

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 93 OF 2022 OF 26TH OCTOBER 2022

BETWEEN

BURHANI ENGINEERS LIMITED APPLICANT

AND

THE ACCOUNTING OFFICER,

KENYA AIRPORTS AUTHORITY 1ST RESPONDENT

THE PROCURING ENTITY,

KENYA AIRPORTS AUTHORITY2ND RESPONDENT

CONTRALINKS SOLUTIONS AND SERVICES

LIMITED..... INTERESTED PARTY

Review against the decision of the Accounting Officer of the Kenya Airports Authority (KAA) in relation to Tender No. KAA/OT/EIA/0019/2022-2023 for Supply and Replacement of Airfield Ground Lighting (AGL) Cables and Accessories at Eldoret International Airport.

BOARD MEMBERS PRESENT

- | | |
|----------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Ms. Njeri Onyango | - Member |

3. Dr. Paul Jilani

- Member

IN ATTENDANCE

Ms. Sarah Ayoo

-Holding brief for Board Secretary

BACKGROUND OF THE DECISION

The Tendering Process

Kenya Airports Authority, the Procuring Entity and the 2nd Respondent herein, invited eligible tenderers to submit sealed tenders in response to Tender No. KAA/OT/EIA/0019/2022-2023 for Supply and Replacement of Airfield Ground Lighting (AGL) Cables and Accessories at Eldoret International Airport (hereinafter referred to as the 'subject tender') using an open national method of tendering and by way of an advertisement on 9th August 2022 on MyGov Newspaper Supplement and posted on the 2nd Respondent's website (www.kaa.go.ke). The subject tender's submission deadline was initially set for 31st August 2022 at 11.00 a.m online making the same an e-procurement. A Pre-bid meeting/ site visit was held on 24th August 2022 at 10.00 a.m. at Eldoret International Airport- Eldoret.

Addenda

The 2nd Respondent issued three (3) addenda namely (a) Addendum No. 1 dated 29th August 2022 which, *inter alia*, clarified at Clause No. 6 that NCA

4 Registration Certification or above for Civil works and valid practicing license is a mandatory requirement and must be met while extending the subject tender's submission deadline to 14th September 2022 (hereinafter referred to as "Addendum No. 1"); (b) Addendum No. 2 dated 7th September 2022 while making further clarifications retained the tender's submission deadline of 14th September 2022 (hereinafter referred to as "Addendum No. 2") and; Addendum No. 3 dated 9th September 2022 while making further clarifications retained the tender's submission deadline of 14th September 2022 (hereinafter referred to as "Addendum No. 3").

Submission of Tender and Tender Opening

According to the Minutes for the Opening of Tender held on 14th September 2022 (hereinafter referred to as "Tender Opening Minutes"), the 2nd Respondent's Tender Opening Committee opened the subject tender virtually through Zoom platform and in the presence of tenderers' representatives who joined the tender opening session through a link that had earlier on been provided to tenderers who had submitted their tenders online and who wished to participate in the subject tender's opening.

A total of six (6) tenderers submitted their tenders in response to the subject tender within the tender submission deadline of 14th September 2022. The said six (6) tenderers were recorded in the 2nd Respondent's Tender/Quotation Register for the subject tender dated 14th September 2022 as follows:

Tenderer No.	Tenderer	Quote (Ksh)
1.	Integrated Supplies & Consultancy Limited	135,976,969.22
2.	Africa Engineering Supplies Limited	150,511,536.76
3.	Trojan Trading Co. Limited	147,043,688.00
4.	Magnate Ventures Limited	89,730,357.62
5.	Contralinks Solutions and Services Limited	64,983,524
6.	Burhani Engineers Limited	60,867,379.14

Evaluation of Tenders

A Tender Evaluation Committee (hereinafter referred to as the 'Evaluation Committee') appointed by the 1st Respondent undertook the evaluation of the six (6) tenders in the following three stages and as captured in an Evaluation Report signed by the Evaluation Committee members on 6th October 2022 (hereinafter referred to as the 'Evaluation Report'):

- i. Preliminary Evaluation;
- ii. Technical Evaluation; and
- iii. Financial Evaluation.

Preliminary Evaluation

At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out as Stage 1: Preliminary Evaluation/ Mandatory of Section III – Evaluation and Qualification Criteria at page 25 to 26 of the blank tender document issued to prospective tenderers by the 2nd Respondent (hereinafter referred to as “the Tender Document”). Tenders were required to satisfy all the 17 mandatory requirements at this stage to qualify to proceed for evaluation at the Technical Evaluation stage. A failure to satisfy any one of the 17 mandatory requirements would lead to automatic disqualification from further evaluation.

At the end of evaluation at this stage, four (4) tenders were found to be non-responsive which included the Applicant’s tender, while two (2) tenders were found responsive which included the Interested Party’s tender. Only the responsive tenders proceeded for evaluation at the Technical Evaluation stage.

Technical Evaluation

At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out as Stage 2: Technical Evaluation of Section III – Evaluation and Qualification Criteria at page 26 to 27 of the Tender Document. Tenders were required to satisfy all the 5 technical evaluation requirements at this stage to qualify to proceed for evaluation at the Financial Evaluation stage. At the end of evaluation at this stage, all one tender was found non-responsive while the tender submitted by the

interested party was found responsive and proceeded for evaluation at the Financial Evaluation stage.

Financial Evaluation

At this stage of evaluation, the Evaluation Committee was required to apply the criteria outlined as Stage 3: Financial Evaluation of Section III – Evaluation and Qualification Criteria at page 28 to 31 of the Tender Document.

The Engineer’s Estimate for the project was Kenya Shillings One Hundred and Fifty-Two Million Only (KES 152,000,000) only. The Interested Party’s tender was the only responsive tender at this stage of evaluation and quoted as follows:

Bidder No.	Bidder’s Name	Amount
5	Contralinks Solution and Services Ltd	64,983,524.81 (KES) 720,993.64 (USD)

Evaluation Committee’s Recommendation

The Evaluation Committee recommended the Interested Party to be awarded the subject tender at their quoted price as follows:

Imported Items: (USD 720,993.64) United States Dollars Seven Hundred and Twenty Thousand, Nine Hundred and Ninety-Three and Sixty-Four cents only.

Labour & Local Material: (KES 64,983,524.81) Kenya Shillings Sixty-Four Million, Nine Hundred and Eighty-Three Thousand, Five Hundred and Twenty-Four and Eighty-One cents only.

Professional Opinion

In a Professional Opinion dated 12th October 2022 (hereinafter referred to as the "Professional Opinion"), the Acting General Manager (Procurement & Logistics), Ms. Linda Okidi, reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender.

Thereafter, Mr. Alex Gitari, the 1st Respondent herein, approved the Professional Opinion on 13th October 2022.

Notification to Tenderers

Tenderers were notified of the outcome of evaluation of the subject tender vide letters of Notification of Intention to Award the subject tender dated 12th October 2022.

REQUEST FOR REVIEW

On 26th October 2022, M/s Buhrani Engineering Ltd, the Applicant, filed a Request for Review dated 25th October 2022 together with a Statement in Support of the Request for Review sworn by Zoher Hussein Pirbhai, on 25th October 2022 through the firm of D Chepkemoi & Associates Advocates seeking the following orders, verbatim:

- 1. That the Board order that the tender be re-evaluated to determine the right lowest evaluated bidder.***

- 2. That the Board order that the procuring entity substitute the decision of the procuring entity and award the Applicant herein with the tender the subject of this review.***

- 3. That the Board Orders Public Procurement Regulatory Authority to initiate investigations on the conduct of the staff of the procuring entity who were engaged in this procurement for possible misconduct and commence debarment processes against the awarded bidder if found to have engaged in collusion.***

4. The Applicant be awarded the costs of this Request for Review.

In a Notification of Appeal and a letter dated 26th October 2022, the Acting Board Secretary of the Public Procurement Administrative Review Board (hereinafter referred to as the "Board"), Mr. James Kilaka, notified the Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the Respondents a copy of the Request for Review together with the Board's Circular No. 02/20 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five days from 26th October 2022.

In opposition to the Request for Review, Ms. Lilian Okidi, Acting General Manager (Procurement and Logistics) of the 2nd Respondent and on behalf of the 1st and 2nd Respondent, on 31st October 2022, filed a Reply by the Procuring Entity dated 31st October 2022.

Vide letters dated 1st November 2022, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the subject

Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments about the subject tender within 3 days from 1st November 2022.

On 24th March 2020, the Board issued Circular No. 2/2020 detailing the Board's administrative and contingency management plan to mitigate COVID-19 pandemic. Through this circular, the Board dispensed with physical hearings and directed that all requests for review applications 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 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 Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as 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.

On 2nd November 2022, the Interested Party filed a Memorandum of Response dated 1st November 2022 together with its written submissions date 1st November 2022 through the firm of Kimani & Muchiri Advocates LLP.

On 4th November 2022, M/s Integrated Supplies & Consultancy Limited, a tenderer in the subject tender, in response to the Request for Review sent a letter addressed to the Chairperson of the Board signed by its Managing Director, Moses Mbogoh, seeking the review of whole/part of the conduct, processing and decision of the subject tender.

On 4th November 2022, the Applicant filed its written submissions dated 4th November 2022. The 1st and 2nd Respondents did not file any written submissions.

APPLICANT'S CASE

The Applicant avers that the Procuring Entity breached the provisions of Article 227 (1) of the Constitution of Kenya 2010 on procurement of public goods and services which requires that a procuring entity must be fair, equitable, transparent and competitive when contracting for goods and services.

To support this assertion, the Applicant avers that the 2nd Respondent did not act in a fair manner contrary to the requirements of Article 227 by disqualifying them at the Preliminary Evaluation stage for the reason that they had failed to provide an NCA Certificate and Practicing License for Civil

Works and yet the same had been duly provided at pages 58 and 59 of its tender.

The Applicant further avers that the 2nd Respondent breached the provisions of the Constitution in disqualifying it at the Preliminary Evaluation stage on the ground that it failed to provide the Manufacture Authorization Letter for Transformer Housing yet the Applicant had duly submitted the Manufacturer Authorization letter from ADB Safegate which was duly executed by Christiaan Pelser, its Authorized representative. The Applicant avers that the said letter was duly attached to its tender at pages 53 to 54.

The Applicant avers that the Evaluation Committee breached the requirements of Section 46(4)(e) of the Public Procurement and Asset Disposal Act (hereinafter referred to as "the Act") which requires the Evaluation Committee to adopt a process that ensures the evaluation process adheres to Articles 201(d) and 227(1) of the Constitution. The Applicant claims that its tender of Kshs. 60,867,379.14 was the lowest compared to that of the Interested Party herein quoted at Kshs. 64,983,524.81.

It is the Applicant's case that the 2nd Respondent breached the requirements of Regulation 30(b) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "Regulations 2020") which

requires due diligence in the evaluation of bids. The Applicant avers that had the Evaluation Committee carried out the evaluation with due diligence then the mistakes elaborated hereinabove would not have arisen.

The Applicants avers that the Evaluation Committee breached the requirements of Section 79(1) of the Act by disqualifying its tender yet it had conformed with all the eligibility and mandatory requirements of the Tender Document. In conclusion, the Applicant avers that the award of the subject tender did not satisfy the requirements of Section 86(1) of the Act.

RESPONDENTS' CASE

In response, the Respondents contend that they acted in a fair manner by complying with the provisions of the Tender Document under the Preliminary Evaluation stage. The Respondents aver that mandatory requirement no. 6 of Stage 1 – Preliminary Evaluation/ Mandatory of Section III- Evaluation and Qualification Criteria at page 25 of the Tender Document required a tenderer to submit a Current NCA 4 Registration Certification or above for Civil Works and valid practicing license. Having attached an extract of the NCA Act as revised in 2020 on the classification of Contract Works, the Respondents contend that from the said classification, Building Works and Civil Engineering are distinct classes. The Respondents contend that the Applicant submitted an NCA 1 Certificate for Building Works Contractor and

therefore failed to meet mandatory requirement no. 6 as stipulated at page 25 of the Tender Document.

Additionally, the Respondents contends that mandatory requirement no. 5 of Stage 1 – Preliminary Evaluation/ Mandatory of Section III- Evaluation and Qualification Criteria at page 25 of the Tender Document required tenderers to submit a Manufacturer's Authorization letter for specific items of the tender being AGL cables, Series Transformers, and Transformer Housing (Deep cans). It is the Respondents' case that the letter submitted by the Applicant was general and not specific to those items specified and therefore did not meet mandatory requirement no. 5 as stipulated at page 25 of the Tender Document.

The Respondents contends that the Applicant having failed the two criteria highlighted above could not be evaluated further and therefore the claim that it was the least evaluated bidder pursuant to Section 79(1) of the Act cannot stand and the same fate applied to the alleged breach of Articles 201(d) and 227(1) of the Constitution.

The Respondents contend that the allegation on breach of Section 83(1) of the Act cannot stand since due diligence was required to be done on an evaluated tenderer with the lowest tender prior to awarding the subject tender which was not the case with the Applicant who was declared non-responsive at the Preliminary Evaluation stage.

The Respondents admit to the jurisdiction of the Board and prays that the Applicant's Request for Review be dismissed with costs.

INTERESTED PARTY'S CASE

The Interested Party contends that it acted within the strict confines of the law in the course of the tendering process and was identified as the successful tenderer on merit and any allegations of wrongdoing on its part are unfounded.

The Interested party contends that contrary to the averments made by the Applicant, the 2nd Respondent properly evaluated the submitted tenders in the subject tender with the requisite due diligence.

The Interested Party contends that the Applicant's Request for Review is devoid of merit lacking in substance and being riddled with falsehoods and subjective theories without any backing of an iota of evidence. The Interested Party avers that it demonstrated with sufficiency of facts and law that it was awarded the subject tender on merit, the process thereof being transparent and in conformity with the relevant law and prays that the Board dismiss the Request for Review with costs.

BOARD'S DECISION

The Board has considered each of the parties' cases, documents, pleadings, written submissions, authorities together with confidential documents submitted to the Board by the Respondents pursuant to Section 67(3)(e) of the Act and finds the issues that arise for determination are:

- 1. Whether the Applicant's tender complied with the mandatory requirements of criteria No. 5 and 6 of Stage 1- Preliminary Evaluation/Mandatory of Section III- Evaluation and Qualification Criteria at page 25 of the Tender Document to proceed for evaluation at the Technical Evaluation stage.**
- 2. What orders should the Board grant in the circumstances?**

Whether the Applicant's tender complied with the mandatory requirements of criteria No. 5 and 6 of Stage 1- Preliminary Evaluation/Mandatory of Section III- Evaluation and Qualification Criteria at page 25 of the Tender Document to proceed for evaluation at the Technical Evaluation stage.

The Applicant challenges the decision of the 1st and 2nd Respondents to disqualify its tender at the Preliminary Evaluation stage for having failed to provide a Manufacturer's Authorization letter for the following items of the

subject tender being AGL Cables, Series Transformers and Transformer Housing (Deep Cans) as required under mandatory requirement no. 5 of Stage 1- Preliminary Evaluation/Mandatory of Section III- Evaluation and Qualification Criteria at page 25 of the Tender Document and a current NCA 4 Registration Certificate or above for Civil works and valid practicing license as required under mandatory requirement no. 6 of Stage 1- Preliminary Evaluation/Mandatory of Section III- Evaluation and Qualification Criteria at page 25 of the Tender Document.

The Applicant alleges that the 2nd Respondent breached the provisions of Articles 227(1) and 201 (d) of the Constitution, Sections 46(4)(e), 79(1), and 86(1) of the Act and Regulation 30(b) of Regulations 2020 in evaluation of the subject tender.

The Respondents on the other hand contend that they adhered to the provisions of the Constitution, the Act and the Tender Document in evaluating the Applicants Tender.

We note that the Respondents vide a letter dated 12th October 2022 notified the Applicant of the outcome of evaluation of the subject tender as follows:

"
.....

The Evaluation process for the subject tender has been finalized and we regret to inform you that your bid was unsuccessful.

It was noted that:

- You did not provide NCA Certificate and Practising License for Civil Works.***
- You did not provide Manufacturer Authorisation letter for transformer housing.***

The bidder who was determined to be the lowest evaluated and therefore the successful tenderer is M/S Contralinks Solutions and Services Limited at their bid price of USD 720,993.64 for Imported items and Kshs. 64,983,524.81 for labour & local materials inclusive of all applicable taxes.

....."

The Board is cognizant of Article 227 of the Constitution which requires procurement of goods and services to be undertaken in a system that is fair, equitable, transparent, competitive and cost-effective and provides for a legislation that governs public procurement and asset disposal framework as follows:

"227. Procurement of public goods and services

- (1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.**
- (2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following –**
- a)**
 - b)**
 - c) and**
 - d)"**

The Board observes that the legislation contemplated in Article 227(2) of the Constitution is the Act. Section 80 (1) and (2) of the Act is instructive on how evaluation and comparison of tenders should be conducted by a procuring entity as follows:

"80. Evaluation of tender

- (1) The evaluation committee appointed by the accounting officer pursuant to Section 46 of the Act, shall evaluate and compare the responsive tenders other than tenders rejected under Section 82(3).**

(2) 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."

Section 80(2) of the Act as indicated above requires the Evaluation Committee to evaluate and compare tenders in a system that is fair using the procedures and criteria set out in the 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 since such criteria is well laid out for in a tender document issued to tenderers by a procuring entity.

Further, Section 46(4)(e) of the Act provides that:

"(4) ...an evaluation committee established under subsection (1), shall—

(a).....

(b).....

(c).....

(d).....

(e) adopt a process that shall ensure the evaluation process utilized adheres to Articles 201 (d) and 227(1) of the Constitution."

Additionally, Article 201 (d) of the Constitution states that:

"...public money shall be used in a prudent and responsible way..."

The Board having carefully studied the Tender Document of the subject tender notes that the criteria for evaluation of the subject tender was set out in Section III- Evaluation and Qualification Criteria at page 24 to 34 of the Tender Document. Mandatory Requirements No. 5 and 6 of Stage 1- Preliminary Evaluation/Mandatory of Section III- Evaluation and Qualification Criteria at page 25 of the Tender Document provides as follows:

" SECTION III- EVALAUTION AND QUALIFICATION CRITERIA

- 1.***
- 1.1***
- 1.2***

1.3

2. *Preliminary Examination for Determination of Responsiveness*

2.1 *The Procuring Entity will start by examining all tenders to ensure they meet in all respects the eligibility criteria (including requirements in the qualification forms, tenderer's eligibility- confidential business questionnaire) and other requirements in the ITT, and that the tender is complete in all aspects in meeting the requirements of "part 2- Procuring Entity's Requirements", including checking for tenders with unacceptable errors, abnormally low tenders, and abnormally high tenders. The Standard Tender Evaluation Report for Goods and Works provides clear guidelines on how to deal with review of these requirements. Tenders that do not pass the Preliminary Examination will not be considered further.*

Stage 1- Preliminary Evaluation/ Mandatory

Based on the information contained in the Instructions to Tenderers and the appendix thereof, the following will be the evaluation criteria for determination of responsive tenderer leading to award of the contract.

1. Preliminary Evaluation

No.	Requirement	
1.	.....	.....
2.	.....	.....
3.	.....	.....
4.	.....	.....
5.	Manufacturers Authorization letter for the following items of tender- AGL Cables, Series Transformers and Transformer Housing (Deep Cans). (for each of the items)	Must Meet
6.	Current NCA 4 Registration Certification or above for Civil works and valid practicing license.	Must Meet
7.	.....	.....

The Board has studied the Evaluation Report and observes that upon evaluation, the Applicant's tender was determined as non-responsive at the Preliminary Evaluation stage having failed to comply with mandatory requirements no. 5 and mandatory requirement no. 6 of Stage 1- Preliminary

Evaluation/Mandatory of Section III- Evaluation and Qualification Criteria at page 25 of the Tender Document.

We have studied the Applicant's tender submitted online in response to the subject tender and note that at pages 58, 59 and 60 of the Applicant's tender are attached the following certificates in response to mandatory requirement no. 6 of Stage 1- Preliminary Evaluation/Mandatory of Section III- Evaluation and Qualification Criteria at page 25 of the Tender Document:

- a. BUILDING WORKS Contractor NCA1 and Practicing License***
- b. ELECTRICAL ENGINEERING SERVICE Contractor NCA1 and Practicing License."***

The Board notes that the Third Schedule of the National Construction Authority Act, CAP 449A provides for classification of contractors as follows:

A- Building Works

- a. General Building Contractor;***
- b. Carpentry/Joinery;***
- c. Painting;***
- d. Masonry;***
- e. Reinforced masonry works;***
- f. Specialized building works.***

B- Civil Engineering

- a. Roadworks;***
- b. Structural Works;***
- c. Boreholes;***
- d. Site Investigation Works;***
- e. Sewers.***

C- Electrical Engineering Services

- a.***
- b.***
- c.***

D- Mechanical Engineering Services

- a.***
- b.***
- c.***

The Board observes that the Respondents contend that the certificates produced by the Applicant in its tender belong to the Building Works classification and yet mandatory requirement no. 6 required certification under the Civil Engineering classification. The Board notes that the wording used under mandatory requirement no. 6 is, "...civil works" and not "...civil engineering" which is the terminology used in the classification within the NCA Act. Indeed, the Applicant has sought to pursue its case arguing that there was ambiguity in the wording of the Tender Document.

The Board notes the 2nd Respondent issued Addendum No.1, Addendum No. 2 and Addendum No. 3 in respect to the subject tender in line with provisions of Clause 9 of the Tender Document which provides that:

"...a tenderer requiring any clarification of the Tender Document shall contact the Procuring Entity in writing at the Procuring Entity's address specified in the TDS or raise its enquiries during the pre-Tender meeting and the pre-arranged pretender visit of the site of the works if provided for in accordance with ITT8.4..."

The Board further notes that the three addenda were clarifications of various issues raised by tenderers. However, there was no clarification sought either by the Applicant or any of the tenderers in the subject tender on what entails 'NCA4 or above Certificate of Registration in Civil Works'. Nevertheless, had the Applicant herein been the successful tenderer we doubt if it would have raised the issue of ambiguity in the Tender Document as regards this issue. That said, this Board has before in **Application No. 81 of 2016 Brooms Limited v Kenya Ports Authority** held as follows:

"... the Board notes that the tender did not specify what exactly that Schedule of Work would entail in a tender for portable toilets. Different bidders gave different things.... However, the Procuring Entity admitted at the hearing that it did not know which Government Agency or Authority had the

mandate of inspecting portable toilets...it was up to the Procuring Entity to give clear requirements in its tender document..."

It is our considered view that the 2nd Respondent ought to have in no uncertain terms and no ambiguity used terminologies that exist within the classification in the NCA Act. That said we shall not allow an indolent party to benefit in an after the event adventure as the Applicant seeks to. The Tender Document provided the Applicant an opportunity to seek clarifications. The Applicant never sought that specific clarification at least as per the records in the form of addenda that the Board is in possession of. The Act too provides the Applicant an avenue to challenge a tender document within fourteen days from the date of an occurrence of a breach at any stage of procurement process. The Applicant did not pursue any of the avenues.

The Board has previously held that procurement is a time bound process and any party that seeks to benefit from the processes of this Board must do so when an opportunity first avails itself. We note that the Applicant is now engaged in an afterthought adventure perhaps aggrieved by its non-responsiveness. We find that the Applicant's tender did not comply with the mandatory requirement no. 6 of Stage 1- Preliminary Evaluation/ Mandatory of Section III- Evaluation and Qualification Criteria.

Turning to the second ground on which the Applicant's tender was declared non-responsiveness we have studied the Applicant's tender submitted online in response to the subject tender and note that the Applicant provided a Manufacturers' Authorization Letter from ADB Safegate at page 53 of its tender that read as follows:

"...We ADB Safegate bv who are official manufacturers of Airfield Ground Lighting products, having factories at Leuvensesteenweg 585, B-1930 Zaventem, Belgium, do hereby authorize Burhani Engineers Ltd of Nairobi, Kenya to submit a Tender the purpose of which is to provide the following goods, manufactured by us SUPPLY AND REPLACEMENT OF AIRFIELD GROUND LIGHTING (AGL) CABLES AND ACCESSORIES, and to subsequently negotiate and sign the Contract."

The Board notes that the said Manufacturers Authorization Letter despite indicating "*the following goods*" failed to categorically specify the goods required under mandatory requirement no. 6 being AGL Cables, Series Transformers and Transformer Housing (Deep Cans). We further note that the Manufacturers Authorization letter was to be provided for each of the listed items.

It is clear that the Applicant's tender did not comply with mandatory requirements nos. 5 and 6 of of Stage 1- Preliminary Evaluation/ Mandatory

of Section III- Evaluation and Qualification Criteria. Failure to comply would render a tender non-responsive and such tender would not proceed for further evaluation at Stage 2: Technical Evaluation of Section III- Evaluation and Qualification Criteria.

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 tender only qualifies as a responsive tender if it meets all requirements set out in the tender 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." [Emphasis ours].

Further, in **Republic v Public Procurement Administrative Review Board ex parte Guardforce Group Limited; Pwani University & 2 Others (Interested Parties) [2021]** eKLR Justice E.K. Ogola, held that;

"...it becomes apparent to this court that the aspect of compliance with the mandatory requirement of the tender document aims to promote fairness, equal treatment, good governance, transparency, accountability and to do away with unfairness. Failure to conform to this mandatory requirement, and/or exempt or give an opportunity to those who had not earlier on conformed to this mandatory requirement translates to unequal and unfair treatment of other tenderers and, if allowed, may encourage abuse of power and disregard of the law by not only bidders, but also procuring entities."

[Emphasis ours]

The import of the aforementioned cases is that mandatory requirements cannot be waived. In this instance therefore, the Evaluation Committee had no option but to find the Applicant's tender non-responsive at the Preliminary Evaluation stage, having failed to meet mandatory requirements No. 5 and 6 of Stage 1- Preliminary Evaluation/Mandatory of Section III – Evaluation and Qualification Criteria at page 25 of the Tender Document.

In the circumstances, we find that the Applicant's tender did not comply with mandatory requirements no. 5 and 6 of Stage 1- Preliminary Evaluation/ Mandatory of Section III- Evaluation and Qualification Criteria at page 25 of the Tender Document to proceed for evaluation at the Technical Evaluation stage.

What orders should the Board grant in the circumstances?

We have found that the Applicant's tender **did not comply with the mandatory requirements No. 5 and 6 of Stage 1- Preliminary Evaluation/Mandatory of Section III – Evaluation and Qualification Criteria at page 25 of the Tender Document to proceed for evaluation at the Technical Evaluation stage. It therefore follows that the 2nd Respondent's Evaluation Committee was right in finding the Applicant's tender non-responsive for failure to comply with mandatory requirements of the Tender Document. Consequently, it is only just and fair that we dismiss, which we hereby do, the instant Request for Review for lacking in merit.**

FINAL ORDERS

In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, 2015, the Board makes the following

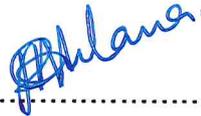
orders in the Request for Review filed on 26th October 2022 and dated 25th October 2022:

- 1. The Request for Review filed on 26th October 2022 by the Applicant with respect to Tender No. KAA/OT/EIA/0019/2022-2023 for Supply and Replacement of Airfield Ground Lighting (AGL) Cables and Accessories at Eldoret International Airport be and is hereby dismissed.**
- 2. Each party shall bear its own costs in the Request for Review.**

Dated at NAIROBI, this 15th day of NOVEMBER, 2022



.....
CHAIRPERSON
PPARB



.....
SECRETARY
PPARB

