

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 94/2023 OF 10TH NOVEMBER 2023

BETWEEN

CENTRAL ELECTRICALS INTERNATIONAL LTD APPLICANT

AND

THE GENERAL MANAGER/CEO,

EAST AFRICAN PORTLAND CEMENT PLC1ST 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. Mr. Alexander Musau | - | Member |
| 3. Dr. Susan Mambo | - | Member |

IN ATTENDANCE

Mr. Philemon Kiprop - Holding Brief for Board Secretary

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

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

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. The Board considered the parties' pleadings, documents, written and oral submissions, the list and bundle of authorities together with the confidential documents submitted by the Respondent to the Board pursuant to Section 67(3) (e) of the Act and found the following issues called for determination in the Request for Review No. 65 of 2023:

i. 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;

ii. 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;

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

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

18. On the first issue framed for determination, the Board found that the Applicant's failure to join the successful bidder to the proceedings in the instant Request for Review did not make the application fatally incompetent as the Interested Party actively participated in the proceedings and as such, the Board found it had jurisdiction to hear and determine the issues raised in the instant Request for Review.

19. On the second issue framed for determination, the Board 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 as 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.

20. On the third issue framed for determination, the Board found that the letters of notification of the outcome of 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 were therefore null and void.

21. On 16th October 2023, and in exercise of the powers conferred upon it under the Act, the Board made the following final orders with respect to Request for Review No. 65 of 2023:

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.

22. No evidence was tendered by any party in Request for Review No. 65 of 2023 demonstrating that a party to the Request for Review No.65 of 2023 sought judicial review by the High Court of the Board's Decision dated 16th October 2023 in Request for Review No. 65 of 2023. In the absence of such evidence, it is just to hold that the Board's Decision dated 16th October 2023 in Request for Review No. 65 of 2023 became final and binding to all parties to Request for Review No. 65 of 2023 after the lapse of 14 days from 16th October 2023 in accordance with Section 175(1) of the Act.

RE-EVALUATION OF THE SUBJECT TENDER

Evaluation of the Technical Proposal

23. 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.

24. According to the Minutes for Tender Re-Evaluation of the subject tender's held on 25th and 26th October 2023 and signed by members of the Evaluation Committee on 26th October 2023 (hereinafter referred to as the "Technical Re-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 by scoring 88.76% and was determined responsive and thus proceeded for evaluation at the Evaluation of the Financial Proposal stage.

Financial Evaluation

25. 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.

26. 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 26th October 2023 and signed by members of the Evaluation Committee on 26th October 2023. The Evaluation Committee concluded that the bid sum submitted by the Interested Party was within the average market prices as evidenced by the Market Survey Report.

Evaluation Committee's Recommendation

27. 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 evaluated tender price.

Second Professional Opinion

28. In a Professional Opinion dated 27th October 2023 (hereinafter referred to as "the Second Professional Opinion"), the Head of Supply Chain, Mr. Moses Sudi, reviewed the manner in which the subject procurement process was undertaken including re-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.

29. 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

30. Tenderers were notified of the outcome of evaluation of the subject tender vide letters of Notification of Intention to Award dated 30th October 2023.

REQUEST FOR REVIEW NO. 94 OF 2023

31. On 10th November 2023, being dissatisfied with the decision of the Procuring Entity, the Applicant herein filed Request for Review No. 94 of 2023 together with an Affidavit in Support of the Request for Review sworn on 10th November 2023 by Mohamed Taki Rashid, its Head of Marketing and Tendering through Nyamu & Nyamu Co. Advocates LLP seeking for the following orders:

a) THAT the Notice of the decision by the Procuring Entity for Tender No. EAPCPLC/RFP/009/2023 dated 30th October, 2023 be set aside.

b) THAT the Public Procurement Administrative Review Board orders appropriate evaluation of the tender No. EAPCPLC/RFP/009/2023 and in adherence of the Public Procurement and Asset Disposal Act 2015 and Article 227 of the Constitution of Kenya 2010 and Paragraph 107(d)&(e) and 108 of the Decision PPARB Case No. 65 of 2023.

c) This Honourable Review Board sets aside the decision by the Procurement Entity made on 30th October 2023, declare the same illegal and unconstitutional.

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.

32. In a Notification of Appeal and a letter dated 10th November 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 10th November 2023.
33. On 24th November 2023, the Respondents filed through Mwaniki Gachoka & Co. Advocates a Notice of Appointment dated 23rd November 2023, a Respondents Response dated 24th November 2023 together with confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.
34. Vide letters dated 24th November 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.

35. Vide a Hearing Notice dated 27th November 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 28th November 2023 at 12:00 noon, through a link availed in the said Hearing Notice.
36. On 27th November 2023, the Interested Party filed through Karuru Mwaura & Company Advocates a Notice of Appointment of Advocates dated 27th November 2023, a Memorandum of Response to the Applicant's Request for Review dated 27th November 2023, a Replying Affidavit of the Interested Party sworn on 27th November 2023 by Berjeesh Dady Surty, its Managing Director, and Interested Party's Written Submissions dated 27th November 2023.
37. When the matter came up for hearing on 28th November 2023, counsel for the Applicant sought for one (1) hour to enable him file his written submissions. He indicated that the delay in filing the same was occasioned by the Respondent's and the Interested Party's failure to serve their responses to the instant Request for Review. On his part, Counsel for the Respondent made an application to adjourn the matter on the basis that he was on his feet before Hon. Musienga and indicated that there was a miscommunication regarding the email address used in service of the Applicant's pleadings in the subject

matter. Counsel for the Interested Party also indicated that he had been pressed for time having been served with the pleadings in the instant Request for Review on Friday, 24th November 2023 and had only managed to serve the response by the Interested Party on Monday. Upon enquiry by the Board on whether parties were agreeable to canvassing the instant Request for Review by way of written submissions, all parties indicated that they were agreeable to the same.

38. Having considered parties' submissions, the Board directed (a) the Applicant to file and serve its written submissions by 5.00 p.m. on 28th November 2023, (b) the Respondents and Interested Party to file and serve their written submissions by 10.00 a.m. on 29th November 2023, and (c) the Applicant to file any rejoinder by 11.00 a.m. on 29th November 2023. Parties were cautioned to strictly observe the set timelines in filing and service of their pleadings as directed

39. On 28th November 2023, the Applicant filed Written Submissions dated 28th November 2023.

40. On 29th November 2023, the Respondents filed Written Submissions dated 29th November 2023.

PARTIES' SUBMISSIONS

Applicant's Submission

41. It is the Applicant's case that the Respondents (a) did not evaluate its tender in accordance with the decision by the Board in Application No. 65 of 2023 as they failed to adhere to the findings of the Board at paragraphs 107(d) & (e) and 108 of the said decision, (b) proceeded to re-evaluate the entire tender and unfairly denied the Applicant full marks earned by failing to adhere to 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, (c) did not disclose the marks scored by the Applicant as it declared the Applicant unsuccessful and it was out of malice and bias that they failed to disclose the scores garnered by the Applicant in a bid to secure a predetermined selection of the Interested Party, (d) letter of notification failed to comply with Section 87 of the Act read with Regulation 82 of Regulations 2020 as they have not demonstrated or provided for the delegated authority in writing, and (e) cite in their letter dated 30th October 2023 new reasons for disqualification of the Applicant which clearly departs from the reasons cited in their letter dated 26th September 2023 which clearly shows the Respondents bias.

42. On the issue of whether the award of the subject tender was made in compliance with the Act and Regulations 2020, the Applicant submits that according to Section 87(3) of the Act, reasons presupposed under the said provision ought to be detailed enough to include the scores

garnered by the Applicant and contrary to this, the Procuring Entity failed to disclose the scores in its notification letter. The Applicant further submits that the Procuring Entity only introduced the scores in its response to the instant Request for Review. Further, that the said notification letter was authored and signed by one Moses Sudi, the Head of Supply Chain without exhibiting any delegated authority by the 1st Respondent.

43. On the issue of whether the Procuring Entity complied with the orders of the Board issued in Application NO. 65 of 2023, the Applicant submits that contrary to the Board's findings at paragraph 107(a) and (e), 108, and 133(c), the Procuring Entity re-evaluated its entire bid and reduced the score from 77.8% to 62.24% thereby departing from the decision of the Board.
44. The Applicant further submits that departure from the directions of the Board is tantamount to disregard of judicial authority espoused under the Constitution and ought to be treated with the contempt it deserves. In support of its argument, the Applicant relies on the holding in (a) *PPARB No. 22 of 2019 GBM-ERG Consortium and National Irrigation Scheme* where the Board cited that courts have maintained that court orders must be obeyed by all state organs, public entities, as well as civilians, (b) *Hadkinson v Hadkinson [1952] ALL ER 567*, (c) *Refrigeration and Kitchen Utensils Ltd v Gulabchand Popatlal Shah & Another Civil Application No. 39 of 1990*, and (d) *Shimmers Plaza Ltd v National Bank of Kenya Limited Nairobi Civil Appeal No. 33 of 2012 [2015] eKLR*.

45. On the issue of whether the decision of the Respondents was tainted with bias, the Applicant submits that the Procuring Entity in its letter dated 30th October 2023 cited new reasons for disqualification of its tender departing from the reasons set out in the letter dated 26th September 2023. The Applicant contends that such departure points at bias and a predetermination to disqualify its bid at any cost in favour of the Applicant contrary to Article 47 of the Constitution.
46. The Applicant submits that failure by the Procuring Entity to adhere to the material covered under Section 79 and 87 of the Act is in breach of Article 227 read with Article 10 and 47 of the Constitution. Further that the Applicant failed to adhere to the criteria set out in the Tender Document in evaluation of the subject tender and its decision ought to be set aside.
47. The Applicant points out that the Respondent violated the mandatory procedure set out under Regulation 205(3) of Regulations 2020 in its late filing of its response having been served with the Request for Review on 10th November 2023 and ought to be denied audience by the Board. The Applicant urged the Board to allow the Request for Review as prayed.

Respondents' submissions

48. In its submissions, the Respondents relied on the Statement of response dated 24th November 2023 that was filed before the Board.

49. On the issue of whether the Procuring Entity re-evaluated the Applicant's bid in accordance with the directions issued by the Board in Request for Review No. 65 of 2023, the Respondents submit that contrary to the allegations by the Applicant, the Procuring Entity complied with the directions of the Board requiring them to re-evaluate the Applicant's bid.

50. The Respondents submit that the Technical Evaluation of the bids was governed by ITT 38 of the Tender Document and Section 126 of the Act. On Evaluation of Tenders, ITT38.4 provided that ***"a proposal shall be rejected at this stage (technical) if it does not respond to important aspects of the tender document if it fails to achieve the minimum technical score indicated in the TDS."***

51. The Respondents contend that the Board in its holding at paragraph 107 and 108 in Request for Review No. 65 of 2023 noted that there was no basis upon which the procuring entity should prorate the scores to be awarded in the technical evaluation and against this backdrop, the Procuring entity re-evaluated the Applicant's bid and observed as follows:

52. Under requirement 1(a) in the Technical Evaluation criteria, the Applicant was required to demonstrate proof of three (3) projects done

in Kenya and the size of the projects should be more than 1 Mwp. However, the Applicant failed to meet this requirement for the following reasons:

- a. The Applicant attached a certificate of completion that was not done on the client's letterhead and not signed by the client and therefore failed to meet the requirement under 1a. Further, the Respondents avers that contrary to the allegation that the Board confirmed that the Applicant submitted proof of similar projects, the Respondent notes that the criteria required a bidder to support the claim by providing supporting documents including award letters on official letter head from clients which the Applicant failed to provide.
- b. While the Applicant had submitted the Kimilili project as part of the 3 local projects done, the purchase order submitted was in the letterhead of Sentimental Energy while the handing over certificate was in the name of Sentimental Energy and IcFEM Dreamland Hospital Kimilili. As such it was unclear as to the exact role of the Applicant with regard to this particular project.
- c. In a similar vein, the Evaluation Committee identified several discrepancies in the documentation provided by the Applicant for the Kitugum/Lorgum Hospital project:
 - i. The Local Purchase Order (LPO) furnished by the Applicant was printed on Sentimental Energy Company Limited's letterhead instead of the Applicant's own letterhead.
 - ii. The corresponding Handover Certificate was also issued on Sentimental Energy Company Limited's letterhead and was

signed accordingly, despite the Applicant having previously stated that the client for this project was Kitigu/Lorgum Hospital.

- iii. Finally, it was observed that the LPO submitted was dated 18/07/2019, and the Certificate of Completion was dated 02/08/2019. This indicates that the project was purportedly completed within a span of two weeks, a timeframe considered implausible for a project of this scale and complexity.

53. In response to the applicant's claim of executing a single-axis installation in Kenya, the Procuring Entity avers that the Evaluation Committee considered the Kitigum/Lorgum Hospital project, which the applicant presented as featuring a solar tracking system. However, the Evaluation Committee's detailed examination of the submitted Purchase Order and Handover Certificate did not show the presence of a tracking system in the project.

54. The Respondents further submit that in complying with the Board's direction against prorating marks, the Evaluation Committee did not prorate the marks awarded to the Applicant in the technical evaluation and as such, the Evaluation Committee conducted the evaluation of the Applicant's tender accurately, following section 80(2) of the Public Procurement & Asset Disposal Act and Article 227 (1) of the Constitution, and taking into account the Board's findings.

55. On the issue of whether the Procuring Entity Evaluated the Applicant's

bid in good faith and in accordance with the Constitutional, Statutory and the Tender requirements, the Respondents submit that contrary to the Applicant's claims the evaluation process was carried out in a transparent, fair, and unbiased manner, adhering to Articles 10, 47(1)(2), and 227 of the Constitution of Kenya 2010.

56. The Respondents further submit that they did not introduce new or novel reasons for disqualification of the Applicant's bid but rather provided additional clarification on existing grounds in light of the previous decision issued by the Board, while also taking into account the Board's directives concerning the scoring criteria.

57. The Respondents contend that the allegations that their Response to the Request for Review was filed 17 days after service is untenable and untrue since having been served on 16th November 2023, they filed their responses and pleadings within the timeframe prescribed.

58. In response to the Applicant's claim regarding the absence of proper delegation authority for the subject tender, the Procuring Entity submit that the 1st Respondent had already transferred his authority to the Head of the Supply Chain and this action was consistent with the Board's findings.

59. In conclusion, the Respondents urged the Board to dismiss the Request to Review with costs.

Interested Party's Submissions

60. The Interested Party submits that the basis for review is to ensure that a procuring entity has complied with both the Constitutional edicts as found in Article 227 and Statutory principles and provisions as contained in the Act and Regulations 2020.
61. According to the Interested Party, the Applicant has failed to demonstrate that the procuring entity flouted any of the principles enumerated and/or any constitutional and statutory provision, and the instant Request for Review ought to be dismissed with costs.
62. The Interested Party submits that the Respondent complied and adhered to the directions of the Honourable Board since (a) the decision to award the subject tender to the Interested Party was communicated on 30/10/2023 which was exactly 14 days after the decision of the Board on 16/10/2023 (b) the Respondent's Evaluation Committee admitted the Applicant's Tender together with those of other tenders for reevaluation of the technical proposal stage and its tender was still found to be non-compliant as it did not meet the requirements (c) the Applicant has not shown that the Evaluation Committee prorated the scores awarded and as such, the Applicant is on a fishing expedition on shallow waters and is operating at a misconception that the Board ordered for the tender to be awarded to it as long as they were admitted for re-evaluation.

63. The Interested Party contends that from the letter of 30th October 2023 issued by the Respondent to the Applicant, the reasons why the tender was unsuccessful are published as seen at Paragraph 18 of the Supporting Affidavit of Mohammed Taki Rashid and all the issues raised are with reference to issues that were to be complied with at the technical proposal stage and therefore the generality of the Applicant's allegations makes it vague and as a consequence untenable.

64. The Interested Party further contends that the Respondents adhered to the provisions of Section 125(4) and 87 of the Act read with Regulation 82 of Regulations 2020 and that Article 47 of the Constitution upon which the Applicant's claim is anchored is also explicitly clear that the only requirement is written reasons to be communicated for any administrative action; which the Applicant received through the letter of 30/10/2023. Further that Article 47(2) provides: *If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.*

65. It is the Interested Party's case that the Applicant's allegations that the Respondent in their letter dated 30th October 2023 cites new reasons for disqualifying the Applicant which clearly depart from the reasons cited in their letter dated 26th September 2023 is an attempt by the Applicant to clutch onto very thin straws than cannot sustain its case since the Evaluation Committee could not have ignored issues present and pointed out that the Applicant was informed that a

certificate of completion that was attached was not done on a client's letterhead nor was the same signed in contravention to evaluation criteria 1(a) and if the certificate presented did not conform with the criteria set out in the Tender Document, it ought not to have been held as having met the full requirements.

66. The Interested Party contends that the Applicant who has come exhorting integrity and fair dealing does not want the Evaluation Committee to point out the obvious flaws on its bid yet this is their function as held by the Board in its decision of 16th October 2023 at paragraphs 95- 96.

67. In support of its arguments, the Interested Party relied on the High Court 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* and urged the Board to dismiss the instant Request for Review with costs.

68. The Board informed parties that the instant Request for Review having been filed on 10th November 2023 was due to expire on 1st December 2023 and that the Board would communicate its decision on or before 1st December 2023 to all parties to the Request for Review via email.

BOARD'S DECISION

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

- i. Whether the Respondents complied with the orders of the Board issued on 16th October 2023 in Request for Review No. 65 of 2023.**
- ii. What orders should the Board grant in the circumstances.**

Whether the Respondents complied with the orders of the Board issued on 16th October 2023 in Request for Review No. 65 of 2023.

70. We understand the Applicant's case to be that the Procuring Entity failed to comply with the Board's orders issued on 16th October 2023 in Request for Review No. 65 of 2023 and when re-evaluating the

Applicant's tender at the Evaluation of the Technical Proposal stage. The Applicant contends that the reasons advanced by the Procuring Entity for its unsuccessfulness as communicated in the letter dated 30th October 2023 were unlawful, irrational, biased and illogical and based on a non-existent position. The Applicant further contends that the Evaluation Committee failed to adhere to the findings of the Board at paragraph 107(d) & (e) and 108 of the Decision dated 16th October 2023 in Request for Review No. 65 of 2023.

71. We understand the Respondents case to be that they complied with the orders of the Board requiring them to re-evaluate the Applicant's tender and observed the findings of the Board in Decision No. 65 of 2023 in re-evaluating the Applicant's tender at the Evaluation of the Technical Proposal stage. It is the Respondents' submissions that it complied with the provisions of Section 80(2) of the Act read with Article 227(1) of the Constitution in evaluating the subject tender.

72. On its part, the Interested Party associated itself with the submissions by the Respondents and contends that the Applicant has not demonstrated that the Procuring Entity flouted any of the provisions of the Constitution and the Act in re-evaluation of the subject tender. The Interested Party further contends that the Respondents complied with the directions of the Board issued in its Decision dated 16th October 2023 in its re-evaluation of the subject tender.

73. Having considered parties' submissions and pleadings in the instant

Request for Review and the Board's Decision dated 16th October 2023 in Request for Review No. 65 of 2023 where the Board ordered at page 64 and 65, *inter alia* (a) under Order (c) for the 1st Respondent to direct the 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 the Request for Review, and (b) under Order (d) for the 1st Respondent to proceed with the procurement process to its logical conclusion within 14 days of issuance of the decision in accordance with provisions of the Tender Document, the Constitution, the Act and Regulations 2020.

74. According to Order (c) at page 65 of the Decision dated 16th October 2023 in Request for Review, we note that the Respondents were directed to (a) admit the Applicant's tender together with all other tenders that were responsive at the Preliminary Examination stage, (b) re-evaluate the said tenders at the Technical Proposal stage, (c) in re-evaluating the said tenders, take into consideration the findings of the Board in Request for Review No. 65 of 2023.

75. It is not in contest that the Applicant's tender together with all other tenders that were responsive at the Preliminary Examination stage were admitted for re-evaluation at the Technical Proposal stage. The issue in contention in the instant Request for Review is whether the Evaluation Committee in conducting the re-evaluation of the subject tender at the Technical Proposal stage strictly adhered to the findings

of the Board as provided in the Board’s Decision dated 16th October 2023 in Request for Review No. 65 of 2023. The Applicant pointed to non-adherence of paragraphs 107(d) & (e) and 108 of the Board’s decision dated 16th October 2023, denial of full marks earned, non-disclosure of the marks scored and issuance of new reasons for disqualification of its tender which depart from the reasons cited in the letter dated 26th September 2023 when the Applicant was first notified of its unsuccessfulness.

76. The Board noted under paragraph 100 and 101 at page 38 to 41 of the Decision dated 16th October 2023 in Request for Review No. 65 of 2023 that the Technical Evaluation Criteria was provided for in the Tender Document as follows:

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	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	10 5 15	

	<i>clients with official contact details including corresponding completion certificates that are fully signed to fully meet this requirement.</i>		
<i>b</i>	<i>Bidders must provide EPRA licenses for Solar PV Contractor, Solar PV Vendor and Solar PV Importer.</i>	<i>5</i>	
<i>c</i>	<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>	<i>2.5 2.5</i>	
	<i>Subtotal</i>	<i>40</i>	
<i>2.</i>	<i>Contractor Implementation Team Capacity.</i>		
<i>a</i>	<i>Provide overall project management structure/organogram with each role clearly defined.</i>	<i>2</i>	
<i>b</i>	<i>Provide construction team structure/organogram with each role clearly defined.</i>	<i>2</i>	
<i>c.</i>	<i>Experience profile of Project Team Leader. The above should demonstrate specific experience of 5year in managing design,</i>	<i>3</i>	

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.

77. The Board also noted under paragraph 103 at page 42 of the Decision dated 16th October 2023 in Request for Review No. 65 of 2023 that the Applicant scored 77.8% as follows:

“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%.”

78. The Board at page 42 to 43 of the Decision dated 16th October 2023 in Request for Review No. 65 of 2023 noted the reasons for disqualification of the Applicant as follows:

“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.***

..... "

79. The Board in the Decision dated 16th October 2023 in Request for Review No. 65 of 2023 noted at paragraphs 107 and 108 as follows with regard to evaluation of the Applicant's tender:

"108. 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.

80. In essence, the Board noted that in compliance with Requirement No. 1a. under the Technical Evaluation Criteria, the Applicant submitted at pages 47 to 58 proof of projects done in Kenya.

81. The Board also satisfied itself in its Decision dated 16th October 2023 in Request for Review No. 65 of 2023 that the Applicant had demonstrated experience in successful implementation of three (3) similar solar PV contracts in Kenya by virtue of the proof of projects done in Kenya for Two Rivers Power Company Limited, IcFem Dreamland Hospital, Kimilili, and Kitugum/Lorgum Hospital.

82. Notably, the Board faulted the Evaluation Committee for failing to (a) give reasons why it did not score full marks where the Technical Evaluation Criteria was fully met (b) evaluate the Applicant's tender in 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 and (c) adopting an incorrect approach in evaluating and scoring the Applicant's tender.

83. The Board notes that in a letter dated 30th October 2023, the Applicant was notified of the reasons for its unsuccessfulness following the Re-Evaluation of the subject tender as follows:

"
.....

We therefore wish to notify you that your tender was unsuccessful because the following reasons:

- i. It was noted that you provided letter of acceptance and a corresponding Certificate of completion. The Letter of acceptance was in the client's letterhead and was signed. The certificate of completion was not done on client's letterhead and was not signed by the client. In light of the reviewed documentary evidence, the submission did not satisfy the requirements evaluation criteria 1(a).***
- ii. In light of the reviewed documentary evidence it is unclear what relationship Central Electrical International Ltd had with Sentimental Energy Company Ltd and the stated client i.e. IcFEM Dreamland Hospital, Kimilili and the role that Central Electrical played in the delivery of the project.***
- iii. In light of the reviewed documentary evidence it is unclear what relationship Central Electrical International Ltd had with Sentimental Energy Company Ltd and the stated client i.e. Kitugum/Lorgum Hospital and the role that Central Electrical played in the delivery of the project.***
- iv. Among the three locally done project provided, it is only IcFEM Dreamland Hospital Kimilili that had a capacity of 2MWP. In light of the reviewed***

documentary evidence provided, you did not demonstrate the design aspect in your scope of work or implementation since neither the LPO nor the certificate of completion provided explicitly indicated the same.

- v. Among the three locally done projects it is only Kitgum/Lorgum Hospital project that was delivered using a tracking system. In light of the submitted and reviewed documentary evidence i.e the LPO and hand over certificate, you did not demonstrate that in your scope of work or implementation since neither the LPO nor the certificate of completion provided explicitly indicated the same.*
- vi. Among the three locally done projects it is only KItgum/Lorgum Hospital project that was delivered using a tracking system. In light of the submitted and reviewed documentary evidence i.e. the LPO and hand over certificate, you did not demonstrate that in your scope of work for the above project you included the tracking system hence you did not meet the threshold of 1(a)(iii)*
- vii. Failure to demonstrate experience in designing of PV solar plant with MV system*
- viii. Failure to provide the procedure for handling non-conformity.*

The successful tenderer is M/s Spenomatic Kenya Limited

at a proposed contract price of Kes 572,790,267(Kenya Shillings of Five Hundred Seventy Two Million Seven Hundred Ninety Thousand and Two Hundred Sixty Seven Only) VAT Inclusive.

.....”

84. We further note from the Minutes for Tender Re-Evaluation for the subject tender held on 25th and 26th October 2023 that the Applicant's tender was re-evaluated and scored as follows:

No.	Description of items	MAX Score	Central Electricals International Ltd	Spenomatic (K) Limited	Ofgen Energy Simplified
1.	Contractor Experience				
a	-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 letter head from clients with official contact details including corresponding completion certificates that fully signed to fully meet this requirement	10 5 15	0 0 0	10 5 15	0 0 0
b	Bidders must provide EPRA licenses for Solar PV Contractor, Solar PV Vendor and Solar PV Importer.	5	5	5	0
c	Bidder must provide 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	2.5 2.5	2.5 2.5	2.5 2.5	2.5 2.5

	<i>Electrical License holder Class AI (Subcontractor license is acceptable)</i>				
	<i>Subtotal</i>	<i>40</i>			
<i>2.</i>	<i>Contractor Implementation Team Capacity.</i>				
<i>a</i>	<i>Provide overall project management structure/organogram with each role clearly defined.</i>	<i>2</i>	<i>2</i>	<i>2</i>	<i>2</i>
<i>b</i>	<i>Provide construction team structure/organogram with each role clearly defined.</i>	<i>2</i>	<i>2</i>	<i>2</i>	<i>2</i>
<i>c.</i>	<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>	<i>3</i>	<i>3</i>	<i>3</i>	<i>3</i>
<i>d</i>	<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>	<i>3</i>	<i>0</i>	<i>0</i>	<i>0</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>3</i>	<i>3</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>5</i>	<i>5</i>	<i>5</i>
	<i>Subtotal</i>	<i>20</i>			

3.	Design Methodology				
a	Solar PV Plant. <i>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>	10	10	10	10
b	Electrical System Design <i>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>	5	5	5	0
c	Civil/Structural Design <i>Submit preliminary design of the of solar PV array farm.</i>	5	5	0	5
	Subtotal	20			
4.	Construction Methodology and Management				
a	Grid Tied Solar PV Plant Construction Procedure <i>Submit general work methodology, installation procedures and installation check list for equipment and material. Support with manual from the manufacturer</i>	10	10	10	10
b	Quality Management Plan <i>Submit a detailed QA/QC plan detailing all the test procedures, all the functional checks to be carried out on the on each equipment and the system. Submit procedure for handling any non-compliances and the corrective action to be taken</i>	4	0	4	4
c	Project Implementation Work Plan <i>Submit a detailed Gantt chart plan of implementation detailing</i>	3	3	3	3

	<i>the tasks, timelines and sequence of task</i>				
	<i>Subtotal</i>	<i>17</i>			
<i>5</i>	<i>Health and Safety Plan Submit detailed HSE management plan for the works including risk matrix and electrical hazards.</i>	<i>3</i>	<i>3</i>	<i>0</i>	<i>0</i>
	<i>Subtotal</i>	<i>3</i>			
	<i>Total</i>	<i>100</i>	<i>61/98(62.24%)</i>	<i>87/98(88.76%)</i>	<i>52/98(53.06%)</i>

1. M/s Central Electricals International Ltd

“The bidder must provide award letters on official letter head from clients with official contact details and provide fully signed corresponding completion certificates to fully meet this requirement”

1(a) Contractor Experience

- (i) Experience in successful implementation of three similar PV contracts in Kenya size (1MWP). The bidder provided the following three local firms:***

***Project 1: Two Rivers Solar PV Plant
Client –Two Rivers Power Company Limited
Project Size -1521KWP***

The committee noted that the bidder provided letter of acceptance and a corresponding Certificate of completion. The Letter of acceptance was in the client’s letterhead and was signed.

The committee noted that the certificate of completion was not done on clients letterhead and was not signed by the client.

Therefore the project does not meet the requirements of 1 (a) as the review of the documentation did not satisfy the requirements.

***Project 2: Supply, Delivery, and installation of Solar Grid Tie Power System
Client – IcFEM Dreamland Hospital, Kimilili
Project Size -2300KWP
The committee noted:***

- That the bidder provided a Local Purchase Order in which the letterhead was from Sentimental Energy Company Limited whereas the bidder had stated that the client is IcFEM Dreamland Hospital, Kimilili***
- That the bidder provided a hand over certificate an equivalent to a certificate of completion. The hand over certificate was done on Sentimental Energy Company Limited and IcFEM letterheads and signed by Sentimental Energy Company Limited and not signed by IcFEM***
- That the LPO was issued on 17/5/19 and the certificate of handover issued on 20/6/2019 meaning that the project was completed in a period of one (1) month. The project completion duration is also unrealistic for a project of this magnitude.***

In light of the reviewed documentary evidence it is unclear what relationship Central Electrical International Ltd has with Sentimental Energy Company Ltd and the stated client i.e IcFEM Dreamland Hospital, Kimilili and the role that Central Electrical played in the delivery of the project

Project 3: Supply, Delivery, and installation of 1027 KWP Tracking System Solar Power Plant

Client – Kitugum/Lorgum Hospital

The committee noted:

- *That the LPO was on Sentimental Energy Company Limited letterhead*
- *The corresponding hand over certificate was done on Sentimental Energy Company Limited letterhead and signed whereas the bidder stated that the client was Kitugum/Lorgum Hospital*
- *That the LPO was issued on 18/7/2019 and the certificate of completion issued on 2/8/2019 meaning that the project was completed in a period of two (2) weeks which is unrealistic for a project of this magnitude*

In light of the reviewed documentary evidence it is unclear what relationship Central Electrical International Ltd has with Sentimental Energy Company Ltd and the stated client i.e Kitugum/Lorgum Hospital and the role that Central Electrical played in the delivery of the project

- (ii) *At least one should include design, supply, installation, and commissioning of Solar PV systems above 2MWp.*

Besides the key issues highlighted in 1(a) (i) above, among the three locally done projects provided, it is only IcFEM Dreamland Hospital Kimilili that had a capacity of 2MWP

In light of the reviewed documentary evidence provided, the bidder did not demonstrate the design aspect in his scope of work or implementation since neither the LPO nor the certificate of completion provided explicitly indicated the same.

- (iii) *Bidder to have at least done 1 no single axis installation in Kenya and working satisfactorily*

Besides the key issues highlighted in 1(a) (i) above, among the three locally done projects it is only Kitugum/Lorgum Hospital project that was delivered using a tracking system

In light of the submitted and reviewed documentary evidence i.e. the LPO and hand over certificate, the bidder did not demonstrate that in his scope of work for the above project he included the tracking system hence did not meet the threshold of 1(a) (iii)

(b) EPRA Licenses

The bidder provided the following copies of licenses:

(a) Solar PV Contractor /Vendor

✓ Licence Number EPRA/SPV/00825

✓ Solar Photovoltaic Systems Contractor/vendor Class C1

(b) Solar PV Vendor – same as above

(c) Solar PV Importer –Provided

✓ Licence Number EPRA/SPVM/000271

✓ Solar Photovoltaic Systems Manufacturer Importer Class V1

(c) NCA Registration Certificates and Practicing Licenses

The following NCA certificates were provided:

- ✓ *Electrical Engineering Services NCA 1 Certificate of Registration and Contractor Annual Practicing License*
- ✓ *Building Works Contractor NCA 7 Certificate of Registration and Contractor Annual Practicing License*
- ✓ *EPRA license for contractor in electrical installation Class A1 –EPRA/EC/0206*

2. Contractor Implementation Team Capacity

- a) *Provided overall project management structure/organogram with defined titles*
- b) *Provided construction team with defined roles*
- c) *Concerning the experience profile for the project team leader, the bidder proposed:*
 - *a project manager as the project leader who is qualified and experienced.*
 - *a graduate engineer registered by EBK EPRA T3 Licensed Solar Technician*
 - *demonstrated experience in installation of several solar PV projects including design installation and commissioning of 3.6MW solar PV plant in DRC which is on going*
 - *He also had experience in commercial management of project which includes supply chain.*
- d) *On experience profile of the electrical engineer, the bidder proposed :*
 - *Position – Electrical Engineer –Name Phineas Gitonga*
 - *Graduate of electrical and electronic and Communication Engineering*
 - *Licensed electrician with ERC CLASS B Solar Licensed Technician T3:*
 - *Has only done installation projects*
 - *Has been involved in several installation of voltaic systems*
 - *Did not demonstrate experience in designing of PV solar plant with MV system.*
- e) *On experience profile of the civil/structural supervisor, the bidder proposed*
 - *Civil Engineer –Janet Nabwile –page 123*
 - *Graduate of civil engineering*
 - *Demonstrated experience of civil works in electrical plant infrastructure*
- f) *Construction Team Profile*
 - *Project Engineer – Winnie Akeyo–page 129*
 - *Graduate of electrical and communication Engineering*
 - *Electrician licence Class B*
 - *Project Engineer –Eric Onyango Wangaruo –page 135*
 - *Graduate of Electrical and Electronics Engineering*
 - *EPRA Licensed Electrician C1 and T3*
 - *Based on the CVs provided, the construction team has demonstrated the experience required*
 - *Health and Safety Officer*
 - *Bachelor of Science in Environmental Conservation*
 - *EMCA Auditor*
 - *Based on the CVs provided, the construction team has demonstrated the experience required*

1. Design Methodology

a) The optimal sizing of the PV Plant

- *The bidder provided report on the projection simulation from PVsyst V7.3.1 software*
- *The data indicates the capacity of the project at 5MWp*
- *The information is captured in page 158 of the bid document*
- *Production Report*
 - *The above is indicated/provided vide PVsyst V.7.3.1 software simulation report –general parameters and system production data provided*
 - *Monthly power generation from the PV system. System production data provided for the year –page 159-162 indicating specific production and performance ratios*
- *Layout drawings /diagrams showing PV Modules layouts on the proposed land area –page 167-168*
 - *Preliminary civil design considerations for the solar PV array farm.*
 - *Design for the PV modules support structure provided –page 245-246*
 - *ASLD provided indicating the tie in of the solar system to the existing MV system –page 138*

The bidder submitted the following manufacturer manual brochures and technical data sheets

Demonstrated tier 1 equipment as follows:

- *Solar modules –jinko solar type Tiger Neo N Type 78HL4 BDV*
- *Inverters –SUN 2000 200 KTL H2 Smart String Inverter*

Manufacturing Authorization Letter

- *Solar module Jinko Solar –Provided*
- *Inverters –provided*

Warrantee and Guarantees

- *Solar module –Provided*
- *Inverters –provided*

Financial Analysis

- *The bidder provided an analysis table showing the following : ROI, Annual Energy Saving –page 234*

(b) Electrical System Design

- *Consumption and load analysis provided in a table demonstrating the consumption quantities and production of PV energy –page 237*
- *Provided a drawing showing the grid design –page 238*
- *Transformer and associated works drawings provided –page 240-242*

(c) Civil /structural Design

- Structural drawings of the solar array panel supporting structures provided –pages 244-245*

Pictorial details of the land and layout of the solar modules array provided also drawing showing the arrangement of the modules arrays on the proposed land have been provided

2. Construction Methodology and Management

- a) *Grid Tie Solar PV plant construction procedures on general work methodology, installation procedures and installation. The general work methodology is well provided –page 248 this includes work flows and site preparations, installation procedures for the panel and inverter are also well provided.*
- b) *Though the Quality assessment checklist was provided, the procedure for handling non – conformity was not provided.*
- c) *A detailed Gantt chart with tasks sequence of implementation with specific timeframe are provided*

5. Health and Safety Plan

HSE management plan provided that includes the following:

- *Environmental Health and Safety Impact Assessment*
- *Safety Management*
- *Safe Working Procedures*
- *Roles and Responsibilities*
- *Detailed risk management matrix provided*

85. According to the above Evaluation Report, we note that the Evaluation Committee:

- i. Did not score any marks out of the maximum score provided under Requirement No. 1a under the Technical Evaluation

Criteria which the Board takes to mean that according to the Evaluation Committee, in evaluating whether the Applicant met this requirement fully, it found that the Applicant did not:

- a. Demonstrate experience in successful implementation of three (3) similar solar PV contracts in Kenya whose size was more than 1 Mwp to warrant award of the Maximum score of 10 marks;
 - b. Include at least one project demonstrating design, supply, installation and commissioning of Solar PV systems above 2MWp to warrant the Maximum Score of 5 marks;
 - c. Have at least done one no. single axis installation in Kenya which is working satisfactorily and to provide award letters on official letter head from clients with official contact details including corresponding completion certificates that are fully signed to warrant the Maximum score of 15 marks.
- ii. Did not score any marks out of the maximum score under Requirement No. 2d under the Technical Evaluation Criteria which the Board takes to mean that according to the Evaluation Committee, in evaluating whether the Applicant met this requirement, it found that the Applicant did not:
- a. Demonstrate from the profile of its Electrical Engineer, that the said Electrical Engineer had at least five years' experience in the design construction and commissioning of PV Solar Plant with MV systems and neither did it provide CV and relevant certificates to support this requirement to warrant the Maximum score of 3 marks.

- iii. Did not score any marks out of the maximum score under Requirement No. 4b under the Technical Evaluation Criteria which the Board takes to mean that according to the Evaluation Committee, in evaluating whether the Applicant met this requirement, it found that the Applicant did not:
 - a. 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; and submit procedure for handling any non-compliance and the corrective action to be taken to warrant the Maximum score of 4 marks.

86. Subsequently, following the Re-Evaluation of the Applicant's tender, the Evaluation Committee scored the Applicant 61/98 marks making a percentage of 62.24% which was below the minimum technical score of 80% provided under the Technical Evaluation Criteria of the Tender Document. This was a substantial reduction of the Applicant's score from 77.8% which it had previously scored as was captured by the Board in the Decision dated 16th October 2023 in Request for Review No. 65 of 2023. Which reduction to the Board is unjustified and unfair in light of the Boards finding in Decision dated 16th October, 2023 in Request for Review No.65 of 2023.

87. 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 re-

evaluation:

No.	Technical Evaluation Criteria	Maximum Score	Reason for Disqualification of the Applicant's tender Upon Re-Evaluation of the subject tender as communicated vide a notification letter dated 30 th October 2023	Whether Reason Captured in the Initial Evaluation of the Applicant's tender in the subject tender as communicated vide a notification letter dated 26 th September 2023	Board's Observations
1.	<ul style="list-style-type: none"> Bidder should demonstrate experience in 		<p>It was noted that you provided letter of acceptance and a</p>	<ul style="list-style-type: none"> The issue captured was with regard 	<ul style="list-style-type: none"> The <u>maximum</u> score under this requirement was

	<p>successful implementation of three (3) similar solar PV contracts in Kenya. The size of the projects should be more than 1 Mwp.</p> <ul style="list-style-type: none"> At least one should include design, supply, installation, and commissioning of Solar PV systems above 2MWp. Bidder to have at least done 1 	<p>10</p>	<p>corresponding Certificate of completion. The Letter of acceptance was in the client's letterhead and was signed. The certificate of completion was not done on client's letterhead and was not signed by the client. In light of the reviewed documentary evidence, the submission did not satisfy the requirements evaluation criteria 1(a).</p>	<p>to lack of complete signatures on certain Purchase Orders (LPOs) and concerns regarding the practicality of the specified completion timelines therein</p>	<p>30 Marks.</p> <ul style="list-style-type: none"> The Applicant provided at page 47-50 of its tender a Letter of Acceptance in the Letterhead of Two Rivers; The Applicant provided at page 51-52 a Certificate of Completion and Handover on the Applicant's Letter Head. There was no provision for a bidder to provide completion
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	<p>no single axis installation in Kenya and working satisfactorily</p> <ul style="list-style-type: none"> • Provide award letters on official letter head from clients with official contact details including corresponding completion certificates that fully signed to fully meet this requirement. • Bidder should 		<ul style="list-style-type: none"> • It is unclear 	<p>certificates on official letter head from the client. What was provided was for the bidder to include <u>corresponding</u> completion certificates that were also fully signed. As such a bidder was to provide a completion certificate connected to the award letters.</p>
2.			<ul style="list-style-type: none"> • The issue of 	<ul style="list-style-type: none"> • The Applicant

	<p>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.</p> <ul style="list-style-type: none"> At least one should include design, supply, installation, and commissioning of Solar PV systems above 2MWp. 	10	<p>what relationship Central Electrical International Ltd had with Sentimental Energy Company Ltd and the stated client i.e. ICFEM Dreamland Hospital, Kimilili and the role that Central Electrical played in the delivery of the project.</p> <ul style="list-style-type: none"> it is unclear what relationship Central Electrical 	<p>what relationship of the Applicant had with Sentimental Energy Company Ltd was never raised during the first evaluation.</p>	<p>provided at page 53 and 54 details demonstrating it was engaged in the project: Supply, Delivery, and Installation of 2300KWP Solar Grid-Tie Power System where the client was ICFEM Dreamland Hospital, Kimilili accompanied by the proof of the contract being a Purchase Order PO No: P000568 where the description of</p>
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	<ul style="list-style-type: none"> • Bidder to have at least done 1 no single axis installation in Kenya and working satisfactorily • Provide award letters on official letter head from clients with official contact details including corresponding completion certificates that fully signed to fully meet this 	15	<p>International Ltd had with Sentimental Energy Company Ltd and the stated client i.e. Kitugum/Lorgum Hospital and the role that Central Electrical played in the delivery of the project.</p>		<p>Items was Supply, Delivery, and Installation of 2300kWp solar grid-tie power system.</p> <ul style="list-style-type: none"> • The Applicant provided at page 55 a Handing Over Certificate on the letterhead of Sentimental Energy which was signed and indicated that it was issued by the Engineer Being Sentimental Energy Company Ltd and the
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	requirement.				<p>Applicant as the Contractor and the Employer as Aggrey Muyila, IcFEM Dreamland Hospital for the project Supply, Installation, and Commissioning of a 2300KWP Solar Grid- Tie Power System – Kimilili.</p> <ul style="list-style-type: none">• The Applicant provided at page 56 and 57 details demonstrating it was engaged in the project: Supply, Delivery, and Installation of
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1027KWP	Tracking System	Solar Power Plant	where the client	was	Kitugum/Lorgum	Hospital	accompanied by	the proof of the	contract being a	Purchase Order	PO No: P001576	where the	description of	Items was Supply,	Delivery, and	Installation of	1027kwp solar	power system.	• The Applicant																																																																																																																																								

<p>provided at page 58 a Handing Over Certificate on the letterhead of Sentimental Energy which was signed and indicated that it was issued by the Engineer Being Sentimental Energy Company Ltd and the Applicant as the Contractor and the Employer as Chris Mbori Kitugum and Lorgum Hospitals, Turkana for the Project:</p>				
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<p>Supply, Installation, and Commissioning of a 1027 KWP Tracking System Solar Power Plant at Kitugum and Lorgum, Turkana.</p> <ul style="list-style-type: none">• It is clear from the above Handing Over Certificates that the role of the Applicant was that of the contractor as evidenced from the Purchase orders and Handing Over Certificate.					
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3.	At least one should include design, supply, installation, and commissioning of Solar PV systems above 2MWp.	10	<ul style="list-style-type: none"> Among the three locally done project provided, it is only IcFEM Dreamland Hospital Kimilili that had a capacity of 2MWp. In light of the reviewed documentary evidence provided, you did not demonstrate the design aspect in your scope of work or implementation since neither the LPO nor the certificate of completion provided explicitly 	<p>Issue of Design had previously been raised following the previous evaluation as follows: <i>Failure to adequately demonstrate the design aspect of a 2 MWP solar PV system</i></p>	<ul style="list-style-type: none"> The Applicant ought to only have been denied the score under this category for lack of demonstration of the design aspect It is clear that the Applicant has demonstrated supply, delivery, and installation of 2300KWP Solar Grid-Tie Power System and ought to be scored for the same.
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			<p>indicated the same.</p> <ul style="list-style-type: none"> Failure to demonstrate experience in designing of PV solar plant with MV system 		
4.	<p>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.</p> <p>10</p>		<ul style="list-style-type: none"> Among the three locally done projects it is only Kitgum/Lorgum Hospital project that was delivered using a tracking system. In light of the submitted and reviewed documentary evidence i.e. the LPO and hand over 	<ul style="list-style-type: none"> The issue of tracking was not raised in the previous evaluation. 	<ul style="list-style-type: none"> There was no provision for a tracking system under Requirement No.1a of the Technical Evaluation Criteria. The Evaluation Committee was only required to satisfy itself as to

			<p>certificate, you did not demonstrate that in your scope of work for the above project you included the tracking system hence you did not meet the threshold of 1(a)(iii)</p> <ul style="list-style-type: none"> • Failure to provide the procedure for handling non-conformity. 		<p>whether the Applicant had demonstrated its experience in successful implementation of three (3) similar solar PV contracts in Kenya whose size was more than 1 Mwp and score the Applicant accordingly for its information.</p>
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88. Additionally, we note that the Applicant under Requirement No. 2(d) of the Technical Evaluation Criteria requiring *'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'* the maximum score provided was 3 marks and the Applicant was scored 0 following re-evaluation while in the previous evaluation, the Applicant had been scored 2 marks. It is not clear why the previous marks were withdrawn noting that award of the 2 marks was quite fair as the Applicant had submitted at page 118 of its tender as follows:

- Position – Electrical Engineer –Name Phineas Gitonga
- Graduate of electrical and electronic and Communication Engineering
- Licensed electrician with ERC CLASS B Solar Licensed Technician T3:
- Has only done installation
- Has been involved in several installation of voltaic systems
- Design and construction aspects not clearly demonstrated most of it is installation and maintenance

89. We also note that under Requirement No. 4(b) of the Technical Evaluation Criteria requiring 'Quality Management Plan Submit a detailed QA/QC plan detailing all the test procedures, all the functional checks to be carried out on the on each equipment and the system.

Submit procedure for handling any non-compliances and the corrective action to be taken' the maximum score provided was 4 marks and the Applicant was scored 0 following re-evaluation while in the previous evaluation, the Applicant had scored 2.7 marks. It is not clear and there is no justification why no marks were awarded for this requirement in view of the fact that what has been provided under the scoring criteria is a maximum score and in view of the fact that the Applicant had previously been scored having provided a Quality Management Plan provided at pages 281 to 293 of its tender.

90. From the foregoing, and in view of the orders issued by the Board in the Decision dated 16th October 2023 in Request for Review No. 65 of 2023, it is our considered view that the Respondents failed to score the Applicant accordingly as provided for in the Tender Document where the Applicant had met the stipulated requirements, noting that the scoring provided was for maximum marks that a tenderer could score and did not limit issuance of scores below the set maximum scores.

91. The Board takes cognizance of section 173 (b) of the Act, which states that: -

“Upon completing a review, the Review Board may do anyone or more of the following-

i;

ii 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.”

92. In the circumstances, we find that the Evaluation Committee failed to evaluate the Applicant's tender in accordance with the criteria provided for 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 and in doing so failed to comply with the orders of the Board issued on 16th October 2023 in Request for Review No. 65 of 2023. Accordingly, the Applicant's tender is reinstated back and the Procuring Entity directed to carry out a technical and financial evaluation of the Applicant's bid since the grounds for it's being declared as non-responsive are not valid.

What orders should the Board grant in the circumstances?

93. We have established that the Evaluation Committee failed to comply with the orders of the Board issued on 16th October 2023 in Request for Review No. 65 of 2023. Consequently, the Board deems it fit to nullify the letter of notification of intention to award and letters of regret dated 30th October 2023 and order the 1st Respondent to direct the Evaluation Committee to re-admit the Applicant's tender together with all other tenders that were determined responsive at the at the Technical Proposal stage taking into consideration the Board's findings in this Request for Review.

94. The upshot of our finding is that the Request for Review dated 10th

November 2023 and filed on even date succeeds in terms of the following specific orders:

FINAL ORDERS

95. 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 10th November 2023 and filed on even date:

- a) The Letter of Notification of Award issued to the Interested Party dated 30th October 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 30th October 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 hereby ordered to direct the Procuring Entity's Evaluation Committee to re-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 1st Day of December 2023.

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PANEL CHAIRPERSON
PPARB

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SECRETARY
PPARB