

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 77/2022 OF 31STAUGUST2022 CONSOLIDATED
WITH APPLICATION NO. 81/2022 OF 2ND SEPTEMBER 2022

BETWEEN

PASONDIA CABLES PRIVATE LIMITED.....1ST APPLICANT
SHOWAN LIMITED.....2ND APPLICANT

AND

THE ACCOUNTING OFFICER,

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

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

CONDUCTORS & TRANSFORMERS MANUFACTURING

LIMITED.....1ST INTERESTED PARTY

CABLE CONNECT LIMITED.....2ND INTERESTED PARTY

GREEN HILLS CABLE COMPANY LIMITED.....3RD 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 - Member(In the Chair)
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

The Tendering Process

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
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.

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.

First 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 1st Applicant a Notification of Intention to Award the Subject tender wherein both successful and unsuccessful tenderers were listed. The 1st 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
	Pasondia Cables	40000618 80	1	2.2.4.(e)	They did not submit the company resolution.
3	Private Limited		2	Addendum 2	They did not submit the beneficial ownership form.

The 1st Applicant requested a debrief vide a letter dated 12th July 2022 addressed to the Procuring Entity and received on 13th July 2022 wherein

the 1st 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 1st Applicant in the subject tender be amended to read as follows:

- 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 1st 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 1st Applicant detailing the said grounds leading to non-responsiveness of the 1st Applicant's Bid.

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 1st 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*

In its decision rendered on 8th August 2022, the Board made the following orders:

- 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 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 tendering 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.**

TENDER RE-EVALUATION

In view of the Board's orders in Review No. 65 of 2022, the Evaluation Committee re-admitted the tender of M/s Pasondia Cables PVT Limited to the Technical Evaluation Stage and re-evaluation of the subject tender was carried out from 15th August 2022 to 16th August 2022. The said tenderer was found responsive at the preliminary technical evaluation stage and

proceeded to the detailed technical evaluation stage where the tenderer was found responsive for lot 1 and lot 2. However, the 1st Applicant was not responsive for lots 3 to 10 because they did not submit original tender securities.

Consequently, bidders found responsive upon re-evaluation and qualified to proceed to financial evaluation were as follows:

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
5	M/s Pasondia Cables PVT Limited	Lot 1 and 2

Financial Re-Evaluation

The five (5) bidders who qualified for the financial evaluation 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

Having ranked the bidders on lot by lot basis, the bidders were awarded as follows:

No	Bidder	Lots awarded
1	Ms Showan Limited	No award
2	Ms Conductors and Transformers Manufacturing Limited	Lot 6
3	Ms Cable Connect Limited	Lot 7 and 8 Lot 5, 9, and 10
4	Ms Green Hills Cable Company Limited	Lot 3 and 4
5	Ms Pasondia Cables PVT Ltd	Lot 1 and 2

The Evaluation Committee's Recommendation

The Evaluation Committee recommended award of Tender No. KP1/9A.3/RT/07/21-22 for supply of cables and conductors at a total estimated cost of **Kshs. 2,781,922,434.78 (Two billion, Seven Hundred and Eighty One million, Nine Hundred and Twenty Two Thousand, Four Hundred and Thirty Four Shillings and Seventy Eight Cents only) VAT Inclusive** as follows:

- a) **M/s Conductors and Transformers Manufacturing Limited** award at a total estimated cost of **Kshs.678,600,000.00DDP VAT Inclusive** for Lot 6.

- b) M/s Cable Connect Limited** award at a total estimated cost of **Kshs.1,360,697,320.54DDP VAT Inclusive** for Lots 7,8,5,9, and 10.
- c) Ms Green Hills Cable Company Limited** award at a total estimated cost of **Kshs.548,966,037.44DDP VAT Inclusive** for Lot 3 and 4.
- d) MsPasondia Cables PVT Ltd** award at a total estimated cost of **USD.1,656,480.00 DAP VAT Inclusive** equivalent to **Kshs.193,659,076.80 DAPVAT Inclusive** for Lot 1 and 2.

Second Professional Opinion

A Professional opinion dated 19th August 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 22nd August 2022.

Notification to Tenderers

By letters dated 19th August 2022, the Respondent notified the tenderers of the outcome of the subject tender

CONSOLIDATION OF REQUEST FOR REVIEW NO. 77/2022 OF 31ST AUGUST 2022 AND REQUEST FOR REVIEW NO. 81/2022 OF 2ND SEPTEMBER 2022

The Board observes that the tender in issue in Request for Review Applications No. 77/2022 of 31st August 2022 and Request for Review No. 81 of 2022 of 2nd September 2022 is the same subject tender.

Regulation 215 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "Regulations 2020") provide as follows:

Where two or more requests for review are instituted arising from the same tender or procurement proceedings, the Review Board may consolidate the requests and hear them as if they were one request for review.

The two request for review applications are instituted with respect to the subject tender with the Respondents being the same and the grounds for review around the same subject tender. The Board is satisfied the two request for review applications meet the requirement for consolidation under Regulation 215 of Regulations 2020.

Accordingly, the Board hereby consolidates Request for Review Application No. 77/2022 and Request for Review No. 81/2022 and proceeds to determine them as one Request for Review Application with the following parties:

PASONDIA CABLES PRIVATE LIMITED.....1ST APPLICANT
SHOWAN LIMITED.....2ND APPLICANT

AND

THE ACCOUNTING OFFICER,

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

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

CONDUCTORS & TRANSFORMERS MANUFACTURING
LIMITED.....1ST INTERESTED PARTY

CABLE CONNECT LIMITED.....2ND INTERESTED PARTY

GREEN HILLS CABLE COMPANY LIMITED.....3RD INTERESTED PARTY

REQUEST FOR REVIEW 77/2022

The Request for Review regarding the subject tender was lodged by M/s Pasondia Cables Private Limited (the Applicant), together with a Supporting Affidavit sworn by Sagar Gupta, on 30th August, 2022 through the firm of Abdullahi, Gitari & Odhiambo Advocates LLP, seeking the following orders

- a) The Respondent's decision notifying the Applicant that it had not been successful in TENDER NO.KP1/9A.3/RT/07/21-22 in respect to lots 3 to 10 by way of the letter dated the 19th August, 2022 be and is hereby set aside and nullified.***
- b) The Respondent's decision awarding TENDER NO.KP1/9A.3/RT/07/21-22 in respect to lots 3 to 10 to the alleged successful tenderers by way of the letter dated the 19th August, 2022 be and is hereby set aside and nullified.***

- c) A declaration that the Respondent failed to evaluate the Applicant's bid for lots 3 to 10 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 in respect to lots 3 to 10 and evaluate its bid and conclude the procurement process to its logical conclusion in accordance with the tender document, the Act and regulations.***
- e) In the alternative, the Board be pleased to make a declaration that the Applicant did provide original tender securities for lots 3 to 10 and proceed to award the Applicant the tender for the two Lots with the highest value in accordance with the award criteria specified under TDS, ITT 40 of the tender document.***
- f) The Respondent be and is hereby ordered to pay the costs of and incidental to these proceedings; and***
- g) Such other or further relief or reliefs as this board shall deem just and expedient***

In a Notification of Appeal and a letter dated 31st August 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 Respondents filed on 6th September 2022 a Notice of Appointment of Justus Ododa Advocate to act on its behalf dated 5th September 2022 together with its Response to the 1st Applicant's Request for Review dated 5th September 2022 and filed on 6th September 2022.

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 6th September 2022, the Acting Board Secretary notified the rest of the Tenderers 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 6th September 2022.

In response to the Board Secretary's notification, the 2nd Applicant and being the 4th interested party in the Request for Review filed on 9th September 2022 a Notice of Appointment of Advocates appointing the firm of M/s Caroline Oduor and Associates to act on its behalf together with its Replying Affidavits sworn on 9th September 2022 by its director, George BaiyaNjenga

On 12th September 2022 the 1st Applicant filed a Further Affidavit sworn on 10th September 2022 by Sagar Gupta in response to the Respondents

Statement of Response together with its written submissions and authorities relied on.

The 2nd Applicant/4th interested party in Review Application No. 77/2022 filed its written submissions on 15th September 2022.

REQUEST FOR REVIEW 81/2022

The Request for Review regarding the subject tender was lodged by M/s Showan Limited (the Applicant), together with a Supporting Affidavit sworn by George BaiyaNjenga, on 2nd September, 2022 through the firm of Caroline Oduor & Associates seeking the following orders:

- i. The 1st Respondent's Letter of Notification of Regret of Tender No. KPI/9A.3/RT/07/21-22 in relation to Tender for Supply Cables and Conductors dated 19th August 2022, addressed to the Applicant be nullified and set aside.*
- ii. The 1st Respondent's Letters of Notification of Award of Tender No. KPI/9A.3/RT/07/21-22 addressed to the 1st, 2nd, 3rd and 4th Interested Parties be nullified and set aside.*
- iii. The 1st Respondent be ordered to direct the 2nd Respondent's Evaluation Committee to reinstate the Applicant's tender at the Financial Evaluation Stage and conduct a re-evaluation of the Applicant's tender at the Financial stage in strict compliance with the tender*

criteria stipulated at page 32 under ITT 40 of the tender document.

- iv. In the alternative to prayer No. 3 above, the 1st Respondent be directed to award the Applicant Lot 1 and 2 of the subject tender in line with the analysis proffered in paragraph 10 herein above.***
- v. The Respondents be 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 the Board's decision taking into consideration the Board's findings in this review.***
- vi. The Respondents to pay the cost of the Review.***
- vii. Any other orders as necessary for the ends of justice.***

In a Notification of Appeal and a letter dated 2nd September 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 on 8th September 2022 a Notice of Appointment of Justus Ododa Advocate to act on its behalf dated 7th September 2022 together with its Response to the Applicant's Request for Review dated 7th September 2022 and filed on 8th September 2022.

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 8th September 2022, the Acting Board Secretary notified the rest of the Tenderers 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 8th September 2022.

The 1st Applicant's Case

The 1st 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 all mandatory documents as specified in the tender document; the Technical Evaluation Stage and the Financial Evaluation Stage.

The 1st Applicant further states that there were 10 lots/categories of the goods procured upon which the tenderers were required to bid. Pursuant to Addendum No.4 dated the 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. According to the 1st Applicant, the implication of this is that the Procuring Entity 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.

The 1st Applicant had a legitimate expectation that its bid would be evaluated in strict adherence to the criteria set out in the tender document and in accordance with the provisions of Section 80(2) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act").

The 1st Applicant confirms having filed Request for Review No. 65 of 2022 on grounds that the Procuring Entity did not evaluate its bid in accordance with the criteria set out in the tender document and in total defiance of Section 80(2) of the Act. The application was allowed vide Board's decision dated 8th August 2022 which directed for the 1st Applicant's tender to be reinstated at the Technical Evaluation Stage and conduct a re-evaluation of the 1st Applicant's tender at the Technical Stage. The Procuring Entity was also ordered to proceed with the procurement process to its logical conclusion and in strict compliance with the provisions of the relevant laws, taking into account the Board's findings.

The 1st Applicant states that vide letter dated 19th August 2022, the Respondent notified it that its tender was successful in respect to only Lot 1 and 2. The letter further stated that the its tender was unsuccessful in respect to Lot 3 to 10 on grounds that it did not submit original tender securities as required in the Tender Data Sheet ITT 18.1 page 31 of the tender and clause 2.2.1 of the evaluation and qualification criteria page 34 of the tender document.

The 1st Applicant states that the reasons offered by the Respondent as to why its tender was unresponsive for lots 3 to 10 is unjustifiable and unfair as the Applicant did submit the said original tender securities. The tender security sum was in accordance with the specifications provided by Addendum No. 2 dated 5th May 2022.

The 1st Applicant further states that the tender securities it provided for lots 3 to 10 were strikingly similar in substance and form with the ones it provided for lot 1 and 2. Therefore, having accepted the 1st Applicant's tender securities for lot 1 and 2, the Respondent did not have any basis to reject the tender securities for lots 3 to 10.

The 1st Applicant avers that the Respondent acted unfairly, unjustifiably, and applied extraneous criteria in evaluating its bid in total defiance of Section 79 and 80(2) of the Act.

The 1st Applicant contends that whereas the awarding criteria under TDS, ITT 40 of the tender document stipulates that a successful tenderer could only be awarded a maximum of 2 lots, it also provided that if a bidder qualified as the lowest evaluated bidder in more than one lot, they would be awarded the lot(s) with the highest value. As such, despite being awarded the maximum number of 2 lots, it was unjustifiably and unfairly denied the chance of being awarded the lot(s) with the highest value.

The 1st Applicant avers that the Respondent uploaded to its online portal a response analysis of the bids by the various tenderer which revealed the following:

- a. Lot 1 – Pasondia Cable Pvt Ltd was the only bidder with a bid price of Kshs 118, 881, 280.00.
- b. Lot 2- Pasondia Cable Pvt Ltd quoted a bid price of Kshs 25, 646,600 and was the lowest under this category compared to a bid price of Kshs 29, 232, 720 for Cable connect Ltd and Kshs 29, 520, 000.00 for Greenhills Cable Co. Ltd.
- c. Lot 3-Pasondia Cable Pvt Ltd quoted a bid price of Kshs 251, 510, 652.87 and was the lowest under this category compared to the bid price of Kshs 272, 204, 380 by Cable Connect Ltd and Kshs 268, 565, 580 by Greenhills Cable Co.Ltd.
- d. Lot 8- Pasondia Cable Pvt Ltd quoted a bid price of Kshs 378, 020, 284.55, Conductors and transformers manufacturers limited quoted a bid price of Kshs 353, 974, 435, Cable Connect Ltd quoted Kshs 406,087, 799.50 and Greenhills Cable Co Ltd quoted 411, 342, 705.50.

In view of the above analysis, the 1st Applicant states that it was eligible for award under Lot 3 and Lot 8 given that where a bidder qualified for award in more than one lot, TDS ITT 40 provided that such a bidder would be awarded the lot (s) with highest value.

The 1st Applicant contests that it was the lowest evaluated bidder under Lot 3. In respect of Lot 8 the 1st Applicant was the only bidder eligible for award under that category as the only other bidder with a competitive price being M/s Conductors and Transformers Manufacturers Limited had already been awarded two Lots of the highest value being Lot 6 and 7 and thus

unavailable for award under Lot 8 while rest of the bidders quoted a higher price than the 1st Applicant.

The 1st Applicant further states that despite the Board reiterating that the tender document was categorical on the award criteria that successful bidders would be awarded a maximum of 2 Lots, the Respondent proceeded and awarded the subject tender to only four (4) bidders which means there were bidders awarded more than 2 Lots in violation of the award criteria set out in the tender document and the Board's findings in Application 65 of 2022.

The 1st Applicant contends that the Respondent, failed, ignored and /or declined to adhere to the criteria set out in the tender document by purporting to award it 2 Lots in which it was qualified but with the lowest value. The Respondent's decision offended the spirit of the Act and failed to adhere to the requirements as set out in Section 3 of the Act by failing to promote competition or ensure that competitors are treated equally and fairly. Further, the Respondent breached Article 227 of the Constitution in that the evaluation process was not fair, equitable, transparent or competitive and the declaration of its bid for lots 3 to 10 as unresponsive contrary to the requirements of the tender document is not a cost effective way of conducting public procurement and does not promote fairness and competition.

The 2nd Applicant's case

The 2nd Applicant confirms that it submitted its bids for Lot 1, 2 & 3 out of a possible 10 Lots with respect to the Respondent's subject tender which

had a closing date of 2nd June 2022 following change of closing date through various Addenda. Initially, it had been awarded Lot 1 only besides the 1st, 2nd and 3rd Interested Parties who were also successful tenderers for various Lots.

The 2nd Applicant avers that following the Board's decision in Application 65 of 2022, the Respondents conducted a re-evaluation of the subject tender and found the 2nd Applicant's tender to be unsuccessful on the grounds that it was not the lowest evaluated bidder for Lot 1 & 2.

The 2nd Applicant contends that the 1st Respondent's decision of 19th August 2022 does not conform to the tender award criteria stipulated at Section II- Tender Data Sheet (TDS), ITT 40, page 32 of the tender document

The 2nd Applicant states that it agrees with the 1st Applicant's assertion that the tender criteria at Section II- Tender Data Sheet (TDS) ITT 40, Page 32 of the tender document requires that successful bidders can only be awarded a maximum of two (2) Lots, which means that there ought to be a maximum of 5 successful bidders. Further that by the Respondent's own admission at paragraph 28 of its Response, M/s Cable Connect Limited was awarded Lots 5,7,8,9, and 10 contrary to the tender award criteria.

The 2nd Applicant also agrees with the 1st Applicant's assertion that where a tenderer is the lowest evaluated bidder in more than two lots, the tender in issue ought to be awarded the lots with the highest value as per the tender award criteria.

The interested party states that the subsequent to opening the subject tenders, the Respondent uploaded the Tender Opening Price Schedules on

its Supplier Relationship Management (SRM) Portal which information could be accessed by all tenderers registered with the Respondent and having log in credentials as issued by the Respondent.

The 2nd Applicant states that in applying the award criteria to the information provided in the Tender Opening Price Schedule for purposes of determining the tender lot with the highest value based on the lowest priced bid leads to the following ranking of each Lot with respect to the 5 Tenderers (Applicant herein and the 4 Interested Parties) who made it to the Financial Evaluation stage:

<u>S/No.</u>	<u>LOT NO.</u>	<u>CONDUCTORS AND TRANSFORMERS MANUFACTURING LIMITED</u>	<u>CABLE CONNECT LIMITED</u>	<u>GREEN HILLS CABLE COMPANY LIMITED</u>	<u>PASONDIA CABLES PVT LIMITED</u>	<u>SHOWAN LIMITED</u>
<u>1.</u>	<u>6</u>	<u>1</u>	<u>3</u>	<u>2</u>	<u>4</u>	<u>-</u>
<u>2.</u>	<u>7</u>	<u>1</u>	<u>2</u>	<u>3</u>	<u>4</u>	<u>-</u>
<u>3.</u>	<u>8</u>	<u>1</u>	<u>3</u>	<u>4</u>	<u>2</u>	<u>-</u>
<u>4.</u>	<u>3</u>	<u>-</u>	<u>3</u>	<u>2</u>	<u>1</u>	<u>4</u>
<u>5.</u>	<u>4</u>	<u>-</u>	<u>2</u>	<u>3</u>	<u>1</u>	<u>-</u>
<u>6.</u>	<u>5</u>	<u>-</u>	<u>2</u>	<u>3</u>	<u>1</u>	<u>-</u>
<u>7.</u>	<u>9</u>	<u>-</u>	<u>2</u>	<u>3</u>	<u>1</u>	<u>-</u>
<u>8.</u>	<u>1</u>	<u>-</u>	<u>-</u>	<u>-</u>	<u>1</u>	<u>2</u>
<u>9.</u>	<u>2</u>	<u>-</u>	<u>2</u>	<u>3</u>	<u>1</u>	<u>4</u>
<u>10.</u>	<u>10</u>	<u>-</u>	<u>1</u>	<u>-</u>	<u>2</u>	<u>-</u>

The 2nd Applicant contends that the Respondents are obligated to adhere to the tender award criteria as demanded by section 80(2) the Act. Further that applying the three tender award criteria to the information in the Tender Opening Price Schedule against the 5 Tenderers ought to have led to the following deduction with respect to each Tenderer:

- i. Conductors and Transformers Manufacturing Limited (1st Interested Party)

The above firm participated in 3 LOTS (6, 7 & 8) out of the 10 available lots. They are considered the LOWEST PRICED BIDDER in LOTS 6, 7 and 8. However, the lots with the highest values are 6 & 7. Therefore, the firm should be awarded LOTS 6 & 7 and shouldn't be considered for award in any other lots.

- ii. Cable Connect Limited (2ND Interested Party)

The above firm participated in 9 LOTS (2, 3, 4, 5, 6, 7, 8, 9 & 10) out of the 10 available lots. They are considered the LOWEST PRICED BIDDER in LOT 10. From the remaining lots eligible for award, LOTS (2,5,8,9), they are considered the 2ND LOWEST PRICED BIDDER in LOTS 2,5,9 and the 3RD LOWEST PRICED BIDDER in LOT 8. However, the lot with the highest value is LOT 8. Therefore, the firm should be awarded LOTS 8 & 10 and shouldn't be considered for award in any other lots.

They are to be considered for award for LOT 8 since the 2ND LOWEST PRICED BIDDER in LOT 8, PASONDIA CABLES PVT LIMITED has been

awarded the maximum 2 LOTS in which he was LOWEST PRICED BIDDER and isn't eligible for consideration for award in any other lots.

iii. Greenhills Cable Company Limited (3rd Interested Party)

The above firm participated in 8 LOTS (2, 3, 4, 5, 6, 7, 8 & 9) out of the 10 available lots. From the remaining lots eligible for award, LOTS (2,5,9), the firm is considered the 3RD LOWEST BIDDER in LOTS 2,5 & 9. However, the lots with the highest value are LOTS 5 & 9. Therefore, the firm should be awarded LOT 5 & 9 and shouldn't be considered for award in any other lots.

iv. Pasondia Cables Pvt Limited (1st Applicant)

The above firm participated in all the 10 LOTS. They are considered the LOWEST PRICED BIDDER in LOTS 1, 2, 3, 4, 5 and 9. However, the lots with the highest values are 3 & 4. Therefore, the firm should be awarded LOTS 3 & 4 and shouldn't be considered for award in any other lots.

v. Showan Limited (2nd Applicant)

The above firm participated in 3 LOTS (1, 2 & 3) out of the 10 available lots. From the remaining lots eligible for award, LOTS (1 & 2), the firm is considered the 2ND LOWEST PRICED BIDDER in LOT 1 and 4TH LOWEST PRICED BIDDER in LOT 2. Since all the other qualified bidders have already been awarded all the other lots as per the award criteria, the firm should be awarded LOT 1 & 2.

The 2nd Applicant states that the 1st Respondent's decision has, additionally, been made in disobedience of the Board's Orders issued in Request for Review Application No.65 of 2022 and more particularly order No. 4 thus null and void pursuant to the provisions of section 175(6) of the Act.

The 2nd Applicant further contends that had the Respondents fairly evaluated its bid, it ought to have qualified to be the 5th successful bidder based on the tender criteria and taking into account the analysis of each of the successful tenderers based on the Tender Opening Price Schedule.

The 1st Respondent in implementing orders of the Board ought to have ensured as a matter of **equity** and **fairness**, that 5 successful bidders are awarded a maximum of two (2) lots each as per the provisions of the tender document and in accordance with the provisions of Article 227 (1) of the Constitution

The 2nd Applicant is apprehensive that it is likely to unfairly and unlawfully suffer loss of a business opportunity as may be occasioned by the 1st Respondent's unfair and unlawful decision made in breach of legal obligations imposed on the 1st and 2nd Respondents by the law unless the Honorable Board intervenes.

The 1st and 2nd Respondents Case

In respect of the allegations raised in the Request for Review No. 77/2022, the 1st and 2nd Respondents states that having adhered to the criteria for award under the Tender Document in its evaluation, the 1st Applicant did

not provide original bid securities as required in the tender data sheet ITT 18.1 on page 31 of the tender document clause 2.2.1 of the evaluation and qualification criteria on page 34 of the tender document and page 3 of addendum no. 2 of the tender document in Lots 3 to 10. Hence the Applicant's bid for Lots 3 to 10 failed at the preliminary stage for failure to provide the original bid securities. Addendum no. 2 on page 3 amended Section II – Tender Security ITT 18.1 states:

"This tender requires a Tender Security, each lot should have its own tender security"

The 1st Respondent states that the tender securities provided by the bidders for respective lots were captured in the tender opening bid bond register which was signed by the tender opening committee and the representatives of the bidders on 02.06.2022. From this register, it is evident that the 1st Applicant provided tender securities for only Lot 1 and 2 as captured on the 2nd page of the tender opening bid bond register under item no. 6 and 7. Hence, the Applicant's allegation is an afterthought, not justifiable and ought to be dismissed.

In response to the averments made by the 1st Applicant that the Procuring Entity uploaded to its online portal a response analysis of the bids by various tenderers, the 1st Respondent avers that the same is far from the truth as the Procuring Entity only uploaded a copy of the duly signed tender opening minutes and tender opening register as had been captured in the tender form during the tender opening.

The 1st Respondent further avers that it did not conduct any form of price comparison or financial evaluation during the tender opening stage hence the alleged analysis provided by the 1st Applicant did not originate from the Respondents tender opening committee or the evaluation committee and calls the 1st Applicant to strict proof.

The 1st Respondent avers that it duly adhered to the criteria for award under the tender document and did not violate the provisions of Section 3 of the Act and Article 227 of the Constitution. The Respondents urge the Board to dismiss the Applicant's Request for Review No. 77/2022 with costs and issue a declaration that the procurement process was lawful and ought to proceed to conclusion.

In respect of the allegations raised in the Request for Review No. 81/2022, the 1st and 2nd Respondents states that only an evaluation committee appointed by the 1st Respondent has powers emanating from Sections 46 and 80 of the Act to evaluate and compare the responsive tenders. Hence, the alleged evaluation as demonstrated by the 2nd Applicant in its Request for Review No. 81/2022 is illegal and against the spirit of the Act.

The 1st Respondent avers that it complied with the Board's orders issued Application 65 of 2022 and adhered to the set evaluation criteria under Section III Part III and clause 2.2.5 and clause 2.2.6 on page 41 as well as the award criteria under page 32 of the tender document.

It is the Respondents' position that the 2nd Applicant has focused on the award criteria under page 32 of the tender document and turned a blind eye on the evaluation criteria in the Procuring Entity's tender document. As

such, the allegations by the 2nd Applicant that the 1st Respondent's decision of 19.08.2022 does not conform to the tender award criteria stipulated at section II-Tender Data Sheet (TDS), ITT 40, page 32 of the tender document is misplaced and far from truth.

Further, the 1st Respondents avers that the 2nd Applicant on its own admission has under paragraph 10 (ii) of the Request for Review No. 81/2022 admitted that the 1st Applicant had been awarded the maximum of 2 lots in which it was the lowest priced bidder and is not eligible for consideration for award in any other lots.

The 1st Respondent states that the 2nd Applicant's bid was not responsive since it was not the lowest evaluated bidder for lot 1 and 2 and invites this Honorable Board to examine page 32 and 41 of the tender document, the Evaluation Report and Re-Evaluation Report submitted by the Respondents as confidential documents. The Respondents urge the Board to dismiss the Applicant's Request for Review No. 81/2022 with costs and issue a declaration that the procurement process was lawful and ought to proceed to conclusion.

1st Applicant's Rejoinder

In its rejoinder, the 1st Applicant reiterates that it submitted tender securities for each lot as required by Addendum No. 2 on page 3 amended Section II –Tender Security ITT 18.1 and states that the ten (10) tender securities for individual lots are accessible from the Respondent's portal and attaches a copy of each tender security for each lot as they appear on the Respondent's portal. The 1st Applicant availed a link which one can click

and download all the ten (10) tender securities for each lot which are accessible from the Respondent's portal together with a Certificate of Electronic Evidence pursuant to Section 106B of the Evidence Act.

The 1st Applicant avers that none of its representatives signed the tender opening bid bond register and confirms that at the submission of the tender application, a bidder is only required to put the original bid securities in a tender drop box and no stamp is engraved on the counterparts to acknowledge receipt for record purposes. Additionally, the Respondents have not produced proof of the said signed tender opening bid bond register.

The 1st Applicant states that an agent of the Respondents sent an email to an agent of the issuer of the tender securities seeking verification of bonds listed but only sought verification of bonds for lot 1 and 2 which were eventually awarded to the 1st Applicant. Electing to verify security bonds for lot 1 and 2 point to a premeditated pattern upon which the Respondents would achieve a pre-determined outcome of the lots to award the 1st Applicant.

The 1st Applicant further states that the issuer of its tender securities confirmed authenticity of the same to its advocates on record, and averred that the said issuer had changed its name from Century Microfinance Bank Limited to Branch Microfinance Bank.

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 Procuring Entity in making its award complied with the Board's orders issued in PPARB Application No. 65 of 2022 and if in its re-evaluation the evaluation committee adhered to the award criteria set out in the Tender Document.***
- 2. What orders should the Board grant in the circumstances.***

DETERMINATION OF ISSUES

Issue 1: Whether the Procuring Entity in making its award complied with the Board's orders issued in PPARB Application No. 65 of 2022 and if in its re-evaluation the evaluation committee adhered to the award criteria set out in the Tender Document.

In the Request for Review Application No. 65 of 2022, the Board notes that the 1st Applicant had been rendered unsuccessful at the preliminary stage for reasons that 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 which led to filing of Application 65 of 2022.

This Board issued its orders on 8th July 2022 in Application No. 65 of 2022 and inter alia directed the 1st Respondent, by Order No. 3 to direct the evaluation committee to reinstate the 1st Applicant's tender at the Technical Stage and conduct re-evaluation of the 1st Applicant's tender at the Technical Evaluation Stage.

By Order No. 4, the Board directed the evaluation committee's recommendation of award of the subject tender to the four successful bidders as per the awarded lots be set aside and the evaluation committee was 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.

By Order No. 5, the Board directed the Procuring Entity to proceed with the tendering 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 the decision, taking into consideration the Board's findings in the review.

The 1st Applicant submits that this instant Request for Review Application No. 77/2022 is predicated on the grounds that the Respondents unjustifiably and unfairly deemed its bids for lots 3 to 10 as unresponsive despite the 1st Applicant meeting all the eligibility requirements set out in the tender document.

Vide letter dated 19th August 2022, the 1st Applicant was informed by the Respondents that its tender was successful in respect to Lot 1 and 2 but unsuccessful in Lots 3 to 10 and states that:

"

- ***You were not responsive for lots 3 to 10 because you did not submit original tender securities as required in the Tender Data Sheet ITT 18.1 page 31 of the tender and clause 2.2.1 of the evaluation and qualification criteria page 34 of the tender document.***
- ***In clause 4.2.5.3 of the GIP for 11KV cables, you offered to provide an aluminum tape instead of copper tape as required in Addendum No. 2 dated 5th May 2022. You however offered to provide for the required copper tape in the submitted drawing and type test report hence you were allowed to proceed to financial evaluation stage.***

....."

The 1st Applicant contests that it did indeed submit the said original tender securities. Further the tender securities provided by the 1st Applicant for lots 3 to 10 were strikingly similar in substance and form with the ones provided for lot 1 and 2. Therefore having accepted the 1st Applicant's tender securities for lot 1 and 2, the 1st Respondent did not have any basis to reject the tender securities for lots 3 to 10. The 1st Applicant's avers that it submitted individual tender securities for all 10 lots and invites this Board to have a look at the Respondent's portal and note the 10 submitted tender securities can be accessed from the said portal.

The 1st Applicant has stated that the Respondents elected to verify tender securities for lot 1 and 2 only thus pointing to a premeditated pattern upon

which the Respondent would achieve a premeditated outcome of the lots to award the 1st Applicant. It is the 1st Applicant's submission that the Respondents acted in callous disregard of Section 79 (1) of the Act which provides that:

"A tender is responsive if it conforms to eligibility and other mandatory requirements set out in the tender document"

The Applicant further submits that whereas bidders had the responsibility to tender as per the terms specified in the tender document, the Procuring Entity had a corresponding obligation to evaluate the tenders in accordance with the criteria set out in therein and having regard to Section 80(2) of the Act which states:

"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."

The Respondents are adamant that the 1st Applicant provided tender securities for only Lot 1 and 2 as captured on the 2nd page of the tender opening bid bond register under item no. 6 and 7 and invites the Board to examine the tender opening bid bond register which was signed by the Respondent's tender opening committee and representatives of the bidders on 2nd June 2022.

A scrutiny of the Tender Document establishes that the evaluation of the subject tender was to be done in three stages, namely:

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

ITT 28.1 at page 31 of the Tender Data Sheet (hereinafter referred to as "TDS") expressly provides that prior to the detailed Technical and Financial evaluation the procuring entity would determine the substantial responsiveness of each tender. For purposes of the subject tender, a substantially responsive tender is one that conforms to the requirements of preliminary evaluation as set out in Section III- Evaluation Criteria.

One of the mandatory requirements under the preliminary evaluation criteria as indicated under Section III Evaluation and Qualification Clause 2.2.1 at page 34 of the Tender Document was submission of Tender Security and states:

2.2.1 Submission of Tender Security - Checking its validity, whether it is Original; whether it is authentic, whether it is sufficient, whether it is issued by a local bank or Microfinance; Institution, whether it is strictly in the format required in accordance with the sample Tender Security Form(s).

Additionally, ITT 18.1 at page 31 provides as follows:

"A Tender Security valid for 210 days shall be required in form of bank guarantee only. The amount and currency of the bid security shall be as follows:

Lot No. Amount in KSHS

Lot 1 1,400,000.00

Lot 2 3,000,000.00

Lot 3 5,000,000.00

Lot 4 7,000,000.00

Lot 5 4,000,000.00

Lot 6 1,300,000.00

Lot 7 1,300,000.00

Lot 8 140,000.00

Total 23,140,000.00

Amount in Words: Twenty three million one hundred and forty thousand shillings only.

The Original Tender Security should be kept in an envelope clearly labelled with the Tender number & name, and shall be deposited in the Tender Security Box on 3rd Floor Supply Chain Reception at Stima Plaza, Kolobot Road, on or before the opening date."

The Board takes note of the exchange of emails on the 9th June 2022 10:15 between Lynn Sylvia Adhiambo from the Procuring Entity to Marcus Kariuki, of Century Microfinance Bank Ltd (*as it then was and having*

changed its name to Branch Microfinance Bank Limited) which was intended to verify submitted bonds. The email state as follows:

".....

We are in receipt of the attached bonds:

1

2.

***3. BOND NO. CMB/PBG/CBD/2696-22 EXT FOR KSHS.
698,000.00 O.B.O PASONDIA CABLES PRIVATE
LIMITED.***

***4. BOND NO. CMB/PBG/CBD/2695-22 EXT FOR KSHS.
184,000.00 O.B.O PASONDIA CABLES PRIVATE
LIMITED.***

5.

***Kindly as a matter of urgency confirm to us if the bonds
originated from yourselves, should we fail to receive any
response from you within 2 days the bidders will
automatically be disqualified.***

....."

On even date, Marcus Kariuki responded at 10:42 and stated:

"Dear Lynn,

***We confirm the below bonds are authentic and are valid as
per the original bonds***

1.

2.

- 3. BOND NO. CMB/PBG/CBD/2696-22 EXT FOR KSHS.
698,000.00 O.B.O PASONDIA CABLES PRIVATE
LIMITED.**
- 4. BOND NO. CMB/PBG/CBD/2695-22 EXT FOR KSHS.
184,000.00 O.B.O PASONDIA CABLES PRIVATE
LIMITED.**
- 5.”**

The Board further notes from the confidential documents submitted by the Respondents that on 15th August 2022 the evaluation committee reinstated the 1st Applicant's bid to the technical evaluation stage in compliance with the Board's orders. The issue of lack of provision of tender securities for lots 3 to 10 did not arise during the preliminary evaluation of the 1st Applicant's tender and was never a reason advanced for disqualification in the first instance. Hence, the following bidders were responsive at the preliminary evaluation 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
5. M/s Pasondia Cables PVT Limited

From the Tender Document, the Board notes that at the Technical Evaluation stage, bidders would be subjected to a Preliminary Technical

Evaluation criteria as set out in Section III-Part II (Stage I of II) of the Tender Document. Upon being found responsive, bidders would proceed to 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.

Re-evaluation of the responsive bids was done and the above five (5) responsive bidders were then subjected to the financial evaluation stage.

An examination of the financial evaluation criteria set out at Section III Part III Financial Evaluation Criteria Under Clause 33.1 of the ITT sets out the mandatory requirements which the Board notes do not touch on the issue of tender security. The financial evaluation criteria states as follows:

2.2.5.1 This will include the following:

- a. Confirmation of and considering Price Schedule duly completed, correctly computed, and signed (Note: In case of a price discrepancy between those entered in the SRM portal and those on the price schedule uploaded as an attachment, the latter shall prevail)***
- b. Taking into account the cost of any deviation(s) from the tender requirements***
- c. Considering information submitted in the Confidential Business Questionnaire against other information in the bid including: -***
 - i. Declared maximum value of business***

ii. Shareholding and citizenship for preferences where applicable.

It is the Board's considered view that the issue of whether the 1st Applicant's bid for Lots 3 to 10 was responsive could not have been assessed at the financial evaluation stage as the same ought to have been a mandatory requirement under the preliminary evaluation stage. In **Republic v Public Procurement Administrative Review Board & 3 Others Ex Parte Saracen Media Limited [2018] eKLR** the court held that:

"it is a universally accepted principle of Public Procurement that bids which do not meet the minimum requirements as stipulated in a bid document are to be registered as non-responsive and rejected without further consideration."

As clearly stipulated in the tender document, submission of a tender security was a mandatory requirement and alleged failure of the 1st Applicant to submit the same should have led to disqualification of the 1st Applicant's bid for non-compliance with mandatory provisions at the preliminary stage. In this instant, the 1st Applicant was found responsive up to the financial evaluation stage.

The 2nd Applicant being aggrieved by the decision of the Procuring Entity filed Request for Review Application No. 81 of 2022 and submits that the criteria utilized by the Respondents in meting out the tender award is contrary to the tender award criteria at page 32 of the tender document

and by extension the orders of this Board issued on 8th August 2022 in Request for Review Application No. 65 of 2022.

The 2nd Applicant has urged the Board to hold that to the extent that the Respondent awarded more than the maximum two (2) lots required per successful bidder, its evaluation committee offended the mandatory provisions of Section 80 (2) of the Act. The 2nd Applicant further submits that tenderers have a legitimate expectation that the Procuring Entity shall conduct the tender process in accordance with the requirements, procedures, and criteria set out in its own tender document. That the conduct of the Respondent herein in the subject tender offends the provisions of Article 227(1) of the Constitution.

The Board is cognizant of the fact that procurement of public goods and services is provided for under Article 227(1) of the Constitution which states:

(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.

The import of Section 80(2) of the Act as read with Article 227 (1) of the Constitution is that an evaluation committee is enjoined to evaluate tenders in a system that is fair and in accordance with the criteria and the procedure laid down in a tender document. A system that is fair is one that considers equal treatment of all tenders against a criteria of evaluation known by all tenderers.

The Board has perused the Tender Document and notes that the Procuring Entity's evaluation committee was required 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

The Award Criteria as stipulated in ITT 40 at page 32 of the Tender document is as follows:

No.	Award Criteria
1	<i>Award shall be on lot-by-lot basis to the lowest evaluated bidder</i>
2	<i>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 <u>maximum of TWO (2) lots</u></i>
3	<i>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.</i>
4	<i>In case of a tie, the award shall be allocated equally among the bidders.</i>

5	<i>KPLC Shall also take into consideration before award of the following:</i> <i>(i) Bidder Capacity as declared in the Manufacturer's Capacity Declaration Form</i> <i>(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</i>
----------	---

From a reading of the above provisions of the Tender Document, it is evident that the successful bidder(s) would be awarded a maximum of TWO (2) lots.

We note from the evaluation report that 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 7,8, 5, 9, and 10
3. Ms Green Hills Cable Company Limited- Lot 3 and 4
4. Ms Showan Limited –No award
5. Ms Pasondia Cables PVT Limited – Lot 1 and 2

According to the above, it is clear to the Board that the successful bidders were not awarded a maximum of two lots as stipulated in the award criteria.

From the 1st and 2nd Applicant's pleadings, the Board observes that parties have made for the Board's consideration an analysis of the award criteria against what is alleged to have been an uploaded Tender Opening Price Schedule uploaded on the Respondent's Supplier Relationship Management (SRM) Portal which information could be accessed by all tenderers registered with the Respondent and having log in credentials as issued by the Respondent.

However, the Respondents have objected to any evaluation demonstrated by the Applicants citing that the same is illegal and against the spirit of the Act since the 1st Respondent has power emanating from the Act to appoint an evaluation committee to evaluate and compare responsive tenders.

The Board is cognizant of the fact that evaluation of bids is done by an evaluation committee and thus evaluation can only be undertaken after the appointment of the evaluation committee. However, the Board takes note of the different interpretations of the award criteria by the evaluation committee and the Applicants herein.

Section 173 of the Act gives the Review Board wide powers of review and provides that:

Upon completing the Review, the Review Board may do any one of the following:

- a) Annul anything the accounting officer of a procuring entity has done in the procurement of disposal proceedings in their entirety;***

- b) Give directions to the accounting officer of a Procuring Entity with respect to anything to be done or redone in the procurement or disposal proceedings;***
- c) Substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;***
- d) Order the payment of costs as between parties to the review in accordance with the scale as prescribed ; and***
- e) Order termination of the procurement process and commencement of a new procurement process.***

In determination of this issue, the Board has studied the Tender Document and being guided by the Procuring Entity's Tender Opening Price Schedule, outlines below the ranking of the bidders who qualified at the financial evaluation stage on the basis of the lot with the highest bid value to the one with the lowest bid value:

<u>LOT OF THE HIGH</u>	<u>PASONDIA CABLES PRIVATE LIMITED</u>		<u>CABLE CONNECT LIMITED</u>		<u>GREEN HILLS CABLE COMPANY LIMITED</u>		<u>CONDUCTORS AND TRANSFORMERS MANUFACTURING LIMITED</u>		<u>SHOWAN LIMITED</u>	
<u>EST VALU E</u>	<u>RA NK</u>	<u>TOTAL BID PRICE FOR THE LOT</u>	<u>RA NK</u>	<u>TOTAL BID PRICE FOR THE LOT</u>	<u>RA NK</u>	<u>TOTAL BID PRICE FOR THE LOT</u>	<u>RA NK</u>	<u>TOTAL BID PRICE FOR THE LOT</u>	<u>RA NK</u>	<u>TOTAL BID PRICE FOR THE LOT</u>

		<u>(VAT EXCL.)</u>								
6	<u>4</u>	675,600,0 00.00	<u>3</u>	621,000,0 00.00	<u>2</u>	614,250,0 00.00	<u>1</u>	585,000,0 00.00	-	-
7	<u>4</u>	450,400,0 00.00	<u>2</u>	414,000,0 00.00	<u>3</u>	415,000,0 00.00	<u>1</u>	395,000,0 00.00	-	-
8	<u>2</u>	378,020,2 84.55	<u>3</u>	406,087,7 99.50	<u>4</u>	406,460,2 99.50	<u>1</u>	355,886,8 41.00	-	-
3	<u>1</u>	251,511,1 25.87	<u>3</u>	272,204,3 80.00	<u>2</u>	268,565,5 80.00	-	-	<u>4</u>	456,160,6 00.00
4	<u>1</u>	176,413,5 57.12	<u>2</u>	203,456,1 12.00	<u>3</u>	204,681,0 04.00	-	-	-	-
5	<u>1</u>	173,264,0 00.00	<u>2</u>	199,680,0 00.00	<u>3</u>	200,000,0 00.00	-	-	-	-
9	<u>1</u>	124,512,0 97.22	<u>2</u>	140,671,0 32.00	<u>3</u>	148,784,0 22.00	-	-	-	-
1	<u>1</u>	118,881,2 80.00	-	-	-	-	-	-	<u>2</u>	166,720,0 00.00
2	<u>1</u>	25,646,60 0.00	<u>2</u>	29,232,00 0.00	<u>3</u>	29,520,00 0.00	-	-	<u>4</u>	50,800,00 0.00
10	<u>2</u>	13,254,24 9.00	<u>1</u>	12,576,10 0.00	-	-	-	-	-	-

According to the Award Criteria laid out in the Tender Document, the first action to be undertaken is to establish the lowest priced bidder per lot as outlined in Table 1 below:

Table 1:

<u>LOT OF THE HIGHE ST VALUE</u>	<u>PASONDIA CABLES PRIVATE LIMITED</u>	<u>CABLE CONNECT LIMITED</u>	<u>GREEN HILLS CABLE COMPANY LIMITED</u>	<u>CONDUCTORS AND TRANSFORMERS MANUFACTURIN G LIMITED</u>	<u>SHOWAN LIMITED</u>
--	--	--------------------------------------	--	---	---------------------------

	<u>RAN</u> <u>K</u>	<u>TOTAL</u> <u>BID PRICE</u> <u>FOR THE</u> <u>LOT (VAT</u> <u>EXCL.)</u>	<u>RAN</u> <u>K</u>	<u>TOTAL</u> <u>BID</u> <u>PRICE</u> <u>FOR THE</u> <u>LOT (VAT</u> <u>EXCL.)</u>	<u>RAN</u> <u>K</u>	<u>TOT</u> <u>AL</u> <u>BID</u> <u>PRIC</u> <u>E</u> <u>FOR</u> <u>THE</u> <u>LOT</u> <u>(VAT</u> <u>EXCL</u> <u>)</u>	<u>RAN</u> <u>K</u>	<u>TOTAL</u> <u>BID PRICE</u> <u>FOR THE</u> <u>LOT (VAT</u> <u>EXCL.)</u>	<u>RAN</u> <u>K</u>	<u>TOT</u> <u>AL</u> <u>BID</u> <u>PRIC</u> <u>E</u> <u>FOR</u> <u>THE</u> <u>LOT</u> <u>(VAT</u> <u>EXCL</u> <u>)</u>
6							<u>1</u>	585,000,00 0.00		
7							<u>1</u>	395,000,00 0.00		
8							<u>1</u>	355,886,84 1.00		
3	<u>1</u>	251,511,12 5.87								
4	<u>1</u>	176,413,55 7.12								
5	<u>1</u>	173,264,00 0.00								
9	<u>1</u>	124,512,09 7.22								
1	<u>1</u>	118,881,28 0.00								
2	<u>1</u>	25,646,600. 00								
10			<u>1</u>	12,576,100 .00						

From the analysis of the lot ranking and bid prices in Table 1, there are three (3) bidders who are the lowest priced bidders and starting with the highest value downwards. Therefore, they should be allocated the lots of the highest value as outline below:

1. Pasondia Cables Private Limited – LOT 3
2. Conductors And Transformers Manufacturing LIMITED – LOT 6 & 7
3. Cable Connect Limited

The lowest priced bidder in Lot 10 is CABLE CONNECT LIMITED. They should be awarded Lot 10 and another lot in which they are considered the second lowest priced bidder. The lowest priced bidder in Lot 3 is PASONDIA CABLES PRIVATE LIMITED. They should be awarded Lot 3 and another lot in which they are considered the second lowest priced bidder and one with highest value.

For the subsequent allocations, the CONDUCTORS AND TRANSFORMERS MANUFACTURING LIMITED will not be considered for award as it has already been allocated the maximum number of lots with the highest value. In addition, LOTS 3, 6, 7 & 10 have been allocated to Higher value and lowest priced bidder hence cannot be allocated to any other bidder.

The next action to be undertaken is to allocate the subsequent lots (LOTS 1, 2, 4, 5, 8 & 9) based on the highest value per lot and lowest bid price per lot and until all the lots are allocated as outlined in Table 2 below:

Table 2:

<u>LOT OF THE HIGHEST</u>	<u>PASONDIA CABLES PRIVATE LIMITED</u>	<u>CABLE CONNECT LIMITED</u>	<u>GREEN HILLS CABLE COMPANY LIMITED</u>	<u>SHOWAN LIMITED</u>
----------------------------------	---	-------------------------------------	---	------------------------------

<u>I</u> <u>VALUE</u>	<u>RAN</u> <u>K</u>	<u>TOTAL BID</u> <u>PRICE FOR</u> <u>THE LOT</u> <u>(VAT EXCL.)</u>						
8	<u>2</u>	378,020,284. 55	<u>3</u>	406,087,799. 50	<u>4</u>	406,460,299. 50	-	-
4			<u>2</u>	203,456,112. 00	<u>3</u>	204,681,004. 00		
5			<u>2</u>	199,680,000. 00	<u>3</u>	200,000,000. 00	-	-
9			<u>2</u>	140,671,032. 00	<u>3</u>	148,784,022. 00	-	-
1			-	-	-	-	<u>2</u>	166,720,000. 00
2			<u>2</u>	29,232,000.0 0	<u>3</u>	29,520,000.0 0	<u>4</u>	50,800,000.0 0

From the analysis of the lot ranking and bid prices in Table 2, the remaining 4 bidders should be allocated lots of the highest value in which they are considered to be the lowest priced bidder as outlined below:

1. PASONDIA CABLES PRIVATE LIMITED- Lot 8
2. CABLE CONNECT LIMITED – LOT 10 & 4
3. GREEN HILLS CABLE COMPANY LIMITED – LOT 5 & 9
4. SHOWAN LIMITED – LOT 1 & 2

From the foregoing, the successful bidders should be allocated lots as outlined below:

S/No.	<u>NAME OF BIDDER</u>	<u>LOTS ALLOCATED</u>
1	PASONDIA CABLES PRIVATE LIMITED	Lots 3 and 8
2	CONDUCTORS AND TRANSFORMERS MANUFACTURING LIMITED	Lots 6 and 7
3	CABLE CONNECT LIMITED	Lots 10 and 4
4	GREEN HILLS CABLE COMPANY LIMITED	Lots 5 and 9
5	SHOWAN LIMITED	Lots 1 and 2

Issue 2: What orders should the Board grant in the circumstances.

The Board finds that the Procuring Entity must evaluate tenders using the procedures and in accordance with the evaluation criteria set out in the Tender Document as read with Section 80(2) of the Act and the principles provided in Article 227 (1) of the Constitution.

By reinstating the 1st Applicant's bid at the technical evaluation stage, the Board finds that the Procuring entity complied with its directions as ordered in Application No. 65 of 2022. That notwithstanding, the Board finds that the Procuring Entity failed adhere to the award criteria at page 32 of the Tender Document and as ordered.

Consequently, the Board has laid out the award criteria to be used in awarding the lots in the subject tender to the successful bidders herein. In the case *Kenya Pipeline Company Limited v Hyosung Ebara*

Company Limited and Others Nairobi CA Civil Appeal No. 145 of 2011 (Unreported), the Court of Appeal stated that

"The Review Board is a specialized statutory tribunal established to deal with all complaints of breach of duty by the procuring entity. "S. 98 of the Act confers wide powers on the Review Board. It is clear from the nature of powers given to the Review Board including annulling, anything done by the procurement entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal... It follows that its decision in matters within its jurisdiction should not be lightly interfered with."

This Board is also cognizant of the role played by an Evaluation Committee after evaluation of bids at the Financial Evaluation stage. If an Evaluation Committee finds responsive tenders qualified for award of a tender, then they ought to recommend award of a tender to those responsive tenders in accordance with the award criteria provided in the Tender Document. Rightly so, section 85 of the Act provides that:

"Subject to prescribed thresholds all tenders shall be evaluated by the evaluation committee of the procuring entity for the purpose of making recommendations to the accounting officer through the head of procurement to inform the decision of the award of contract to the successful tenderers"

In the present case, the Evaluation Committee while exercising its role in section 85 of the Act cited hereinbefore failed to take in to account the award criteria provided in the Tender Document. That award criteria capped the number of lots to be awarded to a successful bidder as 2 Lots. It is our considered view that the award criteria took into account the guiding principle of equity and fairness provided in Article 227 of the Constitution as follows:

"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."

It is only just for the Procuring Entity to stick to the procedures for evaluation and by extension, the award criteria provided in the Tender Document and communicated to bidders. These bidders relied on the award criteria provided and had an expectation that it would be applied during evaluation and award of tenders. Section 173 (b) of the Act gives this Board the power to ***"give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings."*** Since we have established the Evaluation Committee failed to apply the award criteria in accordance with the provisions of the Tender Document, we find it just to order the Accounting Officer to direct the Evaluation Committee to recommend award of the subject tender in the respective lots in accordance with the award criteria in the Tender Document, taking into consideration our findings in this Review. For clarity, the Evaluation Committee shall not re-

evaluate the bids but shall be guided by the requirement of ranking of tenders so as to arrive at the evaluated price and determine the lowest evaluated tender prices in accordance with the award criteria of the subject tender that entitles a bidder to a maximum of 2 lots. On the question of ranking of tenders, Regulation 77 (3) of the Public Procurement and Asset Disposal Regulations, 2020 (Regulations 2020) provides as follows:

"Tenders shall be ranked according to their evaluated price and the successful tender shall be in accordance with the provisions of Section 86 of the Act"

The Evaluation Committee's re-consideration of the Award Criteria as stipulated in ITT Clause 40 at page 32 of the Tender Document, section 85 and 86 of the Act, Article 227 (1) of the Constitution read together with Regulation 77 (3) of Regulations 2020, will guide the Committee in recommendation of award in the subject tender, taking into consideration, the Board's findings and analysis herein.

The upshot of the Board's findings herein is that the consolidated Request for Review succeeds only in respect to the following specific orders:

FINAL ORDERS

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

- 1. 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 19th August 2022, addressed to the four successful bidders, be and are hereby nullified and set aside.**
- 2. 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 19th August 2022, addressed to the 1st and 2nd Applicants and to all other bidders, be and are hereby nullified and set aside.**
- 3. The recommendation of award of the subject tender by the Evaluation Committee as contained in the Evaluation Report dated 17th August, 2022 be and is hereby expunged from the Evaluation Report.**

For the avoidance of doubt the Evaluation Committee's findings on evaluation and comparison of tenders in all the stages of evaluation in the subject tender remain valid.

- 4. The Accounting Officer of the Procuring Entity is hereby ordered to direct the Evaluation Committee to recommend award of the subject tender in accordance with the Award Criteria stipulated in ITT Clause 40 at page 32 of the Tender Document read together with section 85 and 86 (1) (a) of the Act, taking into consideration, the Board's findings in this Review.**

For the avoidance of doubt, the Accounting Officer shall not direct the Evaluation Committee to conduct a re-evaluation of bids in the subject tender.

5. Further to Order No. 4 above, the Accounting Officer of the Procuring Entity is hereby ordered to proceed with the subject procurement process to its logical conclusion including the making of an award in the respective lots of the subject tender and to issue new notification letters to all bidders who participated in the subject tender in accordance with section 87 of the Act, within seven (7) days from the date of this decision.
6. Each party shall bear its own costs in the Request for Review.

Dated at Nairobi, this 21st day of September 2022



.....
CHAIRPERSON
PPARB



.....
SECRETARY
PPARB

