

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 27/2023 OF 3RD MAY 2023

BETWEEN

TARIME TRADING LIMITED.....APPLICANT

AND

ACCOUNTING OFFICER

KENYA PIPELINE COMPANY LIMITED.....1ST RESPONDENT

KENYA PIPELINE COMPANY LIMITED.....2ND RESPONDENT

FEIHAB CONSTRUCTION LIMITED.....INTERESTED PARTY

Review against the decision of the Accounting Officer, Kenya Pipeline Company Limited in relation to Tender No. KPC/PU/OT-217/CIVIL/MTCC/22-23 for Replacement of PVC Tiles with Granito Tiles in Common Areas, Usambara Block Cottages and Offices

BOARD MEMBERS PRESENT

- | | | |
|-------------------------------|---|-------------|
| 1. Mrs. Njeri Onyango FCI Arb | - | Chairperson |
| 2. Mr. Jackson Awele | - | Member |
| 3. Eng. Mbiu Kimani | - | Member |

IN ATTENDANCE

Mr. James Kilaka

- Secretariat

PRESENT BY INVITATION

APPLICANT - TARIME TRADING LIMITED

Ms. Zipporah Wahome - Director, Tarime Trading Limited

**RESPONDENTS -ACCOUNTING OFFICER, KENYA PIPELINE
COMPANY LIMITED**

KENYA PIPELINE COMPANY LIMITED

Ms. Karen Muriithi -Advocate, Kenya Pipeline Company Limited

THE INTERESTED PARTY- FEIHAB CONSTRUCTION LIMITED

N/A

-N/A

BACKGROUND OF THE DECISION

The Tendering Process

Kenya Pipeline Company Limited, the Procuring Entity and the 2nd Respondent herein, invited sealed tenders in response Tender No. KPC/PU/OT-217/CIVIL/MTCC/22-23 for Replacement of PVC Tiles with Granito Tiles in Common Areas, Usambara Block Cottages and Offices (hereinafter referred to as the "subject tender") using an open competitive

method open tender (Reserved for Women). The invitation was by way of an advertisement on 31st January 2023 on The Standard Newspaper publication and the 2nd Respondent's website www.kpc.co.ke and the Public Information Portal www.tenders.go.ke. The subject tender's submission deadline was Friday, 24th February 2023 at 10.00 a.m. Completed tender documents were to be submitted electronically in PDF format and uploaded on the 2nd Respondent's Supplier Relationship Management (SRM) Collaboration Folder.

Submission of Tenders and Tender Opening

According to the Tender Opening Minutes signed by members of the Tender Opening Committee on 28th February 2023, a total of thirty (30) tenderers submitted their tenders. The said thirty (30) tenders were opened and were recorded as having submitted their respective tenders in response to the subject tender within the tender submission deadline as follows:

No.	Name of Tenderer
1.	Zueda Zee Enterprises
2.	Regence Enterprises Company Limited
3.	Supersmart Merchants Limited
4.	Wayrren Enterprises Limited
5.	Lergend Enterprises
6.	Hirola Investments Limited

7.	Carlsche Limited
8.	Farhis Ventures Limited
9.	Vision On the Go Limited
10.	Gemlyne Enterprises
11.	Cemex Construction Limited
12.	Godata Agencies
13.	Saint Field Limited
14.	Dadian Works Limited
15.	Tranx Holdings Limited
16.	Karura Engineering Works
17.	Tarime Trading Limited
18.	Feihab Construction Limited
19.	Wilcoreg Limited
20.	Hansha Ventures Limited
21.	Tojax Company Limited
22.	Agrofield Planet Limited
23.	Incredible Arc Company Limited
24.	Waruka Agencies Limited
25.	M-Africa Company
26.	Gretfox Capital Limited

27.	Eversmart Agencies Limited
28.	Aflac General Supplies
29.	Centre Point Solutions
30.	Elite Builders Company Limited

Evaluation of Tenders

The 1st Respondent constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") to undertake an evaluation of the thirty (30) tenders in the following three stages as captured in an Evaluation Report signed by members of the Evaluation Committee on 17th March 2023:

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

Preliminary Evaluation

At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the criteria set out in clause 2 Preliminary examination for Determination of Responsiveness under SECTION III-EVALUATION AND QUALIFICATION CRITERIA at pages 40 to 43 of the Tender Document.

At the end of the evaluation at this stage, nine (9) tenders which included the Applicant's tender were found to be non-responsive while twenty-one (21) tenders which included the Interested Party's tender were found to be responsive. Only the responsive tenders proceeded for evaluation at the Technical Evaluation Stage.

Technical Evaluation

At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the Criteria set out as Clause 2. Technical Evaluation Criteria under Section III-EVALUATION QUALIFICATION CRITERIA at page 43 of the Tender Document. Tenders were required to score YES in all the requirements at the technical evaluation stage to qualify to proceed for evaluation at the Financial Evaluation Stage.

At the end of evaluation at this stage, thirteen (13) tenders were found unresponsive with only eight (8) tenders being responsive and proceeding for evaluation at the Financial Evaluation Stage.

Financial Evaluation

At this stage of evaluation, the Evaluation Committee was required to examine tenders as outlined under the criteria set out as Clause 4. Financial Evaluation Criteria under SECTION III - EVALUATION AND QUALIFICATION CRITERIA at page 44 of the Tender Document. The Evaluation Committee was required to conduct financial evaluation using the Bill of Quantities under Section VII of the Tender Document and compare the tenders to determine

the lowest evaluated price by ranking the responsive tenders according to their tendered price.

At the end of the evaluation, the Interested Party's tender was determined to be the lowest evaluated responsive tender as indicated at page 20 of the Evaluation Report which forms part of the confidential documents submitted to the Public Procurement Administrative Board (hereinafter referred to as the 'Board') by the Respondents pursuant to Section 67(3)(e) of the Public Procurement Asset and Disposal Act, 2015 (hereinafter referred to as the 'Act').

Evaluation Committee's Recommendation

According to page 21 of the Evaluation Report, the Evaluation Committee determined the tender offered by the Interested Party as the lowest evaluated responsive tender thus recommended award of the subject tender to the Interested Party at their tender price of Kenya Shillings Ten Million, Two Hundred and Twenty-Five Thousand and Four Hundred only (Kshs. 10,225,400.00).

Professional Opinion

In a Professional Opinion dated 30th March 2023 (hereinafter referred to as the "Professional Opinion"), the Acting General Manager, Ms. Maureen Mwenje, reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and recommended the

award of the subject tender to the Interested Party as per the recommendations of the Evaluation Committee.

Notification to Tenderers

Tenderers were notified of the outcome of the evaluation of the subject tender vide letters of Notification of Intention to Award dated 12th April 2023 signed by the 1st Respondent.

REQUEST FOR REVIEW

On 3rd May 2023, the Applicant filed a Request for Review dated 3rd May 2023 together with an undated Supporting Statement by Zipporah Wahome, seeking the following orders from the Board in verbatim:

- a) This honorable tribunal be pleased to order the Respondent to quash the decision by the Respondents dated 21st April 2023;***
- b) This honorable tribunal be pleased to order the Respondent to fresh evaluation of the tenders that were bided for by the Applicant among other tenders;***
- c) This honourable tribunal be pleased to order the Respondent to disband the tender reviewing committee that arrived at the said decision and the formation of a new one in a bid to ensure transparency, efficiency and regularity in the decision-making process;***

d) That costs and incidentals of this review application be provided for.

In a Notification of Appeal and a letter dated 3rd May 2023, Mr. James Kilaka, the Acting Board Secretary of the Board notified the 1st and 2nd 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 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the 1st and 2nd Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five days from 3rd May 2023.

On 8th May 2023, in response to the Request for Review, the Respondents, filed a Memorandum of Response dated 8th May 2023 and a Replying Affidavit sworn on 8th May 2023 by Ms. Nancy Rono, the 2nd Respondent's Acting Manager, Supply Chain Division. The Respondents also submitted to the Board a confidential file containing confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

Vide letters dated 8th May 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 24th March 2020. All tenderers in the subject tender were invited to submit to the Board

any information and arguments concerning the subject tender within 3 days from 8th May 2023.

On 11th May 2023, the Applicant filed an Affidavit sworn on 10th May 2023 by Ms. Zipporah Njoki Wahome in response to the Respondents Replying Affidavit.

None of the other tenderers who participated in the subject tender filed any document or made any representation in response to the Board's invitation for them to submit any information and arguments concerning the subject tender.

Vide a Hearing Notice dated 15th May 2023, the Acting Board Secretary, notified parties and all tenderers in the subject tender that the hearing of the instant Request for Review will be by online hearing on 17th May 2023 at 12:00 noon., through the link availed in the said Hearing Notice.

During the online hearing on 17th May 2023, the Board observed that the Respondents had filed a Memorandum of Response that constituted an admission that the Applicant's tender was erroneously disqualified for the alleged reason that the Applicant submitted in the subject tender a Power of Attorney addressed to KeRRA, when in fact the Applicant's Power of Attorney was not addressed to KeRRA. Counsel for the Respondents, Ms. Muriithi indicated that the 2nd Respondent's Evaluation Committee was ready to re-

evaluate the Applicant's tender in view of the mistake that was noted after the Applicant's complaint.

Ms. Wahome, the Managing Director at the Applicant also confirmed to the Board that the Applicant was agreeable to its tender being readmitted for re-evaluation.

In view of the foregoing, it was agreed that the Request for Review would be dispensed with as per a signed Consent between the Applicant and Respondents. Accordingly, the Board directed parties to file a signed consent in the matter on or before 18th May 2023 at 11.00 a.m.

At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 28th April 2023 had to be determined by 19th May 2023 and that the Board would communicate its decision on or before 19th May 2023 to all parties via email and that the same would be as per the consent that they would file in the matter.

In compliance with the Board's directions, on 17th May 2023 at 4.26 p.m., the parties filed consent signed by the Applicant and Respondents. The Consent read:

"...:CONSENT

Pursuant to Regulation 216(2) of the Public Procurement and Asset Disposal Regulations, 2020 The Applicant, the 1st and 2nd Respondents will be most obliged if the following terms are recorded before the Board. By Consent:

- a) THAT the bids submitted for tender reference Number KPC/PU/OT-217/CIVIL/MTTC/22-23 for replacement of PVC tiles with granite tiles in common areas Usambara cottages and offices including the Applicant's bid be subjected to re-evaluation by the 2nd Respondent.***
- b) THAT the Request for Review dated 3^d May 2023 and filed on even date by the Applicant is marked as withdrawn to allow the re-evaluation to proceed to its logical conclusion.***
- c) THAT each party bear its own costs..."***

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 3rd May 2023:

BY CONSENT:

- 1. The bids submitted for tender reference Number KPC/PU/OT-217/CIVIL/MTTC/22-23 for the Replacement of PVC tiles with Granito tiles in Common Areas Usambara Block Cottages and offices including the Applicant's bid be subjected to re-evaluation by the 2nd Respondent.**

2. The Request for Review dated 3rd May 2023 and filed on even

date by the Applicant is marked as withdrawn to allow the re-evaluation to proceed to its logical conclusion.


3. Each party shall bear its own costs

Dated at NAIROBI, this 19th Day of May 2023.

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CHAIRPERSON

PPARB

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SECRETARY

PPARB

