

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 82/2024 OF 22ND AUGUST 2024

BETWEEN

EVANTON COMPANY LIMITED APPLICANT

AND

ACCOUNTING OFFICER,

COUNTY GOVERNMENT OF KISUMU,

DEPARTMENT OF WATER, ENVIRONMENT,

CLIMATE CHANGE AND NATURAL RESOURCES ... 1ST RESPONDENT

COUNTY GOVERNMENT OF KISUMU2ND RESPONDENT

SANABIL GEN SUPPLIERS LTD INTERESTED PARTY

Review against the decision of the Accounting Officer County Government of Kisumu, Department of Water, Environment, Climate Change and Natural Resources in relation to Tender No. CGK/FLLOCA/KSM/WECCNR/2023-2024/LOT05 for Rehabilitation and Expansion of Kisumu Rural Water Project

BOARD MEMBERS PRESENT

- | | |
|----------------------------|---------------------------------------|
| 1. Ms. Alice Oeri | -Vice Chairperson & Panel Chairperson |
| 2. Mr. Alexander Musau CPA | -Member |

3. Mr. Daniel Langat -Member

IN ATTENDANCE

1. Mr. James Kilaka - Acting Board Secretary
2. Mr. Philemon Kiprop - Secretariat
3. Ms. Evelyn Weru - Secretariat

PRESENT BY INVITATION

APPLICANT

EVANTON COMPANY LIMITED

Mr. Anton Joel Opar - Director

RESPONDENTS

**ACCOUNTING OFFICER,
COUNTY GOVERNMENT OF KISUMU,
DEPARTMENT OF WATER
ENVIRONMENT, CLIMATE CHANGE AND
NATURAL RESOURCES & COUNTY
GOVERNMENT OF KISUMU**

Ms. Opondo -Advocate, Office of the County Government of
Kisumu

INTERESTED PARTY

SANABIL GEN SUPPLIERS LTD

No Appearance

BACKGROUND OF THE DECISION

The Tendering Process

1. The County Government of Kisumu, the Procuring Entity and 2nd Respondent herein invited sealed bids in response to Tender No. CGK/FLLOCA/KSM/WECCNR/2023-2024/LOT05 for Rehabilitation and Expansion of Kisumu Rural Water Project (hereinafter referred to as the "subject tender"). Tendering was conducted under open competitive method (National) and the invitation was by way of an advertisement on 28th June 2024 in The Standard and Daily Nation and published on the Procuring Entity's website www.kisumu.go.ke and on the Public Procurement Information Portal (PPIP) website www.tenders.go.ke where the blank tender document issued to tenderers (hereinafter referred to as the 'Tender Document') was available for download. The Procuring Entity issued Addendum 1 dated 3rd July 2024 and Addendum 2 dated 5th July 2024 and the tender's submission deadline was on 10th July 2024 at 10.00 a.m.

Submission of Tenders and Tender Opening

2. According to the Tender Opening Attendance List which is part of confidential documents furnished to the Public Procurement Administrative Review Board by the Procuring Entity pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), a total of eight (8) tenders were submitted in response to the tender. The tenders were opened in the presence of tenderers' representatives present, and were recorded as follows:

| Bidder No. | Name |
|-------------------|--------------------------|
| 1. | Fairton Agencies Ltd |
| 2. | Evanton Co. Ltd |
| 3. | Shamas Road Cont. Ltd |
| 4. | Sanabil General Supplies |
| 5. | Robicon Engineering Ltd |
| 6. | Season Energy Ltd |
| 7. | Ralu Investment Ltd |
| 8. | Ramas Enterprises Ltd |

Evaluation of Tenders

3. A Tender Evaluation Committee appointed by the Respondent undertook evaluation of the eight (8) tenders as captured in the Evaluation Report dated 24th July 2024. The evaluation was done in the following stages:

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

Preliminary Evaluation

4. At this stage of evaluation, the Evaluation Committee was required to examine tenders for responsiveness using the criteria set out under Preliminary Evaluation of Section III- Evaluation and Qualification

Criteria of the Tender Document. Tenderers were required to meet all the mandatory requirements at this stage to proceed to the technical evaluation stage.

5. At the end of evaluation, stage four (4) tenders were determined non-responsive, while four (4) tenders were determined responsive. The responsive tenders proceeded for Technical Evaluation.

Technical Evaluation

6. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set under Technical Evaluation of Section III- Evaluation and Qualification Criteria of the Tender Document. The pass mark for the technical qualification was set as a minimum of 70 out of 100 points.
7. At the end of evaluation at this stage, the four (4) tenders were determined responsive having attained the minimum score and proceeded for evaluation at the Financial Evaluation stage.

Financial Evaluation

8. At this stage of evaluation, the Evaluation Committee was required to rank tenders so as to determine the lowest evaluated bidder and the Procuring Entity would award the subject tender to the bidder with the lowest evaluated price.

9. At the end of evaluation at this stage, the Evaluation Committee ranked bids as follows:

| Ranking | Bidder No. | Bidder's Name | Bid amount (Kshs.) |
|----------------|-------------------|--|-------------------------------|
| 1 | 4 | SANABIL GEN SUPPLIES P.O BOX 7456-00610 NAIROBI | 9,215,000 |
| 2 | 2 | EVANTON CO. LTD P.O. BOX 4601-40103 KISUMU | 8,444,530 |
| 3 | 3 | SHAMAS ROAD CONT LTD. P.O. BOX 71078- 00100 NAIROBI | 9,495,000 |
| 4 | 6 | SEASON ENERGY LTD P.O. BOX 40-00610 NAIROBI | 9,675,000 |

10. The Evaluation Committee proceeded to note as follows:

"In view of the above, despite bidder no. 2 at a bid sum of 8,444,530 being the lowest evaluated bidder, awarding the contract at the lowest evaluated price would materially compromise on the quality of works involved based on the engineers estimates in the bills of quantities. The downward deviation from the engineer's estimates was too high."

Evaluation Committee's Recommendation

11. The Evaluation Committee recommended award of the tender to Sanabil Gen Supplies, the Interested Party herein, at Kenya Shillings Nine Million Two Hundred and Fifteen Thousand only (Kshs. 9,215,000/=) being the most responsive and lowest evaluated tender.

Professional Opinion

12. In a Professional Opinion dated 25th July 2024, the Director Supply Chain Management, Mr. Eliud O. Sotty reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender to the Sanabil Gen Supplies, the Interested Party herein, at Kenya Shillings Nine Million Two Hundred and Fifteen Thousand only (Kshs. 9,215,000/=) being the most responsive and lowest evaluated tender.
13. The Professional Opinion was approved by Mr. Francis Asunah, Chief Officer Water, Environment, Natural Resources and Climate Change on 25th July 2024.

Notification to Tenderers

14. Tenderers were notified of the outcome of evaluation process *vide* letters dated 9th August 2024.

REQUEST FOR REVIEW NO. 82 OF 2024

15. On 22nd August 2024, Evanton Company Limited hereinafter referred to as (“the Applicant”) filed a Request for Review dated 21st August 2024 together with an Applicant’s Statement in Support of the Request for Review sworn on 21st August 2024 by Anton Joel Ajowi Opar, its Director (hereinafter referred to as “the instant Request for Review”) seeking the following orders from the Board:

a) The Respondents’ decision awarding Tender No: CGK/FLLOCA/KSM/WECCNR/2023-2024/LOT05 for Rehabilitation and Expansion of Kisumu Rural Water Project to the Interested Party be annulled and set aside in its entirety.

b) The 2nd Respondent’s letter of notification of Intention to Award the subject tender dated 9th August, 2024 notifying the successful bidder of its successfulness in Tender No: CGK/FLLOCA/KSM/WECCNR/2023-2024/LOT05 for Rehabilitation and Expansion of Kisumu Rural Water Project be annulled and set aside.

c) The 2nd Respondent’s letter of notification of Intention to Award the subject tender dated 9th August, 2024 notifying the Applicant of its

unsuccessfulness in Tender No: CGK/FLLOCA/KSM/WECCNR/2023-2024/LOT05 for Rehabilitation and Expansion of Kisumu Rural Water Project be annulled and set aside.

d) The Respondents be directed to award Tender No: CGK/FLLOCA/KSM/WECCNR/2023-2024/LOT05 for Rehabilitation and Expansion of Kisumu Rural Water Project to the Applicant as the bidder who submitted the bid with the lowest evaluated price.

e) The Respondents be compelled to pay to the Applicant the costs arising from, and incidental to, this Request for Review; and

f) Such other and further relief that this Board shall deem just and appropriate in ensuring that the ends of justice are fully met in the circumstances of this Request for Review.

16. In a Notification of Appeal and a letter dated 22st August 2024, Mr. James Kilaka, the Acting Secretary of the Board notified the Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondents a copy of the Request for

Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 22st August 2024.

17. On 28th August 2024 the Respondents filed through the Office of the County Attorney a Notice of Appointment dated 26th August 2024, Response to the Grounds of Appeal dated 26th August 2024, a Supporting Affidavit sworn by Erick Omondi together with confidential documents submitted pursuant to Section 67(3)(e) of the Act.
18. *Vide* email dated 29th August 2024, the Acting Board Secretary notified all tenderers in the subject tender, of the existence of the Request for Review while forwarding to them the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. All tenderers were invited to submit to the Board any information and arguments concerning the tender within three (3) days.
19. *Vide* a Hearing Notice dated 30th August 2024, the Acting Board Secretary, notified parties and all tenderers of an online hearing of the instant Request for Review slated for 4th September 2024 at 11:00 hrs through the link availed in the said Hearing Notice.

20. On 4th September 2024, the Applicant filed Written Submissions dated 2nd September 2024.

21. At the hearing on 4th September 2024 at 11:00 hrs, the Board read out pleadings filed by parties. Subsequently, parties were allocated time to highlight their respective cases and the Request for Review proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

Applicant's case

22. The Applicant, led by Mr. Anton Joel Ajowi Opar, its Director relied on its documents filed before the Board and went on to submit that the Applicant received a notification letter on 9th August 2024 informing it that its bid had been disqualified in the subject tender and the reason provided was that its tender price materially deviated from the Bill of Quantities (BOQ).

23. He indicated that upon seeking clarification from the Respondents by requesting a debrief, on how the Applicant deviated vide its letters dated 12th and 14th August 2024, no response was given and their letters were not responded.

24. Mr. Opar submitted that on 15th August 2024, the Applicant met with a committee from the Respondents for debriefing but an amicable solution was not reached leading the meeting to be postponed to 16th August 2024. He stated that during this meeting, the Applicant sought

to be provided with documents previously requested for but he was informed that they were no longer with the Evaluation Committee though after much insistence, the said documents were availed for review.

25. Mr. Opar pointed out that before the Applicant began reviewing the documents, the Ag. Director General Supply Chain Department, Mr. Eliud Sotty stopped the process, stating that it could not proceed further and defiantly walked out from the meeting leading to its termination and disbandment without resolution of the issue at hand. He further pointed out that the lack of transparency and co-operation from the Procuring Entity prompted the Applicant to seek redress before the Board as stipulated under Section 167(1) of the Act.

26. Mr. Opar submitted that the reason given as to why the Applicant's bid was unsuccessful being that 'the tender price materially deviates from the requirements in the bill of quantities' is ambiguous, unreasonable, irrational and unjustifiable and in breach of Clause 37 of the Tender Document. He indicated that it was the Applicant's expectation that the Procuring Entity would state in the notification letter the exact reason as to how its tender price materially deviated from the requirements in the Bill of Quantities which evidently, they couldn't provide because there was none. He further indicated that in any event, if the Procuring Entity was apprehensive that the Applicant's tender price was abnormally low, it ought to have sought

clarification as provide for under Clauses 37.1, 37.2 and 37.3 of the Tender Document and the Act.

27. Mr. Opar submitted that the Evaluation Committee intentionally deviated from the evaluation criteria outlined in Section 86(1) of the Act and pointed out that the Tender Document provided by the Procuring Entity specifically provided that Section 86(1)(a) of the Act was the criteria for award which mandates that the successful bidder should be the one with the lowest evaluated price. He pressed on that the Applicant's bid was competitive and in full compliance with the stipulated evaluation criteria.

28. Mr. Opar submitted that it was the Applicant's suspicion that there was a scheme to exclude it from the competition despite it being the lowest evaluated bidder at the financial evaluation stage and the Evaluation Committee conduct raises concerns about potential collusion and bias undermining the integrity of the procurement process.

29. He pointed out that the Applicant had successfully carried out and completed several projects with the Procuring Entity all of which are well documented and can be found on the Kisumu County Water Services records and at no point was the Applicant accused of deviating from the BOQ or any other requirement and as such, it was the Applicant's belief that the Procuring Entity did not have any reason to deny it the tender in question having emerged as the lowest

evaluated bidder. He further pointed out that the Interested Party's tender price of Kshs. 9,215,000/= was about Kshs. 600,00/= more than its price and a clarification was necessary to expound how the Applicant's price was not competitive enough and how this decision was arrived at in view of the principles provided under Article 227(1) of the Constitution.

30. Mr. Opar urged the Board to allow the Request for Review as prayed.

Respondents' case

31. The Respondents, led by Ms. Opondo, relied on the documents that they filed before the Board, together with confidential documents concerning the tender.

32. Counsel submitted that the Applicant was not before the Board in good faith and that the Request for Review stems from the Applicant's dissatisfaction with the legitimate procurement process.

33. She pointed out that the subject tender was guided by 3 crucial documents marked as Exhibits E02, E03 and E04 being the Intergovernmental Participation Agreement dated 22nd March 2024, the Intergovernmental Agreement dated 28th April 2024 and the Financing Locally-Led Climate Action Program Operations Manual which required the Procuring Entity to follow strict procedures while applying the procurement procedures so as to safeguard public resources and maintain integrity in the subject tender's procurement process.

34. Counsel argued that advertising the subject tender, publishing of the Tender Document and encouraging competitive bidding with a set out evaluation criteria indicates that the Procuring Entity adhered to the principle of fairness as provided for under Article 227(1) of the Constitution and afforded the Applicant an opportunity to meet the set out criteria.
35. She indicated that the Applicant has not availed any evidence in the Request for Review to show that the criteria was not included nor the BOQ provided in the Tender Document provided under form 5.
36. She referred the Board to the holding in *Republic v Public Procurement Administrative Review Board Ex parte Tana Water Services Board* which mandates a Procuring Entity not to deviate from the set out criteria. She reiterated that the criteria was available to the Applicant at the onset of the procurement process.
37. Ms. Opanda submitted that the Procuring Entity in compliance with Section 87 of the Act read with Regulation 82(2) of Regulations 2020 issued a notification of intention to award the subject tender dated 9th August 2024 which clearly indicated the reasons why the Applicant's bid was disqualified being that 'the tender price materially deviates from the requirements in the bill of quantities'.

38. She argued that pursuant to Regulation 82(2) of Regulations 2020, the Procuring Entity ought to confine itself to the reasons why a particular bidder did not qualify for award of a tender and the Procuring Entity is not under an obligation to disclose any further information.

39. On the issue of debriefing raised by the Applicant, counsel pointed to a letter dated 14th August 2024 written by the Director Supply Chain addressed to the Applicant inviting it for a debriefing meeting on 15th August 2024. She further pointed out that prior to the meeting taking place, the Applicant wrote to the Director Supply Chain requesting to be supplied with submitted tender documents, opening minutes, evaluation appointment letters, individual score sheets, evaluation reports and professional opinions and argued that in view of Section 67 of the Act on confidential documents, the Applicant was asking the Procuring Entity to commit an illegality which was asserted again at the debriefing meeting held on 15th August 2024 whose minutes had been attached for the Board's attention.

40. With regard to the evaluation process, counsel submitted that the Applicant was disqualified at the Financial Evaluation stage and submitted that the material breach is such that the Evaluation Committee would find proceeding with the bid sum was so flawed that it would make the completion of the subject tender non-feasible and that this is what was agreed and decided as evidenced in the minutes before the Board.

41. She further submitted that there seemed to be a confusion with the Applicant regarding lowest bid sum and lowest evaluated bidder and that there is no law in Kenya which requires that the lowest bid sum ought to qualify even if it has not met other criteria provided for in the Tender Document which was the case in the instant review.
42. In support of her arguments, counsel referred the Board to the holding in *Republic v Public Procurement Administrative Review Board and 3 others (2018) eKLR* where the court mandated that the decision to disqualify a bidder ought to be clear and the reasoning cogent, which was adhered to by the Procuring Entity noting that its decision to the Applicant was clearly communicated as evidenced by the notification letter and as such, the Procuring Entity adhered to the provisions under Section 87 of the Act.
43. On the allegation by the Applicant that the Procuring entity failed to carry out due diligence, counsel questioned how the Applicant came to know that information without having access to the evaluation minutes and pointed out there was no evidence availed before the Board to prove that allegation. She submitted that the Procuring Entity carried out due diligence during the evaluation process and that one of the principles envisioned under Article 227 (1) of the Constitution is value for money and the Evaluation Committee would want the most qualified bidder to be awarded the subject tender which was the

Interested Party per Clause 38.1 of the ITT in the Tender Document which the Applicant varied.

44. She urged the Board to dismiss the Request for Review with costs.

Applicant's Rejoinder

45. In a rejoinder, Mr. Opar challenged the Respondents to state if they brought the technical person who prepared the BOQ to elaborate how the Applicant deviated from the bill of quantities and to avail the outcome of the debriefing held on 16th August 2024.

46. He pointed out that no elaboration was availed on how the Applicant's tender price deviated from the BOQ.

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

CLARIFICATIONS

48. When asked by the Board to clarify on whether the Tender Document provided for any Engineer Estimates as a guiding principle for bidders, counsel submitted that this was provided for under Clause 39 of the ITT in the Tender Document which provides for unbalanced BOQs and the Applicant's right to call for debriefing should there be any variations and in this regard, the debriefing minutes were attached.

49. Upon enquiry by the Board on how the difference of around Kshs. 700,000/= between the Interested Party's and the Applicant's tender price would affect execution of work in the subject tender, counsel submitted that the technical officers who were part of the Evaluation Committee were not confident that the Applicant would manage to complete the project without price variations leading to their decision to disqualify it as captured in the Evaluation Report.
50. With regard to compliance with Section 87 of the Act, Ms. Opondo submitted that per the notification letter dated 9th August 2024, the successful bidder was indicated together with its tender price awarded and a table included at the second page where all unsuccessful bidders were listed together with their tender price in compliance with Section 87 of the Act.
51. With regard to the allegation that the Applicant sought confidential documents contrary to Section 67 of the Act, Mr. Opar clarified that the Applicant did not tell the Procuring Entity to issue it with confidential documents but only asked for the Respondent to show that the Professional Opinion is what guided issuance of the notification letter since it did not believe that members of the Evaluation Committee would come up with an ambiguous decision.

52. On whether a debriefing meeting was held, Mr. Opar clarified that the debriefing meeting held was not concluded and the Applicant never received an outcome on the same from the Procuring Entity.

53. On the issue of due diligence, Mr. Opar submitted that there were score sheets and the Applicant wanted to prove that all the scorers indicated that the Applicant deviated and by how much and it was upon the Procuring Entity to check and conclude if the argument was in order if every evaluator stated the deviation clearly as no clarification was sought from the Applicant on the deviation. He pointed out that the pumps at the Applicant's store were bought earlier when the dollar rate was not so high and that the rate has since increased and it is not bad to give a discount to the Procuring Entity and as such, the Applicant's tender price did not materially deviate from the BOQs.

54. At the conclusion of the hearing, the Board informed parties that the instant Request for Review having been filed on 22nd August 2024 was due to expire on 12th September 2024 and the Board would communicate its decision on or before 12th September 2024 to all parties to the Request for Review via email.

BOARD'S DECISION

55. The Board has considered each of the parties' submissions and documents placed before it and find the following issues call for determination.

A. Whether the 2nd Respondent's Evaluation Committee disqualified the Applicant's tender in the subject tender in accordance with the provisions of the Tender Document read with Section 80 of the Act and Article 227(1) of the Constitution.

B. What orders the Board should grant in the circumstances

Whether the 2nd Respondent's Evaluation Committee disqualified the Applicant's tender in the subject tender in accordance with the provisions of the Tender Document read with Section 80 of the Act and Article 227(1) of the Constitution

56. We understand the Applicant's case on this issue to be that the Procuring Entity in disqualifying its tender as communicated in the letter of notification of intention to award the subject tender dated 9th August 2024 failed to adhere to the requirements of the Tender Document, the Act and the Constitution as the reasons provided for its disqualification were unreasonable, ambiguous, irrational, unjustifiable and in breach of Clause 37 of the ITT in the Tender Document. The Applicant contends that the Procuring Entity ought to have stated in the notification letter how its tender price deviated from the requirements in the Bill of Quantities (BOQs) and if its price was abnormally low as alluded, the Procuring Entity ought to have sought for clarification as provided under Clause 37 of the Tender Document.

57. We understand the Respondents case to be that the Applicant's tender price materially deviated from the BOQs which would result in a compromise of the quality of works expected in the subject tender. During the hearing, counsel for the Respondents submitted that the technical officers who were part of the Evaluation Committee were not confident that the Applicant would manage to complete the project without seeking price variations leading to the decision to disqualify the Applicant's tender at the Financial Evaluation stage.

58. The Respondents contend that the Evaluation Committee adhered to the set out evaluation criteria in the Tender Document and complied with the provisions of the Constitution and the Act.

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

"227. Procurement of public goods and services

(1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

(2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and

asset disposal shall be implemented and may provide for all or any of the following –

- a)***
- b)***
- c) and***
- d)”***

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

"80. Evaluation of tender

- (1)***
- (2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and,***
- (3); and***
- (4)”***

61. Section 80(2) of the Act as indicated above requires the Evaluation Committee to evaluate and compare tenders in a system that is fair using the procedures and criteria set out in the Tender Document. A system that is fair is one that considers equal treatment of all tenders

against a criteria of evaluation known by all tenderers since such criteria is well laid out in a tender document issued to tenderers by a procuring entity. Section 80(3) of the Act requires for such evaluation criteria to be as objective and quantifiable to the extent possible and for the criteria to be applied in accordance with the procedures provided in a tender document.

62. Further, Section 86(1)(a) of the Act provides:

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

(a) the tender with the lowest evaluated price;

....."

63. Turning to the circumstances in the instant Request for Review, we note that the Applicant was notified in a letter of notification of intention to award dated 9th August 2024 that its tender was unsuccessful in the subject tender as follows:

"....."

| <i>No</i> | <i>Name of Tender</i> | <i>Tender Price as Read our</i> | <i>Tender's Evaluated Price</i> | <i>Reason(s) why bid was not successful</i> |
|---------------------|-------------------------------|--|--|--|
| <i>.....</i> | <i>.....</i> | <i>.....</i> | <i>.....</i> | <i>.....</i> |
| <i>7</i> | <i>Evanton Co. Ltd</i> | <i>8,444,530</i> | <i>844,530</i> | <i>• Tender price materially</i> |

| | | | | |
|--|--|--|--|---|
| | | | | <p><i>deviates from the requirements in the bill of quantities</i></p> |
|--|--|--|--|---|

.....”

64. The Board notes that the Tender Document provided under Clause 42 of Section I- Instructions To Tenderers for the Award Criteria as follows:

"The Procuring Entity shall award the Contract to the successful tenderer whose tender has been determined to be the Lowest Evaluated Tender."

65. We further note that the footnote under the Technical Evaluation Criteria of Section III- Evaluation and Qualification Criteria of the Tender Document provides that:

" N.B

To qualify for financial evaluation, the bidder must score a minimum of 70 out of 100 points.

The bidder who shall be determined as the lowest evaluated bidder after meeting the minimum in technical score shall be considered and recommended for award."

66. Additionally, the Tender Document provided under Clause 40 of Section I- Instructions To Tenderers for the Lowest Evaluated Tender as follows:

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

- a) Most responsive to the Tender document; and***
- b) The lowest evaluated price.***

67. With regard to the lowest evaluated price, Clause 36 of the Tender Document provided for comparison of tenders as follows:

"The Procuring Entity shall compare the evaluated costs of all substantially responsive Tenders established in accordance with ITT 35.2 to determine the Tender that has the lowest evaluated cost."

68. ITT 35.2 referred to above provided as follows:

"To evaluate a Tender, the Procuring Entity shall consider the following:

- a) Price adjustment in accordance with ITT 31.1 (iii); excluding provisional sums and contingencies, if any, but including Day work items, where priced competitively;***

- b) Price adjustment due to discounts offered in accordance with ITT 14.4;***
- c) Converting the amount resulting from applying (a) and (b) above if relevant, to a single currency in accordance with ITT 32;***
- d) Price adjustment due to quantifiable non material non-conformities in accordance with ITT 30.3; and***
- e) Any additional evaluation factors specified in the TDAS and Section III, Evaluation and Qualification Criteria.”***

69. According to the Evaluation Report, we note that the Applicant was disqualified at the Financial Evaluation stage as follows:

"1.6 Financial Evaluation

Upon completion of the technical evaluation, the evaluation committee conducted a financial evaluation and comparison to determine the evaluated price of each tender.

The evaluated price for each bid shall be determined by:

- i Taking the bid price in the tender form***
- ii Taking into account consideration the available budget and comparing the bid price with engineer's estimates and the prevailing market prices***

Ranking of Tenders

Tenders are ranked according to their evaluated price and the successful tender shall be the tenderer who's

[sic] tender price does not materially deviate from the requirements set out in the tender document, the bills of quantities and engineer's estimates pursuant to section 79 of the Public Procurement and Asset Disposal Act 2015.

Table 6. Ranking of the bids

| Ranking | Bidder No. | Bidder's Name | Bid amount (Kshs.) |
|----------------|-------------------|--|-------------------------------|
| 1 | 4 | SANABIL GEN SUPPLIES P.O BOX 7456-00610 NAIROBI | 9,215,000 |
| 2 | 2 | EVANTON CO. LTD P.O. BOX 4601-40103 KISUMU | 8,444,530 |
| 3 | 3 | SHAMAS ROAD CONT LTD. P.O. BOX 71078- 00100 NAIROBI | 9,495,000 |
| 4 | 6 | SEASON ENERGY LTD P.O. BOX 40-00610 NAIROBI | 9,675,000 |

In view of the above, despite bidder no. 2 at a bid sum of 8,444,530 being the lowest evaluated bidder, awarding the contract at the lowest evaluated price would materially compromise on the quality of works involved based on the

engineers estimates in the bills of quantities. The downward deviation from the engineer's estimates was too high."

70. In essence, the Evaluation Committee acknowledged that the Applicant was the lowest evaluated bidder upon ranking of bids at the Financial Evaluation stage but awarding the subject tender at the lowest evaluated price would materially compromise on the quality of works involved based on the engineers estimates in the bills of quantities and that the downward deviation from the engineers' estimates was too high.

71. During the hearing, counsel for the Respondents Ms. Opondo submitted that the technical officers who were part of the Evaluation Committee were not confident that the Applicant would manage to complete the project in the subject tender in view of its price variations in the BOQs leading to their decision to disqualify it and render it unsuccessful for being abnormally low.

72. The Board observes that the Tender Document provided for Abnormally Low Tenders and Abnormally High Tenders under Clause 37 of Section I- Instructions To Tenderers as follows:

"Tenders Abnormally Low Tenders

37.1 An Abnormally Low Tender is one where the Tender price, in combination with other elements of the Tender, appears so low that it raises material

concerns as to the capability of the Tenderer in regards to the Tenderer's ability to perform the Contract for the offered Tender Price or that genuine competition between Tenderers is compromised.

37.2 In the event of identification of a potentially Abnormally Low Tender, the Procuring Entity shall seek written clarifications from the Tenderer, including detailed price analyses of its Tender price in relation to the subject matter of the contract, scope, proposed methodology, schedule, allocation of risks and responsibilities and any other requirements of the Tender document.

37.3 After evaluation of the price analyses, in the event that the Procuring Entity determines that the Tenderer has failed to demonstrate its capability to perform the Contract for the offered Tender Price, the Procuring Entity shall reject the Tender.”

73. The import of the above provision is that where a potentially abnormally low tender is identified, the Procuring Entity ought to mandatorily seek written clarifications from the bidder, including detailed price analyses of its tender price in relation to the subject matter of the contract, scope, proposed methodology, schedule, allocation of risks and responsibilities and any other requirements of the Tender Document. Following evaluation of these price analyses, if

the Procuring Entity finds that the bidder has failed to demonstrate its capability to perform the contract at the offered tender price, it shall reject the said bid.

74. In view of the foregoing and having taken note of the remarks made in the Evaluation Report, it is our considered view that the Evaluation Committee ought to have adhered to the requirements under Clause 37.1, 37.2 and 37.3 of Section I- Instructions To Tenderers of the Tender Document by seeking clarifications from the Applicant in line with that clause before resorting to disqualify its tender. This is in view of the fact that the award of the subject tender would be to the bidder with the lowest evaluated cost and ITT 35.2 of Section I- Instructions To Tenderers of the Tender Document provided that the Procuring Entity in its financial evaluation would consider inter alia Price adjustments due to discounts offered in accordance with ITT 14.4. The Board has established that the Applicant's tender price as submitted in its Form of Tender and when ranked as against other responsive bidders at the Financial Evaluation stage was the lowest evaluated tender price.

75. In the circumstances, the Board finds that the Procuring Entity **failed to comply** with the requirements of the Tender Document, the Act and the Constitution in evaluating the Applicant's tender.

What orders the Board should grant in the circumstances

76. We have found that the Procuring Entity failed to comply with the requirements of the Tender Document, the Act and the Constitution in evaluating the Applicant's tender at the Financial Evaluating stage and in awarding the subject tender to the Interested Party.

77. Accordingly, we deem it fit and just to order the 1st Respondent to direct the Evaluation Committee to re-instate the Applicant's tender back into the procurement process and to conduct a re-evaluation of all responsive tenders at the Financial Evaluation Stage and proceed with making an award of the subject tender to the bidder with the lowest evaluated tender price in accordance with provisions of the Tender Document and taking into consideration the findings of the Board in this decision, the provisions of the Act, the Constitution and the Tender Document.

78. In totality, the instant Request for Review succeeds with respect to the following specific orders:

FINAL ORDERS

79. 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 this Request for Review:

A. The letter of Notification of Intention to Award dated 9th August 2024 with respect Tender No. CGK/FLLOCA/KSM/WECCNR/2023-2024/LOT05 for

Rehabilitation and Expansion of Kisumu Rural Water Project issued to the Interested Party be and is hereby nullified and set aside.

B. The letters of Notification of Intention to Award dated 9th August 2024 with respect to Tender No. CGK/FLLOCA/KSM/WECCNR/2023-2024/LOT05 for Rehabilitation and Expansion of Kisumu Rural Water Project addressed to the Applicant and to all other unsuccessful tenderers be and are hereby nullified and set aside.

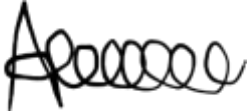
C. The 1st Respondent is hereby ordered to reconvene and direct the Evaluation Committee to re-admit the Applicant's tender at the Financial Evaluation stage and re-evaluate the Applicant's tender together with all tenders that made it to the Financial Evaluation stage and award the subject tender to the bidder with the lowest evaluated tender price taking into consideration the findings of the Board in this Request for Review, the provisions of the Tender Document, the Act and the Constitution within 14 days of the date of this decision.

D. Further to Order No. C, the 1st Respondent is hereby ordered to proceed with the procurement process of Tender No. CGK/FLLOCA/KSM/WECCNR/2023-

2024/LOT05 for Rehabilitation and Expansion of Kisumu Rural Water Project to its logical conclusion taking into account the Board’s findings herein.

E. Given that the procurement process for the subject tender is not complete each party shall bear its own costs in the Request for Review.

Dated at NAIROBI this 12th Day of September 2024.



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PANEL CHAIRPERSON

SECRETARY

PPARB

PPARB