

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 48/2022 OF 3<sup>RD</sup> JUNE 2022**

**DAYIBSON INVESTMENT LIMITED ..... APPLICANT**

**AND**

**CHIEF EXECUTIVE OFFICER . 1<sup>ST</sup> RESPONDENT (Accounting Officer)**

**NATIONAL WATER HARVESTING**

**AND STORAGE AUTHORITY .... 2<sup>ND</sup> RESPONDENT (Procuring Entity)**

Review against the decision of the National Water Harvesting and Storage Authority in respect to Tender No. NWHSA/ONT/025/2021-2022 for Kathuli Pan in Mwingi North and Yongela Dam in Mutumo in Kitui County.

**BOARD MEMBERS**

- |                      |               |
|----------------------|---------------|
| 1. Ms. Faith Waigwa  | - Chairperson |
| 2. Mr. Jackson Awele | - Member      |
| 3. Dr. Joseph Gitari | - Member      |
| 4. Mr. Hussein Were  | - Member      |
| 5. Dr. Paul Jilani   | - Member      |

## **IN ATTENDANCE**

Mr. Philemon Kiprop - Holding brief for Acting Board Secretary

## **BACKGROUND TO THE DECISION**

### **The Tendering Process**

National Water Harvesting and Storage Authority, the Procuring Entity and the 2<sup>nd</sup> Respondent herein, invited sealed tenders from qualified interested tenderers for Tender No. NWHSA/ONT/025/2021-2022 for Kathuli Pan in Mwingi North and Yongela Dam in Mutumo in Kitui County by way of Open National Tendering method through advertisement in the Government Tenders Website ([www.tenders.go.ke](http://www.tenders.go.ke)) and on the 2<sup>nd</sup> Respondent's website ([www.waterauthority.go.ke](http://www.waterauthority.go.ke)) on 11<sup>th</sup> April 2022 with a tender closing date of 4<sup>th</sup> May 2022 at 10.00a.m.

### **Addenda**

Through Addendum No.1 dated 12<sup>th</sup> April 2022 and Addendum No.2 dated 21<sup>st</sup> April 2022, the 2<sup>nd</sup> Respondent amended bill of quantities, tender data sheet, evaluation & qualification criteria and extended the tender submission deadline to 5<sup>th</sup> May 2022 at 08.30a.m.

## **Tender Submission Deadline and Opening**

On the extended tender submission deadline of 5<sup>th</sup> May 2022 at 8:30 a.m., the 2<sup>nd</sup> Respondent received nineteen (19) tenders as captured in the minutes of the Tender Opening Committee signed by members of the Tender Opening Committee on 5<sup>th</sup> May 2022 (hereinafter referred to as th 'Tener Opening Minutes'). The Tender Opening Committee shortly thereafter opened the nineteen (19) tenders in the presence of tenderers' representatives present and the following tenderers were recorded as having submitted their respective tenders: -

<b>No.</b>	<b>Tenderer's name</b>
1.	Dayibson Investment Limited
2.	Ponika Enterprises Limited
3.	Sliprose Engineering Group Limited
4.	Aztec Infrastructure (Kenya) Limited
5.	Khadim Limited
6.	Noor Consult Limited
7.	Amarolle Civil Contractors Limited

8.	Hiraan Construction Company Limited
9.	Sosmut Trading Company Limited
10.	Justec Communication Limited
11.	Tadala Company Limited
12.	Systems Group Limited
13.	Fenke Agencies Limited
14.	El-Vis Communication Limited
15.	Restah Company Limited
16.	Hydratech Building Contractors & Supplies Limited
17.	Nakkal Realtors Limited
18.	Watercore Services Limited
19.	Ambit Energy Company Limited

## **Evaluation of Tenders**

A Tender evaluation team appointed by the 1<sup>st</sup> Respondent (hereinafter referred to as the 'Evaluation Committee') evaluated the nineteen (19)

tenders in three stages as captured in an Evaluation Report signed by members of the Evaluation Committee on 23<sup>rd</sup> May 2022 (hereinafter referred to as the 'Evaluation Report'). The three stages for evaluation were:

- 1) Preliminary Evaluation;
- 2) Technical Evaluation; and
- 3) Financial Evaluation;

### **Preliminary Evaluation**

At this stage of evaluation, the Evaluation Committee was required to evaluate tenders applying the criteria outlined in Clause 2. Preliminary examination for Determination of Responsiveness of Section III – Evaluation and Qualification Criteria at page 22 to 24 of the blank tender document issued to prospective tenderers by the 2<sup>nd</sup> Respondent (hereinafter referred to as the 'Tender Document') read with Addendum No.1 and 2. Tenders needed to have met, in all respects, the eligibility criteria and other requirements in Section I – Instructions to Tenderers as complemented, supplement or amended by Section II – Tender Data Sheet (TDS) and the preliminary evaluation requirements at this stage to be eligible for technical evaluation.

At the end of the evaluation at this stage, the Evaluation Committee determined only one (1) tender responsive while the other eighteen (18) tenders were determined non-responsive. The one (1) responsive tender was the tender submitted by El – Vis Communication Limited thus proceeded for technical evaluation. The Applicant’s tender was among the eighteen (18) tenders determined non-responsive at this stage thus was disqualified to proceed for further evaluation.

### **Technical Evaluation**

At this stage of evaluation, the Evaluation Committee was required to evaluate tenders by applying the criteria set out in Preliminary Technical Evaluation of Section III – Evaluation and Qualification Criteria at page 25 of the Tender Document read with Addendum No.1 and 2. Each criterion of evaluation at this stage was to be weighted and tenders needed to attain a minimum technical score of 80 marks to proceed to the Financial Evaluation stage.

At the end of evaluation at this stage, the Evaluation Committee determined El-Vis Communication Limited’s tender responsive to proceed for financial evaluation for having attained a technical score of 91.25%.

## **Financial Evaluation**

At this stage of evaluation, the Evaluation Committee was required to evaluate tenders by applying the criteria set out Clause 3. Tender Evaluation (ITT 35) Price Evaluation of Section III – Evaluation and Qualification Criteria at page 26 of the Tender Document read with Addendum No.1 and 2.

At the end of evaluation at this stage, El-Vis Communication Limited's tender being the only tender that made it to the financial evaluation stage, was determined to have the lowest evaluated price of Kshs.28,425,188.80 (Kenya Shillings Twenty-Eight Million, Four Hundred and Twenty-Five Thousand, One Hundred and Eighty-Eight and Eighty Cents) only.

## **Post Qualification and Contract Award**

At this stage, the Evaluation Committee was required to conduct due diligence on the tenderer who submitted the lowest evaluated tender to be awarded the subject tender by applying the criteria set out in Clause 7. Post Qualification and Contract Award (ITT39) of Section III – Evaluation and Qualification Criteria at page 26 of the Tender Document.

At the end of the post qualification evaluation, the due diligence exercise conducted on El-Vis Communication Limited yielded a positive outcome.

### **Recommendation**

The Evaluation Committee recommended that El-vis Communication Limited be awarded the subject tender at its lowest evaluated price of Kshs.28,425,188.80 (Kenya Shillings Twenty-Eight Million, Four Hundred and Twenty-Five Thousand, One Hundred and Eighty-Eight and Eighty Cents) only.

### **Professional Opinion**

In a Professional Opinion dated 24<sup>th</sup> May 2022, the Chief Procurement Officer of the 2<sup>nd</sup> Respondent, Mr. John Musyoka, upon reviewing the Evaluation Report and Due Diligence report, opined that the evaluation and due diligence report adhered to the criteria set out in the Tender Document and as provided in the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'). He recommended to the Ag. Chief Executive Officer of the 2<sup>nd</sup> Respondent to award the subject tender as per the recommendation of the Evaluation Committee and as contained in the



Evaluation Report signed by members of the Evaluation Committee on 23<sup>rd</sup> May 2022.

### **Notification to tenderers**

Vide letters transmitted via email ([procurement@waterauthority.go.ke](mailto:procurement@waterauthority.go.ke)) on Tuesday the 24<sup>th</sup> May 2022, tenderers were notified of the outcome of evaluation of the subject tender.

### **REQUEST FOR REVIEW**

Dayibson Investment Limited, the Applicant herein, lodged a Request for Review dated 3<sup>rd</sup> June 2022 and filed on even date together with a Statement in Support of Request for Review sworn on 3<sup>rd</sup> June 2022 by Abdullahi Mohamed Abdi, a Director of the Applicant, in person, seeking the following orders: -

- a) That the Board be pleased to quash the decision of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents dated 24<sup>th</sup> May 2022 in respect of Tender No. NWHSA/ONT/025/2021-2022 KATHULI PAN MWINGI NORTH & YONGELA DAM IN MUTOMO IN KITUI COUNTY.***

***b) That the Board be pleased to award Tender No. NWHSA/ONT/025/2021-2022 KATHULI PAN MWINGI NORTH & YONGELA DAM IN MUTOMO IN KITUI COUNTY.***

***c) That the Board be pleased to order the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to meet the costs of these proceedings.***

***IN THE ALTERNATIVE***

***d) That the Respondents be compelled to pay damages in the sum Kenya Shillings Thirteen Million, Seven Hundred EightyFour, Nine Hundred Fifty (Kshs.13,784,950/=) being the bid offered by the Applicant.***

***e.) That the Honourable Board be pleased to make any or such further orders as the ends of justice may require.***

In a Notification of Appeal and a letter dated 3<sup>rd</sup> June 2022, the Acting Board Secretary of the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') notified the Respondents of the existence of the Request for Review and the suspension of procurement proceedings for the subject tender while forwarding to the Respondents a copy of the Request for Review together with the Board's Circular No.02/2020 dated 24<sup>th</sup> March 2020, detailing administrative and contingency measures to mitigate the spread of Covid-19. Further, the Respondents were

requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within 5 days from 3<sup>rd</sup> June 2022.

On 9<sup>th</sup> June 2022, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed a Replying Affidavit sworn on 8<sup>th</sup> June 2022 by Sharon A. Obonyo, the acting Chief Executive Officer of the 2<sup>nd</sup> Respondent and the 1<sup>st</sup> Respondent herein, through Doris N. Mwangi Advocate, the 2<sup>nd</sup> Respondent's in-house counsel. Further, the Respondents submitted to the Board confidential information and documents with respect to the subject tender pursuant to Section 67(3)(e) of the Act.

Vide letters dated 10<sup>th</sup> June 2022, the Acting Board Secretary notified all tenderers in the subject tender, via their respective addresses as provided by the Respondents, of the existence of the Request for Review while forwarding to tenderers a copy of the Request for Review together with the Board's Circular No.02/2020 dated 24<sup>th</sup> March 2020. Further, all tenderers were invited to submit to the Board any information and arguments on the subject tender within 3 days from 10<sup>th</sup> June 2022. No tenderer in the subject tender other than the Applicant filed any pleadings or documents with respect to the subject tender in the instant Request for Review.

Pursuant to the Board's Circular No.2/2020 dated 24<sup>th</sup> March 2020, the Board dispensed with physical hearings and directed all requests for review applications be canvassed by way of written submissions. Clause 1 on page 2 of the said Circular directed that pleadings and documents would be deemed properly filed if they bore the Board's official stamp.

### **APPLICANT'S CASE**

The Applicant avers that it was a tenderer in the subject tender, following an invitation to tender by the Respondent on or about 25<sup>th</sup> June 2022 alongside other seven (7) tenderers namely, Noor Consult Limited, Danfi Enterprises Limited, Saarama General Construction & Supplies Limited, Barbaares Construction & Supplier Limited, Doyen Investment Limited, Dayibson Investment Limited, Goldsmith Engineering Enterprises Limited and M1 Design Build Engineering Works Limited.

According to the Applicant, the 2<sup>nd</sup> Respondent carried out preliminary, technical & financial evaluation and proceeded to award the subject tender to Noor Consult Limited on account of being the lowest evaluated tenderer.

The Applicant avers that by a letter dated 24<sup>th</sup> May 2022, the 2<sup>nd</sup> Respondent notified it of its unsuccessful tender on account of failure to provide a Power

of Attorney and Rent/Lease Agreement which according to the Applicant is false because it provided all the requisite documents including the Power of Attorney and a Lease Agreement.

Given the foregoing, the Applicant alleges that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have breached the Act, Public Procurement and Asset Regulations, 2020 (hereinafter referred to as 'Regulations 2020') the Fair Administrative Actions Act 2005 and Articles 2, 10(b), (c), 47, 50, 159, 227 and 232 of the Constitution of Kenya (2010), the Act as well as Public Procurement and Asset Disposal Regulations 2020 (hereinafter referred to as the 'Regulations, 2020'). Consequently, the Applicant seeks for the orders sought in the instant Request for Review.

### **1<sup>ST</sup> AND 2<sup>ND</sup> RESPONDENTS' RESPONSE**

The 1<sup>st</sup> Respondent contends that the subject tender was floated by the 2<sup>nd</sup> Respondent on 11<sup>th</sup> April 2022 through the 2<sup>nd</sup> Respondent's website and the Government Tenders website. Further, that the subject tender was amended through 2 addenda dated 12<sup>th</sup> April 2022 and 21<sup>st</sup> April 2022 and subsequently, the tender submission deadline was extended to 5<sup>th</sup> May 2022.

The 1<sup>st</sup> Respondent contends that on the aforesaid extended tender submission deadline, nineteen (19) tenderers submitted their tenders. These nineteen (19) tenderers were:

<b>No.</b>	<b>Tenderer's name</b>
1.	Dayibson Investment Limited
2.	Ponika Enterprises Limited
3.	Sliprose Engineering Group Limited
4.	Aztec Infrastructure (Kenya) Limited
5.	Khadim Limited
6.	Noor Consult Limited
7.	Amarolle Civil Contractors Limited
8.	Hiraan Construction Company Limited
9.	Sosmut Trading Company Limited
10.	Justec Communication Limited
11.	Tadala Company Limited
12.	Systems Group Limited

13.	Fenke Agencies Limited
14.	El-Vis Communication Limited
15.	Restah Company Limited
16.	Hydratech Building Contractors & Supplies Limited
17.	Nakkal Realtors Limited
18.	Watercore Services Limited
19.	Ambit Energy Company Limited

According to the 1<sup>st</sup> Respondent, interested tenderers were required to submit their tender in compliance with the terms and conditions as set out in the Tender Document and addenda on or before 5<sup>th</sup> May 2022 at 08.30a.m and that the subject tender's evaluation was conducted pursuant to the provisions of the Constitution, the Act, the Tender Document and no other criteria was used.

The 1<sup>st</sup> Respondent confirms that Notifications of Intention to Award dated 24<sup>th</sup> May 2022 were issued to all tenderers through electronic mails provided by tenderers and through postal addresses in line with Section 87(1) and (3)

of the Act and that on 25<sup>th</sup> May 2022, the successful tenderer accepted the award in line with Section 87(2) of the Act.

The 1<sup>st</sup> Respondent contends that vide the said Notification of Intention to Award dated 24<sup>th</sup> May 2022, the Applicant was notified of its tender's non-responsiveness for failure to comply with the preliminary/mandatory provisions of the Tender Document being (i) failure to provide Bid Bond of Kshs.250,00 as per ITT 21.2(d) and (ii) failure to put the Form of tender on stationery with the letter head of the tenderer. Further, the 1<sup>st</sup> Respondent contends that the 2<sup>nd</sup> Respondent vide a letter dated 30<sup>th</sup> May 2022 sent electronically on 31<sup>st</sup> May 2022, debriefed the Applicant on the detailed reasons for not being successful in the subject tender being (i) failure to attach letter granting power of attorney as required in accordance with ITT 22.3, (ii) failure to certify all documents provided as copies by a Commissioner for Oaths as per ITT13.1(h) item Q, (iii) failure to provide valid Business permit as per ITT13.1(h) item B, (iv) failure to provide Bid bond of Ksh.250,000 as per ITT21.2(d) and (v) failure to put the Form of tender on stationery with the letter head of the tenderer.

According to the 1<sup>st</sup> Respondent all the reasons given for determining the Applicant's tender non-responsive were mandatory requirements in the



Tender Document which needed to be complied with by tenderers at the Preliminary Responsiveness and Mandatory Requirements before being technically evaluated.

The 1<sup>st</sup> Respondent invited the Board to refer to copies of documents attached to the Applicant's original tender submitted to the Board under the confidential file and observe that contrary to the Applicant's claims, the Applicant's tender did not have any power of attorney as required under Clause ITT 22.3 of the Tender Document and copies therein were not duly signed by a commissioner for oaths/notary public to signify that they are true copies of the original as required under Clause ITT 13.1(h) item Q of the Tender Document. Further, that the lack of the impugned power of attorney is further buttressed by the fact that the Applicant has failed, rejected or ignored to attach a paginated copy of the alluded power of attorney as evidence in support of its claim in the instant Request for Review, which according to the 1<sup>st</sup> Respondent, is a clear demonstration of the fact that the document was non-existent and not contained in the Applicant's tender from the onset.

The 1<sup>st</sup> Respondent contends that the 2<sup>nd</sup> Respondent did not cite the issue of the lease agreement as a reason for determining the Applicant's tender

non-responsive to the subject tender thus the allegation by the Applicant that its tender was unsuccessful on account of failure to provide a lease agreement is baseless and unfounded.

Given the foregoing, the 1<sup>st</sup> Respondent's contends that the Applicant's tender failed to meet the Preliminary Requirements of the subject tender and could therefore not proceed for technical evaluation.

Accordingly, it is the 1<sup>st</sup> Respondent's contention that the Applicant was not the successful tenderer because it was not the tenderer with the lowest evaluated price as required under Section 86(1)(a) of the Act and was therefore not denied its rightful advance to the technical and financial evaluations as alleged or at all.

The 1<sup>st</sup> Respondent further alleges that the Applicant's instant Request for Review is marred with confusion and self-contradictions because the Applicant (i) makes reference to an advertisement issued in the year 2021, and (ii) alludes to tenderers who did not participate in the subject tender. According to the 1<sup>st</sup> Respondent, it is evident that the Applicant seeks to delay service delivery to the citizens of Kenya and has approached the Board

with unclean hands with an application that is acquiescently vexatious and an afterthought.

The 1<sup>st</sup> Respondent concludes by contending that the request by the Applicant for the Board to evaluate its tender is untenable since the same was lawfully declared non-responsive.

The 1<sup>st</sup> Respondent prays for the Board to (i) find the Notification of Intention to Award letters dated 24<sup>th</sup> May 2022 and communicated to tenderers (including the Applicant) together with the letter dated 30<sup>th</sup> May 2022 debriefing the Applicant, are a true reflection of the fair evaluation process and (ii) find the instant Request for Review and prayers sought therein as frivolous, lacks merit, in bad faith, and are meant to delay service delivery to citizens of Kenya.

## **BOARD'S DECISION**

The Board has considered each of the parties' case, pleadings, documents and confidential documents submitted by the Respondents to the Board pursuant to Section 67 (3) (e) of the Act and finds the following issues crystalize for determination: -

**1. Whether the Applicant's tender satisfied and/or met the eligibility criteria and other requirements for evaluation under Clause 2. Preliminary examination for Determination of Responsiveness of Section III – Evaluation and Qualification Criteria at pages 22 to 24 of the Tender Document to warrant it to proceed for further evaluation:**

- **Submission of a Securing declaration form in the required form, amount and validity period/ Tender security for Kshs.250,000;**
- **Submission of a Form of Tender prepared on a tenderer's letterhead clearly showing the tenderer's complete name and business address;**
- **Submission of a Letter appointing a Power of Attorney authorized to commit a tenderer;**
- **Certification by a commissioner for oaths/notary public signifying true copies of original of all documents submitted as copies; and**
- **Submission of a valid business license for principal place of business for year 2022.**

**2. What orders should the Board grant in the circumstances?**

We shall now proceed to address the above mentioned issues for determination.

**Whether the Applicant's tender satisfied and/or met the eligibility criteria and other requirements for evaluation under Clause 2. Preliminary examination for Determination of Responsiveness of Section III – Evaluation and Qualification Criteria at pages 22 to 24 of the Tender Document to warrant it to proceed for further evaluation:**

- **Submission of a Securing declaration form in the required form, amount and validity period/ Tender security for Kshs.250,000;**
- **Submission of a Form of Tender prepared on a tenderer's letterhead clearly showing the tenderer's complete name and business address;**
- **Submission of a Letter appointing a Power of Attorney authorized to commit a tenderer;**
- **Certification by a commissioner for oaths/notary public signifying true copies of original of all documents submitted as copies; and**

- **Submission of a valid business license for principal place of business for year 2022.**

Section 79(1) of the Act provides for responsiveness of tenders and requires tenders to conform to all mandatory requirements in a tender document and reads as follows:-

***'79. Responsiveness of tenders***

***(1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents.'***

Section 80(1) and (2) of the Act on the other hand provides for an evaluation committee to evaluate tenders and, in evaluating tenders, to use the procedures and criteria set out in a tender document. The said Section 80(1) and (2) of the Act read as follows:

***'80. Evaluation of tenders***

***(1) The evaluation committee appointed by the accounting officer pursuant to section 46 of this Act, shall evaluate and compare the responsive tenders other than tenders rejected.***

***(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.'***

We note the evaluation procedure and criteria for the subject tender is set out and provided for at Section III – Evaluation and Qualification Criteria at page 22 to 26 of the Tender Document.

Clause 2. Preliminary examination for Determination of Responsiveness of Section III – Evaluation and Qualification Criteria at page 22 to 24 of the Tender Document provides as follows in part:

**The Procuring Entity will start by examining all tenders to ensure they meet in all respects the eligibility criteria and other requirements in the ITT, and that the tender is complete in all aspects in meeting the requirements of "Part 2 – Procuring Entity's Works Requirements", including checking for tenders with unacceptable errors, abnormally low tenders, abnormally high tenders and tenders that are front loaded.**

**Tenders that do not pass the preliminary Examination will be considered irresponsive and will not be considered further.**

#### **PRELIMINARY EVALUATION**

**The bid document shall be subjected to preliminary evaluation to determine that:**

- a) A tenderer complies with all the eligibility requirements;**
- b) the tender has been submitted in the required format and serialized/paginated on each page;**
- c) the securing declaration form submitted is in the required form, amount and validity period;**
- d) the tender has been duly signed by the person lawfully authorized to do so through the power of attorney;**



***e) the required number of copies of the tender have been submitted;***

***f) the tender is valid for the period required, and***

***g) all required documents as outlined below have been submitted:***

<b><i>A</i></b>	<b><i>.....</i></b>
<b><i>B</i></b>	<b><i>Copy of a Valid Business License for principal place of business for the year 2022.</i></b>
<b><i>C</i></b>	<b><i>Evidence of a permanent office for the bidding entity in the form of either office space lease/rent agreement with evidence of payment of rent/lease for each of the last 12 months OR proof of ownership of the premise where the office is located which shall be in the form of a land ownership document/purchase evidence in the name of the bidding entity.</i></b>
<b><i>D</i></b>	<b><i>All QUALIFICATION FORMS have been duly filled, signed and stamped. Checklist for compliance found on QUALIFICATION FORMS SUMMARY.</i></b>
<b><i>E</i></b>	<b><i>.....</i></b>

<b>F</b>	.....
<b>G</b>	.....
<b>H</b>	.....
<b>I</b>	.....
<b>J</b>	.....
<b>K</b>	.....
<b>L</b>	.....
<b>M</b>	.....
<b>N</b>	.....
<b>O</b>	.....
<b>P</b>	.....
<b>Q</b>	<b><i>All documents submitted as copies shall be stamped and signed by a Commissioner for Oaths/Notary Public to signify that they are true copies of the original. Appointment as a Commissioner for Oaths attached. A valid practicing license for 2022 to be attached.</i></b>

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Our understanding of the above excerpt of the Tender Document is that the evaluation procedure and criteria to be used by the Evaluation Committee with respect to the subject tender at the preliminary evaluation stage is as outlined hereinbefore.

In essence, the Evaluation Committee was required to evaluate the Applicant's tender, *inter alia*, by examining the Applicant's tender to ensure that it met, in all respect, the eligibility criteria and other requirements in Section I - Instructions to Tenderers (ITT) outlined at pages 1 to 17 of the Tender Document or as complemented, supplemented or amended by Section II – Tender Data Sheet (TDS) outlined at pages 18 to 21 of the Tender Document. Further, if the Applicant's tender failed to pass the preliminary examination, the same ought to have been considered non-responsive and would not be considered for further evaluation.

With this background on the eligibility criteria and other requirements in Section I – Instructions to Tenderers as complemented, supplemented or amended by Section II – Tender Data Sheet (TDS), on determination of a responsive tender and on how evaluation of tenders is required to be conducted, we shall now proceed to determine whether the Applicant's tender satisfied the aforementioned eligibility criteria and other requirements

in Section I – Instructions to Tenderers as complemented, supplemented or amended by Section II – Tender Data Sheet (TDS of the Tender Document to warrant it to proceed for further evaluation by examining the Applicant’s original tender submitted to the 2<sup>nd</sup> Respondent in the subject tender against the Evaluation Report, both documents forming part of the confidential documents submitted to the Board by the Respondents pursuant to Section 67(3)(e) of the Act.

- **Submission of a Securing declaration form in the required form, amount and validity period/Tender security for Kshs.250,000;**

Clause 21.2(d) of Section I-Instructions to Tenderers at page 8 of the Tender Document as complemented, supplemented or amended by Clause ITT 21.2(d) of Section II – Tender Data Sheet (TDS) at page 20 of the Tender Document required tenderers to furnish a tender security of Kshs.250,000. Further a securing declaration form submitted in the required form, amount and validity period was a mandatory criteria for evaluation at the preliminary evaluation stage as outlined hereinbefore.

The Respondents contend that the Applicant failed to provide a bid bond (tender security) of Kshs.250,000. We note that the Applicant has not controverted this contention by the Respondents.

We have carefully studied the Applicant’s original tender and note that no tender security (bid bond) of Kshs.250,000 or a securing declaration form in the required form, amount and validity period was submitted by the Applicant as required by the Tender Document.

According to page 8 of 46 of the Evaluation Report, the Evaluation Committee marked as follows with respect to the Applicant’s original tender:

<b><i>S/N</i></b>	<b><i>ITT</i></b>	<b><i>Mandatory Eligibility criteria</i></b>	<b><i>1</i></b> <b><i>(Dayibson Investment Limited)</i></b>
<b><i>8</i></b>	<b><i>21.2 (d) (and as amended in the</i></b>	<b><i>A Tender-Securing Declaration/Tender Security as required: Tender Security of Kes.250,000.00</i></b>	

	<i>particular conditions)</i>		
		<i>Is an original tender security attached?</i>	<i>X</i>
		<i>Is the tender security for Kes.250,000?</i>	<i>X</i>
		<i>Is the tender security valid for a period more than 121 days?</i>	<i>X</i>

At page 11 of 46 of the Evaluation Report, the Evaluation Committee found that the Applicant failed to provide a bid bond (tender security) of Kshs.250,000 as per ITT 21.2(d).

- **Submission of a Form of Tender prepared on a tenderer’s letterhead clearly showing the tenderer’s complete name and business address;**

Clause 13.1(a) and 14.1 of Section I-Instructions to Tenderers at page 5 and 6 of the Tender Document respectively read with Clause (i) of Clause 5. Form of Tender of Other Forms at page 64 of the Tender Document required a tender to comprise of a Form of Tender prepared

on stationery on a tenderer's letterhead clearly showing a tenderer's complete name and business address.

The Respondents contend that the Applicant failed to provide a Form of Tender prepared on the Applicant's letterhead. We note that the Applicant has not controverted this contention by the Respondents.

We have carefully studied the Applicant's original tender and note that it provided a Form of Tender at page 64 of one of its two bundles of its original tender. However, this Form of Tender was not prepared on the Applicant's letterhead. What the Applicant did was to fill in by hand, the Form of Tender provided at page 64 of the Tender Document and submit the same, as such, instead of preparing the Form of Tender on its letterhead as required in the Tender Document.

At page 11 of 46 of the Evaluation Report, the Evaluation Committee found that the Applicant failed to put the Form of Tender on stationery on the letterhead of the Applicant.

- **Submission of a Letter appointing a Power of Attorney authorized to commit a tenderer;**

Clause 22.3 of Section I - Instructions to Tenderers at page 9 of the Tender Document as complemented, supplemented or amended by Clause ITT 22.3 of Section II – Tender Data Sheet (TDS) at page 20 of the Tender Document required tenderers to attach to their respective tenders a written confirmation of authorization to sign on behalf of a tenderer consisting of a letter appointing a power of attorney authorizing who would commit a tenderer with a specimen signature of such appointee expressly included in the appointing letter and a copy of the identification card for the appointee also attached.

The Applicant alleges that it provided a power of attorney. On the other hand the Respondents contend that the Applicant failed to provide a letter granting power of attorney as required in the Tender Document and that the power of attorney the Applicant claims to have submitted is non-existent and that is why the Applicant did not provide a copy thereof as evidence in support of its claim in the instant Request for Review.

We have carefully studied the Applicant's original tender and note that no letter appointing a power of attorney authorized to commit the Applicant with a specimen signature of such appointee expressly included in the appointing letter and a copy of the identification card



for the appointee was attached to the Applicant’s original tender as required in the Tender Document.

According to page 1 of 46 of the Evaluation Report, the Evaluation Committee marked as follows with respect to the Applicant’s original tender:

<b>S/N</b>	<b>ITT</b>	<b>Mandatory Eligibility criteria</b>	<b>1 (Dayibson Investment Limited)</b>
<b>1</b>	<b>22.3</b>	<b><i>The Tender is signed and by the person with power of attorney, without material deviation, reservation, or omission.</i></b>	<b>X</b>
<b>2</b>	<b>22.3 (and as amended in the</b>	<b><i>There is a letter granting power of attorney to sign the contract: <u>A letter appointing a Power of Attorney who shall be</u></i></b>	

	<i>particular conditions)</i>	<p><b><u>authorized to commit the tenderer.</u></b></p> <p><b><u>A specimen signature of such appointee shall be expressly included in the appointing letter.</u></b></p> <p><b><u>A copy of the Identification card for the appointee shall also be attached.</u></b></p>	
		<b><i>Is Power of Attorney document, Attached?</i></b>	<b><i>X</i></b>
		<b><i>Is it signed by the Directors of the Bidder?</i></b>	<b><i>X</i></b>
		<b><i>Is a Specimen signature of appointee, expressly indicated?</i></b>	<b><i>X</i></b>
		<b><i>Is a Copy of ID of appointee attached?</i></b>	<b><i>X</i></b>
		<b><i>If ID is copy, is it certified by a commissioner for oaths</i></b>	<b><i>X</i></b>

At page 11 of 46 of the Evaluation Report, the Evaluation Committee found that the Applicant failed to attach a letter granting power of attorney as required in accordance with ITT 22.3.

- **Certification by a commissioner for oaths/notary public signifying true copies of original of all documents submitted as copies.**

Clause 13.1(h) of Section I - Instructions to Tenderers at page 5 of the Tender Document as complemented, supplemented or amended by Clause ITT 13.1(h) Q of Section II – Tender Data Sheet (TDS) at page 19 of the Tender Document required tenderers to have all documents submitted as copies to be stamped and signed by a Commissioner for Oaths/Notary Public to signify that they are true copies of the original with appointment of a commissioner for oaths attached together with a valid practicing license for 2022.

The Respondents contend that the Applicant failed to certify all documents provided as copies by a Commissioner for Oaths. We note that the Applicant has not controverted this contention by the Respondents.

We have carefully studied the Applicant's original tender and note that the Applicant submitted several documents as copies as part of its original tender. However, none of these copies of documents submitted by the Applicant in its original tender was certified by a Commissioner for Oaths or Notary Public to signify that they are true copies of the original. Further, no appointment as a Commissioner for Oaths nor a practicing license for 2022 was attached to the Applicant's original tender as required by the Tender Document

At page 11 of 46 of the Evaluation Report, the Evaluation Committee found that the Applicant failed to certify its documents by a Commissioner for Oaths as per ITT 13.1(h) item Q.

- **Submission of a valid business license for principal place of business for year 2022.**

Clause 13.1(h) of Section I - Instructions to Tenderers at page 5 of the Tender Document as complemented, supplemented or amended by Clause ITT 13.1(h) B of Section II – Tender Data Sheet (TDS) at page 18 of the Tender Document required tenders to comprise of a copy of a valid business license for principal place of business for the year 2022.

The Respondents contend that the Applicant failed to provide a valid business permit. We note that the Applicant has not controverted this contention by the Respondents.

We have carefully studied the Applicant's original tender and note that as the second last document in one of its two bundles of its original tender, the Applicant submitted a copy of Nairobi City County, Single Business Permit, issued to the Applicant on 10<sup>th</sup> March 2020 with an expiry date of 10<sup>th</sup> March 2021. In essence this business permit was not valid as at the time of the subject tender's submission deadline of 5<sup>th</sup> May 2022 at 08.30a.m.

At page 11 of 46 of the Evaluation Report, the Evaluation Committee found that the Applicant failed to provide a valid business permit as per ITT 13.1 (h) item B.

Given the foregoing, the Evaluation Committee determined the Applicant's tender non-responsive after examining the Applicant's tender and finding the same failed to meet some eligibility criteria and other requirements in Section I – Instructions to Tenderers as complemented, supplemented or amended by Section II – Tender Data Sheet (TDS) of the Tender Document.

Consequently, the Evaluation Committee did not consider the Applicant's tender for further evaluation in accordance with Clause 2. Preliminary examination for Determination of Responsiveness of Section III – Evaluation and Qualification Criteria at page 22 of the Tender Document.

Thereafter, vide Notification of Intention to Award transmitted via email on 24<sup>th</sup> May 2022 and vide a letter dated 30<sup>th</sup> May 2022 the Applicant was notified and explained to of the non-responsiveness of its tender on account of non-compliance of all the aforementioned five (5) eligibility criteria and other requirements in Section I – Instructions to Tenderers as complemented, supplemented or amended by Section II – Tender Data Sheet (TDS) of the Tender Document.

We note that the Applicant alleged that it was informed that its tender in the subject tender was not successful, *inter alia*, for failure to provide a Rent/Lease Agreement and which Lease Agreement the Applicant claims it provided. However, the evidence in support of this allegation by the Applicant was a copy of a Notification of Intention to Award transmitted via email on 24<sup>th</sup> May 2022 with respect to a different tender from the subject tender being Tender No.NWHSA/ONT/028/2021-2022 for Construction of Dusebima Pan in Mandera County.

Having carefully studied the confidential documents submitted to the Board by the Respondents pursuant to Section 67(3)(e) of the Act, we note that the Applicant's tender in the subject tender was never disqualified on account of failure to provide a rent/lease agreement and neither did the Respondents notify the Applicant that its tender in the subject tender was disqualified on account of failure to provide a rent/lease agreement.

**In *Miscellaneous Application 407 of 2018 Republic v Public Procurement Administrative Review Board; Arid Contractors & General Supplies (Interested Party) Ex parte Meru University of Science & Technology [2019] eKLR*** (hereinafter referred to as the Meru University case), Justice John M. Mativo held as follows with respect to responsiveness of tenders and waiver of mandatory requirements of a tender document:

***"The materiality of irregularities is determined primarily by assessing whether the tender requirements have been substantively achieved. The starting point is Section 79 of the Act which provides as follows:-***

***79. Responsiveness of tenders***

***(1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents.***

.....

***72. A proper construction of the above provision shows that the requirement of responsiveness operates in the following manner:-***

***a. A bid only qualifies as a responsive bid if it meets with all requirements as set out in the bid documents. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements.***

***b. .... Indeed, public procurement practically bristles with formalities, which bidders often overlook at their peril.***

***73. Such formalities are usually listed in bid documents as mandatory requirements – in other words, they are a sine qua non for further consideration in the evaluation process. The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing or empowerment. Bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids.***



***Responsiveness thus serves as an important first hurdle for bidders to overcome.***

***74. .... Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions.***

***.....***

***78. In essence, a conforming / compliant / responsive tender is defined as a tender that complies with all the "material" or "substantial" aspects of the tender invitation. ....***

***79. For there to be fairness in the public procurement process as required under Article 227, all bids should be considered on the basis of their compliance with the terms of the solicitation***

*documents, and a bid should not be rejected for reasons other than those specifically stipulated in the solicitation document.*

*80. .... The Evaluation Committee has a duty to act fairly. .... The Bid documents contained clear instructions to bidders. No contest was raised before me that the requirements cited by were not in the bid documents. ....*

*81. A Procuring Entity is bound by its Bid Documents. Mandatory conditions cannot be waived. No argument was advanced before me to the effect that such deviations do not prejudice the other bidders or confer a benefit to the Interested Party.*

*82. The Evaluation Committee had no choice but to evaluate the bids in accordance with the eligibility and mandatory requirements of the Tender Documents by examining the documents before it. ....*

*83. ....*

*84. ....*

*85. The purpose of a tender is not to reward bidders who are clever enough to decipher unclear directions. It is to elicit the best solution through a process that is fair, equitable, transparent, cost-effective and competitive."*

Just like in the Meru University case, the Applicant has not challenged the requirements for tenderers to submit (i) *a letter appointing a Power of Attorney who shall be authorized to commit the tenderer with a specimen signature of such appointee expressly included in the appointing letter and a copy of the identification card for the appointee attached*, (ii) *copies of documents certified by a commissioner for oaths /notary public with an appointment as commissioner for oaths and a practicing license for 2022 attached*, (iii) *a copy of a valid business license for principal place of business for the year 2022*, (iv) *tender security for Kshs.250,000* and (v) *Form of Tender prepared on stationery of a tenderer's letter head clearly showing the tenderer's complete name and business address*. The Meru University case buttressed the fact that mandatory requirements of a tender document cannot be waived because doing so, would defeat the principle of fairness under Article 227(1) of the Constitution which requires all tenderers to compete on an equal footing.

Given the foregoing we find that the Applicant's tender did not satisfy and/or meet some of the eligibility criteria and other requirements in Section I – Instructions to Tenderers as complemented, supplemented or amended by Section II – Tender Data Sheet (TDS) and Clause 2. Preliminary examination for Determination of Responsiveness of Section III – Evaluation and

Qualification Criteria at page 22 of the Tender Document to warrant it to proceed for further evaluation.

### **What orders should the Board grant in the circumstances?**

Having found that the Applicant's tender did not satisfy and/or meet some of the eligibility criteria and other requirements in Section I – Instructions to Tenderers as complemented, supplemented or amended by Section II – Tender Data Sheet (TDS) and Clause 2. Preliminary examination for Determination of Responsiveness of Section III – Evaluation and Qualification Criteria at page 22 of the Tender Document to warrant it to proceed for further evaluation, we find the Applicant's tender was evaluated and eventually determined non-responsive by the Evaluation Committee in accordance with Section 79(1) and 80(2) of the Act and Article 227 of the Constitution of Kenya. Accordingly, we are inclined to find and we hereby do, that the instant Request for Review is devoid of merit and the same is ripe for dismissal.

### **FINAL ORDERS**

In exercise of the powers conferred upon it by Section 172 and 173 of the Public Procurement and Asset Disposal Act, 2015, the Board makes the following orders in the Request for Review dated 3<sup>rd</sup> June 2022: -

**1. The Applicant's Request for Review dated 3<sup>rd</sup> June 2022 and filed on even date be and is hereby dismissed for lacking in merit.**

**2. Given the findings herein, each party shall bear its own costs in the Request for Review.**

**Dated at Nairobi this 23<sup>rd</sup> day of June 2022.**



.....

.....

**CHAIRPERSON**

**SECRETARY**

**PPARB**

**PPARB**