

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 107/2023 OF 11TH DECEMBER 2023

BETWEEN

DALBIT PETROLEUM LIMITED APPLICANT

AND

MANAGING DIRECTOR, KENYA POWER &

LIGHTING COMPANY PLC (KPLC PLC)

(ACCOUNTING OFFICER) 1ST RESPONDENT

KENYA POWER & LIGHTING COMPANY PLC 2ND RESPONDENT

RUBIS ENERGY KENYA PLC..... 3RD RESPONDENT

Review against the decision of the Managing Director, Kenya Power & Lighting Company PLC in relation to Tender No. KP1/9A.3/OT/19/23-24 for Procurement of Supply and Delivery of Low Sulphur to Diesel to Off-Grid Power Stations.

BOARD MEMBERS PRESENT

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

IN ATTENDANCE

1. Mr. Philemon Kiprop - Holding Brief for Board Secretary
2. Ms. Sarah Ayoo - Secretariat
3. Ms. Evelyn Weru - Secretariat

PRESENT BY INVITATION

APPLICANT

DALBIT PETROLEUM LIMITED

1. Mr. Kamau Muturi -Advocate, Maina & Macharia Advocates LLP
2. Mr. Maina Ngeshu - Dalbit Petroleum Limited
3. Ms. Sharon Juma - Dalbit Petroleum Limited

RESPONDENTS

MANAGING DIRECTOR, KENYA POWER AND LIGHTING COMPANY PLC (ACCOUNTING OFFICER) & KENYA POWER AND LIGHTING COMPANY PLC

- Mr. Muchai -Advocate, Kenya Power and Lighting Company PLC

3RD RESPONDENT

RUBIS ENERGY KENYA PLC

1. Mr. Peter Njeru - Advocate, Kaplan & Stratton Advocates
2. Ms. Elizabeth Onyango - Advocate, Kaplan & Stratton Advocates
3. Ishmael Opande - Commercial Manager, Rubis Energy Kenya PLC

BACKGROUND OF THE DECISION

The Tendering Process

1. Kenya Power & Lighting Company Plc, the Procuring Entity and the 2nd Respondent herein invited bids from interested and eligible in response to Tender No. KP1/9A.3/OT/19/23-24 for Procurement of Supply and Delivery of Low Sulphur to Diesel to Off-Grid Power Stations. (hereinafter referred to as the "subject tender"). The invitation was by way of an advertisement on 10th October 2023 on My Gov Newspaper, on the Procuring Entity's website www.kplc.co.ke and from the KPLC E-Procurement Portal – RFX No. 1000002369 where the blank tender document for the subject tender issued to tenderers by the Procuring Entity (hereinafter referred to as the 'Tender Document') was available for download.
2. The 2nd Respondent used an electronic-procurement system referred to as SAP Tendering Portal on www.kplc.co.ke to manage issuance of tendering document, submission of tenders and opening of tenders. Prospective bidders were required to log on and register via the said e-procurement system to be able to participate on the subject tender.
3. The subject tender's submission deadline was initially scheduled for 2nd November 2023 at 10.00 a.m.

Addendum

4. In an Addendum issued vide letter dated 26th October 2023 (hereinafter referred to as "Addendum No. 1"), the Procuring Entity, *inter alia*, extended the tender submission deadline to 9th November 2023 at 10.00 a.m.

Submission of Tenders and Tender Opening

5. According to the Minutes of the subject tender's opening signed by members of the Tender Opening Committee on 9th November 2023 (hereinafter referred to as the 'Tender Opening Minutes') and which Tender Opening Minutes were part of confidential documents furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') by the 1st Respondent pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), a total of six (6) tenders were submitted in response to the subject tender. The said six (6) tenders were opened in the presence of tenderers' representatives present at the tender opening session, and were recorded as follows:

Bidder No.	Name
1.	Vivo Energy Kenya
2.	Oryx Energies Kenya Ltd
3.	Dalbit Petroleum Ltd
4.	Lake Oil Limited

5.	Galana Energies Ltd
6.	Rubis Energy Kenya

Evaluation of Tenders

6. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1st Respondent undertook evaluation of the six (6) tenders as captured in an Evaluation Report for the subject tenders signed by members of the Evaluation Committee on 22nd November 2023 (hereinafter referred to as the "Evaluation Report") in the following stages:

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

Preliminary Evaluation

7. The Evaluation Committee was required to carry out a Preliminary Evaluation and examine tenders for responsiveness using the criteria provided under ITT 10(j) of Section II – Tender Data Sheet at page 27 to 28 of the Tender Document and Part I – Preliminary Evaluation Criteria under clause 28.2 of the ITT of Section III- Evaluation and Qualification Criteria at page 33 to page 34 of the Tender Document. Tenderers were required to meet all the mandatory requirements at this stage to proceed to the Technical Evaluation stage.

8. At the end of evaluation at this stage, five (5) tenders were determined non-responsive, including the Applicant's tender, while one(1) tender, being the Interested Party's tender, was determined responsive and proceeded to the Technical Evaluation stage.

Technical Evaluation

9. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Clause 2.2 Evaluation of Technical aspects of the Tender of Section III- Evaluation and Qualification Criteria at page 34 to page 35 of the Tender Document. A tender was required to comply with all the provisions under stage I of II – Technical Evaluation Criteria under clause 28.3 of the ITT (under Clause 2.3.1 Part II- Technical Evaluation Criteria Under clause 28.3 of the ITT) before proceeding for a detailed technical evaluation under Stage 2 of Part II – Detailed Technical Evaluation under clause 28.3 of the ITT where tenderers were required to score a minimum of 75% to proceed for Financial Evaluation.

10. At the end of evaluation at this stage, the Interested Party's tender was determined responsive to proceed to the Financial Evaluation stage.

Financial Evaluation

11. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Clause 2.3

Evaluation of Commercial Terms and Conditions of the Tender (ITT 33.1 (a)) of Section III- Evaluation and Qualification Criteria at page 38 of the Tender Document.

12. At the end of evaluation at this stage, the Interested Party's bid, being the only responsive bid was recommended for award of the subject tender for a period of twenty-four (24) months based on the price formulae set out in the price schedule subject to the estimated annual budget of Kenya Shillings Three Billion Eight Hundred and Sixty –Eight Million Six Hundred and Sixty- Nine Thousand and Seventy-Two VAT Exclusive and availability of funds from MoE&P as recommended.

Evaluation Committee's Recommendation

13. The Evaluation Committee recommended the Interested Party for award of the subject tender for a period of twenty-four (24) months based on the price formulae set out in the price schedule subject to the estimated annual budget of Kenya Shillings Three Billion Eight Hundred and Sixty –Eight Million Six Hundred and Sixty- Nine Thousand and Seventy-Two VAT Exclusive and availability of funds from MoE&P as recommended.

Due Diligence

14. The Evaluation Committee conducted due diligence exercise as provided for in the Tender Document to verify the Interested Party's

depots and storage capacity as captured in its bid document. Following the exercise, the Interested Party was found to have surpassed the minimum storage capacity of 2,000,000 liters (2000m³) as stipulated in the Tender Document.

Professional Opinion

15. In a Professional Opinion dated 24th November 2023 (hereinafter referred to as "the Professional Opinion"), Dr. John Ngeno 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.

16. Thereafter, the Professional Opinion was approved as recommended on 24th November 2023.

Notification to Tenderers

17. Tenderers were notified of the outcome of evaluation of the subject tender vide letters of notification of intention to award the subject tender dated 27th November 2023.

REQUEST FOR REVIEW NO. 107 OF 2023

18. On 11th December 2023, Dalbit Petroleum Limited, the Applicant herein, filed a Request for Review dated 11th December 2023 together

with an Applicant's Statement sworn on 11th December 2023 by Ruth Njambi Muhia, its Finance Manager, (hereinafter referred to as the 'instant Request for Review') through Maina & Macharia Advocates LLP seeking the following orders from the Board in verbatim:

- a) The 1st and 2nd Respondents decision awarding Tender No. KP1/9A.3/OT/19/23-24 Procurement of Supply and Delivery of Low Sulphur Diesel to Off-Grid Power Stations, to the 3^d Respondent be and is hereby set aside and nullified.***

- b) The Letter of Regret notification dated 27th November 2023 issued to the Applicant in respect of Tender No. KP1/9A.3/OT/19/23-24 Procurement of Supply and Delivery of Low Sulphur Diesel to Off-Grid Power Stations be set aside;***

- c) The 1st and 2nd Respondent be ordered to re-admit the Applicant's tender and proceed to evaluate it in compliance with the tender documents, the Act and the Constitution;***

- d) In alternative to prayer c) above, the Honourable Board be pleased to review all records of the procurement process relating Tender No. KP1/9A.3/OT/19/23-24 Procurement of Supply and Delivery of Low Sulphur***

Diesel to Off-Grid Power Stations and do substitute the decision of the 1st and 2nd Respondent with an order for award of the Tender to the Applicant;

e) Such other or further relief or reliefs as this Board shall deem just and expedient.

19. In a Notification of Appeal and a letter dated 11th December 2023, Mr. James Kilaka, the Acting Board Secretary of the Board notified the 1st and 2nd Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 11th December 2023.

20. On 19th December 2023, the Respondents filed through Joseph Muchai Advocate a Notice of Appointment of Advocates dated 19th December 2023, a 1st and 2nd Respondents' Memorandum of Response to the Request for Review dated 19th December 2023 together with a file containing confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

21. *Vide* a Hearing Notice dated 20th December 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 27th December 2023 at 11.00 a.m., through the link availed in the said Hearing Notice.
22. *Vide* letters dated 22nd December 2023, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the subject Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within three (3) days.
23. On 22nd December 2023, the Applicant filed a Further Statement in Support of the Request for Review sworn on 22nd December 2023 by Ruth Njambi Muhia.
24. On 27th December 2023, the Applicant filed Written Submissions dated 23rd December 2023.
25. When the matter first came up for hearing on 27th December 2023 at 11.00 a.m., the Board read out pleadings filed by parties in the matter. Counsel for the 3rd Respondent, Ms. Onyango informed the Board that the 3rd Respondent had just been served on the morning

of 27th December 2023 with pleadings and the hearing notice in the instant Request for Review and sought for an adjournment to examine the Request for Review and file a response since proceeding with the hearing would be prejudicial to the 3rd Respondent. In response, counsel for the Applicant, Mr. Muturi concurred that it would be in the interest of justice for the 3rd Respondent to file its response to the Request for Review though he intimated that they had earlier been served with the pleadings in the matter. He sought for corresponding leave to file a rejoinder to the 3rd Respondent's response to the Request for Review should substantive issues be raised. On his part, counsel for the 1st and 2nd Respondent, Mr. Muchai indicated that he was yet to be served with the Applicant's submissions and sought leave to file written submissions in the matter.

26. Having considered parties' submissions on the application by the 3rd Respondent, the Board allowed the application by the 3rd Respondent and directed (a) the 3rd Respondent to file and serve its response to the Request for Review together with written submissions by close of business on 27th December 2023, (b) the 1st and 2nd Respondents to file and serve their written submissions by close of business on 27th December 2023, (c) the Applicant to file and serve its rejoinder, if necessary, by 9.00 a.m. on 28th December 2023, (d) hearing of the instant Request for Review to proceed on 28th December 2023 at 1.00 p.m. Parties were cautioned to adhere to the strict timelines as

specified in the Board's directions since the Board would rely strictly on the documentation filed before it in rendering its decision.

27. On 27th December 2023, the 3rd Respondent filed its Notice of Appointment of Advocates dated 27th December 2023, a 3rd Respondent's Memorandum of Response to the Request for Review and a Third Respondent List of Authorities dated 27th December 2023.

28. On 28th December 2023, the 1st and 2nd Respondent filed a 1st and 2nd Respondents' Affidavit in Response to Applicant's Further Statement sworn on 28th December 2023 by Maanzo Dennis Advocate.

29. At the hearing of the instant Request for Review on 28th December 2023 at 1.00 p.m., parties confirmed compliance with the Board's previous orders and upon the Board reading out pleadings filed, counsel for the Applicant, Mr. Muturi made an application to have the 1st and 2nd Respondent's Affidavit in Response to Applicant's Further Statement sworn on 28th December 2023 by Maanzo Dennis Advocate expunged from the record since the same had been filed without leave and had been served upon him an hour before the hearing commenced which was late in the day and he would be greatly prejudiced by the same since the Applicant, having the right of last response, would not have a chance to respond to the same. He argued that it is trite that pleadings must come to a close and the

1st and 2nd Respondents in filing the same were attempting to cure a gross violation of law in regard to the letters of notification of intention to award the subject tender.

30. In response, Mr. Muchai submitted that he had stated before the Board when the matter came up on 27th December 2023 that he had not been served with the Applicant's Further Affidavit and Written Submissions and it was upon service and perusal of the same that he saw that a new issue had been raised pertaining the letters of notification of intention to award at paragraph 17 and deemed it necessary to respond to the same and offer clarity on the said issue.

31. In a rejoinder, Mr. Muturi opposed the allegation that Mr. Muchai had not been served with the said documents and referred the Board to the thread of email dated 22nd December 2023 and submitted that it was not true that Mr. Muchai got the Applicant's Further Affidavit and Written Submissions by chance.

32. Having considered submissions made by parties on the Applicant's application to expunge from the record the 1st and 2nd Respondents' Affidavit in Response to Applicant's Further Statement sworn on 28th December 2023 by Maanzo Dennis Advocate, the Board allowed the application and directed that (a) the Applicant has the right of last response and the 1st and 2nd Respondents cannot have a right of further reply after the Applicant since pleadings must come to a close, (b) as at 22nd December 2023, communication had been

issued on the Request for Review and at the hearing on 27th December 2023, counsel for the 1st and 2nd Respondent only made a request to file its written submissions, (c) 1st and 2nd Respondents to rely on their pleadings together with the confidential documents submitted before the Board. Thus, the matter proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

Applicant's submissions.

33. In his submissions, counsel for the Applicant, Mr. Muturi, relied on pleadings filed before the Board i.e. the instant Request for Review, Applicant's Further Affidavit and Written Submissions.

34. On the issue of whether the letter of notification dated 27th November 2023 is competent and compliant with the law, Mr. Muturi referred the Board to annexure marked DP-3 and pointed out that the said notification letter had been signed by Eng. Rosemary Oduor, Acting Managing Director & CEO and from annexure marked DP-6 in the Applicant's Further Statement being a press release which indicated that the Managing Director of the 1st Respondent is Dr. (Eng) Joseph Siror and as such, the notification letter dated 27th November 2023 was invalid.

35. In support of his arguments, Mr. Muturi relied on the provisions of Section 87 of the Act read with Regulation 82 of Regulations 2020 requiring an accounting officer to notify tenderers in writing of the outcome of evaluation of tender and the holding in *PPARB Application No. 65/2023* where the Board indicated that letters of notification must be signed by an accounting officer and if not, to be demonstrated in the confidential file that there was a delegation of authority to act. He submitted that there was no justification why the 1st Respondent did not sign the letters of notification dated 27th November 2023.

36. With regard to disqualification of the Applicant's tender, Mr. Muturi submitted that the reasons for disqualification indicated in the letter of notification dated 27th November 2023 were unfair and unprocedural and not in accordance with the Tender Document. Counsel submitted that in full compliance with Clause 2.2.8 under Part I, Preliminary Evaluation Criteria of the Tender Document requiring a bidder to submit a copy of accreditation certificate for the testing body to ISO/IEC 17025, the Applicant submitted Certificate of Accreditation of SGS Kenya Limited, Facility Accreditation Number T0151 to ISO/IEC 17025:2017 valid until 29 May 2027 and an Accreditation Certificate from Kenya Accreditation Service Accrediting Inspectorate East Africa Limited as a Testing Laboratory upon satisfactory requirements of ISO/IEC 17025: 2017 valid until 29th September 2026.

37. Mr. Muturi submitted that a reading of clauses 2.2.7, 2.2.8, 2.3.1.3 and 2.3.1.4 did not require a bidder to provide accreditation certificates from the testing bodies and what was required of a bidder was to submit a type test report and certificates from the relevant authority or ISO/IEC 17025 and accreditation certificates for the testing laboratory to ISO/IEC 17025.
38. He pressed on that the letter of notification changed the requirements as provided in the Tender Document and introduced new terms that were not initially in the Tender Document.
39. Mr. Muturi submitted that to date it was not clear at what stage the Applicant was disqualified since the 1st and 2nd Respondents Memorandum of Response indicates that the Applicant did not comply with a preliminary requirement and a technical requirement.
40. With regard to the second reason for disqualification, counsel submitted that the Applicant submitted 30 site visit forms for the off-grid stations dully filled, signed and stamped by the station in charge and that only 11 forms were in reference to the subject tender and the other 19 were for a past tender. He submitted that there was no requirement for the site visit to be referenced to the subject tender and the only requirement was for the bidders to conduct a site visit and submit dully filled and signed site visit forms.



41. In support of his arguments, counsel relied on the holding by the High Court in *Republic v Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex parte Tuv Austria Turk (2020)*.

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

1st and 2nd Respondents' submissions

43. In his submissions, counsel for the 1st and 2nd Respondents, Mr. Muchai relied on pleadings and confidential documents filed before the Board on behalf of the 1st and 2nd Respondents.

44. On whether the Applicant complied with clause 2.2.7, 2.2.8, 2.3.1 & 4 of the Tender Document, Mr. Muchai submitted that clause 2.3.1 & 4 refer the Technical Evaluation criteria and the Applicant having been rendered unsuccessful at the Preliminary Evaluation stage did not proceed for further evaluation at the Technical Evaluation stage. He pointed out that in line with the provisions of clauses 2.2.7 of the Tender Document, the Applicant submitted Type Test certificates and their reports from Kenya Pipeline Company Limited, SGS Gulf Limited and SGS Saudi Arabia Limited. He further pointed out that in an attempt to comply with provisions of clauses 2.2.8 of the Tender Document, the Applicant submitted accreditation certificates for SGS Kenya Limited and Inspectorate East Africa Limited which were accreditation certificates for two different testing bodies.

45. Mr. Muchai submitted that the accreditation certificates to be submitted as per clause 2.2.8 is informed by the type test certificates and reports submitted as per clause 2.2.7 of the Tender Document and should relate to the testing bodies whose type certificates have been submitted and this being a mandatory requirement, non-compliance would lead to automatic disqualification at the Preliminary Evaluation stage.

46. In reference to the site visit, Mr. Muchai submitted that Addendum No. 1 amended ITT 6.2 of the Tender Document to provide that there will be a mandatory site visit for all the 30 off grid stations and a site visit form would be dully filled, signed and stamped by the station in charge or assistant. He further submitted that the Applicant filled, signed and stamped site visit forms for the 30 off grid stations, but only 11 forms were in reference to the subject tender while the other 19 forms were in reference to a past tender and as such, the Applicant failed to comply with the provisions of the amended clause 2.2.11 of the Tender Document.

47. Mr. Muchai pressed on that the provisions of Addendum 1 became part of the Tender Document and forms used in a previous tender cannot be part of the current tender.

48. Counsel submitted that for the Applicant to qualify as the lowest evaluated bidder, it had to pass the Preliminary Evaluation stage, the Technical Evaluation stage and the Financial stage and having been



disqualified at the Preliminary Evaluation stage, it wasn't the lowest evaluated bidder and its tender wasn't the most responsive. He further submitted that the reasons to disqualify the Applicant were justified as the Applicant failed to comply with mandatory requirements and the reasons given for its disqualification were valid.

49. On the issue of validity of the letters of notification, counsel submitted that the 1st Respondent was away from office on official duties on 27th and 28th November 2023 hence appointed Eng. Rosemary to act on his behalf and she therefore had authority to sign the letters of notification of intention to award the subject tender.

50. He urged the Board to dismiss the Request for Review with costs.

51. When asked to clarify whether there was a timeline and validity period for the site visit, Mr. Muchai submitted that the Tender Document doesn't specify timelines when the forms are to be submitted but indicated that site visit forms had to be part of the tender document and their purpose was to confirm that bidders visited the various sites.

3rd Respondent's submissions

52. In his submissions, counsel for the 3rd Respondent, Mr. Njeru, relied on pleadings filed before the Board on behalf of the 3rd Respondent.

He fully associated himself with the 1st and 2nd Respondents response to the Request for Review and submissions.

53. Mr. Njeru submitted that it was admitted at paragraph 12 of the Request for Review that the Applicant did not comply with the stipulated mandatory requirements of the Tender Document and the Applicant was asking the Board to exempt it yet the Board had no such powers.

54. On the allegation by the Applicant that its price was the lowest, counsel submitted that this only becomes relevant following conclusion of the three stages of evaluation and the Applicant having been disqualified at the Preliminary Evaluation stage, the issue of price does not arise. He referred the Board to the holding in *Republic v Public Procurement Administrative Review Board & 2 others Ex parte Coast Water Services Board (2016) eKLR*.

55. He pointed out that the 3rd Respondent emerged as the successful tenderer having complied with Tender Requirements and urged the Board to dismiss the Request for Review with costs.

Applicant's Rejoinder

56. In a rejoinder, Mr. Muturi submitted that the Applicant was not asking the Board to exempt it but was requesting for the subjecttender to be evaluated as per the requirements in the Tender Document.



57. Counsel submitted that the Applicant submitted site visit forms signed by the in charge as required in the Tender Document and that the reason for submission of site visit forms was to confirm that every bidder knows where the site is. He argued that should the site visit form not have been signed, then that would have been a different issue and that this requirement was introduced seven days to the tender submission deadline and that the requirement in the addendum did not say that previous forms would not apply. Counsel further submitted that the Applicant had sought clarification on this issue and it was not responded to.

58. With regard to the letters of notification, counsel submitted that there was no evidence on the signatory having been appointed to act for the accounting officer.

59. Mr. Muturi submitted that the requirements under clause 2.2.7 and 2.2.8 of the Tender Document are disjunctive and there was no requirement that ISO Certification would coincide with test results. He urged the Board to allow the Request for Review as prayed.

60. Upon enquiry by the Board on whether the site visit was belated hence not necessary, Mr. Muturi submitted that initially, the Tender Document required one to submit for stations one was interested in and this changed with Addendum 1 requiring bidders to submit site visit forms for all stations. He indicated that the Applicant sought

clarification on whether the forms for the previous tender would apply and this was not responded to and despite this, by indicating the previous tender in the Tender Document, this was non-material and a minor deviation as there was no indication as to timelines when those site should have been undertaken.

61. When asked to clarify whether the Applicant was notified at what stage it was disqualified, Mr. Muturi submitted that the letter of notification did not indicate the stage at which the Applicant was disqualified.

62. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 11th December 2023 was due to expire on 2nd January 2024 and that the Board would communicate its decision on or before 2nd January 2024 to all parties to the Request for Review via email.

BOARD'S DECISION

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

- i Whether the Procuring Entity's Evaluation Committee properly evaluated the Applicant's tender in accordance with the provisions of the Tender Document, Section 79 and 80(2) of the Act and Article 227(1) of the Constitution;**

- ii Whether the letter of Notification of Intention to Award dated 27th November 2023 met the threshold required in Section 87(3) of the Act read with Regulations 2020;**

- iii What orders should the Board grant in the circumstances?**

Whether the Procuring Entity's Evaluation Committee properly evaluated the Applicant's tender in accordance with the provisions of the Tender Document, Section 79 and 80(2) of the Act and Article 227(1) of the Constitution.

64. We understand the Applicant's case on this issue to be that the Procuring Entity indisqualifying its tender as communicated in the letter of notification of intention to award the subject tender dated 27th November 2023 failed to adhere to the requirements the Tender Document, the Act and the Constitution as the reasons provided for its disqualification deviated from the requirements of the Tender Document. The Applicant contends that the Procuring Entity unfairly

and unlawfully evaluated its bid simultaneously in both preliminary and technical stage of evaluation and that its bid was substantially responsive and was the lowest evaluated bidder.

65. We understand the Respondents' response on this issue to be that the Applicant's tender failed to meet the mandatory requirements provided in the Tender Document and was non-responsive as stipulated under Section 79(1) of the Act. The Respondent contend that the Evaluation Committee adhered to the set out evaluation criteria in the Tender Document and complied with the provisions of the Constitution and the Act.

66. On its part, the Interested Party associated itself with the Respondent's submissions and submitted that the Applicant failed to meet the threshold on the requirements set out in the Tender Document to warrant it being issued the orders sought in the instant Request for Review.

67. Having considered parties' submissions herein, we note that objective of public procurement is to provide quality goods and services in a system that implements the principles specified in Article 227 of the Constitution which provides as follows:

"227. Procurement of public goods and services

(1) When a State organ or any other public entity contracts for goods or services, it shall do so in

accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

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

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

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

"45. Article 227 of the Constitution provides that when procuring entities contract for goods or services they must comply with the principles of fairness, equity, transparency, competitiveness and cost-effectiveness. For there to be fairness in the public procurement

process, all bids should be considered on the basis of their compliance with the terms of the solicitation documents, and a bid should not be rejected for reasons other than those specifically stipulated in the solicitation document.

46. However, there is a need to appreciate the difference between formal shortcomings, which go to the heart of the process, and the elevation of matters of subsidiary importance to a level, which determines the fate of the tender. The Evaluation Committee has a duty to act fairly. However, fairness must be decided on the circumstances of each case..."

69. Section 58 of the Act requires a procuring entity to use a standard tender document which contains sufficient information and provides as follows:

"(1) An accounting officer of a procuring entity shall use a standard procurement and asset disposal documents issued by the Authority in all procurement and asset disposal proceedings.

(2) The tender documents used by a procuring entity under subsection (1) shall contain sufficient information to allow fairness, equitability, transparency, cost-effectiveness and competition

among those who may wish to submit their applications.”

70. Further Section 60() provides as follows:

“(1) An accounting officer of a procuring entity shall prepare specific requirements relating to the goods, works or services being procured that are clear, that give a correct and complete description of what is to be procured and that allow for fair and open competition among those who may wish to participate in the procurement proceedings.”

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

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

72. Section 80 of the Act is instructive on how evaluation and comparison of tenders should be conducted by a procuring entity as follows:

"80. Evaluation of tender

- (1) The evaluation committee appointed by the accounting officer pursuant to Section 46 of the Act, shall evaluate and compare the responsive tenders other than tenders rejected.**
- (2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.**
- (3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)-**

 - (a) the criteria shall, to the extent possible, be objective and quantifiable;**
 - (b) each criterion shall be expressed so that it is applied, in accordance**



with the procedures, taking into consideration price, quality, time and service for the purpose of evaluation; and
(4)"

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

74. Turning to the circumstances in the instant Request for Review, we note that the Applicant was notified in a letter of Notification of Intention to Award dated 27th November 2023 that its tender was unsuccessful in the subject tender as follows:

"....."
Reason For disqualification;

- ***You did not submit a valid accreditation certificate for the relevant testing laboratory to ISO/IEC 17025 for the type tests reports;***
- ***You failed to visit all the Off-Grid Power Stations as required in the tender. You submitted eleven (11) duly filled and stamped site visit forms for the relevant tender while nineteen (19) were for a past tender.***

.....”

75. We note that the above reasons for disqualification of the Applicant’s tender fell under mandatory requirements of the Tender Document provided under Part 1- Preliminary Evaluation Criteria Under clause 28.2 of the ITT of Section III- Evaluation and Qualification Criteria at pages 33 to 34 of the Tender Document as follows:

“Part 1 – Preliminary Evaluation Criteria Under clause 28.2 of the ITT. These are mandatory requirements. This shall include confirmation of the following: -

.....

2.2.7 Submission of Copies of relevant Type Test Certificates and their Reports or Test Certificate and their Reports from the designated bodies;

2.2.8 Submission of a copy of accreditation certificate for the testing body to ISO/IEC 17025 (Applicable for firms without KEBS certification).

.....
2.2.11 Site visit forms dully filled signed and stamped by station in charge or assistant.

Tenders will proceed to the Technical Stage only of they qualify in compliance with Part 1 above, Preliminary Evaluation under clause 28.3 of the ITT.”

76. Additionally, ITT 10(j) of Section II – Tender Data Sheet at page 27 to 28 of the Tender Document provides as follows:

ITT Reference	Particulars Of Appendix To Instructions To Tenders
.....
ITT 10 (j)	<p>The Tenderer shall submit the following additional documents in its Tender: [list any additional documents not already listed in ITT 11.1 that must be submitted with the Tender]</p> <p>a) Guaranteed Technical Particulars (GTPs)</p> <p>b) Type Test Certificates and reports</p> <p>c) KEBs Standardization Mark and/or Mark of Quality</p> <p>d) ISO 9001:2015 Certificate for foreign</p>

	<p><i>bidders</i></p> <p><i>e) Four (4) Reference Letters and/or Certificate of Completion for completed orders/contracts of for similar goods</i></p> <p><i>f) Copy of Accreditation Certificate to ISO/IEC 17025 for the Testing Lab</i></p> <p><i>g) Manufacturer's Warranty</i></p> <p><i>h) Manufacturer's Authorization</i></p> <p><i>i) Any other documents or item required under Section III – Evaluation and Qualification Criteria</i></p>

77. We further note that Addendum No. 1 amended the Tender Document as follows:

"

2. SECTION II – TENDER DATA SHEET (TDS)

Prospective bidders are notified that ITT 6.2 has been amended as follows:

ITT	Particulars	Amendment
6.2	A pre-tender conference will not be held however there will be a Mandatory Site for each station of	A pre-tender conference will not be held however there will be a Mandatory Site visit for all the stations. Prospective

	<i>Interest</i>	<i>Bidders shall be required to visit the stations any day during normal working hours before tender closing date.</i>
--	------------------------	---

3. SECTION III – EVALAUTION AND QUALIFICATION CRITERIA

Prospective bidders are notified that Part 1 – Preliminary Evaluation Criteria clause 2.2.11 has been amended as follows: -

<i>Clause</i>	<i>Particulars</i>	<i>Amendment</i>
<i>2.2.11</i>	<i>Site visit forms dully filled signed and stamped by station in charge or assistant</i>	<i>Submission of site visit forms for all the 30 off grid station dully filled signed and stamped by station in charge or assistant</i>

.....”

78. In view of the above, tenderers were required to comply with all the mandatory requirements at the Preliminary Evaluation stage for their respective tenders to proceed to the Technical Evaluation stage. If a tenderer did not satisfy even one of the mandatory requirements at the Preliminary Evaluation stage, its tender would be found non-

responsive and would be disqualified from proceeding to the Technical Evaluation stage.

79. Mandatory requirement 2.2.7 at page 33 of Section III – Evaluation and Qualification Criteria of the Tender Document read with ITT 10(j) at page 28 of Section II – Tender Data Sheet of the Tender Document required bidders to submit copies of relevant Type Test Certificates and their Reports or Test Certificate and their Reports from the designated bodies.

80. Mandatory requirement 2.2.8 at page 33 of Section III – Evaluation and Qualification Criteria of the Tender Document read with ITT 10(j) at page 28 of Section II – Tender Data Sheet of the Tender Document required bidders to submit a copy of accreditation certificate for the testing body/lab to ISO / IEC 17025 and this was applicable for firms without KEBS certification.

81. Mandatory requirement 2.2.11 as amended in Addendum 1 required bidders to attend a mandatory site visit for all the 30 off grid stations during normal working hours before the subject tender's closing date and submit site visit forms dully filled signed and stamped by station in charge or assistant.

82. During the hearing, counsel for the Applicant, Mr. Muturi submitted that in full compliance of the mandatory requirements:

- a) In response to mandatory requirement 2.2.7, the Applicant submitted Kenya Pipeline Company Limited and SGS test reports and certification;
- b) In response to mandatory requirement 2.2.8, the Applicant submitted the Certificate of Accreditation of SGS Kenya Limited, Facility Accreditation Number T0151 to ISO/IEC 17025:2017 valid until 29th May 2027 and an Accreditation Certificate from Kenya Accreditation Service Accrediting Inspectorate East Africa Limited as a Testing Laboratory upon satisfactory requirements of ISO/IEC 17025: 2017 valid until 29th September 2026. He argued that a reading of clause 2.2.7, 2.2.8, 2.3.1.3 and 2.3.1.4 did not in any way require a bidder to provide accreditation certificates from the testing bodies and what was required was for a bidder to submit a type test report and certificates from the relevant authority or ISO/ IEC 17025 and accreditation certificates for the testing laboratory to ISO/IEC 17025 and that the Respondents were now attempting to introduce new terms not provided in the Tender Document; and
- c) In response to the mandatory requirement 2.2.11 as amended in Addendum 1, the Applicant submitted 30 site visit forms for the off-grid stations dully filled, signed and stamped by the station in charge and conceded that 11 forms were in reference to the subject tender and the other 19 were for a past tender

arguing that there was no requirement for the site visit to be referenced to the subject tender and that the only requirement was for bidders to conduct a site visit and evidence the same. He submitted that it was non-material and a minor deviation for the 19 site visit forms to indicate the previous tender.

83. We have studied the Applicant's original tender submitted to the Board by the Respondent as part of the confidential documents in respect to the subject tender and note as follows:

As regards mandatory requirement 2.2.8:

84. The Applicant submitted Accreditation certificates for the following testing laboratories/bodies:

- a) SGS Kenya Limited-accredited by South Africa National Accreditation System (SANAS) Facility Accreditation Number T0151 to ISO/IEC 17025:2017 valid until 29th May 2027
- b) Inspectorate East Africa Limited accredited by Kenya Accreditation Services (KENAS) of ISO/IEC 17025: 2017 valid until 29th September 2026.

85. Having carefully perused the requirement under mandatory requirement 2.2.8 at page 33 of Section III – Evaluation and Qualification Criteria of the Tender Document read with ITT 10(j) at page 28 of Section II – Tender Data Sheet of the Tender Document, and having established that a tenderer was required to submit a copy of accreditation certificate to ISO/IEC 17025 for the Testing

Body/Lab, this can only be taken to mean that the accreditation certificate required under mandatory requirement 2.2.8 was in regard to the testing lab/body that a tenderer provided under mandatory requirement 2.2.7.

86. We note that the Applicant submitted Type Test certificates and their reports from the following testing bodies:

- a) Kenya Pipeline Company Limited at pages 23,24 and 25 of its bid;
- b) SGS Gulf Limited at pages 26 and 27 of its bid; and
- c) SGS Saudi Arabia Limited pages 28-30 of its bid.

87. As such, the Applicant having submitted Type Test Certificates and Reports from the aforementioned testing labs/bodies ought to have submitted a copy of accreditation certificate to ISO/IEC 17025 for the said testing labs/bodies (i.e. Kenya Pipeline Company Limited, SGS Gulf Limited, SGS Saudi Arabia Limited) in compliance to mandatory requirement 2.2.8. In the circumstances, it is clear that the Applicant did not conform to the provisions of mandatory requirement 2.2.8 of the Tender Document.

As regard mandatory requirement 2.2.11 as amended in Addendum 1:

88. It is not in dispute that the Applicant submitted 19 site visit forms in reference to a past tender for Procurement of Supply and Delivery of

Low Sulphur Diesel to Off Grid Power Station which had been cancelled. A tenderer was required to make a site visit to all the 30 off-grid stations and submit 30 site visit forms for the off-grid stations dully filled, signed and stamped by the station in charge. We have established that mandatory requirement 2.2.11 as amended in Addendum 1 required bidders to attend a mandatory site visit for all the 30 off grid stations during normal working hours before the subject tender's closing date and submit site visit forms dully filled signed and stamped by station in charge or assistant.

89. In essence, the Applicant was required to make a site visit to all the 30 off grid stations during normal working hours and before the subject tender's closing date. As such for all site visit forms to be considered as dully filled, they ought to have been signed and stamped by the station in charge or assistant during the pendency of the subject tender and before the same closed. A site visit form referring to a previous tender and not the subject tender cannot be said to have been dully filled in compliance with mandatory requirement 2.2.11 as amended in Addendum 1 in the subject tender.

90. Section 79(1) of the Act provides for responsiveness of tenders as follows:

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

91. Responsiveness serves as an important first hurdle for tenderers to overcome. From the above provision, a tender only qualifies as a responsive tender if it meets all eligibility and mandatory requirements set out in the tender documents. In the case of **Republic v Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020] eKLR** the High Court stated that:

"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."

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

"74. Preliminary evaluation of open tender

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

- (a) a tenderer complies with all the eligibility requirements provided for under section 55 of the Act;***
- (b) the tender has been submitted in the required format and serialized in accordance with section 74(1)(i) of the Act;***
- (c) any tender security submitted is in the required form, amount and validity period, where applicable;***

- (d) the tender has been duly signed by the person lawfully authorized to do so through the power of attorney;***
- (e) the required number of copies of the tender have been submitted;***
- (f) the tender is valid for the period required;***
- (g) any required samples have been submitted; and***
- (h) all required documents and information have been submitted.***

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

94. Section 79 (2) and (3) of the Act provides as follows with respect to minor deviations:

"(2) A responsive tender shall not be affected by-
(a) minor deviations that do not materially depart from the requirements set out in the tender document; or

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

(3) A deviation described in subsection (2)(a) shall-

(a) be quantified to the extent possible; and

(b) be taken into account in the evaluation and comparison of tenders.

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

96. In **Miscellaneous Civil Application 85 of 2018 Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR** the High Court considered what amounts to a minor deviation and determined as follows:

The term "acceptable tender" means any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document. A tender may be regarded as acceptable, even if it contains minor deviations that do not materially alter or

depart from the characteristics, terms, conditions and other requirements set out in the tender documents or if it contains errors or oversights that can be corrected without touching on the substance of the tender. Any such deviation shall be quantified, to the extent possible, and appropriately taken account of in the evaluation of tenders. A tender shall be rejected if it is not acceptable....

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.”

97. It is evident that a procuring entity cannot waive a mandatory requirement or term it as a “minor deviation” since a mandatory requirement is instrumental in determining the responsiveness of a tender and is a first hurdle that a tender must overcome in order to be considered for further evaluation. It is clear from the foregoing case that a minor deviation (a) does not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the tender documents; (b) may be an error or oversight that can be corrected without touching on the substance of the tender; and (c) can be quantified, to the extent possible, and appropriately taken account of in the evaluation of tenders.

98. We are therefore not persuaded by the Applicant’s arguments to consider that its tender was substantially responsive and that any minor deviations in its tender were immaterial and would not affect the competitive position of other tenders as public procurement espouses the principle of competition which requires that participating tenderers should compete on equal footing such that any non-compliance on any tender requirement calls for the automatic disqualification of the non-compliant tender.

99. In saying so, the Board is guided by the holding in **Republic v Public Procurement Administrative Review Board ex parte**

Guardforce Group Limited; Pwani University & 2 Others (Interested Parties) [2021] eKLR where Justice E.K. Ogola, held that;

"...it becomes apparent to this court that the aspect of compliance with the mandatory requirement of the tender document aims to promote fairness, equal treatment, good governance, transparency, accountability and to do away with unfairness. Failure to conform to this mandatory requirement, and/or exempt or give an opportunity to those who had not earlier on conformed to this mandatory requirement translates to unequal and unfair treatment of other tenderers and, if allowed, may encourage abuse of power and disregard of the law by not only bidders, but also procuring entities."

100. Considering the above, we are left with the inevitable conclusion that the Applicant failed to comply with mandatory requirement 2.2.8 and mandatory requirement 2.2.11 as amended in Addendum 1 of the Tender Document.

101. In the circumstances, the Board finds that the Evaluation Committee properly evaluated the Applicant's tender and disqualified the Applicant at the Preliminary Evaluation stage in accordance with the provisions of the Tender Document, Section 80(2) of the Act and Article 227(1) of the Constitution.

Whether the letter of Notification of Intention to Award dated 27th November 2023 met the threshold required in Section 87(3) of the Act read with Regulations 2020;

102. The Applicant contends that the letter of Notification of Intention to Award dated 27th November 2023 is invalid as the same was not issued by the 1st Respondent. On their part, counsel for the 1st and 2nd Respondents, Mr. Muchai, submitted during the hearing that Eng. Rosemary Oduor executed the notification letters in acting capacity for the 1st Respondent pursuant to an acting appointment issued by the 1st Respondent who was away on official duties.

103. Section 87 of the Act is instructive on how notification of the outcome of evaluation of the successful and unsuccessful tenderers should be conducted by a procuring entity. Section 87 provides as follows:

"87. Notification of intention to enter into a contract

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

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

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

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

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

"82. Notification of intention to enter into a contract

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

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

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

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

106. We are also cognizant of the provisions of section 69 of the Act on procurement approvals and delegation of responsibility which reads:

"(1) All approvals relating to any procedures in procurement shall be in writing and properly dated, documented and filed.

(2) No procurement approval shall be made to operate retrospectively to any date earlier than the date on which it is made except on procurements in response to an urgent need.

(3) In approving procurements relating to an urgent need, the accounting officer shall be furnished with adequate evidence to verify the emergency.

(4) No procurement approval shall be made by a person exercising delegated authority as an accounting officer or head of the procurement function unless such delegation has been approved in writing by the accounting officer or the head of the procurement unit, respectively.

(5) An accounting officer of a procuring entity shall maintain specimen signatures of all persons authorised to make approvals within the procurement process and these signatures shall be availed to all staff and members where applicable.

(6) Responsibility for each approval made in the procurement procedure shall rest with the individual

signatories and accounting officer, whether he or she delegated the authority or not.”

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

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

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

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

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

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

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

(1) Every public officer shall maintain high standards of professional ethics

(2) For the purposes of subsection (1), a public officer maintains high standards of professional ethics if that public officer (a).....;

(b)

(c) is transparent when executing that officer's functions;

(d) can account for that officer's actions;

(e)

(f)

(g); and

(h) observes the rule of law.

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

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

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

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

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

109. From the above excerpt, it is clear that an accounting officer of a procuring entity may delegate his/her authority to nominate tender opening and evaluation committees or to issue letters of notification

to successful and unsuccessful bidders alike due to his/her inability to act in certain circumstances. Nevertheless, as a public officer, an accounting officer is bound by principles of leadership and integrity under the Constitution and other relevant legislation cited hereinabove and therefore remains accountable for acts performed by persons to whom he has delegated authority to act on his behalf.

110. Turning to the circumstances in the instant Request for Review, we note that part of the confidential documents submitted by the 1st Respondent pursuant to Section 67(3)(e) of the Act is an Acting Appointment dated 27th November 2023 which reads in part as follows:

"

RE: ACTING APPOINTMENT – ENG ROSEMARY ODUOR
I will be away on official duties from 27/11/2023 to 28/11/2023 both days inclusive.
During my absence, Eng. Rosemary Oduor S/N 13164 General Manager, Commercial Services & Sales will act on my behalf.
(signed)
DR. ENG. JOSEPH SIROR"

111. In view of the above Acting Appointment, it is our considered view that a delegation of authority has been demonstrated by the 1st and 2nd Respondents' and that the letters of notification of the outcome of the subject tender dated 27th November 2023 issued to tenderers in

the subject tender met the threshold required in Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020 and are hereby valid.

What orders should the Board grant in the circumstances?

112. We have established that the Evaluation Committee evaluated the Applicant's tender in accordance with the provisions of the Tender Document, Section 80(2) of the Act and Article 227(1) of the Constitution. Consequently, it is only just and fair that we dismiss, which we hereby do, the instant Request for Review for lacking in merit.

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

FINAL ORDERS

114. 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 11th December 2023 and filed on even date:

A. The Request for Review dated 11th December 2023 and filed on even date be and is hereby dismissed.

B. The Respondent is hereby directed to proceed with the procurement proceedings of Tender No. KP1/9A.3/OT/19/23-24 for Procurement of Supply and Delivery of Low Sulphur to Diesel to Off-Grid Power Stations to its logical conclusion in accordance with the Tender Document, the Act, and the Constitution.

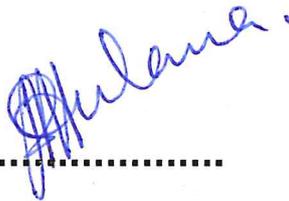
C. Each party shall bear its own costs in the Request for Review.

Dated at NAIROBI this 2nd Day of January 2024.



.....
PANEL CHAIRPERSON

PPARB



.....
SECRETARY

PPARB



