

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 23/2023 OF 13<sup>TH</sup> APRIL 2023**

**BETWEEN**

**APEX PROJECTS LIMITED ..... APPLICANT**

**AND**

**KENYA MEAT COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**THE ACCOUNTING OFFICER,**

**KENYA MEAT COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**TML GROUP LIMITED ..... 3<sup>RD</sup> RESPONDENT**

Review against the decision of the Managing Commissioner, Kenya Meat Commission in relation to Tender No. KMC/IOT/CL/11677/2022 for Procurement of Supply, Installation, Testing and Commissioning of Canning Lane.

**BOARD MEMBERS PRESENT**

- |                          |   |             |
|--------------------------|---|-------------|
| 1. Ms. Faith Waigwa      | - | Chairperson |
| 2. Eng. Mbiu Kimani, OGW | - | Member      |
| 3. Mrs. Irene Kashindi   | - | Member      |

## **IN ATTENDANCE**

Ms. Sarah Ayoo

- Secretariat

## **PRESENT BY INVITATION**

### **APPLICANT**

1. Mr. Kamuiru

### **APEX PROJECTS LIMITED**

-Advocate, Kamuiru Muibi & Co.  
Advocates

2. Eng. Tom Waiharo

- Managing Director, Apex Projects  
Limited

### **1<sup>ST</sup> and 2<sup>ND</sup> RESPONDENTS**

### **KENYA MEAT COMMISSION & THE ACCOUNTING OFFICER, KENYA MEAT COMMISSION**

1. Mr. Anthony Ademba

-Advocate & Head, Legal Affairs &  
Company Secretary

2. Mr. Joakim Boli

- Acting Supply Chain Manager, Kenya  
Meat Commission

### **3<sup>RD</sup> RESPONDENT**

### **TML GROUP LIMITED**

1. Mr. Mukele

-Advocate, Mukele Ngacho & Co.  
Advocates

2. Mr. Ali

- Managing Director, TML Group  
Limited

## **BACKGROUND OF THE DECISION**

### **The Tendering Process**

Kenya Meat Commission, the Procuring Entity and the 1<sup>st</sup> Respondent herein, invited sealed tenders from qualified and interested tenderers in response to Tender No. KMC/IOT/CL/11677/2022 for Procurement of Supply, Installation, Testing and Commissioning of Canning Lane. (hereinafter referred to as the "subject tender") by way of open competitive tendering (National/International). The invitation was by way of an advertisement in MyGov Newspaper on 22<sup>nd</sup> November 2022, the 2<sup>nd</sup> Respondent's website [www.kenyameat.co.ke](http://www.kenyameat.co.ke) and on [www.government.co.ke](http://www.government.co.ke).

A pre-tender conference was slated to be held on Tuesday, 29<sup>th</sup> November 2022 at 10:00 HRS EST at the 1<sup>st</sup> Respondent's boardroom. Additionally, a pre-arranged pretender visit of the site of works was slated to be held on Tuesday, 29<sup>th</sup> November 2022 at 10:00 HRS EST at the 1<sup>st</sup> Respondent's site at Athi River. The subject tender's submission deadline was initially scheduled on Thursday, 22<sup>nd</sup> December 2022 at 11:00 HRS EST.

### **Addendum**

The 1<sup>st</sup> Respondent issued an addendum dated 20<sup>th</sup> December 2022 amending the post qualification and contract award criteria on the minimum average annual construction turnover while extending the subject tender's submission deadline to Thursday, 19<sup>th</sup> January 2023 at 11:00 HRS EST.

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

According to the Tender Opening Minutes signed by members of the Tender Opening Committee on 19<sup>th</sup> January 2023 and submitted to the Public Procurement Administrative Review Board (hereinafter referred to as the "Board") by the 2<sup>nd</sup> Respondent pursuant to Section 67(3)(e) of the Public Procurement Asset and Disposal Act, 2015 (hereinafter referred to as the "Act"), a total of eight (8) tenderers submitted their tenders. However, one (1) tender was not opened as members of the Tender Opening Committee witnessed that the said tender was dropped late and it was unanimously agreed that the said tender be returned without being opened.

Subsequently, seven (7) tenders were opened in the presence of tenderers' representatives who attended the tender opening session 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.	Mushimi Limited
2.	TML Group Limited

3.	Apex Project Limited
4.	CUMA Refrigeration
5.	SAMKYO Investment
6.	JV- AL HUDHA
7.	Biometric Tech Limited

**Evaluation of Tenders**

A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 2<sup>nd</sup> Respondent undertook evaluation of the seven (7) tenders as captured in an Evaluation Report dated 6<sup>th</sup> February 2023 but signed by members of the Evaluation Committee on 5<sup>th</sup> April 2023 (hereinafter referred to as the "Evaluation Report" and which was submitted to the Board pursuant to Section 67(3)(e) of the Act) in the following stages:

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

**Preliminary Evaluation**

The Evaluation Committee was required to carry out Preliminary Evaluation and examine tenders for responsiveness and completeness using the criteria set out in Clause 2 Preliminary examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 24 of the blank tender document issued to prospective tenderers by the 1<sup>st</sup> Respondent (hereinafter referred to as "the Tender Document").

At the end of evaluation at this stage, the Applicant's tender, was determined non-responsive for failure to attach NCA certificate while the remaining six (6) tenders were considered responsive and proceeded to Technical Evaluation.

### **Technical Evaluation**

At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Clause 3.1 Technical Evaluation of Section III- Evaluation and Qualification Criteria at page 25 of the Tender Document. Tenders were required to attain a pass mark of 20 out of 40 marks to proceed to Economic Evaluation.

At the end of evaluation at this stage, one (1) tender was determined non-responsive while five (5) tenderers were rendered responsive and proceeded to Economic Evaluation.

### **Economic Evaluation**

At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Clause 3.2 Economic Evaluation of Section III- Evaluation and Qualification Criteria at page 25 to 26 of the Tender Document.

Upon completion of evaluation of the subject tender as can be discerned from page 7 to 15 of the Evaluation Report, the 3<sup>rd</sup> Respondent was determined to be technically and financially qualified to Supply, Deliver, Install and Commission "HEMA BRAND" Canning Line Machines according to

the 1<sup>st</sup> Respondent's specifications at a total cost of Euro 1,571,000.00 + Kshs. 7,034,620 = Kshs. 212,348,610.00

### **Evaluation Committee's Recommendation**

The Evaluation Committee recommended award of the subject tender to the 3<sup>rd</sup> Respondent for being technically and financially qualified to Supply, Deliver, Install and Commission "HEMA BRAND" Canning Line Machines according to the 1<sup>st</sup> Respondent's specifications at a total cost of Euro 1,571,000.00 + Kshs. 7,034,620 = Kshs.212,348,610.00

### **Professional Opinion**

In a Professional Opinion dated 5<sup>th</sup> April 2023 (hereinafter referred to as the "Professional Opinion" which was submitted to the Board pursuant to Section 67(3)(e) of the Act), the Supply Chain Manager, Mr. Joakim Boli, 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 while making recommendation to conduct due diligence and negotiations before entering into a contract with the successful tenderer.

Thereafter, the 2<sup>nd</sup> Respondent herein, approved the Professional Opinion on 5<sup>th</sup> April 2023.

### **Notification to Tenderers**

Tenderers were notified of the outcome of evaluation of the subject tender vide letters of Notification of Intention to Award dated 6<sup>th</sup> April 2023 signed by the 2<sup>nd</sup> Respondent.

### **REQUEST FOR REVIEW APPLICATION NO. 23 OF 2023**

On 13<sup>th</sup> April 2023, the Applicant herein, filed a Request for Review dated 12<sup>th</sup> April 2023 together with a Supporting Statement signed by Eng. Tom Waiharo Njoroge, its Managing Director, and dated 12<sup>th</sup> April 2023 through the firm of Kamuiru Muibi & Co. Advocates seeking the following orders from the Board in verbatim:

- A. That this Honorable Administrative Review Board be pleased to quash the decision by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents dated 6<sup>th</sup> April 2023.***
  
- B. That this Honorable Administrative Review Board be pleased to order a fresh valuation of all eligible tenders that met the mandatory requirements.***
  
- C. That this Honorable Administrative Review Board be pleased to order the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to disband the Tender Review Committee that arrived at the said decision in (A.) above and immediately form a new Committee in a bid to ensure transparency, efficiency and regularity in the subsequent decision process.***



***D. That this Honorable Administrative Review Board be pleased to make orders as to costs and incidental expenses***

In a Notification of Appeal and a letter dated 13<sup>th</sup> April 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 13<sup>th</sup> April 2023.

Vide a letter dated 19<sup>th</sup> April 2023, the Acting Board Secretary notified the 1<sup>st</sup> and 2<sup>nd</sup> Respondent that the five (5) days within which the Respondents were required to submit their response had lapsed on 18<sup>th</sup> April 2023 and requested the Respondents to submit their response to the Request for Review together with confidential documents concerning the subject tender while bringing to their attention the provisions of Regulation 205 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "Regulations 2020").

On 24<sup>th</sup> April 2023, the Acting Supply Chain Manager, Mr. Joakim Boli, on behalf of the 1<sup>st</sup> Respondent sent via email to the Board Secretariat, a list and contacts of tenderers in the subject tender.

Vide letters dated 24<sup>th</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 24<sup>th</sup> April 2023.

Vide a Hearing Notice dated 24<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 27<sup>th</sup> April 2023 at 12:00 noon, through the link availed in the said Hearing Notice.

On 25<sup>th</sup> April 2023, the Acting Supply Chain Manager, Mr. Joakim Boli, on behalf of the 1<sup>st</sup> Respondent sent via email to the Board Secretariat, soft copies of part of the confidential documents pursuant to section 67(3)(e) of the Act.

On 27<sup>th</sup> April 2023, in opposition to the Request for Review, the Respondents, through Anthony Ademba, Advocate, filed a Memorandum of Appearance dated 24<sup>th</sup> April 2023, a First and Second Respondents Memorandum of Response dated 24<sup>th</sup> April 2023 (hereinafter referred to as “the 1<sup>st</sup> and 2<sup>nd</sup> Respondents’ Memorandum of Response”) and a Replying Affidavit sworn by Joakim Boli, on 24<sup>th</sup> April 2023 (hereinafter referred to as “the 1<sup>st</sup> and 2<sup>nd</sup> Respondents’ Replying Affidavit”) together with confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

On 27<sup>th</sup> April 2023, the 3<sup>rd</sup> Respondent in opposition to the Request for Review filed, through Mukele Ngacho & Company Advocates, a Notice of Appointment of Advocates dated 26<sup>th</sup> April 2023 and a Replying Affidavit sworn by Alli Abdille Hamed on 27<sup>th</sup> April 2023 (hereinafter referred to as “the 3<sup>rd</sup> Respondent’s Replying Affidavit”)

Ms. Wanjiru holding brief for Mr. Kamuiru Advocate for the Applicant applied for an adjournment on the basis that the Applicant had just been served with the Respondents’ Response and needs to go through the same with a view of filing a Further Affidavit together with Written Submissions in the matter.

Mr. Alli, the Managing Director of the 3<sup>rd</sup> Respondent, joined the online hearing and upon noting that the 3<sup>rd</sup> Respondent’s counsel was not present, requested for more time to find an alternative counsel to represent the 3<sup>rd</sup>

Respondent in the instant Request for Review since he was not in a position to understand the legal issues in the instant Request for Review.

Mr. Anthony Ademba Advocate for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not oppose the application for adjournment by the Applicant but prayed for leave to file a Further Reply in the event any new issues were raised by the Applicant. On enquiry by the Board, Ms. Wanjiru confirmed that the Applicant would only be filing its Rejoinder to issues raised by the Respondents.

The Board having heard parties' submissions on the Applicant's and 3<sup>rd</sup> Respondent's application for adjournment, allowed the same while directing that the (a) Applicant, if need be, files and serves all parties its Further Affidavit and Written Submissions via email and serve all parties via email by close of day on 27<sup>th</sup> April 2023; (b) 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent file and serve their respective Written Submissions by 12:00 noon on 28<sup>th</sup> April 2023; and (c) Applicant and 3<sup>rd</sup> Respondent to equally share and pay the day's adjournment fee of Kshs. 10,000/= before the next hearing of the instant Request for Review.

Accordingly, the Board stood over the hearing of the instant Request for Review to 4:30 p.m. on Friday, 28<sup>th</sup> April 2023.

On 28<sup>th</sup> April 2023, the Applicant filed a Further Affidavit signed by Eng. Tom Waiharo on 27<sup>th</sup> April 2023 together with Applicant's Written Submissions dated 27<sup>th</sup> April 2023.

On 28<sup>th</sup> April 2023, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed Written Submissions dated 28<sup>th</sup> April 2023.

On 28<sup>th</sup> April 2023, the 3<sup>rd</sup> Respondent filed 3<sup>rd</sup> Respondent's Written Submissions in Objection to the Request for Review dated 12<sup>th</sup> April 2023, dated 28<sup>th</sup> April 2023.

## **PARTIES' SUBMISSIONS**

### **Applicant's Submissions**

In his submissions, Counsel for the Applicant, Mr. Kamuiru, relied on the Applicant's Request for Review dated 12<sup>th</sup> April 2023, Supporting Statement signed by Eng. Tom Waiharo dated 12<sup>th</sup> April 2023, Further Affidavit signed and commissioned on 27<sup>th</sup> April 2023 and Written Submissions dated 27<sup>th</sup> April 2023 that were all filed before the Board.

Mr. Kamuiru submitted that the tendering process was flawed as enumerated in the grounds in support of the Request for Review. He further submitted that the documents supplied to the Applicant were doctored to favour the 3<sup>rd</sup> Respondent and referred to Annexure No. 9 availed by the 1<sup>st</sup> Respondent which had the Tender No. as KMC/IOT/010627/2022-2023 yet the advertised

Tender No. was KMC/IOT/CL11677/2022. Counsel argued that this proved that the documents availed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were doctored.

Mr. Kamuiru referred the Board to Annexure No. 9 of the 1<sup>st</sup> Respondent which stated on the first page that the subject tender was restricted yet in the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's Replying Affidavit, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had confirmed that the subject tender was open.

Counsel further referred the Board to Annexure No. 5 of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent which he argued had a different letter of appointment of Committee. He submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents alleged that the Applicant did not meet conditions laid out in the subject tender and referred to Annexure No. 9 which he argued contradicted Annexure No. 10 in terms of reasons for disqualification of the Applicant with an aim of favoring the 3<sup>rd</sup> Respondent.

Mr. Kamuiru submitted that the Tender Document had provided a mandatory requirement for tenderers to attend a mandatory site visit on 29<sup>th</sup> November 2023 and that from the 1<sup>st</sup> Respondent's Annexure No. 12, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents confirmed that the 3<sup>rd</sup> Respondent did not attend the mandatory site visit and instead provided a doctored report indicating that the 3<sup>rd</sup> Respondent attended the site visit on 8<sup>th</sup> December 2022.

Mr. Kamuiru further submitted that the Applicant had been provided with several evaluation reports with the 1<sup>st</sup> Evaluation Report attached as Annexure No. 10 signed on 19<sup>th</sup> April 2023 by the Acting Supply Chain Manager; the 2<sup>nd</sup> Evaluation Report attached as Annexure No. 5 dated 6<sup>th</sup> February 2023 by the Evaluation Committee on 5<sup>th</sup> April 2023 and; a report indicated as Annexure No. 7 comprising a Technical Report and Preliminary Report signed on 17<sup>th</sup> February 2023. Counsel pointed out that the report annexed as KMC 7 indicated that the Applicant was disqualified for failure to attach NCA certificates yet all other reports gave different reasons as to why the Applicant was disqualified meaning that there was no consistency on the reasons for disqualification of the Applicant.

Counsel submitted that evaluation of the subject tender ought to have been closed within a period of 30 days and the 1<sup>st</sup> Respondent insisted that evaluation was concluded within the 30 days which begs the question why the Evaluation Report marked as Annexure No. 10 was signed on 19<sup>th</sup> April 2023. He further pointed out to a clarification letter dated 16<sup>th</sup> March 2023 marked as Annexure No. 8 and questioned the need for clarifications if evaluation was closed. Counsel argued that this was a confirmation that whatever was annexed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were doctored reports and documents.

Upon enquiry by the Board on how the Applicant accessed the evaluation reports referred to by Mr. Kamuiru and if these were summaries of the Evaluation Report, Mr. Kamuiru submitted that they were availed by the 1<sup>st</sup>

and 2<sup>nd</sup> Respondents in the Replying Affidavit. Upon further enquiry on whether the Applicant's letter of Notification of Intention to Award had other reasons for disqualification other than failure to submit the NCA certificate, and if so what was the Applicant's position on the other reasons, if they were part of the Tender Document, and whether the Applicant had complied, Counsel submitted that the Applicant had complied with all the conditions it was supposedly disqualified on and particularly on the allegation that the Applicant had not met the qualification of a joint venture and was not a manufacturer of the canning, Counsel submitted that this was not a pre-condition in the Tender Document.

With regard to the issue of the Applicant's NCA certificate provided by the Applicant through a sub-contractor, the Board enquired on whether there was any provision in the Tender Document providing for submission of such a document through a sub-contractor, Counsel submitted that sub-contracting was allowed.

With regard to the allegation of Annexures No. 10 and 7 contradicting, the Board enquired whether the two were both Evaluation Reports or one was an Evaluation Report and the other a Professional Opinion, Counsel submitted that Annexure No. KM7 was an Evaluation Report and Annexure No. 10 was marked as Preliminary Evaluation.

### **1<sup>st</sup> and 2<sup>nd</sup> Respondents' submissions**



Counsel for the Respondents, Mr. Anthony Ademba, relied on the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Memorandum of Response, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Replying Affidavit, Written Submissions together with confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

Mr. Ademba submitted that the evaluation conducted by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in the subject tender was in line with the Tender Document and provisions of the Act. He further submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents advertised the subject tender, tenders were submitted and a site visit conducted prior to opening of tenders.

Mr. Ademba submitted that the Applicant and the 3<sup>rd</sup> Respondent attended the site visit and subsequently, evaluation of the subject tender commenced through the preliminary stage when the Applicant was disqualified due to reasons stated in the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's Replying Affidavit. He further submitted that one of the reasons for disqualification of the Applicant was failure to submit the NCA certificates since the Applicant being the tenderer failed to avail the required NCA certificate. Counsel indicated that the other reasons for disqualification were listed in the letter of Notification of Intention to Award transmitted to the Applicant on 6<sup>th</sup> April 2023 and at paragraph 15 of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's Replying Affidavit and included *inter alia* failure to include in its tender list of spare parts separately as required by the Tender Document.

Mr. Ademba submitted that in regard to the other issues raised by the Applicant, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents categorically denied the same and submitted that evaluation was conducted within the 30 days' statutory timelines. He further submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents sought clarifications from tenderers and sought to conduct due diligence fully complying with statutory timelines.

In response to the allegation by the Applicant that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not avail to the Applicant the signed Technical Evaluation Minutes, Counsel submitted that the Applicant never requested for the said Minutes and referred to Annexure KMC 11 being a letter from the Applicant which Counsel indicated did not contain any specific request with regard to the Technical Evaluation Minutes.

Mr. Ademba submitted that there was no way that the 1<sup>st</sup> Respondent failed to adhere to the requirements of the Tender Document and the Act.

Upon enquiry by the Board on whether the letter of Notification of Intention to Award transmitted to the Applicant had one of the reasons for disqualification as failure to submit the NCA Certificate, Mr. Ademba failed to give a response due to a network challenge. Upon further enquiry on why the date of site visit was different for the 3<sup>rd</sup> Respondent having been dated 8<sup>th</sup> December 2022 yet other tenderers certificates were dated 29<sup>th</sup> November 2022, Mr. Ademba submitted that what was captured in the site visit certificate was the date when the 3<sup>rd</sup> Respondent visited the site.

When asked to clarify whether the reason for disqualification of the Applicant by the Evaluation Committee was on failure to provide the NCA Certificate and the Professional Opinion outlined other reasons for disqualification, Mr. Ademba submitted that the reasons for disqualification were as highlighted in the letter of Notification of Intention to Award.

Counsel confirmed that the Evaluation Report signed on 17<sup>th</sup> February 2023 and marked as Annexure KMC 7 noted that the Applicant did not attach the NCA certificate and this was the only reason for its disqualification according to the Evaluation Committee. He further confirmed that the Professional Opinion done by the Head of Procurement Function came up with several other reasons for disqualification of the Applicant.

When asked why the letter of Notification of Intention to Award did not set out failure to submit NCA certificate as part of the reasons for disqualification of the Applicant, Mr. Ademba submitted that this might have been an omission on the part of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as they picked a few of the reasons leading to why the Applicant was disqualified.

Upon further enquiry by the Board on whether the seven (7) reasons, other than failure to submit the NCA Certificate, that arose in the Professional Opinion were reasons for knocking out a tenderer at the Preliminary Evaluation stage or Technical Evaluation stage, Mr. Joakim Boli, the deponent of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents Replying Affidavit responded by indicating that the reasons were part of the criteria at the Preliminary Evaluation stage which was being done in tandem meaning that at the same

time of evaluating the tenderer's mandatory requirements, the Evaluation Committee was also looking at the tenderer's presentation of its tender on whether it had fulfilled the conditions of the Tender Document and picked a few reasons when giving reasons for disqualification and did not exhaust all reasons. When asked whether giving a few reasons instead of all reasons was allowed in law, Mr. Boli indicated that he would need to consult as there was a format given for notification.

### **3<sup>rd</sup> Respondent's submission**

Counsel for the 3<sup>rd</sup> Respondent, Mr. Mukele relied on the 3<sup>rd</sup> Respondent's Replying Affidavit and Written Submissions dated 27<sup>th</sup> April 2023.

Mr. Mukele submitted that the 3<sup>rd</sup> Respondent visited the site and that at page 656 of the 3<sup>rd</sup> Respondent's tender, the requirement at the preliminary evaluation was a site visit which requirement was satisfied as evidenced by the Site Visit certificate.

On the allegation by the Applicant of doctoring of documents to favour the 3<sup>rd</sup> Respondent, Mr. Mukele submitted that this was not true and that the Applicant misconstrued and misunderstood the documents referred to by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. He submitted that the 3<sup>rd</sup> Respondent participated in the subject tender within the parameters of the law.

Upon enquiry on when the 3<sup>rd</sup> Respondent visited the site, Counsel submitted that the tender was quite bulky and was under the impression that the certificate was dated 12<sup>th</sup> December 2022. Upon further enquiry on the

specific date of the site visit, the 3<sup>rd</sup> Respondent's Managing Director, Mr. Ali, indicated that he would share a copy of the certificate with Counsel via WhatsApp.

### **Applicant's Rejoinder**

In a rejoinder, Mr. Kamuiru referred the Board to the 1<sup>st</sup> Respondent's Annexure No. 7 being a Preliminary Evaluation Report which provided as a pre-condition, a mandatory site visit and submitted that the Applicant had annexed a list of all tenderers who attended the site visit as seen from a picture of the Register taken by the Applicant's Managing Director and annexed as Annexure No. 4 being the mandatory site visit on 29<sup>th</sup> November 2022 contained in the advertisement of the subject tender being the Tender Notice. He argued that a party who did not appear at the mandatory site visit and did not sign the register, which indicated who attended, failed at that juncture.

On the issue of whether the documents were doctored, Counsel submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents provided different tender numbers. With regard to whether an NCA certificate was included in the Applicant's tender, he indicated that the Applicant had annexed as Annexure No. 8 a letter of association from Masters Power and submitted that Clause 11 at page 34 of the Tender Document confirms that sub-contractors were allowed in the subject tender.

Counsel submitted that the Applicant wrote to the 1<sup>st</sup> Respondent vide letter dated 30<sup>th</sup> March 2023 and which letter was annexed by the 1<sup>st</sup> and 2<sup>nd</sup>

Respondents as Annexure No. 11 reminding the 1<sup>st</sup> and 2<sup>nd</sup> Respondents that the statutory timeframe had lapsed with no notification of award in the subject tender. He reiterated that evaluation was concluded beyond the statutory period of 30 days given that clarifications were made on 16<sup>th</sup> March 2023.

Mr. Kamuiru submitted that the Applicant had included in its tender a separate list of spare parts and that the Applicant was given different reasons for disqualification as some of the reasons came to the attention of the Applicant from the 1<sup>st</sup> and 2<sup>nd</sup> Respondents Replying Affidavit. Counsel argued that the Applicant was the lowest tenderer in the subject tender and submitted that there was a conspiracy to conceal information to favour the 3<sup>rd</sup> Respondent and as such costs ought to be awarded to the Applicant.

Upon enquiry by the Board on whether the Applicant was the main contractor or the subcontractor, Counsel submitted that the Applicant was the main contractor. On further enquiry by the Board of whether the NCA certificate was required from the main contractor or the subcontractor, Counsel submitted that the Tender Document had not clarified on this.

On enquiry by the Board on who was supposed to supply the mandatory documents at Preliminary Evaluation stage, Counsel submitted that it had not been clarified and confirmed that the Applicant was the main contractor. At this juncture, Eng. Tom Waiharo submitted that as long as a tenderer had the letter of association it was assumed that the main contractor, being the

tenderer, also had the NCA certificate since this was a specialized installation and needed a specialized subcontractor.

At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 13<sup>th</sup> April 2023 was due to expire on 4<sup>th</sup> May 2023 and that the Board would communicate its decision on 4<sup>th</sup> May 2023 to all parties to the Request for Review 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 2<sup>nd</sup> Respondent pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination.

- 1. Whether the Applicant has substantiated its allegations that the documents supplied to the Applicant in the instant Request for Review as annexures by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were doctored to favour the 3<sup>rd</sup> Respondent.**
- 2. Whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents erred by failing to avail the Applicant with signed Technical Evaluation Minutes?**

- 3. Whether the Evaluation Committee appointed by the 2<sup>nd</sup> Respondent failed to conclude the evaluation of tenders in the subject tender within a maximum period of thirty (30) days in breach of section 80(6) of the Act.**
- 4. Whether the 1<sup>st</sup> Respondent's Evaluation Committee evaluated the Applicant's tender in accordance with the provisions of the Tender Document as read with section 80(2) of the Act.**
- 5. Whether the 3<sup>rd</sup> Respondent met the eligibility criteria specified in Clause 2(f) of Section III- Evaluation and Qualification Criteria at page 24 of the Tender Document.**
- 6. Whether the 1<sup>st</sup> Respondent's Letter of Notification of Intention to Award dated 6<sup>th</sup> April 2023 issued to the Applicant met the threshold required in Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020.**
- 7. What orders should the Board grant in the circumstances?**

**Whether the Applicant has substantiated its allegations that the documents supplied to the Applicant in the instant Request for Review as annexures by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were doctored to favour the 3<sup>rd</sup> Respondent.**



The Applicant, through its counsel, submitted during the hearing of the instant Request for Review that the documents supplied to it by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as annexures were doctored to favour the 3<sup>rd</sup> Respondent. Mr. Kamuiru submitted that according to Annexure 9 annexed as an exhibit in the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Replying Affidavit sworn by Joakim Boli on 24<sup>th</sup> April 2023, the reference number of the subject tender differed since the subject tender was advertised as Tender No. KMC/IOT/CL/1167/2022 yet Annexure 9 referred to Tender No. KMC/IOT/010627/2022-2023. Mr. Kamuiru further submitted that page 1 of Annexure 9 described the method of procurement of the subject tender as restricted yet an open method of tendering was used as confirmed at paragraph 6 of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Replying Affidavit.

We note that the Respondents did not directly address the issue of doctoring of its annexures but submitted through their counsel that they categorically denied all other issues raised by the Applicant.

We have perused the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's Annexure No. 9 and observe that (a) it is the Professional Opinion prepared by Supply Chain Manager – Joakim Boli and dated 5<sup>th</sup> April 2023; (b) under Part A- Basic Information on the first page, Clause 10 on Method of Procurement applied/used indicates that the subject tender was restricted; and (c) under Review and Recommendations on the second page, Clause 2 indicated that Tender Number KMC/IOT/010627/2022-2023 was advertised on the Daily Nation Newspaper on November 22 2022.

We note that paragraph 5 of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Replying Affidavit indicates that the subject tender was advertised on 22<sup>nd</sup> November 2022 on the 1<sup>st</sup> Respondent's website and on the press as Tender No. KMC/10T/CL/11677/2022 as evidenced by exhibit marked as Annexure KMC 1. We further note that the Tender Document submitted by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents pursuant to Section 63 (3)(e) of the Act under ITT1.1 of Section II – Tender Data Sheet at page 20 of the Tender Document indicated the reference number of the Invitation to Tender as KMC/10T/CL/11677/2022. Further, Clause 2 of Invitation to Tender (ITT) Procuring Entity: Kenya Meat Commission at page X of the Tender Document indicated that tendering would be conducted under open competitive method (National/International).

It is not in contest that the subject tender's reference number is KMC/10T/CL/11677/2022 and that tendering was to be conducted under an open competitive (National/International) method of tendering. In our view, Annexure No. 9 being the Professional Opinion contained what can be inferred to as an oversight or a typographical error by its author, Mr. Joakim Boli with regard to the background information on the method of tendering and the tender reference number. The Applicant has not availed any evidence of how such error or oversight amounted to doctoring of the said document to favour the 3<sup>rd</sup> Respondent or impacted the Evaluation Committee in awarding the subject tender to the 3<sup>rd</sup> Respondent noting that a professional opinion is prepared following receipt of the Evaluation Report

from the Evaluation Committee by the Head of the Procurement Function of a procuring entity.

The Board is of the considered opinion that the allegations that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents annexures were doctored to favour the 3<sup>rd</sup> Respondent is a grave allegation akin to fraud and the standard of proof for fraud is quite high in which the Applicant has failed to discharge. We are guided by the Court of Appeal decision in **Ratilal Gordhanbhai Patel v Lalji Makanji [1957] EA 314, 317** where the court held:

***"There is one preliminary observation which we must take on the learned judge's treatment of this evidence: he does not anywhere... expressly direct himself on the burden of proof or on the standard of proof required. Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required. There is no specific indication that the learned judge had this in mind: there are some indications which suggest he had not."***

Further, the Court of Appeal in the case of **Kinyanjui Kamau vs George Kamau [2015] eKLR** expressed itself as follows:

***"...It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo vs Ndolo (2008) 1 KLR (G & F) 742 wherein the Court stated that: "...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts."***

In essence, the onus of proving fraud rests on a party who seeks to rely on an allegation of fraud by another party and the standard of proof required is more than a balance of probability. As such, it is not enough for the Applicant in the instant Request for Review to infer fraud through speculation of how the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' annexures could have been doctored to favour the 3<sup>rd</sup> Respondent. The Applicant is required to make further steps in proving such allegations to the Board.

In the circumstances, we find that the Applicant has not substantiated its allegation that the documents supplied to the Applicant in the instant Request for Review as annexures by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were doctored to favour the 3<sup>rd</sup> Respondent in the subject tender.

## **Whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents erred by failing to avail the Applicant with signed Technical Evaluation Minutes?**

The Applicant alleges at paragraph 7 of the Request for Review that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents erred in law by not availing to it signed Technical Evaluation Minutes and instead sent out an unsigned email with an attachment as evidenced by exhibit marked as APL 5.

In response, counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent submitted during the hearing that the Applicant never requested for the Technical Evaluation Minutes and referred the Board to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' exhibit marked as Annexure KMC 11 being a letter from the Applicant which counsel indicated did not contain any specific request with regard to the Technical Evaluation Minutes.

The Board is cognizant of provisions of section 64 (1) of the Act on form of communication which states:

***"(1) All communications and enquiries between parties on procurement and asset disposal proceedings shall be in writing."***

The Technical Evaluation Minutes referred to by the Applicant form part of confidential information and documentation under Section 67(1)(c) of the Act. Section 67 of the Act provides for confidentiality of procurement

documents and proceedings by the procuring entity subject to disclosures permitted in law and reads:

***"(1) During or after procurement proceedings and subject to subsection (3), no procuring entity and no employee or agent of the procuring entity or member of a board, commission or committee of the procuring entity shall disclose the following-***

- (a) Information relating to a procurement whose disclosure would impede law enforcement or whose disclosure would not be in the public interest;***
- (b) Information relating to a procurement whose disclosure would prejudice legitimate commercial interests, intellectual property rights or inhibit fair competition;***
- (c) Information relating to the evaluation, comparison or clarification of tenders, proposals or quotations; or***
- (d) The contents of tenders, proposals or quotations.***

***(2) For the purposes of subsection (1) an employee or agent or member of a board, commission or committee or the procuring entity shall sign a confidentiality declaration form as prescribed.***

***(3) This section does not prevent the disclosure of information if any of the following apply-***

- (a) the disclosure is to an unauthorized employee or agent of the procuring entity or a member of a board or committee of the procuring entity involved in the procurement proceedings;***
- (b) the disclosure is for the purpose of law enforcement;***

***(c) the disclosure is for the purpose of a review under Part XV or requirements under Part IV of this Act;***

***(d) the disclosure is pursuant to a court order; or***

***(e) the disclosure is made to the Authority or Review Board under this Act.***

***(4) Notwithstanding the provisions of subsection (3), the disclosure to an applicant seeking a review under Part XV shall constitute only the summary referred to in section 68(2)(d)(iii).***

***(5) Any person who contravenes the provisions of this section commits an offence as stipulated in section 176(1)(f) and shall be debarred and prohibited to work for a government entity or where the government holds shares, for a period of ten years.*** [Emphasis by the Board]

The summary in Section 68(2)(d)(iii) of the Act referred to in Section 67(4) of the Act is with respect to procurement records and reads as follows-

***"(2) The records for a procurement shall include –***

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

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

***(c) .....***

***(d) for each tender, proposal or quotation that was submitted***

***(i) .....***

***(ii) .....***

***(iii) a summary of the proceedings of the opening of tenders, evaluation and comparison of tenders, proposals or quotations, including the evaluation criteria used as prescribed;***

***(e) .....***

***(f) .....***

***(g) .....”***

From the foregoing, noting that all communication and enquires between parties in procurement proceedings must be in writing, it follows that a tenderer must request an accounting officer, in writing, to be furnished with a summary of the proceedings of the evaluation and comparison of the tenders, *inter alia*, being procurement records which can only be disclosed by a procuring entity if such a tenderer is an applicant seeking administrative review of procurement proceedings by the Board. This therefore means that a candidate or tenderer is not entitled to disclosure by the procuring entity of a summary of the proceedings of the evaluation and comparison of the tenders unless he or she has filed a request for review before the Board.

Turning to the instant Request for Review, we note that the exhibit referred to by the Applicant as APL5 is a copy of the Letter of Notification of Intention to Award dated 6<sup>th</sup> April 2023 addressed to the Applicant and does not in any way contain any information showing that the Applicant wrote to the 1<sup>st</sup> and 2<sup>nd</sup> Respondent requesting for the signed Technical Evaluation Minutes. Having carefully perused the confidential file submitted to the Board by the



1<sup>st</sup> and 2<sup>nd</sup> Respondents pursuant to Section 67(3)(e) of the Act, we have not come across any written communication addressed to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents by the Applicant requesting for the signed Technical Evaluation Minutes.

Notably, the 1<sup>st</sup> Respondent is only entitled to avail a summary of proceedings of evaluation and comparison of tenders. Technical Evaluation Minutes sought by the Applicant are essentially full minutes of technical evaluation exercise and not a summary thereof. As such, the signed Technical Evaluation Minutes are confidential documents containing confidential information pursuant to section 67(1)(c) of the Act and ought not to be disclosed by the 1<sup>st</sup> Respondent save for where permitted under Section 67(3) of the Act.

We further note that the Applicant did not exhibit any evidence confirming that upon filing the instant Request for Review, as an applicant seeking a review, it sought disclosure from the Respondents of a summary of the proceedings of the Technical Evaluation Minutes and that the Respondents declined to make such disclosure. We note the Applicant was not automatically entitled to a copy of a summary of the proceedings of the Technical Evaluation Minutes there being no express provision of the Act requiring the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to furnish the Applicant with the said summary before being an applicant seeking a review before the Board. As such, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents could only disclose a summary of the

proceedings of the Technical Evaluation Minutes to the Applicant, following a request for the same by the Applicant and upon the Applicant filing the instant Request for Review.

In the absence of proof of a request by the Applicant in writing to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to be availed with a summary of the proceedings of the Technical Evaluation Minutes upon filing of the instant Request for Review, we find that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents **did not** err by failing to avail the Applicant with signed Technical Evaluation Minutes.

**Whether the Evaluation Committee appointed by the 2<sup>nd</sup> Respondent failed to conclude the evaluation of tenders in the subject tender within a maximum period of thirty (30) days in breach of section 80(6) of the Act.**

We understand the Applicant's allegation to be that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents breached Section 80(6) of the Act by failing to conclude evaluation of tenders in the subject tender within a maximum period of thirty (30) days. According to the Applicant, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' evaluation of the subject tender was stale since the statutory period of evaluation had lapsed prior to conclusion of evaluation.

On their part, the Respondents contend at paragraph 12 of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Replying Affidavit that the evaluation exercise was carried out within a period of twelve days i.e. from 6<sup>th</sup> February 2023 to 17<sup>th</sup> February

2023 as evidenced by exhibit marked as KMC-7 and further contend at paragraph 13 that once the evaluation exercise was complete, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents sought for further clarification since the procurement of the subject tender is complex and specialized in nature.

Section 80(6) of the Act reads as follows:

***"80(6) The evaluation shall be carried out within a maximum period of thirty days"***

We note that the Applicant wrote to the 2<sup>nd</sup> Respondent vide letter dated 30<sup>th</sup> March 2023 in regard to delay in evaluation of the subject tender. The letter reads as follows:

".....

***SUBJECT: DELAY IN EVALUATION***

***We refer to the above referenced Tender and the Subject relating to the same. We wish to confirm that we participated in the above public tender.***

***This tender was initially slotted for submission and opening on 22<sup>nd</sup> December 2022, and after notification which we received on time, the closing date was extended to 19<sup>th</sup> January, 2023 at 11:00 a.m.***

***We wish to draw your attention to Clause 80(6) of the Public Procurement and Disposal Act no. 33 of 2015 [Revised 2022]***

***with regard to the evaluation of tenders, and it states as follows”***

***“80 (6) The evaluation shall be carried out within a maximum of thirty days”***

***As we write to you, 63 days have elapsed from the closing date without any communication from yourselves to explain to us the cause of this delay in dispensing with the evaluation and communicating the results thereof.***

***Please communicate to us within the next seven days on the reasons for your failure to complete this exercise.***

***In case of any inquiry do not hesitate to contact us.***

***.....”***

A reading of the above letter indicates that the Applicant was enquiring on the reason for delay and failure to evaluate and communicate the results of evaluation of tenders in the subject tender within the stipulated thirty (30) days pursuant to Section 80(6) of the Act having noted that sixty-three (63) days had lapsed from the tender submission deadline.

We find that it is important to understand what evaluation of tenders is before determining whether evaluation of tenders in the subject tender was concluded within or outside the statutory period of 30 days.

Law Insider defines Bid Evaluation as ***"the evaluation of a submitted bid in a procedure for awarding a procurement contract under public notice"***.

Black's Law Dictionary, 6<sup>th</sup> Edition defines Bid Evaluation as:

***"After the submission deadline, the process of examining, and evaluating bids to determine the bidders' responsiveness, and other factors associated with selection of a bid for recommendation for contract award."***

Section 46 of the Act provides for establishment of an ad hoc Evaluation Committee for purposes of evaluation of tenders.

Section 85 of the Act further provides that:

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

In essence, evaluation of tenders is conducted by an evaluation committee appointed by an accounting officer with a view of recommending a tenderer for award of a tender. Section 80(4) of the Act is instructive on the document that marks the end of evaluation being an evaluation report and reads:

***"The evaluation Committee shall prepare an evaluation report containing a summary of the evaluation and comparison of tenders and shall submit the report to the person responsible for procurement for his or her review and recommendation."***

Regulation 78 of Regulations 2020 further provides that:

***1) An evaluation report prepared under section 80(4) of the Act shall include—***

***(a) a summary of all the tenders received from the head of the procurement function;***

***(b) the results of the preliminary evaluation;***

***(c) the results of the technical evaluation;***

***(d) reasons why any tenders were rejected;***

***e) details of any minor deviations accepted under section 79(2)(a) of the Act and the way in which such deviations were quantified and taken into account in the evaluation and comparison of the tenders;***

***(f) the evaluated price of each tender showing the price and any conversion to a common currency, if any;***

***(g) the ranking of the tenders each according to its total evaluated price;***

***(h) a recommendation to award the contract to the successful tenderer in accordance with section 86 of the Act; and***

***(i) any dissenting opinion and the reasons thereof and such other recommendation as may be deemed necessary by the evaluation committee.***

**(2) The evaluation report under paragraph (1), shall be reviewed by the head of the procurement function and forwarded to the accounting officer together with the professional opinion referred to in section 84 of the Act within a day upon receipt of the evaluation report.**

**(3) The head of the procurement function may seek for clarification from the evaluation committee before making a professional opinion.**

**(4) The professional opinion referred to under paragraph (3) shall be in the format set out in the Ninth Schedule of these Regulations and shall include the following information—**

**(a) a review of the procurement or asset disposal proceedings;**

**(b) adherence to evaluation criteria stipulated in the bid documents;**

**(c) legality of tender award recommendations;**

**(d) whether the recommended price for standard goods, services and works are within the indicative market prices;**

**(e) availability of funds; and**

**(f) a recommendation for change of scope, where the bid document had provided for change of scope, if the successful bid is above the budget available of the procuring entity, taking into account the effect of the scope of change to the entire evaluation of the tender.**

**(5) Where the accounting officer has approved the recommendation of the head of procurement function under paragraph (4)(f), the head of procurement function shall—**

- (a) inform the user department for concurrence;**
- (b) refer the matter back to the evaluation committee for review and recommendation to the accounting officer;**
- (c) inform the successful bidder for concurrence; and**
- (d) make appropriate recommendation to the accounting officer, taking into account the views of the user department, the evaluation committee and the successful bidder.**

From the foregoing, an evaluation report includes, *inter alia*, a summary of all tenders submitted, the results of the preliminary evaluation, technical evaluation, ranking of tenders according to the total evaluated price, and a recommendation to award contract to the successful tenderer pursuant to Section 86 of the Act. The evaluation report is reviewed by the head of the procurement function who prepares a professional opinion and forwards it to the accounting officer together with the evaluation report within a day of receipt of the evaluation report. As such, an evaluation committee having conducted evaluation of tenders is able to recommend a tenderer for award of the tender in accordance with the award criteria set out in the tender document.

In our considered view, evaluation of tenders ends once the evaluation committee prepares and signs an evaluation report containing a summary of evaluation and comparison of tenders and recommendation of award. It



therefore follows that the evaluation of tenders does not include all other processes after the conclusion of an evaluation process such as post qualification evaluation pursuant to Section 83 of the Act, a professional opinion rendered by the Head of Procurement Function pursuant to Section 84 of the Act and award of tenders by an accounting officer pursuant to Section 87 of the Act.

Turning to the instant Request for Review, we note from the confidential file submitted to the Board by the 2<sup>nd</sup> Respondent pursuant to Section 67(3)(e) of the Act that the subject tender was opened on 19<sup>th</sup> January 2023 at 11:00hrs as indicated in the Minutes of the Tender Opening. We note that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents exhibit marked as Annexure KMC 5 a letter of appointment of the Opening, Evaluation and Inspection and Acceptance Committees for Procurement of the subject tender dated 19<sup>th</sup> January 2023.

Part of the confidential documents submitted to the Board on evaluation of the subject tender are individual tenderer's Preliminary Evaluation Reports which laid out item descriptions against which tenderers were evaluated and were used to determine whether such a tenderer had complied with the documents comprising the tender. We note that each of the Preliminary Evaluation Report had a verdict of whether or not a tenderer was qualified to move to the Technical Evaluation stage and if not successful, listed reasons for disqualification at the Preliminary Evaluation stage and each was signed by members of the Evaluation Committee on 17<sup>th</sup> February 2023. Further to the individual tenderer's Preliminary Evaluation Reports signed on

17<sup>th</sup> February 2023 are individual tenderers Technical Specifications Reports laying out several specifications of responsive tenderers at the Technical Evaluation stage and these individual reports were also signed by members of the Evaluation Committee on 17<sup>th</sup> February 2023.

We further note that part of the confidential file submitted to the Board by the 2<sup>nd</sup> Respondents was a Preliminary Evaluation Report with the results of all tenderers adherence to the requirements of Clause 2 Preliminary examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 24 of the Tender Document signed by members of the Evaluation Committee on 17<sup>th</sup> February 2023. In essence, by signing the aforementioned Preliminary Evaluation Reports on 17<sup>th</sup> February 2023, this signified that the Evaluation Committee had concluded evaluation of tenders at the Preliminary Evaluation stage on 17<sup>th</sup> February 2023.

We note that the confidential file also consisted of (a) an undated memo signed by the Chairperson of the Evaluation Committee analyzing the procurement proceedings from number of tenderers who submitted tenders, non-responsive tenderers at Preliminary Evaluation stage and tenderers who proceeded to the technical evaluation stage; (b) a letter dated 16<sup>th</sup> March 2023 addressed by the 2<sup>nd</sup> Respondent to three (3) tenderers who were responsive at the Technical Evaluation stage as indicated in the Memo by the Chairperson of the Evaluation Committee seeking clarification on various

requirements stipulated in the Tender Document; (c) letters dated 31<sup>st</sup> March 2023 from the 2<sup>nd</sup> Respondent addressed to the aforementioned three (3) tenderers notifying them that they would be required to conduct a power point and video presentation on their tenders on 4<sup>th</sup> April 2023 for two (2) of the tenderers and on 6<sup>th</sup> April 2023 for the remaining one (1) tenderer; and (d) a Report by the Evaluation Committee dated (by hand) 6<sup>th</sup> February 2023 but signed by members of the Evaluation Committee on 5<sup>th</sup> April 2023 (referred to in the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Replying Affidavit as Annexure KMC 5). This report by the Evaluation Committee incorporated the report on the Economic Evaluation conducted by the Evaluation Committee on tenderers who were responsive at this stage.

The evaluation report containing a summary of evaluation and comparison of tenders and recommendations of award in the subject tender also produced as Annexure KMC 5 in the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Replying Affidavit was the Report by the Evaluation Committee signed by members of the 1<sup>st</sup> Respondents' Evaluation Committee on 5<sup>th</sup> April 2023. We observe from page 1 of the Report by the Evaluation Committee that it made reference to (a) Tender Opening Minutes dated 19<sup>th</sup> January 2023; (b) Tender Opening Register dated 19<sup>th</sup> January 2023; (c) Tender Documents, Quantity Seven, marked 1 to 7; (d) Letter of Appointment to the Evaluation Committee dated 19<sup>th</sup> January 2023; (e) Copy of the Kenya Meat Commission Technical Specification found in the Tender Document uploaded in the KMC website. The Report by the Evaluation Committee also indicated that tenders had undergone Preliminary Evaluation, Technical Evaluation, and Economic

Evaluation with summaries of tenderers responsive at each stage of evaluation and the Evaluation Committee's Recommendation to award the subject tender.

It is the Board's considered view that by signing the Report of the Evaluation Committee on 5<sup>th</sup> April 2023, this signified that the Evaluation Committee had concluded evaluation of tenders in the subject tender on 5<sup>th</sup> April 2023.

As such, it is misleading for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent to state that the evaluation exercise was carried out within a period of twelve (12) days between 6<sup>th</sup> February 2023 and 17<sup>th</sup> February 2023 since only the Preliminary Evaluation and Technical Evaluation was completed by 17<sup>th</sup> February 2023 and clarifications were still being sought from tenderers on 16<sup>th</sup> March 2023 and presentations made by tenderers with regard to their tenders on 4<sup>th</sup> April 2023.

In computing time taken by the Evaluation Committee to conduct evaluation of tenders in the subject tender, we are guided by Section 57(a) of the Interpretation of General Provisions Act, CAP 2 Laws of Kenya (hereinafter referred to as "the IGPA") which provides that:

***"57. Computation of time***

***In computing time for the purpose 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;***

***.....”***

Having established that tenders were opened on 19<sup>th</sup> January 2023 and an Evaluation Committee was appointed on 19<sup>th</sup> January 2023, and in the absence of a clear definite date of when evaluation of tenders began, assuming that evaluation commenced on appointment of the Evaluation Committee, the 19<sup>th</sup> January 2023 is excluded from computation of time and time started running on 20<sup>th</sup> January 2023 to 18<sup>th</sup> February 2023. In essence, the Evaluation Committee had between 20<sup>th</sup> January 2023 and 18<sup>th</sup> February 2023 to evaluate, compare tenders and make recommendation of award of the subject tender. However, the Report of the Evaluation Committee was signed on 5<sup>th</sup> April 2023 meaning that the Evaluation Committee evaluated tenders within a period of 76 days from 19<sup>th</sup> January 2023 which was outside the 30 days’ statutory period pursuant to section 80(6) of the Act.

Assuming that evaluation of tenders actually commenced on 6<sup>th</sup> February 2023 as alluded to at paragraph 12 of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents’ Replying Affidavit, the 6<sup>th</sup> February 2023 is excluded from computation of time and time started running on 7<sup>th</sup> February 2023 to 8<sup>th</sup> March 2023. In essence, the Evaluation Committee had between 7<sup>th</sup> February 2023 and 8<sup>th</sup> March 2023 to evaluate, compare tenders and make recommendation of award of the subject tender. However, the Report of the Evaluation Committee was

signed on 5<sup>th</sup> April 2023 meaning that the Evaluation Committee evaluated tenders within a period of 58 days from 6<sup>th</sup> February 2023 which was outside the 30 days' statutory period pursuant to section 80(6) of the Act.

In the circumstances we find that the Evaluation Committee appointed by the 2<sup>nd</sup> Respondent did not conclude the evaluation of tenders in the subject tender within the maximum period of thirty (30) days in breach of Section 80(6) of the Act though this does not disqualify the evaluation process since evaluation was completed, a recommendation to award the subject tender made by the Evaluation Committee and notification of intention to award the successful tenderer issued to tenderers within the tender validity period and as such, there is no proof of any prejudice suffered by tenderers.

**Whether the 1<sup>st</sup> Respondent's Evaluation Committee evaluated the Applicant's tender in accordance with the provisions of the Tender Document as read with Section 80(2) of the Act.**

We understand the Respondents case on this issue to be that the reasons for disqualification of the Applicant's tender in the subject tender were (i) as highlighted in the Applicant's Letter of Notification of Intention to Award dated 6<sup>th</sup> April 2023; (ii) as seen at paragraph 15 of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Replying Affidavit being that (a) the Applicant did not provide information on the requirement of the schedule of rates and prices; (b) the Applicant did not include in its tender a list of spare parts separately; (c) the Applicant's tender was not responsive to the Tendering Document; (d) the

Applicant's tender was not the lowest evaluated; (iii) as indicated in the Report by the Evaluation Committee signed by members of the Evaluation Committee on 5<sup>th</sup> April 2023 where the Applicant's tender was determined non-responsive at the Preliminary Evaluation stage for failure to attach NCA certificate and (iv) as indicated in the Professional Opinion dated 5<sup>th</sup> April 2023.

During the hearing, Mr. Joakim Boli, Acting Supply Manager and the deponent in the 1<sup>st</sup> and 2<sup>nd</sup> Respondents Replying Affidavit submitted that evaluation of the Applicant's tender together with other tenderers at the Preliminary Evaluation stage on mandatory requirements was conducted in tandem with evaluation of the Applicant's and other tenderers' presentation of their tender document on whether they had fulfilled the conditions of the Tender Document and as such, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents picked a few reasons for unsuccessfulness in the subject tender when giving reasons for disqualification in the Letter of Notification of Intention to Award and as such, did not exhaust all reasons for unsuccessfulness.

We understand the Applicant's case to be that its tender was compliant with the requirements of the Tender Document and opposed the various reasons advanced by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as to why it was unsuccessful in the subject tender as indicated in its Letter of Notification of Intention to Award dated 6<sup>th</sup> April 2023 which it contends is in conflict with reasons for its disqualification as indicated in the Report by the Evaluation Committee signed by members of the Evaluation Committee on 5<sup>th</sup> April 2023 and in the Preliminary Report signed by members of the Evaluation Committee on 17<sup>th</sup>

February 2023, which were produced by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent as Exhibits marked as Annexures KMC 5 and KMC 7 respectively.

The Board has carefully studied the Tender Document submitted by the 2<sup>nd</sup> Respondent as part of the confidential documents pursuant to Section 67(3)(e) of the Act and notes that Clause 1 (1.3) General Provisions of Section III – Evaluation and Qualification Criteria at page 24 of the Tender Documents provides as follows:

***"1.3 This section contains the criteria that the Procuring entity shall use to evaluate tender and qualify tenderers. No other factors, methods or criteria shall be used other than specified in this tender document. The Tenderer shall provide all the information requested in the forms included in Section IV, Tendering Forms. The Procuring Entity should use the Standard Tender Evaluation Report for Goods and Works for evaluating Tenders."***

From the above, we observe that evaluation of tenders in the subject tender would be in three stages namely: Preliminary examination for Determination of Responsiveness; Technical Evaluation and Economic Evaluation.

Clause 2 Preliminary Examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 24 of the Tender Document provides as follows:



***"Preliminary examination for Determination of Responsiveness***

***The tender evaluation criteria require that a preliminary evaluation be undertaken to determine which tenders meet the mandatory requirements of the tender and thus qualify for further detailed analysis. Tenders that are not responsive to the mandatory requirements of tendering will be disqualified from further evaluation. The preliminary evaluation parameters are:***

***a. Submission of Bid Security in the Required Form, Amount and Validity Period;***

***b. Valid Tax Compliance Certificate;***

***c. Registration of NCA (Mechanical and Electrical)***

***d. Certificate of Incorporation (CR 12)/ Registration;***

***e. Authorized Dealership/ Distribution ship Agreement/ License from the Canning Mother Company;***

***f. Site Visit.*** [Emphasis by Board]

The Board is cognizant of provisions of Section 79 of the Act on responsiveness of tenders which provides that:

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

In essence, 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 tender is one that meets all the mandatory requirements as set out in the Tender Document which are in essence the first hurdle that tenderers 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, tenderers found to be non-responsive are excluded from the tendering process regardless of the merits of their tenders.

Turning to the instant Request for Review, we note from page 3 to 4 of the Report by the Evaluation Committee signed by members of the Evaluation Committee on 5<sup>th</sup> April 2023 submitted to the Board as confidential documents pursuant to Section 63 (3)(e) of the Act that the Applicant was rendered non-responsive at the Preliminary Evaluation stage for failure to attach NCA Certificate. Additionally, from the Preliminary Report signed by members of the Evaluation Committee on 17<sup>th</sup> February 2023 submitted to the Board as confidential documents pursuant to Section 63 (3)(e) of the

Act, the Applicant was rendered non-responsive at the Preliminary Evaluation stage for failure to attach NCA Certificate.

We further note that according to the Professional Report, the Applicant was non-responsive at the Preliminary Evaluation stage due to the following reasons as determined by Mr. Joakim Boli, the Acting Supply Chain Manager of the 1<sup>st</sup> Respondent:

"

***(i) The firm is not a manufacturer yet no joint venture is signed or intended to be signed for the supply an installation of the canning line.***

***(ii) The firm had not itemized the price schedule as per the tender requirement.***

***(iii) The tender doesn't meet minimum acceptable standard pf completeness, consistence and detail and the other specified minimum requirements for specified functional guarantees.***

***(iv) The bidder has only provided manufacturer Authorization and not a license which conforms to requirements of ITT 15.1 Not filled all the six schedules but gave schedules for 1,3, & 5 only.***

***(v) No information of life cycle cost, Operating cost, maintenance cost and functional guarantees.***

***(vi) Recommended spare parts are not quoted for separately, doesn't conform with the type, Quantity and long terms availability of mandatory and recommended spare parts and maintenance.***

***(vii) The Cost of labor, Materials, Transport and contractors equipment is not stated.***

Additionally, we note that the Applicant was notified of its unsuccessfulness in the subject tender vide Letter of Notification of Intention to Award dated 6<sup>th</sup> April 2023 and the reasons advanced as to why it was non-responsive were different from the reason the Evaluation Committee found the Applicant's tender non-responsive at the Preliminary Evaluation stage (being failure to submit an NCA Certificate) as indicated in the Report of the Evaluation Committee being that:

"....."

***(i) the firm is not a manufacturer of canning line yet no joint venture is signed or intended to be signed for the supply and installation of the canning line.***

***(ii) The firm has not provided information on the requirements of schedule of Rates and Prices.***

***(iii) Recommended spare parts are not quoted for separately as is the requirement of tender, therefore doesn't conform with the type, quantity and long terms availability of mandatory and recommended spare parts and maintenance.***

***(iv) The tender doesn't meet minimum acceptable standard of completeness, consistence and detail and the other specified minimum requirements.***

.....”

From the foregoing reasons adduced as to why the Applicant's tender was non-responsive, we consider it important to highlight the role of an Evaluation Committee as provided for in the Act. Section 46 (4)(a) states that:

***" An evaluation committee established under subsection (1) shall-***  
***(a) deal with the technical and financial aspects of procurement as well as the negotiation of the process including evaluation of bids, proposals for prequalification, registration lists, Expression of Interest and any other roles assigned to it."***

Regulation 28(2) of Regulations 2020 provides:

***"The accounting officer of a procuring entity shall appoint an evaluation committee for the purposes of carrying out the technical and financial evaluation of the tenders or proposals"***

On the other hand, Section 80(1) and (4) of the Act states that:

***"(1) The evaluation committee appointed by the accounting officer pursuant to section 46 of this Act, shall evaluate and compare the responsive tenders other than tenders rejected.***

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

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

***(4) The evaluation committee shall prepare an evaluation report containing a summary of the evaluation and comparison of tenders and shall submit the report to the person responsible for procurement for his or her review and recommendation.***

***(5).....***

***(6) .....***

***(7) ....."***

The import of the above provisions is that the Evaluation Committee's role is to evaluate and compare tenders, proposals for prequalification, registration lists, Expression of Interest and any other roles assigned to it. Upon conclusion of evaluation, the evaluation committee prepares an evaluation report containing a summary of evaluation and comparison of tenders.

Further, Section 84 of the Act states that:

***(1) The head of procurement function of a procuring entity shall, alongside the report to the evaluation committee as secretariat comments, review the tender evaluation report and provide a signed professional opinion to the accounting officer on the procurement or asset disposal proceedings.***

***(2) The professional opinion under sub-section (1) may provide guidance on the procurement proceeding in the event of dissenting opinions between tender evaluation and award recommendations.***

***(3) In making a decision to award a tender, the accounting officer shall take into account the views of the head of procurement in the signed professional opinion referred to in subsection (1).***

From the above provision, the Board observes that the Head of Procurement Function has the responsibility to review an evaluation report in order to give a professional opinion that serves the following functions a) provide guidance on the procurement proceedings in the event of dissenting opinions between tender evaluation and award recommendations; and b) guide an accounting officer in making a decision to award a tender.

Regulation 30 (f) of Regulations 2020 provides that:

***"30. In discharging the mandate provided for under the Act, members of the evaluation committee shall— (f) prepare a report on the analysis of the tenders availed and final ratings assigned to each tender and make recommendations and submit the report to the head of the procurement function"***

It is our considered view that the Professional Opinion prepared by Mr. Joakim Boli ought to have been made in consideration and upon review of the Report by the Evaluation Committee signed by members of the



Evaluation Committee on 5<sup>th</sup> April 2023 and as such, the only reason as to why the Applicant failed at the Preliminary Evaluation stage as reported by the Evaluation Committee was that it did not submit the NCA Certificate which was a mandatory requirement under Clause 2(c) Preliminary Examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 24 of the Tender Document.

If upon review, Mr. Joakim Boli noted any non-compliance with the provisions of the Constitution, the Act and the Tender Document by the Evaluation Committee in evaluating and comparing of tenders, this non-compliance should have been made known to the 2<sup>nd</sup> Respondent with a recommendation for re-evaluation of tenders by the Evaluation Committee in order to comply with the provisions of the Constitution, the Act and the Tender Document when re-evaluating the tenders. In such circumstances, if the 2<sup>nd</sup> Respondent approved the re-evaluation, the 2<sup>nd</sup> Respondent would direct the Evaluation Committee to re-evaluate the tenders while taking into consideration the contents contained in the Professional Opinion. We say so because, only the Evaluation Committee is mandated with evaluation and comparison of tenders. The Head of Procurement Function does not evaluate tenders.

We note that the counsel for the Applicant submitted that the Applicant was responsive on this mandatory requirement since it had submitted a Letter of Association from its subcontractor, Master Power Ltd, who is NCA registered as can be verified on the NCA website. However, it is the Board's considered

view that the mandatory requirements under Clause 2 Preliminary Examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 24 of the Tender Document were to be met by the tenderer submitting its tender, being the main contractor in the subject tender and not its subcontractor. Had the intention of the 1<sup>st</sup> Respondent been to allow a sub-contractor to avail any of the documents listed as mandatory requirements, while exempting a tenderer, being the main contractor in the subject tender, then the same would have been provided for in the Tender Document.

We say so because the subject tender was for Supply, Delivery, Installation, Testing and Commissioning of Canning Line and a tenderer needed to have the requisite Electrical and Mechanical Works certifications to qualify to undertake the subject tender. The Tender Document was cognizant of the fact that in performance of the Contract, the successful tenderer may have agents, sub-contractors, sub consultants, service providers, suppliers, and personnel while undertaking the subject tender as evidenced by Clause 3.4 of Section I- Instructions To Tenderers at page 1 of the Tender Document which reads:

***"3.4 Tenderers shall permit and shall cause their agents (where declared or not), subcontractors, sub consultants, service providers, suppliers, and their personnel, to permit the Procuring Entity to inspect all accounts, records and other documents relating to any initial selection process, prequalification process, tender submission, proposal***

***submission, and contract performance (in the case of award), and to have them audited by auditors appointed by the Procuring Entity.”***

In addition to provisions under Clause 2 Preliminary Examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 24 of the Tender Document we note that the Tender Document provided for a tenderer’s personnel and subcontractors as follows:

Clause 9 Personnel of Section III- Evaluation and Qualification Criteria at page 34 of the Tender Document reads:

***"9 Personnel***

***The Tenderer must demonstrate that it will have the personnel for the key positions that meet the following requirements:***

<b><i>No.</i></b>	<b><i>Position</i></b>	<b><i>Total Work Similar Experience (Years)</i></b>	<b><i>In Similar Works Experience (Years)</i></b>
<b><i>1</i></b>	<b><i>-Lead Engineer – BSC/Higher National Diploma (HND) in Engineering, Minimum 5 years’ experience</i></b>	<b><i>5</i></b>	<b><i>5</i></b>

<b>2</b>	<b>Lead Task Engineer – BSC/ Higher National Diploma (HND) in Engineering, Minimum 5 years’ experience</b>	<b>5</b>	<b>5</b>
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***The Tenderer shall provide details of the proposed personnel and their experience records in the relevant Forms included in Section IV, Tendering Forms.***

Clause 11 Subcontractors of Section III- Evaluation and Qualification Criteria at page 34 of the Tender Document reads:

***"11. Subcontractors***

***Subcontractors/manufacturers for the following major items of supply or services ('Specialized Subcontractors') must meet the following minimum criteria, here in listed for that item:***

<b><i>Item No.</i></b>	<b><i>Description of Item</i></b>	<b><i>Minimum Criteria to be met</i></b>
<b><i>1</i></b>	<b><i>Registered with NCA appropriate category</i></b>	<b><i>NCA for Mechanical Engineering &amp; Electrical</i></b>
<b><i>2</i></b>	<b><i>Registered with EPRA</i></b>	<b><i>In Electrical Engineering categories</i></b>
<b><i>3</i></b>		

--	--	--

***Failure to comply with this requirement will result in rejection of the subcontractor.***

.....”

The import of Clause 2 Preliminary Examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 24 of the Tender Document is that a preliminary evaluation would be undertaken on a tender to determine if it had met mandatory requirements before qualifying for any further detailed analysis. In essence, the Applicant, being the tenderer in the subject tender was required to comply with all the mandatory requirements set out in Clause 2 Preliminary Examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 24 of the Tender Document to progress for further detailed analysis under Section III-Evaluation and Qualification Criteria at pages 24 to 34 of the Tender Document. This means that the Applicant, as the tenderer, was required to have met the mandatory requirement under Clause 2 (c) Registration of NCA (Mechanical and Electrical) of Section III- Evaluation and Qualification Criteria at page 24 of the Tender Document to be determined responsive for further evaluation and analysis under Clause 9 Personnel of Section III- Evaluation and Qualification Criteria at page 34 of the Tender Document and Clause 11 Subcontractors of Section III- Evaluation and Qualification Criteria at page 34 of the Tender Document.

In our considered view, the Evaluation Committee was required to analysis whether a tenderer who was determined responsive at the Preliminary Evaluation stage and progressed to the Technical and Economic Evaluation stage had also demonstrated that it had personnel for key position of Lead Engineer and Lead Task Engineer and that any sub-contractor in its tender also had NCA Certificates for Mechanical & Electrical Engineering.

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."***

From the foregoing, the 1<sup>st</sup> Respondent's tender provided sufficient information on the preliminary evaluation parameters that were required to be met by tenderers in the subject tender and failure to meet any of the mandatory requirements stipulated under clause 2 (a) to (f) Preliminary Examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 24 of the Tender Document would render a tenderer non-responsive. A tender only qualifies as a responsive tender if it meets all requirements set out in the tender documents. Responsiveness

serves as an important first hurdle for tenderers to overcome. Section 80(2) of the Act provides for evaluation of tenders as follows:

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

The 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."***

To put the foregoing into perspective, the Board takes the liberty to reproduce in extenso the following exposition as rendered by Mativo J (as he then was) in **Republic v Public Procurement Administrative Review Board & 2 others Exparte BABS security Services Limited [2018] eKLR**. The Learned Judge held:

***"19. It is a universally accepted principle of public procurement that bids which do not meet the minimum requirements as stipulated in a bid document are to be regarded as non-responsive and rejected without further consideration. [9] Briefly, the requirement of responsiveness operates in the following manner: - a bid only qualifies as a responsive bid if it meets with 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. [10] Bid formalities usually require timeous submission of formal bid documents such as tax clearance certificates, audited financial statements, accreditation with standard setting bodies, membership of professional bodies, proof of company registration, certified copies of identification documents and the like. Indeed, public procurement practically bristles with formalities which bidders often overlook at their peril.[11] 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.[12] 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 or empowerment. 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.*

*20. 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.”**

Consequently, we find that the Evaluation Committee, having determined the Applicant’s tender non-responsive at the Preliminary Evaluation stage for failure to satisfy the mandatory requirement under Clause 2(c) Preliminary Examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 24 of the Tender Document, evaluated the Applicant’s tender in accordance with the provisions of the Tender Document as read with Section 80(2) of the Act.

**Whether the 3<sup>rd</sup> Respondent met the eligibility criteria specified in Clause 2(f) of Section III- Evaluation and Qualification Criteria at page 24 of the Tender Document.**

The Applicant contends at paragraph 6 of the Request for Review that the 3<sup>rd</sup> Respondent was automatically disqualified from tendering in the subject tender since it failed to attend the pre-tender mandatory site visit on 29<sup>th</sup> November 2023 as mandated in the subject tender’s advertisement. The Applicant submitted that the 3<sup>rd</sup> Respondent was not among the tenderers recorded in the Register of Firms/ Individuals present during the mandatory site visit on the 29<sup>th</sup> November 2023.

On its part, counsel for the 3<sup>rd</sup> Respondent submitted that the 3<sup>rd</sup> Respondent visited the 1<sup>st</sup> Respondent's site in compliance with the requirement at the preliminary evaluation stage for a site visit. In support of the 3<sup>rd</sup> Respondent, the 1<sup>st</sup> and 2<sup>nd</sup> Respondent submitted that the 3<sup>rd</sup> Respondent attended the site visit as stipulated in its tender document and evidenced by the copy of the signed site visit form by the plant engineer on page 21 of the 3<sup>rd</sup> Respondent's tender (a copy of the signed site visit certificate was produced by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and marked as Exhibit KMC 12).

We note that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted to the Board as part of the confidential documents a Tender Notice advertised in My Gov Publication on 22<sup>nd</sup> November 2022 which reads:

".....  
**Please note that there will be a mandatory pre tender site visit at the Athi River Headquarters on Tuesday, 29<sup>th</sup> November 2022 from 0900 hrs to 1300 hrs. Minutes of the pre tender site visit will be uploaded on the Kenya Meat Commission website indicated above. Tenders will be opened immediately after the submission date/time at the Conference room Athi River**  
....."

Clause 8 of Section I- Instructions to Tenderers at page 4 to 5 of the Tender Document provided that:

***8.1 The Procuring Entity shall specify in the TDS if a pre-tender conference will be held, when and where. The Procuring Entity shall also specify in the TDS if a pre-arranged pretender visit of the site***

***of the works will be held and when. The Tenderer's designated representative is invited to attend a pre-arranged pretender visit of the site of works. The purpose of the meeting will be to clarify issues and to answer questions on any matter that may be raised at that stage.***

***8.2 The Tenderer is requested to submit any questions in writing, to reach the Procuring Entity not later than the period specified in the TDS before the meeting.***

***8.3 Minutes of the pre-Tender meeting and the pre-arranged pretender visit of the site of the works, if applicable, including the text of the questions asked by Tenderers and the responses given, together with any responses prepared after the meeting, will be transmitted promptly to all Tenderers who have acquired the Tender Document in accordance with ITT 6.3. Minutes shall not identify the source of questions asked.***

***8.4 The Procuring Entity shall also publish anonymized (no names) Minutes of the pre-tender meeting and the pre-arranged pretender visit of the site of the works at the webpage identified in the TDS. Any modification to the Tender Documents that may become necessary as a result of the pre-Tender meeting shall be made by the Procuring Entity exclusively through the issue of an Addendum pursuant to ITT10 and not through the minutes of the pre-Tender meeting. Nonattendance at the pre-Tender meeting will not be a cause for disqualification of a Tenderer. [Emphasis by the Board]***

ITT 8.1 of Section II- Tender Data Sheet at page 20 of the Tender Document provides as follows:

<b><i>B. Tendering Document</i></b>	
<b><i>ITT 8.1</i></b>	<p><b><i>The Pre-tender conference will be held (select one).</i></b></p> <p><b><i>If it will be held, it will be held on ___ TUESDAY ___ 29<sup>TH</sup> NOVEMBER 2022 ___ 10:00HRS EST</i></b></p> <p><b><i>And at ___ Kenya Meat Commission, Board room at Athi-River ___</i></b></p> <p><b><i>The pre-arranged pretender visit of the site of the works will be held.</i></b></p> <p><b><i>If it will be held, it will be held on ___ TUESDAY ___ 29<sup>TH</sup> NOVEMBER 2022 ___ 10:00 HRS EST ___</i></b></p> <p><b><i>And at ___ Kenya Meat Commission, site at Athi River</i></b></p>
*****	*****

Clause 2(f) Preliminary Examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 24 of the Tender Document provided the preliminary evaluation parameter as:

***f. Site Visit***

The Board notes that the bone of contention is on whether lack of attendance at the pre-tender site visit on 29<sup>th</sup> November 2022 would lead to automatic disqualification of a tenderer.

From the above provisions of the Tender Notice and Tender Document, it is evident that (a) a pre-arranged pretender visit of the site of works was to be held on 29<sup>th</sup> November 2022 at the 1<sup>st</sup> Respondent's site at Athi River which according to the Tender Notice, attendance by tenderers was mandatory yet the Tender Document did not indicate in the Tender Data Sheet that attendance by tenderers was mandatory ; (b) anonymized minutes of pre-Tender meeting and the pre-arranged pretender visit of the site of the works would be published by the 1<sup>st</sup> Respondent on its website; (c) Non-attendance at the pre-tender meeting would not be a cause for disqualification of a Tenderer; (d) it was nonetheless a mandatory requirement for tenderers to prove attendance of a site visit at the 1<sup>st</sup> Respondent's site to be rendered responsive at the Preliminary Evaluation stage.

In view of the above, the question that then begs to be answered is whether the 3<sup>rd</sup> Respondent ought to have been automatically disqualified from tendering in the subject tender since its Certificate of Tender Site Visit was signed by the 1<sup>st</sup> Respondent's Chief Engineer on 8<sup>th</sup> December 2022 and it was not among the tenderers who attended the pre-tender site visit on 29<sup>th</sup> November 2022.

In interpreting the aforementioned provisions of the Tender Notice and the Tender Document on the pretender site visit, we note and observe that the provisions on the pretender site could be interpreted as follows:

- i a mandatory pretender site visit would be held at the 1<sup>st</sup> Respondent's Athi River Headquarters on 29<sup>th</sup> November 2022 from 0900 hrs to 1300hrs;
- ii a non- mandatory pre-arranged pretender site visit would be held at the 1<sup>st</sup> Respondent's site at Athi River on 29<sup>th</sup> November 2022 at 10:00 hrs;
- iii non-attendance of the pretender site visit on 29<sup>th</sup> November 2022 would lead to disqualification from the tendering process;
- iv non-attendance of the pretender site visit would not be a cause for disqualification of a tenderer.
- v Proof of site visit on any other date prior to the tender submission deadline other than 29<sup>th</sup> November 2022 was sufficient evidence of having met the mandatory requirement for site visit under Clause 2(f) Preliminary Examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 24 of the Tender Document.

It is our considered view that the provisions of attendance of the pretender site visit were inconsistent and incoherent since despite indicating in the Tender Notice that attendance of the pre-tender site visit on 29<sup>th</sup> November 2022 was mandatory, the provisions of the Tender Document did not categorically state that attendance of the Pre-Tender Site visit on 29<sup>th</sup>

November 2022 was mandatory and as such, tenderers could interpret this to mean that they could attend the site visit on any other date prior to the tender submission deadline and be issued with a Certificate of Tender Site Visit signed by the Chief Engineer of the 1<sup>st</sup> Respondent.

We have perused the 3<sup>rd</sup> Respondent's original tender submitted to the Board as part of the Confidential documents pursuant to Section 67(3)(e) of the Act and note that the 3<sup>rd</sup> Respondent availed a Site Visit Certificate in its tender document at page 21 which was stamped by the 1<sup>st</sup> Respondent's Chief Engineer on 8<sup>th</sup> December 2022 which was before the tender submission deadline and upon evaluation, the Evaluation Committee rendered the 3<sup>rd</sup> Respondent's tender responsive at the Preliminary Evaluation stage having met the mandatory requirement of a Site Visit.

We have also perused other tenderers original tenders submitted to the Board as part of the confidential documents and note the following in regard to the Certificate of Tender Site Visit:

<b>No.</b>	<b>Name of Tenderer</b>	<b>Date indicated in the Certificate of Tender Visit</b>
1.	Mushimi Limited	Date indicated by the tenderer and the 1 <sup>st</sup> Respondent's Chief Engineer is 29 <sup>th</sup> November 2022
2.	TML Group Limited	Date indicated by the 1 <sup>st</sup> Respondent's Chief Engineer is 8 <sup>th</sup> December 2022



3.	Apex Project Limited	Date indicated by the tenderer and 1 <sup>st</sup> Respondent's Chief Engineer is 29 <sup>th</sup> November 2022
4.	CUMA Refrigeration	The tenderer dated the Certificate of Tender Site Visit 16 <sup>th</sup> December 2022 while the Chief Engineer of the 1 <sup>st</sup> Respondent dated it 29 <sup>th</sup> November 2022.
5.	SAMKYO Investment	The tenderer signed and stamped the Certificate of Tender Site Visit 15 <sup>th</sup> December 2022 while the Chief Engineer of the 1 <sup>st</sup> Respondent signed but did not date the said certificate.
6.	JV- AL HUDHA	Date indicated by tenderer and the 1 <sup>st</sup> Respondent's Chief Engineer is 29 <sup>th</sup> November 2022
7.	Biometric Tech Limited	Date indicated by tenderer and the 1 <sup>st</sup> Respondent's Chief Engineer is 29 <sup>th</sup> November 2022

To the extent that the provisions of the Tender Notice and the Tender Document on the pretender site visit could be interpreted in more than one meaning, we are of the considered view that the provisions on the pretender site visit are ambiguous.

The question that we are now called upon to answer is how should a provision of a Tender Document that is ambiguous, for having more than one interpretation, be applied during evaluation and comparison of tenders.

We are alive to the *contra proferentem* rule of interpretation that provides for an ambiguous provision of an instrument to be construed against the drafter of the instrument. In the instant Request for Review, the provisions of the pretender site visit in the Tender Notice and in the Tender Document having been found to be ambiguous should be interpreted against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, who are drafters of the Tender Notice and the Tender Document. Put differently, the application of the provisions on the pretender site visit in the Tender Notice and in the Tender Document having been found to be ambiguous should be interpreted in favour of tenderers.

From the foregoing, the Board finds that the interpretation of the provisions of the Tender Notice and the Tender Document on the pretender site visit that tenderers ought to have applied while preparing their tenders in the subject tender was ambiguous and as such, it should be interpreted in favour of tenderers and against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. Hence, the 3<sup>rd</sup> Respondent met the eligibility criteria specified in Clause 2(f) of Section III-Evaluation and Qualification Criteria at page 24 of the Tender Document.

**Whether the 1<sup>st</sup> Respondent's Letter of Notification of Intention to Award dated 6<sup>th</sup> April 2023 issued to the Applicant met the threshold required in Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020.**

It is the Applicant's case that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents failed to give coherent, valid and justifiable reasons for disqualification of its tender having not notified it that the reason for its disqualification according to the Evaluation Committee was failure to submit the Registration of NCA (Mechanical and Electrical) Certificate which was a mandatory requirement.

We have hereinabove established that the Letter of Notification of Intention to Award the subject tender dated 6<sup>th</sup> April 2023 and issued to the Applicant by the 2<sup>nd</sup> Respondent did not contain the reason issued by the Evaluation Committee for disqualification at the Preliminary Evaluation stage being failure to avail NCA Certificate.

Instead, the 2<sup>nd</sup> Respondent proceeded to issue the Applicant with reasons why it was unsuccessful in the subject tender as deposed to by Mr. Joakim Boli at paragraph 15 of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Replying Affidavit and as submitted during the hearing by Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent who conceded to the fact that the reasons for disqualification issued to the Applicant were not those in the Report of the Evaluation Committee but were those captured in the Professional Opinion.

Article 227 of the Constitution requires the 1<sup>st</sup> Respondent to have a procurement system that is fair, equitable, transparent, competitive, and cost effective and provides for a legislation that governs public procurement and asset disposal framework as follows:

***"227. Procurement of public goods and services***

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

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].

Section 3 of the Act further underpins 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.”***

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

In view of the provisions of Section 87 of the Act read with Regulation 82 of Regulations 2020, the Board observes an accounting officer of a procuring entity must notify, in writing, the tenderer who submitted the successful tender, that its tender was successful before the expiry of the tender validity period. Simultaneously, while notifying the successful tenderer, an accounting officer of a procuring entity notifies other unsuccessful tenderers of their unsuccessfulness, giving reasons why such tenderers are unsuccessful, disclosing who the successful tenderer is, why such a tenderer is successful in line with Section 86(1) of the Act and at what price the successful tenderer was awarded the tender. These reasons and disclosures are central to the principles of public procurement and public finance of transparency and accountability enshrined in Article 227 and 232 of the Constitution. This means all processes within a public procurement system, including notification to unsuccessful tenderers must be conducted in a transparent manner.

In the circumstances, the 2<sup>nd</sup> Respondent failed to issue the reason for disqualification of the Applicant's tender at the Preliminary Evaluation stage as indicated by the Evaluation Committee in the Report of the Evaluation Committee and conceded during the hearing that it resulted to giving some of the reasons leading to disqualification of the Applicant's tender which was in breach of provisions of Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020 and the principle of transparency in Article 227(1) of the



Constitution. As such, the letter of notification dated 6<sup>th</sup> April 2023 issued to the Applicant **did not** meet the threshold required in Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020.

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

We have established that the Evaluation Committee evaluated the Applicant's tender in accordance with the provisions of the Tender Document as read with Section 80(2) of the Act.

We have also established that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents lacked transparency in issuance of the Applicant's letter of Notification of Intention to Award the subject tender dated 6<sup>th</sup> April 2023 by failing to disclose the reason why the Applicant was disqualified at the Preliminary Evaluation stage by the Evaluation Committee. Consequently, the Board deems it fit to nullify the Letters of Notification of Intention to Award Contract in the subject tender issued to the successful tenderer and unsuccessful tenderers dated 6<sup>th</sup> April 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.

The upshot of our findings is that the instant Request for Review dated 12<sup>th</sup> April 2023 and filed on 13<sup>th</sup> April 2023 succeeds only to the extent that the Letter of Notification of Intention to Award dated 6<sup>th</sup> April 2023 issued to the

Applicant did not meet the threshold required in Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020.

## **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 12<sup>th</sup> April 2023 and filed on 13<sup>th</sup> April 2023:

- 1. The Letter of Notification of Intention to Award dated 6<sup>th</sup> April 2023 issued to the successful tenderer by the 2<sup>nd</sup> Respondent with respect to Tender No. KMC/IOT/CL/11677/2022 for Procurement of Supply, Installation, Testing and Commissioning of Canning Lane, be and is hereby nullified and set aside.**
  
- 2. The Letters of Notification of Intention to Award dated 6<sup>th</sup> April 2023 issued to the Applicant and other unsuccessful tenderers by the 2<sup>nd</sup> Respondent with respect to Tender No. KMC/IOT/CL/11677/2022 for Procurement of Supply, Installation, Testing and Commissioning of Canning Lane, be and is hereby nullified and set aside.**

3. The 2<sup>nd</sup> Respondent is hereby directed to issue Notification of Intention to Enter into a Contract in Tender No. KMC/IOT/CL/11677/2022 for Procurement of Supply, Installation, Testing and Commissioning of Canning Lane in accordance with Section 87 of the Act read with Regulation 82 of Regulations 2020 within seven (7) days from the date hereof taking into consideration the Board's findings herein.

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

Dated and signed at Nairobi this 4<sup>th</sup> Day of May 2023.



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**CHAIRPERSON**

**PPARB**



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**SECRETARY**

**PPARB**