

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 35/2023 OF 2ND JUNE, 2023

BETWEEN

**POWERMAX INTERNATIONAL LIMITED JV HENGTONG OPTIC
ELECTRIC COMPANY LIMITED..... APPLICANT**

AND

ACCOUNTING OFFICER,

THE ICT AUTHORITY (ICTA)..... 1ST RESPONDENT

THE ICT AUTHORITY (ICTA)..... 2ND RESPONDENT

BARAN TELCOM NETWORKS 1ST INTERESTED PARTY

NIA FIBRE AFRICA2ND INTERESTED PARTY

NIGHTALE ENTERPRISES.....3RD INTERESTED PARTY

Review against the decision of the Accounting Officer, THE ICT AUTHORITY (ICTA) in relation to Tender No. ICTA/OT/14/2022-2023 Procurement of Digital Superhighway Fibre Optic Cable and Associated Accessories (Framework Contracting).

BOARD MEMBERS PRESENT

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

- 1. The Tender Opening Minutes as well as tender pre-bid minutes be provided to the Applicant as required by the tender document and pursuant to the letter dated 26th May 2023.**
- 2. The Letter of Notification of Intention to Award to the Interested Parties dated 16th May 2023 with respect to Tender No. ICTA/OT/14/2022-2023 for Procurement of Digital Super Highway Fibre Optic Cable and Associated Accessories (Framework Contracting) be nullified and set aside.**
- 3. The Letter of Notification of Intention to Award to the Applicant and other unsuccessful tenderers dated 16th May 2023 with respect to Tender No. Tender No. ICTA/OT/14/2022-2023 for Procurement of Digital Super Highway Fibre Optic Cable and Associated Accessories (Framework Contracting) be nullified and set aside.**
- 4. The Honourable Board finds and holds that the Applicant had a legitimate expectation that the 1st and 2nd Respondents would consider tenders whose bid price was quoted in either USD or KES as resolved in the pre-bid meeting.**
- 5. The Honourable Board finds and holds that the Addendum No.2 of 27th March 2023 was not properly availed to bidders, having been uploaded on the "Archives" section of the Respondents' website as opposed to "Open Tenders" section where all bidders would have easily accessed it.**
- 6. An order does issue directing the Respondents' Evaluation Committee to reinstate the Applicant's tender at**

the Financial Evaluation Stage and to re-evaluate the Applicant's tender price in accordance with the clarification offered to the Applicant during the pre-bid meeting and in accordance with the law.

7. In the alternative, an order does issue that the Applicant be added to the list of successful bidders including the interested parties herein on account of having presented the lowest tender price, albeit quoted in United States Dollars (USD)

8. The 1st Respondent to pay the cost of the Review.

9. Any other orders as necessary for the ends of justice.

In a Notification of Appeal and a letter dated 2nd June 2023, Mr. James Kilaka, the Acting Secretary of the Board notified the Respondent and the Procuring Entity of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the Respondent 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 Respondent was requested to submit a response to the instant Request for Review together with confidential documents concerning the subject tender within five (5) days from 2nd June 2023.

On 9th June 2023, in opposition to the Request for Review, the 1st and 2nd Respondents filed a Replying Affidavit sworn on 8th June 2023 by Stanley Kamanguya, the Chief Executive Officer of the 2nd Respondent (hereinafter

referred to as "the Respondents' Replying Affidavit) together with a file containing confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

Vide letters dated 9th June 2023, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the instant Request for Review while forwarding to all tenderers a copy of the Request for Review and the response by the Respondent 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 three (3) days from 9th June 2023.

Vide a Hearing Notice dated 13th June 2023, the Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the instant Request for Review slated for 15th day of June, 2023 at 12:00 noon, through a link availed in the said Hearing Notice.

None of the parties filed written submissions.

Before the matter came up for hearing on 15th day of June, 2023, the Applicant filed notice of withdrawal dated 15th June, 2023 confirmed that it does not wish to proceed with the matter. The Board directed parties to file consent as required by the regulations.

On 15th June 2023, the Applicant's advocates filed, a Notice of Withdrawal of Request for Review by Consent dated 15th June 2023 and filed with the Board on the 16th June,2023 signed by both the Advocate for the Applicant and the Advocate for the 1st and 2nd Respondent and one of the Interested Party .The 2nd and 3rd Interested Party had neither entered appearance nor filed any documents in the response to the instant Request for Review. The Consent reads:

"REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NUMBER 35 OF 2023

BETWEEN:

**POWERMAX INTERNATIONAL LIMITED JV HENGTONG OPTIC
ELECTRIC COMPANY LIMITED..... APPLICANT**

AND

ACCOUNTING OFFICER,

THE ICT AUTHORITY (ICTA)..... 1ST RESPONDENT

THE ICT AUTHORITY (ICTA)..... 2ND RESPONDENT

BARAN TELCOM NETWORKS 1ST INTERESTED PARTY*

NIA FIBRE AFRICA2ND INTERESTED PARTY*

NIGHTALE ETERPRISES.....3RD INTERESTED PARTY*

**(Request for Review of the decision of the Kenya Pipeline
Company Limited (the Procuring Entity) dated the 15th day of May
2023 in the matter of Tender No. ICTA/OT/14/2022 -2023**

***Procurement of Digital Super Highway Fibre Optic Cable and
Associated Accessories (Framework Contracting))***

NOTICE OF WITHDRAWAL OF REQUEST FOR REVIEW BY CONSENT

- 1. The parties through this consent, agree to withdrawal of the Request for Review Application dated 2nd June,2023 (hereinafter 'the Application'), with no orders as to costs.***
- 2. The parties herewith file this consent pursuant to Regulation 216 of the Public Procurement and Asset Disposal Regulations 2020 and in connection with the Notice of withdrawal filed before the Public Procurement Review Board on 15th June,2023.***
- 3. The Parties pray that this consent be adopted as an order of the Review Board and further that the matter be marked as fully withdrawn.***

TAKE NOTICE that BLAKLINE CONSULTING LIMITED, the above-named Applicant has by consent of the parties withdrawn the Request for Review herein.

DATED at NAIROBI this ___15th ___ day of ___June___ 2023

.....signed & stamped.....

***MARLENE ABONG'O & COMPANY
ADVOCATES FOR THE APPLICANT***

.....signed & stamped.....

PAULINE WAMUYU KIMOTHO

ADVOCATE FOR RESPONDENTS

.....signed & stamped.....

BARAN TELECOM NETWORKS

1ST INTERESTED PARTY

****2ND AND 3RD The interested Party has neither entered appearance nor filed any documents in the review proceedings."***

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 29th May 2023:

- 1. Pursuant to Regulation 216 of the Public Procurement and Asset Disposal Regulations 2020, the Request for Review No.35 of 2023 dated 2nd June 2023 and filed on 2nd June, 2023 by the Applicant be and is hereby marked as withdrawn**
- 2. each party shall bear its own costs in the Request for Review.**

DATED at NAIROBI this 19th day of June 2023



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CHAIRPERSON

PPARB



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SECRETARY

PPARB