

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 154/2021 OF 17TH DECEMBER 2021

BETWEEN

LAWSWOOD INVESTMENT LIMITED.....APPLICANT

AND

**THE ACCOUNTING OFFICER,
KENYA RURAL ROADS AUTHORITY RESPONDENT**

FIRST ENERGY SERVICES CO. LTD INTERESTED PARTY

Review against the decision of the Accounting Officer of Kenya Rural Roads Authority in relation to Tender No. KERRA/011/GSA/39/019/2021-22 for Routine Maintenance of: Dadaab – Kulan (G5032) Road in Dadaab Constituency of Garissa County: 22% Constituency Road Funds (CRF) -F/Y 2021/22.

BOARD MEMBERS

- | | |
|---------------------------|---------------|
| 1. Ms. Faith Waigwa | - Chairperson |
| 2. Qs. Hussein Were | - Member |
| 3. Ms. Phyllis Chepkemboi | - Member |
| 4. Mr. Nicholas Mruttu | - Member |
| 5. Ms. Isabella Juma, CPA | - Member |

IN ATTENDANCE

Mr. Philip Okumu	- Acting Board Secretary
------------------	--------------------------

BACKGROUND TO THE DECISION

The Bidding Process

Kenya Rural Roads Authority (KERRA) (hereinafter referred to as “the Procuring Entity”) invited eligible tenderers to tender in Tender No. KERRA/011/GSA/39/019/2021-22 for Routine Maintenance of: Dadaab – Kulan (G5032) Road in Dadaab Constituency of Garissa County: 22% Constituency Road Funds (CRF) -F/Y 2021/22 (hereinafter referred to as “the subject tender”) sometime in October 2021.

Tender Submission Deadline and Opening of Tenders

The Procuring Entity received a total of five (5) tenders by the tender submission deadline of 18th October 2021 as follows:

BIDDER NO.	NAME OF THE FIRM	TENDER AMOUNT (Kshs)
01	Zesco East Africa Ltd	4,199,142.00
02	Lawswood Investment Ltd	4,373,142.00
03	Hayaan General Supplies Ltd	4,860,342.00
04	First Energy Services Co. Ltd	4,609,782.00
05	Garore Trading Trading Co. Ltd	4,668,942.00

Evaluation of Tenders

The Procuring Entity evaluated the tenders resulting in the award of the tender to Messrs First Energy Services Company Limited (hereinafter, referred to as “the Interested Party”). Messrs Lawswood Investment Limited was notified vide letter dated 29th November, 2021 that its tender was unsuccessful.

REQUEST FOR REVIEW

Messrs Lawswood Investment Limited (hereinafter referred to as "the Applicant") lodged a Request for Review together with a Statement in Support and a Supporting Affidavit sworn by Hassan Mohammed, all dated 16th December 2021 and filed on 17th December 2021. It also filed supporting documents dated 16th December 2021 through the firm of Mwaniki Gachuba Advocates. The Applicant sought the following orders of the Board:

- 1. The disqualification of the Applicants tender be annulled and set aside***
- 2. The award of the Tender for Routine Maintenance of: Dadaab – Kulan (G5032) Road in Dadaab Constituency of Garissa County: 22% Constituency Road Funds (CRF) -F/Y 2021/22 (Tender No. KERRA/011/GSA/39/019/2021-22) to the Interested Party be annulled and set aside.***
- 3. The notification dated 29th November, 2021 be annulled and set aside.***
- 4. The Applicant's tender be re-admitted pursuant to Section 79(2)(b) of the Public Procurement and Asset Disposal Act, 2015; Regulation 74(2) of the Public Procurement and Asset Disposal Regulations, 2020 and Clause 29 and 30 of the tender document and Section 72 of the Interpretation and General Provision Act and be re-evaluated.***
- 5. The Applicant be awarded cost of the Application***

The Board Secretary notified the Procuring Entity of the existence of the Request for Review *vide* letter and Notification of Appeal dated 17th December 2021 and invited them to file their response on the same.

Together with notifications to the Procuring Entity and Tenderers, the Board Secretary attached the Board's Circular No.2/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of Covid-19. Pursuant to the said Circular No. 2/2020 dated 24th March 2020, the Board dispensed with physical hearings and directed all requests for review applications be canvassed by way of written submissions. Clause 1 at page 2 of the Circular further specified that pleadings and documents would be deemed as properly filed if they bear the official stamp of the Board.

None of the parties to the Request for Review filed written submissions.

BOARD'S DECISION

The Board has carefully considered the Applicant's pleadings submitted to it the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") and finds that the following issues call for determination:

- (i) *Whether the Procuring Entity failed to evaluate the Applicant's tender in accordance with the tender document, in breach of the provisions of section 80 (2) of the Act.*

- (ii) *Whether the Accounting Officer of the Procuring Entity failed to notify the Applicant of the outcome of the tender as required under the provisions of section 87 (3) of the Act.*

The Board now proceeds to address the above issues.

As to Whether the Procuring Entity failed to evaluate the Applicant's tender in accordance with the tender document, in breach of the provisions of section 80 (2) of the Act.

A brief background to the matter is that sometime in October, 2021 the Procuring Entity advertised the tender in respect of Maintenance of Dadaab – Kulan (G5032) Road in Dadaab Constituency of Garissa County: 22% Constituency Road Funds (CRF) – F/Y 2021/22 (Tender No. KERRA/011/GSA/39/019/2021-22). Five tenders were received and opened by the Procuring Entity's tender opening committee on 18th October, 2021.

The Procuring Entity's tender evaluation committee thereafter evaluated the tenders. On 8th December, 2021 the Applicant received a notification that its tender was disqualified for the reason the Procuring Entity stated that the Applicant had used non-standard Bills of Quantities format in its tender. The letter of notification read in part as follows:

1. "The Successful Tenderer

We intend to award the above tender to M/s First Energy Services Co. Ltd of P.O. Box 28156-00100 at their evaluated tender sum of Kshs. 4,609,782.00 (Four Million six Hundred nine thousand, seven hundred and eighty four only) being the lowest evaluated bidder, pursuant to section 86 (1) (a) of the Public Procurement and Asset Disposal Act 2015.

2. Other Tenderers: Pursuant to Sec. 87 (3) of the PPAD Act, 2015

S/N	Name of Tenderer	Tender price as read out Kshs	Evaluated Tender price	Comments
2	Laswood Investment Ltd	4,373,142.00	4,373,142.00	Used Non-standard BoQ format

If you have any questions regarding this Notification please do not hesitate to contact us on the address provided above.

Yours faithfully,

**Patrick K. Ringera,
REGIONAL DIRECTOR,
GARISSA REGION."**

The Applicant was aggrieved by the decision of the Procuring Entity as conveyed in the letter of notification dated 29th November, 2012 and moved to the Board to contest it in this Request for Review filed on 17th December, 2021.

The Applicant argued in support of the request for review that the disqualification of its tender was unfair and in breach of Articles 47(1) and 227(1) of the Constitution of Kenya, 2010; Section 79(2)(a) of the Act, Clause 29 of the tender document and Section 72 of the Interpretation and General Provisions Act.

It argued further that the disqualification of its tender was in breach of Section 79(2)(b) of the Act, Regulation 74(2) of the Public Procurement and Asset Disposal Regulations, 2020 and Clause 30 of the tender document as the Respondent unlawfully withheld its statutory discretion.

To support its argument, the Applicant averred that it submitted its Bills of Quantities (BoQ) in the format provided in the tender document and that in any case, BoQ format was not an evaluation criterion in the tender document. The Applicant buttressed its argument with a copy of the blank tender document marked as annexure "**HM 1**".

In conclusion, the Applicant contended that the disqualification of its tender was unfair and un-procedural adding that the award of the tender to the

Interested Party was unlawful given that it did not submit the lowest evaluated tender.

The Board has heard the Applicant's averments and perused the documents submitted to it.

It is imperative to state at this point that this Request for Review is undefended. Both the Procuring Entity and the Interested Party did not file any responses nor submit any documents to the Board in respect of the matter. The Board is however cognizant of its obligation to hear and determine all matters brought before it within 21 days as required under Section 171 of the Act which states:

- (1) "The Review Board shall complete its review within twenty one days after receiving the Request for Review.***
- (2) "in no case shall any appeal under this Act stay or delay the procurement process beyond the time stipulated in this Act or the Regulations made thereunder".***

The Act also makes provisions on the handling of a request for review once filed with the Board. Section 168 of the Act states as follows:

"Upon receiving a request for review under section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the

Review Board and the suspension of the procurement proceedings ..."

Further, Regulation 205 of the Regulation makes the following prescriptions:

- (1) "The Secretary shall, immediately after the filing of the request under regulation 203, serve a notice thereof to the accounting officer of a procuring entity in accordance with section 168 of the Act.***
- (2) "The notification of the filing of the request for review and suspension of procurement proceedings shall be communicated, in writing, by the Review Board Secretary.***
- (3) "Upon being served with a notice of request for review, the accounting officer of a procuring entity shall within five days or such lesser period as may be stated by the Secretary in a particular case, submit to the Secretary a written memorandum of response to the request for review together with such documents as may be specified.***
- (4) "An accounting officer of a procuring entity who fails to submit the documents within the stipulated period under paragraph (3), commits an offence and shall be liable to a fine not exceeding four million shillings or to imprisonment for a term not exceeding ten years, or to both.***
- (5) "the Review Board Secretary shall immediately notify all other parties to the review upon receipt of such documents from a procuring entity under paragraph (3)".***

The process of handling a request for review from the time of receipt at the Secretariat of the Review Board is clearly prescribed by the Act under strict timelines.

The instant Request for Review was received at the Board and filed on 17th December, 2021. The Board Secretary notified the Procuring Entity of the existence of the Request for Review *vide* letter and Notification of Appeal dated 17th December 2021 and invited them to file their responses on the same. The Respondents did not file any Response to the Request for Review nor did they submit the confidential documents as required, pursuant to Section 67 of the Act.

The letter and Notification of Appeal were delivered by Courier and received at the Respondent's office on 21st December 2021. In the absence of contact information of the Interested Party and other bidders, the Board Secretary did not notify tenderers in the subject tender of the existence of the Request for Review. The Secretary to the Review Board sent out a reminder *vide* letter dated 3rd January 2022 to the Procuring Entity who did not, again, respond.

By the date of expiry of this Request for Review on 7th January, 2022, the Respondent, the 1st Interested Party and any other tenderer in the subject procurement had neither filed a response nor submitted any documents in the Request for Review.

The Board therefore proceeded to preside over the request for review and deliver a determination within the stipulated 21 days as prescribed under Section 171 of the Act even in the absence of responses from the Respondents and the Interested Party. In taking this course of action the Board does not negate the obligations of the Procuring Entity under the Act and any sanctions prescribed for failure to observe those obligations.

Turning to the substance of the Request for Review, the issue which has arisen is whether the Procuring Entity failed to evaluate the Applicant's tender in accordance with the evaluation criteria contained in the tender document and hence breached of the provisions of Section 80 (2) of the Act.

To resolve this issue the Board has perused all documents placed before it especially the blank tender document marked "HM 1" and the filled BoQ document marked "HM 3". Annexure "HM 1" is evidently a KERRA document and it is titled:

"Garissa Township Constituency: Standard Tender Document for: Spot Improvement of Bulla Iftin-Warable (C-251) Road: Vote / Funding: 10% Constituency Roads Fund (CRF): Financial Year 2021-2022: invitation to Tender (ITT) No. KeRRA/011/GSA/39/029/2021-2022. October, 2021."

It is a 247-page document comprising three parts follows:

- Part 1 - Tendering Procedures
- Part 2 - Works Requirements

Part 3 - Conditions of Contract and Contract Forms

Part 1 is found at pages 1 to 60 and is divided into sections as follows:

Section I - Instructions to Tenderers

Section II - Tender Data Sheet

Section III - Evaluation and Qualification Criteria

Section IV - Tendering Forms

Part 2 is found at page 61 to 74 and is also divided into sections as follows:

Section V - Bills of Quantities

Section VI - Specifications

Section VII - Drawings

Part 3 is housed at page 75 to 247 of the document. It comprises three sections as follows:

Section VIII - General Conditions of Contract

Section IX - Particular Conditions of Contract

Section X - Contract Forms

The Form in contention is found at pages 87 to 92 of "**HM 1**".

The Board has also perused the extracts of the Applicant's priced BoQ submitted at the tender opening and marked as Annexure "**HM 3**" in these proceedings. It is a two-page form filled out in the columns of ITEM NO., DESCRIPTIONS, Unit, Quantities, Unit Bid Rate (Kshs) and Amount (Kshs).

The Board has looked at the two documents and discerned features and contents of both which are noted in the table below.

		HM 1	HM 3
1	Tender No.	KERRA/011/GSA/39/029/2021-22	KERRA/011/GSA/39/019/2021-22
2	Tender Name	Spot Improvement of Bulla Iftin-Warable (C251) Road in Dadaab Constituency of Garissa County: 10% Constituency Road Funds (CRF) -F/Y 2021/22.	Routine Maintenance of: Dadaab – Kulan (G5032) Road in Dadaab Constituency of Garissa County: 22% Constituency Road Funds (CRF) -F/Y 2021/22.
3	Road Code	C251	G5032
4	Technology	MB	-
5	Form Design	Similar	Similar
6	Form Content	Different	Different
7	Work Description	<ul style="list-style-type: none"> a) Earthworks b) Excavation and filling for Structures c) Grading and Gravelling Works d) Concrete works e) Road furniture repair and maintenance 	<ul style="list-style-type: none"> a) Preliminaries b) Site Clearance c) Grading & Gravelling Works

It is clear from the table above that the Forms “**HM 3**” filled and submitted by the Applicant in his tender are different from the ones submitted in the blank Bills of Quantities as “**HM 1**”.

The argument in this issue is that the Applicant used non-standard BoQ format in his tender and that is why he was disqualified. The Applicant, in seeking to counter that argument, submitted a blank tender document to

show that the form it supplied in its tender was similar to the one in the original tender document issued by the Procuring Entity.

Scrutiny of the tender document by the Board reveals that the blank tender document, **HM 1** is for a different tender and not the one that is the subject of this Request for Review. The two documents cannot be compared since they do not speak to the same tender. The contents of the two documents are different.

It is the finding of the Board that the Applicant has not proved its case that it submitted its tender in a BoQ format that is similar to the tender document. Its second argument that the BoQ format was not an evaluation criterion is also unproven since the evaluation criteria contained in HM 1 is for a different tender and cannot be used to determine the issue concerning the tender in dispute.

In view of all of the foregoing, the Board finds that the Applicant has not proved its case and proceeds to hold that this issue framed for determination fails.

As to whether the Accounting Officer of the Procuring Entity failed to notify the Applicant of the outcome of the tender as required under the provisions of section 87 (3) of the Act.

The Applicant averred that the notification letter dated 29th November, 2021 was a nullity as it was unsigned and it was issued by one Patrick Ringera, Regional Director, Garissa Region and not by the Respondent. According to the Applicant the notification letter was issued by a person other than the Respondent contrary to Article 47(1) and 227(1) of the Constitution of Kenya, 2010; Section 87(3) of the Public Procurement and Asset Disposal Act, 2015; Regulation 33(3) (k) and 82(3) of the Public Procurement and Asset Disposal Regulations, 2020.

The Board has studied the provisions of Section 87 (3) of the Act in an attempt to resolve this issue. The Act at Section 87 (3) states:

"When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderers as appropriate and reasons thereof."

The letter of notification dated 29th November, 2021 stated as follows:

1. "The Successful Tenderer

We intend to award the above tender to M/s First Energy Services Co. Ltd of P.O. Box 28156-00100 at their evaluated tender sum of Kshs. 4,609,782.00 (Four Million six Hundred nine thousand, seven hundred and eighty four only) being the

lowest evaluated bidder, pursuant to section 86 (1) (a) of the Public Procurement and Asset Disposal Act 2015.

3. Other Tenderers: Pursuant to Sec. 87 (3) of the PPAD Act, 2015

S/N o	Name of Tenderer	Tender price as read out Kshs	Evaluated Tender price	Comments
2	Laswood Investmen t Ltd	4,373,142.0 0	4,373,142.0 0	Used Non- standard BoQ format

If you have any questions regarding this Notification please do not hesitate to contact us on the address provided above.

Yours faithfully,

**Patrick K. Ringera,
REGIONAL DIRECTOR,
GARISSA REGION."**

The Board notes that the letter of notification dated 29th November, 2021 has information regarding successful bidder and the amount at which it was awarded. It also disclosed the reason for disqualification of the Applicant as:

- ***Used No-standard BOQ format.*** The Board observes that the ingredients of a notification under Section 87 (3) being the successful bidder,

the amount at which the tender was awarded and the reason as to why the unsuccessful tenderer was not awarded are provided therein.

The Board also observes that Section 87 (3) of the Act mandates the accounting officer of the procuring entity, and no one else, to be the notifying officer under subsection 87 (1). The requirement is couched in mandatory terms of "shall".

The Applicant's letter of notification in the subject tender was issued under the authority of one ***Patrick K. Ringeria, Regional Director, Garrissa Region***. Although the letter is on the letter head of Kenya Rural Roads Authority, the Procuring Entity herein, there is no evidence to show that it was signed by the accounting officer. In the circumstances the Board has no other way but to find that the notification letter dated 29th November, 2021 and issued to the Applicant did not comply with the provisions of Section 87 (3) of the Act and that the notification is null and void.

The Board therefore finds merit in this issue and upholds it.

In view of the foregoing, the Request for Review succeeds with respect to the following specific orders:

FINAL ORDERS

In exercise of the powers under section 173 of the Act, the Board makes the following orders in this Request for Review: -

- 1. The Procuring Entity's letter of Notification to the Applicant dated 29th November, 2021 be and is hereby cancelled and set aside.**
- 2. The Accounting Officer of the Procuring Entity is directed to issue a new letter of notification to the Applicant in conformity with the provisions of Section 87 (3) of the Act within seven days from the date of this decision.**
- 3. Due to the outcome of this Request for Review each party shall bear its own costs.**

Dated at Nairobi this 7th Day of January 2022



.....
CHAIRPERSON
PPARB



.....
SECRETARY
PPARB