

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 87/2023 OF 31ST OCTOBER 2023

BETWEEN

CYLINDER WORKS LIMITED.....APPLICANT

AND

THE ACCOUNTING OFFICER,

NATIONAL OIL CORPORATION.....1ST RESPONDENT

NATIONAL OIL CORPORATION.....2ND RESPONDENT

AND

Review against the decision of the Accounting Officer, National Oil Corporation of Kenya in relation to Tender No. NOCK/PRC/03(1700) 2023-2024 for Validation, Repair and Repainting of LPG Cylinders.

BOARD MEMBERS PRESENT

- | | |
|----------------------------------|-------------|
| 1. Mr. George Murugu, FCI Arb. - | Chairperson |
| 2. Eng. Lilian Ogombo - | Member |
| 3. Mr. Daniel Langat - | Member |

IN ATTENDANCE

- | | |
|----------------------|-------------|
| Ms. Sarah Ayoo - | Secretariat |
| Mr. Anthony Simiyu - | Secretariat |

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PRESENT BY INVITATION

APPLICANT

CYLINDER WORKS LIMITED

Mr. Makhandia Wabuti

-Advocate, Anya Kalwa & Co. Advocates

Mr. Aketch

-Advocate, Anya Kalwa & Co. Advocates

RESPONDENTS

THE ACCOUNTING OFFICER, NATIONAL OIL CORPORATION OF KENYA

NATIONAL OIL CORPORATION OF KENYA

Ms. Irene Lukoba

-Legal Department, National Oil Corporation of Kenya

Mr. Erastus Kanyiri

-Procurement Department, National Oil Corporation of Kenya

Mr. Alex Musungu

-Procurement Department, National Oil Corporation of Kenya

BACKGROUND OF THE DECISION

The Tendering Process

1. National Oil Corporation of Kenya, the Procuring Entity together with the 1st Respondent herein, invited an electronic submission of tenders in response to Tender No. NOCK/PRC/03(1700) 2023-2024 for Validation, Repair and Repainting of LPG Cylinders using an open competitive tender method. The subject tender's submission deadline was Tuesday, 26th September 2023 at 10:00 a.m.

Submission of Tenders and Tender Opening

2. According to the signed Tender Opening Minutes for 26th September 2023 under the Confidential File submitted by the Procuring Entity, the

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following 4 tenderers were recorded as having submitted their respective tenders in response to the subject tender by the tender submission deadline:

| No. | Name of Tenderer |
|------------|---|
| 1. | Ferrotech Industries Limited |
| 2. | Cylinder works Limited |
| 3. | Sotimaluei Enterprises Contractors |
| 4. | Bhachu Industries Limited |

Evaluation of Tenders

3. The 1st Respondent constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") to undertake an evaluation of the 4 tenders in the following 3 stages as captured in the Evaluation Report
- i. Preliminary Stage
 - ii. Technical Stage
 - iii. Financial Stage

Preliminary Evaluation

4. At this stage of the evaluation, the Evaluation Committee was required to examine the tenders using the criteria set out as Clause 2. Preliminary examination for Determination of Responsiveness under Section III – EVALUATION AND QUALIFICATION CRITERIA at pages 26 to 27 of 101 of the Tender Document.

5. The evaluation was to be on a Yes/No basis and tenderers who failed to meet any criteria at the Preliminary Evaluation Stage would be disqualified from further evaluation at the Technical Evaluation Stage.
6. At the end of the evaluation at this stage, 2 tenders including that of the Applicant were found unresponsive with the other 2 tenders qualifying for further evaluation at the Technical Evaluation Stage.

Technical Evaluation

7. At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the Criteria set out as Technical Evaluation under Section III – QUALIFICATION CRITERIA AND REQUIREMENTS at pages 27 of 101 of the Tender Document.
8. In order to qualify for further evaluation at the Financial Evaluation Stage, tenderers were required to garner at least 50 out of the possible 80 marks under the criteria outlined at this stage of evaluation.
9. At the end of the evaluation at this stage, both tenders evaluated at this stage surpassed the 50 marks at the Technical Stage and thus qualified for further evaluation at the Financial Evaluation Stage.

Financial Evaluation

10. At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the Criteria set out as Tender evaluation (ITT 34) Price Evaluation under Section III– QUALIFICATION CRITERIA AND REQUIREMENTS at pages 27 to 28 of 101 of the Tender Document.

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11. At the end of the evaluation at this stage, the Evaluation Committee found that tenders by Ferrotech Industries Limited and Bhachu Industries Limited were above the Procuring Entity's budget estimate. Accordingly, the Evaluation Committee recommended that both tenderers be engaged for competitive negotiations on the prices submitted and subsequently be subjected to a due diligence exercise before an award could be made in the subject tender.

Due Diligence

12. On 2nd October 2023, the Evaluation Committee conducted due diligence on Ferrotech Industries Limited by visiting the tenderer's factory and offices as well as verifying the tenderer's statutory documents. The Evaluation Committee established that this tenderer had the capacity to deliver on the subject tender.
13. For Bhachu Industries Limited, the Evaluation Committee reviewed the tenderer's previous contractual performance with the Procuring Entity and found the tenderer's past performance as satisfactory. The Evaluation Committee was therefore satisfied that this tenderer had the capacity to deliver on the subject tender.

Competitive Negotiation

14. According to a signed Competitive Negotiation Report dated 9th October 2023, Ferrotech Industries Limited and Bhachu Industries Limited were invited for a competitive negotiation meeting on 5th October 2023. Both tenderers were represented.

15. The Evaluation Committee disclosed its estimated budget to the two tenderers and invited them to individually revise their tender prices by submitting their best and final offer within 7 days.
16. The tenderers submitted their best offers which were subsequently evaluated by the Evaluation Committee.

Evaluation Committee's Recommendation

17. Subsequently, the Evaluation Committee recommended the award of the subject tender to both Ferrotech Industries Limited and Bhachu Industries Limited under a Framework contract for a period of 3 years.

Professional Opinion

18. In a Professional Opinion dated 13th October 2023 (hereinafter referred to as the "Professional Opinion"), the Procuring Entity's Manager, Procurement, Mr. Alex Musungu, reviewed the manner in which the subject procurement process was undertaken including the evaluation of tenders and recommended the award of the subject tender to Ferrotech Industries Limited and Bhachu Industries Limited as proposed by the Evaluation Committee. The 1st Respondent concurred with the Professional Opinion.

Notification to Tenderers

19. Tenderers were notified of the outcome of the evaluation of the subject tender vide letters dated 13th October 2023.

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REQUEST FOR REVIEW

20. On 31st October 2023, the Applicant filed a Request for Review dated 24th October 2023 supported by a Supporting Affidavit sworn on 31st October 2023 by Anthony Keru, a Manager at the Applicant, seeking the following orders from the Board in verbatim:

- 1. The contract dated 26th September 2023 with respect to Tender Number NOCK/PRC/03 (1700) 2022-2023 for Provision of Revalidation, Repair and Repainting of LPG Cylinders between the procuring entity and the Applicant be and is hereby cancelled and set aside;***
- 2. The Procuring Entity's letter of award in Tender Number: NOCK/PRC/03 2022-2023 for provision of Revalidation, Repair and Repainting of LPG Cylinders dated 13th October 2023 addressed to Bhachu Industries Limited and Ferrotech Industries Limited be and is hereby cancelled and set aside;***
- 3. The letters of notification in Tender Number: NOCK/PRC/03 (1700) 2022-2023 for provision of Revalidation, Repair and Repainting of LPG Cylinders dated 13th October 2023 addressed to the applicant and all other unsuccessful tenderers be and are hereby cancelled and set aside;***
- 4. The Accounting Officer of the Procuring entity is hereby ordered to direct the evaluation Committee to reinstate the Applicant's tender at the Financial Evaluation Stage together with all other tenders that made it at the Financial Evaluation Stage;***

- 5. Further to order 4 above, the Accounting Officer is hereby directed to proceed with the procurement process of Tender Number: NOCK/PRC/03 (1700) 2022- 2023 for the Provision of Revalidation, Repair and Repainting of LPG Cylinders to its logical conclusion including the making of an award to the lowest evaluated tenderer taking into consideration our findings in this Request for Review within 14 days from the date hereof;***
- 6. Given the procurement process is not complete, each party shall bear its own costs in the request for review.***

21. In a Notification of Appeal and a letter dated 31st October 2023, Mr. James Kilaka, the Acting Board Secretary of the Board notified the Respondent of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondent a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondent was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 31st October 2023.
22. In response to the Request for Review, on 6th November 2023, the Respondents filed a Memorandum of Response dated 3rd November 2023, a Witness Statement signed on 3rd November 2023 by Laban Serem; Notice of Preliminary Objection dated 3rd November 2023 and Grounds of Opposition dated 3rd November 2023. The Respondents also submitted

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the confidential documents in the subject tender pursuant to Section 67(3)(e) of the Act.

23. Vide letters dated 7th November 2023, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the subject Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within 3 days from 7th November 2023. None of the tenderers filed any response to Board's Secretary's invitation.
24. On 10th November 2023, the Applicant filed a Further Affidavit sworn on 10th November 2023 by Anthony Keru.
25. On 13th November 2023, the Acting Board Secretary, sent out to the parties a Hearing Notice notifying parties and all tenderers in the subject tender that the hearing of the instant Request for Review would be by online hearing on 15th November 2023 at 11:00 a.m. through the link availed in the said Hearing Notice.
26. During the online hearing on 15th November 2023 at 11:00 a.m., parties were represented by their respective Advocates. The Board noted that since the Respondents had filed a Notice of Preliminary Objection, this would be heard as part of the substantive Request for Review. This was in line with Regulation 209(4) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020') which grants the Board the discretion to hear preliminary objections as part of the substantive Request for Review and render one decision.

27. The Board read out to the parties the documents that had been filed in the Request for Review and sought for parties' confirmation that those were the documents that had been filed and served upon them. Parties confirmed having filed and been served with the said documents.
28. The Board also gave directions on the order of address of the Board as follows:
- i. First, the Respondents would submit on their Notice of Preliminary Objection in 3 minutes
 - ii. The Applicant would submit on their Request for Review as well as in response to the Notice of Preliminary Objection in 13 minutes.
 - iii. Thereafter, the Respondents would offer their rejoinder to the Preliminary Objection and offer a response to the request for Review in 11 minutes.
 - iv. Lastly, the Applicant would then have 1 minute to offer a rejoinder on the Request for Review.

PARTIES SUBMISSIONS

Respondents' Submissions on their Notice of Preliminary Objection

29. Counsel for the Respondents, Ms. Lukoba submitted that the Request for Review as filed was contrary to Section 167(2) of the Act, Regulation 203(3) of the Regulations 2020 as read with Regulations 204(2) of the Regulations 2020.
30. Counsel also submitted that the Request for Review sought orders which override Section 74(1)(i) of the Act and Regulation 74(1)(b) of the Regulations 2020.

Applicant's Submissions on the Notice of Preliminary Objection and the Request for Review

31. Counsel for the Applicant, Mr. Makhandia submitted that Section 74(1) of the Act provides for pagination of tenders and that the Applicant's tender was paginated.
32. He further submitted that though the Respondents alleged themselves as strangers to Tender No. NOCK-PRC/03-(1700) 2022-2023 the Letters of Regret dated 31st July 2023 and 13th September 2023 by the Respondents refer to the said tender. Counsel contended that if the Respondents disputed the said letters then a case had been made for their being found null and void as prayed in the Request for Review.
33. It was contended that Bhachu Industries Limited submitted a tender price that was above market prices. He therefore questioned how the said tenderer was permitted to change their tender price before being awarded the subject tender.
34. Further, the Applicant was found unsuccessful because they did not provide a manufacturer's authorization but according to the notification of 13th October 2023, the Applicant was disqualified on account of pagination. According to Mr. Makhandia this was discrimination and in breach of Section 3 and 157 of the Act.

Respondents' Rejoinder on their Preliminary Objection and Response to the Request for Review

35. Counsel for the Respondents, Ms. Lukoba submitted that the Applicant made reference to 2 procurement processes i.e. Tender No.

NOCK/PRC/03 (1693) 2023-2024 and Tender No. NOCK/PRC/03 (1700) 2023-2024. According to Counsel, the former tender was terminated as all the received tenders quoted above market prices and this gave way to the subject tender.

36. She submitted that the subject required tenderers to paginate their tenders but the Applicant submitted a tender that was not sequentially paginated and for this reason was disqualified at the Preliminary Evaluation Stage.
37. Counsel submitted that though the Procuring Entity had issued a Notification of Intention to Award, the award was yet to happen as the Procuring Entity was waiting for the lapse of the 14-day statutory standstill period. Ms. Lukoba therefore submitted that it was premature to set aside the procurement process as the award was yet to be issued.

Applicant's Rejoinder on the Request for Review

38. Counsel for the Applicant, Mr. Lukoba submitted that Section 79(2) of the Act provides that a responsive tender shall not be affected by a minor deviation. Further, Article 159 of the Constitution requires that tenders not to be disqualified on account of technicalities.

Respondents' Rejoinder on the Applicant's Submission

39. Usually, the Respondents would not be afforded an opportunity to offer a rejoinder but owing to the Applicant's introduction of Section 79(2) of the Act and Article 159 of the Constitution, which were not part of his earlier address, the Board granted the Respondents leave to offer a response on these.

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40. Ms. Lukoba submitted that pagination was not a minor deviation under Section 79(2) of the Act as it safeguards against the modification of a submitted tender. She also argued that the question of pagination was not a mere technicality that one could seek refuge under Article 159 of the Constitution.

CLARIFICATIONS

41. The Board sought the Applicant to clarify whether it was aware that pagination was a mandatory requirement under the Tender Document to which Mr. Makhandia responded in the affirmative. Counsel was also emphatic that the Applicant paginated its tender.

42. Ms. Lukoba took a different view on the Applicant's pagination of its tender. According to Counsel, the Applicant did not paginate its tender in a chronological manner as per the requirement under the Tender Document.

43. Mr. Makhandia told the Board that the Applicant at page 28 of its tender attached documents that were serialized 28(1), 28(2) and 28(2) so as not to disturb the earlier sequence.

44. Mr. Akech, Counsel appearing for the Applicant as well, told the Board that the issue of pagination was an afterthought as it was not raised in the initial letter of regret.

45. The Board sought clarity from the Applicant on whether the instant Request for Review was challenging Tender No. 1693 or 1700. Mr. Makhandia indicated that the Request for Review was challenging tender No. 1700 and that Tender No. 1693 was only mentioned to demonstrate

how the Procuring Entity was guiding Bhachu Industries Limited on how to prepare its tender.

46. The Board inquired whether the Applicant ever sought a clarification from the Procuring Entity on the issue of pagination of tenders. Mr. Makhandia told the Board that he was not certain about this but his colleague Mr. Aketch told the Board that the Applicant sought clarification on the same after receiving the letter of regret.
47. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 31st October 2023 had to be determined by 21st November 2023. Therefore, the Board would communicate its decision on or before 21st November 2023 to all parties via email.

BOARD'S DECISION

48. The Board has considered all documents and pleadings together with confidential documents submitted to it pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination:

I. Whether the instant Request for Review as filed before the Board is competent?

In determining this issue, the Board will determine:

- i. Whether the Applicant complied with the requirements of Section 167(2) of the Act as read with Regulations 203(3) and 204(2) of the Regulations 2020?
- ii. Whether the instant Request for Review seeks orders that override Regulation 74(1)(i) and (b)?

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Depending on the finding on the first issue:

II. Whether the Procuring Entity's Evaluation Committee properly evaluated the tenders submitted in response to the subject tender in compliance with the provisions of Section 80 of the Act and the Tender Document?

III. What orders should the Board issue in the circumstance?

Whether the instant Request for Review as filed before the Board is competent?

49. The Respondents filed before the Board a Notice of Preliminary Objection dated 3rd November 2023 challenging the competency of the instant Request for Review.
50. The Board shall now separately interrogate the Grounds appearing in the Respondents' Notice of Preliminary Objection as urged by the Respondents' Counsel.

Whether the Applicant complied with the requirements of Section 167(2) of the Act as read with Regulations 203(3) and 204(2) of the Regulations 2020?

51. The Respondents assailed the competency of the instant Request for Review imputing non-compliance with Section 167(2) of the Act read with Regulations 203(3) and 204(2) of the Regulations 2020 on the part of the Applicant. This was presented under Grounds 1 and 2 of the Respondents' Notice of Preliminary Objection.

52. On its part, the Applicant did not make any specific response to these grounds of the Respondents' Notice of Preliminary Objection.

53. Notwithstanding the foregoing, the Board shall interrogate the merit of the said Grounds.

54. Section 167(2) the Act provides as follows:

(2) A request for review shall be accompanied by such refundable deposit as may be prescribed in the regulations, and such deposit shall not be less than ten per cent of the cost of the contract:

Provided that this shall not apply to tenders reserved for women, youth, persons with disabilities and other disadvantaged groups.

55. Section 167(2) of the Act above, contemplates that an Applicant filing a Requests for Review should also pay to the Board a refundable deposit as may be prescribed in the Regulations but in any case, the said deposit shall not be less than 10% of the cost of the contract. The only exception for the payment of this deposit is in respect of tenders involving special category groups such as women, youth, persons with disabilities and other disadvantaged groups.

56. On the other hand, Regulations 203(3) and 204(2) provides as follows:

203(1)...

(3) Every request for review shall be filed with the Review Board Secretary upon payment of the requisite fees and refundable deposits.

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204. Deposits

(1) Pursuant to section 167(2) of the Act, the filing of a request for review shall be accompanied by a refundable deposit valued at fifteen percent (15%) of the applicant's tender sum which shall be paid into a deposit account.

(2) Despite paragraph (1), where the tender sum is not determinable at the time of filing of the request for review the amount of deposit shall be two hundred thousand shillings.

57. Regulation 203(3) above restates the requirement of an Applicant filing a Request for Review to pay the refundable deposit in addition to the requisite fees. Regulation 204 sets the refundable deposit sum at 15% of the Applicant's tender and that where the tender sum is unascertainable, the deposit shall be Kshs. 200,000.00.
58. Turning to the present Request for Review, the Board notes that the Applicant paid Kshs. 45,000.00 in filing fees and there is a receipt of the said payment in the Board's file. The Board is therefore satisfied that the Applicant paid the requisite fees adverted to under Regulation 203(1).
59. The Board is also conscious of the fact that Regulation 203(1) of the Regulations 2020 also refers to the refundable deposit that is also provided for under Regulation 204 and Section 167(2).
60. The High Court in ***Petition No. E226 of 2020; Road and Civil Engineering Contractors Association & Anor v The AG & Ors*** issued conservatory orders against the application of Section 167(2) of the Act and Regulation 204 of the Regulations 2020 on issuance of the refundable

deposit in respect of Requests for Review filed before the Board. The said orders have not been vacated or discharged.

61. The effect of the said conservatory orders was to suspend the above provisions that require candidates or tenderers approaching the Board from being required to make payments of the refundable deposit. Effectively, until the conservatory orders are vacated or discharged the competency of any Request for Review filed before the Board cannot be challenged on the basis of the suspended provisions. Consequently, Grounds No. 1 and 2 of the Respondents; Notice of Preliminary Objection fail.

Whether the instant Request for Review seeks orders that override Section 74(1)(b) of the Act and Regulation 74(1)(i) of the Regulations 2020?

62. The Respondents' Notice of Preliminary Objection at Grounds 3 and 4 equally challenged the competency of the Request for Review citing that the reliefs it sought override Sections 74(1)(i) of the Act and Regulation 74(1)(b) of the Regulations 2020.

63. Section 74 of the Act reads:

74. Invitation to tender

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

(a) ...

(b) ...

(c) ...

(d) ...

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(e) ...

(f) ...

(g) ...

(h) ...

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

64. Section 74(1)(i) above places an obligation on the Accounting Officer of a Procuring Entity to ensure that the preparation of an Invitation to Tender includes a requirement for the pages of the submitted tender to be serialized.

65. On the other hand, Regulation 74(1)(b) of the Regulations 2020 reads:

74. Preliminary evaluation of open tender

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

(a) ...

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

(c) ...

(d) ...

66. Regulation 74(1)(b) above, requires that subsequent to tender opening, a Procuring Entity's Evaluation Committee should first subject the received tenders to a Preliminary Evaluation which shall include verifying that the submitted tenders are in the required format and have been serialized on each page.

67. The Board has keenly studied the reliefs sought the reliefs indicated in the instant Request for Review and the same are hereinafter reproduced for ease of reference:

" ...

- 1. The contract dated 26th September 2023 with respect to Tender Number NOCK/PRC/03 (1700) 2022-2023 for Provision of Revalidation, Repair and Repainting of LPG Cylinders between the procuring entity and the Applicant be and is hereby cancelled and set aside;**
- 2. The Procuring Entity's letter of award in Tender Number: NOCK/PRC/03 2022-2023 for provision of Revalidation, Repair and Repainting of LPG Cylinders dated 13th October 2023 addressed to Bhachu Industries Limited and Ferrotech Industries Limited be and is hereby cancelled and set aside;**
- 3. The letters of notification in Tender Number: NOCK/PRC/03 (1700) 2022-2023 for provision of Revalidation, Repair and Repainting of LPG Cylinders dated 13th October 2023 addressed to the applicant and all other unsuccessful tenderers be and are hereby cancelled and set aside;**
- 4. The Accounting Officer of the Procuring entity is hereby ordered to direct the evaluation Committee to reinstate the Applicant's tender at the Financial Evaluation Stage together with all other tenders that made it at the Financial Evaluation Stage;**
- 5. Further to order 4 above, the Accounting Officer is hereby directed to proceed with the procurement process of**

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Tender Number: NOCK/PRC/03 (1700) 2022- 2023 for the Provision of Revalidation, Repair and Repainting of LPG Cylinders to its logical conclusion including the making of an award to the lowest evaluated tenderer taking into consideration our findings in this Request for Review within 14 days from the date hereof;

6. Given the procurement process is not complete, each party shall bear its own costs in the request for review.

68. On the face of the above reliefs, none of them touches on the serialization of tenders. Further, during hearing, Counsel for the Respondents, Ms. Lukoba did not substantiate these 2 grounds appearing on the Respondents' Notice of the Preliminary Objection and how they relate to the provisions of Section 74(1)(i) of the Act and Regulation 74(1)(b) of the Regulations 2020 on serialization of tenders.

69. The oft cited case of **Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors (1969) EA 696** outlined what constitutes a preliminary objection:

"----a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration".

70. The Board has found great difficulty in understanding how Grounds 3 and 4 of the Respondents' Notice of Preliminary Objection constitute pure points of law which if argued as preliminary points would dispose the instant Request for Review. Consequently, both Grounds 3 and 4 of the Respondents' Notice of Preliminary Objection fail.
71. The Respondents equally included Ground 5 in their Notice of Preliminary Objection to wit they argued that the instant Request for Review was otherwise frivolous, vexatious, and an abuse of the Board's process. However, having found that all the substantive Grounds 1 to 4 of the Respondents' Notice of Preliminary Objection failed, this generalized Ground 5 suffers the same fate, it fails.
72. The Board therefore finds that the instant Request for Review as filed before the Board is competent.
73. Before considering the merits of the instant Request for Review, the Board wishes to point out that it noted a mix-up in the manner in which parties' documents in these proceedings were referring to the subject tender. The Applicant in its Request for Review kept referring to the subject tender as Tender No. NOCK/PRC/03 (1700) 2022-2023 when in fact it should be Tender No. NOCK/PRC/03 (1700) 2023-2024. The Respondents picked up this error in the Request for Review but its Letter of Notification of Regret dated 13th October 2023 to the Applicant equally bears the same erroneous Tender Reference Number.
74. Tenderers and Procuring Entities are encouraged to be keen when quoting the tender reference numbers in their correspondence as well as pleadings before this Board. This is because, these tender numbers serve

as the indicators of the tenders parties are referring to. For purposes of this Decision, the mix up that ensued in the procurement process in the subject tender has not been interpreted in favour or against any party herein. The Board shall now delve into the merits of the instant Request for Review.

Whether the Procuring Entity's Evaluation Committee properly evaluated the tenders submitted in response to the subject tender in compliance with the provisions of Section 80 of the Act and the Tender Document?

75. The Applicant's main complaint before the Board is that its tender was unfairly disqualified at the Preliminary Evaluation Stage of the subject tender on account of pagination. According to the Applicant, it submitted a compliant tender but was still disqualified.
76. Counsel for the Applicant, Mr. Makhandia submitted that Section 74(1) of the Act provides for pagination and that the Applicant's tender was compliant as it was paginated.
77. On the other hand, the Respondents took a somewhat different position. They maintained that the Applicant was properly disqualified from the subject tender. According to the Respondents, ITT 22 of the Tender Document required tenderers to submit tenders that were paginated in Arabic numerals but in default of this requirement, the Applicant submitted a tender that was not properly paginated. The Respondents therefore maintained that the Applicant was properly disqualified at the Preliminary Evaluation Stage.

78. The Board is therefore invited to inquire into whether the Evaluation Committee properly arrived at the decision to disqualify the Applicant at the Preliminary Evaluation Stage of the subject tender on account of serialization.

79. Section 80 of the Act offers guidance on how an Evaluation Committee should proceed with the evaluation of tenders in the following terms:

"80. Evaluation of tenders

(1) The evaluation committee appointed by the accounting officer pursuant to section 46 of this Act, shall evaluate and compare the responsive tenders other than tenders rejected.

(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered."

80. Additionally, Section 79 of the Act offers clarity on the responsiveness of tenders in the following terms:

"79. Responsiveness of tenders

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

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

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

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

***(3) A deviation described in subsection (2)(a) shall—
a) be quantified to the extent possible; and
b) be taken into account in the evaluation and comparison of
tenders.”***

81. This Board is further guided by the dictum of the High Court in ***Republic v Public Procurement Administrative Review Board & 2 others Exparte BABS Security Services Limited [2018] eKLR; Nairobi Miscellaneous Application No. 122 of 2018*** where the court while considering a judicial review application against a decision of this Board illuminated on the responsiveness of a tender under section 79 of the Act:

“19. It is a universally accepted principle of public procurement that bids which do not meet the minimum requirements as stipulated in a bid document are to be regarded as non-responsive and rejected without further consideration.[9] Briefly, the requirement of responsiveness operates in the following manner:- a bid only qualifies as a responsive bid if it meets with all requirements as set out in the bid document. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements.[10] Bid formalities usually require timeous submission of formal bid documents such as tax clearance certificates, audited financial statements, accreditation with standard setting bodies, membership of professional bodies, proof of company registration, certified copies of identification documents and the like. Indeed, public procurement practically bristles with formalities which

bidders often overlook at their peril.[11] Such formalities are usually listed in bid documents as mandatory requirements – in other words they are a sine qua non for further consideration in the evaluation process.[12] The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing or empowerment. Bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome.

20. In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some 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."

82. Drawing from the above, the Tender Document is the key guide in the evaluation of tenders submitted in response to any tender invitation. Further, for a tender to be deemed responsive in respect of any requirement, it must comply with the specification of the actual requirement as set out in the Tender Document.
83. Section 74(1)(i) of the Act places an obligation on the part of the Accounting Officer of a Procuring Entity to ensure that in the preparation of an invitation to tender, there is requirement for the pages of a tender to be serialized before submission. The section reads

"74. Invitation to tender

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

(a) ...

(b) ...

(c) ...

(d) ...

(e) ...

(f) ...

(g) ...

(h) ...

(i) requirement of serialisation of pages by the bidder for each bid submitted"

84. Further, Regulation 74(1)(b) of the Regulations requires the Evaluation Committee as part of the Preliminary Evaluation to verify that the pages of the received tenders have been serialized:

"74. Preliminary evaluation of open tender

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

(a) ...

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

(c) ...

(d) ...

85. Additionally, there exists a body of case law affirming the importance of serialization of tenders as part of yardsticks against which tenders should be evaluated. In ***Nairobi High Court Judicial Review Application No. 312 of 2018; R v Public Procurement Administrative Review Board & Anor Ex parte Fourway Construction Company Limited*** the High Court was explicit in its Judgment that failure to serialize a tender could not be termed a minor deviation under Section 79 of the Act:

"49. The requirement of serialization was in the present case indicated to be a mandatory requirement in the 1st Interested Party's tender document, and it was indicated in tender document that a firm lacking in any of the requirements would be dropped at the preliminary stage and would not progress to the Technical evaluation stage. It is also a mandatory requirement under section 74 of the Act, and failure to serialise every page cannot therefore be interpreted as a

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

86. In yet another case, the High Court in ***Nairobi High Court Judicial Review Miscellaneous Civil Application No. 19 of 2020; Republic v Public Procurement Administrative Review Board & Anor Ex parte The Accounting Officer Kenya Ports Authority & Anor*** was explicit that serialization of tenders is a mandatory requirement in all tenders whether or not this is indicated as a requirement in the Tender Document since it is a statutory requirement under Section 74 of the Act:

"49. In light of the foregoing, it becomes apparent to this court that the aspect of serialisation of each and every page of a bid document aims to promote fairness, equal treatment, good governance, transparency, accountability and to do away with discrimination. Failure to conform to this mandatory requirement, and/or exempt or give an opportunity to those who had not earlier on conformed to this mandatory requirement translates to unequal and unfair treatment of other tenderers and it shall also encourage abuse

of power and disregard of the law by not only bidders but also procuring entities.

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

52. That failure to serialise each and every page of a tender document cannot translate to a minor deviation from the laid down principles set down in law as explained hereinabove. It is my finding that the decision by the respondent directing the ex-parte applicants' to re-admit non-responsive bids is in contravention with the provisions of sections 74 and 79 of the PPAD Act of 2015 and thus ultra vires."

87. From the above decisions, it is apparent that (i) serialization is a mandatory requirement under Section 74 of the Act; (ii) All tenders submitted in response to a tender invitation should be serialized whether or not the tender document provides for serialization; (iii) Failure to serialize a tender cannot be termed a minor deviation under Section 79 of the Act; and (iv) Failure to enforce the mandatory requirement of serialization translates to unequal treatment and encourages abuse of power.

88. Turning to the instant case, ITT 22 (d) under Section II- Tender Data Sheet (TDS) at page 25 of 101 of the blank Tender Document made provision for serialization of tenders in response to the subject tender in the following terms:

| | |
|---------------|--|
| ITT 22 | <p>a)</p> <p>b)</p> <p>c)</p> <p>d) Tender submission shall be serialized (each page of the tender submission must have a number and the numbers must be in a chronological order). The numbering system to be used are numerical numbers, i.e. 1,2,3,4,5,6,7,8,9,10 up to the last page.</p> |
|---------------|--|

89. It is therefore apparent, that the Tender Document required tenders to be submitted in the subject tender to be paginated in chronological order of the numerical numbers 1 to the last page. Accordingly, any submitted tender that bore the above pagination in a chronological manner was compliant with the requirement for serialization. Conversely, any submitted tender that did not bear the above pagination in a chronological manner was non-compliant on the requirement for serialization.

90. Counsel for the Applicant, Mr. Makhandia submitted before the Board that the Applicant in preparation of its tender added certain pages after page 28 and that these added pages bore the pagination 28(1), 28(2), 28(3) and so on. Counsel told the Board that the Applicant adopted this new format of pagination so as not to interfere with the previous pagination of the Applicant's tender.

91. The Board has independently studied the Applicant's original tender in the subject tender and noted a number of infractions on the Applicant's pagination of its tender. A few examples will suffice:

- i. Page 1 of the Applicant's tender was not serialized
- ii. Between pages 28 and 29 of the Applicant's tender, the pagination adopted is 28(1) of 101, 28(2) of 101, 28(3) of 101, 28(4) of 101...up to 28(102) of 101.
- iii. There is a blank unpaginated page between pages 29 and 30
- iv. Between pages 52 and 53 of the Applicant's tender, the pagination adopted is 52(1) of 101, 52(2) of 101, 52(3) of 101, 52(4) of 101...up to 52(17) of 101.

92. The Procuring Entity's Evaluation Committee equally picked up on the Applicant's infractions and made the following observations in the Tender Evaluation Report submitted as part of the confidential documents:

"...III. Bid for Cylinder Works Ltd was partially paginated, thus, did not satisfy the conditions and requirements of the mandatory requirements hence did not proceed to the Technical Evaluation Stage."

93. The Board cannot find any fault on the part of the Procuring Entity's Evaluation Committee's observation as it is apparent that one of the infractions in the Applicant's tender pagination was that it was partially paginated.

94. Counsel for the Applicant, Mr. Makhandia attempted to convince the Board that the infractions the Applicant made in respect of pagination of its tender were a minor deviation capable of being excused under Section 79 of the Act. However, guided by the pronouncements by the High Court in ***Nairobi High Court Judicial Review Application No. 312 of 2018; R v Public Procurement Administrative Review Board &***

Anor Ex parte Fourway Construction Company Limited and Nairobi High Court Judicial Review Miscellaneous Civil Application No. 19 of 2020; Republic v Public Procurement Administrative Review Board & Anor Ex parte The Accounting Officer Kenya Ports Authority & Anor, we find that infractions touching on pagination of tenders are not minor deviations excusable under Section 79(2) of the Act.

95. Mr. Makhandia equally assailed the tender process in subject tender arguing that one of the successful tenderers, Bhachu Industries Limited was afforded room to revise its tender price.
96. From the Confidential documents submitted by the Procuring Entity, the tenders that qualified for evaluation at the Financial Evaluation Stage i.e. Bhachu Industries Limited and Ferrotech Industries Limited, had tender prices that exceeded the Procuring Entity's estimated budget and that this necessitated a competitive negotiation process.
97. Competitive negotiation is provided for under Sections 131 and 132 of the Act

131. Competitive Negotiations

An accounting officer of a procuring entity may conduct competitive negotiations as prescribed where—

(a) there is a tie in the lowest evaluated price by two or more tenderers;

(b) there is a tie in highest combined score points;

(c) the lowest evaluated price is in excess of available budget;
or

(d) there is an urgent need that can be met by several known suppliers.

132. Procedure for Competitive Negotiations

(1) In the procedure for competitive negotiations, an accounting officer of a procuring entity shall—

(a) identify the tenderers affected by tie;

(b) identify the tenderers that quoted prices above available budget; or

(c) identify the known suppliers as prescribed.

(2) In the case of tenderers that quoted above the available budget, an accounting officer of a procuring entity shall—

(a) reveal its available budget to tenderers; and

(b) limit its invitation to tenderers whose evaluated prices are not more than twenty five percent above the available budget.

(3) An accounting officer of a procuring entity shall request the identified tenderers to revise their tenders by submitting their best and final offer within a period not exceeding seven days.

(4) The revised prices shall not compromise the quality specifications of the original tender.

(5) Tenders shall be evaluated by the evaluation committee appointed in the initial process.

98. Whereas Section 131 of the Act identifies where the lowest evaluated price exceeds the Procuring Entity's budget estimate as one of the

grounds of competitive negotiations, Section 132 of the Act outlines the procedure for conduct of the competitive negotiations. In cases where the tenders have quoted tender prices above the Procuring Entity's budget, the Evaluation Committee discloses the budget and requests the tenderers being engaged in the competitive negotiations to submit revised tender prices that shall subsequently be considered.

99. The Competitive Negotiations Report submitted herein as part of the Confidential Documents confirms that both Bhachu Industries Limited and Ferrotech Industries Limited submitted revised tender prices following an invitation by the Evaluation Committee. The revision of the tender prices by the two tenderers was therefore regular and in conformity with Section 132 of the Act.

100. The Board therefore finds that the Procuring Entity's Evaluation Committee properly evaluated the tenders submitted in response to the subject tender in compliance with the provisions of Section 80 of the Act and the Tender Document.

What orders the Board should grant in the circumstances?

101. The Board has found that the instant Request for Review as filed before it is competent.

102. The Board has also found Procuring Entity's Evaluation Committee properly evaluated the tenders submitted in response to the subject tender in compliance with the provisions of Section 80 of the Act and the Tender Document.

103. The upshot of our finding is that the Request for Review dated 31st October 2023 in respect of Tender No. NOCK/PRC/03(1700) 2023-2024 for Validation, Repair and Repainting of LPG Cylinders fails in the following specific terms:

FINAL ORDERS

104. 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 31st October 2023:

- 1. The Respondents' Notice of Preliminary Objection dated 3rd November 2023 be and is hereby dismissed.**
- 2. The Request for Review dated 27th November 2023 be and is hereby dismissed.**
- 3. Given the Board's finding above, each party shall bear its own costs.**

Dated at NAIROBI, this 21st Day of November 2023.


.....
CHAIRPERSON
PPARB


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SECRETARY
PPARB