

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 83/2024 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 KISUMU.....2ND RESPONDENT

AND

FOURSONS HOLDINGS (K) LIMITED.....INTERESTED PARTY

Review against the decision of the Accounting Officer, County Government of Kisumu in respect of Tender No. CGK/FLLOCA/KSM/WECCNR/2023-2024-LOT 7 for Delineating Riparian Lands in Nyaidho & Agalla Rivers for Reclamation (Pegging) Purposes (Bamboo & Other Water Friendly Trees), Construction of Gabions of Nyaidho & Agalla Rivers.

BOARD MEMBERS PRESENT

1. Ms. Alice Oeri - Vice-Chairperson & Panel Chair
2. Dr. Susan Mambo - Member
3. Eng. Lilian Ogombo - Member

IN ATTENDANCE

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

PRESENT BY INVITATION

APPLICANT **EVANTON COMPANY LIMITED**

Mr. Anton Joel Opar Director, Evanton Company Limited

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 Office of the County Attorney, Kisumu County Government

INTERESTED PARTY **FOURSONS HOLDINGS (K) LIMITED**

N/A N/A

BACKGROUND OF THE DECISION

The Tendering Process

1. The County Government of Kisumu, the Procuring Entity together with the 1st Respondent herein, through an advert on the Procuring Entity's website (www.kisumu.go.ke) and IFMIS Portal (supplier.treasury.go.ke)

invited interested suppliers to submit their bids in response to Tender No. CGK/FLLOCA/KSM/WECCNR/2023-2024-LOT 7 for Delineating Riparian Lands in Nyaidho & Agalla Rivers for Reclamation (Pegging) Purposes (Bamboo & Other Water Friendly Trees), Construction of Gabions of Nyaidho & Agalla Rivers (herein “the subject tender”) under an open national tender method. Interested suppliers were required to submit their bids before the tender closing date of Friday, 5th July 2024 .

Addenda

2. Subsequently, on various dates between 3rd July 2024 and 5th July 2024, the Procuring Entity issued 2 addenda offering clarifications to various inquiries that were made by different suppliers who had expressed interest in participating in the tender. The tender closing date was also rescheduled to 10th July 2024 at 10:00 a.m.

Submission of Tenders and Tender Opening

3. According to the signed Tender Opening Minutes dated 10th July 2024, submitted under the Confidential File submitted by the Procuring Entity, the following thirteen (13) tenderers were recorded as having submitted their bids in response to the subject tender by the tender submission deadline:

#	Name of Tenderer
1.	Evanton Company Limited
2.	Kontinam Access Construction Co. Limited
3.	Upwork Enterprise Limited

4.	Thrivent Enterprises Limited
5.	Emshwato Enterprises
6.	Walbeck Contractors Limited
7.	Pheroze International Company Limited
8.	Foursons Holdings (K) Limited
9.	Damito Holdings Limited
10.	Cybex Electrical Contractors Company Limited
11.	Duracast International Limited
12.	Fairton Agencies Limited
13.	Woods Dorm Enterprises Limited

Evaluation of Tenders

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

Preliminary Evaluation

5. At this stage of the evaluation, the submitted tenders were to be examined using the criteria set out as Clause 2. Preliminary examination for Determination of Responsiveness under Section III-Evaluation and Qualification Criteria at the page22 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, 7 tenders were disqualified for noncompliance with only 6 tenders including those of the Applicant and Interested Party 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 but the Tender Document does not specify the criteria to be used for the evaluation.
9. A perusal of the Evaluation Report forming part of the Confidential File shows that at the end of the evaluation at this stage, 1 tender being that of the Applicant was disqualified with only 5 other tenders, including that of the Interested Party, qualifying for further evaluation at the Financial Evaluation Stage.

Financial Evaluation

10. The Evaluation Committee was required at this stage to examine tenders successful at the Technical Evaluation Stage using the criteria set out as Price evaluation under Section III-Evaluation and Qualification Criteria at page 23 of the Tender Document.
11. The evaluation was to be on the basis of a comparison of tender prices indicated in the tenders at this stage. The successful tender would be that established as bearing the lowest evaluated price.
12. At the end of the evaluation at this stage the Interested Party's tender price of **Kenya Shillings Thirteen Million, Eight Hundred and Fifty-Four Thousand, Seven Hundred (Kshs. 13,854,700)** was established as the lowest evaluated price among the tenders that qualified for evaluation at this stage.

Evaluation Committee's Recommendation

13. The Evaluation Committee through a signed Evaluation Report forming part of the Confidential File, recommended the award of the subject tender to the Interested Party at its tendered price of **Kenya Shillings Thirteen Million Eight Hundred and Fifty Four Thousand, Seven Hundred** subject to due diligence in accordance with the Act.

Professional Opinion

14. In a Professional Opinion dated 25th July 2024 (hereinafter referred to as the "Professional Opinion") the Procuring Entity's Ag. Director Supply Chain Management, Mr. Eliud O. Sotty reviewed the manner in which the

subject procurement process was undertaken including the evaluation of tenders and recommended the award of the subject tender to the Interested Party as proposed by the Evaluation Committee

15. Subsequently on the same day, 25th July 2024, the Accounting Officer, Mr. Francis Asunah, concurred with the Professional Opinion.

Notification to Tenderers

16. Accordingly, the tenderers was notified of the outcome of the evaluation of the tenders in the subject tender vide letters dated 9th August 2024.

REQUEST FOR REVIEW

17. On 22nd August 2024, the Applicant filed a Request for Review dated 21st August 2024 supported by a Statement dated 12th August 2024 by Anton Joel Ajowi Opar, a Director at the Applicant, seeking the following orders from the Board in verbatim:

a) The Respondents' decision awarding Tender No. CGK/FLLOCA/KSM/WECCNR/2023-2024/LOT 7 for River Training and Embankment Reinforcement along Tiengre Lower-Kotetni stream, Stream Training and Embarkment Reinforcement of Stream from Jumbo to the Lake & Delineating Riparian Lands in Nyaidho and Agalla Rivers along Tiengre Lower Kotetni stream 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/LOT 7 for River Training and Embankment Reinforcement along Tiengre Lower-Kotetni Stream, Stream Training and Embarkment Reinforcement of Stream from Jumbo to the Lake & Delineating Riparian Lands in Nyaidho and Agalla Rivers along Tiengre Lower Kotetni Stream be annulled and set aside;

c) The 2nd Respondent's letter of notification of Intention to Award the subject dated 9th August 2024 notifying the Applicant of its unsuccessfulness in Tender No. CGK/FLLOCA/KSM/WECCNR/2023-2024/LOT 7 for River Training and Embankment Reinforcement along Tiengre Lower-Kotetni stream, Stream Training and Embarkment Reinforcement of Stream from Jumbo to the Lake & Delineating Riparian Lands in Nyaidho and Agalla Rivers along Tiengre Lower Kotetni stream be annulled and set aside;

d) The Applicant's tender be and is hereby readmitted for further evaluation at the Financial Evaluation stage in respect of Tender No. CGK/FLLOCA/KSM/WECCNR/2023-2024/LOT 7 for River Training and Embankment Reinforcement along Tiengre Lower-Kotetni stream, Stream Training and Embarkment Reinforcement of Stream from Jumbo to the Lake & Delineating Riparian Lands in Nyaidho and Agalla Rivers along Tiengre Lower Kotetni stream;

e) The Respondents be compelled to pay 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.

18. In a Notification of Appeal and a letter dated 22nd August 2024, Mr. James Kilaka, the Ag. Board Secretary of the Board notified the Respondents of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the said 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 22nd August 2024.
19. On 28th August 2024, the Respondents through the Office of the County Attorney, County Government of Kisumu, filed their Notice of Appointment of Advocates and a Response to the Grounds of Appeal, both dated 26th August 2024, together with a Supporting Affidavit sworn on 26th August 2024 by Erick Omondi, the Chief Officer Department of Water, Environment, Climate Change and Natural Resources at the Procuring Entity. The Respondent equally forwarded to the Board the Confidential Documents under Section 67(3) of the Act

20. On the same day, 28th August 2024, the Ag. Board Secretary forwarded to the Interested Party a copy of the Request for Review while inviting it to offer information in respect of the subject tender. None of the other tenders filed any response in the proceedings.
21. On 30th August 2024, the Ag. 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 5th September 2024 at 11:00 a.m. through the link availed in the said Hearing Notice.
22. On 4th September 2024, the Applicant filed their Written Submissions dated 2nd September 2024.
23. On 5th September 2024 at 11:00 a.m., when the Board convened for the online hearing, all parties were present and represented by their representatives, who confirmed their readiness to proceed with the hearing as scheduled.
24. Accordingly, the Board gave hearing directions and the order of address as follows:
 - i. The Applicant would begin by prosecuting the Request for Review in 10 minutes.
 - ii. Respondent would then offer a response to the Request for Review in 10 minutes
 - iii. Thereafter the Applicant would close by way of a rejoinder in 5 minutes.

PARTIES SUBMISSIONS

Applicant's Submissions

25. The Applicant's Director, Mr. Opar, submitted that following the Applicant's participation in the subject tender, on 9th August 2024, it received a Notification Letter informing it that its tender was disqualified at the Technical Evaluation Stage on account of failing to meet the minimum score required to qualify for evaluation at the Financial Evaluation Stage. According to him, the said reason lacked a logical basis since the Applicant had submitted identical documents under Lots 5 and 13 of the subject tender, which contained similar requirements and was successful at the Technical Evaluation Stage in those Lots.

26. He argued that though the Applicant sent emails to the Procuring Entity seeking a debrief on the evaluation of its bid in the subject tender, its request was ignored. According to Mr. Opar, the Procuring Entity's finding that the Applicant passed the Technical Evaluation Stage in Lots 5 and 13 but failed under Lot 7 pointed to inconsistencies in the evaluation process. Further that the opportunity to understand the specific scoring of the Applicant's tender at the Technical Evaluation Stage was disqualified under Lot 7 was frustrated when the Applicant's request for a debrief was ignored.

27. Mr. Opar contended that contrary to the requirement under Section 87(3) of the Act, the Notification Letter sent to it did not provide specifics as to how the Applicant's tender failed to meet the minimum threshold required to qualify for evaluation at the Financial Evaluation Stage.

28. Mr. Opar equally argued that Mr. Eric Omondi, deponent in the Respondent's Affidavit, had perjured himself in the various paragraphs of his affidavit. He gave the example of paragraph 7 and 8 indicating that Mr. Omondi had indicated a list of suppliers who were not participants in the subject tender as tenderers in the tender. Further that even the identity of the successful tender as indicated in the affidavit was at a variance from that indicated in the Notification Letters issued in the subject tender.

29. In sum, Mr. Opar urged the Board to allow the Request for Review.

Respondents' Submissions

30. Counsel for the Respondents, Ms. Opondo, urged the Board to confine itself to Lot 7 of the subject tender and not to advert to the other Lots that were not the subject of the instant proceedings. She contended that the said Lots had separate Tender Documents whose requirements were different and distinct from the those of Lot 7 which was under consideration.

31. Ms. Opondo contended that the Procuring Entity issued the Applicant with a Notification Letter dated 9th August 2024 that offered the reason as to why the Applicant's tender was disqualified at the Technical Evaluation Stage. She underscored that Section 67 of the Act required the Procuring Entity to maintain confidentiality, which explains why the Procuring Entity did not disclose to the Applicant the confidential information that was being sought. Counsel submitted that the Applicant's request for a debrief was responded through a letter dated 14th August 2024 from the

Procuring Entity's Director, Supply Chain Management and a meeting was held on 15th August 2024. Further that the meeting was prematurely concluded at the instance of the Applicant's representatives, before the members could get in to the agenda of the meeting.

32. Counsel submitted that since the works being procured were for a FLoCCA (Financially Locally Led Climate Action Program) Project, they were governed by multiple instruments including the Act, Regulations 2020, multiple agreements and Manuals. According to the Respondents, the Applicant had not led any conclusive evidence that the Procuring Entity or any of its officers was in breach of the law.
33. Further that contrary to the Applicant's submission that they were exposed to loss and damage, in public tenders there is usually no guarantee to any participating tenderer that they would emerge as the successful tenderer.
34. In sum the Respondents urged the Board to dismiss the Request for Review with costs.
35. At the end of her address, Ms. Opondo sought to amend paragraphs 7 and 8 of the affidavit of Mr. Omondi arguing there was an error in terms of the identities of the participants in the subject tender as well as that of the successful tenderer. She indicated that the successful tenderer was Foursons Holdings (K) Limited and not Season Energy Limited as indicated in the affidavit. Further that the participants in the subject tender were Evanton Company Limited, Kontinam Access Construction Co. Limited,

Upwork Enterprises Limited, Thrivent Enterprises Limited, Emshwato Enterprises, Walabeck Contractors Limited, Pheroze International Company Limited, Foursons Holdings (K) Limited, Damito Holdings Limited, Cybex Electrical Contractors Company Limited, Duracast International Limited, Fairton Agencies Limited and wood Dorm Enterprises Limited and not Tysany Company Limited, Evanton Company Limited, Cotiah Enterprises Limited, Dalla Premium Limited, Melaka Link Limited, The Stratified Engineers Company Limited, Walbeck Contractors Limited, Qalibrated Systems Limited, Romich Remagen Enterprises and Seasons Energy Limited as indicated in Mr. Omondi's affidavit

Applicant's Rejoinder

36. Mr. Opar in his rejoinder objected to the amendment of Mr. Eric Omondi's affidavit arguing that if it was a genuine mistake the same ought have been raised at the earliest following the filing of the Respondents' response.
37. He maintained that the Applicant had taken issue with the proceedings of the subject tender on account of inconsistencies in the evaluation of the tenders in the different Lots, lack of transparency and the lies that the Respondents were perpetuating.
38. Further that whereas Section 67 of the Act prohibits disclosure of confidential information, the same provision permits disclosure to a tenderer the evaluation scores on their own tender.

CLARIFICATIONS

39. The Board asked the Respondents to confirm the reasons for failing to include the tender requirements in the Tender Document. Counsel for the Respondents' Ms. Opondo indicated that the evaluation criteria was disclosed through Addendum No. 2 and that this was also given through the IFMIS Portal.
40. The Board asked the Respondents to clarify in the reasons given by the Procuring Entity for the Applicant's disqualification from the subject tender. Counsel for the Respondents, Ms. Opondo indicated that the Notification Letter set out all the tenderers that participated in the subject tender and that under the Applicant, the letter details that the Applicant was disqualified for failing to meet the minimum marks at the Technical Evaluation Stage that would have qualified it for further evaluation at the Financial Evaluation Stage.
41. The Board inquired from the Applicant whether he received any communication from the Procuring Entity on their request for a debrief session. Mr. Opar responded in the negative citing that the Procuring Entity had ignored the Applicant's request. On her part, Ms. Opondo indicated that a response was made and asked the Board to verify the email correspondence that was tendered in the proceedings.
42. The Board asked the Respondents to offer clarity on the areas of difference between the criteria in Lot 7 and the other 2 Lots i.e. Lot 5 and 13. Counsel for the Respondents, Ms. Opondo contended that the 2 Lots

had different scopes of works from Lot 7 and equally variously had different sets of requirements.

43. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 22nd August 2024 had to be determined by 12th September 2024. Therefore, the Board would communicate its decision on or before 12th September 2024 to all parties via email.

BOARD'S DECISION

44. 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 Respondents could orally amend the filed affidavit by Mr. Erick Omondi?***
 - II. ***Whether the provisions of Section 67 of the Act forbid the Respondents from divulging to the Applicant, the information they sought?***
 - III. ***Whether the Applicant's tender was disqualified from the subject tender in accordance with the provisions of the Act, Regulations 2020 and the Tender Document?***
 - IV. ***What orders should the Board issue in the circumstance?***

Whether the Respondents could orally amend the filed affidavit by Mr. Erick Omondi?

45. On 28th August 2024, the Respondents filed various documents including a Notice of Appointment of Advocates and a Response to the Grounds of

Appeal, both dated 26th August 2024. The Respondents equally filed a Supporting Affidavit by one Eric Omondi.

46. During the hearing the Applicant assailed the Supporting Affidavit by Erick Omondi for containing names of suppliers who did not take part in the subject tender being represented as tenderers in the subject tender. The affidavit was further assailed for naming Seasons Energy Limited as the successful tenderer in the subject tender when the Notification Letter named the Interested Party herein as the successful tenderer.
47. Counsel for the Respondents, Ms. Opondo, at the end of her address to the Board in response to the Request for Review, sought to orally amend paragraphs 7 and 8 of the affidavit of Mr. Eric Omondi, while giving a new list of suppliers who participated in the subject tender and also naming the Interested Party herein in place of Seasons Energy Limited as the successful tenderer in the subject tender. However, the Applicant opposed this proposed amendment citing that the paragraphs in question had been made under oath and were also relied upon by the Applicant during the preparation for the hearing.
48. The Board has looked at paragraphs 7 and 8 which were sought to be amended and the same read:

7. At I am aware that at the close of the deadline for the submission of tenders set for 10.07.24 at 11:00 am a total of eight (8) bids were received in respect of the tender whereupon opening of the tenders took place publicly on the said date immediately after the deadline time in the presence

of the tenderers designated representatives with the tenders remaining valid for 180 days from the date of the opening thereof as set out in ITT 18.0 and set out in the Tender Data sheet (See pg 8 & 18 respectively of the tender documents)

8. That I am aware that the interested bidders were as follows:-

- a. TYSANY COMPANY LTD***
- b. EVANTON COMPANY LTD***
- c. COTIAH ENTERPRISES LTD***
- d. DALLA PREMIUM LTD***
- e. MELAKA LINK LTD***
- f. THE STRATIFIED ENGINEERS COMPANY LTD***
- g. WALBECK CONTRACTORS LTD***
- h. QALIBRATED SYSTEMS LTD***
- i. ROMICH REMAGEN ENTERPRISES***
- j. SEASONS ENERGY LTD***

49. The Board has keenly studied the affidavit and in its view, Counsel for the Respondent's could have been referring to paragraph 12 of the affidavit and not paragraph 7. The said paragraph 12 reads:

12. That I know of my own knowledge that upon the Financial Evaluation the interested party-SEASON ENERGY LTD was found most responsive and pursuant to Section 86(1) of the Public Procurement & Asset Disposal Act 2025 was recommended for award with a bid sum of Kshs 10,515,300/= annexed and marked "E04" is a copy of the procurement professional opinion"

50. Notwithstanding the foregoing this Board is mindful of the High Court pronouncement in ***Swaleh Gheithan Saanun v Commissioner of Lands & 5 others [2002] eKLR; Mombasa High Court Civil Case No. 227 of 2002*** to the effect that courts should decline substantive amendments to affidavits noting that the averments in affidavits are made on oath:

Counsel for the defendants failed to point out to court any reliable authority supporting their stand that an affidavit cannot be amended. The basis for such a view would appear to be mere common sense and/or logic arising from the fact that an affidavit mainly contains of matters of fact sworn to be true upon knowledge, information or belief. Once such facts have been sworn on oath therefore, they cannot be negated or controverted by the person who deponed them. It is my view what is sworn in the body of the affidavit will thereon be clearly defined. Once it is so stated, and becomes the substance of the oath, it would indeed be against common sense and logic to amend the substantive express contents in the said affidavit. What about formal errors on the face of the affidavit? If a name or a word or a title is misquoted or misdescribed or misspelt; can such be amended? In my view and I so hold, a title like in a court document can be amended]to identify it with the suit as long as it does not in any way alter the meaning and substance of the affidavit. In my further view the same logic and sense that would dictate against amending the substance of an affidavit would be the same that would dictate this Court to hold that there is little that

should prevent technical amendments from being made to an affidavit. Alternatively, the title of a case which must appear in every document drawn and filed in a suit may be said not to be a substantive part of an affidavit. It is not that part of the affidavit that is actually sworn nor is it one liable to alteration by either party in the case and I would so hold.

51. From the above High Court pronouncement which is binding on this Board, it would be illogical to amend the substantive parts of an affidavit made under an oath. Further, that whereas formal errors that do not affect the substance of the affidavit can be amended, amendments that touch on the substance of the affidavit should be rejected.

52. Turning to the present case the amendments being sought are in respect of the suppliers that participated in the subject tender as well as the identity of the successful tenderer in the subject tender. The request for amendment was also orally advanced by Counsel Ms. Opondo and not the maker of the affidavit sought to be amended. In the Board's view, the proposed amendments constitute substantive amendments to the affidavit of Mr. Eric Omondi noting the Act places a premium on the identity of suppliers participating in a tender. Section 86 of the Act for instance outlines an elaborate criteria for determining the successful tender. Section 78(6) on its part mandates the Tender Opening Committee to maintain a Tender Opening Register that should contain the names of the tenderers submitting bids in any tender.

53. In view of the foregoing, it was imprudent on the part of the Respondents to orally seek the amendment of the affidavit of Mr. Omondi. Prudence would have dictated that the Respondents file a Further Affidavit clarifying on the errors and the circumstances under which those errors arose.
54. Appreciating the gravity of statements made under oath and the surrounding consequence of perjury, the Board therefore finds that the Respondents could not orally amend the filed affidavit by Mr. Erick Omondi.

Whether the provisions of Section 67 of the Act forbid the Respondents from divulging to the Applicant, the information they sought?

55. The Applicant faulted the Respondents for failing to disclose to it the details of their scores at the Technical Evaluation Stage. The Applicant's Director, Mr. Opar, argued that the Notification Letter sent to the Applicant indicated that the Applicant's tender did not meet the minimum marks at the Technical Evaluation Stage required of a tender in order to qualify for further evaluation, but the said letter did not contain the specific scoring of the Applicant's tender. Further that attempts by the Applicant's email requests for the scoresheets on its tender were ignored by the Respondents.
56. Counsel for the Respondents, Ms. Opondo, submitted that Section 67 of the Act required the Procuring Entity to maintain confidentiality, which explains why the Procuring Entity did not disclose to the Applicant the confidential information that was being sought. Further, that the

Applicant's request for a debrief was responded through a letter dated 14th August 2024 from the Procuring Entity's Director, Supply Chain Management and a meeting was held on 15th August 2024. She contended that the meeting was prematurely concluded at the instance of the Applicant's representatives, before the participants could get in to the agenda of the meeting.

57. From the foregoing, the Board is invited to interrogate the nature of the information the Applicant was seeking through their request for a debrief session and whether the sought information constitutes information that the Act forbids the Respondents from disclosing.

58. Section 67 of the Act reads:

67. Confidentiality

(1) During or after procurement proceedings and subject to subsection (3), no procuring entity and no employee or agent of the procuring entity or member of a board, commission or committee of the procuring entity shall disclose the following—

(a) information relating to a procurement whose disclosure would impede law enforcement or whose disclosure would not be in the public interest;

(b) information relating to a procurement whose disclosure would prejudice legitimate commercial interests, intellectual property rights or inhibit fair competition;

(c) information relating to the evaluation, comparison or clarification of tenders, proposals or quotations; or

(d) the contents of tenders, proposals or quotations.

(2) For the purposes of subsection (1) an employee or agent or member of a board, commission or committee of the procuring entity shall sign a confidentiality declaration form as prescribed.

(3) This section does not prevent the disclosure of information if any of the following apply—

(a) the disclosure is to an authorized employee or agent of the procuring entity or a member of a board or committee of the procuring entity involved in the procurement proceedings;

(b) the disclosure is for the purpose of law enforcement;

(c) the disclosure is for the purpose of a review under Part XV or requirements under Part IV of this Act;

(d) the disclosure is pursuant to a court order; or

(e) the disclosure is made to the Authority or Review Board under this Act.

(4) Notwithstanding the provisions of subsection (3), the disclosure to an applicant seeking a review under Part XV shall constitute only the summary referred to in section 68 (2)(d)(iii).

(5) Any person who contravenes the provisions of this section commits an offence as stipulated in section 176(1)(f) and shall be debarred and prohibited to work for a government entity or where the government holds shares, for a period of ten years.

59. Section 67(1) above, in general terms prohibits a Procuring Entity from disclosing information relating to a procurement process where:
- i. The disclosure is likely to impede law enforcement, not in public interest,
 - ii. The disclosure would prejudice legitimate commercial interest, intellectual property rights or inhibit fair competition
 - iii. The information relates to evaluation or comparison or clarification of bids
 - iv. The information relates to the contents of submitted bids
60. However, Section 67(4) of the Act creates an exception to the general rule against disclosure by allowing a Procuring Entity to disclose to an Applicant seeking review, the summary referred to in Section 68(2)(d)(iii), which essentially is a summary of tender opening, evaluation and comparison of tenders including the evaluation criteria used.
61. The said Section 68(2)(d)(iii) of the Act reads:

68. Procurement records

(1) An accounting officer of a procuring entity shall keep records for each procurement for at least six years after the resulting contract has been completed or, if no contract resulted, after the procurement proceedings were terminated.

(2) The records for a procurement shall include—

(a) ...

(b) ...

(c)

(d) for each tender, proposal or quotation that was submitted—

(i) the name and address of the person making the submission;

(ii) the price, or basis of determining the price, and a summary of the other principal terms and conditions of the tender, proposal or quotation; and

(iii) a summary of the proceedings of the opening of tenders, evaluation and comparison of the tenders, proposals or quotations, including the evaluation criteria used as prescribed;

62. From the foregoing, it would follow that whereas the Act generally categorizes procurement records as confidential information, there are certain limited circumstances under which the Act permits a Procuring Entity to disclose the procurement records. Section 67(4) permits a Procuring Entity to disclose to an Applicant seeking review, a summary of the proceedings of tender opening, evaluation and comparison of bids including the evaluation criteria used as prescribed.

63. It is against the above benchmark that the Board will now interrogate the Applicant's request for information from the Procuring Entity.

64. The Board has spotted an email printout of the correspondence between the parties herein annexed to the affidavit of Anton Joel Ajowi Opar as ***annexure AJAO***. The printout was inelegantly printed with the result

that certain parts of the email was cut out during the printing. Nonetheless the readable parts of the email printout read as follows:

***NOTIFICATION OF INTENTION TO AWARD:-
CGK/FLOCCA/KSM/WECCNR/2023-***

Procurement.cg.k@kisumu.go.ke

***Kindly find attached NOTIFICATION OF INTENTION TO
AWARD-CGK/FLLOCA/KSM/WECCNR/2023-2024/LOT7***

Evanton Limited <email details withheld>

***Greetings write to request for debriefing for the above letter
regarding the intention to award the stated tender. We would
like to state that we ar...***

shortcomings of the submitted proposal from our company.

Regards,

Managing Director

65. From the readable parts of the email the Board gathers that the Applicant was seeking for a debrief to know the shortcomings of their bid. During the hearing the Applicant's Director, Mr. Opar, submitted that the Applicant was seeking to understand the scoring of their bid so as to understand how they fail to garner the minimum marks required at the Technical Evaluation Stage. This information in the Board's view falls under the exception provided for under Section 67(4) of the Act.

66. The Board therefore finds that the provisions of Section 67 of the Act do not forbid the Respondents from divulging to the Applicant, the information they sought.

Whether the Applicant's tender was disqualified from the subject tender in accordance with the provisions of the Act, Regulations 2020 and the Tender Document?

67. The gravamen of the Applicant's complaint before the Board was that its tender was irregularly disqualified at the Technical Evaluation Stage. The Applicant's Director, Mr. Opar, took issue with the fact that the Applicant's tender was disqualified at the Technical Evaluation Stage of the subject tender notwithstanding the fact that it was successful under Lots 5 and 13, where it submitted identical tenders and that the evaluation criteria in the said Lots was similar to that of the subject tender.

68. On the flip side, the Respondents contended that the Applicant's tender was properly disqualified having failed to meet the minimum score required of a tender in order to qualify for further evaluation at the Financial Evaluation Stage.

69. Hereinbelow is an excerpt of the Notification Letter sent to the Applicant:

NOTIFICATION OF INTENTION TO AWARD

For the attention of Tenderer's Authorized Representative

Name : THE DIRECTORM EVANTON COMPANY LIMITED

Address: (details withheld)...

...

3.Request a debriefing in relation to the evaluation of your tender

a)The successful tenderer:

b)Other Tenderers

Names of all Tenderers that submitted a Tender. If the Tender's price was evaluated include the evaluated price as well as the Tender price read out. For Tenders not evaluated, give one main reason the Tender was unsuccessful.

No.	Name of Tender	Tender Price as Read out	Tender's Evaluated Price	Reason(s) why bid was not successful
1
...
12	EVANTON COMPANY LIMITED	13,653,400	N/A	Did not attain minimum technical score therefore did not proceed to financial evaluation stage

70. From the above the Applicant was disqualified for failing to attain the minimum technical score at the Technical Evaluation Stage. The Board is therefore invited at this stage to establish whether the Applicant's tender met the requirements stipulated at the Technical Evaluation Stage.

71. For starters, Section 80 of the Act offers guidance on how an Evaluation Committee should proceed with the evaluation of tenders in the following terms:

"80. Evaluation of tenders

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

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

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

"79. Responsiveness of tenders

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

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

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

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

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

a) be quantified to the extent possible; and

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

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

“19. It is a universally accepted principle of public procurement that bids which do not meet the minimum requirements as stipulated in a bid document are to be regarded as non-responsive and rejected without further consideration.[9] Briefly, the requirement of responsiveness operates in the following manner:- a bid only qualifies as a responsive bid if it meets with all requirements as set out in the bid document. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements.[10] Bid formalities usually require timeous submission of formal bid documents such as tax clearance certificates, audited financial statements, accreditation with standard setting bodies, membership of professional bodies,

proof of company registration, certified copies of identification documents and the like. Indeed, public procurement practically bristles with formalities which bidders often overlook at their peril.[11] Such formalities are usually listed in bid documents as mandatory requirements – in other words they are a sine qua non for further consideration in the evaluation process.[12] The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing or empowerment. Bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome.

20. In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the

procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions.”

See also ***Nairobi High Court Judicial Review Misc. Application No. 407 of 2018; Republic v Public Procurement Administrative Review Board; Arid Contractors & General Supplies (Interested Party) Ex parte Meru University of Science & Technology [2019] eKLR.*** and ***Nairobi High Court Misc. Civil Application No. 60 of 2020; Republic v Public Procurement Administrative Review Board & Ors Ex parte Tuv Austria Turk,***

74. Drawing from the above, the Tender Document is the key guide in the evaluation of tenders submitted in response to any tender invitation. Further, for a tender to be deemed responsive in respect of any requirement, it must comply with the specification of the actual requirement as set out in the Tender Document.
75. Turning to the present Request for Review, the Board has keenly studied the Tender Document but has neither spotted the evaluation criteria for the Technical Evaluation Stage nor a minimum requirement on the threshold that tenders qualifying for evaluation at the Technical Evaluation Stage had to muster.

76. The Board finds it an anomaly that the Tender Document did not stipulate the evaluation criteria. This is in view of the express provisions of Section 70(4) and 70(6)(i) of the Act which vest the responsibility of preparation of the Tenderer Documents on the Accounting Officer and further provide that the Tender Document must outline the evaluation criteria to be applied any tender.

77. However from pages 7 to 9 of the signed but undated Evaluation Report forming part of the Confidential File forwarded to the Board, the Board gathers the following:

- i. The Procuring Entity adopted 7 requirements for evaluation at the Technical Evaluation Stage
- ii. The 7 requirements carried a total score of 100 marks, with each requirement bearing separate marks.
- iii. The Procuring Entity set a threshold of 70 marks for one to qualify for further evaluation at the Financial Evaluation Stage.

78. The Board has studied the Evaluation Report and independently compared the scores awarded to the Applicant's tender alongside that of the Interested Party. For completeness of the record, the same is herein reproduced:

No.	TECHNICAL REQUIREMENT	WEIGHTING SCORE	Maximum score	Bidder 1	Bidder 8
1.	Proof of experience-At least 4 Each letter of award/LSO is 5 similar contracts undertaken for marks the last three(3) years-Attach at least four (4)	Each letter of award /LSO is 5 marks each	20	10	20

	copies of LPOs/letters of award/contracts				
2.	References	should attach recommendation letters from at least three(3) clients in public sector whom they have offered similar goods (2marks)	12	0	6
		should attached recommendation letters from at least three(3) clients in private sector whom they have offered similar goods (2marks		0	0
3.	Ongoing projects	should attach letters of award/LSO		0	0
4.	Key personnel	Provide detail of key personnel that the company will use to undertake the work Degree and above -10 marks Diploma -5 marks		15	10

		Certificate- 5 marks			
5.	Evidence of financial capacity to handle contract if awarded	provide certified 3-year 2021, 2022,2023, bank statement /line of credit (each year 5marks)	15	15	15
6.	Certified audited accounts by ta certified ICPAK accountant for the last three years 2021 2022,2023 Attached ICPAK Member No, for verification	6 marks each	18	18	18
7.	Litigation history	provide history of court/arbitral award decision against the tenderer since January, 2010	10	10	10
	TOTAL SCORE		100	68	79

79. From the Evaluation Report, the tender of the Applicant and the Interested Party scored similar scores with respect to Technical Requirements No. 3, 5, 6 and 7. Further, that they only received different scores with respect of requirements No. 1,2 and 4.

80. The Board will in the following paragraph offer an analysis on Technical Requirements No.1 and 2 examining how the tenders were evaluated.

Technical Requirement No. 1

81. Technical Requirement No. 1 as can be glanced from the above table was on proof of experience and tenders were evaluated on the basis of attached Letter of Awards and LSOs. Each Letter of Award or LSO was to attract 5 marks up to a maximum of 20 marks under this requirement.
82. From the Interested Party's original tender, the Board has spotted 2 Letters of Award from the County Government Migori, 2 Letters of Award from the County Government of Homabay, 1 Letter of Award from the County Government of Kisumu and 1 Letter of Award from KeLCop. Consequently the Evaluation Committee awarded the Interested Party the maximum 20 mark for submitting more than the 4 required Letters of Award/LSOs under this requirement.
83. From the Applicant's tender, the Board has spotted 3 Letters of Award from Kisumu County Government, 1 Letter of Award from the County Government of Turkana, 1 Letter of Award from Dorcus Kenya and 1 letter of Award from the County Government of Busia. Surprisingly, the Evaluation Committee awarded the Applicant's tender only 10 marks despite the tender containing more than 4 Letters of Award/LSOs.
84. The Board therefore finds that this evaluation criteria was not uniformly applied with the result that the Applicant's tender was unjustifiably denied 10 marks in the process.

Technical Requirement No. 2

85. Technical Requirement No.2 as can be glanced from the above table was on references and required tenderers to submit recommendation letters

from at least 3 clients from the public sector and 3 clients from the private sector. Each of the recommendation letters earned a tenderer 2 marks with a cap of 6 marks on public sector recommendations and a cap of 6 marks on private sector recommendations.

86. The Interested Party's tender was scored 0 on this requirement as it did not attach any recommendation letter.
87. On the Applicant's part, its tender was scored 0 marks despite submitting as part of its bid 2 letters of recommendation from the public sector i.e. from the County Government Kisumu and the County Government of Busia and 1 letter from the private sector i.e. from Dorcus Kenya. Consequently, the Evaluation Committee from their scoring unjustifiably denied the Applicant 6 marks.
88. From the foregoing it is clear the Tender Document neither specified the Technical Evaluation criteria nor provided for any minimum threshold that a tender was to score before qualifying for further evaluation at the Financial Evaluation Stage. Additionally, even for the criteria that the Evaluation Committee chose to adopt on their own account, they unjustifiably denied the Applicant's tender marks that it was entitled to.
89. In view of the foregoing, the Board finds that the Applicant's tender was not disqualified from the subject tender in accordance with the provisions of the Act, Regulations 2020 and the Tender Document.

What orders the Board should grant in the circumstances?

90. The Board has found that the Respondents could not orally amend the filed affidavit by Mr. Erick Omondi.
91. The Board has equally found that the provisions of Section 67 of the Act do not forbid the Respondents from divulging to the Applicant, the information they sought.
92. Additionally, The Board has equally found that the Applicant's tender was not disqualified from the subject tender in accordance with the provisions of the Act, Regulations 2020 and the Tender Document.
93. The upshot of our finding is that the Request for Review dated 21st August 2024 in respect of Tender No. CGK/FLLOCA/KSM/WECCNR/2023-2024-LOT 7 for Delineating Riparian Lands in Nyaidho & Agalla Rivers for Reclamation (Pegging) Purposes (Bamboo & Other Water Friendly Trees), Construction of Gabions of Nyaidho & Agalla Rivers succeeds in the following specific terms:

FINAL ORDERS

94. 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 21st August 2024 :

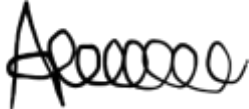
1. The Notification Letters dated 9th August 2024 and addressed to the unsuccessful tenderers in Tender No. CGK/FLLOCA/KSM/WECCNR/2023-2024-LOT 7 for

Delineating Riparian Lands in Nyaidho & Agalla Rivers for Reclamation (Pegging) Purposes (Bamboo & Other Water Friendly Trees), Construction of Gabions of Nyaidho & Agalla Rivers be and are hereby cancelled and set aside.

- 2. The Notification Letters dated 9th August 2024 and addressed to the successful tenderer in Tender No. CGK/FLLOCA/KSM/WECCNR/2023-2024-LOT 7 for Delineating Riparian Lands in Nyaidho & Agalla Rivers for Reclamation (Pegging) Purposes (Bamboo & Other Water Friendly Trees), Construction of Gabions of Nyaidho & Agalla Rivers be and is hereby cancelled and set aside.**
- 3. The Applicant's tender be and is hereby admitted for further evaluation at the Financial Evaluation Stage alongside the rest of the tenders that were previously established as having passed the Technical Evaluation Stage.**
- 4. The 1st Respondent be and is hereby directed to reconvene the Evaluation Committee for purposes of evaluation of the Applicant's tender alongside the rest of the tenders that passed the Technical Evaluation Stage, at the Financial Evaluation Stage.**

5. 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