

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 16/2023 OF 27<sup>TH</sup> MARCH 2023**

**BETWEEN**

**ARM ENGINEERING COMPANY LIMITED ..... APPLICANT**

**AND**

**THE ACCOUNTING OFFICER,**

**KENYA ELECTRICITY GENERATING COMPANY**

**PLC ..... 1<sup>ST</sup> RESPONDENT**

**KENYA ELECTRICITY GENERATING COMPANY**

**PLC ..... 2<sup>ND</sup> RESPONDENT**

**THAMES ELECTRICALS LIMITED ..... INTERESTED PARTY**

Review against the decision of the Accounting Officer, Kenya Electricity Generating Company PLC in relation to Tender No. KGN-HYD-048-2022 for Design, Manufacture, Factory Testing, Supply, Delivery, Installation, Testing and Commissioning of a Single-Core 1000Mm<sup>2</sup> Copper XLPE 15 KV Power Cable for Kiambere Unit I Generator.

**BOARD MEMBERS PRESENT**

1. Njeri Onyango (Mrs.) FCIArb - Panel Chairperson

2. Eng. Mbiu Kimani, OGW - Member
3. Mr. Jackson Awele - Member

### **IN ATTENDANCE**

Ms. Sarah Ayoo - Secretariat

### **PRESENT BY INVITATION**

#### **APPLICANT**

#### **ARM ENGINEERING COMPANY LIMITED**

Mr. Joseph Atwoli - Advocate for the Applicant

#### **RESPONDENTS**

#### **THE ACCOUNTING OFFICER, KENYA ELECTRICITY GENERATING COMPANY PLC & KENYA ELECTRICITY GENERATING COMPANY PLC**

1. Dr. Muthomi Thiankolu - Advocate, Muthomi & Karanja Advocates
2. Mr. Dennis Njoroge - Advocate, Muthomi & Karanja Advocates
3. Mr. Ibrahim Kitoo - Chief Legal Officer of the 2<sup>nd</sup> Respondent

#### **INTERESTED PARTY**

#### **THAMES ELECTRICALS LIMITED**

Ms. Abayo - Advocate for the Interested Party

## **BACKGROUND OF THE DECISION**

### **The Tendering Process**

Kenya Electricity Generating Company PLC, the Procuring Entity and the 2<sup>nd</sup> Respondent herein, invited sealed tenders from eligible candidates and restricted to invited firms only in response to Tender No. KGN-HYD-048-2022 for Design, Manufacture, Factory Testing, Supply, Delivery, Installation, Testing and Commissioning of a Single-Core 1000Mm<sup>2</sup> Copper XLPE 15 KV Power Cable for Kiambere Unit I Generator (hereinafter referred to as the “subject tender”) using an open competitive method of tendering. Invitations to tender were dispatched to six (6) firms vide letters dated 19<sup>th</sup> December 2022. Submission of tenders would strictly be through the 2<sup>nd</sup> Respondent’s e-procurement system referred to as the SRM System found at [www.kengen.co.ke](http://www.kengen.co.ke) (<https://eprocurement.kengen.co.ke:5000I/irj/portal>). Internet Explorer and Firefox Mozilla were the preferred web browsers. Tenderers were required to note that system challenges/support related to tender submission issues would be addressed 48 hours before tender opening date and time. The subject tender’s submission deadline was initially set on 4<sup>th</sup> January, 2023 at 10.00 a.m.

### **Addenda and Clarification**

The 2<sup>nd</sup> Respondent issued two (2) addenda and one (1) clarification namely: (a) Addendum No. 1 dated 4<sup>th</sup> January 2023 extended the subject tender’s submission deadline from 4<sup>th</sup> January, 2023 at 10.00 a.m. to 18<sup>th</sup> January, 2023 at 10.00 a.m.; (b) Clarification No. 1 dated 12<sup>th</sup> January 2023 detailed

the 2<sup>nd</sup> Respondent's response to clarifications sought with regard to the subject tender; and (c) Addendum No. 2 dated 18<sup>th</sup> January 2023 extended the subject tender's submission deadline from 18<sup>th</sup> January, 2023 at 10.00 a.m. to 25<sup>th</sup> January 2023 at 10.00 a.m.

### **Submission of Tenders and Tender Opening**

According to the Tender Opening Minutes signed by members of the Tender Opening Committee on 26<sup>th</sup> January 2023, a total of two (2) tenderers submitted their tenders. The said two (2) tenders were opened and were recorded as having submitted their respective tenders in response to the subject tender within the tender submission deadline as follows:

<b>No.</b>	<b>Name of Tenderer</b>
1.	Thames Electricals Limited
2.	ARM Engineering Co. Ltd

### **Evaluation of Tenders**

A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1<sup>st</sup> Respondent undertook evaluation of the two (2) tenders as captured in an Evaluation Report signed by members of the Evaluation Committee on 8<sup>th</sup> February 2023 (hereinafter referred to as the "Evaluation Report") as follows:

- i Preliminary/Mandatory Evaluation;
- ii Evaluation of Technical Aspects of the Tender; and

iii Financial Evaluation.

### **Preliminary/Mandatory Evaluation**

At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out as Stage 1- Mandatory Requirements of Clause 2.2 Evaluation of Tenders Preliminary examination for Determination of Responsiveness at page 31 to 32 of the blank tender document issued to prospective tenderers by the 2<sup>nd</sup> Respondent (hereinafter referred to as "the Tender Document"). Tenders were required to satisfy all the eighteen (18) mandatory requirements at this stage to qualify to proceed for evaluation at the Technical Evaluation stage.

At the end of evaluation, it was noted, as can be discerned from page 4 of the Evaluation Report submitted to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') by the 1<sup>st</sup> Respondent pursuant to section 67(3)(e) of the Public Procurement Asset and Disposal Act, 2015 (hereinafter referred to as the 'Act'), that the Applicant indicated different currencies in their tender as follows:

- ***In the Price Schedule the firm indicated DDP Kiambere Power Station as Kshs. 276,229.59 the figure transferred to the Tender Form. In the Tender Form the firm indicated price DDP Kiambere Power Station as USD 276,229.59.***
- ***The price schedule is not consistent with the Form of Tender and therefore disqualified the firm from further evaluation.***

Consequently, the Applicant's tender was found to be non-responsive while the Interested Party's tender was determined responsive and proceeded to Technical Evaluation.

### **Evaluation of Technical Aspects of the Tender**

At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out as Stage 2- Technical Evaluation on Capacity To Deliver The Contract of Clause 2.3 Evaluation of Technical aspects of the Tender at page 32 to 33 of the Tender Document. The Technical Evaluation would also be based on compliance with the technical specifications set out in Section V of the Tender Document.

At the end of evaluation at this stage, the Interested Party's tender was found responsive at this stage 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 under Price Evaluation at page 33 in addition to the criteria listed in ITT 33.3 and ITT 29.3; and ITT 34 and its subparagraphs at page 33 of the Tender Document. The Evaluation Committee was required to check completeness of financial bids and an award would be based on the lowest compliant tenderer.

The Interested Party's tender was evaluated and no arithmetic errors were noted as can be discerned from page 5 and 6 of the Evaluation Report.

## **Due Diligence**

The criteria outlined as Stage 4. Due Diligence at page 33 of the Tender Document provided that the 2<sup>nd</sup> Respondent may prior to award of the tender conduct due diligence on the recommended tenderer to ascertain the information provided in its tender.

Due Diligence was not carried out since the Interested Party was regarded as credible.

## **Evaluation Committee's Recommendation**

The Evaluation Committee recommended the Interested Party to be awarded the subject tender at its quoted price of Kenya Shillings Fifty-Nine Million Eight Hundred and Thirty-Two Thousand Eight Hundred and Ninety-Two and Eighty Cents (Kshs. 59,832,892.80) only inclusive of VAT delivered to Kiambere Store.

## **Professional Opinion**

In a Professional Opinion dated 21<sup>st</sup> February 2023, the General Manager Supply Chain, Mr. Philip Yego, 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. Abraham Serem, the Acting Managing Director & CEO of the 2<sup>nd</sup> Respondent and the 1<sup>st</sup> Respondent herein, approved the Professional Opinion on 21<sup>st</sup> February 2023.

## **Notification to Tenderers**

Tenderers were notified of the outcome of evaluation of the subject tender vide letters of Notification of Intent to Award and letter of regret 13<sup>th</sup> March 2023 signed by Mr. Philip Yego, General Manager, Supply Chain on behalf of the 2<sup>nd</sup> Respondent.

## **REQUEST FOR REVIEW**

On 27<sup>th</sup> March 2023, the Applicant filed a Request for Review dated 22<sup>nd</sup> March 2023 together with a Supporting Affidavit sworn by Eng. Rodgers Mudegu Adai, its Managing Director on 22<sup>nd</sup> March 2023 through Joseph Atwoli Advocate seeking the following orders from the Board in verbatim:

***a) An order annulling and setting aside the award of Tender No. KGN-HYD-048-2022 for Design, Manufacture, Factory Testing, Supply, Delivery, Installation, Testing and Commissioning of Single-core 1000mm<sup>2</sup> Copper XLPE 15KV Power Cable for Kiambere Unit 1 Generator awarded to Thames Electricals Limited;***



- b) An order annulling and setting aside the Respondents Letter of Regret dated 13.03.2023 addressed to the Applicant with respect to the said tender;***
- c) An order declaring that the Applicant's bid was substantially responsive;***
- d) An order declaring that the Applicant's bid was substantially responsive;***
- e) An order declaring that the Respondent's actions have resulted in the Applicant being treated unfairly;***
- f) Any other relief that the Board may deem fit and just to grant;***
- g) An order awarding costs of the review to the Applicant herein.***

In a Notification of Appeal and a letter dated 27<sup>th</sup> March 2023, Mr. James Kilaka, the Acting Board Secretary of the Board notified the 1<sup>st</sup> and 2<sup>nd</sup> Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 27<sup>th</sup> March 2023.

On 29<sup>th</sup> March 2023, in opposition to the Request for Review, the Respondents, through the firm of Muthomi & Karanja Advocates filed a Notice of Appointment of Advocates dated 29<sup>th</sup> March 2023.

On 3<sup>rd</sup> April 2023, the Respondents filed the Procuring Entity's Memorandum of Response dated 31<sup>st</sup> March 2023, the Procuring Entity's Affidavit Support of the Memorandum of Response sworn by John Theuri on 31<sup>st</sup> March 2023, and The Respondents' Exhibit to the Supporting Affidavit dated 31<sup>st</sup> March 2023.

Vide letters dated 3<sup>rd</sup> April 2023, 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 24<sup>th</sup> March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within three (3) days from 3<sup>rd</sup> April 2023.

On 4<sup>th</sup> April 2023 the Respondents filed confidential documents concerning the subject tender pursuant to section 67(3)(e) of the Act.

The Board Circular No. 2/2020 detailing the Board's administrative and contingency management plan to mitigate COVID-19 pandemic was issued

on 24<sup>th</sup> March 2020. 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 it 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.

However, vide email dated 5<sup>th</sup> April 2023, the Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the Request for Review slated for 11<sup>th</sup> April 2023 at 12:00 noon, through the link availed in the said email.

On 11<sup>th</sup> April 2023, the Respondents filed written submissions dated 6<sup>th</sup> April 2023 together with a List and Bundle of authorities dated 6<sup>th</sup> April 2023. Further, on the same day, the Interested Party sent to the Board Secretary an email attaching a Memorandum of Appearance appointing the firm of C.R.Abayo Advocates to act for it in the matter. Additionally, the Applicant also sent to the Board Secretary an email attaching its written submission dated 11<sup>th</sup> April 2023 and later on filed hard copies of the written submissions on the same day.

During the online hearing on 11<sup>th</sup> April 2023, the Board directed parties to highlight the issues they needed it to consider in making its determination. Counsel for the Interested Party indicated that she was watching brief for the Interested Party and would not be addressing the Board.

## **PARTIES' SUBMISSIONS**

### **Applicant's Submissions**

During the online hearing, Counsel for the Applicant, Mr. Atwoli relied on the pleadings and documents filed by the Applicant I.e. Request for Review dated 22<sup>nd</sup> March 2023, Supporting Affidavit sworn on 22<sup>nd</sup> March 2023 by Eng. Rodgers Mudegu Adai, and the Applicant's Written Submissions dated 11<sup>th</sup> April 2023.

Mr. Atwoli submitted that the Applicant considered the issue at hand ought to have been resolved through a mere clarification as what transpired was not a material error that would have affected the substance of the subject tender. He further submitted that the price quoted on the price schedule is not considered an absolute and final price of the tender hence any alleged error on the same ought not to have been considered as a major discrepancy as provided under section 82 of the Act read with Regulation 77 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "Regulations 2020").

Counsel submitted that there was no specific evaluation criteria that required the prices schedule to conform to the Form of Tender and that the relevant evaluation criteria being Clause 1.1(c) of the Evaluation and Qualification criteria stated that any error determining the exchange rates in the Tender may be corrected by the Procuring Entity.

Mr. Atwoli referred the Board to Decision *in PPARB Application No. 24 of 2021* stating that the Board held that there was no need to introduce an extraneous evaluation criterion when evaluating a tender as the Procuring Entity had introduced an Error Check Analysis which was not provided for in the Tender Document and compared the aforementioned application to the instant Request for Review where the Applicant is challenging the introduction of what the Respondents termed as the prices schedule not conforming to the Form of Tender as indicated in the regret letter. Mr. Atwoli argued that this was introduction of a criteria that was not provided for in the Tender Document.

Mr. Atwoli submitted that there was lack of transparency surrounding the Interested Party's Form of Tender as the Applicant only came to learn of the same after it was submitted since at the Tender Opening stage it was clear that the Interested Party's Form of Tender was not attached. He further submitted that after award of the subject tender when seeking clarification, the Applicant was made aware that a Form of Tender had been uploaded and the Respondents' in their Memorandum of Response had stated that the Form of Tender had been uploaded in the Notes and Attachments Tab.

Mr. Atwoli submitted that the Tender Data Sheet at ITT 21.1 provided it was a mandatory requirement for the Form of Tender to be uploaded in the C Folder and not on the Notes and Attachments Tab. He further submitted that any document attached to the Notes and Attachments tab would not be considered for evaluation.

Counsel re-iterated that the information pertaining uploading of the Interested Party's Form of Tender only came to the attention of the Applicant after award of the subject tender and it had also learnt that it had been uploaded in the wrong folder through the Respondents' Memorandum of Response.

Mr. Atwoli referred to a precedent availed by the Respondents being *Judicial Review Application No. 135 of 2018 Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Kemotrade Investment Limited [2018] eKLR* and while distinguishing it with the instant Request for Review, he argued that on this particular case, the complainant was well aware that the Interested Party had not submitted a sample and had complained about it yet in the instant Request for Review, the complaint is about inclusion of the Form of Tender which was noted at the Tender Opening as having not been availed and which the Applicant only came to know about after evaluation and award of the subject tender and learnt that a Form of Tender had been attached in the wrong folder without any justification.

Mr. Atwoli submitted that the letter of Regret addressed to the Applicant had been signed by a person who was not the Accounting Officer of the 2<sup>nd</sup> Respondent. He referred the Board to its Decision in *PPARB Application No. 25 of 2020 Limah East Africa Ltd v Mathari Hospital* where the Board held that where there is delegation of authority, it must be in writing and specific and in the absence of such, any such letter is null and void. He indicated that in the instant Request for Review, the Applicant had not had sight of such delegated authority in writing and specific and as such the regret letter sent to the Applicant was null and void.

In Conclusion, Mr. Atwoli stated that the Applicant's tender complied with all requirements stipulated in the Tender Document and that the Applicant had submitted a sealed tender electronically as per the 2<sup>nd</sup> Respondent's guidelines, no evaluation criteria required his tender to conform to the Form of Tender as alleged in the regret letter and if there was any discrepancy, it was the responsibility of the Respondents as stipulated under ITT 29.3 and Clause 1.1(c) of the Evaluation and Qualification Criteria of the Tender Document to rectify quantifiable and non-conformities related to the tender price and ensure that any in determining exchange rates in the tender were corrected by the 2<sup>nd</sup> Respondent. He re-iterated that the error in dispute is not a material error and a mere clarification should have addressed the issue.

Upon enquiry by the Board on at what point the Applicant learnt of the omission to upload the Interested Party's Form of Tender and when the

same had been uploaded, Mr. Atwoli submitted that the Applicant received the regret letter on 14<sup>th</sup> March 2023 and responded to the Respondents on the same date by indicating that the Applicant was aware that the Interested Party's hadn't submitted a Form of Tender leading the Respondents to reply to the Applicant on 17<sup>th</sup> March 2023 informing it that the Interested Party's Form of Tender had been uploaded and submitted which was the point the Applicant became aware of the irregularity on 17<sup>th</sup> March 2023.

Upon further enquiry by the Board on which error regarding the price ought to have been corrected, Mr. Atwoli indicated that the price to be corrected was the price in the price schedule as it was not absolute and final and did not constitute a major discrepancy sticking to the Applicant's price in the Form of Tender read out at the Tender Opening and submitted that the price in the Form of Tender cannot be changed as it was absolute and final.

### **Respondents' submissions**

During the online hearing, Counsel for the Respondent, Dr. Muthomi relied on the Procuring Entity's Memorandum of Response dated 31<sup>st</sup> March 2023, the Procuring Entity's Affidavit Support of the Memorandum of Response sworn by John Theuri on 31<sup>st</sup> March 2023, Written Submissions dated 6<sup>th</sup> April 2023 together with a List and Bundle of Authorities dated 6<sup>th</sup> April 2023 and confidential documents forwarded to the Board pursuant to section 67(3)(e) of the Act.



Dr. Muthomi submitted that parties are only before the Board due to the Applicant's own admitted error in preparing its price schedule as read with its Form of Tender. He further submitted that an Applicant cannot make an error and file a Request for Review that is inexorably or entirely based on its own error.

Dr. Muthomi submitted that the error was not one of exchange rates as argued by the Applicant but one of submitting two vastly different prices whose effect was, on applying the exchange rates, that one price was thirty-four million shillings more than the second offer. Counsel further submitted that a tenderer can only make one offer and the offer in the Applicant's price schedule was not the same as the offer in the Form of Tender.

It was the Respondents' case that the reason this was considered a material deviation was because when the provisions of the Tender Document are read together with provisions of section 135(6) of the Act, both the Price Schedule and the Form of Tender are essential elements of any contract resulting from an award of the subject tender. Counsel questioned how the 2<sup>nd</sup> Respondent would reconcile two essential documents of any resulting contract, where one was in the range of Kshs. 276,000/= and the other in the range of Kshs. 35,000,000/=. He re-iterated that this was not an error in the exchange rate since it was clear in the Applicant's Price Schedule that its offer was in Kenya Shillings yet in amount in the Form of Tender on applying the exchange rate was a vastly different price. Dr. Muthomi submitted that this placed the 2<sup>nd</sup> Respondent in an impossible dilemma especially given the provisions of the

section 135(6) of the Act and that the matter was not a minor deviation but a major deviation for reasons outlined.

Dr. Muthomi submitted that the Request for Review must revolve around a duty imposed on a procuring entity as opposed to a power, or discretion and argued that there is no duty on the part of the 2<sup>nd</sup> Respondent to seek clarifications as it has a power and a discretion which the Board has no jurisdiction to compel the exercise of discretion or performance of a power.

Counsel submitted that it was a requirement for any clarifications to be applied uniformly across all candidates and the Applicant was the only tenderer that had two vastly different prices and even if that discretion would have been exercised, it would not have been possible within the law as to clarifications.

Dr. Muthomi cautioned the Board against creating a precedent where tenderers have a leeway to offer two different prices in hope of a wager where if one price is rejected the tenderer can rely on the other price.

Dr. Muthomi submitted that the Respondents had not introduced any mandatory criteria that was an extrinsic evaluation criterion since the criteria to be applied in evaluation of tenders, taking note of the referred C Folder vis-à-vis the Notes and Attachments Folder, was that provided for at page 38 of the Confidential Bundle submitted to the Board. He further submitted

that putting the documents in the C-Folder was not one of the mandatory criteria.

Counsel submitted that per the provisions of the Tender Document, it envisioned that tenderers could encounter technical challenges while uploading their tender documents in either of the other folders and such challenges were to be addressed with the 2<sup>nd</sup> Respondent. He argued that due to technical reasons that are not clear to anyone including the 2<sup>nd</sup> Respondent, the Interested Party's documents could only fit into the Notes and Attachments Folder which was not a non-compliance issue that would lead to disqualification and in any event, it is not in dispute that the document was submitted and that the said Notes and Attachments Folder was not one of the mandatory requirements in the Tender Document.

Counsel submitted that the instant Request for Review is not factually similar with the facts addressed in PPARB Application No. 24 of 2021 referred to by the Applicant since in that application, there was no tenderer who had submitted two vastly different quotes since what was in issue was that the Procuring Entity had introduced an additional mandatory evaluation criterion not in the Tender Document yet what was before the Board in the instant Request for Review is a situation where prices are different.

Dr. Muthomi submitted that the law forbids any clarification or correction of arithmetic errors if that will change the substance of the Tender. He further

submitted that a change from an amount less than Kshs 300,000/= to an amount in the realm of Kshs. 35,000,000/= is so vast that it cannot be a minor correction, or an arithmetic correction, and in any event, arithmetic is about addition and multiplication yet the error in question was not an arithmetic error but an error of different prices.

Dr. Muthomi submitted that there was nothing in the Request for Review demonstrating a breach of duty and it is not enough for the Applicant to claim breach as such breach ought to be within the parameters set out either in the Act or Regulations 2020. He further submitted that the Respondents had traversed every ground raised in the Request for Review and none revealed any breach of the Act and Regulations hence there was no valid Request for Review before the Board. Counsel urged the Board to find that there can be no relief that can cure the Applicant's tender and to dismiss the instant Request for Review noting the description of the context of the subject tender given in its response being one of the procurements that should not be delayed any further.

Dr. Muthomi referred the Board to paragraph 10(a) at page 12 of the Respondents' Memorandum of Response where it addressed the issue of when the Applicant knew or ought to have known about uploading of the Interested Party's Form of Tender and argued that the Applicant knew that information on 27<sup>th</sup> January 2023.

Upon enquiry by the Board on his response to the submission made by Counsel for the Applicant that the notification letter was signed by an unauthorized person, and though such power can be delegated, there was no evidence that that delegation was made as required in law, Dr. Muthomi submitted that there is no law forbidding delegation of signing of notification letters and to that extent, it would be a bad precedent to establish a rule that it is not delegable especially given that the accounting officer being at a very high level of administration of public entities would seriously strain the day to day operations of many procuring entities if there is to be a law that something routine as issuing notification letters must be personally signed by the accounting officer and in such processes that are time bound.

Upon further clarification by the Board that the Applicant was actually stating that such law requiring proof of delegation exist and that its claim was that no proof of such delegation has been availed, Dr. Muthomi submitted that the Respondents understood his complaint to mean that the power to sign the said letter must be personally exercised by the accounting officer and cannot be delegated and that it was not their reading of the Request for Review that the Applicant required that to be availed which in any case it would have been availed. He further stated that this was a question of facts which required getting instructions from his client to which the Board indicated that it would look at documents availed by the 2<sup>nd</sup> Respondent pursuant to section 67(3)(e) of the Act.

### **Applicant's Rejoinder**

Mr. Atwoli indicated that he would not be putting in any rejoinder.

At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 27<sup>th</sup> March 2023 had to be determined by 17<sup>th</sup> April 2023 and that the Board would communicate its decision on or before 17<sup>th</sup> April 2023 to all parties via email.

### **BOARD'S DECISION**

The Board has considered each of the parties' cases, documents, pleadings, oral and written submissions, list and bundle of authorities together with confidential documents submitted to the Board by the Respondents pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination.

#### **1. Whether the Board has jurisdiction to hear and determine the instant Request for Review;**

In determining the first issue, the Board will make a determination on whether the instant Request for Review was filed within the statutory period of 14 days of notification of award or occurrence of alleged breach by the Respondents in accordance with section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020 to invoke the jurisdiction of the Board;

Depending on the determination of the first issue;

- 2. Whether the 2<sup>nd</sup> Respondent's Evaluation Committee evaluated the Applicant's tender in the subject tender in accordance with Section 80 of the Act and Article 227(1) of the Constitution;**
- 3. Whether the 2<sup>nd</sup> Respondent Evaluation Committee committed an illegality during evaluation of the Interested Party's tender in the subject tender in accordance with Section 80 of the Act and Article 227(1) of the Constitution with respect to the Interested Party's Form of Tender;**
- 4. Whether the letter of notification of regret dated 13<sup>th</sup> March 2023 issued to the Applicant complied with the provisions of Section 87 of the Act and Regulation 82 of Regulations 2020; and**
- 5. What orders should the Board grant in the circumstances?**

**Whether the Board has jurisdiction to hear and determine the instant Request for Review as amended.**

The Respondents at paragraph 10(a) of their Memorandum of Response contend that the complaint relating to the Interested Party's Form of Tender

is time barred since the Tender Opening Minutes of the subject tender had been shared with the Applicant on 27<sup>th</sup> January 2023 and as such, the Applicant ought to have filed a Request for Review on this issue within 14 days of receipt of 25<sup>th</sup> January 2023 i.e. on or before 10<sup>th</sup> February 2023. In support of their argument, the Respondents relied on the holding by Nyamweya J. (as she then was) in *Judicial Review Application No. 135 of 2018 Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Kemotrade Investment Limited [2018] eKLR*.

Mr. Atwoli on behalf of the Applicant however argued that the Applicant only came to learn of the alleged breach by the Respondents on 17<sup>th</sup> March 2023 following receipt of a letter dated 17<sup>th</sup> March 2023 clarifying its letter of regret dated 13<sup>th</sup> March 2023 which the Applicant had received on 14<sup>th</sup> March 2023 and responded to on the same day informing the Respondents that it was aware that the Interested Party had not submitted a Form of Tender as recorded in the Tender Opening Minutes.

It is necessary for the Board to determine whether it has jurisdiction to hear and determine the issues raised by the Applicant in this Request for Review noting that it is trite law that courts and decision making bodies should only act in cases where they have jurisdiction and when a question of jurisdiction arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before doing anything concerning such a matter.



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

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

Jurisdiction is defined in Halsbury's Laws of England (4 th Ed.) Vol. 9 as:

***"...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision."***

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

***"By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court [or other decision making body] is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation***

***may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."***

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

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

In the case of **Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others [2013] eKLR**, the Court of Appeal emphasized on the centrality of the issue of jurisdiction and held that:

***"...So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain...."***

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

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

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

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

***jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with Counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings.”***

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

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

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

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

***(a) reviewing, hearing and determining tendering and asset disposal disputes; and***

***(b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law.”***

The jurisdiction of the Board is provided for under Part XV – Administrative Review of Procurement and Disposal Proceedings and specific at Section 167 of the Act which provides for what can and cannot be subject to review of procurement proceedings before the Board and Section 172 and 173 of the Act which provides for the powers the Board can exercise upon completing a review as follows:

***PART XV — ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS***

***167. Request for a review***

***(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.***

***(2) .....***

***(3) .....***

***(4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)—***

***(a) the choice of a procurement method;***

***(b) a termination of a procurement or asset disposal proceedings in accordance with section 63 of this Act; and***

***(c) where a contract is signed in accordance with section 135 of this Act. [Emphasis by the Board]***

***168. ....***

***169. ....***

***170. ....***

***171. ....***

***172. ....***

***172. Dismissal of frivolous appeals***

***Review Board may dismiss with costs a request if it is of the opinion that the request is frivolous or vexatious or was solely for the purpose of delaying the procurement proceedings or performance of a contract and the applicant shall forfeit the deposit paid.***

***173. Powers of Review Board***

***Upon completing a review, the Review Board may do any one or more of the following—***

***(a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or 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.***

Given the forgoing provisions of the Act, the Board is a creature of the Act and the Board's jurisdiction flows from Section 167 (1) of the Act read with Section 172 and 173 of the Act which donates powers to the Board with respect to an administrative review of procurement proceedings before the Board.

It therefore follows, for one to invoke the jurisdiction of the Board, they need to approach the Board as provided under Section 167 (1) of the Act. Section 167(1) of the Act, allows an aggrieved candidate or tenderer to seek administrative review within 14 days of (i) notification of award or (ii) date of occurrence of alleged breach of duty imposed on a procuring entity by the Act and Regulations 2020 at any stage of the procurement process in a manner prescribed.

The manner in which an aggrieved candidate or tenderer seeks administrative review is prescribed under Part XV – Administrative Review of Procurement and Disposal Proceedings of Regulations 2020 and specific under Regulation 203 of Regulations 2020 as follows:

***PART XV – ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS***

***203. Request for a review***

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

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

***(a) state the reasons for the complaint, including any alleged breach of the Constitution, the Act or these Regulations;***

***(b) be accompanied by such statements as the applicant considers necessary in support of its request;***

***(c) be made within fourteen days of —***

***(i) the occurrence of the breach complained of, where the request is made before the making of an award;***

***(ii) the notification under section 87 of the Act; or***



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

***(d) be accompanied by the fees set out in the Fifteenth Schedule of these Regulations, which shall not be refundable.***

***(3) Every request for review shall be filed with the Review Board Secretary upon payment of the requisite fees and refundable deposits.***

***(4) The Review Board Secretary shall acknowledge by stamping and signing the request filed for review immediately.***

Regulation 203 prescribes an administrative review sought by an aggrieved candidate or tenderer under Section 167(1) of the Act to be by way of (i) a request for review which is to be (ii) accompanied by such statements as the applicant considers necessary in support of its request. The request for review is to be in a form set out in the Fourteenth Schedule of Regulations 2020. The Fourteenth Schedule of Regulations 2020 provides for a form known as a Request for Review.

A reading of Regulation 203(1), (2)(c) & (3) of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 confirms that an aggrieved candidate or tenderer invokes the jurisdiction of the Board by filing a request for review with the Board Secretary within 14 days of (i) occurrence of breach complained of, having taken place before an award is made, (ii)

notification under Section 87 of the Act; or (iii) occurrence of breach complained of, having taken place after making of an award to the successful tenderer.

Section 87 of the Act referred to in Regulation 203(2)(c)(ii) of Regulations 2020 provides as follows:

***87. Notification of intention to enter into a contract***

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

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

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

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

It is therefore clear from a reading of Section 167(1) and 87 of the Act, Regulation 203(1), (2)(c) & (3) of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 that an aggrieved candidate or tenderer invokes the jurisdiction of the Board by filing a request for review with the Board Secretary within 14 days of (i) occurrence of breach complained of, having taken place before an award is made, (ii) notification of intention to enter into a contract having been issued or (iii) occurrence of breach complained of, having taken place after making of an award to the successful tenderer. Simply put, an aggrieved candidate or tenderer can invoke the jurisdiction of the Board in three instances namely, (i) before a notification of intention to enter into a contract is made, (ii) when a notification of intention to enter into a contract is made and (iii) after a notification to enter into a contract has been made. The option available for an aggrieved candidate or tenderer in the aforementioned three instances is determinant on when occurrence of breach complained of took place and should be within 14 days of such occurrence of breach. It was not the intention of the legislature that where an alleged breach occurs before notification to enter into a contract is issued, the same is only complained of after the notification to enter into a contract has been issued. We say so because there would be no need to provide three (3) instances within which a Request for Review may be filed.

Having considered parties' pleadings, submissions, and the confidential documents contained in the confidential file submitted by the Respondents

to the Board pursuant to section 67(3)(e) of the Act, the issue that calls for determination by this Board is what were the circumstances in the instant Request for Review that determine the period when the Applicant ought to have approached the Board?

We have studied the Request for Review and Supporting Affidavit dated 22<sup>nd</sup> March 2023 and understand the Applicant's contention to be that (a) the Respondents applied extraneous evaluation criteria in evaluating and disqualifying its tender and failed to comply with the provisions of the Tender Document, the Act and Regulations 2020; and (b) the process of awarding the subject tender lacked transparency, accountability and fairness and was in violation of Article 10 and 227(1) of the Constitution since the Respondents (i) failed to disclose at the Tender Opening stage that the Interested Party had submitted a Form of Tender( with a disclosed tender) sum and had in fact indicated in the Tender Opening Minutes that the Interested Party had not submitted a Form of Tender and (ii) failed to disclose and record the contents of the Interested Party's Form of Tender during Tender Opening.

The Applicant has stated that it only came to learn of the breach relating to the Interested Party's Form of Tender when it was notified in accordance with section 87 of the Act of its unsuccessfulness in the subject tender vide a letter of notification of regret dated 13<sup>th</sup> March 2023 received on 14<sup>th</sup> March 2023 which set out the reasons as to why its tender was unsuccessful. According to the Applicant, it responded to the Respondents' letter of

notification of regret and informed the Respondents that it was aware that during the tender opening, the Interested Party did not submit a Form of Tender as recorded in the Tender Opening Minutes and objected to the award of the subject tender to the Interested Party. Subsequently, the Applicant states that it received a response to its letter from the Respondents on 17<sup>th</sup> March 2023 from which it learnt that the Interested Party's Form of Tender was electronically submitted and available.

We have carefully studied the confidential documents submitted by the Respondents to the Board pursuant to section 67(3)(e) of the Act and note a letter of regret dated 13<sup>th</sup> March 2023 addressed to the Applicant which reads in part:

"....."

***We refer to the above tender, referenced KGN-HYD-048-2022 opened on 25<sup>th</sup> January 2023 and wish to advise that your firm was not successful due to the following reason(s) :-***

***1. Your firm did not meet the following requirements as stipulated in the tender document;***

***a. In the price schedule, your firm indicated DDP Kiambere Power Station as KShs. 276,229.59 the figure transferred to the Form of Tender. In the form of tender, your firm indicated price as DDP Kiambere Power Station as USD.276,229.59. The Price Schedule was not consistent with the form of***

***The bidder awarded the contract is Thames Electricals Limited at their quoted price of KShs.59,832,892.80 (Say Kenya Shillings Fifty Nine Million, Eight Hundred and Thirty Two Thousand, Eight Hundred and Ninety Two Shillings and Cents Eighty Only) inclusive of 16% VAT.***

***We would however, like to thank you for your interest to do business with us.***

***Attached find your bid bond for cancellation.***

***Yours Faithfully;***

***(signed)***

***PHILIP YEGO***

***GENERAL MANAGER, SUPPLY CHAIN***

***For: KENYA ELECTRICITY GENERATING COMPANY PLC”***

We note that the Applicant wrote to the Respondents in response to the letter of regret vide a letter dated 14<sup>th</sup> March 2023 which reads in part as follows:

***".....***

***However, we do not accept the evaluation and award of the above referenced tender to Thames Electricals Limited.***

***We feel that the reasons given are not sufficient and the evaluation committee could have asked for clarification in areas of concern.***

***We wish to state that during the tender opening, Thames Electricals Limited did not submit the Form of Tender as recorded in the Tender Opening Minutes.***

***We therefore we object the award and should be cancelled.***

***.....”***

We further note that the Respondents responded to the Applicant’s letter above vide a letter of clarification on letter of regret dated 17<sup>th</sup> March 2023 which reads in part:

***”.....***

***We wish to clarify the following:***

***Your firm indicated different currencies in the submission as follows:-***

- ***DDP Kiambere Power Station as KShs. 276,229.59 the figure transferred to the Tender Form. In the Tender Form your firm indicated price DDP Kiambere Power Station as USD 276,229.59.***

***The Price Schedule was not consistent with the Form of Tender and therefore disqualified from further evaluation.***

***The evaluation committee didn’t consider it necessary to consult your firm for further clarification on an issue that was clearly understood during evaluation.***

***Further, the bid for the recommended firm, Ms. Thames Electrical Limited was electronically submitted as seen in the electronic portal where the Form of Tender was available. Therefore, as per Section 78 of the Public Procurement & Asset Disposal Act 2015 (revised Edition 2022) "No tenderer shall be disqualified by the procuring entity during the opening of tender." The tender evaluation committee deemed it necessary to evaluate all tenders submitted in the electronic portal by the closing date and time. We hope that the foregoing clarifies the matter conclusively and thank you for your interest in doing business with us.***

***Yours faithfully,***

***(signed)***

***PHILIP YEGO***

***GENERAL MANAGER, SUPPLY CHAIN***

***For: KENYA ELECTRICITY GENERATING COMPANY PLC"***

From the foregoing, we understand that the Applicant filed the instant Request for Review because it is aggrieved by the contents of the letter of regret dated 13<sup>th</sup> March 2023 since it believes that the reasons for its disqualification were not sufficient and having prior knowledge that the Interested Party had not submitted a Form of Tender as was noted during the Tender Opening and as recorded in the Tender Opening Minutes, it is opposed to award of the subject tender as communicated by the Respondents. It is our considered view that is only after the Applicant



received the letter of clarification on letter of regret dated 17<sup>th</sup> March 2023 that it found out that the Interested Party's Form of Tender was available on the electronic portal and that in the Respondent's evaluation committee had in fact deemed it necessary to evaluate all tenders submitted in the electronic portal by the closing date and time.

Hence, the allegation of breach by the Respondents failure to disclose the contents of the Interested Party's Form of Tender during Tender Opening and failure to disclose that a Form of Tender had been submitted by the Interested Party at the Tender Opening stage became known to the Applicant when it received the letter of clarification on letter of regret dated 17<sup>th</sup> March 2023 and could not have been known when the Applicant obtained the Tender Opening Minutes on 27<sup>th</sup> January 2023 as alleged since no breach had occurred at the time of obtaining the said minutes which was prior to evaluation of tenders in the subject tender. The Board understands the duty of a Tender opening Committee to be limited to receiving and recording the tenders received and the documents presented by the Tenderers in support of their bid in the presence of the Bidders or their representatives. Thereafter, the Evaluation Committee retires to conduct the evaluation based on the tender requirements.

In computing time, the Board is guided by Section 57 of the IGPA which provides as follows:

***57. Computation of time***

***In computing time for the purposes of a written law, unless the contrary intention appears—***

- (a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;***
- (b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;***
- (c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;***
- (d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.***

In computing time when the Applicant should have sought administrative review before the Board with respect to challenging the evaluation of the subject tender, the 17<sup>th</sup> March 2023 is excluded pursuant to Section 57(a) of IGPA being the day the Applicant learnt of the occurrence of the alleged

breach. This means that fourteen (14) days started running on 18<sup>th</sup> March 2023 and lapsed on 31<sup>st</sup> March 2023. In essence, the Applicant had between 18<sup>th</sup> March 2023 and 31<sup>st</sup> March 2023 to seek administrative review before the Board. The Applicant filed the instant Request for Review on 27<sup>th</sup> March 2023, which was the 10<sup>th</sup> day from the day the Applicant learnt of the occurrence of the alleged breach.

We find that this was within the statutory period of fourteen (14) days prescribed under Section 167(1) of the Act read with Regulation 203(2)(c)(ii) of Regulation 2020 and find fault in the Respondents' argument that the Applicant ought to have filed a Request for Review within 14 days from 25<sup>th</sup> January 2023. We say so because the Applicant could not possibly have filed its Request for Review using 25<sup>th</sup> January 2023 as a benchmark date since as at that date, it was not aware of any breach of the provisions of the Act by the Respondents. Evaluation of the bids by the tenders had not been undertaken.

Accordingly, the Board finds and holds that it has jurisdiction to hear and determine the instant Request for Review having been filed in good time. We shall now proceed to consider the Request for Review on its merit by determining the remaining substantive issues.

**Whether the 2<sup>nd</sup> Respondent's Evaluation Committee evaluated the Applicant's tender in the subject tender in accordance with Section 80 of the Act and Article 227(1) of the Constitution**

At paragraph 14 of its Request for Review dated 22<sup>nd</sup> March 2022 and during the hearing, the Applicant submitted, *inter alia*, that the Respondents applied extraneous evaluation criteria in evaluating and disqualifying its tender based on the ground that its Price Schedule was not consistent with its Form of Tender contrary to the provisions of the Tender Document, the Act and Regulations 2020. It is the Applicant's case that the alleged discrepancy between its Price Schedule and Form of Tender is not a material discrepancy since the total amount indicated in the Price Schedule tallies with the amount provided in the Form of Tender, the only difference being the error on currency in the Price Schedule.

The Applicant contends that there was no specific evaluation criteria that required the Price Schedule to be consistent with the Form of Tender and that the price on the Price Schedule is not considered an absolute and final price of the tender hence any alleged error on the same cannot be considered a major discrepancy.

The Applicant submitted that the issue at hand required a mere clarification by the Respondents to correct an obvious non-material error that would not have affected the tender price as read out during the subject tender opening and that the said clarification would not (a) materially deviate from the requirements of the services set out in the tender; (b) change the prices; (c)

affect the substance of the tender; (d) affect unfairly the position of any firm presenting a responsive bid.

On its part, the Respondents at paragraph 7 of the Procuring Entity's Memorandum of Response dated 31<sup>st</sup> March 2023 and during the hearing submitted, *inter alia*, that they evaluated the subject tender using the criteria set in the Tender Document and denied use of extrinsic criteria in evaluating the Applicant's tender. The Respondents contend that a tenderer's Price Schedule is inexorably linked to its Form of Tender and that any clarification changing the Applicant's tender from Kshs. 276,229.59 to US\$ 276,229.59 (or vice versa) is a major deviation that would substantially change the terms of the Applicant's tender contrary to section 80(2) of the Act.

The Respondents further contend that such clarification would change the Applicant's tender by 12,325% from the Kshs. 276,229.59 indicated in the Price Schedule to Kshs. 34,321,526.56 indicated in the Form of Tender based on the exchange rate of 124.25 prevailing as of the Tender Opening Date of 25<sup>th</sup> January 2023. As such, the Applicant's admitted error placed the 2<sup>nd</sup> Respondent in an impossible dilemma since both the Price Schedule and Form of Tender are essential elements of all public procurement contracts justifying the decision to render the Applicant's tender non-responsive.

Article 227(1) of the Constitution provides the overarching principles of public procurement to be observed by any public entity such as the 2<sup>nd</sup> Respondent herein when contracting for goods and services. Article 227(1) of the Constitution provides 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) ....."**

Justice Mativo (as he then was) in **Nairobi High Court Misc. Application No. 60 of 2020; Republic v The Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020] eKLR** (hereinafter referred to as "Misc. Application No. 60 of 2020") spoke to the principles under Article 227 of the Constitution as follows:

**"45. Article 227 of the Constitution provides that when procuring entities contract for goods or services they must comply with the principles of fairness, equity, transparency, competitiveness and**

***cost-effectiveness. For there to be fairness in the public procurement process, all bids should be considered on the basis of their compliance with the terms of the solicitation documents, and a bid should not be rejected for reasons other than those specifically stipulated in the solicitation document.***

***46. However, there is a need to appreciate the difference between formal shortcomings, which go to the heart of the process, and the elevation of matters of subsidiary importance to a level, which determines the fate of the tender. The Evaluation Committee has a duty to act fairly. However, fairness must be decided on the circumstances of each case..."***

The Board observes that the legislation contemplated in Article 227(2) of the Constitution is the Act. Section 80 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.***

***(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.***

***(3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)-***

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

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

***(4) .....***"

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. Section 80(3) of the Act requires for such evaluation criteria to be as objective and



quantifiable to the extent possible and to be applied in accordance with the procedures provided in a tender document.

Turning to the circumstances of the instant Request for Review, the Tender Document provided for mandatory requirements under Stage 1-Mandatory Requirements of Clause 2.2 Evaluation of Tenders Preliminary examination for Determination of Responsiveness at pages 31 and 32 of the Tender Document. Mandatory requirement 7 and 8 provided for the Tender Form and Price Schedules as follows:

<b>No.</b>	<b>MANDATORY REQUIREMENTS</b>
.....	.....
<b>MR7</b>	<b><i>Tender Form duly filled, signed and stamped</i></b>
<b>MR8</b>	<b><i>Price Schedule duly filled, signed and stamped</i></b>
.....	.....

The Tender Document provided for the Form of Tender at pages 35 to 37 and provided under Clause e) Tender Price as follows:

***"The total price of our Tender, excluding any discounts offered in item (f) below is:***

***Option 1, in case of one lot: Total price is: [insert the total price of the Tender in words and figures, indicating the various amounts and the respective currencies]; or***

***Option 2, in case of multiple lots:....."***

We further note that the Tender Document provided for the Price Schedule at pages 52 to 53 and tenderers were required to fill in the Price Schedule Forms in accordance with the instructions indicated. The total cost under Price Schedule 1 & 2 would be placed in Summary Schedule 1& 2 as indicated at page 53 of the Tender Document and the total cost transferred to the Tender Form. It is imperative to note that the unit price and the cost was indicated in Kenya Shillings under the Price Schedules.

Having carefully perused the Applicant's tender submitted to the Board as part of the confidential documents pursuant to section 67(3)(e) of the Act, we note that the Applicant in its Form of Tender dated 24<sup>th</sup> January 2023 at page 9 of its tender submitted a **total price of Two Hundred and Seventy Six Thousand, Two Hundred and Twenty Nine US Dollars and Fifty Nine cents – USD 276,229.59 (VAT Inclusive)**. We further note at page 12 to 15 of its Tender that the Applicant filled in a Price Schedule 1 & 2 where the unit prices and costs of the items in the description box were listed under the heading of **Kenya Shillings** and a summary of schedule 1 & 2 indicated a **total cost of KES 276,229.59**

We have carefully studied the Evaluation Report submitted to the Board as part of the confidential documents and note that the Applicant's tender was determined non-responsive at the Preliminary/Mandatory Evaluation stage as captured at page 3 and 4 of the said report which reads in part:

<b>No.</b>	<b>MANDATORY REQUIREMENTS</b>	<b>PASS/FAIL</b>	
		<b>THAMES ELECTRICAL</b>	<b>ARM ENGINEERING</b>
.....	.....	.....	.....
<b>MR7</b>	<b>Tender Form duly filled, signed and stamped</b>	<b>Pass</b>	<b>Pass</b>
<b>MR8</b>	<b>Price Schedule duly filled, signed and stamped</b>	<b>Pass</b>	<b>Fail</b>
.....	.....	.....	.....

**Notes: -**

**a. ARM Engineering indicated different currencies in their submission as follows:-**

- **In the Price Schedule the firm indicated DDP Kiambere Power Station as Kshs. 276,229.59 the figure transferred to the Tender Form. In the Tender Form the firm indicated price DDP Kiambere Power Station as USD 276,229.59.**
- **The price schedule is not consistent with the Form of Tender and therefore disqualified the firm from further evaluation.**

It is not in contest that the Applicant’s quoted prices in its Form of Tender and in the Price Schedules were in two different currencies i.e USD and Kshs. The question that begs to be answered is whether this error or oversight in

currencies provided in the Price Schedule is a minor deviation that does not materially depart from the requirements set out in the Tender Document.

The Board is cognizant of section 82 of the Act which provides as follows:

***"The tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be the subject of correction, adjustment or amendment in any way by any person or entity."***

The import of the above provision is that the tender sum as read out at the tender opening shall be absolute and final and shall not be the subject of correction, adjustment or amendment in any way by any person or entity

It is worth noting that the Board has consistently held in previous decisions that the tender sum is absolute and cannot be changed. In **PPARB Application No. 42 of 2017, Surestep Systems and Solutions Limited vs. Industrial and Commercial Development Corporation**, the Board concurred with its decision in **PPARB Application No. 38 of 2019, Alfatech Contractors Limited vs. Kenya National Highways Authority**, where it stated the importance and the primacy of the Form of Tender in any tender process in the following words:

***"The Board holds that the form of tender is the document which the offer is communicated to specified employer. It is the offer that the procuring entity would consider an either accept or reject. The Board finds that the form of tender is a very vital document which***

***communicates every essential information based on which a contract is created. The provision of section 82 of the Act, are couched in mandatory terms and leaves no room for any other interpretation. The tender sum for the successful bidder as read out and as recorded at the tender opening was Kshs. 34,166,398.13/- and was not subject to any variation whatsoever pursuant to the prohibition contained in section 82 of the Act."***

As such, it is expected that the total price in the Applicant's Form of Tender dated 24<sup>th</sup> January 2023 would be the total price it proposes to undertake the subject tender as outlined under its Price Schedule which categorizes the unit price of every item listed in the description box under Price Schedule 1 & 2 at page 52 and 53 of the Tender Document.

It is Applicant's submission that there was no specific evaluation criteria that required the Price Schedule to be consistent with the Form of Tender. We have however established that it was a mandatory requirement for tenderers to submit duly filled, signed and stamped Tender Forms and Price Schedules as stipulated under MR 7 and MR 8. And there was provision for tenderers to cite the currency of the quote.

Collins Dictionary defines the word "duly" as an adverb as "*If something is duly done, it is done in the correct way.*" From this definition, for a Tender Form and Price Schedule to be "duly" filled, they must be filled in the correct way with no omissions, mistakes or errors.

The question that arises in this regard is what is a mandatory requirement and what is its purpose?

The Board notes that section 79 of the Act is instructive on this aspect as it states as follows:

***"A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents."***

Accordingly, a responsive tender is one that conforms to all the eligibility and mandatory requirements in the tender document. These eligibility and mandatory requirements were considered by the High Court in **Miscellaneous Civil Application 85 of 2018 Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR** (hereinafter referred to as Miscellaneous Civil Application No. 85 of 2018) where it held:

***"Briefly, the requirement of responsiveness operates in the following manner: - a bid only qualifies as a responsive bid if it meets all requirements as set out in the bid document. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements. Indeed, public procurement practically bristles with formalities which bidders often overlook at their peril. Such formalities are usually listed in***

***bid documents as mandatory requirements – in other words they are a sine qua non for further consideration in the evaluation process. The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing, empowerment or post qualification. Bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome.....***

***.....Mandatory criteria establish the basic requirement of the invitation. Any bidder that is unable to satisfy any of these requirements is deemed to be incapable of performing the contract and is rejected. It is on the basis of the mandatory criteria that "competent" tenders are established....."***

In essence, a responsive bid is one that meets all the mandatory requirements as set out in the bid document which are in essence the first hurdle that bidders must overcome for further consideration in an evaluation process. These eligibility and mandatory requirements are mostly considered at the Preliminary Evaluation Stage following which other stages of evaluation are conducted. Further, bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids.

The next question that arises is what is a 'minor deviation'?

Following the definition of a responsive tender as provided hereinabove, section 79 (2) and (3) of the Act provides as follows with respect to minor deviations:

***"(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."*** [Emphasis by the Board]

The import of the above provision is that responsiveness of a tender shall not be affected by any minor deviations that do not materially depart from the requirements set out in the Tender Document and that do not affect the substance of a tender. This provision details a minor deviation as one that can be quantified to the extent possible and shall be taken into account in the evaluation and comparison of tenders.

The High Court in **Miscellaneous Civil Application No. 85 of 2018** considered what amounts to a minor deviation and determined as follows:

***"The term "acceptable tender" means any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document. A tender may be***



**regarded as acceptable, even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the tender documents or if it contains errors or oversights that can be corrected without touching on the substance of the tender. Any such deviation shall be quantified, to the extent possible, and appropriately taken account of in the evaluation of tenders. A tender shall be rejected if it is not acceptable....**

**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."**

It is clear from the foregoing case that a minor deviation (a) does not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the tender documents; (b) does not touch on the substance of the tender; and (c) can be quantified, to the extent possible, and appropriately taken account of in the evaluation of tenders.

It is also evident that a procuring entity cannot waive a mandatory requirement or term it as a "minor deviation" since a mandatory requirement is instrumental in determining the responsiveness of a tender and is a first hurdle that a tender must overcome in order to be considered for further evaluation.

This has further been emphasized by the High Court in **Miscellaneous Civil Application 140 of 2019 Republic v Public Procurement Administrative Review Board; Accounting Officer, Kenya Rural Roads Authority & 2 others (Interested Parties) Ex Parte Roben Aberdare (K) Ltd [2019] eKLR** where it held:

***"It is evident that compliance with the requirements for a valid tender process including terms and conditions set out in the bid documents, issued in accordance with the constitutional and legislative procurement framework, is thus legally required. These requirements are not merely internal prescripts that a bidder or the Respondent may disregard at whim. To hold otherwise would undermine the demands of equal treatment, transparency and efficiency under the Constitution. Mandatory requirements in bid document must***

***be complied with. Deviations from mandatory bid requirements should not be permissible.”***

Turning to the instant Request for Review, it is our considered view that a duly filled Form of Tender required under MR7 is one whereby a tenderer indicated its total price of the tender in words and figures indicating the various amounts and the respective currencies. This total price was the total cost transferred to the Form of Tender as tabulated under the Price Schedule 1 & 2 provided at pages 52 and 53 of the Tender Document. It is also our considered view that a duly filled Price Schedule required under MR8 is one whereby a tenderer has clearly indicated the currency of the unit price and currency of cost of items listed in the description box as this is the amount transferred to the Form of Tender.

Subsequently, we find that failure by the Applicant to correctly indicate the currency in USD under the Price Schedule so as to tally with the currency indicated in the Form of Tender is not an error of exchange rates and amounts to a material deviation that affects the substance of the Applicant's tender noting that it was a mandatory requirement for the Price Schedule to be duly filled, signed and stamped.

The Board has considered the Applicant's submission that the error on the issue the price indicated in the Price Schedule required a mere clarification to correct an obvious non-material error that would not have affected the tender price and notes that clarifications of issues by a procuring entity after

completion of evaluation of tenders is provided for under section 81 of the Act and reads:

***"(1) A procuring entity may, in writing request a clarification of a tender from tenderer to assist in the evaluation and comparison of tenders.***

***(2) A clarification shall not change the terms of the tender."***

In essence, a procuring entity may seek a clarification of a tender with the aim of assisting the evaluation committee in evaluation and comparison of tenders. We note that the High Court in **Republic vs. Public Procurement Administrative Review Board & Another Ex parte: Athi Water Service Board & Another [2017] eKLR** discussed the scope of the seeking clarifications and held:

***"Such clarification is however not a passport for the tenderer to change the terms of the tender. In my view a clarification cannot be equated to a confirmation of the procuring entity's view of the tenderer's bid. Where the procurement entity can ascertain the bid, there would be no need for the procuring entity to seek a clarification. However, the mere fact that the procuring entity seeks a clarification and a response is given does not bind the procuring entity to the purported clarification if the so-called clarification in fact amounted to change the terms of the tender."***

As such, where the terms of a Tender Document are clear, a procuring entity has no power to invoke the provisions of section 81 of the Act in order to validate a tender which, according to the requirements set out in the Tender Document, is non-responsive. In any event, seeking clarification is not mandatory under the Act as cited above.

Consequently, the Board finds that the Applicant failed to satisfy Mandatory Requirement No. 8 of Stage 1- Mandatory Requirements of Clause 2.2 Evaluation of Tenders Preliminary examination for Determination of Responsiveness at page 31 and 32 of the Tender Document and that the evaluation committee evaluated the Applicant's tender in the subject tender in accordance with provisions of section 80 of the Act and Article 227(1) of the Constitution.

**Whether the 2<sup>nd</sup> Respondent's Evaluation Committee committed an illegality during evaluation of the Interested Party's tender in the subject tender in accordance with Section 80 of the Act and Article 227(1) of the Constitution with respect to the Interested Party's Form of Tender.**

The Applicant has taken issue with the evaluation process of the Interested Party's bid in the subject tender and avers that the process of awarding the subject tender to the Interested Party lacked transparency, accountability and fairness and that the Respondents breached Articles 10, 47, and 227(1)

of the Constitution since they (a) failed to disclose at the Tender Opening stage that the Interested Party had submitted a Form of Tender and had in fact indicated in the Tender Opening Minutes that the Interested Party had not submitted a Form of Tender and (b) failed to disclose the contents of the Interested Party's Form of Tender during Tender Opening.

We have hereinabove noted that the objective of public procurement is to provide quality goods and services in a system that implements the principles specified in Article 227 of the Constitution. Additionally, Article 10 of the Constitution sets out National values and principles of governance which apply to State organs and public entities contracting for goods and services and reads in part:

***"(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—***

***(a) applies or interprets this Constitution;***

***(b) enacts, applies or interprets any law; or***

***(c) makes or implements public policy decisions.***

***(2) The national values and principles of governance include—***

***(a) .....***

***(b) .....***

***(c) good governance, integrity, transparency and accountability" [Emphasis ours].***

Article 47(1) of the Constitution provides:

***"(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."***

Section 3 of the Act further underpin good governance, integrity, transparency and accountability as key pillars in public procurement and asset disposal proceedings and provides as follows:

***"Public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of the Constitution and relevant legislation—***

***(a) the national values and principles provided for under Article 10;***

***(b) the equality and freedom from discrimination provided for under Article 27;***

***(c) affirmative action programmes provided for under Articles 55 and 56;***

***(d) principles of integrity under the Leadership and Integrity Act, 2012 (No. 19 of 2012);***

***(e) the principles of public finance under Article 201;***

***(f) the values and principles of public service as provided for under Article 232;***

***(g) principles governing the procurement profession, international norms;***

***(h) maximisation of value for money;***

***(i) promotion of local industry, sustainable development and protection of the environment; and***

***(j) promotion of citizen contractors.”***

In essence, efficient good governance in public procurement proceedings provides tenderers with an assurance that public procurement and asset disposal processes are operating effectively and efficiently and such processes are also underpinned by broader principles such as the rule of law, integrity, transparency and accountability amongst others.

Section 70 of the Act requires a procuring entity to use a standard tender document which contains sufficient information to allow for fair competition among tenderers. Section 70(3) reads as follows:

***“(3) The tender documents used by a procuring entity pursuant to subsection (2) shall contain sufficient information to allow fair competition among those who may wish to submit tenders.”***

Having carefully studied the Tender Document submitted to the Board as part of the confidential file pursuant to section 67(3)(e) of the Act, we note



that the 2<sup>nd</sup> Respondent indicated that it would use an e-procurement system to manage the tendering process in the subject tender. ITT 1.2(a) at page 27 of the Tender Document provide as follows:

<p><b>ITT Reference</b></p>	<p><b>Particulars Of Appendix To Instructions To Tenders</b></p>
<p><b>A. General</b></p>	
<p>..... .....</p>	<p>.....</p>
<p><b>ITT 1.2(a)</b></p>	<p><b>Electronic –Procurement System</b>  <b>The tender MUST be submitted through our e-procurement platform found at <a href="http://www.kengen.co.ke">www.kengen.co.ke</a> (<a href="https://eprocurement.kengen.co.ke:50001/irj/portal">https://eprocurement.kengen.co.ke:50001/irj/portal</a>)</b></p> <p><b>SUBMISSION OF TENDERS</b>  <b>For suppliers registering for the first time using the link.....</b></p> <p><b>It is a mandatory requirement that all documents are uploaded to the c-folder of the SRM System through the link <a href="https://eprocurement.kengen.co.ke:50001/irj/portal">https://eprocurement.kengen.co.ke:50001/irj/portal</a> 'Technical RFX response'. Responses documents attached to the 'notes and attachments' tab will not be considered for evaluation.</b></p>

	<p>.....</p> <p>.....</p> <p><b><i>Bidders to note that system challenges/support related to bid submission issues shall be addressed 48 hours before tender opening date and time.</i></b></p>
<p>.....</p> <p>.....</p>	<p>.....</p>

From the above ITT 1.2(a) at page 27 of the Tender Document, we note that it was a mandatory requirement for tenderers to upload their documents to the **C-folder of the SRM System** through the availed link and it was expressly stated that any responses **documents attached to the notes and attachments tab would not be considered for evaluation.** (emphasis ours)

The issue now in contest was whether the Interested Party complied with this requirement when uploading its Form of Tender in the subject tender.

The Respondents at paragraphs 10(b)-(h) of the Procuring Entity’s Memorandum of Response dated 31<sup>st</sup> March 2023 and paragraphs 16 to 22 of the Procuring Entity’s Affidavit Support of the Memorandum of Response sworn by John Theuri on 31<sup>st</sup> March 2023 contend that at the Tender Opening, the Tender Opening Committee could establish each tenderer’s Form of Tender without seeing it as the tender submission features of the

e-procurement system included a request box for filling the figures indicated in the Form of Tender.

It is the Respondent's case that the e-procurement portal has two tabs/folders through which tenderers could upload their tender being (a) the collaboration folder (the C-folder) and the Notes and Attachment folder. The Respondents contend that the Tender Opening Committee only accessed the C folder of the portal during tender opening and did not access the Notes and Attachment folder of the portal. They further contend that the Applicant's Form of Tender was on the C folder while the Interested Party's Form of Tender was not on the C folder hence the annotation in the Tender Opening Minutes to the effect that the Interested Party's Form of Tender was not attached.

The Respondents argue that this only meant that the document was not on the C folder of the portal and did not mean nor was it intended to be read as a final or definitive conclusion on the issue of submission of the Interested Party's Form of Tender because (a) the Evaluation Committee had access to all the tabs/folders of the portal and could open all documents submitted by all tenderers and confirm whether the Interested Party had uploaded a Form of Tender as part of its tender; and (b) the detailed perusal of documents uploaded by tenderers and making a definitive conclusion on the completeness of those documents were matters for the Evaluation Committee.

The Respondents submitted that the Evaluation Committee confirmed that the Interested Party submitted a Form of Tender through the Notes and Attachments folder of the portal on page 12 of its tender and during the online hearing, Counsel indicated that it was not clear why the Interested Party's documents did not fit into the C folder.

We note that the Respondents submitted to the Board as part of their confidential documents Tender Opening Details pursuant to Section 67(3)(e) of the Act which indicate in part as follows:

"....."

***Tender Opening Details***

<b><i>S1 No</i></b>	<b><i>Name of Firm</i></b>	<b><i>Amount</i></b>	<b><i>Curr</i></b>	<b><i>Bid Response</i></b>	<b><i>Tender Form Remarks</i></b>
<b><i>1</i></b>	<b><i>Thames Electricals Limited</i></b>	<b><i>59,832,892.80</i></b>	<b><i>KES</i></b>	<b><i>6000070991</i></b>	<b><i>NOT ATTACHED</i></b>
<b><i>2</i></b>	<b><i>ARM Engineering Co. Ltd</i></b>	<b><i>276,229.59</i></b>	<b><i>USD</i></b>	<b><i>6000070207</i></b>	<b><i>USD 276,229.59</i></b>

....."

The Board notes from the Evaluation Report submitted as part of the confidential documents by the Respondents pursuant to Section 67(3)(e) of the Act that details of the opened tenders were noted at page 1 of the Evaluation Report as follows:

**Table 2: Opening Prices**

<b>No</b>	<b>Name of Firm</b>	<b>Form of Tender Amount</b>	<b>KSH equivalent</b>	<b>Bid Bond (Yes/No)</b>	<b>Ranking as per Opening Price</b>
<b>1</b>	<b>Thames Electricals Ltd</b>	<b>59,832,892.80</b>	<b>59,832,892.80</b>	<b>Yes</b>	<b>2</b>
<b>2</b>	<b>ARM Engineering Co. Ltd</b>	<b>US\$276,229.59</b>	<b>34,320,725.49</b>	<b>Yes</b>	<b>1</b>

The question that arises is whether the Evaluation Committee usurped the role of the Tender Opening Committee in recording the total price quoted by the Interested Party in the Evaluation Report and committed an illegality in proceeding with evaluation of the Interested Party's tender.

This Board is cognizant of the provisions of section 78 of the Act on opening of tenders and notes that section 78 of the Act provides:

***(1) An accounting officer of a procuring entity shall appoint a tender opening committee specifically for the procurement in accordance with the following requirements and such other requirements as may be prescribed—***

***(a) the committee shall have at least three members; and***

***(b) at least one of the members shall not be directly involved in the processing or evaluation of the tenders.***

***(2) Any bid withdrawn in writing shall not be eligible for evaluation or consideration in the tender process.***

***(3) Immediately after the deadline for submitting tenders, the tender opening committee shall open all tenders received before that deadline.***

***(4) Those submitting tenders or their representatives may attend the opening of tenders.***

***(5) The tender opening committee shall assign an identification number to each tender and record the number of pages received.***

***(6) As each tender is opened, the following shall be read out loud and recorded in a document to be called the tender opening register—***

***(a) the name of the person submitting the tender; b) the total price, where applicable including any modifications or discounts received before the deadline for submitting tenders except as may be prescribed; and***

***(c) if applicable, what has been given as tender security.***

***(7) No tenderer shall be disqualified by the procuring entity during opening of tenders.***

***(8) The accounting officer of a procuring entity shall, on request, provide a copy of the tender opening register to a person submitting a tender.***

***(9) Each member of the tender opening committee shall—***

***(a) sign each tender on one or more pages as determined by the tender opening committee; and***

***(b) initial, in each tender, against the quotation of the price and any modifications or discounts, where applicable.***

***(10) The tender opening committee shall prepare tender opening minutes which shall set out—***

***(a) a record of the procedure followed in opening the tenders; and***

***(b) the particulars of those persons submitting tenders, or their representatives, who attended the opening of the tenders.***

***(11) To acknowledge that the minutes are true reflection of the proceedings held, each member of the tender opening committee shall—***

***(a) initial each page of the minutes;***

***(b) append his or her signature as well as initial to the final page of the minutes indicating their full name and designation.***

***(12) A person who causes the physical loss of tender documents provided for under this section commits an offence.***

In essence, it is the role of the Tender Opening Committee to open all tenders received by a procuring entity immediately after the tender submission deadline. Section 78 (6) and (10) of the Act sets out the procedure to be followed by members of a tender opening committee and stipulates that what is to be read out and recorded in a tender opening register is the name of the tenderer, the total price tendered where applicable including any modifications or discounts received before the tender submission deadline unless otherwise prescribed and if applicable what has been given as tender security. Additionally, the tender opening minutes sets out a record of the procedure followed at the opening of tenders and particulars of those persons submitting tenders, or representatives present at the tender opening.



The import of the above provisions is that a Tender Opening Committee is restricted to follow the procedure stipulated in section 78 (6) of the Act during opening of tenders and is required to record in the tender opening minutes the specific requirements set out section 78(10) of the Act. We are of the considered view that in opening submitted tenders in the subject tender, the Tender Opening Committee was guided by the provisions of ITT 1.2(a) at page 27 of the Tender Document and considered documents uploaded in the C folder of the 2<sup>nd</sup> Respondent's SRM System in reading out and recording the total price of tenders submitted by the Applicant and the Interested Party. If it is true that the Tender Evaluation Committee could establish the price quoted without seeing the Form of Tender as claimed by the Respondents at paragraph 10(b) of their Memorandum of Response, then the same ought to have first been read out and recorded in compliance with section 78(6) of the Act. In this regard therefore, we find that the procedure for recording the opening prices as stipulated in Table 2: Opening Prices at page 1 of the Evaluation Report recorded by the Evaluation Committee was unlawful and usurped the role of the Tender Opening Committee, as well as acting contrary to the Mandatory provisions of the Tender Document in regard to where the Form of Tender was to be located. Transparency would dictate that all tender prices in the subject tender were read out and recorded at the Tender Opening by the Tender Opening Committee as provided for under section 78 of the Act.

We are cognizant of the fact that section 78(7) of the Act stipulates that no tenderer shall be disqualified by the procuring entity during opening of

tenders. Evaluation of tenders is a role given to an Evaluation Committee established pursuant to section 46 of the Act.

The question that begs to be answered is whether the 2<sup>nd</sup> Respondent was justified to proceed to consider and evaluate the Interested Party's tender noting that it had failed to avail its Form of Tender in the C Folder and instead uploaded the same in the Notes and Attachment folder.

ITT 1.2(a) at page 27 of the Tender Document provided that it was a mandatory requirement for all documents submitted by tenderers to be uploaded to the C folder of the SRM System and that responses documents attached to the notes and attachments tab would not be considered for evaluation. Further, system challenges/support related to tender submission issues would be addressed 48 hours before the tender opening date and time. We have carefully perused the confidential file submitted by the Respondents pursuant to section 67(3)(e) of the Act and note that there is no correspondence or clarification sought by the Interested Party on any challenge or difficulty faced while uploading its documents more so on the C folder. Neither is there any correspondence addressing any system challenge related to submission of tenders by the Interested Party to justify uploading its Form of Tender in the notes and attachments tab yet it was a mandatory provision that responses documents attached to the notes and attachments ab would not be considered for evaluation. If the 2<sup>nd</sup> Respondent intended for documents uploaded in the notes and attachments tab to be evaluated, then such provision in ITT 1.2(a) at page 27 of the Tender Document would

not have been included. The Interested Party had an opportunity in these proceedings to speak to the omission to Comply with the stated mandatory requirement but did not do so in any form. It is to be noted that the said party was represented by counsel who elected not to make any submissions. The Respondent cannot fill in the gap to try and explain the omission as has been attempted.

The High Court in Misc. Application No. 60 of 2020 pronounced itself on what procuring entities should consider in evaluation of tenders and held as follows:

**"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].

From the above case law, it is clear that a procuring entity only consider a conforming, compliant and responsive a tender and such tender ought to have complied with all aspects of the invitation to tender supplied by the procuring entity and met all requirements set out in the Tender Document since failure to comply with tender conditions defeats the underlying purpose of supplying information to tenderers for preparation and submission of tenders. A procuring entity is also expected to comply with its own tender conditions.

Turning to the circumstances of the instant Request for Review, for the Interested Party’s tender to have been considered as compliant and responsive, the Interested Party ought to have submitted its Form of Tender in the required C folder for consideration, noting that it was a mandatory requirement for the Form of Tender to be submitted in the C folder and that the Tender Document specifically stated that any document submitted in the notes and attachment tab would not be considered.

Having the above in mind, the principles of transparency, accountability and fairness envisioned under Articles 10 and 227(1) of the Constitution read with section 3,78, and 80 of the Act and provisions of the Tender Document would dictate that the 2<sup>nd</sup> Respondent would not consider and evaluate the

Interested Party's Tender and Form of Tender submitted in the notes and attachments tab.

We find that the Evaluation Committee adopted a wrong approach in admitting the Interested Party's Form of Tender from the notes and attachment tab and proceeding with evaluating and awarding the subject tender to the Interested Party yet the Interested Party had failed to adhere to the mandatory requirement stipulated in ITT1.2(a) at page 27 of the Tender Document. Accordingly, we find that the Interested Party's tender did not satisfy the criterion under ITT 1.2(a) at page 27 of the Tender Document and was therefore not qualified for further evaluation at the Technical stage or for award of the subject tender.

The Board is guided by the holding in **Zachariah Wagunza & Another vs. Office of the Registrar Academic Kenyatta University & 2 Others [2013] eKLR** where the High Court held that:

***"Concerning irrelevant considerations, where a body takes account of irrelevant considerations, any decision arrived at becomes unlawful. Unlawful behavior might be constituted by (i) an outright refusal to consider the relevant matter; (ii) a misdirection on a point of law; (iii) taking into account some wholly irrelevant or extraneous consideration; and (iv) wholly omitting to take into account a relevant consideration."***

Bearing in mind the requirements in the Tender Document and the observations drawn above, it is our considered view that the Interested Party's tender did not satisfy the mandatory requirement set out at ITT 1.2 (a) at page 27 of the Tender Document to warrant it to qualify for Technical evaluation and award of the subject tender and ought to have been rendered non-responsive at the Preliminary Evaluation stage.

**Whether the letter of notification of regret dated 13<sup>th</sup> March 2023 issued to the Applicant complied with the provisions of Section 87 of the Act and Regulation 82 of Regulations 2020**

Section 87 of the Act is instructive on how Notification of the outcome of evaluation of the successful and unsuccessful tenderers should be conducted by a procuring entity and provides as follows:

***"87. Notification of intention to enter into a contract***

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

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

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

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

Section 87 of the Act recognizes that notification of the outcome of evaluation of a tender is made in writing by an accounting officer of a procuring entity. Further, the notification of the outcome of evaluation ought to be done simultaneously to the successful tenderer(s) and the unsuccessful tenderer(s). A disclosure of who is evaluated as the successful tenderer is made to the unsuccessful tenderer with reasons thereof in the same notification of the outcome of evaluation.

The procedure for notification under Section 87(3) of the Act is explained by Regulation 82 of Regulations 2020 which provides as follows:

***"82. Notification of intention to enter into a contract***

***(1) The notification to the unsuccessful bidder under Section 87(3) of the Act, shall be in writing and shall be made at the same time the successful bidder is notified.***

- (2) For greater certainty, the reason to be disclosed to the unsuccessful bidder shall only relate to their respective bids.**
- (3) The notification in this regulation shall include the name of the successful bidder, the tender price and the reason why the bid was successful in accordance with Section 86(1) of the Act.”**

Turning to the circumstances of the instant Request for Review, the Board heard submissions from the 2<sup>nd</sup> Respondent that neither the Act nor Regulations forbid accounting officers of procuring entities from delegating the signing of a notification letter and any decision to the contrary would significantly impair the efficient and effective functioning of procuring entities.

The Board has carefully studied the letter of notification of regret dated 13<sup>th</sup> March 2023 notifying the Applicant of its unsuccessfulness in the subject tender and notes that the said letter was signed by Mr. Philip Yego, General Manager, Supply Chain for the 2<sup>nd</sup> Respondent. We also observe that Mr. Philip Yego, General Manager, Supply Chain for the 2<sup>nd</sup> Respondent also signed off the Letter of Notification of Award to the Interested Party. The Board also notes that the same officer signed off the letters appointing the Tender Opening Committee and the Evaluation Committee.



We have further examined the 2<sup>nd</sup> Respondent's confidential file and observes therein no letter, memo or instrument therein issued by the 1<sup>st</sup> Respondent, specifically delegating responsibility to Mr. Philip Yego, General Manager, Supply Chain to sign and issue letters in respect of this tender and specifically letters of notification of the outcome of bids to all bidders, with respect to the subject tender.

The Board is cognizant of the provisions of section 69 of the Act on procurement approvals and delegation of responsibility which reads:

***"(1) All approvals relating to any procedures in procurement shall be in writing and properly dated, documented and filed.***

***(2) No procurement approval shall be made to operate retrospectively to any date earlier than the date on which it is made except on procurements in response to an urgent need.***

***(3) In approving procurements relating to an urgent need, the accounting officer shall be furnished with adequate evidence to verify the emergency.***

***(4) No procurement approval shall be made by a person exercising delegated authority as an accounting officer or head of the procurement function unless such delegation has been approved in writing by the accounting officer or the head of the procurement unit, respectively.***

***(5) An accounting officer of a procuring entity shall maintain specimen signatures of all persons authorised to make approvals within the procurement process and these***

***signatures shall be availed to all staff and members where applicable.***

***(6) Responsibility for each approval made in the procurement procedure shall rest with the individual signatories and accounting officer, whether he or she delegated the authority or not."***

In essence, no procurement approval shall be made by a person exercising delegated authority as an accounting officer unless such delegation has been approved in writing by the accounting officer of a procuring entity.

Section 87 of the Act read with Regulation 82 of Regulations 2020 clearly stipulates that the accounting officer of a procuring entity issues notification letters in writing to successful and unsuccessful bidders. As to whether an accounting officer can delegate his authority to issue notification letters, this Board in **PPARB Application No. 9 of 2020 Internet Solutions (K) Limited v. Kenya Airports Authority** stated as follows:

***"As regards the question whether an accounting officer can delegate his authority to issue notification letters, section 37 of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya, provides that: -***

*Where by or under an Act, powers are conferred or duties are imposed upon a Minister or a public officer, the President, in the case of a Minister, or the Minister, in the case of a public officer, may direct that, if from any cause the office of that Minister or public officer is vacant, or if during any period, owing to absence*

*or inability to act from illness or any other cause, the Minister or public officer is unable to exercise the powers or perform the duties of his office, those powers shall be had and may be exercised and those duties shall be performed by a Minister designated by the President or by a person named by, or by the public officer holding an office designated by, the Minister; and thereupon the Minister, or the person or public officer, during that period, shall have and may exercise those powers and shall perform those duties, subject to such conditions, exceptions and qualifications as the President or the Minister may direct.*

***The above provision specifies that a public officer, such as the Accounting Officer herein, may delegate his authority because of inability to act in certain circumstances, However, in exercise of his functions as a public officer, the Accounting Officer is bound by principles of leadership and integrity under the Constitution and other legislation. Article 10 (2) (c) of the Constitution outlined national values and principles of governance that bid all State officers and public officers including "good governance, integrity, transparency and accountability". Article 232 (1) (e) of the Act puts it more strictly, that "the values and principles of public service include accountability for administrative acts.***

***Section 5 of the Public Service (Values and Principles) Act No 1 A of 2015 requires public officers to maintain high standards of professional ethics in that: -***

*(1) Every public officer shall maintain high standards of professional ethics*

*(2) For the purposes of subsection (1), a public officer maintains high standards of professional ethics if that public officer*

*(a).....;*

*(b) .....*

*(c) is transparent when executing that officer's functions;*

*(d) can account for that officer's actions;*

*(e) .....*

*(f) .....*

*(g) .....*; and

*(h) observes the rule of law.*

***From the above provisions, the Board notes that the Accounting Officer has the obligation to maintain high standards of professional ethics as he is held accountable for administrative acts, whether performed personally or through delegated authority.***

***The above provisions demonstrate that the Accounting Officer has power to delegate his authority, but he must still remain accountable for acts performed by persons to whom he has delegated authority to act on his behalf. In order to observe the national values and principles of governance, it is more efficient for an accounting officer to specify the tender for which the delegated authority is given to avoid instances where such authority is exercised contrary to the manner in***

***which he had specified. The person to whom the authority is delegated may use such delegated authority to undermine the Accounting Officer.***

***The Constitution and the aforementioned legislation gives responsibilities to all persons in the public service including the Procuring Entity's Accounting Officer to take necessary steps to ensure that his authority, when delegated, is specific, is given in writing and not open to misuse contrary to the manner he had specified.***

***It is the Board's finding that to achieve the underlying principles and national values of governance, the delegated authority by an accounting officer must be in writing and specific to a particular tender to avoid instances where such authority is exercised contrary to the manner in which he had specified, thus undermining the accounting officer."***

From the above excerpt, it is clear that an accounting officer of a procuring entity may delegate his/her authority to nominate Tender Opening and Evaluation Committees or to issue letters of notification to successful and unsuccessful bidders alike due to his/her inability to act in certain circumstances. Nevertheless, as a public officer, an accounting officer is bound by principles of leadership and integrity under the Constitution and other relevant legislation cited hereinabove and therefore remains

accountable for acts performed by persons to whom he has delegated authority to act on his behalf.

Moreover, in order to ensure that any delegated authority is not exercised in order to undermine an accounting officer, it is necessary for the delegated authority to be in writing and specific, in that the accounting officer should specify the tender for which the delegated authority is given and the exact acts to be undertaken, as such delegated authority may be prone to abuse and exercised contrary to the manner in which the accounting officer had specified.

In the circumstances, the 2<sup>nd</sup> Respondent failed to demonstrate that the 1<sup>st</sup> Respondent expressly delegated his authority in writing, to sign and issue notification letters to bidders as provided for under section 87 of the Act, to Mr. Philip Yego, General Manager, Supply Chain. It is therefore the finding of this Board that Mr. Philip Yego, General Manager, Supply Chain who signed notification letters on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents acted without authority, since there is no evidence before the Board demonstrating that the 1<sup>st</sup> Respondent expressly delegated such authority to him. As such, the letters of notification dated 13<sup>th</sup> March 2023 issued to the Applicant and the Interested Party **did not** meet the threshold required in Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020 and are hereby null and void.

## **What orders should the Board grant in the circumstances?**

We have established that the Board has jurisdiction to hear and determine the instant Request for Review having been filed in good time

We have found that the Applicant failed to satisfy Mandatory Requirement No. 8 of Stage 1- Mandatory Requirements of Clause 2.2 Evaluation of Tenders Preliminary examination for Determination of Responsiveness at page 31 and 32 of the Tender Document and that the evaluation committee evaluated the Applicant's tender in the subject tender in accordance with provisions of section 80 of the Act and Article 227(1) of the Constitution.

We have also found that the Interested Party's tender did not satisfy the mandatory requirement set out at ITT 1.2(a) at page 27 of the Tender Document and was not properly evaluated by the Evaluation Committee hence any action undertaken thereafter emanating from an unlawful evaluation cannot be allowed to stand because such actions are consequently null and void.

We have found that there is no written proof of delegation of power to sign off the notification letters dated 13<sup>th</sup> March 2023. Consequently, the Board deems it fit to nullify the Letters of Notification of Intention to Award Contract in the subject tender issued to the Interested Party and to the Applicant dated 13<sup>th</sup> March 2023, to enable all tenderers be notified of the outcome of their tenders in accordance with Section 87 of the Act read with Regulation 82 of regulations 2020.

In determining the appropriate orders to grant in the circumstances, the Board is cognizant of section 173 (b) of the Act, which states that:

***"Upon completing a review, the Review Board may do any one or more of the following-***

***(a).....;***

***(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***

***....."***

Having considered the findings above, we observe that an appropriate relief in the circumstances ought to be one that ensures that the public can still benefit from the services the 2<sup>nd</sup> Respondent sought to procure through the subject tender noting the Board’s specific findings above in the subject tender.

In totality of the foregoing, the Board issues the following specific orders:

**FINAL ORDERS**

In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review dated 27<sup>th</sup> March 2023:



- 1. The Letter of Notification of Award dated 13<sup>th</sup> March 2023 issued to the Interested Party with respect to Tender No. KGN-HYD-048-2022 for Design, Manufacture, Factory Testing, Supply, Delivery, Installation, Testing and Commissioning of a Single-Core 1000Mm<sup>2</sup> Copper XLPE 15 KV Power Cable for Kiambere Unit I Generator, be and is hereby nullified and set aside.**
  
- 2. The Letter of Notification of Regret dated 13<sup>th</sup> March 2023 issued by the 1<sup>st</sup> Respondent with respect to Tender No. KGN-HYD-048-2022 for Design, Manufacture, Factory Testing, Supply, Delivery, Installation, Testing and Commissioning of a Single-Core 1000Mm<sup>2</sup> Copper XLPE 15 KV Power Cable for Kiambere Unit I Generator, be and is hereby nullified and set aside.**
  
- 3. The 1<sup>st</sup> Respondent in view of the findings above, is at liberty to take such action as shall be necessary to meet the needs for the Design, Manufacture, Factory Testing, Supply, Delivery, Installation, Testing and Commissioning of a Single-Core 1000Mm<sup>2</sup> Copper XLPE 15 KV Power Cable for Kiambere Unit I Generator, in accordance with the Constitution, the Act and Regulations 2020.**

**4. Given our findings herein, each party shall bear its own costs in the Request for Review.**

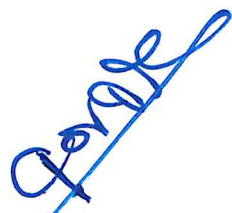
**Dated and signed at Nairobi this 17<sup>th</sup> Day of April 2023.**



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**VICE-CHAIRPERSON**

**PPARB**



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**SECRETARY**

**PPARB**