

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 110/2023 OF 15<sup>TH</sup> DECEMBER 2023**

**BETWEEN**

**BELYNE FREIGHT AND LOGISTICS LIMITED.....APPLICANT**

**AND**

**ACCOUNTING OFFICER,**

**KENYA PORTS AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**KENYA PORTS AUTHORITY.....2<sup>ND</sup> RESPONDENT**

**AUTO EXPRESS LIMITED.....1<sup>ST</sup> INTERESTED PARTY**

**TIREWORLD.....2<sup>ND</sup> INTERESTED PARTY**

**SPECIALITY TYRES KENYA LIMITED.....3<sup>RD</sup> INTERESTED PARTY**

**SILVERSTONE TYRES.....4<sup>TH</sup> INTERESTED PARTY**

**HAJI MOTORS LIMITED.....5<sup>TH</sup> INTERESTED PARTY**

**UNIAH VENTURES LIMITED.....6<sup>TH</sup> INTERESTED PARTY**

Review against the decision of the Accounting Officer, Kenya Ports Authority in relation to Tender No. KPA/195/2022-2023/PSM for Supply of Tyres, Tubes and Associated Products.

**BOARD MEMBERS PRESENT**

1. Ms. Alice Oeri - Panel Chairperson
2. Dr. Susan Mambo - Member
3. Mr. Daniel Langat - Member

**IN ATTENDANCE**

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

**PRESENT BY INVITATION**

**APPLICANT BEYLINE FREIGHT AND LOGISTICS LIMITED**

Ms. Shabana Osman -Advocate, S.S. Osman & Company Advocates

**RESPONDENTS ACCOUNTING OFFICER, KENYA PORTS AUTHORITY**

**KENYA PORTS AUTHORITY**

Mr. Ham Lagat -Advocate, Ham & Hamsly Advocates

**1<sup>ST</sup> INTERESTED PARTY AUTO EXPRESS LIMITED**

N/A -N/A

**2<sup>ND</sup> INTERESTED PARTY TIREWORLD**

N/A -N/A

**3<sup>RD</sup> INTERESTED PARTY SPECIALTY TYRES KENYA LIMITED**

Mr. Onesmus Kirui -Representative, Specialty Tyres Kenya Limited

**4<sup>TH</sup> INTERESTED PARTY SILVERSTONE TYRES**

Mr. Joseph Wainaina - Representative, Silverstone Tyres

**5<sup>TH</sup> INTERESTED PARTY HAJI MOTORS LIMITED**

NA -N/A

**6<sup>TH</sup> INTERESTED PARTY UNIAH VENTURES LIMITED**

N/A N/A

**BACKGROUND OF THE DECISION**

**The Tendering Process**

1. Kenya Ports Authority, the Procuring Entity together with the 1<sup>st</sup> Respondent herein, invited submission of sealed tenders in response to Tender No. KPA/195/2022-2023/PSM for Supply of Tyres, Tubes and Associated Products using an open competitive tender method. The subject tender's submission deadline was Tuesday, 25<sup>th</sup> July 2023 at 10.00 a.m.

**Addenda**

2. The Procuring Entity issued 4 Addenda in the subject tender offering clarification on various inquiries that had been made by interested candidates. The 4<sup>th</sup> Addendum set the tender submission deadline as Friday, 18<sup>th</sup> August 2023 at 10:00 a.m.

### **Submission of Tenders and Tender Opening**

3. According to the signed Tender Opening Minutes for 18<sup>th</sup> August 2023, submitted under the Confidential File submitted by the Procuring Entity, the following 30 tenderers were recorded as having submitted their respective tenders in response to the subject tender by the tender submission deadline:

<b>No.</b>	<b>Name of Tenderer</b>
<b>1.</b>	<b>Mazam Investments Limited</b>
<b>2.</b>	<b>Tash Investments</b>
<b>3.</b>	<b>Uniah Ventures</b>
<b>4.</b>	<b>Fexity Investments</b>
<b>5.</b>	<b>Diatom International Limited</b>
<b>6.</b>	<b>Autoxpress Limited</b>
<b>7.</b>	<b>Haji Motors Limited</b>
<b>8.</b>	<b>Kerim Enterprises</b>
<b>9.</b>	<b>Bluestream Investments</b>
<b>10.</b>	<b>Daycan Trading Limited</b>
<b>11.</b>	<b>Belyne Freighters and Logistics Limited</b>
<b>12.</b>	<b>Imali Auto Tyres</b>
<b>13.</b>	<b>Specialty Tyres</b>
<b>14.</b>	<b>Achelis Material Handling</b>
<b>15.</b>	<b>Taurus Solutions Limited</b>
<b>16.</b>	<b>Sayyarati Limited</b>
<b>17.</b>	<b>Lexpire K. Limited</b>
<b>18.</b>	<b>Kingsway Tyres Limited</b>

<b>19.</b>	<b>Ports &amp; Harbours Support</b>
<b>20.</b>	<b>Cavide Co. Limited</b>
<b>21.</b>	<b>Stock IT Limited</b>
<b>22.</b>	<b>Tyre World Limited</b>
<b>23.</b>	<b>Bek Supplies Limited</b>
<b>24.</b>	<b>Khalif Supplies Limited</b>
<b>25.</b>	<b>Assurena Enterprises</b>
<b>26.</b>	<b>Generation Tyres Limited</b>
<b>27.</b>	<b>Tigmon Investments</b>
<b>28.</b>	<b>Silverstone Tyres</b>
<b>29.</b>	<b>Budget Supplies Limited</b>
<b>30.</b>	<b>Fairates Tyres</b>

### **Evaluation of Tenders**

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

## **Preliminary Evaluation**

5. At this stage of the evaluation, the submitted tenders were to be examined using the criteria set out as Clause 2.2. Preliminary Evaluation for Determination of Responsiveness under Section III – EVALUATION AND QUALIFICATION CRITERIA on pages 35 to 39 of the Tender Document.
6. The evaluation was to be on a Yes/No basis and tenderers who failed to meet any criterion outlined at this Stage would be disqualified from further evaluation.
7. At the end of the evaluation at this stage, 13 tenders were found unresponsive with only 17 tenders including those of the Applicant and the Interested Parties qualifying for further evaluation at the Technical Evaluation Stage.

## **Technical Evaluation**

8. The Evaluation Committee was required at this stage to examine tenderers successful at the Preliminary Stage using the criteria set out as Clause 2.3 Evaluation of Technical aspects of the Tender under Section III – EVALUATION AND QUALIFICATION CRITERIA on page 39 of the Tender Document.
9. At this stage, tenderers were to be examined on a Yes/No basis for compliance with the Procuring Entity's requirements under Section V 'Schedule of Requirements'. In order to qualify for further evaluation at

the Financial Stage, a tenderer was required to meet all the requirements at this stage

10. At the end of the evaluation at this stage, 4 tenders were found unresponsive on all the line items and were disqualified at this stage. Also, 2 other tenders were found unresponsive in brands whose manufacturer's authorization did not meet the technical requirements.

### **Financial Evaluation**

11. At this stage of evaluation, the Evaluation Committee was required to examine the tenders per line item using the Criteria set out as Clause 2.4 Price Evaluation under Section III– EVALUATION AND QUALIFICATION CRITERIA on page 39 of the Tender Document.
12. Tenders were to be examined by price comparison from among the qualified tenderers and the successful tender on a line item would be one with the lowest tender price for that line item. Further, abnormally low tenders and abnormally high tenders would equally be rejected.
13. At the end of the evaluation at this stage, it was established that the Interested Parties' tenders were the lowest evaluated tenders in the respective line items in the subject tender.

### **Evaluation Committee's Recommendation**

14. Accordingly, the Evaluation Committee recommended the award of the various line items in subject tender to the Interested Parties at their respective tender prices for a period of 3 years.

## **Professional Opinion**

15. In a Professional Opinion dated 22<sup>nd</sup> November 2023 (hereinafter referred to as the "Professional Opinion"), the Procuring Entity's General Manager, Supply Chain Management, Ms. Eveline Shigholi, reviewed the manner in which the subject procurement process was undertaken including the evaluation of tenders and agreed with the Evaluation Committee's recommendation for the award of the subject tender to the Interested Party. The 1<sup>st</sup> Respondent concurred with the Professional Opinion and approved it on 24<sup>th</sup> November 2023.

## **Notification to Tenderers**

16. Accordingly, tenderers were notified of the outcome of the evaluation tenders submitted in response to the subject tender vide letters dated 4<sup>th</sup> December 2023.

## **REQUEST FOR REVIEW**

17. On 15<sup>th</sup> December 2023, the Applicant through the firm of S.S. Osman & Company Advocates, filed a Request for Review dated 15<sup>th</sup> December 2023 supported by an affidavit sworn on 15<sup>th</sup> December 2023 by Everlyne Mbinya Sumbi, a Director at the Applicant as well as a signed Statement dated 15<sup>th</sup> December 2023, by Benard Nyarige Ong'ayo, the Applicant's Procurement Manager, seeking the following orders from the Board in verbatim:

***1. That the evaluation process and the culminating decision of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in the procurement proceedings with respect to TENDER NO. KPA/195/2022-***

***23/PSM-SUPPLY OF TYRES, TUBES AND ASSOCIATED PRODUCTS be and is hereby declared unlawful and unprocedural;***

- 2. That the decision of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents made vide a letter dated 4<sup>th</sup> December, 2023 addressed to the Applicant in the procurement proceedings with respect to TENDER NO. KPA/195/2022-23/PSM-SUPPLY OF TYRES, TUBES AND ASSOCIATED PRODUCTS be and is hereby declared unlawful and is hereby cancelled and set aside;***
- 3. That the evaluation process and the culminating decision of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents awarding the 3<sup>rd</sup> to 8<sup>th</sup> Respondents the awarded items subject to this review in the procurement proceedings with respect to TENDER NO. KPA/195/2022-23/PSM-SUPPLY OF TYRES, TUBES AND ASSOCIATED PRODUCTS be and is hereby cancelled, set aside, vacated and annulled;***
- 4. That the Applicant BELYNE FREIGHT AND LOGISTICS LIMITED be and is hereby declared the successful tender for items listed as 2,3,6-10 and 12-16 (hereinafter referred to as "the awarded items") on the Applicant's Price Schedule on pages 199 to 201 of the Applicant's submitted tender documents;***
- 5. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents shall issue a notification of successful award in favour of the Applicant with respect to the awarded items subject to this review in the procurement proceedings with respect to TENDER NO.***

***KPA/195/2022-23/PSM-SUPPLY OF TYRES, TUBES AND ASSOCIATED PRODUCTS and issue the Applicant with a contract thereof;***

***6. That for the interests of justice and fairness the Board do grant any other orders as it deems fit.***

***7. That the Applicant be awarded the costs of these proceedings;***

***8. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents do bear the costs of these proceedings.***

18. In a Notification of Appeal and a letter dated 15<sup>th</sup> December 2023, Mr. James Kilaka, the Acting Board 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 the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondents was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 15<sup>th</sup> December 2023.
19. In response to the Request for Review, on 21<sup>st</sup> December 2023, the Respondents through the law firm of Ham & Hamsly Advocates filed a Notice of Appointment of Advocates.

20. Vide letters dated 22<sup>nd</sup> 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 24<sup>th</sup> March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within 3 days from 22<sup>nd</sup> December 2023.
21. On 22<sup>nd</sup> December 2023, the Acting Board Secretary, sent out to the parties a Hearing Notice notifying parties and all tenderers in the subject tender that the hearing of the instant Request for Review would be by online hearing on 28<sup>th</sup> December 2023 at 11.00 a.m. through the link availed in the said Hearing Notice.
22. On 23<sup>rd</sup> December 2023, the 4<sup>th</sup> Interested Party wrote a letter to the Board Secretary indicating that they were satisfied with the manner in which the tender process was carried out.
23. On 27<sup>th</sup> December 2023, the Respondents filed a Memorandum of Response of even date supported by an affidavit sworn on the same day by Daniel Amuyunzu, the Procuring Entity's Principal Supplies Chain Officer. The Respondents also submitted the confidential documents in the subject tender pursuant to Section 67(3)(e) of the Act.
24. On 28<sup>th</sup> December 2023 at 11:00 a.m. the Applicant and the Respondents joined the online hearing session through their respective Advocates. There was no representative on the part of any of the Interested Parties.

25. The Board read out to the parties the documents that had been filed in the Request for Review and sought for parties' confirmation that those were the documents that had been filed and served upon them. Parties' Advocates confirmed having filed and been served with the said documents.
26. However, before the Board gave hearing directions in the matter, Counsel for the Applicant, Ms. Osman made an application for an adjournment to allow the Applicant file a Supplementary Affidavit as well as Written Submissions, the Respondents having served their Response upon the Applicant late in the day on the eve of the hearing.
27. Counsel for the Respondents, Mr. Lagat apologized for the late filing of the Respondents' Memorandum of Response attributing this to the Respondents' officers being away for the Christmas holiday as at the time he received instructions to come on record for the Respondents. He indicated that the Respondents were not opposed to the Applicant's request for adjournment as they equally desired to file Written Submissions and their Bundle of Authorities in the matter.
28. The Board considered the Applicant's request for adjournment above and returned the following directions to parties:
  - i. The Applicant would have until 4.00 p.m. on 28<sup>th</sup> December 2023 to file and serve their Supplementary Affidavit and Written Submissions;

- ii. The Respondents would have until 8.00 a.m. on 29<sup>th</sup> December 2023 to file and serve their Written Submissions and Bundle of Authorities;
  - iii. Any late filings would be struck out and not considered;
  - iv. The hearing of the Request for Review was deferred to 29<sup>th</sup> December 2023 at 12:00 noon; and
  - v. During the hearing, each party would have 10 minutes to highlight their case with the Applicant being assigned an extra 5 minutes to offer any rejoinder in respect of the parties' responses to the Request for Review.
29. On the same day, 28<sup>th</sup> December 2023, the Applicant filed a Supplementary Affidavit sworn on 28<sup>th</sup> December 2023 by Bernard Nyarige Ong'ayo. On the same day, the Applicant also filed Written Submissions and Bundle of Authorities of even date.
30. On the morning of 29<sup>th</sup> December 2023, the Respondents filed Written Submissions of even date. Later on, the same day, 29<sup>th</sup> December 2023 at 12:00 noon parties joined the online hearing session.
31. Counsel for the Applicant and Respondents confirmed compliance with the Board's directions on the filings to be made subsequent to the 28<sup>th</sup> December 2023 online hearing. Thereafter the Board directed that the hearing would proceed as per its previous directions with the addition that the 4<sup>th</sup> Interested Party would equally be given 2 minutes to highlight its case as it was the only Interested Party that filed a document in response to the Request for Review.

## **PARTIES SUBMISSIONS**

### **Applicant's Submissions**

32. Counsel for the Applicant, Ms. Osman submitted that the Request for Review was brought under Sections 167(1) and 70 of the Act as well as Regulation 203(1) of the Regulations 2020 following the Procuring Entity's decision finding that the Applicant's tender was not the lowest evaluated tender in the subject tender. She contended that the Applicant was the lowest evaluated tender in respect of line items 2,3, 6 to 10 and 12 to 16.
33. Ms. Osman submitted that public procurement is guided by the Constitution, the Act and Regulations 2020 and that in accordance with Section 86(1) of the Act, the Applicant should have been found as the successful tenderers in respect of line items 2,3, 6 to 10 and 12 to 16 of the subject tender.
34. She pointed out that the Respondents had in their Supporting Affidavit by Daniel Amuyunzu indicated that the Applicant could not be a judge on its being the lowest evaluated tender but a scrutiny of the Applicant's price list and Appendix 1 confirms that the Applicant was the lowest evaluated tender in the stated line items.
35. Counsel submitted that the financial evaluation stage is preceded by preliminary and technical evaluation stages and that having been evaluated at the financial evaluation stage, the Applicant responsive to

the Tender Document's requirements at both the preliminary and technical evaluation stages.

36. According to Counsel, the Respondents were speculative as to the reasons for the disqualification of the Applicant as their response to the Request for Review states that the reason could be that either the Applicant was not responsive to the technical requirements or was not the lowest evaluated tender in the named line items.
37. Ms. Osman equally urged that new issues were raised in the Respondents' Written Submissions and she urged the Board to ignore them. Nonetheless, she argued that the Respondents were contradictory in their responses since at paragraph 13 of the Respondents' Submissions, the Respondents indicated that item catalogue 1812801091 was awarded to the 3<sup>rd</sup> Interested Party because they provided load capacity and tread depth specification that was higher than what the Procuring Entity requested for yet under paragraph 1 and 6 the Respondents indicate that they were bound by the requirements under the Tender Document.
38. Counsel relied on ***PPARB Application No. 40 of 2004; Zadock Furniture Systems Limited v Kenya Airports Authority*** for the proposition that it is the primary duty of a Procuring Entity to provide specifications that are clear, correct and complete and where appropriate, specifications should be based on international standards or otherwise recognized standards under Regulation 14(3) of the Regulations 2020.

39. Ms. Osman maintained that the argument that the Applicant's prices were abnormally low was an afterthought as it was not the reason in the Notification of Intention to Award the subject tender.
40. Counsel argued that the prices submitted by the Applicant were within the market range citing that the Applicant had previously supplied the Procuring Entity and other customers the very items in the tender at the same prices. She invited the Board to look at pages 137 to 139 of the Applicant's tender against the blank Tender Document to confirm that the Applicant's tender was responsive to the tender requirements.
41. She submitted that Section 87(3) of the Act requires the Accounting Officer to notify all unsuccessful tenderers the reasons as to why their tenders were unsuccessful.
42. Relying on ***PPARB Application No. 31 of 2017; Muturi Maina t/a Samjush Contractors & Supplies v Kenya Airports Authority***, it was argued that failure to award a tender to the lowest evaluated tender offends the spirit of Article 227 of the Constitution as it does not maximize value for money. Counsel therefore urged the Board to allow the Request for Review.

### **Respondents' Submissions**

43. Counsel for the Respondents, Mr. Lagat, indicated that the Respondents were relying on their filed documents i.e. Memorandum of Response, Supporting Affidavit and Written Submissions.

44. He argued that the instant Request for Review should be dismissed. According to Counsel, there was a minimum requirement given by the Procuring Entity on the prices and that this was meant to encourage competition among the interested participants in the subject tender.
45. Mr. Lagat submitted that the criteria at the Financial Evaluation Stage was verifying financials, price comparison and evaluating the lowest tender per line items while rejecting abnormally low and high tenders. He submitted that the prices given by the Applicant in the respective line items were abnormally low.
46. Counsel argued that the evaluation process in the subject tender was objectively conducted in compliance with Section 86(1) of the Act. Relying on ***Republic v Public Procurement Administrative Review Board & 20rs Ex parte Coast Water Services Board & anor [2016]eKLR*** it was argued that a Procuring Entity should consider all the aspect of the Tender Document.

#### **4<sup>th</sup> Interested Party's Submissions**

47. The 4<sup>th</sup> Interested Party's representative, Mr. Joseph Wainaina, noted that the Applicant's prices in respect of line item 8 had a huge difference with that of the successful tender for that line item. He therefore questioned whether the Applicant had obtained the Manufacturer's Authorization and whether the Applicant's tender met the requirements under the Tender Document.

### **Applicant's Rejoinder**

48. In a brief a rejoinder, Counsel for the Applicant, Ms. Osman, submitted that Article 227(1) of the Constitution espouses the principle of cost-effectiveness which according to her entails public bodies obtaining goods at the lowest evaluated cost with regard to value for money.
49. Counsel also argued that the Applicant submitted a technical tyre compliant statement which gives specifications as per the requirements of the Tender Document. Further, that the Applicant was not under an obligation to supply the 4<sup>th</sup> Interested Party with any document in respect of its tender.

### **CLARIFICATIONS**

50. The Board sought clarity from the Procuring Entity as to whether the evaluation process complied with the requirements under the Tender Document, to which Counsel for the Respondents, Mr. Lagat, answered in the affirmative.
51. The Board equally asked the Procuring Entity to confirm whether the Applicant's tender was the lowest evaluated tender in any of the contested line items, to which Counsel for the Respondents, Mr. Lagat, answered in the negative.
52. The Board asked the Applicant to confirm if its tender was the lowest evaluated tender to which Counsel for the Applicant answered in the affirmative. She indicated that the fact that the Applicant was evaluated

at the Financial Stage, means they were responsive to the requirements at the Preliminary and Technical Evaluation Stages.

53. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 15<sup>th</sup> December 2023 had to be determined by 5<sup>th</sup> January 2024. Therefore, the Board would communicate its decision on or before 5<sup>th</sup> January 2024 to all parties via email.

### **BOARD'S DECISION**

54. The Board has considered all documents, oral submissions and pleadings together with confidential documents submitted to it pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination:
- I. ***Whether the Procuring Entity's Evaluation Committee properly evaluated the Applicant's tender in accordance with Sections 79 and 80 of the Act as well as the provisions of the Tender Document?***
  - II. ***What orders should the Board issue in the circumstance?***

**Whether the Procuring Entity's Evaluation Committee properly evaluated the Applicant's tender in accordance with Sections 79 and 80 of the Act as well as the provisions of the Tender Document?**

55. The Applicant assailed the Procuring Entity's decision to disqualify its tender for the reason that it was not the lowest evaluated tender.

According to the Applicant it was the lowest evaluated tender in respect of line items 2,3, 6 to 10 and 12 to 16 in the subject tender.

56. Counsel for the Applicant, Ms. Osman, submitted that the Respondents were speculative as to the reasons for the disqualification of the Applicant as their response to the Request for Review states that the reason could be that either the Applicant was not responsive to the technical requirements or was not the lowest evaluated tender in the named line items.
57. Ms. Osman maintained that the argument that the Applicant's prices were abnormally low was an afterthought as it was not the reason in the Notification of Intention to Award the subject tender.
58. Counsel argued that the prices submitted by the Applicant were within the market range citing that the Applicant had previously supplied the Procuring Entity and other customers the very items in the tender at the same prices. She invited the Board to look at pages 137 to 139 of the Applicant's tender against the blank Tender Document to confirm that the Applicant's tender was responsive to the tender requirements.
59. On the other hand, the Respondents and the Interested Parties took the view that the Applicant was properly disqualified from the subject tender. It was argued on behalf of the Respondents that there was a minimum requirement given by the Procuring Entity on the prices and that this was meant to encourage competition among the interested participants in the subject tender.

60. Counsel for the Respondents, Mr. Lagat, submitted that the criteria at the Financial Evaluation Stage was verifying financials, price comparison and evaluating the lowest tender per line items while rejecting abnormally low and high tenders. He submitted that the prices given by the Applicant in the respective line items were abnormally low and thus the Applicant was properly disqualified from the subject tender.
61. The Board is therefore invited to interrogate the Evaluation Committee's evaluation process that culminated in the disqualification of the Applicant's disqualification from the subject tender.
62. Section 80 of the Act offers guidance on how an Evaluation Committee should proceed with the evaluation of tenders in the following terms:

***"80. Evaluation of tenders***

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

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

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

***"79. Responsiveness of tenders***

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

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

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

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

***(3) A deviation described in subsection (2)(a) shall—***

***a) be quantified to the extent possible; and***

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

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

***"19. It is a universally accepted principle of public procurement that bids which do not meet the minimum requirements as stipulated in a bid document are to be regarded as non-responsive and rejected without further consideration.[9] Briefly, the requirement of responsiveness***

*operates in the following manner:- a bid only qualifies as a responsive bid if it meets with all requirements as set out in the bid document. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements.[10] Bid formalities usually require timeous submission of formal bid documents such as tax clearance certificates, audited financial statements, accreditation with standard setting bodies, membership of professional bodies, proof of company registration, certified copies of identification documents and the like. Indeed, public procurement practically bristles with formalities which bidders often overlook at their peril.[11] Such formalities are usually listed in bid documents as mandatory requirements – in other words they are a sine qua non for further consideration in the evaluation process.[12] The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing or empowerment. Bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome.*

*20. In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant*

**or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions.”**

See also ***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***

65. Drawing from the above, the Tender Document is the key guide in the evaluation of tenders submitted in response to any tender invitation. Further, for a tender to be deemed responsive in respect of any requirement, it must comply with the specification of the actual requirement as set out in the Tender Document.

66. Turning to the instant Request for Review, the Applicant was disqualified from the subject tender on what the Respondents indicated that the Applicant was not the lowest evaluated tender. The Board shall now interrogate the Evaluation Committee's evaluation of the tenders at the Financial Evaluation Stage against the requirements under the Tender Document.

67. Clause 2.4 at Page 39 of the Tender Document provides as follows:

**"2.4 PRICE EVALUATION**

***Consistent with and in addition to the criteria listed in ITT 33.3 and ITT 29.3; and ITT 34 and its subparagraphs the following criteria shall apply***

- i) Financial evaluation shall entail verifying the financials and price comparisons among the qualified tenderers in accordance with the evaluation criteria.***
- ii) Award will be made to the lowest evaluated bidder per line item.***
- iii) Abnormally Low Tender and Abnormally High Tender shall be rejected.***

68. From the above, at the Financial Evaluation Stage, the Procuring Entity's Evaluation Committee was required to (i) verify the financials and conduct price comparisons; (ii) Make an award to the lowest evaluated tenderer per line item and (iii) Reject abnormally low tenders as well as abnormally high tenders.

69. The related provisions mentioned at Clause 2.4 of the Tender Documents i.e. **ITT 33.3 and ITT 29.3; and ITT 34** are equally hereinafter reproduced for completeness:

***"29.3 Provided that a Tender is substantially responsive, the Procuring Entity shall rectify quantifiable nonmaterial non-conformities related to the Tender Price. To this effect, the Tender Price shall be adjusted, for comparison purposes only, to reflect the price of a missing or non-conforming item or component in the manner reflected in the TDS. The adjustment shall be based on the average Tenders. If the price of the item or component cannot be derived from the price of other substantially responsive Tenders, the Procuring Entity shall use its best estimate..."***

...

***33.3 The estimated effect of the price adjustment provisions of the Conditions of Contract, applied over the period of execution of the Contract shall not be considered in Tender evaluation..."***

...

#### ***34. Comparison of Tenders***

***34.1 The Procuring Entity shall compare the evaluated costs of all substantially responsive Tenders established in accordance with ITT 33.2 to determine the Tender that has the lowest evaluated cost. The comparison shall be on the basis of total cost (place of final destination) prices for all goods and all prices, plus cost of inland transportation and***

***insurance to place of destination for goods manufactured within the Kenya, together with prices for any required installation, training, commissioning and other services.”***

70. Taken together, the applicable criteria at the Financial Evaluation Stage called on the Procuring Entity’s Evaluation Committee to (i) verify the financials and conduct price comparisons; (ii) Make an award to the lowest evaluated tenderer per line item and (iii) Reject abnormally low tenders as well as abnormally high tenders.
71. The Board has keenly studied the Applicant’s tender prices for the various line items against the other tenderers and made the following observation:
- i. For line item 9 the Applicant’s tender price of Kshs. 2,500 was not the lowest price compared to the successful tenderer’s price of Kshs. 1,500
  - ii. For line item 13 the Applicant’s tender price of Kshs. 165,000.00 was not the lowest price compared to the successful tenderer’s price of Kshs. 162,721.007
  - iii. For line item 7 the Applicant’s tender price was the lowest but its tender was non-compliant with the technical requirements. Accordingly, the Applicant could not be deemed the lowest evaluated tender in respect of this line item.
  - iv. For line item 16 the Applicant’s tender price was the lowest but its tender was non-compliant with the technical requirements.

Accordingly, the Applicant could not be deemed the lowest evaluated tender in respect of this line item.

- v. For line items 2, 3, 6, 8, 10, 12 and 14 the Applicant's tender was abnormally low as tender prices as submitted by the Applicants were way lower than the prevailing market rates as well as the other tender prices submitted by the other tenderers for the said items

Below is a sample of the prices in contention:

<b>ITEM</b>	<b>Applicant's prices (Kshs.)</b>	<b>Awarded prices (Kshs.)</b>	<b>Other bidders price range (Kshs.)</b>	<b>Price difference (Kshs.) (%)</b>
Item 3- 1812801053 SET	33,000	100,745.935 HAJI MOTORS LTD	between 100,745.935- 129,040	67,745.935 (32.76%)
Item 7- 181201058 SET	53,000	93,463.08 TIREWORLD	between 93,463- 177,434	40,463.08 (76.35%)
Item 8- 1812801135 SET	55,000	104,990.85 Silverstone	Between 71,514- 580,000	49,990.85 (90.8%)

Item 9- 1812801102 EA	50,000	86,010.43 TIREWORLD	86,010.43- 177,434.00	36,010 (72.02%)
Item10- 1812901114 SET	128,000	197,350 TYRE K LTD	140,070.81- 296,531.00	(54.2%)
Item 16- 1812901087 SET	310,000	507,744 UNIAH VENTURES LTD	507,744 - 1,676,740.64	197,744 (63.8%)

72. From the above, it is clear that the Applicant's tender price was not the lowest in respect of some of the complained line items while abnormally low in the rest of the line items. We cannot fault the Evaluation Committee for picking out these discrepancies on the part of the Applicant's tender and eventual disqualification of the Applicant on these grounds. This is because, the Tender Document stipulated that only the lowest evaluated tender per line item would be the successful tender and that abnormally low tenders would be rejected.
73. In view of the foregoing analysis, the Board finds that the Procuring Entity's Evaluation Committee properly evaluated the Applicant's tender in accordance with Sections 79 and 80 of the Act as well as the provisions of the Tender Document.

### **What orders the Board should grant in the circumstances?**

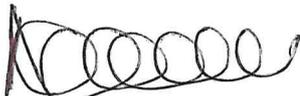
74. The Board has found that the Procuring Entity's Evaluation Committee properly evaluated the Applicant's tender in accordance with Sections 79 and 80 of the Act as well as the provisions of the Tender Document.
75. The upshot of our finding is that the Request for Review dated 15<sup>th</sup> December 2023 in respect of Tender No. KPA/195/2022-2023/PSM for Supply of Tyres, Tubes and Associated Products fails in the following specific terms:

### **FINAL ORDERS**

76. 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 15<sup>th</sup> December 2023:
- 1. The Request for Review dated 15<sup>th</sup> December 2023 be and is hereby dismissed.**
  
  - 2. The 1<sup>st</sup> Respondent is hereby directed to proceed with the procurement process of Tender No. KPA/195/2022-2023/PSM for Supply of Tyres, Tubes and Associated Products to its logical conclusion .**

**3. Given Board's finding above, each party shall bear its own costs in the Request for Review.**

**Dated at NAIROBI, this 5<sup>th</sup> Day of January 2024.**

  
.....

**PANEL CHAIRPERSON**

**PPARB**

  
.....

**SECRETARY**

**PPARB**

