by a letter dated 19th March 2021.

44. In determining the date of occurrence of this breach, I am persuaded by the decision by Elias JA of the English Court of Appeal in SITA vs Manchester Waste Management Authority (2011) EWCA Civ 156 wherein while applying the decision of the European Court of Justice in Uniplex (UK) Ltd vs NHS Business Services Authority (2010) 2 CMLR 47 the Court extensively discussed when time starts to run with respect

to a breach in procurement proceedings and concluded as follows:

"The conclusion in paragraph 31 that time only starts to run once the unsuccessful tenderer can "come to an informed view as to whether there has been an infringement of the applicable provisions and as to the appropriateness of bringing proceedings" reflects a number of decisions that the Court of Justice must have taken with respect to the test of discoverability. The most obvious question that arises for consideration, given that the unsuccessful tenderer has such a small window of time in which to start proceedings and given that the factual basis of a claim may be complex is what happens if the information which the unsuccessful tenderer has is incomplete" It seems to me that in effect the Court of Justice resolves the problem of gaps in knowledge by treating the existence of an informed view as sufficient to bridge this gap. Once that is reached, there is no further threshold test in terms of prospects of success or indeed any other reason to escape the consequence of knowledge, such as lack of resources or failure to realise the true position in law, that can be taken into account. From this analysis it must follow that it is irrelevant that the unsuccessful tenderer's evidence is incomplete. The unsuccessful tenderer has the requisite knowledge once he has sufficient information to enable him to reach an informed view as to the matters stated in paragraph 31 of the judgment of the Court of

Justice. Finally, the formulation provided by the Court of Justice, involving an informed view as to the appropriateness of bringing proceedings, may well mean that knowledge of some trivial breach not justifying the start of proceedings would not be enough...”

The Board further relies on **JR CAUSE NO. 2 OF 2019: XTREEME ENGINEERING SERVICES LIMITED VS REPUBLIC PUBLIC PROCUMENT AND ADMINISTRATIVE REVIEW BOARD & ANOTHER**

“I’m in agreement with the Review Board’s observation that the aforementioned section has two limbs with which a candidate or tenderer may lodge a request for review. Firstly, a request for review may be filed within fourteen days after the notification of the award, or secondly, on the date of occurrence of the alleged breach at any stage of the procurement process or disposal process. The later can also be explained as to file a request for review within fourteen days from the date the aggrieved tenderer learns of the alleged breach by the Procuring Entity at any stage of the procurement or disposal process. As correctly observed by the Review Board, this connotes that the aggrieved tenderer or candidate has two alternatives available to approach the Board.”

The Board also wishes to rely on its own decision **Application for Review No. 120 of 2021: The Consortium Of Tsk Electronica Yelectricidad S. A & Ansaldo Energia Vs The Accounting**

Officer, Kenya Electricity Generating Company Plc & Another in

which the Board held as follows:-

"In the circumstances regarding this issue the Board is bound by its previous position requiring an Applicant to approach the Board at the earliest opportunity after discovery of an event or upon notification of a breach by the Procuring Entity in the evaluation of Tenders contrary to the criteria set in the tender documents. The Board therefore upholds this objection in so far as the Applicant seeks to revive the contest in relation to the defect in the Interested Party's bid security."

The decision herein turns on the issue as to when the Applicants can be said to have learnt, or discovered the alleged breach set out in their Application. as the Procurement process is still ongoing, the applicable position is the second limb as analysed in the past decisions referred to above. In this matter the Board notes that the Applicants admit that they received the Tender Document, which has been established to have been availed to all the Thirty-Three tenderers vide the Email of 15th March, 2022. The Applicants through their Association wrote a letter of complaint to the Procuring Entity on 22nd April, 2022. The complaints are the same issues now raised in the present Application for Review. It is to be noted that the letter of 22nd April 2022, is issued by the Umbrella Association of the Players in their industry and the supporting Affidavit admits as much. It cannot be stated that the information they had then and what they have now presented, had any incompleteness that made it difficult for them to

determine whether or not a breach has arisen so as to approach the Board for Review. The tender document contents, the alleged Statute infractions and facts remain the same.

It is also noteworthy that the said Association filed Application for Review dated 8th April, 2022 and filed on 19th April, 2022 In the said Application, the grounds were:-

- i. The meaning of the word manufacturer as captured in its tender bearing in mind that the local players are assemblers who fall under the ambit and definition of Section 155 (3) (a) of the Public Procurement and Asset Disposal Act;*
- ii. Whether it have done a report detailing evidence of inability to locally procure the products as stated in the Tender noting that it has never invited members of the Applicants on discussions on their ability to deliver;*
- iii. Whether exclusive preference has been given to the local players noting that there is no indication that the funding is not from national or county government or a Kenyan body.*

The Applicants complaints in the current Application and the prayers are a mirror image of those in Application No 31 of 2022 which we have cited above.

The Board issued its determination in Application No 31 of 2022 on 10th May, 2022 when it struck out the Application on the ground that the Applicant therein Energy Meters Assemblers & Manufacturers Association

Did not possess the Locus Standi to agitate the matter before the Board, as it was not a candidate or Tenderer in terms of Sections 2 and 167 (1) of the Act.

It is to be noted that in Application No 31 of 2022, all the Thirty-three (33) tenderers in the subject tender, which includes the Applicants herein, were by a letter from The Board Secretary dated 24th April, 2022 notified of the filing of the said Application for Review and its details and were invited to participate in the Application and to submit any documents or arguments in support of the Application. None of them availed itself of that chance to so participate or provide any support.

The decision of the Board in Application No 31 of 2022 was communicated to the parties therein on 10th May, 2022. It will be noted that the Deponent of the Affidavit in support of the current Application for Review Mr. William Gatheca is one of the authors of the letter of 22nd March, 2022 and signed the same as Secretary of Energy Meters Assemblers & Manufacturers Association. He is also the deponent of the Supporting Affidavit in respect of Review Application Number 31 of 2022. As such, he was aware of the outcome of the said Application as at 10th May, 2022, but more important, as at the time of authoring the letter of 22nd March, 2022 there I as a clear indication that as at that date, he was aware of the contents of the Tender document and the issues that the Applicants now complain of, which were well set out in the letter of 22nd March, 2022.

It is clear from the Addendum No 1 of 5th April that the queries (among others) now in contestation were addressed in the said Addendum. The

same also arose in the question and answers contained in the minutes of the pre-bid meeting of 7th April 2022. It is apparent from those minutes that the Respondent's position in regard to current complaints were explained clarified and maintained, thus answering the questions by the tenderers who had raised concerns. Particularly, issues regarding provisions in conditions 8.2.1, 8.2.2 and 40% content requirement were addressed and the Procuring Entity's position which is now under challenge given.

It is the Board's considered view therefore that the issues regarding the contents of the Tender Document and the complaints as well as the Procuring Entity's position were well known to the Applicants as early as 15th March, 2022, when they received the Tender Document, and as early as 22nd March, 2022 when they through their Association penned the letter annexed to the Supporting Affidavit. Further the position taken by the Procuring Entity on each of those queries was communicated through Addendum No 1 of 5th April, 2022 and further restated in the pre-bid meeting of 7th April, 2022 which all bidders were required to attend. From the confidential documents available, it is noted that the invitation to the pre-bid meeting was issued by way of an invite to the thirty-three bidders and it is also indicated in the minutes that the thirty-three bidders were represented at the meeting.

Following from the foregoing, it is safe to determine that the alleged offending provisions of the Tender Document were within the knowledge of the Applicants when the documents was sent to them on 15th

March, 2022 leading to the letter of 22nd April, 2022 which has been produced by the Applicants.

Further, the position taken by the Procuring Entity regarding the Applicants' complaints on the requirements in the Tender Documents which is the alleged breach was known to the Applicants at latest, at the pre-bid meeting of 7th April, 2022.

The Applicants have in their submissions stated that there has been no response to their queries and that therefore, the breach is continuing. The Board has not been provided with any letter to the Procuring Entity by any of the Applicants after the letter of 22nd March (issued by their Association) and after the pre-bid meeting of 7th April, 2022.

It is the Board's position therefore that the breach complained of was known to the Applicants upon receipt of the Tender Document on 15th March, 2022 and at the latest on 7th April, 2022. Therefore, in terms of Section 167 (1) of the Act the Fourteen (14) days within which to approach the Board with an Application for Review ought to be reckoned with those dates in mind and therefore an Application for Review should have been filed at the latest on or by 21st April, 2022.

The Board notes from the authorities cited above that an Applicant is obliged to approach the Board with an Application for Review Fourteen (14) days from the date of becoming aware of the Breach. To the Board's understanding, the plain reading of Section 167 (1) of the Act does not require that a Response from the Procuring Entity be obtained in regard to a Bidder's query before the right to approach the Board for Review arises.

The date of reckoning is based on the date of discovery (learning) of the breach.

Even if the Board was to stretch the requirements further, it will be noted that the Applicants were granted an opportunity to each one of them present their position and arguments to the Board in Application No 31 of 2022 which they failed to do. The decision therein was rendered on 10th May, 2022. The current Application is filed on 20th May, 2022. So whichever way one looks at it, the present Application is filed way out of the requirements of Section 167 (1) of the Act.

Having considered the matters above, it is the Board's position that the Request for Review filed on 20th May, 2022 was filed out of time as provided for under Section 167 (1) of the Act as read together with Regulation 203 (2) of the Regulations 2020. The Board lacks jurisdiction to entertain the Application. The Board proceeds to make 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;

- 1. The Request for Review dated 19th May, 2022 and filed on 20th May, 2022 in respect of tender number KP1/9A.3/RT/05/21-22 KP1/9A.3/RT/05/21-22 - for supply and delivery of single phase, three phase post-paid and pre-paid meters be and is hereby struck out**

2. Each party shall bear its own costs in this Application

Dated at Nairobi this 10th day of June, 2022



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CHAIRPERSON

(PPARB)



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SECRETARY

(PPARB)