

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 71/2023 OF 05TH OCTOBER 2023

BETWEEN

FREJED ENGINEERING SERVICES LIMITED APPLICANT

AND

THE DIRECTOR GENERAL,

KENYA MARITIME AUTHORITY1ST RESPONDENT

KENYA MARITIME AUTHORITY 2ND RESPONDENT

Review against the decision of the Accounting Officer, Kenya Maritime Authority in relation to Tender No. KMA/ONT/04/2023-2024 for Provision of Maintenance and Repair Services for KMA Towers Lifts.

BOARD MEMBERS PRESENT

- | | |
|-------------------------------|-------------------|
| 1. Mr. George Murugu | Panel Chairperson |
| 2. Mrs. Njeri Onyango FCI Arb | Member |
| 3. Eng. Lilian Ogombo | Member |
| 4. Dr. Paul Jilani | Member |
| 5. Mr. Daniel Langat | Member |

IN ATTENDANCE

Mr. Philemon Kiprop

- Acting Board Secretary



PRESENT BY INVITATION

APPLICANT

FREJED ENGINEERING SERVICES LIMITED

Ms. Rutto

Advocate, Rutto Jepchirchir Advocates

RESPONDENTS

ACCOUNTING OFFICER,

**KENYA MARITIME AUTHORITY & KENYA
MARITIME AUTHORITY**

1. Ms. Raya Salim

Ag. Corporation Secretary and Director Legal
Services, Kenya Maritime Authority

2. Ms. Kibet

Senior Legal Officer, Kenya Maritime Authority

BACKGROUND OF THE DECISION

The Tendering Process

1. Kenya Maritime Authority, the Procuring Entity and the 2nd Respondent herein, invited sealed tenders from qualified and interested tenderers in response to Tender No. KMA/ONT/04/2023-2024 for Provision of Maintenance and Repair Services for KMA Towers Lifts (hereinafter referred to as the "subject tender") for a period of two years subject to annual performance review. The invitation was by way of an advertisement in MyGov Newspaper on 22nd August 2023 and on the 2nd Respondent's website www.kpa.co.ke and on the Public Procurement Information Portal (PPIP) (www.tenders.go.ke) where the blank tender document for the subject tender issued to tenderers by the 2nd Respondent (hereinafter referred to as the 'Tender Document')





was available for download. The subject tender's submission deadline was scheduled for 5th September 2023 at 10.00 a.m.

Submission of Tenders and Tender Opening

2. According to the Minutes of the subject tender's opening held on 5th September 2023 signed by members of the Tender Opening Committee on 5th September 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 six (6) tenders were submitted in response to the subject tender. The said six (6) 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. | Euro Lifts EA Ltd |
| 2. | Frejed Engineering Services Ltd |
| 3. | Shindler Limited |
| 4. | Zeina Ventures East Africa Limited |
| 5. | Kone (Kenya) Limited |
| 6. | Elevator General Services Ltd |

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Evaluation of Tenders

3. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1st Respondent undertook evaluation of the six (6) tenders as captured in an Evaluation Report for the subject tender signed by members of the Evaluation Committee (hereinafter referred to as the "Evaluation Report") in the following stages:
- i Preliminary/Mandatory Evaluation;
 - ii Technical Evaluation; and
 - iii Financial Evaluation.

Preliminary Evaluation

4. At this stage of evaluation, the Evaluation Committee was required to carry out a Preliminary Evaluation and examine tenders for responsiveness using the criteria provided under Stage I: Mandatory Requirements of Section III- Evaluation and Qualification Criteria at page 25 to page 26 of the Tender Document. Tenderers were required to meet all the mandatory requirements at this stage to proceed to the Technical Evaluation stage.
5. At the end of evaluation at this stage, all the six (6) tenders, including the Applicant's tender were determined non-responsive and as such none proceeded to Technical Evaluation.

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Technical Evaluation

6. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria provided under Stage II: Technical Evaluation Criteria of Section III- Evaluation and Qualification Criteria at page 26 to page 27 of the Tender Document. Tenderers were required to score 70% and above at this stage to proceed to the Financial Evaluation stage.

7. No tender made it to this stage of evaluation.

Financial Evaluation

8. At this stage of evaluation, the Evaluation Committee was required to apply the criteria provided under Stage III: Financial Evaluation of Section III- Evaluation and Qualification Criteria at page 27 of the Tender Document. The tender with the lowest evaluated price would be considered for award.

9. No tender made it to this stage of evaluation.

Evaluation Committee's Recommendation

10. The Evaluation Committee recommended the procurement of the subject tender to be retendered.

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Professional Opinion

11. In a Professional Opinion dated 25th September 2023 (hereinafter referred to as the "Professional Opinion"), the Assistant Director, Supply Chain Management, Ms. Bevaline Lundu, 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 re-tendering of the subject tender.

12. Thereafter, the 1st Respondent herein, approved the Professional Opinion on 26th September 2023.

Notification to Tenderers

13. Tenderers were notified of the outcome of evaluation of the subject tender vide letters of Notification dated 27th September 2023 signed by the 1st Respondent.

REQUEST FOR REVIEW NO. 71 OF 2023

14. On 5th October 2023, the Applicant filed a Request for Review dated 5th October 2023 together with a Supporting Statement sworn on 5th October 2023 by Paul Weda, its Managing Director (hereinafter referred to as the 'instant Request for Review') through the firm of Rutto Jepchirchir Advocates seeking the following orders from the Board in verbatim:

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a) That a letter of award be granted to the Applicant arising from Tender Number KMA/ONT/04/2023-2024.

b) Cost of the review to the Respondents.

c) Any other remedy that the Review Board may deem fit to grant under the circumstances.

15. In a Notification of Appeal and a letter dated 5th October 2023, Mr. James Kilaka, the Acting Board Secretary of the Board notified the 1st and 2nd Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 5th October 2023.

16. On 11th October 2023, the Respondents filed through John Odira Omingo, the Ag. Director General and the 1st Respondents' herein a Memorandum of Response dated 9th October 2023 and an Affidavit in Support of the Memorandum of Response sworn on 9th October 2023

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by John Odira Oming'o together with confidential documents concerning the subject tender pursuant to section 67(3)(e) of the Act.

17. Vide letters dated 11th October 2023, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the subject Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within three (3) days from 11th October 2023.

18. Vide a Hearing Notice dated 18th October 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 19th October 2023 at 12.00 noon, through the link availed in the said Hearing Notice.

19. On 18th October 2023, the Applicant filed through its advocates Written Submissions dated 18th October 2023 and a List of Authorities dated 18th October 2023.

20. When the matter first came up for hearing on 19th October 2023, counsel for the Respondents, Ms. Raya Salim sought for an adjournment on the ground that she had just been served at mid-day with the Applicant's Written Submissions and List of Documents and as such, was not ready to proceed. The Board allowed the application for

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adjournment and granted the Respondents leave to file and serve its written submissions by 12.00 noon on 23rd October 2023 and commensurate leave granted to the Applicant to file a rejoinder limited to issues of law by 5.00 p.m. on 23rd October 2023. The Board further directed the Applicant to pay adjournment fees of Kshs. 10,000.00 by 5.00 p.m. 23rd October 2023 since the adjournment was caused by their late filing. The hearing of the instant Request for Review was stood over to 24th October 2023.

21. On 23rd October 2023, the Respondents filed Written Submissions dated 23rd October 2023 and a List of Authorities dated 23rd October 2023.

22. During the hearing on 24th October 2023, the Board confirmed compliance with its orders issued on 19th October 2023 and allocated parties time to highlight their respective cases. Thus, the instant Request for Review proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

Applicant's Submission

23. In her submissions, counsel for the Applicant, Ms. Rutto submitted that the Applicant's tender met all the mandatory requirements and that its tender was responsive.



24. It is the Applicant's case that it was notified of the reason for disqualification of its tender on the ground that it failed to submit a registered Power of Attorney in its tender. Ms. Rutto submitted that the issue of registration of the Power of Attorney was an error or oversight that could simply be corrected by providing a duly registered Power of Attorney to the Respondents.

25. Counsel pointed out that this was not the first time the Applicant was dealing with the Respondents as it had applied and won two previous tenders where it was specific that the Power of Attorney should be signed or registered.

26. Ms. Rutto submitted that in the instant matter, there was no specific requirement for a registered Power of Attorney and as such the Applicant is not at fault for failing to submit a registered Power of Attorney since the Respondents have in the past been very specific in their tender requirements and if the same had been provided for, the Applicant would have submitted a registered Power of Attorney.

27. In support of her arguments, Ms. Rutto referred the Board to the holding in the case of *David Bundi v Timothy Mwenda Muthee [2022] eKLR*.

28. Counsel pressed on that since the Respondents had indicated that they were in urgent need to have the lift repaired, retendering could be

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avoided if the Applicant was asked to provide a registered Power of Attorney.

Respondents' Submissions

29. In her submissions, counsel present for the Respondents, Ms. Kibet, submitted that the requirement to have a document registered cannot be said to be a mere technicality and that the issue of registration could not be corrected as alleged by the Applicant since it was a requirement under the Tender Document for the Power of Attorney to be registered to give it effect.

30. Ms. Kibet pointed out that it was a statutory requirement for the Power of Attorney to be registered and the same not having been registered rendered it inadmissible in the subject tender.

31. Counsel submitted that non-registration of the Applicant's Power of Attorney cannot be corrected as that would amount to giving preferential treatment if a tenderer was allowed to correct its tender document after the submission date had closed.

32. Counsel concluded by submitting that the Respondents urgently needed to conclude the matter since they need service providers for the lift.

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[Handwritten signature]

33. Upon enquiry by the Board on whether the Act requires evaluation to be done in accordance with the Act, Counsel submitted in the affirmative. When asked to elaborate whether the Tender Document had a requirement for the Power of Attorney to be registered and the mischief intended to be covered, Ms. Kibet submitted that there has been instances where tenderers have undertaken activities in the name of the company without authorization and this would be cured by ensuring tenderers had authority to act by submitting a registered Power of Attorney. She pointed out that while the Applicant had failed to submit a registered Power of Attorney, there were bidders who had submitted a registered Power of Attorney.

34. Upon further enquiry by the Board on whether Mandatory Requirement 11 expressly required tenderers to submit a registered Power of Attorney, Ms. Kibet conceded that there was no express provision but Section 4 of the Registration of Documents Act required registration of the Power of Attorney and this was not limited to only immovable property but was applicable in the subject tender.

Applicant's Rejoinder

35. Counsel for the Applicant, Ms. Rutto, indicated that she had no rejoinder.

36. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 5th October 2023 was due to expire on 26th October 2023 and that the Board would

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communicate its decision on or before 26th October 2023 to all parties to the Request for Review via email.

BOARD'S DECISION

37. The Board has considered each of the parties' cases, documents, pleadings, oral and written submissions, list and bundle of authorities together with confidential documents submitted to the Board by the Respondents pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination.

A. Whether the Applicant's tender satisfied Mandatory Requirement No. 11 of Stage I: Mandatory Requirements of Section III- Evaluation and Qualification Criteria of the Tender Document.

B. What orders should the Board grant in the circumstances?

Whether the Applicant's tender satisfied Mandatory Requirement No. 11 of Stage I: Mandatory Requirements of Section III- Evaluation and Qualification Criteria of the Tender Document.

38. At paragraph 2 of the instant Request for Review, the Applicant contends that the Respondent erred in law by rejecting its tender on the grounds that its Power of Attorney was not registered. The

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Applicant submitted that non-registration of the Applicant's Power of Attorney was a minor deviation that does not depart from the requirements of the Tender Document and could be corrected by submitting a registered Power of Attorney.

39. On the other hand, it is the Respondents case that the Applicant failed to comply with Mandatory Requirement No. 11 set out in the Tender Document since it failed to submit a registered Power of Attorney. During the hearing, counsel for the Respondent, Ms. Kibet submitted that registration of a Power of Attorney was a statutory requirement and that evaluation of tenders in the subject tender was done in accordance with the provisions of the Tender Document, the Act and the Constitution.

40. The Board notes that the objective of public procurement is to provide quality goods and services in a system that implements the principles specified in 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 –

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- a)
- b)
- c) **and**
- d) ”
- e)

41. Justice Mativo (as he then was) in **Nairobi High Court Misc. Application No. 60 of 2020; Republic v The Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020] eKLR** (hereinafter referred to as “Misc. Application No. 60 of 2020”) spoke to the principles under Article 227 of the Constitution as follows:

“45. Article 227 of the Constitution provides that when procuring entities contract for goods or services they must comply with the principles of fairness, equity, transparency, competitiveness and cost-effectiveness. For there to be fairness in the public procurement process, all bids should be considered on the basis of their compliance with the terms of the solicitation documents, and a bid should not be rejected for reasons other than those specifically stipulated in the solicitation document.

46. However, there is a need to appreciate the difference between formal shortcomings, which go to the heart of the process, and the elevation of matters of subsidiary

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importance to a level, which determines the fate of the tender. The Evaluation Committee has a duty to act fairly. However, fairness must be decided on the circumstances of each case...

42. 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.

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(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)

43. 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.

44. Section 70 of the Act requires a procuring entity to use a standard tender document which contains sufficient information to allow for fair competition among tenderers. Section 70(3) reads as follows:

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"(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."

45. 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."

46. Responsiveness serves as an important first hurdle for tenderers to overcome. From the above provision, a tender only qualifies as a

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responsive tender if it meets all eligibility and mandatory requirements set out in the tender documents.

47. 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

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work and to the same terms and conditions.” [Emphasis ours].

48. 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;**

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- (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]"***

49. The import of the aforementioned cases and provisions 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.

50. The Board has carefully studied the Tender Document submitted by the 1st Respondent as part of the confidential documents pursuant to Section 67(3)(e) of the Act and notes that Mandatory Requirement No. 11 of Stage I: Mandatory Requirements of Section III- Evaluation and Qualification Criteria at page 26 of the Tender Document provided as follows:

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STAGE I: MANDATORY REQUIREMENTS

| No. | MANDATORY REQUIREMENT | YES/NO |
|--------------|---|---------------|
| | | |
| MR 11 | <i>Power of attorney/ Authorization Letter duly signed (should be signed by directors appearing in CR 12/13), giving the name of person who has been authorized to submit/ execute this agreement as a binding document and this person should sign all the documents related to this tender.</i> | |
| | | |

51. From the above Mandatory Requirement No. 11, a tenderer was required to submit either a Power of Attorney or Authorization Letter duly signed by the directors appearing in the CR 12/13, indicating the name of the person authorized to submit/execute the said agreement as a binding agreement and the said person was required to sign all the documents related to the subject tender.

52. It is not in contest that the Applicant submitted a Power of Attorney. What is in contest is whether it was mandatory for the said Power of

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Attorney to be registered in view of provisions of the Registration of Documents Act.

53. The Board notes that there is no statute in Kenya governing powers of attorney. There is however the Registration of Documents Act, Cap 285 of the Laws of Kenya which provides for *inter alia* mandatory registration of certain documents.

54. Section 4 of the Registration of Documents Act provides as follows:

"(1) All documents conferring, or purporting to confer, declare, limit or extinguish any right, title or interest, whether vested or contingent to, in or over immovable property (other than such documents as may be of a testamentary nature) and vakallas shall be registered as hereinafter prescribed:

Provided that the registration of the documents following shall not be compulsory—

(i) any composition deed;

(ii) any document relating to shares in a joint stock company, notwithstanding that the assets of such company consist in whole or in part of immovable property;

(iii) any debenture issued by such a company, and not creating, declaring, assigning, limiting or extinguishing any right, title or interest to, in or over any immovable property, except in so far as it entitles the holder to the security

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afforded by a registered instrument, whereby the company has mortgaged, conveyed or otherwise transferred the whole or part of its immovable property, or any interest therein, to trustees upon trust for the benefit of the holders of such debentures;

(iv) any endorsement upon or transfer of any debenture issued by any such company;

(v) any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest to, in or over any immovable property but merely creating a right to obtain another document, which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest;

(vi) any lease or license of land for any term not exceeding one year; or

(vii) any document registrable under the provisions of the Government Lands Act (Cap. 280), the Registration of Titles Act (Cap. 281), the Land Titles Act (Cap. 282) or the Registered Land Act (Cap. 300):

Provided that, if any such document relates to land registrable under any such Act and also to land not so registrable, such document shall also be registered under this Act.

(2) A person may register a document referred to in subsection (1) by filing it in physical or electronic form."

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55. Further, Section 5 of the Registration of Documents Act provides:

5. Any other document may be registered, at the option of the person holding the same:

Provided that a registrar may refuse to register any such document, for reasons to be stated by him in writing."

56. The import of the above provisions is that all documents which confer or purport to confer, declare, limit or extinguish any right, title or interest whether vested or contingent to, in or over immovable property other than documents which may be of a testamentary nature shall be registered as prescribed in the Registration of Documents Act. However, such registration is not compulsory for documents such as, *inter alia*, a composition deed; an endorsement upon or transfer of a debenture issued by a company and; a document which by itself does not create, declare, assign, limit or extinguish any right, title or interest to, in or over any immovable property but merely creates a right to obtain another document which when executed, creates, declares, assigns, limits or extinguishes any such right. Simply put, when dealing with immovable property, any document that may confer, declare or extinguish any right, title or interest in the immovable property other than a document of testamentary nature must be registered as prescribed in the Registration of Documents Act. Any other document which does not relate to immovable property may be registered at the option of its holder.

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57. The Board is guided by the holding in **Civil Appeal 72 of 2015 South Nyanza Sugar Co. Ltd v Shadrack Manga (2020) eKLR** where Justice A.C. Mrima (hereinafter referred to as "the Shadrack Manga case") held as follows:

"19. To be able to determine whether the power of attorney in this matter fell within the category of the documents which must be registered, a look at the power of attorney itself is inevitable. The same was tailored as follows: -

REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATES'S COURT AT MIGORI

CIVIL SUIT NO. 242 OF 2015

HON. SHADRACK MANGA.....PLAINTIFF

VERSUS

SOUTH NYANZA SUGAR CO. LTD.....DEFENDANT

GENERAL POWER OF ATTORNEY

ORDER 9 RULE 2 CIVIL PROCEDURE RULES 2010

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I, SHADRACK ROGER MANGA holder of ID No. 1868617 and of P. O. Box 20190 Nairobi, HEREBY APOINT CHRISPUS WEIRIA GIBAGIRI ID/NO 8807554 to be my Agent/Attorney and generally in relation to my interest in the above mentioned suit, to do anything and everything that I myself could do, and for me and in my name to execute all such instruments and to do all such acts, matters and things as may be necessary or expedient for carrying out the powers given within the Republic of Kenya do hereby swear affidavit and state as follows;

Signed by the Donor

In the presence of

20. The power of attorney related to the suit. It was a revocable general power of attorney. The documents referred to in Section 4 of the RDA relates to interests in immovable properties.

21. Section 2 of the RDA defined 'immovable property' to include land, buildings, hereditary allowances, rights of way, lights, ferries, fisheries and any other benefit to arise out of land, and things attached to the earth or

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permanently fastened to anything which is attached to the earth, but not standing timber (except coconut trees), growing crops or grass.'

22. The suit therefore did not deal with an immovable property. It simply related to a breach of contract. I hence find and hold that the power of attorney in this suit did not require registration.

58. Having in mind the above holding in the Shadrack Manga case, we have perused the Applicant's Power of Attorney submitted in the subject tender which reads:

POWER OF ATTORNEY

FREJED ENGINEERING SERVICES LIMITED of Post Office Box 60617-00200, Nairobi. IN the Republic of Kenya and having our registered offices at Ramco Court along Mombasa Road.

Do hereby nominate and appoint Ms. Dorice Achieng Agullo of Post Office 60617-00200, Nairobi, whose signature appears below to be the true and lawful agent of the company in respect to: -

TENDER FOR PROVISION OF MAINTENANCE SERVICE AND REPAIR SERVICES FOR KMA TOWERS LIFTS. TENDER NO: KMA/ONT/04/2023-2024

To sign all partnership documents, contracts and any other legal documents in connection therewith and thereby legally

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bind the company and further to attend personally or by proxy at any meeting concerning the aforesaid tenders and bids;

To manage and transact all affairs of the company to the fullest extent permitted by law in relation to the aforesaid tenders and bids for the full period of their validity.

In witness whereof we have here unto set our hands this25th ... Day of AUGUST... 2023

FREJED ENGINEERING SERVICES LIMITED

SEALED with the Common Seal of the Company

In presence of

DIRECTOR

(signed)

(Applicant's official stamp and

signed)

KENNEDY SHIUNDU

NOMINEE(Advocates certification stamp) COMMISSIONER FOR OATHS

(Signed)

OMENTA AGNES MANYA

DORICE ACHIENG AGULLO ADVOCATE AND COMMISSIONER FOR OATHS

P.O.BOX 56219-00200 NAIROBI

PROCUREMENT MANAGER"

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59. From the contents of the Applicant's Power of Attorney above, it is clear to the Board that the same did not relate to immovable property and instead relates to "*Tender For Provision of Maintenance Service and Repair Services for KMA Towers Lifts Tender No: KMA/ONT/04/2023-2024*" being the subject tender herein and as such registration is not required.

60. Considering the above findings and in view of the provisions of Mandatory Requirement No. 11, we are left with the inevitable conclusion that it was not a requirement for a Power of Attorney submitted by a tenderer in the subject tender to be registered. As such, the Respondents acted contrary to Mandatory Requirement No. 11 by disqualifying the Applicant's tender due to failure to submit a registered Power of Attorney. If it was the intention of the Procuring Entity to have tenderers submit a registered Power of Attorney in the subject tender, then they were at liberty to provide as much in the mandatory requirements of the Tender Document.

61. In the circumstances, we find that the Applicant's tender in response to the subject tender **was not** evaluated in accordance with Section 80(2) of the Act read with Article 227(1) of the Constitution with respect to Mandatory Requirement No. 11 of Stage I: Mandatory Requirements of Section III- Evaluation and Qualification Criteria at page 26 of the Tender Document.

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What orders should the Board grant in the circumstances?

62. We have found that the Applicant's tender was not evaluated in accordance with provisions of Section 80(2) of the Act read with Article 227(1) of the Constitution and the Tender Document.

63. In determining the appropriate orders to grant in the circumstances, the Board is cognizant of section 173 (b) of the Act, which states that:

"Upon completing a review, the Review Board may do any one or more of the following-

(a).....

...;

(b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings

....."

64. We therefore find it just and fair to nullify the letters of Notification dated 27th September 2023 issued to all unsuccessful tenderers.

65. Effectively, any tender that was determined non-responsive at the Preliminary Evaluation stage on account of having not complied with Mandatory Requirement No. 11 of Stage I: Mandatory Requirements of Section III- Evaluation and Qualification Criteria at page 26 of the Tender Document for not having been registered under the

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Registration of Documents Act, should be admitted to the Technical Evaluation stage.

66. For avoidance of doubt, a tender that failed to meet any of the other mandatory requirements at Stage I: Mandatory Requirements of Section III- Evaluation and Qualification Criteria at pages 25 to 26 of the Tender Document should not be admitted for evaluation at the Technical Evaluation stage.

67. The upshot of our findings is that the instant Request for Review succeeds with respect to the following specific orders:

FINAL ORDERS

68. 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 5th October 2023 and filed on even date:

A. The Letters of Notification dated 27th September 2023 issued by the 1st Respondent with respect to Tender No. KMA/ONT/04/2023-2024 for Provision of Maintenance and Repair Services for KMA Towers Lifts, addressed to all the unsuccessful tenderers including the Applicant, be and are hereby nullified and set aside.

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B. The 1st Respondent is hereby ordered to direct the 2nd Respondent's Evaluation Committee to admit the Applicant's tender, together with all other tenders that were disqualified at the Preliminary Evaluation stage on account of failure to comply with Mandatory Requirement No. 11 of Stage I: Mandatory Requirements of Section III- Evaluation and Qualification Criteria at page 26 of the Tender Document for reason of failure of registration of the Power of Attorney under the Registration of Documents Act, to the Technical Evaluation stage and proceed with evaluation at the Technical Evaluation stage taking into consideration the Board's findings in this Request for Review.

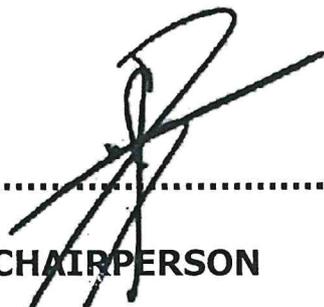
C. Further to Order No. B above, the Respondents are hereby directed to proceed with the procurement process of the subject tender to its logical conclusion within fourteen (14) days of this decision in accordance with the provisions of the Tender Document, the Act, Regulations 2020 and the Constitution.

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D. Given that the procurement process for the subject tender is not complete each party shall bear its own costs in the Request for Review.

Dated at NAIROBI this 26th Day of October 2023.


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CHAIRPERSON
PPARB


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SECRETARY
PPARB

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