

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 65 OF 2022 OF 19th JULY 2022

BETWEEN

PASONDIA CABLES PRIVATE LIMITED.....APPLICANT

AND

THE ACCOUNTING OFFICER,

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

SHAWAN LIMITED.....1ST INTERESTED PARTY

CONDUCTORS & TRANSFORMERS MANUFACTURING

LIMITED.....2ND INTERESTED PARTY

CABLE CONNECT LIMITED.....3RD INTERESTED PARTY

GREEN HILLS CABLE COMPANY LIMITED.....4TH INTERESTED PARTY

Request for review of the decision of Kenya Power & Lightning Company PLC in relation to tender for Supply of Cables and Conductors in Tender No. KPI/9A.3/RT/07/21-22

BOARD MEMBERS

1. Mr. Nicholas Mruttu - Chairperson
2. Mr. Ambrose Ogeto - Member
3. Dr. Paul Gilani - Member

IN ATTENDANCE

1. Mr. Philemon Kiprop - Holding Brief for Board Secretary

BACKGROUND TO THE DECISION

Kenya Power & Lighting Company Plc, (hereinafter referred to as, "the Procuring Entity"), advertised through a restricted e-procurement tender for Tender No. KPI/9A.3/RT/07/21-22 for the Supply of Cables and Conductors (hereinafter referred to as the 'subject tender'). Prospective bidders were to obtain the tender documents from the KPLC E-Procurement Portal or KPLC's website. Completed Tenders were to be submitted in electronic format on the KPLC's E-procurement portal. The tender closing date was on 9th May 2022 at 10.00 a.m.

Pre-Bid Meeting

A pre-bidding meeting was slated to be held on Thursday, 28th April 2022 at 10.00 a.m at Stima Plaza Auditorium.

Clarifications and Addendum

The procuring entity on several instances advertised amendments to the tender document, issued clarifications to bidders, and extended the tender closing date. The Addendums were as follows:

- a. Addendum No.1 dated 21st April 2022** amended ITT 19 under Section II (TDS) of the Tender document.
- b. Addendum No. 2 dated 5th May 2022** amended various sections of the Tender document extended the tender closing date to 16th May 2022 at 10.00 a.m.

- c. Addendum No.3 dated 11th May 2022** provided several clarifications sought by bidders and extended the tender closing date to 23rd May 2022 at 10.00 a.m.
- d. Addendum No. 4 dated 18th May 2022** amended Section II Tender Data Sheet ITT 3.1 extended the tender closing date to 26th May 2022 at 10.00 a.m.
- e. Addendum No. 5 dated 23rd May 2022** extended the tender closing date to 2nd June 2022.
- f. Addendum 6 dated 31st May 2022** indicated that the tender security validity would be considered from 23rd May 2022 and retained the tender closing date of 2nd June 2022.

Tender Submission Deadline and Opening of Bids

By the Tender submission deadline of 2nd June 2022, the Procuring Entity had received a total of ten (10) bids. The subject tender was opened by a Tender Opening Committee and the following tenderers were recorded as having submitted their bids:

	Bidder Name	Tender Form Price
1.	Conductor and Transformers MFG Ltd	KSHS 1,549,628,735.56
2.	Green Hills Cables Company Ltd	KSHS 2,653,222,650.38
3.	Energya Power Cables	USD 18,421,640.00
4.	Cable Connect Ltd	KSHS 2,666,732,611.26
5.	Dynamic Cables PVT Ltd	USD 20,169,030.00
6.	Riyadh Cables Group	USD 1,860,060.00
7.	KEC International Ltd (PVT Cables)	USD 110,875,555,000.00
8.	Yifang Electric Group	USD 31,710,906.51
9.	Showan Ltd	KSHS. 781,469,496.00

	Bidder Name	Tender Form Price
10.	Pasondia Cables PVT Ltd	USD 27,347,539.98

Evaluation of Tender Bids

From the evaluation report dated 17th June 2022, the evaluation of the subject tender was done in three stages, namely:

- i. Preliminary/Mandatory Evaluation;
- ii. Technical Evaluation; and
- iii. Financial Analysis Evaluation

Preliminary/Mandatory Requirements Evaluation

At this stage of evaluation, the Evaluation Committee evaluated the bids received by the Procuring Entity against the mandatory requirements as outlined in the Tender Document. Upon conclusion of the preliminary evaluation, out of the ten (10) bidders who submitted their bids in the portal, four (4) bidders were found responsive while six (6) bidders were found to be non-responsive, amongst them the Applicant herein. Reasons advanced as to why the Applicant's tender was non-responsive is that they did not submit the company resolution as required under clause 2.2.4(e) of the Tender document and that they did not submit the beneficial ownership form as required under Addendum 2 of the Tender document as seen below:

No	Bidder Name	Response No.	S/n	Clause No.	Reason For Non-Responsiveness
1			1	2.2.4 (d)	They did not submit the Power of Attorney.

No	Bidder Name	Response No.	S/n	Clause No.	Reason For Non-Responsiveness
	Dynamic Cables Private Limited	4000061691	2	2.2.4.(e)	They did not submit the company resolution.
			3	2.2.7	They did not submit the certificate of confirmation of directors (CR12) or equivalent.
			4	Addendum 2	They did not submit the beneficial ownership form.
2	Riyadh Cables Group	4000061865	1	2.2.4.(e)	They did not submit the company resolution.
			2	2.2.7	They did not submit the certificate of confirmation of directors (CR12) or equivalent.
			3	2.2.9	They submitted the accreditation certificate ISO/IEC 17025 dated 1/4/2022 and therefore invalid. Tender was published on 8 th April 2022 KPLC E-Procurement portal
			4	Addendum 2	They did not submit the beneficial ownership form.
			5	2.2.1,2.2.2, 2.2.4, 2.2.5 (e), 2.2.10 (a), 2.2.11 2.2.6	<p>-They submitted the following documents under Saudi modern company for metals, cables and plastic industry (Riyadh cables and metals) ; Tender security, Manufacturers capacity declaration form, Form of Tender, Power of attorney, reference letters, Manufacturer's Warranty and Guaranteed lead time.</p> <p>-The confidential business questionnaire had two names of Saudi modern company for metals, cables and plastic industry and Riyadh Cables group</p> <p>-The rest of the documents were by Riyadh Cables group hence no consistency in the bid.</p> <p>- The Tender did not allow JV.</p>

No	Bidder Name	Response No.	S/n	Clause No.	Reason For Non-Responsiveness
3	Pasondia Cables Private Limited	4000061880	1	2.2.4.(e)	They did not submit the company resolution.
			2	Addendum 2	They did not submit the beneficial ownership form.
4	Yifang Electric Group INC	4000061848	1	2.2.4.(e)	They did not submit the company resolution.
			2	2.2.7	They did not submit the certificate of confirmation of directors (CR12) or equivalent
			3	Addendum 2	They submitted the beneficial ownership form but was not duly filled.
5	KEC International Limited	4000061737	1	2.2.4	They did not submit the form of tender.
			2	2.2.4 (c)	The Declaration and Commitment to the code of ethics form was not signed by the witness.
			3	2.2.4.(e)	They did not submit the company resolution.
			4	2.2.6	The Confidential Business Questionnaire was not duly filled.
			5	2.2.7	They did not submit the certificate of confirmation of directors (CR12) or equivalent.
			6	Addendum 2	They did not submit the beneficial ownership form.
6	Energya Power Cables	4000061687	1	2.2.4 (a)	They did not submit the Certificate of Independent Tender Determination.
			2	2.2.4 (b)	They did not submit the Self Declaration forms Form SD1 & SD2.
			3	2.2.4 (d)	They did not submit the Power of Attorney.
			4	2.2.4.(e)	The submitted company resolution document did not capture the signature of signatory.

No	Bidder Name	Response No.	S/n	Clause No.	Reason For Non-Responsiveness
			5	2.2.9	They submitted a type test report from KEMA whose accreditation certificate ISO/IEC 17025 was dated 1/4/2022 and therefore invalid. Tender was published on 8 th April 2022 KPLC E-Procurement portal. -THE ministry of Energy extra high research Centre has no corresponding accreditation certificate ISO/IEC 17025
			6	2.2.11	They did not submit the Guaranteed lead time document.

The following four (4) bidders were found to be responsive at the preliminary stage and progressed to the technical evaluation stage.

1. M/s Showan Limited
2. M/s Conductors and Transformers Manufacturing Limited

3. M/s Cable Connect Limited
4. M/s Ms Green Hills Cable Company Limited

Technical Evaluation

a. Preliminary Technical Evaluation

The four (4) bidders who qualified in the preliminary evaluation stage were subjected to the Preliminary Technical Evaluation criteria contained in Section III – Part II (Stage I of II) of the Tender document and found

responsive for the lots as indicated in the comprehensive Preliminary Technical Evaluation report below:

S/no	Bidders	Lots Responsive
1	M/s Showan Limited	Lot 1,2 & 3
2	M/s Conductors and Transformers Manufacturing Limited	Lot 6,7 & 8
3	M/s Cable Connect Limited	Lot 2 to 10
4	M/s Green Hills Cable Company Limited	Lot 2 to 9

The bidders proceeded to the Detailed Technical Evaluation.

b. Detailed Technical Evaluation

Following the Detailed Technical Evaluation as set out in the technical evaluation criteria contained in Section III – Part II, (Stage II of II) of the Tender document, all the four (4) bidders were found to be responsive in their respective lots and proceeded for financial evaluation.

Financial Evaluation

The four (4) responsive bidders were subjected to the financial evaluation criteria as contained in Section III– Part III and clause 2.2.5 and clause 2.2.6 of the Tender document. A financial evaluation and price comparison was done and reports prepared.

Market survey

A market survey analysis was conducted on 15th and 16th June 2022. The evaluation committee noted that the quoted prices were a representative of the prevailing international market prices. An increase was noted in prices

for most of the items as compared to the previous purchase due to change in LME prices.

Award criteria

The award criteria used was set out under Section II Tender Data Sheet (TDS) which indicated that the specific data would complement, supplement, or amend the provisions in the Instructions to Tenderers (ITT) and whenever there was a conflict, the provisions therein would prevail over those in ITT. ITT 40 of the Tender Data Sheet provided that the award of contract would be as follows:

No.	Award Criteria
1	Award shall be on lot-by-lot basis to the lowest evaluated bidder
2	Bidders MUST quote for all items in a given lot to qualify for award of that lot. However, the successful bidder(s) shall be awarded a maximum of TWO (2) lots
3	If a bidder qualifies as the lowest evaluated bidder in more than one lot, they shall be awarded the lot with the highest value following the procedure in (2) above. Consequently, the subsequent lots shall be awarded based on the lowest price per item and highest value per lot until all the lots are allocated provided that the price of the subsequent lowest bidder is within the market price. If the price of the subsequent lowest bidder exceeds the market price or there is no subsequent qualified bidder, the award shall revert to the lowest bidder.
4	In case of a tie, the award shall be allocated equally among the bidders.
5	KPLC Shall also take into consideration before award of the following: (i) Bidder Capacity as declared in the Manufacturer's Capacity Declaration Form (ii) Bidders who have defaulted in performance on previous contract for unjustified reasons and/or have more than 50% outstanding orders for the same items will not be eligible for award

The Evaluation Committee's Recommendation

Since the award was on Lot by Lot basis, the Tender Evaluation Committee recommended award of the subject tender at a total estimated cost of **Kshs. 2,815,567,677.98 (Two billion, eight hundred and fifteen**

million, Five hundred and sixty seven thousand, six hundred and seventy seven shillings and ninety eight cents only) VAT Inclusive as follows;

- i) **Ms Conductors and Transformers Manufacturing Ltd** award at a total estimated cost of **Kshs.678,600,000.00 VAT Inclusive** for Lot 6.
- ii) **Ms Cable Connect Limited** award at a total estimated cost of **Kshs.1,394,606,440.54 VAT Inclusive** for Lots 2, 5, 7, 8, 9 and 10.
- iii) **Ms Green Hills Cable Company Limited** award at a total estimated cost of **Kshs.548,966,037.44 VAT Inclusive** for Lot 3 and 4.
- iv) **Ms Showan Limited** award at a total estimated cost of **Kshs.193,395,200.00 VAT Inclusive** for Lot 6.

Professional Opinion

A Professional opinion dated 4th July 2022 was issued by the Acting General Manager Supply Chain & Logistics pursuant to Section 84 of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as, "the Act") which confirmed review of the tender evaluation report and opined that the procurement complied with Section 102 (1) (c) and (d) of the Act. The opinion further indicated that the award of the subject tender could be approved as recommended by the Evaluation Committee.

The Acting Managing Director approved the recommendation on 5th July 2022.

Notification of Intention to Award

In a letter dated 7th July 2022, the Procuring Entity sent the Applicant a Notification of Intention to Award the Subject tender wherein both successful and unsuccessful tenderers were listed. The Applicant was indicated as an unsuccessful tenderer for the reasons indicated as follows:

N o.	Bidder Name	Response No.	S/n	Clause No.	Reason For Non-Responsiveness
3	Pasondia Cables Private Limited	4000061880	1	2.2.4.(e)	They did not submit the company resolution.
			2	Addendum 2	They did not submit the beneficial ownership form.

Clause 3 of the said letter advised the Applicant on how to request for a debriefing and Clause 4 indicated how to make a complaint.

The Applicant requested a debrief vide a letter dated 12th July 2022 addressed to the Procuring Entity and received on 13th July 2022 wherein the Applicant requested for review of the verdict made in respect of their bid in the subject tender for reasons reproduced as follows:

- 1. Clause 2.2.4 states; for a company resolution in case of one Director/Partner signing where company has more than one director.***

The signatory in our documents was not a director; we therefore provided a power of attorney as per the attached documents.

2. Addendum 2, Section 6 States; *for the foreign bidders who are not registered in Kenya under the Companies Act, they should provide the Beneficial Ownerships in accordance with both their countries of origin and registration.*

In response to this, we attached equivalent documentation (form mgt 7) which is a document filled annually in India (where the company is based and registered) to provide company ownership details.

The Evaluation Committee through a Matters Arising Report dated 15th July 2022 regarding the subject Tender recommended that the reasons for non-responsiveness of the Applicant in the subject tender be amended to read as follows:

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1. *They did not submit the company resolution. Where a company has more than one director, any document in the bid signed by one director shall be accompanied by a company resolution signed by all directors. They submitted a power of attorney signed by one director and the company has two directors as per their CBQ.*
 2. *They submitted a Beneficial Ownership Disclosure Form that was not dully filled. The form 9 was a mandatory document to be filled by all bidders. Just like the CR 12 which is filled annually in Kenya to provide ownership details, the said form*

MGT-7 is also filled annually. The Evaluation Committee therefore took the form as a CR 12 equivalent.

Contact details, voting rights a person holds in a company and the right to appoint a majority of the board of directors of the company or an equivalent governing body of the tenderer required in the form 9 have not been shown elsewhere.

Where there are exemptions or laws barring such disclosures in their countries of origin and registration, they provide certified proof by a Notary Public or his/her equivalent of such exemption/law barring such disclosure. No proof was provided as per the Beneficial Ownership Disclosure Form requirement.

The Acting General Manager Supply Chain & Logistics prepared a second professional opinion dated 18th July 2022 and confirmed having reviewed the Matters Arising Report by the Evaluation Committee and noted that the request to amend reasons for non-responsiveness by the Applicant in regard to the Subject tender can be approved as recommended.

This recommendation was approved by the Acting Managing Director on 18th July 2022 and consequently an amended notification of intention to award/regret letter dated 20th July 2022 was sent via email to the Applicant detailing the said grounds leading to non-responsiveness of the Applicant's Bid. Since neither letter of award nor regret was sent out to the tenderers, the status quo has been maintained as guided by the letter of notification of award/regret dated 7th July 2022 and the evidence as sent out on 19th July 2022 from the Public Procurement Administrative Review Board.

REQUEST FOR REVIEW NO. 65 OF 2022

The Request for Review was lodged by M/s Pasondia Cables Private Limited on 19th July, 2022 by Abdullahi, Gitari & Odhiambo Advocates LLP on behalf of the Applicant together with a Supporting Affidavit sworn by Sagar Gupta on even date seeking the following orders **THAT**:

- a) The Respondent's decision notifying the Applicant that it had not been successful in TENDER NO.KP1/9A.3/RT/07/21-22 by way of the letter dated the 7th July, 2022 be and is hereby set aside and nullified.***
- b) The Respondent's decision awarding TENDER NO.KP1/9A.3/RT/07/21-22 to the alleged successful tenderers by way of the letter dated the 7th July, 2022 be and is hereby set aside and nullified.***
- c) A declaration that the Respondent failed to evaluate the Applicant's bid in accordance with the tender document, the act and the regulations.***
- d) Consequent to (c) above, the Board be pleased to review all records of the procurement process relating to TENDER NO.KP1/9A.3/RT/07/21-22 and do direct the Respondent to re-admit the Applicant back to the tender process and evaluate its bid and conclude the procurement process to its logical conclusion in accordance with the tender document, the Act and regulations.***

e) The Respondent be and is hereby ordered to pay the costs of and incidental to these proceedings; and

f) Such other or further relief or reliefs as this board shall deem just and expedient

Board Notification to the Respondents of filed Request for Review

In a Notification of Appeal and a letter dated 19th July 2022, the Acting Board Secretary of the Public Procurement Administrative Review Board (hereinafter referred to as "the Board") notified the Respondents of the existence of the Request for Review and suspension of procurement proceedings for the subject tender while forwarding a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of Covid-19. Further, the Respondent was requested to submit any information and arguments about the subject tender within five days pursuant to the PPARB Circular No. 2/2020 dated 24th March 2020.

In opposition of the Request for Review, the Respondent filed a Notice of Appointment dated 25th April 2022 and filed on 26th July 2022 appointing Justus Ododa Advocate to Act on its behalf in the matter. The Notice of Appointment was accompanied by the Respondent's Response to the Applicant's Request for Review dated 25th April 2022 and filed on 26th July.

The Respondents proceeded to amend their Response to the Applicant's Request for Review by filing an amended Response on 28th July 2022 dated on even date.

On 16th March 2020, the Board issued Circular No. 1/2020 and the same was published on the Public Procurement Regulatory Authority (hereinafter referred to as "the PPRA") website (www.ppra.go.ke) in recognition of the challenges posed by the COVID-19 pandemic and instituted certain measures to restrict the number of representatives of parties that may appear before the Board during administrative review proceedings in line with the presidential directives on containment and treatment protocols to mitigate against the potential risks of the virus.

On 24th March 2020, the Board issued Circular No. 2/2020 further detailing the Board's administrative and contingency management plan to mitigate the COVID-19 disease. Through this circular, the Board dispensed with physical hearings and directed that all requests for review applications shall be canvassed by way of written submissions. The Board further cautioned all parties to adhere to the strict timelines as specified in its directive as the Board would strictly rely on the documentation filed before it within the timelines specified to render its decision within twenty-one days of filing of the request for review in accordance with section 171 of the Act. Clause 1 on page 2 of the said Circular directed that pleadings and documents would be deemed properly filed if they bore the Board's official stamp.

Vide letters and notifications of appeal dated 26th July 2022, the Acting Board Secretary notified the rest of the Bidders via email as provided in the submitted confidential documents, of the existence of the subject Request for Review while forwarding to the interested parties a copy of the Request for Review together with the Board's circular No. 02/2020 dated 24th March

2020. The tenderers were invited to submit to the Board any information and arguments about the subject tender within 3 days from 26th July 2022.

The Applicant filed a further Affidavit on 2nd August sworn by Sagar Gupta on 30th July 2022 in response to the Respondent's Amended Statement of Response.

THE APPLICANT'S CASE

The Applicant avers that following an invitation to tender by the Respondents for the supply of cables and conductors, it submitted a bid for the subject tender. There were 10 lots/categories of goods procured upon which the tenderers were required to bid and that the Respondent issued several addendums with regard to the subject tender.

That pursuant to Addendum 4 dated 18th May 2022, the award criteria stipulated in TDS, ITT 40 was reiterated to wit, bidders were to quote for all items in a given lot to qualify for award, however the successful bidder (s) would be awarded a maximum of 2 lots. The Applicant avers that the implication from this was that the Respondent was to secure a minimum of 5 successful bidders so that each could be awarded a maximum of 2 lots of the goods to be procured.

The Applicant avers that it is a provision of the tender document and a requirement under Section 80 (2) of the Act that all bids submitted were to be in accordance with the criteria set out in the tender document. The Applicant hence had a legitimate expectation that its bid would be evaluated in strict adherence to the criteria set out in the tender document.

The Applicant states that the tender document was designed to consist of three parts namely the Preliminary/Mandatory Evaluation stage (determination of responsiveness) which entailed checking of all mandatory documents as specified in the tender document; the Technical Evaluation stage; and the Financial Evaluation stage.

That by a letter dated 7th July 2022 the Respondent notified the Applicant that its tender was unsuccessful on grounds that *'you did not provide company resolution as per clause 2.2.4(e) and you did not submit the beneficial ownership form as per Addendum 2.*

The Applicant states that from the reasons cited by the Respondent as to why its tender was unsuccessful, it is clear that the Respondent did not evaluate the tender document in accordance with the criteria set out in the tender document.

The Applicant further states that under the Clause 2.2.4 (e) of the tender document bidders were required to provide a company resolution in case of one director/ partner signing where company has more than one director (not applicable for Sole Proprietorship or where the company has got only one director or where all Directors have signed). That further, under the Tender Data Sheet ITT 19.3 it was provided that the written confirmation of authorization to sign on behalf of the Tenderer shall consist of a.) A company resolution in case of a Director/Partner signing (not applicable for sole proprietorship or where the company has got only one director, or where all Directors have signed) or; b.) Power of Attorney where a person other than the director/Partner/Owner is signing. The Applicant states that the person who signed its tender document was Sagar Gupta who was not a

director of its company and as such per the requirements of the Tender document, it was only obligated to provide a power of attorney authorizing Sagar Gupta to sign the tender documents on its behalf, which it did.

The Applicant contends that the Respondent acted unfairly for requiring it to provide a company resolution and evaluating its tender using an extraneous evaluation criteria. That in any event, for the purposes of signing the tender document on its behalf, the power of attorney serves the same purpose and/or is equivalent to a company resolution authorizing the same.

The Applicant further states that under clause 6 of Addendum No. 2, foreign bidders who are not registered in Kenya were required to provide beneficial ownership details in accordance with both their countries of origin and registration. The Applicant being a foreign company complied with this requirement by providing Form No. MGT-7, which is the equivalent of Form No. 9 in India (where the Applicant is based and registered).

Therefore, by rejecting the Applicant's bid on the ground that it did not submit the beneficial ownership form as per Addendum No. 2, the Respondent acted unfairly and applied an extraneous evaluation criterion in evaluating the Applicant's bid.

Additionally, the Applicant contests that the Notification of Intention to Award/Regret dated 7th July 2022 does not satisfy the requirements of the Act as it was not issued by the accounting officer of the procuring entity. Paragraph 1 of the said Notification of Intention to Award/Regret states that: 'this notification is sent by: Office of the General Manager, Supply Chains and Logistics Division'.

The Applicant states that the Respondent's decision offends the spirit of the Act and also failed to adhere to the requirements set out under Section 3 of the Act. That the Respondent breached Article 227 of the Constitution in that the evaluation process was not fair, equitable, transparent or competitive; and the declaration of the Applicant's bid as unresponsive contrary to the requirements in the tender document and termination of the entire tender process is not a cost effective way of conducting public procurement and does not promote fairness and competition. The Applicant states that it has been greatly prejudiced by the Respondent's actions which amount to a denial of the Applicant's rights and renders the tender proceedings unfair.

The Applicant avers that this Board is conferred with wide jurisdiction and mandate to review the tender process per Section 173 and that the evaluation of tenders is a critical process which the Board should scrutinize the entire evaluation and the tender documents to ensure the same conforms with the law.

The Respondents Case

Through an amended Respondent's Response to the Request for Review filed on 28th July 2022, the Respondent avers that upon closing the tender and upon evaluation, all ten (10) bidders were subjected to the evaluation criteria as provided under the tender document.

That from the preliminary evaluation stage, the evaluation committee used the criteria stipulated in the Tender document under Section III (Evaluation

and Qualification Criteria) of page 34 to 45. At the end of this stage, only four (4) bidders were found responsive to proceed to the technical evaluation stage. That the remaining six (6) bidders, including the Applicant, were not responsive for failing to meet the mandatory requirements per reasons outlined from page 6 to 8 of the Evaluation report as well as page 3 to 5 of the Professional opinion dated 04.07.2022 and 18.07.2022.

The Respondent states that the grounds upon which the Applicant was found non-responsive at the preliminary stage were that the Applicant submitted a beneficial ownership disclosure form that was not dully filled; and that the Applicant did not submit its company resolution.

The Respondent contends that clause 2.2.4 (e) on page 35 of the Tender document, listed a company resolution as a mandatory requirement in the preliminary evaluation criteria and that the said clause required the tenderers to submit a company resolution in case of one director/partner signing where a company has more than one director (not applicable for sole proprietorship or where a company has got only one director, or where all directors have signed).

That Clause 2.2.4 (d) on page 35 of the tender document on the other hand provided for a power of attorney where a person other than the director/partner/owner was signing the documents. Further, ITT 19.3 on page 31 of the tender document expressly indicated that a written confirmation of authorization to sign on behalf of the tenderer shall consist of a company resolution in case of a director/partner signing (not applicable for sole proprietorship or where the company has got only one director or

where all directors have signed) or power of attorney where a person other than the director/partner/owner is signing.

The Respondents state that the Applicant submitted Form No. MGT-7 and Confidential Business Questionnaire which listed the Applicant's two (2) directors as Smita Goel with a shareholding of 343,865 and Raghavendra Goel with a shareholding of 317,600 respectively.

The Respondent further states that the Applicant's Power of Attorney appointing Mr. Sagar Gupta was signed by Mr. Raghavendra Goel, one of the directors yet the company had two directors. Additionally, that the Applicant did not provide its company resolution authorizing Mr. Raghavendra Goel to appoint Mr. Sagar Gupta as the Applicant's Attorney to act on behalf of the Applicant.

The Respondent contends that the allegation by the Applicant that it was only obliged to provide a Power of Attorney authorizing Mr. Sagar Gupta to sign the tender documents on its behalf since Mr. Gupta is not a director amounted to the Applicant re-writing the tender document since the Power of Attorney was not signed by Smita Goel and was only signed by Raghavendra Goel. That the Applicant ought to have attached a company resolution authorizing Raghavendra Goel to single handedly appoint Sagar Gupta as the Applicant's attorney to act on its behalf.

The Respondent contends that the Applicant's averments that the power of attorney serves the same purpose and/or is equivalent to a company resolution authorizing the same is a clout chasing move with an intent to

seek empathy before the Board having failed to conform with the requirements of the tender document.

The Respondents contends that a close analogy of clause 6 of Addendum No.2 dated 5th May 2022 is:

- a. That the beneficial ownership disclosure form is a mandatory document to be filled by all bidders.
- b. That foreign companies should provide a beneficial ownership disclosure form in accordance with both their countries of origin and registration.
- c. That where there are exemptions or laws barring the foreign companies from such disclosures in their countries of origin and registration, they should provide a certified proof by a Notary Public or his/her equivalent of such exemption/law barring such disclosure.
- d. The timeline for this should be not more than 3 months old from the date of the tender document.

Further, the Respondent states that the Applicant provided a beneficial ownership disclosure form which was not dully filled. In the alternative, the Applicant neither provided a Beneficial Ownership Disclosure form in accordance with its country of origin nor an exemption or laws barring the Applicant from such disclosures. That the Applicant provided form MGT-7 and not a dully filled Beneficial Ownership Disclosure form.

That the Beneficial Ownership Disclosure form provided by the Applicant which was scanned together with the Confidential Business Questionnaire is incomplete leading to no conformity with clause 6 of addendum no. 2 of 5th

May 2022 of the tender document and further leading to non-responsiveness of the Applicant's bid.

The Respondent avers that the Applicant's actions contravened clause 2.2.4 (e) and (d) on page 35 as well as ITT 19.3 on page 31 of the tender document leading to non-responsiveness of the Applicant's bid and consequently disqualification of the Applicant's bid at the preliminary stage.

The Respondent also contends that ITT (Instructions to Tenderers) 40 of page 32 of the tender document among other criteria provides that an award would be on lot by lot basis to the lowest evaluated bidder and not to five (5) bidders as alleged by the Applicant.

The Respondent avers that both the Notification of Intention to award/regret letter dated 7th July 2022 and 20th July 2022 were issued on the Accounting Officer's letterhead and were signed by the Respondent Accounting Officer and hence in compliance with Section 87 of the Act.

The Respondent avers that it evaluated all the bids in accordance with the tender document as well as Section 80(2) of the Act and the Constitution and that the prayers sought by the Applicant are fashioned to re-write the tender document. That any direction to annul the subject tender or anything done or intended to be done in pursuance thereof would be unfair, unlawful and grossly prejudicial to the Respondent as well as being a loss to the exchequer and members of the public.

The Respondents states that this Board lacks jurisdiction to entertain the Request for Review since the same is not properly before the board. That the Applicant's Authorization letter dated 19th July 2022 has been signed by

a single director (Mr. Raghavendra Goel) while the Applicant has two directors and the Applicant has not provided a company resolution authorizing Mr. Raghavendra to act/depone a supporting affidavit on behalf of the Applicant in the Request for Review.

The Respondent prays for the Request for Review to be dismissed with costs and for a declaration to be issued that the procurement process is lawful and ought to progress.

APPLICANT'S REJOINDER

On 2nd August 2022, the Applicant filed a further Affidavit in response to the issues raised in the Respondent's Memorandum of Response.

The Applicant avers that it was only obligated to provide a power of attorney authorizing the said Sagar Gupta to sign the tender documents on its behalf, which it did.

That the said power of attorney donated by the Applicant and which has been placed before the Board was validly issued contrary to the allegations in the statement of response.

That pursuant to the Applicant's Articles of Association, clause 46 and 49 authorizes the Applicant to issue a Power of Attorney delegating powers ordinarily served for Directors.

The Applicant states that the its directors passed a resolution authorizing Mr. Raghavendra Goel –Director to donate the Power of Attorney to the deponent, Sagar Gupta, on behalf of the Applicant.

Additionally, the Applicant reiterated that the Applicant being a foreign company complied with the requirement under clause 6 of the Addendum No.2 by providing Form No. MGT-7, which is equivalent of Form No.9 in India where the Applicant is based and registered.

That the Respondent has not controverted averments made by the Applicant in regard to the 10 lots/categories that tenderers were required to bid and that bidders were required to quote for all items in a given lot to qualify for award but the successful bidder (s) would be awarded a maximum of 2 lots. Hence the implication was that the Respondent was to secure a minimum of 5 successful bidders so that each can be awarded a maximum of 2 lots of the goods to be procured.

That the procuring entity failed to comply with provisions of Sections 3,79 (1), 80 (2) of the Act, and Article 227 of the Constitution.

The Applicant filed its submissions dated 2nd August 2022 and filed on 3rd August 2022 in advancement of its case as at the date of this decision. The Respondent also filed its submissions dated 5th August 2022 filed on even date.

BOARD'S DECISION

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

- 1. Whether the Request for Review dated 19th July 2022 filed by the Applicant is fatally defective and hence not properly before the Board and if the Board has jurisdiction to hear and determine the instant Request for Review.**
- 2. Whether the Respondent's Letter of Notification of Intention to Award/Regret dated 7th July 2022 meets the threshold of Section 87 of the Act.**
- 3. Whether the Applicant's tender was Responsive as stipulated under Section 79 of the Act and if the evaluation committee adhered to the preliminary evaluation criteria set out in the tender document and as stipulated under Section 80 of the Act.**

- 4. Whether the Evaluation Committee in making its recommendation complied with the Award Criteria set out in the Tender document.**
- 5. What orders should the Board grant in the circumstances.**

DETERMINATION OF ISSUES

The Board now proceeds to address the above issues conclusively as follows:

Whether the Request for Review dated 19th July 2022 filed by the Applicant is fatally defective and hence not properly before the Board and if the Board has jurisdiction to hear and determine the instant Request for Review.

It is trite law that jurisdiction is everything and when the question arises the Court or tribunal seized of the matter must as a matter of prudence enquire into it before doing anything concerning the matter in respect of which it is raised.

Black's Law Dictionary, *8th Edition*, defines jurisdiction as:

"... the power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties ... the power of courts to inquire into facts, apply the law, make decisions and declare judgment; The legal rights by which judges exercise their authority."

In his book, "Words and Phrases Legally defined", Vol. 3, John Beecroft Saunders defines jurisdiction as follows:

"By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this

authority are imposed by the statute, charter or commission under which the Court [or other decision making body] is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."
[Emphasis by the Board]

The '*locus classicus*' case on jurisdiction is the celebrated case of **The Owners of the Motor Vessel "Lillians" -V- Caltex Oil Kenya Ltd (1989) KLR 1** where Nyarangi J.A. held:

"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 continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction."

The Supreme Court of Kenya in the case of Samuel Kamau Macharia - vs- Kenya Commercial Bank & 2 Others, Civil Appl. No. 2 of 2011, held that:

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

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

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

Such is the centrality of jurisdiction that the Court of Appeal has held in **Isaak Aliaza v Samuel Kisiavuki [2021] eKLR**, that:

“whether it is raised either by parties themselves or the Court suo moto, it has to be addressed first before delving into the interrogation of the merits of issues that may be in controversy in a matter.” (Emphasis ours).

This Board is a creature of statute owing to its establishment as provided for under **Section 27(1) of the Act** which provides that:

(1) There shall be a central independent procurement appeals review board to be known as the Public Procurement Administrative Review Board as an unincorporated Board.”

Further, Section 28 of the Act provides for the functions of the Board as:

(1) The functions of the Review Board shall be—

-
- (a) reviewing, hearing and determining tendering and asset disposal disputes; and***
- (b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law.”***

The jurisdiction of this Board flows from Section 167(1) of the Act which provides that:

"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."

Regulation 203 (2) (c) of the Regulations 2020, expounds on the manner in which the fourteen-day period for seeking administrative review can be applied as follows:

203. Request for a Review

1) A request for review under section 167(1) of the Act shall be made in the Form set out in the Fourteenth Schedule of these Regulations

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.;

ii.; or

iii. the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder.”

Regulation 203 prescribes an administrative review sought by an aggrieved candidate or tenderer under Section 167(1) of the Act will be by way of a request for review. Further, such request for review is to take the form set out in the Fourteenth Schedule of Regulations 2020. The Fourteenth Schedule of Regulations 2020 provides for the Request for Review form which is filed at the Review Board.

The jurisdiction of this Board to hear the instant request for Review has been challenged by the Respondents on grounds that the Review is not properly before the Board reason being that the Applicant's Authorization letter dated 19th July 2022 is fatally defective since it has been signed by a single director yet the Applicant has two directors. Further, that the Applicant has not provided a company Resolution authorizing the single director to act/depone a supporting affidavit on behalf of the Applicant in the Review.

The Board also considered the Respondent's submissions on the above and have observed that in its submissions at paragraph 50, the Respondents contests that the Applicant has not availed any Board Resolution authorizing the Applicant's Advocates on record to represent the Applicant in this Request for Review.

The Board notes that this is a new issue that is being raised at the submission stage and was never raised in the Respondent's pleadings being the

Memorandum in response of the Request for Review. We are guided by the decision **of Shah v. C. M. Patel (1961) 1 EA 397** wherein the court stated that :

"an issue must be pleaded to enable opportunity to respondent to address it. An issue cannot be raised by way of submissions. It should be in the Memorandum of Appeal."

As such, the Board will not address itself to the said issue of authorization of the Applicant's Advocates on record.

The Board wish to point out that to invoke the jurisdiction of this Board, an applicant must comply with the provisions of Section 167 of the Act as highlighted above. Only a candidate or tenderer may seek administrative review before this Board. The Act under **Section 2** interprets a Candidate to mean:

"a person who has obtained the tender document from a public entity pursuant to an invitation notice by a procuring entity"

Further under the same section, a tenderer means:

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

Both interpretations use the word "person" whose interpretation under Section 2 of the Act state:

"has meaning assigned to it in Article 260 of the Constitution and includes sole proprietorship"

Turning to Article 260 of the Constitution, person has been defined as:

"includes a company, association or other body of persons whether incorporated or unincorporated."

The Applicant falls within this ambit and we observe from the pleadings before us that the Applicant herein is a private limited company incorporated at New Delhi, India on 28th July 1999 under the Companies Act, 1956. To institute this Request for Review, the Board observes that the Applicant annexed an authorization letter dated 19th July 2022 appointing and authorizing Mr. Sagar Gupta, General Manager, as its true and lawful attorney for representation of the instant review.

The said letter of authorization is signed by one director, Mr. Raghavendra Goel. It is on this basis that the Respondent contests that the said letter of appointment is fatally defective for having been issued by one director and hence the Request for review was not properly filed. Consequently, the Board lacks jurisdiction to hear and determine the Review.

As regards the necessity for a company resolution to back the institution of the suit, Justice Odunga in his Judgement in the case of **Leo Investments Ltd V Trident Insurance Company Limited (2014) eKLR** referred to the holding of **Hewett, J.** in **Assia Pharmaceuticals v Nairobi Veterinary Centre Ltd HCCC No. 391 of 2000** as follows:

"It is settled law that where a suit is to be instituted for and on behalf of a company there should be a company resolution to that effect..... As regards litigation by an incorporated company, the directors are as a rule, the persons who have

the authority to act for the company; but in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified."

The Board observes that in response, the Applicant filed a further Affidavit annexing a copy of its Memorandum and Articles of Association together with a copy of Board Resolution which resolved that Mr. Raghavendra Goel, had the authority to donate to the deponent, Mr. Sagar Gupta, the Power of Attorney to act on behalf of the Applicant. The said Resolution provides:

"...RESOLVED THAT Mr. Raghavendra Goel, Director of the Company be and is hereby authorized, to appoint and/or nominate an attorney, or authorize, any official of the company to sign, or execute deeds, tenders or other documents, as may be required, on the company's behalf. Any deed, tender, or any other document executed by the authorized official has the effect as if executed by the company and shall be binding on the company, until this resolution is withdrawn or otherwise varied.

Signature of the Directors:

1. Name and Signatory- Mr Raghavendra Goel

2. Name and Signatory- Mrs. Smita Goel”

We note that the above Resolution filed by the Applicant as an annexure in its Further Affidavit was not filed initially with the Request for Review. In establishing whether the same had to be filed together with the Request for Judgment, we refer to the case of **Republic v Registrar General & 13 Ors (2005) eKLR** where Justice Kimaru held:

“... that the legal position was that such a resolution of the Board Directors of a company may be filed at any time before the suit is fixed for hearing.”

As such, failure by the Applicant to file the Resolution together with the Authorization letter annexed in the Request for Review cannot invalidate the instant Request for Review. The Board is of the considered view that the Applicant’s Request for Review as filed by Sagar Gupta was with authorization of the director, Mr. Raghavendra Goel, who from the above resolution had the power to nominate an attorney on behalf of the Company.

This Board is cognizant of provisions of **Article 159(2)(d)** of the Constitution which provide that justice shall be administered without undue regard to procedural technicalities. However, this provision should not be used to trash procedural provisions as the rules are the handmaidens of justice. It has however been reiterated that courts should not pay undue attention to procedural technicalities and requirements at the expense of substantive justice. The Supreme Court of Kenya in the case of **Raila Odinga v I.E.B.C & Others (2013) eKLR**, held that:

"Article 159(2)(d) of the Constitution simply means that a Court of Law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Court."

This Board has a duty to do substantive justice to parties while at the same time considering whether matters before it have been properly filed. We are guided by the case of **Trust Bank Ltd v Amalo Co. Ltd (2009) KLR 63** where the Court held that:

"(1) The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merit and that errors should not necessarily deter a litigant from the pursuits of his right.

(2) The spirit of the law is that as far as possible in the exercise of judicial discretion the court ought to hear and consider the case of both parties in any dispute in the absence of any good reason for it not to do so."

This Board, while taking cognizance of the requirements for a company, which in filing a suit, should have an authorizing resolution from its Board of Directors or by members of the company in a General Meeting, opines that the instant review has been properly instituted and that the Board has jurisdiction under the Act to hear, and determine the Request for Review filed on 19th July 2022.

Whether the Respondent's Letter of Notification of Intention to Award/Regret dated 7th July 2022 meets the threshold of Section 87 of the Act.

The Applicant in its Request alleges that the notification letter dated 7th July 2022 does not satisfy the requirements of Section 87 of the Act as it was not issued by the accounting officer of the procuring entity. This is on the basis that paragraph 1 of the said notification states that the notification is sent by Office of the General Manager, Supply Chains and Logistics Division.

In response, the Respondent submits that the notification letter was drafted on the Accounting Officer's letterhead and signed by its Accounting Officer in compliance with Section 87 of the Act.

Section 87 of the Act provides,

87. Notification of intention to enter into a contract

(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.

(2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.

(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.

(4) For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security.

The Board has perused the copy of letter of notification dated 7th July 2022 and it is clear that the same was signed off by the Respondent's accounting officer on his letterhead. There is no evidence that the accounting officer delegated his authority to any other person since he authored the said letter.

As such, the Board finds and holds that the letter of notification was properly authored by the Respondent's Accounting officer and did not violate the provisions of Section 87 of the Act.

Whether the Applicant's tender was Responsive as stipulated under Section 79 of the Act and if the evaluation committee adhered to the preliminary evaluation criteria set out in the tender document and as stipulated under Section 80 of the Act.

Vide a letter of notification to award addressed to the Applicant dated 7th July 2022, the Applicant was notified of the successful and unsuccessful

tenderers following the decision by the Procuring Entity to award the subject tender. Forming part of the unsuccessful tenderers, the Applicant was notified that the reasons for non-responsiveness of its bid were that:

- i. You did not submit the company resolution as per Clause 2.2.4 (e)*
- ii. You did not submit the beneficial ownership form as per Addendum 2*

Section 79 of the Act provides for responsiveness of tenders as follows:

(1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents.

(2) A responsive tender shall not be affected by—

(a) minor deviations that do not materially depart from the requirements set out in the tender documents; or

(b) errors or oversights that can be corrected without affecting the substance of the tender.

(3) A deviation described in subsection (2)(a) shall—

(a) be quantified to the extent possible; and

(b) be taken into account in the evaluation and comparison of tenders.

From the above provision, a bid only qualifies as a responsive bid if it meets all requirements set out in the bid documents. In the case of **Republic v**

Public Procurement Administrative Review Board & another;
Premier Verification Quality Services (PVQS) Limited (Interested
Party) Ex Parte Tuv Austria Turk [2020] eKLR the Court stated:

"In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions..... In essence, a conforming / compliant / responsive tender is defined as a tender that complies with all the "material" or "substantial" aspects of the tender invitation. Procuring entities are allowed to consider tenders even if they contain minor deviations that do not materially

alter or depart from the characteristics, terms, conditions and other requirements set out in the tender documents, or if they contain errors or oversights that can be corrected without touching on the substance of the tender. Article 227 of the Constitution provides that when procuring entities contract for goods or services they must comply with the principles of fairness, equity, transparency, competitiveness and cost-effectiveness. For there to be fairness in the public procurement process, all bids should be considered on the basis of their compliance with the terms of the solicitation documents, and a bid should not be rejected for reasons other than those specifically stipulated in the solicitation document."

Responsiveness serves as an important first hurdle for bidders to overcome. An evaluation committee appointed by the accounting officer of the Procuring Entity is tasked with evaluating and comparing respective bids pursuant to Section 80 of the Act. Section 80(2) of the Act provides:

"The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered."

Further Section 80(3) states:

"The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)—

(a) the criteria shall, to the extent possible, be objective and quantifiable;

(b) each criterion shall be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality, time and service for the purpose of evaluation"

The task before the Board is to establish if the Procuring Entity evaluated the Applicant's tender in accordance with the criteria set out in the Tender document.

On the first reason advanced for non-responsiveness, the Board observes that the tender document at **page 34 Section III Evaluation and Qualification Criteria** provided at **Part 1** as follows:

"Preliminary Evaluation Criteria Under Clause 28.2 of the ITT. These are mandatory requirements. This shall include confirmation of the following:

.....

- 2.2.4 Submission and considering Form of Tender duly completed and signed together with the following:***
- a. Certificate of Independent Tender determination***
 - b. Self-Declaration forms (See Form SD1&SD2)***
 - c. Declaration and Commitment to the code of Ethics***

- d. Power of Attorney where a person other than the director/Partner/Owner is signing documents.***
- e. A company resolution in case of one Director/Partner signing where company has more than one director (not applicable for Sole Proprietorship or where the company has got only one director, or where all Directors have signed)."***

Following the letter of notification, the Applicant attempted to clarify their position by writing to the Procuring Entity and stating that the signatory in their documents was not a director and hence provided a power of attorney instead of a company resolution as none of its directors had signed the tender document. The Applicant submits that the person who signed its tender document, that is Sagar Gupta, is not a director of the Company and as such as per the requirements of the tender document, the Applicant was only obligated to provide a power of attorney authorizing the said Sagar Gupta to sign the tender documents on its behalf, which it did. The Applicant annexed the said power of attorney as its evidence.

Further, the Applicant has stated that under the Tender Data Sheet, ITT 19.3 provides that:

"The written confirmation of authorization to sign on behalf of the Tenderer shall consist of:

- a. A company resolution in case of a Director/Partner signing (not applicable for sole proprietorship or where the***

company has got only one director, or where all Directors have signed) or;

b. Power of Attorney where a person other than the Director/Partner/Owner is signing."

The Respondent in opposition argues that the Applicant's Power of Attorney appointing Mr. Sagar Gupta has been signed by Mr. Raghavendra Goel who is one of the director while the company has two directors. Further, the Applicant did not provide a resolution authorizing Mr. Raghavendra Goel to appoint Mr. Sagar Gupta as the Applicant's Attorney to act on behalf of the Applicant.

The Board notes for a fact that the argument advanced by the Respondent did not form part of the reasons advanced in the Letter of Notification issued to the Applicant by the Procuring entity. Neither was there a requirement in the tender document or in any of the addendums issued for a power of attorney to be accompanied with a company resolution evidencing nomination of the attorney by company directors.

The Board further observe that the tender document at page 27 provided under Section II- Tender Data Sheet (TDS) that:

"The following specific data shall complement, supplement, or amend the provisions in the Instructions to Tenderers (ITT). Whenever there is a conflict, the provisions herein shall prevail over those in ITT" (Emphasis ours)

Consequently, it follows that in interpreting the provisions under the tender document, one must take into account that the provisions under Section II-

Tender Data Sheet prevails over those in the Instructions to Tenderers as provided in the tender document.

The Board notes that ITT 19.3 uses the conjunctive “or” in laying out what the written confirmation of authorization to sign on behalf of the tenderer should consist of.

The Board considers the use of the word ‘or’ and notes that the Concise Oxford English Dictionary (11 Edition, Oxford University Press) defines “or” as a *‘conjunction used to link alternatives.’* The use of the word “or” gives bidders an alternative of either providing a company resolution where a director/partner signs or a power of attorney where a person other than the director /partner/owner is signing the tender documents. Either of the two documents would rightfully consist of the written confirmation of authorization to sign on behalf of the tenderer.

Accordingly, the Board finds that the Procuring Entity erred in its evaluation by requiring the Applicant to provide company resolution as per clause 2.2.4(e) yet the tender document had provided for an alternative, being the power of attorney, which the Applicant rightfully availed. to this extent, the Board holds that the Applicant met the mandatory requirements as provided for under Section III, Part 1 at pages 34 and 35 as read with Section II , ITT 19.3 at page 31 of the tender document.

On the second reason for non-responsiveness, the procuring entity indicated that the Applicant did not submit the beneficial ownership form as per Addendum 2.

The Board observes that Addendum No.2 to the subject tender dated 5th May 2022 under Clause 6 provided for Beneficial Ownership Disclosure form. It states:

"Attached is form 9 which is a mandatory document to be filled/completed by all bidders. Failure to disclose ownership as required will lead to disqualification. For foreign bidders who are not registered in Kenya under the Companies Act, they should provide the Beneficial Ownerships in accordance with both their countries of origin and registration. Where there are exemptions or laws barring such disclosures in their countries of origin and registration, they provide certified proof by a Notary Public or his/her equivalent of such exemption/law barring such disclosure. The timeline for this should be not more than 3 months old from Date of tender document."

The Applicant submits that being a foreign company, it complied with this requirement by providing Form No. MGT-7 which is equivalent of Form 9 in India (*where the Applicant is based and registered*). This has been submitted for the Board's review in the Request for Review. It has placed reliance on this Board's decision in **Application No. 99/101 of 2020 Magal Security Limited V The Joint Parliamentary Service Commission** where the Board held that *the production of a certificate of incorporation and registration of private company in Israel was equivalent to a CR12 in Kenya.*

The Respondent in opposition submits that the Applicant in defiance of the requirement under clause 6 of Addendum 2 of the tender document provided a Beneficial Ownership Disclosure Form which was not duly filled. It further submits that the Applicant did not care to provide a Beneficial Ownership Disclosure Form in accordance with its country of origin nor an exemption or laws barring the Applicant from such disclosures. The Respondent concedes that the Applicant did provide form MGT-7 and was the document it considered during evaluation exercise. What the Respondent does not address is whether or not the said form MGT-7 is equivalent per their evaluation with Form 9 in India.

The Board notes that none of the Respondent's allegations regarding the Beneficial Ownership Disclosure Form were issued to the Applicant in the letter of notification dated 7th July 2022.

To resolve this issue, the Board has studied the contested Form 9 and Form MGT-7. We note that the Applicant is a company incorporated in India hence was not required to fill/complete Form 9 per clause 6 of Addendum 2. The Board also notes that an alternative option had been given to bidders not registered in Kenya to provide the Beneficial Ownership in accordance with both their countries of origin and registration. The Applicant went ahead and submitted form MGT-7 in response as its alternative. The Respondent in its evaluation and reasoning has not stated that what the Applicant submitted is not an equivalent in India to the Beneficial Ownership form in Kenya.

In **Miscellaneous Civil Application No. 85 of 2018, Republic V Public Procurement Administrative Review Board Ex Parte Meru**

University of Science & Technology; M/S AAKI Consultants Architects and Urban Designers (Interested Party) [2019] eKLR, the court held:

"Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions."

The Board finds and holds that the Applicant has demonstrated that it complied with the mandatory requirement per clause 6 under Addendum 2 and hence its bid was responsive in accordance with Sections 79(1) and 80(2) of the Act.

Whether the Evaluation Committee in making its recommendation complied with the Award Criteria set out in the Tender document.

The Applicant contests that there were 10 lots upon which bidders were required to bid. Pursuant to addendum No.4 dated 18th May 2022 the award criteria stipulated under the Tender Data Sheet ITT 40 required bidders to quote for all items in a given lot to qualify for award, however the successful bidders would only be awarded a maximum of two (2) lots. The Applicant submits that the Respondent was to secure a minimum of five (5) successful bidders so that each can be awarded a maximum of two (2) lots of the goods procured. The Respondent purported to shortlist four (4) bidders in total disregard to the award criteria set out in the tender document.

The Respondent submits that ITT 40 on page 32 of the tender document among other criteria provides that an award shall be on lot-by-lot basis to the lowest evaluated bidder and not to five (5) bidders as alleged. The Respondent does concede at paragraph 34 that the successful bidders would be awarded a maximum of two (2) lots. Having found four (4) bidders responsive after the preliminary evaluation, the said bidders were subjected to the technical and financial evaluation stages. The Respondent further submits that it was only *reasonable in the Wednesbury sense (Associated Provincial Picture Houses Limited V Wednesbury Corporation (1948) 1 K.B. 223)* to award the successful bidders as per the tender document.

The Board notes that per Addendum No.4 to the subject tender dated 18th May 2022, clause 2 provided for amendment of Section II-Tender Data Sheet (TDS)and stated as follows:

"ITT Clause Reference ITT 3.1 in reference to lots has been amended to read as follows:

- ITT 3.1 1. This being a restricted tender to few known suppliers, all bidders can quote for all lots.***
- 2. Award Criteria is as stipulated in the TDS, ITT 40"***

ITT 40 at page 32 of the Tender document stipulates:

No.	Award Criteria
1	Award shall be on lot-by-lot basis to the lowest evaluated bidder
2	Bidders MUST quote for all items in a given lot to qualify for award of that lot. However, the successful bidder(s) shall be awarded a maximum of TWO (2) lots
3	If a bidder qualifies as the lowest evaluated bidder in more than one lot, they shall be awarded the lot with the highest value following the procedure in (2) above. Consequently, the subsequent lots shall be awarded based on the lowest price per item and highest value per lot until all the lots are allocated provided that the price of the subsequent lowest bidder is within the market price. If the price of the subsequent lowest bidder exceeds the market price or there is no subsequent qualified bidder, the award shall revert to the lowest bidder.

4	In case of a tie, the award shall be allocated equally among the bidders.
5	KPLC Shall also take into consideration before award of the following: (i) Bidder Capacity as declared in the Manufacturer's Capacity Declaration Form (ii) Bidders who have defaulted in performance on previous contract for unjustified reasons and/or have more than 50% outstanding orders for the same items will not be eligible for award

The Evaluation Committee proceeded to award the successful bidders as follows:

1. Ms Conductors and Transformers Manufacturing Limited- Lot 6
2. Ms Cable Connect Limited- Lot 2,5,7,8,9 and 10
3. Ms Green Hills Cable Company Limited- Lot 3 and 4
4. Ms Showan Limited –Lot 1

Having regard to the Respondent's argument that it was reasonable in the "*Wednesbury sense*" to award the successful bidders as per the tender document, we refer to the case of **Judicial Review Application No. 646 of 2017 Konton Trading Limited V Kenya Revenue Authority & 3 others** where Justice Mativo while addressing the concept of reasonableness and the test for *Wednesbury unreasonableness* stated at paragraph 64 that:

"Review by a court of the reasonableness of decision made by another repository of power is concerned mostly with the

existence of justification, transparency and intelligibility within the decision-making process but also with whether the decision falls within a range of possible, acceptable outcomes which are defensible with respect to the facts and law.”

In view of the above, we must establish whether the Respondent's decision in awarding the subject tender was justified, transparent and intelligible and if the decision fell within a range of possible acceptable outcomes that are defensible with respect to the provisions of the tender document and per the Act.

The Board having analyzed the award criteria stipulated in the tender document notes that the tender document was categorical on the award criteria that successful bidders would be awarded a maximum of two (2) lots. Had the tender document intended for the award criteria to be otherwise, it would have provided for the same.

As such we find and hold that the Respondent contravened the clear provisions on the award criteria set out in the tender document and in violation of Section 80 (2) of the Act which stipulates that evaluation and comparison must be done using the procedures and criteria set out in the Tender document.

What orders should the Board grant in the circumstances.

It is trite law that courts and decision-making bodies such as this Board can only act in cases where they have jurisdiction.

The Board made a determination that the Applicant in the instant Request for Review had authorization to institute the matter before this Board and as such opine that the instant review has been properly instituted and that the Board has jurisdiction to hear and determine the matter.

The Board has also found that the Respondent's letter of notification of award/regret dated 7th July 2022 complied with the provisions of Section 87 of the Act and was properly authored and issued by the Respondent's Accounting Officer.

This Board draws its attention to Section 80(2) of the Act as read with Section 79(1). The two sections stipulate that a responsive bid is one that meets the eligibility and mandatory requirements in the Tender document and therefore an evaluation committee is bound to follow the procedures and criteria set out in the Tender Document.

The Board considered the issue of the Applicant's tender responsiveness and found the Applicant submitted its tender in accordance with the provisions of the tender document and by providing a power of attorney authorizing Sagar Gupta to sign the tender documents on its behalf complied with the mandatory terms laid out in the tender document at page 34 and 35 Part 1 clause 2,2,4 as read with ITT 19.3 at page 31 under Section II Tender Data Sheet (TDS) by Additionally, by availing form MGT-7 the Applicant complied with the mandatory terms laid out at page 5 of Addendum No. 2 dated 5th May 2022 under Clause 6 requiring Beneficial Ownership Disclosure form.

It is only fair and just for the Board to nullify the letter of notification of award/regret dated 7th July 2022 issued to the Applicant by the Respondent

and direct the Respondent to find that the Applicant's tender was responsive to proceed to the next stage of evaluation being the technical stage.

The Board also established that the evaluation committee in making its award of the subject tender to the various successful bidders failed to adhere to the award criteria stipulated at page 32 of the tender document under ITT40 which stipulated that successful bidders shall be awarded a maximum of TWO (2) lots.

FINAL ORDERS

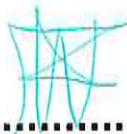
In exercise of the powers conferred upon it by Section 173 of the Act, the Board makes the following orders in the Request for Review dated 19th July 2022:

- 1. The Accounting Officer of the Procuring Entity's Letter of Notification of Award/Regret of Tender No. KPI/9A.3/RT/07/21-22 in relation to tender for Supply of Cables and Conductors dated 7th July 2022, addressed to the Applicant and to the other bidders be and is hereby nullified and set aside.**
- 2. The Accounting Officer of the Procuring Entity's Letters of Notification of Award/Regret of Tender No. KPI/9A.3/RT/07/21-22 dated 7th July 2022, addressed to the four successful bidders, be and are hereby nullified and set aside.**
- 3. The Accounting officer of the Procuring Entity is hereby directed to direct the evaluation committee to reinstate the Applicant's tender at the Technical Evaluation Stage and**

conduct a re-evaluation of the Applicant's tender at the Technical Evaluation Stage.

4. The Evaluation Committee's recommendation of award of the subject tender to the four successful bidders as per the awarded lots is hereby set aside and the Evaluation Committee is hereby directed to award the subject tender to the successful bidders as per the set out award criteria stipulated at page 32 under ITT 40 of the tender document.
 5. The Procuring Entity is hereby directed to proceed with the procurement process to its logical conclusion and in strict compliance with the provisions of the relevant laws including making of an award within fourteen (14) days from the date of this decision, taking into consideration the Board's findings in this review.
 6. In view of the fact that the procurement process is still ongoing, each party shall bear its own costs in the Request for Review.
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Dated at Nairobi, this 8th day of August, 2022



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CHAIRPERSON
PPARB



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SECRETARY
PPARB

