

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATIONS NO. 58/2020 AND 60/2020 (CONSOLIDATED)

BETWEEN

ROBEN ABERDARE (K) LIMITED.....1ST APPLICANT

SAXON INVESTMENT LIMITED.....2ND APPLICANT

AND

THE ACCOUNTING OFFICER,

KENYA NATIONAL HIGHWAYS AUTHORITY.....1ST RESPONDENT

AND

HALANE CONSTRUCTION COMPANY LIMITED.....2ND 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. Ms. Robi Chacha | -Member |
| 3. Mr. Alfred Keriolale | -Member |

IN ATTENDANCE

1. Mr. Philemon Kiprop -Holding brief for the 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 Limited	1,426,880,301.00	3
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 was 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.

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.

REQUEST FOR REVIEW NO. 38/2020

M/s Roben Aberdare (K) Limited lodged a Request for Review dated and filed on 18th March 2020 seeking 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.***

The Board having considered parties' pleadings, submissions and documentation submitted to it pursuant to section 67 (3) (e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act"), issued the following orders in its final decision dated 8th April 2020:-

- 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.

THE RE-EVALUATION PROCESS

1. Technical Evaluation

According to the Procuring Entity's Evaluation Report dated 20th April 2020, The Evaluation Committee considered the final orders as directed by the Board and undertook a re-evaluation by re-instating all the four (4) bids that had made it to the Technical Evaluation Stage and re-evaluated 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.

The reinstated four (4) bids that had made it to the Technical Evaluation Stage were as follows:-

- i. Bidder Number 2: (M/s Halane Construction Co. Ltd);*
- ii. Bidder Number 6: (M/s Tosha Holdings Ltd);*
- iii. Bidder Number 8: (M/s Saxon Investments Ltd);*
- iv. Bidder Number 12: (M/s Roben Aberdare (K) Ltd).*

The results of Technical Evaluation were as follows:-

S/N o	Main Equipment	Quantity (Minimum)	Marks (Score)		Bidder No.s			
			Owned	Hired	2	6	8	12
1	Paver	1	15	3.75	15	15	NR	15
2	Bitumen Distributor	1	15	3.75	15	15	NR	NR
3	Pneumatic Roller	1	3	0.75	3	3	3	3
4	Drum roller (Minimum 10 Tons)	1	3	0.75	3	3	3	3
5	Tippers (Cumulative Capacity 28 Tons)	2	4	1	4	4	4	4
Total					40	40	Non- Responsive	

1.1. Remarks on Technical Evaluation

a) Bidder Number 2: (M/s Halane Construction Co. Ltd)

The bidder demonstrated proof of ownership through provision of logbooks for all the five minimum mandatory equipment and thus scored full marks i.e. 40.

b) Bidder Number 6: (M/s Tosha Holdings Ltd)

The bidder demonstrated proof of ownership through provision of logbooks for all the five minimum mandatory equipment and thus scored full marks i.e. 40.

c) Bidder Number 8: (M/s Saxon Investments Ltd)

The bidder provided logbooks for the pneumatic roller, drum roller and tippers. However, the comments on bitumen distributor and paver were recorded by the Evaluation Committee as follows;

- **Bitumen Distributor**

The logbook provided for the proposed bitumen distributor that was indicated as owned, was in the name of Ganatra Plant and Equipment Ltd. As ruled by the Review Board, the sale agreement and other supporting documents provided for the same, could not be considered as proof of ownership as there was no evidence of payment or settlement of the provided invoice by way of a receipt. In addition, the Review Board ruled that the documents provided in regards to lease of an extra Bitumen Distributor were an '*intent to lease*' and not a lease agreement.

- **Paver**

The Bidder provided documents demonstrating evidence of shipping and processing of import duty with the Kenya Revenue Authority for two pavers. However, the Bidder did not provide Logbooks for these two equipment. The bidder further proposed to lease one additional paver. However, the committee noted that the lease agreement provided did not have all the salient details as provided in the bidding document.

In conclusion, and as per the Board's observations and ruling, it was compulsory for the bidders to provide proof of ownership or leasing arrangements (lease agreement) for ***all the minimum mandatory***

equipment, Pursuant 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 the section 8 of the Tender document. The mandatory equipment were i.e. Paver, Bitumen distributor, Pneumatic Roller, Drum Roller and Tippers (Cumulative Capacity 28 Tons). The Board further ruled that the proof of ownership can only be demonstrated through provision of a logbook.

M/s Saxon Investments Ltd was therefore found to be non-responsive since he did not provide logbooks or proper lease agreement for both the Paver and Bitumen Distributor, which were part of the **minimum mandatory equipment** that the bidders were required to demonstrate proof of ownership through a logbook or provide a leasing arrangement.

d) Bidder Number 12: (M/s Roben Aberdares (K) Ltd)

The bidder did not provide logbook for the Articulated Bitumen Distributor of Chassis No. AF-9128-17 and IDF No. E1701493029 but instead provided shipping document dated 13th February 2017. As per the Review Board Ruling, the proof of ownership can only be demonstrated by provision of a logbook issued by the National Transport and Safety Authority (NTSA). The bidder did not provide any leasing arrangement for the Bitumen Distributor.

Similarly, M/s Roben Aberdare (K) Ltd was found to be non-responsive since he did not provide logbook or lease agreement for the Bitumen Distributor,

which was one of the ***minimum mandatory equipment*** that the bidders were required to demonstrate proof of ownership through a logbook or provide a leasing arrangement.

The following two bidders were therefore found responsive and hence proceeded to financial evaluation:-

a) Bidder Number 2: (M/s Halane Construction Co. Ltd);

b) Bidder Number 6: (M/s Tosha Holdings Ltd).

2. Financial Evaluation

At this stage, the Evaluation Committee undertook a comparison of the Tender Sums for the two (2) bidders outlined hereinbefore who qualified for financial evaluation.

Recommendation

Having compared the bid prices of the two bidders, the Evaluation Committee observed that M/s Tosha Holdings Ltd emerged the lowest at the financial evaluation stage. However, the Evaluation Committee noted that M/s Tosha Holdings Ltd had been awarded Tender No. KeNHA/R5/116/2019 for Periodic Maintenance Thika-Garissa (Lot 2-Kanyonyo/Embu Junction-Mwingi) (A3) Road at a contract sum of Kshs. 1,098,269,382/- currently under contract preparation.

The Evaluation Committee further noted that Tender No. KeNHA/R5/116/2019 and the subject tender have similar scope and magnitude of works and that the program of works provided by the bidder for the two tenders were similar as the activities were scheduled to be undertaken concurrently. The Evaluation Committee further indicates that M/s Tosha Holdings Ltd only provided one set of equipment, and that delay in implementation is likely to occur as 80% of the two tenders involve bituminous works. Based on the inadequacy of the relate equipment to execute the two projects concurrently, the Evaluation Committee recommended award of Lot 1 of the subject tender to M/s Halane Construction Company Ltd at the sum of Kshs. 1,583,648,472.00, since Lot 2 had already been award to M/s Tosha Holdings Ltd.

Professional Opinion

In a professional opinion dated 22nd April 2020, the Deputy Director, Supply Chain Management reviewed the Re-Evaluation Report dated 20th April 2020, and took the view that it met the requirements of the Tender Document therefore urged the Director General to approve award of the subject tender to M/s Halane Construction Company Ltd. The said professional opinion was approved on the same date of 22nd April 2020.

Notification

In letters dated 22nd April 2020, the successful and all unsuccessful bidders were notified of the outcome of their bids.

REQUEST FOR REVIEW NO. 58/2020

M/s Roben Aberdare (K) Limited lodged a Request for Review dated and filed on 5th May 2020 together with a Statement in Support of the Request for Review sworn and filed on even date, through the firm of Muchemi & Co. Advocates, seeking the following orders:-

- 1. An order setting aside the decision of the Procuring Entity addressed to M/s Roben Aberdare (K) Limited contained in a letter dated 22nd April 2020 finding M/s Roben Aberdare (K) Limited's tender as non-responsive at the technical evaluation stage and awarding TENDER NO. KENHA/R5/115/2019 FOR PERIODIC MAINTENANCE OF THIKA-GARISSA/LOT 1-MAKONGENI-EMBU JUNCTION (KANYONYO)/(A3) ROAD to the 2nd Respondent;***
- 2. An order setting aside the decision of the procuring entity contained in a letter dated 22nd April 2020 finding that M/s Roben Aberdare (K) Limited did not provide logbook for the articulated bitumen distributor for Chassis No. AF-9128-17 and IDF No. E1701493029;***
- 3. The Board be pleased to review all the records submitted in the procurement process including the proof of ownership***

documents thereof and grant an order substituting and/or amending the decision of the Procuring Entity and award the TENDER NO. KENHA/R5/115/2019 FOR PERIODIC MAINTENANCE OF THIKA-GARISSA/LOT 1-MAKONGENI-EMBU JUNCTION (KANYONYO)/(A3) ROAD to M/s Roben Aberdare (K) Limited;

- 4. THAT in alternative to prayer (2) above, an order directing the Procuring Entity to progress the procurement process to its logical conclusion and make an award within Seven (7) days; and***
- 5. THAT the 1st Respondent be ordered to pay the full costs of and incidental to these proceedings.***

In response, the 1st Respondent filed a Memorandum of Response dated and filed on 8th May 2020 and a Replying Affidavit sworn and filed on even date through the firm of Robson Harris & Company Advocates while M/s Halane Construction Company Limited filed a Replying Affidavit sworn and filed on 14th May 2020, through the firm of J.M Waiganjo & Co. Advocates.

REQUEST FOR REVIEW NO. 60/2020

M/s Saxon Investments Limited lodged a Request for Review dated and filed on 7th May 2020 together with a Statement in Support of the Request for Review sworn and filed on even date and a Further Statement sworn and

filed on 18th May 2020, through the firm of Gerivia Advocates LLP, seeking the following orders:-

- a) An order annulling and setting aside the Respondent's decision awarding Tender Number KENHA/R5/115/2019 for the Periodic Maintenance Of Thika - Garissa [Lot 1 - Makongeni-Embu Junction (Kanyonyo)] (A3) Road to Halane Construction Co. Ltd;***
- b) An order annulling and setting aside the Respondent's letter dated 22nd April 2020 notifying the Applicant that it was not successful in Tender Number KENHA/R5/115/2019 for the Periodic Maintenance of Thika - Garissa [Lot 1 - Makongeni-Embu Junction (Kanyonyo)] (A3) Road be annulled and set aside;***
- c) An order directing the Respondent to follow the orders of the Honourable Board by subjecting the bid of M/s Saxon Investments Limited to technical evaluation as directed by the Board in the Ruling dated 8th April 2020 and in observance and adherence to the provisions of Section 80 (3) of the Act, more specifically taking into account the requirement for objective, quantitative and qualitative evaluation of bids at the technical evaluation stage;***
- d) An order directing the Respondent to observe and apply the procedures and criteria in the Tender Document as required by the Act at Section 80 (2), taking note, that there is no requirement in the Tender Document for the Procuring Entity***

to allocate a score/mark and at the same time disqualify a bidder at the technical evaluation stage since the Tender Document only provides for allocation of scores;

e) An order directing the Respondent with respect to anything that needs to be done or redone in the technical evaluation in line with the procedures and criteria under the Tender Document and Section 80 of the Act and proceed to undertake a financial evaluation of the bids including that of M/s Saxon Investments Limited;

f) An order compelling the Respondent to pay to M/s Saxon Investments Limited the costs arising from/and incidental to this Application; and

g) Such and further orders as the Board may deem fit and appropriate to grant in ensuring that the ends of justice are fully met in the circumstances of this Request for Review.

In response, the 1st Respondent lodged a Memorandum of Response dated and filed on 13th May 2020 together with a Replying Affidavit sworn and filed on even date while M/s Halane Construction Company Limited lodged a Replying Affidavit sworn and filed on 14th May 2020.

On 16th March 2020, the Board issued Circular No. 1/2020 and the same was published on the Public Procurement Regulatory Authority's website (www.ppra.go.ke) in recognition of the challenges posed by the COVID-19

pandemic. Through the said Circular, the Board instituted certain measures to restrict the number of representatives of parties that may appear before the Board during administrative review proceedings in line with the presidential directives on containment and treatment protocols to mitigate against the potential risks of the virus.

On 24th March 2020, the Board issued Circular No. 2/2020 further 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. Clause 1 at page 2 of the said Circular further specified that pleadings and documents shall be deemed as properly filed if they bear the official stamp of the Board.

Accordingly, M/s Roben Aberdare (K) Limited lodged Written Submissions in Request for Review No. 58/2020 (hereinafter referred to as "Review No. 58/2020"), which are dated and filed on 15th May 2020 together with a List and Digest of Authorities dated and filed on even date, a Replying Affidavit sworn on 24th May 2020 and filed on 26th May 2020 for Review No. 60/2020 together with Written Submissions dated and filed on even date for Review No. 60/2020. The 1st Respondent lodged Written Submissions in Review No. 58/2020, which are dated and filed on 20th May 2020 with authorities attached thereto, and also lodged Written Submissions in Request for Review No. 60/2020 (hereinafter referred to as "Review No. 60/2020"), dated and

filed on 21st May 2020 together with authorities attached thereto. M/s Saxon Investments Limited lodged its Written Submissions in Review No. 58/2020, dated 24th May 2020 and filed on 26th May 2020, and Written Submissions in Review No. 60/2020, which are dated 20th May 2020 and filed on 21st May 2020, together with a List of Authorities filed on even date. M/s Halane Construction Limited lodged Written Submissions dated and filed on 22nd May 2020 and its List of Authorities filed on even date in Review No. 58/2020 and also lodged Written Submissions dated and filed on 22nd May 2020 in Review No. 60/2020.

The Board further notes the letter of Notification and Hearing dated 18th May 2020 addressed to M/s Tosha Holdings Limited by the Board Secretary was dispatched on 22nd May 2020. However, despite having been notified of the two Request for Review applications, M/s Tosha Holdings Limited, being one of the bidders who participated in the subject tender and evaluated at the Financial Evaluation Stage, did not file any documentation in support or in opposition of any of the Request for Review applications.

CONSOLIDATION OF THE TWO REQUEST FOR REVIEW APPLICATIONS

When the Board met to deliberate on Review No. 58/2020 filed by M/s Roben Abdare (K) Limited, it noted that a separate application, that is, Review No. 60/2020 had been filed by M/s Saxon Investments Limited regarding the same tender. The Board further noted that the 21-day statutory period under

section 171 (1) of the Act for Review No. 58/2020 would lapse on 26th May 2020, whereas that Review No. 60/2020 would lapse on 28th May 2020.

When Review No. 60/2020 came up for deliberation, the Board noted that where two Request for Review applications are filed relating to the same tender, it has discretion to exercise the power vested upon it under Regulation 82 of the Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as "the 2006 Regulations") which provides as follows:-

"Where two or more requests for review are instituted arising from the same tender or procurement procedure the Review Board may consolidate the requests and hear them as if they were one request for review"

Accordingly, the Board consolidated the two Request for Review applications pursuant to Regulation 82 of the 2006 Regulations, bearing in mind the fact that any orders issued by the Board upon completing review of either of the two applications, must be taken up by the Accounting Officer who is the same in both applications, and this would affect both applicants in the two request for review applications since the tender under review before this Board is the same in both applications.

Pursuant to the said consolidation, the parties to the Request for Review shall be identified as follows:-

- M/s Roben Aberdare (K) Limited -1st Applicant
- M/s Saxon Investments Limited -2nd Applicant
- The Accounting Officer of the Procuring Entity -1st Respondent
- M/s Halane Construction Company Limited -2nd Respondent

BOARD'S DECISION

The Board has considered all the pleadings and written submissions filed before it, including the confidential documents submitted to it pursuant to section 67 (3) (e) of the Act and finds that the following issue call for determination:-

Whether the Procuring Entity rightfully found the 1st Applicant's bid and the 2nd Applicant's bid non-responsive in accordance with 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, read together with Section 79 (1), 80 (2) and (3) of the Act following a re-evaluation process at the Technical Evaluation Stage ordered by the Board in the decision rendered on 8th April 2020 in PPARB Application No. 38/2020, M/s Roben

Aberdare (K) Limited v. The Accounting Officer, Kenya National Highways Authority & 2 Others.

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

The 1st Applicant in its Request for Review and Written Submissions took the view that the reason provided by the 1st Respondent in the letter of notification dated 22nd April 2020 is a contradiction of the initial reason contained in the letter of notification dated 3rd March 2020.

The Board having considered the 1st Applicant's averment notes that initially, the 1st Respondent having concluded its evaluation of bids received in the subject tender, found the 1st Applicant's bid non-responsive due to the following reason stated in the letter dated 3rd March 2020:-

"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 Ltd, being the lowest evaluated bidder pursuant to section 86 (1) (a) 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..."

The 1st Respondent had initially notified the 1st Applicant that its tender was unsuccessful because the 1st Applicant was found to have submitted the second lowest evaluated bid. The 1st Applicant, being aggrieved by this decision, lodged **Request for Review No. 38/2020, Roben Aberdare (K) Limited v. The Accounting Officer, Kenya National Highways Authority & 2 Others** (hereinafter referred to as "Review No. 38/2020") challenging the decision of award of the subject tender to the 2nd Applicant herein.

The Board having considered parties' cases and pleadings, together with the confidential documents submitted to it delivered a decision dated 8th April 2020 in Review No. 38/2020 directing the Procuring Entity to undertake the following:-

- 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."***

Pursuant to Order No. 3 of the Board's decision dated 8th April 2020, the Procuring Entity proceeded to undertake a re-evaluation of four bidders namely; the 1st Applicant, the 2nd Applicant, the 2nd Respondent and M/s Tosha Holdings Ltd at the Technical Evaluation Stage. M/s Tosha Holdings Ltd and the 2nd Respondent made it to Financial Evaluation, wherein the 2nd Respondent was recommended for an award of the subject tender.

Accordingly, vide a letter dated 22nd April 2020, the 1st Applicant was notified of the following reason why its bid was found non-responsive:-

“Reference is made to the above tender in which you participated and our subsequent regret letter referenced KeNHA/R5/115/2019 dated 3rd March 2020

Your attention is drawn to the appeal case for the procurement process of the subject tender that was filed before the Public Procurement Administrative Review Board and subsequent ruling that was delivered on 8th April 2020

Following the implementation of the Review Board’s ruling:-

- 1. Our earlier letter referenced KeNHA/R5/115/2019 dated 3rd March 2020 is hereby revoked.***
- 2. Your Tender is non-responsive at the Technical Evaluation Stage because you did not provide logbook for the Articulated Bitumen Distributor of Chassis No. AF-9128-17 and IDF No. E1701493029 but instead you provided shipping document dated 13th February 2017. As per the said Ruling, the proof of ownership should be provided through provision of a logbook.***

Pursuant to section 86 (1) (a) of the Public Procurement and Asset Disposal Act, 2015 the contract was awarded to M/s Halane Construction Company Ltd, being the lowest evaluated bidder...”

At this point, the Board deems it fit to address its mind on the meaning of the word "re-evaluation" and the import of the Board's decision in Review No. 38/2020 directing the Procuring Entity to re-instate all bids that made it to Technical Evaluation and conduct a re-evaluation of such bids 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, whilst taking into consideration the Board's findings in that case.

The Cambridge Dictionary of English, 4th Edition defines the term "re-evaluate" as follows:-

"to consider or examine something again in order to make changes or to form a new opinion about it"

From the foregoing definition, the Board observes that the Procuring Entity's Evaluation Committee had the obligation to consider or examine the bids that made it to Technical Evaluation, again (that is, a second time) in order to make changes or to form a new opinion about the responsiveness, or lack thereof, of the bids that made it to Technical Evaluation, whilst taking into consideration the Board's findings on how bidders ought to have demonstrated their qualifications with respect to 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.

It is therefore possible that whilst re-considering or re-examining the bids that made it to Technical Evaluation, the Evaluation Committee could arrive at a different conclusion from the one it previously arrived at the first time it evaluated all bids that made it to Technical Evaluation. **In Judicial Review Miscellaneous Application No. 283 of 2019, Republic v Public Procurement Administrative Review Board & 3 others Ex parte Tecno Relief Services Limited [2019] eKLR**, the court while considering the effect of an order made by this Board for a procuring entity to undertake a re-evaluation process held as follows:-

"...Therefore, the new set of intervening facts created a new cause of action, which arose as a result of the 1st Respondent's [Review Board's] own orders. In other words, even though the same set of circumstances may have existed in the First Request for Review as regards the 3rd Respondent's bid, the 1st Respondent's orders of 26th July 2019, which were final and binding, that the 3rd Respondent's bid among others be re-evaluated in line with specified criteria opened the gate for a new cause of action, in the event that there was noncompliance."

In the above case, the High Court found that where this Board orders a procuring entity to conduct a re-evaluation, this amounts to new intervening facts that may give an aggrieved bidder a new cause of action (that is not *res judicata*) following a re-evaluation process. Similarly, the Board notes, where an Evaluation Committee conducts a re-evaluation comprising of a re-examination or re-consideration of the bids before it, such a process may result in discovery of a new reason why a bidder is eventually found non-responsive after conclusion of the re-evaluation.

The import of the Board's decision in Review No. 38/2020 (specifically Order No. 3 thereof) was for the Evaluation Committee to re-examine or re-consider afresh all bids that made it to Technical Evaluation, as if the Evaluation Committee had never examined or considered such bids before, with a view of determining their responsiveness 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 and proceed to a reconsideration and reexamination at the Financial Evaluation Stage including the making of an award (that is, Order No. 4 of Review No. 38/2020), with respect to the bids determined to be responsive at the end of Technical Evaluation.

The 1st and 2nd Applicants in this Consolidated Request for Review challenged the outcome of their bids as contained in their respective letters of notification, both dated 22nd April 2020.

As regards the 1st Applicant, the Board has already noted that the 1st Applicant's bid was found non responsive because, in the Procuring Entity's view, the 1st Applicant did not provide logbook for the Articulated Bitumen Distributor of Chassis No. AF-9128-17 and IDF No. E1701493029 but instead provided shipping document dated 13th February 2017.

The Board studied the Tender Document used in the subject tender and observes that the criterion under consideration is outlined in several clauses. 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 that they own 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 - <u>Attach copy of log books</u> which may be verified with NTSA - <u>Equipment Lease Agreement must be provided supported by ownership of Equipment by the owner which may be verified.</u>

From the above pre-qualification checklist, the Board further 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>
	Bitumen Distributor	1	15	3.75
	<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 Tons)</i>	<i>2</i>	<i>4</i>	<i>1</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. A bidder was required to provide proof of ownership or lease agreements, since 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 agreement, 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.	Paver	1				
2.	Bitumen Distributor	1				
3.	Pneumatic Roller	1				
4.	Drum Roller (Minimum 10 Tons)	1				
5.	Tippers (Cumulative Capacity 28 Tons)	2				

(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

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

Name of the Lessor:	
Telephone Number	
Email Address	

Postal Address	
Contact Person	
Mobile Contact of the Contact Person	
Official Stamp	

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>Description, Type, Model, Make</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 (If to be imported)</i>	<i>Source</i>	<i>Owned/Leased/Imported</i>	<i>Power rating</i>	<i>Date of Arrival on Project (days after commencement)</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."

In paragraph 16 of its Written Submissions, the 1st Applicant provides a definition of what an **"Articulated Bitumen Distributor"** means from a technical perspective as *"an insulated tank with several components that make it possible to spray bitumen on the surface during execution of the expected works under the tender"*. In paragraph 17 of its Written Submissions, the 1st Applicant went further to outline the components of its Articulated Bitumen Distributor comprising different components as follows:-

- *A prime over with its specific Registration number KBR 110Y and Engine Number 6DAE03897;*
- *A bitumen Sprayer with a specific chassis/frame number AF-9128-17;*
and
- *A trailer with a specific registration number ZD 9088 and chassis/frame number BIL 18327*

The 1st Applicant then submits that the above mentioned components combined, would then make an Articulated Bitumen Distributor. According to the 1st Applicant, the trailer registration number ZD 9088 and chassis/frame number BIL 18327 provides the foundation/chassis/frame upon which the bitumen sprayer (chassis/frame number AF-9128-17) is mounted, with the prime mover registration number KBR 110Y and Engine Number 6DAE03897 being at the front of the overall vehicle. This combination in the 1st Applicant's view, is what forms an Articulated Bitumen Distributor and that these documents were provided in its bid.

The 1st Applicant further makes reference to a Mechanical/Visual Inspection Report dated 29th April 2020 issued by E. M Karingithi for Chief Engineer Mechanical, Ministry of Transport, Infrastructure and Urban Development, State Department of Infrastructure attached to its Request for Review and submits that the said Engineer confirmed that the bitumen sprayer chassis/frame number AF-9128-17 was mounted on trailer registration number ZD 9088 and chassis/frame number BIL 18327 and further remarked that the bitumen distributor on the trailer was in good working condition.

The 1st Applicant also referred the Board to a Monthly Progress Report issued in July 2019 by the Procuring Entity with respect to Contract No. KeNHA/RD/M/2502/2017 to support its submission that the Articulated Bitumen Distributor used under the said contract is the same one proposed to be used in the subject tender and specifically referred the Board to pages 12 and 15 of the said Monthly Progress Report which cite a Bitumen Distributor deemed to be in good working condition and a photograph of a complete bitumen distributor whose registration number can be seen to be KBR 110Y, respectively.

The 1st Respondent maintained its submission that the 1st Applicant provided various logbooks for a prime mover and a trailer but failed to provide ownership for the Articulated Bitumen Distributor Chassis No. AF-9128-17 and IDF No. E1701493029 but instead had a shipping document which did not constitute proof of ownership. The 1st Respondent further submitted that

the photographs provided by the 1st Applicant in its bid alleged to be the bitumen distributor have no number plates and could not be verified. In the 1st Respondent's view, proof of ownership was meant to demonstrate a bidder's capacity to perform works of the subject tender, which proof was not provided by the 1st Applicant.

In determining this issue, the Board notes that the 1st Applicant during Review No. 38/2020 maintained its submission that proof of ownership of an Articulated Bitumen Distributor is evidenced by logbooks and/or lease agreements between a lessor and the lessee and vehemently opposed the award to the 2nd Applicant (i.e. the 3rd Respondent in Review No. 38/2020) because in the 1st Applicant's view, the 2nd Applicant did not own a Bitumen Distributor. The Board in Review No. 38/2020, having considered parties' submissions found that ownership of the Articulated Bitumen Distributor is evidenced by logbooks that can be verified by the National Transport Safety Authority and/or lease agreements between a lessor and lessee and attaching the ownership documents of the lessor for verification.

In the decision rendered on 8th April 2020 in Review No. 38/2020, the Board addressed its mind to the meaning of a Bitumen Distributor, whether this equipment falls under the category of a motor vehicle and the documentation required in the Tender Document to satisfy this criterion. The Board held as follows:-

"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:...

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...

...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."

From the foregoing, the Board having considered the ordinary meaning of a Bitumen Distributor and the provisions of the Traffic Act, Chapter 403, Laws of Kenya (hereinafter referred to as "the Traffic Act") found that a Bitumen

Distributor falls under the category of a motor vehicle within the meaning of section 2 of the Traffic Act. The Board further addressed its mind on what documentation would support proof of ownership of a motor vehicle pursuant 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 and held that bidders were required to attach copy of logbooks which may be verified by National Transport and Safety Authority. Further, 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.

Before determining the documentation provided by the 1st Applicant, the Board observes that parties to the instant Request for Review made reference to "Articulated Bitumen Distributor" and "Articulated Bitumen Sprayer", in so far as the criterion under consideration is concerned.

Andrew Dawson in his book "**Water in Road Structures: Movement, Drainage and Effects (2008)**" describes "articulated vehicle" as follows:-

"a vehicle which has a permanent or semi-permanent pivot joint in its construction, allowing a vehicle to turn more sharply. In broader sense, any vehicle towing a trailer or semi-trailer, incorporating plant or equipment of the following nature; bitumen or tar heaters, bitumen, tar or water

sprayers, distributors, crushers, extending towers or ladders, could be described as articulated”

The Board in Review No. 38/2020 adopted the definition provided by the Cambridge English Dictionary, 7th Edition regarding a Bitumen Distributor described 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.”

Hence, an Articulated Bitumen Distributor can be described 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 with a permanent or semi-permanent pivot joint in its construction, allowing it to turn more sharply.

On the other hand, a Bitumen Sprayer and its usage, is explained by Andrew Dawson in his book **“Water in Road Structures: Movement, Drainage and Effects (2008)”** as follows:-

“Bitumen Sprayer machines are known as asphalt distributors or bitumen distributors and they help in

controlling spraying of bitumen on the surface prior to the laying of hot mix asphalt. Sprayer chassis is built as per the truck chassis on which the bitumen sprayer is fitted. Depending on the width of the truck chassis, the width of the sprayer chassis is determined.

A tank for the bitumen sprayer is mounted on the main chassis and the purpose of the tank is to hold the bitumen and heat it as and when required

The author further explains that:-

"Bitumen Sprayers may be truck mounted and self-propelled along with the appropriate heating system and variable spray bar. It is designed to operate on a consistent pressure system, complete with air-compressor, bitumen pump, auxiliary engine, tank mounting and other accessories. It offers constant rate of application of hot bitumen or cold tar"

Further to this, a Prime Mover is explained by the author as follows:-

"When referring to a "prime mover", it is generally a robust engine that has excellent motive power to haul bulky towed or trailered loads. The Prime mover consist

of axle group and is used in towing a semi-trailer or truck”

Having considered the foregoing definitions, the Board notes that in certain instances, the word “Bitumen Distributor” is applied synonymously with the word “Bitumen Sprayer”. It is the Board’s considered view that an Articulated Bitumen Distributor may comprise of different components for it to work correctly in road construction and repair and such components include a Bitumen Sprayer mounted on a truck/trailer that is towed by a Prime Mover. A Tank for the Bitumen Sprayer is also fitted, by mounting it on the main chassis to hold the bitumen and heat it when required.

The Board studied the 1st Applicant’s original bid and notes that it provided the following documentation:-

At page 073 of its original bid, the 1st Applicant duly completed the form outlined on page 53 and 54 of the Tender Document as follows:-

<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>2</i>	<i>-</i>	<i>2</i>
<i>2</i>	<i>Bitumen Distributor</i>	<i>1</i>		<i>1</i>	<i>-</i>	<i>1</i>
<i>3</i>	<i>Pneumatic Roller</i>	<i>1</i>		<i>4</i>	<i>-</i>	<i>4</i>

4	<i>Drum Roller (Minimum 10 tons)</i>	1		6	-	4
5	<i>Tippers (Cumulative Capacity 28 Tons)</i>	2		24	-	20

From the above form, the Board observes that the 1st Applicant indicated it owned one bitumen distributor and that it would avail one bitumen distributor for the execution of the subject tender.

At page 074 of its original bid, the 1st Applicant did not fill the rows and columns of the Schedule 4. Major Items of Construction Plant and Equipment, instead, the 1st Applicant referred the Procuring Entity to an Attached Schedule by indicating **"See Attached Schedule"** and appended its signature and a date of 3rd January 2020.

This "Attached Schedule" is found at page 075 of its original bid, where the 1st Applicant listed several equipment it deemed necessary to execute the subject tender, which were more than the 5 major Plant and Equipment required at page 52 and 53 of the Tender Document, including 1 Articulated Bitumen Sprayer/Distributor listed as the fourth item and 2 Prime Movers-MAN listed as the seventeenth item with the following details:-

Description, Type, Model, Make	No. of	Year of Manufact	New or used	Capacity or m3	Estimated CIF Mombasa Value (lf	Source	Owned/Leased/Imported	Power rating	Date of Arrival on Project (days after commencement
ARTICULATED BITUMEN SPRAYER/DISTRIBUTOR	1	2016	NEW			UK	OWNED		7 DAYS
PRIME MOVERS-MAN	2	2011	USED			KENYA	OWNED		7 DAYS

The 1st Applicant further provided the following:-

- *At page 077 of its original bid, a Bill of Lading issued on 13th February 2017 with respect to 1 Articulated Bitumen Sprayer Chassis Number AF-9128-17 IDF No. E1701493029;*
- *At pages 092 to 095 of its original bid, photographs of equipment which are not named and with no indication of their registration details;*
- *At page 096 of its original bid, a photograph of an equipment indicated to be an Articulated Distributor, however no details of its registration can be seen;*
- *At page 105 of its original bid, a photograph of an equipment indicated to be a Trailer with the registration number visible at the front as KBR 114Y;*
- *At page 106 of its original bid, a photograph of an equipment indicated to be a Trailer with the registration number visible at the front as KBR 110Y;*

- *At page 145 of its original bid, logbook of a Prime Mover Registration No. KBR 532X, Chassis/Frame LFWSVXPJ9CAD02569 with Roben Aberdare (K) Ltd identified as one of the registered owners;*
- *At page 146 of its original bid, a logbook of a Trailer Registration No. ZD9173 Chassis/Frame BIL18328 with Roben Aberdare (K) Ltd identified as one of the registered owners;*
- *At page 147 of its original bid, a logbook of a Prime Mover Registration No. KBR 114Y, Chassis Frame MC60814 with Roben Aberdare (K) Ltd identified as one of the registered owners;*
- *At page 148 of its original bid, a logbook of a Trailer Registration No. ZD9088, Chassis/Frame BIL18327 with Roben Aberdare (K) Ltd identified as one of the registered owners;*
- *At page 149 of its original bid, a logbook of a Prime Mover Registration No. KBR 110Y, Chassis/Frame MC60812 (Engine No. 6DAE03897).*

Having considered the above documentation, it is worth noting that after page 075 of the 1st Applicant's original bid where its Schedule of Equipment can be found, the document attached on the next page, i.e. page 076 of its original bid is a Bill of Lading for a I Unit Voegel Asphalt Paver, I Unit Hamm Tyre Roller and I Unit Hamm Tandem Roller. The Bill of Lading of an Articulated Bitumen Sprayer Chassis No. AF-9128-17, IDF No. E1701493029 dated 13th February 2017 is then attached on the next page 077 of the 1st Applicant's original bid.

Further, it is only after running through to page 096 of the 1st Applicant's original bid that one comes across a photograph of a complete "Articulated Distributor" with no registration number at the rear, and the front cannot be seen for one to verify the registration number, however, one can see that the Prime Mover at the front is Maroon/Red in colour. In addition to this, it is only after running through to page 105 of the 1st Applicant's bid, that one comes across the photograph of a Trailer whose Prime Mover bears the number plate KBR 114Y and at page 106 of the 1st Applicant's bid, a photograph of a Prime Mover (not attached to anything else) that is white in colour, but named as a Trailer KBR 110Y. Further, at page 149 of the 1st Applicant's original bid, the logbook attached therein is for a Prime Mover, KBR 110Y indicated to be White in Colour.

In essence, despite the 1st Applicant having indicated an Articulated Bitumen Sprayer/Distributor listing it as the fourth item and 2 Prime Movers listing as the seventeenth item of its Schedule of Equipment, the documentation it provided as evidence for these equipment were not attached in a chronological order in the 1st Applicant's bid.

In essence, the 1st Applicant provided evidence in the form of logbooks of 3 Prime Movers (KBR 532X, KBR 114Y and KBR 110Y) and 2 Trailers (Registration numbers ZD9173, and ZD9088), unnamed photographs of equipment with no registration details, a photograph of a complete Articulated Distributor with no registration details and photographs of 2

Prime Movers with their registration numbers indicated as KBR 114Y (this Prime Mover was attached to a Trailer whose registration cannot be seen) and KBR 110Y (this Prime Mover was not attached to anything else) but indicated as Trailers in the said photographs, and these documentation are not in any chronological order to reflect the sequence of equipment in the 1st Applicant's Schedule of Equipment that would have assisted the Evaluation Committee to deduce the equipment that form part of the components of the Articulated Bitumen Distributor.

The 1st Applicant submitted in its Written Submissions that the Articulated Bitumen Distributor it proposed for executing the subject tender comprised of; *a prime over with its specific Registration number KBR 110Y and Engine Number 6DAE03897; a bitumen Sprayer with a specific chassis/frame number AF-9128-17; and a trailer with a specific registration number ZD 9088 and chassis/frame number BIL 18327.*

Having considered the documentation in the 1st Applicant's bid, it is evident that the Evaluation Committee could not ascertain that the Prime Mover Registration number KBR 110Y and Engine Number 6DAE03897, the Bitumen Sprayer with specific chassis/frame number AF-9128-17; and Trailer Registration No. ZD 9088 and chassis/frame number BIL 18327 are the components of the Articulated Bitumen Distributor proposed by the 1st Applicant noting that the 1st Applicant not only attached logbooks of other

prime movers and trailers as observed hereinabove, but also had no chronological order for its supporting documentation.

The 1st Applicant referred the Board to a letter dated 28th April 2020 that it addressed to a Chief Mechanical & Transport Engineer for Inspection of Bitumen Mixer Mounted on a Trailer ZD9088, with the following details:-

"We wish to request for an Inspection of a Bitumen Mixer mounted on a Trailer ZD9088 and confirm that it's a one complete unit"

In response to this letter, the Ministry of Transport, Infrastructure, Housing and Urban Development, State Department of Infrastructure addressed a letter dated 29th April 2020 to the Managing Director of the 1st Applicant stating as follows:-

"RE: INSPECTION REPORT: BITUMEN DISTRIBUTOR MOUNTED ON A TRAILER ZD9088

Please find attached Inspection Report for the above as per your request "

The Board studied the Mechanical/Visual Inspection Report dated 29th April 2020 referred to by the Regional Mechanical Engineer in the Ministry of Transport, Infrastructure, Housing and Urban Development, State Department of Infrastructure and notes that the said report is with respect

to an Articulated Bitumen Distributor comprising of Trailer Registration No. ZD9088 and Chassis No. BIL18327, Bitumen Distributor Chassis No. AF-9128-17, Prime Mover Registration No. KBR 110Y with Chassis No. MC6-0812 and Engine No. 6DAE03897. The Regional Mechanical Engineer [who signed the letter for the Chief Engineer (Mechanical)], confirms that the Bitumen Distributor mounted on the Trailer is in good working condition.

Further to this, the 1st Applicant referred the Board to a photograph of a complete Articulated Bitumen Distributor found at page 15 of a Monthly Progress Report issued by the Procuring Entity in July 2019 with respect to Contract No. KeNHA/RD/M/2502/2017. At page 12 thereof, it is stated that one of the equipment mobilized by the 1st Applicant in implementation of the aforesaid contract is 1 Bitumen Distributor that is in good working condition.

Lastly, the 1st Applicant made reference to a Vehicle Inspection Report dated 23rd April 2020 which appears to have been obtained from National Transport and Safety Authority's portal (<https://tims.ntsa.go.ke/portal/user/mvi/toDetailE.htm?inspectionVehicle..>) with respect to a Trailer Registration No. ZD9088, Chassis No. BIL 18327 with the owner identified as the 1st Applicant herein. From the said Inspection Report, the Inspector asserts that he inspected the vehicle and found the same to have complied with the provisions of the Traffic Act and

rules made thereunder. Further to this, the date of Inspection is indicated as 10th December 2019.

All these documents corroborate the 1st Applicant's assertions that its Articulated Bitumen Distributor comprise of a Prime Mover KBR110Y, Bitumen Sprayer Chassis No. AF-9128-17 and Trailer Registration ZD 9088. However, it is important to address the question whether the Evaluation Committee had these documentation before it, at the time it evaluated the 1st Applicant's bid. The Board having studied the 1st Applicant's original bid observes that the letters dated 28th April 2020 and 29th April 2020, the Monthly Progress Report issued in July 2019 and the Vehicle Inspection Report obtained on 23rd April 2020 are not in the 1st Applicant's original bid.

These documents, had they been attached in the 1st Applicant's bid before the tender submission deadline, would have assisted the Evaluation Committee in determining the specific Prime Mover and Trailer forming part of the Articulated Bitumen Distributor proposed by the 1st Applicant.

Section 76 of the Act gave the 1st Applicant the right to modify its bid before the tender submission deadline of 7th January 2020. The said provision states as follows:-

"(1) Before the deadline for submitting tenders, a person who submitted a tender may only change or withdraw it in accordance with the following—

- (a) the change or withdrawal shall be in writing; and***
 - (b) the change or withdrawal shall be submitted before the deadline for submitting tenders and in accordance with the procedures for submitting tenders.***
- (2) After the deadline for submitting tenders, a person who submitted a tender shall not change, or offer to change the terms of that tender”***

Hence, after the tender submission deadline of 7th January 2020, the 1st Applicant could not change or offer to change the terms of its tender. This means, the Evaluation Committee would therefore rely on the documentation submitted in the 1st Applicant’s bid by the tender submission deadline of 7th January 2020. It is also worth noting that the 1st Applicant received a prompt response on the working condition of the Articulated Bitumen Distributor within a day after writing to the Chief Engineer (Mechanical) in the Ministry of Transport, Infrastructure, Housing and Urban Development, State Department of Infrastructure. This is clear demonstration that the 1st Applicant could have obtained this information in good time, had it sought for the same before the tender submission deadline and would have attached the letters dated 28th and 29th April 2020 to its original bid.

Nothing could have been easier than for the 1st Applicant to also attach the monthly progress report that was issued in July 2019, which is at least 5 months before the tender submission deadline of 7th January 2020. The Evaluation Committee in this instance had no way of knowing the equipment that would form part of the Articulated Bitumen Distributor proposed by the 1st Applicant, especially in this instance where the 1st Applicant attached several logbooks, some unnamed photographs and other named photographs of equipment that lack registration numbers and in no chronological order. The Evaluation Committee would not engage in a fishing expedition trying to wrap their minds around the components of the Articulated Bitumen Distributor proposed by the 1st Applicant in the subject tender.

Article 227 (1) of the Constitution identifies fairness as one of the principles that guide public procurement processes. Hence, no favourable treatment can be afforded to the 1st Applicant with respect to documentation that was not submitted in its bid by the tender submission deadline of 7th January 2020. Further section 79 (1) of the Act states that:-

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

In reviewing the decision by the Procuring Entity, this Board examines whether an evaluation committee fairly evaluated the tenders before it during an evaluation process and a fair evaluation requires the Evaluation

Committee to determine responsive tenders to be the one that meet the eligibility and mandatory requirements in the Tender Document.

The 1st Applicant in Review No. 38/2020 averred that it was within its own knowledge that the 2nd Applicant did not own a bitumen distributor as required under the Tender Document and therefore the 2nd Applicant's bid ought to have been found technically non-responsive and disqualified from further evaluation. At that time, the 1st Applicant requested the Board to satisfy itself 2nd Applicant had attached ownership documents of the Bitumen Distributor it had proposed to execute the subject tender, because the 1st Applicant knew from the industry that the 2nd Applicant did not own a Bitumen Distributor..

When the same threshold is applied on the 1st Applicant, this Board observes that the 1st Applicant did not provide documentation that would identify and therefore demonstrate that the Trailer Registration No. ZD9088 and Chassis No. BIL18327 and Prime Move Registration No. KBR 110Y with Chassis No. MC6-0812 and Engine No. 6DAE03897 are components of its Articulated Bitumen Distributor, hence failed to satisfy 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.

Accordingly, the Board finds that the Procuring Entity rightfully found the 1st Applicant's bid non-responsive in accordance with 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 and section 79 (1) of the Act.

With respect to the 2nd Applicant, the Board observes that the said bidder received a letter of notification of unsuccessful bid dated 22nd April 2020 with the following details:-

"Reference is made to the above tender in which you participated and our subsequent award letter referenced KeNHA/R5/115/2019 dated 3^d March 2019

Your attention is drawn to the appeal case for the procurement process of the subject tender that was filed before the Public Procurement Administrative Review Board and subsequent ruling that was delivered on 8th April 2020.

Following the implementation of the Review Board's ruling, we wish to inform you that your tender was non-responsive at the technical evaluation stage, due to the following reasons:-

- The logbook provided for the proposed bitumen distributor that was indicated as owned was in the name of Ganatra Plant and Equipment Ltd. As guided by the Review Board, the sale agreement and other supporting***

documents provided for the same, could not be considered as proof of ownership as there was no evidence of payment or settlement of the provided invoice by way of a receipt. Further the documents provided in regards to lease of an additional Bitumen Distributor were found to be an "intent to lease" ad not a lease agreement.

- You did not provide logbooks for the two pavers that you had indicated as owned but instead provided documents demonstrating evidence of shipping and processing of import duty with the Kenya Revenue Authority. Further, the lease agreement provided for an additional paver did not have all the salient details required Pursuant 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, taking into consideration the Review Board's findings, you did not demonstrate ownership or lease of the Paver and Bitumen Distributor..."***

The 2nd Applicant was aggrieved by the Procuring Entity's decision on its bid, hence challenged the said decision through this Request for Review. It is important to reiterate that the 1st Applicant previously challenged the award made to the 2nd Applicant, through Review No. 38/2020. The Board in Review

No. 38/2020 considered each of the parties' cases and upon studying the 2nd Applicant's bid, established that the 2nd Applicant failed to satisfy the criterion under Clause 31.4 of the Qualification and Evaluation Criteria read together with Schedule 8 of Section 7 Qualification Criteria and Schedule 4 of Section 8 of the Tender Document in so far as a Bitumen Distributor is concerned when it held as follows:-

"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:-

<i>DESCRIPTON TYPE</i>	<i>NUMBER OWNED</i>	<i>MODEL, MAKE</i>	<i>REGISTRATION NUMBER</i>
<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 ancilleries' 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 3^d 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 Ancellaries' for the cost of Kshs 318,590/-.***

- ✓ ***Finally, on page 575 of its bid, the 3^d 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 3^d 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 3^d Respondent.

In totality, the Board notes, the 3^d 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'...

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 in Review No. 38/2020 already held that the 2nd Applicant 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' described at page 539 of the 2nd Applicant's original bid.

The Board notes that the documents in the 2nd Applicant's original bid remain unchanged. To the best of the Board's knowledge, its decision dated 8th April 2020 in Review No. 38/2020 has not been challenged in so far as the Board's finding of the 2nd Applicant's failure to satisfy 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 with respect to a Bitumen Distributor, is concerned. Accordingly, the Board's decision dated 8th April 2020 in Review No. 38/2020 remains final and binding to all parties to Review No. 38/2020 in accordance with section 175 (1) of the Act.

The documents attached in the 2nd Applicant's bid as outlined in the Board's decision in Review No. 38/2020 are the same documentation considered during re-evaluation, which the Evaluation Committee found not to have met the requirement 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 in so far as the Bitumen Distributor is concerned.

Accordingly, the Board finds that the Procuring Entity rightfully found the 2nd Applicant's bid non-responsive given its failure to satisfy the requirement of

a Bitumen Distributor 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

The Board observes that the letter of notification dated 22nd April 2020 addressed to the 2nd Applicant contained a second reason why the 2nd Applicant's bid was found non-responsive that is; failure to provide logbooks for the two pavers indicated as owned but instead provided documents demonstrating evidence of shipping and processing of import duty with the Kenya Revenue Authority. Further, that the lease agreement provided for an additional paver did not have all the salient details required.

The Board studied the 2nd Applicant's original bid and notes that at page 53 thereof, the 2nd Applicant provided a list of equipment, including 2 Pavers for execution of the subject tender, outlined in the table below:-

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.	Paver	1	15	2	1	2

In its Schedule 4 on page 65 of its bid, the 2nd Applicant provided details of Pavers that it would avail for execution of the subject works as follows:-

<i>Description, Type, Model, Make</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</i>
<i>Paver</i>	<i>2</i>	<i>Refer to Log Books</i>	<i>Used</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>1 day</i>

Further, at page 499 and 501 of its original bid, the 2nd Applicant provided a duly completed table of its Plant and Equipment for executing the subject tender, including Pavers with the following details:-

Description Type	Number Owned	Model, Make	Registration Number
Paver	2 (Owned)	APOLLO MAKE 600 HYDROSTATIC APOLLO MODEL	A1N4304L18082137/HWHM- 433121 HS CODE NO. 84306100
Paver	1 (Lease)	BITELLI	KHMA424M

The 2nd Applicant also attached the following:-

- *At page 503 of its original bid, a shipping document dated 22nd September 2018 for 1 Apollo Make AP 600 Hydrostatic Sensor Paver, Finisher suitable for Asphalt application complete with Hydraulically extendable screed mechanical bolt on with the Exporter/Consignor identified as Amman India Private Limited and the Importer/Consignee identified as the 2nd Applicant;*

- *At page 505 of its original bid, an Import Declaration Form dated 7th August 2018 for a New Apollo Make AP 600 Hydrostatic Sensor Paver, HS Code 8479100000 Finisher suitable for Asphalt application complete with Hydraulically extendable screed mechanical bolt on extensions, swinging console, rotary grade and slope control sensors and complete with standard accessories, with the Importer identified as the 2nd Applicant and the Seller identified as Amman India Private Limited;*
- *At page 507 of its original bid, an **Invoice No. ZI1018004821** dated 4th September 2018 for a brand new Apollo Make AP 600 Hydrostatic Sensor Paver Finisher suitable for Asphalt application complete with Hydraulically extendable screed and mechanically bolt on extensions, Engine No. HWHM-433121, HS Code 847910.10, with the Exporter/Manufacturer/Beneficiary identified as Ammann Private Limited and Consignee identified as the 2nd Applicant;*
- *At page 509 of its original bid, an **Invoice No. ZI1018004821-A** dated 4th September 2018 for a brand new Apollo Make AP 600 Hydrostatic Sensor Paver Finisher suitable for Asphalt application complete with Hydraulically extendable screed and mechanically bolt on extensions, Engine No. HWHM-433121, HS Code 847910.10, with the Exporter/Manufacturer/Beneficiary identified as Ammann Private Limited and Consignee identified as the 2nd Applicant;*
- *At page 511 of its original bid, an **Invoice No. ZI1018004821** dated 4th September 2018 for a brand new Apollo Make AP 600 Hydrostatic Sensor Paver Finisher suitable for Asphalt application complete with Hydraulically extendable screed and mechanically bolt on extensions,*

Engine No. HWHM-433121, HS Code 847910.10, with the Exporter/Manufacturer/Beneficiary identified as Ammann Private Limited and Consignee identified as the 2nd Applicant;

- *At page 513 of its original bid, a Bill of Lading for 1 AP-600 Tractor Unit without Screed, Ancellaries and Spares, **Invoice No. ZI1018004821 & ZI1018004821-A DTD: 4th September 2018, HS Code 84791000**, with the Shipper identified as Ammann Private Limited and Consignee identified as the 2nd Applicant;*
- *At page 517 of its original bid, an **Invoice No. ZI1018004821** dated 3^d August 2018 for 1 brand new Apollo Make AP 600 Hydrostatic Sensor Paver Finisher suitable for Asphalt application complete with Hydraulically extendable screed and mechanically bolt on extensions, Engine No. HWHM-433121, HS Code 847910.10, with the Exporter/Manufacturer/Beneficiary identified as Ammann Private Limited and Consignee identified as the 2nd Applicant;*
- *At page 519 of its original bid, an **Invoice No. ZI1018004821-A** dated 4th September 2018 for 1 brand new Apollo Make AP 600 Hydrostatic Sensor Paver Finisher suitable for Asphalt application complete with Hydraulically extendable screed and mechanically bolt on extensions, Engine No. HWHM-433121, HS Code 847910.10, with the Exporter/Manufacturer/Beneficiary identified as Ammann Private Limited and Consignee identified as the 2nd Applicant;*
- *At page 521 to page 527 of its original bid, an **Invoice No. ZI1018004821-A** dated 3^d August 2018 for several goods including 1No SunCanopy for Paver, 1No Manual Paver Spare Parts, with the*

Exporter/Manufacturer/Beneficiary identified as Ammann Private Limited and Consignee identified as the 2nd Applicant;

- *At page 531 of its original bid, a document whose details are unclear. However, one can see the description of a New Apollo Model Asphalt Paver Finisher suitable for paving Asphalt and wet mix along with vibratory screed with basic paving width...and hydraulically extendable up to 4.5 metres engine...;*
- *At page 532 of its original bid, Tax Invoice dated 29th October 2015 for WM 6 Has Paver, Engine Serial Number FYHM-413446, Machine Number 201 WH 09 241 issued by Ammann Construction Machinery (Pty) Ltd;*
- *At page 533 of its original bid, description of a Brand New Apollo Model WM-6-HES Asphalt Paver Finisher suitable for Paving Asphalt and Wet mix along with vibratory screed with basic paving width 2.5meters and hydraulically extendable up to 4.5 meters engine-Ashok Leyland, Screed Heating System-Diesel Fired with the consignee identified as the 2nd Applicant from Ammann Construction Machinery South Africa;*
- *At page 534 of its original bid, an Exportation Document specifying a consignment made to the 2nd Applicant by Ammann Construction Machinery South Africa but the description of the consigned goods is not given.*

From the foregoing documentation, the Board observes that the 2nd Applicant attached a Shipping Document, an Import Declaration Form and several Invoice documents for the shipping, importation and consignment of

1 brand new Apollo Make AP 600 Hydrostatic Sensor Paver from Ammann Private Limited to the 2nd Applicant. The Board observes that no documentation was adduced by the 2nd Applicant to demonstrate that ownership has changed from Ammann Private Limited to the 2nd Applicant and that the 2nd Applicant now owns the 1 brand new Apollo Make AP 600 Hydrostatic Sensor Paver. The Board is therefore of the view that the Shipping Document Import Declaration Form and Invoices adduced by the 2nd Applicant fail to demonstrate the 2nd Applicant's ownership of the Apollo Make AP 600 Hydrostatic Sensor Paver as required under the Tender Document.

Further to this, the 2nd Applicant provided documents describing an Apollo Model WM-6-HES Asphalt Paver Finisher, a Tax Invoice and an Exportation Document that does not describe the goods being consigned, but some of the documents appear to have been issued by Amman Construction Machinery South Africa. These documents fail to demonstrate that ownership of the Apollo Model WM-6-HES Asphalt Paver Finisher, has since been transferred to the 2nd Applicant and that the 2nd Applicant now owns the said equipment. The Board is therefore of the view that the documents describing an Apollo Model WM-6-HES Asphalt Paver Finisher, the Tax Invoice and Exportation Document (which does not describe the goods being consigned), fail to demonstrate the 2nd Applicant's ownership of the Apollo Model WM-6-HES Asphalt Paver Finisher as required under the Tender Document

The 2nd Applicant further provided a table at page 535 of its original bid with the following details:-

Description Type	Number Owned	Model, Make	Registration Number
Paver	1 (lease)	Bitelli	KHMA424M

In addition to this, the 2nd Applicant attached the following:-

- *At page 537 of its original bid, a Lease Agreement for Asphalt Paver dated 19th December 2019 between the 2nd Applicant and one Paul N. Ngari, wherein Mr. Paul N. Ngari confirms that his firm will provide asphalt paver Registration No. KHMA424M and personnel to the 2nd Applicant for the performance of Periodic Maintenance of Thika-Garissa [Lot 1-Makongeni-Embu Junction (Kanyonyo)] (A3) Road; under commercial hire conditions as agreed at the rate of Kshs. 45,000/- per day and that operators allowances will be paid by the lessee (i.e. the 2nd Applicant as follows:-*
 - ✓ *Paver Operator at rate of Kshs 4,000/- per day;*
 - ✓ *Paver screw man at rate of Kshs. 3,000/- per day.*
- *At page 538 of its original bid, a Log book of a Roller/Grader/Crane/Combine Harvester, Bitelli Make, Model No. BB650, with Registration No. KHMA424M registered in the name of Paul Nduiga Ngari on 27th June 2018.*

It is worth noting that bidders had leeway to provide leasing arrangements with respect to the equipment that would be used to execute the subject tender and that such leasing arrangement must be supported by ownership documents by the owner of the leased equipment. The 2nd Applicant provided a Lease Agreement dated 19th December 2019 for the lease of an Asphalt Paver Registration No. KHMA424M, from Mr. Paul Nduiga Ngari and further attached the logbook evidencing registration of the aforementioned equipment in the name of Mr. Paul Nduiga Ngari.

The Schedule for Plant and Equipment at page 53 of the Tender Document required bidders to provide 1 Paver as the Minimum Number required for the Contract Execution. This means, so long as 1 of the Pavers proposed by a bidder is owned and there is a logbook to support this ownership this criterion would be satisfied. Alternatively, if the Paver is hired and there is a lease agreement together with ownership documents from the owner for verification, these documents would be sufficient to satisfy this criterion.

According to the Evaluation Report dated 20th April 2020, the Evaluation Committee observed that the lease agreement provided by the 2nd Applicant with respect to a Paver did not have the "salient details required as per the bidding document". However, the Tender Document required bidders to provide a lease agreement between the lessor and the lessee together with ownership documents of the owner (i.e. the logbook) for verification, if a bidder proposed an equipment that would be hired.

Hence, the Lease Agreement dated 19th December 2019 for the lease of an Asphalt Paver Registration No. KHMA424M, from Mr. Paul Nduiga Ngari supported by a logbook evidencing registration of the aforementioned equipment in the name of Mr. Paul Nduiga Ngari, met the threshold of Minimum Number of equipment, i.e. a Paver required for the Contract Execution, hence ought not to have been one of the reasons why the 2nd Applicant's bid was found non-responsive.

At this juncture, the Board observes that the 2nd Applicant submitted that it ought to have proceeded to Financial Evaluation. According to the 2nd Applicant, since the Procuring Entity was of the view that the 2nd Applicant only failed to satisfy the requirement of Bitumen Distributor, then the Procuring Entity ought to have denied 2nd Applicant the marks/scores allocated to the criterion of Bitumen Distributor, instead of disqualifying the 2nd Applicant's bid. In the 2nd Applicant's view, even if the Procuring Entity denies it 15 marks with respect to Bitumen Distributor, it would still meet the 75% threshold required to proceed to Financial Evaluation.

The 1st Respondent on the other hand affirms that the Tender Document provided a minimum technical score to be 75% and that this was hinged on bidders satisfying the minimum mandatory requirements at the Technical Evaluation Stage.

Having considered parties' submissions, it is important to note that page 52 and 53 of the Tender Document listed the Main Equipment required by the Procuring Entity to execute the subject tender as; **Paver, Bitumen Distributor, Pneumatic Roller, Drum Roller and Tippers**. In addition to this, the Procuring Entity's Tender Document specifies that a total of 40 marks shall be assigned to the mandatory minimum equipment as tabulated below:-

Main Scope of Works of this Tender	Main Equipment	Quantity	Marks (Score)	
			Owned	Hired
Bituminous Works (AC/DBM/Surfacing/Overlay)	Paver	1	15	3.75
	Bitumen Distributor	1	15	3.75
	Pneumatic Roller	1	3	0.75
	Drum Roller (Minimum 10 Tons)	1	3	0.75
	Tippers (Cumulative Capacity 28 Tons)	2	4	1

According to the above table, the five equipment identified therein comprise of the Main Equipment required to execute the Bituminous Works in the subject tender. In essence, without any of the minimum mandatory equipment listed above, a bidder would not meet the needs of the Procuring Entity, in so far as Main Equipment for Bituminous Works is concerned.

For example, it would serve no purpose for a bidder to provide more than 1 Paver, more than 1 Bitumen Distributor, more than 1 Pneumatic Roller, more than one Drum Roller but fail to provide at least 2 Tippers and after achieving an overall score of 75% at the Technical Evaluation Stage, to proceed to Financial Evaluation without having the minimum number of 2 Tippers required to execute the subject tender.

It would also serve no purpose for a bidder to attain and/or exceed the minimum number of Paver, Pneumatic Roller, Drum Roller and Tippers but fail to demonstrate ownership or leasing arrangement of a Bitumen Distributor, achieve the minimum technical score of 75% at the Technical Evaluation Stage, then proceed to Financial Evaluation without evidence of a Bitumen Distributor required to execute the subject tender.

The Board studied the Tender Document and notes that Technical Evaluation of bids in the subject tender also comprised of other parameters such as Financial Capacity, Experience, Key Personnel, Plant and Equipment, Program of Works & Work Methodology in addition to the parameter of Major Items of Construction Plant and Equipment outlined at page 52 and 53 of the Tender Document.

Assuming a bidder gets an overall score of 60% under Financial Capacity, Experience, Key Personnel, Plant and Equipment, Program of Works & Work Methodology, then provides a Bitumen Distributor as required, which carries

a maximum score of 15 marks, the total score for such a bidder would be 75% before the other four (4) minimum mandatory equipment are considered. Such a bidder would not be responsive if it fails to provide the other mandatory minimum equipment required at pages 52 and 53 of the Tender Document.

In **Judicial Review Application No. 90 of 2018, Republic v Public Procurement Administrative Review Board & 3 others Ex-Parte Saracen Media Limited [2018] eKLR**, the court while considering responsiveness of bids held as follows:-

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

compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions.

In **Civil Appeal No. 145 of 2011, Kenya Pipeline Company Limited v Hyosung Ebara Company Limited & 2 others [2012] eKLR**, the Court of Appeal held that:-

"Further by Reg. 48 an evaluation committee is required to reject all tenders which are not responsive as stipulated in S.64 [that is section 79 (1) of the 2015 Act] of the Act – that is to say, to reject tenders which do not conform with the mandatory requirements in the tender documents..."
[Emphasis by the Board]

Having considered the finding in the above case, the Board observes that one of the tender conditions in the subject tender that all bidders were required to comply with as a minimum mandatory requirement is proof of ownership or lease arrangements in the form of logbooks and lease agreement for a core equipment known as a Bitumen Distributor as listed on page 52 and 53 of the Tender Document.

In considering the import of section 80 (3) of the Act, the same must be read together with sub-section (2) thereof and section 79 (1) of the Act

(already reproduced hereinbefore). Section 80 (2) and (3) of the Act provide as follows:-

"80 (1)

(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents...

(3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)

(a) the criteria shall, to the extent possible, be objective and quantifiable;

(b) each criterion shall be expressed so that is is applied, in accordance with the procedures, taking into consideration price, quality, time and service for the purpose of evaluation"

An Evaluation Committee has the obligation to apply the procedures and criteria in the Tender Document in addition to applying a criteria that is objective and quantifiable. Further, section 79 (1) of the Act deems a responsive bid to be the one that meets the eligibility and mandatory requirements of a tender. Hence, in addition to achieving a quantifiable score of 75%, the Evaluation Committee has no option but to apply the criteria in the Tender Document, which in this instance, to consider bids that meet

minimum mandatory requirements to the responsive bids as required by section 79 (1) of the Act.

Responsiveness of a Bid at the Technical Evaluation Stage in the Board's view is concerned about the technical capacity of a bidder to execute a tender, in this instance, by providing the equipment necessary for road construction which requires a specialized type of equipment and personnel with the technical expertise to commandeer such equipment during implementation of the subject tender, in addition to satisfying the minimum requirements in the other parameters of Technical Evaluation. In as much as a bidder strives to achieve a higher technical score against other bidders, the minimum mandatory requirements on each parameter of Technical Evaluation ought to have been satisfied by all bidders to render a bid responsive.

The 2nd Applicant failed to prove ownership or lease arrangement for a minimum mandatory equipment called a Bitumen Distributor and this rendered its bid non-responsive and therefore ineligible to proceed to Financial Evaluation.

In conclusion, the Board finds that the Procuring Entity rightfully found the 1st Applicant's bid and the 2nd Applicant's bid non-responsive in accordance with 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, read together with Section 79 (1) of the Act, in so far as the equipment of Bitumen Distributor is concerned, following a re-evaluation process ordered by the Board in its decision rendered on 8th April 2020 in PPARB Application No. 38/2020, M/s Roben Aberdare (K) Limited v. The Accounting Officer, Kenya National Highways Authority & 2 Others.

In totality, the Consolidated Request for Review is hereby dismissed and the Board proceeds to make 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, the Board makes the following orders in the Request for Review:-

- 1. The Request for Review Application No. 58 of 2020 and Application No. 60 of 2020 (Consolidated) filed by the 1st Applicant and the 2nd Applicant respectively with respect to Tender No. KeNHA/R5/115/2019 for Periodic Maintenance of Thika-Garissa/Lot 1-Makongeni-Embu Junction (Kanyonyo)/(A3) Road, be and is hereby dismissed.**

2. Each party shall bear its own costs in the Request for Review.

Dated at Nairobi this 26th day of May 2020

CHAIRPERSON

SECRETARY

PPARB

PPARB