

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 11/2020 OF 21<sup>ST</sup> JANUARY 2020**

**BETWEEN**

**RAHASS ENTERPRISE &**

**CONTRACTORS COMPANY LIMITED.....APPLICANT**

**AND**

**THE ACCOUNTING OFFICER,**

**COUNTY GOVERNMENT OF TURKANA –**

**MINISTRY OF INFRASTRUCTURE,**

**TRANSPORT & PUBLIC WORKS .....1<sup>ST</sup> RESPONDENT**

**AND**

**COUNTY GOVERNMENT OF TURKANA –**

**MINISTRY OF INFRASTRUCTURE,**

**TRANSPORT & PUBLIC WORKS .....2<sup>ND</sup> RESPONDENT**

Review against the decision of the County Government of Turkana –  
Ministry of Infrastructure, Transport and Public Works with respect to  
Tender No. TCG/MITPW/008/2019-2020 for Routine Maintenance of  
Lokichoggio-Lochor Aikope Road

**BOARD MEMBERS**

- |                     |              |
|---------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mr. Steven Oundo | -Member      |

3. Ms. Phyllis Chepkemboi -Member
4. Ms. Rahab Chacha -Member

### **IN ATTENDANCE**

1. Mr. Philip Okumu -Holding brief for Secretary
2. Ms. Maryanne Karanja -Secretariat

### **PRESENT BY INVITATION**

#### **APPLICANT**

#### **-JUBILANT CLEANING SERVICES LIMITED**

1. Mr. Nathan Karugu Mbugua -Advocate, Karugu, Mbugua & Company Advocates
2. Mr. Ibrahim Adan

#### **1<sup>ST</sup> AND 2<sup>ND</sup> RESPONDENTS**

#### **-COUNTY GOVERNMENT OF TURKANA**

1. Mr. John Ariko -County Chief Officer
2. Mr. Zoaloe Shakespear -S.P.O
3. Mr. Lochodo E. Lewis -Senior Accountant

#### **INTERESTED PARTY**

1. Mr Tom Makumu for Mr Okumu -Wawira Ogode & Owino Advocates

## **BACKGROUND TO THE DECISION**

### **The Bidding Process**

The County Government of Turkana (hereinafter referred to as "the Procuring Entity") advertised Tender No. TCG/MITPW/008/2019-2020 for Routine Maintenance of Lokichoggio-Lochor Aikope Road (hereinafter referred to as "the subject tender"), in The Standard Newspaper on 6<sup>th</sup> November 2019. The tender document was uploaded in the Turkana County Website ([www.turkana.go.ke](http://www.turkana.go.ke)), Public Procurement and Information portal (PIPP) [www.tenders.go.ke](http://www.tenders.go.ke), Integrated Financial Management Information System (IFMIS) supplier Portal and also posted on the Turkana County Supply Chain Management Service Notice Board.

All interested candidates were required to submit their tender documents through the E-Procurement Module in the Integrated Financial Management Information System (IFMIS) platform in the IFMIS Supplier Portal.

### **Bid Submission Deadline and Opening of bids**

A total of seven (7) bidders' submitted bids and the same were opened on 20<sup>th</sup> November 2019 which were recorded as follows:

<b>Item</b>	<b>Bidder(s)</b>
1.	M/s Amstrad Engineering Company Limited
2.	M/s Akiton Company Limited
3.	M/s Dhurres Construction

<b>Item</b>	<b>Bidder(s)</b>
	Company Limited
4.	M/s Nalita General Construction and Supplies Company Limited
5.	M/s Octopub Investment Limited
6.	M/s Rahass Enterprise and Contractors Company Limited
7.	M/s Tebesi Investments Limited

## **Evaluation of Bids**

Evaluation commenced on 12<sup>th</sup> November 2019 and the Evaluation Committee conducted evaluation of bids in the following three stages:-

- Preliminary Evaluation
- Technical Evaluation;
- Financial Evaluation.

### **1. Preliminary Evaluation**

At this stage of evaluation, bids were evaluated against the mandatory requirements, set out in evaluation criteria of the Tender document, to assess their compliance.

At the conclusion of the evaluation process, the following bidders were found non-responsive to the mandatory requirements stated in the Tender Documents: B1, B2, B3, B4 and B5. Bidders B6 and B7 were found responsive and therefore proceeded for technical evaluation.

## 2. Technical Evaluation

At this stage of evaluation, Bidders B6 and B7 were considered for technical evaluation of their bid documents based on the evaluation criteria set out in the Tender Document. This was done on an item-by-item basis. According to the technical evaluation criteria, only bidders who scored 50 marks would proceed to financial evaluation.

At the conclusion of technical evaluation, Bidder B6 scored above 50 and therefore proceeded to Financial Evaluation (for Scorer 1 & 2)

Bidder B7 also scored above 50 and proceeded for Financial Evaluation.

## 3. Financial Evaluation

Two (2) bids qualified for financial evaluation.

At this stage of evaluation, the firm quoting the lowest bid after surpassing the minimum technical score would be awarded the contract.

Determination of total price (inclusive of all taxes and discounts)

<b>OFFICIAL ENGINEER'S ESTIMATE</b>	Kshs. 8,769,600.00
-------------------------------------	--------------------

The results were as follows: -

<b>BIDDER NO.</b>	<b>QUOTE NO:</b>	<b>COMPANY NAME</b>	<b>BID AMOUNT</b>
B6	762471	RAHASS ENTERPRISE & CONTRACTORS CO. LIMITED	7,799,840.00
B7	763323	TEBESI INVESTMENTS LIMITED	8,117,680.00

## **Due Diligence**

The Evaluation Committee conducted due-diligence on the AGPO certificates for both Bidder No. 6 (M/s Rahass Enterprise & Contractors Company Limited) and Bidder No. 7 (M/s Tebesi Investments Limited).

The team first checked for the AGPO certificate validity for Bidder No. 6 in AGPO webpage and no records could be found. The team went ahead and checked the AGPO certificate of Bidder No. 6 in the PPRA list as at 17<sup>th</sup> September, 2019 and its certificate could still not be verified.

Moreover, the evaluation team conducted a search for Bidder No. 7's AGPO certificate in the AGPO webpage, which was verified and found to be approved by the National Treasury.

The evaluation team therefore concluded that Bidder No. 6 had an invalid AGPO certificate and Bidder No. 7 had a valid AGPO certificate. The Evaluation Committee therefore agreed to recommend Bidder No. 7 (M/s Tebesi Investments Limited) for consideration of award.

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

In view of the evaluation process, the Evaluation Committee recommended award of the subject tender to **M/s Tebesi Investments Limited** at a Bid Sum of **Kshs. 8,117,680 (Eight million one hundred and seventeen thousand six hundred and twenty eight shillings) only inclusive of all taxes.**

## **Professional Opinion**

The Head of Procurement reviewed the Evaluation Report and concurred with the recommendation of award made by the Evaluation Committee which recommendation was approved by the Procuring Entity's Accounting Officer.

## **THE REQUEST FOR REVIEW**

M/s Rahass Enterprise & Contractors Company Limited (hereinafter referred to as "the Applicant"), lodged a Request for Review dated 20<sup>th</sup> January 2020 and filed on 21<sup>st</sup> January 2020 (hereinafter referred to as "the Request for Review") together with a Supporting Affidavit sworn on 20<sup>th</sup> January 2020 and filed on 21<sup>st</sup> January 2020 (hereinafter referred to as "the Applicant's Affidavit").

In response, the County Government of Turkana (hereinafter referred to as "the Procuring Entity") filed a Response to the Request for Review dated 31<sup>st</sup> January 2020 and filed on 5<sup>th</sup> February 2020 (hereinafter referred to as "the Procuring Entity's Response").

The Applicant sought for the following orders in the Request for Review:-

- i. An order annulling the award made in the subject tender;***
- ii. An order for re-evaluation of the Applicant's bids and all other bids for the subject tender and award be made thereof;***

***iii. An order awarding costs of the application to the Applicant;***

***iv. Any other orders that the Honourable Board may deem just and fit.***

During the hearing, the Applicant was represented by Mr. Mbugua on behalf of the firm of Karugu Mbugua & Company Advocates whereas the Procuring Entity was represented by its County Chief Officer, Mr. Ariko.

## **PARTIES' SUBMISSIONS**

### **The Applicant's Submissions**

In his submissions, Counsel for the Applicant, Mr Mbugua, fully relied on the Request for Review, the Applicant's Affidavit and supporting documentation thereto.

Mr. Mbugua submitted that the Procuring Entity breached section 80 (2) of the Act as read together with the evaluation criteria in the Tender Document by failing to consider the Applicant's bid as submitted on IFMIS in totality. It was also the Applicant's submission that the Procuring Entity breached section 87 of the Act by failing to give sufficient reasons as to why the Applicant's bid was found unsuccessful.

Counsel submitted that on 7<sup>th</sup> January 2020, the Applicant received a notification from IFMIS to the effect that the Applicant's bid was unsuccessful. Counsel submitted that upon logging into IFMIS, the



Applicant found that the Procuring Entity awarded the Applicant only 47 marks at the technical evaluation stage despite having attached all the documentation required under the Tender Document.

Counsel contended that the Procuring Entity never supplied the Applicant with any further information as to why it only scored 47 marks which prompted the Applicant to file this Request for Review and seek for the orders therein. Counsel therefore urged the Board to consider the Applicant's Request for Review and grant the orders as sought by the Applicant.

### **The 1<sup>st</sup> & 2<sup>nd</sup> Respondents'/Procuring Entity's Submissions**

In his submissions, the Procuring Entity's County Chief Officer, Mr. Ariko, fully relied on the Procuring Entity's Response and supporting documentation thereto.

Mr. Ariko submitted that contrary to the Applicant's submissions, the Procuring Entity did not breach section 80 (2) of the Act and followed the procedure as outlined in the evaluation criteria in the Tender Document and in accordance with the IFMIS process.

Mr. Ariko contended that the Procuring Entity did not breach section 87 (3) of the Act and submitted that under the current procurement system, once a prospective contractor failed to proceed in a given stage, the system automatically sends a message to the contractor, which does

not include reasons why a particular bid was unsuccessful. However, in this instance, the Accounting Officer further issued notifications to the successful and the unsuccessful bidders with reasons, which the Procuring Entity has duly submitted before the Board. Mr. Ariko submitted that the letter of notification issued to the Applicant was dated 9<sup>th</sup> January 2020.

Mr Ariko submitted that letters of notification were sent to bidder's postal addresses which were posted by the Procuring Entity in one parcel. However, in response to an enquiry from the Board, Mr Ariko submitted that the Procuring Entity did not have proof of postage for these letters of notification.

Mr Ariko further submitted that the Procuring Entity's Evaluation Committee conducted due diligence to verify the authenticity of the AGPO certificates of two companies. He confirmed that the Procuring Entity conducted a search to verify the Applicant's AGPO certificate on both the AGPO website and the PPRA website and the Procuring Entity was unable to verify the Applicant's AGPO certificate.

In response to an enquiry from the Board, Mr. Ariko submitted that the Evaluation Committee did not conduct a due diligence at the preliminary evaluation level. However, Mr Ariko submitted that at technical evaluation, there were three evaluators, and one of the evaluators did not score the Applicant as in his view, the Applicant's AGPO certificate was not authentic.

Further, Mr Ariko submitted that due diligence was conducted after financial evaluation and it was evident from the minutes of evaluation that the Applicant's bid price was evaluated at financial evaluation and the Applicant was found to be the lowest bidder.

However, upon due diligence of the Applicant's AGPO certificate, Mr Ariko submitted that no record could be found on the PPRA list as at 17<sup>th</sup> September 2019 and therefore the Evaluation Committee concluded that the Applicant had an invalid AGPO certificate. The Evaluation Committee then proceeded to conduct due diligence on the second lowest bidder.

In response to an enquiry from the Board, Mr Ariko submitted that the notification letter sent to the successful bidder was dated 7<sup>th</sup> January 2020 whereas the notification letters sent to unsuccessful bidders, including the Applicant, were dated 9<sup>th</sup> January 2020, and in view of section 87 of the Act, Mr. Ariko conceded that indeed the Procuring Entity should have prepared and issued notification letters to both the successful and unsuccessful bidders on the same date, which was an oversight on the part of the Procuring Entity.

However, Mr Ariko contended that in this case, the Applicant knew the reasons why its bid was unsuccessful as it kept in contact with the Procuring Entity and was provided with all the necessary information. However, he conceded that this information was not provided to the Applicant in writing and therefore there was no evidence of the same.

Further, Mr. Ariko submitted that the Procuring Entity entered into a contract with the successful bidder on 21<sup>st</sup> January 2020. In response to an enquiry from the Board, Mr. Ariko submitted that the law requires that a contract shall not be signed for the first fourteen days after notification of an intention to enter into a contract and therefore if the successful bidder was notified on 8<sup>th</sup> January 2020, Mr. Ariko conceded that the Procuring Entity ought to have entered and signed the contract on 22<sup>nd</sup> and not 21<sup>st</sup> January 2020.

Mr. Ariko pointed out to the Board that during due diligence, the Procuring Entity's Evaluation Committee found that the Applicant did not attach Identification Documents which was a requirement under the Tender Document if a bidder was applying under the AGPO category. In his submissions, Mr. Ariko conceded that these documents should have been confirmed at the preliminary evaluation stage; under eligibility requirements and that this was an oversight by the Procuring Entity. Mr. Ariko further conceded that he only realised this oversight when the Applicant's Request for Review was filed and served upon the Procuring Entity.

In conclusion Mr Ariko urged the Board to dismiss the Request for Review and allow the procurement process to proceed accordingly.

## **The Applicant's Rejoinder**

In a rejoinder, Mr Mbugua contended that the subject procurement process was a fraud. He argued that based on the Procuring Entity's submissions, the Board can clearly deduce that the Procuring Entity is unaware at what point the Applicant's bid was disqualified from further evaluation but there was nevertheless an admission that the Applicant's bid reached the financial evaluation stage.

Counsel invited the Board to observe that due diligence under section 83 of the Act can only be carried out on the lowest evaluated responsive bidder and not two bidders as submitted by the Procuring Entity which was in breach of the said section of the Act.

He submitted that contrary to the Procuring Entity's submission, the Applicant's AGPO certificate could be verified on the PPRA website from the AGPO list of companies as at 10<sup>th</sup> November 2017, as it was issued on 19<sup>th</sup> February 2016 and was valid for a period of five years

Mr Mbugua submitted that also contrary to the Procuring Entity's submission, the Applicant duly provided its Identification Documents for Persons with Disability on page 24, 25 and 28 of its bid. The Applicant further provided a letter from the Council for Persons with Disability which confirmed that the Directors of the Applicant, one Mr Hassan Nur was a person living with disability.

Counsel reiterated that the Applicant had not yet received a letter of notification of the outcome of its bid from the Procuring Entity which was one of the key reasons why the Applicant found it necessary to approach the Board.

Finally, Mr Mbugua urged the Board to allow the Request for Review and grant the prayers as requested therein.

### **BOARD'S DECISION**

The Board has considered each of the parties' cases, the documents before it, including confidential documents submitted to it pursuant to section 67 (3) (e) of the Public Procurement and Asset Disposal Act (hereinafter referred to as "the Act") and the oral submissions by all parties to the Request for Review.

The issues for determination are as follows:-

- I. Whether the contract dated 21<sup>st</sup> January 2020 with respect to the subject tender signed between the Procuring Entity and M/s Tebesi Investments Limited ousts the jurisdiction of this Board.***

Depending on the outcome of the above issue: -

***II. Whether the Procuring Entity issued the Applicant with a letter of notification of unsuccessful bid in accordance with section 87 (3) of the Act;***

***III. Whether the Procuring Entity evaluated the Applicant's bid at Preliminary Evaluation in accordance with section 80(2) of the Act as read together with Article 227 (1) of the Constitution with respect to the following mandatory requirement in the Tender Document: -***

*a. MR8: Copies of National ID or passport for all directors;  
Certified copy of form CR12*

***IV. Whether the Procuring Entity conducted due diligence in accordance with section 83 of the Act ;***

***V. Whether the Applicant is entitled to the orders sought in the Request for Review***

The Board will now proceed to determine the issues framed for determination as follows:

It is trite law that courts and decision making bodies can only act in cases where they have jurisdiction. In the Court of Appeal case of **The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) KLR 1** it was stated that jurisdiction is everything and without

it, a court or any *other decision making body* has no power to make one more step the moment it holds that it has no jurisdiction.

The Supreme Court in the case of **Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Ltd and 2 Others, Civil Application No. 2 of 2011** held that:

***"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with Counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings."***

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

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



Accordingly, once a jurisdictional issue is before a court or a decision making body, it must be addressed at the earliest opportune moment and it therefore behooves upon this Board to determine whether it has the jurisdiction to entertain the substantive Request for Review.

The jurisdiction of this Board flows from section 167 of the Act which states as follows: -

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

***(2).....;***

***(3).....;***

***(4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)—***

***(a) the choice of a procurement method;***

***(b) a termination of a procurement or asset disposal proceedings in accordance with section 62 of this Act;  
and***

***(c) where a contract is signed in accordance with section 135 of this Act.***

Section 167 (4) (c) of the Act expressly stipulates that the jurisdiction of this Board is ousted only if a contract is signed in accordance with section 135 (3) of the Act.

The Board studied section 135 (3) of the Act which reads as follows: -

***"The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period."***

This means that a written contract shall be entered into within the period specified in the notification but not before the lapse of fourteen days following the giving of a notification of award and within the tender validity period.

Further, section 135 (2) of the Act clearly stipulates: -

***"An accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications that emanate from the procurement proceedings."*** [Emphasis by the Board]

Accordingly, a contract entered into between a procuring entity and a successful bidder in any procurement process ought to be reduced into writing.

The Board notes that the notification referred to under section 135 (3) of the Act is issued pursuant to section 87 of the Act which states as follows: -

- "(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.**
- (2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.**
- (3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.**

**(4) For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security.” [Emphasis by Board]**

Accordingly, a procuring entity must notify, in writing, the bidder who submitted the successful tender, that its tender was successful before the expiry of the tender validity period.

It is important to note that once a procuring entity issues a letter of notification of award to a successful bidder under a subject tender, this notification marks the beginning of the fourteen (14) day stand still period within which a procuring entity and a successful bidder are precluded from entering into a written contract pursuant to the right to administrative review afforded to an aggrieved candidate or tenderer under section 167 (1) of the Act.

This is in line with the public procurement principles as espoused under Article 227 (1) of the Constitution which states that

***“When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.” [Emphasis by the Board]***

Hence, a public procurement system must be seen to be fair and equitable to all bidders, including unsuccessful bidders, by protecting their right to administrative review of public procurement proceedings.

In the instant case, the Procuring Entity submitted that it entered into a contract with the successful bidder on 21<sup>st</sup> January 2020, this being fourteen days after notification of award to the said bidder on 7<sup>th</sup> January 2020. However, the Procuring Entity submitted that on the same date it entered into a contract with the successful bidder, it received a letter from the Board Secretariat, informing it of the existence of the Applicant's Request for Review. It was therefore the Procuring Entity's submission that in view of this contract, the Board had no jurisdiction in the subject procurement process in accordance with section 167 (4) (c) of the Act.

The Board examined the Procuring Entity's confidential file submitted to it in accordance with section 67 (3) (e) of the Act and observes that the Procuring Entity issued a letter of notification of award to the successful bidder, that is, M/s Tebesi Investments Limited, on 7<sup>th</sup> January 2020, which read as follows: -

***"This is to inform you that your Tender No. TCG/MITPW/008/2019-2020 for Lokichoggio-Lochor Aikope Road of Quotation No. 763323 and Negotiation No. 748757-2019-2020 was successful during the County Government Tender Evaluation Committee meeting and awarded you the Road Works at a total sum of Kshs***

***8,117,680.00 (Eight million One Hundred and Seventeen Thousand Six Hundred and Eighty Shillings only.)***

***This notification of award shall lead to a conclusion of a contract between the parties upon the expiry of 14 days from the date of this letter. Confirmation will be through the signing of the contract agreement between you and the Employer. This is not an instruction to commence; written instructions on the same will be given to you within seven days of signing the contract. You are therefore required to give a formal written unconditional acceptance of this offer within 7 days from the date of this letter....*** [Emphasis by the Board]

Accordingly, the Procuring Entity notified the successful bidder that a contract would be signed between the parties upon expiry of fourteen days from the date of the letter of notification of award, that is, 7<sup>th</sup> January 2020.

The Board further examined the Procuring Entity's confidential file and observes that a contract was signed between the Procuring Entity and the successful bidder on 21<sup>st</sup> January 2020, that is, on the fourteenth day from the date of the notification of award to the successful bidder on 7<sup>th</sup> January 2020 and not fourteen days after.

As explained hereinbefore, it is the Board's view that the Procuring Entity ought to have waited for the 14-day 'standstill' period to lapse before entering into a contractual relationship with the successful bidder in order to allow any aggrieved bidders, including the Applicant herein, to challenge the award and seek redress if need be.

It is worth noting that, the Applicant herein lodged its Request for Review on 21<sup>st</sup> January 2020, on the fourteenth day from the date of notification of award to the successful bidder and therefore within the standstill period as provided for under section 135 (3) of the Act.

Accordingly, the Board finds that the contract dated 21<sup>st</sup> January 2020 with respect to the subject tender signed between the Procuring Entity and M/s Tebesi Investments Limited was entered into before the lapse of the fourteen day period, contrary to section 135 (3) of the Act and is therefore null and void.

The Board therefore finds it has jurisdiction to hear the Request for Review and shall now proceed to address the issues raised in the substantive Request for Review.

A brief background to the Request for Review is that the Procuring Entity advertised the subject tender on 6<sup>th</sup> November 2019 and invited interested and eligible bidders to submit bids in response to the subject tender.

By the bid submission deadline of 20<sup>th</sup> November 2019, the Procuring Entity received a total of seven (7) bids which were submitted by bidders through the e-procurement module on the Integrated Financial Management Information System (IFMIS).

At the conclusion of the evaluation process, the Procuring Entity's Evaluation Committee recommended award of the tender to M/s Tebesi Investments Limited for having the lowest evaluated responsive bid which was approved by the Procuring Entity's Accounting Officer, having been reviewed by the Head of Procurement function. The successful bidder including all unsuccessful bidders, were duly notified of the outcome of their bids.

The Applicant submitted that on 7<sup>th</sup> January 2020 it received a notification on the IFMIS system which read as follows with the subject heading as "*Fwd: FYI: Award Decisions: RFQ 748757 (Open Tender – National – 748757 – 2019/2020)*" and a separate title as "*Open Tender– National -748757 – 2019/2020*". The said notification states as follows: -

***"Negotiation Preview Not specified***

***Negotiation Open October 26 2019 12:26 pm***

***Negotiation Close November 11 2019 05:00 pm***

***Supplier RAHASS ENTERPRISE AND CONTRACTORS COMPANY LIMITED***

***Supplier site***



***Award date December 30, 2019 10:31 pm***

***Your Quote Number 762471”***

The Applicant submitted that once it received the above notification it logged into the IFMIS portal and learnt that its bid was unsuccessful despite having met all the requirements under the subject tender.

The Applicant contended that the Procuring Entity failed to supply the Applicant with sufficient reasons why its bid was unsuccessful in the notification dated 7<sup>th</sup> January 2020 which prompted it to move the Board through this Request for Review.

In response, the Procuring Entity submitted that it conducted the subject procurement process through IFMIS in compliance with Executive Order No. 2 of 2018. According to the Procuring Entity, once a bidder's bid was disqualified at a given stage of evaluation, IFMIS automatically sends a notification to the said bidder. In this regard therefore, the notification sent to the Applicant dated 7<sup>th</sup> January 2020 was issued via IFMIS once the Applicant's bid was disqualified from further evaluation.

However, it was the Procuring Entity's submission that once the evaluation process was concluded, the Accounting Officer would issue letters of notification of the outcome of bids to both the successful

bidder and all unsuccessful bidders under the subject tender in accordance with section 87 (3) of the Act.

Moreover, the Procuring Entity submitted that all letters of notification of unsuccessful bids were sent via post to the respective bidders, including the Applicant herein.

In its determination of this issue, the Board studied section 87 of the Act, cited hereinbefore, which provides that a procuring entity must notify, in writing, the bidder who submitted the successful tender, that its tender was successful before the expiry of the tender validity period. This section further requires that in the same breath, a Procuring Entity must also notify other bidders who participated in the subject tender that their respective bids were not successful.

Moreover, a procuring entity's notification of unsuccessful bid to a bidder should disclose the reasons why its bid was unsuccessful and further disclose the successful bidder in the procurement process therein, who is determined at the conclusion of an evaluation process.

It is important to note that the requirement to disclose the successful bidder of a subject tender as stipulated under section 87 (3) of the Act, affords unsuccessful bidders the opportunity to establish if the successful bidder satisfied the eligibility criteria as set out in the Tender

Document, that is, whether the successful bidder was qualified for award of the tender and challenge the same if need be.

Section 87 (3) of the Act further imposes a mandatory obligation on a procuring entity to outline the reasons why a bidder's bid was unsuccessful. These reasons ought to be specific and not general, such that if a bidder is found unsuccessful at Due Diligence, the letter of notification ought to specifically state whether there was a failure to confirm and verify the documents submitted by a bidder in support of its eligibility and qualifications under the subject tender and the reasons thereof.

The Board is cognisant that providing a bidder with reasons why its bid was found unsuccessful is an issue that goes to the root of the rules of natural justice, one of them being, "the right to a fair hearing" including the right to have adequate time and facilities to prepare a defence as stated under Article 50 (c) of the Constitution.

A bidder cannot adequately exercise this right when specific reasons are not afforded to it by a procuring entity. In contrast, providing a bidder with specific reasons why its bid was unsuccessful enables such bidder to have clear grounds that form its request for review lodged before this Board, if it wishes to do so.

In the instant case, the procedure to be followed in the notification of award was stipulated under Clause 36 of Award of Contract under Section 4 Instructions to Bidders on page 50 of the Tender Document which reads as follows: -

***"36.1 Prior to expiration of the period of bid validity prescribed by the Employer, the Employer will notify the successful bidder in writing or by cable confirmed by registered letter that its bid has been accepted. This letter, (hereinafter and in the Conditions of Contract called "Letter of Acceptance") shall specify the sum which the Employer will pay the Contractor in consideration of the execution and completion of the works and the remedying of any defects therein by the Contractor as prescribed by the contract (hereinafter and in the Conditions of Contract called "the Contract Price")***

***36.2 At the same time that the Employer notifies the successful bidder that his bid has been accepted, the Employer shall notify the other bidders that their bids have been unsuccessful and that their bid securities will be returned as promptly as possible in accordance with sub-clause 17.4..."***

Accordingly, notification of award to a successful bidder should be done prior to expiration of the bid validity period and both successful and unsuccessful bidders should be notified of the outcome of their bids at the same time.

The Board observes from the Procuring Entity's confidential file, that all notifications to all unsuccessful bidders, including the Applicant herein, were issued on 9<sup>th</sup> January 2020, whereas the notification of award to the successful bidder, which is referenced hereinbefore, was issued on 7<sup>th</sup> January 2020.

The Board notes that section 87 (3) expressly stipulates that a notification of award to a successful bidder should be done prior to expiration of the tender validity period and that both successful and unsuccessful bidders should be notified of the outcome of their bids at the same time.

As explained hereinbefore, this is to allow an unsuccessful bidder to challenge the award made in a subject procurement process and seek redress if need be within the 14-day statutory 'standstill' period prior to the signing of a contract between a procuring entity and a successful bidder.

The Board examined the Applicant's notification from the Procuring Entity dated 7<sup>th</sup> January 2020 and notes from the contents therein that the Procuring Entity did not provide reasons why the Applicant's bid was unsuccessful and further did not disclose the identity of the successful bidder in the subject tender.

The Board studied the Procuring Entity's confidential file and observes therein a letter of notification dated 9<sup>th</sup> January 2020 addressed to the Applicant which states as follows: -

***"I hereby notify you that your tender bid for routine maintenance of Lokichoggio-Lochor Aikope road was not successful during the Ministry of Infrastructure, Transport and Public Works Evaluation Committee meeting held on 11<sup>th</sup> November 2019.***

***Your bid was not successful due to the following reason: -***

- ***AGPO certificate is invalid and neither could the system identify nor recognize the purported AGPO certificate.***

***On behalf of Turkana County Government, we take this opportunity to thank you for taking interest in doing business with the county government"***

However, the Board heard submissions from the Applicant that it did not receive the said notification dated 9<sup>th</sup> January 2020, which submission was disputed by the Procuring Entity, who in turn averred that the said notification was sent via post to the Applicant's respective postal address.

The Board however notes that the Procuring Entity's submission that it sent the Applicant its letter of notification via post was not supported by any evidence and therefore we cannot rely on the same in order to ascertain if the said notification dated 9<sup>th</sup> January 2020 was duly sent by the Procuring Entity and received by the Applicant.

The Board therefore finds that the Procuring Entity did not issue the Applicant with a letter of notification of unsuccessful bid in accordance with section 87 (3) of the Act.

The Board will now proceed to the third issue for determination: -

Mandatory Requirement No. 8 in Table 1: Pre-Qualification Checklist for Completeness and Responsiveness on page 64 of the Tender Document reads as follows: -

<b>S/NO</b>	<b>Completeness and Responsiveness Criteria</b>	<b>References</b>	<b>Requirement</b>
8	Eligibility	Section 3; Item 3..9 Clause 4.1/4.2	Copies of National ID or passport for all directors Certified copy of CR12

According to this mandatory requirement, bidders were required to submit '*Copies of National ID or Passport for all directors and a Certified copy of CR12.*'

In its oral submissions, the Procuring Entity submitted that upon conducting a due diligence exercise on the Applicant's bid, the Procuring Entity established that the Applicant had failed to attach identification documents for Persons with Disability as required by AGPO registered companies.

This submission was disputed by the Applicant who contended that it duly submitted the said identification documents in addition to a reference letter from the Council for Persons with Disabilities confirming that the Directors of the Applicant were indeed persons living with disability.

The Board examined the Applicant's bid and observes on page 24 that the Applicant submitted an identification document belonging to one Mr Hassan Nur Abdirahman Abdullahi of ID No. 20400719.

Further on page 25 of the Applicant's bid document, the Board observes that the Applicant further submitted an identification document belonging to one Mr Ibrahim Mohammed Adan of ID No. 22621122.

The Board further examined the Applicant's bid and observes on page 23 a document identified as a CR12 issued by the Companies Registry Service as at 8<sup>th</sup> November 2019 which identifies one Mr Hassan Nur Abdirahman Abdullahi as a Director/Shareholder of the Applicant.



From the foregoing it is evident that the Applicant duly submitted identification documents and a copy of CR12 as required under Mandatory Requirement No. 8 in Table 1: Pre-Qualification Checklist for Completeness and Responsiveness on page 64 of the Tender Document.

Upon examination of the Procuring Entity's Evaluation report signed on 31<sup>st</sup> December 2019, the Board observes that the Applicant's bid was found to have met all the mandatory requirements and therefore proceeded to technical evaluation.

The Board therefore finds that the Procuring Entity fairly evaluated the Applicant's bid at Preliminary Evaluation with respect to Mandatory Requirement No. 8 in Table 1: Pre-Qualification Checklist for Completeness and Responsiveness on page 64 of the Tender Document in accordance with section 80 (2) of the Act as read together with Article 227 (1) of the Constitution.

The Board will now proceed to the fourth issue for determination: -

In its submissions, the Applicant argued that the Procuring Entity unfairly disqualified its bid on the basis that its AGPO certificate was invalid since the Procuring Entity was unable to verify the same.

The Applicant contended that its AGPO certificate was issued on 19<sup>th</sup> February 2016 and was valid for a period of five years and further, that

it was possible to verify its AGPO certificate on the Public Procurement and Regulatory Authority (hereinafter referred to as "the PPRA") website from the AGPO list of companies as at 10<sup>th</sup> November 2017.

The Procuring Entity on its part submitted that at technical evaluation, one of the evaluators of the Procuring Entity's Evaluation Team questioned the authenticity of the Applicant's AGPO certificate and therefore did not score the Applicant at this stage of evaluation.

However, after financial evaluation, the Procuring Entity conducted due diligence on the Applicant's AGPO certificate and was unable to verify the same on both the AGPO website [www.agpo.go.ke](http://www.agpo.go.ke) website and the PPRA website [www.ppra.go.ke](http://www.ppra.go.ke). The Procuring Entity therefore disqualified the Applicant's bid and conducted due diligence on the AGPO certificate of M/s Tebesi Investments Limited and upon verification of the same, proceeded to award the subject tender to the said bidder.

In its determination of this issue, the Board finds it necessary to first establish what a due diligence exercise is, and its purpose.

Black's Law Dictionary, Ninth Edition at page 523 defines 'due diligence as ***"the diligence reasonably expected from, and ordinarily exercised by a person who seeks to satisfy a legal requirement***

***or discharge an obligation” with the term ‘diligence’ meaning “the attention and care required from a person in a given situation”.***

A due diligence exercise is therefore a fundamental element of a procurement process that assists a procuring entity to exercise the attention and care required to satisfy itself that the lowest evaluated responsive tenderer can execute a tender.

Further, section 83 of the Act provides as follows: -

- “(1) An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act.***
- (2) The conduct of due diligence under subsection (1) may include obtaining confidential references from persons with whom the tenderer has had prior engagement.***
- (3) To acknowledge that the report is a true reflection of the proceedings held, each member who was part of the due diligence by the evaluation committee shall—***
  - (a) initial each page of the report; and***

***(b) append his or her signature as well as their full name and designation.”***

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

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

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

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

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

so to the tenderer determined to have submitted the lowest evaluated responsive tender.

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

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

In the instant case, the Board studied the Procuring Entity's evaluation report signed on 31<sup>st</sup> December 2019 and observes that during technical evaluation, one of the evaluators of the Procuring Entity's Evaluation Team awarded the Applicant zero scores against each technical criterion as stipulated under the Tender Document.

However, the Applicant's bid proceeded for financial evaluation and following a price comparison was found to have quoted the lowest tender sum. The Evaluation Committee then stated as follows: -

***"The committee decided to conduct a due diligence on the AGPO certificates for both Bidder 6 (Rahass Enterprise and Contractors Company Limited) and Bidder 7 (Tebesi***

***Investments Limited). The team checked first for the AGPO certificate validity for Bidder 6 in the AGPO webpage and no records could be found (Annex 1). The team went ahead and checked the AGPO certificate of the latter in the PPRA list as at 17<sup>th</sup> September 2019 and still it wasn't found (Annex 2).***

***Moreover the evaluation team had a search of the AGPO certificate for Bidder 7 in AGPO webpage and was found and approved by the National Treasury (Annex 3).***

***The team therefore concluded that Bidder 6 as a valid AGPO certificate and Bidder 7 has a valid AGPO certificate”***

From the above excerpt, the Board notes that the Procuring Entity conducted due diligence on the AGPO certificates of two bidders, that is, the Applicant and Bidder 7 (Tebesi Investments Limited), who is the successful bidder herein.

According to the Procuring Entity's Evaluation Committee, once it failed to verify the Applicant's AGPO certificate on both the AGPO website and the PPRA website, it proceeded to conduct due diligence on the successful bidder's AGPO certificate which it confirmed it was able to verify.

The Board studied the AGPO website and notes that verification of an AGPO certificate is to be done using the certificate number, that is, for AGPO certificates issued from October 2018. The AGPO website further directs that any other certificate shall be verified on the PPOA (now PPRA) website.

The Board further studied the PPRA website which includes the following three lists of enterprises which are registered to benefit from the Public Procurement Reservations and Preference Scheme or what are referred to as AGPO enterprises: -

- a) AGPO List at 10<sup>th</sup> November 2017
- b) AGPO List for missing companies January 2018
- c) AGPO list as at 17<sup>th</sup> September 2019

The website further stipulates that companies older than two years that have not renewed their certificates are not listed, and that the list is updated every one or two months.

In the instant case, the Board notes that the Applicant's AGPO certificate was issued on 19<sup>th</sup> February 2016. It therefore follows that the same could only be verified on the PPRA website as it was issued prior to October 2018.

From the three lists of companies on the PPRA website, the Board perused the AGPO list of companies as at 10<sup>th</sup> November 2017, noting

that the Applicant's AGPO certificate was issued on 19<sup>th</sup> February 2016 and confirmed that the Applicant is indeed registered as an AGPO enterprise with the following details: -

***Rahass Enterprise & Contractors Company Limited***

***CPR/2010/36020***

***P.O BOX 360 Garissa***

***Construction***

***PWD***

***Limited***

***Garissa***

From the foregoing it is evident that it was possible for the Procuring Entity to verify the Applicant's AGPO certificate on the PPRA website, contrary to its submission on the same.

The Board further observed from the Procuring Entity's Evaluation Report that one of the evaluators of the Procuring Entity's Evaluation Team awarded the Applicant zero scores for each technical criterion on the basis that the Applicant's AGPO certificate was invalid. The Board observes that the said evaluator awarded zero scores against technical criteria unrelated to the Applicant's AGPO certificate.

In this instance, the evaluator from the Procuring Entity's Evaluation Committee should not have based its technical evaluation of the



Applicant's bid on its own individual assessment of the authenticity of the Applicant's AGPO certificate, whose verification ought to be conducted after tender evaluation but prior to award of the tender in accordance with section 83 (1) of the Act.

Further, in its consideration of the due diligence exercise conducted by the Procuring Entity, the Board notes with concern that the Procuring Entity conducted due diligence on the AGPO certificates of two bidders, that is, the Applicant and Bidder 7 (Tebesi Investments Limited), who is the successful bidder herein.

Section 83 (3) of the Act as outlined hereinabove, clearly stipulates the procedure that must be followed in a due diligence process. For one, due diligence is conducted after tender evaluation but prior to award of the tender to confirm and verify the qualifications of the tenderer determined by the Procuring Entity to be the lowest evaluated responsive tenderer.

Secondly, the Procuring Entity must prepare a due diligence report outlining how due diligence was conducted and the findings of the process. The said report is signed only by members of the Evaluation Committee who took part in the due diligence exercise, and they must include their designation. Further, the report must be initialled on each page.

If the qualifications of the lowest evaluated tenderer are satisfactory, the due diligence report is submitted to the Head of Procurement function for his professional opinion and onward transmission to the Accounting Officer who will consider whether or not to award the tender to that lowest evaluated tenderer.

If the lowest evaluated tenderer is disqualified after due diligence, this fact must be noted in the Due Diligence Report with reasons. In view of the findings of this report that the lowest evaluated tenderer be disqualified after due diligence, the Evaluation Committee then recommends award to the next lowest evaluated tenderer, subject to a similar due diligence process conducted on such tenderer, as outlined hereinbefore.

This procedure is applied until the successful tenderer for award of the tender is determined.

Turning to the circumstances of the instant case, and in view of the foregoing, it is the Board's view that the Procuring Entity should not have conducted due diligence on two bidders simultaneously after financial evaluation. The Procuring Entity ought to have only conducted due diligence on the bidder determined by the Procuring Entity to have submitted the lowest evaluated responsive tender, to confirm and verify the qualifications of the said tenderer. This is pursuant to section 83 (1) of the Act which stipulates that a due diligence exercise is conducted on

the lowest evaluated responsive tender to confirm and verify qualifications of such tenderer.

It is therefore the Board's finding that the due diligence exercise conducted by the Procuring Entity with respect to the Applicant's AGPO certificate does not meet the threshold of section 83 (3) of the Act and further, that the Procuring Entity did not conduct due diligence in the subject tender in accordance with section 83 of the Act.

The Board is now left with the question as to what are the appropriate reliefs to grant in the circumstances.

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

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

***(a).....;***

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

Having found that the Procuring Entity did not conduct due diligence in the subject tender in accordance with section 83 of the Act, it is the Board's considered view that the most appropriate orders in these circumstances would be to direct the Procuring Entity to conduct a fresh

due diligence exercise in accordance with the law and the findings of the Board herein.

In totality, the Board holds that the Request for Review succeeds in terms of the following specific orders:-

### **FINAL ORDERS**

In view of all the above findings and in the exercise of the powers conferred upon it by the Provisions of section 173 of the Act, the Board makes the following orders on this Request for Review: -

- 1) The Contract dated 21<sup>st</sup> January 2020 in Tender No. TCG/MITPW/008/2019-2020 for Routine Maintenance of Lokichoggio-Lochor Aikope Road signed between the Procuring Entity and M/s Tebesi Investments Limited be and is hereby cancelled and set aside.**
  
- 2) The Procuring Entity's Letter of Notification of Award dated 7<sup>th</sup> January 2020 addressed to M/s Tebesi Investment Limited, with respect to the subject tender be and is hereby cancelled and set aside.**
  
- 3) The Procuring Entity's Letter of Notification of Unsuccessful Tender dated 9<sup>th</sup> January 2020 addressed to**

**the Applicant herein with respect to the subject tender be and is hereby cancelled and set aside.**

**4) The Procuring Entity is hereby directed to award the subject tender to the lowest evaluated responsive tenderer subject to a due diligence exercise conducted in accordance with section 83 of the Act, taking into consideration the Board's findings in this case and proceed with the procurement process to its logical conclusion within fourteen (14) days from the date of this decision.**

**5) Each party shall bear its own costs in the Request for Review.**

**Dated at Nairobi on this 12<sup>th</sup> Day of February, 2020**

**CHAIRPERSON**

**SECRETARY**

**PPARB**

**PPARB**

**Delivered in the presence of: -**

- i.** Mr Mbugua for the Applicant;
- ii.** No appearance for the Respondent.