

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 77/2021 OF 3RD JUNE 2021

BETWEEN

VISROM COMPANY LIMITED APPLICANT

AND

**ACCOUNTING OFFICER,
LIMURU WATER & SEWERAGE COMPANY LTD.....RESPONDENT**

BLUESWIFT CONTRACTOR &

GENERAL SUPPLIES LTD.....INTERESTED PARTY

Review against the decision of the Accounting Officer of the Limuru Water and Sewerage Company Limited with respect to Tender No. LIWASCO/001/KENHA/2020/21 for Relocation of Water and Sewerage Infrastructure along Rironi Magumu Flyover and Rironi- Mutarakwa (section 1) of Nairobi Nakuru Mau Summit Highway (A8).

BOARD MEMBERS

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

IN ATTENDANCE

- | | |
|------------------------|---|
| 1. Mr. Philomen Kiprop | -Holding brief for the Acting Board Secretary |
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BACKGROUND TO THE DECISION

The Bidding Process

Limuru Water and Sewerage Company Ltd (hereinafter referred to as “the Procuring Entity”) invited sealed tenders for Tender No. LIWASCO/001/KENHA/2020/21 for Relocation of Water and Sewerage Infrastructure along Rironi Magumu Flyover and Rironi- Mutarakwa (section 1) of Nairobi Nakuru Mau Summit Highway (A8) (hereinafter referred to as “the subject tender”) through an advertisement published in the Daily Nation Newspaper and the Procuring Entity’s Website (www.limuruwater.go.ke) on 10th March 2021.

Pre-Tender Site Visit & Addendum

A Mandatory site visit and pre tender meeting took place at the Procuring Entity’s offices on 19th March 2021 from 10:00 am.

The following addendums were issued

- a. Addendum 1 was issued on 22nd March 2021 clarifying that bidders must be registered with NCA 3 and above and further requesting bidders to take note of the additional drawings while confirming other details of the tender remained unchanged.
- b. Addendum 2 issued on 23rd March 2021 made clarifications with respect to Clauses 5.1 and 7.1 of the tender document, advised all bidders of the clarifications and revisions to the tender while confirming other terms and conditions of the tender remained unchanged.
- c. Addendum 3 issued on 24th March 2021 clarified that the annual turnover was Kshs. 200,000,000.00 (Kenya Shillings Two Hundred Million).

Bid Submission Deadline and Opening of Bids

The Procuring Entity received a total of four (4) bids by the bid submission deadline of 30th March 2021. The same were opened shortly thereafter by a Tender Opening Committee in the presence of bidders' representatives and recorded as follows: -

| Bidder | Bid Bond | Total price |
|---|-----------------------------|--------------------|
| Visrom Company Limited | 1,980,000 NCBA Bank | 98,994,568.20 |
| Yellow House Limited | 6,960,000 Consolidated Bank | 126,224,867.56 |
| Comroad Construction & Equipment's Limited | 2,600,000 Equity Bank | 120,610,947.00 |
| Blue swift Contractors & General Supplies Limited | 2,578,129 Rafiki Bank | 128,905,156.60 |

Evaluation of Bids

An Evaluation Committee appointed by the Procuring Entity's Managing Director evaluated bids in the following stages: -

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

1. Preliminary Evaluation

This stage of evaluation involved examination of pre-qualification conditions set out in the Tender Document as follows:

| S/No | Completeness and responsiveness Criteria/ Requirement | Bidder 1 | Bidder 2 | Bidder 3 | Bidder 4 |
|------|--|----------|----------|----------|----------|
| A | Form of bid- Form provided in the right format and signed | R | R | R | R |
| B | No. of copies provided- 3 No. plus the original | R | R | R | R |
| C | Bid Validity- 120 days from bid submission date | R | R | R | R |
| D | Pre-tender site visit- Attended the mandatory Pre-Tender site visit and attached certificate | R | R | R | R |
| E | Bid security- Right form from a recognized bank amount being equal to 2% of bid price and valid for 150 days from bid submission date | R | R | R | R |
| F | Eligibility- Registered in NCA 3 and above registered with the Ministry of Water | R | R | R | R |
| G | Form of power of attorney- Authority granted to bidder's representative | R | R | R | R |
| H | Bid submitted complete with all forms and Bills of Quantities Appendix to Bid Technical Schedules Form PER 1& 2 Form ELI 1&2 Form CON 2 Form FIN 1,2,3 &4 Bills of Quantities | N | R | R | R |
| | Overall Score | N | R | R | R |

At the end of Preliminary Evaluation, out of the four (4) bidders who bid for the works, three (3) bidders satisfied the mandatory requirements thus proceeded to the Technical Evaluation stage.

2. Technical Evaluation

Technical Evaluation was carried in accordance with the criteria outlined herein below;

| S/no | Item | Requirements | Bidder 2 | Bidder 3 | Bidder 4 |
|-------------|------------------------------|--|----------|----------|----------|
| 1. | Structure of Bidding Company | Single entity/JV/Consortium/Association | R | R | R |
| Eligibility | | | | | |
| 2. | Conflict of Interest | No conflicts of interests as described in ITB 3.2 | R | R | R |
| 3. | History of non-performance | Non-performance of a contract did not occur within the last five (5) years prior to the deadline for application submission based on all information on fully settled disputes nor litigation. A fully settled dispute or litigation is one that has been resolved in accordance with the dispute resolution mechanism under the respective contract where all | R | R | R |

| | | | | | |
|-----------------------------|----------------------------|--|---|---|---|
| | | appeal instances available to the bidder have been exhausted. | | | |
| 4. | Pending litigations | All pending litigation shall in total not represent more than 100% of the bidder's net worth and shall be treated as resolved against the bidder | R | R | R |
| Technical Experience | | | | | |
| 5 | General Experience | Experience under contracts in the role of contractor, subcontractor or management contractor for at least the last five (5) years prior to the applications submission deadline | R | R | R |
| 6 | Specific Experience | a. Participation as a contractor or subcontractor in at least three (3) similar contracts within the last five (5) years each with a value of Kshs. 150,000,000(Kenya Shillings One Hundred Million) that have been successfully and substantially completed (attach completion certificates) that are similar to the proposed works. The similarity shall be based on the physical size, complexity or methods/technology | N | N | R |
| | | b. For the above or other contracts executed during the period stipulated in 2.4.2 (a) above a minimum experience in the following key activities Experience in laying of water supply and sewer pipelines Contractors should have laid UPVC/ferrous pipes/HDPE size between 200mm for UPVC and 1000mm dia. and above | N | R | R |
| 7 | Personnel Experience | | | | |
| | | Project Manager-1 Nr person 15 years of general experience and 5 years of similar experience | R | R | R |
| | | Site Agent- 1 Nr. Person, 10 years of general experience and 5 years of similar experience | R | R | R |
| | | Deputy site agent- 1 Nr person, 8 years of general experience and 5 years of similar experience | R | R | R |
| | | Pipeline Engineer(Civil engineer)- 1 Nr person, 8 years of general experience and 5 years of general experience | R | R | R |
| | | Foreman (Pipe laying, testing)- 2Nr persons 8 years of general experience and 5 years of general experience | R | R | R |
| | | Engineering surveyor- 2Nr persons 5 years of general experience and 2 years of similar experience | R | R | R |
| | | CAD technician 1 Nr person 5 years of general experience and 3 years of similar experience | R | R | R |
| 8 | Equipment | No. Equipment Type Min req. 1. 7/10 ton tipper lorry 2 2. Concrete mixers(0.4m3) 3 3. Concrete vibrator(50m 3 4. Pick up 3 5. Roll breakers 1 6. Mechanical/hydrostatic/pressure testing equipment 2 7. Backhoe excavator 3 8. Dewatering pumps 2 9. Self-loading crane 1 10. Excavator 0.4m3 2 11. Excavator 0.4m3 2 12. Crane able to lift 15 ton 1 | R | R | R |
| 9 | Technical proposal | Site organization | R | R | R |
| | | Method statement | R | R | R |
| | | Mobilization schedule | R | R | R |
| | | Construction schedule | R | R | R |
| 10 | Financial Situation | | | | |

| | | | | | |
|--|----------------------------------|--|----------|----------|----------|
| | Historical Financial Performance | Submission of audited financial statement for the last three (3) years to demonstrate the current soundness of the bidder's financial position and prospective long-term profitability | R | R | R |
| | Average annual turnover | Minimum annual turnover of Kshs200,000,000 (Kenya Shillings Two Hundred Million) or equivalent in a freely convertible currency calculated as certified payments received for contracts in progress or completed within the last three (3) years | N | R | R |
| | Financial Resources | The bidder must demonstrate access to or availability of financial resources such as liquid assets, lines of credit and other financial means other than any contractual advance payments to meet <ul style="list-style-type: none"> i. The following cash flow requirement: ii. Cash flow of Kshs100,000,000 (Kenya Shillings One Hundred Million) iii. The overall cash flow requirements for this contract and its concurrent commitments | R | R | R |
| | Total technical score | | N | N | R |

At the end of Technical Evaluation, only one (1) bidder was found responsive thus proceeded to the Financial Evaluation Stage.

3. Financial Evaluation

The bidder responsive at the technical stage was subjected to financial evaluation. The Tender Sum quoted by M/s Blueswift Contractors & General Supplies Limited was recorded as follows: -

| Bidder No. | Bidder's Names | Amount (Kshs) | Ranking |
|------------|--|----------------|---------|
| 4 | BLUESWIFT CONTRACTORS & GENERAL SUPPLIES LIMITED | 128,905,156.60 | 1 |

Recommendation

The Evaluation Committee recommended award of the subject tender to **M/s Blueswift Contractors & General Supplies** at a unit cost of Kshs. 128,905,156.60 (Kenya Shillings One Hundred and Twenty-Eight Million Nine

Hundred and Five Thousand One Hundred and Fifty Six and Sixty Cents) only, having submitted the lowest evaluated tender price.

Due Diligence

Due diligence was conducted to verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender. At the end, responses received were tabulated as follows;

| S/No. | Parameters | Bidder No.1 (Blueswift Contractors & General Supplies LTD) |
|-------|----------------------------|--|
| 1 | NTSA/Equipment Hire | Y |
| 2 | Firm's Experience | Y |
| 3 | Site Agent | Y |
| 4 | Bid Bond | Y |
| 5 | CR12 Form | Y |
| 6 | TCC Online Checker | Y |
| 7 | NCA Online Checker | Y |
| 8 | ICPAK Auditor Online Check | Y |
| 9 | Ongoing Works | Y |
| | Overall Remarks | pass |

Professional Opinion

In a professional opinion dated 15th April 2021, the Procuring Entity's Procurement Officer, outlined the manner in which the subject procurement process was undertaken including evaluation of bids. He concurred with the Evaluation Committee's award recommendation, thus advised the Accounting Officer to approve award of the subject tender to **M/s Blueswift Contractors & General Supplies Ltd** at a unit cost of Kshs. 128,905,156.60 (Kenya Shillings One Hundred and Twenty Eight Million Nine

Hundred and Five Thousand One Hundred and Fifty Six and Sixty Cents) only, having submitted the lowest evaluated tender price. This professional opinion was approved by the Managing Director of the procuring Entity on the same date of 15th April 2021.

Notification to Bidders

In letters dated 16th April 2021, the Accounting Officer notified all bidders of the outcome of their respective bids.

THE REQUEST FOR REVIEW NO. 59 OF 2021

M/s Visrom Company Limited lodged (herein referred to as "the Applicant") a Request for Review together with a Statement in Support of the Request for Review both dated 21st April 2021 and filed on 22nd April 2021 and the Applicant's Supplementary Affidavit sworn on 7th May 2021 and filed on 10th May 2021 seeking the following orders: -

- 1. An order setting aside the decision by the Procuring Entity addressed to the Applicant in a letter dated 16th April 2021 finding the Applicant's tender as non-responsive at the preliminary evaluation stage and awarding the Tender No. LIWASCO/001/KENHA/2020/21 Relocation of Water and Sewerage Infrastructure along Rironi Magumu Flyover and Rironi- Mutarakwa to the 2nd Respondent;***
- 2. An order substituting and/or amending the decision of the Procuring Entity by reviewing all the records submitted in the procurement process including the Bill of Quantities of the Applicant, the form and substance of the Applicant's tender document and awarding the Tender No.***

LIWASCO/001/KENHA/2020/21 Relocation of Water and Sewerage Infrastructure along Rironi Magumu Flyover and Rironi- Mutarakwa to the Applicant;

3. An order directing the Procuring Entity to progress the procurement process to its logical conclusion inclusive of the Applicant and make an award within seven (7) days;

4. An order directing the 1st Respondent to pay the full costs of and incidental to these proceedings.

In response, the 1st Respondent acting in person, lodged a Response to the Request for Review dated 3rd May 2021 and filed on even date while the 2nd Respondent lodged its Response to Request for Review dated 3rd May and filed on even date through the firm of Meritad Law Africa LLP Advocates.

Pursuant to the Board's Circular No. 2/2020 dated 24th March 2020 detailing the Board's administrative and contingency management plan to mitigate Covid-19 pandemic, the Board dispensed with physical hearings and directed that all request for review applications 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 its written submissions dated 9th April 2021 and filed 10th May 2021. The 1st Respondent filed written submissions dated 6th May 2021 and filed on even date while the 2nd Respondent lodged written submission dated 6th May 2021 and filed on even date.

The Board considered each of the parties' cases and confidential documents submitted to it pursuant to section 67 (3) (e) of the Act and issued the following orders on 12th May 2021 in **PPARB Application No. 59 of 2021, Visrom Company Limited v. The Accounting Officer, Limuru Water & Sewerage Company Ltd** (hereinafter referred to as "Review No. 59/2021"): -

- 1. The Accounting Officer of the Procuring Entity's letters of Notification of Tender No. LIWASCO/001/KENHA/2020/21 for Relocation of Water and Sewerage Infrastructure along Rironi Magumu Flyover and Rironi-Mutarakwa (Section 1) of Nairobi Nakuru Mau Summit Highway (A8) dated 16th April 2021 addressed to the Applicant herein and all other unsuccessful bidders, be and are hereby set aside.**
- 2. The Accounting Officer of the Procuring Entity's letter of Notification of Award of Tender No. LIWASCO/001/KENHA/2020/21 for Relocation of Water and Sewerage Infrastructure along Rironi Magumu Flyover and Rironi-Mutarakwa (Section 1) of Nairobi Nakuru Mau Summit Highway (A8) dated 16th April 2021 addressed to the 2nd Respondent herein, be and is hereby set aside.**
- 3. The Accounting Officer of the Procuring Entity is hereby ordered to direct the Evaluation Committee to reinstate the Applicant's bid back into the procurement process including all other bidders and conduct a re-evaluation in accordance with Clause 29 of Section II. Instructions to Tenderers read together with Section IV. Evaluation and Qualification Criteria of the Bidding Document and thereafter proceed with the**

subject procurement process to its logical conclusion, including the making of an award subject to a post-qualification (due diligence) exercise conducted on the lowest evaluated bidder pursuant to Section IV. Evaluation and Qualification Criteria at page 22 of the Bidding Document read together with section 83 of the Act within fourteen (14) days from the date of this decision.

4. Given that the subject procurement process has not been completed, each party shall bear its own costs in the Request for Review.

RE-EVALUATION OF BIDS

Following the orders of the Board dated 12th May 2021 in Review No.59/2021 the Evaluation Committee of the Procuring Entity re-evaluated the subject tender as follows:-

Preliminary Evaluation

According to the Evaluation Report dated 20th May 2021, the Evaluation Committee reinstated the bid of M/s Visrom Company Limited together with all other bidders at the Preliminary Evaluation stage and re-evaluated the same based on the following parameters: -

| S/No | Completeness and responsiveness Criteria/ Requirement | Bidder 1 | Bidder 2 | Bidder 3 | Bidder 4 |
|-------------|---|-----------------|-----------------|-----------------|-----------------|
| A | Form of bid- Form provided in the right format and signed | R | R | R | R |
| B | No. of copies provided- 3 No. plus the original | R | R | R | R |
| C | Bid Validity- 120 days from bid submission date | R | R | R | R |
| D | Pre-tender site visit- Attended the mandatory Pre-Tender site visit and attached certificate | R | R | R | R |

| | | | | | |
|---|--|----------|----------|----------|----------|
| E | Bid security- Right form from a recognized bank amount being equal to 2% of bid price and valid for 150 days from bid submission date | R | R | R | R |
| F | Eligibility- Registered in NCA 3 and above registered with the Ministry of Water | R | R | R | R |
| G | Form of power of attorney- Authority granted to bidder's representative | R | R | R | R |
| H | Bid submitted complete with all forms and Bills of Quantities Appendix to Bid Technical Schedules Form PER 1& 2 Form ELI 1&2 Form CON 2 Form FIN 1,2,3 &4 Bills of Quantities | N | R | R | R |
| | Overall Score | N | R | R | R |

All bidders were found responsive and proceeded to Technical Evaluation stage.

Technical Evaluation Stage

Technical Evaluation was carried in accordance with the criteria outlined herein below;

| S/no | Item | Requirements | Bidder 1 | Bidder 2 | Bidder 3 | Bidder 4 |
|-----------------------------|------------------------------|--|----------|----------|----------|----------|
| 1. | Structure of Bidding Company | Single entity/JV/Consortium/Association | R | R | R | R |
| Eligibility | | | | | | |
| 2. | Conflict of Interest | No conflicts of interests as described in ITB 3.2 | R | R | R | R |
| 3. | History of non-performance | Non-performance of a contract did not occur within the last five (5) years prior to the deadline for application submission based on all information on fully settled disputes nor litigation. A fully settled dispute or litigation is one that has been resolved in accordance with the dispute resolution mechanism under the respective contract where all appeal instances available to the bidder have been exhausted. | R | R | R | R |
| 4. | Pending litigations | All pending litigation shall in total not represent more than 100% of the bidder's net worth and shall be treated as resolved against the bidder | R | R | R | R |
| Technical Experience | | | | | | |
| 5 | General Experience | Experience under contracts in the role of contractor, subcontractor or management contractor for at least the last five (5) years prior to the applications submission deadline | R | R | R | R |
| 6 | Specific Experience | c. Participation as a contractor or subcontractor in at least three (3) similar contracts within the last five (5) years each with a value of Kshs. 150,000,000(Kenya Shillings One Hundred Million) that have been successfully and substantially completed (attach completion certificates) that are similar to the proposed works. The similarity shall | N | N | N | R |

| | | | | | | |
|----|----------------------------------|--|---|---|---|---|
| | | be based on the physical size, complexity or methods/technology | | | | |
| | | d. For the above or other contracts executed during the period stipulated in 2.4.2 (a) above a minimum experience in the following key activities Experience in laying of water supply and sewer pipelines Contractors should have laid UPVC/ferrous pipes/HDPE size between 200mm for UPVC and 1000mm dia. and above | N | N | R | R |
| 7 | | Personnel Experience | | | | |
| | | Project Manager-1 Nr person 15 years of general experience and 5 years of similar experience | N | R | R | R |
| | | Site Agent- 1 Nr. Person, 10 years of general experience and 5 years of similar experience | N | R | R | R |
| | | Deputy site agent- 1 Nr person, 8 years of general experience and 5 years of similar experience | R | R | R | R |
| | | Pipeline Engineer(Civil engineer)- 1 Nr person, 8 years of general experience and 5 years of general experience | R | R | R | R |
| | | Foreman (Pipe laying, testing)- 2Nr persons 8 years of general experience and 5 years of general experience | | R | R | R |
| | | Engineering surveyor- 2Nr persons 5 years of general experience and 2 years of similar experience | | R | R | R |
| | | CAD technician 1 Nr person 5 years of general experience and 3 years of similar experience | | R | R | R |
| 8 | Equipment | No. Equipment Type Min req. 13. 7/10 ton tipper lorry 2 14. Concrete mixers(0.4m3) 3 15. Concrete vibrator(50m 3 16. Pick up 3 17. Roll breakers 1 18. Mechanical/hydrostatic/pressure testing equipment 2 19. Backhoe excavator 3 20. Dewatering pumps 2 21. Self-loading crane 1 22. Excavator 0.4m3 2 23. Excavator 0.4m3 2 24. Crane able to lift 15 ton 1 | N | R | R | R |
| 9 | Technical proposal | Site organization | R | R | R | R |
| | | Method statement | R | R | R | R |
| | | Mobilization schedule | R | R | R | R |
| | | Construction schedule | R | R | R | R |
| 10 | | Financial Situation | | | | |
| | Historical Financial Performance | Submission of audited financial statement for the last three (3) years to demonstrate the current soundness of the bidder's financial position and prospective long-term profitability | R | R | R | R |
| | Average annual turnover | Minimum annual turnover of Kshs200,000,000 (Kenya Shillings Two Hundred Million) or equivalent in a freely convertible currency calculated as certified payments received for contracts in progress or completed within the last three (3) years | R | N | R | R |
| | Financial Resources | The bidder must demonstrate access to or availability of financial resources such as liquid assets, lines of credit and other financial means other than any contractual advance payments to meet iv. The following cash flow requirement: | R | R | R | R |

| | | | | | | |
|--|------------------------------|---|----------|----------|----------|----------|
| | | v. Cash flow of Kshs100,000,000 (Kenya Shillings One Hundred Million) | | | | |
| | | vi. The overall cash flow requirements for this contract and its concurrent commitments | | | | |
| | Total technical score | | N | N | N | R |

At the end of Technical Evaluation, only one (1) bidder was found responsive thus proceeded to the Financial Evaluation Stage.

3. Financial Evaluation

The bidder responsive at the technical stage was subjected to financial evaluation. The Tender Sum quoted by M/s Blueswift Contractors & General Supplies Limited was recorded as follows: -

| Bidder No. | Bidder's Names | Amount (Kshs) | Ranking |
|-------------------|--|----------------------|----------------|
| 4 | BLUESWIFT CONTRACTORS & GENERAL SUPPLIES LIMITED | 128,905,156.60 | 1 |

Recommendation

The Evaluation Committee recommended award of the subject tender to **M/s Blueswift Contractors & General Supplies** at a unit cost of Kshs. 128,905,156.60 (Kenya Shillings One Hundred Twenty-Eight Million Nine Hundred and Five Thousand One Hundred Fifty Six and Sixty Cents) only having submitted the lowest evaluated tender price.

Due Diligence

After the re-evaluation, the Tender Evaluation committee did not conduct due diligence on **M/s Blueswift Contractors & General Supplies Ltd.**

The Evaluation Committee stated that it was satisfied with the due diligence carried out earlier as the bidder had met all the requirements.

Professional Opinion

In a professional opinion dated 21st May 2021, the Procuring Entity's Procurement Officer, outlined the manner in which the subject procurement process was undertaken including evaluation of bids. He concurred with the Evaluation Committee's award recommendation, thus advised the Accounting Officer to approve award of the subject tender to **M/s Blueswift Contractors & General Supplies Ltd** at a unit cost of Kshs. 128,905,156.60 (Kenya Shillings One Hundred Twenty-Eight Million Nine Hundred Five Thousand One Hundred Fifty Six and Sixty Cents) only having submitted the lowest evaluated tender price. This professional opinion was approved by the Managing Director of the Procuring Entity on the same date of 21st May 2021.

Notification to Bidders

In letters dated 21st May 2021, the Accounting Officer notified all bidders of the outcome of their respective bids.

REQUEST FOR REVIEW NO. 77 OF 2021

M/s Visrom Company Limited (hereinafter referred to as "the Applicant"), lodged a Request for Review together with a Statement in Support of the Request for Review sworn by Samuel Kimani, the Applicant's Director on 3rd June 2021 and filed on even date through the firm of Muchemi & Co. Advocates seeking the following orders: -

- 1. An order setting aside the decision by the Procuring Entity to the Applicant contained in a letter dated 21st May 2021 finding that the Applicant's tender was non-responsive and awarding Tender No. LIWASCO/001/KENHA/2020/21 for Relocation of Water and Sewerage Infrastructure along Rironi Magumu Flyover and Rironi- Mutarakwa (section 1) of Nairobi Nakuru Mau Summit Highway (A8) to the Interested Party.***
- 2. An order that the Board be pleased to evaluate and examine the list of registered contractors with the Ministry of Water and Sanitation for purposes of authenticating the Interested Party's compliance with Section 1 Clause 1.3 of the invitation to tender.***
- 3. An order that the Board be pleased to review all the records submitted in the procurement process, the form and substance of the Applicant's tender document, and substitute and/or amend the decision of the Procuring Entity by awarding the Tender No. LIWASCO/001/KENHA/2020/21 for Relocation of Water and Sewerage Infrastructure along Rironi Magumu Flyover and Rironi- Mutarakwa (section 1) of Nairobi Nakuru Mau Summit Highway (A8) to the Applicant.***
- 4. An order in alternative to prayer (3) above, directing the Procuring Entity to progress to the procurement process to its logical conclusion inclusive of the Applicant and make an award within seven (7) days; and***
- 5. An order directing the Respondent to pay the full costs of and incidental to these proceedings.***

The Applicant also filed a Further Affidavit sworn by Samuel Kimani on 18th June 2021 and filed on even date, through the firm of Muchemi & Co Advocates.

In response, the Respondent lodged a Respondent's Response to the Request for Review dated 16th June 2021 and filed on 17th June 2021 together with an Objection to Request for Review dated 16th June 2021 and filed on 17th June 2021 through M/s Margret Waruguru Maina, Managing Director Limuru Water & Sewerage Company Limited. The Interested Party filed a Memorandum of Response dated 15th June 2021 and filed on 16th June 2021 through the firm of Sigano & Omollo LLP Advocates.

Pursuant to the Board's Circular No. 2/2020 dated 24th March 2020 detailing the Board's administrative and contingency management plan to mitigate Covid-19 pandemic, the Board dispensed with physical hearings and directed that all request for review applications 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. However, only the Applicant filed written submissions dated 23rd June 2021, on 24th June 2021.

BOARD'S DECISION

The Board has considered each of the parties' pleadings; the Applicant's Request for Review, Statement in Support of Request for Review, Applicant's Further Affidavit, Respondent's Response to the Request for Review, Respondent's Objection to the Request for Review, Interested Party's Memorandum of Response, including the confidential documents submitted

by the Respondents pursuant to section 67 (3) (e) of the Act and finds that the following legal issues call for determination: -

- 1. Whether the contract dated 4th June 2021 made between the Procuring Entity and M/s Blueswift Contractors & General Supplies Ltd satisfies the requirements of section 135 (3) of the Act read together with section 168 of the Act for the Board's jurisdiction to be ousted by dint of section 167(4) (c) of the Act.**

Depending on the outcome of the above issue:

- 2. Whether the plea of sub-judice is applicable to the instant Request for Review.**
- 3. Whether the Procuring Entity complied with the orders of the Board issued on 12th May 2021 in PPARB Application N0. 59 of 2021 Visrom Company Limited vs. Accounting Officer, Limuru Water & Sewerage Company Limited and Blue Swift Contractors & General Supplies Ltd.**
- 4. Whether the Procuring Entity re-evaluated the Applicant's bid in accordance with section 80 (2) of the Act read together with Article 227 of the Constitution of Kenya 2010 in respect of the following criteria in the Tender Document;**
 - i) Clause 2.4.2 Specific Experience of Section IV. Evaluation and Qualification Criteria at page 28 of the Bidding Document.**
 - ii) Clause 2.5 Personnel of Section IV. Evaluation and Qualification Criteria at page 30 of the Bidding Document.**

iii) Clause 2.6 Equipment of Section IV. Evaluation and Qualification Criteria at page 30 of the Bidding Document.

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

On the first issue for determination, it is trite law that courts and decision making bodies only act in cases where they have jurisdiction. In the Court of Appeal case of **The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited [1989] eKLR**, Nyarangi JA stated as follows:

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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." [Emphasis added]

Similarly, in the case of **Kakuta Maimai Hamisi vs. Peris Pesi Tobiko & 2 Others [2013] eKLR** the Court of Appeal emphasized the importance of jurisdiction and stated that:-

"So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any

judicial proceedings is concerned. It is a threshold question and best taken at inception. "

The Supreme Court in ***Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Ltd and 2 Others [2012] eKLR*** pronounced itself regarding where the jurisdiction of a court or any other decision making body flows from 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." [Emphasis added]

The jurisdiction of the Board flows from section 167 (1) of the Act which states as follows:-

"(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date

of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed”

However, section 167 (4) (c) of the Act lays down one of the circumstances where the jurisdiction of the Board is ousted. Section 167 (4) (c) of the Act states as follows:-

“The following matters shall not be subject to the review of procurement proceedings under subsection (1)-

- (a)**
- (b)**
- (c) Where a contract is signed in accordance with section 135 of this Act.”**

Section 135(3) of the Act mentioned in section 167(4) (c) states as follows;

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

At paragraph 5, 6 and 7 of the Respondent’s Objection read together with paragraph 10 and 11 of the Respondent’s Response, the Respondent avers that having complied with the provisions of Section 135 (3) of the Act, the Procuring Entity entered into a contract with the Interested Party on 4th June 2021. Further, the Respondent avers that she was only notified of the instant Request for Review on 7th June 2021 after the Procuring Entity had already

entered into a contract thus denying this Honourable Board the jurisdiction to determine the instant suit.

The Jurisdiction of the Board can only be ousted by Section 167(4) (c) of the Act if a contract entered into between a procuring entity and a successful tenderer meets the conditions provided in Section 135 of the Act.

In the instant Request for Review, what is in issue is whether the contract alleged to have been signed by the Procuring Entity and the Interested Party was entered into in accordance with section 135(3), that is to say, (i) within the period specified in the notification but (ii) not before fourteen days have elapsed following the giving of that notification and (iii) provided that a contract is signed within the tender validity period.

It is clear from section 135 (3) that there is a stand still period of 14 days from the date bidders are notified of the tender award in which no public procurement contract can be entered into between a procuring entity and a successful bidder.

The Respondent furnished the Board with a contract made between the Procuring Entity and M/s Blueswift Contractors & General Supplies Ltd dated and signed on 4th June 2021 as part of the confidential documents under section 67(3)(e) of the Act. Further, at paragraphs 5 and 8 of the Respondent's Response, the Respondent confirms having notified all bidders of the outcome of the re-evaluation process via email on 21st May 2021.

In computing time when the stand still period of 14 days within which a procurement contract of the subject tender ought not to have been entered, the Board is guided by section 57 (a) of the Interpretations and General Provisions Act, Chapter 2 of the Laws of Kenya that states as follows:-

"(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;"

As admitted by the Respondent, the Applicant was notified of the outcome of the subject tender via email on 21st May 2021. The 21st May 2021 being an excluded day, the stand still period of 14 days started running on 22nd May 2021 and lapsed on the 4th of June 2021. The earliest a procurement contract for the subject tender would be entered into was 5th June 2021. Accordingly, the contract dated 4th June 2021 made between the Procuring Entity and the Interested Party was entered into contrary to the provisions of section 135(3) of the Act having been made during the stand still period of 14 days and is thus null and void *ab initio*.

The upshot of this finding is that there is no valid contract in place between the Procuring Entity and the Interested Party to oust the jurisdiction of the Board. The Board therefore finds that it has jurisdiction to entertain the instant Request for Review and shall now proceed to determine the other issues framed for determination.

On the second issue framed for determination, the Respondent at paragraph 1 and 2 of her Objection to the Request for Review, objects to the jurisdiction

of this Board under the plea of sub-judice provided in section 6 of the Civil Procedure Act which states as follows:-

"Stay of suit

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."

The Board notes no evidence has been adduced by the Respondent or any other party to the instant Request for Review proving the existence of another Request for Review pending before this Board or another court having jurisdiction in Kenya that touches on the matter in issue and between the same parties herein. In the circumstances, this ground of objection fails because the Respondent has failed to substantiate the same.

That notwithstanding, the Board observes that the subject tender is before the Board for the second time. The first time the subject tender came up before the Board, the Board was faced with two issues for determination in **PPARB Application No. 59 of 2021, Visrom Company Limited v. The Accounting Officer, Limuru Water & Sewerage Company Ltd** as follows: -

"i. Whether the Procuring Entity evaluated the Applicant's bid at the Preliminary Evaluation Stage in accordance with

section 80(2) read together with the criteria and procedures in the tender Document specifically, section 82 of the Act;

ii. Whether the 2nd Respondent satisfied the requirement of registration with the National Construction Authority (NCA), category NCA3 and registration with the Ministry of Water and Sanitation as required in Clause 1.3. Of Section I Invitation to Tender of the Tender Document.”

Vide its Decision dated 12th May 2021, the Board issued the following Orders in Review No.59/2021:-

“1. The Accounting Officer of the Procuring Entity’s Letters of Notification of Tender No. LIWASCO/001/KENHA/2020/21 for Relocation of Water and Sewerage Infrastructure along Rironi Magumu Flyover and Rironi- Mutarakwa (section 1) of Nairobi Nakuru Mau Summit Highway (A8) dated 16th April 2021, addressed to the Applicant herein and all other unsuccessful bidders, be and are hereby be set aside.

2. The Accounting Officer of the Procuring Entity’s Letter of Notification of Award of Tender No. LIWASCO/001/KENHA/2020/21 for Relocation of Water and Sewerage Infrastructure along Rironi Magumu Flyover and Rironi- Mutarakwa (section 1) of Nairobi Nakuru Mau Summit Highway (A8) dated 16th April 2021, addressed to the 2nd Respondent herein, be and is hereby be set aside.

3. The Accounting Officer of the Procuring Entity is hereby ordered to direct the Evaluation Committee to reinstate the Applicant's bid back into the procurement process including all other bidders and conduct a re-evaluation in accordance with Clause 29 of Section II. Instructions to Tenderers read together with Section IV. Evaluation and Qualification Criteria of the Bidding Document and thereafter proceed with the subject procurement process to its logical conclusion, including the making of an award, subject to a post qualification (due diligence) exercise conducted on the lowest evaluated bidder pursuant to Section IV. Evaluation and Qualification Criteria at page 22 of the Bidding Document read together with section 83 of the Act within fourteen (14) days from the date of this decision.

4. Given that the subject procurement process has not been completed, each party shall bear its own costs in the Request for Review.

Section 7 of the Civil Procedure Act, codifies the plea of *res judicata* and states as follows:-

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has

been subsequently raised, and has been heard and finally decided by such court."

The above provision was discussed at length in **Civil Appeal No. 42 of 2014, John Florence Maritime Services Ltd v. Cabinet Secretary for Transport and Infrastructure & 3 Others (2015) eKLR** as follows:-

"From the above, the ingredients of res judicata are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title and lastly that the court or tribunal before which the former suit was litigated was competent and determined the suit finally...

Res judicata is a subject which is not at all novel. It is a discourse on which a lot of judicial ink has been spilt and is now sufficiently settled. We therefore do not intend to re-invent any new wheel. We can however do no better than reproduce the re-indentation of the doctrine many centuries ago as captured in the case of Henderson v Henderson [1843] 67 ER 313:-

".....where a given matter becomes the subject of litigation in and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same

subject of litigation in respect of a matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time...

The court in Civil Appeal No. 40 of 2014 went further to hold that:-

"The doctrine of res judicata has two main dimensions: cause of action res judicata and issue res judicata. Res judicata based on a cause of action, arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter.

Cause of action res judicata extends to a point which might have been made but was not raised and decided in the earlier proceedings. In such a case, the bar is absolute unless fraud or collusion is alleged. Issue res judicata may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different

cause of action to which the same issue is relevant and one of the parties seeks to re-open that issue.”

According to section 7 of the Civil Procedure Act, read together with the findings in **Civil Appeal No. 42 of 2014, John Florence Maritime Services Ltd v. Cabinet Secretary for Transport and Infrastructure & 3 Others (2015) eKLR**, the ingredients of *res judicata* are as follows:-

(i) The former suit should be between the same parties, or parties under whom they or any of them claim, litigating under the same title; (ii) The issue in dispute in the former suit between the parties must directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded (or raised) as a bar;(iii) The court or tribunal before which the former suit was litigated was competent and determined the suit with finality; (iv) The plea of *res judicata* extends to points upon which the court was actually required by parties to form an opinion and pronounce a judgment on, including every point which properly belonged to the subject of litigation; (v)The plea of *res judicata* extends to a point which might have been made but was not raised and decided in the earlier proceedings.

The issues raised in the instant Request for Review touching on re-evaluation of the Applicant’s bid are not barred by the plea of *res judicata* because they were never raised in Review No. 59/2021 and were not known to the Applicant for the Applicant to raise them in Review No. 59/2021.

On the other hand, the issue raised with respect to the Interested Party is *res judicata* only to the extent of the Board’s finding at pages 36 and 37 of

the decision in Review No. 59/2021 that the Interested Party provided evidence of a certificate of registration with the Ministry of Water and Sanitation and Irrigation as a Water Development Contractor and had thus, satisfied the requirement under Clause 1.3 of Section I. Invitation to Tender of the Bidding Document.

However, with respect to verifying and confirming the authenticity of the certificate of registration for Water Development Contractors issued by the Ministry of Water and Sanitation and Irrigation to the Interested Party dated 26th September 2019 under Registration Number MTAC-1558/18 attached to License No. WD/WC/2403 dated 26th September 2019 and official receipt of Serial No. 11090000665 dated 23rd March 2021 issued to the Interested Party as renewal fee for registration with the Ministry of Water, Sanitation and Irrigation through a due diligence exercise to be conducted on the Interested Party after the re-evaluation exercise and on the lowest evaluated bidder is not barred by the plea of *res judicata*.

Page 37 of the Board's decision was clear that authenticity of the above mentioned certificate could be verified through a due diligence and the Board proceeded to order that an award of the subject tender should be made once a due diligence has been conducted on the lowest evaluated bidder.

However, the Board shall not address the question whether the Interested Party provided Documents in the requirement of registration with the National Construction Authority (NCA), category NCA3 and registration with the ministry of water and sanitation because the Board has found that this issue is *res judicata* as earlier in established.

On the third issue framed for determination, the Respondent in paragraph 1 of its Response to the Request for Review stated that it re-admitted the Applicants bid back to the tender evaluation process subject to decision in Review No. 59 of 2021 of 12th May 2021. Further, that all four bids were subjected to re-evaluation as provided for under section 80 of the Act and a report submitted on 20th May 2021.

The Board in its decision of 12th May 2021 in Review No. 59 of 2021 ordered the Respondent to direct the Evaluation Committee to reinstate the Applicant's bid back into the procurement process including all other bidders and conduct a re-evaluation in accordance with Clause 29 of Section II. Instructions to Tenderers read together with Section IV. Evaluation and Qualification Criteria of the Bidding Document and thereafter proceed with the subject procurement process to its logical conclusion, including the making of an award, subject to a post qualification (due diligence) exercise conducted on the lowest evaluated bidder pursuant to Section IV. Evaluation and Qualification Criteria at page 22 of the Bidding Document read together with section 83 of the Act within fourteen (14) days from the date of this decision.

Turning to the re-evaluation report, in the Procuring Entity's confidential file, we note that the Procuring Entity's Evaluation Committee re-instated the Applicant's bid back into the evaluation process and undertook a re-evaluation of all bids.

In Review No. 59/2021, the Board observed that the Bidding Document did not demarcate stages of evaluation. However, we note from the previous Evaluation Report and the report emanating from a re-evaluation, that stages were demarcated as Preliminary, Technical and Financial Evaluation

stages. The Applicant was disqualified at the Technical Evaluation stage and it was only the Interested Party who proceeded to the Financial Evaluation stage.

After Financial Evaluation, the Interested Party was awarded the Subject Tender.

According to page 37 paragraph one, of the Board's findings on the issue of whether the Interested Party satisfied the requirement of registration with the National Construction Authority (NCA), category NCA3 and registration with the ministry of water and sanitation emerged in PPARB Application No. 59 of 2021 whereby the Board having perused the documents submitted by the Interested Party found that on the face of those documents, the Interested party satisfied that criteria. However, the Board proceeded to note that since the Applicant had challenged the registration of the interested party with the Ministry of water and sanitation. As a matter of fact, the Board directed in its final orders that a due diligence ought to be conducted on the bidder who would be found as the lowest evaluated bidder pursuant to Section IV. Evaluation and Qualification Criteria at page 22 of the Bidding Document read together with section 83 of the Act.

From the confidential file, the Tender Evaluation committee did not recommend a further Due diligence on the Interested party as recommended by the Board on its decision in PPARB Application No. 59 of 2021. The Committee stated that it was satisfied with the due diligence carried out earlier as the bidder had met all the requirements in the first Due Diligence done.

However, after studying the first Due Diligence report, the Board notes that verification of the requirement of registration with the National Construction

Authority (NCA), category NCA3 and registration with the ministry of water and sanitation did not form part of the Due Diligence.

Secondly, the Respondent ever challenged the Board's decision and it was therefore final and binding to them pursuant to Section 175 (1) of the Act and therefore they did not have leeway not to undertake another Due Diligence exercise on the Interested Party specifically on the documents the Board had referred them to.

To that extent it is clear that the Procuring Entity did not fully comply with the orders of the Board because they never undertook a Due Diligence to verify the specific documentation the Board had noted.

We also observe in the confidential documents after an evaluation was undertaken a Professional Opinion was prepared. Since this was a case where Due Diligence ought to have been conducted, it was incumbent upon the Evaluation Committee to undertake a Due Diligence on the lowest evaluated bidder after evaluation and a Professional Opinion needed to be prepared by the Head of Procurement reviewing the manner in which re-evaluation had been conducted and the manner in which Due Diligence had been conducted so as to advise the Accounting Officer on award of the Subject Tender.

The Board finds that the Procuring Entity partially complied with the orders of the Board issued on 12th May 2021 in **PPARB Application No. 59 of 2021 Visrom Company Limited V Accounting Officer, Limuru Water & Sewerage Company Limited and Another** as they did not do a post qualification (due diligence) on the lowest evaluated bidder pursuant to Section IV. Evaluation and Qualification Criteria at page 22 of the Bidding Document read together with section 83 of the Act.

On the fourth issue for determination, the Applicant in their Request for Review at paragraph seven state that the Respondent through a notification letter dated 21st May 2021 informed it that its bid had been unsuccessful and provided the following reasons;

a) "Under specific experience, the evaluation committee found out that of the four projects of similar nature provided two of them could not be authenticated. These are:

- Kangoki Trunk Sewer Line Rehabilitation Project for a total tender sum of Kshs 158,276,482.60(Kenya Shillings One Hundred Fifty Eight Million Two Hundred Seventy Six Thousand Four Hundred Eighty Two and Sixty Cents Only) completed on 9th July 2020.***
- Construction of Maua Sewerage Project (Tender sum no clear) completed on 20th September 2019***

b) Personnel provided did not meet threshold specifications after the review of the provided curriculum vitae. these are:

- Project Manager***
- Site Agent***
- Foreman***

The experience required for works of similar works similar nature was not met.

c) The list of equipment's (sic provided did not meet the threshold as required in terms of numbers and ownership. There was no provision of log books or lease agreement as stipulated in the tender document."

The Applicant further states that the reasons provided in the notification letter dated 21st May 2021 are significantly and materially different from those in the initial letter dated 16th April 2031 which difference can only be interpreted as a calculated witch hunt against the Applicant's bid, and a gross misapprehension of the Board's orders.

It further states that the reasons for finding its bid non-responsive hence unsuccessful as contained on the notification letter are not only nonfactual, but also and more importantly denied it the rightful advance of its bid to the technical and financial evaluations.

In Review No. 59 of 2021, the Board had directed that the Applicant's bid be re-instated back into the procurement process. In Review no.59 of 2021, the Board found that the Procuring Entity had not clearly demarcated the stages of evaluation. However, the evaluation report in the previous case showed that the evaluation was done at Preliminary, Technical and Financial evaluation stages. From the evaluation report emanating from the re-evaluation, the Applicant bid was responsive after Preliminary but was found non-responsive at technical evaluation stage. The Reasons in the Applicant's bid relate to Technical evaluation hence the reason why they are different from the previous letter of notification issued.

Having studied the Criteria where the Applicant was found non-responsive, documents provided by the Applicant, the Evaluation Committee's remarks

as stated in the Evaluation Report, the Board makes the following remarks as outlined in the table below:

| S/no | Item | Requirements | What the Applicant provided in its original bid | Evaluation Committee's Remarks | Board's Remarks |
|------|---------------------|---|---|--|---|
| 6 | Specific Experience | (a) Participation as a contractor or subcontractor in at least three (3) similar contracts within the last five (5) years each with a value of Kshs. 150,000,000(Kenya Shillings One Hundred Million) that have been successfully and substantially completed (attach completion certificates) that are similar to the proposed works. The similarity shall be based on the physical size, complexity or methods/technology | <p>Page 650 Letter of Award of Proposed Kangoki Trunk Sewer Line Rehabilitation Project dated 20th August 2019 addressed to the Applicant</p> <p>Page 651, A Practical Completion Certification dated 30th July 2020 issued to the Applicant for Proposed Kangoki Trunk Sewer Line Rehabilitation Project</p> <p>Page 652, Recommendation letter dated 15th September 2020 issued by Thika Water and Sewerage Company Limited recommending the Applicant without naming the project for which the recommendation relates</p> <p>Page 653, Letter of Award dated 4th February 2019 issued by Tana Water Services Board to the Applicant for Construction of Maua Sewerage Project</p> <p>Page 654, a Practical Completion Certificate dated 2nd October 2019 for Construction of Maua Sewerage Project</p> <p>Page 655, letter of award dated 19th June 2019 from County Government of Embu for Improvement of Drainage and Sewerage System in Mavuria Ward</p> <p>Page 656, Certificate of Practical Completion or Project on 14th November 2018 on Improvement of Drainage and Sewerage System in Mavuria Ward</p> <p>Page 657, Letter of Award of 9th March 2018 for Construction of Water Pans/Small Dams under National Water Harvesting and Ground Water Exploitation Programme issued by Ministry of Agriculture Irrigation to the Applicant</p> <p>Page 658, Certificate of Practical Completion for works achieved on 7th February 2019 by Applicant for the Ministry of Agriculture and Irrigation</p> <p>Page 659, Letter of Award dated 6th October 2017 issued by Nyeri Water & Sewerage Company Limited to the Applicant (NYEWASCO) for Kamakwa/Kandara Scheme</p> <p>Page 660, Completion Certificate for Construction of</p> | <p>On specific experience, the Evaluation Committee noted with concern that the award letter for contract No. TW/SB/025/2018-2019 awarded by Tana Water Services Board was signed off by the Procurement Manager as opposed to the Accounting Officer (Page 653) pursuant to section 87 (1) of the Act. In view of the above, the Evaluation Committee unanimously decided to take a <u>sampling verification of the works attached</u></p> <p>The following projects were sampled for verification:</p> <p>Proposed Kagonki trunk Sewer Line Rehabilitation project Construction of Maua Sewerage Project</p> <p>As per the correspondences attached, the Procuring Entity's (Thika Water and Sewerage Co. Ltd and Tana Water Services Board respectively) indicated in writing to not have awarded nor worked with the bidder on the aforementioned projects</p> <p>The Evaluation Committee hence finds the bidder non-responsive under specific experience</p> | <p>The Applicant provided more than the required 3 projects</p> <p>The Evaluation Committee wrote to third parties regarding experience of the Applicant during evaluation of the Applicant</p> |

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| | | | <p>Kamakwa/Kandara Scheme Lot 3 issued by NYEWASCO Page 661, Recommendation Letter to the Applicant issued by NYEWASCO</p> <p>Page 662, Letter of Award to the Applicant issued by Athi Water for Construction of Embakasi Sewers Lot 4</p> <p>Page 663, Letter of Recommendation of the Applicant for the Construction of Embakasi Sewers Lot 4 issued by Athi Water</p> <p>Page 664, Letter of Award dated 24th December 2018 issued by County Government of Kiambu to the Applicant for Proposed Improvement of 1.5 KM storm water Drainage Systems in Kinoo in Kikuyu Municipalities</p> <p>Page 665. Take Over Certificate for Proposed Improvement of 1.5 KM storm water Drainage Systems in Kinoo in Kikuyu Municipalities issued by County Government of Kiambu to the Applicant</p> <p>Page 666,</p> | | |
| | | <p>(b) For the above or other contracts executed during the period stipulated in 2.4.2 (a) above a minimum experience in the following key activities Experience in laying of water supply and sewer pipelines Contractors should have laid UPVC/ ferrous pipes/HDPE size between 200mm for UPVC and 1000mm dia. and above</p> | <p>Page 667, Letter of Award dated 21st November 2018 issued by Ruiru-Juja Water and Sewerage Company for Provision of Sewer Lines Connectivity issued to the Applicant</p> <p>Page 668, Recommendation Letter dated 8th May 2020 issued by Ruiru-Juja Water and Sewerage Company for Provision of Sewer Lines Connectivity issued to the Applicant</p> <p>Page 669, Letter of Award dated 13th November 2018 issued by Export Processing Zones Authority for Construction of Sewer System to the Applicant</p> <p>Page 670, Completion Certificate dated 19th December 2019 issued by Export Processing Zones Authority for Construction of Sewer System to the Applicant</p> <p>Page 671, Letter of Award dated 21st March 2019 issued by Kenyatta University to the Applicant for Plumbing Drainage Firefighting and External Water Reticulation Works at proposed lecture theatre and external works at Mama Ngina University College, Gatundu</p> <p>Page 672, Completion Certificate dated 6th November 2019 Kenyatta University to the Applicant for Plumbing Drainage Firefighting and External Water Reticulation Works at proposed lecture</p> | | |

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| | | | <p>theatre and external works at Mama Ngina University College, Gatundu</p> <p>Page 673, Recommendation Letter dated 10th December 2019 from Kenyatta University to the Applicant for Plumbing Drainage Firefighting and External Water Reticulation Works at proposed lecture theatre and external works at Mama Ngina University College, Gatundu</p> <p>Page 674, Letter of Award dated 17th July 2019 by Tana Water Services Board Construction of Othaya Sewerage Project Last Mile Connectivity issued to the Applicant</p> <p>Page 675, Letter of Award dated 28th April 2020 by Ruiru-Juja Water and Sewerage Company Ltd for Construction of Ruiru-Juja Sewer Connectivity issued to the Applicant</p> <p>Page 676, Notification of Award dated 9th June 2020 issued by Athi Water Works to the Applicant for Construction Works for Gatundu Water and Sanitation Expansion of Gatundu Water Works Project</p> <p>Page 677, Notification of Award dated 4th June 2020 issued by Athi Water Works to the Applicant for Gatundu Water and Sanitation Augmentation</p> <p>Page 678, Notification of Tender Award dated 18th February 2021 issued by National Irrigation Authority to the Applicant for Rehabilitation Works for Solio Earth Day in Laikipia West Constituency.</p> | | |
| 7 | Personnel Experience | | | | |
| | | Project Manager-1 Nr person 15 years of general experience and 5 years of similar experience | <p>Page 108 to 115, Curriculum Vitae of Mr. Abdulrahim Guyo Tubi</p> <p>Page 112 of the CV, participated in Pipeline Survey since 1998</p> <p>Worked as Engineer with Applicant from July 2008 and as Site Manager with the Applicant from July 2010</p> | <p>The CV of the project manager shows that he started working with Visrom Co. Ltd in 2008</p> <p>The credibility of this CV is in question because the company (Visrom) was incorporated on 15th April 2011 as per the attached Certificate of Incorporation</p> <p>Further to this, the Project Manager lacks 5 years specific experience as per requirement of Tender Document</p> | <p>Personnel Experience The Tender Document under Clause 2.4.2 of Section IV provided Specific Experience for the bidding company. The Tender Document did not state that specific experience of personnel relates to the date of incorporation of the bidder.</p> |
| | | Site Agent- 1 Nr. Person, 10 years of general experience and 5 years of similar experience | Page 124 to 129, CV of Robert King'ori Munyoroku | The projects given by the Site Manager as his experience could not be verified | The Applicant attached evidence of experience of |

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| | | | <p>Worked as project Engineer of Applicant from September 2014</p> <p>Page 126, worked as Assistant Engineer with Wanjohi Consulting Engineers from August 2009</p> | <p><u>on their existence or magnitude because the same are not given by his employer</u></p> | <p>its Site Agent (Robert King'ori Munyoroku)</p> <p>The Evaluation Committee wrote to third parties during evaluation of the Applicant</p> |
| | | <p>Foreman (Pipe laying, testing)- 2Nr persons 8 years of general experience and 5 years of similar experience</p> | <p>Pages 155 to 161, CV of Mutisya Gabriel Maluku</p> <p>Worked as Site Engineer of the Applicant from June 2017</p> <p>Page 159, Experience Working as Foreman with the Applicant from June 2017</p> | <p>The Evaluation Committee found that the Foreman is bereft of 5 years specific experience in pipe laying or similar experience as per the requirements in the Tender Document.</p> | <p>Tender closed on 30th March 2021</p> <p>Foreman has experience of less than 5 years</p> <p>Properly evaluated</p> |
| 8 | Equipment | <p>7/10 ton tipper lorry (2)</p> | <p>Page 89, 2 Trucks</p> <p>Page 616, Log Book Registration No. KCE540N Lorry Truck under National Industrial Credit Bank Limited and Visrom Company Limited</p> <p>Page 617, Log Book Registration Number KAA570T Lorry Truck under James Muchiri Kariuki</p> | <p>The requirement in the tender document was that a bidder must have a minimum of 2 (7/10) tipper lorries. The Evaluation Committee found that the bidder did not meet this requirement as the logbooks provided indicated lorry trucks instead of tipper lorries</p> | <p>Log books are for Lorry Trucks instead of Tipper Lorry</p> <p>Properly Evaluated</p> |
| | | <p>Concrete mixers(0.4m3) (3)</p> | <p>Page 619, a Receipt from UHUARSIVA Enterprise Ltd to the Applicant for a Concrete Dumper at Kshs. 1,392, 000 issued to the Applicant</p> <p>Page 620, Cash Sale Receipt for a Lenhard Mixer 1 piece at Kshs. 120,000 issued to the Applicant</p> | <p>The requirement was that a bidder must have a minimum of 3 concrete mixers. The bidder only provided 1</p> | <p>Provided a receipt for a Concrete Dumper and another for a Lenhard Mixer</p> <p>Did not provide the minimum required number of 3 concrete mixers</p> |
| | | <p>Pick up (3)</p> | <p>Page 89 and 90, 2 Pick Ups</p> <p>Page 626, Log Book Registration KCS793J Toyota Hilux Double Cabin under Samuel Karonji Kimani</p> <p>Page 627, Log Book Registration Number KCE 126S Isuzu Pickup Under Visrom Company Limited</p> | <p>The requirement in the Tender Document was that a bidder must have a minimum of 3 pickups. The bidder only provided 2 log books and thus does not meet this requirement</p> | <p>Provided log books for 2 pickups contrary to the minimum requirement of providing 2 pickups.</p> <p>Failed to satisfy the requirement</p> |
| | | <p>Rock breakers (2)</p> | <p>Page 629, Logbook Registration Number KHMA737G Wheel Loader under Visrom Company Limited and Credit Bank Limited</p> <p>Page 630, Log book Registration KHMA617K Crawler under National Industrial Credit Bank Limited and Visrom Company Limited</p> <p>Page 631, Log Book Registration Number KHMA084L Crawler National Industrial Credit Bank Limited and Visrom Company Limited</p> | <p>The requirement in the Tender Document was that a bidder must provide a minimum of 2 Rock Breakers. The bidder did not provide any documents to show ownership or lease of these equipments</p> | <p>Provided ownership documents in form of 4 logbooks contrary to the assertion of the Evaluation Committee</p> <p>It was unfairly evaluated</p> |

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| | | | Page 632, Log Book Registration Number KHMA253G Crawler/Tractor National Industrial Credit Bank Limited and Visrom Company Limited | | |
| | | Mechanical/hydrostatic/pressure testing equipment (2) | Page 614, provided a list of equipment owned including 3 No Pipe Pressure Testing Equipment | The requirement in the tender document was that a bidder must provide a minimum of 2 No. of this equipment. Similarly, there was no proof of ownership or lease of this equipment. | The Bidder only outlined a list without any ownership documents. Fairly evaluated |
| | | Crane 25 Tons (1) | At page 614, provided a list of equipment but a 25 ton crane is not listed neither are there ownership documents | The requirement in the tender document was that a bidder must provide at least 1 No. 25 tons crane. The bidder did not provide any document to show ownership or lease of this equipment. | provided a list of equipment but a 25 ton crane is not listed neither are there ownership documents Fairly evaluated |
| | Total technical score | | N (Non responsive) | | |

From the foregoing, the Board notes that the Evaluation Committee wrote to third parties during evaluation of the Applicant's bid under the criterion on Specific Experience and the criterion on Personnel Experience (Site Agent). In doing so, the Procuring Entity received negative responses from those third parties in an exercise that is akin to a due diligence exercise

ITB 31.1 Section IV, Evaluation and Qualification Criteria of the Bidding Document provided that;

"The Employer shall determine to its satisfaction whether the Bidder that is selected as having submitted the lowest evaluated and substantially responsive bid either continues to meet (if prequalification applies) or meets (if post qualification applies) the qualifying criteria specified in Section IV, Evaluation and Qualification Criteria.

31.2 The determination shall be based upon an examination of the documentary evidence of the Bidder's qualifications submitted by the Bidder, pursuant to ITB 14.1.

31.3 An affirmative determination shall be a prerequisite for award of the Contract to the Bidder. A negative determination shall result in disqualification of the bid, in which event the Employer shall proceed to the next lowest evaluated bid to make a similar determination of that Bidder's qualifications to perform satisfactorily"

Section 83 of the Act provides that:

"(1) An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act.

(2) The conduct of due diligence under subsection (1) may include obtaining confidential references from persons with whom the tenderer has had prior engagement.

(3) To acknowledge that the report is a true reflection of the proceedings held, each member who was part of the due diligence by the evaluation committee shall—

(a) Initial each page of the report; and

(b) Append his or her signature as well as their full name and designation."

The above provisions state that Due Diligence is conducted on the lowest evaluated bidder after tender evaluation but before award. A Due Diligence exercise is a post-qualification exercise which is not conducted during

evaluation. This is a process conducted only on the lowest evaluated bidder after tender evaluation but prior to award of a tender. Article 227 (1) of the Constitution of Kenya, 2010 states;

"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."

Article 227 (1) of the Constitution is a principle applicable to procurement of goods and services because, state organs and public entities are required to procure for goods and services in a system that is fair, equitable, transparent, competitive and cost-effective. This explains why evaluation of bids is done in stages, so that bidders compete for award of a tender by first demonstrating their responsiveness to eligibility and mandatory requirements (including technical specifications) before a consideration of price is made at the Financial Evaluation Stage.

Even though the Procuring Entity wrote to third parties regarding qualifications of the Applicant, this exercise was only carried out on the Applicant yet the technical Evaluation was conducted on four bidders. The Board wonders why this erroneous Due Diligence was only applied to the Applicant.

The Board finds that the Procuring Entity breached its own Tender Document by conducting an erroneous verification exercise on the Applicant yet ITB Clause 31.1 Section IV, Evaluation and Qualification Criteria of the Bidding Document expressly stated that verification diligence is conducted only on the lowest evaluated bidder. This verification should not have been

undertaken when evaluating the Applicant on Specific Experience and Personnel Experience (Site Agent).

Furthermore, evaluation of the Applicant's bid on the criterion of Personnel Experience (Project Manager) was unfair because the Tender Document under Clause 2.4.2 of Section IV provided Specific Experience relating to the Bidder as an entity. The Experience of the Personnel as to general and specific experience did relate to experience gained while working with a particular bidder. Thus, the Evaluation Committee introduced extraneous criterion. Further, the criterion for Equipment, specifically Rock Breakers was unfairly evaluated because the Tender Document required a minimum of 2 rock breakers and the Applicant provided ownership documents in form of 4 logbooks contrary to the assertion of the Evaluation Committee.

The re-evaluation on the Applicant's bid does not stand the test of section 80 (2) and Article 227 (1) of the Constitution on fairness.

The Board finds that Procuring Entity failed to re-evaluate the Applicant's bid at the Technical Evaluation Stage in accordance with section 80 (2) read together with the Article 227 of the Constitution of Kenya 2010 in the following specific areas:

- Specific Experience;
- Personnel Experience (Site Agent and Project Manager);
- Equipment (Rock Breakers);

In determining the specific orders to grant in the circumstances, the Board observes that the Procuring Entity did not fully comply with the orders of

the Board. This is because, instead of conducting a due diligence exercise only on the lowest evaluated bidder after tender evaluation and prior to award of the subject tender, the Respondent ignored the Board's directions on the manner of conducting due diligence (as a post qualification exercise) whilst undertaking an erroneous verification exercise on the Applicant during evaluation of bids.

The Board has also found evaluation of the Applicant's bid was unfair of the criterion of Specific Experience; Personnel Experience (Site Agent and Project Manager); and Equipment (Rock Breakers).

It is therefore necessary to direct the Accounting Officer to direct the Evaluation Committee to reinstate the Applicant's bid back into the procurement process together with all other bidders and conduct a re-evaluation in accordance with Clause 29 of Section II. Instructions to Tenderers read together with Section IV. Evaluation and Qualification Criteria of the Bidding Document on the following specific criterion only:

- Specific Experience;
- Personnel Experience (Site Agent and Project Manager);
- Equipment (Rock Breakers);

Further, a due diligence exercise must be undertaken on the lowest evaluated bidder in accordance with ITB Clause 31.1 Section IV, Evaluation and Qualification Criteria of the Bidding Document read together with section 83 of the Act after tender evaluation but prior to award of the subject tender. In doing so, the Procuring Entity must take into consideration that one of the components of the due diligence exercise must be on verifying and confirming the authenticity of the Certificate of Registration for Water

Development Works Contractors issued by the Ministry of Water and Sanitation and Irrigation to the Interested Party if the Interested Party is found to be the lowest evaluated bidder.

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

FINAL ORDERS

In exercise of the powers conferred upon in by section 173 of the Act, the Board makes the following final orders: -

- 1. The Accounting Officer of the Procuring Entity's Letters of Notification of Tender No. LIWASCO/001/KENHA/2020/21 for Relocation of Water and Sewerage Infrastructure along Rironi Magumu Flyover and Rironi- Mutarakwa (section 1) of Nairobi Nakuru Mau Summit Highway (A8) dated 21st May 2021, addressed to the Applicant herein and all other unsuccessful bidders, be and are hereby be set aside.**
- 2. The Accounting Officer of the Procuring Entity's Letter of Notification of Award of Tender No. LIWASCO/001/KENHA/2020/21 for Relocation of Water and Sewerage Infrastructure along Rironi Magumu Flyover and Rironi- Mutarakwa (section 1) of Nairobi Nakuru Mau Summit Highway (A8) dated 21st May 2021, addressed to the Interested Party herein, be and is hereby be set aside.**

3. The Accounting Officer of the Procuring Entity is hereby ordered to direct the Evaluation Committee to re-instate the Applicant's bid at the stage it was disqualified together with all other bidders that made it to that stage and conduct a re-evaluation in accordance with section 80 (2) of the Act read together with Article 227 of the Constitution of Kenya, 2010 only on the following specific criteria in the Tender Document;

- i) Clause 2.4.2 Specific Experience of Section IV. Evaluation and Qualification Criteria at page 28 of the Bidding Document;**
- ii) Clause 2.5 Personnel of Section IV. Evaluation and Qualification Criteria at page 30 of the Bidding Document on Site Agent and Project Manager; and**
- iii) Clause 2.6 Equipment of Section IV. Evaluation and Qualification Criteria at page 30 of the Bidding Document on Rock Breakers.**

4. Further to Order No. 3 above, the Accounting Officer of the Procuring Entity is hereby ordered to proceed with the subject procurement process to its logical conclusion including the making of an award within fourteen (14) days from the date of this decision, subject to a post qualification (due diligence) exercise on the lowest evaluated bidder pursuant to Section IV. Evaluation and Qualification Criteria at page 22 of the Bidding Document read together with section 83 of the Act taking into consideration the Board's findings in this Review.

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

Dated at Nairobi this 23rd day of June 2021

CHAIRPERSON

SECRETARY

PPARB

PPARB

