

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 160/2020 OF 29<sup>TH</sup> DECEMBER 2020**

**BETWEEN**

**KIU CONSTRUCTION LIMITED.....APPLICANT**

**AND**

**ACCOUNTING OFFICER,**

**KENYA NATIONAL HIGHWAYS AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**ASSOCIATED ELECTRICAL & HARDWARE SUPPLIES**

**LIMITED.....2<sup>ND</sup> RESPONDENT**

Review against the decision of the Accounting Officer of Kenya National Highways Authority with respect to Tender No. KENHA/R4/244/2020 for Performance based contract for the Maintenance of Subukia-Nyahururu (B21) Road.

**BOARD MEMBERS**

- |                         |              |
|-------------------------|--------------|
| 1. Faith Waigwa         | -Chairperson |
| 2. Mr. Ambrose Ogetto   | -Member      |
| 3. Mr. Alfred Keriolale | -Member      |
| 4. Mrs. Njeri Onyango   | -Member      |
| 5. Mr. Nicholas Mruttu  | -Member      |

**IN ATTENDANCE**

- |                       |                                  |
|-----------------------|----------------------------------|
| 1. Mr. Stanley Miheso | -Holding brief for the Secretary |
|-----------------------|----------------------------------|

## **BACKGROUND TO THE DECISION**

### **The Bidding Process**

Kenya National Highways Authority (hereinafter referred to as “the Procuring Entity”) invited bids for Tender No. KENHA/R4/244/2020 for Performance based contract for the Maintenance of Subukia-Nyahururu (B21) Road (hereinafter referred to as “the subject tender”) through a Tender Notice published on MyGov Publication Newspaper on 22<sup>nd</sup> September 2020. The same was uploaded on the Procuring Entity’s Website and the Public Procurement Information Portal.

### **Bid submission deadline and opening of bids**

The Procuring Entity received a total of eighteen (18) bids by the bid submission deadline of 15<sup>th</sup> October 2020. The same were opened shortly thereafter at the Procuring Entity’s Regional Office Boardroom by a Tender Opening Committee and recorded as follows: -

<b>Bidder No.</b>	<b>Firm</b>
1.	M/s. Kawangu Ventures Ltd
2.	M/s. Gragab Agencies Co. Ltd
3.	M/s. Cementers Ltd
4.	M/s. Swiss Grade Consult Ltd
5.	M/s. Associated Construction Co. Ltd
6.	M/s. Diwafa Investment Ltd
7.	M/s. Kiu Construction Ltd
8.	M/s. H. K. Builders & General Contractors Ltd
9.	M/s. H. Young & Co. EA Ltd
10.	M/s. Ascoda General Contractors Ltd
11.	M/s. Associated Electrical & Hardware Suppliers Ltd
12.	M/s. Westbuild General Contractors Ltd
13.	M/s. Territorial Works (K) Ltd
14.	M/s. S. S Mehta & Sons Ltd
15.	M/s. Derow Brothers Construction Ltd
16.	Jilk Construction co. Ltd
17.	M/s. ASWA Developers & Contractors Ltd
18.	M/s. Capital Construction Co. Ltd

## **Evaluation of bids**

Having appointed an Evaluation Committee, evaluation of bids in the subject tender was undertaken in the following three stages: -

- i.** Preliminary Evaluation;
- ii.** Technical Evaluation; and
- iii.** Financial Evaluation.

### **1. Preliminary Evaluation**

The Evaluation Committee evaluated bids against the criteria outlined in Clause 1 of Section 4. Qualification Criteria of the Tender Document and found the following three bidders responsive and thus eligible for Technical Evaluation: -

- Bidder No.9 (M/s. H. Young & Co. EA Ltd);
- Bidder No.11 (M/s. Associated Electrical & Hardware Suppliers Ltd); and
- Bidder No.14 (M/s. S. S Mehta & Sons Ltd)

### **2. Technical Evaluation**

At this stage, the Evaluation Committee applied the criteria outlined in Item 1-7 (b) of the Appendix to Qualification Criteria of the Tender Document. Bidders were also required to achieve a minimum technical score of 75% to proceed to Financial Evaluation. At the end of evaluation at this stage, the Evaluation Committee recorded the scores achieved by the 3 remaining bidders as follows: -

<b>Bidder No.</b>	Bidder 9 M/s. H. Young & Co. EA Ltd	Bidder 11 M/s. Associated Electrical & Hardware Suppliers Ltd	Bidder 14 M/s. S. S Mehta & Sons Ltd
<b>Score</b>	89.6	89.4	78.4

The Evaluation Committee observed that all the three bidders were responsive, having achieved the minimum technical score required to proceed to Financial Evaluation.

### 3. Financial Evaluation

At this stage, the Evaluation Committee recorded the price quoted by bidders in their respective bids as follows: -

<b>Bidder No.</b>	<b>Bidder's Names</b>	<b>Amount (Kshs)</b>	<b>Ranking</b>
9	M/s. H. Young & Co. EA Limited	747,346,761.00	2
11	M/s. Associated Electrical & Hardware Suppliers Limited	632,295,578.42	1
14	M/s. S. S Mehta & Sons Limited	787,871,449.00	3

### Recommendation

According to Clause 12.2. and 15 of the Evaluation Report dated 13<sup>th</sup> November 2020, the Evaluation Committee recommended award of the subject tender to M/s Associated Electrical & Hardware Suppliers Limited for a Contract Period of **Thirty-Six (36) Months comprising of Twenty-Four (24) Months for completion of works and 12 Months defects liability period** at a total cost of **Kshs. 632,295,518.42 (Kenya**

**Shillings Six Hundred and Thirty-Two Million Two Hundred and Ninety-Five Thousand Five Hundred and Eighteen Cents Forty-Two Only),** having submitted the lowest evaluated tender price.

## **Due Diligence**

According to the Due Diligence Report dated 26<sup>th</sup> November 2020, the Evaluation Committee confirmed and verified the authenticity of documents submitted by M/s Associated Electrical & Hardware Suppliers Limited and recorded the outcome of due diligence as follows: -

<b>S/No</b>	<b>Parameters</b>	<b>Bidder No. 11 (M/s. Associated Electrical &amp; Hardware Suppliers Limited)</b>	<b>Appendix</b>
1.	NTSA/Equipment Hire	Y	IX
2.	Firms' Experiences	Y	X
3.	Contractor's Staff	Y	XI
4.	Bid Security	Y	XII
5.	CR12 Form	Y	XIII
6.	PBC Training Certificate	Y	XIV
7.	TCC Online Checker	Y	XV
8.	NCA Online Check	Y	XVI
9.	ICPAK Auditor Online Check	Y	XVII
<b>Overall Remarks</b>		<b>Pass</b>	

## **Professional Opinion**

In a professional opinion dated 27<sup>th</sup> November 2020, the Procuring Entity's Deputy Director-Supply Chain Management reviewed the Evaluation Report dated 13<sup>th</sup> November 2020 and the Due Diligence Report dated 26<sup>th</sup> November 2020. He concurred with the Evaluation Committee's recommendation for award of the subject tender to M/s Associated Electrical & Hardware Suppliers Limited. As a result, he advised the Procuring Entity's

Director-General to approve award of the subject tender to the said bidder. The said professional opinion was approved on 27<sup>th</sup> November 2020.

## **Notification to Bidders**

In letters dated 30<sup>th</sup> November 2020, the Procuring Entity notified the successful bidder and all other unsuccessful bidders of the outcome of their bids.

## **THE REQUEST FOR REVIEW**

M/s Kiu Construction Limited (hereinafter referred to as "the Applicant") lodged a Request for Review dated 29<sup>th</sup> December 2020 and filed on even date together with a Statement in Support of the Request for Review sworn by the Applicant's Director on 29<sup>th</sup> December 2020 and filed on even date, through Muchemi & Co. Advocates, seeking the following orders: -

- 1. An order setting aside the decision by the Procuring Entity communicated to the Applicant through a letter dated 30<sup>th</sup> November 2020 finding the Applicant's tender non-responsive at the Technical Evaluation Stage and awarding TENDER NO. KENHA/R4/244/2020 FOR PERFORMANCE BASED CONTRACT FOR THE MAINTENANCE OF SUBUKIA-NYAHURURU (B21) ROAD to the 2<sup>nd</sup> Respondent;***
- 2. An order substituting and/or amending the decision of the Procuring Entity and awarding TENDER NO. KENHA/R4/244/2020 FOR PERFORMANCE BASED CONTRACT***

***FOR THE MAINTENANCE OF SUBUKIA-NYAHURURU (B21) ROAD to the Applicant upon reviewing all the records submitted in the procurement process including the Directorship of the Applicant, the form and substance of the Applicant's Tender Document;***

- 3. In alternative to prayer (2) above, an order directing the 1<sup>st</sup> Respondent to progress the procurement process to its logical conclusion inclusive of the Applicant at the Financial Evaluation stage and the making of an award within Seven (7) days; and***
- 4. An order compelling the 1<sup>st</sup> Respondent to pay the full costs of and incidental to these proceedings.***

In response, the 1<sup>st</sup> Respondent lodged a Notice of Preliminary Objection dated 4<sup>th</sup> January 2021 and filed on 5<sup>th</sup> January 2021 together with a Memorandum of Response dated 4<sup>th</sup> January 2021 and filed on 5<sup>th</sup> January 2021 through Lawrence Maruti Advocate while the 2<sup>nd</sup> Respondent lodged a Notice of Preliminary Objection dated 4<sup>th</sup> January 2021 and filed on even date together with a Response to the Request for Review dated 5<sup>th</sup> January 2021 and filed on even date through Oluga & Company Advocates.

On 24<sup>th</sup> March 2020, the Board issued Circular No. 2/2020 detailing the Board's administrative and contingency management plan to mitigate Covid-19 pandemic. Through this circular, the Board dispensed with physical hearings and directed that all request for review applications would be canvassed by way of written submissions. Clause 1 at page 2 of the said

Circular further specified that pleadings and documents would be deemed as properly filed if they bear the official stamp of the Board.

Accordingly, the Applicant lodged Written Submissions dated 8<sup>th</sup> January 2021 and filed on even date. The 1<sup>st</sup> Respondent lodged Written Submissions dated 11<sup>th</sup> January 2021 and filed on 12<sup>th</sup> January 2021 while the 2<sup>nd</sup> Respondent lodged Written Submissions dated 14<sup>th</sup> January 2021 and filed on 15<sup>th</sup> January 2021.

### **BOARD'S DECISION**

The Board has considered each of the parties' pleadings and written submissions including confidential documents submitted to it pursuant to section 63 (1) (e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") and finds that the following issues call for determination: -

#### **I. Whether the Board has jurisdiction to entertain the Request for Review.**

In addressing the above issue, the Board will make a determination on the following: -

- a) Whether the Request for Review is properly filed before the Board in accordance with section 167 (2) of the Act read together with*



*Regulation 204 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as Regulations 2020) regarding payment of 15% deposit of the tender sum by an applicant.*

Depending on the outcome of sub-issue (a): -

*b) Whether the Request for Review was filed outside the statutory period of fourteen (14) days specified in section 167 (1) of the Act, thus ousting the jurisdiction of the Board.*

**II. Whether the Procuring Entity evaluated the Applicant's bid at the Preliminary Evaluation Stage in accordance with section 80 (2) of the Act in respect of the following criteria: -**

***a. Copies of ID's of Company Directors pursuant to Clause 1.10. Eligibility Requirements of Section 4. Qualification Criteria of the Tender Document;***

***b. Serialization of Bids pursuant to Clause 1.13. Eligibility Requirements of Section 4. Qualification Criteria of the Tender Document;***

***c. Resume of Proposed Key Personnel pursuant to Clause 13.2 of Section 2. Instructions to Tenderers read together with Schedule 9. Format of Resume of Proposed Key Personnel of Section 10. Standard Forms and Clause***

***6. Key Professional and technical Site Staff of Section 4. Qualification Criteria of the Tender Document***

- d. Consent by Proposed Personnel pursuant to Clause 13.2 of Section 2. Instructions to Tenderers read together with Schedule 9. Format of Resume of Proposed Key Personnel of Section 10. Standard Forms and Clause 6. Key Professional and Technical Site Staff of Section 4. Qualification Criteria of the Tender Document***
- e. Bid Security pursuant to Clause 1.3. Eligibility Requirements of Section 4. Qualification Criteria read together with Schedule 3 of Section 10. Standard Forms of the Tender Document.***

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" v. Caltex Oil Kenya Limited (1989) KLR 1**, it was held at page 8 to 9 as follows: -

***"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction"***

Similarly, in the case of **Kakuta Maimai Hamisi v. Peris Pesi Tobiko & 2 Others (2013) eKLR** the Court of Appeal emphasized on the centrality of the issue of jurisdiction and made the following determination at paged 4 to 5 of its decision: -

***"So central and determinative is the question of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceeding is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren "cul de sac". Courts, like nature, must not act and must not sit in vain."***

Further in **Anisminic vs Foreign Compensation Commission (1969) 1 All ER 208 at 233**, Lord Pearce addressed some instances when a tribunal may lack jurisdiction whilst stating as follows at page 195 of his decision: -

***"Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to a tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage, while engaged on a proper enquiry, the tribunal may depart from the***

***rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step out of its jurisdiction. It would turn its enquiry into something not directed by Parliament and fail to make the enquiry which Parliament did direct. Any of these things would cause its purported decision to be a nullity.***

The first sub-issue of the first issue for determination revolves around the manner in which the Request for Review was filed within the purview of payment of a deposit at a percentage of the Applicant's tender sum. In relation to this specific sub-issue, it is important for the Board to determine whether or not the Applicant was required to pay a deposit at a percentage of its tender sum. This is because if the Board finds such deposit was payable but the same was not paid, it would not be proper in law for the Board to hear and determine the Request for Review.

The 2<sup>nd</sup> Respondent raised a preliminary objection at paragraph 2 of its Notice of Preliminary Objection by alleging that the Applicant did not comply with the mandatory provisions of section 167 (2) of the Act. Through a letter dated 4<sup>th</sup> January 2021 addressed to the Board Secretary, the 2<sup>nd</sup> Respondent's Advocates stated as follows: -

***"We have been instructed to act for ASSOCIATED ELECTRICAL & HARDWARE SUPPLIES LIMITED, the 2<sup>nd</sup> Respondent in the above application***

***Kindly let us know whether the Applicant paid the refundable deposit in accordance with section 167 (2) of the Act and the Public Procurement and Asset Disposal Regulations 2020. If in the affirmative, please let us know how much was deposited and when"***

The Board observes that section 167 (2) of the Act provides that: -

***"A request for review shall be accompanied by such refundable deposit as may be prescribed in the regulations, and such deposit shall not be less than ten per cent of the cost of the contract"***

Section 167 (2) of the Act requires an applicant to pay a refundable deposit prescribed in the Regulations when such applicant is filing its Request for Review. The court in **Judicial Review Application No. 623 & 645 of 2016 (Consolidated), Republic v Public Procurement Administrative Review Board Ex-parte Kenya Power and Lighting Company Limited & another [2017] eKLR** (hereinafter referred to as "the KPLC Case") had occasion to interpret application of section 167 (2) of the Act whilst citing the decision in **Republic vs. Public Procurement Administrative Review Board & 2 others Ex Parte Kenya National**

**Highway Authority [2016] eKLR.** The court in the KPLC Case held at paragraphs 88 to 91 as follows: -

***"It was contended that the Request for Review is not accompanied by a deposit as required under section 167 (2) of the Public Procurement and Asset Disposal Act, 2015..."***

***This Court has had occasion to deal with a provision couched in similar terms being section 175 (2) of the Act which provides as hereunder:***

*The application for a judicial review shall be accepted only after the aggrieved party pays a percentage of the contract value as security fee as shall be prescribed in Regulations.*

In **Republic vs. Public Procurement Administrative Review Board & 2 others Ex Parte Kenya National Highway Authority [2016] eKLR** this Court expressed itself as hereunder:

*"...since section 175(2) of the Act places an obligation on the aggrieved party to pay a prescribed percentage of the contract value as security fee, I am unable to agree with the applicant that the said provision does not apply to it. As to what percentage is required to be paid, is a matter for the regulations. It is however contended which contention is not disputed that the regulations prescribing percentages are yet to be formulated. It is my view that section 175(2) of the Act [and section 167 (2)] with respect to payment of the percentage can only be implemented after the Regulations are in place. It is therefore my view and I hold that*

*this application cannot be disallowed on the basis of the failure to pay a percentage which is yet to be prescribed.”*

***It is on that basis that I find the position taken by the Respondent [Board] on the issue incapable of being faulted.” [Emphasis by the Board]***

The High Court in the KPLC Case compared provisions of section 175 (2) of the Act with those of section 167 (2) of the Act and in doing so, found that the deposit payable pursuant to section 167 (2) of the Act could only be applied once a percentage is prescribed by way of Regulations.

It is within public knowledge that through Gazette Notice No. 4957 (found in Vol. CXXII —No. 142 of Kenya Gazette of 10<sup>th</sup> July 2020, the Cabinet Secretary for the National Treasury stated thus: -

***"THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT (No. 33 of 2015)***

***THE PUBLIC PROCUREMENT AND ASSET DISPOSAL REGULATIONS***

***(LN. No. 53 of 2020)***

***COMMENCEMENT***

***IT IS notified for the general information of the public that the Public Procurement and Asset Disposal Regulations, 2020 came into operation on the 2<sup>nd</sup> July, 2020 following the approval by Parliament under section 180 of the Act.***

***Dated the 9<sup>th</sup> July, 2020.”***

According to the said Gazette Notice, the commencement date for Regulations 2020 was 2<sup>nd</sup> July 2020, following approval by Parliament pursuant to section 180 of the Act, which provides as follows: -

***"The Cabinet Secretary shall make Regulations for the better carrying out of the provisions of this Act and, without limiting the generality of the foregoing, may make Regulations to facilitate the implementation of this Act, and such regulations shall not take effect unless approved by Parliament pursuant to the Statutory Instruments Act, 2013"***

Regulation 204 (1) of Regulations 2020 provides as follows: -

***"Pursuant to section 167 (2) of the Act the filing of a request for review shall be accompanied by a refundable deposit valued at fifteen percent (15%) of the applicant's tender sum which shall be paid into a deposit account"***

Having considered the decision of the Court in the KPLC Case, the Board observes, the Court found that application of section 167 (2) of the Act could only take effect once a percentage on payment of a deposit is prescribed by way of Regulations. Regulations 2020 came into force on 2<sup>nd</sup> July 2020, in effect made Regulation 204 therein applicable from that date, prescribing a refundable deposit valued at fifteen percent (15%) of an applicant's tender sum. Despite this, on 27<sup>th</sup> July 2020, Honourable Justice Weldon Korir issued



conservatory orders in **Petition No. E226 of 2020, Roads and Civil Engineering Contractors Association & Another v. Attorney General & 3 Others** (hereinafter referred to as "Petition No. E226 of 2020") directing as follows: -

***"IT IS HEREBY ORDERED***

***(1) THAT a Conservatory Order is issued staying the implementation and or Operation of any Regulation of the Public Procurement and Asset Disposal Regulations 2020, requiring the deposit of 15% of the Applicant's tender sum or 3% of the Applicant's tender sum before the commencement of Judicial Review Proceedings in respect of the Public Procurement"***

Regulation 204 (1) of Regulations 2020 which came into force to give effect to section 167 (2) of the Act was suspended by the Honourable Justice Weldon Korir through his orders issued in Petition No. E226 of 2020. As a result, both section 167 (2) of the Act and Regulation 204 (1) of Regulations 2020 cannot be implemented until the High Court hears and makes a determination on Petition No. E226 of 2020. Pursuant to the said orders, any Request for Review application filed after 27<sup>th</sup> July 2020 is not subject to payment of a deposit of 15% of an applicant's tender sum. The Applicant filed its Request for Review on 29<sup>th</sup> December 2020 after suspension of Regulation 204 (1) of Regulations 2020 by the High Court through Petition No. E226 of 2020.

Accordingly, the Board finds that the Request for Review is properly filed before it because Regulation 204 (1) of Regulations 2020 on payment of a deposit of 15% of an applicant's tender sum pursuant to section 167 (2) of the Act remains suspended and thus not applicable in the circumstances.

On the second sub-issue of the first issue for determination, the Board observes that 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** (hereinafter referred to as "the Samuel Kamau Macharia Case") addressed a central issue regarding instruments that donate jurisdiction to a court or any other decision making body when it held at paragraph 68 of its decision as follows: -

***"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."***

The decision of the Supreme Court in Samuel Kamau Macharia Case is very critical in determining where the jurisdiction of this Board flows from. The Board's attention is drawn to section 167 (1) of the Act which states as follows: -

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

An aggrieved candidate or tenderer is required to approach the Board within fourteen days from; the date of notification of award or the date such aggrieved candidate or tenderer learns of the alleged breach of duty by a procuring entity at any stage of the procurement process, or disposal process.

The 1<sup>st</sup> Respondent raised a Preliminary Objection to the jurisdiction of the Board on grounds that the Request for Review was filed outside the statutory period specified in section 167 (1) of the Act. To support this position, the 1<sup>st</sup> Respondent stated at paragraph 29 of its Memorandum of Response that the Applicant's letter of notification of unsuccessful bid dated 30<sup>th</sup> November 2020 was dispatched on 1<sup>st</sup> December 2020 via registered mail. The first

ground of the 2<sup>nd</sup> Respondent's Notice of Preliminary Objection dated 4<sup>th</sup> January 2021 is that the Request for Review was lodged out of time. However, the 2<sup>nd</sup> Respondent did not make any averments to support this objection in its Response to the Request for Review but merely stated that it received its letter of notification of award on 4<sup>th</sup> December 2020.

On its part, the Applicant stated at paragraph 6 of its Request for Review that it did not receive any communication from the Procuring Entity after the tender submission deadline of 15<sup>th</sup> October 2020 and thus enquired about the status of the subject tender through a letter dated 21<sup>st</sup> December 2020 addressed to the 1<sup>st</sup> Respondent.

Having considered the foregoing pleadings, the Board observes that on one hand, the 1<sup>st</sup> Respondent referred the Board to a copy of an A4 paper with no letterhead, containing the tender number of the subject tender, a list of bidders who participated in the subject procurement process, their postal addresses and a stamp of General Post Office (GPO) dated 1<sup>st</sup> December 2020. The said A4 paper has no evidence to show whether the details provided therein are for notification letters to bidders who participated in the subject procurement process. The 1<sup>st</sup> Respondent did not furnish the Board with an official receipt from GPO to verify whether or not notification letters were posted at the Post Office on the alleged date of 1<sup>st</sup> December 2020. In essence, the A4 paper attached to the 1<sup>st</sup> Respondent's Memorandum of Response does not support the 1<sup>st</sup> Respondent's assertion that the

Applicant's letter of notification dated 30<sup>th</sup> November 2020 was dispatched on 1<sup>st</sup> December 2020.

The 1<sup>st</sup> Respondent also attached an email dated 22<sup>nd</sup> December 2020 addressed to all bidders stating as follows: -

***"PERFORMANCE BASED CONTRACT FOR THE MAINTENANCE OF SUBUKIA-NYAHURURU (B21) ROAD- TENDER NO. KENHA/R4/244/2020***

***Tenders (Kenya National Highways) <tenders@kenha.co.ke>***

***Tue 12/22/2020 3:41 PM***

***The tendering process for the above tender has been finalized and the letters of award and regret has been posted via registered mail***

***Kindly check your postal office box for your letter"***

Lastly, the 1<sup>st</sup> Respondent attached a forwarded email dated 24<sup>th</sup> December 2020 with an attachment known as **"KIU NOTIFICATION LETTERS"** accompanying the said email. The details of the email of 24<sup>th</sup> December 2020 are as follows: -

***"Fwd.: NOTIFICATION LETTERS***

***Tenders (Kenya National Highways) <tenders@kenha.co.ke>***

***Thu 12/24/2020 1.13PM***

**To: kariukitheuri@gmail.com <kariukitheuri@gmail.com>**

**1 attachment (2MB)**

***KIU NOTIFICATION LETTERS.pdf***

On its part, the Applicant referred the Board to a letter dated 21<sup>st</sup> December 2020 addressed to the 1<sup>st</sup> Respondent stating as follows: -

***"Dear Sir***

***RE: TENDER NO. KENHA/R4/244/2020 FOR PERFORMANCE  
BASED CONTRACT FOR THE MAINTENANCE OF SUBUKIA-  
NYAHURU (B21) ROAD***

***Please refer to the above matter; our company bid in the  
above tender number KENHA/R4/244/2020***

***We submitted our tender on 15<sup>th</sup> October 2020. We are yet to  
receive any notification on the outcome of the procurement  
process***

***Your sincerely,***

***KIU CONSTRUCTION LTD'***

Having studied the documentation adduced by the Applicant and the Procuring Entity, the Board observes, the letter dated 21<sup>st</sup> December 2020 addressed to the 1<sup>st</sup> Respondent contains the Procuring Entity's stamp affixed therein showing the same was received on 22<sup>nd</sup> December 2020. This

evidence was not challenged by the 1<sup>st</sup> Respondent thus demonstrating that as at 21<sup>st</sup> December 2020, the Applicant was enquiring about the status of the subject procurement process. The email dated 24<sup>th</sup> December 2020 attached to the 1<sup>st</sup> Respondent's Response shows the Applicant's letter of notification was forwarded to it on 24<sup>th</sup> December 2020 because the said email contains an attachment referred to as "**KIU NOTIFICATION LETTERS.pdf**"

The 1<sup>st</sup> Respondent has failed to substantiate its allegation that letters of notification were sent to bidders via registered mail on 1<sup>st</sup> December 2020 but provided the Board with an email of 24<sup>th</sup> December 2020 showing the Applicant's letter of notification was forwarded to it on 24<sup>th</sup> December 2020. This supports the Board's finding that the Applicant was notified of the outcome of its bid on 24<sup>th</sup> December 2020.

In computing the period within which the Applicant was required to lodge its Request for Review, the Board observes that section 57 (a) of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya provides as follows: -

***"In computing time for the purposes of a written law, unless the contrary intention appears—***

***(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive***

***of the day on which the event happens or the act or thing is done”***

The Applicant received its letter of notification of unsuccessful bid on 24<sup>th</sup> December 2020. This date is excluded from computation of time pursuant to section 57 (a) of the Interpretation and General Provisions Act. The Applicant had 14 days after 24<sup>th</sup> December 2020 to file a Request for Review and the said period lapsed on 7<sup>th</sup> January 2021. The Applicant’s Request for Review was filed on 29<sup>th</sup> December 2020, within the statutory period specified in section 167 (1) of the Act.

Accordingly, the Board finds that it has jurisdiction to entertain the Request for Review and thus dismisses the 1<sup>st</sup> Respondent’s Notice of Preliminary Objection dated 4<sup>th</sup> January 2021 and the 2<sup>nd</sup> Respondent’s Notice of Preliminary Objection dated 4<sup>th</sup> January 2021.

Having dismissed the preliminary objections raised by the Respondents, the Board shall now address the substantive issue raised in the Request for Review as follows: -

The Applicant challenged the reasons why its bid was found non-responsive through this Request for Review and thus it behooves upon this Board to determine whether the Applicant’s bid was evaluated at the Preliminary



Evaluation Stage in accordance with the criteria set out in the Tender Document. The Applicant's letter of notification of unsuccessful bid dated 30<sup>th</sup> November 2020 contains the following details: -

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

***This is to inform you that your Tender was unsuccessful because your bid failed to meet the following Preliminary (Mandatory) Requirements as stipulated in the Tender Document***

- ***Copy of ID for the Company Director-Anthony Mureithii was not provided.***
- ***Almost all (over 60%) the serial numbers were not legible therefore difficult to ascertain if the serials were sequential.***
- ***The Format of Resume for key personnel (schedule 9) was not filled.***
- ***The page containing the programme of works was not serialized.***
- ***The proposed personnel did not sign to give consent"***

The Board considered rival pleadings and submissions by all parties to the Request for Review and thus proceeds to make the following findings: -

## A. Copy of ID's of the Company Directors

Clause 1.10. Eligibility Requirements of Section 4. Qualification Criteria at page 29 of the Tender Document specified this requirement as follows:-

<b>No</b>	<b>Subject</b>	<b>Requirement</b>	<b>Bidder</b>	<b>Submission Requirements</b>
1.10	CR 12 form	Issued within the last 6 months from the tender opening date	Must meet requirements	All the Directors Identification Documents-National Identification Cards/IDs or Passports

The Board studied the foregoing criterion and notes that apart from providing a CR 12 form issued within the last 6 months from the date of tender opening, bidders were also required to provide National IDs or Passports for all the directors of the company.

The Board studied the Applicant's original bid and notes that in response to this requirement, the Applicant provided the following: -

- At page 343 of its original bid, a CR 12 extract of the Applicant from the Companies Registry as at 11<sup>th</sup> July 2020 showing details of directors as follows: -

<b>Name</b>	<b>Description</b>
Julia Waguthi Gakui	Director/Shareholder
John Francis Kariuki Theuri	Director/Shareholder

- At page 344 of its original bid, a National ID No. 8715773 issued on 28<sup>th</sup> February 2005 to John Francis Kariuki Theuri;
- At page 349 of its original bid, a National ID No. 7440552 issued on 7<sup>th</sup> August 2015 to Julia Waguthi Kariuki

The Board observes that the Applicant's CR 12 extract from the Companies Registry as at 11<sup>th</sup> July 2020 shows the Applicant has two directors, namely; Julia Waguthi Gakui and John Francis Kariuki Theuri. The Applicant's CR 12 extract from the Companies Registry as at 11<sup>th</sup> July 2020 does not identify any person by the name Anthony Mureithii and upon studying the Applicant's original bid in its entirety, the Board did not find any documentation showing the Applicant has a director named Anthony Mureithii, which therefore leads the Board to find that Anthony Mureithii is a stranger to the Applicant.

The 2<sup>nd</sup> Respondent advanced an argument at paragraph 4 (ii) of its Response to the Request for Review that the Applicant attached a copy of the ID of **Julia Waguthi Kariuki** with no affidavit or any other documentation to clarify if the two names; **Julia Waguthi Gakui** and **Julia Waguthi Kariuki** refer to the same person. In response, the Applicant deponed at paragraph 5 of its Supplementary Statement that there was no harm in the Procuring Entity seeking clarification pursuant to section 81 of the Act which would have confirmed the directors identified in the Applicant's CR 12 extract are husband and wife. According to the Applicant, a

clarification sought by the Procuring Entity would have confirmed the family name of the said individuals and their marriage names.

The Board observes that section 81 of the Act regarding clarifications sought by a procuring entity, provides as follows: -

***"(1) A procuring entity may, in writing request a clarification of a tender from tenderer to assist in the evaluation and comparison of tenders.***

***(2) A clarification shall not change the terms of the tender"***

Section 81 (2) of the Act permits the Procuring Entity to seek clarifications from a tenderer to assist in evaluation and comparison of tenderers so long as such clarification does not change the terms of the tender. The Procuring Entity was at liberty to seek clarification from the Applicant regarding the relation, if at all, between **Julia Waguthi Gakui** and **Julia Waguthi Kariuki**. This clarification, in the Board's view would not have changed the terms of the Applicant's tender because the same is aimed at verifying whether **Julia Waguthi Gakui** and **Julia Waguthi Kariuki** is the same person. If these names belong to the same person, a clarification would have provided information to the Procuring Entity whether a marriage relationship exists between Julia Waguthi Gakui and John Francis Kariuki Theuri, having noted the Applicant has deponed in its Supplementary Affidavit that a clarification would have verified the family name and married names of the said individuals.

That notwithstanding, the Board has established the 1<sup>st</sup> Respondent found the Applicant's bid non-responsive on this criterion based on failure to attach a copy of ID of one Anthony Mureithii who is a stranger to the Applicant and thus was unfairly evaluated. This should not have been a reason to find the Applicant's bid non-responsive.

Accordingly, the Board finds that the Applicant satisfied the criterion Clause 1.10. Eligibility Requirements of Section 4. Qualification Criteria at page 29 of the Tender Document.

**B. Serialization of the Bid**

Clause 1.13 of Eligibility Requirements of Section 4. Qualification Criteria at page 30 of the Tender Document specified this requirement as follows:-

<b>No</b>	<b>Subject</b>	<b>Requirement</b>	<b>Bidder</b>	<b>Submission Requirements</b>
1.13	Serialization of the Bid	<p><i>Bidders shall sequentially serialize all pages of each tender submitted.</i></p> <p><i>Any written pages or document attached or inserted Documents MUST be sequentially serialized</i></p>	Must meet requirements	The serialization MUST be numerically sequential starting from Numeric 1

The Board studied the Applicant's bid in its entirety and notes that the Applicant serialized its bid from the first page up to page 564, save that the ink used by the Applicant to serialize its bid is smudged on some pages. As

a result, the numbers allocated to some pages of the Applicant's bid are not clear to the eyes. This prompted the Board to determine whether the Evaluation Committee could count the number of pages where the ink for serialization was smudged, having noted that some serialized pages were clear. In doing so, the Board observes the following few examples: -

- *Pages 3 to 29 of the Applicant's original bid are serialized in a legible manner whereas the pages appearing before "page 3" are only two in number and thus one can reasonably conclude that the first page was serialized as "1" and the second page was serialized as "2", save that the ink on page 1 and 2 is smudged;*
- *Pages 31 to 37 of the Applicant's original bid are serialized in a legible manner whereas a page appears before "page 31" and thus one can reasonably conclude that, the page appearing before "page 31" was serialized as "30", save that the ink on page 30 is smudged;*
- *Page 41 of the Applicant's original bid is serialized in a legible manner whereas there are three pages appearing between "page 37" and "page 41" and thus one can reasonably conclude that, the three pages were serialized as "38", "39" and "40", save that the ink on page 38, 39 and 40 is smudged;*
- *Pages 43 to 47 of the Applicant's original bid are serialized in a legible manner whereas there is only one page between "page 41 [which is legible]" and "page 43 [which is legible]" and thus one can reasonably conclude that, the page between "page 41" and "page 43" was serialized as "42", save that the ink on page 42 is smudged, etc*

Having compared the pages where the ink for serialization was smudged and the pages where the ink used for serialization was clear, the Board finds that the Evaluation Committee could easily confirm the numbers allocated on the pages where ink was smudged because the Board did not find any page that was removed from the Applicant's bid or inserted therein. We say so because, one can reasonably count the pages comprising the Applicant's bid from "page 1" (being the first page) to "page 564" without missing any pages between page 1 to page 564.

It is not lost to the Board that the Applicant was informed that the page where its Program of Works appears was not serialized as the reason contained in bullet 4 of its letter of notification of unsuccessful bid dated 30<sup>th</sup> November 2020.

This prompted the Board to study the page where the Applicant's Program of Works appears and we note that a document is attached at the last page of the Applicant's original bid known as "**Program of Works for Performance Based Contract for the Maintenance of Subukia-Nyahururu (B21) Road-Tender No. KeNHA/R4/244/2020**". The Applicant printed the said document in "landscape" layout, as opposed to "portrait" layout commonly found in Microsoft Word applications, because the table provided by the Applicant to demonstrate its proposed program of works is too large for a "portrait" layout. The Applicant serialized the page

that is overleaf and blank as "565" instead of the page containing a description of its proposed program of works.

The Board has already established the Applicant serialized its bid from the page '1', up to page "564", save that the ink used for serialization was smudged in some pages. It is however clear that when it came to the last document in its bid, which contains information regarding the Applicant's Program of Works" for implementing the subject tender, the Applicant did not serialize the said page, but serialized the page that is overleaf and blank.

The Applicant had obligation to serialize all pages that contained documents and information required in the Tender Document. A Program of Works formed part of the documents required under the qualification criteria in Section 4 of the Tender Document hence ought to have been serialized. We say so because Regulation 74 (1) (h) of Regulations 2020 provides that: -

**"74 (1) Pursuant to section 80 of the Act and upon opening of tenders the evaluation committee shall first conduct a preliminary evaluation to determine whether —  
... (h) all required documents and information have been submitted"**

An evaluation committee ought to determine whether all required documents and information have been submitted. All the blank pages that are overleaf in the Applicant's bid did not contain any information thus there was no need to serialize the same. However, the Program of Works provided by the Applicant contained information, hence ought to have been serialized. In any



case, the criterion under Clause 1.13 of Eligibility Requirements of Section 4. Qualification Criteria at page 30 of the Tender Document clearly stated that any written Pages or document attached or inserted Documents MUST be sequentially serialized.

The Board would like to make an observation that bidders must exercise caution when serializing pages where documents and information required by a procuring entity can be found. A bidder's failure to do so would be to the detriment of such bidder because a procuring entity must stick to the procedures and criteria for evaluation and in this case, all written pages, attached documents or inserted documents needed to be serialized. Even though the Applicant serialized page 1 up to page 564 of its bid save that the ink in some pages were smudged, it has itself to blame for its failure to serialize the page where its program of works can be found.

Accordingly, the Board finds that the Applicant serialized its bid using the numerical format, starting from "number 1" as directed in Clause 1.13 of Eligibility Requirements of Section 3. Appendix to Instructions to Tenderers of the Tender Document up to "number 564" but failed to serialize the page where its Program of Works can be found, thus failed to satisfy the criterion under Clause 1.13. Eligibility Requirements of Section 4. Qualification Criteria at page 30 of the Tender Document.

### **C. Format of Resume of Proposed Key Personnel**

The Board studied the Tender Document and notes that Clause 13 of Section 2. Instructions to Tenderers thereof listed documents comprising the bid as follows: -

***"13. Documents comprising the bid***

***13.1. The bid to be prepared by the bidder shall comprise:***

- (a) Duly filled-in the Form of Bid and Appendix to form of bid;***
- (b) Bid Security;***
- (c) Priced Bills of Quantities;***
- (d) Schedule of information;***
- (e) Qualification criteria;***
- (f) Any other materials required to be completed and submitted in accordance with the Instructions to Bidders embodied in these bidding documents***

***13.2. These Forms, Bills of Quantities and Schedules provided in these Bidding Documents shall be used without exception (subject to extensions of the Schedules in the same format***

***All forms to be filled and signed SHALL be duly filled and signed. Any alterations made in the tender document must be countersigned.***

Clause 13.2 of Section 2. Instructions to Tenderers of the Tender Document provided a mandatory requirement that all forms to be filled and signed must be duly filled and signed. This prompted the Board to confirm the forms provided in the Tender Document and we note that Section 10. Standard Forms provided forms which ought to have been duly filled and signed by bidders. These forms include the following: -

- Schedule 1. Form of Bid;
- Schedule 2. Appendix to Form of Bid;
- Schedule 3. Form of Bid Security;
- Schedule 4. Confidential Business Questionnaire;
- Schedule 5. Form of Written Power of Attorney;
- Schedule 6. Certificate of Bidder's Site to Visit;
- Schedule 7. Major Items of Construction Plant and Equipment;
- Schedule 8. Key Personnel;
- Schedule 9. Format of Resume of Proposed Personnel;
- Schedule 10. Schedule of Roadworks carried out by the bidder in the last five years
- Schedule 10. Contract completed within completion period;]
- Schedule 11. Schedule of Ongoing Projects;
- Schedule 12. Financial Standing;
- Schedule 13. Financial Evaluation Ratios;
- Schedule 14. Declaration Form-Debarment;
- Schedule 15. Declaration Form-Litigation;
- Schedule 16. Form of Agreement;
- Schedule 17. Form of Performance Bank Guarantee (Unconditional);

- Schedule 18. Bank Guarantee for Advance Payment (Unconditional);
- Schedule 19. Form RB1 Application.

The Board observes that owing to COVID-19 pandemic, the Procuring Entity did not conduct a site visit and thus waived the requirement of Schedule 6. Certificate of Bidder’s Site Visit of Section 10. Standard Forms of the Tender Document as stated in the Evaluation Report dated 13<sup>th</sup> November 2020. Having established it was mandatory for bidders to provide a duly filled and signed Format of Resume of Proposed Key Personnel in accordance with Schedule 9 of Section 10. Standard Forms of the Tender Document, the Board notes that at page 301 of the Tender Document, a Format of Resume of Proposed Key Personnel is provided therein and the same appears as follows: -

**SCHEDULE 9: FORMAT OF RESUME OF PROPOSED KEY PERSONNEL**

<b>Tenderer Name:</b>
-----------------------

<b>Position</b>		
<b>Personnel Information</b>	<b>Name</b>	<b>Date of Birth</b>
	<b>Professional Qualifications</b>	
<b>Present Employment</b>	<b>Name of Employer</b>	
	<b>Address of Employer</b>	
	<b>Telephone</b>	<b>Contact (Manager/Personnel Officer</b>
	<b>Fax</b>	<b>E-mail</b>
	<b>Job Title</b>	<b>Years with present employer</b>
	<b>Current Work load</b>	

		<b><i>Summarize the current work load. Indicate particular (if any) the projects the staff is involved</i></b>
<b>From</b>	<b>To</b>	<b>Company/Project/Position/Relevant technical and management experience</b>
		<b><i>Summarize professional experience, in reverse chronological order. Indicate particular technical and managerial experience relevant to the project)</i></b>

I..... ID No .....

**Mobile.....**

**Email..... of EBK Registration No.:  
..... and IEK Membership No.: .....**

**Give Consent to M/s..... for the  
proposed position of Site Agent**

**Sign ..... Date .....**

**NOTE:**

***The CV's (or resumes) for the proposed key personnel are to be presented in format indicated above***

***The proposed staff MUST give consent by appending his/her signature***

Further, Clause 6. Key Professional and technical Site Staff of Section 4. Qualification Criteria on page 35 to 36 of the Tender Document listed proposed key personnel and technical site staff as follows: -

6. Key Professional and technical Site Staff				
		Curriculum Vitae (CVs) of the Proposed Key Staff must be duly signed by the		

		proposed individual.  Certified copies of certificates and Annual Practicing Licenses (for Engineers) and Academic Certificates for all staff is mandatory		
	<b>Site Agent/Road Agent</b>			
	<b>Engineer</b>			
	<b>Foreman</b>			

The Board observes that the Tender Document listed the Key Professional and Technical Site Staff as; Site Agent/Road Agent, Engineer and Foreman. For purposes of confirming whether bidders duly filled and signed Schedule 9. Format for Proposed Key Personnel as required by Clause 13.2 of Section 2. Instructions to Tenderers of the Tender Document, the Evaluation Committee evaluated this criterion at the Preliminary Evaluation Stage. However, for purposes of allocating scores for qualification and experience of key personnel and technical site staff proposed by a bidder, the same was considered at the Technical Evaluation Stage.

At paragraph 16 of its Supplementary Statement the Applicant deponed that even though it provided a list of 9 of its site staff, the said list is not the one contemplated for its key personnel and technical site staff since the list of 9 personnel in the Applicant’s bid was only used to show the capacity of the Applicant to implement the subject tender. In the Applicant’s view, it listed

key personnel and technical site staff in its bid as Eng. James Gachiri, Eng. Steve Wambani and Simon Wangira.

Having established the key personnel and technical site staff listed in the Tender Document were three, it is the Board's considered view that bidders were required to provide duly filled and signed Curriculum Vitae of their proposed Site Agent/Road Agent, Engineer and Foreman, being the key personnel and technical site staff listed under Clause 6. Key Professional and technical Site Staff of Section 4. Qualification Criteria on page 35 to 36 of the Tender Document.

In response to this criterion, the Applicant provided the following: -

- On the divider serialized as page 532 of its original bid, a list of 9 Site Staff namely; Kariuki Theuri (Director), Eng. James Gachiri (Site Agent/Road Manager), Eng. Steve Wambani (Engineer/Deputy Site Agent), Simon Wangira Ndeke (Senior Foreman-Asphalt Concrete Works/Civil Works), George Mugenya (Site Surveyor), Salim O. Chacha (Foreman), Zedekia Agira (Ass. Foreman-Bituminous Works), Maurice Onyango (Foreman-Structures/Drainage), Daniel Ngugi (Foreman-Earthworks);
- At page 300 of its original bid, the Applicant duly completed Schedule 8. Key Personnel and listed Key Personnel for its Site Office as Eng. James Gachiri, Site Engineer as Eng. Steve Wambani and Foreman as Simon Wangira Ndeke;

- At page 535 of its original bid, the Applicant attached the Curriculum Vitae of Eng. James Gachiri duly filled and signed in the format provided in Schedule 9. Format of Resume of Key Personnel of Section 10. Standard Forms of the Tender Document;
- At page 544 of its original bid, the Applicant attached the Curriculum Vitae of Eng. Steve Wambani duly filled and signed in the format provided in Schedule 9. Format of Resume of Key Personnel of Section 10. Standard Forms of the Tender Document; and
- At page 549 of its original bid, the Applicant attached the Curriculum Vitae of Simon Wangira Ndeke duly filled and signed in the format provided in Schedule 9. Format of Resume of Key Personnel of Section 10. Standard Forms of the Tender Document.

Even through the 1<sup>st</sup> Respondent referred to a blank form on page 301 of the Applicant's bid, the Board observes that the said form was duly completed at page 535, 545 and 549 of the Applicant's original bid because the Applicant merely identified key personnel at page 300 of its original bid, but attached their respective Curriculum Vitae/Resume on the aforelisted pages, using the format provided in Schedule 9. Format of Resume of Key Personnel of Section 10. Standard Forms of the Tender Document.

The Board also takes cognizance that the Applicant listed 9 proposed staff at page 532 of its original bid. That notwithstanding, the Applicant was required to provide Curriculum Vitae of its proposed Site Agent/Road Agent, Engineer and Foreman, being the key personnel and technical site staff listed



under Clause 6. Key Professional and technical Site Staff of Section 4. Qualification Criteria on page 35 to 36 of the Tender Document. The 3 individuals listed at page 300 of the Applicant's original bid are; Eng. James Gachiri (Site Agent/Road Manager), Eng. Steve Wambani (Engineer/Deputy Site Agent), Simon Wangira Ndeke (Senior Foreman-Asphalt Concrete Works/Civil Works) whose Curriculum Vitae/Resume complied with Clause 13.2 of Section 2. Instructions to Tenderers read together with Schedule 9 of Section 10. Standard Forms and Clause 6. Key Professional and technical Site Staff of Section 4. Qualification Criteria on page 35 to 36 of the Tender Document.

Accordingly, the Board finds that the Applicant satisfied the criterion under Clause 13.2 of Section 2. Instructions to Tenderers read together with Schedule 9. Format of Resume of Proposed Key Personnel of Section 10. Standard Forms and Clause 6. Key Professional and technical Site Staff of Section 4. Qualification Criteria on page 35 to 36 of the Tender Document.

#### **D. Consent by Proposed Personnel**

The Board observes the fifth reason provided to the Applicant in its letter of notification of unsuccessful bid dated 30<sup>th</sup> November 2020 is that the proposed personnel did not sign to give consent. Having studied Schedule 9 of Section 10. Standard Forms at page 301 of the Tender Document, the Board notes that at the foot of the said form, there was a mandatory

requirement for the **“proposed staff to give CONSENT by appending their signature”**.

The Board has already established that it was a mandatory requirement for the Applicant to provide the resumes of 3 **“key personnel and technical site staff”** in accordance with Clause 13.2 of Section 2. Instructions to Tenderers read together with Schedule 9 of Section 10. Standard Forms of the Tender Document. These 3 key personnel and technical site staff were; Site Agent/Road Agent, Engineer and Foreman. The Standard Form where consent ought to have been provided is Schedule 9 of Section 10. Standard Forms of the Tender Document considered by the Board hereinbefore. This therefore leads the Board to find the Applicant was required to demonstrate that the 3 aforementioned key personnel and technical site staff gave consent to act in their respective proposed positions.

Having studied the resumes of Eng. James Gachiri, Eng. Steve Wambani and Simon Wangira Ndeke, the Board observes that: -

- At page 539 of the Applicant’s original bid, Eng. James Gachiri gave consent to the Applicant for the proposed position of Site Agent;
- At page 546 of the Applicant’s original bid, Eng. Steve Wambani gave consent for the proposed position of Deputy Site Agent; and
- At page 551 of the Applicant’s original bid, Simon Wangira Ndeke gave consent for the proposed position of Site Agent (i.e. Senior Foreman-Asphalt Concrete Works/Civil Works).

These consents can be found in the resumes of the said individuals thus satisfied the criterion under Schedule 9 of Section 10. Standard Forms at page 301 of the Tender Document

Accordingly, the Board finds that the Applicant satisfied the criterion under Clause 13.2 of Section 2. Instructions to Tenderers read together with Schedule 9. Format of Resume of Proposed Key Personnel of Section 10. Standard Forms and Clause 6. Key Professional and technical Site Staff of Section 4. Qualification Criteria on page 35 to 36 of the Tender Document because the Applicant's "key personnel and technical site staff" gave consent in their respective Resumes to act for their respective proposed positions.

### **E. Bid Security**

The starting point in addressing this criterion is to observe that the failure to provide a bid security required in the Tender Document did not form part of the reasons contained in the Applicant's letter of notification of unsuccessful bid dated 30<sup>th</sup> November 2020. This reason was introduced in paragraph 35 of the 1<sup>st</sup> Respondent's Memorandum of Response. The 1<sup>st</sup> Respondent avers that the Bid Security provided by the Applicant did not meet the requirements of Section 17 of the Instructions to Tenderers of the Tender Document. At paragraph 26 of its written submissions, the 1<sup>st</sup> Respondent states that the bid security provided by the Applicant was not as per the specified format having omitted the last paragraph dealing with details of extension of validity of bid security. To support this submission, the 1<sup>st</sup>

Respondent referred the Board to Section 4. Qualification Criteria of the Tender Document which required Bid Security to be provided in the format specified in the Tender Document with all conditions indicated and validity within the prescribed time limits. Having had sight of the 1<sup>st</sup> Respondent's Response, the Applicant at paragraph 6 to 9 of its Supplementary Statement, deponed that it submitted a bid security that was fully compliant in form and substance with the format provided in the Tender Document.

The Board observes that the 1<sup>st</sup> Respondent's action of introducing the issue of bid security as one of the reasons why the Applicant's bid was found non-responsive in the 1<sup>st</sup> Respondent's Response, instead of providing this reason to the Applicant in its letter of notification dated 30<sup>th</sup> November 2020 goes against the letter and spirit of section 87 (3) of the Act which requires as follows: -

***"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."***

Regulation 82 (2) of Regulations 2020 further states as follows: -

***82 (1) .....***;

***(2) For greater certainty the reason to be disclosed to the unsuccessful bidder shall only relate to their respective bids***

Thus, the 1<sup>st</sup> Respondent was required to disclose all reasons why the Applicant's bid was unsuccessful in the letter dated 30<sup>th</sup> November 2020 and not through its Response. That notwithstanding, the Applicant had an opportunity to respond to the issue of bid security through its Supplementary Statement and thus we shall now address the said issue as follows: -

Clause 1.3. Eligibility Requirements of Section 4. Qualification Criteria of the Tender Document specified the requirement of bid security as follows: -

<b>No</b>	<b>Subject</b>	<b>Requirement</b>	<b>Bidder</b>	<b>Submission Requirements</b>
1.3	<i>Bid Security</i>	<i>Unconditional bank guarantee In the format provided with all conditions indicated and Validity within prescribed time limits NONE for Special Groups</i>	<i>Must meet requirement</i>	<i>Unconditional Bank Guarantee in the Prescribed format and Meeting all Conditions stipulated</i>

Further, Schedule 3 of Section 10. Standard Forms of the Tender Document provided a form of bid security that appears as follows: -

**SCHEDULE 3. FORM OF BID SECURITY**

**TENDER BANK GUARANTEE**

**Note: The bidder shall complete this form of Bank guarantee. No other Form of Bid Bond or any other forms of security will be accepted. Bidders who fail to comply with this requirement will be disqualified.**

**WHEREAS [Name of bidder].**

.....  
 .....

(herein after called "the Bidder") has submitted his bid dated .....for the

**PERFORMANCE BASED CONTRACT FOR THE MAINTENANCE OF SUBUKIA – NYAHURURU (B21) ROAD**

hereinafter called "the bid"

**KNOW ALL MEN by these presents that we [*Name of Bank*]**

.....  
.....

**of [*Name of Country*]**

.....

**having our registered offices at**

.....

**(hereinafter called the Bank) are bound unto the Director General, Kenya National Highways Authority, (hereinafter called "the Employer") in the sum of (in words Kshs) .....**

.....

**(In figures Kshs) .....**

**for which payment will be well and truly made to the said Employer the Bank binds itself, its successors and assigns by these presents.**

**SEALED with the common Seal of the said Bank this ..... day of 20.....**

**THE CONDITIONS of this obligation are:**

**1. If the bidder withdraws his Bid during the period of bid validity specified by the Bidder on the Bid Form; or**

**2. If the Bidder refuses to accept the correction of errors in his bid; or**

**3. If the Bidder having been notified of the acceptance of his bid by the Employer during the period of Bid Validity**

**(i) fails or refuses to execute the Form of Agreement in accordance with the Instructions to Tenderers when required or**

**(ii) fails or refuses to furnish the Performance Security, in accordance with the Instructions to Bidders.**

**We undertake to pay to the Employer up to the above amount upon receipt of his first written demand, without the Employer having to substantiate his demand, provided that in his demand the Employer will note that the amount claimed by**

him is due to him owing to the occurrence of any of the above conditions, specifying the occurred condition or conditions.

This guarantee will remain in force up to and including Thirty (30) days after the date of expiration of the bid validity, as stated in the Instructions to Bidders.

At the request of the Employer the Bid validity period may be extended by mutual agreement between the Employer and the Bidder and we undertake to extend the validity of this surety accordingly without you having to inform us of such an extension of the Bid validity period if within this period the Bidder has been notified of the acceptance of his Bid. This Surety shall remain valid up to the time the Contract Agreement has been executed.

**SIGNATURE AND SEAL OF THE BANK**

.....  
**NAME OF SIGNATORY .....DATE.....**

**NAME OF THE WITNESS .....**

**SIGNATURE OF THE WITNESS ..... DATE .....**

**ADDRESS OF THE WITNESS .....**

**[Emphasis by the Board]**

The Board observes that the clauses underlined hereinbefore were omitted from the Applicant's bid security dated 14<sup>th</sup> October 2020 issued by Credit Bank PLC. The same contains the following details: -

***Director General***

***Kenya National Highways Authority***

***P.O Box 49712-00100***

***NAIROBI***

***Dear Sir/Madam,***

**RE: TENDER NO. KENHA/R4/244/2020 FOR PERFORMANCE BASED CONTRACT  
FOR THE MAINTENANCE OF SUBUKIA-NYAHURU (B21) ROAD.**

**WHEREAS M/s Kiu Construction Limited of P.O Box 10564-00100, Nairobi (herein after called "the Bidder") has submitted its tender KenHA/R4/244/2020 dated 15<sup>th</sup> October 2020 for the PERFORMANCE BASED CONTRACT FOR THE MAINTENANCE OF SUBUKIA – NYAHURURU (B21) ROAD (hereinafter called "the Tender")**

**KNOW ALL PEOPLE by these presents that we [Credit Bank PLC of P.O BOX 61064-0200, Nairobi having our registered office at Mercantile House, Ground Floor, Koinange Street, Nairobi, Kenya (hereinafter called "the Bank") are bound unto the KENYA NATIONAL HIGHWAYS AUTHORITY (hereinafter called "the Procuring Entity") in the sum of Kshs 750,000.00 (Kenya Shillings Seven Hundred and Fifty Thousand Only)] for which payment well and truly made to the said Procuring Entity, the Bank binds itself, its successors and assigns by these presents.**

**SEALED with the common Seal of the said Bank this 14<sup>th</sup> day of October 2020.**

**THE CONDITIONS of this obligation are:**

- 1. If the Tenderer withdraws its tender during the period of tender validity specified by the Tenderer on the Tender Form; or**
- 2. If the Tenderer, having been notified on the acceptance of its tender by the Procuring Entity during the period of tender validity in**
  - (a) fails or refuses to execute Contract Form if required; or**
  - (b) fails or refuses to furnish the Performance Security, in accordance with the Instructions to Tenderers.**

**We undertake to pay to the Procuring Entity up to the above amount upon receipt of his first written demand, without the Procuring Entity having to substantiate his demand, provided that in its demand the Procuring Entity will note that the amount claimed by it is due to it, owing to the occurrence of one or both of the two conditions, specifying the occurred condition or conditions.**

**This guarantee will remain in force up to and including Thirty (30) days after the period of tender validity, and any demand in respect thereof should reach the Bank not later than 15<sup>th</sup> April 2021.**



**Upon expiry, this Guarantee becomes NULL and VOID irrespective of whether the original is returned to us for cancellation or not and any claim or statement received after expiry shall be ineffective.**

**This Guarantee shall be governed and construed in accordance with the Laws of the Republic of Kenya.**

***[signature affixed]***  
**Mary Waruingi**  
**AUTHORISED SIGNATORY**  
**[Emphasis by the Board]**

***[signature affixed]***  
**Helina Njoroge**  
**AUTHORISED SIGNATORY**

Having studied the Applicant's bid security, the Board observes that the clauses underlined hereinbefore were included/added by the Applicant and thus had the following effect: -

- The Applicant's bank gave an undertaking to pay to the Procuring Entity upon receipt of a first written demand owing to the occurrence of one or both of the 2 conditions listed in the Applicant's bid security (that is, the failure or refusal to execute Contract Form if required or the failure or refusal to furnish the Performance Security, in accordance with the Instructions to Tenderers);
- The Applicant's bid security will remain in force up to and including Thirty (30) days after the period of tender validity. However, the Applicant's bank did not provide an undertaking that the bid security would be extended;
- The Applicant's bank did not provide an undertaking that the bid security will remain valid up to the time the Contract Agreement has been executed.

In addressing the question whether the Applicant's bid security satisfied the criterion under consideration, the Board notes that section 61 (4) (d) of the Act provides that: -

**"61 (4) A procuring entity may immediately release any tender security if—**

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

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

**(c) .....**;

**(d) a bidder declines to extend the tender validity."**

Having considered the foregoing provision, the Board observes that a bidder's failure to extend the bid security gives a procuring entity a right to release the bid security. Clause 16.1 of Section 2. Instructions to Tenderers specified the tender validity period as 150 days from the date of tender opening which was 15<sup>th</sup> October 2020. This means, the tender validity period would expire on 14<sup>th</sup> March 2021. The Applicant's bid security provided by Credit Bank PLC through the letter dated 14<sup>th</sup> October 2020 is valid thirty (30) days after 14<sup>th</sup> March 2021, and any demand in respect thereof should reach the Bank not later than 15<sup>th</sup> April 2021. However, after expiry of the said bid security, the Applicant's Bank did not provide an undertaking that the same would be extended.

The Applicant's bid security does not bind the Applicant's bank to extend the bid security upon expiry on 15<sup>th</sup> April 2021 neither does it create room for such an extension nor secure the requirement that the bid security must be in force as at the time of signing the contract. Evidently, the Applicant's bid security does not meet all the Conditions stipulated in Schedule 3 of Section 10. Standard Forms of the Tender Document because the Applicant omitted some conditions on extension of the bid security and the requirement that the bid security must be in force as at the time of signing the contract, an aspect that helps cushion the Procuring Entity in case the bid security provided by bidders expires before a contract is signed.

For the foregoing reasons, the Board finds that the Applicant's bid security dated 14<sup>th</sup> October 2020 issued by Credit Bank PLC fails to satisfy the conditions stipulated under Clause 1.3. Eligibility Requirements of Section 4. Qualification Criteria read together with Schedule 3 of Section 10. Standard Forms of the Tender Document.

It is worth noting that section 80 (2) of the Act requires the Procuring Entity to conduct **"evaluation and comparison of tenders using the procedures and criteria set out in the tender documents"**. It is the Board's considered view that the Procuring Entity failed to adhere to the said provision when the evaluating the Applicant's bid in respect of the criterion on: providing copies of IDs of Company Directors, Resume of Proposed Key Personnel and Consent by Proposed Key Personnel.

In totality of the second issue for determination, the Board finds that the Procuring Entity failed to evaluate the Applicant's bid at the Preliminary Evaluation Stage in accordance with section 80 (2) of the Act in the following criteria: -

- Copies of IDs of Company Directors;
- Resume of Proposed Key Personnel; and
- Consent by Proposed Key Personnel

In determining the appropriate orders to issue in the circumstances and having studied the Evaluation Report dated 13<sup>th</sup> November 2020, the Board observes that the Applicant's bid was found non-responsive on the criteria for; (a) bid security, (b) confidential business questionnaire, (c) serialization of submitted bid document & (d) page where Applicant's program of works appears), (e) format of resume of proposed key personnel, f) filling of schedules/forms (schedule of roadworks carried out in the last five years) and (g) completeness of tender document [all pages with entries (typed or handwritten) must be initialized. Any alterations made in the tender document must be countersigned]. The reason on bid security was only raised in the Respondent's Response and not in the Applicant's letter of notification while the reason on; a) confidential business questionnaire (b) filling of schedules/forms (schedule of roadworks carried out in the last five years) and (c) completeness of tender document [all pages with entries (typed or handwritten) must be initialized; any alterations made in the tender

document must be countersigned] were not raised in the Applicant's letter of notification or in the 1<sup>st</sup> Respondent's Response.

The rules of natural justice require that a person is informed of all reasons for an administrative action hence the reason why section 87 (3) of the Act and Regulation 82 (2) of Regulations 2020 gives the 1<sup>st</sup> Respondent a duty to notify the Applicant of all specific reasons why its bid was found non-responsive. This duty was not properly discharged by the 1<sup>st</sup> Respondent.

In addition to its failure to evaluate the Applicant's bid in accordance with section 80 (2) of the Act at the Preliminary Evaluation, the 1<sup>st</sup> Respondent also withheld some reasons why the Applicant's bid was found non-responsive. In the circumstances, the Board deems it necessary to order the 1<sup>st</sup> Respondent to re-instate the Applicant's bid together with all other bids at the Preliminary Evaluation Stage and direct the Evaluation Committee to conduct a re-evaluation at the Preliminary Evaluation Stage in accordance with section 80 (2) of the Act, taking into consideration the Board's findings in this review. Upon conclusion of the subject procurement process, the 1<sup>st</sup> Respondent must notify all tenderers of the outcome of their bids in accordance with section 87 of the Act read together with Regulation 82 of Regulations 2020.

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

## **FINAL ORDERS**

In exercise of the powers conferred upon it by section 173 of the Act, the Board makes the following orders in the Request for Review: -

- 1. The Accounting Officer of the Procuring Entity's Letter of Notification of Unsuccessful bid in Tender No. KENHA/R4/244/2020 for Performance based contract for the Maintenance of Subukia-Nyahururu (B21) Road dated 30<sup>th</sup> November 2020 addressed to the Applicant, be and is hereby cancelled and set aside.**
- 2. The Accounting Officer of the Procuring Entity's Letter of Notification of Award of Tender No. KENHA/R4/244/2020 for Performance based contract for the Maintenance of Subukia-Nyahururu (B21) Road dated 30<sup>th</sup> November 2020 addressed to the 2<sup>nd</sup> Respondent, be and is hereby cancelled and set aside.**
- 3. The Accounting Officer of the Procuring Entity is hereby ordered to re-instate the Applicant's bid together with all other bids at the Preliminary Evaluation Stage and direct the Evaluation Committee to conduct a re-evaluation at the Preliminary Evaluation stage, taking into consideration the Board's findings in this review.**
- 4. Further to Order No. 3 above, the Accounting Officer of the Procuring Entity is hereby directed to ensure the procurement proceedings in Tender No. KENHA/R4/244/2020 for Performance based contract for the Maintenance of Subukia-**

**Nyahururu (B21) Road proceeds to its logical conclusion including the making of an award and issuance of notification letters to bidders in accordance with section 87 of the Act and Regulation 82 of Regulations 2020 within fourteen (14) days from the date of this decision.**

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

**Dated at Nairobi this 18<sup>th</sup> day of January 2021**

**CHAIRPERSON**

**SECRETARY**

**PPARB**

**PPARB**