

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 36/2023 OF 02<sup>ND</sup> JUNE 2023**

**BETWEEN**

**VIVO ENERGY KENYA LIMITED ..... APPLICANT**

**AND**

**KENYA RAILWAYS CORPORATION.....1<sup>ST</sup> RESPONDENT  
(PROCURING ENTITY)**

**THE ACCOUNTING OFFICER,**

**KENYA RAILWAYS CORPORATION.....2<sup>ND</sup> RESPONDENT**

**GALANA OIL KENYA LIMITED ..... 1<sup>ST</sup> INTERESTED PARTY**

**DALBIT PETROLEUM LIMITED ..... 2<sup>ND</sup> INTERESTED PARTY**

**TOTAL ENERGIES MARKETING**

**KENYA .....3<sup>RD</sup> INTERESTED PARTY**

Review against the decision of the Accounting Officer, Kenya Railways Corporation in relation to Tender No. KR/SCM/070/2022-2023 for Supply and Delivery of Automotive Gas Oil (AGO) Diesel Fuel for SGR Locomotive (Consignment Stocking) for a period of One (1) year renewable.

**BOARD MEMBERS PRESENT**

- |                     |   |                   |
|---------------------|---|-------------------|
| 1. QS Hussein Were  | - | Panel Chairperson |
| 2. Dr. Paul Jilani  | - | Member            |
| 3. Eng. Mbiu Kimani | - | Member            |

**IN ATTENDANCE**

- |                  |   |             |
|------------------|---|-------------|
| 1. Ms.Sarah Ayoo | - | Secretariat |
|------------------|---|-------------|

**PRESENT BY INVITATION**

**APPLICANT**

**VIVO ENERGY KENYA LIMITED**

- |                               |   |                                    |
|-------------------------------|---|------------------------------------|
| 1. Mr. S. Luseno<br>Advocates | - | Advocate, Majanja Luseno & Company |
|-------------------------------|---|------------------------------------|

**RESPONDENTS**

**KENYA RAILWAYS&THE ACCOUNTING OFFICER, KENYA RAILWAYS**

- |                            |   |
|----------------------------|---|
| 1. Mr.Kamau Muturi-        | Advocate, Mwaniki Gachoka & Co. Advocates |
| 2. Ms. Nkatha<br>Advocates | - Advocate, Mwaniki Gachoka & Co.         |

**1<sup>ST</sup> INTERESTED PARTY**

**-GALANA OIL KENYA LIMITED**

- |                     |   |                                     |
|---------------------|---|-------------------------------------|
| 1. Mr. Litoro Oscar | - | Advocate, Litoro & Omwebu Advocates |
|---------------------|---|-------------------------------------|

**2<sup>ND</sup> INTERESTED PARTY-DALBIT PETROLEUM LIMITED**

1. Mr. Steven Maina - Advocate, Maina & Macharia LLP
2. Mr. Victor Ngenchu - Advocate, Maina & Macharia LLP

### **INTENDED 3<sup>RD</sup> INTERESTED PARTY**

### **TOTAL ENERGIES MARKETING KENYA**

1. Mr. Paul Ogunde - Advocate, Walker Kontos Advocates

## **BACKGROUND OF THE DECISION**

### **The Tendering Process**

Kenya Railways, the Procuring Entity, herein invited sealed tenders in response to Tender No. KR/SCM/070/2022-2023 for Supply and Delivery of Automotive Gas Oil (AGO) Diesel Fuel for SGR Locomotive (Consignment Stocking) for a period of One (1) year renewable (hereinafter referred to as the "subject tender"). The invitation was by way of an advertisement in *the Daily Nation* on 21<sup>st</sup> March 2023. The blank tender document for the subject tender was available for download from the Procuring Entity's website [www.krc.co.ke](http://www.krc.co.ke) and on the Public Procurement Information Portal (PPIP), [www.tenders.go.ke](http://www.tenders.go.ke). The tender's submission deadline was initially scheduled for 30<sup>th</sup> March 2023 at 10.00 a.m.

### **Addendum**

The Procuring Entity issued Addendum 1 dated 24<sup>th</sup> March 2023 which clarified evaluation criteria no. 8 of Section III- Evaluation and Qualification

Criteria of the Tender Document and issued a Revised Preliminary/Mandatory Requirement Criteria while extending the tender submission deadline to 4<sup>th</sup> April 2023 at 2.00 p.m.

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

According to the Minutes of the Tender Opening Committee held on 4<sup>th</sup> April 2023 a total of eight (8) tenders were submitted in response to the tender and opened in the presence of tenderers' representatives present. The opened tenders were recorded as follows:

<b>No.</b>	<b>Bidder's Name</b>
1.	Rubis Energy Kenya
2.	Hass Petroleum
3.	Trinity Energy Kenya Limited
4.	Total Energies Marketing Kenya Plc
5.	Galana Oil Kenya
6.	Vivo Energy Kenya
7.	Dalbit Petroleum Limited
8.	One Petroleum Limited

### **Evaluation of Tenders**

A Tender Evaluation Committee appointed by the Managing Director of the Procuring Entity undertook evaluation of the tenders in the following stages:

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

### **Preliminary Evaluation**

The Evaluation Committee was required to carry out a preliminary evaluation of the tenders using the criteria provided under the Preliminary/Mandatory Requirement Criteria of the Tender Document. Tenders were required to meet all the 23 mandatory requirements at this stage to proceed to the Technical Evaluation stage.

At the end of evaluation at this stage, five (5) tenders were determined non-responsive while three (3) tenders were determined responsive. Bidder No. 6 - Vivo Energy Kenya Limited, the Applicant herein, was among the five tenderers found non-responsive. The three (3) tenders that were determined responsive proceeded for evaluation at the Technical Evaluation stage.

### **Technical Evaluation Stage**

At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Clause B. Technical Evaluation of Section III – Evaluation and Qualification Criteria at pages

39/116 to 41/116 of the Tender Document. Tenderers were required to meet a technical score of 70% at this stage to proceed for financial evaluation.

At the end of evaluation at this stage, one (1) tender was determined non-responsive while two (2) tenders were determined responsive and thus proceeded for evaluation at the Financial Evaluation stage.

### **Financial Evaluation**

At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Price Evaluation of Section III – Evaluation and Qualification Criteria at page 41/116 of the Tender Document. Recommendation of award of the subject tender would be made to the lowest evaluated tender.

At the end of evaluation at this stage, the Evaluation Committee recommended award of the subject tender to be made as can be discerned from page 26/53 of the Evaluation Report.

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

The Evaluation Committee recommended the award of the subject tender as follows:

***a. M/S Dalbit Petroleum Limited – Mombasa Port Reitz Depot at the prevailing ERC prices at a discounted rate of Kshs. 5.00 being***

***the bidder with the highest discount rate for Mombasa Port Reitz Depot.***

***b. M/S Galana Oil Kenya Limited – to supply fuel to Nairobi SGR Depot at the prevailing ERC prices at a discounted rate of Kshs. 1.12 being the bidder with the highest discount rate for Nairobi.***

### **Professional Opinion**

In a Professional Opinion to the Managing Director dated 22<sup>nd</sup> May 2023, the Ag. GM-SCM, Ms. Jane Vuligwa, 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 tender and thus requested the MD to approve the award as per the recommendation of the Evaluation Committee.

Mr. Philip J. Mainga, Managing Director and the 2<sup>nd</sup> Respondent herein, approved the Professional Opinion on 22<sup>nd</sup> May 2023.

### **Notification to Tenderers**

Tenderers were notified of the outcome of evaluation *vide* letters of Notification of Intention to Award, dated 24<sup>th</sup> May 2023.

## **REQUEST FOR REVIEW NO. 36 OF 2023**

On 2<sup>nd</sup> June 2023, Vivo Energy Kenya Limited, the Applicant herein, filed a Request for Review No.36 of 2023 dated 2<sup>nd</sup> June 2023 together with an Affidavit in Support of Review sworn on 2<sup>nd</sup> June 2023 by Joseph Kering', the Applicant's Commercial Manager, through the firm of Majanja Luseno & Company Advocates with respect to the subject tender seeking the following orders:

- a) ANNULMENT of the decision by Kenya Railways Corporation, the Procuring Entity and communicated by a Notice of Intention to award dated 24<sup>th</sup> May 2023 that Vivo Energy Kenya Limited, the Applicant's bid in relation to the tender Number KR/SCM/070/2022-2023 for the Supply and Delivery of Automotive Gas Oil (AGO) Diesel Fuel SGR Locomotive (Consignment Stocking) For a period of one year Renewal was unsuccessful and that the successful Tenderers were Galana Oil Kenya Limited and Dalbit Petroleum Limited;***
  
- b) This Honourable Board do re-evaluate the Tender Number KR/SCM/070/2022-2023 for the Supply and Delivery of Automotive Gas Oil (AGO) Diesel Fuel SGR Locomotive (Consignment Stocking) For a period of one year Renewal and award it to Vivo Energy Kenya Limited, the Applicant;***
  
- c) Costs of and/or incidental to this Review be borne by the Procuring Entity; and***

***d) Any other orders that deem just and fit in the circumstances.***

In a Notification of Appeal and a letter dated 2<sup>nd</sup> June 2023, Mr. James Kilaka, the Acting 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 Respondent 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 instant Request for Review together with confidential documents concerning the subject tender within five (5) days from 2<sup>nd</sup> June 2023.

On 8<sup>th</sup> June 2023, the 2<sup>nd</sup> Respondent submitted to the Secretariat a file containing confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as 'the Act') with regard to Request for Review No. 36 of 2023 and Request for Review No. 39 of 2023 which related to the same subject tender.

On 9<sup>th</sup> June 2023, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, through the firm of Mwaniki Gachoka & Co. Advocates, filed a Notice of Appointment dated 8<sup>th</sup> June 2023, and a 1<sup>st</sup> and 2<sup>nd</sup> Respondent's Response dated 9<sup>th</sup> June 2023 signed by Stanely Gitari, for the 1<sup>st</sup> Respondent.

*Vide* letters dated 12<sup>th</sup> 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 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 tender within three (3) days from 12<sup>th</sup> June 2023.

*Vide* a Hearing Notice dated 12<sup>th</sup> June 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 15<sup>th</sup> June 2023 at 13:00 hours, through a link availed in the said Hearing Notice.

On 13<sup>th</sup> June 2023, the Applicant filed through its advocates on record an Applicant's Reply to Response dated 13<sup>th</sup> June 2023.

On 13<sup>th</sup> June 2023 the intended 3<sup>rd</sup> Interested Party filed, through Walker Kontos Advocates, a Notice of Motion application dated 13<sup>th</sup> June 2023 together with a Supporting Affidavit sworn on even date by Boniface Abala, its Legal Manager.

Through the firm of Maina & Macharia LLP Advocates, the 2<sup>nd</sup> Interested Party filed a Notice of Appointment of advocates dated and filed on 13<sup>th</sup> June 2023 and a Replying Affidavit sworn on 13<sup>th</sup> June 2023 by Philip Kimieu, its Regional Business Development Manager.

The 1<sup>st</sup> Interested Party, through the firm of Litoro & Omwebu Advocates, filed a Notice of Appointment of Advocates dated 13<sup>th</sup> June 2023 and filed on 14<sup>th</sup> June 2023 together with a Replying Affidavit sworn on 14<sup>th</sup> June 2023 by Edwin Irungu Gicheri, its Client Relationship Manager and its List of Authorities.

On 14<sup>th</sup> June 2023, the 1<sup>st</sup> Respondent filed a Replying Affidavit to the Applicant's Notice of Motion Applications, dated 13<sup>th</sup> June 2023 sworn on 14<sup>th</sup> June 2023 by Stanley Gitari, its General Manager, Legal Services and the Corporation Secretary.

On 14<sup>th</sup> June 2023, the Intended 3<sup>rd</sup> Interested Party herein and Applicant in Request for Review No. 39 of 2023 filed, through its Advocates, its combined written submissions in Request for Review No. 36 of 2023 and Request for Review No. 39 of 2023 dated 14<sup>th</sup> June 2023 together with its Authorities.

On 15<sup>th</sup> June 2023 the Applicant filed Applicant's Written Submissions, Applicant's List of Authorities, Applicant's Case Digest, and an Index of Applicant's Filings, all dated 15<sup>th</sup> June 2023.

The Respondents filed Written Submissions with respect to Request for Review No. 36 of 2023 and Request for Review No. 39 of 2023 together with a List and Bundle of Authorities, all dated and filed on 15<sup>th</sup> June 2023.

The 2<sup>nd</sup> Interested Party filed Written Submissions together with a List of Authorities, all dated 14<sup>th</sup> June 2022 (*perhaps meant to read 2023*) and filed on 15<sup>th</sup> June 2023, with respect to Request for Review No. 36 of 2023 and Request for Review No. 39 of 2023.

### **On consolidation of Requests for Review No. 36 and 39**

When the matter came up for hearing on 15<sup>th</sup> June 2023 at 13.00 hrs, the Panel's Chairperson informed parties present that the two matters before the Board, that is, Request for Review No. 36 of 2023 and Request for Review No. 39 of 2023 relate to the same tender being *Tender No. KR/SCM/070/2022-2023 for Supply and Delivery of Automotive Gas Oil (AGO) Diesel Fuel for SGR Locomotive (Consignment Stocking) for a period of One (1) year renewable* and that in the interest of saving time, it was proposed that the two matters be consolidated and heard as one upon which a decision would be rendered on or before 23<sup>rd</sup> June 2023. This discretion is provided for in Regulation 215 of Regulations 2020.

Thereafter, the Panel's Chairperson invited reactions from all parties in the two matters.

Mr. Muturi, counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that he was opposed to the consolidation on the ground that though Reviews No. 36 and No. 39 relate to the same tender, the parties in the two matters were different. He indicated that the Applicant in Request for Review No. 36 had sought review against two Respondents being Kenya Railways and the Accounting Officer of Kenya Railways while the Applicant in Request for Review No. 39 had only sought review against the Procuring Entity, being the 1<sup>st</sup> Respondent and had not included the Accounting Officer of the 1<sup>st</sup> Respondent as a party which had prompted him to file a preliminary objection on 9<sup>th</sup> June 2023 in Request for Review No. 39 of 2023 raising issues of its competence which was one of the issues anticipated to be heard during the hearing. He further submitted that he was not opposed to Request for Reviews No. 36 and No. 39 being heard together and reiterated that what he was opposed to was their consolidation.

Mr. Luseno, counsel for the Applicant, submitted that he was not opposed to consolidation of Request for Review No. 36 of 2023 and Request for Review No. 39 of 2023 since he had noted that the Applicant in Request for Review No. 39 of 2023 had remedied the issue of joinder and since the issues raised in the two requests for review related to the same tender, it would save time given the strict timelines the Board had to render a decision.

Mr. Ogunde, counsel for the intended 3<sup>rd</sup> Interested Party (also being the Applicant in Request for Review No. 39 of 2023) submitted that he was not opposed to consolidation as the Board had power to order for consolidation. He further submitted that the parties before the Board were substantively the same in both matters when taking into account the issue of joinder and that the outcome in both matters would affect all parties. He argued that consolidation of the two request for reviews would not preclude the preliminary objection by Mr. Muturi which would be addressed as part of the decision by the Board in the matter.

Mr. Litoro, for the 1<sup>st</sup> Interested Party (also being the 2<sup>nd</sup> Respondents in Request for Review No. 39 of 2023), submitted that he was opposed to consolidation of the two Requests for Reviews since the effect of consolidation would defeat the application filed by the Applicant in Request for Review No. 39 of 2023. Counsel argued that the application by the Applicant herein to enjoin the accounting officer of the 1<sup>st</sup> Respondent had been made out of time and a great prejudice would be suffered since consolidation would have the effect of putting life to something that was dead.

Counsel for the Interested Party (also being the 3<sup>rd</sup> Respondents in Request for Review No. 39 of 2023) concurred with the submissions by Mr. Muturi and Mr. Litoro and added that he was opposed to consolidation of the two matters but was not opposed to the two being heard together. He further added that consolidation allows for expeditious disposal of cases but is not intended to give undue advantage to a party.

After hearing the parties, the Board held that Request for Review No. 36 of 2023 and Request for Review No. 39 of 2023 would be heard together but would not be consolidated and that the Board would render two separate decisions for each matter. Further, the hearing of the Notice of Preliminary Objection by Mr. Muturi would be heard as part of the substantive instant Request for Review. This was in accordance with Regulation 209(4) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020') which grants the Board the discretion to hear preliminary objections as part of a substantive request for review and deliver one decision.

Thus, having dispensed with the preliminary issue of consolidation of the two matters, Request for Review No. 36 of 2023 and Request for Review No. 39 of 2023 proceeded for virtual hearing as scheduled.

## **PARTIES' SUBMISSIONS**

### **Applicant's Submissions**

In his submissions, Counsel for the Applicant, Mr. Luseno relied on the Applicant's Request for Review, Reply to Response, Written Submissions, List of Authorities, Case Digest and Index that were all filed before the Board.

The Applicant submitted that the criteria and methodology to be adopted in the evaluation of bids was outlined in the Tender Document and a bid was required to be substantially responsive as opposed to strictly responsive as defined under ITT 28 of the Tender Document which allowed the 2<sup>nd</sup> Respondent to request a party that had made a deviation or omission to remedy the same.

The Applicant further submitted that its tender was found unsuccessful because it did not avail a valid KPC Certificate and that the tender had inconsistent pagination. It argued that there was no requirement under the Tender Document for the KPC Certificate to be for the years 2022-2023 as this certificate was generated per transaction and not yearly. It was the Applicant's case that it is the remarks in the KPC Quality Certificate as opposed to date that has a bearing on its validity and/or quality of the product. The Applicant urged the Board to find that the KPC Certificate requirement was ambiguous and could not have been used to disqualify its tender and relied on the case, ***PPARB Application No. 135/2019 – The Consortium of Rentco East Africa Limited and Spenomatic (K) Limited-vs- The Accounting Officer, Moi Teaching and Referral Hospital and Pharmaken Limited.***

On the inconsistency in pagination, it was the Applicant's case that Section 74(1)(j) places an obligation on the Procuring Entity by directing it on how to draft Tenders. It argued that the inconsistency of its tender was a minor error that could have been rectified in accordance with ITT 29.2 of the

Tender and that the Procuring Entity did not establish in their response how the inconsistency in the pagination of the Applicant's tender affected its evaluation.

In conclusion, the Applicant stated that procurement was about saving public money and that the award in the subject tender would cost Kenyans Kshs. 300 million more. It urged the Board to consider the matter in the spirit of legislative intention of the Act and grant the prayers sought in the Request for Review. It further indicated that it was not opposed to the Application filed by Total Energies Marketing Kenya Plc to be enjoined as a 3<sup>rd</sup> Interested Party in the instant Request for Review.

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

In his submissions, Counsel for the Respondents, Mr. Muturi relied on the Respondents' Response, Respondent's Replying Affidavit to the Applicant's Notice of Motion Applications dated 13<sup>th</sup> June 2023 sworn on 14<sup>th</sup> June 2023 by Stanley Gitari, Written Submissions and List of Authorities that were all filed before the Board.

The Respondents submitted that the law applicable in procurement proceedings is Article 227(1) of the Constitution, the Act and Regulations, 2020. It reiterated that the issue of responsiveness of tenders was provided for under Section 79 of the Act and that a tender is responsive only if it conforms with eligibility criteria and other mandatory requirements

of the Tender Document. It further submitted that Section 79(2) of the Act provides for deviations.

The Respondents pointed out to the Board that the Applicant did not contest the reasons for its disqualification and that having admitted to the same was now asking for the Board not to treat these reasons as material non-compliance but minor deviations and that the Procuring Entity ought to have asked it to correct these mistakes.

It was the Respondents' case that the reasons for disqualification were not minor deviations. It referred the Board to paragraph 7 of the Respondents' Response and urged the Board to consider that the word valid means current/ongoing. It further argued that counsel for the Applicant did not submit that the Applicant had not had a new batch form KPC and that the importance of the KPC Certificate was to determine that the product required by the 2<sup>nd</sup> Respondent met legal qualities.

Turning to the question of pagination the Respondents submitted that the Applicant's tender had major irregularities with regard to pagination arguing that the issue of pagination goes to the integrity of the tender process since a party can insert pages when tendering process has commenced. The Respondents, in support of its argument, relied on the cases, ***Republic v Public Procurement Administrative Review Board; Ex-parte Accounting Officer, Kenya Ports Authority &***

*another; FCM Travel Solutions t/a Charleston Travel Limited & 3 others (Interested Parties) [2021] eKLR,; Republic v. Public Procurement Administrative Review Board; Nairobi Water & Sewerage Company & Another Ex. Parte Fourway Construction Company (2019)eKLR* and submitted that the evaluation committee was justified in declaring the Applicant's tender non-responsive due to its failure to comply with the mandatory requirements.

### **1<sup>st</sup> Interested Party's submissions**

In his submissions, Counsel for the 1<sup>st</sup> Interested Party, Mr. Litoro relied on the Replying Affidavit sworn on 14<sup>th</sup> June 2023 by Edwin Irungu Gicheri, its Client Relationship Manager together with the 1<sup>st</sup> Interested Party's List of Authorities dated 14<sup>th</sup> June 2023 that were all filed before the Board.

The 1<sup>st</sup> Interested Party invited the Board to look at provisions of Section 74 of the Act and Section 79 of the Act and consider whether the Applicant's tender was responsive or not and if the deviations leading to its disqualifications were material or not. It submitted that deviations/omissions were material and that the Applicant failed to avail a valid certificate despite knowing that requirement well in advance.

The 1<sup>st</sup> Interested Party submitted that a valid KPC Certificate would demonstrate to the 2<sup>nd</sup> Respondent a product's quality and that it could be used. The 1<sup>st</sup> Interested Party further submitted that Article 227(1) of the

Constitution gives every party equality before the law and these principles were codified in the Tender Document and argued that in view of these principles, permitting tenderers to submit additional documents would be an undue advantage over other tenderers.

The 1<sup>st</sup> Interested Party averred that non-compliance on pagination was not a minor deviation contemplated under Section 79(2) of the Act. It also objected to the application for joinder by the 3<sup>rd</sup> Interested Party for being filed too late in the day.

It urged the Board to dismiss the instant Request for Review with costs.

### **2<sup>nd</sup> Interested Party's submissions**

In his submissions, Counsel for the 2<sup>nd</sup> Interested Party, Mr. Maina relied on Replying Affidavit in response to the 1<sup>st</sup> Applicant's Request for Review dated 2<sup>nd</sup> June 2023 and the 2<sup>nd</sup> Applicant's Request for Review dated 7<sup>th</sup> June 2023 sworn on 13<sup>th</sup> June 2023 by Philip Kimeu, its Regional Business Development Manager. together its Written Submissions and List of Authorities that were all filed before the Board.

The 2<sup>nd</sup> Interested Party adopted the submissions made by the Respondents and the 1<sup>st</sup> Interested Party and submitted that Article 227(1) of the Constitution provides for the principles of fairness and transparency

and that pursuant to Section 80(2) of the Act, evaluation of the subject tender was within the criteria provided for in the Tender Document.

The 2<sup>nd</sup> Interested Party contended that the Procuring Entity was correct in declaring the Applicants' bids not successful because they were not substantially responsive as they failed to comply with the above mandatory requirements of the Tender Document. It submitted that the Applicant held KPC Certificate for year 2022-2023 but failed to submit the same. On whether non-compliance by the Applicant amounted to major or minor deviations that could be cured or to be rectified under the tender document, the 2<sup>nd</sup> Interested Party averred that the same were substantial in nature and any attempt to allow the Applicant to correct the non-compliance would clearly be contrary to Article 227 of the Constitution and the Act.

It was the 2<sup>nd</sup> Interested Party's case that evaluation was strictly done in accordance with the criteria and methodology of the Tender Document, the Act, and the Constitution. Since the Tender Document mandatorily required a bidder to meet the minimum requirements, failure to comply with the same would render a bid incomplete and non-responsive. Furthermore, all the bids were subjected to the same process and requirements as provided in the Tender Document and therefore the award to the 2<sup>nd</sup> Interested Party was fair and in compliance with the law.

## **Applicant's Rejoinder**

In a rejoinder, Counsel for the Applicant, Mr. Luseno, submitted that the Applicant had invited the Board to establish whether the Interested Parties were the successful tenderers having met the threshold set out in the Tender Document noting that pricing was a key component. He argued that the intention of Parliament was that the issue of price was a key consideration. Counsel argued that competitiveness comes in the pricing.

In response to the allegation that the Applicant held KPC Certificate for year 2022-2023 but failed to submit the same, counsel submitted that the Tender Document did not require submission of KPC Certificate for year 2022-2023 and reiterated that validity is not anchored on a date but on a dispatch and that what was being validated was the product being dispatched.

Mr. Luseno submitted that it was agreed that the issues before the Board was on omission and if the omission was material or not. He invited the Board to look at the definition of what constitutes an omission. Mr. Luseno submitted that it was not fair that the 2<sup>nd</sup> Respondent chose which part of its Tender Document it wanted to enforce for purposes of responsiveness. Counsel submitted that the only issue that would not constitute an omission was on pricing as provided under ITT 29.2 and the Applicant's tender had no issue.

Mr. Luseno clarified to the Board that by the Tender Document giving a proviso that omissions as to pricing could not be clarified, then there was a legitimate expectation where there were any omissions that the 2<sup>nd</sup> Respondent would call for clarifications.

Counsel also referred the Board to paragraph 33 of the Respondents submissions and argued that the entire process of evaluation proceeded contrary to the Tender Document and Section 80(2) of the Act.

### **3<sup>rd</sup> Interested Party**

Mr. Ogunde submitted that he had filed a Notice of Motion application for joinder as an interested party pursuant to provisions of Section 170(d) of the Act and argued that the Board has power to join parties to a review.

At the conclusion of the online hearing, the Board informed parties that the Board would communicate its decision on or before 23<sup>rd</sup> June 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 documents, authorities together with confidential documents submitted to the Board by

the Respondent pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination:

- i. Whether the Respondents unfairly disqualified the Applicant's tender at the Preliminary Evaluation stage in breach of the provisions of Section 80(2) of the Act.*
  
- ii. What orders the Board should grant in the circumstances.*

Before addressing the issues framed for determination, the Board would like to dispense with one preliminary aspect arising from the proceedings in the instant Request for Review.

Total Energies Marketing Kenya Limited filed a Notice of Motion application dated 13<sup>th</sup> June 2023 accompanied by a Supporting Affidavit sworn on 13<sup>th</sup> June 2023 by Boniface Abala, its Legal Manager, seeking to be enjoined in the proceedings herein as the 3<sup>rd</sup> Interested Party on the grounds that Section 170(d) of the Act gives the Board power to join powers to a Request for Review. Total Energies Marketing Kenya argued that it had a legitimate interest in the proceedings challenging the award of the subject tender and that it is able to demonstrate that the Respondents did not evaluate tenders in compliance with provisions of Section 79(1) and 80(2) of the Act.

On their part, the Respondents objected to the application by Total Energies Marketing Kenya to be enjoined in the proceedings herein and contended that Total Energies Marketing Kenya had not demonstrated any stake in the proceedings since the orders sought only related to the parties in the instant Request for Review and that, in any case, it had filed a separate request for review where it had raised its complaints.

The Board notes that a determination of this issue falls squarely on interpretation of Section 170(d) of the Act which provides that:

Section 170      ***"The parties to a review shall be.***

- (a) the person who requested the review;***
- (b) the accounting officer of a Procuring Entity;***
- (c) the tenderer notified as successful by the Procuring Entity; and***
- (d) such other persons as the Review Board may determine."***

According to Section 170(d) of the Act, the Board has the discretion to determine whether a party can participate in an administrative review before it. Black's Law Dictionary (Tenth Edition) defines judicial discretion as:

***"The exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and***

***principles of law; a court's power to act or not act when a litigant is not entitled to demand the act as a matter of right."***

In essence, determination of which other person participates in an administrative review other than the Applicant, the Accounting Officer of a procuring entity and the successful tender ought to be based on what is fair under the circumstances and should be guided by the rules and principles of law.

The Board notes that Regulation 205 of Regulations 2020 mandates the Board Secretary to immediately notify all other parties who participated in the procurement proceedings upon receipt of such documents from a procuring entity.

The Board further notes that Mr. Kilaka, the Acting Board Secretary notified all tenderers in the subject tender of the filing of the instant Request for Review upon receipt of the confidential documents submitted by the Procuring Entity pursuant to Section 67(3)(c) of the Act *vide* a Notification for Review of the subject tender dated 12<sup>th</sup> June 2023 which, read in part:

**"....."**

***We would like to inform you that on 2<sup>nd</sup> June, 2023, a Request for Review was lodged at the Public Procurement Administrative Review Board regarding the processing of the above tender.***

***You are required to forward to this Board any information and arguments about the tender within three days of this mail pursuant to PPARB Circular No. 2/2020 dated 24<sup>th</sup> March 2020. Failure to submit your response within the stipulated 3 days may result in the Board declaring your response inadmissible.***

***A copy of the grounds of Review plus PPARB Circular No. 2/2020 dated 24<sup>th</sup> March 2020 is attached for your reference."***

From the above notification, it is clear that tenderers who participated in the subject tender were notified and invited to respond to the instant Request for Review. It is not lost on the Board that the application by Total Energies Marketing Kenya to be enjoined in these proceedings were made outside the stipulated period of three (3) days within which tenderers were required to put in a response, if any. Nevertheless, since Total Energies Marketing Kenya have also sought administrative review with regard to the subject tender in Request for Review No. 39 of 2023, we find that it would only be fair to allow them join these proceedings as the 3<sup>rd</sup> Interested Party and ventilate any arguments that may have an impact with regard to the issues raised by either the Applicant, Respondents or Interested Parties in the instant Request for Review.

In the circumstances, the Notice of Motion Application dated 13<sup>th</sup> June 2023 is allowed.

Having made a determination on the above preliminary issue, the Board now proceeds to the merits of the instant Request for Review.

**As to whether the Respondents unfairly disqualified the Applicant's tender at the Preliminary Evaluation stage in breach of the provisions of Section 80(2) of the Act.**

It is common understanding in this Request for Review that the Kenya Railways Corporation (the Procuring Entity) invited tenders for Tender No. KR/SCM/070/2022-2023 for Supply and Delivery of Automotive Gas Oil (AGO) Diesel Fuel for SGR Locomotive (Consignment Stocking) for a period of One (1) year renewable (the "subject tender") on 21<sup>st</sup> March, 2023. The tenders were opened on 4<sup>th</sup> April 2023 with eight (8) tenderers, including the Applicant, submitting bids.

The Procuring Entity thereafter evaluated tenders in three stages of preliminary, technical and financial and recommended award to the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties herein.

The Applicant was notified *vide* letter dated 24<sup>th</sup> May, 2023 that its tender was unsuccessful. The letter read in part as follows:

**"...we therefore wish to notify you that your tender was unsuccessful due to the following reasons:**

- 1. You provided a copy of KPC quality certificate No. 14146020221055 dated 19/2/2021 instead of one that is valid as required.**
- 2. You provided a bid document with inconsistent Pagination; the inconsistency are as follows: -**
  - i. Paginated from pages 1-159 then skips to page 201**
  - ii. Pages 284-354 then to 370 and reverts back to 242 to 373**
  - iii. Pages 376-393 has two sets of pagination, the other set is 236-250 that is mixed up,**
  - iv. Pagination then proceeds from pages 394-560."**

It is not in doubt that the letter of notification dated 24<sup>th</sup> May, 2023 is the trigger that set off the instant Request for Review.

The Applicant contends that the evaluation of the subject tender was not in accordance with the criteria and methodology set out in the Tender Document and neither was it in compliance with the legislative intention of the Act. The Applicant submitted that the Tender Document required a tenderer to submit a substantially responsive tender as opposed to strict responsiveness and argued that the 2<sup>nd</sup> Respondent had a duty to invite a tenderer to remedy a deviation in its tender. The alleged inconsistency in pagination of the Applicant's tender was not material, the Applicant argued.

On the validity of the KPC Quality Certificate the Applicant submitted that there was ambiguity in Mandatory Requirement No. 6 since the issue of year 2022-2023 was not contained in the Tender Document.

On their part, the Respondents averred that the Applicant's tender did not satisfy the mandatory requirements No. 6 and 23 of the Revised Preliminary/Mandatory Requirement Criteria of Addendum 1 of the Tender Document. The Respondents contend that the Applicant's tender did not comply with mandatory requirements since;

(a) it submitted a Kenya Pipeline Quality Certificate referenced as 14146020221055 dated 19<sup>th</sup> February 2021 which was deemed invalid as it did not meet or align with the requirements of the Tender Document which mandated a valid certificate for years 2022-2023, and

(b) it submitted a tender which consisted of 566 pages which failed to adhere to the prescribed pagination guidelines outlined in the Tender Document and did not paginate some pages in addition to the sequence of pagination having severe or major irregularities and inconsistencies.

The Respondents opined that the Applicant's tender breached Section 79 of the Act read with Article 227(1) of the Constitution and argued that the stipulated evaluation criteria was express and specific.

The 1<sup>st</sup> Interested Party concurred with the submissions made by the Respondents and argued that failure to adhere to the mandatory requirements provided in the Tender Document was a breach of Section 79

of the Act and that any deviation from the mandatory requirements was material and not a minor deviation. It further submitted that failure to paginate a tender was not a minor deviation and was not curable under Section 79 of the Act. It also submitted that the principles under Article 227(1) of the Constitution gives every party equality before the law and asking a tenderer to avail more documents would give it an undue advantage over other tenderers since availing a document not submitted in its tender would affect the substance of its tender.

On its part the 2<sup>nd</sup> Interested Party adopted the submissions by the Respondents and the 1<sup>st</sup> Interested Party on this issue and submitted that the documents required from tenderers in Mandatory Requirement No. 6 had to be valid during the validity period of the subject tender and as such the KPC Quality Certificate submitted by the Applicant in its tender did not meet the requirements of the Tender Document in addition to failure to paginate its tender as required in the Tender Document.

The Board is cognizant of Article 227 of the Constitution which provides as follows:

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

***(1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.***

**(2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following –**

- a) .....**
- b) .....**
- c) ..... and**
- d) ....."**

The Board observes that the legislation contemplated in Article 227(2) of the Constitution is the Act. Section 80 (1) and (2) of the Act is instructive on how evaluation and comparison of tenders should be conducted by a procuring entity as follows:

**"80. Evaluation of tender**

- (1) The evaluation committee appointed by the accounting officer pursuant to Section 46 of the Act, shall evaluate and compare the responsive tenders other than tenders rejected under Section 82(3).**
- (2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this**

***Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.***

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

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

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

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

Section 80(2) of the Act as indicated above requires the Evaluation Committee to evaluate and compare tenders in a system that is fair using the procedures and criteria set out in the Tender Document. A system that is fair is one that considers equal treatment of all tenders against a criteria of evaluation known by all tenderers since such criteria is well laid out for in a tender document issued to tenderers by a procuring entity. Section 80(3) of the Act requires for such evaluation criteria to be as objective and quantifiable to the extent possible and to be applied in accordance with the procedures provided in a tender document.

Section 79 of the Act provides for responsiveness of tenders as follows:

***"(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."***

Responsiveness serves as an important first hurdle for tenderers to overcome. From the above provision, a tender only qualifies as a responsive tender if it meets all eligibility and mandatory requirements set out in the tender documents.

In the case of **Republic v Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS)**

**Limited (Interested Party) Ex Parte Tuv Austria Turk [2020]**

**eKLR** the Court stated:

***"In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions."***  
**[Emphasis ours].**

The Board notes that Regulation 74(1) of Regulations 2020 provides that:

**"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) any tender security submitted is in the required form, amount and validity period, where applicable;**

**(d) the tender has been duly signed by the person lawfully authorized to do so through the power of attorney;**

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

**(f) the tender is valid for the period required;**

**(g) any required samples have been submitted; and**

**(h) all required documents and information have been submitted. [Emphasis by the Board]"**

Section 74(1)(i) of the Act provides that:

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

.....

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

....."

The import of the aforementioned cases is that mandatory requirements cannot be waived. In this instance, the Evaluation Committee was mandated to evaluate the Applicant's tender using the procedures and criteria set out in the Tender Document having regard to provisions of the Act and the Constitution. A laid out evaluation criteria must, to the extent possible, be objective and quantifiable.

The Board has carefully studied the Tender Document submitted by the 1<sup>st</sup> Respondent as part of the confidential documents pursuant to section 67(3)(e) of the Act and notes that enclosed to Addendum 1 was the Revised Preliminary/ Mandatory Requirement Criteria which the Evaluation Committee was required to use in carrying out a preliminary evaluation of tenders in the subject tender. The Board further notes that Mandatory Requirement No. 6 and 23 of the Revised Preliminary/Mandatory Requirement Criteria of Addendum 1 of the Tender Document provided as follows:

**Revised Preliminary/ Mandatory Requirement Criteria**

<b>A</b>	<b>PRELIMINARY EVALUATION/ MANDATORY REQUIREMENT</b>	<b>Mandatory</b>
.....	.....	.....
<b>6</b>	<b>Bidders must provide a copy of a valid KPC quality certificate or Certificate of analysis.</b>	<b>Mandatory</b>
.....	.....	
<b>23</b>	<b>Paginate/serialize the tender document as required by Law (in the format 1, 2,3, 4.....to the last page) and indicate total number of pages on the cover page.</b>	<b>Mandatory</b>
	<b><u>Pursuant to Section 79 of Public Procurement and Assets Disposal Act, 2015 any tender not meeting the mandatory and other eligibility criteria will not proceed to Technical Evaluation Stage.</u></b>	

In essence, tenderers were required to comply with all the 23 mandatory requirements at the Preliminary Evaluation stage for their respective tenders to proceed to the Technical Evaluation stage. If a tenderer did not satisfy even one of the 23 mandatory requirements at the Preliminary Evaluation stage, its tender would be found non-responsive and would be disqualified from proceeding to the Technical Evaluation stage.

It is not in contention that the Applicant was determined as non-responsive at the Preliminary Evaluation stage on two reasons of a non-valid KPC Certificate and inconsistent pagination. The Board has heard the Applicant's arguments that these are minor deviations that could have been corrected pursuant to Section 79 (2) of the Act.

The Board has studied the Applicant's original tender submitted to the Procuring Entity in respect to the subject tender and notes that the Applicant's KPC Quality Certificate No. 14146020221055 submitted at page 154 is dated 19<sup>th</sup> February 2021. The date sampled is indicated as 18<sup>th</sup> February 2021.

On the issue of the validity of the Applicant's KPC Quality Certificate, the Board has considered the use of the word **valid** in Mandatory Requirement No. 6 of the Revised Preliminary/Mandatory Requirement Criteria of Addendum 1 of the Tender Document. Oxford Learners Dictionary defines the word "valid" as *"that is legally or officially acceptable"*.

The question the Board is now called upon to answer is whether the Applicant's KPC Quality Certificate No 14146020221055 dated 19<sup>th</sup> February 2021 was a legally or officially acceptable certificate by the Respondents. The Board observes that the Applicant's KPC Quality Certificate reveals that sampling was last done on 18<sup>th</sup> February 2021, a period of two years prior

to the submission date of the subject tender. A certificate issued for a sampling of fuel done two years ago cannot, by any stretch of imagination, be considered current and therefore valid, in the context of the goods to be supplied in the subject procurement.

In the Board's considered view, the Applicant's KPC Quality Certificate submitted in the subject tender was not a valid or officially acceptable certificate as required under the tender document.

On the issue of serialization, the Board takes cognizance of Clause 7 of the Invitation to Tender at page 5/116 of the Tender Document which requires tenderers to chronologically serialize all pages of the tender document. This was further buttressed by Mandatory Requirement No. 23 of the Revised Preliminary/Mandatory Requirement Criteria of Addendum 1 of the Tender Document.

The Courts have pronounced themselves on this issue. One such case is **Republic v Public Administrative Review Board & Ors Ex-parte Fourway Construction Company Limited [2019] eKLR** which the High Court held as follows;

***"49. The requirement of serialization was in the present case indicated to be a mandatory requirement in the 1<sup>st</sup> Interested Party's tender document, and it was indicated in tender document that a firm lacking in any of the requirements would be dropped at the preliminary stage and would not progress to the Technical***

***evaluation stage. It is also a mandatory requirement under section 74 of the Act, and failure to serialise every page cannot therefore be interpreted as a minor deviation from the requirements set out in the tender documents, and cannot fall within the exceptions provided for in section 79. It is also evident that the discretion given by section 79 to waive a requirement that has not been conformed with only applies where that conformity can be corrected without causing prejudice to the other bidders, or is quantifiable, which is not the case with the requirement of serialization of every page because of the objective of the requirement and attendant risks of non-conformity that have been explained in the foregoing.”***

From the above authority, a tenderer’s failure to serialize its tender cannot be interpreted as a minor deviation nor can it fall under the exceptions of Section 79(2) of the Act.

**In Republic v Public Procurement Administrative Review Board ex parte Guardforce Group Limited; Pwani University & 2 Others (Interested Parties) [2021] eKLR Justice E.K. Ogola, held that;**

***“...it becomes apparent to this court that the aspect of compliance with the mandatory requirement of the tender document aims to promote fairness, equal treatment, good governance, transparency, accountability and to do away with unfairness.***

***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, if allowed, may encourage abuse of power and disregard of the law by not only bidders, but also procuring entities.” [Emphasis ours]***

The Board has perused the Applicant’s original tender submitted to the Procuring Entity and observes that the Applicant submitted a bid with inconsistent pagination from page 1-566. Inconsistent pagination was in between the document, paginated from pages 1-159 skipped to 201, then skipped to 284-354, skipped to 370. The pagination then reverted to 242 to 373 and then 376-393. Pages 236-250 were mixed up and further pagination proceeds to 394-560).

The Board has observed that the Applicant, in its submission, did not refute the allegation of inconsistent pagination but merely argued that the same ought to be considered as a minor deviation curable by section 79 (2) of the Act.

The Board is not convinced that inconsistencies in pagination in the manner outlined herein can be termed as a minor deviation. Consistent chronological pagination goes to the root of the construction of a submitted tender. Were inconsistencies in pagination to be allowed in tendering, what

will stop submitted tenders from being tampered with by, say, pulling out pages and inserting new pages after the date of submission of tenders?

The Board believes that the Requirement for consistent chronological pagination contained in the tender document was a reasonable mandatory requirement. It is the finding of the Board that the Applicant did not meet the requirement of the tender document on pagination and the failure cannot be termed as a minor deviation.

In view of all of the foregoing, the Board finds that the Applicant did not satisfy Mandatory Requirement No. 6 and 23 of the Revised Preliminary/Mandatory Requirement Criteria of Addendum 1 of the Tender Document to proceed for evaluation at the Technical Evaluation stage.

The upshot of our findings is that the instant Request for Review fails.

### **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 and filed on 2<sup>nd</sup> June 2023:

1. The Request for Review dated 2<sup>nd</sup> June 2023 and filed on even date be and is hereby dismissed.

2. The Respondents are hereby directed to proceed with the procurement process in Tender No. KR/SCM/070/2022-2023 for Supply and Delivery of Automotive Gas Oil (AGO) Diesel Fuel for SGR Locomotive (Consignment Stocking) for a period of One (1) year renewable to its logical conclusion in accordance with provisions of the Tender Document, the Act, and the Constitution.

3. In view of the outcome, each party shall bear its own costs in the Request for Review.

Dated at Nairobi this 23<sup>rd</sup> Day of June 2023.



CHAIRPERSON

PPARB



SECRETARY

PPARB