

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 51/2024 OF 7TH JUNE 2024

BETWEEN

EZEETECH LIMITED.....APPLICANT

AND

CHIEF EXECUTIVE OFFICER,

RURAL ELECTRIFICATION

& RENEWABLE ENERGY CORPORATIONRESPONDENT

BRIGHT RAYS INTERNATIONAL LIMITED..... INTERESTED PARTY

Review against the decision of the Accounting Officer, Rural Electrification & Renewable Energy Corporation in relation to Lot 4 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

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. 452,9777,281.38
 - 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 7th June 2024 by Sanjay Dhumal, a General 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- Lot 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- Lot 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- Lot 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- Lot 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- Lot 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 the same day, 14th 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 19th June 2024 at 2:00 p.m. through the link availed in the said Hearing Notice. However, this was subsequently rescheduled to 20th June 2024 at 2:00 p.m. and notices shared with the parties.
24. On 19th June 2024, the 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 19th June 2024. The Interested Party equally filed a Replying Affidavit sworn on 19th June 2024 by Elisha Okello, the Technical Manager at the Interested Party.

25. On the same day, 19th June 2024, the Respondent filed Written Submissions and a Bundle of Authorities, both dated 19th June 2024.
26. On 20th June 2024 at 2:00 p.m. during the scheduled hearing of the related case involving PPARB Application No. 50 of 2024, the Board rescheduled the hearing of this Request for Review to 24th June 2024.
27. On 22nd June 2024 the Applicant filed a Rejoinder to the Respondent's Memorandum of Response, dated 21st June 2024 together with a Notice of Preliminary Objection and Written Submissions dated 21st June 2024.
28. On 24th June 2024, the Respondent filed Supplementary Written Submissions dated 21st June 2024.
29. On 24th June 2024, the Interested Party filed Supplementary Bundle of Authorities.
30. On 24th June 2024 at 2:00 p.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.

31. The Board observed that since the Interested Party had filed a Preliminary Objection the same would be canvassed alongside the Request for Review pursuant to Regulation 209 of the Regulations 2020. The Board equally 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 10 minutes to argue its case and urge its Preliminary Objection.;
 - iii. The Interested Party would take 10 minutes to argue its case and urge its Preliminary Objection
 - iv. The Applicant would offer a rejoinder to the responses made on its Request for Review as well as Preliminary Objection;
 - v. The Interested Party would close by offering a rejoinder on the responses to its Preliminary Objection.

PARTIES SUBMISSIONS

Applicant's Submissions

32. Counsel for the Applicant, Mr. Gachuba, indicated that the Applicant was placing reliance on their filed documents.
33. He argued that the Interested Party's Preliminary Objection was unmerited as the Applicant was a tenderer in Lot 4 of the subject tender. He urged that the inclusion of the named Respondent was not fatal. According to Counsel, Order 1 Rule 5 of the Civil Procedure Rules prescribes that it shall not be necessary that every defendant shall be interested as to all the relief claimed in any suit against him. Further that Order 1 Rule 9 stipulates that misjoinder or non-joinder of parties in a suit

is not fatal. He equally relied on ***Fubeco China Fushun v Naiposha Company Limited & 11 others [2014] eKLR and Republic v. Public Procurement Administrative Review Board v. Kenya Ports Authority & Another ex parte Jalaram Industrial Suppliers Limited (2019) eKLR***

34. Counsel argued that Section 170 of the Act lists the parties to a Request for Review and argued that the Interested Party was made a party to the instant proceedings pursuant to Section 170(c). According to Counsel, Order 1 Rule 5 of the Civil Procedure Rules, 2010 the inclusion of the Interested Party was not fatal to the proceedings and that non joinder/misjoinder was not fatal.
35. While relying on Order 1 Rule 10(2) of the Civil Procedure Rules, 2010 and ***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.
36. He argued that the Applicant's Preliminary Objection was merited since the Respondent's Memorandum of Response 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.

37. 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***
38. 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.
39. Counsel argued that on 28th May 2024the Applicant learnt that Notification Letters had been issued in the subject tender and upon inquiry from the Respondent was notified that the same had been sent to dipendra.rle@ezeetec.co.ke". Further, that even after notice, the Respondent neglected to formerly notify it in accordance with Section 87(3) of the Act; Regulation 82 of the Regulations 2020 and ITT 44.1.
40. He maintained that by failing to notify the Applicant, the Respondent breached the duty of transparency bestowed under Articles 10(2)(c), 47(1), 201(a) and 227(1) of the Constitution. Further that the Letter dated 29th May 2024 purported to inform the Applicant that it was disqualified

at the Preliminary Stage without disclosing the successful tenderer, its tender price and the reason why it was successful.

41. Mr. Gachuba argued that the reasons cited for the Applicant's disqualification were that :
 - i. Applicant did not indicate at Part K of the Tender Form whether or not it was state owned company; and
 - ii. Applicant did not submit commissioned Confidential Business Questionnaire, Certificate of Independent Tender Determination, Self-Declaration of the Tenderer and Declaration and Commitment to the Code of Ethics
 - iii. Applicant did not submit the 2023 audited Financial Statement.
42. He argued that the Applicant submitted as part of its tender a CR12 which indicated that the Applicant is a private company and not state-owned.
43. He implored the Board to apply Section 72 of the Interpretation and General Provisions Act; Part 14.405 of the United States of America Federal Acquisitions Regulations 2014; ***Dilshad Hassanali Manji v Hassanali Vasanji Manji [2006] eKLR and Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR*** to overlook any non-compliance on account of form.
44. He argued that a CR12 is an official and legal confirmation on the status of a company in Kenya. He therefore urged that the disqualification of the Applicant was unfair.

45. He further argued that neither the Respondent nor the Interested Party tendered evidence to demonstrate that the Interested Party satisfied the requirements under the Tender Document.

Respondent's Submissions

46. Counsel for the Respondent, Mr. Mosota, indicated that the Respondent was placing reliance on their filed documents in the matter.
47. He argued that the Applicant's Preliminary Objections did not constitute pure points of law as required under the ***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 for the appointment of MMA Advocates LLP. Further, Mr. Oduor's authorization to depone the affidavit was equally a factual matter that required evidence.
48. Mr. Mosota maintained that the Memorandum of Response was filed within the timelines under Regulation 205 of the Regulations 2020 read alongside the Interpretation and General Provisions Act. He contended that in computing the time Sunday was excluded.
49. 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; CDMS Research & Consultancy Services v Ministry of Investment, Trade and Industry & Ors***

50. Counsel maintained that the Applicant's tender did not comply with Section 79 of the Act as it failed to disclose whether the Applicant was a state-owned enterprise. He argued that Section 55 of the Act required tenderers to disclose all the required information failing which they would be ineligible for consideration.
51. Further, that the Applicant's tender failed to comply with the requirement for commissioning of all attachments to the Tender Form. Counsel argued that Section 79 of the Act requires compliance with all the mandatory requirement. Relying on ***Republic v PPARB & anor ; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex parte Tuv Austria Turk [2020]eKLR*** he argued that a tender only qualifies as responsive when it meets all the requirements set out in the tender document.
52. Counsel argued that the Respondent issued Notification Letters pursuant to Section 87 of the Act , to all the tenderers through their emails as submitted during registration.
53. It was the Respondent's case that the Applicant attempted to mislead the Board on firms that met the requirements under the subject tender without any evidence. Counsel for the Respondent, Mr. Mosota argued that the subject tender was an open tender and thus open to all firms satisfying the requirements in the Tender Document.
54. Relying on ***Madison General Insurance v Kenya Bureau of Standards; PPARB Application No. 19 of 2022*** he asserted that a claim based on industry knowledge has to supported by evidence.

Interested Party's Submissions

55. Counsel for the Interested Party, Ms. Nungo, placed reliance on the Interested Party's filed documents. She argued that the Applicant failed to join the Accounting Officer in the present proceedings since the named Respondent was a stranger to the proceedings.
56. Relying on ***El Roba Enterprises Limited & 5 others v James Oyondi t/a Betoyo Contractors 5 others [2018] eKLR and James Oyondi t/a Betoyo Contractors & another v Elroba Enterprises Limited & 8 others [2019] eKLR*** she argued that failure to join an Accounting Officer to a Request for Review before the Board is fatal and in breach of Section 170 (b) of the Act.
57. Ms. Nungo urged that the Applicant had not challenged the accuracy of the reasons given in the Notification Letter for its disqualification from the subject tender.
58. She argued that from the reasons disclosed by the Respondent on the disqualification of the Applicant's tender, the Applicant was properly disqualified at the Preliminary Stage of the subject tender.
59. She submitted that the Applicant had not denied that it failed to submit attachments of the Tender Form that were commissioned and thus non-responsive to the requirements under the Tender Document. Further, the Applicant did not also deny that it failed to indicate whether it was a state company or not as required in the Tender Document.

60. Relying *on Republic v PPARB Ex parte Guardforce Group Limited; Pwani University & 2 Ors (Interested Party) [2021]eKLR* she maintained that requirements under a tender serve to advance competition and non-compliance with any mandatory requirement renders a tender non-responsive.
61. Ms. Nungo argued that the Applicant made generalized allegations against the Interested Party without any evidence. Relying on *PPARB Application No. 19 of 2022; Madison General Insurance Kenya Limited v Lt. Col (RTD BN Njiriani, the Accounting Officer (KEBS) and CIC Insurance Limited* which was upheld by the Court of Appeal in *CIC General Insurance Limited v Madison General Insurance Kenya Limited, PPARB, Lt Col. (Rtd) BN Njiriani, the Accounting Officer (KEBS)* she argued that the evidential burden could only shift to the Interested Party to prove its qualification upon the Applicant discharging the initial legal burden.
62. She equally argued that the Notification transmitted on 24th May 2024 by the Respondent satisfied the requirements under Section 87 of the Act and Regulation 82 of the Regulations 2020.

Applicant's Rejoinder on its Request for Review

63. In his 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.
64. He equally indicated that in the computation of time for the filing of the Respondent's Memorandum of Response, the weekend was not excluded.

Further that no reference was made to a requirement in the Tender Documents for the commissioning of documents.

65. He submitted that the qualifications of the Interested Party was something within the knowledge of the Respondent and the Interested Party and thus under Section 112 of the Evidence Act, the evidential burden shifted to the Interested Party and the Respondent.
66. 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.

Interested Party's Rejoinder on its Preliminary Objection

67. Counsel for the 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.
68. 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

69. The Board has considered all documents, submissions and pleadings together with confidential documents submitted to it pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination:

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

- i. In determining this issue the Board will address itself on whether the Applicant enjoined the proper Accounting Officer to the Request for Review and whether failure to do so, if at all was fatal?
- ii. Whether the predating of the Supporting Affidavit to the Request for review was fatal?

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

In determining this issue the Board will have to address itself on 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 Procuring Entity issued Notification Letters compliant with Section 87 of the Act and Regulation 82 of the Regulations 2020?***
- V. ***Whether the interested parties were fairly awarded the subject tenders.***
- VI. ***What orders should the Board issue in the circumstance?***

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

- 70. Subsequent to the institution of the instant Request for Review, the Interested Party filed a Preliminary Objection dated 19th June 2024 challenging the jurisdiction of the Board citing the Applicant failed to join the Accounting Officer as a party to these proceedings.
- 71. 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..
- 72. 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*

73. 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....”

74. 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."

75. 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."

76. 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.

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

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

78. The 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 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.

79. 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.

80. 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.

81. 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...."

82. 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.

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

84. 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.

85. 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.

86. 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.

87. In the ZPMC case, not only did 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 thereof 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.

88. 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 finds that though good law, 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 occasion any confusion as to who was sued and neither did it 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.

89. 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:

90. 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

91. 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

..

92. 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.

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

ii. Whether the predating of the Supporting Affidavit to the Request for review was fatal?

94. The 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 Interested Party, the Affidavit could not be taken to be in support of the Request for Review.

95. 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:

96. 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.

97. From the foregoing both the Act and Regulations are silent on the dating of the Request for Review and the Statement in support thereof.
98. 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.
99. Paragraph 23 of the said affidavit contains the following averment:

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

100. 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.
101. 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 and within the time prescribed by statute.

102. 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?

103. 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.

104. 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.

105. 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.

106. 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.

107. 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.

108. 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.

109. 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).

110. 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.

111. 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"

112. 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.

113. 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 :**

114. 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.

115. 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 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?

116. 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.

117. 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.

118. 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 .

119. 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."

120. 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."

121. 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

122. 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.
123. 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.

124. 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***

125. 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.

126. 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 in fact conducting a post-qualification due diligence under section 83 of the Act and the presumption therefore was that the Applicant had in fact 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 infact a successful tenderer.

Alleged Non-compliance with Clause 8.1.1

127. 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:

128. 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.

129. 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.

130. 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.

131. 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.

132. Further, clause k under Section IV-Tendering Forms at page 57 of the Tender Document provides as follows:

k)State-owned enterprise or institution: [Select the appropriate option and delete the other] [We are not a state-owned enterprise or institution]/ [We are a state-owned enterprise or institution but meet the requirements of ITT 4.6]

133. From the above tenderers were required to disclose, by deleting the inapplicable words, whether or not they were state-owned enterprises by deleting appropriately at clause k.

134. The Board has keenly studied the Applicant's tender and observed at pagethereof that the Applicant did not delete any words under clause (k) above in its tender. Effectively, the Applicant did not disclose whether it was a state-owned enterprise or not. For all material respects, this left the Applicant's tender as incomplete and not duly filled and ineligible under Section 55(5) of the Act as read with section 79 of the Act.

135. Section 55 of the Act empowers a Procuring Entity to find a tenderer an ineligible where it provides incomplete information:

55. Eligibility to bid

(1)...

(5) State organ or public entity shall consider as ineligible a person for submitting false, inaccurate or incomplete information about his or her qualifications.

136. It was not open for the Applicant to claim that it had attached a CR-12 to show it was a private company as this was not the criterion used to confirm compliance with clause (k) above.
137. The Board also notes that the Applicant alleged that the Interested Party was non-responsive to requirements under the tender document but failed to adduce evidence in this regard. Guided by the Court of Appeal 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, the Board holds 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.
138. In view of the foregoing 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.

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

139. 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.

140. On the flip side both the Respondent and the Interested Party maintained that the Notification Letters were compliant.

141. 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.

142. 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

143. 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."

144. 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.
145. The Board shall now interrogate the Notification Letter issued in the subject tender for purposes of confirming compliance.
146. Below is an excerpt of Notification Letter dated 24th May 2024:

Ms Ezeteec 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 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.

147. The above Notification Letter discloses (i) the Interested Party herein as the successful tenderer for Lot 4; (ii) the Interested Party’s tender price and (iii) the stage at which the Applicant’s tender was disqualified.

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

29th May 2024

Ezeetec Limited

(Address Details withheld)

Dear Sir/Madam,

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 letter dated May 28,2024, requesting a debriefing regarding the disqualification of your tender, 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...your tender was disqualified at the Preliminary Evaluation Stage. The specific issues that led to your disqualification at the Preliminary Evaluation Stage are detailed below:

<i>Preliminary Evaluation Criteria</i>	<i>Reasons for Non-responsiveness</i>
<i>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</i>	<i>Bidder submitted a Tender Form not dully filled; they did not indicate where they were a state owned company or not. Park K if the tender form Pg 8/543.</i>

<i>by Commissioner of Oaths or a Magistrate of the Kenyan Judiciary</i>	
<i>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</i>	<i>Bidder submitted a Confidential Business Questionnaire that was not Commissioned by a Commissioner of Oaths or a Magistrate of the Kenyan Judiciary.</i>
<i>Certificate of Independent Tender Determination- to declare that we completed the tender without colluding with other tenders</i>	<i>Bidder submitted a Certificate of Independent Tender Determination that was not Commissioned by a Commissioner of Oaths or a Magistrate of the Kenyan Judiciary</i>
<i>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)</i>	<i>Bidder submitted a Self-Declaration of the Tenderer (SD1 and SD2) that was not Commissioned by a Commissioner of Oaths or a Magistrate of the Kenyan Judiciary</i>
<i>Declaration and commitment to the code of ethics for Persons Participating in Public Procurement</i>	<i>Declaration and commitment to the code of ethics that was not Commissioned by a</i>

<i>and Asset Disposal Activities in Kenya</i>	<i>Commissioner of Oaths or a Magistrate of the Kenyan Judiciary</i>
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Yours sincerely,

Signed

Dr. Rose N. Mkalama

149. From the foregoing, it is apparent that the Applicant was fully made aware of the identity of the successful tenderer, the successful tenderer's tender price and the reasons why the Applicant was unsuccessful in the subject tender. In the circumstance the Notification Letter dated 24th May 2024 only complies with Section 87 of the Act and Regulation 82 when taken alongside the subsequent letter dated 29th May 2024.

Whether the interested parties were fairly awarded the subject tenders.

150. 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.

151. 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.

152. 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.

153. In the instant case, we are satisfied that absent 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.

154. 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

155. In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review dated 7th June 2024:

- 1. The Interested Party's Notice of Preliminary Objection dated 19th 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 No. RFX No. 1000001030 for Procurement of Design , Supply, Installation, Testing and Commissioning of Galana Kulalu Substations and Associated Lines 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.



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PANEL CHAIRPERSON

PPARB

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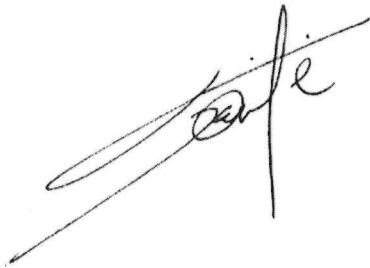
SECRETARY

PPARB

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.

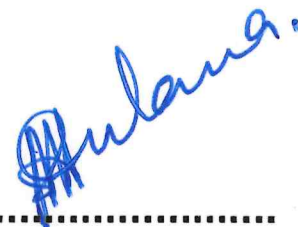
Dated at NAIROBI, this 28th Day of June 2024.



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PANEL CHAIRPERSON

PPARB



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SECRETARY

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