

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 36 OF 2018 DATED 2<sup>ND</sup> MARCH, 2018**

**BETWEEN**

**TRANSPower ENERGY SOLUTIONS LIMITED .....APPLICANT**

**AND**

**KENYA PIPELINE COMPANY LIMITED .....PROCURING ENTITY**

Review against the decision of the Kenya Pipeline Company Limited in the matter of Tender No. KPC/PU/028-OT/17 for Supply, Installation and Commissioning of Mainline Metering System

**BOARD MEMBERS PRESENT**

- |                          |            |
|--------------------------|------------|
| 1. Paul Gicheru          | - Chairman |
| 2. Peter B. Ondieki, MBS | - Member   |
| 3. Hussein Were          | - Member   |
| 4. Mrs. Gilda Odera      | - Member   |
| 5. Mrs. Rosemary Gituma  | - Member   |

**IN ATTENDANCE**

- |                     |                               |
|---------------------|-------------------------------|
| 1. Philip Okumu     | -Sitting in for the Secretary |
| 2. Maryanne Karanja | -Secretariat                  |

## PRESENT BY INVITATION

### APPLICANT- TRANSPOWER ENERGY SOLUTIONS

1. Anthony Kiprono - Advocate, A.E. Kiprono & Associates

### PROCURING ENTITY- KENYA PIPELINE COMPANY LIMITED

1. Richard Otieno - Advocate, Robinson Harris & Co. Advocates
2. Maureen Kiprop - Lawyer, Robinson Harris & Co. Advocates
3. Kelvin Mbogo - Advocate, Robinson Harris
4. Edith Kemunto - Legal Officer, KPC

### INTERESTED PARTIES

1. S. Lancaster - Legal Counsel, Krohne
2. D. Rampathi - Sales Proj. Manager, Krohne

### BOARD'S DECISION

Upon hearing the representations of the parties and interested candidates before the Board and upon considering the information and all the documents before it, the Board decides as follows:

### BACKGROUND TO THE TENDER UNDER REVIEW

The subject tender for the Supply, Installation and Commissioning of Mainline Metering System was advertised on Tuesday 16<sup>th</sup> May 2017 on the Government Weekly Review Paper and the KPC Website. The Tender closing date was 14<sup>th</sup> June 2017.

Nine (9) bidders submitted their bids and underwent Preliminary Evaluation, Technical evaluation and financial bid-opening.

The Results of the Preliminary and Technical Evaluation were communicated to all the bidders on 17<sup>th</sup> August 2017. Those that proceeded to Financial were invited for the Financial Opening on 7<sup>th</sup> September 2017 when the results of the Technical Evaluation and tender price were read out at the financial bid-opening on the same date as follows:-

- a. M/S Barico Maintenance Ltd - 80
- b. M/S Giza Systems Ltd - 95
- c. Krohne Pty Ltd - 95
- d. Transpower Energy Solutions - 100

M/s Giza Systems Ltd, Krohne (Pty) Ltd and Transpower Energy Solutions Ltd had met the Technical criteria and proceeded for the Financial Opening.

### **Professional Opinion**

The General Manager Supply Chain Mr. Vincent Cheruiyot in his professional opinion to the Managing Director dated 14<sup>th</sup> August, 2017 stated that the procurement process complied with the provisions of the Public Procurement and Asset Disposal Act, 2015 and Requested the Accounting officer to consider approving the following three to proceed to financial evaluation which the Managing Director approved as per recommendation on 16<sup>th</sup> August, 2017.

### **Financial Evaluation**

The evaluation committee noted that M/S Krohne Pty Ltd did not indicate in Form of Tender whether the indicated amount of €3,007,056.00 was inclusive of VAT. However, in clause 3 of the invitation to tender document provided as follows, "The prices quoted were to be inclusive of all taxes and valid for



entire contract period". Therefore, this **implied** Krohne's quoted amount was inclusive of all taxes.

### **Recommendation**

The tender evaluation committee recommended award of the tender for the **Supply, Installation and Commissioning of Mainline Metering System to M/S Transpower Solutions Ltd**, at their total quoted price of €2,998,533.88 (Two Million, Nine Hundred and Ninety Eight Thousand, Five Hundred and Thirty Three point Eight Euros), VAT inclusive as detailed above.

### **THE REVIEW FOR REVIEW NO.99 OF 2017**

Transpower Energy Solutions Ltd on 17<sup>th</sup> November, 2017 filed the request for review against the decision of the Kenya Pipeline Company Limited in matter of tender No. KPC/PU/028-OT/17 for the Supply Installation and Commissioning of mainline metering system with the Public Procurement Administrative Review Board. The Board heard the dispute and delivered a decision on 7<sup>th</sup> day of December, 2017 in which it allowed the Request for Review. The Board further directed the Kenya Pipeline Company (Procuring Entity) to complete the procurement process herein including the making of an award of the tender in question based on the recommendations contained in the tender financial evaluation committee's report which was signed on 17<sup>th</sup> October, 2017 and issue letter of notification under the provisions of Section 83 of the Public Procurement and Asset Disposal Act to the successful and the unsuccessful bidder/bidders.

In follow up to the decision of 7<sup>th</sup> December, 2017, the Procuring Entity terminated the tender under review.



## THE REQUEST FOR REVIEW NO. 1 OF 2018

Transpower Energy Solutions Ltd (the Applicant herein) filed a second Request for Review Number 1 of 2018 dated 2<sup>nd</sup> January, 2018 against the decision of the Kenya Pipeline Company Limited in the matter of Tender No. KPC/PU/028-OT/17 for Supply, Installation and Commissioning of Mainline Metering System as communicated vide letter of termination dated 21<sup>st</sup> December, 2017. The Board heard the parties and rendered a decision in Request for Review Number 1 of 2018 on 22<sup>nd</sup> day of January, 2018 in which the Board set aside the termination and declared it null and void and further directed the Procuring Entity to complete the procurement process in accordance with the law and the Board's decision in the Request for Review No. 99 of 2017.

## THE CURRENT REQUEST FOR REVIEW

The Request for Review was lodged by M/S Transpower Energy Solutions Limited, the above named Applicant, on 2<sup>nd</sup> March, 2018 in the matter of Tender No. KPC/PU/028-OT/17 for the Supply, Installation and Commissioning of Mainline the Metering Systems.

The Applicant sought for the following orders:-

- 1. A declaration that the Respondent's decision to carry out a "detailed evaluation" and thereafter award Tender No. KPC/PU/028-OT/17 to M/s Krohne Pty Limited is null and void.*
- 2. An order quashing the award of Tender No. KPC/PU/028-OT/17 to M/s Krohne Pty Limited.*

3. *A declaration that the Applicant submitted the lowest evaluated bid and was recommended for award of the tender by the Evaluation Committee.*
4. *An order awarding Tender No. KPC/PU/028-OT/17 to the Applicant at the tender sum of Euros 2,998,553.88 (inclusive of taxes).*
5. *An order directing the Respondent and the Applicant to sign the resultant contract within the period of seven (7) days.*
6. *An award of costs for the review to the Applicant.*
7. *Any other relief that the Review Board deems fit to grant.*

During the hearing of the Request for Review, the Applicant was represented by Mr. Anthony Kiprono Advocate while the Procuring Entity was represented by Mr. Richard Otieno Advocate. The interested party on the other hand was represented by M/s S. Lancaster legal Counsel for the interested party.

### **ARGUMENTS**

The following were the parties' respective cases and submissions before the Board.

#### **The Applicant's submissions**

The Applicant relied on its Request for Review dated 2<sup>nd</sup> March, 2018, the statement in support thereof dated 2<sup>nd</sup> March, 2018 together with all the annexures thereto and the submissions dated 19<sup>th</sup> March 2018.

Counsel for the Applicant invited the Board to consider the full text of the application and the submissions and proceeded to highlight his submissions as follows;

Counsel for the Applicant submitted that the gist of the application was that the Procuring Entity went out of its way to re-evaluate the tender contrary to the Board's decisions in Application Number 99 of 2017 and Application Number 1 of 2018 between the same parties. He stated that in the said applications, the Board had directed the Procuring Entity to complete the tendering process. Counsel for the Applicant submitted that completion was not the same as re-evaluation of the tender.

Counsel for the Applicant further submitted that what remained in the evaluation process was for the Procuring Entity to prepare and issue a letter of award of the tender. He further submitted that before the financial evaluation, the head of procuring unit had rendered an opinion to the Accounting Officer, the Managing Director of the Procuring Entity who approved the professional opinion and thus the Procuring Entity proceeded to evaluate the financial bids of the three candidates who had passed the technical and preliminary evaluation stages of the tender evaluation process.

Counsel for the Applicant further submitted that it would be superfluous for the Head of Procurement of the Procuring Entity to again render an opinion on the technical and preliminary findings of the evaluation committee.

Counsel for the Applicant stated that the issue raised by the Procuring Entity in its letter dated 27<sup>th</sup> February 2018 is an issue that the Board had dealt with, considered and decided in Application Number 99 of 2017. He submitted that the issue cannot be re-canvassed before the Board. He further submitted



that the issue was *resjudicata* and the Board was *functus officio* as far as that issue was concerned.

Counsel for the Applicant further submitted that the same issue was also dealt with by the evaluation committee. Counsel for the Applicant invited the Board to refer to the Applicant's submissions. On the issue of *resjudicata* the Applicant relied on the case of **Pop-In (Kenya) Ltd & 3 Others-vs- Habib Bank AG Zurich [1990] KLR, 609** and **Sari Ram Kaura -vs- M. J. E Morgan [1961] E.A, 462** and stated that in the said decision, the Court held that issues are *resjudicata* even if the parties had not raised them provided they ought to have been initially raised for the court's determination. Counsel for the Applicant further submitted that in this case, the issues were raised and determined by the Board in Application Number 99 of 2017. He urged the Board not reopen the said issues.

Counsel for the Applicant stated that the assertion by the interested party at paragraph 38 to the effect that the issue of responsiveness of a tender is not a decision that can be made by the Procuring Entity and the Board was erroneous because evaluation of a tender is undertaken by the Procuring Entity and a party aggrieved by the outcome of the evaluation is at liberty to request the Board to review the same.

Counsel for the Applicant referred to paragraph 75 of the Interested Party's submissions in which the Interested Party submitted that even if a procurement process was technically not compliant with the Act and the regulations, it may still be accepted if the Procuring Entity acted in the public interest. On this issue, counsel for the Applicant submitted that a number of

decisions emanating from the High Court have held that public interest demands that parties comply with the law and the Constitution.

Counsel for the Applicant further made reference to paragraph 87 of the Interested Party's submissions which referred to instances where the Act allows re-evaluation of the tender. Counsel for the Applicant submitted that contrary to the Interested Party's submissions, section 80 (4) deals with the preparation of an evaluation report by an evaluation committee while Section 83 of the Act deals with due diligence report which is not a re-evaluation and section 84 deals with the professional opinion which is not the same as a re-evaluation process.

Counsel for the Applicant also referred to the documents attached to the interested Party's submissions and submitted that what the Interested Party called a Weights and Measures Department Certificate of Approval was by the Interested Party through a company called Seraph Engineering, a company that also participated in the subject tender. Counsel for the Applicant submitted that the said document cannot therefore be relied upon by the Interested Party.

Counsel for the Applicant further referred the Board to documents titled OIML Certificate of Conformity and submitted that the said documents bore the name of Krohne Altometer as the Applicant/Producer and not the interested party herein. He further submitted that the said documents did not have any probative value as far as the subject review was concerned and stated that in any event that was not an issue before the Board because the issue before the board was the completion of the tender process by the Procuring Entity.



Counsel for the Applicant concluded his submissions by urging the Board to grant the prayers sought. He submitted that the Applicant had at paragraph 26 of its submissions demonstrated to the Board why the Board should grant the prayers sought. Counsel for the Applicant urged the Board to direct the Procuring Entity to award the subject tender to it at its tender sum of 2,998,523.88 EUROS Inclusive of taxes.

### **The Procuring Entity's submissions**

Mr. Richard Otieno advocate for the Procuring Entity opposed the Applicant's Request for Review. He relied on the response dated 14<sup>th</sup> March 2018 the Replying Affidavit sworn by Lamik Rotich on 15<sup>th</sup> March 2018, the bundle of authorities dated 15<sup>th</sup> March 2018 and the Respondent's submissions dated 20<sup>th</sup> March 2018.

Counsel for the Procuring Entity submitted that due to the fact that this matter has been before the Board severally, there may be an erroneous perception that the Procuring Entity was seeking to avoid compliance with the orders of the Board. He submitted that to the contrary, the Procuring Entity had in this particular instance sought to give full meaning and tenure to the decisions of the Board delivered on 17<sup>th</sup> December 2017 and stated that the Board had given the Procuring Entity some leeway to correct some instances of certain bidders such as Seraph Engineering Limited.

Counsel for the Procuring Entity further submitted that Seraph Engineering Limited had continuously participated in the proceedings before this Board and had in the last hearing before the Board made submissions to the effect



that the Board had made a positive finding in their favor which finding the Procuring Entity had ignored.

Counsel for the Procuring Entity submitted that it is on the basis of the above background that the Accounting Officer of the Procuring Entity had exercised his powers pursuant to the provisions of Section 44 of the Act as read together with Section 51 of the Interpretation and General Provisions Act and disbanded the initial tender evaluation committee because the Board had impugned that particular evaluation committee. He submitted that the accounting officer had exercised his powers under the provisions of Section 51 of the Interpretation and General Provisions Act by appointing a new evaluation committee to give life to the decision of the Board.

Counsel for the Procuring Entity further submitted that upon constitution the new tender evaluation committee, the evaluation committee proceeded to exercise its powers pursuant to Section 46 (4) (d) of the Public Procurement and Asset Disposal Act by re-evaluating the tenders afresh. Counsel for the Procuring Entity additionally submitted that the previous evaluation committee was procedurally disbanded and a new evaluation committee appointed in accordance with the law. He urged the Board to find that the new evaluation committee acted within the law in evaluating the tender afresh and making its recommendations.

Counsel for the Procuring Entity further stated submitted that in carrying out its functions under the Act, the Procuring Entity had an obligation to take into account the provisions of Articles 227 and 201 of the Constitution as well as the overriding objectives set out in the Act to ensure that the procurement process was fair, equitable, transparent, competitive and cost effective.

Counsel for the Procuring Entity further submitted that the Board had in its ruling of 7<sup>th</sup> December 2017 directed the Procuring Entity to correct the instances of unfairness that the Board had noted in the process. He further stated that the only way for the Procuring Entity to give life to the decision of the Board was to conduct the evaluation process as it did and in the process correct the instances of unfairness that the Board had noted in its previous decisions.

Counsel for the Procuring Entity urged the Board to find that in conducting the fresh evaluation, the new tender evaluation committee took cognizance of the provisions of the tender document, those of the Constitution, the provisions of the Act and the Regulations made thereunder. Counsel for the Procuring Entity further submitted that the Applicant had not impugned the evaluation process per-se. He submitted that what the Applicant was impugning was the fact that the Procuring Entity commenced a fresh evaluation upon appointing a new evaluation committee.

Counsel for the Procuring Entity urged the Board to uphold the decision of the Procuring Entity taking into account the fact that the Applicant had not complied with the mandatory requirements under the Act. He concluded his submissions by urging the Board to dismiss the request for review with costs to the Respondent.

### **The Interested Parties' submissions**

M/s Sonette Lancaster Legal Counsel for the interested party Khrono Pty Ltd relied on the submissions filed before the Board on 19<sup>th</sup> March 2018.



She began her submissions by addressing the Board on the issue of *res judicata*. Counsel for the interested party submitted that though she did not disagree with the Applicant's counsel submissions that the issues had been determined previously by the Board, it was also a requirement for a plea of *res judicata* to succeed that the parties must be the same parties as in the previous proceedings.

Counsel for the interested party further submitted that if a party does not take part in the initial proceedings, they cannot later be precluded by a plea of *resjudicata*. She submitted that during the previous hearings, the review applications between the Applicant and the Respondent of the interested party requested to be provided with certain information by the Board to enable them effectively take part in the proceedings. She further submitted that the Applicant has never been served with any of the applications by the Applicant nor has it ever been served with any of the answers from the Respondent and therefore had been unable and was precluded from partaking in the two previous applications to the fullest extent.

Counsel for the interested party further submitted that being the successful bidder, Krohne Pty Ltd was an interested party and thus the plea of *resjudicata* cannot be successful or be a bar in the proceedings now before the Board. The Board had not had an occasion to consider the submissions made by the interested party. Counsel submitted that *resjudicata* cannot apply, as in this matter, where the parties were not the same even if the issues may be the same.

Counsel for the Procuring Entity submitted that it understood the core dispute between the Applicant and the Respondent to be the Applicant's



contention that the Respondent should not have re-evaluated the tender once the evaluation had been concluded. She submitted that when one reads the Act, the regulations and the tender document one had to accept that re-evaluation was part and parcel of a proper and efficient tender evaluation process.

Counsel for the Procuring Entity further submitted that no party in a tender evaluation process should act with impunity and without question from any of the other officials in the tender evaluation process and that if that was to be the case that would amount to a mere rubber stamping of what the evaluation committee found.

She further submitted that if during the process of due diligence or preparation of a professional opinion it was found that the evaluation committee made an error in the evaluation of the tenders submitted, the Procuring Entity was at liberty to remedy any errors that had occurred in the tender evaluation process. She however conceded that the Board was the only entity that can review the conduct of the Procuring Entity or any other party to a tender process.

She further submitted that even if one accepts the view that the tender evaluation process should not be impugned, one has to also consider that under the provisions of section 79 of the Act, a tender is only responsive if it meets the mandatory requirements set out in the tender document. Counsel for the Procuring Entity submitted that once a tender document had been prepared only the Procuring Entity could amend it in accordance with the processes prescribed by the Act and the Regulations.

She further stated that in clarification number 1 filed by the Procuring Entity, the Procuring Entity clarified that it would accept the equivalent OIML R-117 approval from the country of origin. She invited the Board to consider whether the documents attached to the Applicant's tender documents were in fact compliant with this provision or clarification by the Procuring Entity.

Counsel for the Procuring Entity additionally submitted that the Interested Party had the occasion to consider the findings of the Board and the submissions by the Procuring Entity of what OIML certification constituted and had noted with interest the fact that it was argued during the previous review proceedings before the Board that a certificate of conformity is an additional requirement that should not have been imported into the process by the Procuring Entity. Counsel for the Procuring Entity invited the Board to note that the documents attached to the interested party's submissions with the exception of the weights and measures certification were documents that are available on the internet and the same can be verified from the OIML website. She stated that the said documents are public in nature and are available for the reason that any party contracting with an individual claiming that his product has an OIML certification was able to go to the OIML website and confirm the same.

Counsel for the interested party submitted that it was not for the Procuring Entity or the Review Board to decide whether a tender is responsive or non-responsive. She stated that the wording of the clarification was simple and further submitted that even if the Board were to we accept that the documents submitted by the Applicant met the mandatory requirements as clarified in clarification number 1 and or that they are custody transfer type



of approvals by OIML or an equivalent, then they would still factually not be from the country of origin of either the Applicant or its manufacturer of the metering system. Based on the foregoing she stated that on a plain reading of section 79 of the Act, the Procuring Entity would not have found the Applicant's tender as responsive.

Counsel for the interested party supported the Procuring Entity's submissions in as far as they stated the Procuring Entity was able to lawfully re-evaluate the tenders. She submitted that on a plain reading of the Board's findings in the previous review applications and considering the conduct of the Procuring Entity, there should be no question that the Procuring Entity acted prudently and as a custodian of public money and of the product of the said project.

Counsel for the interested party additionally submitted that the Applicant was not frank and honest in its submissions before the Board as it had deliberately and evasively misinformed the Board of the technical requirements, had deliberately and evasively not provided the Board with all of the information that should have been available to the Board when they made the findings that they previously did and for that reason the plea of *resjudicata* cannot be applied.

She further submitted that by bringing several applications before the Board, the Applicant had in the interested party's view exerted undue influence on the tender evaluation process by driving the process through the mechanisms of the Board. She submitted that the same should not be allowed.



On whether the Interested Party had participated in the proceedings of the Board in **PPARB No. 99 of 2017** and **PPARB No. 1 of 2018**, Counsel for the interested party submitted that the interested party was present and had made submissions which are recorded in the findings of the Board. She submitted that the Applicant was however unable to participate fully because it had not been served with any of the documentation that was filed before the Board. Whilst not placing any blame on anyone's doorstep, Counsel for the interested party stated submitted that the interested party, though present during the proceedings in the previous reviews, was not able to partake effectively or sufficiently in the process.

She therefore urged the Board to dismiss the Applicant's Request for Review with costs.

**The Applicant's Response to the submissions made by Counsel for the Procuring Entity and the Interested Party**

In reply to the submissions made by Counsel by the Procuring Entity and Counsel for the Interested Party, Counsel for the Applicant pointed out that the Interested Party had participated in the two previous review proceedings. He pointed that the Interested Party's participation is captured at pages 9 and 55 of the application. Counsel for the Applicant further submitted that having participated in the said proceedings which gave rise to the decisions which are the subject matter of present proceedings, the Interested Party cannot claim that the plea of *res judicata* does not apply to it. Counsel for the Applicant further submitted that the mere fact that a party chooses to play a passive role in the proceedings is not a denial of their right to raise issues for the Board's determination.

Counsel for the Applicant stated that the Interested Party's submissions were in the nature of an application for the Board to review its previous decisions. Counsel for the Applicant further submitted that section 173 of the Act is clear as to the mandate of the Board and that a party aggrieved by a decision of the Board is entitled to file an application for Judicial Review before the High Court. Counsel for the Applicant stated that none of the two (2) decisions of the Board had been challenged by either the Procuring Entity or the Interested Party before the High Court and that they were therefore final and binding on all the parties.

On the Procuring Entity's submission that the evaluation committee had been disbanded pursuant to section 46 (4) (d) of the Act and a new one set up because the Board had impugned its evaluation report, Counsel for the Applicant submitted that the Board had never impugned the evaluation committee's report in any of its two previous decisions and wondered why the evaluation committee was disbanded yet it had discharged its mandate and had given a report with a recommendation of award to the Applicant to the Managing Director of the Procuring Entity who was also its Accounting Officer.

Counsel for the Applicant agreed with the Procuring Entity on the need to ensure fairness, transparency, accountability and equality in a procurement process as provided for under Article 227 of the Constitution. He however submitted that a procurement process cannot be transparent if the Procuring Entity conducts the process to its conclusion, receives a recommendation of award from the evaluation committee then proceeds to re-evaluate the tender. Counsel for the Applicant further submitted that if the Procuring



Entity felt that there was an error in the process, it should have requested the Board to review the process with a view of seeking the Board's concurrence to re-evaluate the tender. He however stated that the Procuring Entity did not seek any prayer to re-evaluate the tender in both Review No. 99 of 2017 and 1 of 2018 yet it had an opportunity to do so.

On the Procuring Entity's submission that the Applicant had not impugned the process *per se*, Counsel for the Applicant submitted that the second evaluation report was in breach of the decisions of the Board and was therefore unlawful. Counsel for the Applicant submitted that due its unlawfulness, the Applicant did not wish to go into the merits of the said report.

In conclusion Counsel for the Applicant urged the Board to allow the Request for Review with costs to the Applicant.

### **THE BOARD'S DECISION**

The Board has considered the Request for Review and the responses filed by the Procuring Entity and the successful bidder/the interested party.

The Board has also considered all the submissions which were made by the parties which were lengthy in nature.

In spite of the lengthy nature of the submissions made and particularly those made by the successful bidder/the interested party and which extended up to 157 paragraphs, the Board finds that the issue raised in this Request for Review was a fairly straight forward one and it was whether in carrying out the second evaluation process the Procuring Entity complied with the



decisions given by the Board in applications numbers 99 of 2017 and number 1 of 2018.

For the purposes of determining the above issue, the Board wishes to observe that this is the third time that a Request for Review is being filed before it relating to the procurement in issue.

A Request for Review was first filed before the Board on 17<sup>th</sup> November, 2017 and upon a consideration of the merits of the Review application, the Board delivered a decision in the matter where the Board made the following orders in a decision given on 7<sup>th</sup> December, 2017.

- a) The Applicant's Request for Review which was filed with the Board on 17<sup>th</sup> November, 2017 in respect of tender number KPC/PU/028-OT/17 for the Supply, Installation and Commissioning of Mainline Metering System be and is hereby allowed.
- b) The Procuring Entity is directed to complete the procurement process herein in accordance with the law and the Board's observations in this decision within fourteen (14) days from today's date.
- c) Being cognizant of the fact that tender validity period herein will lapse on 10<sup>th</sup> December, 2017, the Board directs that the Procuring Entity and the tenderers involved in this tender process shall take steps to extend the tender validity and the tender security validity periods for a further period of thirty (30) days from today's date to enable the procurement process herein be concluded.
- d) The Board however orders that each party shall bear its own costs of this Request for Review.

Instead of completing the procurement process as directed by the Board, the Procuring Entity proceeded to terminate the procurement process herein by a letter dated 21<sup>st</sup> December, 2017 which again gave rise to a second Request for Review namely Request for Review number 1 of 2018 dated 2<sup>nd</sup> January, 2018. The Board heard the said Request for Review to conclusion and by a decision given on 22<sup>nd</sup> January, 2018, the Board made the following orders meant at ensuring that the Procuring Entity completed the process.

- a) A declaration be and is hereby issued declaring that the Respondent's decision to terminate Tender No. KPC/PU/028-OT/17 for the supply, installation and commissioning of mainline metering system as contained in the Respondent's letter of termination dated 21<sup>st</sup> December, 2017 is null and void and the same is set aside.
- b) The Procuring Entity is directed to complete the procurement process herein in accordance with the law and the Board's decision in the Request for Review No. 99 of 2017 within fourteen (14) days from today's date.
- c) For the purposes of giving effect to this decision in issue the Board hereby extends the tender validity periods for all bidders who participated in this tender by a further period of thirty (30) days to enable the Procuring Entity complete the procurement process herein in compliance with this and the Board's decisions in the Request for Review No. 99 of 2017.
- d) In view of the fact that the procurement process herein is still ongoing, the Board directs that each party shall bear its own costs of this Request for Review.

Pursuant to the nullification of the termination dated 21<sup>st</sup> December, 2017, the Procuring Entity then embarked on the process of completing the procurement process but instead of maintaining the tender evaluation committee which had initially been constituted to evaluate the procurement process in issue from start, the Procuring Entity instead constituted an entirely new tender evaluation committee which now determined that the Applicant's tender was non-responsive and proceeded to award the said tender to the successful bidder herein.

The Board has considered all the events surrounding the evaluation and the award process for this tender and wishes to state as reiterated in the decision given on 22<sup>nd</sup> January, 2018 in Review application No. 1 of 2018 that under the provisions of Section 175(1) and (6) of the Act, a Procuring Entity is under an obligation to comply with the decisions of the Board unless the said decisions are set aside either on judicial review or by way of an appeal.

The said Sections 175(1) and (6) state as follows:-

"175(1) A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties."

"175(6) A party to the review which disobeys the decision of the Review Board or the High Court or the Court of Appeal shall be in breach of this Act and any action by such party contrary to



**the decision of the Review Board or the High Court or the Court of Appeal shall be null and void.”**

The court stated the law on the finality of decisions held in several cases as illustrated by the case of **Ethics and Anti-Corruption Commission -vs.- Horsebrige Networks & Another (Nai HCA 69 of 2015)** which the Board referred to in Request for Review number 1 of 2018.

The question which then arises in this Request for Review is whether faced with the two decisions given by Board in Review Applications Number 99 Of 2017 and 1 of 2018 which have become final, the Procuring Entity could lawfully constitute a different tender evaluation to carry out a fresh evaluation of the tenders from the start notwithstanding the fact that a tender evaluation committee which had lawfully been constituted had carried out an evaluation of the tender as evidenced by the decision given by the Board on 7<sup>th</sup> December, 2017 in Request for Review number 99 of 2017.

It is the Board's respectful view that the action by the Procuring Entity was wrongful because by 18<sup>th</sup> October, 2017 the tender evaluation committee constituted to evaluate the tenders in issue had carried out a preliminary, technical and the financial of the tenders and had made a recommendation that the tender in issue be awarded to the Applicant at its tender price of 2,998,533.88 Euros (V.A.T) inclusive which was lower than the price quoted by the successful bidder herein namely the sum of 3,083,556.00 Euros.

Having completed the evaluation process and made a recommendation of award on 18<sup>th</sup> October, 2018 in a report signed on 17<sup>th</sup> October, 2017, the only meaningful interpretation of the Board's decisions given on 7<sup>th</sup> December, 2017 and 22<sup>nd</sup> January, 2018 was that the Procuring Entity completed the

remaining part of procurement process by issuing a letter of award in favour of the Applicant.

The Board has carefully read the two decisions given in Reviews No. 99 of 2017 and 1 of 2018 and finds that nowhere in the said decisions did the Board fault the process of evaluation up to the point of recommendation of award. Nowhere in any of the two decisions did the Board also direct the Procuring Entity to reconstitute the tender evaluation committee a fresh to the re-evaluate the tenders which had already been evaluated. The Board's decision in application No.99 of 2018 to the point and specifically stated as follow:-

**“For the purposes of an orderly and lawful completion of the procurement process herein, the Procuring Entity is directed to complete the procurement process herein including the making of an award of the tender in question based on the recommendations contained in the tender financial evaluation committee's report which was signed on 17<sup>th</sup>October, 2017 within a period of Seven (7) days from today's date.”**

Further to all the above, the effect of the Procuring Entity's action of reconstituting the tender evaluation committee afresh is that there are now two contradictory evaluation reports prepared by the Procuring Entity relating to the same tender. It is however legally untenable to have two evaluation reports relating to the same tender prepared by a Procuring Entity unless the earlier evaluation report is set aside or annulled on the motion of a bidder in a Request for Review or by the court.

If the Board were to allow two evaluation reports containing different recommendations of award to be prepared in respect of the same



procurement process then such an eventuality would give rise to uncertainty and deprive procurement processes of the integrity envisaged by among other legal instruments by the provisions of Article 227 of the Constitution and Section 3 of the Public Procurement and Asset Disposal Act.

It is also evident from what the Board has set out above that the Procuring Entity's actions to terminate the subject tender at one stage and by later reconstituting the tender evaluation committee afresh were meant to tilt the process in favour of a particular bidder. The Board cannot however accept such kind of attempts aimed at circumventing due process.

On the nature of the orders to be made and as already pointed out in this decision, this is the third time that a Request for Review in respect of the tender in question has been brought before the Board.

In the first two instances, the Board gave the Procuring Entity two opportunities to complete the procurement process and even gave the Procuring Entity a further extension of thirty (30) days on 9<sup>th</sup> February, 2018 in case number 1 of 2018 in order to complete the process and make an award.

The Board however regrettably notes that instead of taking the two opportunities to do the right thing, the Procuring Entity instead squandered them through processes which are clearly in contravention of the provisions of the Act and the Constitution in order to arrive at a particular result.

It is therefore evident from the several actions by the Procuring Entity that its aim is to circumvent the procurement process and the decisions given by the Board in the matter and the Procuring Entity appears determined to go to





any length in ensuring that the tender is finally awarded to a particular bidder.

Where this is the case, the Board will not hesitate to step in in order that the procurement process comes to an end for the purposes of ensuring that projects which are meant to benefit the public commence while at the same time upholding the law that all bidders must be accorded a fair and an equal chance to participate in any procurement process.

As already observed above and this is an issue which has also weighed on the Board's mind, the Applicant offered the lowest evaluated price as compared to the successful bidder and its tender having been previously been fully evaluated, there can be no legal basis for setting aside the earlier recommendation of award.

For all the above reasons, the Applicant's Request for Review dated 2<sup>nd</sup> March, 2018 is allowed in terms of the following final orders:-

#### **FINAL ORDERS**

In view of all the above findings and in the exercise of the powers conferred upon it by the Provisions of Section 173 of the Public Procurement and Asset Disposal Act, 2015 the Board makes the following orders on this Request for Review.

- a) A declaration be and is hereby made declaring that the Respondent's decision to carry out a fresh evaluation and thereafter award Tender No. KPC/PU/028-OT/17 to the interested party herein M/s Krohne Pty Limited is null and void.

- b) An order be and is hereby issued annulling the award of Tender No. KPC/PU/028-OT/17 to M/s Krohne Pty Limited the interested party herein as contained in the Procuring Entity's letter of award dated 27<sup>th</sup> February, 2018.
- c) A declaration be and is hereby issued declaring that the Applicant submitted the lowest evaluated bid and was recommended for award of the tender by the tender evaluation committee on 18<sup>th</sup> October, 2017.
- d) An order be and is hereby issued awarding Tender No. KPC/PU/028-OT/17 to the Applicant at the tender sum of Euros 2,998,553.88 (inclusive of taxes).
- e) An order be and is hereby issued directing the Procuring Entity and the Applicant to sign the resultant contract within a period of fourteen (14) days from today's date.
- f) The Procuring Entity shall deposit the duly executed contract agreement between it and the Applicant with the Board within the said period of fourteen (14) days set out in order number (e) above.
- g) Since costs follow the event, the Applicant is awarded the costs of this Request for Review to be agreed or taxed.

Dated at Nairobi on this 22<sup>nd</sup> day of March, 2018.

  
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**CHAIRMAN**  
**PPARB**

  
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**SECRETARY**  
**PPARB**