

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 28/2024 OF 3RD APRIL 2024

BETWEEN

PINRO EMPIRE LIMITED APPLICANT

AND

THE ACCOUNTING OFFICER,

KENYA ELECTRICITY GENERATING COMPANY 1ST SPONDENT

KENYA ELECTRICITY GENERATING COMPANY 2ND RESPONDENT

SPARK GENERAL BUILDERS LIMITED INTERESTED PARTY

Review against the decision of the Accounting Officer, Kenya Electricity Generating Company in relation to Tender No. KGN-GDD-008-2024 for Rehabilitation Works for Olkaria and Eburru Geothermal Fields.

BOARD MEMBERS PRESENT

1. Ms. Alice Oeri - Panel Chairperson
2. Eng. Lilian Ogombo - Member
3. Mr. Stanslaus Kimani - Member

IN ATTENDANCE

Ms. Sarah Ayoo - Secretariat

Mr. Anthony Simiyu - Secretariat

PRESENT BY INVITATION

APPLICANT **PINRO EMPIRE LIMITED**

Ms. Dorothy Jemator Advocate, Chepkuto Advocates

RESPONDENTS **THE ACCOUNTING OFFICER, KENYA
ELECTRICITY GENERATING COMPANY
KENYA ELECTRICITY GENERATING
COMPANY**

Dr. Muthomi Thiankolu Advocate, Muthomi & Karanja Advocates

Ms. Joan Jeruto Advocate, Muthomi & Karanja Advocates

INTERESTED PARTY **SPARK GENERAL BUILDERS LIMITED**

N/A N/A

BACKGROUND OF THE DECISION

The Tendering Process

1. Kenya Electricity Generating Company, the Procuring Entity together with the 1st Respondent herein, invited electronic submission of tenders in response to Tender No. KGN-GDD-008-2024 for Rehabilitation Works for Olkaria and Eburru Geothermal Fields using the open tender method. The tender was exclusive to firms registered under the AGPO Group (Youth) Category and its submission deadline was set as Tuesday, 20th February 2024 at 2:00 p.m.

Submission of Tenders and Tender Opening

2. According to the signed Tender Opening Minutes for 20th February 2024, submitted under the Confidential File submitted by the Procuring Entity, the following 16 tenderers were recorded as having submitted their respective tenders in response to the subject tender by the tender submission deadline:

No.	Name of Tenderer
1.	Pinro Empire Limited
2.	Jaymila Interiors and Builders Limited
3.	Sayan Ventures
4.	Inovate Enterprises Limited
5.	Spark General Builders Limited
6.	KarIngesh Construct Company Limited
7.	Brycea General Company Limited
8.	Jaramu Ventures Limited
9.	Kuza Company Limited
10.	Milrock Company Limited
11.	Whitewash Africa Limited
12.	Tykhe Enterprises Limited
13.	Kylios Merchants Limited
14.	Kigumo Youth General Suppliers
15.	Bhoki Limited
16.	Megawatt Power & Telecommunication

Evaluation of Tenders

3. The 1st Respondent constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") which was to undertake an evaluation of the received tenders in accordance with the following 3 evaluation stages:
- i. Preliminary Evaluation Stage
 - ii. Technical Evaluation Stage
 - iii. Financial Evaluation Stage

Preliminary Evaluation Stage

4. At this stage of the evaluation, the submitted tenders were to be examined using the criteria set out as Clause 2.0: Preliminary examination for Determination of Responsiveness under Section III – EVALUATION AND QUALIFICATION CRITERIA on pages 33 to 35 of the Tender Document.
5. The evaluation was conducted on a Yes/No basis and tenders that failed to meet any of the evaluation criteria at this stage would be disqualified from further evaluation.
6. At the end of evaluation at this stage 11 tenders were found unresponsive with only 5 tenders including those of the Applicant and Interested Party qualifying for evaluation at the Technical Evaluation Stage.

Technical Evaluation Stage

7. At this stage of the evaluation, the submitted tenders were to be examined using the criteria set out as Stage 2: Technical Evaluation Criteria under Section III – EVALUATION AND QUALIFICATION CRITERIA on page 37 of the Tender Document.
8. Tenders were to meet all the requirements at this stage and any of them found unresponsive to any of the requirements would be disqualified from further evaluation.
9. At the end of evaluation, all the 5 tenders evaluated at this stage including those of the Applicant and Interested Party were found

responsive and thus qualifying for further evaluation at the Financial Evaluation Stage.

Financial Evaluation Stage

10. At this stage of the evaluation, the submitted tenders were to be examined using the criteria set out as Stage 3: Financial Evaluation Criteria under Section III – EVALUATION AND QUALIFICATION CRITERIA on pages 37 to 38 of the Tender Document.
11. Tenderers were required to demonstrate that they had sufficient funding to implement the project. The successful tender would be that established to be substantially responsive to the Tender Document and has equally offered the lowest evaluated tender price.
12. All the tenderers met the requirement on demonstrating access to sufficient funding. However, when the tender prices were compared, the Evaluation Committee found that the Interested Party's tender was the lowest evaluated tender.

Evaluation Committee's Recommendation

13. Accordingly, the Evaluation Committee recommended the award of the subject tender to the Interested Party at their quoted rates inclusive of taxes.

Professional Opinion

14. In a signed Professional Opinion dated 19th March 2024 (hereinafter referred to as the "Professional Opinion"), the Procuring Entity's Supply Chain Manager, Mr. Vincent Mamboleo, reviewed the manner in which

the subject procurement process was undertaken including the evaluation of tenders and agreed with the Evaluation Committee's recommendation of the Interested Party .

15. Thereafter, on the same day, 19th March 2024, the Accounting Officer, Eng. Peter Njenga, expressed his concurrence with the Professional Opinion.

Notification to Tenderers

16. Accordingly, tenderers were notified of the outcome of the evaluation of the tenders in the subject tender vide letters dated 22nd March 2024.

REQUEST FOR REVIEW

17. On 3rd April 2024, the Applicant through the firm of Chepkuto Advocates, filed a Request for Review dated 3rd April 2024 supported by an Affidavit sworn on 3rd April 2024 by Michael Mwaniki, the Applicant's Chief Executive Officer, seeking the following orders from the Board in verbatim:

- a) A declaration that the Procuring Entity breached the requirements under the Tender Document;*
- b) A declaration that the Procuring Entity breached the provisions of the Public Procurement and Asset Disposal Act, 2015;*
- c) A declaration that the Procurement Entity breached Article 227(i) of the Constitution, 2010;*
- d) The decision of the Procuring Entity dated 22nd March 2024 to award the tender to Spark General Builders Ltd to be annulled and set aside forthwith.*

e) The Applicant be declared the Lowest Evaluated Bidder and the Tender No. KGN-GDD-008-2024 FOR REHABILITATION WORKS FOR OLKARIA AND EBURRU GEOTHERMAL FIELDS be awarded to the Applicant.

f) The costs of this application be awarded to the Applicant in any event.

18. In a Notification of Appeal and a letter dated 3rd April 2024, 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 Respondent a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the 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 3rd April 2024.

19. On 8th April 2024, the Respondents, through the firm of Muthomi & Karanja Advocates filed a Memorandum of Response dated 8th April 2024. The Respondents also forwarded to the Board the confidential documents in the subject tender pursuant to Section 67(3)(e) of the Act.

20. Vide letters dated 8th April 2024, 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 .

21. On 12th April 2024, the Acting Board Secretary, sent out to the parties a Hearing Notice dated 12th April 2024 notifying parties and all tenderers in the subject tender that the hearing of the instant Request for Review would be by online hearing on 17th April 2024 at 11:00 a.m. through the link availed in the said Hearing Notice.
22. On 15th April 2024, the Applicant filed a Further Affidavit sworn on 13th April 2024 by Michael Mwaniki.
23. On 17th April 2024, the Applicant and Respondents filed their Written Submissions both dated 16th April 2024. Later on, the same day, 17th April 2024 at 11:00 a.m., the parties joined the scheduled online hearing session through their respective Advocates.
24. The Board read out to the parties the documents that had been filed in the Request for Review and sought for each party to confirm that each of the said documents had been served upon them. Counsel for the Applicant, Ms. Jemator, confirmed having been served with the Respondents' filed documents. On his part, Counsel for the Respondents, Dr. Thiankolu, confirmed having been served with the Applicant's filed documents save for their Written Submissions. Nonetheless, Counsel indicated that he was ready to proceed with the hearing as earlier scheduled.

25. The Board then gave hearing directions on the order of address being that the Applicant would go first, thereafter the Respondents with the Applicant closing with a rejoinder on the Respondents' submissions.
26. The Board also directed Counsel for the Applicant to immediately serve their filed Written Submissions upon the Respondents by way of email.

PARTIES SUBMISSIONS

Applicant's Submissions

27. Counsel for the Applicant, Ms. Jemator, argued that the Applicant placed its tender with a tender price of Kshs. 3,127,750 which amount features on its Form of Tender and was also captured in the Tender Opening Minutes.
28. Ms. Jemator contended that the Interested Party's tender price as could be discerned from the letter of regret served upon the Applicant was Kshs. 6,967,370. Accordingly, if the subject tender was evaluated on the basis of the lowest evaluated tender, the Applicant's tender ought to be the successful tenderer. However, the Procuring Entity awarded the subject tender to the Interested Party on the basis that the Applicant's tender was not the lowest evaluated tender.
29. Counsel argued that the Procuring Entity, post-evaluation disclosed that they arrived at tenderer's tender prices by multiplying the figures quoted in the Form of Tender by the Engineer's Estimated Measurements , which translated to the Applicant's and Interested Party's tender prices being posted as 796,989,600 and 460,505,400 respectively.

30. Ms. Jemator surmised that the sole issue for determination was what was the tender price. She questioned whether it was the figure in the Form of Tender or amount determined from the calculations against the Engineer's Estimated Measurements.
31. Counsel referred to the tender advert for the subject tender arguing that the tender was an open tender reserved for the youth under Section 96 of the Act.
32. She argued that ITT 14.3 of the Tender Document provides that the tender price is to be quoted in the Form of Tender in accordance with ITT 12.1 and shall be the total price of the tender including any discounts provided therein. Further, that the total price can only be provided for in the Form of Tender as provided for under ITT 12.1.
33. Ms. Jemator contended that under Section 78(6)(b) of the Act each tender should be opened and the tender price read out and recorded in the Tender Opening Register. Further, under Regulations 77 and 78 of the Regulations 2020, the evaluated price for each tender shall be determined by taking the price in the Tender Form.
34. She argued that the Procuring Entity was not required to introduce any foreign criterion in determining the respective tenderer's tender prices. Therefore, in using the Engineer's Estimated Measurements, the Procuring Entity flouted their own evaluation criteria and unfairly knocked out the Applicant from the subject tender. This is because the Tender Document did not mention the Engineer's Estimated Measurements.

35. Counsel argued that under ITT 31.1 of the Tender Document the prices indicated by the tenderers cannot be adjusted by introduction of a new formula. It was her contention that in the subject tender, the Procuring Entity adjusted the tender prices submitted by the tenderers.
36. She contended that under ITT 40, 42 and 45 the Procuring Entity was not at liberty to come up with a new criteria. Further, once prices are read out at the tender opening, those are the prices that shall be used to determine who was the lowest evaluated tender.
37. Ms. Jemator pressed the argument that the Procuring Entity flouted various provisions of the Act including:
- i. Section 82 of the Act that requires a Procuring Entity to follow the evaluation criteria outlined in the Tender Document. She argued that the Procuring Entity adopted a criterion not in the Tender Document.
 - ii. Section 75 of the Act that prohibits amendment of the Tender Document after tender closing. She argued that by introduction of the Engineer's Estimate Measurements, the Procuring Entity purported to amend the Tender Document.
 - iii. Section 82 of the Act that prohibits the adjustment, amendment and correction of tender price after tender closing.
 - iv. Section 86 of the Act for failing to properly determine who was the lowest evaluated price.
38. Counsel argued that the Procuring Entity breached various Regulations of the Regulations 2020 including Regulation 77 which requires reference to be made to the figures in the Tender Form to establish the lowest evaluated tender. She argued that the Applicant quoted Kshs.

3,127,750 in its Form of Tender but the Interested Party failed to indicate their prices as the Tender Opening Minutes bear the comment "as per the price schedule". She therefore questioned what the Procuring Entity used to determine the Interested Party's tender price.

39. Counsel argued that the subject tender was a rates-only tender and therefore the total price would be total rates quoted by the tenderers, which is different from what the Procuring Entity has relied in determining the lowest evaluated tender.

40. She argued that Procuring Entity contradicted itself by arguing that the subject tender was a rates-only tender only to introduce the Engineer's Estimated Measurements in ascertaining tenderers' tender prices.

41. She contended that there was mischief as the Applicant did not know the measurements used to calculate the lowest evaluated tender. Further, in failing to disclose the said measurements, the Procuring Entity was acting without transparency and that nothing stopped the Procuring Entity from disclosing their estimates for tenderers to disclose their tender price. Counsel urged the Board to allow the Request for Review.

Respondents' Submissions

42. Counsel for the Respondents, Dr. Thiankolu, indicated that the Respondents would be placing reliance on their filed documents i.e. Memorandum of Response, Affidavit by Vincent Mamboleo, Written Submissions and the Confidential Documents.

43. Dr. Thiankolu agreed that the sole issue was whether the Applicant submitted the lowest evaluated tender.
44. Counsel argued that the Applicant made multiple errors of principle. First, he argued that the Applicant failed to appreciate the distinction between the lowest price and the lowest evaluated price. Additionally, that Applicant failed to appreciate the place of an Engineers Estimated Measurements in the subject tender.
45. Counsel made the argument that the Applicant failed to appreciate what is a rates-only contract, arguing that at paragraph 23 of the Applicant's Further Affidavit , the Applicant gave a parallel computation which made an assumption that all items in the Bill of Quantities were of the same quantity. He argued that when you check the Bill of Quantities in the Tender Document, each line item had varying quantities based on the degree of degradation of the site of the subject tender being for rehabilitation of a site that has degraded over time because of the elements of the weather.
46. Dr. Thiankolu contended that the Applicant admitted in the Further Affidavit that though it attended the site visit, it never bothered to take measurements and one wonders what was purpose of the visit. He argued that the Applicant signed a declaration at page 63 of the tender confirming that they had studied the Tender Document, gained knowledge of the local conditions of the site certify that they were satisfied with the description of the works.
47. He argued that it is not the practice of the procurement Entity to share the Engineers Estimate Measurements because the value and

quantitative of the actual works in the Bill of Quantities is not predetermined and not even the Engineer's Estimates because under a rate-based contract one is paid for work actually done. He gave an example that one can submit a tender price of Kshs. 3 Million yet it may well be that the work done is for Kshs. 100,000 and that's why it is a framework contract.

48. Dr. Thiankolu made the case that the purpose of not disclosing the engineers estimated measurements was to give the Procuring Entity an objective baseline to conduct the evaluation of the received tenders. He argued that without the estimates, the Procuring Entity would lack a scientific way of budgeting for the tender. Further, the estimates are not shared because tenderers are required to attend the site visit and conduct their own measurements or estimates. Additionally, the degree of degradation of the site by weather elements is not predetermined and the works under the subject tender are to be conducted over multiple financial years and the quantity of works keep varying.
49. Counsel equally rebutted the suggestion that the tender was tailor-made for specific tenderer, arguing this was impossible. He argued that to do that the Engineer would need to know in advance the level of degradation of the site in to the future, the identities of the tenderers participating in the tender and the respective tenderer's prices in the price schedule for the various works as will be quoted by the tenderers.
50. Counsel contended that though the Applicant appeared to suggest at paragraph 25 of their Further affidavit that they had done similar works, no evidence had been furnished to show that the said works involved rates-based contracts. Further, the mentioned similar works were valued

at over Kshs. 20 M when the Applicant priced the subject tender at Kshs. 3 Million.

51. He argued that the site visit was a mandatory requirement where tenderers were required to inspect the site and gather all relevant information to enable pricing of the tender. Further, the purpose of the site visit was to seek any clarification but the Applicant never sought any clarification pursuant to Clause 7.2 of the Tender Document.
52. Counsel referred to page 57 of the Memorandum of Response arguing that the Tender Document made the contract in question a rates-based contract and obligated the Procuring Entity to use a non-binding estimated quantities for determination of a non-binding contractual price.
53. Counsel argued that Clause 22 made it clear that this was not a contract where one was paid a predetermined price but paid from measuring the actual work done.
54. Dr. Thiankolu contended that the Line items in the Bill of Quantities was expressed in various standards of measurements including, Km, M, M², M³. He therefore argued that the Applicant committed an error of principle assuming a unit of 100 for all the items in the Bill of Quantities i.e. anything measured in km its 100km, anything in m³ is 100m³ and thus erroneously thought they would add the different rates to arrive at the contractual rate for their tender.
55. Counsel used Item 2.01 in the Bill of Quantities, cutting grass and clearing bushes, citing that the Engineer's Estimate was 100,000m² but

the Applicant adopted an erroneous estimate of 100m². He argued that the Applicant had made a similar error in respect of Line Items 2.02. and 4.01.

56. Counsel argued that the Evaluation Report at page 251 of the Memorandum of Response bears out the Applicant's tender was the most expensive compared with the rest of the tenderers. He argued that the rates by the Applicant meant nothing until they are read alongside the Engineers Estimate. According to Counsel, the Applicant was using unrealistic figures, the kind of figures that call to question the capacity of the Applicant to deliver on the tender. He therefore sought a dismissal of the Request for Review.

Applicant's Rejoinder

57. In her rejoinder, Counsel for the Applicant, Ms. Jemator, submitted that the Procuring Entity was contradicting itself on the one hand suggesting rates meant nothing while equally arguing that the contract in question was a rates-based contract.
58. She further clarified that the measurement of 100 units in the Applicant's calculation in the instant Request for Review was an assumption and in the alternative and not the Applicant's estimated measurements of the various Line Items in the Bill of Quantities. She emphasized that the Tender Document provided a unit of measurement for each of the works that was to be undertaken.
59. She reiterated it was not open for the Procuring Entity to introduce a new measurement in the subject tender when the same was not

provided for in the Tender Document. Further, that nothing in the Tender Document indicated that the subject tender was a framework agreement and that under such agreement the Procuring Entity shortlists a minimum of 7 vendors.

60. She added that the Tender Document did not require tenderers to do measurements during the site visit and the Procuring Entity's insistence on this was a requirement was actually an amendment of the Tender Document .

61. She reiterated that the tender price is that on the Form of Tender and not any other price.

CLARIFICATIONS

62. The Board sought the Procuring Entity to offer clarity on whether the Tender Document required tenderers to take measurements during the site visit. Counsel for the Procuring Entity, Dr. Thiankolu conceded that though the word "measure" was not used, the Tender Document used the word "examination". Further, that the purpose of the site visit was to give tenderers a real picture of the site so that they don't provide their tender prices in an abstract.

63. The Board asked the Procuring Entity to confirm whether the Form of Tender had a slot for filling the tender price to which Counsel for the Procuring Entity, Dr. Thiankolu answered in the affirmative. Adding, that the price therein had to co-relate with the Bill of Quantities and Price Schedule.

64. The Board sought to understand why the Applicant thought that they had submitted the lowest evaluated tender in the subject tender.

Counsel for the Applicant, Ms. Jemator, argued that upon an assumption that every work had a unit of measurement and price, the Applicant's rate was arrived at through a summation of the rates quoted for the different works.

65. Counsel for the Procuring Entity, Dr. Thiankolu indicated that the Applicant was mistaken on its assumption that one could arrive at the rate by way of summing up the rates quoted for the different works.
66. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 3rd April 2024 the same had to be determined by 24th April 2024. Therefore, the Board would communicate its decision on or before 24th April 2024 to all parties via email.

BOARD'S DECISION

67. The Board has considered all documents, 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 arrived at the tender prices of the tenders received in the subject tender ?***
 - II. ***What orders should the Board issue in the circumstance?***

Whether the Procuring Entity's Evaluation Committee properly arrived at the tender prices of the tenders received in the subject tender ?

68. The Applicant filed the instant Request for Review challenging its disqualification from the subject tender arguing that it submitted the

lowest evaluated tender price. Counsel for the Applicant, Ms. Jemator, submitted that the Applicant submitted a tender price of Kshs. 3,127,750 but was surprised to learn that it was assigned a different tender price during evaluation. She protested the Procuring Entity's use of what was termed the Engineer's Estimated Measurements when the same was not provided for in the Tender Document arguing that this was akin to amending the Tender Document subsequent to tender closing. She equally argued that ascribing the Applicant a different tender price was a modification of the Applicant's tender subsequent to tender closing and in breach of the Act and Regulations. It was therefore her case that the Applicant's tender price was that indicated in its Form of Tender and that this figure was arrived at after an addition of the rates of the unit prices of the individual Line Items in the Bill of Quantities.

69. On the flip side, the Respondents took the view that the Applicant's tender price was in fact the highest tender price. Counsel for the Respondents, Dr. Thiankolu argued that the tender in question was a rates-based contract and that the Applicant was mistaken in arriving at the tender price merely by referring summing up the rates of the unit rates of the Individual Line Items. He argued that the correct approach in determining the tender price was to calculate the individual rates for the Line Items against the respective Engineer's estimated measurements for the respective Line Items. It was Counsel's contention that the Tender Document made it mandatory for tenderers to conduct a site visit so that they could acquaint themselves with the site forming the subject of rehabilitation and at the very least they were

expected to have measured or estimated the quantum of the various work items to be done.

70. The Board is therefore at this stage invited to interrogate the Procuring Entity's Evaluation Committee's evaluation of the tenderers' tender prices that culminated in the disqualification of the Applicant's tender .

71. For starters, 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."

72. 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.”*

73. This Board is further guided by the dictum of the High Court in *Republic v Public Procurement Administrative Review Board & 2 others Ex parte 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 *Nairobi High Court Judicial Review Misc. Application No. 407 of 2018; Republic v Public Procurement Administrative Review Board; Arid Contractors & General Supplies (Interested Party) Ex parte Meru University of Science & Technology [2019] eKLR* and *PPARB Application No. 15 of 2024; Nash Eq Inc v Accounting Officer Sacco Societies Regulatory Authority & Ors*

74. 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.
75. Section 86 of the Act offers guidance that the successful tender is the one that is established to have submitted the lowest evaluated price:

86. Successful tender

(1) The successful tender shall be the one who meets any one of the following as specified in the tender document—

(a) the tender with the lowest evaluated price;

(b) the responsive proposal with the highest score determined by the procuring entity by combining, for each

proposal, in accordance with the procedures and criteria set out in the request for proposals, the scores assigned to the technical and financial proposals where Request for Proposals method is used;

(c) the tender with the lowest evaluated total cost of ownership; or

(d) the tender with the highest technical score, where a tender is to be evaluated based on procedures regulated by an Act of Parliament which provides guidelines for arriving at applicable professional charges:

Provided that the provisions of this subsection shall not apply to section 141 of this Act.

76. This is equally echoed under ITT 40.0 on page 23 of the Tender Document which provides as follows:

Having compared the evaluated prices of Tenders, the Procuring Entity shall determine the Lowest Evaluated Tender. The Lowest Evaluated Tender is the Tender of the Tenderer that meets the Qualification Criteria and whose Tender has been determined to be:

a) Most responsive to the Tender Document; and

b) The lowest evaluated price

77. On its part, Section 82 of the Act signals the finality of the tender price read out and recorded during tender opening:

82. Correction, revision, adjustment or amendment of tender
(1) Subject to subsection (2) of this section, the tender sum as submitted and read out during the tender opening shall be

absolute and final and shall not be the subject of correction, revision, adjustment or amendment in any way by any person entity.

(2) For avoidance of doubt, the provisions of subsection (1) shall not apply to sections 103, 131 and 141 of this Act.

78. The finality of the tender price is also provided for by ITT 18.3 under Section II-Tender Data Sheet at page 27 of the Tender Document, which stipulates that the tender price is incapable of adjustment:

Reference to ITC Clause	PARTICULARS OF APPENDIX TO INSTRUCTIONS TO TENDERS
...	...
18.3	... (b) The tender price shall be adjusted N/A

79. The said position is also echoed under ITT 31.1 at page 19 of the Tender Document:

The tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be the subject of correction, adjustment or amendment in any way by any person or entity.

80. Regulation 77(2) of the Regulations 2020 stipulates that tender price of each tender shall be that indicated in the Form of Tender:

77. Financial evaluation

(1) Upon completion of the technical evaluation under regulation 76 of these Regulations, the evaluation committee

shall conduct a financial evaluation and comparison to determine the evaluated price of each tender.

(2) The evaluated price for each bid shall be determined by—

(a) taking the bid price in the tender form;

(b) taking into account any minor deviation from the requirements accepted by a procuring entity under section 79(2)(a) of the Act;

(c) where applicable, converting all tenders to the same currency, using the Central Bank of Kenya exchange rate prevailing at the tender opening date;

(d) applying any margin of preference indicated in the tender document.

(3) Tenders shall be ranked according to their evaluated price and the successful tender shall be in accordance with the provisions of section 86 of the Act.

81. This position is also echoed by ITT 14.3 on page 12 of the Tender Document which provides as follows:

The price to be quoted in the Form of Tender, in accordance with ITT 12.1 shall be the total price of the Tender, including any discount offered.

82. On its part ITT 12.1 on page 11 of the Tender Document provides guidance on the filling of the Form of Tender, the Bill of Quantities and the forms under the Tender Document:

The Form of Tender and Schedules, including the Bill of Quantities, shall be prepared using the relevant forms furnished in Section IV, Tender Forms. The forms must be

completed without any alterations to the text, and no substitutes shall be accepted except as provided under ITT 20.3. All blank spaces shall be filled in with the information requested. The tenderer shall chronologically serialize all pages of the tender documents submitted.

83. ITT 42.0 at page 23 of the Tender Document stipulated the award criteria in the subject tender as follows:

42.0 Award Criteria

The Procuring Entity shall award the Contract to the successful tenderer whose tender has been determined to be the lowest evaluated tender.

84. Article 227(1) of the Constitution of Kenya, 2010 espouses the principles of fairness, transparency, equality, competition and cost-effectiveness in public procurement processes. Relevant to the subject tender is the principle of cost-effectiveness which demands prudent expenditure in respect of public expenses to wit the public should get value for money. It is because of this that the Act designates the lowest evaluated tender and not just the lowest tender as the successful tender.

85. From the parties address to the Board, there appears to be consensus that the successful tender in the subject tender was to be the lowest evaluated tender. Equally, parties were in agreement that the tender in question was a rates-based tender i.e. the subject tender contained multiple line items where each tenderer was required to indicate a rate for the different line items.

86. The only point of departure appears to be the manner of establishing the tender prices submitted by the tenderer's in the subject tender. Whereas the Applicant maintains that its tender was the lowest evaluated tender from a summation of the rates it quoted under the various line items in the Bill of Quantities, the Respondents are of the view that in fact the highest evaluated tender. The Respondents fault the Applicant's computation which involved a simple addition of the individual quoted rates for the different line items. According to the Respondents, a tenderer's tender price was to be determined from multiplying the tenderer's quoted rates for the various line items against estimates or actual measurements of the work to be done and thereafter adding the values under the individual line items.
87. Having interrogated the parties address on the calculation of the tender prices in the subject tender, the Board is inclined to agree with the formula outlined by the Respondents. We say so, because the the subject tender constituted multiple line items where tenderers were to indicate their different rates and thus there was need to have baseline measurement against which these rates would be objectively compared. The Respondents provided this baseline measurement as the Engineer's estimated measurements of the site.
88. The said Engineer's estimated measurements find application in the subject tender by virtue of the Tender Document which outlined that during the evaluation, the Procuring Entity shall use non-binding estimated quantities for determination of non-binding contract price.

89. Equally Clauses 9 and 21 at pages 130 and 132 of the Tender Document together with page 2 of the Tender Document made the site-visit exercise in the subject tender, an avenue for tenderers to measure or estimate the level of degradation of the site for purposes of determining their tender prices for the respective Line items in the Bill of Quantities.
90. Page 2 of the Tender Document made the site-visit a mandatory exercise in the subject tender. On their part, Clauses 9 and 21 under Section V(E): Preamble of the Bill of Quantities made provision for tenderers to assess the site for purposes of pricing the works under the various Line Items in the Bill of Quantities:

	<i>Detail</i>	<i>Description</i>
<i>1</i>	<i>...</i>	<i>...</i>
<i>9</i>	<i>Rates and Sums</i>	<i>The rates and sums entered by the contractor against all the items in the Bill of Quantities shall bear a proper relationship to the cost of carrying out the work described in the Contract. All costs and similar charges that are applicable to the Contract as a whole shall be spread over all items in the Bill of Quantities whilst those that are applicable only to particular sections of the Contract shall only to be spread over the relevant items in particular sections</i>
<i>21</i>	<i>Site conditions and Visit</i>	<i>Notwithstanding the fact that surveys have been made, each Bidder must</i>

		<p><i>make local and independent examination and inquiries as to the physical conditions prevailing at the site and each Bidder shall obtain his own information regarding all matters and things that may in any way influence him in making a tender and fixing the price to be inserted in these documents.</i></p> <p><i>Each bidder shall satisfy himself as to the risks, obligations and responsibilities to be undertaken in the Contract to be entered in to by him should his tender be accepted.</i></p> <p><i>The costs and charges incurred by the Bidder in connection with the above-mentioned visit to the Site shall be borne by the Bidder.</i></p>
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91. The Board has equally sighted a declaration that was to be filled as part of the tenderers' tenders on page 63 of the Blank Tender Document affirming that they had examined and were aware of the status of the site in as far as this would impact the pricing of their tenders:

FORM CON-4: DECLARATION OF KNOWLEDGE OF SITE

This is to certify that.....

(Name); Being the authorized representative/Agent

.....

[Name and address of the bidder]; Had familiarized himself/herself with the Site Conditions in accordance with Instructions To bidders and the Tender Notice for purposes of bidding for this project.

TENDER FOR REHABILITATION WORKS FOR OLKARIA AND EBURRU GEOTHERMAL FIELD

Declaration

Having studied the Tender Documents and gained knowledge of local conditions on site likely to influence the works and cost thereof, I certify that I am satisfied with the description of the works and understand the scope of works as specified and as implied in this tender

Sign: Contractor's Representative or Key Personnel

.....

[insert name]

.....

Signature

Date: (day month year)

92. We are unable to agree with argument made on behalf of the Applicant that a simple summation of the rates under the different line items in the Bill of Quantities would offer a tenderer's tender price in the subject tender. We say so for at least 2 reasons:
93. First, the simple addition of the rates quoted for the different line items in the Bill of Quantities makes an erroneous assumption that all line items have 1 unit, which is not the case in the subject tender. The



Engineer's Estimated Measurements bears out that different units for the various line items in the Bill of Quantities.

94. Second, the Applicant's proposal also makes the erroneous assumption that the different line items in the Bill of Quantities are expressed in the same standard of measurement and thus capable of a simple addition. The Bill of Quantities contained 7-line items i.e. Bill No. 1: Preliminaries; Bill No. 2: Site Clearance and Earth Works; Bill No. 3: Landscaping and Earth Stabilization; Bill No. 4: Protection and Drainage Works; Bill No. 5: Concreting Works; Bill No. 6: Pothole Patching and Bill No. 7: Road Furniture which are actually expressed in multiple units of measurement including Linear meter, Cubic meter, Square Meter and Liters.
95. The Applicant did not its address before the Board take issue with accuracy or otherwise of the estimates used by the Procuring Entity. It only challenged the use of these estimates.
96. The Tender Document itself contemplated that there would be a baseline against which the tenderers' rates for the different line items in the Bill of Quantities would be determined.
97. When the Applicant's and Interested Party's rates for the different line items are expressed in their actual prices as per the Engineer's estimate measurements of the site, the results are as follows:

<i>Line Item</i>	<i>Applicant tender price (Kshs)</i>	<i>Interested Party's tender price (Kshs)</i>
<i>Bill No. 1: Preliminaries;</i>	<i>3,120,000</i>	<i>6,710,000</i>
<i>Bill No. 2: Site</i>	<i>414,000,000</i>	<i>167,500,000</i>

Clearance and Earth Works;		
Bill No. 3: Landscaping and Earth Stabilization;	14,500,000	41,900,000
Bill No. 4: Protection and Drainage Works;	191,640,000	127,180,000
Bill No. 5: Concreting Works;	30,000,000	23,000,000
Bill No. 6: Pothole Patching	32,250,000	28,125,000
Bill No. 7: Road Furniture	1,550,000	2,575,000
Total	687,060,000	396,990,000

98. From the above it is apparent that the Applicant's tender price was not the lowest as the Interested Party's tender price was much lower. The Board has independently computed the tender prices of the other tenderers evaluated at the Financial Evaluation Stage and established that the Interested Party's tender price was in fact the lowest. Accordingly, in line with Section 86 of the Act and ITT 40.0, the Interested Party was correctly identified as the successful tenderer in the subject tender.

99. The Board therefore finds that the Respondents' Evaluation Committee properly arrived at the tender prices of the tenders received in the subject tender.

What orders the Board should grant in the circumstances?

see

100. The Board has found that the Respondents' Evaluation Committee properly arrived at the tender prices of the tenders received in the subject tender.

101. The upshot of our finding is that the Request for Review dated 3rd April 2024 in respect of Tender No. KGN-GDD-008-2024 for Rehabilitation Works for Olkaria and Eburru Geothermal Fields fails in the following specific terms:

FINAL ORDERS

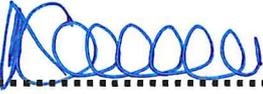
102. In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review dated 3rd April 2024:

- 1. The Request for Review dated 3rd April 2024 be and is hereby dismissed.**

- 2. The Respondent be and is hereby directed to proceed with Tender No. KGN-GDD-008-2024 for Rehabilitation Works for Olkaria and Eburru Geothermal Fields to its logical conclusion.**

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

Dated at NAIROBI, this 24th Day of April 2024.


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CHAIRPERSON

PPARB


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SECRETARY

PPARB



