

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 38/2020 OF 18TH MARCH 2020

BETWEEN

ROBEN ABERDARE (K) LIMITED..... APPLICANT

AND

THE ACCOUNTING OFFICER,

KENY NATIONAL HIGHWAYS AUTHORITY.....1st RESPONDENT

AND

KENYA NATIONAL HIGHWAYS AUTHORITY.....2nd RESPONDENT

SAXON INVESTMENTS LIMITED.....3RD RESPONDENT

Review against the decision of the Accounting Officer of Kenya National Highways Authority with respect to Tender No. KENHA/R5/115/2019 For Periodic Maintenance of Thika-Garissa [Lot 1-Makongeni-Embu Junction (Kanyonyo)] (A3) Road

BOARD MEMBERS

- | | |
|-------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mr. Alfred Keriolale | -Member |
| 3. Ms. Rahab Chacha | -Member |

IN ATTENDANCE

1. Mr. Phillip Okumu

-Holding brief for Secretary

BACKGROUND TO THE DECISION

The Bidding Process

Kenya National Highways Authority (hereinafter referred to as “the Procuring Entity”) invited bids from eligible contractors through an advertisement in the My Government pull-out dated 26th November 2019 for Tender No. KENHA/R5/115/2019 For Periodic Maintenance of Thika-Garissa [Lot 1-Makongeni-Embu Junction (Kanyonyo)] (A3) Road (hereinafter referred to as “the subject tender”). Interested bidders were directed to download the tender documents from the Procuring Entity’s website www.kenha.co.ke or from the Public Procurement Information Portal at www.tenders.go.ke.

Bid Submission Deadline and Opening of Bids

By the bid submission deadline of 7th January 2020, the Procuring Entity received a total of fourteen (14) bids which were read out and opened in the presence of bidders and their representatives as follows: -

NO.	BIDDERS/FIRMS
1.	M/s Kabuito Contractors Ltd
2.	M/s Halane Construction Company Ltd
3.	M/s Ongata Works Limited
4.	M/s Kiu Construction Limited
5.	M/s Wak Construction Limited

	M/s Tosha Holdings Limited
6.	M/s Victoria Engineering Co. Limited
7.	M/s Saxon Investments Limited
8.	M/s King Construction Limited
9.	M/s Zhongmei Eng. Group Limited
10.	M/s Rural Distributors Enterprises Limited
11.	M/s Roben Aberdare (K) Limited
12.	M/s Interways Works Limited
13.	M/s Cementers Limited

Evaluation of Bids

The Evaluation Committee conducted evaluation of bids in the following three stages:-

- Preliminary (Mandatory) Evaluation
- Technical Evaluation;
- Financial Evaluation.

1. Preliminary (Mandatory) Evaluation

At this stage of evaluation, bids were evaluated against the mandatory requirements as stipulated in the Tender Document.

Upon conclusion of preliminary evaluation, only four (4) bidders met the minimum requirements and proceeded to technical evaluation stage as follows: -

- a) Bidder 8 – M/s Saxon Investments Limited
- b) Bidder 12 – M/s Roben Aberdare (K) Limited

c) Bidder 6 – M/s Tosha Holdings Limited

d) Bidder 2 – M/s Halane Construction Company Limited

2. Technical Evaluation

At this stage of evaluation, bids were evaluated against the technical criteria as outlined in the Tender Document. Bidders were required to attain a minimum score of 75% in order to qualify for the next stage of evaluation.

Upon conclusion of technical evaluation, the four (4) bidders who qualified for technical evaluation attained the minimum pass mark of 75% and hence proceeded for financial evaluation.

3. Financial Evaluation

At this stage of evaluation, the tender sums for the four (4) bidders who qualified for financial evaluation were compared against the Engineers estimate and ranked as follows: -

Bidder No.	Bidders' Names	Amount (Kshs)	Ranking
8	M/s Saxon Investments Limited	1,248,984,093.00	1
12	M/s Roben Aberdare (K) Limited	1,325,687,643.00	2
6	M/s Tosha Holdings	1,426,880,301.00	3

	Limited		
2	M/s Halane Construction Co. Ltd	1,583,648,472.00	4

Due Diligence

Upon conclusion of the evaluation process, the Evaluation Committee recommended that pursuant to section 83 of the Public Procurement and Asset Disposal Act, 2015, a due diligence process should be undertaken on all the four bidders who proceeded to the financial evaluation stage in order to save on time should the lowest responsive bidder at financial evaluation stage fail the due diligence test. Thereafter the tender shall be awarded to the lowest evaluated bidder who shall have passed the due diligence test.

The scope of the due diligence test entailed authentication of the relevant documents that contributed to the qualification of the bidders. The following areas were covered during the due diligence test based on the relevant documents submitted by the bidders: -

- a) On experience of the contractors, the Evaluation Committee verified documents from the issuing institutions where bidders had previously undertaken similar assignments
- b) Equipment holding – ownership of equipment were verified from the NTSA and where applicable the lease agreements/letters were authenticated by the lessors

- c) Proposed site agents were asked to confirm if contractors sought their consent before proposing them as site agents
- d) Bid bonds were verified from the respective issuing banks

In addition, the Evaluation Committee carried out online authentication of the following documents: -

- a) Tax compliance certificates (TCC) were verified on KRA website
- b) The particulars of the CR12 were verified from the Registrar of Companies portal to confirm both the legal existence of the companies and their directors
- c) National Construction Authority (NCA) certificate were checked on the NCA website
- d) The standing of the Accountants who signed the financial reports were checked with the Institute of Certified Public Accountants of Kenya (ICPAK) website
- e) Registered Engineers were verified from the Engineers Board of Kenya/Institution of Engineers of Kenya websites,

In instances where the above information was not available online, verification was done by writing to the relevant bodies to confirm authenticity.

The Evaluation Committee's Recommendation

In view of the evaluation process, the Evaluation Committee recommended award of the subject tender to **M/s Saxon Investments Limited** for being the only lowest evaluated bidder at a contract sum of **Kshs 1,248,984,093.00 (Kenya Shillings One Billion Two Hundred and Forty-Eight Million Nine Hundred and Eighty-Four Thousand and Ninety-Three Only)** for a contract period of **twenty-four (24) months** comprising of eighteen months' completion period and six months' defects liability period.

THE REQUEST FOR REVIEW

M/s Roben Aberdare (K) Limited (hereinafter referred to as "the Applicant") lodged a Request for Review dated and filed on 18th March 2020 together with a Statement in Support of the Request for Review sworn and filed on even date (hereinafter referred to as "the Applicant's Statement"). The Applicant further filed a Supplementary Affidavit sworn and filed on 27th March 2020 (hereinafter referred to as "the Applicant's Supplementary Affidavit") and Written Submissions dated and filed on 27th March 2020.

In response, the Procuring Entity lodged a Memorandum of Response to the Request for Review (hereinafter referred to as "the Procuring Entity's Response") dated 20th March 2020 and filed on 24th March 2020 together

with a Replying Affidavit (hereinafter referred to as "the Procuring Entity's Replying Affidavit) sworn on 20th March 2020 and filed on 24th March 2020. The Procuring Entity further lodged Submissions in Opposition of the Request for Review dated and filed on 30th March 2020.

M/s Saxon Investments Limited (hereinafter referred to as "the 3rd Respondent") lodged a Replying Affidavit sworn on 30th March 2020 and filed on 31st March 2020 (hereinafter referred to as "the 3rd Respondent's Replying Affidavit").

The Applicant sought for the following orders: -

- a) An order cancelling the 1st & 2nd Respondent's decision to award Tender No. KENHA/R5/115/2019 For Periodic Maintenance of Thika-Garissa [Lot 1-Makongeni-Embu Junction (Kanyonyo) (A3) Road to the 3rd Respondent and substituting the same with an award of tender by the Board to the Applicant;***
- b) An order substituting and/or amending the decision of the 1st and 2nd Respondent for award of Tender No. KENHA/R5/115/2019 For Periodic Maintenance of Thika-Garissa [Lot 1-Makongeni-Embu Junction (Kanyonyo) (A3) Road to the Applicant following a review of all the records of***

the procurement process including the consequent evaluation thereof;

c) An order directing the Respondent to pay the costs of and incidental to these proceedings; and

On 24th March 2020, the Board issued Circular 1/2020 detailing the Board's administrative and contingency management plan to mitigate the COVID-19 disease. Through this circular, the Board dispensed with physical hearings and directed that all request for review applications shall be canvassed by way of written submissions.

In compliance with the directions of the Board, the Applicant filed its written submissions on 27th March 2020. The Procuring Entity lodged its written submissions in opposition of the Request for Review on 30th March 2020 whereas the 3rd Respondent lodged its written submissions on 3rd April 2020.

BOARD'S DECISION

The Board has considered each of the parties' cases, the documents filed before it, including confidential documents filed in accordance with section 67 (3) (e) of the Public Procurement and Asset Disposal Act, 2015

(hereinafter referred to as "the Act") together with the written submissions by parties.

The following issues call for determination: -

I. Whether the Board has jurisdiction to entertain the Applicant's Request for Review.

Depending on the determination of the above issue: -

II. Whether the Procuring Entity evaluated the successful bidder's bid at Technical Evaluation Stage in accordance with section 80 (2) of the Act as read together with Article 227 (1) of the Constitution with respect to Clause 31.4 of the Qualification and Evaluation Criteria in the Tender Document read together with Schedule 8 of Section 7 Qualification Criteria and Schedule 4 of Section 8 of the Tender Document;

III. What are the appropriate orders to issue in the circumstances?

The Board now proceeds to address the above issues as follows:-

In the famous case of **The Owners of Motor Vessel 'Lillian 'S' vs Caltex Oil Kenya Ltd 1989 K.L.R 1**, Justice Nyarangi held that:-

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

Similarly, in the case of **Kakuta Maimai Hamisi vs. Peris Pesi Tobiko & 2 Others (2013) eKLR** (hereinafter referred to as "Kakuta Mamai Case") the Court of Appeal emphasized on the centrality of the issue of jurisdiction and stated thus:

"So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question best taken at inception. "

To determine the jurisdiction of this Board to entertain the Request for Review, it is important to establish from what such jurisdiction flows. In the case of **Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Ltd and 2 Others, Civil Application No. 2 of 2011** the Supreme Court held that:

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. "

It is important at this point to note that this Board is a creature of statute. Section 27 (1) of the Act provides that:-

"27. Establishment of the Public Procurement Administrative Review Board

(1) There shall be a central independent procurement appeals review board to be known as the Public Procurement Administrative Review Board as an unincorporated Board."

Further, Section 28 of the Act provides that:-

"28. Functions and powers of the Review Board

(1) The functions of the Review Board shall be—

(a) reviewing, hearing and determining tendering and asset disposal disputes; and

(b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law.”

In order for the Board to exercise the mandate provided to it in section 28 (1) (a) of the Act, section 167 (1) of the Act explains the manner in which the jurisdiction of this Board is invoked. The said provision states as follows:-

“Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed”

From the foregoing provision, it is worth noting that it is only candidates and tenderers who have suffered or risk suffering loss that may approach this Board by way of a Request for Review. Such candidates and tenderers

have the obligation to lodge a Request for Review within fourteen days of notification of award or date of occurrence of an alleged breach of duty by a procuring entity.

The Procuring Entity at paragraphs 21 of its Replying Affidavit read together with paragraph 21 of its Memorandum of Response which were both filed on 24th March 2020 avers as follows:-

"THAT I am informed by the 1st and 2nd Respondents' Advocates on record and which information I verily believe to be true that Section 167 of the Public Procurement and Asset Disposal Act, 2015 provides for the conditions under which a party may seek review and that the Applicant having failed to prove any breach of the Act and Regulations has failed to meet the requirements of the section and this Request for Review ought to be dismissed

The 1st and 2nd Respondents state that Section provides for the conditions under which a party may seek a review. The Section provides as follows:... "

Further, At paragraph 4 of its Written Submissions, the Procuring Entity avers as follows:-

"4. Jurisdiction of the Public Procurement Administrative Review Board

- 4.1. The Jurisdiction of the Board is pursuant to Section 167 of the Public Procurement and Asset Disposal Act, 2015. The powers are to be exercised in accordance with the Act and Regulations where a party claims to have suffered or risks to suffer loss or damage due to a breach of a duty imposed on a procuring entity by the Act or the Regulations**
- 4.2. It is upon the Applicant to lay a basis for exercise of the Board's jurisdiction by setting out a legal and factual basis for the Orders it is seeking and thereafter for the Respondent to rebut the same before the Board can exercise its jurisdiction.**
- 4.3. The Respondents will in these submissions show that none of the prerequisites provided under Section 167 have been met by the Applicant and the application for review ought to be dismissed"**

Having considered the Procuring Entity's pleadings, the Board observes that according to the Procuring Entity, the Applicant failed to demonstrate the loss it has suffered or risks suffering in order for the jurisdiction of this

Board to be invoked to entertain the Request for Review and to grant the prayers sought therein.

The Board observes that there is no contention that the Applicant was a tenderer in the subject procurement process and that the Request for Review was filed within the statutory period required under Section 167 (1) of the Act. The Board having studied the Request for Review filed by the Applicant notes that, the Applicant's main contention is that the Procuring Entity failed to undertake the subject procurement process in a system that is fair, equitable, transparent, cost-effective and competitive in accordance with Article 227 (1) of the Constitution.

In that regard, the Applicant's contends that the 3rd Respondent failed to meet the criterion under Clause 31.4 of the Qualification and Evaluation Criteria in the Tender Document read together with Schedule 8 of Section 7 Qualification Criteria and Schedule 4 of Section 8 of the Tender Document which was a mandatory requirement at the Technical Evaluation Stage, but that the Procuring Entity still proceeded to award the subject tender to the 3rd Respondent.

The Applicant further contends that, had the Procuring Entity fairly evaluated the 3rd Respondent's bid in accordance with the aforementioned

criteria, the 3rd Respondent would have been found non-responsive and that the Applicant would have a chance to be awarded the subject tender.

The Board is cognizant of the principles that guide public procurement processes in this country as outlined in Article 227 (1) of the Constitution, one of them being that public procurement must be undertaken in a system that is fair. This, in the Board's view means that during evaluation of bids, all bidders ought to be subjected to the same evaluation criteria and that no advantage should be given to one bidder to the detriment of all others.

In the circumstances, the Board notes, the Applicant is likely to suffer loss should we find that the Procuring Entity unfairly evaluated the 3rd Respondent's bid in so far as the criterion under Clause 31.4 of the Qualification and Evaluation Criteria in the Tender Document read together with Schedule 8 of Section 7 Qualification Criteria and Schedule 4 of Section 8 of the Tender Document challenged by the Applicant, is concerned, and proceeded to award the subject tender to a non-deserving bidder.

The Board has a duty to ensure the principle of fairness as enshrined in Article 227 (1) of the Constitution is upheld in the sense that bidders compete on an equal footing during evaluation. The Applicant has

demonstrated its likelihood to suffer loss as a result of the alleged breach of duty by the Procuring Entity when evaluating the 3rd Respondent's bid, hence, the Request for Review was filed in accordance with section 167 (1) of the Act.

Accordingly, the Board finds that it has jurisdiction to entertain the Request for Review filed by the Applicant and shall now address the issues framed for determination in the substantive Request for Review.

On the second issue, the Board proceeds to make the following findings:-

A brief background to the Request for Review is that the Procuring Entity advertised the subject tender on 26th November 2019 and the Applicant duly submitted its bid in response to the same.

By the bid submission deadline of 7th January 2020, the Procuring Entity received a total of fourteen (14) bids which were opened in the presence of bidders and their representatives.

At the conclusion of the evaluation process, the Procuring Entity's Evaluation Committee recommended award of the tender to M/s Saxon Investments Limited for being the lowest responsive evaluated bidder.

The Accounting Officer approved the recommendation made by the Evaluation Committee, having been reviewed by the Head of Procurement and the successful bidder, including all unsuccessful bidders, were duly notified of the outcome of their bids.

On 9th March 2020, the Applicant received a letter of notification of unsuccessful bid from the Procuring Entity dated 3rd March 2020 which read as follows: -

"Reference is made to the above tender in which you participated.

This is to inform you that your tender was unsuccessful because it was the second lowest evaluated bid while the contract was awarded to M/s Saxon Investments Limited, being the lowest evaluated bidder pursuant to section 86 (1) of the Public Procurement and Asset Disposal Act, 2015.

We however wish to thank you for having participated in the public procurement process for the cited tender.

We wish you success in future tenders."

Aggrieved by the decision of the Procuring Entity, the Applicant moved the Board through this Request for Review.

It was the Applicant's contention that the 3rd Respondent did not meet the minimum technical requirements of the subject tender. The Applicant averred that it was within its own knowledge that the 3rd Respondent did not own a bitumen distributor as required under the Tender Document and therefore the 3rd Respondent's bid ought to have been found technically non-responsive and disqualified from further evaluation.

According to the Applicant's Supplementary Affidavit, the 3rd Respondent attached a copy of an undated sale agreement and a copy of an Invoice No. 56635 dated 3rd December 2019 which invoice indicated that goods remained the property of the seller until payment is made in full and which in the Applicant's view did not amount to either proof of ownership or proof of payment of purchase of a bitumen distributor respectively. It was therefore the Applicant's averment that the 3rd Respondent's bid ought to have been found technically non-responsive and the Applicant ought to have been found the lowest evaluated bidder and awarded the subject tender.

In response, the Procuring Entity averred that in the subject tender, all bidders were required to indicate the core plant and equipment they

considered necessary to undertake the tender together with proof of ownership or lease arrangements for all plants and equipment.

With respect to the bitumen distributor listed by the 3rd Respondent in its bid, the Procuring Entity averred that the 3rd Respondent duly provided proof of ownership of the said equipment in form of a sale agreement with a third party seller as evidence of purchase of the same. The Procuring Entity therefore awarded the 3rd Respondent maximum marks at technical evaluation as provided under the Tender Document.

Further, it was the Procuring Entity's averment that once the 3rd Respondent was found to be the lowest evaluated bidder, the Procuring Entity conducted due diligence on the 3rd Respondent's sale agreement and contacted the third party seller who confirmed the sale of the bitumen distributor to the 3rd Respondent thereof. The Procuring Entity therefore contended that the 3rd Respondent's bid was properly evaluated at technical evaluation in accordance with the provisions of the Tender Document, section 80 (2) of the Act and Article 227 (1) of the Constitution.

On its part, the 3rd Respondent averred that it listed a bitumen distributor in its bid document as equipment to be used in implementation of the subject tender. According to the 3rd Respondent, it purchased the bitumen distributor from a third party seller and duly submitted proof of ownership

of the said equipment in form of a copy of a sale agreement including other documents such as invoices and shipping documents as required by the Procuring Entity.

The 3rd Respondent contended that the Procuring Entity, through a due diligence exercise, confirmed the veracity of the sale agreement and the other documents the 3rd Respondent submitted as proof of ownership of the bitumen distributor. It was therefore the 3rd Respondent's averment that it met the mandatory minimum requirement of equipment in the subject tender, thus the Applicant's averments to the contrary were unfounded.

In its determination of this issue, the Board first addressed its mind to what is ownership and what amounts to proof of ownership?

The Black's Law Dictionary defines the term 'owner' to mean:-

"The person in whom is vested the ownership, dominion, or title of property; also known as proprietor"

It further defines the term 'ownership' as: -

"The complete dominion, title, or proprietary right in a thing or claim"

Ownership is therefore the complete dominion, title or proprietary right vested in a person over property.

However, according to the Black's Law Dictionary, the term 'property' is synonymous to ownership and refers to: -

"The ownership of a thing, that is, the right of one or more persons to possess and use it to the exclusion of others"

The Sale of Goods Act, Chapter 31, Laws of Kenya, also defines the term 'property' as: -

"the general property in goods, and not merely a special property"

Section 3 (1) of the Sale of Goods Act further provides that such property or ownership in goods may be transferred from one person to another through a sale of goods contract which is defined therein as: -

"a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price"

Accordingly, a sale of goods contract is a process of transfer of property or ownership in goods from a seller to a buyer.

This transfer of property or ownership from a seller to a buyer takes effect as provided for under section 19 of the Sale of Goods Act as follows: -

(1) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred

(2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

From the above provision, property or ownership in goods will pass from a seller to a buyer at such time as the parties intend for ownership to be transferred as stipulated in the terms of the contract of sale, the conduct of the parties to the contract and the circumstances of the case.

With respect to ownership of motor vehicles the Board observes, section 2 of the Traffic Act, Chapter 403, Laws of Kenya, (hereinafter referred to as "the Traffic Act) defines the term 'motor vehicles' as: -

"any mechanically propelled vehicle, excluding any vehicle running on a specially prepared way such as a railway or tramway or any vehicle deriving its power from overhead electric power cables or such other vehicles as may from

time to time by rules under this Act be declared not to be motor vehicles for the purposes of this Act

Further, a mechanically propelled vehicle as defined by the Oxford English Dictionary, 6th Edition is:-

"A motor vehicle driven by petrol, oil, steam, or electricity"

In order to determine whether a Bitumen Distributor falls under the category of a motor vehicle as defined in Section 2 of the Traffic Act, the Board observes that the Cambridge English Dictionary, 7th Edition defines a Bitumen Distributor as:-

"A truck equipped with a tank body and with a system for pumping hot tar, road oil, or other bituminous material through a perforated spray bar at the rear; used to lay down a surface coating of the bituminous material."

From the foregoing, it is evident that a Bitumen Distributor is a motor vehicle driven by petrol and thus a mechanically propelled motor vehicle within the meaning of Section 2 of the Traffic Act.

Section 2 of the Traffic Act further defines the term 'owner' as: -

"...in relation to a vehicle which is the subject of a hire-purchase agreement or hiring agreement, includes the person in possession of the vehicle under that agreement"

Moreover, section 8 of the Traffic Act provides that the owner of a motor vehicle shall be: -

"The person in whose name a vehicle is registered, unless the contrary is proved, be deemed to be the owner of the vehicle"

From the above provisions, we observe that an owner of a motor vehicle may be the person in possession of a vehicle which is the subject of a hire purchase or hiring agreement and/or the person in whose name a vehicle is registered, unless the contrary is proved.

As concerns transfer of ownership with respect to a motor vehicle, the Board studied section 9 (4) of the Traffic Act which states as follows: -

"Application for registration of a new owner may be made before the actual transfer of the vehicle, but the registration of a new owner shall not be effective until the registration certificate has been surrendered to and re-issued by the Authority."

Further, section 9 (6) of the Traffic Act provides as follows: -

"On the registration of a new owner, the Authority (The National Transport and Safety Authority) shall make the necessary alterations to the registration book, and shall deliver the amended registration book to the new registered owner and may, if it considers it fit, issue a new registration book"

From the above provisions, it is clear that registration of a new owner shall only take effect once the registration certificate has been surrendered to and re-issued by the National Transport and Safety Authority (hereinafter referred to as "the Authority"). Further, the Authority shall make the necessary alterations to the registration book, or what is commonly known as a log book, to capture the transfer of ownership of a motor vehicle from one owner to another or in some instances, issue a new registration book.

The Board is also cognizant of the role of the Authority in the registration and licensing of motor vehicles as stipulated under section 3 of the Traffic Act which reads as follows:-

"The Authority (The National Transport Safety Authority) shall be responsible for the registration and licensing of motor vehicles and trailers and for the licensing of drivers,

and for the keeping of such records in relation thereto as are required by this Act”

Further, section 5 of the Traffic Act provides as follows: -

(1) The Authority (the National Transport Safety Authority) shall keep records of all motor vehicles and trailers registered in Kenya, and shall cause every licensing officer to keep records of all vehicles registered by him.

(2) Vehicle records maintained by the Authority shall be open for inspection by any police officer or collector of customs who shall be entitled to a copy of any entry in such records free of charge.

(3) Any person who satisfies the Authority that he has reasonable cause therefore shall be entitled on payment of the prescribed fee to a copy of any entry in such vehicle records.

(4) The Authority shall create, maintain and update a database of all motor vehicles with diplomatic number plates which are owned or operated by foreign nationals, and shall require such number plates to be surrendered upon the end of the tour of duty, retirement or sale of the motor vehicle

From the above provisions, we observe that the Authority is responsible for the registration and licensing of motor vehicles and trailers and further keeps a record of all motor vehicles and trailers in the country. Further, verification of vehicle records may be conducted from its records by any police officer or collector of customs.

Turning to the circumstances in this instance, the Board studied the Tender Document used in the subject tender and observes Clause 31.4 Qualification and Evaluation Criteria of Section 2. Instructions to Tenderers and Conditions of Tender which stipulated as follows: -

"Equipment capabilities: The Applicant should list down the plants and equipments that are in his ownership and the ones proposed for hire which should be suitable for executing contract works. Applicants must attach evidence of ownership or hiring arrangements."

From the above clause, all bidders were required to provide a list of plants and equipment in their ownership and those proposed for hire in their bid documents, suitable for executing contract works. Further, bidders were required to attach evidence of ownership or hiring arrangements of the listed plants and equipment.

This requirement was further outlined in the Pre-Qualification Checklist for Completeness and Responsiveness as No. 16 on page 8 of the Tender Document as follows: -

S/No	Completeness and Responsiveness Criteria	References	Requirement
16.	Schedule of Major Items of Plant	Item 9 of QC Section 8; Schedule 4	<ul style="list-style-type: none"> - Properly fill and sign both Schedule 8 and Schedule 4 Schedule of the Major Items of Plant to be used on the Proposed Contract - Indicate the Registration Numbers of all Key Equipment to be provided - Attach copy of log books which may be verified with NTSA - Equipment Lease Agreement must be provided supported by ownership of Equipment by the owner which may be verified.

From the above pre-qualification checklist, the Board studied Schedule 8 on page 52 of the Tender Document which reads as follows: -

"8. Schedule of the Major Items of Plant to be used on the Proposed Contract

The Bidder must indicate the core plant and equipment considered by the company to be necessary for undertaking the project together with proof of ownership or lease arrangements.

Mandatory minimum number of equipment required by the Employer for the execution of this project that the bidder MUST make available for the Contract are detailed below.

The 40 marks shall be assigned to the mandatory minimum as tabulated below: -

Main scope of works of this tender	Main Equipment	Quantity (No) Equipment	Marks	
			Owned	Hired
<i>Bituminous Works (AC/DBM/Surfacing/Overlay)</i>	<i>Paver</i>	<i>1</i>	<i>15</i>	<i>3.75</i>
	<i>Bitumen Distributor</i>	<i>1</i>	<i>15</i>	<i>3.75</i>
	<i>Pneumatic Roller</i>	<i>1</i>	<i>3</i>	<i>0.75</i>
	<i>Drum Roller (Minimum 10 Tons)</i>	<i>1</i>	<i>3</i>	<i>0.75</i>
	<i>Tippers (Cumulative Capacity 28</i>	<i>2</i>	<i>4</i>	<i>1</i>

	<i>Tons)</i>			
Total			40	10

The above provision stipulated the mandatory and minimum number of equipment that a bidder was required to make available for execution of the contract works of which a bidder was required to provide proof of ownership or lease arrangements, as marks would be assigned based on whether the equipment was owned or hired by a respective bidder. With respect to a bitumen distributor, the Board observes that for proof of ownership a bidder would be awarded 15 marks and for proof of a lease arrangement, a bidder would be awarded 3.75 marks.

This mandatory and minimum list of equipment was required to be filled in by each bidder into a form as outlined on page 53 and 54 of the Tender Document as follows: -

Item No.	Equipment Details	Minimum Number Required for the Contract	Maximum Score	No. of Equipment Owned by the Bidder	Equipment to be hired/purchased by a bidder	Equipment to be made available for the contract
1.	<i>Paver</i>	1				
2.	<i>Bitumen Distributor</i>	1				
3.	<i>Pneumatic Roller</i>	1				
4.	<i>Drum Roller (Minimum 10 Tons)</i>	1				
5.	<i>Tippers (Cumulative Capacity 28</i>	2				

	Tons)					
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(Bidders must provide proof of ownership or lease arrangements for all plants and equipments)

In cases where Bidders are planning to lease equipment, they MUST provide signed and dated Lease Agreements with Lessors Addresses in the schedule below

Leasor: Owner of the Equipment Being Leased to duly fill, sign and stamp below:

<i>Name of the Leasor:</i>	
<i>Telephone Number</i>	
<i>Email Address</i>	
<i>Postal Address</i>	
<i>Contact Person</i>	
<i>Mobile Contact of the Contact Person</i>	
<i>Official Stamp</i>	

We hereby certify that notwithstanding the list of plant and equipment detailed above, we will provide sufficient, suitable and adequate plant in good working order for the successful completion of works."

Further, Schedule 4 of Section 8: Schedules of Supplementary Information on page 63 of the Tender Document required bidders to list in the format provided all major items of plant and equipment proposed for the contract works as follows: -

<i>Descrip tion, Type, Model, Make</i>	<i>No . of ea ch</i>	<i>Year of Manufac ture</i>	<i>Ne w or us ed</i>	<i>Capa city or m3</i>	<i>Estima ted CIF Momb asa Value (If to</i>	<i>Sour ce</i>	<i>Owned/Leased/I mported</i>	<i>Pow er rati ng</i>	<i>Date of Arrival on Project (days after commence ment</i>
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					<i>be imported)</i>				

The Bidder shall enter in this schedule all major items of plant and equipment which he proposes to bring to site. Only reliable plant in good working order and suitable for the work required of it shall be shown on this schedule. Summary of the same shall be entered into Section 5: Qualification Criteria Part 7.”

The Board examined the 3rd Respondent’s original bid and observes on page 53 therein, a list of equipment it proposed for execution of the subject works: -

<i>Item No.</i>	<i>Equipment Details</i>	<i>Minimum Number Required for the Contract</i>	<i>Maximum Score</i>	<i>No. of Equipment Owned by the Bidder</i>	<i>Equipment to be hired/purchased by a bidder</i>	<i>Equipment to be made available for the contract</i>
<i>1.</i>	<i>Paver</i>	<i>1</i>	<i>15</i>	<i>2</i>	<i>1</i>	<i>2</i>
<i>2.</i>	<i>Bitumen Distributor</i>	<i>1</i>	<i>15</i>	<i>1</i>	<i>1</i>	<i>1</i>
<i>3.</i>	<i>Pneumatic Roller</i>	<i>1</i>	<i>3</i>	<i>1</i>		<i>1</i>
<i>4.</i>	<i>Drum Roller (Minimum 10 Tons)</i>	<i>1</i>	<i>3</i>	<i>1</i>		<i>1</i>
<i>5.</i>	<i>Tippers (Cumulative Capacity 28 Tons)</i>	<i>2</i>	<i>4</i>	<i>3</i>		<i>3</i>

(Evidence of ownership attached in Appendix 12)

From the above form, the Board observes, the 3rd Respondent indicated that it would avail one bitumen distributor for execution of the subject works. Further, that the 3rd Respondent owned one bitumen distributor and

that one bitumen distributor would be hired/purchased by the 3rd Respondent.

In its Schedule 4 on page 65 of its bid, the 3rd Respondent provided details of the bitumen distributor that it would avail for execution of the subject works as follows: -

<i>Description, Type, Model</i>	<i>No. of each</i>	<i>Year of Manufacture</i>	<i>New or used</i>	<i>Capacity or m3</i>	<i>Estimated CIF Mombasa Value</i>	<i>Source</i>	<i>Owned/Leased/Imported</i>	<i>Power rating</i>	<i>Date of Arrival on Project (days)</i>
<i>Bitumen Distributor</i>	<i>1</i>	<i>Refer to Log Book</i>	<i>New</i>	<i>Refer to Log Book</i>	<i>N/A</i>	<i>N/A</i>	<i>Owned</i>	<i>Refer to Log Book</i>	<i>One day</i>

The Board then examined Appendix 12 of the 3rd Respondent's bid document to establish what proof of ownership or lease arrangements the 3rd Respondent provided with respect to a bitumen extractor as required under Schedule 8 on page 52 of the Tender Document.

According to the Pre-Qualification Checklist for Completeness and Responsiveness on page 8 of the Tender Document cited hereinbefore, bidders were required to indicate the Registration Numbers of all Key Equipment to be provided. The Board observes, in order to prove ownership of equipment, bidders were required to attach copy of logbooks which may be verified by NTSA and in order to prove the existence of a lease arrangement, bidders were required to provide a lease agreement

supported by ownership of equipment by the owner which must be verified.

The Board observes on page 539 of the 3rd Respondent's bid, the 3rd Respondent provided a description of its bitumen distributor (s) as follows:-

DESCRIPTON TYPE	NUMBER OWNED	MODEL, MAKE	REGISTRATION NUMBER
<i>(iii) BITUMEN DISTRIBUTOR</i>	<i>1 (OWNED)</i>	<i>PHOENIX</i>	<i>HS CODE NO. 8703329000</i>
	<i>1 (LEASE)</i>	<i>IVECO</i>	<i>KBZ 073T</i>

From this description we observe that the 3rd Respondent provided details of two bitumen distributors. The first is a Phoenix Model, Registration Number '*HS CODE NO. 8703329000*' which it indicated it owned and secondly an Iveco Model Registration Number '*KBZ 073T*' which the 3rd Respondent indicated was on lease.

With respect to proof of ownership of the bitumen distributor Phoenix Model, Registration Number '*HS CODE NO. 8703329000*', the 3rd Respondent supplied the following documents in its original bid: -

- ✓ On page 543 of its bid, the 3rd Respondent attached a copy of a document titled '*Single Administrative Document (SAD)-SIMBA*'. From the contents of the document we observe that it relates to the clearing and forwarding of a consignment described as '*1 x 40 CNER 1 PKG of used Phoenix Bitumen Tank and Spreading Ancelleries*'. The

Board further observes, the document indicates the Importer/Consignee of the consignment as one '*Ganatra Plant and Equipment*' and the Exporter/Consignee as one '*Navasaria Trading LTG 105 United Kingdom*'.

- ✓ From page 545 to 551 of its bid, the 3rd Respondent provided a copy of what appears to be an un-dated sale agreement for what is described as '*One (1 Used Phoenix Bitumen Distributor)*'. From its contents, we observe the sale agreement is made between one '*Ganatra Plant and Equipment Ltd*' who is indicated therein as the 'Seller' and the 3rd Respondent as the 'Customer'. Further, we observe that the sale agreement is for a consideration of Kshs 1,160,000.00 which was to be paid by the seller before taking delivery of the machine for sale. Moreover, the sale agreement appears to be executed and stamped by representatives of both parties to the agreement save for the execution of the purchaser is not witnessed and remains blank.

- ✓ On page 553 of its bid, the 3rd Respondent attached a copy of an invoice on the letterhead of one '*Ganatra Plant & Equipment Ltd*' dated 3rd December 2019. The invoice is issued to the 3rd Respondent for what is described as '*1 Used Phoenix Bitumen Distributor and Spreading Ancellaries*' for the value of Kshs 1,160,000/- inclusive of VAT. The invoice is signed by one '*Suhhel*' and stamped in the name

of '*Ganatra Plant & Equipment Ltd*' is affixed at the tail end of the letter.

- ✓ On page 555 of its bid, the 3rd Respondent attached a copy of an Import Declaration Form dated 5th July 2018. From its contents, we observe that one '*Ganatra Plant & Equipment Ltd*' is indicated as the Importer and the Seller is identified as one '*Navsaria Trading Limited*'. The subject of the import is described as '*1 Unit Used Phoenix Bitumen Tank and Spreading Ancellaries*' whose HS Code is *84743200* which is different from the HS Code No. 8703329000 that the 3rd Respondent recorded in on page 539 of its bid was the Bitumen Distributor it owned and whose origin is identified as the United Kingdom. The Import Declaration Form further indicates an FOB Value of USD 15,000.00.

- ✓ On page 557 of its bid, the 3rd Respondent attached a copy of a Bill of Lading dated and issued on 23rd May 2018. The Bill of Lading identifies the shipper as one '*Navsaria Trading Limited*' and the Consignee as one '*Ganatra Plant & Equipment Ltd*'. The Bill of Lading further contains a description of goods shipped as "*1 x 40FF Container said to contain 1 package USED Phoenix Bitumen Tank and Spreading Ancellaries*" **whose HS Code is 8703329000**. It further

identifies the Port of Loading as 'Southampton' and the Port of Discharge as 'Mombasa'.

- ✓ On page 559 of its bid, the 3rd Respondent attached a copy of an invoice dated 5th July 2018 in what appears to be the letterhead of one 'CMA CGM KENYA'. The invoice is issued to one '*Najmi Clearing and Forwarding Limited*' and payable to one '*CMA CGM Kenya Limited*'. From its contents therein we observe the invoice is for a Bill of Lading LPL0809343 for what is described as port handling fees valued at USD 463.20 inclusive of tax, payable by 5th July 2018.

- ✓ On page 561 of its bid, the 3rd Respondent further attached a copy of an invoice dated 10th July 2018 in what appears to be the letterhead of one 'CMA CGM KENYA'. The invoice is issued to one '*Najmi Clearing and Forwarding Limited*' and payable to one '*CMA CGM Kenya Limited*'. From its contents, we observe the invoice is for a Bill of Lading LPL0809343 for what is described as '*Equip detention & demur import*' valued at USD 360 inclusive of tax, payable by 10th July 2018.

- ✓ On page 563 of its bid, the 3rd Respondent attached a copy of an invoice dated 16th July 2018 in what appears to be the letterhead of one 'CMA CGM KENYA'. The invoice is issued to one '*Najmi Clearing*

and Forwarding Limited and payable to one *'CMA CGM Kenya Limited'*. From its contents therein we observe the invoice is for a Bill of Lading LPL0809343 for what is described as *'Equip detention & demur import'* valued at USD 400 inclusive of tax, payable by 16th July 2018.

- ✓ On page 565 of its bid, attached therein is a copy of an invoice dated 24th July 2018 in what appears to be the letterhead of one *'CMA CGM KENYA'*. The invoice is issued to one *'Najmi Clearing and Forwarding Limited'* and payable to one *'CMA CGM Kenya Limited'*. From its contents therein we observe the invoice is for a Bill of Lading LPL0809343 for what is described as *'Equip detention & demur import'* valued at USD 680 inclusive of tax, payable by 24th July 2018.
- ✓ On page 567 of its bid, 3rd Respondent attached a copy of an invoice dated 19th July 2018 in what appears to be the letter head of one *'Great Lakes Ports Limited'* and issued to one *'Najmi Clearing and Forwarding'*. From its contents therein we observe the invoice is for a Bill of Lading LPL0809343 for what is described as *'ECTS, Handling Charges, Shore Handling and Wharfage'* valued at Kshs 72,161/- inclusive of VAT, payable by 19th July 2018.

- ✓ On page 569 of its bid, we observe the 3rd Respondent attached a copy of an invoice dated 21st June 2018 in what appears to be the letterhead of one *'Navsaria Trading Limited'* issued to one *'Ganatra Plant & Equipment'*. From its contents therein we observe the invoice is for what is described as *'Used Phoenix Bitumen Tank and spreading ancillaries'* valued at USD 15,000/-.

- ✓ On page 571 of its bid, the 3rd Respondent attached a copy of an invoice dated 27th July 2018 in what appears to be the letter head of one *'Najmi Clearing and Forwarding Ltd'* and issued to one *'Ganatra Plant & Equipment Ltd'*. From its contents therein we observe the invoice is for the clearing and forwarding costs for what is described as a *'Used Phoenix Bitumen Tank'* valued at Kshs 861,859.28/-.

- ✓ On page 573 of its bid, the 3rd Respondent attached a copy of a quality inspection fee demand note dated 12th July 2018 in what appears to be on the letter head of the Kenya Bureau of Standards. From its contents therein we observe this document is issued to one *'Ganatra Plant and Equipment c/o Najmi Clearing and Forwarding Ltd'* for what is described as a *'Used Phoenix Bitumen Tank & Spreading Ancillaries'* for the cost of Kshs 318,590/-.

- ✓ Finally, on page 575 of its bid, the 3rd Respondent attached a copy of a payment receipt dated 13th July 2018 issued by Kenya Bureau of Standards for a payment received from one '*Ganatra Plant and Equipment c/o Najmi Clearing and Forwarding Limited*' of Kshs 318,590/-.

The Board considered the documents submitted by the 3rd Respondent to demonstrate proof of ownership of the bitumen distributor Phoenix Model, Registration Number '*HS CODE NO. 8703329000*' and observes that the sale agreement supplied therein, is un-dated and thus not clear when the agreement was executed by the parties.

The Board has established hereinbefore that a contract or agreement of sale is the process in which property/ownership is transferred between parties and such transfer of ownership is only effected dependant on the terms of the contract, the conduct of the parties and the circumstances of the agreement.

In this regard therefore, the Board observes from the sale agreement in question that the consideration for the sale of the bitumen distributor was valued at Kshs 1,160,000/- which was to be paid by the seller before taking delivery of the machine as provided in Clause 3 of the said sales agreement. The Board notes, the 3rd Respondent did not attach a receipt payment to demonstrate that the amount was paid to one '*Ganatra Plant &*

Equipment Ltd'. Instead, the 3rd Respondent only gave evidence of an Invoice No. 56636 for Kshs. 1,160,000/- raised by Ganatra Plant & Equipment Ltd but did not give evidence of payment or settlement of the said Invoice by way of a receipt.

Further, the 3rd Respondent attached several shipping documents with respect to the bitumen distributor in question, which the Board observes are all in the name of one '*Ganatra Plant & Equipment Ltd'*, and not in the name of the 3rd Respondent. The Board observes that no documentation has been adduced by the 3rd Respondent to demonstrate that ownership has changed hands and that the 3rd Respondent now owns the bitumen distributor Phoenix Model, Registration Number '*HS CODE NO. 8703329000'*. The Board is therefore of the view that the shipping documentation adduced by the 3rd Respondent fails to demonstrate the 3rd Respondent's ownership of the bitumen distributor in question as required under the Tender Document.

With respect to proof of a lease arrangement of the bitumen distributor Iveco Model Registration Number '*KBZ 073T'*, the 3rd Respondent supplied the following documents in its original bid: -

- ✓ On page 541 of its bid, the 3rd Respondent provided a copy of a letter addressed to it dated 19th December 2019 on the letter head of what appears to be a company called '*COLAS'* which reads as follows: -

"RE: BITUMEN DISTRIBUTOR

Reference is made to your letter dated 29th November 2019 on behalf of our bitumen distributor.

Colas East Africa is willing to lease the said equipment to Saxon Investment Limited for the said period to undertake the works on your sites. Our sprayer has a capacity of 10,000L and fully automated that can spray up to 4.2M in width.

The agreement is based on our charges and our documents (logbook attached for our ownership).

SALES & BUSINESS DEVELOPMENT

Peter Mugambi"

- ✓ On page 542 of its bid, the 3rd Respondent provided a copy of a Republic of Kenya Motor Vehicle Registration Certificate for one KBZ 073T with the serial number K 542384 Z. The contents of the Registration Certificate describes the Motor Vehicle in question as a lorry/truck, whose registered owner is indicated as 'Colas East Africa Limited' of Post Office Box 46644-00100 Nairobi.

The Board considered the above two documents and observes as follows: -

From the contents of the letter dated 19th December 2019, the company known as Colas East Africa Ltd appears to own a bitumen distributor and was willing to lease the equipment to the 3rd Respondent for the period necessary to undertake the works on the 3rd Respondent's sites. Evidently, this letter is a letter of intent to lease a bitumen distributor and does not amount to an agreement to lease a bitumen distributor as required under the subject tender.

Moreover, the Board examined the Motor Vehicle Registration Certificate of the bitumen distributor Iveco Model Registration Number 'KBZ 073T' and observes that one 'Colas East Africa Limited' is indicated therein as the registered owner. However, the 3rd Respondent did not provide evidence of a Lease Agreement between it and Colas East Africa Limited to demonstrate that it leased the bitumen distributor Iveco Model Registration Number 'KBZ 073T' that is owned by Colas East Africa Limited.

Instead, it provided a letter dated 19th December 2019, which is a letter of intent to lease a bitumen distributor and does not amount to an agreement to lease a bitumen distributor as required under the subject tender because an agreement would entail two parties (i.e the lessor and the lessee) and the terms of the lease. The letter in issue was only signed by a

representative of Colas and did not bear any other party, moreso that of the 3rd Respondent.

In totality, the Board notes, the 3rd Respondent did not provide sufficient proof of the existence of a lease arrangement with respect to bitumen distributor Iveco Model Registration Number `KBZ 073T` or sufficient proof of ownership proof of the bitumen distributor Phoenix Model, Registration Number `HS CODE NO. 8703329000`.

Following its examination of the 3rd Respondent's bid, the Board studied the Procuring Entity's Tender Evaluation Report dated 28th January 2020 and observes on page 11 that at technical evaluation, the 3rd Respondent's bid was awarded as follows with respect to Plant and Equipment: -

<i>Relevant Equipment (as detailed in Schedule 8)</i>	<i>Score</i>
<i>Owned (Max 40 Marks)</i>	<i>40</i>
<i>100 % Leased (Max 10 marks)</i>	<i>0</i>

From the above excerpt we observe, the 3rd Respondent was awarded maximum marks with respect to ownership of the mandatory minimum equipment as detailed in Schedule 8 of its bid document, despite the 3rd

Respondent's failure to demonstrate ownership of the Bitumen Distributor it proposed to execute works in the subject tender.

The Board further examined the Procuring Entity's confidential documents submitted to the Board in accordance with section 67 (3) (e) of the Act and observes that the Procuring Entity conducted a due diligence exercise on the 3rd Respondent as captured in a due diligence report dated 27th February 2020. As indicated in the report, the Procuring Entity's Evaluation Committee conducted a due diligence exercise to primarily verify the qualifications of the lowest evaluated tenderer. On page 4 of the due diligence report, the Evaluation Committee remarked that it verified several of the 3rd Respondent's documentation including the NTSA/Lease Agreement. At the conclusion of the exercise, the Evaluation Committee found the 3rd Respondent compliant and recommended it for award of the subject tender.

In view of the foregoing, this Board is of the view that before the Procuring Entity conducted a due diligence exercise on the 3rd Respondent, it ought to have satisfied itself that the 3rd Respondent had either demonstrated that it owned a bitumen distributor by providing proof of ownership such as a logbook or that it had demonstrated the existence of a lease arrangement by providing a lease agreement in addition to a logbook or proof of ownership of the bitumen distributor by the lessor.

This is in line with section 80 (2) of the Act which clearly stipulates that the evaluation and comparison of bids shall be done: -

"....using the procedures and criteria set out in the tender documents"

Once the Procuring Entity had satisfied itself that the 3rd Respondent had complied with this requirement in the Tender Document and had provided the necessary documentation, the Procuring Entity could then proceed to conduct a due diligence exercise on the documentation supplied by the 3rd Respondent.

Section 83 (1) of the Act provides as follows: -

"An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act"

Accordingly, a procuring entity may elect to conduct a due diligence exercise to satisfy itself of the qualifications of the tenderer determined to be the lowest evaluated responsive tenderer.

It is important to note that when a procuring entity advertises a tender, bidders submit their tender documents attaching evidence of their qualifications. In arriving at the responsive tenderer therefore, the procuring entity considers documents that support the eligibility and mandatory requirements specified in the procuring entity's tender document.

Section 79 of the Act is instructive on this aspect as it states:-

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

These eligibility and mandatory documents/requirements are considered at the Preliminary and Technical Evaluation stages after which Financial Evaluation is conducted. During Financial Evaluation in open tenders, where Request for Proposal method of tendering is not used, award of a tender is based on the criteria of lowest evaluated responsive tender. Hence, when the accounting officer awards the tender, he or she does so to the tenderer determined to have submitted the lowest evaluated responsive tender.

This means the lowest evaluated responsive tenderer is determined by looking at its qualifications that meet the minimum eligibility and mandatory requirements in the Tender Document.

In this regard therefore, a procuring entity conducts a due diligence exercise to verify and confirm the qualifications of the lowest evaluated responsive tenderer, which exercise would be based on documents and qualifications considered during evaluation that met the minimum eligibility and mandatory requirements of the Tender Document.

In view of the foregoing, we find that the 3rd Respondent did not satisfy Clause 31.4 of the Qualification and Evaluation Criteria in the Tender Document as read together with Schedule 8 of Section 7 Qualification Criteria and Schedule 4 of Section 8 of the Tender Document. We therefore find that the Procuring Entity did not evaluate the successful bidder's bid at Technical Evaluation in accordance with section 80 (2) of the Act as read together with Article 227 (1) of the Constitution.

The Board must now determine the appropriate reliefs to grant in the circumstances as the fourth issue framed for determination.

The Board takes cognizance of section 173 (b) of the Act, which states that:-

“Upon completing a review, the Review Board may do any one or more of the following-

(a).....;

(b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings...”

Having found that the 3rd Respondent did not satisfy Clause 31.4 of the Qualification and Evaluation Criteria in the Tender Document as read together with Schedule 8 of Section 7 Qualification Criteria and Schedule 4 of Section 8 of the Tender Document and that the Procuring Entity did not evaluate the successful bidder's bid at Technical Evaluation in accordance with section 80 (2) of the Act as read together with Article 227 (1) of the Constitution, this Board is of the considered view that the most appropriate order in these circumstances is to direct the Procuring Entity conduct a re-evaluation of all bids that made it to the Technical Evaluation Stage in so far as the criterion under Clause 31.4 of the Qualification and Evaluation Criteria in the Tender Document read together with Schedule 8 of Section 7 Qualification Criteria and Schedule 4 of Section 8 of the Tender Document, is concerned.

In totality, the Request for Review succeeds with respect to the following specific orders:-

FINAL ORDERS

In exercise of the powers conferred upon it by section 173 of the Public Procurement and Asset Disposal Act, 2015, the Board makes the following orders in the Request for Review:-

- 1) The Procuring Entity's Letter of Notification of Award of Tender No. KENHA/R5/115/2019 For Periodic Maintenance of Thika-Garissa [Lot 1-Makongeni-Embu Junction (Kanyonyo)] (A3) Road addressed to M/s Saxon Investments Limited dated 3rd March 2020, be and is hereby cancelled and set aside.**
- 2) The Procuring Entity's Letters of Notification of Unsuccessful bid dated 3rd March 2020 addressed to the Applicant with respect to the subject tender, be and is hereby cancelled and set aside.**
- 3) The Procuring Entity is hereby directed to re-instate all bids that made it to the Technical Evaluation Stage and re-evaluate them at the Technical Evaluation Stage with respect to the criteria under Clause 31.4 of the Qualification and Evaluation Criteria in the Tender Document read together with Schedule 8 of Section 7. Qualification Criteria and Schedule 4 of Section 8 of the Tender Document, taking into consideration the Board's findings in this case.**

4) Further to Order No. 3 above, the Procuring Entity is hereby directed to proceed with the procurement process to its logical conclusion including the making of an award within fourteen (14) days from the date of this decision.

5) Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.

Dated at Nairobi on this 8th Day of April 2020

CHAIRPERSON

SECRETARY

PPARB

PPARB