

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 6 OF 2018 DATED 5TH JANUARY, 2018

BETWEEN

EPCO BUILDERS LIMITED.....APPLICANT

AND

**KENYA MEDICAL
SUPPLIES AUTHORITY (KEMSA).....PROCURING ENTITY**

**VAGHJIYANI ENTERPRISES
LIMITED.....1ST INTERESTED PARTY**

**JILK CONSTRUCTION
COMPANY LIMITED.....2ND INTERESTED PARTY**

Review against the decision of the Kenya Medical Supplies Authority (Kemsa) in the matter of Tender No. GF-KEMSA-CONST -1-7/OIT 6/2017-2018 for Proposed Construction of Modern Warehouse and Office Block on LR NO. 9042/176 at Embakasi, Nairobi Kenya.

BOARD MEMBERS PRESENT

1. Paul Gicheru - Chairman
2. Mr. Hussein Were - Member
3. Mrs. Rosemary Gituma - Member

4. Mr. Peter Bita Ondieki, MBS - Member
5. Mr. Nelson Orgut - Member

IN ATTENDANCE

1. Stanley C. Miheso - Holding Brief for Secretary
2. Ms. Maureen Namadi - Secretariat (taking the proceedings)

Present By Invitation

Applicant- EPCO BUILDERS LIMITED

1. A.M Mbindyo - Advocate, A.M Mbindyo & Company Adv

Procuring Entity-Kenya Medical Supplies Authority

1. Kenneth Akide (SC) - Advocate, Akide & Company Advocates
2. R.Murithi -Director
3. James Kamau - Quantity Surveyor, Public Works
4. Charles Juma -Director Procurement
5. David Muttu -Procurement Manager
6. Edward Buluma -Procurement Manager
7. Khadija Ramadhani - Senior Procurement Officer
8. Anthony Chege - Procurement Officer
9. Albert Kangerep -Procurement Officer
- 10.Purity Kanini -Procurement Officer
- 11.Caroline W.Mugo -Procurement Officer
- 12.Susan Onyango -Procurement Officer
- 13.Marylyn Kioko -Pupil

INTERESTED PARTIES

1. Osundwa M -Advocate, Vaghjiyani Enterprises Limited
2. George Kamau -Advocate, Jilk Construction Company Limited

BOARD'S DECISION

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

THE BACKGROUND

The Request for Review was lodged by M/s EPCO Builders Ltd who appointed the firm of A.M Mbindyo & Co Advocates filed a Request for Review against the decision of the Kenya Medical Supplies Authority in the matter of Tender No. GF-KEMSA-CONST -1-7/OIT 6/2017-2018 for the Proposed Construction of a Modern Warehouse and Office Block.

During the hearing of the Request for Review, the Applicant was represented by Mr. A.M Mbindyo Advocate while the Procuring Entity was represented by Mr. Kenneth W Akide SC, Advocate. The successful bidder M/s Vaghjiyani Enterprises Ltd was on the other hand represented by Mr. Mr Osundwa M. Advocate one other Interested Party namely Jilk Construction Company Limited was represented by Mr. George Kamau, Advocate.

The Applicant sought for the following orders:

- a) *That the Respondent's decision awarding Tender No. GF-KEMSA-CONST-1/OIT6/2017-2018 to the alleged successful bidder be and is hereby set aside and nullified.*

- b) That the Respondents decision notifying the Applicant that it had not been successful in Tender No. GF-KEMSA-CONST-1/OIT6/2017-2018 by way of the letter dated 22nd December 2017 and forwarded to the Applicant by the email dated 23rd December 2017 at 3:43a.m be set aside and nullified.*
- c) The board be pleased to review all records of the procurement process (particularly the alleged technical evaluation) relating to tender No. GF-KEMSA-CONST-1/OIT6/2017-2018 and establish what criteria was used and if not according to the law and tender document, annul the results of such an evaluation and declare the Applicant the successful bidder and award the tender to the Applicant towards negotiating and signing a contract with the Applicant as per the tender and the board's decision.*

THE SUBMISSIONS

The Applicant's Submissions

The Applicant filed this Request for Review on 5th January, 2018 challenging the decision of the Procuring Entity as contained in the Procuring Entity's letter of notification dated 22nd of December, 2017 declaring the Applicant's bid as unsuccessful since it was aggrieved by the decision of the Procuring Entity to award the subject tender to M/s Vaghjiyani Enterprise limited.

The Applicant through Mr. Alphones Mbindyo advocate argued that in response to Procuring Entity invitation to tender and in line with the Procuring Entity's instructions it submitted a valid bid for Tender No.GF-

KEMSA-CONS-1/OIT6/2017-2018 in strict compliance with the requirements of the bid document and the Act.

Counsel for the Applicant further stated that it met all the mandatory requirements set out in the tender documents and was also substantially responsive at technical evaluation and that was the reason why its bid was subjected to financial evaluation.

The Applicant further averred that the criteria adopted and used in the evaluation and final award of the tender to M/s Vaghjiyani Enterprises limited was different from the criteria contained in the invitation to tender documents thus going against the Spirit of section 80(2) of the Act which requires the evaluation and the comparison of the tenders to be done in accordance with the criteria spelt out in the invitation to tender document(s) and that the evaluation process be objective.

Counsel for the Applicant further submitted that, the procurement method used by the Procuring Entity in this tender was that of an open tender but the award was made using a method reserved for the Requests for Proposals method by combining the technical and financial scores.

He stated that it was clear that the criteria used was different from the one set out in the tender documents and the one prescribed by the law.

It was the Applicant's submission that the notification of award of the tender to the successful bidder was not done as required by the Act and the incidental regulations. Counsel for the Applicant further stated that the reasons advanced by the procuring entity as the reasons why the Applicant failed in its bid were unclear, incomplete and largely

ambiguous since the Procuring Entity only stated that **“your combined score of 89.10 was not the highest”**.

Counsel for Applicant further contended that the Procuring Entity’s decision not to legally evaluate the bids offended the spirit of the Public Procurement and Disposal Act 2015.

In response to the averments contained in the Replying Affidavit sworn by Fredrick Simiyu Wanyonyi on 18th January 2018 and the Summary of the Evaluation Report supplied to the Applicant by the Procuring entity and which was annexed to the Further Replying Affidavit sworn by Fredrick Simiyu Wanyonyi as annexure FSW1, Counsel for the Applicant stated that the summary confirmed the contention by the Applicant that the Tender for the construction of the modern warehouse and Office Block on L.R No. 9042/176 at Embakasi, Nairobi Kenya was not done in accordance with the provisions of the Tender Document, the Act or the attendant Regulations and that the whole procurement process was marred with questionable evaluation criteria thus casting doubt on the credibility of the process and/or its outcome.

Counsel for the Applicant further stated that upon examination of the summary of evaluation report it noted that at the Technical Evaluation stage, the Applicant’s bid was among the 10 bids that were cleared to proceed to the third and final stage and at this stage, the applicant had a percentage score of 85.893% against that of the winning bidder which was 92.86% .This according to the Applicant meant that the two and eight other bidders met the minimum threshold score at the technical

evaluation stage by more than 75% and were therefore cleared to proceed to the final stage.

He stated that it was again evident according to the summary of the evaluation report that the Applicant namely bidder No. 17 abbreviated as 'B17' made it through all stages of evaluation stage and was indeed in contention to be awarded the tender just like any other bidder.

Counsel for the Applicant further submitted on the basis of the summary of evaluation report that At Stage C - Financial Evaluation, the bids were evaluated and scores assigned as indicated in the table appearing on page 13.

He stated that according to the table on page 13, the Applicant scored 28.67% at the financial evaluation stage against the winning bidder's score of 28.83%. He stated that it was worth noting that bid No.14 abbreviated as 'B14' in other tables scored the highest score in financials. That is, 30%. He stated that what this meant was that, bidder number 14 had the lowest evaluated tender price and having met the 75% in the technical evaluation could have easily been declared the successful bidder, but this was not the case. He instead stated that bidder number 23 abbreviated as 'B23' was declared as the successful bidder and awarded the multi-billion tender to construct a modern warehouse and office Block at Embakasi, Nairobi to the surprise of the Applicant and other unsuccessful bidders.

Counsel for the Applicant stated on the basis of the Financial Evaluation results as contained in the summary of evaluation at page 13 that the successful bidder was awarded the tender in spite of its bid not been the lowest evaluated tender in terms of price.

Counsel for the Applicant further contended that according to the table titled 'List of Bidders' found at pages 2 to 3 of the Summary of the Evaluation Report prepared and served by the Procuring Entity, the winning bidder submitted a tender price of Kshs. 3,079,998,859.50 whereas M/s N.K Brother's Limited which was among the 10 bidders cleared to be subjected to financial evaluation had offered a bid sum of Kshs. 2,959,909,101.00. He stated that from an arithmetic calculation of the price difference, the winning bid was actually higher than the bid with the lowest evaluated bid price by about Kshs 120 million. This, he stated was a huge sum of money that could have been saved and put to proper use.

Counsel for the Applicant further contended that through illogical means the procuring entity had thus awarded the tender to a bidder whose bid was for a sum which was higher by more 120 million than the responsive bidder with the lowest quoted price and averred that it was worth noting that the bid by N.K Brothers Ltd met all the preliminary, technical and mandatory requirements.

Counsel for the applicant further submitted that all the criteria to be used in the evaluation and award together with their weightings to be used in the tendering process ought to have been disclosed upfront.

He stated that the use of the highest combined score criteria which is associated with the Requests For Proposals method ('Request for Proposals') and which was not the appropriate award criteria amounted to a separate criteria which was not disclosed to the tenderers. He stated that if the procuring entity intended to use the 'said award criteria' then

it ought to have disclosed it upfront in the advertisement carried out in the Daily Nation Newspaper Edition of 17th November 2017. He stated that the non-disclosure of all the criteria upfront amounted a breach of duty owed to the tenderers by the Procuring Entity and should not go unpunished.

Counsel for the Applicant further argued that the use of more than one criteria in the award of the contract to M/S Vaghjiyani Enterprises Limited was not only against the Act but was open to misuse by unscrupulous agents of any procuring entity and should not be permitted. He stated that to allow any procuring entity to use more than one criteria and which is not applied uniformly across the board would be tantamount to giving agents of the procurement entity unfettered power to flout procurement rules at will. He further averred that this also goes against the provisions of Section 80(2) of the act which emphasizes the need for the evaluation and the comparison of the tenders to be done in accordance with the criteria set out in the tender document(s).

Counsel for the Applicant further submitted that apart from scoring above 75% at the technical evaluation stage, the Applicant was better qualified in all of technical aspects than the successful bidder and thus urged the Board to carry out an independent review and evaluation of the scores assigned at the technical evaluation stage in arriving at a fair awarding of marks as the evaluation by the Procuring Entity had been put into doubt by the Applicant.

Ultimately, Counsel for the Applicant urged the Board to grant the prayers sought in its Request for Review.

The 2nd Interested Party's Case

Mr. George Kamau Advocate for the 2nd interested party supported the Applicant's case and relied on the affidavit sworn by one Mr. Sammy Maina Kamau. He submitted that the 2nd interested party was notified of the outcome of its tender and that it attained a combined technical and financial score of 78.41% but on reading the tender document the 2nd interested party noted that the Procuring Entity provided more than one award criteria thereby opening itself up to subjectivity and consequently awarded the tender to the favored bidder. He further stated that a tender whose document was not prepared, evaluated and awarded in line with the Act should not be allowed to proceed under the circumstances. He therefore urged the Board to terminate the process and direct for a fresh process be re-started.

The Procuring Entity's Case

In response to the submissions made by Counsel for the Applicant, counsel for the Procuring Entity through Mr. Kenneth Akide advocate submitted that the Applicant was successful at the preliminary examination stage and at the Technical Evaluation Stage having attained marks above the 75% threshold and was therefore recommended to proceed to the financial evaluation stage.

Counsel for the Procuring Entity stated that a combined technical and financial score was computed and the bidder with the highest combined technical and financial score was recommended for award. It was the Procuring Entity's case that the Applicant attained a combined technical

and financial score of 89.10 marks against the winning bidder's combined score of 93.83 and the Procuring Entity therefore notified the Applicant that it had submitted the successful tender in compliance with the provisions of section 87(3) of the Act. Counsel the Procuring Entity further stated that it made similar communication to all bidders and gave reasons to those who were successful and unsuccessful and disclosed the successful bidder in the later case.

Counsel for the Procuring Entity further stated that it adhered to the provisions of Section 86(1) of the Act. Counsel for the Procuring Entity further stated that the Applicant's Request for Review lacked merit and was inconsistent with its ultimate prayer that the process be set aside or nullified only to later seek the award of the tender to be made in its favour.

Counsel for the Procuring Entity reiterated that it conducted a transparent, fair, equitable and competitive process in compliance with the Constitutional principles and Values as well as the provisions of Public Procurement and Asset Disposal Act 2015 and the Regulations in force.

He therefore urged the Board to uphold the decision of the procuring entity/ Respondent and dismiss the Request for Review with costs to the Respondent.

The Successful Bidder/1st Interested Party's Submissions

Mr. Michael Osundwa Advocate for the Successful Bidder M/s Vaghjiyani Enterprises Limited opposed the Applicant's Request for Review and stated that the successful bidder was duly awarded the

tender by the Procuring Entity and the prayers sought by the Applicant would adversely affect the successful bidder's rights.

Counsel for the successful bidder contended that Section 80(2) of the Act bestows the evaluation committee with the responsibility of evaluating tenders using the procedures and the criteria set out in the tender documents and relied on the case of **Republic vs Public Procurement Administrative Review Board Ex Parte Athi Waters Services Board & 2 Others (2017) eKLR** for that proposition. Counsel for the Successful Bidder further submitted that the successful bidder's tender was the Lowest responsive bid, and hence it was proper that it be awarded the tender based on substantial responsiveness to the tender requirements in addition to being the lowest evaluated bidder in the terms of the price and having also attained the highest combined technical and financial score.

Counsel for the successful bidder stated that contrary to the averments by the Applicant that the Applicant submitted the lowest and most competitive bid, the Applicant submitted a financial quote of Ksh.3,096,884,822 whilst the Successful Bidder offered a price of ksh.3,079,998,859.50 and was therefore lower in terms of price when compared with the Applicant.

He therefore urged the Board to uphold the award made in favour of the successful bidder and dismiss the Request for Review with costs.

Applicant Reply's

In a short response to the submissions made by Counsel for the Procuring Entity and Counsel for the successful bidder, Counsel for the Applicant

reiterated his earlier submissions and stated that the Procuring Entity's decision to declare the Applicant's bid as unsuccessful was unjustified and unfair.

THE BOARD'S DECISION

The Board has considered the written and the oral submissions made by all the advocates for the parties who appeared before it in this Request for Review and which have been set out in full above. The Board has also considered the Request for Review filed by the Applicant, the annexures thereto and all the responses and the affidavits which were filed in opposition to the said Request for Review.

The Board has in addition to looking at all the above documents also looked at the original tender document as amended by Addendums 1 and 2 dated 29th November, 2017 and 4th December, 2017 together with the evaluation report and the summary of the evaluation report supplied to the Board and the parties by the Procuring Entity.

Upon a consideration of all the above documents and the oral and the written submissions made before it, the Board determines that this Request for Review raises the following issues for determination.

- a) **Whether the Procuring Entity breached the provisions of Sections 80(2) and 86(1) of the Public Procurement and Asset Disposal Act by awarding the subject tender to the successful bidder using a criteria other than the award criteria set out in the tender document.**
- b) **Whether the tender document used in this procurement process was defective.**
- c) **What orders should the Board make in the circumstances.**

The Board will now proceed to consider and determine the above issues in the order in which they have been set out above.

ISSUE NO. I

Whether the Procuring Entity breached the provisions of Section 80(2) and 86(1) of the Public Procurement and Asset Disposal Act by awarding the subject tender to the successful bidder using a criteria other than the award criteria set out in the tender document.

It is apparent from the submissions by the parties and which have already been reproduced above that the Request for Review by the Applicant's in this Request for Review case was largely anchored on the contention that the Procuring Entity breached the provisions of Section 80(2) and 86(1)(a) of the Public Procurement and Asset Disposal Act by failing to award the tender in question to the bidder with the lowest evaluated bid price but instead awarded the tender to the bidder with the highest combined technical and financial score.

Counsel for the Applicant and the 2nd interested party contended that the method of procurement used in this tender was that of an open tender and not a Request for Proposals and that pursuant to the provisions of Section 86(1)(a) of the Act, the tender ought to have been awarded to the lowest evaluated bidder in terms of price.

Counsel for the Procuring Entity and Counsel for the successful bidder/the 1st Interested Party however resisted this argument and stated that the tender in issue had rightly been awarded to the tenderer with the highest combined technical and financial scores.

The Board has perused the records provided to it by the parties for the purposes of determining the issue under consideration and finds that the method of procurement used in this procurement was that an open

international tender. The Procuring Entity consequently published an advertisement inviting bidders to submit tenders in the Daily Nation and the Star Newspapers of 11th November, 2017.

The Board has perused the original tender document as initially issued and notes that the award criteria as initially set out under clause 6.1 appearing at page 17 of the tender document provided that the tender would be awarded to the tenderer who offered the lowest evaluated tender price.

The said clause reads as follows:-

Award of Contract

“6.1: Subject to clause 6.2, the award of the contract will be made to the tenderer whose tender has been determined to be substantially responsive to the tendering documents and who has offered the lowest evaluated tender price, provided that such tenderer has been determined to be (a) eligible in accordance with the provisions of Clauses 1.2, and (b) qualified in accordance with the provisions of clause 1.7 and 1.8”.

The Board further notes that at page 25 of the tender document as originally issued, the Procuring Entity set out a financial evaluation criteria where it provided the formula for determining the successful bidder and at the conclusion of the said page stated that the tender in question would be awarded to the bidder with the highest total combined technical and financial weighted score.

The financial evaluation criteria at page 25 of the tender document reads as follows:-

FINANCIAL EVALUATION

“The tenderers who qualify under Technical Evaluation will have their financial bid evaluated and the lowest responsive bid submitted after analysis shall have their tender considered for award.

Financial Score= Lowest Responsive Bidder/Bidder Price (under consideration) x 30

Combined scores

Total combined score= Weighted Technical Score + Weighted Financial Score

RECOMMENDATION FOR AWARD

The bidder with the highest total combined weighted score shall be recommended for award”.

It is further clear from the records availed to the Board by the Procuring Entity that several bidders purchased the tender document for this tender but only a total of Thirty Five (35) bidders submitted their bids to the Procuring Entity pursuant to the invitation to tender as at the closing date of the tender.

The Board however importantly notes that before the date of submission of the tenders the parties were invited for a pre-bid meeting between bidders and the Procuring Entity on 29th November, 2017.

According to the minutes of the pre-bid meeting held on 29th November, 2017 various bidders raised several issues and sought several

clarifications on various aspects of the criteria set out in the tender document. One of enquiries dealt with the criteria for the determination of the successful bidder under this tender.

Pursuant to the said inquiry, the Procuring Entity issued Addendum No. 1 dated 29th November, 2017 where it clarified that for the purposes of the main contract and the sub-contracts failing under this procurement, an award would be made to the bidder who had attained the highest total combined technical and financial weighted score.

The said addendum reads as follows in part:-

“RECOMMENDATION FOR AWARD

The bidder with the highest total combined weighted score shall be recommended for award”.

It is the Board’s view based on the provisions of Section 75 of the Public Procurement and Asset Disposal Act 2015 that a Procuring Entity may amend a tender document at any time before the deadline for the submission of tenders by issuing an addendum and that such an addendum may be issued by the Procuring Entity on its own initiative or in response to an inquiry by a candidate or a tenderer.

Under the provisions of Section 75(4) of the said Act, where an addendum is issued as was done in this case, the addendum shall be deemed to be part of the tender document.

The said Section 75(4) of the Act reads as follows:-

75(4): The addendum shall be deemed to be part of the tender documents.

It is the Board's further view that based on Addendum 1 dated 29th November, 2017, the Procuring Entity effectively amended the award criteria set out under clause 6.1 of the tender document and thereby aligned it with the financial evaluation and award criteria set out at page 25 of the tender document and which the Board has already reproduced above.

Based on all the above findings, the Board therefore holds that the tender in issue was to be awarded to the tenderer with the highest combined technical and financial score but not to the tenderer with the lowest evaluated price as contended by Counsel for the Applicant and Counsel for the 2nd interested party.

Having determined what the award criteria was for the purposes of this tender was the Board will then proceed and determine whether the award criteria used in awarding this tender was inconsistent with the procurement method adopted by the Procuring Entity in this tender process.

The Board notes that under the provisions of Section 80(2) of the Public Procurement and Asset Disposal Act 2015 a Procuring Entity is bound to evaluate and compare tenders using the procedures and the criteria set out in the tender document and that no other criteria shall be used.

The said Section 80(2) of the said Act provides as follows:-

"80(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 the fees chargeable for the services rendered”.

The effect of the above provision of the Act is therefore that a Procuring Entity cannot employ an evaluation or an award criteria other than the one set out in the tender document which in this case was to award the tender to the bidder with the highest combined technical and financial score.

The issue on whether the use of such a criteria to award a tender is fatal or not where the method used is that of an open tender was dealt with by the High Court at great length in the case of **JGH Marine A/S Western Marine Services Ltd, CNPC Northeast Refining & Chemical Engineering Co. Ltd/Pride Enterprises -vs- The Public Administrative Review Board, Civicon Ltd & Kenya Pipeline Company Ltd (Nai HC JR Misc. Appl. No. 137 of 2015)**.

In the High Court cited case above, the Procuring Entity invited tenders using the open tender procurement method but stated that the successful bidder would be the bidder with the highest combined technical and financial score.

A complaint was then lodged before the Board where the main point of contention was that the Procuring Entity in that case had erred by not awarding the tender to the lowest evaluated bidder in terms of price. The Board heard the Request for Review it determined that the award criteria set out in the tender document contradicted the then provisions of Section 66(4) of the Repealed Public Procurement and Disposal Act 2005 which were in the same wording as Section 86(1)(a) of the new Act and directed

that the award of the tender be made to the bidder with the lowest evaluated price.

The successful bidder which was the interested party before the Board but the Applicant in the case before the High Court was dissatisfied with the decision of the Board and challenged the decision before the High Court which in a judgment given on 10th July, 2015 set aside the decision of the Board on the ground that the Board had erred in directing the award of the tender to a bidder using an award criteria other than the one set out in the tender document.

The High Court stated as follows at holdings numbers 97, 98, 99, 100, 101, and 102 of the said decision:-

“ 97. The Ex Parte Applicant’s case is that the Review Board awarded the tender to the 1st Interested Party outside the Tender Document and this was in clear breach of Section 66(2). The Ex parte Applicant asserted that the importance of evaluation and comparison of bids using the procedures and criteria set out in the tender documents and nothing else is reiterated by Rule 16(5)(a) and (7)(a) of the Regulations which insist that the technical evaluation and financial evaluation of the tenders or proposals received shall be in strict adherence to the evaluation criteria set out in the tender documents.

“ 98. I have intentionally reproduced the decision of the Review Board in order to show that it completely failed to take into consideration Section 66(2) of the PP&DA. Not only did it fail to do so but it also ignored Clause 3.27 of the Tender Document which specifically stated that:

"3.27. Award

3.27.1. The award of the tender shall be quality and cost based selection as follows:

i. The technical score shall be subjected to a weight of 0.7

ii. The Financial score shall be subjected to a weight of 0.3

iii. The financial score shall be computed as follows: the lowest bid price, X, shall attract 100% score in Financial Evaluation. Any other bid price, Y shall attract a Financial score as below:-

$$\text{Financial score} = (\text{lowest bid price, X} / \text{bid price, Y}) * 100\%$$

vi. The bidder's final score shall be the summation of the weighted technical and the financial scores.

3.27.2 Subject to clause 3.27.3 KPC will award the Contract to the tenderer whose tender is determined to be substantially responsive to the tender documents and who has the highest evaluated combined weighted score subject to possessing the capability and resources to effectively carry out the Contract Works.

3.27.3 KPC reserves the right to accept or reject any tender, and to annul the tendering process and reject all tenders, at any prior to award of Contract, without thereby incurring any liability to the effected tenderers.

3.27.4 The successful tender shall be the tender with the highest evaluated combined weighted score."

"99. If indeed the Review Board had found that there was a problem with the Tender Document, it ought to have asked the PE to retender. You cannot use a faulty Tender Document to award a tender. Doing so would invoke the Macfoy (supra) principle.

"100. There are several decisions of the Review Board in which it has consistently held that a tender can only be awarded as per the criteria found in the tender document. In Societe Generale De surveillance S.A (SGS) v Kenya Bureau of Standards (2008-2010) PPLR Page 716, it was noted that:

"The Boards notes that this conversion was contrary to the requirements of section 66 (2) of the Act which requires that the evaluation and comparison of the tenders shall be done using the procedures and criteria set out in the tender documents and no other criteria shall be used. The Board finds that there was no criteria for conversion provided for in the tender document and the assumptions made by the Procuring Entity in the conversion were arbitrary and not based on any requirement in the tender document."

"101. In Midroc Water Drilling Co. Ltd V National Water Conservation & Pipeline Corporation (2008 – 2010) PPLR Page 162, the Review Board stated:

"Sections 31 (3) and 31(4) of the Act require that the criteria to be used by the Procuring Entity in determining whether a tenderer is qualified to be awarded a contract must be set

out in the tender documents, and that the Procuring Entity uses that criteria in determining whether the tenderers are thus qualified. The Board notes that there were no instructions in the tender document for a bidder to prepare and submit technical proposals alongside their financial bids, and neither was there a clear criteria and procedure for the evaluation of such technical bids.”

“102. The principle was also reiterated in Richardson Company Ltd V the Registrar High Court of Kenya (2008-2010) PPLR Page 232, when the Review Board opined that:

“The Board has examined the tender documents and noted that the financial evaluation parameters were not set out in the Tender Documents. At the hearing, the procuring Entity stated that those parameters are set out in the International Financial Reporting Standards (IFRS). However the tender documents did not provide that those parameters or the IFRS would apply. As the Board has held severally, a procuring Entity can only use the criteria set out in the Tender Document for Evaluation. This is clearly stated in section 66(2) which states as follows...”

Whereas the court was interpreting the provisions of Section 66(2) of the repealed Act, the same provision is similar to the provisions of Section 80(2) of the new Public Procurement and Asset Disposal Act and is therefore relevant to the case now before the Board.

Based on the above decision by the High Court which is binding on the Board, the Procuring Entity in the Request for Review before the Board

could only resort to the criteria for award set out in the tender document since by doing otherwise it would have been acting in contravention of the provisions of Section 80(2) of the Public Procurement and Asset Disposal Act.

Turning to the facts of this case, it is clear from the original tender documents provided to the Board that the Applicant which was bidder No. 17 and the successful bidder which was bidder No. 23 the offered to perform the main works in question at the sums of Kshs. 3,096,884,882.90 and 3,079,998,859.50 respectively and that in terms of price, the successful bidder's tender was lower by a sum of Kshs. 16,886,023.40 compared to that submitted by the Applicant.

The 2nd interested party which was bidder no. 5 on the other hand offered a price of Kshs. 3,426,888,080.80 which was much higher than those of the successful bidder and the Applicant.

Upon the conclusion of the evaluation exercise and upon combining the technical and the financial scores in line with the criteria set out in the tender document as amended by Addendum No. 1 above, the Procuring Entity ranked the 10 bidders who reached the final stage of evaluation as follows:-

Bidder no.	Weighted Technical score (Bidder's score/Maximum score (140) x 70)	Weighted Financial Score (Lowest Bid/Bid value under consideration x 30)	Total combined score	Rank
Bidder No. 5	53.75	25.91	79.66	10
Bidder No. 6	56.38	27.73	84.12	6
Bidder No. 10	53.00	27.95	80.95	9
Bidder No. 14	53.50	30.00	83.50	8

Bidder no.	Weighted Technical score (Bidder's score/Maximum score (140) x 70)	Weighted Financial Score (Lowest Bid/Bid value under consideration x 30)	Total combined score	Rank
Bidder No. 17	60.43	28.67	89.10	3
Bidder No. 23	65.00	28.83	93.83	1
Bidder No. 26	57.00	29.05	86.05	4
Bidder No. 28	55.00	28.80	83.80	7
Bidder No. 29	62.50	27.41	89.91	2
Bidder No. 31	55.75	29.51	85.26	5

The Board finds based on the above results that the successful bidder (bidder no. 23) was ranked 1st while the Applicant (bidder no. 17) was ranked 3rd after obtaining combined technical and financial scores of 93.83 and 89.10 respectively.

In view of all the above findings the Board therefore finds and holds that the Procuring Entity properly applied the award criteria set out in the tender document in awarding the tender in question and did not contravene the provisions of Section 80(2) or 86(1) of the Public Procurement and Asset Disposal Act 2015.

But even assuming for arguments sake that the tender ought to have been awarded to the lowest evaluated bidder in terms of price, the successful bidder's price was still lower than that offered by the Applicant and the procuring Entity could not have awarded the tender to a tenderer with a higher price than the successful bidder.

The Board wishes to observe that during the course of the hearing of this Request for Review, Counsel for the Applicant argued that the successful

bidder herein ought not to have been awarded the tender because the summary of evaluation showed that there was one other bidder namely N. K Brothers Limited (bidder No. 14) which had submitted a lower price of Kshs. 2,959,909,101.00.

The Board however wishes to observe that bidder no. 14 did not file any formal Request for Review before the Board. The summary of the combined technical and financial scores also shows that the said bidder attained a total combined technical and financial score of 83.50 marks and was ranked as no. 8.

The Procuring Entity could not have therefore been reasonably expected to award the tender for the main works to a bidder who was ranked number 8 and the Board cannot equally be expected to grant an award in favour of a bidder who did not file any Request for Review before it.

The contention by the Applicant as supported by the 2nd interested party that the Procuring Entity breached the provisions of Section 80(2) and 86(1) of the Act therefore fails and the same is disallowed.

ISSUE NO. II

Whether the tender document used in the procurement process herein was defective.

The issue of the defective nature of the tender document as far as the award criteria was concerned was raised by Counsel for the Applicant and Counsel for the 2nd interested party.

They both contended that the tender document contained two contradictory award criteria. Counsel for the 2nd interested party additionally picked out a number of items listed under the technical

evaluation criteria and contended that some items had been assigned disproportionate scores while others were entirely unnecessary.

The Board has already determined what the award criteria in this tender was and therefore finds no merit in the contention that the award criteria was unclear or was contradictory.

On the issue of the unsatisfactory nature of the technical evaluation criteria, the Board finds that the 2nd interested party did not file an independent Request for Review to challenge the contents of the tender document and that its prayer for a retender was clearly an afterthought and was in the Board's view an attempt at seeking to have a second opportunity to participate in a new tender process after coming to the realization that it had not offered the lowest price and or had not attained the highest combined score.

The Board has in addition to all the above also examined the technical evaluation criteria set out in the tender document and finds that the same precise clear and was applied equally to all bidders.

The Board further wishes to observe that if there were any defects in the tender document, what the Applicant and the 2nd interested party ought to have challenged the offending clauses immediately they purchased the tender document but they instead elected to put in their tenders and only complained after they were declared unsuccessful at the end of the process.

The High Court held in the case of **Republic -vs- The Public Administrative Review Board, Kenya Railways Corporation Exparte Gibb Africa Ltd & Canarail Consulting INC** [Nai HC JR 92 of 2011) that

a bidder who had elected to participate in a procurement process on the basis of a tender document which it considered defective could not later turn back and challenge the document merely because it was unsuccessful at the end of the evaluation process.

The Court held as follows at the conclusion of its decision dated 27th November, 2012:-

“Finally, it is now well established that judicial review remedies are discretionary in nature. The applicants have admitted that the procurement documents had two different scores for the technical evaluation parameters, they nevertheless went ahead to submit their bid in a procurement process, which in their view, was founded on a flawed document. It is only after they failed to attain the minimum technical evaluation marks that they started complaining. The document had clearly provided room for seeking clarifications but they did not take this opportunity. Even if they had established grounds for review of the decision, I think they would not have been entitled to the orders sought”.

The Board adopted the same reasoning in the case of **Civicon Ltd –vs- Kenya Pipeline Company Limited [PPRB Appl. No. 26 of 2014]** where it stated as follows:-

“The Applicant in this tender had several options open to it. If any provision in the tender document was not clear, the Applicant had the option of seeking for clarification using the time window allowed in the Tender Documents or challenging the criteria promptly through the filing of a request for review; assembling a

bid through strategic partnership or not tendering on realizing it had no capacity or would not qualify.

The Board also reiterates that the duty to draw up a tender document and the evaluation criteria is vested in the Procuring Entity and having therefore formulated a tender document providing for the criteria for the evaluation of the tenders, the Procuring Entity cannot be said to have breached any of the Provisions of the Act or the Regulations and more particularly the Provisions of Section 64 (1) of the Act or Regulations 48(1) and 49(1) of the Regulations....

Once the Procuring Entity had prepared a tender document containing the relevant criteria it would not be practical for every bidder to come up with its own evaluation criteria any more than candidates in an examination would each come up with his or her own marking scheme...

The Board, having perused the tender documents notes that the Procuring Entity applied the criteria in the manner set out in the tender documents

The Board also notes that the nature of the contract in question was highly technical and it is for that reason that the procuring Entity gave more consideration in the weighting to the technical aspects as compared to the Financial. Indeed the Board observes that in projects that are highly technical, it is normal to give more weight to the technical aspect."

For all the above reasons this ground of review therefore also fails and is disallowed.

Based on all the above finding and holdings, the Applicant's Request for Review dated 5th January, 2018 therefore fails and is disallowed in terms of the following 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) The Applicant's Request for Review dated 5th January, 2018 and which was filed with the Board on the same date challenging the award of tender No. GF-KEMSA-CONST-1/OT16/2017-2018 for the construction of the KEMSA Modern Warehouse and Office Block on LR No. 9042/176 at Embakasi, Nairobi Kenya to the successful bidder herein M/s Vaghjiyani Enterprises Limited be and is hereby dismissed.
- b) The Procuring Entity is therefore at liberty to proceed with the procurement process herein to conclusion.
- c) On the issue of costs the Board directs that each party shall bear its own costs of this Request for Review.

Dated at Nairobi on this 25th day of January, 2018.



**CHAIRMAN
PPARB**



**SECRETARY
PPARB**

