

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 41/2023 OF 12<sup>TH</sup> JUNE 2023**

**BETWEEN**

**SARO HOLDINGS LIMITED.....APPLICANT**

**AND**

**ACCOUNTING OFFICER**

**KENYA RURAL ROADS AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**KENYA RURAL ROADS AUTHORITY.....2<sup>ND</sup> RESPONDENT**

Review against the decision of the Regional Director of Kenya Rural Roads Authority in relation to Tender No. KeRRA/008/39/NDI/ALDAI/C676/22%RMLF/2-34-22|23-068 for Routine Maintenance & Spot Improvement of C676 (KOBUJOI-KIMAREN-ARIOK)

**BOARD MEMBERS PRESENT**

- |                                |   |                  |
|--------------------------------|---|------------------|
| 1. Mr. George Murugu           | - | Chairperson      |
| 2. Mrs. Njeri Onyango F. CIArb | - | Vice-Chairperson |
| 3. Eng. Mbiu Kimani, OGW       | - | Member           |
| 4. Ms. Alice Oeri              | - | Member           |
| 5. Mr. Daniel Langat           | - | Member           |

## **IN ATTENDANCE**

Mr. James Kilaka - Secretariat

## **PRESENT BY INVITATION**

**APPLICANT - SARO HOLDINGS LIMITED**

Ms. Sheila Cherono - Advocate, C&K Advocates LLP

**RESPONDENTS ACCOUNTING OFFICER, KENYA RURAL  
ROADS AUTHORITY**

**KENYA RURAL ROADS AUTHORITY**

N/A

N/A

## **BACKGROUND OF THE DECISION**

### **The Tendering Process**

Kenya Rural Roads Authority, the Procuring Entity together with the 1<sup>st</sup> Respondent herein, invited sealed tenders in response to Tender No. KeRRA/008/39/NDI/ALDAI/C676/22%RMLF/2-34-22/23-068 for Routine Maintenance & Spot Improvement of C676 (KOBUJOI-KIMAREN-ARIOK) using the open competitive method. The invitation was by way of an advertisement published on the 2<sup>nd</sup> Respondent's website [www.kerra.go.ke](http://www.kerra.go.ke) and the Public Procurement Information Portal [www.tenders.go.ke](http://www.tenders.go.ke). The subject tender submission deadline was Friday, 27<sup>th</sup> January 2023 at 10:00 a.m.

## **Submission of Tenders and Tender Opening**

According to the Tender Opening Minutes dated 27<sup>th</sup> January 2023 under the Confidential File submitted by the Procuring Entity, the following seven (7) tenderers were recorded as having submitted their respective tenders in response to the subject tender by the tender submission deadline:

<b>No.</b>	<b>Name of Tenderer</b>
1.	Superroad Enterprises Limited
2.	Dakiye Limited
3.	Rilmac Limited
4.	Shadom Engineering Limited
5.	Tovena Construction Limited
6.	Turquesh Agencies
7.	Saro Holdings Limited

## **Evaluation of Tenders**

The 1<sup>st</sup> Respondent constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") to undertake an evaluation of the seven (7) tenders in the following three stages as captured in the Evaluation Report dated and signed 24<sup>th</sup> February 2023.

- i. Preliminary Evaluation
- ii. Technical Evaluation

### iii. Financial Evaluation

#### **Preliminary Evaluation**

At this stage of the evaluation, the Evaluation Committee was required to examine the tenders using the criteria set out as Clause A. Preliminary Examination under Section IV –EVALUATION AND QUALIFICATION CRITERIA of the Tender Document.

Evaluation was to be on Yes/No basis and tenderers who failed to meet any criteria in the Preliminary Evaluation would not proceed for further evaluation at the Technical Evaluation Stage.

At the end of the evaluation at this stage, five (5) tenders were found to be non-responsive while two (2) tenders which included the Applicant's tender were found to be responsive. Only the responsive tenders proceeded for evaluation at the Technical Evaluation Stage.

#### **Technical Evaluation**

At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the Criteria set out as Clause B: Technical Evaluation under Section IV –EVALUATION AND QUALIFICATION CRITERIA of the Tender Document.



Tenderers were required to meet all the requirements under the technical requirement criteria at the Technical Stage for them to qualify to proceed for evaluation at the Financial Evaluation Stage.

At the end of the evaluation at this stage, 2 tenders which included the Applicant's tender were found to be responsive met the criteria. And thus qualified for evaluation at the Financial Evaluation Stage.

### **Financial Evaluation**

At this stage of evaluation, the Evaluation Committee was required to examine tenders using the Criteria set out as Clause C. Financial Evaluation under Section IV –EVALUATION AND QUALIFICATION CRITERIA of the Tender Document.

The lowest evaluated tender would be subjected to due diligence. At the end of the evaluation the Applicant's tender was found to be the lowest evaluated tender.

### **Due Diligence**

The Evaluation Report indicates that the Evaluation Committee conducted a due diligence test on the Applicant and that it passed the test.

### **Evaluation Committee's Recommendation**

The Evaluation Committee found that the Applicant's tender was the lowest evaluated tender and thus recommended the award of the subject tender to

it at its tender cost of **Kenya Shillings Four Million Seven Hundred and Fifty-Three and Thirty-Five and Four Cents (Kshs. 4,753,035.04)**

### **Professional Opinion**

In a Professional Opinion dated 14<sup>th</sup> March 2023 (hereinafter referred to as the "Professional Opinion" which was submitted to the Board pursuant to section 67(3)(e) of the Act), the Senior Supply Chain Management Officer, Ms. Nancy Chepngeno Ngetich, reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender.

However, it would appear that upon receipt of the Professional Opinion, on 14<sup>th</sup> March 2023 the 1<sup>st</sup> Respondent recommended the termination of the tender pursuant to Section 63(1)(e) of the Act.

### **Notification to Tenderers**

Tenderers were notified of the termination of the subject tender vide Notification letters dated and signed on 29<sup>th</sup> May 2023, by the 1<sup>st</sup> Respondent.

## **REQUEST FOR REVIEW**

On 12<sup>th</sup> June 2023, the Applicant filed a Request for Review dated 12<sup>th</sup> June 2023 and a Supporting Affidavit in support of the Request for Review sworn on 12<sup>th</sup> June 2023 by Isaac Kipchirchir Sang, seeking the following orders from the Board in verbatim:

- 1. That the Termination of procurement proceedings notices dated 29<sup>th</sup> May 2023 be and is hereby lifted and set aside.***
- 2. That the Accounting Officer be and is hereby estopped from re-advertisement /Re-tendering or in any way commencing any other procurement proceeding in respect of the above road.***
- 3. That the Board finds the termination notice irregular and thus voidable.***
- 4. That the Board directs that the Accounting Officer proceeds and awards the tender to the most eligible party.***
- 5. That the costs of review be awarded to the Applicant herein.***

In a Notification of Appeal and a letter dated 12<sup>th</sup> June 2023, Mr. James Kilaka, the Acting Board Secretary of the Board notified the 1<sup>st</sup> and 2<sup>nd</sup> Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said 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 1<sup>st</sup>

and 2<sup>nd</sup> Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 12<sup>th</sup> June 2023.

On 21<sup>st</sup> June 2023, in response to the Request for Review, the Respondents, through Eng. Philemon K. Kandie, the 1<sup>st</sup> Respondent, filed a Response to the Request for Review dated 21<sup>st</sup> June 2023. The Respondents also submitted to the Board a confidential file containing confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

Vide letters dated 22<sup>nd</sup> June 2023, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the subject Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within 3 days from 22<sup>nd</sup> June 2023.

Vide a Hearing Notice dated 23<sup>rd</sup> June 2023, the Acting Board Secretary, notified parties and all tenderers in the subject tender that the hearing of the instant Request for Review would be by online hearing on 27<sup>th</sup> June 2023 at 12.00 p.m., through the link availed in the said Hearing Notice.



On 26<sup>th</sup> June 2023 the Applicant filed a Reply to Response to Request for Review dated 26<sup>th</sup> June 2023 and a Further List of Documents dated 26<sup>th</sup> June 2023.

When the matter came up for hearing on 27<sup>th</sup> June 2023 at 12.00 noon only the Applicant's Advocates had joined the online hearing session. The Board adjourned the hearing to allow the Secretariat time to get in touch with the Respondents through the telephone details provided in their documents and remind them to join the online session. Thereafter as at 12.30 p.m., neither the Respondents nor their representatives had joined the session despite being called by the Secretariat to join the session.

The Board satisfied itself that the Respondents were sent the Hearing Notice via email on 23<sup>rd</sup> June 2023 and that they had been reminded to join the session. The Board therefore directed that the hearing would proceed as scheduled and the Applicant was assigned 10 minutes to prosecute its Request for Review.

## **PARTIES SUBMISSIONS**

### **Applicant's Submissions**

During the online hearing, Counsel for the Applicant, Ms. Cherono, submitted that the Respondents purported to terminate the subject tender under section 63 of the Act but failed to identify the specific ground under the section.



Counsel submitted that the termination was unlawful for failure to give reasons for termination. She pointed out that the Respondents' Response to the Request for Review suggests that the termination was under section 63(e) of the Act but no evidence was supplied to support this suggestion. She submitted to that the Respondents did not communicate the reason for termination to any of the tenderers, including the Applicant.

Ms. Cheronno argued that the termination of the subject tender was done discriminately since notification of intention to award had been made in respect of certain lots in the subject tender. For this, she mentioned Nyamata Enterprises Limited who had received a received a Notification of Intention to enter into a Contract in respect of Road C653 (St. Teresa Simat-Kapsiria (L2602) in Tender No. KeRRA/008/39/NDI/MOSOP/C653/22%RMLF/2-34-22|23-003.

Counsel submitted that the work plan for the subject tender had been approved and the specific Regional Officer approved the advertising of the subject tender.

It was Counsel's contention that even if the Board was to consider the attempted defence by the Respondents, the Procuring Entity did not adhere to the threshold for termination of tenders as outlined in ***PPARB Application No. 50 of 2020; Danko Africa (K) Limited v Accounting Officer, Kenya Ports Authority*** and ***PPARB Application No. 9 of 2022;***

***Intertek Testing Services (EA) PTY Limited & Anor v The Director General, Energy and Petroleum Regulatory Authority & Anor.***

Ms. Cherono argued that the Procuring Entity had not demonstrated that there was any material governance issue in the subject tender. She urged that the burden of proof lay with the Procuring Entity to demonstrate the existence of the material governance issues. For this, she placed reliance on the High Court case of ***Evans Otieno Nyakwana v Cleophas Bwana Ongaro [2015]eKLR.***

Counsel submitted that the termination of the subject tender was unfair and in breach of procurement laws on transparency and competition and urged the Board to allow the instant Request for Review.

The Board noted that the Applicant had attached as part of its Further List of Documents a Judgment in the case of ***Nairobi Employment and Labour Relations Court Judicial Review Application No. E013 of 2022; R v Kenya Urban Roads Authority Ex parte Samson Nzivo Muthiani*** where the Court revoked the appointment of Eng. Philemon K. Kandie's as the Director General of the 2<sup>nd</sup> Respondent. The Board, therefore, sought clarity from the Applicant on whether the said Judgment had been stayed. Ms. Cherono responded that she was unaware of any stay orders in the case.

The Board also sought clarity on whether it was possible for a Procuring Entity issuing tenders in lots to cancel certain lots and allow others to continue. Ms. Cherono responded in the affirmative agreeing that this was possible.

The Board also sought to know how the Applicant gained possession of the correspondence between the Procuring Entity and its Regional Directors i.e. letters dated 9<sup>th</sup> December 2022, 30<sup>th</sup> December 2022 and 13<sup>th</sup> January 2023; 19<sup>th</sup> January 2023 which documents form part of the confidential documents in procurement law and why the Board should not expunge the documents from the proceedings. Ms. Cherono urged the Board not to expunge the documents since the Respondents had neither appeared at the hearing nor challenged the production of the said documents.

### **The Respondent's Case.**

Even though the Respondents did not attend the online hearing, they filed a Response to Request for Review dated 21<sup>st</sup> June 2023. The Response indicates that the Respondents terminated the subject tender by invoking the provisions of section 63(1)(e) of the Act after material governance issues arose in the tender process. Additionally, it is also indicated that stakeholders in the project roads had not been prioritized by the Constituency Roads Committee and therefore the scope of works given in the subject tender was inadequate hence the termination.

At the conclusion of the online hearing, the Board informed the Applicant that the instant Request for Review having been filed on 12<sup>th</sup> June 2023 had



to be determined by 3<sup>rd</sup> July 2023 and that the Board would communicate its decision on or before 3<sup>rd</sup> July 2023 to all parties via email.

### **BOARD'S DECISION**

The Board has considered all documents, pleadings, oral submissions, and authorities together with confidential documents submitted to it pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination:

- i. Whether the Procuring Entity terminated the subject procurement process in accordance with section 63 of the Act thereby ousting the jurisdiction of the Board;***

*Depending on the outcome of the first issue;*

- ii. Whether the 1<sup>st</sup> Respondent's letter of notification dated 29<sup>th</sup> May 2023 terminating the subject tender complied with the requirements under Section 63(4) of the Act?***
- iii. What orders the Board should grant in the circumstances?***

The Board now proceeds to determine the issues framed for determination.

**Whether the Procuring Entity terminated the subject procurement process in accordance with section 63 of the Act thereby ousting the jurisdiction of the Board?**

It is now a settled principle that courts and decision-making bodies can only hear and determine matters that are within their jurisdiction. Therefore, prudence dictates that a court or tribunal seized of a matter should first enquire into its jurisdiction before considering the matter.

Black's Law Dictionary, *8th Edition*, defines jurisdiction as:

***"... the power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties ... the power of courts to inquire into facts, apply the law, make decisions and declare judgment; The legal rights by which judges exercise their authority."***

Jurisdiction is defined in Halsbury's Laws of England (4<sup>th</sup> Ed.) Vol. 9 as:

***"...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision."***

The *locus classicus* case on the question of jurisdiction is the celebrated case of **The Owners of the Motor Vessel "Lillian S" -v- Caltex Oil Kenya Ltd (1989) KLR 1** where Nyarangi J.A. held:

***"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 continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction."***

In the case of **Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others [2013] eKLR**, the Court of Appeal emphasized on the centrality of the issue of jurisdiction and held 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. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain...."***

Such is the centrality of jurisdiction that the Court of Appeal has held in **Isaak Aliaza v Samuel Kisiavuki [2021] eKLR**, that:

***"whether it is raised either by parties themselves or the Court suo moto, it has to be addressed first before delving into the interrogation of the merits of issues that may be in controversy in a matter."***

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

Section 167 of the Act affords room to candidates and tenderers disgruntled in the manner in which a tender by a Procuring Entity has been undertaken to approach the Board for redress. However, subsection (4) of the Section divests the jurisdiction of the Board on a myriad of instances including the termination of a procurement process from the in the following terms:

***"167. Request for a review***

***(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.**

**(2) ...**

**(3) ...**

**(4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)—**

**(a) the choice of a procurement method;**

**(b) a termination of a procurement or asset disposal proceedings in accordance with section 63 of this Act; and**

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

Termination of public procurement proceedings is governed by Section 63 of the Act which provides as follows:

**"63. Termination or cancellation of procurement and asset disposal proceedings**

**(1) An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies—**

**(a) the subject procurement have been overtaken by—**

**(i) operation of law; or**

**(ii) substantial technological change;**



***(b) inadequate budgetary provision;***

***(c) no tender was received;***

***(d) there is evidence that prices of the bids are above market prices;***

***(e) material governance issues have been detected;***

***(f) all evaluated tenders are non-responsive;***

***(g) force majeure;***

***(h) civil commotion, hostilities or an act of war; or***

***(i) upon receiving subsequent evidence of engagement in fraudulent or corrupt practices by the tenderer.***

Our interpretation of section 63 of the Act is that for an Accounting Officer of a Procuring Entity to validly terminate a procurement or asset disposal proceedings (i) the termination must be based on any of the grounds under section 63(1) of the Act; (ii) the Accounting Officer should give a Written Report to the Public Procurement Regulatory Authority within 14 days of termination giving reasons for the termination and (iii) the Accounting Officer should within 14 days of termination give a Written notice to the tenderers in the subject tender communicating the reasons for the termination.

Effectively, a Procuring Entity is under a duty to provide sufficient reasons and evidence to justify and support the ground of termination of the procurement process under challenge. The Procuring Entity must in addition

to providing sufficient evidence also demonstrate that it has complied with the substantive and procedural requirements set out under the provisions of section 63 of the Act.

On the one hand, the substantive requirements relate to a Procuring Entity outlining the specific ground under section 63(1) as to why a tender has been terminated and the facts that support such termination.

On the other hand, the procedural requirements involve (i) the submission of a Written Report to the Authority on the termination of a tender within 14 days of such termination and (ii) the issuance of notices of termination of tender to tenderers who participated in the said tender outlining the reasons for termination within 14 days of such termination.

There is a large body of case law of the applicability of section 63 of the Act and the ousting of the jurisdiction of the Board under section 167(4) Act.

In ***Nairobi High Court Judicial Review Misc. Application No. 390 of 2018; R v Public Procurement Administrative Review Board & Ors Ex parte Kenya Revenue Authority***, the High Court considered a judicial review application challenging the decision of this Board. The Board had dismissed a preliminary objection that had cited that it lacked jurisdiction to hear a Request for Review before it on account of the fact that it related to the termination of a proposal process under section 63 of the Act. In



dismissing the judicial review application, the Court affirmed that the Board has jurisdiction to establish whether the preconditions for termination under section 63 have been met before downing its tools:

***33. A plain reading of Section 167(4) (b) of the Act is to the effect that a termination that is in accordance with section 63 of the Act is not subject to review. Therefore, there is a statutory precondition that first needs to be satisfied in the said sub-section namely that the termination proceedings are conducted in accordance with the provisions of section 63 of the Act, and that the circumstances set out in section 63 were satisfied, before the jurisdiction of the Respondent can be ousted...***

***43. Consequently, the Respondent was justified in holding that there was no valid termination of the suit tender to begin with, and the purported termination as conveyed in the letter dated 16th August 2018 was a nullity, hence the tender was still alive. As a result, the provisions of section 167(4) (b) had not crystalized to oust the jurisdiction of the Respondent, hence the Respondent was within its jurisdiction as provided under Section 173 of the Act when it entertained the request for review.***

This is the position that was also taken in ***Nairobi High Court Judicial Review Misc. Application No. 117 of 2020; Parliamentary Service Commission v Public Procurement Administrative Review Board & Ors v Aprim Consultants*** where the High Court considered a judicial

review application in which the Ex-parte Applicant was challenging the decision of this Board to hear and determine an application challenging the Procuring Entity's termination of a tender under section 63 of the Act. The Ex-parte Applicant had raised a Preliminary Objection before the Board but the same was dismissed. The High Court in affirming that the Board was correct in its finding stated that

***48. A plain reading of section 167(4)(b) is to the effect that a termination that is in accordance with section 63 (and not section 62 as stated therein) of the Act is not subject to review. Therefore, there is a statutory pre-condition that first needs to be satisfied in the said sub-section namely that the termination proceedings are conducted in accordance with the provisions of section 63 of the Act, and that the circumstances set out in section 63 were satisfied, before the jurisdiction of the Respondent can be ousted...***

***51. This being the case, the Respondent and this Court upon an application for review have jurisdiction to determine whether or not the statutory precondition was satisfied, and/or that there was a wrong finding made in this regard by applying the principles that apply to judicial review. Therefore, from the outset, the Respondent has jurisdiction to determine if the conditions of section 63 have been met when a tender is terminated on any of the grounds listed thereunder, and a termination under the section does not automatically oust the Respondent's jurisdiction. It is only upon a finding that the termination was conducted in accordance***

**with section 63 of the Act that the Respondent is then divested of jurisdiction and obliged to down its tools.**

The above judicial pronouncements mirror the position of this Board in its previous decisions in ***PPARB Application No. 29 of 2023; Craft Silicon Limited v Accounting Officer Kilifi County Government & anor; PPARB Application No. 50 of 2020; Danka Africa (K) Limited v Accounting Officer, Kenya Ports Authority*** and ***PPARB Application No. 9 of 2022; Intertek Testing Services (EA) PTY Limited & Anor v The Director General, Energy and Petroleum Regulatory Authority & Anor.***

Drawing from the above judicial pronouncements, this Board takes the view that a party's plea that a procurement process has been terminated under section 63 of the Act does not of itself oust the jurisdiction of the Board. The Board has jurisdiction to interrogate whether the conditions set out under section 63 of the Act have been fulfilled and that it is only upon satisfying itself that the said conditions have been met that the Board can down its tools in the matter under consideration.

This Board is therefore called upon to determine whether the 1<sup>st</sup> Respondent terminated the subject tender in accordance with the provisions of Section 63 of the Act, which determination can only be made by interrogating the reason cited for termination.



The Board will now turn to interrogate the reasons for the termination of the subject tender. The letter of the notification dated 29<sup>th</sup> May 2023 addressed to the Applicant by the 1<sup>st</sup> Respondent is herein reproduced:

***"Our Ref: KeRRA/NDI/PROC/TENDER-068/2022/23***

***Date:29<sup>th</sup> May, 2023***

***THE MANAGING DIRECTOR***

***M/S SARO HOLDINGS LTD,***

***P.O. BOX 274-30300***

***KAPSABET***

***Dear Sir/Madam,***

***RE: TENDER FOR ROUTINE MAINTENANCE AND SPOT  
IMPROVEMENT OF KOBUJOI-KIMAREN-ARIOK ROAD C676***

***TENDER NO. KeRRA/008/39/NDI/ALDAI/C76/22%RMLF/2-34-  
22/23-068***

***TERMINATION OF PROCUREMENT PROCEEDINGS***

***The above subject matter refers.***

***The procurement proceeding for the above mentioned road tender  
has been terminated pursuant to section 63 of Public Procurement  
and Asset Disposal Act 2015 and recommended for re-tendering***

***Yours faithfully,***

***Signed***

***Eng. Januaris M. Kimilu***

***REGIONAL DIRECTOR"***

The Board takes note that the letters to the other bidders are all set out in a similar manner. From the above letter, it is notable that it is general in nature and only mentions that the subject tender was terminated pursuant to section 63 of the Act. no attempt is made in setting out the specific subsection of section 63, under which the termination is undertaken.

Paragraphs 4 and 5 of the Respondents' Response to Request for Review attempt to provide more information on the termination of the subject tender in the following terms:

***"4. The Respondents admits the contents of paragraph 4 of the Request for Review to the extent that the 2<sup>nd</sup> Respondent sent out notices of termination of procurement proceedings related to the Road tender pursuant to Section 63(1)(e) of the Public Procurement and Asset Disposal Act.***

***5. The Respondents deny the contents of paragraph 5 of the Request for Review as stated and aver that there was no violation of the Act as alleged. The Respondents reiterate that material governance issues came up during the procurement process herein warranting the invoking of the provisions of Section 63(1)(e) regarding the termination of procurement proceedings, hence the***



***termination of the procurement process over the road projects, and the Applicant is put to strict proof thereof."***

From the above paragraphs in the Respondents' Response to the Request for Review, the Respondents attribute the termination of the subject tender to the detection of material governance issues. The Board takes the position that this detail should in the first instance have been contained in the letters of Notification. It is also incumbent upon the Respondents to lead evidence of the facts and circumstances qualifying as material governance issues.

The question that now arises is what are material governance issues?

Governance and how it relates to public procurement is explained in the book **"Public Procurement: International Cases and Commentary, (2012)** edited by Louise Knight:

***"Effective procurement practices provide governments with a means of bringing about social, economic and environmental reform. Conversely, malpractice within public procurement demonstrates a failure of governance and typically arises from corruption and fraud"***

From the above definition, the Board notes that principles of governance require procuring entities and tenderers to avoid any form of malpractice that compromises the integrity of a procurement process. Principles of

governance that apply in public procurement in Kenya are outlined in the Constitution of Kenya, 2010 some of which include:

***"Article 10(2)(c): The national values and principles of governance include- good governance, integrity, transparency and accountability."***

***"Article 227(1) When a State organ or 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"***

This Board in its Decision ***PPARB Application No. 50 of 2022; Danka Africa (K) Limited v Accounting Officer, Kenya Ports Authority*** also offered a description of material governance issues under section 63 of the Act at page 42 as follows:

***Therefore, the Board observes that one may deduce the meaning of material governance in public procurement to mean; significant or important governance issues detected in a procurement process that negatively affect the capability of a procuring entity to guarantee compliance with principles of governance, leadership and integrity when procuring for goods and services. Such material governance issues may emanate from malpractice during the procurement process by the bidders, or by the bidder while colluding with a procuring entity, or operational challenges attributed from policy decisions influencing a procuring entity's procurement process.***

Turning to the instant Request for Review, this Board notes the Respondents' allegation that material governance issues were detected in the subject tender remained unsubstantiated:

First, the Respondents' notification letter dated 29<sup>th</sup> May 2023 only mentions that the subject tender was terminated pursuant to clause 63 of the Act without specifying the ground for termination of the tender.

Secondly, paragraphs 4 and 5 of the Respondents' Response to the Request for Review only mention that the subject tender was terminated under section 63(1)(e) of the Act after material governance issues were detected without offering an explanation and evidence of the said material governance issues. This leaves one guessing what material governance issues, if any, arose in the subject tender. It therefore defeats the principles of transparency and fairness that must guide procurement processes undertaken under the Act.

Thirdly, the Respondents failed to appear before the Board when the matter came up for hearing despite previous notification of the hearing date and a subsequent reminder when they failed to appear at the appointed hearing date and time. The online hearing was an opportunity for the Respondents to explain the specific material governance issues that had arisen in the subject tender but they blew this chance by their skipping the hearing.



There was also no evidence that the Respondents had submitted a Written Report to the Public Procurement Regulatory Authority as required under section 63(2) of the Act. The Board has keenly studied the Confidential file submitted to it by the Procuring Entity and could not trace any such report. The skipping of the hearing by the Respondents also compounded matters as the Board could not verify whether such a report was ever prepared.

This Board reiterates that the conditions for termination of procurement processes under section 63 of the Act are not cosmetic provisions as they give effect to article 227 of the Constitution which demands for a procurement system that is fair, equitable, transparent, competitive and cost-effective.

This Board therefore finds that the Procuring Entity did not terminate the subject tender in accordance with section 63 of the Act and therefore this Board has jurisdiction to entertain the instant Request for Review.

**Whether the 1<sup>st</sup> Respondent's letter of notification dated 29<sup>th</sup> May 2023 terminating the subject tender complied with the requirements under Section 63(4) of the Act?**

Section 63(4) of the Act provides as follows:



***(4) An accounting officer shall notify all persons who submitted tenders of the termination within fourteen days of termination and such notice shall contain the reason for termination.***

Our interpretation of the above provision is that in the event of a termination of a tender, the Accounting Officer of a Procuring Entity bears the obligation to give tenderers in the subject tender sufficient reasons for termination which should be backed by evidence that support such reasons other than merely reciting the provisions of the Act. This will in our view go a long way in promoting transparency and accountability in procurement proceedings and will be in accordance with Article 47(1) of the Constitution. Evidence backing the reasons for termination would allow a tenderer to weigh its options by making an informed decision as to whether to challenge such termination.

In the present case, the 1<sup>st</sup> Respondent issued a notification letter dated 29<sup>th</sup> May 2023 simply stating that the subject tender had been terminated pursuant to section 63 of the Act. The letter which neither communicates the reason for the termination nor offers a background behind the termination has been reproduced at the initial pages of this Decision **(Page 23)**.

Whereas Article 227 of the Constitution enjoins public authorities to conduct their procurement processes with transparency, this cannot be said of the Respondents in the manner in which they communicated the termination of

the subject tender. The 1<sup>st</sup> Respondent as the Accounting Officer simply communicated in the letter dated 29<sup>th</sup> May 2023 that the subject tender had been terminated pursuant to Section 63 of the Act. The mentioned provision contains 9 different grounds under which an Accounting Officer can terminate a tender. Any tenderer receiving the notice of termination will be left guessing as to the reasons behind the termination of the tender contrary to the requirements of section 63(4) of the Act.

In the circumstance, we find that the Respondents' letter of notification dated 29<sup>th</sup> May 2023 terminating the subject tender failed to comply with the requirements under Section 63(4) of the Act.

Before concluding this Decision, the Board wishes to highlight an observation that came to light during the hearing of the instant Request for Review. It came to the Board's attention that the Applicant produced multiple correspondences between the Procuring Entity and its Regional Officers as part of the Applicant's Further List of Documents. These documents constitute confidential documents under section 67 of the Act and such documents should not be made available to unintended parties, least of all tenderers participating in tenders to which the said confidential documents relate. Notwithstanding the fact that this Decision did not turn on the said documents, this Board proceeds to expunge the said documents from the record.

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

It is the finding of the Board that the Procuring Entity did not terminate the subject tender in accordance with section 63 of the Act and therefore this Board has jurisdiction to entertain the instant Request for Review. The Respondent's failed to substantiate that the subject tender was validly terminated under section 63(1)(e).

The Board also found that the 1<sup>st</sup> Respondent's letter of notification dated 29<sup>th</sup> May 2023 terminating the subject tender failed to comply with the requirements under Section 63(4) of the Act as it did not contain the reasons for termination.

The upshot of our finding is that the Request for Review dated 12<sup>th</sup> June 2023 in respect of Tender No. KeRRA/008/39/NDI/ALDAI/C676/22%RMLF/2-34-22/23-068 for Routine Maintenance & Spot Improvement of C676 (KOBUJOI-KIMAREN-ARIOK) succeeds in the following specific terms:

### **FINAL ORDERS**

In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review dated 12<sup>th</sup> June 2023:



- 1. The 1<sup>st</sup> Respondent's Letter of Termination dated 29<sup>th</sup> May 2023 with respect to Tender No. KeRRA/008/39/NDI/ALDAI/C676/22%RMLF/2-34-22|23-068 for Routine Maintenance & Spot Improvement of C676 (KOBUJOI-KIMAREN-ARIOK) addressed to the Applicant be and is hereby cancelled and set aside.**
- 2. The 1<sup>st</sup> Respondent's Letters of Termination dated 29<sup>th</sup> May 2023 with respect to Tender No. KeRRA/008/39/NDI/ALDAI/C676/22%RMLF/2-34-22|23-068 for Routine Maintenance & Spot Improvement of C676 (KOBUJOI-KIMAREN-ARIOK) addressed to all the other tenderers who participated in the said tender be and are hereby cancelled and set aside.**
- 3. The subject tender is hereby referred back to the 1<sup>st</sup> Respondent for consideration of the Professional Opinion dated 14<sup>th</sup> March 2023 and to complete the procurement process in the subject tender to its logical conclusion including the issuance of notification letters to all bidders who participated in the subject tender with specific and sufficient reasons in accordance with the Act and the Constitution, within 14 days from the date of this decision, taking into account the Board's finding in this decision.**

**4. Given that the procurement process in the subject tender is incomplete, each party shall bear its own costs.**

**Dated at NAIROBI, this 3<sup>rd</sup> Day of July 2023.**

  
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**CHAIRPERSON**

**PPARB**

  
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**SECRETARY**

**PPARB**

