

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 65/2023 OF 25TH SEPTEMBER 2023

BETWEEN

CENTRAL ELECTRICALS INTERNATIONAL LTD.....APPLICANT

AND

THE GENERAL MANAGER/CEO,

EAST AFRICAN PORTLAND CEMENT PLC.....1ST RESPONDENT

EAST AFRICAN PORTLAND CEMENT PLC 2ND RESPONDENT

SPENOMATIC KENYA LIMITED INTERESTED PARTY

Review against the decision of the General Manager/CEO, East African Portland Cement PLC in relation to RFP No. EAPCPLC/RFP/009/2023 for Design, Supply, Installation and Commissioning of a Grid tied Solar PV Plant.

BOARD MEMBERS PRESENT

- | | | |
|------------------------|---|-------------------|
| 1. Mr. Joshua Kiptoo | - | Panel Chairperson |
| 2. Ms. Alice Oeri | - | Member |
| 3. Mr. Alexander Musau | - | Member |
| 4. Eng. Lilian Ogombo | - | Member |

5. Dr. Susan Mambo - Member

IN ATTENDANCE

Mr. Philemon Kiprop - Secretariat

PRESENT BY INVITATION

APPLICANT CENTRAL ELECTRICALS INTERNATIONAL LTD

Mr. Nyamu -Advocate, Nyamu & Nyamu Co. Advocates LLP

**RESPONDENTS THE GENERAL MANAGER/CEO,
EAST AFRICAN PORTLAND CEMENT PLC
& EAST AFRICAN PORTLAND CEMENT
PLC**

Mr. Gideon Muturi - Advocate, Mwaniki Gachoka & Co. Advocates

INTERESTED PARTY SPENOMATIC KENYA LIMITED

Mr. Mwaura - Advocate, Karuru Mwaura & Company
Advocates

BACKGROUND OF THE DECISION

The Tendering Process



1. Vide an Expression of Interest (hereinafter referred to as "EOI") for listing of firms for the Development of Captive Solar Generation advertised on 18th November 2022 on the Daily Nation Newspaper, East African Portland Cement PLC, the Procuring Entity and 2nd Respondent herein, invited interested and eligible bidders to make applications for the development of the Captive Solar Generation. The EOI submission deadline was on 25th November 2022.

2. Following the EOI, the following firms were shortlisted (hereinafter referred to as "the shortlisted firms") by the 1st Respondent:

No.	Name
1.	Central Electrical International
2.	Spenomatic Kenya Limited
3.	Voltalia Kenya Services Limited
4.	Imexolutions Limited
5.	Ofgen Energy Solutions Simplified
6.	Ric Energy

3. On 17th April 2023, the Procuring Entity invited sealed requests for proposals from the shortlisted firms being the pre-qualified bidders in response to RFP No. EAPCPLC/RFP/009/2023 for Design, Supply, Installation and Commissioning of a Grid tied Solar PV Plant

(hereinafter referred to as "the subject tender"). The blank tender document for the subject tender was addressed to the shortlisted firms and had an initial closing date of Thursday, 4th May 2023 but this date was extended twice vide Addendum No. 1 dated 28th April 2023 and Addendum No. 2 dated 15th May 2023 upon request by some of the bidders. The new closing date was pushed to Tuesday, 23rd May 2023.

Submission of Tenders and Tender Opening

4. According to the Minutes of the subject tender's opening held on 23rd May 2023 signed by members of the Tender Opening Committee on 23rd May 2023 (hereinafter referred to as the 'Tender Opening Minutes') and which Tender Opening Minutes were part of confidential documents furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') by the 1st Respondent pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), a total of five (5) tenders were submitted in response to the subject tender. The said five (5) tenders were opened in the presence of tenderers' representatives present at the tender opening session, and were recorded as follows:

No.	Name of Tenderer
1.	Central Electricals International Ltd
2.	Ric Energy Kenya Limited

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3.	Spenomatic Kenya Limited
4.	Imexolutions Ltd
5.	Ofgen- Hdec Consortium

Evaluation of Tenders

5. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1st Respondent undertook evaluation of the five (5) tenders as captured in an Evaluation Report for the subject tender signed by members of the Evaluation Committee on 4th August 2023 (hereinafter referred to as the "Evaluation Report") (which Evaluation Report was furnished to the Board by the 1st Respondent pursuant to Section 67(3)(e) of the Act), in the following stages:

- a) Preliminary Examination for Determination of Responsiveness;
- b) Evaluation of the Technical Proposal; and
- c) Evaluation of the Financial Proposal.

Preliminary Examination for Determination of Responsiveness

6. The Evaluation Committee was required to carry out a preliminary evaluation of tenders in the subject tender using the criteria provided under Clause 2.1 Preliminary Evaluation Criteria Mandatory Requirements for Preliminary Evaluation Criteria of Section III – Evaluation and Qualification Criteria at page 23 to 24 of the Tender. Tenderers were required to meet all the mandatory requirements at

this stage to proceed to the Evaluation of the Technical Proposal stage.

7. According to the Minutes of the subject tender's held on 25th and 31st May 2023 and signed by members of the Evaluation Committee on 31st May 2023, at the end of evaluation at this stage, two (2) tenders were determined non-responsive while three (3) tenders including the Applicant's and Interested Party's tenders were determined responsive. The three (3) tenders that were determined responsive proceeded for evaluation at the Evaluation of the Technical Proposal stage.

Evaluation of the Technical Proposal

8. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Clause 3 Evaluation of the Technical Proposal of Section III – Evaluation and Qualification Criteria at page 25 to 27 of the Tender Document. Tenders were required to attain 80% pass mark to proceed for Evaluation of the Financial Proposal.
9. According to the Minutes of the subject tender's held on 13th and 17th June 2023 and signed by members of the Evaluation Committee on 17th June 2023 (hereinafter referred to as the "Technical Evaluation Report"), at the end of evaluation at this stage, only the Interested Party's tender had met the pass mark score of 80% in the Evaluation

of the Technical Proposal and was determined responsive and thus proceeded for evaluation at the Evaluation of the Financial Proposal stage.

Financial Evaluation

10. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Clause 3.2 Price Schedule and Financial Evaluation Requirements BOQ of Section III – Evaluation and Qualification Criteria at page 27 to 34 of the Tender Document.
11. At the end of evaluation at this stage, the Evaluation Committee independently undertook a cost analysis per unit of energy produced for the photovoltaic systems in current solar energy space and compared with the Interested Party's submission in its tender in order to appreciate the competitiveness of the pricing as can be discerned in the Minutes of the subject tender's held on 18th July 2023 and signed by members of the Evaluation Committee on 18th July 2023.

Evaluation Committee's Recommendation

12. The Evaluation Committee recommended the award of the subject tender to the Interested Parties at its quoted total bid price of Kshs. 572,790,267/= inclusive of all taxes having (i) met the qualification criteria, (ii) been determined to be substantially responsive to the

Tender Document, and (iii) been determined to have the lowest tender price.

Professional Opinion

13. In a Professional Opinion dated 18th July 2023 (hereinafter referred to as the "Professional Opinion"), the Head of Supply Chain, Mr. Moses Sudi, reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender to the Interested Party. He thus requested the 1st Respondent to approve the award of the subject tender as per the recommendation of the Evaluation Committee.

14. The Professional Opinion was furnished to the Board by the 1st Respondent as part of confidential documents pursuant to Section 67(3)(e) of the Act.

Notification to Tenderers

15. Tenderers were notified of the outcome of evaluation of the subject tender vide letters of Notification of Award dated 11th September 2023.

REQUEST FOR REVIEW NO. 65 OF 2023

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16. On 25th September 2023, the Applicant herein, filed a Request for Review No. 652 of 2023 dated 25th September 2023 together with an Affidavit in Support of the Request for Review sworn on 25th September 2023 by Mohamed Taki Rashid, the Applicant's Head of Marketing and Tendering (hereinafter referred to as "the instant Request for Review) through the firm of Nyamu & Nyamu Advocates LLP seeking the following orders:

a) THAT the Notice of the decision by the Procurement Entity for Tender No. EAPCPLC/RFP/009/2023 dated 11th September 2023 be set aside.

b) THAT the Public Procurement Administrative Review Board reviews the scores entered by the Procurement Entity, the tender documents and awards the tender to the applicant. In the alternative this Honorable review Board directs the Procuring entity to evaluate the Applicant's bid at Technical Stage and to award the appropriate marks to the Applicant.

c) This Honourable Review Board substitutes the decision by the Procurement Entity made on 11th September 2023, with a decision awarding the tender herein to the Applicant.

d) The Public Procurement Administrative Review Board directs the procurement Entity to pay exemplary costs to the Applicant.

e) Any other relief that this honourable Review Board may deem fit to grant.

17. In a Notification of Appeal and a letter dated 25th September 2023, Mr. James Kilaka, the Acting Secretary of the Board notified the Respondents of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to them 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 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 the date of the Notification of Appeal and letter dated 25th September 2023.

18. On 2nd October 2023, the Respondents filed through Mwaniki Gachoka & Co. Advocates a Notice of Appointment dated 29th September 2023 together with confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

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19. Vide letters dated 3rd October 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 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 3rd October 2023.
20. On 4th October 2023, the Respondents filed through Mwaniki Gachoka & Co. Advocates a Respondents Response dated 2nd October 2023.
21. On 5th October 2023, the Interested Party filed through Karuru Mwaura & Company Advocates a Memorandum of Response to the Applicant's Request for Review, a Replying Affidavit of the Interested Party sworn on 5th October 2023 by Berjeesh Dady Surty, its Managing Director and Written Submissions dated 5th October 2023.
22. On 6th October 2023, the Interested Party filed through Karuru Mwaura & Company Advocates a Notice of Appointment of Advocates dated 5th October 2023.
23. Vide a Hearing Notice dated 6th October 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 11th

October 2023 at 12:00 noon, through a link availed in the said Hearing Notice.

24. On 9th October 2023, the Applicant filed through Nyamu & Nyamu Advocates a Further Affidavit sworn on 9th October 2023 by Mohamed Taki Rashid, its Head of Marketing and Tendering, a letter dated 9th October 2023, Applicant's Submissions dated 9th October 2023 and a List of Authorities dated 9th October 2023.
25. On 9th October 2023 the Interested Party through Karuru Mwaura & Company Advocates filed the Interested Party's Authorities dated 9th October 2023.
26. On the morning of 11th October 2023, the Applicant filed through Nyamu & Nyamu Advocates Amended Applicant's Submissions dated 11th October 2023.
27. On 11th October 2023, the Respondents through Mwaniki Gachoka & Co. Advocates filed Written Submissions dated 11th October 2023.
28. During the hearing on 11th October 2023, the Board issued hearing directions allocating the Applicant, Respondent and Interested Party 10 minutes each to highlight their respective cases with the Applicant being granted a right of rejoinder on matters of law only. Thus, the instant Request for Review proceeded for virtual hearing as scheduled.

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PARTIES' SUBMISSIONS

Applicant's Submission

29. In his submissions, Counsel for the Applicant, Mr. Nyamu relied on the Applicant's Request for Review dated 25th September 2023, Affidavit in Support of the Request for Review sworn on 25th September 2023 by Mohamed Taki Rashid, Further Affidavit sworn on 9th October 2023 by Mohamed Taki Rashid, and the Applicant's Written Submissions that were filed before the Board.
30. Mr. Nyamu submitted that the gist of the instant Request for Review is on two issues namely notification of award of the subject tender and evaluation of the Applicant's Technical Proposal submitted in the subject tender.
31. It is the Applicant's case that the letter communicating rejection of the Applicant's tender dated 11th September 2023 and the further letter issued to the Applicant dated 26th September 2023 failed to conform to the provisions of the Act. Counsel pointed out that the letter dated 11th September 2023 failed to give reasons for rejection of the Applicant's tender which prompted the Applicant to write to the Respondents vide letter dated 19th September 2023 seeking reasons for disqualification of its tender. However, the Applicant's request for reasons was responded to when the instant Request for Review had been filed and the standstill period had lapsed.



32. Counsel submitted that the letter of notification dated 11th September 2023 was accompanied by the Applicant's Financial Proposal yet it was the Applicant's expectation that the Procuring Entity would hold onto the same until the lapse of the standstill period in the event an administrative review was lodged with the Board.
33. Mr. Nyamu further submitted that the letter dated 26th September 2023 failed to disclose the successful tenderer contrary to Section 87(3) of the Act. He further pointed out that though not pleaded, there was no accompanying Authority to the officer who signed the letters of notification and urged the Board to strike out the same for want of conformity.
34. Counsel pressed that the reasons for disqualification of the Applicant's Technical Proposal as communicated in the letter dated 26th September 2023 are unfair and illogical. On the ground that the Applicant failed to adequately demonstrate the design aspect of a 2MWP Solar PV System, counsel submitted that experience of a 2MW solar PV system was submitted at pages 53-55 of the Applicant's bid i.e. IcFem Dreamland Hospital-Kimilili Project Size 2300kwp and as such, this shortcoming lacks basis and the project design is intellectual property and cannot be disclosed during tendering.

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35. On the ground that the Applicant failed to adequately demonstrate experience of having designed, installed and commissioned one single axis solar PV System in Kenya, counsel submitted the Applicant duly submitted at page 56 of its bid one single axis solar PV system i.e. the 1027kwp tracking system solar power plant at Kitugum/Lorgum Hospital and as part of the Procuring Entity's due diligence, it set out to examine this project and their representative requested to have the photos sent to them as proof of the project hence the Applicant fully demonstrated this experience.
36. Counsel pressed on that the Act defines at Section 2 the term work to mean a combination of goods and services for the construction, repair, renovation, extension, alteration, dismantling or demolition of buildings, roads or other structures and includes designing, building, installing testing commissioning, and setting up of equipment and plant.
37. On the ground that certain Letter of Purchase Orders (LPOs) submitted were found to lack complete signatures and an assessment of the corresponding completion certificates led to concerns regarding the practicality of the specified completion timelines, counsel submitted that it is not the onus of the Procuring Entity to determine the completeness of the signatures on the LPOs made by suppliers and or private entities and that all the LPOs appearing at page 54 and 57 of the Applicant's bid bore a signature from the issuing entity which is in itself a complete execution of the LPOs.

Additionally, on the issue of practicality of the specified completion timelines, he stated that this observation was purely on a subjective approach which the Procuring Entity chose to adopt and the fact of the matter is that all the projects submitted under the Applicant's experience were completed within the timelines therein as the Applicant has all the manpower and resources to complete the said projects within the timelines therein.

38. On the ground that some of the projects referenced in the Applicant's bid were executed outside Kenya while the Tender Document explicitly required the demonstration of Kenyan-specific experience, counsel argued that the subject tender required three projects as part of the experience of a tender and the Applicant submitted seven which was way above the requirements and out of the seven, three projects were all Kenyan i.e. Two Rivers, Kitugum/Lorgum, and Icfem Dreamlands Hospital Kimilili.

39. Mr. Nyamu referred the Board to the provisions of Section 79 of the Act and submitted that the Applicant's proposal was consistent with the general particulars and specific requirements under the Tender Document and as such, the 2.3 marks lost ought to have been awarded.

40. He urged the Board to allow the Request for Review as prayed.

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Respondents' submissions

41. In his submissions, Counsel for the Respondent, Mr. Muturi, relied on the Respondents Statement of Response dated 2nd October 2023, confidential documents submitted by the 1st Respondent pursuant to Section 67(3)(e) of the Act and Written Submissions dated 11th October 2023 that were filed before the Board.
42. Mr. Muturi submitted that the reasons for disqualification of the Applicant's tender as stipulated in the notification letter dated 11th September 2023 were clear contrary to the Applicant's allegation. He stated that the Applicant's bid was not successful for having failed to meet the minimum score in the Technical Evaluation noting that the minimum technical score was 80% and the Applicant scored 77%.
43. Counsel faulted the Applicant for relying on the provisions of Section 79 of the Act and argued that Section 79 of the Act does not apply at the technical stage of evaluation and since the Applicant's tender had passed the Preliminary Evaluation stage, the issue of minor deviation had already been dealt with.
44. Counsel further faulted the Applicant for relying on the provisions of Section 87 of the Act on Notification of Award of the subject tender arguing that this was a Request for Proposal (RFP) with its own mode of evaluation and notification provided for under Section 115 and 126 of the Act. He referred the Board to Section 126(4) of the Act and pointed out that it only requires notification to tenderers

with reasons for disqualification but does not require the Procuring Entity to notify other bidders on the successful tenderer.

45. Counsel relied on the Board's decision in Application Number 74 of 2017 Kemax Trading Co. Limited v Ministry of Interior and National Coordination of National Government where it was held that the procuring entity's failure to strictly comply with Section 87(3) of the Act did not render the procurement process fatally defective and the test the Board considered was whether the Applicant suffered any prejudice and held that none was suffered as the Applicant was able to file the Request for Review with the Board on time. With reference to the instant Request for Review, the winning tenderer is participating in the proceedings before the Board.
46. On the issue of the person who signed the notification letter, Counsel submitted that this issue was not pleaded and had been introduced at the submission stage making the Respondent unable to appropriately respond and file the document demonstrating that the accounting officer had delegated the authority. He pointed out that the 1st Respondent right from the advertisement of the subject tender had delegated the authority and responsibility to the Head of Supply Chain to act on his behalf.
47. On the issue of evaluation of the Applicant's Technical Proposal, Mr. Muturi submitted that the Applicant was attempting to convert the Board to an Evaluation Committee and the prayer for the Board to

award the subject tender to the Applicant was beyond its scope and noting that the Applicant's tender was not evaluated at the Financial stage, it cannot be awarded the subject tender.

48. Counsel submitted that Section 126 of the Act required the Evaluation Committee to examine proposals in accordance with the Request for Proposals. He pointed out that the Applicant failed to submit at least one work including design, supply, installation and commissioning of Solar PV systems as required in the request for proposal. This design aspect of the work was critical and had a huge impact on the overall project and referred the Board to page 5 of the Technical Evaluation Report where it is clearly indicated that the Applicant did not submit technical designs which were critical and had a huge impact on the overall project. He further pointed out that this had been admitted by the Applicant on the claim that it fell within the intellectual property and could not be disclosed yet under Section 67 of the Act, such critical information was protected under the confidentiality provision.

49. On the issue that the Applicant demonstrated experience of having designed, installed and commissioned one single axis solar PV system as seen at page 56 of its bid document, counsel invited the Board to review the Applicant's Technical Proposal and note that there was no design aspect submitted to demonstrate it executed the same. He pointed out that from the LPOs submitted, it emerged that they had

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only supplied and installed the solar system and there was no mention of the tracking system or design of the solar system.

50. Counsel argued that from all the projects the Applicants submitted, there was no project in Kenya which had the design aspect to demonstrate their ability to perform the project. That from all the documents submitted by the Applicant to demonstrate supply and installation of similar projects, it was notable that the purchase order only had supply, delivery and installation and there is no aspect of design or the tracking system which was required in technical proposal under Criteria 1(a) of the technical proposal under the Tender Document.

51. Mr. Muturi submitted that the letter dated 26th September 2023 was not a notification letter and that it only responded to the Applicant's request for clarifications.

52. In conclusion, Mr. Muturi urged the Board to dismiss the Request for Review.

53. Upon enquiry by the Board on apportionment of scores of the Applicant's Technical Proposal, Mr. Muturi submitted that the marks awarded were based on the criteria in the Tender Document and were awarded per each category. He further pointed out that there was no disparity of how marks were awarded from the Evaluation Report.



54. When asked why the Procuring Entity returned the Financial Proposal before the standstill period had lapsed, Mr. Muturi submitted that he was not aware that the Financial Proposals had been returned and he would have to consult on the issue with the Respondents.
55. Mr. Muturi re-iterated that the issue of signing of the notification letter by the Head of Supply Chain had not been pleaded and if the Board required, the Authority letter delegating this function could be shared.

Interested Party's Submissions

56. In his submissions, Counsel for the Interested Party, Mr. Mwaura, relied on the Memorandum of Response to the Applicant's Request for Review dated 5th October 2023, Replying Affidavit of the Interested Party sworn on 5th October 2023 by Berjeesh Dady Surty and Written Submissions that were filed before the Board.
57. Mr. Mwaura aligned himself with the submissions of the Respondents and raised a question as to whether the Board has jurisdiction to hear and determine the instant Request for Review.
58. Counsel argued that for the Board to have jurisdiction, correct parties ought to be before the Board as per Section 179 of the Act. He pointed out the instant Request for Review left out the Accounting officer of the Procuring Entity and the winning tenderer in the subject



tender. He further pointed out that the Procuring Entity is not envisioned as a party under the Request for Review

59. Mr. Mwaura submitted that the Applicant has not offered any security as required under the Act and had failed to demonstrate what damages it was likely to suffer by the subject tender being awarded to the Interested Party.

60. He urged the Board to dismiss the instant Request for Review and referred to the case of Anderson Mole Munyara & 3 others v Morris Sulubu Hare (2017) and the decision by the Supreme Court of Nigeria in Goodwill & Trust Investment Ltd and Another v Witt & Bush Ltd – SC 266/2005.

Applicant's Rejoinder

61. In a rejoinder, Counsel for the Applicant, Mr. Nyamu maintained that the applicable provisions on notification of award of the subject tender was Section 87 of the Act and not the notice stipulated under Section 126 of the Act.

62. Counsel pointed out that the Notice of November 2022 does not inform the Board of delegated authority for the Head of Supply to issue the notification letter and no authority had been shown before the Board.

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63. Counsel submitted that evaluation of the Technical Proposal was score based and as long as a party had substantially complied, it ought to have been awarded marks. He further submitted that as long as demonstration had been made that works had been done as defined under Section 2 of the Act, one could not have scored a zero.
64. On the question of jurisdiction, Mr. Nyamu submitted that the Applicant should not be faulted for failure to join the Interested Party as it is the duty of the Procuring Entity to notify bidders on the successful tenderer. He further submitted that the CEO of the Procuring Entity had been joined to the proceedings being the accounting officer as provided under the Act and since the Interested Party had participated in the proceedings no prejudice had been suffered.
65. Upon enquiry by the Board on whether the Board could grant the orders sought by the Applicant as prayed, counsel submitted that the questions in the Request for Review lie squarely within the Board's Jurisdiction and should the Board find that evaluation was not proper, it can order for re-evaluation of the subject tender since it cannot shut its eye on obvious unfairness and relied on the decision in Application No. 30 of 2018 CRCC11 Kenya Limited v Kenya Roads Rural Authority and Application 118 of 2018 GBM Consortium v National Authority.
66. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 25th

September 2023 was due to expire on or before 16th October 2023 and that the Board would communicate its decision on or before 16th October 2023 to all parties to the Request for Review via email.

BOARD'S DECISION

67.__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:

A. Whether the Board has jurisdiction to hear and determine the instant Request for Review;

In determining the first issue, the Board will make a determination on whether the Request for Review is fatally defective as a result of the Applicant's failure to join the successful bidder as a party to the Request for Review, thus divesting the Board of jurisdiction;

Depending on the determination of the first issue;

B. Whether the Applicant's tender in response to the subject tender was evaluated in accordance with the criteria set out at Clause 3 Evaluation of the Technical

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Proposal of Section III- Evaluation and Qualification Criteria of the Tender Document read with Section 80(2) of the Act and Article 227(1) of the Constitution;

C. Whether the Letter of Notification dated 11th September 2023 met the threshold required in Section 87(3) of the Act read with Regulations 2020;

D. What orders should the Board grant in the circumstances.

Whether the Board has jurisdiction to hear and determine the instant Request for Review

68. It is trite law that courts and decision making bodies should only act in cases where they have jurisdiction and when a question of jurisdiction arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before doing anything concerning such a matter.

69. Black's Law Dictionary, 8th Edition, defines jurisdiction as:

"... the power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties ... the power of courts to inquire into facts, apply the law, make

decisions and declare judgment; The legal rights by which judges exercise their authority.”

70. The celebrated Court of Appeal decision in **The Owners of Motor Vessel “Lilian S” v Caltex Oil Kenya Limited [1989]eKLR; Mombasa Court of Appeal Civil Appeal No. 50 of 1989** underscores the centrality of the principle of jurisdiction. In particular, Nyarangi JA, decreed:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for continuation of proceedings pending evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction.”

71. The Supreme Court added its voice on the source of jurisdiction of a court or other decision making body in the case **Samuel Kamau Macharia and another v Kenya Commercial Bank Ltd and 2 others [2012] eKLR; Supreme Court Application No. 2 of 2011** when it decreed that;

“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only

exercise jurisdiction is conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with Counsel for the first and second Respondent in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings."

72. In the persuasive authority from the Supreme Court of Nigeria in the case of **State v Onagoruwa [1992] 2 NWLR 221 – 33 at 57 – 59** the Supreme Court held:

"Jurisdiction is the determinant of the vires of a court to come into a matter before it. Conversely, where a court has no jurisdiction over a matter, it cannot validly exercise any judicial power thereon. It is now common practice, indeed a well beaten legal track, that jurisdiction is the legal right by which courts exercise their authority. It is the power and authority to hear and determine judicial proceedings. A court with jurisdiction builds on a solid foundation because jurisdiction is the bedrock on which court proceedings are based."

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73. In the case of **Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others [2013] eKLR**, the Court of Appeal emphasized on the centrality of the issue of jurisdiction and held that:

“...So central and determinative is the issue of jurisdiction that it is at once fundamental and overarching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain....”

74. The jurisdiction of a court, tribunal, quasi-judicial body or an adjudicating body can only flow from either the Constitution or a Statute (Act of Parliament) or both.

75. This Board is a creature of statute owing to the provisions of Section 27 (1) of the Act which provides:

“(1) There shall be a central independent procurement appeals review board to be known as the Public Procurement Administrative Review Board as an unincorporated Board.”



76. Further, Section 28 of the Act provides for the functions and powers of the Board as follows:

“(1) The functions of the Review Board shall be—

(a) reviewing, hearing and determining tendering and asset disposal disputes; and

(b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law.”

77. The above provisions demonstrate that the Board is a specialized, central independent procurement appeals review board with its main function being reviewing, hearing and determining tendering and asset disposal disputes.

78. Turning to the circumstances in the instant Request for Review, Mr. Mwaura, counsel for the Interested Party submitted that the instant Request for Review as filed was not proper for failure to have enjoined the Accounting Officer of the Procuring Entity and the Interested Party and as such divesting the Board of Jurisdiction to hear and determine the same. He further argued that the Procuring Entity is not envisioned as a party under the Request for Review.

79. On its part, counsel for the Applicant submitted that the instant Request for Review as filed was proper and that the CEO of the

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Procuring Entity was a party in the proceedings. Counsel further submitted that having not been notified of the successful tenderer, it was not its duty to find out who had been awarded the subject tender but the duty of the Procuring Entity.

80. A determination of whether the instant Request for Review as filed is proper or not falls squarely on the interpretation of Section 170 of the Act which sets out in mandatory terms parties to an administrative review as follows:

“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.”

81. In essence, an administrative review must comprise of (a) the candidate or tenderer requesting the review, (b) the accounting officer of a Procuring Entity, (c) the successful tenderer, and (d) such other persons as the Review Board may determine.

82. The Board notes that Regulation 203(1) of Regulations 2020 provides that:



“(1) A request for review under section 167(1) of the Act shall be made in the Form set out in the Fourteenth Schedule of these Regulations”

83. We have carefully studied the instant Request for Review and note that the Applicant filed its administrative review application against the Procuring Entity being East African Portland Cement PLC, and the Accounting Officer being the General Manager/CEO, East African Portland Cement PLC and thus to this extent, complied with the provisions of Section 170 (a) and (b) of the Act.
84. In view of Section 170(c) of the Act on joining a tenderer notified as successful by the Procuring Entity, the Board notes that the mischief this provision intends to cure is avoid instances where a Request for Review is heard and determined in the absence of a successful tenderer who was neither joined as a party to the Request for Review nor notified of the filing and hearing thereof. Later on, such a successful party learns that a decision has been made by the Board which decision may have adversely affected the award made to it.
85. Regulation 205 of Regulations 2020 mandates the Board Secretary, immediately after the filing of a request for review, to notify all other parties who participated in the procurement

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proceedings upon receipt of confidential documents from a procuring entity detailing the particulars of other tenderers.

86. We note that on 3rd October 2023, upon receipt of the confidential documents submitted by the 1st Respondent pursuant to Section 67(3)(e) of the Act, Mr. Kilaka, the Acting Board Secretary notified all tenderers in the subject tender vide a Notification for Review dated 3rd October 2023.
87. Subsequently, the Interested Party appointed Karuru Mwaura & Company Advocates to represent it in the proceedings in the instant Request for Review and filed its Memorandum of Response to the Applicant's Request for Review dated 5th October 2023, Replying Affidavit of the Interested Party sworn on 5th October 2023 by Berjeesh Dady Surty and Written Submissions and further attended the hearing slated on 11th October 2023 and advanced its case.
88. Taking cognizance of the provisions of Article 50 of the Constitution on the right to a fair hearing and Article 47 of the Constitution on the right to fair administrative action, the successful tenderer's right under the aforementioned provisions has not been affected in the instant Request for Review noting that the purpose of Section 170(c) of the Act has been achieved as evidenced by the Interested Party's participation in the proceedings in the Request for review.
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89. Accordingly, it is the Board's finding that the Applicant's failure to join the successful bidder in this Request for Review does not make the review application fatally incompetent in this instance where the Interested Party has actively participated in these review proceedings.

90. Consequently, the Board has jurisdiction to hear and determine the issues raised in the instant Request for Review. We shall now proceed to consider the Request for Review on its merit by determining the substantive issues.

Whether the Applicant's tender in response to the subject tender was evaluated in accordance with the criteria set out at Clause 3 Evaluation of the Technical Proposal of Section III- Evaluation and Qualification Criteria of the Tender Document read with Section 80(2) of the Act and Article 227(1) of the Constitution;

91. We understand the crux of the Applicant's Request for Review to be that its tender satisfied the criteria at the Evaluation of the Technical Proposal of Section III- Evaluation and Qualification Criteria of the Tender Document. Accordingly, if the Procuring Entity's Evaluation Committee had properly considered the Applicant's tender, the Applicant's tender would have surpassed the cut off points of 80 out of 100 marks at the Evaluation of Technical Proposal stage.



92. On the other hand, the Respondents deny that the Applicant's tender was responsive at the Evaluation of Technical Proposal stage and gave various reasons as captured hereinabove and as per the Technical Evaluation Report submitted to the Board pursuant to Section 67(3)(e) of the Act as to why the Applicant's tender was disqualified, having failed to meet the minimum score of 80 out of 100 to proceed for further evaluation at the Price Schedule and Financial Evaluation Requirements stage.

93. The Interested Party fully associates itself with the sentiments and averments set out by the Respondents on this issue.

94. The Board is cognizant of Article 227 of the Constitution which requires the 2nd Respondent to have a procurement system that is fair, equitable, transparent, competitive, and cost effective and provides for a legislation that governs public procurement and asset disposal framework as follows:

"227. Procurement of public goods and services

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

(2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and



asset disposal shall be implemented and may provide for all or any of the following –

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

95. The Board observes that the legislation contemplated in Article 227(2) of the Constitution is the Act. Section 80 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.**

- (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)

96. 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.



97. Section 79 of the Act provides that:

“(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 document; 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.”

98. The import of the above provision is that responsiveness of a tender shall not be affected by any minor deviations that do not materially depart from the requirements set out in the Tender Document and that do not affect the substance of a tender. This provision details a minor deviation as one that can be quantified to the extent possible and shall be taken into account in the evaluation and comparison of tenders.

99. In Republic v Public Procurement Administrative Review Board & another; Premier Verification Quality Services

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(PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020] eKLR the High 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].

100. Turning to the instant Request for Review, the Tender Document provided under Clause 3 Evaluation of the Technical Proposal of Section III- Evaluation and Qualification Criteria at pages 25 to 27 of the Tender Document as follows:



TECHNICAL EVALUATION CRITERIA			
No.	Description of items	MAX SCORE	SCORE
1.	Contractor Experience		
a	<i>Bidders should demonstrate experience in successful implementation of three (3) similar solar PV contracts in Kenya. The size of the projects should be more than 1 Mwp. At least one should include design, supply, installation, and commissioning of Solar PV systems above 2MWp. Bidder to have at least done 1 no single axis installation in Kenya and working satisfactorily Provide award letters on official letterhead from clients with official contact details including corresponding completion certificates that are fully signed to fully meet this requirement.</i>	10 5 15	
b	<i>Bidders must provide EPRA licenses for Solar PV Contractor, Solar PV Vendor and Solar PV Importer.</i>	5	
c	<i>Bidder must provide a valid NCA registration certificate. As follows: - - Valid NCA 8 Certificate in Civil Works (Subcontractor license is acceptable) - Valid EPRA license for Contractor in Electrical installation ClassA1/Individual Electrical License holder Class A1 (Subcontractor license is acceptable)</i>	2.5 2.5	
	Subtotal	40	
2.	Contractor Implementation Team Capacity.		
a	<i>Provide overall project management structure/organogram with each role clearly defined.</i>	2	
b	<i>Provide construction team structure/organogram with each role clearly defined.</i>	2	
c.	<i>Experience profile of Project Team Leader. The above should demonstrate specific experience of 5year in managing design,</i>	3	

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	<i>procurement and construction of Solar PV plant of at least 2MWp. Provide CV and relevant certificates to support this requirement.</i>		
<i>d</i>	<i>Experience profile of the Electrical Engineer Should demonstrate at least 5 years experience in the design construction and commissioning of PV Solar Plant with MV systems Provide CV and relevant certificates to support this requirement.</i>	<i>3</i>	
<i>d</i>	<i>Experience profile of the Civil/Structural Supervisor. Should demonstrate at least 5 years' experience in the supervision of structural works. Provide CV and relevant certificates to support this requirement.</i>	<i>3</i>	
<i>e</i>	<i>Experience profile of the construction team. Should demonstrate experience in the construction of the PV solar systems or other similar works Provide CV to support this requirement EPRA electrical license should be submitted for the technicians</i>	<i>5</i>	
	<i>Subtotal</i>	<i>20</i>	
<i>3.</i>	<i>Design Methodology</i>		
<i>a</i>	<i>Solar PV Plant. i) Submit preliminary design report of the plant Indicate optimal sizing of the PV plant and layout drawings of PV components ii) Submit Manufacturer's manuals, brochures and technical datasheets demonstrating Tier 1 equipment and date of manufacture. iii) Submit Manufacturer's Authorization letters. iv) Warranty guarantees for solar modules and inverters. v) Financial analysis</i>	<i>10</i>	
<i>b</i>	<i>Electrical System Design i) Submit preliminary study report on consumption analysis, load analysis, and grid tie design ii) Submit the design for the step transformer and associated works.</i>	<i>5</i>	
<i>c</i>	<i>Civil/Structural Design</i>	<i>5</i>	

	<i>Submit preliminary design of the solar PV array farm.</i>		
	<i>Subtotal</i>	20	
4.	<i>Construction Methodology and Management</i>		
a	<i>Grid Tied Solar PV Plant Construction Procedure Submit general work methodology, installation procedures and installation checklist for equipment and material. Support with manual from the manufacturer</i>	10	
b	<i>Quality Management Plan Submit a detailed QA/QC plan detailing all the test procedures, all the functional checks to be carried out on each equipment and the system. Submit procedure for handling any non-compliances and the corrective action to be taken</i>	4	
c	<i>Project Implementation Work Plan Submit a detailed Gantt chart plan of implementation detailing the tasks, timelines and sequence of task</i>	3	
	<i>Subtotal</i>	17	
5	<i>Health and Safety Plan</i> <i>Submit a detailed HSE management plan for the works including risk matrix and electrical hazards.</i>	3	
	<i>Subtotal</i>	3	
	<i>Total</i>	100	

A proposal shall be rejected at this stage if it does not respond to important aspects of the Terms of Reference or if it fails to achieve the minimum technical score of 80% of the Technical Evaluation Criteria.

101. From the above a tenderer was required to respond to the important aspects of the Terms of Reference and achieve the minimum technical score of 80% at the Evaluation of the Technical Proposal stage. A tender would also be evaluated and scored against the requirements set out the Technical Evaluation Criteria.



102. The Board notes that Regulation 76 of Regulations 2020 dictate that the Evaluation Committee shall conduct a Technical Evaluation by comparing each tender to the technical requirements of the goods, works, or services in the Tender Document as follows:

"76. Technical evaluation

(1) Upon completion of the preliminary evaluation under regulation 74, the evaluation committee shall conduct a technical evaluation by comparing each tender to the technical requirements of the goods, works or services in the tender document.

103. We note that according to the Technical Evaluation Report submitted to the Board by the 1st Respondent pursuant to Section 67(3)(e) of the Act, the Applicant was determined non-responsive at the Evaluation of the Technical Proposal stage because it failed to meet the minimum technical score of 80% of the Technical Evaluation criteria having scored 77.8%.

104. According to a letter dated 26th September 2023 addressed to the Applicant, the Respondents provided clarifications to the Applicant as to why its tender was disqualified as follows:

".....

Following a comprehensive evaluation by the Evaluation Committee, you obtained a score of 77.8% against our minimum technical score of 80% of the



Technical Evaluation Criteria. Some of the shortcomings noted by the committee in your proposal included among others;

- i Failure to adequately demonstrate the design aspect of a 2 MWP solar PV system;**
- ii Failure to adequately demonstrate experience of having designed, installed and commissioned one single axis solar PV system in Kenya;**
- iii Certain Letter of Purchase Orders (LPOs) submitted were found to lack complete signatures, and an assessment of the corresponding Completion Certificates led to concerns regarding the practicality of the specified completion timelines; and**
- iv Some of the projects referenced in your bid documents were executed outside Kenya while the tender document explicitly required the demonstration of Kenyan-specific experience.**

.....”

105. Having carefully studied the Technical Evaluation Report, we note that tenderers who had qualified at this stage, including the Applicant, were evaluated as follows:



No	Description of items	MAX SCORE	Central Electricals Internationa I Ltd	Spenomatic (K) Limited	Ofgem Energy Simplified
1.	Contractor Experience				
a	<i>Bidder should demonstrate experience in successful implementation of three (3) similar solar PV contracts in Kenya. The size of the projects should be more than 1 Mwp. At least one should include design, supply, installation, and commissioning of Solar PV systems above 2MWp. Bidder to have at least done 1 no single axis installation in Kenya and working satisfactorily Provide award letters on official letterhead from clients with official contact details including corresponding completion certificates that are fully signed to fully meet this requirement.</i>	<u>15</u> <u>10</u> <u>5</u>	10 5.8 0	15 10 5	5 3 1.6
b	<i>Bidders must provide EPRA licenses for Solar PV Contractor, Solar PV Vendor and Solar PV Importer.</i>	5	5	5	3.7
c	<i>Bidder must provide a valid NCA registration certificate. As follows: - - Valid NCA 8 Certificate in Civil Works (Subcontractor license is acceptable) - Valid EPRA license for Contractor in Electrical installation ClassA1/Individual Electrical License holder Class A1 (Subcontractor license is acceptable)</i>	2.5 2.5	2.5 2.5	2.5 2.5	2.5 2.5
	Subtotal	40	25.8	40	18.3
2.	Contractor Implementation Team Capacity.				

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a	<i>Provide overall project management structure/organogram with each role clearly defined.</i>	2	1.5	1.9	2
b	<i>Provide construction team structure/organogram with each role clearly defined.</i>	2	1.4	1.9	2
c.	<i>Experience profile of Project Team Leader. The above should demonstrate specific experience of 5year in managing design, procurement and construction of Solar PV plant of at least 2MWp. Provide CV and relevant certificates to support this requirement.</i>	3	3	3	3
d	<i>Experience profile of the Electrical Engineer Should demonstrate at least 5years experience in the design construction and commissioning of PV Solar Plant with MV systems Provide CV and relevant certificates to support this requirement.</i>	3	2	2.1	2.1
d	<i>Experience profile of the Civil/Structural Supervisor. Should demonstrate at least 5 years' experience in the supervision of structural works. Provide CV and relevant certificates to support this requirement.</i>	3	3	3	3
e	<i>Experience profile of the construction team. Should demonstrate experience in the construction of the PV solar systems or other similar works Provide CV to support this requirement</i>	5	5	5	5

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	<i>EPRA electrical license should be submitted for the technicians</i>				
	<i>Subtotal</i>	20	15.9	16.9	17.1
3.	<i>Design Methodology</i>				
a	<i>Solar PV Plant.</i>	10			
	<i>i) Submit preliminary design report of the plant (4mks) Indicate optimal sizing of the PV plant and layout drawings of PV components</i>		3	2.4	2.4
	<i>ii) Submit Manufacturer's manuals, brochures and technical datasheets demonstrating Tier 1 equipment and date of manufacture. (1mks)</i>		1	1	1
	<i>iii) Submit Manufacturer's Authorization letters. (1mks)</i>		1	1	1
	<i>iv) Warranty guarantees for solar modules and inverters. (2mks)</i>		2	2	2
	<i>v) Financial analysis (2mks)</i>		2	2	0
b	<i>Electrical System Design</i>	5			
	<i>i) Submit preliminary study report on consumption analysis, load analysis, and grid tie design (2.5 mks)</i>		2.5	2.5	2.5
	<i>ii) Submit the design for the step transformer and associated works. (2.5 mks)</i>		2.5	1	0
c	<i>Civil/Structural Design</i>	5	4.8	2	4.3
	<i>Submit preliminary design of the of solar PV array farm.</i>				
	<i>Subtotal</i>	20	18.8	13.9	13.2
4.	<i>Construction Methodology and Management</i>				
a	<i>Grid Tied Solar PV Plant Construction Procedure</i>	10	8.8	8.4	9.2
	<i>Submit general work methodology, installation procedures and installation check list for equipment and material.</i>				

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	<i>Support with manual from the manufacturer</i>				
<i>b</i>	<i>Quality Management Plan Submit a detailed QA/QC plan detailing all the test procedures, all the functional checks to be carried out on each equipment and the system. Submit procedure for handling any non-compliances and the corrective action to be taken</i>	<i>4</i>	<i>2.7</i>	<i>2.7</i>	<i>3.8</i>
<i>c</i>	<i>Project Implementation Work Plan Submit a detailed Gantt chart plan of implementation detailing the tasks, timelines and sequence of task</i>	<i>3</i>	<i>3</i>	<i>3</i>	<i>3</i>
	<i>Subtotal</i>	<i>17</i>	<i>14.5</i>	<i>14.1</i>	<i>16</i>
<i>5</i>	<i>Health and Safety Plan Submitted a detailed HSE management plan for the works including risk matrix and electrical hazards.</i>	<i>3</i>	<i>2.8</i>	<i>1.9</i>	<i>1.8</i>
	<i>Subtotal</i>	<i>3</i>	<i>2.8</i>	<i>1.9</i>	<i>1.8</i>
	<i>Total</i>	<i>100</i>	<i>77.8%</i>	<i>86.8%</i>	<i>66.4%</i>

[Underlined for Emphasis by the Board]

106. From the above Technical Evaluation Report, we observe that:

- a) Under requirement 1a. Contractor Experience the maximum score under the described items was inverted from what had been provided in the Tender Document to read 15, 10, and 5 yet according to the Tender Document, the maximum score had been provided as 10, 5, and 15;
- b) Under requirement 3 on Design Methodology the scoring under the various requirements under 3a and 3b in the Technical

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Evaluation Report had been prorated yet this criteria as provided in the Tender Document had no option of prorating the marks scored under clause 3a and 3b of the Technical Evaluation Criteria.

- c) In regard to the scoring of the various requirements under the Technical Evaluation Criteria, the maximum scores provided did not have any option for prorating of marks.

107. We have studied the Applicant's original tender submitted to the Board by the 1st Respondent as part of the confidential documents in respect of the subject tender and note the following with respect to its evaluation:

- a) In compliance with requirement 1a. Under the Technical Evaluation Criteria, the Applicant submitted at pages 47 to 58 proof of Projects done in Kenya for Two Rivers Power Company Limited, IcFem Dreamland Hospital, Kimilili, and Kitugum/Lorgum Hospital. Additionally, the Applicant provided at pages 59 to 82 of its tender proof of projects done in Kenya as follows:

- i The Applicant submitted a letter of acceptance on the official letterhead of the client at page 48 to 50 of its tender together with its Certificate of Completion and Handing Over indicating the total capacity of the project as 1521.0 kWp. 

- ii The Applicant submitted a Purchase Order for the Supply, Delivery and Installation of 2300kWp solar grid-tie power system at page 54 of its tender and a Handing Over Certificate at page 55.
 - iii The Applicant submitted a Purchase Order for the Supply, Delivery and Installation of 1027 kWp solar power system at page 57 of its tender and a Handing Over Certificate at page 58.
 - iv The other references given by the Applicant are from Quantel Renewable Energy, Malawi; Mataba Farms Limited, Kigali; Congo Energy Solution; and Revolutionary Government of Zanzibar.
- b) Noting that there was no provision for prorating marks under requirement 1a. Under the Technical Evaluation Criteria, it is unclear how the Evaluation Committee scored the Applicant noting the inversion of marks under the scoring category in the Evaluation Report.
- c) In compliance with requirement 3(a) and (b) under the Technical Evaluation Criteria the Applicant submitted at pages 155 to 245 documents in response to this requirement and in evaluating the same, the Evaluation Committee prorated the marks scored yet this was not provided for in the Tender Document.



d) In compliance with requirement 3(c) under the Technical Evaluation Criteria the Applicant submitted at pages 167 to 168 pictorial details of the land and layout of the solar modules array provided depicting arrangement of the modules arrays on the proposed land. The Applicant was scored 4.8 out of the maximum score of 5 with no justification as to why it was not awarded the full marks.

e) In compliance with requirement 4 (a) under the Technical Evaluation Criteria, the Applicant submitted at pages 248 a general work methodology, installation procedures and installation checklist for equipment and material and was scored 8.8 out of the maximum score of 10 marks with no justification as to why it was not awarded the full marks.

108. It is our considered opinion that the Evaluation Committee adopted an incorrect approach in evaluating and scoring the Applicant's tender as it failed to give reasons why it did not score full marks where the Technical Evaluation Criteria was fully met by the Applicant. If the Respondent had intended to prorate the scores under the Evaluation of the Technical Proposal, nothing would have been easier than indicating and detailing as such within the Technical Evaluation Criteria of the Tender Document so that tenderers would know from the inception the evaluation criteria at the Evaluation of the Technical Proposal stage for them to prepare and submit tenders in conformity with the said requirements.

109. The Board is cognizant of the provisions of Section 70 (3) of the Act which stipulate that tender documents ought to contain sufficient information to allow for fair competition amongst tenderers and provides as follows:

“(3) The tender documents used by a procuring entity pursuant to subsection (2) shall contain sufficient information to allow fair competition among those who may wish to submit tenders”

110. From the foregoing, we find that the Evaluation Committee **failed to evaluate** the Applicant’s tender submitted in response to the subject tender in accordance with the criteria set out at Clause 3 Evaluation of the Technical Proposal of Section III- Evaluation and Qualification Criteria of the Tender Document read with Section 80(2) of the Act and Article 227(1) of the Constitution.

Whether the Letter of Notification dated 11th September 2023 met the threshold required in Section 87(3) of the Act read with Regulations 2020;

111. The Applicant took issue with the fact that the Respondents letter dated 11th September 2023 failed to issue it with reasons for its disqualification and that the Respondents further failed to notify it of the successful tenderer in the subject tender.

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112. On its part, the Respondents contend that the letter of notification dated 11th September 2023 informed the Applicant of the reasons for its disqualification. During the hearing, counsel for the Respondents argued that notification in the subject matter was pursuant to Section 126(4) of the Act and that the Respondent was under no obligation to notify the Applicant of the successful tender this being tendering by a Request for Proposal.

113. Section 126 of the Act provides:

"126. Evaluation of proposals

(1) An evaluation committee of a procuring entity shall examine the proposals received in accordance with the request for proposals.

(2) The procedures for evaluation of the request for proposal shall be by using each selection method set out in section 124 and as may be prescribed.

(3) The evaluation shall be carried out within a maximum of twenty-one days, but shorter periods may be prescribed in the Regulations for particular types of procurement.

(4) When a person submitting the successful bid shall be notified, the accounting officer of the procuring entity shall at the same time notify in writing all other persons who had submitted bids that their bids were not successful and give reasons thereof.

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(5) The notice of intention to enter into contract in subsection 87(2) shall, as applicable, be publicized on the procuring entity's website and other public notice boards that do not attract a cost."

114. From the above provision, it is evident that when notifying the successful bidder in a Request for Proposal, the accounting officer is under an obligation to simultaneously notify other bidders that their bids were not successful and give reasons thereof. Section 126(5) of the Act proceeds to make reference to Section 87(2) of the Act on the notice of intention to enter into a contract and publication of the same.

115. As such, Section 87 of the Act read with Section 126(4) of the Act is instructive on how notification of the outcome of evaluation of the successful and unsuccessful tenderers should be conducted by a procuring entity. Section 87 provides as follows:

"87. Notification of intention to enter into a contract

(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.

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(2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.

(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.

(4) For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security.”

116. The procedure for notification under Section 87(3) of the Act is explained by Regulation 82 of Regulations 2020 which provides as follows:

“82. Notification of intention to enter into a contract

(1) The notification to the unsuccessful bidder under Section 87(3) of the Act, shall be in writing and shall be made at the same time the successful bidder is notified.

(2) For greater certainty, the reason to be disclosed to the unsuccessful bidder shall only relate to their respective bids.



(3) The notification in this regulation shall include the name of the successful bidder, the tender price and the reason why the bid was successful in accordance with Section 86(1) of the Act.”

117. In view of the provisions of Section 125(4) and 87 of the Act read with Regulation 82 of Regulations 2020, the Board observes an accounting officer of a procuring entity must notify, in writing, the tenderer who submitted the successful tender, that its tender was successful before the expiry of the tender validity period. Simultaneously, while notifying the successful tenderer, an accounting officer of a procuring entity notifies other unsuccessful tenderers of their unsuccessfulness, giving reasons why such tenderers are unsuccessful, **disclosing who the successful tenderer is**, why such a tenderer is successful in line with Section 86(1) of the Act and at what price is the successful tenderer awarded the tender. These reasons and disclosures are central to the principles of public procurement and public finance of transparency and accountability enshrined in Article 227 and 232 of the Constitution. This means all processes within a public procurement system, including notification to unsuccessful tenderers must be conducted in a transparent manner.

118. We have carefully perused the letter of notification dated 11th September 2023 issued to the Applicant which reads as follows:

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“

We refer to the above tender in which you participated and regret to inform you that you were not successful since your bid did not meet our technical proposal evaluation pass mark score.

We thank you for your interest in doing business with us, and hope that you shall be of service to us in future.

Yours faithfully,

For: East African Portland Cement Plc.

(signed)

MOSES SUDI

HEAD OF SUPPLY CHAIN”

119. We note from the said letter that the Respondents failed to notify the Applicant of the successful tenderer in the subject tender. Further, the Respondents failed to indicate sufficient reasons as to why the Applicant’s tender in the subject tender did not meet the technical proposal evaluation pass mark score.

120. On the issue of signing of the letter of notification, though not pleaded, but addressed by both the Applicant and Respondent at the submission stage of these proceedings, we note that the said letter of notification was not signed by the 1st Respondent but were signed by Mr. Moses Sudi, Head of Supply Chain with no proof of authorization



to do so and no letter of authorization presented before the Board as part of the confidential documents submitted pursuant to Section 67(3)(e) of the Act.

121. We are cognizant of the provisions of section 69 of the Act on procurement approvals and delegation of responsibility which reads:
- “(1) All approvals relating to any procedures in procurement shall be in writing and properly dated, documented and filed.**
 - (2) No procurement approval shall be made to operate retrospectively to any date earlier than the date on which it is made except on procurements in response to an urgent need.**
 - (3) In approving procurements relating to an urgent need, the accounting officer shall be furnished with adequate evidence to verify the emergency.**
 - (4) No procurement approval shall be made by a person exercising delegated authority as an accounting officer or head of the procurement function unless such delegation has been approved in writing by the accounting officer or the head of the procurement unit, respectively.**
 - (5) An accounting officer of a procuring entity shall maintain specimen signatures of all persons authorized to make approvals within the procurement process and these signatures shall be available to all staff and members where applicable.**

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(6) Responsibility for each approval made in the procurement procedure shall rest with the individual signatories and accounting officer, whether he or she delegated the authority or not."

122. In essence, no procurement approval shall be made by a person exercising delegated authority as an accounting officer unless such delegation has been approved in writing by the accounting officer of a procuring entity. Section 87 of the Act read with Regulation 82 of Regulations 2020 clearly stipulates that the accounting officer of a procuring entity issues notification letters in writing to successful and unsuccessful bidders.

123. As to whether an accounting officer can delegate his authority to issue notification letters, this Board in **PPARB Application No. 9 of 2020 Internet Solutions (K) Limited v. Kenya Airports Authority** stated as follows:

"As regards the question whether an accounting officer can delegate his authority to issue notification letters, section 37 of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya, provides that: -

Where by or under an Act, powers are conferred or duties are imposed upon a Minister or a public officer, the President, in the case of a Minister, or the Minister, in the case of a public officer, may direct that, if from any cause the office of that Minister or public officer is vacant, or if during any period, owing to

absence or inability to act from illness or any other cause, the Minister or public officer is unable to exercise the powers or perform the duties of his office, those powers shall be had and may be exercised and those duties shall be performed by a Minister designated by the President or by a person named by, or by the public officer holding an office designated by, the Minister; and thereupon the Minister, or the person or public officer, during that period, shall have and may exercise those powers and shall perform those duties, subject to such conditions, exceptions and qualifications as the President or the Minister may direct.

The above provision specifies that a public officer, such as the Accounting Officer herein, may delegate his authority because of inability to act in certain circumstances, However, in exercise of his functions as a public officer, the Accounting Officer is bound by principles of leadership and integrity under the Constitution and other legislation. Article 10 (2) (c) of the Constitution outlined national values and principles of governance that bid all State officers and public officers including "good governance, integrity, transparency and accountability". Article 232 (1) (e) of the Act puts it more strictly, that "the values and principles of public service include accountability for administrative acts.

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Section 5 of the Public Service (Values and Principles) Act No 1 A of 2015 requires public officers to maintain high standards of professional ethics in that: -

- (1) Every public officer shall maintain high standards of professional ethics
- (2) For the purposes of subsection (1), a public officer maintains high standards of professional ethics if that public officer
 - (a)
 - (b).....;
 - (c) is transparent when executing that officer's functions;
 - (d) can account for that officer's actions;
 - (e)
 - (f).....;
 - (g); and
 - (h) observes the rule of law.

From the above provisions, the Board notes that the Accounting Officer has the obligation to maintain high standards of professional ethics as he is held accountable for administrative acts, whether performed personally or through delegated authority.

The above provisions demonstrate that the Accounting Officer has power to delegate his authority, but he must still remain accountable for acts performed by persons to whom he has delegated authority to act on his behalf. In order to observe the national values and principles of governance, it

is more efficient for an accounting officer to specify the tender for which the delegated authority is given to avoid instances where such authority is exercised contrary to the manner in which he had specified. The person to whom the authority is delegated may use such delegated authority to undermine the Accounting Officer.

The Constitution and the aforementioned legislation gives responsibilities to all persons in the public service including the Procuring Entity's Accounting Officer to take necessary steps to ensure that his authority, when delegated, is specific, is given in writing and not open to misuse contrary to the manner he had specified.

It is the Board's finding that to achieve the underlying principles and national values of governance, the delegated authority by an accounting officer must be in writing and specific to a particular tender to avoid instances where such authority is exercised contrary to the manner in which he had specified, thus undermining the accounting officer."

124. From the above excerpt, it is clear that an accounting officer of a procuring entity may delegate his/her authority to nominate Tender Opening and Evaluation Committees or to issue letters of notification to successful and unsuccessful bidders alike due to his/her inability to act in certain circumstances. Nevertheless, as a public officer, an

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accounting officer is bound by principles of leadership and integrity under the Constitution and other relevant legislation cited hereinabove and therefore remains accountable for acts performed by persons to whom he has delegated authority to act on his behalf.

125. Moreover, in order to ensure that any delegated authority is not exercised in order to undermine an accounting officer, it is necessary for the delegated authority to be in writing and specific, in that the accounting officer should specify the tender for which the delegated authority is given and the exact acts to be undertaken, as such delegated authority may be prone to abuse and exercised contrary to the manner in which the accounting officer had specified.

126. In the circumstances, the Respondents failed to demonstrate that the 1st Respondent expressly delegated his authority in writing, to sign and issue notification letters to tenderers as provided under Section 87 of the Act to Mr. Moses Sudi, Head of Supply Chain. It is therefore our finding that Mr. Moses Sudi who signed the notification letters on behalf of the 1st Respondent acted without authority, since there is no evidence before the Board demonstrating that the 1st Respondent expressly delegated such authority to him.

127. As such, the letters of notification of the outcome of the subject tender dated 11th September 2023 issued to tenderers in the subject tender **did not** meet the threshold required in Section 126(4) and 87(3) of the Act read with Regulation 82(3) of Regulations 2020 and

are hereby null and void.

What orders should the Board grant in the circumstances?

128. We have established that the Board has jurisdiction to hear and determine the Request for Review having been properly filed before the Board.

129. We have found that the Evaluation Committee failed to evaluate the Applicant's tender submitted in response to the subject tender in accordance with the criteria set out at Clause 3 Evaluation of the Technical Proposal of Section III- Evaluation and Qualification Criteria of the Tender Document read with Section 80(2) of the Act and Article 227(1) of the Constitution.

130. We have found that the letters of notification of the outcome of the subject tender dated 11th September 2023 issued to tenderers in the subject tender did not meet the threshold required in Section 126(4) and 87(3) of the Act read with Regulation 82(3) of Regulations 2020 and are hereby null and void.

131. Consequently, the Board deems it fit to nullify the letter of notification of intention to award and letters of notification of regret dated 11th September 2023 to enable all tenderers be notified of the



outcome of their tenders in accordance with Section 126(4) and 87 of the Act read with Regulation 82 of Regulations 2020.

132. The upshot of our finding is that the Request for Review dated 25th September 2023 and filed on even date succeeds in terms of the following specific orders:

FINAL ORDERS

133. 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 25th September 2023 and filed on even date:

a) The Letter of Notification of Award issued to the Interested Party dated 11th September 2023 with respect to RFP No. EAPCPLC/RFP/009/2023 for Design, Supply, Installation and Commissioning of a Grid tied Solar PV Plant, be and is hereby nullified and set aside.

b) The Letters of Regret Notification dated 11th September 2023 issued to the Applicant and other unsuccessful tenderers with respect to RFP No. EAPCPLC/RFP/009/2023 for Design, Supply, Installation



and Commissioning of a Grid tied Solar PV Plant, be and are hereby nullified and set aside.

- c) The 1st respondent is ordered to direct the Procuring Entity's Evaluation Committee to admit the Applicant's tender, together with all other tenders that were determined responsive at the Preliminary Examination stage for re-evaluation at the Technical Proposal stage taking into consideration the Board's findings in this Request for Review.**
- d) Further to Order No. (c), the 1st Respondent is hereby ordered to proceed with the procurement process of RFP No. EAPCPLC/RFP/009/2023 for Design, Supply, Installation and Commissioning of a Grid tied Solar PV Plant to its logical conclusion within fourteen (14) days of this decision in accordance with the provisions of the Tender Document, the Act, Regulations 2020 and the Constitution.**
- e) Given that the procurement process/proceedings of the subject tender is not complete, each party shall bear its own costs in the Request for Review.**



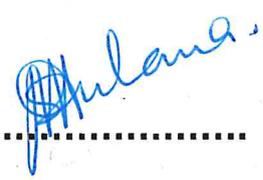
Dated at NAIROBI, this 16th Day of October 2023.



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PANEL CHAIRPERSON

PPARB



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SECRETARY

PPARB