

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 31/2023 OF 26TH MAY 2023

BETWEEN

LEGEND MANAGEMENT LIMITED.....APPLICANT

AND

TRUST SECRETARY, KENYA PIPELINE COMPANY

RETIREMENT BENEFITS SCHEME.....1ST RESPONDENT

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

ALLIANCE REALTORS LIMITED.....INTERESTED PARTY

Review against the decision of the Trust Secretary, Kenya Pipeline Company Retirement Benefits Scheme in relation to Tender No. KPCRBS/PROC/012/2022/2023 for Provision of Property Management Services.

BOARD MEMBERS PRESENT

- | | | |
|----------------------|---|-------------|
| 1. Ms. Faith Waigwa | - | Chairperson |
| 2. Mr. Jackson Awele | - | Member |
| 3. Eng. Mbiu Kimani | - | Member |

IN ATTENDANCE

Mr. Philemon Kiprop

- Secretariat

PRESENT BY INVITATION

APPLICANT - LEGEND MANAGEMENT LIMITED

Mr. Kiplangat

-Advocate, H&K Law Advocates

**RESPONDENTS -TRUST SECRETARY, KENYA PIPELINE
COMPANY RETIREMENT BENEFITS SCHEME
KENYA PIPELINE COMPANY RETIREMENT
BENEFITS SCHEME**

Mr. Kelvin Mbogo

-Advocate, Robson Harris Advocates LLP

THE INTERESTED PARTY- ALLIANCE REALTORS LIMITED

N/A

BACKGROUND OF THE DECISION

The Tendering Process

Kenya Pipeline Company Retirement Benefits Scheme, the Procuring Entity and the 2nd Respondent herein, invited sealed tenders in response to Tender No. KPCRBS/PROC/012/2022/2023 for Provision of Property Management Services. (hereinafter referred to as the "subject tender") using an open

competitive method. The invitation was by way of an advertisement on 10th March 2023 on the 2nd Respondent's website www.kpcrbs.com The subject tender submission deadline was Friday, 24th March 2023 at 10.00 a.m.

Submission of Tenders and Tender Opening

According to the Confidential File submitted by the Procuring Entity, the following seven (7) tenderers were recorded as having submitted their respective Proposals in response to the subject Proposal by the proposal submission deadline:

No.	Name of Tenderer
1.	Firmus Realtors
2.	Legend Management Limited
3.	Kiragu & Mwangi
4.	Zone One Technology
5.	Alliance Realtors Limited
6.	Ebony Estates Limited
7.	Advent Valuers 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

seven (7) tenders in the following three stages as captured in the Evaluation Report dated and signed on 21st April 2023.

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

Preliminary Evaluation

At this stage of the 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 page 27 of the Tender Document.

Evaluation was to be on Yes/No basis and tenderers who failed to meet any criteria in the Preliminary Evaluation would not proceed for further evaluation at the Technical Evaluation Stage.

At the end of the evaluation at this stage, two (2) tenders were found to be non-responsive while five (5) tenders which included the Applicant's and Interested Party's tenders 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 at Clause 3. Technical Evaluation Criteria under Section III-EVALUATION QUALIFICATION CRITERIA at page 28 to 30 of the Tender Document. Tenderers were required to score a minimum of 70% marks in the overall evaluation at the Technical Stage and also a minimum of Kshs. 50% marks of the total marks in each of the qualifying criteria at the technical evaluation stage to qualify to proceed for evaluation at the Financial Evaluation Stage.

At the end of evaluation at this stage, two (2) tenders were found to be non-responsive while three (3) Proposals which included the Applicant's and Interested Party's tenders were found to be responsive having surpassed the 70% marks in the overall evaluation and a minimum of 50% marks of the total marks in each of the qualifying criteria at the technical evaluation stage. Only the responsive tenders qualified for evaluation at the Financial Evaluation Stage. The Evaluation Committee recommended that the 1st Respondent considers the report with the view of inviting the responsive tenderers who qualified for financial evaluation for financial bids opening on 28th April 2023.

Financial Evaluation

At this stage of evaluation, the Evaluation Committee was required to examine the tenderers financial proposals.

When Evaluation Committee opened the financial proposals on 28th April 2023, all the 3 responsive tenders at the Technical Stage had submitted identical bids for 2.9% Property Management fees and 4.35% Letting Fee. Accordingly, all the 3 tenders were scored 30% marks at financial evaluation.

Evaluation Committee's Recommendation

The Evaluation Committee found that the combined Interested Party's Technical and Financial scores was the lowest evaluated tender and therefore recommended the award of the subject tender to it at its tender cost of 2.9% Management fee and 4.35% Letting fee.

Professional Opinion

The Respondents did not submit a Professional Opinion as part of the confidential documents in the subject tender.

Notification to Tenderers

Tenderers were notified of the outcome of the evaluation of the subject proposal vide Notification of Intention to Award letters dated and signed on 12th May 2023, by the 1st Respondent.

REQUEST FOR REVIEW

On 26th May 2023, the Applicant filed a Request for Review dated 15th May 2023 and an Affidavit in support of the Request for Review sworn on 26th

May 2023 by Geoffrey Koros, seeking the following orders from the Board in verbatim:

- a) An order annulling and setting aside the Procuring Entity's decision awarding Tender Number KPCRBS/PROC/012/2022/2023 to the alleged successful bidder;***
- b) An order annulling and setting aside the Respondent's decision notifying the Applicant that it had not been successful vide letter dated 12th May 2023;***
- c) An order substituting the decision of the Respondent and awarding Tender Number KPCRBS/PROC/012/2022/2023 to the Applicant after reviewing all records of the procurement process relating to the subject tender;***
- d) An order directing the Procuring Entity to sign a contract with the Applicant in accordance with the Tender and the decision of the Board thus bringing the procurement process to its logical conclusion;***
- e) Any other or further relief or reliefs as the Board shall deem just and expedient; and***
- f) The costs of this Review be borne by the Procuring Entity.***

In a Notification of Appeal and a letter dated 26th May 2023, Mr. James Kilaka, the Board Secretary 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 26th May 2023.

On 31st May 2023, in response to the Request for Review, the Respondents, through the firm of Robson Harris Advocates LLP filed a Notice of Appointment of Advocates dated 31st May 2023, a Memorandum of Response dated 31st May 2023 together with the Respondents' Replying Affidavit sworn on 31st May 2023 by Sammy Njeru, the 2nd Respondent's Trust Secretary. 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 6th June 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 6th June 2023.

On 5th June 2023 the Applicant filed a Supplementary Affidavit sworn on 2nd June 2023 by Geoffrey Koros alongside their Written Submissions dated 5th June 2023.

Vide a Hearing Notice dated 7th June 2023, the Acting Board Secretary, notified parties and all tenderers in the subject proposal that the hearing of the instant Request for Review will be by online hearing on 8th June 2023 at 1.00 p.m., through the link availed in the said Hearing Notice.

On the morning of 8th June 202, the Respondents filed their Written Submissions dated 8th June 2023.

On 8th June 2023 as at 1.00 p.m. only the Applicant and Respondents had joined the online hearing session through their respective Advocates. There was no representation on the part of the Interested Party. The Board adjourned the matter for 10 minutes to allow Mr. Philemon Kiprof from the Secretariat to make a telephone call to the Interested Party to confirm their whereabouts.

When the Board resumed for the hearing session at 1.17 p.m., Mr. Kiprof notified the Board that upon contacting the Interested Party, the Interested Party's representatives requested for the hearing link to be re-shared with them and even after sharing the link with them, no representative from the Interested Party had joined the hearing session.

The Board sought the comments from the parties present whether the matter should proceed in the absence of the Interested Party. Both Counsel for the Respondents and Applicant affirmed that the hearing proceeds as earlier scheduled as the Interested Party had not filed any document in the matter.

In light of the foregoing, Board gave hearing directions with all the parties being assigned 10 minutes for highlighting of their respective submissions. The Board also directed that in the Interested Party subsequently joined the hearing session, they too, would be allocated time to address the Board only on matters of law. The Applicant was also assigned an extra 5 minutes to offer a rejoinder on the submissions that would be made by the other parties.

PARTIES' SUBMISSIONS

Applicant's Submissions

During the online hearing on 8th May 2023, Counsel for the Applicant, Mr. Kiplangat placed reliance on the Applicant's documents filed in the matter i.e. Request for Review dated 26th May 2023, Affidavit in Support of the Request for Review sworn on 26th May 2023 by Geoffrey Koros, Supplementary Affidavit sworn on 2nd June 2023 by Geoffrey Koros and the Applicant's Written Submissions dated 5th June 2023.

Counsel submitted that the 1st Respondent invited tenderers sometime in March 2023 to submit tenders for the subject tender. He indicated that the

Applicant submitted its tender and was subsequently notified that it had qualified to proceed for Financial Evaluation. He submitted that the Applicant was invited to submit Financial bid for opening on 18th April 2023 and that it complied in submitting the bid.

Mr. Kiplangat indicated that thereafter, the Applicant received a regret letter dated 12th May 2023 citing that its tender was unsuccessful. According to the letter, the Applicant was unsuccessful because its combined technical and financial score was not competitive.

Counsel argued that the Applicant challenges the award of the tender to the Interested Party citing the Interested Party's tender as substantially unresponsive to the requirements under the Tender Document for at least 3 reasons:

- i. The Interested Party did not supply 2 copies of their submitted tender document as required under Instructions To Tenders No. 22.1 of the Tender Document.
- ii. The original tender by the Interested Party was not serialised
- iii. The Interested Party did not submit a separate financial bid

Mr. Kiplangat argued that during the tender opening on 24th March 2023 it was noted in the tender opening notes attached to the Request for Review that the Interested Party did not comply with the above requirements.

Counsel contended that the evaluation criteria of the subject tender was outlined under Section III of the Tender Document and that a successful tender was one that was the lowest evaluated tender. He argued that the same tender provision defines the lowest evaluated tender as the tender that meets the qualification criteria of a tender determined to be responsive to the Tender Document and the tender is also determined to have the lowest evaluated price. Mr. Kiplangat further submitted that the section further defines a responsive tender as one that meets all the eligibility criteria as well as mandatory requirements under the ITT.

Counsel referred to Instruction To Tenderers No. 22.1 of the Tender Document and submitted that it required each tenderer to submit 2 other copies in addition to their original tender.

Counsel added that the Instruction To Tenderers at page 2 of the Tender Document requires that each submitted tender has to be serialised and that this was in line with section 74 the Act and the Regulation 74(1)(b) of the Regulations 2020.

Mr. Kiplangat submitted that in view of the stated non-compliance, the Interested Party's tender was not responsive to the Tender Document. And thus not eligible to proceed for evaluation at the Technical Stage of evaluation.

He further pointed out that though the Respondents' alleged that the requirements that the Interested Party was non-compliant had been waived, the Evaluation Committee's minutes of the said waiver had not been attached to the Respondents' response to the instant Request for Review. Additionally, counsel submitted that even if the Evaluation Committee waived the said requirements, the Committee acted ultra vires as it purportedly waived mandatory tender requirements which are also statutory requirements provided for under the Act and Regulations 2020.

Counsel referred the Board to the case of **Republic v PPARB & Ors Ex parte Roben Aberdare (K) Limited [2019]eKLR** for the argument that tenders should comply with all the aspects of the Instructions To Tenderers and meet all the mandatory requirements and that failure to comply with any aspect of the instructions would defeat the purpose of supplying the information to tenderers for preparation of tenders, occasioning unfairness to the tenderers who are compliant.

Mr. Kiplangat submitted that non-compliance with tender specifications on the part of the Interested Party occasioned unfairness and rendered the Interested Party's tender document unresponsive.

Respondents' Submissions

Counsel for the Respondents, Mr. Mbogo, pointed out that in response to the Request for Review, the Respondents would be relying on their filed

documents i.e. Memorandum of Response dated 31st May 2023, the Replying Affidavit sworn on 31st May 2023 by Sammy Njeru, Written Submissions dated 8th June 2023.

Mr. Mbogo submitted that the main issue for determination was whether the 2nd Respondents' Evaluation Committee conducted an evaluation of the tenders submitted in the subject tender in accordance with the law and Tender Document. He argued that the Procuring Entity conducted the entire procurement process in accordance with the law, Constitution, and provisions of the Tender Document.

Counsel indicated that Clause 2 under Section III of the Tender Document provided for mandatory requirements that if not complied with would lead to a tenderer being disqualified from further evaluation in the subject tender. He argued that none of the reasons for the alleged non-responsiveness of the Interested Party's tender was in the list of the mandatory requirements listed under Section III of the Tender Document. Accordingly, Counsel argued that for this reason alone, the Interested Party's tender was responsive.

On the issue of the other Instructions To Tenderers, Mr. Mbogo argued that the question that the Board should ask itself is whether these Instructions To Tenders were couched in such mandatory terms as to render a submitted tender unresponsive. He posed the question that where a tenderer failed to

submit separate Technical and Financial tenders, would their tender be found unresponsive?

Counsel referred the Board to the decision of Mativo J. (as he then was) in **R v PPARB & 2ors ex parte BABS Security Services Limited [2018]eKLR** where the High Court decreed that a tender only qualifies as a responsive tender if it meets all the requirements set out in the Tender Document and which formalities are usually listed in Tender Document as mandatory requirements. Further, if the formality is not listed as a mandatory requirement, then it cannot in itself be a determination for declaring a bid unresponsive.

Mr. Mbogo argued the reasons for the Interested Party's alleged non-responsiveness were waived by the Evaluation Committee and that the minutes on the waiver were submitted to the Board as part of the confidential documents.

Counsel submitted that the power to waive a criteria or a formality is provided for under section 79(2) as read with Regulation 75 of the Regulations 2020 and that the only condition attached to such waivers is that it should be applied uniformly and consistently to all tenders. He therefore indicated that, in the absence of an allegation that a waiver was preferentially applied to any tender, the waiver by the Evaluation Committee was proper,

It was Counsel's further submission that a tender that contains minor informalities should not be considered non-responsive. He argued that a minor informality or irregularity is one that is merely a matter of form and not substance. He contended that a defect or variation is immaterial when its effect on price, quantity, quality or delivery is negligible when contrasted with the total cost in a submitted tender. Counsel invited the Board to consider Clause 31 under Section I of the Tender Document on the definition of responsiveness under the subject tender.

Mr. Mbogo contended that under the Tender Document, the successful tender would be the one with the highest combined Technical and Financial Scores and that the Interested Party's score was the highest in this regard. We seek that the Request for Review be dismissed with costs.

Interested Party's Submission

When the Respondents' Counsel finished highlighting the Respondents' submissions, the Interested Party was still unrepresented in the online session. The Board directed that the Applicant would proceed to give their rejoinder on the basis of the Respondents' submission only.

Applicant's Rejoinder

In brief a rejoinder, Mr. Kiplangat pointed out that it had been erroneously argued for the Respondents that none of the issues raised in the Request fell under the mandatory requirements under the Tender Document.

Counsel submitted that the mandatory requirements at page 27 of the Tender Document were only but one aspect of determining the responsiveness of tenders. It was his contention that Section III of the Tender Document provides the criteria for evaluating tenders for responsiveness and one of the criteria thereunder is finding out whether the submitted tender conforms with requirements of the tender documents in addition to the listed mandatory requirements.

Additionally, Mr. Kiplangat submitted that the grounds upon which the Applicant challenged the award of the subject tender were contained in the Act and Regulations 2020. He argued that where there existed an inconsistency in the provisions then statutory provisions would apply. To this end, Counsel indicated that Regulation 74(1)(b) provides that in undertaking preliminary evaluation, serialization is a factor that must be considered by the Evaluation Committee.

Counsel submitted that Mr. Mbogo, Counsel for the Respondents, confirmed that the minutes waiving certain requirements in the subject tender had not been shared in the present proceedings. Mr. Kiplangat submitted that public procurement is underpinned under the Constitution and under Article 227 of the Constitution the process should have been transparent such that if there was a change of requirements, then this change ought to have been done transparently with the Evaluation Committee notifying all the tenderers of the waiver and the reasons for the waiver.

Counsel relied on the decision in ***R v PPARB Ors Ex parte Roben Aberdare (K) Limited [2019]eKLR*** for the proposition that a tender document should comply with all aspects of the Instructions To Tenderers as the instructions form part of the tender requirements.

Mr. Kiplangat invited the Board to find the Interested Party's tender was not responsive to the Tender Document and thus the award of the subject tender should be annulled.

CLARIFICATIONS

The Board sought clarification from the Respondents on the provisions of law the Evaluation Committee relied on when waiving the requirements under the Tender Document to which Mr. Mbogo singled out section 79(2) of the Act and Regulations 74 and 75 of the Regulations 2020.

The Board also sought to understand from the Respondents the reasons as to why the waiver was done to those specific requirements in the Tender Document. Mr. Mbogo indicated that the waived requirements were not mandatory requirements under Section III of the Tender Document.

The Board also sought to understand from the Respondents their understanding of the waived requirements if they did not consider them as mandatory requirements to which Mr. Mbogo indicated that they were simply Instructions To Tenderers as implied by their name.

The Board also inquired from the Respondents whether the Evaluation Committee in conducting the evaluation in the subject tender was guided by Section III of the Tender Document to which Mr. Mbogo responded in the affirmative.

Additionally, the Board sought clarity from the Respondents as to whether the Evaluation Committee was to evaluate the tenders in the subject tender on the basis of eligibility criteria as well as the other mandatory requirements in the Instructions To Tenderers as opposed to only the requirements listed under the Preliminary Evaluation section of the Tender Document. Mr. Mbogo submitted that a wholesome look at the Tender Document yields that only the specific requirements under the Preliminary Evaluation section of the Tender Document were determinant for establishing the responsiveness of any submitted tender.

At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 26th May 2023 had to be determined by 16th June 2023 and that the Board would communicate its decision on or before 16th May 2023 to all parties via email.

BOARD'S DECISION

The Board has considered all documents, pleadings, oral submissions, Written Submissions and authorities together with confidential documents submitted to it pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination:

- i. Whether the 2nd Respondent's Evaluation Committee evaluated the Interested Party's tender in the subject in accordance with the law and the Tender Document?***
- ii. What orders the Board should grant in the circumstances?***

The Board now proceeds to determine the issues framed for determination.

Whether the 2nd Respondent's Evaluation Committee evaluated the Interested Party's tender in the subject tender in accordance with the law and the provisions of the Tender Document?

The Applicant filed the instant Request challenging the award of the subject tender to the Interested Party while faulting the 2nd Respondent's Evaluation Committee for the manner in which they evaluated the Interested Party's tender. Counsel for the Applicant, Mr. Kiplangat submitted that the Interested Party's tender should not have made it to the Technical Evaluation Stage of the evaluation process as the Interested Party's tender was unresponsive at the Preliminary Stage since (i) the Interested Party failed to submit 2 additional copies of their submitted tender document; (ii) the Interested Party's tender document was not serialized and (iii) the Interested Party did not submit its Technical and Financial Proposals separately contrary to the requirements under the Tender Document. Counsel maintained that it was not open for the Evaluation Committee to waive the above requirements.

The Respondents' opposed the instant Request for review citing that the Evaluation Committee properly evaluated the tenders submitted in the subject tender. Mr. Mbogo, Counsel for the Respondent submitted that the requirements forming the basis of the instant Request for Review were not mandatory instructions under the Tender Document and were in fact waived by the Evaluation Committee. He submitted that the Act and Regulations 2020 permitted the Evaluation Committee to waive tender requirements that were not of a mandatory nature and that the said waived requirements were applied uniformly during the evaluation process in the subject tender.

This Board is therefore called upon to review the manner in which the Evaluation Committee evaluated the tenders submitted in the subject tender to confirm whether the evaluation was undertaken in accordance with the law and the Tender Document.

Section 80(1) and (2) of the Act offers guidance on how the Evaluation Committee should conduct the evaluation of tenders submitted by tenderers in response to any invitation to tender:

"80. Evaluation of tenders

(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) 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. "

Specific to the Preliminary Evaluation Stage, Section 74 of the Act makes provision of how the Evaluation Committee should conduct the preliminary evaluation in the following terms:

"74. Preliminary evaluation of open tender

(1) Pursuant to section 80 of the Act and upon opening of tenders, the evaluation committee shall first conduct a preliminary evaluation to determine whether—

(a) a tenderer complies with all the eligibility requirements provided for under section 55 of the Act;

(b) the tender has been submitted in the required format and serialized in accordance with section 74(1)(i) of the Act;

(c) ...

(d) ...

(e) the required number of copies of the tender have been submitted;

(f) ...

(2) Subject to section 79(2)(b) of the Act, any errors in the submitted tender arising from a miscalculation of unit price, quantity, subtotal and total bid price shall be considered as a major deviation that affects the substance of the tender and shall lead to disqualification of the tender as non-responsive"

Section 79 of the Act provides as follows:

"79. Responsiveness of tenders

(1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents.

(2) A responsive tender shall not be affected by—

(a) minor deviations that do not materially depart from the requirements set out in the tender documents; or

(b) errors or oversights that can be corrected without affecting the substance of the tender.

(3) A deviation described in subsection (2)(a) shall—

(a) be quantified to the extent possible; and

(b) be taken into account in the evaluation and comparison of tenders.”

Regulation 75 of the Regulations 2020 is also instructive that non-responsive tenders should be rejected:

"75. Non-responsiveness to tender

(1) A procuring entity shall reject all tenders, which are not in conformity to the requirements of section 79 of the Act and regulation 74 of these Regulations.

(2) The classification of a deviation from the requirements as minor under section 79(2) (a) of the Act shall be applied uniformly and consistently to all tenders received by a procuring entity.”

From the above provisions the Board takes the view that (i) An Evaluation Committee can only evaluate and compare responsive and not rejected

tenders; (ii) Evaluation of tenders shall be based on procedures set out in the Tender Document; (iii) During Preliminary Evaluation of tenders, the Committee's task is to confirm whether a tender is in the correct format, is serialized and the correct number of copies have been supplied by a tenderer; (iv) Errors arising from a miscalculation of unit price, quantity, subtotal and total tender price constitute material deviation and shall lead to disqualification of a tenderer; (v) A responsive tender is one that meets all eligibility and mandatory requirements in the Tender Document; (vi) Minor deviations that do not depart from the tender requirements and errors that can be corrected without affecting the substance of a tender do not render a tender as unresponsive and (vii) Non-responsive tenders should be rejected.

This Board is also alive to the decision of the High Court in ***R v PPARB & Ors Ex parte Roben Abdare (K) Limited [2019]eKLR*** which affirmed that tenderers should comply with tender conditions:

"63. First, 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 purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. As stated above, the second Interested Party complied with the bid requirements.

Second, 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. Third, 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. Fourth, fairness must be decided on the circumstances of each case. Whatever is done may not cause the process to lose the attribute of fairness or, in the constitutional sphere, the attributes of transparency, competitiveness and cost-effectiveness."

This position was also taken by the High Court in ***R v PPARB & Ors Ex parte BABS Security Services Limited; Nairobi High Court Miscellaneous Application No. 122 of 2018;***

"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. 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. 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. 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 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

bidder 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..."

From the above decisions it is apparent that the Evaluation Committee is tasked with the responsibility of first ascertaining that a tender is responsive to the requirements under the Tender Document before evaluating the tender any further.

In the instant Request for Review, we understand the Applicant to be challenging the award of the subject tender to the Interested Party on the ground that the Interested Party's tender was unresponsive to the requirements under the Tender Document. The said requirements included failing to provide the required number of copies of the tender document; failing to serialize the tender document and failing to submit separate financial and technical bids. The Respondent on its part contends that the said requirements were waived as they were not listed as mandatory.

We have carefully perused the tender document and observe that Clause 2 under Section III of the Tender Document offers guidance on how the Evaluation Committee was to conduct the Preliminary Evaluation in the subject tender:

"2. Preliminary examination for Determination of Responsiveness

The Procuring Entity will start by examining all tenders to ensure that they meet in all respects the eligibility criteria and other mandatory requirements in the ITT, and that the tender is complete in all respects in meeting the requirements provided for in the preliminary evaluation criteria outlined below. The Standard Tender Evaluation Report Document for Goods and Works for evaluating Tenders provides very clear guide on how to deal with review of these requirements. Tenders that do not pass the Preliminary Examination will be considered non-responsive and will not be considered further. The Tenderer must submit the following Mandatory documents in its Tender:

PRELIMINARY EVALUATION

Eligible tenderers must provide the following mandatory requirements. Non-provision of the below, will lead to the tenderer being disqualified from the tender proceedings:

- a) Copy of certificate of Incorporation/Registration**
- b) Valid Kenya Revenue Authority Tax Compliance**
- c) Certified copy of the latest CR12 issue by the Registrar of Companies**
- d) Duly filled confidential business questionnaire**
- e) Duly signed and Stamped Bidders Anti-Corruption Declaration Form and Integrity Pact.**

- f) Company Profile addressing Property Management Services***
- g) Valid registration as an Estate Agent by the regulator (Estate Agents Registration Board)***
- h) Copy of Professional Indemnity Cover of KES 500,000 (Five Hundred Thousand)***
- i) Certified copy of audited accounts for the last two years***
- j) Letter of comfort from the tenderers bank***
- k) Provide evidence of having dealt with at least 3 clients for the last three years***
- l) Pretender Site visit certificate"***

Our interpretation of the above clause is that the Evaluation Committee was tasked with examining all tenders to verify that they satisfy all the eligibility criteria and other mandatory requirements in the Instructions To Tenderers as well as the mandatory requirements listed (a) to (l) above (emphasis ours).

We find fault with the Respondents' submission that the Evaluation was to be conducted in accordance with the mandatory requirements listed (a) to (l) above to the exclusion of the eligibility criteria and the mandatory requirements in the Instructions To Tenders. We say so because, clause 2 under Section III of the Tender Document is express that the preliminary evaluation would be based on the eligibility criteria, other mandatory requirements in the Instructions To Tenderers as well as mandatory requirements listed as (a) to (l) at clause 2 under Section III of the Tender Document.

This Board has keenly studied pages 4 to 11 of the Evaluation Committee’s Report dated 21st April 2023 and observed that the Evaluation Committee evaluated tenders according to the mandatory requirements listed under (a) to (l) above only. The Evaluation Report does not indicate the performance of the individual tenders as against the eligibility criteria and the mandatory requirements in the Instructions To Tenderers. The relevant parts of the Evaluation Report are herein reproduced for ease of reference:

Table 3: Preliminary Evaluation

	CRITERIA	Firmus	Lege nd	Kirag u Mwa ngi	Zone One	Allia nce	Ebo ny	Adv ent
i.	Copy of certificate of Incorporation/Registration	R	R	R	R(Busin ess Name)	R	R	R
ii.	Valid Tax Compliance Certificate	R	R	R	NR (Wrong name, expired 14/03/2 022)	R	R	R

7. Certified copy of CR12 certificate issued by the Registrar of Companies	R	R	R	R(CR13)	R	R	R
7. Duly filled confidential business questionnaire	R	R	R	R	R	R	R
7. Duly signed and Stamped Bidders Anti-corruption Declaration	R	R	R	R	R	R	R

<i>on Form and Integrity Pact</i>								
<i>Company Profile addressing Property Management Services</i>	<i>R</i>	<i>R</i>	<i>R</i>	<i>R</i>	<i>R</i>	<i>R</i>	<i>R</i>	<i>R</i>
<i>Valid Registration As an Estate Agent by the regulator (Estate Agents Registration Board)</i>	<i>R</i>	<i>R</i>	<i>R</i>	<i>NR</i>	<i>R</i>	<i>R</i>	<i>R</i>	<i>R</i>
<i>Certified copy of Professio</i>	<i>R</i>	<i>R</i>	<i>R</i>	<i>NR</i>	<i>R</i>	<i>R</i>	<i>R</i>	<i>R</i>

<i>nal Indemnity cover of KES 500,000 (Five hundred thousand)</i>							
<i>Certified copy of audited accounts for the last two years</i>	<i>R</i>	<i>R</i>	<i>R</i>	<i>NR</i>	<i>R</i>	<i>R</i>	<i>R</i>
<i>Letter of comfort from the tenderers bank</i>	<i>NR (Letter dated 22/11/2 021) Not current</i>	<i>R</i>	<i>R</i>	<i>NR</i>	<i>R</i>	<i>R</i>	<i>R</i>
<i>Provide evidence of having dealt with</i>	<i>R</i>	<i>R</i>	<i>R</i>	<i>NR</i>	<i>R</i>	<i>R</i>	<i>R</i>

<i>at least 3 clients for the last three years</i>							
<i>Pretender Site visit certificate</i>	<i>NR</i>	<i>R</i>	<i>R</i>	<i>NR</i>	<i>R</i>	<i>R</i>	<i>R</i>

From the above, it is apparent that the Evaluation Committee did not evaluate the tenders in the subject tender in respect of the eligibility criteria and other mandatory requirements in the Instructions To Tenderers. On this ground alone, we find that the Evaluation failed to evaluate the submitted tenders in accordance with the requirements of Tender Document.

Further, ITT 22.1 under Section II- TENDER DATA SHEET (TDS) made provision for the tenderer to submit 2 extra of copies of their submitted tender documents:

ITT Reference	<i>PARTICULARS OF APPENDIX TO INSTRUCTIONS TO TENDERS</i>
ITT 22.1	<i>In addition to the original of the Tender, the number of copies is: TWO (2)</i>

The Tender Opening Notes which have been annexed to the Affidavit sworn on 26th May 2023 by Geoffrey Koros as annexure "GK-3" and which has also

been supplied by the Respondents as part of the confidential documents is herein reproduced for ease of reference:

TENDER OPENING DATE: 24TH MARCH 2023, 10.00 A.M.

BIDDING FIRMS

NO	FIRM	ORIGINA L	COP Y	NO. OF PAGES	FINANCIA L ID SEPARATE
1.	FIRMUS REALTORS	1	2	NOT SERIALIZED	NO
2.	LEGEND MANAGEMENT LTD	1	2	184	YES
3.	KIRAU AND MWANGI	1	1	118	NO
4.	ZONE ONE TECHNOLOGY	1	NO	NOT SERIALIZED	NO
5.	ALLIANCE REALTORS	1	NO	NOT SERIALIZED	NO
6.	EBONY ESTATES LIMITED	1	2	202	NO
7.	ADVENT VALUERS LIMITED	1	1	432	YES

WITNESSED BY (tenderers' representatives)

No.	NAME	FIRM	SIGN
	COLLINS NGETICH	LEGEND MNGT LTD	SIGNED
	CHARLES ODEMBA	EBONY ESTATES LTD	SIGNED
	KUTOSI SAMUEL	D.1.5.1	SIGNED
	NANCY MWIKALI	FIRMUS REALTORS	SIGNED
	EVANS MWENDA	EXPLICIT PROPERTIES	SIGNED
	DANIEL OKUMU	ADVENT	SIGNED
	FRED KISU	JOHN & SONS LTD	SIGNED
No	NAME	DESIGNATION	SIGN
	SUSAN SHIHUGWA	BO	SIGNED
	IREEN K	ACCOUNTANT	SIGNED
	DANIEL MBUBA	ICT	SIGNED
	SIMON WAWERU	AA	SIGNED

From the tender opening notes which have been countersigned by the Tender Opening Committee as well as tenderers' representatives, it is apparent that the Interested Party, whose tender was found successful, had the following entries (i) the Interested Party did not provide 2 copies as required under ITT 22.1. (ii) The Interested Party's tender document was not serialized and (iii) The Interested Party did not supply a separate financial bid.

Additionally, Clause 7 under the Invitation To Tender required the tenderers in the subject tender to serialize their tender documents:

"The Tenderer shall chronologically serialize all pages of the tender documents submitted"

The serialization was also restated under Clause 13.1 under Section I of the Tender Document:

"13.1...The Tenderer shall chronologically serialize pages of all the tender documents submitted."

The Board has already observed in the foregoing paragraphs that the Tender Opening Notes countersigned by the Tender Opening Committee bear out that the Interested Party's tender was not serialized contrary to the requirements under the Tender Document.

We remain alive to the fact that serialization of tenders is a mandatory requirement that applies even in instances when the tender document does not make provisions for it since it is already provided for in law as was held by the High Court in ***Republic v Public Procurement Administrative Review Board & Ors Ex-parte Kenya Ports Authority [2020] eKLR*** :

"49. In light of the foregoing, it becomes apparent to this court that the aspect of serialization of each and every page of a bid document aims to promote fairness, equal treatment, good governance, transparency, accountability and to do away with discrimination. Failure to conform to this mandatory requirement, and/or exempt or give an

opportunity to those who had not earlier on conformed to this mandatory requirement translates to unequal and unfair treatment of other tenderers and it shall also encourage abuse of power and disregard of the law by not only bidders but also procuring entities.

50. I therefore find that despite the fact that serialization was not a mandatory requirement in the ex-parte applicants tender document, it is a mandatory requirement under section 74 of the PPAD Act of 2015 and all bidders ought to have fully complied.”

Section 74 of the Act creates an obligation on the part of Accounting Officers of public entities to enlists serialization of tenders to constitute part of the contents of an invitation to tender in the following terms:

74. Invitation to tender

(1) The accounting officer shall ensure the preparation of an invitation to tender that sets out the following—

(a) ...

(i) requirement of serialization of pages by the bidder for each bid submitted; and

On its part, Regulation 74 of the Act makes it mandatory for the Evaluation Committee to verify that tenders have been serialized:

74. Preliminary evaluation of open tender

(1) Pursuant to section 80 of the Act and upon opening of tenders, the evaluation committee shall first conduct a preliminary evaluation to determine whether—

(a) ...

(b) the tender has been submitted in the required format and serialized in accordance with section 74(1)(i) of the Act;

This Board has also had a chance to review the Interested Party's tender document and observed some abnormalities in regards to the serialization requirement: (i) the Interested Party's original tender document bears serialization yet both the Respondents' tender opening notes and the Evaluation Committee's Report records that the Interested Party's tender was not serialized. Additionally, the cover of the Interested Party's tenders bears physical marks that suggest that the tender document was at some point unbound and rebound. The physical marks and the inconsistency observed suggest that it is plausible that subsequent to the filing of the instant Request for Review, someone might have accessed the Interested Party's original tender document, unbound it, serialized it and returned the said document before it was forwarded to this Board for purposes of the hearing of the instant Request for Review.

Article 227 of the Constitution requires that the country's public procurement system should be fair, equitable, transparent, competitive and cost-effective and accounting officers of various public entities bear the primary responsibility that their organizations are compliant in this regard. This Board is also alive to section 76(2) of the Act which provides that after the tender

submission deadline, it is not open for a tenderer to amend their already submitted tender.

In light of the observation above, this Board recommends that the Public Procurement Regulatory Authority investigates the 2nd Respondent to establish what transpired in the lead-up to the Interested Party's original tender ending up serialized when the Tender Opening Notes and Evaluation Report capture that the Interested Party's tender document was not serialized.

The Tender Document also required the tenderers to submit their financial tender separately. In the Tender Opening Notes already mentioned herein, the Respondents recorded that the Interested Party did not submit a separate financial tender as per the Tender Document.

The Respondents' Counsel submitted that though the Interested Party failed to comply with the above requirements, the said requirements were in fact waived by the Evaluation Committee and the minutes for the said waiver were supplied to the Board as part of the confidential documents. Counsel therefore argued that the instant Request for Review was therefore unfounded.

This Board has keenly studied the minutes of the Technical Evaluation and an excerpt is hereinafter reproduced for ease of reference:

3.Preliminary Evaluation of Bids

...The Committee noted that the following bidders did not provide two copies of the original bid document as stated in the tender document under tender data sheet (TDS). The bidders submitted their bid documents as follows:

- i. Kiragu and Mwangi Limited (One original and one copy)***
- ii. Zone One Technology (One original and no copies)***
- iii. Alliance Realtors Ltd (One original and no copies)***
- iv. Advent Valuers Ltd (One original and one copy)***

After deliberations, the committee waived the requirement since it was not a mandatory requirement.

The committee also noted that the following bidders did not serialize their bid documents as stated in the tender document under tender data sheet (TDS)

- i. Firmus Realtors Limited***
- ii. Zone One Technology***
- iii. Alliance Realtors Ltd***

After deliberations the committee waived the requirement since it was not a mandatory requirement.

From the above minutes it is apparent that the Evaluation Committee waived the requirement for providing 2 extra copies of the tender document and serialization citing that these requirements were not mandatory requirements under the Tender Document. However, this Board has already made a finding that Clause 2 under Section III of the Tender Document incorporated the eligibility requirements, requirements under the

Instructions to Tenderers and the requirements listed as (a) to (l) under the said clause collectively constituted mandatory requirements that tenderers in the subject tender had to fulfil. Accordingly, the Evaluation Committee's reasoning that the waived requirements were not mandatory requirements has no basis.

Additionally, in waiving the said requirements, the Evaluation Committee extended an unfair advantage to tenderers who had not complied with the said waived requirements. Considering the fact that all the 3 tenderers who made it to the Financial Evaluation Stage shared a common financial bid, the subject tender was obviously very competitive and any undue advantage that would have been extended to any tenderer at a previous evaluation stage would be detrimental to the other tenderers. The Interested Party's tender herein was found as the successful tender, only after they benefitted from the Evaluation Committee's waiver of the requirements that the Applicant now complains of.

The Evaluation Committee in the subject tender evaluated tenders on the basis of the requirements listed as (a) to (l) in clause 2 under Section III of the Tender Document and ignored the eligibility criteria and other mandatory instructions in the Instructions To Tenderers. The Evaluation Committee also irregularly purported to waive mandatory requirements in the Tender Document under the guise that requirements were not mandatory. This Board therefore finds and holds that the 2nd Respondent's Evaluation Committee did not evaluate the Interested Party's tender in the subject tender in accordance with the law and the provisions of the Tender Document.

What orders the Board should grant in the circumstances.

It is the finding of the Board that the 2nd Respondent's Evaluation Committee did not evaluate the Interested Party's tender in the subject tender in accordance with the law and the provisions of the Tender Document.

The upshot of our finding is that the Request for Review dated 26th May 2023 in respect of Tender No. KPCRBS/PROC/012/2022/2023 for the Procurement of Property Management Services succeeds in the following specific terms:

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 26th May 2023:

- 1. The Letter of Notification of Intention to Award to the successful tenderer dated 12th May 2023 with respect of Tender No. KPCRBS/PROC/012/2022/2023 for the Procurement of Property Management Services, be and is hereby nullified and set aside.**
- 2. The Letters of Notification of Intention to Award to the unsuccessful tenderers dated 12th May 2023 with respect to Tender No. KPCRBS/PROC/012/2022/2023 for the Procurement of Property Management Services, be and is hereby nullified and set aside.**

3. The 1st Respondent be and is hereby directed to reconvene the Evaluation Committee to re-admit all the tenders submitted in respect of Tender No. KPCRBS/PROC/012/2022/2023 for the Procurement of Property Management Services to the Preliminary Evaluation Stage and conduct a re-evaluation of all tenders at the Preliminary Stage in accordance with section 80 of the Public Procurement and Disposal Act, 2015 read with Article 227 of the Constitution taking into consideration the findings of the Board in this Decision.
4. Further to Order 3, the 2nd Respondent is hereby ordered to proceed with the procurement proceedings in respect of Tender No. KPCRBS/PROC/012/2022/2023 for the Procurement of Property Management Services to its logical conclusion within fourteen (14) days from the date hereof
5. Given the subject procurement proceedings are not complete, each party shall bear its own costs.

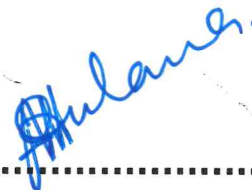
Dated at NAIROBI, this 15th Day of June 2023.



.....

CHAIRPERSON

PPARB



.....

SECRETARY

PPARB