

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 84/2024 OF 22<sup>ND</sup> AUGUST 2024**

**BETWEEN**

**EVANTON COMPANY LIMITED ..... APPLICANT**

**AND**

**ACCOUNTING OFFICER,**

**COUNTY GOVERNMENT OF KISUMU,**

**DEPARTMENT OF WATER, ENVIRONMENT,**

**CLIMATE CHANGE AND NATURAL RESOURCES ... 1<sup>ST</sup> RESPONDENT**

**COUNTY GOVERNMENT OF KISUMU .....2<sup>ND</sup> RESPONDENT**

**SEASON ENERGY 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/LOT13 for Upgrading of Moro Water Project, Rehabilitation & Expansion of Nyahera Mkendwa Water Supply & Expansion of Sang'oro Water Project

**BOARD MEMBERS PRESENT**

1. Ms. Alice Oeri - Vice Chairperson & Panel Chairperson
2. Mr. Stanslaus Kimani - Member
3. Ms. Jessica M'mbetsa - Member

### **IN ATTENDANCE**

1. Ms. Sarah Ayoo - Holding brief for Acting Board Secretary
2. 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**

#### **SEASON ENERGY LTD**

No Appearance

### **BACKGROUND OF THE DECISION**

## **The Tendering Process**

1. The County Government of Kisumu, the Procuring Entity and 2<sup>nd</sup> Respondent herein invited sealed bids in response to Tender No. CGK/FLLOCA/KSM/WECCNR/2023-2024/LOT13 for Upgrading of Moro Water Project, Rehabilitation & Expansion of Nyahera Mkendwa Water Supply & Expansion of Sang'oro 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 28<sup>th</sup> June 2024 in The Standard and Daily Nation published on the Procuring Entity's website [www.kisumu.go.ke](http://www.kisumu.go.ke) and on the Public Procurement Information Portal (PPIP) website [www.tenders.go.ke](http://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 3<sup>rd</sup> July 2024 and Addendum 2 dated 5<sup>th</sup> July 2024 and the tender's submission deadline was on 10<sup>th</sup> 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 twelve (12) tenders were submitted in response to the tender. The tenders were

opened in the presence of tenderers' representatives present, and were recorded as follows:

<b>Bidder No.</b>	<b>Name</b>
1.	Tysany Company Ltd
2.	Evanton Company Ltd
3.	Cotiah Enterprises Ltd
4.	Season Energy Ltd
5.	Dalla Premium Ltd
6.	Melaka Link Ltd
7.	The Stratified Engineers Company Ltd
8.	Walbeck Contractors Ltd
9.	Qalibrated Systems Ltd
10.	Romich Remagen Enterprises
11.	Robicon Engineering Ltd
12.	Boybridge Investment Ltd

### **Evaluation of Tenders**

3.A Tender Evaluation Committee appointed by the Respondent undertook evaluation of the twelve (12) tenders as captured in the Evaluation Report dated 24<sup>th</sup> 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 this evaluation stage, seven (7) tenders were determined non-responsive, while five (5) 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, two (2) tenders were determined non-responsive while three (3) 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 proceeded to note as follows:

".....

### ***Bidder No. 2***

***It was in the view of the evaluation committee that the deviation would materially affect the substance of the contract of Rehabilitation & Expansion Of Nyahera Mkendwa Water Supply component due to imbalanced Bill of Quantities. The bidder therefore was not considered for award.***

### ***Bidder no. 8***

***In the spirit of fair distribution of opportunities, it was in the view of the committee to award another bidder since the bidder is a beneficiary of another County Government of Kisumu FLLOCA tender awarded in May 2024. The bidder therefore was not considered for award.***

### ***Table 6. Ranking of the bids***

<b><i>Ranking</i></b>	<b><i>Bidder No.</i></b>	<b><i>Bidder's Name</i></b>	<b><i>Bid Amount (Ksh)</i></b>
<b><i>1</i></b>	<b><i>4</i></b>	<b><i>SEASON ENERGY LTD P.O. BOX 40-00610 NAIROBI</i></b>	<b><i>10,515,300</i></b>

### **Evaluation Committee's Recommendation**

10.The Evaluation Committee recommended award of the tender to Season Energy Ltd, the Interested Party herein, at Kenya Shillings Ten Million Five Hundred and Fifteen Thousand Three Hundred only (Kshs. 10,515,300/=) being the most responsive and lowest evaluated tender.

### **Professional Opinion**

11.In a Professional Opinion dated 25<sup>th</sup> 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 Season Energy Ltd, the Interested Party herein, at Kenya Shillings Ten Million

Five Hundred and Fifteen Thousand Three Hundred only (Kshs. 10,515,300/=) being the most responsive and lowest evaluated tender.

12.The Professional Opinion was approved by Mr. Francis Asunah, Chief Officer Water, Environment, Natural Resources and Climate Change on 25<sup>th</sup> July 2024.

### **Notification to Tenderers**

13.Tenderers were notified of the outcome of the evaluation process *vide* letters dated 9<sup>th</sup> August 2024.

### **REQUEST FOR REVIEW NO. 84 OF 2024**

14.On 22<sup>nd</sup> August 2024, Evanton Company Limited hereinafter referred to as (“the Applicant”) filed a Request for Review dated 21<sup>st</sup> August 2024 together with an Applicant’s Statement in Support of the Request for Review sworn on 21<sup>st</sup> 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 in verbatim:

***a) The Respondents’ decision awarding Tender No: CGK/FLLOCA/KSM/WECCNR/2023-2024/LOT13 for Upgrading of Moro Water Project, Rehabilitation & Expansion of Nyahera Mkendwa Water Supply & Expansion of Sang’oro Water Project to the***



***Interested Party to be annulled and set aside in its entirety.***

***b) The 2<sup>nd</sup> Respondent's letter of notification of Intention to Award the subject tender dated 9<sup>th</sup> August, 2024 notifying the successful bidder of its successfulness in Tender No: CGK/FLLOCA/KSM/WECCNR/2023-2024/LOT13 for Upgrading of Moro Water Project, Rehabilitation & Expansion of Nyahera Mkendwa Water Supply & Expansion of Sang'oro Water Project be annulled and set aside.***

***c) The 2<sup>nd</sup> Respondent's letter of notification of Intention to Award the subject tender dated 9<sup>th</sup> August, 2024 notifying the Applicant of its unsuccessfulness in Tender No: CGK/FLLOCA/KSM/WECCNR/2023-2024/LOT13 for Upgrading of Moro Water Project, Rehabilitation & Expansion of Nyahera Mkendwa Water Supply & Expansion of Sang'oro Water Project be annulled and set aside.***

***d) The Respondents be directed to award Tender No: CGK/FLLOCA/KSM/WECCNR/2023-2024/LOT13 for Upgrading of Moro Water Project, Rehabilitation***

***& Expansion of Nyahera Mkendwa Water Supply & Expansion of Sang'oro 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.***

15. In a Notification of Appeal and a letter dated 22<sup>nd</sup> 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 24<sup>th</sup> 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 22<sup>nd</sup> August 2024.

16. On 28<sup>th</sup> August 2024 the Respondents filed through the Office of the County Attorney a Notice of Appointment dated 26<sup>th</sup> August 2024, Response to the Grounds of Appeal dated 26<sup>th</sup> August 2024, a Supporting Affidavit sworn by Erick Omondi together with confidential documents submitted pursuant to Section 67(3)(e) of the Act.

17. *Vide* email dated 29<sup>th</sup> 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 24<sup>th</sup> March 2020. All tenderers were invited to submit to the Board any information and arguments concerning the tender within three (3) days.

18. *Vide* a Hearing Notice dated 30<sup>th</sup> August 2024, the Acting Board Secretary, notified parties and all tenderers of an online hearing of the instant Request for Review slated for 5<sup>th</sup> September 2024 at 14:00 hrs through the link availed in the said Hearing Notice.

19. On 5<sup>th</sup> September 2024, the Applicant filed Written Submissions dated 4<sup>th</sup> September 2024.

20. At the hearing on 5<sup>th</sup> September 2024 at 14:00 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**

21. 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 9<sup>th</sup> 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).

22. He indicated that upon seeking clarification from the Respondents by requesting a debrief, on how its Tender deviated vide its email dated 14<sup>th</sup> August 2024, no response was given and their email was not responded to.

23. 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 provided for under Clauses 37.1, 37.2 and 37.3 of the Tender Document and the Act.

24.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.

25.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's conduct raises concerns about potential collusion and bias undermining the integrity of the procurement process.

26.He pointed out that the Interested Party's tender price of Kshs. 10,515,300/= was about Kshs. 200,00/= more than its price and this did not in any way constitute a deviation that could affect the quality of its work, which then raised serious questions about the fairness and transparency of the evaluation process.

27.He further pointed out that the Applicant had successfully carried out and completed several projects with the Procuring Entity all of which are well documented and could be found on the Kisumu County Water Services records and that 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.

28.Mr. Opar pointed to the list of bidders submitted by the Respondents in the Supporting Affidavit sworn by Erick Ochieng at paragraphs 8, 9,12, and 16 and argued that (a) those listed bidders did not participate in the subject tender with the exception of Walbeck Contractors Limited and the Applicant, (b) the price awarded in the subject tender was erroneously indicated as Kshs. 13,854,700.00 and (c) that the notification letter originated from the Evaluation Committee's report and as such, the sworn affidavit was misleading therefore the deponent committed perjury by deliberately lying on oath which actions undermine the integrity of the entire procurement process and constitute a serious violation of legal and ethical standards.

29.On the act of provision of false information by the Respondents, he referred the Board to Section 177 of the Act and Article 10 of the Constitution on the national values of integrity, transparency, and accountability which are crucial in ensuring fair proceedings and urged

the Board to take action against Mr. Eric Ochieng for providing false information.

30.He 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.With regard to the concerns raised by Mr. Opar regarding the Respondents' Supporting Affidavit sworn by Erick Ochieng, counsel asked the Board to take judicial notice of the timelines involved with filing responses before the Board and indicated that this was a simple matter of confusion between pleadings filed in Request for Review no. 83 of 2024 and 84 of 2024 whereby the affidavits were mixed up and switched in an inadvertent mistake by her office. She requested for the same to be amended so as to indicate the correct bidders and the correct annexure.

33.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.

34. 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 22<sup>nd</sup> March 2024, the Intergovernmental Agreement dated 28<sup>th</sup> 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.

35. On the issue of notification, Counsel indicated that the Applicant was issued with a conclusive and all-encompassing reason as to why it was disqualified from the subject tender as evidenced in the Respondents' annexure marked 'E-08' which was also annexed to the Request for Review.

36. She submitted that from the evaluation criteria, Clause 38 of the Tender Document provided for unbalanced BOQs meaning that a bid has materially deviated from the tender sum and this was what the Evaluation Committee found and was adopted in the Professional Opinion.

37. Counsel further submitted that from the letter appointing members of the Evaluation Committee, it is clear that it was comprised of technical officers who were experienced in the areas of work and who found that the bid document as submitted by the Applicant could not possibly



and sufficiently provide for the completion of the project due to the variation of over Kshs. 2.5 Million in certain areas which did not make its proposal tenable.

38. With regard to issues of due diligence raised by the Applicant in the instant Request for Review, counsel submitted that he who alleges must prove and argued that no evidence had been availed. She indicated that the Evaluation Committee's integrity must be upheld as evidenced in the minutes submitted to the Board. Counsel reiterated that the Applicant was not the lowest evaluated bidder since the lowest evaluated bidder is the one who emerges as the successful bidder.

39. On the allegation of loss of business by the Applicant and anticipation of succeeding in the subject tender, counsel submitted that not all bidders are guaranteed success. She urged the Board to uphold the decision of the Procuring Entity and dismiss the Request for Review with costs.

### **Applicant's Rejoinder**

40. In a rejoinder, Mr. Opar reiterated that provision of false and misleading information by the Respondents in their Supporting Affidavit is rather critical and a deliberate misrepresentation that goes to the heart of the integrity of the procurement process and that swearing a false affidavit is not a matter of confusion but a serious violation of the Act and ought not be taken lightly. He pointed out that

these were not small discrepancies or innocent errors and that necessary legal action ought to be taken including sanctions against the 1<sup>st</sup> Respondent.

41.He indicated that the mere fact that the subject tender was advertised in the newspaper does not preclude the Applicant from raising concerns about fairness and transparency of the evaluation process, how evaluation was conducted and potential misconduct in the process.

42.On the issue of unbalanced BOQs, Mr. Opar submitted that the evaluation process and disqualification lacked clarity and failed to meet the standard of transparency and fairness required by the Act. He indicated that the Applicant was not sufficiently informed in its notification of how its BOQs were unbalanced and how its tender price materially deviated from the BOQs in view of Clause 38 of the Tender Document which he argued was applied without proper explanation or engagement.

43.He reiterated that the minimal difference of Kshs. 200,000 between the Applicant's tender price and the Interested Party's tender price was negligible and could not affect the Applicant's ability to carry out the project effectively noting that it had executed similar projects for the Procuring Entity successfully.

44.Mr. Opar pointed out that Section 86(1) of the Act emphasizes award of tenders to the lowest evaluated bidder and the Applicant met all the technical and financial requirements and the minimal variance in its tender price would not affect its execution of the said project.

45.He indicated that the Applicant's bid was competitive and that it provided a discount which ought not to be taken as an offence.

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

### **CLARIFICATIONS**

47.When asked by the Board to clarify on where the issue of minor deviations came in at the Financial Evaluation stage in view of the evaluation criteria laid out in the Evaluation Report, Ms. Opondo submitted that the subject tender had 3 elements in it, being Upgrading of Moro Water Project, Rehabilitation & Expansion of Nyahera Mkendwa Water Supply & Expansion of Sang'oro Water Project and these had different BOQs whereby the Applicant over quoted in two and underquoted in one and this variation was what was considered a material deviation and that this was the criteria used by the Evaluation Committee in arriving at its decision.

48.When asked to point out where that evaluation criterion falls under in view of the evaluation criteria stipulated under Financial Evaluation, counsel submitted that the Evaluation Committee discussed the

financial provisions and found the same to be unbalanced and this was what was considered a material deviation leading to disqualification of the Applicant's bid.

49. On his part, Mr. Opar submitted that the 3 projects in the subject tender are clustered together and that under the Tender Form, the Applicant submitted an all-inclusive price and not the price for each individual project.

50. Upon enquiry by the Board on what prejudice the Applicant would suffer in view of the concession by the Respondents that the Affidavit by the Respondent had an inadvertent mistake due to the number of responses filed leading to the confusion, Mr. Opar submitted that the Procuring Entity has a history of misleading the Applicant in previous projects and the current discrepancy further erodes its trust and as such, the Board ought to consider the pattern of misrepresentation when assessing the validity of the evaluation process and ensure accountability and fairness is met.

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

## **BOARD'S DECISION**

52.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 2<sup>nd</sup> 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**

53. Before delving into the issues framed for determination, the Board would like to dispense with a preliminary aspect arising from the proceedings before it. During the hearing, Mr. Opar pointed out that the list of bidders submitted by the Respondents in the Supporting Affidavit sworn by Erick Ochieng was false, that the Respondent was misleading the Board and that the deponent committed perjury by deliberately lying on oath which actions undermine the integrity of the entire procurement process and constitute a serious violation of legal and ethical standards.

54.In response, counsel for the Respondents, Ms. Opondo submitted that that was an inadvertent mistake caused by the number of responses filed in Request for Review No. 82, 83 and 84 of 2024 between the same parties and the Board ought to take judicial notice of the same.

She urged that it was the inadvertent mistake that led to the confusion and that it was not intended to mislead the Board.

55. 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.***

56. 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.

57. 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.

58. 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.

59. 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 2<sup>nd</sup> 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**

60. 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 9<sup>th</sup>



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 the exact reason on 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. The Applicant further contends that though the subject tender consisted of three (3) projects, they were clustered together and it submitted an all-inclusive price under the Tender Form, and not the price for each individual project.

61. 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 3 projects with the price variations leading to the decision to disqualify the Applicant's tender at the Financial Evaluation stage.

62. 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.

63. Having considered parties' submissions herein, we note that the 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) ....."**

64. 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) .....”**

65. 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 for 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 that the evaluation criteria be applied in accordance with the procedures provided in a tender document.

66. 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;**

**.....”**

67. 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 9<sup>th</sup> August 2024 that its tender was unsuccessful in the subject tender as follows:

" .....

<b>No</b>	<b>Name of Tender</b>	<b>Tender Price as Read our</b>	<b>Tender's Evaluated Price</b>	<b>Reason(s) why bid was not successful</b>
.....	.....	.....	.....	.....
<b>2</b>	<b>Evanton Co. Ltd</b>	<b>10,300,000</b>	<b>10,300,000</b>	<ul style="list-style-type: none"> <li><b>Deviation from the requirements in the Bills of Quantities would materially affect the substance of the contract of Rehabilitation &amp; Expansion of Nyahera Mkendwa</b></li> </ul>

				<b><i>Water Supply component due to imbalanced Bill of Quantites</i></b>
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.....”

68.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."***

69.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."***

70. 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.***

71. 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."***

72. 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.”***

73. 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***

***Bidder No. 2***

***It was in the view of the evaluation committee that the deviation would materially affect the substance of the contract of Rehabilitation & Expansion Of Nyahera Mkendwa Water Supply component due to imbalanced Bill of Quantities. The bidder therefore was not considered for award.***

74. In essence, the Evaluation Committee was of the view that there was a material deviation in the Applicant's tender price due to an imbalanced Bill of Quantities that would affect the substance of the contract of Rehabilitation & Expansion of Nyahera Mkendwa Water Supply component.

75. 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 3 projects 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. However, the Applicant argued that the three (3) projects were clustered together



and it submitted an all-inclusive tender price under the Tender Form, and not the price for each individual project

76. 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.”***

77.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.

78.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 Clauses 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 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.

79. It is also imperative to take note of the fact that evaluation criteria indicated in the Evaluation Report at Financial Evaluation was that the evaluated price of each bid would be determined by taking the bid price in the form of tender and as such, the Applicant's tender price in the subject tender was all-inclusive for the three (3) projects and when ranked as against other responsive bidders at the Financial Evaluation stage, it had the lowest evaluated tender price.

80. 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**

81. 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.

82. Accordingly, we deem it fit and just to order the 1<sup>st</sup> 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.

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

### **FINAL ORDERS**

84. 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 9<sup>th</sup> August 2024 with respect Tender No. CGK/FLLOCA/KSM/WECCNR/2023-2024/LOT13 for Upgrading of Moro Water Project, Rehabilitation & Expansion of Nyahera Mkendwa Water Supply & Expansion of Sang'oro 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 9<sup>th</sup> August 2024 with respect to Tender No. CGK/FLLOCA/KSM/WECCNR/2023-2024/LOT13 for Upgrading of Moro Water Project, Rehabilitation & Expansion of Nyahera Mkendwa Water Supply & Expansion of Sang'oro Water Project addressed to the**

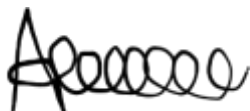
**Applicant and to all other unsuccessful tenderers be and are hereby nullified and set aside.**

**C. The 1<sup>st</sup> 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 1<sup>st</sup> Respondent is hereby ordered to proceed with the procurement process of Tender No. CGK/FLLOCA/KSM/WECCNR/2023-2024/LOT13 for Upgrading of Moro Water Project, Rehabilitation & Expansion of Nyahera Mkendwa Water Supply & Expansion of Sang'oro 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 12<sup>th</sup> Day of September 2024.**



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**PANEL CHAIRPERSON**

**SECRETARY**

**PPARB**

**PPARB**