

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 50/2024 OF 7TH JUNE 2024

BETWEEN

BURHANI ENGINEERS LIMITED.....APPLICANT

AND

CHIEF EXECUTIVE OFFICER,

RURAL ELECTRIFICATION

& RENEWABLE ENERGY CORPORATIONRESPONDENT

FAST CONVEYORS SUPPLIES LIMITED.....1ST INTERESTED PARTY

BIG SKY SOLUTIONS LIMITED2ND INTERESTED PARTY

ALL DAY TECHNOLOGIES LIMITED.....3RD INTERESTED PARTY

BRIGHT RAYS INTERNATIONAL LIMITED.....4TH INTERESTED PARTY

Review against the decision of the Accounting Officer, Rural Electrification & Renewable Energy Corporation in relation to Lots 1, 2, and 3 of Tender No. RFX No. 1000001030 for Procurement of Design , Supply, Installation, Testing and Commissioning of Galana Kulalu Substations and Associated Lines.

BOARD MEMBERS PRESENT

1. Mr. Jackson Awele - Panel Chairperson
2. Eng. Lilian Ogombo - Member
3. Ms. Jessica Mmbetsa - Member

IN ATTENDANCE

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

PRESENT BY INVITATION

APPLICANT

BURHANI ENGINEERS LIMITED

Mr. Gachuba Advocate, Mwaniki Gachuba Advocates
Mr. Ken Nyamweya Advocate, Mwaniki Gachuba Advocates

RESPONDENT

CHIEF EXECUTIVE OFFICER, RURAL ELECTRIFICATION & RENEWABLE ENERGY CORPORATION

Mr. Mosota Advocate, MMA Advocates LLP
Ms. Faith Cherop Advocate, MMA Advocates LLP

1ST INTERESTED PARTY FAST CONVEYORS SUPPLIES LIMITED

Mr. Ligunya Advocate, Rachier & Amollo Advocates LLP
Mr. Wakwaya Advocate, Rachier & Amollo Advocates LLP

2ND INTERESTED PARTY BIG SKY SOLUTIONS LIMITED

Mr. Ogola Advocate, Togolaw & Company Advocates

3RD INTERESTED PARTY ALL DAY TECHNOLOGIES LIMITED

Mr. Mbugua GM Muchoki & Company Advocates

4TH INTERESTED PARTY BRIGHT RAYS INTERNATIONAL LIMITED

Ms. Desma Nungo

NOW Advocates LLP

BACKGROUND OF THE DECISION

The Tendering Process

1. Rural Electrification & Renewable Energy Corporation, the Procuring Entity together with the Respondent herein, invited electronic submission of tenders in response to Tender No. RFX No. 1000001030 for Procurement of Design , Supply, Installation, Testing and Commissioning of Galana Kulalu Substations and Associated Lines using the open national tender method. The tender was divided into 4 Lots and it was permissible for a tenderer to submit its tender in more than 1 Lot. The tender submission deadline was also set as Wednesday, 6th March 2024 at 10:00 a.m.

Addenda.

2. On various dates, the Procuring Entity issued various addenda offering clarifications on the Tender Document while altering the tender submission deadline. Eventually the tender submission deadline was rescheduled to 12th April 2024 at 10:00 a.m.

Submission of Tenders and Tender Opening

3. According to the signed Tender Opening Minutes dated 12th April 2024, submitted under the Confidential File submitted by the Procuring Entity, the following fifteen (15) tenderers were recorded as having submitted in response to the subject tender by the tender submission deadline:

#	Name of Tenderer
1.	All Day Technologies Limited
2.	Big Sky Solutions Limited
3.	Brightrays International Limited
4.	Fast Conveyors Suppliers Limited
5.	Mashtech Engineering & Supplies Limited
6.	Nginu Power Engineering E.A Limited
7.	Ezeetec Limited
8.	Hyperteck Electrical Services Limited
9.	Burhani Engineers Limited
10.	Philafe Engineering Limited
11.	Miliki Development Company Limited
12.	Central Electrical International Limited
13.	HML Ventures
14.	Powergen Technologies Limited
15.	Sunset Electro Services Limited

Evaluation of Tenders

4. The 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 7.1 Part I- Preliminary Evaluation Criteria under Clause 3.33 of the ITT under Section IIII- Evaluation and Qualification Criteria at pages 30 to 31 of the Tender Document.
6. The evaluation was to be on a Yes/No basis and tenders that 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, 10 tenders including that of the Applicant were found non-responsive, with only 5 tenders including those of 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 tenders successful at the Preliminary Stage using the criteria set out as Clause 8.2 Part II- Technical Evaluation under clause 3.35 of the ITT under Section III at pages 31 to 34 of the Tender Document.
9. The evaluation was to be on a Yes/No basis and tenders that failed to meet any criterion outlined at this Stage would be disqualified from further evaluation.

10. At the end of the evaluation, all the 5 tenders evaluated at this stage including those of the Interested Parties were found responsive and thus qualifying for further evaluation at the Financial Evaluation Stage.

Financial Evaluation

11. The Evaluation Committee was required at this stage to examine tenders successful at the Technical Evaluation Stage using the criteria set out as Part III- Financial Evaluation under ITT 37.4 under Section III at page 35 of the Tender Document.
12. The Evaluation Committee was to check on the financial aspects of the tenders at this stage. The successful tenders would be those that were compliant with the requirements at this stage and also the lowest evaluated tender under their respective Lots.
13. At the end of the evaluation at this stage tenders of the following firms were established as the lowest evaluated tenders under their respective Lots:
 - i. Lot 1 Fast Conveyors Suppliers Limited at USD 6,208,848.37 and Kshs. 452,977,281.38
 - ii. Lot 2 Big Sky Solutions Limited at USD 670,773.83 and Kshs 77,533,321.20
 - iii. Lot 3 All Day Technologies Limited at USD 805,283.55 and Kshs. 139,953,924.60
 - iv. Lot 4 Brightrays International Limited at USD 5,303,830.07 and Kshs. 1,192,672,865.93

Evaluation Committee's Recommendation

14. The Evaluation Report dated 14th May 2024 forming part of the Confidential File indicates that the Evaluation Committee recommended the award of the subject tender to the Interested Parties for their respective Lots and at their respective tender prices.

Professional Opinion

15. In a Professional Opinion dated 14th May 2024 (hereinafter referred to as the "Professional Opinion") the Procuring Entity's Manager Supply Chain Management, Mr. Wilfred Oduor, 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 Parties.
16. Subsequently on the same day, 14th May 2024, the Respondent concurred with the Professional Opinion .

Notification to Tenderers

17. Accordingly, the tenderers was notified of the outcome of the evaluation of the tenders in the subject tender vide letters dated 24th May 2024 indicating the Interested Parties as the successful tenderers under their respective Lots and their respective tender prices.

REQUEST FOR REVIEW

18. On 7th June 2024, the Applicant through the firm of Mwaniki Gachuba Advocates, filed a Request for Review dated 7th June 2024 supported by an Affidavit sworn on 6th June 2024 by Eng. Eric Muya, a Business

development Manager at the Applicant, seeking the following orders from the Board in verbatim:

- a) That the Applicant's Tender for Procurement of Design , Supply, Installation, Testing and Commissioning of Galana Kulalu Substations and Associated Lines (RFX1000001030- Lots 1,2,3 and 4) was responsive at the preliminary examination stage;***
- b) The Respondent's decision to disqualify the Applicant's Tender for Procurement of Design , Supply, Installation, Testing and Commissioning of Galana Kulalu Substations and Associated Lines (RFX1000001030- Lots 1,2,3 and 4) as non responsive at the preliminary examination stage be annulled and set aside;***
- c) The Respondent be directed to re-admit the Applicant's Tender for Procurement of Design , Supply, Installation, Testing and Commissioning of Galana Kulalu Substations and Associated Lines (RFX1000001030- Lots 1,2,3 and 4) and subject the same to technical evaluation;***
- d) The Respondent be directed to disqualify the Interested Parties' Tender for Procurement of Design , Supply, Installation, Testing and Commissioning of Galana Kulalu Substations and Associated Lines (RFX1000001030- Lots 1,2,3 and 4) at the Preliminary examination stage;***
- e) The Respondent's decision to award of the Interested Party's Tender for Procurement of Design, Supply, Installation, Testing and Commissioning of Galana Kulalu Substations and Associated Lines (RFX1000001030- Lots 1,2,3 and 4) and the notification thereof be annulled and***

set aside;

f) Costs of this application be awarded to the Applicant.

19. In a Notification of Appeal and a letter dated 7th June 2024, Mr. James Kilaka, the Acting Board Secretary of the Board notified the Respondent of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondent a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the said Respondent was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 7th June 2024.
20. On 12th June 2024, the Respondent through the law firm of MMA Advocates LLP filed a Notice of Appointment of Advocates of even date.
21. Vide letters dated 13th June 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 within 3 days from 13th June 2024.
22. On 14th June 2024, the Respondent filed a Memorandum of Response dated 13th June 2024 together with a Replying affidavit sworn on 14th June 2024 by Mr. Wilfred Ouma Oduor, the Procuring Entity's Manager

Supply Chain Management. The Respondent equally supplied the confidential documents concerning the subject tender pursuant to section 67(3)(e) of the Act.

23. On 18th June 2024, the 4th Interested Party through the firm of NOW Advocates LLP filed a Notice of Appointment of Advocates, a Notice of Preliminary Objection, Written Submissions, List and Bundle of Authorities, all dated 14th June 2024. The 4th Interested Party equally filed a Replying Affidavit sworn on 14th June 2024 by Elisha Okello, the Technical Manager at the 4th Interested Party.
24. On the same day, 18th June 2024, the 2nd Interested Party through the law firm of Togolaw & Company Advocates, filed a Notice of Appointment of Advocates dated 14th June 2024 together with a Replying Affidavit sworn on 14th June 2024 by John Ndekei Kamau.
25. Still on 18th June 2024, the 3rd Interested Party through the law firm of GM Muchoki & Company Advocates filed a Notice of Appointment of Advocates dated 14th June 2024 together with a Replying Affidavit sworn on 14th June 2024 by Lucy Moraa Ombongi, a Director at the 3rd Interested Party.
26. On the same day, 18th June 2024, the 1st Interested Party through the law firm of Rachier & Amollo Advocates LLP filed a Notice of Appointment of Advocates dated 14th June 2024 together with a replying Affidavit sworn on 14th June 2024 by Widah Nasta, a Director at the 1st Interested Party.

27. On 18th June 2024, the Acting Board Secretary, sent out to the parties a Hearing Notice notifying parties that the hearing of the instant Request for Review would be by online hearing on 20th June 2024 at 11:00 a.m. through the link availed in the said Hearing Notice.
28. On 18th June 2024, the Applicant in response to the hearing invitation, wrote an email to the Acting Board Secretary indicating that he would be seeking an adjournment on 20th June 2024 as he would be attending another matter i.e. Siakago MCCR/693/2018 and that he equally wanted to file rejoinders to the responses that had been filed to the Request for Review.
29. On 20th June 2024 at 11:00 a.m., when the Board convened for the online hearing, all the parties were represented by their various Advocates. The Board read out to the parties the documents filed by the parties and requested them to confirm if the same had been served upon them of which all responded in the affirmative. However, before hearing directions could be taken, Counsel for the Applicant, Mr. Gachuba, made an application for adjournment on account of his previously communication to the Acting Board Secretary that he was previously scheduled to attend the hearing in Siakago MCCR/693/2018 and that he equally wanted to file rejoinders on the responses that had been filed to the Request for Review.
30. Counsel for the Respondent, Mr. Mosota, opposed the adjournment application citing that nothing new had been introduced by the responses to warrant an adjournment. He argued that in the event the adjournment was to granted the Applicant pay costs for the adjournment.

31. Counsel for the 1st Interested Party, Mr. Ligunya, equally opposed the adjournment application on grounds that Mr. Gachuba could work around the Siakago case by picking the correct time allocation for the matter. He further pointed out that this Board has strict statutory timelines unlike the Magistrates Court in Siakago and thus precedence should be accorded to the instant proceedings. Further, that there may be need to filing of Submissions and Supplementary Submissions by parties and this would greatly impact on time management
32. Counsel for the 2nd Interested Party, Mr. Ogola opposed the adjournment application indicating that all Counsel on record in the matter had set aside time to attend to the scheduled hearing noting the strict timelines attendant to procurement matters. He however noted that in the event, the Board allowed the adjournment request the 2nd Interested Party would be inclined to ask for more time to file Supplementary Submissions.
33. Counsel for the 3rd Interested Party, Mr. Muchoki, equally opposed the adjournment request citing grounds that procurement matters are time-bound and that in the event the Board allowed the adjournment request the 3rd Interested Party would be inclined to ask for more time to file Supplementary Submissions.
34. Counsel for the 4th Interested Party, Ms. Nungo, also opposed the adjournment request citing the strict timelines within which the Board has to operate in hearing and rendering itself on procurement matters. She equally argued that Counsel for the Applicant ought to have made arrangements for the handling of his multiple matters. Further that if the Applicant wished to file any response to the responses he could have

done so from 18th June 2024 since as at that date, all the responses were already on record.

35. The Board retreated and returned a Ruling adjourning the hearing session to 24th June 2024 at 11:00 a.m. The Board also gave the following directions:

- i. The Applicant was to file any rejoinder to the parties responses as well as any Written Submission by 6:00 p.m. on 21st June 2024.
- ii. The rest of the parties were at liberty to file their supplementary and/or Written Submissions by 9:00 a.m. on 24th June 2024.
- iii. These directions would equally apply to the related application No. PPARB Application No. 51 of 2024.

36. On 21st June 2024, the 3rd Interested Party filed their Written Submissions dated 18th June 2024.

37. On 21st June 2024 at 6:34 p.m., the Applicant filed Written Submissions as well as a Rejoinder to the Respondent's Memorandum of Response.

38. On 24th June 2024 , the 1st Interested Party filed their Written Submissions of even date.

39. On 24th June 2024, the 2nd Interested Party filed their Supplementary Written Submissions of even date.

40. On 24th June 2024, the Respondent filed their Supplementary Written Submissions dated 21st June 2024.

41. On 13th June 2024 at 11:00 a.m., when the Board convened for the online hearing, all the parties save for the 2nd and 3rd Interested Parties were represented by their various Advocates. The Board gave directions for the Secretariat to reach out to the Counsel representing the unrepresented parties.

42. Counsel representing the 1st and 2nd Interested Parties subsequently joined the session and the Board then read out to the parties the documents that had been filed subsequent to the previous hearing date and requested the parties to confirm if the same had been served upon them of which all responded in the affirmative.

43. The Board subsequently gave the following hearing directions:
 - i. The Applicant would start by arguing both the Request for Review as well as its Preliminary Objection in 15 minutes;
 - ii. The Respondent would take 15 minutes to argue its case and respond to the Applicant's Preliminary objection;
 - iii. Each of the Interested Parties would have 10 minutes to argue its case save for the 4th Interested party who was allocated 15 minutes;
 - iv. The 4th Interested Party would in its assigned 15 minutes offer its response and urge its Preliminary Objection.
 - v. The Applicant would offer a rejoinder to the responses made on its Request for Review as well as Preliminary Objection in 10 minutes;
 - vi. The 4th Interested Party would close by offering a rejoinder on the responses to its Preliminary Objection only in 5 minutes.

PARTIES SUBMISSIONS

Applicant's Submissions

44. Counsel for the Applicant, Mr. Gachuba, indicated that the Applicant was placing reliance on their filed documents.
45. In response to the 4th Interested party's preliminary objection, Counsel argued that Section 170 of the Act lists the parties to a Request for Review and argued that the 4th Interested Party was made a party to the instant proceedings pursuant to Section 170(c). According to Counsel, pursuant to Order 1 Rule 5 of the Civil Procedure Rules, 2010 the inclusion or misjoinder of the 4th Interested Party was not fatal to the proceedings.
46. Relying on ***Fubeco China Fushun v Naiposha Company Limited & 11 others [2014] eKLR*** he argued that the Applicant erroneously misdescribed the Procuring Entity but this misdescription was not fatal to the proceedings.
47. On the different dates appearing on the Request for Review and the affidavit in support thereof, Counsel argued that Regulation 203 (b) does not prescribe that a Request for Review must be dated the same date as the Statement in support thereof. For this submission he relied on ***Ndeya & Others v Samuel Nyoike t/a Same Agencies [2006] eKLR***
48. On the Applicant's Preliminary Objection, counsel argued that the Respondent's Memorandum of Response was incompetent as the same was filed by the firm of MMA Advocates LLP without authority. Relying on

Mugoye & Associates Advocates v Kiambu County Assembly Speaker [2018] eKLR and East African Portland Cement Ltd v Capital Markets Authority & 4 others [2014] eKLR he argued that there must be evidence in writing when dealing with public institutions.

49. Counsel equally challenged the affidavit in support of the Respondent's Memorandum of Response arguing that there was no evidence that deponent of the said affidavit, Mr. Oduor, was in fact authorized to depone the affidavit on behalf of the Respondent. For this he relied on ***Oduor Siminyu & Company Advocates v Dock Workers Union (Judicial Review Miscellaneous Application E002 of 2022) [2023] KEHC 24561 (KLR) (13 July 2023) (Ruling) and Hosea Mundui Kiplagat v Sammy Komen Mwaita & 2 others [2013] eKLR***
50. Mr. Gachuba contended that the Memorandum of Response and Replying affidavit were filed outside the 5 days. Relying on ***The Consortium of TSK Electronica Y Electricdad SA & Ansaldoenergia v PPARB & 3 Others, Civil Appeal No E012 of 2022*** he argued that timelines under the statute were incapable of extension.
51. On the merits of the Request for Review, he submitted that verification was a post-qualification exercise and that accordingly the Applicant's tender must have been responsive for the Procuring Entity to have gone in to post qualification verification of its documents.

52. He submitted that the Tender Document did not contain a requirement on commissioning and that the Procuring introduced this alien requirement to disqualify the Applicant.
53. He further argued that the Interested Parties were not qualified for award of the tender as no evidence was tendered to show that the Interested Parties satisfied the requirements under the Tender Document. He indicated that the Applicant was only aware of 7 companies that had previously carried out similar works and asserted that this averment was not contradicted.
54. He therefore urged the Board to allow the Request for Review.

Respondent's Submissions

55. Counsel for the Respondent, Mr. Mosota, indicated that the Respondent was placing reliance on their filed documents in the matter.
56. He argued that the Applicant's Preliminary Objections did not constitute pure points of law as required under the locus classicus ***Mukisa. Biscuit Manufacturing Co. Ltd Vs. West End Distributors. Ltd [1969] EA 696*** . He pointed out that the grounds invited an inquiry in to factual matters for instance circumstances surrounding the appointment of MMA Advocates LLP. Further, Mr. Oduor's authorization to depone the affidavit was equally a factual matter that required evidence.
57. Mr. Mosota maintained that the Memorandum of Response was filed within the timelines under regulation 205 of the Regulations 2020 read

alongside section 57 of the Interpretation and General Provisions Act. He contended that in computing the time Sunday was excluded.

58. He further argued in the alternative that in the event the Response was filed outside time, he sought that the Board applies Article 159(2)(b) of the Constitution of Kenya, 2010 and overlook the procedural technicality. He placed reliance on ***PPARB Application No 25 of 2024; S Research & Consultancy Services v Ministry of Investment, Trade and Industry & Others***
59. Counsel maintained that the Applicant's tender did not comply with Section 79 of the Act as it failed to commission its documents and provide audited accounts. Further, the Applicant placed reliance on a forged NCA Certificate that was incapable of verification.
60. He argued that failure of the Applicant to comply with mandatory requirements under the Tender Document did not constitute a minor deviation and that a mandatory requirement was incapable of being waived. For this proposition reliance was placed on ***PPARB Application No. 1 of 2017.; Nomads Constructions Company Ltd v Kenya National Highways Authority & Anor.***
61. He argued that the subject tender was a public tender and thus any firm meeting the requirements under the Tender Document including the Interested Parties herein were eligible to submit their tenders.

1st Interested Party's Submissions

62. Counsel for the Interested Party, Mr. Ligunya, pointed out that the instant Request for Review was anchored on allegations against the Procuring Entity and the qualifications of the Interested Parties.
63. He argued that under the subject tender success was to be gauged on the completeness of a tender and thus non-compliance with a requirement would lead to disqualification.
64. According to Counsel, an inability of the Procuring Entity to verify the genuineness of a document after making reasonable attempts to do so constitutes a good ground for disqualification. Therefore, it constituted a good ground of disqualification of the Applicant's tender after the Procuring Entity was unable to verify its submitted NCA Certificate. Further, that the Applicant failed to lead evidence in the instant proceedings that its NCA Certificate was in fact valid.
65. Mr. Ligunya faulted the Applicant for not disclosing how they were compliant. He pointed out that the Applicant did not lead evidence of having submitted a duly filled Confidential Business Questionnaire or commissioned documents and the presumption therefore was that it didn't meet this requirement.
66. He clarified that clause 7 at page 67 of the tender document allowed tenderers to quote tender prices in multiple currencies.

67. He faulted the Applicant's affidavit for violating confidentiality of the tender process and questioned the source of the Applicant's averments regarding the qualifications or otherwise of the interested parties' tenders.
68. He argued that at paragraphs 7 and 19 of the affidavit in support of the application for review, the Applicant contradicted itself on receipt of the Notification Letter.
69. Mr. Wakwaya, equally appearing for the 1st Interested Party, argued that the Evaluation Committee was best placed to determine responsive tenders.
70. He argued that bid formalities are sine qua non for a responsive tender and where a tender does not satisfy a mandatory requirement it must be disqualified.
71. He urged that the Applicant was notified of its disqualification and that the competency of the Notification was not a subject of challenge.

2nd Interested Party's Submissions

72. Counsel for the 2nd Interested Party, Mr. Ogola, indicated that the 2nd Interested Party would be placing reliance on its filed documents.
73. He equally associated himself with the submissions made on behalf of the Respondent and indicated his support for the 4th Interested Party's Preliminary Objection.

74. Relying on ***ZMPC vs THE KENYA PORTS AUTHORITY (KPA) & JIANGSU RAINBOW INDUSTRIAL EQUIPMENT COMPANY LIMITED PPARB decision No. 41 of 2024***, he argued that the instant Request for Review was defective for failing to join the Accounting Officer.
75. He maintained that a Procuring Entity should only consider conforming tenders. He faulted the Applicant for not leading evidence to show that only 7 tenderers could satisfy the tender requirements in the subject tender terming this as bare allegations.
76. He argued that the Notification complied with Section 87 of the Act and Regulation 82 of the Regulations 2020.

3rd Interested Party's Submissions

77. Counsel for the 3rd Interested Party, Mr. Mbugua, indicated that the 3rd Interested Party would be placing reliance on its filed documents.
78. He argued that ITT 20 allowed tenderers to quote for their tenders in any currency.
79. He contended that the Applicant ought to have placed evidence of lack of experience on the part of the Interested Parties or proof of their debarment from participating in the subject tender. He maintained that the subject tender being an open tender, it was open for the Interested Parties herein to submit their tenders,

80. He maintained that the Notification Letters were compliant having disclosed the successful tenders, their tender prices and the reasons for the disqualification of the unsuccessful tenders.

81. He sought for the dismissal of the Request for Review.

4th Interested Party's Submissions

82. Counsel for the 4th Interested Party, Ms. Nungo, placed reliance on the 4th Interested Party's filed documents.

83. Counsel pointed out that the body of the Request for Review did not mention Lot 4 of the subject tender and that this was only introduced in the reliefs in the Request for Review. She placed reliance on paragraphs 23-30 of her written submissions in this regard.

84. She maintained that the jurisdiction of the Board derives from Article 227 of the Constitution as read with section 27 and 167 of the Act and submitted that the Board lacked jurisdiction to hear the Application as the Applicant was neither a tenderer nor a candidate in respect of Lot 4. She placed reliance on Authorities No. 4 and 5 in the 4th Interested Party's list of authorities and paragraphs 33-34 of her written submissions.

85. Further counsel argued that Section 170(b) of the Act makes it mandatory for the Accounting Officer to be joined to a Request for Review before the Board, She contended that the Accounting Officer had not been joined as the Procuring Entity named in the Request for Review was a stranger. She placed reliance on the recent board decision in the case of **ZMPC vs THE KENYA PORTS AUTHORITY (KPA) & JIANGSU**

***RAINBOW INDUSTRIAL EQUIPMENT COMPANY LIMITED PPARB
decision No. 41 of 2024.***

86. She equally argued that the affidavit in support of the Request for review could not possibly have been sworn in support of the Request for Review owing to the different dates on the affidavit and the Request for Review and further that the said application was not supported by a statement as required by section 167(1) of the Act..
87. She indicated that the Applicant had not challenged the accuracy of the reasons given in the Notification Letter for its disqualification from the subject tender.

Applicant's Rejoinder on its Request for Review

88. In a brief rejoinder, Counsel for the Applicant, Mr. Gachuba, indicated that no evidence had been adduced to disprove the allegations made in the Applicant's Preliminary Objection.
89. He equally indicated that in the computation of time for the filing of the Respondent's Memorandum of Response, the weekend was not excluded.
90. Further that no reference was made to a requirement in the Tender Documents for the commissioning of documents.
91. He maintained that paragraphs 1 to 13 of the rejoinder clarified on the genuineness of the Applicant's NCA Certificate.

92. He argued that the Tender Document did not specifically require audited accounts for the year 2023.
93. He equally argued that the qualifications of the Interested Parties was something within the knowledge of the Respondent and the Interested Parties and thus under Section 112 of the Evidence Act, the evidential burden shifted to the Interested Parties and the Respondent.
94. Mr. Gachuba argued that the Notification Letters did not disclose why the Interested Parties were the successful tenderers.
95. Further that it was necessary to include the 4th Interested Party in the proceedings.
96. Further that Section 170 of the Act did not require an Applicant to name a Procuring Entity and the fact that the office of the Respondent did not take issue with how it was described could not change the position in law.

4th Interested Party's Rejoinder on its Preliminary Objection

97. Counsel for the 4th Interested Party, Ms. Nungo maintained that the Accounting Officer was not joined in the proceedings as the named Respondent was a stranger and that the failure of the Respondent to take issue with the description does not negate the law.
98. She indicated that allowing prayers 1,2,3, and 5 would affect the outcome of Lot 4 of the Tender Document.

CLARIFICATIONS

99. The Board sought for the Applicant to clarify on how it expected the Procuring Entity to verify the documents submitted in the subject tender. Counsel for the Applicant, Mr. Gachuba, indicated that there was a distinction between clarification from a tenderer under Section 81 of the Act and a clarification from an issuing authority under Section 83 of the Act.
100. The Board asked the Applicant to clarify on its submitted financial accounts for which Counsel for the Applicant argued that the 2023 financial year ended in December 2023 and thus it would be impracticable to expect that its audited financial accounts would be ready by February 2023 and thus the Applicant submitted audited accounts for 2022.
101. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 7th June 2024 had to be determined by 28th June 2024. Therefore, the Board would communicate its decision on or before 28th June 2024 to all parties via email.

BOARD'S DECISION

102. 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 crystallized the following issues for determination:
- I. ***Whether the Board has jurisdiction to hear and determine the instant Request for Review.?***

In determining this issue the Board will address the following:

- i. Whether the Applicant has the locus standi to bring the instant Request for Review in view of its non-participation in Lot 4 of the subject tender?
- ii. Whether the Applicant enjoined the proper Accounting Officer to the Request for Review and whether failure to do so, if at all was fatal?
- iii. Whether the Applicant's predating of its Supporting Affidavit was fatal to the request for review proceedings?

II. ***Whether the Applicant's Notice of preliminary Objection is appropriate?***

In determining this issue the Board will address the following:

- i. Whether the Respondent properly instructed its Advocates?
- ii. Whether Mr. Oduor had the authority to depone the Respondent's Replying Affidavit in response to the Request for Review?
- iii. Whether the Respondent's response to the Request for Review is time-barred?

Depending on the Board's finding on the two issues above:

III. ***Whether the Procuring Entity's Evaluation Committee's disqualification of the Applicant from the subject tender was in line with the provisions of the Constitution of Kenya, 2010, the Act, the Regulations 2020 and the Tender Document?***

- IV. ***Whether the interested parties were fairly awarded the subject tenders.***

- V. ***Whether the Procuring Entity issued Notification Letters compliant with Section 87 of the Act and Regulation 82 of the Regulations 2020?***

- VI. ***What orders should the Board issue in the circumstance?***

Whether the Board has jurisdiction to hear and determine the instant Request for Review?

103. Subsequent to the institution of the instant Request for Review, the 4th Interested Party filed a Preliminary Objection dated 14th June 2024 challenging the jurisdiction of the Board over the matter on grounds inter-alia that the Applicant lacked locus standi to bring the Request for Review as against Lot 4 of the tender; that it failed to enjoin the Accounting Officer to the proceedings and that the Request for Review was supported by a supporting affidavit that predated it.
104. For starters, this Board acknowledges the established legal principle that courts and decision-making bodies can only preside over cases in which they have jurisdiction and that when a jurisdictional question arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before taking any further step in the matter..

105. In the locus classicus case on the question of jurisdiction ***The Owners of the Motor Vessel "Lillian S" -v- Caltex Oil Kenya Ltd (1989) KLR 1*** Nyarangi J.A. stated the law on this point thus:

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction." Emphasis ours

106. In the case of ***Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others [2013] eKLR***, the Court of Appeal emphasized the centrality of the issue of jurisdiction and held that:

"...So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of

proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain...."

107. This Board is a creature of statute specifically Section 27(1) of the Act which provides that:

"(1) There shall be a central independent procurement appeals review board to be known as the Public Procurement Administrative Review Board as an unincorporated Board."

108. Section 28 of the Act provides for the functions of the Board as follows:

The functions of the Review Board shall be— reviewing, hearing and determining tendering and asset disposal disputes; and to perform any other function conferred to the Review Board by this Act, Regulations or any other written law."

109. Needless to state, in performing the foregoing statutory functions, the Board is at all times bound by the provisions of the Constitution and the Constitutive Act.

110. The Board shall now interrogate the individual grounds of the Preliminary Objection raised by the 4th Interested Party to establish whether it is clothed with the requisite jurisdiction over the instant Request for Review:

i. Whether the Applicant has the locus standi to bring the instant Request for Review in view of its non-participation in Lot 4 of the subject tender?

111. The 4th Interested Party challenged the Applicant's locus to standi to bring the instant Request for Review on grounds that the Applicant neither obtained a blank Tender Document nor submitted a tender in respect of Lot No. 4 of the subject tender. According to the 4th Interested Party therefore, the Applicant was incapable of suffering any loss or damage.

112. On its part the Applicant admitted that though it did not participate in Lot No. 4 of the subject tender, Section 170(c) of the Act required the 4th Interested Party as the successful tenderer for that Lot to be joined to the proceedings. Further, that under Order 1 Rule 5 of the Civil Procedure Rules, 2010 misjoinder of a party was not fatal.

113. Section 167 of the Act identifies the categories of persons capable of sustaining a Request for Review before this Board in the following terms:

167. Request for a review

(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.

114. Section 2 defines a candidate and tenderer as follows:

"candidate" means a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity;

"tenderer" means a person who submitted a tender pursuant to an invitation by a public entity;

115. From the above sections, it is only tenderer i.e. a person who submitted a tender or a candidate i.e. a person who has obtained the tender document from a Procuring Entity, that have the locus standi to approach the Board in a Request for Review.

116. Turning to the circumstances of this case, the Applicant obtained the tender document and submitted its tender in respect of all Lots with the exception of Lot No. 4. Can the Applicant's failure to submit a tender in respect of Lot No. 4 constitute a ground to suggest that he lacks the locus standi to bring the instant Request for Review? We think not. The Applicant has the requisite locus standi for at least 2 reasons:

- i. The subject tender had 4 Lots, all of which were using the same Tender Document and therefore the Applicant having obtained the Tender Document, qualifies as a candidate within the meaning under Sections 2 and 167(1) of the Act.
- ii. The subject tender had 4 Lots and the Applicant submitted its tenders in in 3 of the Lots i.e. Lots No. 1, 2 and 3. Accordingly, the

Applicant qualifies as a tenderer in the subject tender and thus capable of bringing a challenge in respect of the subject tender.

117. In view of the foregoing, the Board finds that the Applicant has the locus standi to bring the instant Request for Review in view of its non-participation in Lot 4 of the subject tender. This ground of the Preliminary Objection fails.

iii. Whether the Applicant enjoined the proper Accounting Officer to the Request for Review and whether failure to do so, if at all was fatal?

118. The 4th Interested Party argued that the Applicant by suing the **CHIEF EXECUTIVE OFFICER OF THE RURAL ELECTRIFICATION AUTHORITY & RENEWABLE ENERGY CORPORATION** instead of the **CHIEF EXECUTIVE OFFICER OF THE RURAL ELECTRIFICATION & RENEWABLE ENERGY CORPORATION** failed to join the proper Accounting Officer as a party to the proceedings and was thus in breach of Section 170(b) of the Act. Counsel for the 4th Interested Party argued that the Applicant had in place of the Accounting Officer of the RURAL ELECTRIFICATION & RENEWABLE ENERGY CORPORATION enjoined a stranger as a party to the Request for Review. Counsel relied on the Board's decision in ***ZMPC vs THE KENYA PORTS AUTHORITY (KPA) & JIANGSU RAINBOW INDUSTRIAL EQUIPMENT COMPANY LIMITED PPARB decision No. 41 of 2024*** in support of its submission.

119. Counsel for the Applicant, Mr. Gachuba, argued that the Applicant had joined the Accounting Officer to the proceedings only that there was a

minor misdescription of the Accounting Officer. He maintained that this was not fatal and was curable by dint of Order 1 Rule 5 of the Civil Procedure Rules, 2010.

120. Section 170 of the Act spells out the parties to Request for Review to include the Accounting Officer in the following terms:

170. Parties to review

The parties to a review shall be—

(a) the person who requested the review;

(b) the accounting officer of a procuring entity;

(c) the tenderer notified as successful by the procuring entity;

and

(d) such other persons as the Review Board may determine.

121. Courts of this country have taken the position that failure to join the Accounting Officer is fatal. In ***El Roba Enterprises Limited & 5 others v James Oyondi t/a Betoyo Contractors 5 others [2018] eKLR*** the High Court held that failure to join the Accounting Officer of a Procuring Entity to a Request for Review renders the Request fatally defective. The Board held:

34. The Public Procurement and Asset Disposal Act 2015 came into operation on 7th January 2016. Prior to this the Public Procurement and Disposal Act, 2005 was in effect. Section 96 of the repealed Act read as follows:

96. The parties to a review shall be— (a) the person who requested the review; (b) the procuring entity; (c) if the procuring entity has notified a person that the person’s tender, proposal or quotation was successful, that person; and (d) such other persons as the Review Board may determine. This provision did not require the accounting officer of a procuring entity to be a party to a review. However, under the current Public Procurement and Asset Disposal Act, the accounting officer is named as a party to the proceedings before the Review Board.

35. In my view, there must be a reason as to why Parliament saw it fit to introduce the accounting officer of the procuring entity as a necessary party to the review. A keen reading of Section 170 of the Act reveals that the term "shall" is used. According to the Black’s law dictionary the term "shall" is defined as "has a duty to; more broadly, is required". As such the provision should be read in mandatory terms that the accounting officer of a procuring entity must be a party to a review.

37. Parties form an integral part of the trial process and if a party is omitted that ought not to be omitted then the trial cannot be sustained. In this case, the omission of the accounting officer of the procuring entity from the applications filed before the 5th Respondent is not a procedural technicality. The Applicants (the 1st and 2nd Respondents herein) in the review applications ought to have

included the accounting officer of the procuring entity in the proceedings before the 5th Respondent. The failure to do so meant that the 5th Respondent could not entertain the proceedings before it. The 5th Respondent ought to have found review applications No. 76 of 2017 and 77 of 2017 to be incompetent and dismissed the applications....”

122. The above position was affirmed by the Court of Appeal in **James Oyondi t/a Betoyo Contractors & another v Elroba Enterprises Limited & 8 others [2019] eKLR** thus:

“It is clear that whereas the repealed statute named the procuring entity as a required party to review proceedings, the current statute which replace it, the PPADA, requires that the accounting officer of the procuring entity, be the party. Like the learned Judge we are convinced that the amendment was for a purpose. Parliament in its wisdom elected to locate responsibility and capacity as far as review proceedings are concerned, on the accounting officer specifically. This, we think, is where the Board’s importation of the law of agency floundered. When the procuring entity was the required party, it would be represented in the proceedings by its officers or agents since, being incorporeal, it would only appear through its agents, though it had to be named as a party. Under the PPADA however, there is no such leeway and the requirement is explicit and the language compulsive that it is the accounting officer who is to be

a party to the review proceedings. We think that the arguments advanced in an attempt to wish away a rather elementary omission with jurisdictional and competency consequences, are wholly unpersuasive. When a statute directs in express terms who ought to be parties, it is not open to a person bringing review proceedings to pick and choose, or to belittle a failure to comply.

123. From the foregoing, it follows that failure to join an Accounting Officer to a Request for Review renders it fatal.

124. Turning to the instant Request for Review, the Applicant named the Respondent as "**Chief Executive Officer, Rural Electrification Authority & Renewable Energy Corporation**" instead of "**Chief Executive Officer, Rural Electrification & Renewable Energy Corporation**". In other words, the Applicant included an extra word "Authority" in the description of the Respondent, when he should not have done so. Relying on the **ZPMC case** supra, in which this Board downed its tools on account inter-alia that the Applicant was not a party known in law and that the Application did not enjoin the Accounting officer to the proceedings.

125. The Board takes cognizance of its decision in the ZPMC Case and is of the considered opinion that its raison d'être or ratio decidendi remains relevant and good law on the facts of that case but not in the current case for the following reasons.

126. As rightly noted by this Board and the courts in the foregoing authorities that trace the history of section 170 of the Act, the requirement that an accounting officer be enjoined to procurement proceedings is for good reason and intended to attach responsibility and accountability to the person of the accounting officer in proceedings before the Board and the courts. As the person in charge of procurement proceedings of a procuring entity, the buck stops with the accounting officer whenever questions are raised regarding the propriety or otherwise of the said proceedings. In the event, failure to enjoin an accounting officer, we opine, undermines and dilutes the principle of accountability and condemns the accounting officer unheard contrary to the principle of fair hearing and fair administrative action. It is for this reason that the legislature deemed it fit that he/she be made a mandatory party to a request for review before the Board. That said, we must emphasize that failure to enjoin an Accounting officer to a request for review would by operation of law be a fatal omission to a request for review.

127. In the ZPMC case, not only didn't the Applicant fail to enjoin the accounting officer of the procuring entity in any form or shape, it failed, the Board held, to establish its (the Applicant's) legal status as a juristic person. On the latter issue, a cursory review of the Board's decision and in particular paragraphs 90-94 will show that the Board did not down its tools or strike out the application on the mere basis of the 'misdescription' of the Applicant's name. In the decision, the Board painstakingly combed through the material placed before it in an attempt to find a logical and/or rational connection between the Applicant before it and the candidate or tenderer(s) in the subject tender proceedings. Paragraph 94 of the ZPMC

decision summarizes the Board's difficulties with reconciling the Applicant's legal status in Kenya or at all hence its decision to strike out the Application.

128. In the instant case, the Board notes a number of distinguishing factors from the ZPMC case. Firstly, unlike private entities with fine distinctions or differences in name and which must therefore be identified with exactitude, the Respondent is a public entity established under section 43 of the Energy Act and whose Identity cannot therefore be the subject of conjecture as would be the case with private entities. Secondly, as intensioned by the legislature in the enactment of section 170 of the Act, the accounting officer of the relevant procuring entity did in fact appear and actively participated in the review proceedings without qualms or doubt as to who had been sued. Thirdly, the Board has reviewed the confidential documents and responses filed by the accounting officer in the instant proceedings and finds no inconsistencies whatsoever between the same and the procurement proceedings to which the request for review relate. In the event, the Board's finds that the ratio in the ZPMC case is inapplicable to the instant request for review. We are inclined to agree with the Applicant that the misdescription by addition of the word 'authority' to the name of the procuring entity did not visit any prejudice upon the parties herein as all parties including the Respondent was capably represented in the present proceedings. We hold that the misdescription qualifies as one that can in the peculiar circumstances of this case be excused under Article 159(2)(d) of the Constitution of Kenya, 2010 in the interest of justice.

129. The Board has also studied the Tender Document and noted that parts the blank Tender Document equally makes the error of referring to the Procuring Entity and the Accounting Officer as Rural Electrification Authority and Renewable Energy Corporation and Chief Executive Officer, Rural Electrification Authority and Renewable Energy Corporation respectively . A few examples would suffice:

130. First, the Preamble of the Invitation to Tender in the Tender Document refers to the Procuring Entity as Rural Electrification Authority and Renewable Energy Corporation:

INVITATION TO TENDER (ITT) PROCURING ENTITY:
Rural Electrification Authority and Renewable Energy Corporation
Kawi Complex, South C
P.O. Box 34585-00100
NAIROBI, KENYA

131. Equally, Clause 11 of the Invitation To Tender in the Tender Document describes the Accounting Officer as the Chief Executive Officer, Rural Electrification Authority and Renewable Energy Corporation:

11. The address referred to above are:
A. Address for obtaining further information
Chief Executive Officer
Rural Electrification Authority and Renewable Energy Corporation
Kawi Complex, South C

Kawi House- South C, Off Red Cross Road

P.O. Box 34585-00100

Nairobi, Kenya

..

132. Evidently therefore, the Procuring Entity itself was not infallible to the mix up that the Applicant fell for. As in the instant case, the said mix up does not seem to have occasioned any confusion on any of the candidates or tenderers as the issue was not raised by any of them prior to or after submission of tenders. We find no reason to hold otherwise as against the Applicant in these proceedings.

133. In view of the foregoing, this ground of the Preliminary Objection fails.

ii. Whether the Supporting Affidavit to the Request for Review bearing a date predating the Request for Review was fatal to the Request for Review?

134. The 4th Interested Party took issue with the Supporting Affidavit in support of the Request for Review predating the Request for Review. According to Counsel for the 4th Interested Party, the Affidavit could not be taken to be in support of the Request for Review.

135. The Applicant maintained that neither the Act nor the Regulations 2020 prescribed the sequence of dating the Request for Review and the Statement in support thereof.

136. Section 167 of the Act speaks to the filing of a Request for Review but is silent on its dating. However, Regulation 203 Regulations 2020 goes a step further in prescribing the format of a Request for Review as well as making it mandatory that a Request for Review should be accompanied by a Statement:

137. Regulation 203 of the Regulations 2020 provide as follows:

203. Request for a review

(1) A request for review under section 167(1) of the Act shall be made in the Form set out in the Fourteenth Schedule of these Regulations.

(2) The request referred to in paragraph (1) shall—

(a) state the reasons for the complaint, including any alleged breach of the Constitution, the Act or these Regulations;

(b) be accompanied by such statements as the applicant considers necessary in support of its request;

(c) be made within fourteen days of —

(i) the occurrence of the breach complained of, where the request is made before the making of an award;

(ii) the notification under section 87 of the Act; or

(iii) the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder.

(d) be accompanied by the fees set out in the Fifteenth Schedule of these Regulations, which shall not be refundable.

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

138. From the foregoing both the Act and Regulations are silent on the dating of the Request for Review and the Statement in support thereof.

139. Turning to the instant case, the Request for Review is dated 7th June 2024 and its Statement in support thereof i.e. the Supporting Affidavit of Eng. Eric Muya is indicated as having been sworn on 6th June 2024, which is a day earlier.

140. Paragraph 23 of the said affidavit contains the following averment:

"23. THAT I swear this affidavit to support the Request for Review filed herewith"

141. What is not controverted is that the sworn affidavit of Eng. Muya was filed alongside the Request for Review dated 7th June 2024 and for all intents and purposes therefore, accompanied the Request for review as contemplated by regulation 203(2)(b) of the Act. It therefore cannot be mistaken as having been intended to be in support of the said Request for Review.

142. Good order would have of course required that the affidavit bear the same or a later date to that of the Request for Review to signify that the deponent of the affidavit had actual knowledge of the contents of the Request for Review. Nonetheless, absent evidence of fraud or a statutory prescription on the dating of the Request for Review and Statement in support thereof, a statement, howsoever dated is for all intents and

purposes appropriately filed in a request for review provided that both documents are filed on the same date.

143. In view of the foregoing , the Board finds that the Supporting Affidavit to the Request for Review bearing a date predating the Request for Review was not fatal to the Request for Review. This ground of the Preliminary Objection equally fails.

Whether the Applicant’s Notice of preliminary Objection is appropriate?

144. The Respondent and the Interested Party’s took issue with the Applicant’s filed Preliminary Objection on grounds that it contains grounds that were not pure grounds of law typical of a Preliminary Objection. They argued that the grounds were such that they called for the adduction of evidence and thus outside the province of a Preliminary Objection.

145. The Board has keenly studied the 4 grounds in the Applicant’s Notice of Preliminary Objection dated 21st June 2024 and wishes to reproduce them for completeness of the record as follows:

1. The Memorandum of Response and the Supporting Affidavit were drawn and filed by MMA Advocates LLP which was not appointed by the Respondent in writing.

2. MMA Advocates LLP was not contracted in accordance with Article 227(1) of the Constitution of Kenya, 2010.

3. The Supporting Affidavit was sworn by Wilfred Ouma Oduor who was not authorised by the Respondent in writing.

4. The Memorandum of Response and the Supporting Affidavit are time barred by virtue of Regulation 205(3)(4) of the Public Procurement and Asset Disposal Regulations, 2020 and the Board lacks jurisdiction to entertain the same.

146. From a cursory look of the above, the Grounds 1 to 3 above do not constitute pure grounds of law contemplated under the oft celebrated case of ***Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969]EA 696***. They are grounds that call for a factual analysis of the evidence both for and against their suppositions:

- i. Ground 1 of the Preliminary Objection requires parties to lead evidence on the appointment of MMA Advocates LLP to represent the Respondent.
- ii. Ground 2 of the Preliminary Objection requires parties to lead evidence on the contracting of MMA Advocates LLP.
- iii. Ground 3 of the Preliminary Objection requires parties to lead evidence on Mr. Oduor's authority to sign the supporting affidavit in support of Respondent's Memorandum of Response.

147. Accordingly, Grounds 1 to 3 having failed to constitute pure points of law, must of necessity be struck out. However, Ground 4 of the Preliminary Objection warrants an analysis as it constitutes a pure point of law, which the Board will analyze in the ensuing part of this Decision.

148. The Applicant took issue with the Respondent's Memorandum of Response having been filed on 14th June 2024 which was outside the

allowed timelines from the date it was served with the Request for Review on 7th June 20024.

149. The Respondent argued that its Memorandum of Response was timeously filed taking into account the computation of time under the Interpretation of General Provisions Act. Further that in the event it was time-barred, the Respondent sought to invoke Article 159(2)(d) of the Constitution of Kenya.

150. Regulation 205 of the Regulations provides as follows:

205. Notification of the review and suspension of procurement proceedings

(1) The Secretary shall, immediately after the filing of the request under regulation 203, serve a notice thereof to the accounting officer of a procuring entity in accordance with section 168 of the Act.

(2) The notification of the filing of the request for review and suspension of procurement proceedings shall be communicated, in writing, by the Review Board Secretary.

(3) Upon being served with a notice of a request for review, the accounting officer of a procuring entity shall within five days or such lesser period as may be stated by the Secretary in a particular case, submit to the Secretary a written memorandum of response to the request for review together with such documents as may be specified.

(4) An accounting officer of a procuring entity who fails to submit the document within the stipulated period under paragraph (3), commits an offence and shall be liable to a fine not exceeding four million shillings or to imprisonment for a term not exceeding ten years, or to both.

(5) The Review Board Secretary shall immediately notify all other parties to the review upon receipt of such documents from a procuring entity under paragraph (3).

151. In the instant proceedings the Board Secretary notified the Accounting Officer of the filing of the instant Request for Review through an email sent on the evening of Friday, 7th June 2024. The Accounting Officer was granted 5 days from 7th June 2024 to file their Memorandum of Response.

152. In computing the 5 days contemplated under the Act for the filing of its response, we take guidance from section 57 of the Interpretation and General Provisions Act:

"57. Computation of time

In computing time for the purposes of a written law, unless the contrary intention appears—

(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;

(b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section

referred to as excluded days), the period shall include the next following day, not being an excluded day;

(c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;

(d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time”

153. When computing time when the Respondent’s Memorandum of Response ought to have been filed 7th June 2024 is excluded as per section 57(a) of the IGPA being the day that the Respondent learnt of the Request for Review. This means time started to run on 8th June 2024 and lapsed on 12th June 2024. In the event, the Respondent’s Memorandum of Response was filed 2 days outside time.

154. That said, we agree with the Applicant that the Memorandum of response was indeed filed outside the timelines prescribed by the regulations. We however hasten to add that unlike timelines prescribed by the Act, the timelines for filing a response to a request for review are not cast in stone and may, at the discretion of the Board, judiciously exercised, be extended in the interest of justice. In the instant case, the Applicant neither pleaded nor demonstrated any prejudice it stood to suffer as a result of the late filing of the Respondent’s memorandum of response. It is trite law that **Rules of procedure are handmaidens**

and not mistresses of justice and should not be elevated to a fetish as theirs is to facilitate the administration of justice in a fair orderly and predictable manner, not fetter or choke it and where it is evident that a party has attempted to comply with the rules but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out its defence in toto. Deviations from or lapses in form or procedure, which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect, ought not be treated as nullifying the legal instruments thus affected and the Court should rise to its higher calling to do justice by saving the proceedings in issue. – See Ringera, J (as he then was) in the case of Microsoft Corporation vs. Mitsumi Computer Garage Ltd & Another Nairobi (Milimani) HCCC No. 810 of 2001 [2001] KLR 470; [2001] 2 EA 460 :

155. In the circumstances of this case, the Board finds and holds that having sought time and filed a rejoinder to the Respondent's response and further highlighted its submissions to the same, the Applicant did not suffer or demonstrate to have suffered any prejudice in any fundamental respect or at all to warrant the draconian action of striking out the Respondent's Memorandum of response. To do so would not only unduly elevate the rules of procedure to a fetish but more importantly deprive this Board of the benefit of the Respondent's response as to enable it dispense justice in a holistic and just fashion.

156. In view of the foregoing the Board finds that the Applicant's Notice of Preliminary Objection lacks merit and suffers the same fate as the 4th Interested Party's preliminary objection.

Whether the Procuring Entity's Evaluation Committee's disqualification of the Applicant from the subject tender was in line with the provisions of the Constitution of Kenya, 2010, the Act, the Regulations 2020 and the Tender Document?

157. On the merits of its application for review, the Applicant has taken issue with its disqualification from the subject tender at the Preliminary Evaluation Stage.

158. The Respondent contended that the Applicant's tender was properly disqualified at the Preliminary Evaluation Stage having failed to satisfy the Mandatory requirements under the Tender Document. The Respondent further contended that the Applicant's tender failed to meet the requirements under Clauses 8.0, 8.1.1 and 8.1.5 of the Tender Document.

159. The Board is therefore invited to interrogate the Procuring Entity's Evaluation Committee's evaluation process that culminated in the disqualification of the Applicant's tender .

160. 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.”

161. 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.”

162. 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 offered an explication of section 79 of the Act thus:

"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***

163. 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.

164. From the instant Request for Review the Applicant was disqualified from the subject tender on account of what the Respondent termed as non-compliance with the requirements under Clauses 8.0, 8.1.1 and 8.1.5 of the Tender Document. Each of these clauses of the Tender Document shall now be interrogated in turn to verify the Applicant's compliance with them:

Alleged Non-Compliance with Clause 8.0.

165. Page 38 of the Tender Document provides as follows:

Part I- Preliminary Evaluation Criteria under Clause 3.33 of the ITT . These are mandatory requirements.

8.0 Submission of contractor's registration Certificate with NCA and EPRA in category of works and class as follows:

- i. Building and Civil works- NCA 4 and above***
- ii. Electrical installation works- NCA 3 (and above)***
- iii. EPRA Certification as Electrical Contractor- ERC A1***

166. From the above, in order for a tender to comply with Clause 8.0 it had to contain a contractor's registration certificate with NCA and EPRA in the 3 category works and class listed above. Failure to have a contractor's registration certificate with NCA and EPRA in any of the 3 works and classes above would lead to disqualification from the subject tender.
167. The Board has keenly studied the Applicant's submitted tender and noted that the Applicant submitted its contractor's registration certificates with NCA for Building and Civil works-NCA 4 and Electrical installation works -NCA 3 at pages 92 to 95 of the tender. However, the Respondent contends that these certificates were incapable of verification on the NCA Portal and screenshots to this effect were attached to the Memorandum of Response.
160. According to the Applicant, by verifying the validity of its NCA certificates, the Respondent was infact conducting a post-qualification due diligence under section 83 of the Act and the presumption therefore was that the Applicant had infact been successful at preliminary, technical and financial evaluation. It accordingly invited the Board to investigate the issue. Having carefully studied the confidential documents including the blank tender documents, the Board concurs with the Applicant that the nothing in the provided criteria indicated to bidders that verification will be carried on the NCA portal at preliminary evaluation stage. In the absence of such express provision in the tender document then verification carried out at preliminary evaluation stage is inconsistent with section 79 and 80 of the Act as the same can only be carried out at due diligence stage if any. Accordingly, the Board finds fault in the Evaluation Committee's disqualification of the Applicant on this ground. We however

find no merit in the Applicant's submission that the verification gave rise to a presumption that it was in fact a successful tenderer.

Alleged Non-compliance with Clause 8.1.1

168. The Board has equally traced Clause 8.1.1 at page 30 of the Tender Document and the same is hereinafter reproduced for completeness of the record:

169. Page 30 of the Tender Document provides as follows:

8.1.1 Confirmation of submission that the Tender Form duly completed, stamped, signed by the bidder in the format provided in the tender and all attachments thereto Commissioned by a Commissioner of Oaths or a Magistrate of the Kenyan Judiciary.

170. In order to satisfy the above requirement under clause 8.1.1 a tenderer would have its tender forms duly completed, stamped, signed in the format under the Tender Document and all attachments thereto commissioned by a Commissioner of Oaths or a Magistrate of local courts. Conversely, any tender that failed to meet any of the above would be non-responsive to the said requirement and a candidate for disqualification from the subject tender.

171. Turning to the Applicant's submitted tender, the Board has made the following observations:

- i. Page 68 of the Applicant's tender contains a Confidential Business Questionnaire that is neither duly filled up nor commissioned.

- ii. Page 69 of the Applicant's tender contains a Certificate of Independent Tender Determination that was not commissioned.
- iii. Page 71 and 72 of the Applicant's tender contains a Self-Declaration of the Tenderer (SD-1 and SD-2) that were not commissioned.
- iv. Page 76 of the Applicant's tender contains a Declaration and Commitment to the Code of Ethics that was not commissioned.

172. Clause 8.1.1 required tenderers to commission the documents accompanying the tender form. We have studied the blank tender document and note that the foregoing documents comprised attachments to the Form of Tender and were accordingly required to be commissioned. The fact that in the opinion of the Applicant the said requirement served no logical purpose within the meaning of the Oaths and Statutory Declarations Act was irrelevant and argumentative at best. The Applicant is deemed to have been aware of the said requirement on the date it obtained the blank tender document and ought to have sought clarifications on the issue within 14 days from the said date. That it now seeks to challenge the rationale of the said requirement is an afterthought and time barred. We cannot fault the Respondent's finding that the Applicant's bid was unresponsive in this regard. We therefore find no fault on the part of the Evaluation Committee disqualifying the Applicant on this account.

Alleged Non-compliance with Clause 8.1.5

173. The Board has traced clause 8.1.5 at page 31 of the Tender Document and the same is hereinafter reproduced for ease of reference:

8.1.5 Submission of audited Financial Statements for the last five (5) years. The latest audited financial statements must be those that are reported within twelve (12) calendar months of the date of the tender document. The statement must be stamped and signed. The auditors must be valid ICPAK registered practitioners whose valid ICPAK Practicing License must be attached.

174. From the above, tenders responsive to the requirement under Clause 8.1.5 had to contain audited financial statements for the last 5 years with the latest statements being those that were reported within 12 calendar months of the date of the tender i.e. reported between February 2023 and February 2024.

175. The Board has independently **reviewed** the Applicant's tender and at pages 115-217/616 are its Audited Financial Statements as follows:

- a) Burhani Engineers Ltd Group Annual Reports & financial statements for the year ended 31st December,2022 pages 115-138 of the Applicant Bid.
- b) Burhani Engineers Ltd Group Annual Reports & financial statements for the year ended 31st December,2021 pages 138-160 of the Applicant Bid
- c) Burhani Engineers Ltd Group Annual Reports & financial statements for the year ended 31st December,2020 pages 160-187 of the Applicant Bid
- d) Burhani Engineers Ltd Group Annual Reports & financial statements for the year ended 31st December,2019 pages 188-208 of the Applicant Bid

e) Burhani Engineers Ltd Group Annual Reports & financial statements for the year ended 31st December, 2018 pages 209-217 of the Applicant Bid

172. The mandatory requirement under Clause 8.1.5 cited above was for bidders to submit audited Financial Statements for the last Five (5) years and from the foregoing it is evident that the Applicant's books of account are closed in December of each year. The subject tender was advertised and opened on 12th April 2024 and it follows therefore that the latest books of Account for the 5 years preceding this date were those of the years ;2023,2022,2021,2020 and 2019. Though counsel argued that the Applicant's books of account are ordinarily audited in December, this submission was made from the bar and without evidentiary basis. We accordingly find that the Applicant having failed to submit the audited Financial Statements for the year 2023 did not comply with the requirements under Clause 8.1.5 of the Tender. Accordingly, the Board finds no fault in the Evaluation Committee's disqualification of the Applicant on this ground.

176. In sum, despite the observation of the Board that the Evaluation committee erred in carrying out due diligence at preliminary evaluation stage, having already established that the Applicant was properly disqualified on account of Non-compliance with Mandatory Requirements under clause 8.0 and 8.1.1 the Board finds that the Applicant's tender was unresponsive to the mandatory requirements under the Tender Document and was for disqualification from the subject tender.

Whether the interested parties were fairly awarded the subject tenders.

177. The Applicant contends that the Interested Parties were not qualified for award of the tender as no evidence was tendered to show that they satisfied the requirements under the Tender Document. According to the Applicant there are only 7 companies that had previously carried out similar works in Design, Supply, Installation, Testing and Commissioning of Substations and Associated Lines and asserted that this averment was not controverted by the Respondent and interested parties. The Applicant thus contended that it was unclear how the Applicant was disqualified and yet the interested parties were qualified for the subject tender. The Applicant submitted that the onus was on the Respondent and interested parties to adduce evidence to prove how the interested parties met the requirements of the tender document pursuant to section 112 of the Act that places the onus of proof of facts requiring special knowledge on the person who holds the same.

178. On their part the Respondents and interested parties submit that the onus and burden of proof was the Applicant's and unless discharged could not shift. For this proposition they placed reliance on section 107 of the Act.

179. We have considered the rival submissions and are guided in the determination of this issue by the trite principle that the Burden of proof rests on he who alleges and further that failure to prove or disprove a fact does not constitute proof of that fact. See sections 107 and 3(4) of the Evidence Act respectively.

180. In the instant case, we are satisfied that absent some cogent evidence that the interested parties were not qualified for the tenders awarded, an attempt by the Board to re-open the evaluation based on the Applicant's bare suspicions or market opinion would be speculative and a usurpation of the powers of the evaluation committee – an act that would be *ultravires* the Board's powers under the Act. Indeed, absent clear and precise pleadings and evidence of malfeasance on the part of the Evaluation committee within the bounds of the tender documents and the law, the Board lacks the technical wherewithal to comb through the technical aspects and capacities of the tenderers herein in order to ascertain the Applicant's apprehensions. We rely on the Court of Appeal's decision in ***CIC General Insurance Limited v Madison General Insurance Kenya Limited, PPARB, Lt Col. (Rtd) BN Njiriani, the Accounting Officer (KEBS)***, which decision is binding on this Board, that the Applicant had to first adduce evidence on the Interested Party's alleged non-compliance before the evidential burden could shift to the Interested Party.

Whether the Procuring Entity issued Notification Letters compliant with Section 87 of the Act and Regulation 82 of the Regulations 2020?

181. The Applicant took issue with the Notification Letter issued to it in respect of the subject tender. It argued that the Notification Letters did not comply with Section 87 of the Act and Regulation 82 of the Regulations 2020.

182. On the flip side both the Respondent and the Interested Parties maintained that the Notification Letters were compliant.

183. Section 87 of the Act prescribes the contents of the Notification of Intention of Award in the following terms:

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.

184. On its part Regulation 82 of the Regulations 2020 speaks to the procedure of notification in the following terms:

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

185. In ***PPARB Application No. 12 of 2023; Royal Taste Kitchen v CEO, National Social Security Fund & Anor*** this Board pronounced itself on Section 87 of the Act and Regulation 82 as follows:

"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 tenderer 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 87(1) of the act and at what price the successful tenderer was awarded the tender. These reasons and disclosures are central to the principles of public procurement and public finance as they speak to transparency and accountability enshrined in Article 227 and 232 of the Constitution. This means all processes with a public

procurement system, including notification to unsuccessful tenderers must be conducted in a transparent manner.”

186. From the above decision and provisions of the Act and Regulations, it is apparent that the law espouses as part of transparency and accountability for Procuring Entities to disclose in their Notifications to tenders as a bare minimum (i) the identity of the successful tenderer; (ii) the tender price at which the successful tenderer has been awarded the tender; (iii) reason why the successful tenderer’s tender emerged successful; (iv) specific reason why an unsuccessful tenderer was found unsuccessful.

187. The Board shall now interrogate the Notification Letter issued to the Applicant in the subject tender for purposes of confirming compliance.

188. Below is an excerpt of Notification Letter dated 24th May 2024:

Ms Burhani Engineers Limited

P.O. Box (Details withheld)

Email address (Details withheld)

Date of transmission: 24th May 2024

Notification of Intention to Award

...

1. This Notification of Intention to Award (Notification) notifies you of our decision to award the above contract. The transmission of

this Notification begins the Standstill Period. During the Standstill period you may:

Request debriefing...

Submit a Procurement-related complaint...

a. The successful tenderers

...Name of Successful Tender LOT 1: Fast Conveyors Suppliers Limited

Address of successful Tender: .. : (Details withheld)

Contract Price: USD 6,208,848.37...KES 452,977,281.38

Name of successful Tender LOT 2:Big Sky Solutions Limited

Address of successful Tender: : (Details withheld)

Contract Price: USD 670,773.83

Name of successful Tender LOT 3:Big Sky Solutions Limited

Address of successful Tender: (Details withheld)

Contract Price: USD 805,383.55...and KES 139,953,924.60

...

Name of Successful Tenderer LOT 4: Brightrays International Limited

Address of Successful Tenderer (Details withheld)

Contract Price of the Successful Tenderer: USD 5,303,830.07...and KES 501,311,191.20...

b. Other Tenderers

Names of all other tenderers that submitted a tender

S/N	Bidder Name	Failed Evaluation Stage
...
...

...

Signed

Dr. Rose N. Mkalama, Chief Executive Officer.

189. The above Notification Letter discloses (i) the Interested Parties herein as the successful tenderers for Lots 1 to 4; (ii) the Interested Parties respective tender prices and (iii) the stage at which the Applicant’s tender was disqualified.

190. Details of the Applicant’s reasons for disqualification are further specified in the Procuring Entity’s subsequent letter dated 29th May 2024:

29th May 2024

Burhani Engineering Limited
(Address Details withheld)

Attention: Sanjay Dhumal

Dear Sir,

RE: TENDER FOR THE PPROCUREMENT OF DESIGN, SUPPLY, INSTALLATION, TESTING AND COMMISSIONING OF GALANA KULALU SUBSTATIONS AND ASSOCIATED LINES (RFX NO. 1000001030)

...

In response to your request set out in the last paragraph of your aforementioned letter and in accordance with ITT 46.2 of the Tender Document, this debriefing is provided in writing. As indicated in the Notification of Intention to Award dated May 24,2024... Below, the specific issues leading to your disqualification at this stage are detailed:

<i>Preliminary Evaluation Criteria</i>	<i>Reasons for Non-responsiveness</i>
<i>Submission of contractor's registration Certificate with NCA and EPRA in category of works and Class as follows (i) Building and Civil Works-NCA4 and above</i>	<i>Bidder submitted NCA certificates that could not be verified on the NCA portal (No valid license found for 30935/B/0722 as per the NCA Portal (Screenshot attached) Pg 95/616</i>
<i>(ii) Electrical installation works-NCA 3 (and above)</i>	<i>NC bidder submitted NCA Certificates that could not be verified on the NCA portal. No valid license found for 3/e/0722 as per the NCA Portal as shown in annex 13. Pg 92-95/616</i>

<p>8.1.1.)Confirmation of Submission and verification that the Tender Form duly completed, stamped, signed by the bidder in the format provided in the tender and all attachments thereto commissioned by Commissioner of Oaths or a Magistrate of the Kenyan Judiciary</p> <p>(i) Tenderer’s Eligibility; Confidential Business Questionnaire- to establish we are not in any conflict of interest.</p>	<p>i)Bidder submitted a Tender Form not dully filled on the name of the Tenderer;</p> <p>ii) Confidential Business Questionnaire not commissioned by Commissioner for Oaths or a Magistrate of the Kenyan Judiciary Pg 68/616</p> <p>they did not indicate where they were a state owned company or not. Park K if the tender form Pg 8/543.</p>
<p>(ii) Certificate of Independent Tender Determination- to declare that we completed the tender without colluding with other tenderers.</p>	<p>Bidder submitted a Certificate of Independent Tender Determination that was not Commissioned by a Commissioner of Oaths or a Magistrate of the Kenyan Judiciary. Pg 69/616</p>
<p>(iii)Self-Declaration of the Tenderer- to declare that we will, if awarded a contract, not engage in any form of fraud or corruption(SD1 and SD2)</p>	<p>Bidder submitted a Self-Declaration of the Tenderer (SD1 and SD2) that was not Commissioned by a Commissioner of Oaths or a</p>

	<i>Magistrate of the Kenyan Judiciary. Pg 71&72/616</i>
<i>(iv)Declaration and commitment to the code of ethics for Persons Participating in Public Procurement and Asset Disposal Activities in Kenya</i>	<i>Bidder submitted a Declaration and commitment to the code of ethics that was not Commissioned by a Commissioner of Oaths or a Magistrate of the Kenyan Judiciary,. Pg 76/616</i>
<i>8.1.5) Submission of audited Financial Statements for the last Five (5) years. The latest audited financial statements must be those that are reported within twelve (12) calendar months of the date of this tender document. The statement must be stamped and signed. The auditors must be valid ICPAK registered practitioner whose valid ICPAK Practicing License must be attached.</i>	<i>The Bidder didn't submit the audited Financial Statements for 2023. Pg 115-217/616</i>

..

Yours sincerely,

Signed

Dr. Rose N. Mkalama

191. From the foregoing, it is apparent that the Applicant was fully made aware of the identity of the successful tenderers, the successful tenderers'

tender prices and the reasons why the Applicant was unsuccessful in the subject tender. In the circumstance the Notification Letter dated 24th May 2024 complies with Section 87 of the Act and Regulation 82 when taken alongside the subsequent letter dated 29th May 2024.

192. The upshot of our finding is that the Request for Review dated 7th June 2024 in respect of Tender No. RFX No. 1000001030 for Procurement of Design , Supply, Installation, Testing and Commissioning of Galana Kulalu Substations and Associated Lines fails in the following specific terms:

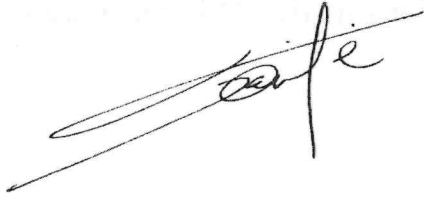
FINAL ORDERS

193. In exercise of the powers conferred on the Board 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 7th June 2024:
- 1. The 4th Interested Party's Notice of Preliminary Objection dated 14th June 2024 be and is hereby dismissed.**
 - 2. The Applicant's Notice of Preliminary Objection dated 21st June 2024 be and is hereby dismissed.**
 - 3. The Applicant's Request for Review dated 7th June 2024 filed on even date with respect to Tender for the Provision of Design, Supply, Installation, Testing, and Commissioning of Galana Kulalu Substations and Associated Lines (Tender No. RFX 1000001030) be and is hereby dismissed.**
 - 4. The Respondent be and is hereby directed to proceed with Tender No. RFX No. 1000001030 for Procurement of Design**

, Supply, Installation, Testing and Commissioning of Galana Kulalu Substations and Associated Lines to its Logical Conclusion.

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

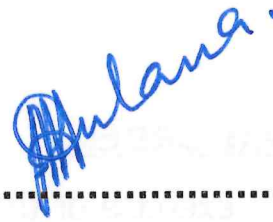
Dated at NAIROBI, this 28th Day of June 2024.



.....

PANEL CHAIRPERSON

PPARB



.....

SECRETARY

PPARB