

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 24/2020 OF 17<sup>TH</sup> FEBRUARY 2020**

**BETWEEN**

**MARSH CONSTRUCTION COMPANY LIMITED.....APPLICANT**

**AND**

**THE ACCOUNTING OFFICER,**

**NATIONAL WATER**

**HARVESTING AND STORAGE AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**AND**

**NATIONAL WATER**

**HARVESTING AND STORAGE AUTHORITY.....2<sup>ND</sup> RESPONDENT**

**AND**

**EL-VIS COMMUNICATION LIMITED.....INTERESTED PARTY**

Review against the decision of the Accounting Officer National Water Harvesting and Storage Authority with respect to Tender No. NWC/ONT/005/2019-2020 for Construction of Godha Merti Flood Control Works Located in Isiolo County (Reserved for AGPO – Youth, Women and Persons with Disabilities).

**BOARD MEMBERS**

- |                        |              |
|------------------------|--------------|
| 1. Ms. Faith Waigwa    | -Chairperson |
| 2. Mr. Nicholas Mruttu | -Member      |

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

**IN ATTENDANCE**

- 1. Mr. Philemon Kiprop -Holding brief for Secretary
- 2. Ms. Judy Maina -Secretariat

**PRESENT BY INVITATION**

**APPLICANT**

**-MARSH CONSTRUCTION COMPANY LIMITED**

- 1. Mr. Innocent Muganda -Advocate, Caroline Oduor & Associates
- 2. Mr. Mike Lagat -Representative

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

**-NATIONAL WATER HARVESTING AUTHORITY**

- 1. Mr. Duncan Kiprono -Advocate, National Water Harvesting Authority

**INTERSETED PARTY**

**A. EL VIS COMM**

- 1. Mr. Charles Kiplangat -Advocate Representative

## **BACKGROUND TO THE DECISION**

### **The Bidding Process**

The National Water Harvesting and Storage (hereinafter referred to as "the Procuring Entity) invited eligible and interested bidders to submit their bids in response to Tender No. NWC/ONT/005/2019-2020 for Construction of Godha Merti Flood Control Works Located in Isiolo County (Reserved for AGPO – Youth, Women and Persons with Disabilities) (hereinafter referred to as "the subject tender"). The subject tender was advertised in *MyGov* newspaper and the Procuring Entity's website [www.watercorporation.go.ke](http://www.watercorporation.go.ke) on 17<sup>th</sup> December 2019.

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

A total of thirty-two (32) firms/bidders submitted bids and the same were opened on 14<sup>th</sup> January 2020. The following firms submitted bids in response to the subject tender: -

<b>Bidder No.</b>	<b>Address</b>
1	El-vis Communication
2	ARbaah Agencies Ltd
3	Aless construction Co. Ltd
4	Sanabil Construction & Supplies Ltd
5	Three shades Company Ltd
6	Harafat Trading Co. Limited
7	Reices Limited
8	Rollins Kenya Ltd
9	Supreme waterways General Contractors Ltd
10	Gratimo Holdings Co. Ltd
11	Vango Roads and Engineering Ltd
12	Green Earth Construction & Ent. Ltd
13	Waso Link Enterprises Ltd
14	Laismati Enterprises limited
15	Edmod Ltd
16	Gamoji Limited
17	ILabarok Agencies (k) Ltd
18	Trigamo Enterprises Ltd
19	Marsh Construction co. Ltd

20	Athiroads Enterprises Ltd
21	Imperial Africans Kenya ltd
22	Fossilis Agencies
23	Avir Enterprises Ltd
24	Jewel Touch Investment Ltd
25	Budul Investment Co. Ltd
26	Premier Zip Limited
27	Bishin Transporters Construction Company Ltd
28	Alaliwe Enterprises Ltd
29	AMG Sagirin ltd
30	Northern Frontier Enterprises
31	Masterpiece Contractors
32	Classic East Africa (E.A) Ltd

## Evaluation of bids

According to the Procuring Entity's Tender Document with respect to the subject tender, evaluation was to be conducted in the following three stages:-

- Preliminary Evaluation
- Technical Evaluation;
- Financial Evaluation.

### 1. Preliminary Evaluation

At this stage of evaluation, bidders were evaluated against the following mandatory criteria and bidders who failed in any of the criteria did not proceed to the next stage of evaluation.

The Evaluation criteria were as follows:-

	<b>PRELIMINARY/MANDATORY CONDITIONS</b>
1.	Tender shall be valid for 120 days from the date of tender opening.
2.	The tenderer shall submit 1 Original, 1 Hard copy and 1 soft copy in PDF format in a flash disc.
3.	Copy of current business license from Authority of the principal place of

	<b>PRELIMINARY/MANDATORY CONDITIONS</b>
	business.
4.	Provide a copy of Valid Tax Compliance Certificate from KRA.
5.	Copy of certificate of business Incorporation/Registration.
6.	Copies of rent lease agreements and receipts for payment of rent for the last 6 months or proof of ownership of the premises.
7.	Duly filled, signed and stamped Confidential Business Questionnaire.
8.	Duly filled, signed and stamped Form SD1 as per the Standard format provided in this tender.
9.	Duly filled, signed and stamped Form SD2 as per the Standard format provided in this tender.
10.	Duly filled, signed and stamped Tender Securing Declaration Form?
11.	Duly completed, signed and stamped Form of Tender.
12.	Certificate copy of registration by National Treasury under AGPO (Youth or Women or PWD) - Small Works Engineering Category
13.	Certificate copy of registration by National Construction Authority for water works - category NCA6 and above (6, 5, 4, 3, 2, 1 for water works).
14.	Certified bank statements for last 6 months.
15.	Copy of certificate of the composition of directors of shareholding (CR12) for a limited company, partnership deed (for partnership) or national ID for sole proprietorship.
16.	Tender document must be serialized.
17.	Copies of Audited financial accounts of the company for the last 3 financial years.
18.	List of major items of construction equipment to be available on site; copies of logbooks or specific lease agreements (must include logbook of equipment to be leased).
19.	Excavator (bucket) - 230Hp to 250Hp
20.	15Ton Tipping Lorries
21.	15Ton Tipping Lorries
22.	15Ton Tipping Lorries
23.	Dozer D6
24.	Water Bowser 6000ltrs-10000ltrs
25.	18Ton Sheep Foot Compactor
26.	CV's showing qualifications and experience of key site management and technical personnel proposed for the contract and must be signed by the staff. Certificate of such staff must be attached. The personnel must include at least include a contract manager, site supervisor, plant operator.
27.	i. Contract manager
28.	ii. Site Supervisor
29.	iii. 2-plant operators
30.	Copy of at least 2 contracts or procurement orders in works of a similar nature and size within the last 5 years. Such contracts must be above Kes.15million.

	<b>PRELIMINARY/MANDATORY CONDITIONS</b>
	Substantial completion certificates must be attached. Details of clients who may be contacted for further information on these contracts must be submitted. Recommendation letters (issued in 2019) from the clients must be attached. Such letters must include name of specific project, period of implementation, cost of project, and remarks on whether it was completed successfully.

At the conclusion of this stage of the evaluation process, only 3 bidders i.e. M/s El-Vis Communication Ltd, M/s Vanqo Roads and Engineering Ltd and M/s Marsh Construction Company Limited were compliant and thus subjected to Technical Evaluation

## 2. Technical Evaluation

At this stage of evaluation, bidders were evaluated against the technical specifications stipulated in the Tender Document as follows: -

<b>ITEM</b>	<b>TECHNICAL EVALUATION CRITERIA</b>
<b>TE1</b>	<b>Qualified technical staff.</b>
	a) Contract Manager at least Higher National Diploma in a water related course : 5 years relevant experience
	b) Site supervisor with at least Diploma in water works related field: 5 years relevant experience.
	c) 2 Plant operators with at least Certificate in relevant field: 5 years relevant experience: Have a valid certificate of good conduct: Have a valid driving license
	<b>Subtotal Marks</b>
<b>TE2</b>	<b>Machinery &amp; equipment</b>
	Ownership of major equipment
	Proof of ownership of the listed equipment in the form of either logbook or copy of lease agreement (logbook must be attached) or specific purchase receipt.
	Excavator (bucket) - 230Hp to 250Hp
	15Ton Tipping Lorries
	15Ton Tipping Lorries
	15Ton Tipping Lorries
	Dozer D6
	Water Bowser 6000ltrs-10000ltrs

	18Ton Sheep Foot Compactor
	Proof of insurance of the Equipment in the form of certified copies of insurance covers
	Proof of roadworthiness of the Eqpt in the form of certified copies of NTSA inspection certificates.
	<b>Subtotal Marks</b>
<b>TE3</b>	<b>Past completed projects</b>
	Successfully completed similar projects in the last 5 years whose value is above Kshs.15 million (attach certified copies of substantial completion certificates)
	Project 1
	Project 2
	Project 3
	Project 4
	Project 5
	<b>Subtotal Marks</b>
<b>TE 4</b>	<b>Others</b>
	Proof of Financial stability (current ratios of at least 2:1)
	<b>SubTotal Marks</b>
	<b>GRAND TOTAL (PASS MARK = 70%)</b>

The following bidders passed the technical evaluation stage and therefore proceeded to financial evaluation: -

<b>BID NO</b>	<b>FIRM</b>	<b>SCORE</b>
B1	M/s El-vis Communication	<b>99</b>
B11	M/s Vango Roads and Engineering Limited	<b>95</b>
B19	M/s Marsh Construction Company Limited	<b>94</b>

### **3. Financial Evaluation**

At this stage of evaluation, the Evaluation Committee conducted a comparison of prices submitted by bidders who qualified for financial evaluation, that is, Bidders B1, B11 and B19.

The results were as follows: -

<b>BIDDER NO.</b>	<b>BIDDER NAME</b>	<b>QUOTED AMOUNT (Ksh.)</b>	<b>RANK</b>
1	El-vis Communication	36,990,312.00	1
11	Vanqo Roads and Engineering Ltd	44,622,380.00	3
19	Marsh Construction Co. Ltd	44,523,102.00	2

From the above analysis, Bidder No.1 M/s El-vis Communication was the lowest evaluated.

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

In view of the evaluation process, the Evaluation Committee recommended that **Bidder No. 1 M/s El-vis Communication Limited** be awarded the tender at the evaluated price of **Kshs. 36,990,312.00** (Thirty-six million nine hundred and ninety thousand and three hundred and twelve shillings) VAT Incl.

### **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 on 4<sup>th</sup> February 2020 subject to confirmation from the Finance Department of the budget, that is, Kshs 119 million for flood control works.



## **THE REQUEST FOR REVIEW NO. 24 OF 2020**

M/s Marsh Construction Limited (hereinafter referred to as "the Applicant"), lodged a Request for Review dated and filed on 17<sup>th</sup> February 2020 (hereinafter referred to as "the Request for Review") together with a Statement in Support of the Request for Review sworn and filed on even date (hereinafter referred to as "the Applicant's Statement").

In response, the Procuring Entity filed a Replying Affidavit dated 2<sup>nd</sup> March 2020 and filed on 3<sup>rd</sup> March 2020 (hereinafter referred to as "the Procuring Entity's Affidavit").

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

- i. An order setting aside the decision by the Respondent to award Tender No. NWC/ONT/005/2019-2020 for Construction of Godha Merti Flood Control Works Located in Isiolo County (Reserved for AGPO – Youth, Women and Persons with Disabilities);***
- ii. An order setting aside and annulling the decision of the Respondent notifying the Applicant that it had not been successful in Tender No. NWC/ONT/005/2019-2020 for Construction of Godha Merti Flood Control Works Located***

***in Isiolo County (Reserved for AGPO – Youth, Women and Persons with Disabilities);***

***iii. An order declaring the Applicant as the lowest evaluated bidder for Tender No. NWC/ONT/005/2019-2020 for Construction of Godha Merti Flood Control Works Located in Isiolo County (Reserved for AGPO – Youth, Women and Persons with Disabilities) taking into account Regulation 19 of the 2011 Regulations for the purpose of ensuring maximum participation of disadvantaged groups, small and micro-enterprises in public procurement,***

During the hearing, the Applicant was represented by Mr. Muganda on behalf of the firm of Caroline Oduor & Associates; the Procuring Entity was represented by Legal Counsel, Ms. Mwangi whereas the 1<sup>st</sup> Interested Party was represented by Mr Kiplangat, on behalf of the firm of Kiplangat & Associates Advocates.

## **PARTIES' SUBMISSIONS**

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

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

Mr. Muganda submitted that the letters of award and regret letters were not issued in consonance with section 87 of the Act which provides that

an accounting officer should notify all bidders of the outcome of their bids. Mr Muganda referred the Board to the Applicant's letter of notification dated 4<sup>th</sup> February 2020 and submitted that the said letter does not disclose the identity of the successful bidder and is also signed by one Ms. Sharon Obonyo on behalf of the CEO.

Mr Muganda also referred the Board to the internal memo attached to the Procuring Entity's bundle of documents as Annexure 1 which stated that during the CEO's absence, one Ms Sharon Obonyo shall hold his brief. Mr Muganda contended that the said memo does not make reference to the tender in question. He invited the Board to consider its previous decision in *Internet Solutions v Kenya Airports Authority* where it adjudicated on the issue of delegated authority and this Board determined that delegation must be within the purview of the law and must be specific as to what powers can be performed. He submitted that in this instance, the instrument of delegation of authority did not specify that the same would apply to the subject tender or what role was to be performed on behalf of the Accounting Officer and therefore, Ms Sharon Obonyo acted without authority in as far as issuance of the notification letters were concerned.

Mr Muganda submitted that the Procuring Entity in its Replying Affidavit admitted that Ms Obonyo acted without authority which in the Applicant's view was in contravention of Article 10 and Article 232 of the Constitution which enjoins all public officers to act with high standards of professional ethics, in a transparent manner and in observance of the

rule of law. In this regard therefore, Mr Muganda submitted that the Procuring Entity had for all intents and purposes acted outside the scope of the law.

Mr Muganda referred the Board to a revocation/cancellation letter issued by the Procuring Entity to the Applicant and contended that once the Applicant lodged its Request for Review, all acts performed by the Procuring Entity remained un-implementable as the Board was seized of the matter.

Mr Muganda submitted that the Applicant opposed the cancellation/revocation of the letters of notification and contended that there was no law upon which the Procuring Entity could justify its purported cancellation and revocation of award.

Counsel therefore urged the Board to direct the Procuring Entity to conduct a re-evaluation of the subject tender due to the glaring violations with respect to the subject procurement process, which fact the Procuring Entity conceded to.

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

In her submissions, Counsel for the Procuring Entity, Ms. Mwangi, fully relied on the Procuring Entity's Affidavit and supporting documentation thereto.

Ms. Mwangi submitted that the Procuring Entity would respond to three issues raised in the Request for Review.

On the first issue being on lack of authority or mandate as to who signed the notification letters, Counsel submitted that the Accounting Officer was out of the country from 1<sup>st</sup> to 10<sup>th</sup> February 2020 and asked one Ms Sharon Obonyo to hold his brief in his absence, as evidenced by Annexure One to the Procuring Entity's Affidavit.

Counsel submitted that it was the Procuring Entity's position that the said letter did not give Ms Obonyo express authority to sign any documents and in particular for this tender. It was therefore the Procuring Entity's submission that it has distanced itself from the actions taken by Ms. Obonyo which prompted the Procuring Entity to issue the revocation/cancellation of award letters to all bidders.

Ms Mwangi submitted that the Procuring Entity was served with the Request for Review on 18<sup>th</sup> February 2020 and by the time it issued the revocation/cancellation of award letters to all bidders, the Procuring Entity was not aware of the existence of the Applicant's Request for Review.

Counsel referred the Board to the Procuring Entity's Professional Opinion dated 4<sup>th</sup> February 2020, which was approved by Ms Obonyo and submitted that the said opinion was not perused and approved by the

Accounting Officer and therefore Ms Obonyo acted over and above her delegated authority.

On the issue of budget, Counsel submitted that when the procurement process was ongoing, there was a proposed budget for allocation of works. However, on 28<sup>th</sup> January 2020, the Procuring Entity received a letter from the Principal Secretary requesting for a re-allocation of funds to address the water situation in Mwangi Constituency and a further assessment and prioritization of projects with high impact to reduce water deficiencies in the constituency. Counsel submitted that on the basis of this letter alone, the scope of works and budget available for the subject tender would not be sufficient.

In response to a query from the Board, Ms Mwangi submitted that the budget for flood control for the Procuring Entity was Kshs 125 million and the amount had not been utilized as of yet. However, in view of the letter from the Principal Secretary, the flood control projects were no longer implementable. Ms Mwangi explained that there were three projects that were evaluated jointly, including the subject tender and all the projects were for a total cost of Kshs 125 million. She clarified that these projects were not the same as the five projects indicated in the letter from the Principal Secretary. Counsel submitted that from this amount of Kshs 125 million, Kshs 50 million was to be set aside as directed by the letter from the Principal Secretary. All the same, Counsel submitted that she was unaware of the process of transfer of funds from one project to another.

In response to a query from the Board, Ms Mwangi submitted that the Accounting Officer was out of the country from the 1<sup>st</sup> to the 10<sup>th</sup> of February 2020 and he thus issued the revocation/cancellation of award letters to all bidders upon his return on 17<sup>th</sup> February 2020 which was prompted by the actions of Ms Obonyo and the letter from the Principal Secretary.

Ms Mwangi submitted that the Accounting Officer had not responded to the letter from the Principal Secretary and further the monies were yet to be re-allocated. However, it was the Procuring Entity's prayer that it be allowed to terminate the subject procurement process to allow for fresh bids to be submitted in response to an invitation to tender with an adjusted/reduced scope of works. Ms Mwangi further clarified that according to the Procuring Entity, all was fine as far as the tendering process was concerned and the violations that occurred were with respect to the approval of the Professional Opinion and the issuance of award and regret letters by an officer acting without mandate.

In conclusion, she urged the Board to dismiss the Request for Review and allow the Procuring Entity to terminate the subject tender.

## **The Interested Party's Submissions**

In his submissions, Counsel for the Interested Party, Mr. Kiplangat, submitted that the Interested Party will rely on four grounds in its opposition to the Applicant's Request for Review.

On the issue of authority, Mr Kiplangat submitted that the notifications of award to successful and unsuccessful bidders complied with section 87 of the Act as this provision of law does not state that a letter of notification should be signed by the accounting officer. He submitted that section 135 (1) of the Act is specific that a contract should be signed/executed by an accounting officer which was not the case with section 87 of the Act.

Mr Kiplangat was of the view that the term accounting officer is defined in the Act and the Public Finance and Management Act as the person who is designated as such by the Cabinet Secretary. It therefore refers to the office and not the person. He therefore urged the Board to look at the instruments of delegation and construe whether there was indeed a delegation of authority or not in accordance with the law, and not to the convenience of either party before this Board.

Mr Kiplangat contended that in reference to the internal memo issued by the Accounting Officer, Ms Obonyo was authorised to handle policy issues in consultation with the Principal Secretary, Ministry of Water and Sanitation and Irrigation and that the said memo delegated general authority to Ms Obonyo. It was therefore the Interested Party's



submission that this general authority included performance of duties bestowed on the accounting officer under the Act which included the review of the professional opinion and the issuance of notifications of award.

Further, Mr Kiplangat submitted that a general delegation would suffice in this instance unless the instrument of delegation limited the powers to be exercised with respect to procurement matters.

Counsel submitted that the case of *Internet Solutions v. Kenya Airports Authority* was distinguishable from the instant case as in that case, the person delegated with authority, further delegated the same and the Board held that a person acting on delegated authority cannot further delegate the same. Counsel contended that in the instant case, Ms Obonyo did not delegate the authority to anyone and therefore the Internet Solutions case did not apply in this Request for Review.

On the issue of non-disclosure of the successful bidder, Counsel submitted that the notification to unsuccessful bidders, including the Applicant herein, did not disclose the identity of the successful bidder which in the Interested Party's view, was not fatal as the Applicant had not alleged any loss or damage arising from that failure and thus the Applicant did not suffer any prejudice. In any event, Counsel submitted that the Applicant did not exercise their right to information in order to establish the identity of the successful bidder.

With respect to the revocation/cancellation of the award in the subject procurement process, Counsel submitted that the process of evaluation had not been impugned and further, the professional opinion was reviewed and approved by an authorized delegate in compliance with the law. He submitted that the issuance of the notification of award was done with full authority thus the purported cancellation of award letters was outside section 63 of the Act as an award had already been made and notifications sent.

Mr Kiplangat submitted that in the event the Board determined that the professional opinion and notification of award was done without proper authority, the proper directive to be made as per section 173 of the Act was to compel the Accounting Officer to proceed with the procurement process from the post-evaluation stage to review the professional opinion and issue proper notifications as required by law.

Further, Mr Kiplangat submitted that the Procuring Entity had attempted to mask the real reason why it cancelled the notification of award. Mr Kiplangat was of the view that the Procuring Entity realized that it needed to do a downsizing of the budget and the scope of the works post award, which is not allowed in law. He submitted that the request by the Procuring Entity to terminate the subject tender should therefore be disregarded as it amounted to an illegality.

Counsel submitted that the Procuring Entity submission that it had a budget of Kshs 125 million was not accurate as the actual budget form

the National Treasury website was in actual fact Kshs 429 million. Further, the Procuring Entity had floated tenders for other flood control projects in that day's newspaper. Counsel therefore urged the Board to use its investigative powers and request for information with respect to tenders floated by the Procuring Entity whose closing dates were 25<sup>th</sup> March 2020.

### **The Applicant's Rejoinder**

In a rejoinder, Mr Muganda submitted that the Procuring Entity had conceded that there was no award and in this regard therefore, the notification letters issued to bidders were null and void.

Further, Mr. Muganda contended that it was now a statutory requirement that a Procuring Entity can only tender where there is a budgetary allocation and in this instance the letter from the Principal Secretary did not indicate that money was to be re-allocated from the subject tender.

Mr Muganda submitted that the Procuring Entity's submission that there was no infraction in the tendering process was untrue due to its admission in its Replying Affidavit that there were glaring violations of law in the procurement process. It was therefore appropriate in the circumstances for the Board to direct the Procuring Entity to conduct a re-evaluation of bids.

## **BOARD'S DECISION**

The Board has considered each of the parties' cases, the documents filed 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 Procuring Entity issued the Applicant with a letter of notification of unsuccessful bid in accordance with section 87 (3) of the Act;***
- II. Whether the Procuring Entity's request to terminate the subject procurement proceedings on the grounds of inadequate budgetary provision is in line with section 63 of the Act;***
- III. What are the appropriate orders to issue in the circumstances?***

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

A brief background to the Request for Review is that by way of an advertisement in *MyGov* newspaper on 17<sup>th</sup> December 2019, the Procuring Entity invited interested and eligible bidders to submit bids in response to the subject tender. By the bid submission deadline of 14<sup>th</sup>

January 2020, the Procuring Entity received a total of thirty two (32) bids which were opened on the same date by the Procuring Entity's Tender Opening Committee.

At the conclusion of the evaluation process, the Procuring Entity's Evaluation Committee recommended award of the tender to M/s El-vis Communication Limited for having the lowest evaluated responsive bid. This recommendation of award was approved by the Procuring Entity's Acting Chief Executive Officer, one Ms. Sharon Obonyo, 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 8<sup>th</sup> February 2020, it received a letter of notification of unsuccessful bid dated 4<sup>th</sup> February 2020 which stated as follows: -

***"We regret to inform you that in the above mentioned tender, you were not successful due to the following reason:***

- Passed the mandatory requirements but was evaluated the 2<sup>nd</sup> lowest bidder***

***However, we thank you for having shown interest to do business with us."***

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

The Applicant contended that its letter of notification of unsuccessful bid did not provide reasons why the Applicant's bid was unsuccessful and further, did not disclose the successful bidder and the sum at which the subject tender was awarded.

The Interested Party on its part submitted that the failure by the Procuring Entity to disclose the identity of the successful bidder in the Applicant's notification of unsuccessful bid was not fatal since the Applicant had not suffered any loss or damage as a result of this failure by the Procuring Entity. Moreover, the Applicant was able to file its Request for Review before the Board within the prescribed time in accordance with section 167 (1) of the Act, hence suffered no prejudice.

In its determination of this issue, the Board studied 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. 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.

The Board is cognisant that the requirement to disclose the identity of the successful bidder in a tender 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 to participate in the subject tender and challenge the same if need be.

The obligation of a procuring entity to disclose the identity of a successful bidder in addition to the amount the tender was awarded is central to the principle of transparency as outlined in Article 227 (1) of the Constitution of Kenya, 2010, which provides 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]**

This means that all processes within a procurement system, including notification of unsuccessful bid, must be conducted in a fair, equitable and transparent manner.

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 and these reasons ought to be specific and not general. Moreover, 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 notification was stipulated under Clause 6.3 Award of Contract of Section II Instructions to Tenderers on page 8 of the Tender Document which reads as follows:

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***"The Tenderer whose tender has been accepted will be notified of the award prior to expiration of the tender validity period in writing or by cable, telex or facsimile. This notification (hereinafter and in all contract documents called the "Letter of Acceptance") will state the sum [hereinafter and in all Contract documents called the "Contract Price" which the Employer will pay the Contractor in consideration of the execution, completion and maintenance of the Works by the Contractor as prescribed by the Contract. The contract shall be formed on the parties signing the contract. At the same time the other tenderers shall be informed that their tenders have not been successful."***

Accordingly, notification of award to a successful tenderer should be done prior to expiration of the tender validity period in writing or by cable, telex or facsimile and that both successful and unsuccessful bidders should be notified of the outcome of their bids at the same time. Further, that this notification of award should state the amount or the sum at which the Procuring Entity shall pay the successful bidder with respect to the works procured in the subject tender.

The Board notes, from the contents of the Applicant's letter of notification of unsuccessful bid, the Procuring Entity stated that the Applicant's bid was unsuccessful as it was ranked the second lowest bid. In the Board's view, this statement by the Procuring Entity clearly indicated that the Applicant's bid passed the initial stages of evaluation and was ranked the second lowest bid at financial evaluation, which was sufficient reason why the Applicant's bid was found to be unsuccessful.

However, the Board notes that the Procuring Entity did not disclose the identity of the successful bidder and the sum at which the subject tender was awarded.

Nevertheless, the Board notes, despite the Procuring Entity's failure to disclose the same, the Applicant was able to approach this Board within the statutory period imposed under section 167 (1) of the Act to challenge the Procuring Entity's decision given that the reason why the Applicant's bid was disqualified was disclosed therein, hence suffered no prejudice.

This does not mean that a procuring entity is at liberty to choose whether or not to comply with express provisions of the Act.

The Board finds that the Procuring Entity's letter of notification of unsuccessful bid issued to the Applicant does not meet the threshold of section 87 (3) of the Act since the Procuring Entity failed to disclose the identity of the successful bidder.

On the second sub-issue for determination, the Board observes that the Procuring Entity issued letters of notification dated 4<sup>th</sup> February 2020, to all bidders, including the Applicant herein.

The Applicant on its part submitted that its letter of notification of unsuccessful bid dated 4<sup>th</sup> February 2020 was null and void, having been issued by an officer of the Procuring Entity, who was not authorized to sign and issue the same. The Applicant referred the Board to the Procuring Entity's internal memo dated 30<sup>th</sup> January 2020, addressed to one Ms. Sharon Obonyo from the Procuring Entity's Accounting Officer, which requested Ms Obonyo to hold his brief during his absence, but did not make reference to the subject tender. According to the Applicant therefore, Ms Obonyo acted outside the scope of her delegated authority contrary to Article 10 of the Constitution of Kenya, 2010, thereby rendering the said notification letter null and void.

This submission was not disputed by the Procuring Entity. However, the 1<sup>st</sup> Interested Party held a different view. The 1<sup>st</sup> Interested Party submitted that the Procuring Entity's internal memo dated 30<sup>th</sup> January 2020 delegated general authority to the said Ms Obonyo which included performance of duties bestowed on the Accounting Officer by the Act, but was limited in respect to policy issues which were to be handled in consultation with the Principal Secretary, Ministry of Water and Irrigation.

Having heard parties' submissions, it behooves upon this Board to first determine who is an accounting officer?

In order to answer this question, the Board studied section 2 of the Act which defines the term 'accounting officer' as follows:

***"accounting officer has the meaning assigned to it under section 2 of the Public Finance Management Act, 2012 (No. 18 of 2012)"***

On its part, section 2 of the Public Finance Management Act, 2012 (No. 18 of 2012) states that: -

***"accounting officer means***

***a) An accounting officer of a national government entity referred to in section 67;***

***b) An accounting officer of a county government entity referred to in section 148;***

***c) In the case of the Judiciary, the Chief Registrar of the Judiciary or***

***d) In the case of the Parliamentary Service Commission***

***i. The clerk of the senate in respect of the senate***

***ii. The clerk of the national assembly in respect of the national assembly;***

***iii. Such other officer in the parliamentary service in respect of any other office in the parliamentary service....”***

Further, section 17 (3) and (4) of the Water Act, 2016 provides as follows: -

***“(3) The Chief Executive Officer is the accounting officer of the Authority;***

***(4) The Chief Executive Officer is subject to the direction of the Management Board and is responsible to it for the -***

***(a) implementation of the decisions of the Management Board;***

***(b) day to day management of the affairs of the Management Board;***

***(c) organization and management of the employees; and***

***(d) any other function that may be assigned by the Management Board.”***

From the foregoing, the Board observes that the Chief Executive Officer is the Accounting Officer of the Procuring Entity and is responsible for the implementation of the decisions of the Management Board, day to day management of the affairs of the Management Board, organization and management of the employees and any other function that may be assigned by the Management Board.

With this in mind, the Board studied section 87 of the Act as cited hereinabove which stipulates 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) .....**;

**(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) .....

The above provision clearly stipulates that the accounting officer of a procuring entity issues notification letters to successful and unsuccessful bidders.

As to whether an accounting officer can delegate his authority to issue notification letters to successful and unsuccessful bidders, this Board in **PPARB Application No. 9 of 2020 Internet Solutions (K) Limited v. Kenya Airports Authority** stated as follows: -

***"As regards the question whether an accounting officer can delegate his authority to issue notification letters, section 37 of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya, provides that: -***

*Where by or under an Act, powers are conferred or duties are imposed upon a Minister or a public officer, the President, in the case of a Minister, or the Minister, in the case of a public officer, may direct that, if from any cause the office of that Minister or public officer is vacant, or if during any period, owing to absence or inability to act from illness or any other cause, the Minister or public officer is unable to exercise the powers or perform the duties of his office, those powers shall be had and may be exercised and those duties shall be performed by a Minister designated by the President or by a person named by, or by the public officer holding an office designated by, the Minister; and*

*thereupon the Minister, or the person or public officer, during that period, shall have and may exercise those powers and shall perform those duties, subject to such conditions, exceptions and qualifications as the President or the Minister may direct.*

***The above provision specifies that a public officer, such as the Accounting Officer herein, may delegate his authority because of inability to act in certain circumstances, However, in exercise of his functions as a public officer, the Accounting Officer is bound by principles of leadership and integrity under the Constitution and other legislation. Article 10 (2) (c) of the Constitution outlined national values and principles of governance that bind all State officers and public officers including "good governance, integrity, transparency and accountability". Article 232 (1) (e) of the Act puts it more strictly, that "the values and principles of public service include accountability for administrative acts.***

***Section 5 of the Public Service (Values and Principles) Act No 1 A of 2015 requires public officers to maintain high standards of professional ethics in that: -***

*(1) Every public officer shall maintain high standards of professional ethics*

*(2) For the purposes of subsection (1), a public officer maintains high standards of professional ethics if that public officer*



- (a).....;
- (b) .....
- (c) is transparent when executing that officer's functions;
- (d) can account for that officer's actions;
- (e) .....
- (f) .....
- (g) .....; and
- (h) observes the rule of law.

***From the above provisions, the Board notes that the Accounting Officer has the obligation to maintain high standards of professional ethics as he is held accountable for administrative acts, whether performed personally or through delegated authority.***

***The above provisions demonstrate that the Accounting Officer has power to delegate his authority, but he must still remain accountable for acts performed by persons to whom he has delegated authority to act on his behalf. In order to observe the national values and principles of governance, it is more efficient for an accounting officer to specify the tender for which the delegated authority is given to avoid instances where such authority is exercised contrary to the manner in which he had specified. The person to whom the authority is delegated may use such delegated authority to undermine the Accounting Officer.***

***The Constitution and the aforementioned legislation gives responsibilities to all persons in the public service including the Procuring Entity's Accounting Officer to take necessary steps to ensure that his authority, when delegated, is specific, is given in writing and not open to misuse contrary to the manner he had specified.***

***It is the Board's finding that to achieve the underlying principles and national values of governance, the delegated authority by an accounting officer must be in writing and specific to a particular tender to avoid instances where such authority is exercised contrary to the manner in which he had specified, thus undermining the accounting officer."***

From the above excerpt, it is clear that an accounting officer of a procuring entity may delegate his/her authority to issue letters of notification to successful and unsuccessful bidders alike due to his/her inability to act in certain circumstances. Nevertheless, as a public officer, an accounting officer is bound by principles of leadership and integrity under the Constitution and other relevant legislation cited hereinabove and therefore remains accountable for acts performed by persons to whom he has delegated authority to act on his behalf.

Moreover, in order to ensure that any delegated authority is not exercised in order to undermine an accounting officer, it is necessary for the delegated authority to be in writing and specific, in that the accounting officer should specify the tender for which the delegated authority is given as such delegated authority may be prone to abuse and exercised contrary to the manner in which the accounting officer had specified.

Turning to the circumstances of the case, the Board studied the Procuring Entity's memo dated 30<sup>th</sup> January 2020 addressed to one Ms Sharon Abonyo from the Procuring Entity's Accounting Officer which read as follows: -

***"Subject: ABSENCE ON OFFICIAL DUTY OUTSIDE THE COUNTRY***

***I shall be out of the country on official duties in Israel with effect from 1<sup>st</sup> February 2020 up to 10<sup>th</sup> February 2020. While I am away, Ms Sharon Obonyo, the Acting General Manager – Corporate Services will hold brief.***

***Any policy issues to be handled in consultation with our Principal Secretary Ministry of Water & Sanitation and Irrigation.***

***Please accord the officer the necessary support to enable the Authority meet its objectives."***

From the above letter, the Board observes that the Procuring Entity's Accounting Officer directed that one Ms. Obonyo would hold his brief in his absence from the 1<sup>st</sup> of February 2020 to the 10<sup>th</sup> of February 2020 and any policy issues were to be handled in consultation with the Principal Secretary Ministry of Water, Sanitation and Irrigation.

The question that arises in this regard is what does it mean 'to hold brief'?

The Board observes that the Cambridge Dictionary defines the term 'brief' to mean: -

***"a set of instructions or information"***

Moreover, the Black's Law Dictionary defines the term 'hold' as follows: -

***"To possess; To administer; to conduct or preside at; to convoke, open, and direct the operations of..."***

From the foregoing definitions, holding brief can be construed to mean to possess, administer or conduct a set of instructions or information.

Moreover, the Board observes that the phrase 'holding brief' is often used in legal practice to refer to an arrangement between two lawyers where one lawyer is standing in temporarily for the other lawyer in a

case until the other lawyer is available to continue with the handling of his case personally.

In the same spirit, according to the memo dated 30<sup>th</sup> January 2020, one Ms Obonyo was required by the Procuring Entity's Accounting Officer to stand in temporarily in his place for a specific duration of time, from 1<sup>st</sup> to 10<sup>th</sup> February 2020, and administer the instructions issued to her by the Accounting Officer.

The Board then examined the letter of notification issued to the Applicant dated 4<sup>th</sup> February 2020 and observes the tail end of the Applicant's letter appears as follows: -

***".....However, we thank you for having shown interest to do business with us.***

***Yours faithfully,***

***CS Sharon Obonyo***

***FOR: Ag Chief Executive Officer"***

From the above excerpt, the Board observes that the said letter of notification was issued to the Applicant on behalf of the Acting Chief Executive Officer of the Procuring Entity, by one Ms Sharon Obonyo.

The Board further examined the Procuring Entity's confidential file submitted to the Board in accordance with section 67 (3) (e) of the Act and observes that the Professional Opinion issued by the Procuring Entity's Chief Procurement Officer and dated 4<sup>th</sup> February 2020 was approved by Ms Sharon Obonyo on the same date, that is, 4<sup>th</sup> February 2020. Further that notifications sent to all bidders also dated 4<sup>th</sup> February 2020 were issued on behalf of the Acting Chief Executive Officer of the Procuring Entity, by Ms Sharon Obonyo.

From the foregoing, the Board notes that the memo dated 30<sup>th</sup> January 2020, from the Procuring Entity's Accounting Officer, instructed Ms Obonyo to hold his brief from 1<sup>st</sup> February 2020 to 10<sup>th</sup> February 2020.

However, it is evident from the said memo that the Accounting Officer did not direct one Ms Obonyo to act with respect to the subject tender by approving the Professional Opinion therein or sign and issue notification letters to successful and unsuccessful bidders as the memo did not specify the tender for which the delegated authority is given and further, did not specify what actions, if any, were to be taken with respect to the subject tender.

It is therefore the finding of this Board that one Ms. Sharon Obonyo who approved the Professional Opinion dated 4<sup>th</sup> February 2020 and signed notification letters to both successful and unsuccessful bidders on behalf of the Accounting Officer acted without authority in doing so, since the memo dated 30<sup>th</sup> January 2020 did not delegate such authority to her.

The third sub-issue raised by the Applicant, involves the letter of revocation/cancellation it received from the Procuring Entity dated 17<sup>th</sup> February 2020 which read as follows: -

***"REVOCATION AND CANCELLATION OF AWARD/REGRET LETTERS FOR TENDERS***

***Reference is made to the above subject matter.***

***The Authority has arrived at a decision to revoke and cancel all the letters of award and regrets for Tenders bearing Ref. No. NWC/ONT/005/2019-20; Ref. No. NWC/ONT/002/2018-19 and Ref. No. NWC/ONT/004/2019-20 dated 4<sup>th</sup> February 2020 with immediate effect from the date of this letter.***

***The move will accord the Accounting Officer the necessary time to assess the process of evaluation and then advise the bidders in accordance with the Public Procurement and Asset Disposal Act (PPAD) Act No. 33 of 2015 of the outcome."***

According to the Applicant, the above letter was issued by the Procuring Entity on 17<sup>th</sup> February 2020 at the time the Applicant lodged its Request for Review before the Board thereby suspending all procurement proceedings. It was therefore the Applicant's submission

that the Procuring Entity could not revoke or cancel the notification of award as the Board was seized of the matter on the 17<sup>th</sup> of February 2020.

On its part, the Procuring Entity submitted that one Ms Sharon Obonyo signed and issued notification letters to both successful and unsuccessful bidders with respect to the subject tender devoid of consultation and authority from its Accounting Officer, rendering the award and the notifications issued null and void. In view of this infraction of law, the Accounting Officer proceeded to issue letters of revocation and cancellation of the notifications issued to both the successful and unsuccessful bidders.

According to the Procuring Entity, it was unaware that the Applicant lodged a Request for Review before the Board on 17<sup>th</sup> February 2020, on the same date that it issued letters of revocation of award and notifications with respect to the subject tender, as it was only served with the Applicant's Request for Review on 18<sup>th</sup> February 2020.

The 1<sup>st</sup> Interested Party was of the position that since the approval of the professional opinion and the issuance of notifications to bidders with respect to the subject tender were done by an officer of the Procuring Entity who acted with the authority of the Accounting Officer, the Procuring Entity's attempt to revoke the award and notifications issued to bidders was outside the scope of the law and had no effect in law as an award had already been issued with respect to the subject tender.



In its determination of the third sub-issue, the Board studied section 84 of the Act which states that:-

- "(1) The head of procurement function of a procuring entity shall, alongside the report to the evaluation committee as secretariat comments, review the tender evaluation report and provide a signed professional opinion to the accounting officer on the procurement or asset disposal proceedings.**
- (2) The professional opinion under sub-section (1) may provide guidance on the procurement proceeding in the event of dissenting opinions between tender evaluation and award recommendations.**
- (3) In making a decision to award a tender, the accounting officer shall take into account the views of the head of procurement in the signed professional opinion referred to in subsection (1)."**

Section 84 of the Act demonstrates that a professional opinion is a central aspect between tender evaluation and award recommendations. The professional opinion emanates from the Head of Procurement and offers guidance or what may be referred to as an overview of the entire procurement process to the accounting officer. The Head of Procurement function reviews the Evaluation Report and offers his/her opinion/advice/views to the Accounting Officer on the appropriate decision to make with respect to a procurement process.

Turning to the circumstances of the case, the Board has established that the Professional Opinion dated 4<sup>th</sup> February 2020 was approved by an officer who acted without the authority of the Accounting Officer of the Procuring Entity. Further, that notification letters dated 4<sup>th</sup> February 2020 sent to both the successful and unsuccessful bidders with respect to the subject tender were also issued by an officer who acted without the authority of the Accounting Officer of the Procuring Entity.

The Board is cognizant of the fact that any challenge raised with respect to a procurement process is lodged against the decision of an accounting officer, being the person responsible for overseeing the entire procurement process.

In this instance however, the professional opinion which provides an overview of the entire procurement process was not considered by the Procuring Entity's Accounting Officer or by an officer who had specific delegated authority to consider the same in making an award with respect to the subject tender. It therefore follows that the decision to award was not made by the Procuring Entity's Accounting Officer, but was made by an officer who acted without his authority, thereby rendering the said award null and void.

In this regard therefore, it is the Board's finding that the actions of an officer who acted without the authority of the Procuring Entity's Accounting Officer, do not bind the Procuring Entity as they were not

issued by the Accounting Officer of the Procuring Entity or under his express authority, and such actions are therefore null and void.

On the second issue for determination, the Board heard submissions from the Procuring Entity that on 28<sup>th</sup> January 2020, it received a letter from the Principal Secretary, Ministry of Water and Sanitation and Irrigation which read as follows: -

***"REQUEST FOR FUNDS TO ADDRESS WATER SITUATION  
IN MWINGI NORTH CONSTITUENCY***

***This is in reference to our earlier letter Ref. No. WD/3/3/1306 Vol V dated 30<sup>th</sup> October 2019 concerning a request to fund implementation of 5 small dam projects to address the water situation in Mwingi North Constituency.***

***The projects proposed are:***

***1. Itunguni Dam – Tseikuru***

***2. Ikime Dam – Ngomeni***

***3. Ngungi Dam – Muumoni***

***4. Kamula Dam – Kyuso***

***5. Kwa Kimanzi Dam (Kitambembe Dam) – Kyuso (Tulanduli)***

***The purpose of this letter is to request you to assess the situation and prioritize those projects with high impact to reduce the water stress in the constituency. You are advised to use Kshs 50 million from resources allocated under Flood Control for implementation.***

***Kindly take the necessary action accordingly.”***

According to the Procuring Entity, the above letter directed the Accounting Officer to prioritize and reallocate a sum of Kshs 50 million from the subject tender sum for purposes of addressing the water situation in Mwingi Constituency. The Procuring Entity submitted that according to its budget, Kshs 125 million had been allocated to flood control projects and this amount would not be enough to implement the subject tender, two other tenders that were also evaluated simultaneously with the subject tender and also set aside Kshs 50 million to address the water situation in Mwingi Constituency as directed by the Principal Secretary.

Therefore, in view of this directive by the Principal Secretary and the glaring violations of the Act with respect to the subject procurement process, the Accounting Officer proceeded to revoke and cancel the award and notifications issued to all bidders via letters dated 17<sup>th</sup> February 2020.

Moreover, now that the procurement process was before the Board, the Procuring Entity submitted that it seeks to terminate the entire tender proceedings on the ground of inadequate budgetary provision as provided for under section 63 of the Act, in order to downsize and cater for the reduced budget and scope of works of the subject tender.

The Applicant on its part submitted that the letter from the Principal Secretary dated 28<sup>th</sup> January 2020 did not specifically refer to the subject tender, thus the Procuring Entity was wrong to use the same as a reason to terminate the subject tender. Nevertheless, due to the admission made by the Procuring Entity that there were glaring violations of the Act with respect to the subject procurement process, it was the Applicant's view that the Procuring Entity should not terminate the procurement process but conduct a re-evaluation of all bids received in response to the subject tender.

However, the 1<sup>st</sup> Interested Party held a different view. The 1<sup>st</sup> Interested Party submitted that the real reason for the Procuring Entity's attempt to terminate the entire tendering process was that the Procuring Entity even before receiving the letter referred to hereinbefore from the Principal Secretary, intended to downsize the budget and reduce the scope of works with respect to the subject tender, whilst aware that the law did not permit it to terminate a procurement process post-issuance of a notification of award.

In support of its submission, the 1<sup>st</sup> Interested Party invited the Board to examine the Daily Nation Newspaper dated 4<sup>th</sup> March 2020, where it submitted that the Procuring Entity had floated tenders for flood control projects and yet the Procuring Entity was presently before the Board seeking to terminate the subject tender on the basis that there were inadequate funds to implement the same. The 1<sup>st</sup> Interested Party

further invited the Board to examine the National Treasury's website where a total sum of Kshs 429 million had been set aside for flood control projects contrary to the Procuring Entity's submission that it only had a budget of Kshs 125 million available for the same.

It was therefore the 1<sup>st</sup> Interested Party's submission that granting the Procuring Entity's request to terminate the subject tender would amount to sanctioning an illegality as no challenge had been raised before the Board impugning the process of evaluation. According to the Interested Party, the proper directive in this instance would be to compel the Accounting Officer to proceed with the procurement process from the post-evaluation stage, review the professional opinion which was already on record and issue the proper notifications to bidders on the outcome of the procurement process as required by law.

Having heard parties' submissions, the Board studied section 63 of the Act which reads as follows: -

**"(1) An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies—**

***(a) the subject procurement have been overtaken by—***

***(i) operation of law; or***

- (ii) substantial technological change;***
- (b) inadequate budgetary provision;***
- (c) no tender was received;***
- (d) there is evidence that prices of the bids are above market prices;***
- (e) material governance issues have been detected;***
- (f) all evaluated tenders are non-responsive;***
- (g) force majeure;***
- (h) civil commotion, hostilities or an act of war; or***
- (i) upon receiving subsequent evidence of engagement in fraudulent or corrupt practices by the tenderer.***

***(2) An accounting officer who terminates procurement or asset disposal proceedings shall give the Authority a written report on the termination within fourteen days.***

***(3) A report under subsection (2) shall include the reasons for the termination.***

***(4) An accounting officer shall notify all persons who submitted tenders of the termination within fourteen days of termination and such notice shall contain the reason for termination.”***

Section 63 of the Act is instructive in the manner in which a procuring entity may terminate a tender. According to this provision, a tender is

terminated by an accounting officer who is mandated to terminate any procurement process as per the said section of the Act.

Further, an accounting officer may terminate a tender at any time, prior to notification of tender award. This means that before an award is made with respect to a subject tender, an accounting officer may terminate a tender. Further, a tender may only be terminated by a procuring entity in the specific instances as highlighted under section 63 (1) of the Act, as cited hereinabove.

Section 63 further stipulates that a procuring entity is obliged to submit a report to the Public Procurement Regulatory Authority (hereinafter referred to as "PPRA") stating the reasons for the termination within fourteen days of the termination of the tender. The procuring entity must also notify all bidders who participated in the subject procurement process of the termination, including the reasons for the termination, within fourteen days of termination of the tender.

In its interpretation of section 63 of the Act, the Board considered the decision of the High Court in **Republic v Public Procurement Administrative Review Board; Leeds Equipment & Systems Limited (interested Party); Ex parte Kenya Veterinary Vaccines Production Institute [2018] eKLR** where it held as follows: -

***"in a nutshell therefore and based on the above-cited cases where the decision of a procuring entity to terminate procurement process is challenged before the***



***Board the procuring entity is to place sufficient reasons and evidence before the Board to justify and support the ground of termination of the procurement process under challenge. The procuring entity must in addition to providing sufficient evidence also demonstrate that it has complied with the substantive and procedural requirements set out under the provisions of Section 63 of the Act”.***

Accordingly, a procuring entity invoking section 63 must put forward sufficient evidence to justify and support the ground of termination of the procurement process relied on.

The requirement of real and tangible evidence supporting the ground of termination of the procurement process relied on supports the provision of Article 47 of the Constitution of Kenya, 2010 which states that:-

***“(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***

***(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action”***

In the instant case, the Board examined the letter from the Principal Secretary, Ministry of Water and Sanitation and Irrigation addressed to the Accounting Officer dated 28<sup>th</sup> January 2020 and notes that although

the letter directs the Procuring Entity to prioritize and reallocate a sum of Kshs 50 million for purposes of addressing the water situation in Mwingi Constituency, it does not mention the subject tender or specifically direct that the funds should be reallocated from the funds already set aside for the subject tender.

The Board notes that the said letter was received by the Procuring Entity on 28<sup>th</sup> January 2020 after the subject tender closed on 14<sup>th</sup> January 2020. This means that by the time the Procuring Entity received the said letter, tenders received in response to the subject tender had been opened by the Procuring Entity and the procurement process was live and ongoing.

The Board examined the Procuring Entity's confidential file and notes, a lack of response therein from the Procuring Entity to the Principal Secretary, seeking specifics as to where the funds, that is, Kshs 50 million, should be reallocated from, whether the Procuring Entity should reallocate funds from a procurement process that was ongoing and explaining the consequences of interfering with a live and ongoing tender.

The Board notes that section 45 (3) of the Act clearly stipulates that all procurement processes shall be: -

**(a) within the approved budget of the procuring entity and shall be planned by the procuring entity concerned through an annual procurement plan;**

***(b) .....***;

***(c) undertaken in strict adherence to Article 227 of the Constitution. [Emphasis by Board]***

Accordingly, all procurement processes should be undertaken by a procuring entity within its approved budget and as provided for within an annual procurement plan. Further, all procurement processes should be undertaken in strict adherence to Article 227 of the Constitution, which on its part provides that all procurement processes should be conducted in a fair, equitable, transparent, cost-effective manner.

It is important to note that the subject tender is reserved for AGPO – Youth, Women and Persons with Disabilities and the Board is cognizant of section 53 (5) of the Act which stipulates as follows: -

***"5) A procurement and asset disposal planning shall be based on indicative or approved budgets which shall be integrated with applicable budget processes and in the case of a State Department or County Department, such plans shall be approved by the Cabinet Secretary or the County Executive Committee member responsible for that entity.***

***(6) All procurement and asset disposal planning shall reserve a minimum of thirty per cent of the budgetary allocations for enterprises owned by women, youth, persons with disabilities and other disadvantaged groups.***

***(8) Accounting officer shall not commence any procurement proceeding until satisfied that sufficient***

**funds to meet the obligations of the resulting contract are reflected in its approved budget estimates.**

**(9) An accounting officer who knowingly commences any procurement process without ascertaining whether the good, work or service is budgeted for, commits an offence under this Act.” [Emphasis by Board]**

This means that all procurement and asset disposal proceedings should be based on approved budgets and no procurement process should be commenced without an accounting officer ascertaining that a particular procurement process has been budgeted for. Further, procuring entities are required to reserve a minimum of thirty per cent of their budgetary allocations for enterprises owned by women, youth, persons with disabilities and other disadvantaged groups.

Noting the aforementioned requirements under law, the Board notes, the Procuring Entity did not provide any evidence before this Board to demonstrate that it only had a budget of Kshs 125 million for flood control projects for the year 2019/2020 and that it had reserved thirty percent of the same for procurements for AGPO groups.

The Procuring Entity further failed to demonstrate that there was a deficit in its budget, in view of the directive by the Principal Secretary, and therefore the only recourse available to it in the circumstances was to terminate the subject tender. More so, no procedure was outlined for the movement of funds between budget lines by the Procuring Entity.

As invited by the 1<sup>st</sup> Interested Party, the Board examined the Daily Nation Newspaper dated 4<sup>th</sup> March 2020 and takes Judicial Notice of the tender advertisement therein, which states as follows: -

***"SECTION 1 INVITATION FOR TENDERS***

***TENDER REF NO. NWHSA/ONT/013/2019-2020: NAME:  
CONSTRUCTION OF DYKES LOCATED IN TANA DELTA  
FLOOD CONTROL-TANA RIVER COUNTY....."***

From the above excerpt, the Board notes that the Procuring Entity has placed an advertisement for a tender for flood control works in Tana River County.

The Board further examined the National Treasury's website at [www.treasury.go.ke](http://www.treasury.go.ke) and observes therein a document titled "*2019/2020 Estimates of Development Expenditure of the Government of Kenya for the Year Ending 30<sup>th</sup> June 2020*". The Board observes on page 1544 an estimate of Kshs 438,000,000/- has been set aside for flood control works.

From the foregoing, it is the Board's view that the Procuring Entity's claim that it is experiencing a deficit in funds for flood control projects and that funds need to be re-directed from a live and ongoing procurement process hold no water.

It is therefore the Board's finding that no real and tangible evidence has been adduced by the Procuring Entity to persuade us that its request to terminate the subject tender on the ground of inadequate budgetary provision meets the threshold under section 63 (1) 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...”***

The Board notes that the Applicant in its submissions requested the Board to direct the Procuring Entity to conduct a re-evaluation of the bids. However the Board notes that no breaches of procurement law have been articulated in the course of these review proceedings touching on the evaluation of bids by the Procuring Entity.

In view of the Board's findings in this matter, it is the Board's considered view that the Procuring Entity's Accounting Officer should be allowed to

consider the Professional Opinion dated 4<sup>th</sup> February 2020 and in doing so examine and consider what transpired during the entire procurement process. If the Accounting Officer finds it fit that a re-evaluation should be conducted, following a discovery of infractions of law during the evaluation process, the Accounting Officer may direct for a re-evaluation process to be conducted by the Evaluation Committee.

If having looked at the professional opinion and the Accounting Officer finds that it is satisfied with the conduct of the subject procurement process, the Accounting Officer should therefore proceed to approve the same and make an award or in the alternative, do what is necessary to conclude the subject procurement process.

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

### **FINAL ORDERS**

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

- 1. The Procuring Entity's Letter of Notification of Award dated 4<sup>th</sup> February 2020 addressed to M/s El-Vis Communications Limited, with respect to Tender No. NWC/ONT/005/2019-2020 for Construction of Godha Merti Flood Control Works Located in Isiolo County (Reserved for AGPO – Youth, Women and Persons with Disabilities) be and is hereby cancelled and set aside.**
  
- 2. The Procuring Entity's Letters of Notification of Unsuccessful Tender dated 4<sup>th</sup> February 2020 addressed to all unsuccessful bidders with respect to Tender No. NWC/ONT/005/2019-2020 for Construction of Godha Merti Flood Control Works Located in Isiolo County (Reserved for AGPO – Youth, Women and Persons with Disabilities) be and are hereby cancelled and set aside.**
  
- 3. The Procuring Entity's Accounting Officer is hereby directed to consider the Professional Opinion dated 4<sup>th</sup> February 2020, taking into consideration the findings of this Board herein and proceed with the procurement process with respect to Tender No. NWC/ONT/005/2019-2020 for Construction of Godha Merti Flood Control Works Located in Isiolo County (Reserved for AGPO – Youth, Women and Persons with Disabilities) to its logical conclusion, within fourteen days from the date of receipt of the signed decision.**



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

**Dated at Nairobi, this 9<sup>th</sup> Day of March 2020**

**CHAIRPERSON**

**SECRETARY**

**PPARB**

**PPARB**

**Delivered in the presence of: -**

- i.** Mr. Muganda for the Applicant;
- ii.** Mr. Kiprono holding brief for Ms. Mwangi