

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 100/2023 OF 28TH NOVEMBER 2023

BETWEEN

LAFEY CONSTRUCTION COMPANY LIMITED APPLICANT

AND

ACCOUNTING OFFICER,

NATIONAL WATER HARVESTING AND

STORAGE AUTHORITY 1ST RESPONDENT

VANQO ROADS AND ENGINEERING LIMITED AND

CHINA JIANGXI INTERNATIONAL ECONOMIC

AND TECHNICAL CO., LTD (VANQO & CJIC JV) 2ND RESPONDENT

UASO NGIRO CONTRACTORS LIMITED1ST INTERESTED PARTY

Review against the decision of the Accounting Officer, National Water Harvesting & Storage Authority in relation to Tender No. NWHSA/OIT/001/2023-2024 for Construction of Umaa Dam Water Supply & Irrigation Project in Kitui County, Kenya.

BOARD MEMBERS PRESENT

1. Mr. George Murugu, FCIArb - Chairperson
2. Eng. Lilian Ogombo - Member

3. Mr. Joshua Kiptoo - Member

IN ATTENDANCE

- 1. Mr. Philemon Kiprop - Holding brief for Board Secretary
- 2. Ms. Evelyn Weru - Secretariat

PRESENT BY INVITATION

APPLICANT

LAFEY CONSTRUCTION COMPANY LIMITED

Mr. Otieno

- Advocate, Douglas & Associates Advocates,

1ST RESPONDENT

**ACCOUNTING OFFICER,
NATIONAL WATER HARVESTING AND
STORAGE AUTHORITY**

Ms. Doris Mwangi

-Advocate, National Water Harvesting and
Storage Authority

2ND RESPONDENT

**VANQO ROADS AND ENGINEERING LIMITED AND
CHINA JIANGXI INTERNATIONAL ECONOMIC
AND TECHNICAL CO., LTD (VANQO & CJIC JV)**

Mr. Kiplagat

- Advocate h/b for Mr. Koyyoko, Wagara,
Koyyoko & Company Advocates

1ST INTERESTED PARTY

UASO NGIRO CONTRACTORS LIMITED

N/A

BACKGROUND OF THE DECISION

The Tendering Process

1. National Water Harvesting & Storage Authority (hereinafter referred to as "the Procuring Entity") invited sealed tenders from all qualified and interested tenderers in response to Tender No. NWHSA/OIT/001/2023-2024 for Construction of Umaa Dam Water Supply & Irrigation Project in Kitui County, Kenya (hereinafter referred to as the "subject tender") which entails construction of 33m high earth fill embankment Dam (Umaa) and a Water Treatment Plant of a capacity of 2500m³/day, in Kitui County, all to be completed within 24 months. Tendering was conducted under open competitive method (Open International Tender) and the invitation was by way of an advertisement on 26th September 2023 in the Daily Nation, on the Procuring Entity's website www.waterauthority.go.ke and on the Public Procurement Information Portal www.tenders.go.ke where the blank tender document for the subject tender issued to tenderers (hereinafter referred to as the 'Tender Document') was available for download.
2. The initial tender submission deadline was scheduled on 27th October 2023 at 8.30 a.m.

Addendum and Clarifications

3. The Procuring Entity issued two clarifications dated 5th October 2023 and 9th October 2023 on questions raised in regard to the subject

tender and an Addendum dated 23rd October 2023 notifying tenderers of amendments to the Tender Document under Section V – Bills of Quantities and extension of the tender submission deadline to 2nd November 2023 at 8.30 a.m.

Submission of Tenders and Tender Opening

4. According to the Minutes of the subject tender's opening held on 2nd November 2023 signed by members of the Tender Opening Committee (hereinafter referred to as the 'Tender Opening Minutes') and which Tender Opening Minutes were part of confidential documents furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') by the 1st Respondent pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), a total of three (3) tenders were submitted in response to the subject tender. The said three (3) tenders were opened in the presence of tenderers' representatives present at the tender opening session, and were recorded as follows:

Bidder No.	Name
1.	Vanqo Roads and Engineering Limited and China Jiangxi International Economic and Technical Cooperation Ltd JV
2.	Uaso Ngiro Contractors Limited
3.	Lafey Construction Company Limited

Evaluation of Tenders

5. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the Respondent undertook evaluation of the three (3) tenders as captured in an Evaluation Report for the subject tender signed by members of the Evaluation Committee on 11th November 2023 (hereinafter referred to as the "Evaluation Report") in the following stages:
- i Preliminary Examination;
 - ii Technical Evaluation; and
 - iii Financial Evaluation.

Preliminary Examination

6. The Evaluation Committee was required to carry out a Preliminary Evaluation and examine tenders for responsiveness using the criteria provided under Clause 2 Preliminary Examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 30 of 271 to page 29 of the Tender Document. Tenderers were required to meet all the mandatory requirements at this stage to proceed to the Technical Evaluation stage.
7. At the end of evaluation at this stage, two (2) tenders were determined non-responsive, including the Applicant's tender, while one (1) tender, being the Interested Party's tender, was determined responsive and proceeded to the Technical Evaluation

Technical Evaluation

8. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Technical Evaluation Criteria of Section III- Evaluation and Qualification Criteria at page 37 of 271 to page 38 of the Tender Document. Only bidders who achieved 80 marks and above would be considered for Financial Evaluation.

9. At the end of evaluation at this stage, the Interested Party's tender was determined responsive having scored an average of 95.6 marks and proceeded to Financial Evaluation

Financial Evaluation

10. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Financial Evaluation of Section III- Evaluation and Qualification Criteria at page 39 of 271 of the Tender Document. Tenders would be checked for (a) properly filled and signed Bill of Quantity tables and Schedule of Prices form in conformity with the bill of quantities as provided in the Tender Document, bearing no omissions and countersigning of any alterations, and (b) the price quoted in the form of tender.

11. At the end of evaluation at this stage, the Interested Party's bid, being the only responsive bid was recommended for award of the subject tender at its quoted price of Kenya Shillings One Billion, Nine Hundred and Sixty Million One Hundred and Eighty-Four Thousand Six Hundred

and Twenty-Two and Eighty-Two cents only (Kshs. 1,960,184,622.82) only inclusive of taxes & 10% Contingency.

Evaluation Committee's Recommendation

12. The Evaluation Committee recommended the Interested Party for award of the subject tender at its quoted price of Kenya Shillings One Billion, Nine Hundred and Sixty Million One Hundred and Eighty-Four Thousand Six Hundred and Twenty-Two and Eighty-Two cents only (Kshs. 1,960,184,622.82) only inclusive of taxes & 10% Contingency.

Professional Opinion

13. In a Professional Opinion, as an Internal memo, dated 14th November 2023 (hereinafter referred to as the "Professional Opinion"), the Manager, Supply Chain Mr. John Musyoka 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 and recommended award of the subject tender to the Interested Party at its quoted price.

14. Thereafter, the Professional Opinion was approved on 14th November 2023.

Notification to Tenderers

15. Tenderers were notified of the outcome of evaluation of the subject tender vide letters of notification of intention to award the subject tender dated 14th November 2023.

REQUEST FOR REVIEW NO. 100 OF 2023

16. On 28th November 2023, Lafey Construction Company Limited, the Applicant herein, filed a Request for Review dated 28th November 2023 together with a Statement in Support of the Request for Review sworn on 28th November 2023 by Mohamed Maalim Kulmia, its Director (hereinafter referred to as the 'instant Request for Review') through Douglas & Associates Advocates seeking the following orders from the Board in verbatim:

a. THAT the Board be pleased to evaluate the Bid document of the 2nd Respondents in accordance with Article 227 of the Constitution of Kenya, 2010 to ensure fairness, equitability, transparency, competitiveness, and cost-effectiveness of the subject tender process.

b. THAT decision by the Procuring Entity to the Applicant contained in a letter dated 14th November, 2023 finding the Applicant's tender as non-responsive and awarding CONSTRUCTION OF UMAA DAM WATER SUPPLY

**&IRRIGATION PROJECT IN KITUI COUNTY, KENYA
TENDER NO. NWHSA/OIT/001/2023-2024 to the 2nd
Respondents (Vanqo Roads and Engineering Limited and
China Jiangxi International Economic and Technical Co.,
Ltd (VANQO & CJIC JV) be set aside;**

**c. THAT the Board be pleased to review all the records
submitted in the procurement process including the
form and substance of the Applicant's tender document,
and substitute and/or amend the decision of the
Procuring Entity and award the CONSTRUCTION OF
UMAA DAM WATER SUPPLY &IRRIGATION PROJECT IN
KITUI COUNTY, KENYA TENDER NO.
NWHSA/OIT/001/2023-2024 to the Applicant;**

**d. THAT in alternative to prayer (3) above, the Procuring
Entity be directed to progress the procurement process
to its logical conclusion inclusive of the Applicant and
make an award within fourteen (14) days; and**

**e. THAT the 1st Respondent be ordered to pay the full costs
of and incidental to these proceedings.**

17. In a Notification of Appeal and a letter dated 28th November 2023, Mr. James Kilaka, the Acting Board Secretary of the Board notified the 1st Respondent and the Procuring Entity 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 24th 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 five (5) days from 28th November 2023.

18. On 4th December 2023, the 1st Respondent filed through Doris Mwangi Advocate a Notice of Appointment of Advocate, a 1st Respondent's Replying Affidavit together with a file containing confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

19. Vide letters dated 1st December 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 24th March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within three (3) days.

20. On 4th December 2023, the 2nd Respondent filed through Wagara, Koyyoko & Company Advocates a Notice of Appointment dated 4th December 2023 and a 2nd Respondent's Replying Affidavit sworn on

4th December 2023 by Wang Wei, its duly Approved Attorney and Authorized Signatory.

21. On 8th December 2023, the Applicant filed a Further Supporting Affidavit and Response to the 1st and 2nd Respondents Replying Affidavits dated 4th December 2023 sworn on 8th December 2023 by Mohamed Maalim Kulmia.
22. *Vide* a Hearing Notice dated 8th December 2023, the Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the instant Request for Review slated for 13th December 2023 at 2.00 p.m., through the link availed in the said Hearing Notice.
23. In an email dated 13th December 2023, the Board Secretary informed parties that the online hearing of the instant Request for Review slated for 13th December 2023 had been rescheduled for 14th December 2023 at 2.30 p.m. due to unavoidable circumstances and issued parties with a Hearing Notice dated 13th December 2023, to this effect.
24. At the hearing of the instant Request for Review, the Board noted a preliminary issue raised by counsel for the 1st Respondent, Ms. Mwangi, concerning a missing page in the Applicant's Further Supporting Affidavit and Response to the 1st and 2nd Respondents Replying Affidavits dated 4th December 2023 sworn on 8th December 2023 by Mohamed Maalim Kulmia and upon confirmation that all

parties had been served with the missing page, allocated time for parties to highlight their respective cases. Thus, the matter proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

Applicant's Submissions

25. In his submissions, counsel for the Applicant, Mr. Otieno, relied on the Request for Review dated 28th November 2023 together with a Statement in Support of the Request for Review sworn on 28th November 2023 by Mohamed Maalim Kulmia and Further Supporting Affidavit and Response to the 1st and 2nd Respondents Replying Affidavits dated 4th December 2023 sworn on 8th December 2023 by Mohamed Maalim Kulmia that were filed before the Board.
26. Mr. Otieno submitted that the Applicant submitted its bid document in the subject tender and received a letter dated 14th November 2023 notifying it of its unsuccessfulness with various reasons highlighted therein.
27. He pressed on that on issue 1 pertaining the Tender Security, the issue of the name indicated therein by Rafiki Microfinance Bank Ltd as Lefey Construction Co. Limited was erroneously referenced instead of Lafey Construction Company Limited and that the letter 'e' was a minor deviation, an error of a third party and would be unfair if admitted on the Applicant. With regard to the number of days of the tender validity

period, he pointed out that the tender security was valid for a period of 182 days with the validity extending 30 days beyond the tender validity period. He further pointed out that the letter erroneously dated 23rd October 2022 but correctly stamped 23rd October 2023 and as such, the Tender Security was valid.

28. Counsel submitted that on the issue of Engineer's Certificate, the operative word in the mandatory requirement is 'demonstrate' and that the Applicant's evidence as submitted at pages 477,479,485, and 489 met this requirement of the Tender Document.

29. Counsel submitted that the Applicant also complied with the requirements of Vibratory Roller and Wheel Loaders as highlighted at page 10 and 11 of its Request for Review. Mr. Otieno further submitted that on the issue of proposed staff, the years of experience was an issue of interpretation whereby the Applicant only listed the years of experience that the proposed staff had been working for the Applicant. He stated that the Respondents ought to have sought clarification pursuant to Section 81 of the Act on this issue. He also pointed out that the failure to sign on the CV of Ikomo Peter was an oversight that can be corrected without affecting the substance of the tender.

30. On the requirement of submitting documents that were commissioned, counsel submitted that only a few referenced documents were not commissioned and this can be corrected without affecting the substance of the tender.

31. Mr. Otieno pressed on that the Applicant's price as quoted was the lowest and would be a major save for the Procuring Entity. He urged the Board to allow the Request for Review as prayed.

1st Respondent's submissions

32. In her submissions, counsel for the 1st Respondent, Ms. Mwangi, relied on the 1st Respondent's Replying Affidavit together with a file containing confidential documents concerning the subject tender that were filed before the Board.

33. On the issue of oversights, minor deviations and clarifications, counsel submitted that Section 81 of the Act does not impose an obligation on a procuring entity to seek clarifications from a bidder and a procuring entity cannot entertain a bidder in seeking clarifications where it is clear that the bidder has not met mandatory requirements.

34. Counsel referred the Board to the holding in *Misc. Civil Application No. 85 of 2018 Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science and Technology; M/s AAKI Consultants Architects and Urban Designers (Interested Party) (2019) eKLR* and submitted that mandatory conditions cannot be waived.

35. On the issue of the Applicant's Tender Security, Ms. Mwangi submitted that the difference in the Applicant's name as admitted depicts an utterly different and distinct legal entity and the allegation of the error

being on a third party cannot hold and it is not incumbent for a procuring entity to seek clarifications from a third party as the duty lies on a bidder to confirm the accuracy of documents submitted.

36. Ms. Mwangi submitted that the Applicant changed the standard form which had reduced dates as further elaborated in the 1st Respondent's Replying Affidavit and that the date indicated by the Applicant's bank referred to year 2022 which was prior to advertisement of the subject tender.

37. Ms Mwangi pressed on that this being an open international tender, the Procuring entity ensured that it provided in the Tender Document for 40% suppliers with regard to international companies in compliance with the Act.

38. On the issue of Vibratory Rollers, counsel urged the Board to take note of averments made in the 1st Respondent's Replying Affidavit and evidence cited. She submitted that the Applicant sought to use one vehicle for two items under the mandatory requirements and these vehicles could not be used as both Vibratory Rollers and Wheel Rollers.

39. Counsel submitted that with regard to the submitted personnel, the Applicant left it to the Procuring Entity to ascertain the number of years worked by the proposed staff and the required period of 20 years was unaccounted for hence the Applicant failed to met this mandatory requirement. Further, on the requirement of commissioning of

submitted documents, counsel submitted that the Applicant admitted to having failed to meet this requirement yet the very essence of commissioning of submitted copies was to verify of the said documents.

40. Ms. Mwangi reiterated that mandatory requirements cannot be waived and had the Procuring Entity waived the inconsistencies, it would have placed the Applicant at an advantaged position as opposed to other tenderers. She pressed on that it is incumbent on a procuring entity to ensure that all bidders are placed on a fair and equal pedestal in line with Article 227 of the Constitution and should a bidder fail under one mandatory requirement, that is sufficient to disqualify such a bidder. Counsel pointed out that the Applicant cannot claim to be the lowest evaluated bidder as it failed to meet the threshold of progressing to further stages of evaluation and as such, the Procuring Entity's decision to disqualify it was cogent and valid.

41. She urged the Board to dismiss the Request for Review with costs.

2nd Respondent's submissions

42. In his submissions, counsel for the 2nd Respondent, Mr. Kiplagat, relied on the 2nd Respondent's Replying Affidavit sworn on 4th December 2023 by Wang Wei, its duly Approved Attorney and Authorized Signatory.

43. He referred the Board to provisions of Section 79(1) of the Act and submitted that it is clear that a non-responsive tender is one which fails to meet mandatory requirements. Counsel submitted that the Applicant had admitted to being non-compliant with various mandatory requirements and pointed out that for instance, the error in its name as indicated in its Tender Security portrayed two different entities. Further, that the non-compliance in indicating the experience of its proposed staff amounted to non-conformity of a mandatory requirement that cannot be excused.

44. Mr. Kiplagat submitted that it is not for a bidder to cherry-pick which requirements it would comply with and which requirements it would ignore. He pointed out that the Applicant cannot invoke provisions of Section 79(2) of the Act since once a tender fails to comply with a mandatory requirement, it cannot be responsive. He further pointed out that Section 81 of the Act was not applicable as the matter was dealing with issues of non-conformity with mandatory requirements.

45. Mr. Kiplagat referred the Board to paragraphs 28 to 30 of its Replying Affidavit on highlighted decisions that are similar to the circumstances in the instant Request for Review and urged the Board to dismiss the Request for Review with costs.

Applicant's Rejoinder

46. In a rejoinder, Mr. Otieno submitted that Section 79(2) of the Act allowed for minor deviations which do not give the Applicant an undue

advantage in the subject tender. He further referred the Board to the holding in of *R v PPARB & another Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex pater Tur Austria Turk (2020) eKLR* in support of his argument.

47. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 28th November 2023 was due to expire on 19th December 2023 and that the Board would communicate its decision on 19th December 2023 to all parties to the Request for Review via email.

BOARD'S DECISION

48. The Board has considered each of the parties' cases, documents, pleadings, oral submissions, list and bundle of authorities together with confidential documents submitted to the Board by the Respondents pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination.

a. Whether the Evaluation Committee in disqualifying the Applicant's tender at the Preliminary Examination stage acted in breach of the provisions of the Tender Document, Section 80(2) of the Act and Article 227(1) of the Constitution;

b. What orders should the Board grant in the circumstances?

Whether the Evaluation Committee in disqualifying the Applicant's tender at the Preliminary Examination stage acted in breach of the provisions of the Tender Document, Section 80(2) of the Act and Article 227(1) of the Constitution.

49. It is common knowledge in the instant Request for Review that the Procuring Entity invited tenders in relation to Tender No. NWHSA/OIT/001/2023-2024 for Construction of Umaa Dam Water Supply & Irrigation Project in Kitui County, Kenya, being the subject tender herein which was opened on 2nd November 2023 with three (3) tenderers, including the Applicant, submitting bids. The Procuring Entity's Evaluation Committee proceeded with evaluation of three (3) submitted bids and recommended award of the subject tender to the 2nd Respondent herein.

50. The Applicant was notified vide a letter of Notification of Intention to Award the subject tender dated 14th November 2023 that its bid was unsuccessful having been disqualified at the Preliminary Examination stage. The said letter reads in part as follows:

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3	Lafey Construction Company Limited,	1,739,159,518.65	NE	<p>The bidder failed to be responsive at the mandatory responsiveness stage as it:</p> <ol style="list-style-type: none"> I. Failed to satisfy the <u>Mandatory Requirement A (vi)</u> as per ITT 19 of the bid document by providing a bid security dated 23rd October, <u>2022</u> and paginated as 3 that: <ol style="list-style-type: none"> a. <u>Was for 176 days</u> (lapsing on 26th April 2024) which was less than the set <u>bid validity period of 182 days</u> as indicated under ITT 18.1; and b. Refers to an Applicant called “<u>Lefey Construction Co. Limited</u>” and not the bidder (<u>Lafey Construction Company Limited</u>) as per the provided Certificate of Incorporation paginated as 7 and the Form of Tender paginated as 72 to 85. II. Failed to satisfy the <u>Mandatory Requirement B (v)</u> as per ITT 11.1 (h) of the bid document which required that the bidder demonstrates its ability to raise <u>Engineer’s Payment Certificates or Equivalent of at least Kshs.200 million in the course of executing dam contracts</u> which was to be done by providing copies of past certificates and the related payments highlighted on bidder’s bank statements which ought to have been certified by the issuing bank in the original. <p style="margin-left: 40px;">On examination of the opened bid in relation to the above requirement, it was noted that the Engineer’s certificates provided and paginated as 477, 479, 485 and 489 were <u>not for dam execution works but were for a Partakilat Water Supply Project in Kilgoris Sub-County, Narok County.</u></p> III. Failed to satisfy the <u>Mandatory Requirement B (ix)</u> as per ITT 11.1 (h) of the bid document which required that the proposed major items of construction equipment/machinery/plant be filled in <u>FORM EQU: EQUIPMENT</u> and supported with copies of ownership documents issued by relevant
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machinery/equipment/plant registration or licensing entities or Verifiable ownership documents (only for non-registrable equipment/machinery/plant i.e (i, j, k, l) in the name of bidding entity or in the case of Joint Venture in the name of one of the partners and where leased, lease agreements (witnessed by a competent advocate) shall be provided.

On examination of the opened bid in relation to the above requirement, it was noted as follows:

- a. The proposed Vibratory Roller - Smooth & Sheepfoot (KBE 772V) entered in the FORM EQU: EQUIPMENT paginated as 539, was supported by a logbook paginated as 540 which was in the name of Kundah Singh Construction Ltd and not the bidder. However, no lease agreement was attached. Besides, the equipment did not meet the required capacity of 20 Tonnes Tare Weight as it had a Tare Weight of 11.935 Tonnes;*
- b. Only 2 no. Vibratory Rollers had been proposed in the submitted bid document. They were under registration Nos. KBE 772V and KAZ 547G which were included in FORM EQU: EQUIPMENT paginated as 539 and 543. However, the minimum required number for the Vibratory Rollers was three (3 No.);*
- c. While the requirement was for the bidders to propose 3No. 7Tonnes (Tare Wgt) Wheel Loaders, the bid document (under the FORM EQU: EQUIPMENT paginated as 525 and 528) indicated two equipment under Registration Nos. ZF7911 and KBC 775Y respectively. However, on examining the supporting copies of logbooks paginated as 526 and 529, the equipment were not wheel loaders but a Low Loader -*

				<p><u>Reg No. ZF7911 and a Prime Mover - Reg No. KBC 775Y, respectively;</u></p> <p>d. <u>Only 1 No. 10Tonnes (Load Capacity) Concrete Mixer (Reg No. KBZ 945P) was proposed in the submitted bid under multiple forms (FORM EQU: EQUIPMENT) which were paginated as 560, 562 & 564. Similarly, only one logbook was provided for the equipment but attached multiple times and paginated as 561, 563 & 565. Therefore, the bid failed to meet the minimum required No. of Concrete Mixers which was supposed to be three (3 No.);</u></p> <p>e. <u>The FORM EQU: EQUIPMENT paginated as 547 indicated 4 Water Bowsers (Reg. No. KBS 393Y, KBR 012R, KBS 394Y & KAJ 641W). However, the instruction on the tender's FORM EQU: EQUIPMENT was "A separate Form shall be prepared for each item of equipment listed, or for alternative equipment proposed by the Tenderer". Thus the proposal on the water bowsers failed on that requirement. Besides, the logbooks for the listed KBS 393Y, KBR 012R, KBS 394Y were in the name of Kundah Singh Construction Ltd but No Lease agreement was attached between the owner and the bidder. In addition, there was no logbook for the KAJ 641W;</u></p> <p>f. <u>Although a Concrete Batching Plant was proposed and listed on FORM EQU: EQUIPMENT which was paginated as 573, and a Lease agreement provided and Paginated 566 - 570 between KSC INTERNATIONAL LTD and the bidder,</u></p>
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			<p><u>no ownership document for the leased equipment by the lessor was attached;</u></p> <p>g. <u>Although a Geotechnical Drilling Rig was proposed and listed on FORM EQU: EQUIPMENT which was paginated as 571, and a Lease agreement provided and Paginated 566 - 570 between KSC INTERNATIONAL LTD and the bidder, no ownership document for the leased equipment by the lessor was attached;</u></p> <p>h. <u>Although a Stone Crushing Plant was proposed and listed on FORM EQU: EQUIPMENT paginated as 572, and a Lease agreement provided and Paginated 566 - 570 between KSC INTERNATIONAL LTD and the bidder, no ownership documents for the leased equipment by the lessor was attached; and</u></p> <p>i. <u>Although a Ministry of Public Works Lease of Equipment Letter was attached and paginated as 574 - 575, no supporting FORM EQP: EQUIPMENT were filled for the specific equipment to be leased.</u></p> <p>IV. <u>Failed to satisfy the Mandatory Requirement B (x) as per ITT 11.1 (h) of the bid document which required that the proposed site management and technical personnel (with the requisite past experience) be included in the FORM PER-1, and that the Curriculum Vitaes (CVs) - in the format of FORM PER-2 - for the listed staff be provided. Further, copies of the academic certificates (masters/degree/diploma OR their equivalent for Non-Local Bidders) ought to have been attached. Lastly, the proposed Engineer/Professionals should have been registered/licensed by the relevant professional boards and such proof attached.</u></p> <p><u>On examination of the opened bid in relation to the above requirement, it was noted as follows:</u></p>
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			<p>a. <u>The proposed personnel for the positions of Project Manager, Site Agent, Assistant Site Agent, Materials Engineer, Plant and Equipment Superintendent, Grouting Superintendent, Superintendent Concrete, Superintendent Earthworks and Superintendent Pipeline did not have the requisite Minimum Years of Experience in dam construction & related works. All the Curriculum Vitae (CVs) for the proposed personnel provided and paginated as 362 to 367, 376 to 379, 403 to 408, 412 to 417, 421 to 426, 431 to 437, and 444 to 447, respectively, had an indication of 127 months (approx. 10.7 years) of past experience which was lower than the 240 months (20 years) for the Project Manager, Site Agent, Assistant Site Agent, Materials Engineer and 180 months (15 years) for the Plant and Equipment Superintendent, Grouting Superintendent, Superintendent Concrete, Superintendent Earthworks and Superintendent Pipeline;</u></p> <p>b. <u>The Curriculum Vitae provided and paginated as 444 to 447 for the Superintendent Pipeline (who was listed in FORM PER-1 on Page 361 to be Mr. Peter Ikomo) had not been signed on the section paginated as 447 by either the Contractor's representative or the key personnel as was required; and</u></p> <p>c. <u>The Curriculum Vitae (CVs) and academic certificates for the persons listed in the FORM PER-1 (paginated as 360) for the positions of Assistant Site Agent (where Mr. Paul Munyao was proposed) and Materials Engineer (where Mr. Thomas Odongo was proposed) were not attached. Instead, the Cv provided and paginated as 385 to 388 was for Francis Gichuho and</u></p>
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				<p><i>that paginated as 394 to 398 was for Luke Ouma who were staff not proposed in the FORM PER-1.</i></p> <p>V. Failed to satisfy the <u>Mandatory Requirement B (xiv)</u> as per ITT 11.1 (h) of the bid document which required that All documents submitted as copies should be stamped and signed by a Commissioner for Oaths / Notary Public (OR Equivalent for Non-Local bidders) to signify that they were true copies of the original.</p> <p><i>On examination of the opened bid in relation to the above requirement, it was noted as follows:</i></p> <p>a. <u>The logbook for the dozer (KHMA 125F) provided and paginated as 494 was not stamped and signed by a Commissioner for Oaths to signify that it was a true copy of the original; and</u></p> <p>b. <u>The financial accounts/statements provided and paginated as 220 to 235 (for the year 2022), 236 to 250 (for the year 2021) and 251 to 266 (for the year 2020) had not been stamped and signed by a Commissioner for Oaths to signify that they were true copies of the originals.</u></p> <p>VI. Failed to comply with the requirements of “Part 2 – Procuring Entity's Works Requirements” - Bill of Quantities format.</p> <p><i>On examination of the opened bid in relation to the above requirement, it was noted as follows:</i></p> <p>a. <u>The Bill of Quantities Summary Table provided and paginated as 92 & 93, did not comply with the format of the tender as communicated in Addendum No. 1 issued for the tender.</u></p>
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51. There is no doubt that the letter of Notification to Award the subject tender dated 14th November 2023 is the trigger that set off the instant Request for Review.
52. The Applicant contends that its bid met the various requirements stipulated in the Tender Document and the reasons for disqualification are extrinsic to the evaluation criteria in the subject tender. It is the Applicant's case that the alleged inconsistencies in its bid document were minor deviations that do not materially depart from the requirements set out in the Tender Document and can be corrected without affecting the substance of the tender. Additionally, the Applicant argues that nothing prevented the Procuring Entity's Evaluation Committee from seeking clarifications where it was not clear on the submissions made in the Applicant's bid.
53. On the other hand, the 1st Respondent averred that the Applicant's bid did not satisfy the mandatory requirements provided in the Tender Document and was non-responsive as stipulated under Section 79(1) of the Act. The Respondent contend that the Evaluation Committee adhered to the set out evaluation criteria in the Tender Document and complied with the provisions of the Constitution and the Act.
54. On its part, the 2nd Respondent associated itself with the 1st Respondent's submissions and submitted that the Applicant failed to meet the threshold on the requirements set out in the Tender Document to warrant it being issued the orders sought in the instant Request for Review.

55. The Board is cognizant of Article 227 of the Constitution which provides as follows:

"227. Procurement of public goods and services

(1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

(2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following –

a)

b)

c) and

d)"

56. Justice Mativo (as he then was) in **Nairobi High Court Misc. Application No. 60 of 2020; Republic v The Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020] eKLR** (hereinafter referred to as "Misc. Application No. 60 of 2020") spoke to the principles under Article 227 of the Constitution as follows:



"45. Article 227 of the Constitution provides that when procuring entities contract for goods or services they must comply with the principles of fairness, equity, transparency, competitiveness and cost-effectiveness. For there to be fairness in the public procurement process, 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.

46. However, there is a need to appreciate the difference between formal shortcomings, which go to the heart of the process, and the elevation of matters of subsidiary importance to a level, which determines the fate of the tender. The Evaluation Committee has a duty to act fairly. However, fairness must be decided on the circumstances of each case..."

57. Section 58 of the Act requires a procuring entity to use a standard tender document which contains sufficient information and provides as follows:

"(1) An accounting officer of a procuring entity shall use a standard procurement and asset disposal documents issued by the Authority in all procurement and asset disposal proceedings.

(2) The tender documents used by a procuring entity under subsection (1) shall contain sufficient information to allow fairness, equitability, transparency, cost-effectiveness and competition among those who may wish to submit their applications."

58. Further Section 60() provides as follows:

"(1) An accounting officer of a procuring entity shall prepare specific requirements relating to the goods, works or services being procured that are clear, that give a correct and complete description of what is to be procured and that allow for fair and open competition among those who may wish to participate in the procurement proceedings."

59. In the same vein, section 70 of the Act requires a procuring entity to use a standard tender document which contains sufficient information to allow for fair competition among tenderers. Section 70(3) reads as follows:

"(3) The tender documents used by a procuring entity pursuant to subsection (2) shall contain sufficient information to allow fair competition among those who may wish to submit tenders."

60. Section 80 of the Act is instructive on how evaluation and comparison of tenders should be conducted by a procuring entity as follows:

"80. Evaluation of tender

- (1) The evaluation committee appointed by the accounting officer pursuant to Section 46 of the 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.**

- (3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)-**
 - (a) the criteria shall, to the extent possible, be objective and quantifiable;**

(b) each criterion shall be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality, time and service for the purpose of evaluation; and

(4)

61. Section 80(2) of the Act as indicated above requires the Evaluation Committee to evaluate and compare tenders in a system that is fair using the procedures and criteria set out in the Tender Document. A system that is fair is one that considers equal treatment of all tenders against a criteria of evaluation known by all tenderers since such criteria is well laid out for in a tender document issued to tenderers by a procuring entity. Section 80(3) of the Act requires for such evaluation criteria to be as objective and quantifiable to the extent possible and to be applied in accordance with the procedures provided in a tender document.

62. Section 79(1) of the Act provides for responsiveness of tenders as follows:

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

63. Responsiveness serves as an important first hurdle for tenderers to overcome. From the above provision, a tender only qualifies as a responsive tender if it meets all eligibility and mandatory requirements set out in the tender documents. In the case of **Republic v Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020]** eKLR the High Court stated that:

“In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. 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.”

64. The Board notes that Regulation 74(1) of Regulations 2020 provides that:

"74. Preliminary evaluation of open tender

(1) Pursuant to section 80 of the Act and upon opening of tenders, the evaluation committee shall first conduct a preliminary evaluation to determine whether—

- (a) a tenderer complies with all the eligibility requirements provided for under section 55 of the Act;***
- (b) the tender has been submitted in the required format and serialized in accordance with section 74(1)(i) of the Act;***
- (c) any tender security submitted is in the required form, amount and validity period, where applicable;***
- (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;***
- (g) any required samples have been submitted; and***
- (h) all required documents and information have been submitted.***

65. The import of the aforementioned provisions of the Act and case law is that mandatory requirements cannot be waived. In this instance, the Evaluation Committee was under an obligation to evaluate the Applicant's tender using the procedures and criteria set out in the Tender Document having regard to provisions of the Act and the Constitution. A laid out evaluation criteria must, to the extent possible, be objective and quantifiable

66. Notably, Section 79 (2) and (3) of the Act provides as follows with regard to minor deviations:

"(2) A responsive tender shall not be affected by-
(a) minor deviations that do not materially depart from the requirements set out in the tender document; or
(b) errors or oversights that can be corrected without affecting the substance of the tender.
(3) A deviation described in subsection (2)(a) shall-
(a) be quantified to the extent possible; and
(b) be taken into account in the evaluation and comparison of tenders."

67. The import of the above provision is that responsiveness of a tender shall not be affected by any minor deviations that do not materially depart from the requirements set out in the Tender Document and that do not affect the substance of a tender. This provision details a minor deviation as one that can be quantified to the extent possible

and shall be taken into account in the evaluation and comparison of tenders.

68. In **Miscellaneous Civil Application 85 of 2018 Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR** the High Court considered what amounts to a minor deviation and determined as follows:

"The term "acceptable tender" means any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document. A tender may be regarded as acceptable, even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the tender documents or if it contains errors or oversights that can be corrected without touching on the substance of the tender. Any such deviation shall be quantified, to the extent possible, and appropriately taken account of in the evaluation of tenders. A tender shall be rejected if it is not acceptable...."

In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply

with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. 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.”

69. It is evident that a procuring entity cannot waive a mandatory requirement or term it as a “minor deviation” since a mandatory requirement is instrumental in determining the responsiveness of a tender and is a first hurdle that a tender must overcome in order to be considered for further evaluation. It is clear from the foregoing case that a minor deviation (a) does not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the tender documents; (b) may be an error or oversight that can be corrected without touching on the substance of the tender; and (c)

can be quantified, to the extent possible, and appropriately taken account of in the evaluation of tenders.

70. Turning to the instant Request for Review, the Tender Document provided for mandatory requirements under Clause 2 Preliminary examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at pages 30 of 271 to 34 of 271 of the Tender Document which reads in part as follows:

A	<u>Preliminary Responsiveness Requirement</u>					
			<u>Single Entity Bidder</u>	<u>Joint Venture</u>		
....
vi	<i>Compliance with the validity of the Bid Security provided.</i>		<i>Must meet requirement</i>	<i>Must meet requirement</i>	<i>n/a</i>	<i>n/a</i>
....
B	<u>Mandatory Requirements</u>		<u>Single Entity Bidder</u>	<u>Joint Venture</u>		

				<u>All</u> <u>memb</u> <u>ers</u> <u>combi</u> <u>ned</u>	<u>Each</u> <u>Memb</u> <u>er</u>	<u>One</u> <u>Memb</u> <u>er</u>
.... ,
v	Demonstrate ability to raise Engineer's Payment Certificates or Equivalent of at least Kshs. 200 million in the course of executing dam contracts. This should be done by providing copies of such past certificates and the related payments highlighted on		Must meet requirement	Must meet requirement	n/a	Must meet requirement

	<i>bidder's bank statements (Such bank statements shall have been certified by the issuing bank in the original)</i>					
<i>....</i>	<i>.....</i>	<i>.....</i>	<i>.....</i>	<i>.....</i>	<i>.....</i>	<i>.....</i>
<i>...</i>			<i>....</i>			<i>....</i>
<i>ix</i>	<i>Propose major items of construction equipment/machinery/plant to be made available on site. Fill FORM EQU: EQUIPMENT in the Section IV of the bid document. The proposed construction equipment/machinery</i>	<i>Minimum Quantity</i>				

	hinery/plant shall include:					
	Description with minimum capacity requirement	Minimum Quantity				
		Number				
....
.
b	20 Tonnes (Tare Wgt) Excavator	3	Must meet requirement	Must meet requirement	n/a	Must meet requirement
c	20 Tonnes (Tare Wgt) Vibratory Roller- Smooth & Sheepfoot	3	Must meet requirement	Must meet requirement	n/a	Must meet requirement
..
e	7 Tonnes (Tare Wgt) Wheel Loader	3	Must meet	Must meet	n/a	Must meet

			<i>require ment</i>	<i>require ment</i>		<i>require ment</i>
<i>f</i>	<i>10 Tonnes (Load Capacity) Concrete Mixer</i>	<i>3</i>	<i>Must meet require ment</i>	<i>Must meet require ment</i>	<i>n/a</i>	<i>Must meet require ment</i>
<i>g</i>	<i>Water Bowser</i>	<i>4</i>	<i>Must meet require ment</i>	<i>Must meet require ment</i>	<i>n/a</i>	<i>Must meet require ment</i>
<i>....</i>	<i>.....</i>	<i>.....</i>	<i>.....</i>	<i>.....</i>	<i>.....</i>	<i>.....</i>
<i>j</i>	<i>Concrete Batching Plant</i>	<i>1</i>	<i>Must meet require ment</i>	<i>Must meet require ment</i>	<i>n/a</i>	<i>Must meet require ment</i>
<i>k</i>	<i>Geotechnical Drilling Rig</i>	<i>1</i>	<i>Must meet require ment</i>	<i>Must meet require ment</i>	<i>n/a</i>	<i>Must meet require ment</i>
<i>l</i>	<i>Stone Crushing Plant</i>	<i>1</i>	<i>Must meet require ment</i>	<i>Must meet require ment</i>	<i>n/a</i>	<i>Must meet require ment</i>
	<i>The above listing shall comply</i>					

	<i>with the following</i>					
	<i>The proposed construction equipment/machinery/plant shall be supported with Copies of ownership documents issued by the relevant machinery/equipment/plant registration or licensing entities or Verification ownership documents (only for non-registrable equipment/machinery/plant i.e.</i>		<i>Must meet requirement</i>	<i>Must meet requirement</i>	<i>n/a</i>	<i>Must meet requirement</i>

	<i>(I,j,k,l) in the name of bidding entity or in the case of Joint Venture in the name of one of the partners.</i>					
	<i>Bidders shall own/lease all of the above listed machine/equipment/plant. Ownership shall be determined by provision of ownership documents issue by relevant machinery/equipment/plant registration or licensing entities in the name of bidding entities or its</i>		<i>Must meet requirement</i>	<i>Must meet requirement</i>	<i>n/a</i>	<i>Must meet requirement</i>

	<p>directors.</p> <p>Otherwise, lease agreements (witnessed by a competent advocate) shall be provided.</p> <p>Such agreements shall also be supported with certified copies of the leased equipment which shall be in the name of the lessor.</p>					
x	<p>Propose qualified and experienced site management and technical personnel by filling FORM PER-1. The</p>		<p>Must meet requirement</p>	<p>Must meet requirement</p>	<p>n/a</p>	<p>Must meet requirement</p>

<p><i>listing shall be accompanied by Curriculum Vitae (CVs) in the format of FORM PER-2. Further, copies of the academic certificates (masters/degree/diploma OR their equivalent for Non-Local Bidders) shall be also be attached. The proposed Engineer/Professionals shall be registered/licensed by the relevant professional boards and such proof attached.</i></p>					
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	<i>The proposed personnel shall include:</i>					
	<i>SCHEDULE OF PERSONNEL</i>					
	<i>Position Held</i>	<i>Minimum Years of Experience in dam construction & related works</i>				
<i>a</i>	<i>Project Manager-Degree Qualification in Civil Engineering</i>	<i>20</i>	<i>Must meet requirement</i>	<i>Must meet requirement</i>	<i>n/a</i>	<i>Must meet requirement</i>
<i>b</i>	<i>Site Agent-Degree Qualification in Civil Engineering</i>	<i>20</i>	<i>Must meet requirement</i>	<i>Must meet requirement</i>	<i>n/a</i>	<i>Must meet requirement</i>

c	Assistant Site Agent- Degree Qualification in Civil Engineering	20	Must meet requirement	Must meet requirement	n/a	Must meet requirement
d	Materials Engineer	20	Must meet requirement	Must meet requirement	n/a	Must meet requirement
e	Plant and Equipment Superintendent	15	Must meet requirement	Must meet requirement	n/a	Must meet requirement
f	Grouting Superintendent	15	Must meet requirement	Must meet requirement	n/a	Must meet requirement
g	Superintendent Concrete	15	Must meet requirement	Must meet requirement	n/a	Must meet requirement
h	Superintendent Earthworks	15	Must meet requirement	Must meet requirement	n/a	Must meet requirement

<i>i</i>	<i>Superintendent Pipeline</i>	<i>15</i>	<i>Must meet requirement</i>	<i>Must meet requirement</i>	<i>n/a</i>	<i>Must meet requirement</i>
<i>****</i>	<i>*****</i>	<i>*****</i>	<i>*****</i>	<i>*****</i>	<i>*****</i>	<i>****</i>
<i>****</i>	<i>*****</i>	<i>*****</i>	<i>*****</i>	<i>*****</i>	<i>*****</i>	<i>*****</i>
<i>xiv</i>	<i>All documents submitted as copies shall be stamped and signed by a Commissioner for Oaths/Notary Public (OR Equivalent for Non-Local Bidders) to signify that they are true copies of the original. The practicing license for the certifying officer</i>		<i>15</i>	<i>Must meet requirement</i>	<i>Must meet requirement</i>	<i>n/a</i>

<p><i>shall be attached.</i></p>					
<p><i>Bidders shall meet all the Mandatory conditions in order to proceed to the Technical Evaluation. In the case of Joint Venture (JV) arrangements, the JV shall meet ALL the mandatory conditions in order to proceed to the Technical Evaluation.</i></p>					

71. In essence, tenderers were required to comply with all the mandatory requirements at the Preliminary Examination stage for their respective tenders to proceed to the Technical Evaluation stage. If a tenderer did not satisfy even one of the mandatory requirements at the Preliminary Examination stage, its tender would be found non-responsive and



would be disqualified from proceeding to the Technical Evaluation stage.

72. We note that according to the Evaluation Report, the Applicant was determined non-responsive at the Preliminary Examination stage as can be discerned at page 84 to 87 of the Evaluation Report as follows:

<p><u>BIDDER NO.3</u></p> <p>LAFEY CONSTRUCTION COMPANY LIMITED,</p>	<p><i>The bidder failed to be responsive at the mandatory responsiveness stage as it:</i></p> <p><i>I. Failed to satisfy the <u>Mandatory Requirement A (vi)</u> as per ITT 19 of the bid document by providing a bid security dated 23rd October, 2022 and paginated as 3 that:</i></p> <p><i>c. <u>Was for 176 days</u> (lapsing on 26th April 2024) which was less than the set <u>bid validity period of 182 days</u> as indicated under ITT 18.1; and</i></p> <p><i>d. Refers to an Applicant called “<u>Lefey Construction Co. Limited</u>” and not the bidder (<u>Lafey Construction Company Limited</u>” as per the provided Certificate of Incorporation paginated as 7 and the Form of Tender paginated as 72 to 85.</i></p> <p><i>II. Failed to satisfy the <u>Mandatory Requirement B (v)</u> as per ITT 11.1 (h) of the bid document which required that the bidder demonstrates its ability to raise <u>Engineer’s Payment Certificates or Equivalent of at least Kshs.200 million in the course of executing dam contracts</u> which was to be done by providing copies of past certificates and the related payments highlighted on bidder’s bank statements which ought to have been certified by the issuing bank in the original.</i></p> <p><i>On examination of the opened bid in relation to the above requirement, it was noted that the Engineer’s certificates provided and paginated as 477, 479, 485 and 489 were <u>not for dam execution works but were for a Partakilat Water Supply Project in Kilgoris Sub-County, Narok County.</u></i></p> <p><i>III. Failed to satisfy the <u>Mandatory Requirement B (ix)</u> as per ITT 11.1 (h) of the bid document which required that the proposed major items of construction equipment/machinery/plant be filled in <u>FORM EQU: EQUIPMENT</u> and supported with copies of</i></p>
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ownership documents issued by relevant machinery/equipment/plant registration or licensing entities or Verifiable ownership documents (only for non-registrable equipment/machinery/plant i.e (i, j, k, l) in the name of bidding entity or in the case of Joint Venture in the name of one of the partners and where leased, lease agreements (witnessed by a competent advocate) shall be provided.

On examination of the opened bid in relation to the above requirement, it was noted as follows:

- j. The proposed Vibratory Roller - Smooth & Sheepfoot (KBE 772V) entered in the FORM EQU: EQUIPMENT paginated as 539, was supported by a logbook paginated as 540 which was in the name of Kundah Singh Construction Ltd and not the bidder. However, no lease agreement was attached. Besides, the equipment did not meet the required capacity of 20 Tonnes Tare Weight as it had a Tare Weight of 11.935 Tonnes;
- k. Only 2 no. Vibratory Rollers had been proposed in the submitted bid document. They were under registration Nos. KBE 772V and KAZ 547G which were included in FORM EQU: EQUIPMENT paginated as 539 and 543. However, the minimum required number for the Vibratory Rollers was three (3 No.);
- l. While the requirement was for the bidders to propose 3No. 7Tonnes (Tare Wgt) Wheel Loaders, the bid document (under the FORM EQU: EQUIPMENT paginated as 525 and 528) indicated two equipment under Registration Nos. ZF7911 and KBC 775Y respectively. However, on examining the supporting copies of logbooks paginated as 526 and 529, the equipment were not wheel loaders but a Low Loader - Reg No. ZF7911 and a Prime Mover - Reg No. KBC 775Y, respectively;
- m. Only 1 No. 10Tonnes (Load Capacity) Concrete Mixer (Reg No. KBZ 945P) was proposed in the submitted bid under multiple forms (FORM EQU: EQUIPMENT) which were paginated as 560, 562 & 564. Similarly, only one logbook was provided for the equipment but attached multiple times and paginated as 561, 563 & 565. Therefore, the bid failed

to meet the minimum required No. of Concrete Mixers which was supposed to be three (3 No.);

- n. The FORM EQU: EQUIPMENT paginated as 547 indicated 4 Water Bowsers (Reg. No. KBS 393Y, KBR 012R, KBS 394Y & KAJ 641W). However, the instruction on the tender's FORM EQU: EQUIPMENT was "A separate Form shall be prepared for each item of equipment listed, or for alternative equipment proposed by the Tenderer". Thus the proposal on the water bowsers failed on that requirement. Besides, the logbooks for the listed KBS 393Y, KBR 012R, KBS 394Y were in the name of Kundah Singh Construction Ltd but No Lease agreement was attached between the owner and the bidder. In addition, there was no logbook for the KAJ 641W;
- o. Although a Concrete Batching Plant was proposed and listed on FORM EQU: EQUIPMENT which was paginated as 573, and a Lease agreement provided and Paginated 566 - 570 between KSC INTERNATIONAL LTD and the bidder, no ownership document for the leased equipment by the lessor was attached;
- p. Although a Geotechnical Drilling Rig was proposed and listed on FORM EQU: EQUIPMENT which was paginated as 571, and a Lease agreement provided and Paginated 566 - 570 between KSC INTERNATIONAL LTD and the bidder, no ownership document for the leased equipment by the lessor was attached;
- q. Although a Stone Crushing Plant was proposed and listed on FORM EQU: EQUIPMENT paginated as 572, and a Lease agreement provided and Paginated 566 - 570 between KSC INTERNATIONAL LTD and the bidder, no ownership documents for the leased equipment by the lessor was attached; and
- r. Although a Ministry of Public Works Lease of Equipment Letter was attached and paginated as 574 - 575, no supporting FORM EQP: EQUIPMENT were filled for the specific equipment to be leased.

IV. Failed to satisfy the Mandatory Requirement B (x) as per ITT 11.1 (h) of the bid document which required that the proposed site management and technical personnel (with the requisite past experience) be included in the FORM PER-1, and that the Curriculum Vitae (CVs) - in the format of FORM PER-2 - for the listed staff be provided. Further, copies of the academic certificates (masters/degree/diploma OR their equivalent for Non-Local Bidders) ought to have been attached. Lastly, the proposed Engineer/Professionals should have been registered/licensed by the relevant professional boards and such proof attached.

On examination of the opened bid in relation to the above requirement, it was noted as follows:

- d. The proposed personnel for the positions of Project Manager, Site Agent, Assistant Site Agent, Materials Engineer, Plant and Equipment Superintendent, Grouting Superintendent, Superintendent Concrete, Superintendent Earthworks and Superintendent Pipeline did not have the requisite Minimum Years of Experience in dam construction & related works. All the Curriculum Vitae (CVs) for the proposed personnel provided and paginated as 362 to 367, 376 to 379, 403 to 408, 412 to 417, 421 to 426, 431 to 437, and 444 to 447, respectively, had an indication of 127 months (approx. 10.7 years) of past experience which was lower than the 240 months (20 years) for the Project Manager, Site Agent, Assistant Site Agent, Materials Engineer and 180 months (15 years) for the Plant and Equipment Superintendent, Grouting Superintendent, Superintendent Concrete, Superintendent Earthworks and Superintendent Pipeline;*
- e. The Curriculum Vitae provided and paginated as 444 to 447 for the Superintendent Pipeline (who was listed in FORM PER-1 on Page 361 to be Mr. Peter Ikomo) had not been signed on the section paginated as 447 by either the Contractor's representative or the key personnel as was required; and*
- f. The Curriculum Vitae (CVs) and academic certificates for the persons listed in the FORM PER-1 (paginated as 360) for the positions of Assistant Site Agent (where Mr. Paul Munyao was proposed) and Materials Engineer (where Mr.*

Thomas Odongo was proposed) were not attached. Instead, the Cv provided and paginated as 385 to 388 was for Francis Gichuho and that paginated as 394 to 398 was for Luke Ouma who were staff not proposed in the FORM PER-1.

V. Failed to satisfy the Mandatory Requirement B (xiv) as per ITT 11.1 (h) of the bid document which required that All documents submitted as copies should be stamped and signed by a Commissioner for Oaths / Notary Public (OR Equivalent for Non-Local bidders) to signify that they were true copies of the original.

On examination of the opened bid in relation to the above requirement, it was noted as follows:

c. The logbook for the dozer (KHMA 125F) provided and paginated as 494 was not stamped and signed by a Commissioner for Oaths to signify that it was a true copy of the original; and

d. The financial accounts/statements provided and paginated as 220 to 235 (for the year 2022), 236 to 250 (for the year 2021) and 251 to 266 (for the year 2020) had not been stamped and signed by a Commissioner for Oaths to signify that they were true copies of the originals.

VI. Failed to comply with the requirements of “Part 2 – Procuring Entity's Works Requirements” - Bill of Quantities format.

On examination of the opened bid in relation to the above requirement, it was noted as follows:

b. The Bill of Quantities Summary Table provided and paginated as 92 & 93, did not comply with the format of the tender as communicated in Addendum No. 1 issued for the tender.

73. We have studied the Applicant's original tender submitted to the Board by the 1st Respondent as part of the confidential documents in respect to the subject tender and note as follows:

No.	Mandatory Requirement	Board's observation
1.	Compliance with the validity of the Bid Security provided.	<ul style="list-style-type: none"> • Tender Security dated <u>23rd October 2022</u> issued by Rafiki Microfinance Bank Limited and submitted at page 3 of the bid document; • Refers to <u>Lefey Construction Co. Limited</u> yet bidder is <u>Lafey Construction Co. Ltd</u> indicating a major difference in the name that goes to the root of the person which the Tender Security has been issued on behalf of; • Tender Security provided is dated 2022 instead of 2023 before the subject tender was advertised. • Tender Security was not valid and compliant to the mandatory requirement

2.	<p>Demonstrate ability to raise Engineer's Payment Certificates or Equivalent of at least Kshs. 200 million in the course of executing dam contracts. This should be done by providing copies of such past certificates and the related payments highlighted on bidder's bank statements (Such bank statements shall have been certified by the issuing bank in the original)</p>	<ul style="list-style-type: none"> • Certificates provided at pages 477,479,485 and 489 point to Partakilat Water Supply Project and do not ascertain whether this was a dam contract as required under the mandatory requirement. • Non-compliant to this mandatory requirement.
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<p>3.</p>	<p>Propose major items of construction equipment/machinery/plant to be made available on site. Fill FORM EQU: EQUIPMENT in the Section IV of the bid document. The proposed construction equipment/machinery/plant shall include:</p> <ul style="list-style-type: none"> ✓ 20 Tonnes (Tare Wgt) Excavator (3) ✓ 20 Tonnes (Tare Wgt) Vibratory Roller- Smooth & Sheepfoot (3) ✓ 7 Tonnes (Tare Wgt) Wheel Loader (3) ✓ 10 Tonnes (Load Capacity) Concrete Mixer (3) ✓ Water Bowser (4) ✓ Concrete Batching Plant (1) ✓ Geotechnical Drilling Rig (1) ✓ Stone Crushing Plant (1) <p>The proposed construction equipment/machinery/plant shall be supported with Copies of ownership documents issued by the relevant</p>	<ul style="list-style-type: none"> • The Vibratory Roller as submitted at pages 539 and 540 depict that it has a Tare Weight of 11.935 tonnes; • Only 2 Vibratory Rollers submitted at pages 539 and 543 with the one submitted at page 543 duplicated at page 546; • Submitted Wheel Loaders at pages 523,525,528 under KHMA 901F, ZF7911, and KBC775Y; • Registration Certificates for ZF7911 at page 526 indicates its model as a low loader and KBC775Y at page 529 as a Prime Mover; • Only one Concrete Mixer submitted at pages 560, 562, and 564 duplicated as
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	<p>machinery/equipment/plant registration or licensing entities or Verification ownership documents (only for non-registrable equipment/machinery/plant i.e. (I,j,k,l) in the name of bidding entity or in the case of Joint Venture in the name of one of the partners.</p> <p>Bidders shall own/lease all of the above listed machine/equipment/plant. Ownership shall be determined by provision of ownership documents issue by relevant machinery/equipment/plant registration or licensing entities in the name of bidding entities or its directors. Otherwise, lease agreements (witnessed by a competent advocate) shall be provided. Such agreements shall also be supported with certified copies of the leased equipment</p>	<p>bears same registration no. KBZ 945P;</p> <ul style="list-style-type: none"> • Submitted a combined list instead of separating the same into a separate list of Water Bowser at page 547 under KBS 393Y,KBR 012R,KBS 394Y,KAJ 641W owned by KSC International Limited yet registered owner indicated as Kundan Singh Construction Ltd; • Framework Agreement attached at page 566 does not ascertain that the specific submitted Water Bowsers were leased to the Applicant by the registered owner; • No ownership documents submitted for the Concrete Batching Plant, Geotechnical
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	<p>which shall be in the name of the lessor.</p>	<p>Drilling Rig, Stone Crushing Plant and the same is admitted by the Applicant claiming that this is a minor deviation that can be cured by a request for the necessary document;</p> <ul style="list-style-type: none">• As such, the Applicant seems to insinuate that documents not submitted at the tender submission deadline ought to be considered for evaluation contrary to the principle of fairness and competitiveness in public procurement;
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4.	<p>Propose qualified and experienced site management and technical personnel by filling FORM PER-1. The listing shall be accompanied by Curriculum Vitae (CVs) in the format of FORM PER-2. Further, copies of the academic certificates (masters/degree/diploma OR their equivalent for Non-Local Bidders) shall be also be attached. The proposed Engineer/Professionals shall be registered/licensed by the relevant professional boards and such proof attached. The proposed personnel shall include:</p> <p style="text-align: center;">SCHEDULE OF PERSONNEL</p> <p style="text-align: center;">Position Held</p> <ul style="list-style-type: none"> ✓ Project Manager-Degree Qualification in Civil Engineering ✓ Site Agent- Degree Qualification in Civil Engineering 	<ul style="list-style-type: none"> • The Applicant admits oversights/omissions with regard to the years of experience by the proposed personnel and the oversights in the CV of Ikomo Peter.
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	<ul style="list-style-type: none"> ✓ Assistant Site Agent-Degree Qualification in Civil Engineering ✓ Materials Engineer ✓ Plant and Equipment Superintendent ✓ Grouting Superintendent ✓ Superintendent Concrete ✓ Superintendent Earthworks ✓ Superintendent Pipeline 	
5	All documents submitted as copies shall be stamped and signed by a Commissioner for Oaths/Notary Public (OR Equivalent for Non-Local Bidders) to signify that they are true copies of the original. The practicing license for the certifying officer shall be attached.	<ul style="list-style-type: none"> • Applicant admits to having failed to have several referenced documents commissioned and contends that this is an oversight that can be corrected.

74. In view of the above analysis and observations, the Board is not persuaded by the Applicant's arguments to consider that its tender was substantially responsive and that any minor deviations in its tender were immaterial and would not affect the competitive position of other tenders as public procurement espouses the principle of competition which requires that participating tenderers should

compete on equal footing such that any non-compliance on any tender requirement calls for the automatic disqualification of the non-compliant tender.

75. In saying so, the Board is guided by the holding in **Republic v Public Procurement Administrative Review Board ex parte Guardforce Group Limited; Pwani University & 2 Others (Interested Parties) [2021] eKLR** where Justice E.K. Ogola, held that;

"...it becomes apparent to this court that the aspect of compliance with the mandatory requirement of the tender document aims to promote fairness, equal treatment, good governance, transparency, accountability and to do away with unfairness. Failure to conform to this mandatory requirement, and/or exempt or give an opportunity to those who had not earlier on conformed to this mandatory requirement translates to unequal and unfair treatment of other tenderers and, if allowed, may encourage abuse of power and disregard of the law by not only bidders, but also procuring entities."

76. Considering the above, we are left with the inevitable conclusion that the Applicant failed to comply with the aforementioned Mandatory Requirements as provided under Clause 2 Preliminary examination for Determination of Responsiveness of Section III- Evaluation and

Qualification Criteria at pages 30 of 271 to 34 of 271 of the Tender Document.

77. In the circumstances, the Board finds that the Evaluation Committee properly evaluated the Applicant's tender and disqualified the Applicant at the Preliminary Examination stage in accordance with the provisions of the Tender Document, Section 80(2) of the Act and Article 227(1) of the Constitution.

What orders should the Board grant in the circumstances?

78. We have established that the Evaluation Committee evaluated the Applicant's tender in accordance with the provisions of the Tender Document, Section 80(2) of the Act and Article 227(1) of the Constitution. Consequently, it is only just and fair that we dismiss, which we hereby do, the instant Request for Review for lacking in merit.

79. The upshot of our findings is that the instant Request for Review fails.

FINAL ORDERS

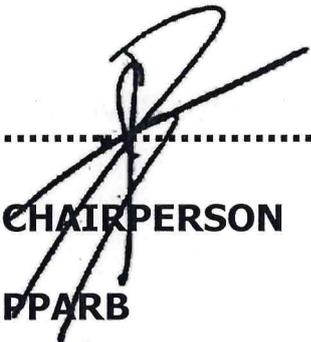
80. In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review dated 28th November 2023 and filed on even date:

A. The Request for Review dated 28th November 2023 and filed on even date be and is hereby dismissed.

B. The Respondent is hereby directed to proceed with the procurement proceedings of Tender No. NWHSA/OIT/001/2023-2024 for Construction of Umaa Dam Water Supply & Irrigation Project in Kitui County, Kenya to its logical conclusion in accordance with the Tender Document, the Act, and the Constitution.

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

Dated at NAIROBI this 19th Day of December 2023.


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CHAIRPERSON
PPARB


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SECRETARY
PPARB