

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 83/2020 OF 19TH JUNE 2020

BETWEEN

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

AND

THE ACCOUNTING OFFICER,

KENYA RURAL ROADS AUTHORITY.....1st RESPONDENT

Review against the decision of the Accounting Officer of Kenya Rural Roads Authority with respect to Tender No. RWC 562 Upgrading to Bitumen Standard and Maintenance of Thaara-Karaba-Muthuthini-Gikondi & Gaikundo-Gakindu-Gikondi-Mukurweini Roads

BOARD MEMBERS

- | | |
|--------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mr. Alfred Keriolale | -Member |
| 3. Mr. Steven Oundo, OGW | -Member |

IN ATTENDANCE

- | | |
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| 1. Mr. Philemon Kiprop | -Holding brief for Secretary |
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BACKGROUND TO THE DECISION

The Bidding Process

Kenya Rural Roads Authority (hereinafter referred to as "the Procuring Entity") invited interested and eligible firms through an advertisement appearing on My Government pull-out dated **2nd April, 2019** as well as its website (**www.kerra.go.ke**) on **11th April, 2019** to bid for Tender No. RWC 562 for Upgrading to Bitumen Standards and Maintenance of Thaara-Karaba-Muthuthini-Gikondi & Gaikundi-Gakindu-Gikondi-Mukurweini Roads (hereinafter referred to as "the subject tender").

Five (5) addenda were issued for the tender pursuant to sub clauses 11.2 and 11.3 of the Instructions to Bidders of the Document for Tender No. RWC 562 for Upgrading to Bitumen Standards and Maintenance of Thaara-Karaba-Muthuthini-Gikondi & Gaikundi-Gakindu-Gikondi-Mukurweini Roads (hereinafter referred to as "the Tender Document").

Pre-bid Site Visit and Meeting

A Pre-Bid site visit was open but mandatory and bidders were free to visit but with prior arrangement with the Procuring Entity's Regional (Deputy Director) for Nyeri where the project is located. Site visit certificates were supposed to be duly signed by the Deputy Director or his representative. This was conducted as per the Conditions of Tender and Instructions to Bidders under Clauses 8.1 and 8.2 respectively of the Tender Document.

Bid Notices

The five (5) addenda issued pursuant to sub clauses 11.2 and 11.3 of the Instructions to Bidders, Appendix 2 of the Tender Document stated as follows:-

- a) **Addendum 1** - In My Government pullout, on 30th April 2019 clarifying the NCA registration categories per contract, detailing the level of participation (open or citizen) and extending the bidding closing date from 15th May 2019 to 22nd May, 2019.
- b) **Addendum 2** - Through a letter to all bidders and placed on the Procuring Entity's Website on 22nd May 2019, clarifying that the Mobile Weigh Bridge Specifications for Appendix 'E' was attached before the Bills of Quantities in PDF format and extending the bidding closing date from 22nd May 2019 to 30th May 2019.
- c) **Addendum 3** - Through a letter to all bidders and placed on the Procuring Entity's Website on 27th May 2019, extending the Tender Submission Date for all the five bids including construction of Sapet Bridge and Approach Roads from 30th May 2019 to 5th June, 2019.
- d) **Addendum 4** - In the National Dailies (Nation and Standard), on 30th May 2019 extending the closing date for bidding from 30th May 2019 to 5th June 2019
- e) **Addendum 5** - In My Government pullout, on 4th June 2019 extending the closing date for bidding from 5th June 2019 to 12th June 2019

after 5th June 2019 was declared a public holiday to mark Idd-UI-Fitr through Gazette Notice No. 4850.

Bid Submission Deadline and Opening of Bids

The Procuring Entity received a total of twenty seven (27) bids which were opened on 12th June 2019 in the presence of bidders and their representatives.

Evaluation of Bids

The Procuring Entity's Director General vide memo **Ref: KeRRA/011/IA/Vol. III (058)** dated **12th June, 2019** appointed an Evaluation Committee to evaluate the bids received and to make recommendations regarding award of the tender.

The Evaluation Committee conducted the evaluation process from 17th June 2019 to 1st July 2019. It began with a Detailed Preliminary Evaluation (Eligibility, Completeness and Responsiveness) of the bids received. A responsive bid was considered as one which met all the completeness criteria as outlined in the Tender Document and which at the minimum was consistent with the requirements of the Tender Document without material deviation, reservation or omission and did not limit the rights of the Employer or the obligations of a bidder or affect unfairly the competitive position of other responsive bidders.

Upon conclusion of Detailed Preliminary Evaluation, all the twenty seven (27) bidders did not meet the requirements of the completeness criteria and were therefore considered non-responsive.

The Evaluation Committee's Recommendation

In view of the evaluation process, the Evaluation Committee recommended that the subject tender be **re-tendered** since all the bidders were found non-responsive to the requirements of the Tender Document.

There was a dissenting opinion from the Secretary to the Evaluation Committee who disagreed with the Evaluation Committee recommendations and offered the following explanation of her differences:-

"Section 79 (1) of the Public Procurement and Asset Disposal Act, 2015 provides that a tender is responsive if it conforms to all the eligibility and other mandatory requirements in the Bidding Documents.

The tender by Bidder (24) conformed to all the eligibility and bids mandatory requirements in the bid document and hence is a responsive tender.

Section 79 (2) of the Public Procurement and Asset Disposal Act, 2015 provides that a responsive tender shall not be affected by;

a) Minor deviations that do not materially depart from the requirements set out in the Bidding Documents or

b) Errors or oversights that can be corrected without affecting the substance of the tender.

From the foregoing provision, it is apparent that a bid that contains "minor informalities" is not considered non-responsive.

A minor informality or irregularity, in turn, is defined as: one that is merely a matter of form and not of substance. It also pertains to some immaterial defect in a bid or variation of a bid from the exact requirements of the invitation that can be corrected or waived without being prejudicial to other bidders. The defect or variation is immaterial when the effect on price, quantity, quality or delivery is negligible when contrasted with the total cost or scope of the supplies or services being acquired.

The bid document by Bidder (24) contains some errors or oversights;

a) Under Item 17.12 Dichloromethane, the BOQ was indicated as zero but the tenderer indicated 200kg. As the BOQ was zero, it is apparent that the item was not to be used. Hence, the quantity quoted by Bidder (24) of no consequence.

By the tenderer indicating a quantity for the said item, that does not affect the substance of the tender, the same is not prejudicial to other bidders. As a consequence, the error or oversight does not render the tender non responsive pursuant to the provisions of Section 79 (2) of the PPADA 2015.

b) Item No. 22.09 of the bid document by Bidder (24) does not have a quantity. However, the item Labor which should not have a quantity has a quantity of 8 hours. This appears to have been a mismatch at the time of filling out the form such that as from Item No. 22.09, the entries went one row below.

Section 81 of the PPADA 2015 provides as follows:

- a) *A procuring entity may, in writing request a clarification of a tender from tenderer to assist in the evaluation and comparison of tenders.*
- b) *A clarification shall not change the terms of the tender.*

It is therefore clear that under the said provision a procuring entity may seek a clarification of the tender which clarification may assist in the evaluation and comparison of the tenders.

The Evaluation Committee ought to have sought clarification regarding Item No. 22.09 and the Item titled Labour from the bidder pursuant to the provisions of Section 81 of the Public Procurement Asset and Disposal Act, 2015. This is an error that could be corrected without affecting the substance of the tender and as a consequence, the said error does not render the tender by Bidder (24) non responsive.”

Professional Opinion

The Procuring Entity's Deputy Director, Supply Chain Management (i.e. the Head of Procurement function) reviewed the Evaluation Report and noted the following:-

"Although the Secretary of the Evaluation Committee is not a member of the Evaluation Committee, the dissenting opinion on this tender is noted. However, the Bidder altered the BOQ by deleting the quantity for bill items No.22.09 with quantity of 8hrs and inserting item (labor) with quantity of 8hrs contrary to the provision of clause 20.3 of the Instructions to Bidders.

Alterations to the bills of quantities in my opinion are major deviation as they have implication during implementation stage in addition, makes it difficult to compare altered bills of the Bidder with other competitors bids (like for like). Provision of clear Specifications is the work of the Employer and bidders should strictly follow the instructions provided or seek clarification before the tender opening date."

She expressed her professional opinion that the subject procurement satisfied the requirements of the Tender Document and statutory requirements of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") and urged the Accounting Officer to adjudicate as appropriate.

REQUEST FOR REVIEW NO 104 OF 2019

M/s Roben Aberdare (K) Limited (hereinafter referred to as "the Applicant") lodged Request for Review No. 104/2019 dated and filed on 4th September 2019 together with the Applicant's Affidavit/Statement sworn and filed on even date and a List of Authorities dated and filed on 17th September 2019.

In response, the Procuring Entity filed its Response to the Request for Review Application dated and filed on 13th September 2019 together with a List of Authorities dated 16th September 2019 and filed on 17th September 2019.

The Applicant sought for the following orders:-

- a) An order annulling and setting aside the Respondent's decision to terminate the procurement proceedings in relation to Tender No. RWC 562;***
- b) An order annulling and setting aside the Respondent's decision to the effect that the Applicant's bid in Tender No. RWC 562 was not responsive as communicated via its letter dated 9th August 2019;***
- c) In the alternative to (b) above, an order directing the Respondent to award Tender No. RWC 562 to the Applicant in case the Applicant was/is determined and/or found to be the lowest evaluated bidder;***

- d) An order directing the Respondent to pay the costs of and incidental to these proceedings; and*
- e) Such other or further relief or reliefs as this Board shall deem just and expedient.*

The Board having considered parties' cases and the documents filed before it, including confidential documents submitted to it pursuant to section 67 (3) (e) of the Act ordered as follows in its decision dated 25th September 2019:-

- 1. The Procuring Entity's Letter of Notification of Termination of the Procurement Proceedings of Tender No. RWC 562 for Upgrading to Bitumen Standards and Maintenance of Thaara-Karaba-Muthuthini-Gikondi & Gaikundi-Gakindu-Gikondi-Mukurweini Roads dated 9th August 2019, that was addressed to the Director General of the Public Procurement Regulatory Authority be and is hereby cancelled and set aside.**

- 2. The Procuring Entity's Letter of Notification regarding termination of the subject tender and unsuccessful bid dated 9th August 2019 addressed to the Applicant is hereby cancelled and the same set aside.**

3. **The Procuring Entity is hereby directed to conduct a re-evaluation of the Applicant's bid, together with all other bidders disqualified on the basis of Item A 104/17.12 of Appendix A and Item 22.09 of Bill No. 22. Schedule of Works under Section 12. Bill of Quantities of the Bidding Document, at the Preliminary Evaluation Stage.**
4. **Further to Order No. 3 above, the Procuring Entity is hereby directed to proceed with the procurement process to its logical conclusion, including the making of an award within twenty-one (21) 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.**

Re-evaluation of the Applicant's Bid

Following the decision of the Board in **PPARB Application No. 104/2019**, the Procuring Entity's Evaluation Committee was instructed to conduct a re-evaluation of the Applicant's bid in accordance with the directives issued by the Board in the said decision and similar decisions made by the Board in **PPARB Application No. 121/2019** and **PPARB Application No. 110/2019** with respect to Tenders No RWC 561 and RWC 563 respectively.

This re-evaluation was intended to focus on the areas that had resulted in the Applicant's bid being considered non-responsive in the preliminary stage of evaluation, that is, alteration of the BOQ and specifically on line items (A 104.17/12 of (Appendix A) and Item 22.09 of Bill No. 22 (schedule of Day Work) during the initial evaluation for the subject tender and the two other tenders, that is, Tenders No RWC 561 and RWC 563.

The Evaluation Committee noted that during the initial evaluation process, it relied on the copies of the bid documents submitted by the bidders. However, as per the directive issued by the Board, the Evaluation Committee proceeded to re-evaluate the Applicant's submissions from its original documents.

The Evaluation Committee noted that while concurring that the original documents ought to have been relied upon in case of a discrepancy it observed that the directive by the Board only resulted in the bidder being responsive under the eligibility completeness and responsiveness criteria.

In this regard, the Evaluation Committee considered it prudent to subject the Applicant to a full evaluation as per the set criteria in the Tender Document (detailed and technical, financial capacity, general and similar experience and sensitivity analysis as stipulated in section 3 (Instructions to Bidders) and 5 (Evaluation Criteria) of the tender documents).

From the re-evaluation findings, one (1) out of the twenty seven (27) bidders, who submitted their bids met all the requirements of the completeness criteria and therefore considered responsive.

The one (1) bidder, that is, M/s Roben Aberdare (K) Limited was subjected to Technical Responsiveness Evaluation from which the said bidder was found to be technically responsive.

Upon conclusion of the evaluation process, the Evaluation Committee established that M/s Roben Aberdare (K) Limited's bid was the lowest evaluated bid.

However, the Evaluation Committee noted that it was not possible to make a recommendation for award of the subject tender due to the following reasons: -

1. The bidder provided details of key personnel which were similar for three tenders, that is, Tenders No RWC 561, RWC 562 and RWC 563
2. The bidder provided details of key equipment and plant which were similar for three tenders, that is, Tenders No RWC 561, RWC 562 and RWC 563
3. The bidder provided details of financial capacity which were similar for all the three tenders, that is, Tenders No RWC 561, RWC 562 and RWC 563, as summarized in the table below:

Table 1: Financial requirements and bidders' capacity for 3 Tenders (RWC 561, RWC 562 and RWC 563)

S/No.	Tender No.	Requirements		Bidder's Capacity	
		Cash Flow	Turnover	Cash Flow	Turnover
1.	RWC 561	500,000,000.00	750,000,000.00	1,047,773,916	1,039,841,005.00
2.	RWC 562	500,000,000.00	750,000,000.00		
3.	RWC 563	500,000,000.00	750,000,000.00		
Total		1,500,000,000.00	2,250,000,000.00	1,047,773,916	1,039,841,005.00

Due to the reasons outlined hereinabove, the Evaluation Committee therefore recommended that the decision to award any or all of the three tenders that the bidder qualified for, be at the discretion of the Accounting Officer.

Professional Opinion

The Deputy Director, Supply Chain Management, in her professional opinion dated 26th November 2019, noted that the Evaluation Committee had not made any recommendations to award the subject tender.

Further, she noted that according to the Procuring Entity's approved procurement plan for the financial year 2019-2020, the budgetary allocation for the project was Kshs 80 million and pursuant to section 53 (8) of the Act, the budgetary allocation was barely sufficient to start off the road.

In addition, Circular No Ref. OP/CAB18/19/10A dated July 2019, from the Office of the President put all the projects in abeyance until further notice.

In view of the foregoing, she advised the Procuring Entity's Director General to terminate the tender and to adjudicate as appropriate.

The Accounting Officer concurred with the Professional Opinion and proceeded to terminate the tender due to inadequate budgetary provision on 29th November 2019.

All bidders who participated in the subject tender were issued with letters of notification of termination of the procurement process dated 9th March 2020.

REQUEST FOR REVIEW NO 42/2020

The Applicant lodged Request for Review No. 42/2020 dated 18th March 2020 and filed on 20th March 2020 together with a Statement in Support of the Request for Review sworn on 18th March 2020 and filed on 20th March 2020.

In response, the Procuring Entity filed its Response to the Request for Review Application dated 31st March 2020 and filed on 1st April 2020.

The Applicant sought for the following orders:-

- a) An order annulling the Procuring Entity's decision contained in the letter dated 9th March 2020 terminating the procurement process;*
- b) An order of specific performance compelling the Procuring Entity to conclude the tendering process within fourteen (14) days in default of which the Board be pleased to review all the records of the procurement process relating to Tender No. RWC 562 Upgrading to Bitumen Standard and Maintenance of Thaara-Karaba-Muthuthini-Gikondi & Gaikundo-Gakindu-Gikondi-Mukurweini Roads, evaluate all the bids and award the tender to the lowest evaluated bidder as provided for in the Tender Document; and*
- c) An order directing the Procuring Entity to bear the costs of and incidental to this Request for Review.*

The Board having considered parties' cases and the documents filed before it, including confidential documents submitted to it pursuant to section 67 (3) (e) of the Act ordered as follows in its decision dated 14th April 2020:-

- 1. The Procuring Entity's Letter of Notification of Termination of the Procurement Process of Tender No. RWC 562 for**

Upgrading to Bitumen Standards and Maintenance of Thaara-Karaba-Muthuthini-Gikondi & Gaikundi-Gakindu-Gikondi-Mukurweini Roads dated 9th March 2020, addressed to the Director General of the Public Procurement Regulatory Authority be and is hereby cancelled and set aside.

- 2. The Procuring Entity's Letter of Notification of Termination of the Procurement Process of Tender No. RWC 562 for Upgrading to Bitumen Standards and Maintenance of Thaara-Karaba-Muthuthini-Gikondi & Gaikundi-Gakindu-Gikondi-Mukurweini Roads dated 9th March 2020, addressed to all bidders be and are hereby cancelled and set aside.**
- 3. The Procuring Entity is hereby directed to proceed with the procurement process to its logical conclusion, including the making of an award within twenty-one (21) days from the date of receipt of the signed decision of the Board.**
- 4. The Procuring Entity shall bear the costs of this Request for Review amounting to Kshs. 100,000/- to be paid to the Applicant**

NOTICE OF MOTION APPLICATION IN REQUEST FOR REVIEW NO 42/2020

The Procuring Entity lodged a Notice of Motion Application in Request for Review Application No. 42/2020 on 6th May 2020 together with a Supporting Affidavit filed on even date. The Procuring Entity further lodged a Supplementary Affidavit sworn and filed on 12th May 2020.

In response, the Applicant filed a Replying Affidavit sworn and filed on 11th May 2020.

The Procuring Entity sought for the following orders:-

- a) An order granting the Procuring Entity an extension of time of 28 days with effect from 14th April 2020 to comply with the orders of the Board issued on 14th April 2020;*
- b) Any other order that the Board may deem just to grant;*
- c) An order directing that the costs of the application be in the cause.*

The Board having considered parties' cases and the documents filed before it, ordered as follows in its decision dated 27th May 2020:-

- 1. The Procuring Entity's Notice of Motion Application in Request for Review Application No. 42/2020 be and is hereby dismissed.**

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

REQUEST FOR REVIEW NO. 83 OF 2020

Subsequently thereafter, the Applicant lodged Request for Review No. 83/2020 dated and filed on 19th June 2020 (hereinafter referred to as "the Request for Review") together with a Statement in Support of the Request for Review dated and filed on even date (hereinafter referred to as the Applicant's Statement") through the firm of Muchemi & Company Advocates.

In response, the Procuring Entity, acting in person, lodged a Response to the Request for Review Application dated and filed on 29th June 2020 (hereinafter referred to as the "Procuring Entity's Response").

The Applicant sought for the following orders: -

- i. An order annulling in its entirety the decision of the Respondent contained in the letter dated 11th May 2020 terminating the procurement process in Tender No. RWC 562 Upgrading to Bitumen Standard and Maintenance of Thaara-***

Karaba-Muthuthini-Gikondi & Gaikundo-Gakindu-Gikondi-Mukurweini Roads;

- ii. An order of specific performance compelling the Respondent to conclude the tendering process within fourteen (14) days in default to which the Board be pleased to review all records of the procurement process relating to Tender No. RWC 562 Upgrading to Bitumen Standard and Maintenance of Thaara-Karaba-Muthuthini-Gikondi & Gaikundo-Gakindu-Gikondi-Mukurweini Roads, evaluate all bids and award the tender to the lowest evaluated bidder as provided in the Tender Document; and***
- iii. An order for costs of and incidental to this Request for Review to borne by the Respondent.***

On 16th March 2020, the Board issued Circular No. 1/2020 and the same was published on the Public Procurement Regulatory Authority (hereinafter referred to as "the PPRA") website (www.ppra.go.ke) in recognition of the challenges posed by the COVID-19 pandemic and instituted certain measures to restrict the number of representatives of parties that may appear before the Board during administrative review proceedings in line with the presidential directives on containment and treatment protocols to mitigate against the potential risks of the virus.

On 24th March 2020, the Board issued Circular No. 2/2020 further detailing the Board's administrative and contingency management plan to mitigate the COVID-19 disease. Through this circular, the Board dispensed with physical hearings and directed that all request for review applications shall be canvassed by way of written submissions.

The Applicant filed Written Submissions dated 2nd July 2020 on even date whereas the Procuring Entity filed Written Submissions dated 8th July 2020 on 9th July 2020 in opposition to awarding costs to the Applicant.

BOARD'S DECISION

The Board has considered each of the parties' cases, the documents filed before it, including confidential documents filed in accordance with section 67 (3) (e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") together with the written submissions by parties.

The main issue that calls for determination is:-

- I. Whether the Procuring Entity terminated or cancelled the procurement proceedings of the subject tender in accordance with section 63 of the Act;***

Termination of procurement proceedings is governed by 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 the person 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, 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 Authority stating the reasons for the termination within fourteen days of the termination of the tender. A 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 order to determine if the Procuring Entity terminated the subject procurement proceedings in accordance with section 63 of the Act, the Board finds it necessary to provide a chronology of events with respect to the subject procurement process.

A brief background to the subject procurement process is that the Procuring Entity invited interested and eligible firms to submit bids in response to Tender No. RWC 561 Upgrading to Bitumen Standard and Performance Based Routine Maintenance of Ihwa-Ihururu, Ndugamano-Gura/Ndugamano-Gachatha & Gachatha-Kangaita-Ithekahuno-Gatiki Roads (hereinafter referred to as "Tender No. RWC 561"), Tender No. RWC 562 Upgrading to Bitumen Standard and Maintenance of Thaara-Karaba-

Muthuthini-Gikondi & Gaikundo-Gakindu-Gikondi-Mukurweini Roads (hereinafter referred to as "the subject tender") and Tender No. 563 Upgrading to Bitumen Standard and Performance Based Routine Maintenance of Githangara–Karuthi-Kagicha-iria, Witima-Giathenge, Chinga Boys-Nyamari, Gathunguri-Kabebero, Gachami-Kagonye-Kithome, Gaturuturu-Kirangi, Kairuthi-Gathumbi, Access to Kenyatta Mahiga High School Road & Kenya Power Othaya Substation-Othaya Girls Secondary School-Munaini Roads (hereinafter referred to as "Tender No. RWC 563"), via an advertisement dated 2nd April 2019. The Applicant herein submitted bids in response to all the three tenders.

Bids received were opened by the Procuring Entity on 12th June 2019, and it commenced the evaluation process shortly thereafter. Upon conclusion of the evaluation process, the Procuring Entity's Evaluation Committee recommended termination of the subject tender, including Tender No RWC 561 and Tender No. RWC 563 since all the bidders who submitted bids in response to the three tenders did not meet the preliminary and mandatory requirements in the respective tender documents and were therefore considered to be non-responsive.

The Accounting Officer approved the Evaluation Committee's recommendation, having been reviewed by the Head of Procurement function. All bidders, including the Applicant herein, were informed of the

Procuring Entity's decision to terminate the three tenders mentioned hereinbefore.

Aggrieved, the Respondent lodged **PPARB Application No. 104/2019** on 4th September 2019, challenging the Procuring Entity's decision to terminate the subject tender, **PPARB Application No. 110/2019** on 17th September 2019, challenging the Procuring Entity's decision to terminate Tender No. RWC 563 and **PPARB Application No. 121/2019** on 18th October 2019, challenging the Procuring Entity's decision to terminate Tender No RWC 561.

In its decisions with respect to the three request for review applications mentioned hereinabove, the Board held that the Procuring Entity failed to fairly evaluate the Applicant at the Preliminary Evaluation Stage and its bids ought to have qualified for further evaluation. In view of this finding, the Board held that the Procuring Entity's termination of the three tenders on the ground that all tenders were found non-responsive was unfounded and therefore declared the Procuring Entity's termination of the three tenders null and void. The Board directed the Procuring Entity to proceed with the procurement process in all the three tenders to their logical conclusion, including the making of an award, within twenty one (21) days from the date of the decisions thereof.

Vide a letter dated 17th October 2019, the Procuring Entity wrote to the Board requesting for a mention of **PPARB Application No. 104 of 2019** in order for the Procuring Entity to apply for extension of time within which to comply with the Board's orders as issued on 25th September 2019.

The Board Secretary in his response informed the Procuring Entity that once the Board issued its decision in **PPARB Application No. 104 of 2019** it became *functus officio* and that the Board could only issue substantive orders with respect to request for review applications filed before it. He advised the Procuring Entity to lodge an application before the Board seeking an extension of time within which to comply with the orders as issued on 25th September 2019 for the Board's consideration.

Shortly thereafter, the Procuring Entity filed a Notice of Motion application which was mentioned before the Board on 7th November 2019 seeking for an extension of time to comply with its orders in **PPARB Application No. 104 of 2019** and **PPARB Application No. 110 of 2020**. On 7th November 2019, the Board granted the Procuring Entity's request and extended the period of compliance for a further thirty six (36) days from 16th October 2019 with respect to **PPARB Application No. 104 of 2019** and for a further thirty five (35) days from 17th October 2019 with respect to **PPARB Application No. 110 of 2019**.

However, on 26th November 2019, the Applicant addressed a letter to the Board through which it informed it that the period of compliance with respect to the orders issued in **PPARB Application No. 104/2019**, **PPARB Application No. 110/2019** and **PPARB Application No. 121/2019** had lapsed and urged the Board to schedule the matter for mention on an urgent basis for purposes of confirming compliance.

In a letter dated 5th December 2019, the Board Secretary in his response informed the Applicant that the Board was *functus officio* with respect to **PPARB Application No. 104/2019**, **PPARB Application No. 110/2019** and **PPARB Application No. 121/2019** and in accordance with section 9 of the Act, the mandate to monitor, assess and review compliance to procurement laws and principles as articulated under the Constitution, the Act and any other laws, including the responsibility to investigate and act on complaints received on procurement and asset disposal proceedings rested squarely with the Public Procurement Regulatory Authority (hereinafter referred to as "the Authority").

Subsequently thereafter, the Procuring Entity completed the evaluation process with respect to Tender No RWC 563 and awarded the Applicant the said tender at a contract sum of Kshs 1,854,676,121.00 via a letter of award dated 24th February 2020.

However, vide letters dated 9th March 2020, the Procuring Entity notified the Applicant of its decision to terminate Tender No. RWC 561 and the subject tender in accordance with section 63 (1) (b) of the Act, due to 'inadequate budgetary provision' for the two tenders.

Aggrieved by the decision of the Procuring Entity, the Applicant filed **PPARB Application No. 42/2020** with respect to the subject tender and **PPARB Application No. 43/2020** with respect to Tender No. RWC 561 and challenged the Procuring Entity's decision to terminate the two respective tenders.

In its decisions dated 14th April 2020, the Board found that the Procuring Entity's termination of the subject tender and Tender No. RWC 561 on the basis of 'inadequate budgetary allocation' failed to meet the threshold under section 63 of the Act since the Board noted that the Procuring Entity had adequate budgetary amount for the subject procurement and such termination was thus null and void. The Board therefore directed the Procuring Entity to conclude the procurement process to its logical conclusion including making an award within seven (7) days from the date of the decision. The Board further awarded costs to the Applicant.

On 24th April 2020, the Procuring Entity addressed a letter to the Board which letter was received on 28th April 2020, requesting for a ten (10) day

extension of time within which to comply with the Board's orders dated 14th April 2020 in **PPARB Application No. 42/2020** with respect to the subject tender and **PPARB Application No. 43/2020** with respect to Tender No. RWC 561.

Upon receipt of the Procuring Entity's letter dated 24th April 2020, the Board Secretary responded via a letter dated 28th April 2020 advising the Procuring Entity that the Board is *functus officio* with respect to **PPARB Application No. 42/2020** and **PPARB Application No. 43/2020** and that the Board can only issue substantive orders with respect to request for review applications filed before it. The Board Secretary further pointed out that the Procuring Entity had sought a similar extension before and following its advice filed a notice of motion application, which was considered and granted by the Board on 7th November 2019. The Board Secretary further advised the Procuring Entity to note the directives issued by the Board through Circular No. 2/2020 dated 24th March 2020 in considering whether to approach the Board.

On 6th May 2020, the Procuring Entity filed a Notice of Motion Application in **PPARB Application No. 42/2020** requesting for an extension period of twenty eight (28) days from the date of the decision of the Board that is 14th April 2020.

In its decision dated 27th May 2020, the Board found that the Procuring Entity did not comply with the orders of this Board dated 14th April 2020 and further, did not proffer sufficient reasons to justify its lack of compliance. The Board therefore found that the Notice of Motion Application had no merit and thus dismissed the same.

On 7th June 2020, the Applicant received a letter from the Procuring Entity dated 11th May 2020 which stated as follows: -

"NOTIFICATION OF TERMINATION OF PROCUREMENT PROCESS"

Reference is made to your tender submitted to the Authority for the above project on 12th June 2019 and the PPARB ruling No. 42 of 2020, where the Authority was directed to proceed with the evaluation process to its logical conclusion, of the above tender.

Pursuant to section 63 (1) (b) of the Public Procurement and Asset Disposal Act (PPADA) 2015, this is to notify you that the above tender has been terminated due to inadequate budgetary provisions as per the Principal Secretary (State Department of Infrastructure) letter Ref MOTIHUD&PW/1/A/14021/V/VOL 12/(77) dated 17th April

2020, which instructed the re-scoping of works to about 50% of the initial scope.

We further wish to inform you that the above tender has not been awarded to any bidder and the procurement process has been terminated pursuant to the provisions of Section 63 (1) (b) of the PPAA 2015.

However, we take this opportunity to thank you for showing interest in the project.

Please arrange to collect your original bid security after expiry of fourteen days from the date of this letter."

Aggrieved, the Applicant moved the Board through the Request for Review Application.

The Applicant submitted that it was served with the abovementioned letter of termination dated 11th May 2020 by the Procuring Entity on 7th June 2020, a month after it was issued, and after the Board had delivered its decision in **Notice of Motion Application in Request for Review No. 42/2020** on 27th May 2020, which in the Applicant's view demonstrated

that the Procuring Entity was deceitful and would go to any lengths to defeat the ends of justice.

The Applicant contended that the letter issued by the Principal Secretary, State Department of Infrastructure dated 17th April 2020, is in contradiction with its earlier letter which granted the Procuring Entity a 'No Objection' to re-scope and re-advertise the road project in the subject tender; noting that the two letters were issued in the same financial year, further demonstrating the Procuring Entity's behaviour as inconsistent and in direct breach with the values espoused under Chapter Six of the Constitution and the provisions of the Act.

Moreover, it is the Applicant's submission that the Procuring Entity, pursuant to section 53 (8) of the Act was aware of its budget prior to initiation of the subject procurement process and thus cannot opt to terminate the procurement process after tenders have been submitted and evaluated on the ground of 'inadequate budgetary allocation'.

The Applicant further argued that the Procuring Entity had embarked on a fishing expedition to find flimsy reasons to terminate the subject tender, noting that this is the fifth time the same is being terminated. The Applicant contended that the Procuring Entity had also failed to provide real and tangible evidence to justify and support the ground for termination

and thus its actions are in gross contravention of the Act and the Constitution.

On its part, the Procuring Entity submitted that at the time of termination of the subject procurement process vide its letter dated 11th May 2020, there was inadequate budget to enable the Procuring Entity conclude the same through an award of the subject tender. Further, that the subject tender being a multi-year project whose execution would need to be effected over a period of several years, it was necessary for budget confirmations to be undertaken before any award is made and a contract signed with any party. It was therefore the Procuring Entity's submission that it terminated the subject tender in accordance with the provisions of the Tender Document, the Act and the Constitution contrary to the Applicant's submissions.

Having considered parties' submissions, the Board examined the Procuring Entity's confidential file submitted in accordance with section 67 (3) (e) of the Act and observes therein a Re-evaluation Report dated 20th April 2020 whereby the Procuring Entity's Evaluation Committee issued the following recommendation: -

"Based on the above final orders issued by the Board (In PPARB Application No. 42 of 2020), and as guided therein in regard to the capacity of the bidder and available budgetary

allocation, the Tender Processing Committee upon further review concluded that the Tender for Upgrading to Bitumen Standard and Maintenance of Thaara-Karaba-Muthuthini-Gikondi & Gaikundo-Gakindu-Gikondi-Mukurweini Roads (RWC 562) be awarded to M/s Roben Aberdare (K) Ltd at their bid price of Kshs 1,330,162,198.00 (One billion Three Hundred Thirty Million One Hundred Sixty Two Thousand , One Hundred Ninety Eight Only)."

From the above excerpt, the Board observes that the Evaluation Committee recommended award of the subject tender to the Applicant herein.

However, the Procuring Entity's Deputy Director, Supply Chain Management vide her 3rd Professional Opinion dated 29th April 2020, made the following findings following the recommendation of the Evaluation Committee: -

"From the above findings, we note the following: -

1. The budgetary allocation for this project still remains the same (80 Million) as stated in the Head of Procurement's 2nd Professional Opinion Ref No. KeRRA/011/33/Vol. XIII (30) dated 26th November 2019. The budgetary allocation is therefore not adequate for the authority to start off this project. To date there has been no budgetary enhancement

provided by the Authority or the Ministry to support the start of this project.

2. We note from the Evaluation Committee's report Ref No. KeRRA|011|16|Vol. XV (021) dated 20th April 2020, M/s Roben Aberdares K Limited was awarded Tender No. RWC 563 at their tender sum of Kshs 1,854,676,121.00 through a notification of award Ref: KeRRA|16|1|RWC563|Vol 1|(4675) on 24th February 2020 in addition to other ongoing projects, the Bidder therefore lacks capacity to undertake additional works.

3. In light of the above facts, we advise the Director General to terminate the above tender."

The Board observes that the Procuring Entity's Deputy Director Supply Chain Management in her professional opinion advised the Accounting Officer to terminate the subject tender on two grounds: Firstly, on the basis of inadequate budgetary allocation as the budget for the subject tender remained at Kshs 80 million since no budgetary enhancement had been provided. Secondly, the Applicant's lack of capacity to undertake the subject tender noting that it had been previously awarded Tender No. RWC 563.

The Board observes, the Accounting Officer approved the Professional Opinion on 5th May 2020 and made the following comments: -

"I concur with your professional opinion and approve a termination of this tender owing to the bidder's lack of capacity to execute the works having been awarded RWC 563. Further, there are inadequate budgetary provisions for this road as per PS letter Ref MOTIHUD&PW/1/A/14.21/C/Vol.12 (77) dated 17th April 2020 which instructed re-scoping of the works to about 50% of the initial scope. You may proceed."

We note, the two issues raised by the Deputy Director Supply Chain Management in her professional opinion and approved by the Accounting Officer as justification to terminate the subject tender were adjudicated upon by the Board in **PPARB Application No. 42/2020**. In the said matter the Board held that all the reasons advanced by the Procuring Entity to justify its termination of the tender did not meet the threshold under section 63 of the Act, noting the Board's finding that the Procuring Entity had sufficient funds to commence the subject procurement process and that there was no requirement in the Procuring Entity's Tender Document that prohibited the Applicant from applying and being awarded several tenders simultaneously.

In this regard therefore, the Procuring Entity deliberately disregarded the decision of this Board in **PPARB Application No. 42/2020** and intentionally flouted the directives therein by terminating the subject tender based on the two issues as referenced hereinabove.

Upon further examination of the Procuring Entity's confidential file, the Board observed therein a letter written by Engineer Luka Kimeli, the Procuring Entity's Accounting Officer addressed to Prof. Arch. Paul M. Maringa, the Principal Secretary, State Department of Infrastructure, Ministry of Transport, Infrastructure & Housing, dated 16th April 2020, requesting for confirmation of availability of adequate funding to conclude the subject procurement process through the making of an award.

Vide a letter addressed to the Accounting Officer dated 17th April 2020 and stamped received on 5th May 2020, the Principal Secretary responded as follows: -

".....However, owing to changing circumstances, the Draft budget 2020/2021 has been prepared on a project by project basis based on our entire ceiling of Kshs 51 billion as opposed to the expected Kshs 150 million. This very material deviation means that you may not continue with the projects under reference as originally designed and tendered due to inadequate budget. There is therefore utmost need to reduce

the scope with a view of reducing the contract sums to approximately 50% of the initial tender amounts. The foregoing is based on the following summary:

- Non receipt of the exchequer for 2019/2020 for the two projects due to reasons highlighted above;*
- Budgetary provisions provided under Draft budget 2020/2021 which are based on the entire departmental ceilings of Kshs 51 billion show that we may only be able to use approximately only 5% of the tendered amounts under the 2020/2021 financial year.*

Based on budget adequacy and looking forward into the MTEF ceilings, if these projects are awarded in their current form, it will take us a minimum two financial years to raise an advance payment of 10% for each. Based on the MTEF outlook, it would also take us a minimum 15 years to complete the projects. Arising from the above, i hereby advice that it is better to re-scope the projects to lower tender values and finish item in say 3-5 years rather than have stalled projects which end up being too expensive and an embarrassment to Government.

Based on the above arguments, you are hereby advised to re-scope the two projects with an intention of a speedy retender."

From the above letter, the Principal Secretary informed the Procuring Entity's Accounting Officer that the draft budget for 2020/2021 was prepared on a project to project basis based on a ceiling of Kshs 51 billion as opposed to the expected Kshs 150 billion. As a result therefore, the Procuring Entity may not continue with the subject tender as originally designed and tendered due to inadequate budget. Further, the Principal Secretary requested the Procuring Entity to reduce the scope of the subject tender with a view of reducing the contract sums to approximately 50% of the initial tender amounts in order to complete the project in approximately three to five years rather than have a stalled project.

On this basis therefore, the Accounting Officer terminated the subject tender.

From the foregoing, the Board observes that the Procuring Entity terminated the subject tender on 5th May 2020 and issued letters of termination to all bidders dated 11th May 2020.

However, when the Procuring Entity filed a Notice of Motion Application in **Application No. 42/2020** on 6th May 2020 requesting for an extension period of twenty eight (28) days to comply with the decision of the Board in Application No. 42 of 2020, the Board notes, the Procuring Entity did not inform the Board that it intended to notify bidders that it had terminated

the subject tender on 5th May 2020, which in the Board's view smacks of bad faith on the part of the Procuring Entity.

The Board observes that in its decision in **PPARB Application No. 42/2020**, the Board directed the Procuring Entity to proceed with the subject procurement process to its logical conclusion including the making of an award within seven (7) days from the date of the decision, this being 14th April 2020.

Notably, completion of the subject procurement process in the aforementioned application was with respect to making of an award since the evaluation process in the subject tender had already been finalized by the Procuring Entity's Evaluation Committee in so far as the preliminary, technical and financial evaluation stages were concerned and that the Applicant was the lowest evaluated bidder as per the recommendation of the Evaluation Committee.

If the Procuring Entity was indeed acting in good faith and indeed required an extension of time to comply with the orders of the Board, it ought to have disclosed to the Board that it terminated the subject tender on 5th May 2020. In this regard therefore, it is possible for this Board to deduce that the Procuring Entity had no intention to comply with the orders of this Board issued on 14th April 2020 in **PPARB Application No. 42/2020**.

The Board observes that to date, the Procuring Entity has not complied with the orders of this Board.

From the background provided hereinbefore, we observe that the subject tender was initiated in the financial year 2018/2019 and was advertised by the Procuring Entity on 2nd April 2019. However, the Procuring Entity terminated the subject procurement process on the basis of a draft budget for 2020/2021 which was prepared on a project to project basis based on a ceiling of Kshs 51 billion.

The Board notes, the estimates in a draft budget may be adjusted prior to confirmation of the final budget and thus a draft budget is not a final budget. It is important to note that when a procuring entity initiates a procurement process, it does so based on an allocated budgetary amount. In this instance, the Board in its decision in **PPARB Application No. 42 of 2020** established that a budget line of Kshs 90 million and Kshs 80 million had been approved by the Principal Secretary for the financial year 2018/2019 and 2019/2020 respectively as evidenced in the letters from the Principal Secretary dated 24th October 2019 and 12th July 2019 respectively. There being no evidence to the contrary, the Board made a finding in **PPARB Application No. 42 of 2020** that the budget set aside so far in the two financial years 2018/2019 and 2019/2020 was an

accumulative amount of Kshs 170 million for the subject tender. Moreover, we note, no evidence has been placed before this Board as proof that the said amount was returned to the Exchequer at the close of the two financial years by the Procuring Entity.

In this regard therefore, it is our considered view that the Procuring Entity grossly erred in relying on a draft budget for the financial year 2020/2021 as a reason to cancel a live and ongoing procurement process.

It is not lost to the Board as outlined in the background hereinbefore that the Procuring Entity terminated the subject tender in two separate instances, which terminations were subsequently annulled by this Board.

In the first instance, the Procuring Entity alleged that no bidder was responsive thereby terminated both procurement processes by dint of section 63 (1) (f) of the Act which decision was annulled by this Board.

In the second instance, that is, in **PPARB Application No. 42 of 2020**, the Procuring Entity alleged lack of sufficient budget to complete the subject procurement process, an issue it did not raise before this Board the first time it attempted to terminate the subject procurement process and further alleged that the Applicant lacked the capacity to execute the

subject tender despite having found it responsive in all stages of evaluation which allegation is not among the grounds for termination under section 63 (1) of the Act. This termination was nullified by the Board, after it noted that the Procuring Entity had adequate budgetary amount to implement the subject tender and directed the Procuring Entity to proceed with the subject procurement process to its logical conclusion, including the making of an award within seven (7) days from the date of the decision, that is, 14th April 2020.

The Board is cognizant of section 175 (1) of the Act which provides as follows: -

"A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties" [Emphasis by the Board]

Accordingly, the decision of this Board is final and binding to parties to a request for review application unless challenged through judicial review by the High Court within fourteen days from the date the decision is issued by this Board.

The Board observes that it rendered its decision with respect to **PPARB Application No. 42/2020** on 14th April 2020, and the fourteen (14) day

period within which a judicial review application may be lodged lapsed on 28th April 2020. The Board further observes from the documents before it that no notice of appeal has been issued with respect to the aforementioned decisions and therefore the same remain final and binding on parties therein.

The Board observes that this is the third time that the Procuring Entity has terminated the subject tender; this time on the ground under section 63 (1) (b) of the Act, that is, 'inadequate budgetary provision' following the Principal Secretary's letter dated 17th April 2020 which instructed the Procuring Entity to re-scope the subject works to approximately 50% of the initial tender amount. This is despite the Principal Secretary's earlier letter dated 3rd December 2019 which granted the Procuring Entity's request for a "**No Objection**" to proceed with the subject procurement process and further approved a budget line of Kshs 80 million to commence the subject procurement process.

However, the Board notes paragraph 11 of the Procuring Entity's Response filed on 29th June 2020 which reads as follows: -

"I know that as of now there is adequate budget on the basis of which this procurement could be brought to its logical conclusion other than through termination on the basis of budget availability."

According to the above paragraph, the Procuring Entity admits that there is adequate budget to conclude the subject procurement process other than through termination of the same.

As stated hereinbefore, the Procuring Entity erred in relying on a draft budget for the 2020/2021 financial year as a reason for terminating the subject tender, noting that the draft budget is not a final budget and is susceptible to amendments in arriving at the final budget.

In view of this statement by the Procuring Entity, and taking into consideration the narrative of events with respect to the subject tender, it is evident that Procuring Entity had no justifiable reason to terminate the subject tender, noting that the Evaluation Committee in its Re-Evaluation Report dated 20th April 2020 recommended award of the subject tender to the Applicant herein as the lowest evaluated bidder. It is therefore possible to conclude that the Procuring Entity did not want to award the subject tender to the Applicant and thus terminated the tender three times as demonstrated hereinbefore.

In this regard therefore, the Board finds, 'inadequate budgetary provision' was not a sufficient reason for termination of the subject tender by the Procuring Entity.

In totality of the foregoing, it is the Board's view that all the reasons advanced by the Procuring Entity to justify its termination of the tender do not meet the threshold under section 63 of the Act.

The Board finds, the Procuring Entity failed to terminate the subject tender in accordance with section 63 of the Act, rendering the purported termination of the subject procurement process null and void, noting the Procuring Entity's admission that there are adequate funds available to conclude the subject procurement other than through termination of the subject tender.

From the above narrative of events, it is the Board's considered view that the Procuring Entity's conduct during the duration of this procurement proceeding has been reprehensible and in gross violation of the provisions of the Act and the Constitution and in blatant disobedience of the Board's orders dated 14th April 2020.

Article 10 of the Constitution provides as follows: -

"(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

(2) The national values and principles of governance include—

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;

(c) good governance, integrity, transparency and accountability; and

(d) sustainable development”

This means that all State organs, State officers and public officers in execution of their duties are bound by the national values and principles of governance which include *inter alia* the rule of law, good governance, integrity, transparency and accountability.

Moreover, Article 227 (1) of the Constitution provides as follows: -

“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.”

In view of the above constitutional provisions, it is important to note that a procuring entity is obligated to uphold the rule of law and the principles of good governance, integrity, transparency and accountability in any public procurement process.

In this instance, the Procuring Entity has at every turn blatantly disregarded the orders of this Board and also prolonged the subject procurement process unnecessarily to the detriment of the members of the public in the region where the subject tender is to be implemented, who have been unable to benefit from the services to be procured with respect to the subject tender for a consecutive two financial years now.

This Board is of the considered view that there should be an end to litigation to allow a procurement to proceed without undue delay and for the public to benefit from the goods or services in good time.

The Procuring Entity's failure to complete the procurement process to its logical conclusion including the making of an award has occasioned this

Board to deal with the same procurement dispute for the fourth time and such fact must not be overlooked or encouraged.

The Board takes cognizance of section 173 (b) (c) and (d) 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...

(c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;

(d) order the payment of costs as between parties to the review in accordance with the scale as prescribed;

The Board would in most instances refrain from exercising the power under section 173 (c) of the Act and direct the Procuring Entity to proceed with the procurement process to its logical conclusion, including making an award in the subject tender.

In **Republic v. Public Procurement Administrative Review Board & 2 Others Ex parte Numerical Machining Complex Ltd**, the Court held as follows regarding the exercise of the power under section 173 (c) of the Act: -

"...the provisions of section 173 (c) of the 2015 Act cannot be read in isolation to the other provisions of the Act and that the power to substitute the decision of the Procuring Entity cannot be unlimited. It must be exercised lawfully. That power can only be exercised with respect to what the Procuring Entity was lawfully permitted to undertake both substantively and procedurally.

The Supreme Court of South Africa in **Gauteng Gambling Board v Silverstar Development Ltd and Others (80/2004) [2005] ZASCA 19 (29 March 2005)** addressed the meaning of section 8 (1) (c) (ii) (aa) of the Promotion of Administrative Justice Act 3 of 2000 of South Africa which contains an almost similar discretionary power enumerated as follows: -

The Review Court may undertake any of the following-

'set aside the procurement decision and remit it for reconsideration or, in exceptional cases, substitute the procurement decision or correct a defect resulting from it.

In the aforementioned case, the Supreme Court of South Africa explained the term 'exceptional' as applied in the aforementioned legislation as follows: -

'Since the normal rule of common law is that an administrative organ on which a power is conferred is the appropriate entity to exercise that power, a case is exceptional when, upon a proper consideration of all the relevant facts, a court is persuaded that a decision to exercise a power should not be left to the designated functionary. How that conclusion is to be reached is not statutorily ordained and will depend on established principles informed by the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair.'

From the above authorities, the Board finds that the subject procurement process before it is one of the exceptional circumstances where the duty imposed upon the Procuring Entity to proceed with the procurement process to its logical conclusion including the making of an award need not be left upon it, due to the flagrant disobedience of the orders of this Board by the Procuring Entity and noting that a re-evaluation was conducted in the subject tender whereby the Applicant was recommended for award of the subject tender.

The Board therefore directs the Procuring Entity to make an award to the Applicant, taking into consideration the finding of this Board and in accordance with the provisions of the Tender Document, the Act and the Constitution.

Furthermore, the Act under section 173 (d) as cited hereinbefore donates a discretionary power to this Board where a party has disobeyed the orders issued to it.

In **Petition No. 240 of 2017, Kenya National Highways Authority v PPP Petition Committee & 2 others [2018] eKLR**, the court extensively dealt with the issue of costs when it held that:-

The question of costs is a legal issue and a natural consequence of litigation which in ordinarily "follow the events". This means that the court or tribunal hearing a dispute may award costs to the winning party...

The principle that "costs follow the events" was emphasized in the case of Solomon v Solomon [2013] EWCA Civ. 1095 where it was held:

"The judge correctly stated the general rule did not relate to the interim applications he had decided. Costs were then in

the discretion of the court, and the principles set out in CPR Part 44 applied. The starting point for what are described as "clean sheet" cases is that costs follow the event. To find that principle one need look no further than Gojkovic v Gojkovic (No. 2) [1991] 2 FLR 233 (CA) where Butler – Sloss LJ (as she then was) said:

There still remains the necessity for some starting – point. The starting point, in my judgment, is that costs prima facie follow the event....but may be displaced much more easily than, and in circumstances which would not apply, in other Divisions of the High Court....'

When considering the issue of costs following the event, the Supreme Court of Uganda stated as follows in the case of Impressa Ing Fortunato Federice vs. Nabwire [2001] 2 EA 383:

The effect of section 27 of the Civil Procedure Act is that the Judge or court dealing with the issue of costs in any suit, action, cause or matter has absolute discretion to determine by whom and to what extent such costs are to be paid; of course like all judicial discretions, the discretion on costs must be exercised judiciously and how a court or a judge exercises such discretion depends on the facts of each case. If

there were mathematical formula, it would no longer be discretion...While it is true that ordinarily, costs should follow the event unless for some good reason the court orders otherwise, the principles to be applied are: - (i). Under section 27(1) of the Civil Procedure Act (Chapter 65), costs should follow the event unless the court orders otherwise. This provision gives the judge discretion in awarding costs but that discretion has to be exercised judicially. (ii). A successful party can be denied costs if it is proved that but for his conduct the action would not have been brought. The costs should follow the event even when the party succeeds only in the main purpose of the suit...It is trite law that where judgment is given on the basis of consent of parties, a court may not inquire into what motivated the parties to consent or to admit liability since admission of liability implied acceptance of the particulars of injuries enumerated in the plaint and the evidence in favour of the Respondent, including loss of hearing and speech."

Going by the dictum in the above cited cases and the principle that costs naturally follow the outcome of a litigation, I find that it would be inconceivable to have a scenario where a specialized tribunal, such as the Petition Committee herein, could be granted powers to consider all complainants related

to the tendering process and be denied the power to consider costs that arise from such proceedings. When faced with a similar question on whether or not the National Environmental Tribunal can make an award of costs in the case of Jane Ngonyo Muhia vs. Director General, National Environmental Management Authority & another [2017] eKLR the Environment and Land Court held as follows:

'On the issue of costs, Rule 39 of NET's Rules of Procedure, 2003 provides that NET would not normally award costs but can award costs against a party when it reaches a finding that such a party had acted frivolously or vexatiously or where a party's conduct in making, pursuing or resisting an appeal is wholly unreasonable.'

The court in the above case was considering the principle that "costs follow the event" in light of the power of a tribunal (i.e. the Public Private Partnerships Petition Committee and National Environment Tribunal) to order an award of costs. This power is donated to this Board by dint of section 173 (d) of the Act.

It was the submission of the Procuring Entity that given the nature of the Request for Review and the Procuring Entity's response on the aspect of

'budget' with respect to the subject tender, it will not serve the public good to burden the Procuring Entity with costs since the subject procurement involves improvement and maintenance of a public road.

The Procuring Entity referred the Board to its decision in **PPARB Application No. 1 of 2020 Energy Sector Contractors Association v. The Accounting Officer Kenya Power and Lightning Company** whereby the Board stated as follows: -

"As regards the issue of costs, the Supreme Court in Jasbir Singh Rai & 3 Others v Tavlochan Singh Rai & 4 others (2014) eKLR set out the following jurisprudential guidelines on the exercise of the discretionary power to award costs when it held as follows:-

"It emerges that the award of costs would normally be guided by the principle that costs follow the event; the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously exercised discretion of the court, accommodation of the special circumstances of the case, while being guided by the ends of justice."

The Board observes that the court in the above case found that even though costs should follow the event, a decision maker should exercise the discretion by accommodating the special circumstances of the case. In the circumstances of the Request for Review, the Applicant herein will have an opportunity to participate in the re-tender having found that such an order is appropriate in this instance. Hence, the Board shall refrain from awarding costs."

The Board has considered the Procuring Entity's submission including the case cited hereinbefore, and observes that the instant application is distinguishable from the case cited hereinbefore in that the Procuring Entity has repeatedly disregarded the orders of this Board and also prolonged the subject procurement process unnecessarily. Moreover as explained hereinbefore, the Procuring Entity's failure to complete the procurement process to its logical conclusion including the making of an award has occasioned this Board to deal with the same procurement dispute for the fourth time and such fact must not be overlooked or encouraged.

The orders of this Board are not issued in vain, but to ensure a procuring entity observes the principles of public procurement under the Act, the national values and principles of governance under the Constitution when

directed to redo something in a procurement process. Accordingly, the Board shall make appropriate orders for the award of costs to the Applicant in the final orders herein.

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

FINAL ORDERS

In exercise of the powers conferred upon it by section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in Request for Review Application:-

- 1. The Procuring Entity's Letter of Notification of Termination of the Procurement Process of Tender No. RWC 562 for Upgrading to Bitumen Standards and Maintenance of Thaara-Karaba-Muthuthini-Gikondi & Gaikundi-Gakindu-Gikondi-Mukurweini Roads dated 11th May 2020, addressed to all bidders be and are hereby cancelled and set aside.**

- 2. The Procuring Entity is hereby directed to award the Applicant within seven (7) days from the date of the decision of the Board.**

3. The Procuring Entity shall bear the costs of this Request for Review amounting to Kshs. 100,000/- to be paid to the Applicant.

Dated at Nairobi, this 10th Day of July 2020



CHAIRPERSON

PPARB



SECRETARY

PPARB