

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 112/2023 OF 19<sup>TH</sup> DECEMBER 2023**

**BETWEEN**

**MUHAFSA CONSTRUCTION COMPANY LIMITED.....APPLICANT**

**AND**

**THE ACCOUNTING OFFICER,**

**COUNTY GOVERNMENT OF KAKAMEGA.....RESPONDENT**

**RODZ LIMITED.....INTERESTED PARTY**

Review against the decision of the Accounting Officer, County Government of Kakamega in relation to Tender No. 1367699-2023/2024 for Cluster 10 Proposed Roads Construction and Maintenance under 10 KM Per Ward Program in East Kabras, Chemceh and Manda/Shivanga Wards in Malava Sub-County.

**BOARD MEMBERS PRESENT**

- |                                  |             |
|----------------------------------|-------------|
| 1. Mr. George Murugu, FCI Arb. - | Chairperson |
| 2. Eng. Lilian Ogombo -          | Member      |
| 3. CPA Alexander Musau -         | Member      |

## **IN ATTENDANCE**

Ms. Sarah Ayoo	- Secretariat
Mr. Anthony Simiyu	- Secretariat

## **PRESENT BY INVITATION**

<b>APPLICANT</b>	<b>MUHAFSA CONSTRUCTION CO. LIMITED</b>
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Mr. Duwane	-Advocate, Duwane & Wethow Advocates
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<b>RESPONDENT</b>	<b>ACCOUNTING OFFICER, COUNTY GOVERNMENT OF KAKAMEGA</b>
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Ms. Vivian Komwonyo	-County Attorney, County Government of Kakamega
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Ms. Mildred Wandema	-Office of the County Attorney, County Government of Kakamega
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Mr. Kweyu Brian	-Supply Chain Management Officer, County Government of Kakamega.
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Mr. Joseph Bushuru	-Supply Chain Director, County Government of Kakamega
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Mr. Justus Wabuko	-Legal Officer, County Government of Kakamega
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**INTERESTED PARTY****RODZ LIMITED**

Eng. Steve Musindai

-Representative, Rodz Limited

**BACKGROUND OF THE DECISION****The Tendering Process**

1. The County Government of Kakamega, the Procuring Entity together with the Respondent herein, invited submission of sealed tenders in response to Tender No. 1367699-2023/2024 for Cluster 10 Proposed Roads Construction and Maintenance under 10 KM Per Ward Program in East Kabras, Chemceh and Manda/Shivanga Wards in Malava Sub-County using an open competitive tender method. The subject tender's submission deadline was Tuesday, 14<sup>th</sup> November 2023 at 10.00 a.m.

**Submission of Tenders and Tender Opening**

2. According to the signed Tender Opening Minutes for 14<sup>th</sup> November 2023, submitted under the Confidential File submitted by the Procuring Entity, the following 4 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>
<b>1.</b>	<b>Muhafsa Construction Company Limited</b>
<b>2.</b>	<b>Rodz Limited</b>
<b>3.</b>	<b>Ranova Limited</b>
<b>4.</b>	<b>Valro Company Limited</b>

### **Evaluation of Tenders**

3. The Respondent constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") to undertake an evaluation of the received tenders in the following 3 stages as captured in the Evaluation Report
  - i. Preliminary Evaluation
  - ii. Technical Evaluation
  - iii. Financial Evaluation

### **Preliminary Evaluation**

4. At this stage of the evaluation, the submitted tenders were to be examined using the criteria set out as Clause 2 Preliminary examination for Determination of Responsiveness under Section III – EVALUATION AND QUALIFICATION CRITERIA on pages 26 to 27 of the Tender Document.
5. Tenderers were to be examined to ensure they meet in all respects the eligibility criteria and other requirements at this stage. Tenderers who failed to meet any criterion outlined at this Stage would be disqualified from further evaluation.
6. At the end of the evaluation at this stage, 1 tender was found unresponsive with the other 3 tenders including those of the Applicant



and Interested Party qualifying for further evaluation at the Technical Evaluation Stage.

### **Technical Evaluation**

7. The Evaluation Committee was required at this stage to examine tenderers successful at the Preliminary Stage using the criteria set out as Technical Evaluation under Section III – EVALUATION AND QUALIFICATION CRITERIA on page 28 of the Tender Document.
8. Tenderers were to be examined and scored against the weighted marks assigned to each criterion at this stage. In order to qualify for further evaluation at the Financial Stage, a tenderer was required to garner at least 70 marks at this stage
9. At the end of the evaluation at this stage, only the the Interested Party's tender garnered over 70 marks and thus qualified for further evaluation at the Financial Evaluation Stage. The other tenders were disqualified after failing to meet the 70-marks threshold.

### **Financial Evaluation**

10. At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the Criteria set out as Clause 3 Tender Evaluation (ITT 35) under Section III– EVALUATION AND QUALIFICATION CRITERIA on page 28 of the Tender Document.

11. The Evaluation was to conduct price adjustments, convert all the tender prices into Kenya Shillings and thereafter compare the tenderers' tender prices. According to the Tender Document, the successful tender would be one that is established as the lowest evaluated tender.
12. At the end of the evaluation at this stage, it was established that the Interested Party's tender, which was the only tenderer evaluated at this stage happened to have quoted a tender price within the Procuring Entity's budget for the subject tender.

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

13. Accordingly, the Evaluation Committee recommended the award of the subject tender to the Interested Party at a cost of **Kenya Shillings Twenty-Eight Million, Seven Hundred and Ninety-Three Thousand, Five Hundred and Thirty-One and Seven Cents (Kshs. 28,793,531.07) only** inclusive of taxes

#### **Professional Opinion**

14. In a Professional Opinion dated 4<sup>th</sup> December 2023 (hereinafter referred to as the "Professional Opinion"), the Procuring Entity's Director, Supply Chain Management, Mr. Joseph Nambwa Bushuru, reviewed the manner in which the subject procurement process was undertaken including the evaluation of tenders and agreed with the Evaluation Committee's recommendation for the award of the subject tender to the Interested Party. The Respondent concurred with the Professional Opinion.

## **Notification to Tenderers**

15. Accordingly, tenderers were notified of the outcome of the evaluation tenders submitted in response to the subject tender vide letters dated 4<sup>th</sup> December 2023.

## **REQUEST FOR REVIEW**

16. On 19<sup>th</sup> December 2023, the Applicant through the firm of Duwane & Wethow Advocates, filed a Request for Review dated 18<sup>th</sup> December 2023 supported by a signed Statement dated 18<sup>th</sup> December 2023, by Hussein Hassan, the Applicant, seeking the following orders from the Board in verbatim:

- 1. Before the Request for Review can be heard substantively, the Procuring Entity to furnish the Applicant with summary of the proceedings of the opening of the tender preliminary, technical and financial evaluation, comparison of the tenders, scores awarded and evaluation criteria;***
- 2. The Respondent's intention to award the Interested Party road maintenance Tender No. 1367699-2023-2024 be declared invalid;***
- 3. The Respondent's decision contained in the letter dated 4<sup>th</sup> December 2023 and all notifications to the tender to disqualify the Applicant's tender be annulled and set aside;***
- 4. The Procuring Entity be directed to award the tender with the lowest evaluated price within 30 days from the date of the Board's decision;***
- 5. The Respondents to pay the costs of the Review herein;***



***6. Any other relief that the Board may deem fit and just to grant in the circumstances.***

17. In a Notification of Appeal and a letter dated 19<sup>th</sup> December 2023, Mr. James Kilaka, the Acting Board Secretary of the Board notified the Respondent of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondent 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 Respondent was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 19<sup>th</sup> December 2023.
18. In response to the Request for Review, on 2<sup>nd</sup> January 2024, the Respondent through the Office of the County Attorney, County Government of Kakamega, filed a Memorandum of Response dated 27<sup>th</sup> December 2023. The Respondent equally submitted the confidential documents in the subject tender pursuant to Section 67(3)(e) of the Act.
19. Vide letters dated 18<sup>th</sup> 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 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 18<sup>th</sup> December 2023.

20. On 29<sup>th</sup> December 2023, the Acting Board Secretary, sent out to the parties a Hearing Notice notifying parties and all tenderers in the subject tender that the hearing of the instant Request for Review would be by online hearing on 3<sup>rd</sup> January 2024 at 2.00 p.m. through the link availed in the said Hearing Notice.
21. On 3<sup>rd</sup> January 2024 at 2:00 p.m. the parties herein joined the online hearing session. However, before the Board could issue directions on the hearing, Mr. Hussein Hassan, a Director at the Applicant, made an application for the adjournment of the hearing on account of the Applicant's Counsel being outside the country.
22. The County Government of Kakamega's County Attorney, Ms. Komwonyo opposed the adjournment application pointing out that it was the Applicant who dragged the Respondent to the present proceedings. Further, that the Board had limited time within which to hear and determine the Request for Review.
23. This Board retreated for a deliberation before returning with the following directions:
  - i. The hearing of the Request for Review was deferred to 2:00 p.m. on 4<sup>th</sup> January 2024 and that there would be no further adjournment;



- ii. The Applicant was directed to pay adjournment costs of Kshs. 20,000.

- 24. On 4<sup>th</sup> January 2023 at 2.00 p.m. parties joined the online hearing session, this time, the Applicant was represented by their Advocate.
- 25. The Board gave the order of address assigning both the Applicant 10 minutes to highlight their case, with the Applicant going first. The Applicant was also assigned an extra 1 minute to offer any rejoinder on the Respondent's case on issues of law.

## **PARTIES SUBMISSIONS**

### **Applicant's Case**

- 26. Counsel for the Applicant, Mr. Duwane, submitted that the Procuring Entity's Evaluation Committee, in evaluating the Applicant's tender, failed to consider the Applicant's machines and equipments and work experience.
- 27. According to Counsel, the Applicant thinks its rights were infringed as it submitted the lowest tender and equally submitted all the documents that were required under the Tender Document. The Applicant was therefore surprised to learn that the Procuring Entity intended to award the subject tender to the Interested Party.
- 28. Mr. Duwane decried that the Applicant was occasioned loss and that the subject tender as carried out offended Section 66(2) of the Act and Article

227 of the Constitution. He therefore sought that the Board grants the orders sought in the Request for Review.

### **Respondent's Case**

29. Counsel for the Respondent, Ms. Komwonyo, submitted that the tender process in the subject tender complied with the law and that due process was followed. She argued that the Applicant bore the burden of proving otherwise and that in the instant case, the Applicant had failed to discharge that burden.
30. According to Counsel, the Applicant failed to provide all the required documents. Further, that the documents that were provided were either unsatisfactory or irrelevant under the Tender Document.
31. Ms. Komwonyo maintained that the Applicant failed to meet the 70 marks threshold at the Technical Evaluation Stage and was thus properly disqualified from the subject tender. She added that the Interested Party was awarded the subject tender after its tender was established as the lowest evaluated tender.
32. The Procuring Entity's Director for Supply Chain Management, Mr. Bushuru, informed the Board that the Applicant's tender passed the Preliminary Evaluation Stage but was unsuccessful at the Technical Evaluation Stage. He indicated that the tender was to be awarded to the lowest evaluated tender and not just the lowest tender as presented by the Applicant.

33. Mr. Bushuru went on to indicate that the Applicant :

- i. Failed to submit a license for its site agent under the key personnel requirement. Mr. Bushuru noted that the Applicant failed to submit licenses for its key personnel despite this being a requirement under the Tender Document;
- ii. Failed to provide contracts under the experience requirement. Mr. Bushuru noted that the Applicant submitted sub-contracts and did not supply any evidence of a project in which the Applicant was the main contractor. Further, that the Applicant supplied an Completion Certificate from a Main Contractor and not the Client.
- iii. Failed to provide the required bank statements under the financial capability requirement. Mr. Bushuru observed that the Applicant only provided bank statements for 6 months when the Tender Document requirement was bank statements for 2 years.
- iv. Failed to provide ownership documents and lease agreements under the machine and equipment requirement. According to Mr. Bushuru, the Applicant submitted a Logbook in the name of Yaro Construction Limited without ant lease agreement. Further that no log book was supplied in respect of the concrete mixer and vibrator;
- v. Failed to duly fill Form CON-2 under the Litigation History Requirement. He indicated that the said Form had check boxes that were not ticked.

34. Mr. Bushuru concluded by pointing out that the Applicant garnered 54.7 marks against the Tender Document's pass mark of 70 marks at the Technical Evaluation Stage. Therefore, according to him, the Applicant was properly disqualified from further evaluation.

### **Applicant's Rejoinder**

35. In a brief rejoinder, Counsel for the Applicant, Mr. Duwane, submitted that it was the role of the Procuring Entity's Evaluation Committee to evaluate and compare the tenders submitted in the subject tender but the Respondents in their address did not mention the Tender Document.
36. He indicated that the Applicant had submitted as part of their tender a lease agreement and that they had 2 tippers, rollers and trucks as per the Tender Document. He equally submitted that the Applicant had been involved in similar works and other megaprojects using the same equipment.
37. Counsel submitted that the Applicant supplied the required bank statements and demonstrated experience as required under the Tender Document. He equally maintained that the Form CON-2 was duly filled.

### **CLARIFICATIONS**

38. The Board sought clarity from the Applicant on whether it had submitted as part of its tender, its key personnel's licenses, academic certificates as well as lease agreements in respect of its machine and equipment. Mr.



Duwane, confirmed that the Applicant had submitted the licenses and leases.

39. The Board inquired from the Respondent on the actual requirement in respect of key personnel. Mr. Bushuru informed the Board that the Tender Document required at least 1 degree or diploma in a Civil Engineering Field to be demonstrated by way of CV, academic certificate and valid license.
40. At the conclusion of the online hearing session, the Board notified the parties that the instant Request for Review having been filed on 19<sup>th</sup> December 2023 had to be determined by 9<sup>th</sup> January 2024. Therefore, the Board would communicate its decision on or before 9<sup>th</sup> January 2024 to all parties via email.

### **BOARD'S DECISION**

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

**Whether the Procuring Entity's Evaluation Committee properly evaluated the Applicant's tender in accordance with Sections 79 and 80 of the Act as well as the provisions of the Tender Document?**



42. The Applicant assailed the Procuring Entity's decision to disqualify its submitted tender for the reason that the Applicant did not attain the required minimum marks required to proceed for financial evaluation.
43. According to the Applicant it submitted a responsive tender and that it was improperly disqualified from the subject tender. It therefore took the view that the subject tender ought not to have been awarded to the Interested Party whose tender price was much higher than it.
44. On the other hand, the Respondent maintained that the Procuring Entity's Evaluation Committee properly evaluated the tenders received in response to the invitation to tender in the subject tender. According to the Respondent, the Applicant was disqualified after failing to garner the minimum 70 marks at the Technical Evaluation Stage.
45. The Respondent maintained that the Applicant:
- i. Failed to comply with the Key personnel requirements under the Tender Document;
  - ii. Failed to comply with the work experience requirements under the Tender Document;
  - iii. Failed to comply with the Financial Capability requirements under the Tender Document;
  - iv. Failed to comply with the Machine and Equipment requirement under the Tender Document; and
  - v. Failed to comply with the Litigation History requirement under the Tender Document.

46. The Board is therefore invited to interrogate the Evaluation Committee's evaluation process that culminated in the disqualification of the Applicant's disqualification from the subject tender at the Technical Evaluation Stage.
47. Section 80 of the Act offers guidance on how an Evaluation Committee should proceed with the evaluation of tenders in the following terms:

***"80. Evaluation of tender***

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

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

48. Additionally, Section 79 of the Act offers clarity on the responsiveness of tenders in the following terms

***"79. Responsiveness of tenders***

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

***(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 documents;***

***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.”***

49. This Board is further guided by the dictum of the High Court in ***Republic v Public Procurement Administrative Review Board & 2 others Exparte BABS Security Services Limited [2018] eKLR; Nairobi Miscellaneous Application No. 122 of 2018*** where the court while considering a judicial review application against a decision of this Board illuminated on the responsiveness of a tender under section 79 of the Act:

**“19. It is a universally accepted principle of public procurement that bids which do not meet the minimum requirements as stipulated in a bid document are to be regarded as non-responsive and rejected without further consideration.[9] Briefly, the requirement of responsiveness operates in the following manner:- a bid only qualifies as a responsive bid if it meets with all requirements as set out in**



the bid document. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements.[10] Bid formalities usually require timeous submission of formal bid documents such as tax clearance certificates, audited financial statements, accreditation with standard setting bodies, membership of professional bodies, proof of company registration, certified copies of identification documents and the like. Indeed, public procurement practically bristles with formalities which bidders often overlook at their peril.[11] Such formalities are usually listed in bid documents as mandatory requirements – in other words they are a sine qua non for further consideration in the evaluation process.[12] The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing or empowerment. Bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome.

20. 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."**

See also ***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***

50. Drawing from the above, the Tender Document is the key guide in the evaluation of tenders submitted in response to any tender invitation. Further, for a tender to be deemed responsive in respect of any requirement, it must comply with the specification of the actual requirement as set out in the Tender Document.
51. The Board has keenly studied the Tender Document in the subject tender and it bears reproducing the requirements the Applicant is alleged to have



been unresponsive towards. The Technical Evaluation Criteria is herein reproduced:

**"TECHNICAL EVALUATION**

***The cut-off mark is 70% for the bidder to be considered for financial analysis***

<b><i>Item</i></b>	<b><i>Description</i></b>		<b><i>Max Point</i></b>
<b><i>i.</i></b>	<b><i>KEY PERSONNEL</i></b> <b><i>Key Personnel</i></b> <b><i>At least 1 No. Degree/Diploma of Key Personnel in Civil Engineering field (Attach current CV's and Education Certificate with valid relevant licence – 10</i></b> <b><i>At least 1No. certificate holder of key personnel in relevant Engineering field (Attach current CV's and Education Certificate with valid relevant licence - 10</i></b>	<b><i>20</i></b>	<b><i>20</i></b>
<b><i>ii.</i></b>	<b><i>WORK EXPERIENCE</i></b> <b><i>Similar Contracts completed in the last ten (10) years (A max of 4 LSOS/CONTRACTS/COMPLETION CERTIFICATES,AWARD LETTERS (Attach evidence)</i></b> <b><i>Works of similar nature, Complexity and magnitude----</i></b> <b><i>----- 20</i></b> <b><i>Works of similar nature but lower value than the one in consideration -----10</i></b>	<b><i>20</i></b>	<b><i>20</i></b>
<b><i>iii.</i></b>	<b><i>FINANCIAL CAPABILITY</i></b>	<b><i>20</i></b>	<b><i>20</i></b>

	<b><i>Certified Audited bank statement (for last two (2) years. Each 10 marks</i></b>		
<b><i>iv.</i></b>	<b><i>MACHINE &amp; EQUIPMENTS</i></b> <b><i>Attach evidence of ownership or lease agreement of excavator, concrete mixer, vibrator and means of transport and any other relevant construction equipment</i></b>	<b><i>20</i></b>	<b><i>20</i></b>
<b><i>v.</i></b>	<b><i>Litigation History</i></b> <b><i>Historical Contract Non-Performance, Pending Litigation and Litigation History FORM CON-2</i></b>	<b><i>10</i></b>	<b><i>10</i></b>
<b><i>vi.</i></b>	<b><i>Sanctity of the Tender Document</i></b> <b><i>Presentation, serialization, neatness etc.</i></b>	<b><i>10</i></b>	<b><i>10</i></b>

52. From the above, a tender had to muster at least 70 marks at the Technical Evaluation Stage for it to qualify for further evaluation at the Financial Evaluation Stage. Additionally, at the Technical Evaluation Stage, the Evaluation Committee was to evaluate the submitted tenders on the basis of 6 requirements that each carried a weighted score. The Board shall now examine the each of the requirements against the parties' submitted tenders:

53. Item (i) on Key Personnel requirements attracting a maximum of 20 marks, was divided in to 2 parts:

54. The first part required tenderers to demonstrate having as part of their key personnel at least one person holding a degree or diploma in a Civil

Engineering field. For this, a tenderer was to submit as part of their tender, a current CV and Education Certificate with valid relevant license so as to garner 10 marks. Anything short of supplying the 3 documents i.e. CV, Education Certificate and license would lead to a tenderer losing out the 10 marks under this criterion.

55. The second part required tenderers to demonstrate having as part of their key personnel at least one person holding a Certificate in a relevant Engineering field. For this, a tenderer was to submit as part of their tender, a current CV and Education Certificate with valid relevant license so as to garner 10 marks. Anything short of supplying the 3 documents i.e. CV, Education Certificate and license would lead to a tenderer losing out the 10 marks under this criterion.
56. The Board has keenly perused the Applicant's tender and noted that it submitted its key personnel documents at pages 283 to 303 of its tender. The following observations were made on these documents:
- i. The Applicant attached the CV of Karuga Elizaphan Njuguna, a holder of Diploma in Civil Technology, (Civil Engineering Technology) as one of its key personnel. The Applicant went on to attach his Diploma Certificate dated 18<sup>th</sup> December 2015 from The Technical University of Kenya but did not accompany this with any license.
  - ii. The Applicant attached the CV of Jacob Oyoo Okoth, a holder of a Diploma in Civil Engineering as one of its key personnel. The



Applicant went to attach his Leaving Certificate from The Kisumu Polytechnic but did not accompany this with any license.

- iii. The Applicant attached the CV of Hussein H. Muhumed, a holder of a Degree in Bachelor of Arts Education as one of its key personnel. The Applicant went on to attach his Provisional Result slip from University of Nairobi for Year 1 and a Primary Teachers Certificate from KNEC but did not accompany this with any license.
- iv. The Applicant attached the CV of Chebon S. Chepkonga, a holder of a Diploma in Land Survey as one of its key personnel. The Applicant went on to attach his Leaving Certificate dated 22<sup>nd</sup> November 2010 from the Kenya Institute of Survey and Mapping and Academic Transcripts for Stage Two but did not accompany this with a license.

57. From the above, none of the key personnel proposed by the Applicant had their license supplied as part of the Applicant's tender contrary to the requirement under the Tender Document. The Applicant's tender was therefore unresponsive to the tender requirement under Item (i) Key Personnel and should have scored 0 Marks in this regard.

58. The Board has keenly studied the Interested Party's tender and noted that it supplied documents of its proposed key personnel at pages 226 to 274 of its tender. None of the key personnel who included Barongo Simon Sianyo, Eng. Edwin Onkendu Ong'auo, Duke Angoi Mose, Festus Bosire, Mogaka Nyasani, David Ombosa King'oina, David Nyang'au Omambia, Kevin Otieno Owilla, Duncan Ochieng', Nyandisi Samuel Mokuu, Benard

Makini Uhuru, Edwin Machani Nyamichaba, who are holders of civil engineering qualifications at different levels, had their license produced as part of the Interested Party's tender. The Interested Party's tender was therefore equally unresponsive to the tender requirement under Item (i) Key Personnel and should have also scored 0 Marks in this regard.

59. However, the Board has noted from the Evaluation Report that the Evaluation Committee awarded the Applicant a score of 12 Marks under Item (i) on Key Personnel requirements. We find this scoring erroneous on the part of the Evaluation Committee for at least two reasons. First, the Tender Document did not provide for the splitting of the 10 marks score for each of the 2 key personnel in the tenderer's teams. Secondly, the Evaluation Committee fails to offer a justification as to how the scores were objectively broken down on the basis of the documents supplied by the Applicant.
60. The Evaluation Report equally indicates that the Interested Party was assigned a score 14.67 Marks under Item (i) on Key Personnel requirements which even raises more questions around how scores in multiples of 10s could end up in a score of 14.67. Compliant tenders were to garner 10 marks for each of the 2 parts under Item (i) on Key Personnel requirements while non-compliant tenders were to lose out the same marks.
61. Item (ii) on Work Experience requirements attracting a maximum of 20 marks, required tenderers to demonstrate having completed similar contracts in the last 10 years. For this, the Tender Document required



tenderers to submit as part of their tenders, a maximum of 4 LSOS or contracts or completion certificates or award letters. According to the Tender Document a tender containing 4 LSOS or contracts or completion certificates or award letters in respect of works of a similar nature, complexity and magnitude would get the full 20 marks while that of a similar nature but of a lower value than that of the subject tender would get 10 marks.

62. The Board has keenly perused the Applicant's tender and noted that the Applicant provided a number of relevant documents at pages 274 to 282 of its tender:
- i. Letter of award dated 18<sup>th</sup> February 2023 and completion certificate dated 30<sup>th</sup> August 2023 for sub-contract of upgrading to bituminous standard for improvement of Wajir High School Access Road Tender No. KURA/RMLF/NE/023/2018-2019. Both the letter of award and completion certificate were from Yarrow Construction Company Limited to the Applicant and the consideration amount was indicated as Kshs. 62,875,000.00.
  - ii. Letter of award dated 10<sup>th</sup> December 2018 and completion certificate dated 15<sup>th</sup> April 2019 for sub-contract of upgrading to gravel standard for emergency maintenance of Wajir- Wajirbor along Road (B96 Road) KENHA/2035/2028. Both the letter of award and completion certificate were from Yarrow Construction Company Limited to the Applicant and the consideration amount was indicated as Kshs. 18,520,600.00.

- iii. Letter of award dated 18<sup>th</sup> February 2019 and completion certificate dated 30<sup>th</sup> August 2019 for sub-contract for periodic maintenance of Lot 4 Roads (Access to Sanbuley Secondary School Within Wajir County) Tender No. KURA/RMLF/NER/156/2018-2019. Both the letter of award and completion certificate were from Yarrow Construction Company Limited to the Applicant and the consideration amount was indicated as Kshs. 6,875,000.00.
- iv. Letter of award dated 19<sup>th</sup> September 2018 and completion certificate dated 23<sup>rd</sup> November 2018 for sub-contract for trench excavation for pipe laying and Site Clearance- For Extension of Water Supply Services to Githunguri WSP Area Tender No. AWSB/WAASP-AF/COMP-1/W-11/15. Both the letter of award and completion certificate were from Yarrow Construction Company Limited to the Applicant and the consideration amount was indicated as Kshs. 27,200,000.00.

63. From the foregoing, it is apparent that the Applicant submitted as part of its tender letters of award and completion certificates for 4 projects of a similar nature as the subject tender. However, only one of the said projects is of a greater value than the Applicant's tender sum of Kshs. 27,796,561.40. Accordingly, a proper scoring would be to assign it marks for works of similar nature but of lower value than one in consideration i.e. 10 Marks.

64. However, the Evaluation Report records that the Evaluation Committee awarded the Applicant 10.33 Marks under Item (ii) on Work Experience

requirements. It is questionable how the 10.33 marks came about when in fact the available marks for award were 0, 10 or 20 Marks. For the same reason it is equally questionable how the Evaluation Committee assigned the Interested Party herein a score of 16.33 Marks Item (ii) on Work Experience requirements.

65. Item (iii) on Financial Capability requirements attracting a maximum of 20 marks, required tenderers to demonstrate their financial capability by providing certified copies of bank statements for the last 2 years. Under the Tender Document a certified bank statement for each year carried 10 marks. It would therefore follow that a tender that contained certified bank statements for a year would garner 10 marks and that lacking a certified bank statement would lose 10 marks.
66. The Board has keenly perused the Applicant's tender and noted that the Applicant supplied certified bank statements from Equity Bank, Kenya Commercial Bank and First Community Bank at pages 221 to 228. However, the following were observed on the statements:
  - i. Only the certified bank statements from Kenya Commercial Bank were for the Applicant. These were for the period between 1<sup>st</sup> January 2023 and 23<sup>rd</sup> February 2023
  - ii. The certified bank statements from Equity Bank were for Hussein Hassan Muhumed, a Director at the Applicant.
  - iii. The certified bank statements from First Community Bank were for Mataanow Construction Company Limited and not the Applicant.

67. It is therefore apparent that the Applicant only submitted 1 set of bank statements in the Applicant's name, in response to the tender requirement for the submission of certified bank statements for 2 years. Further, the said bank statements were for the period between January 2023 and 23<sup>rd</sup> February 2023. Accordingly, if the Applicant was to be scored it would be for the certified bank statements for the year 2023 which would attract 10 Marks.
68. However, when the Board perused the Evaluation Report, it noted that the Evaluation Committee awarded the Applicant 7.67 marks under Item (iii) on Financial Capability requirements. This is an absurdity in that the Tender Document provided for 10 marks for a certified statement for each year. It would therefore follow that a tender would garner 10 marks for each compliant certified bank statement or lose out the 10 marks in the event of non-compliance.
69. The absurdity was further exacerbated when the Board gathered from the Evaluation Report that the Interested Party garnered score of 16.33 marks under the same Item 3. It is inconceivable that with tender scores being prescribed in multiples of 10s could end up with the Applicant and the Interested Party scoring 7.67 and 16.33 marks respectively. Logically, under the subject tender the Applicant and Interested Party could only get scores of 0, 10 or 20 marks and not any other score.
70. Item (iv) on Machine and Equipment requirements attracting a maximum of 20 marks required tenderers to demonstrate access to machine and



equipment for the project. For this, tenderers were required to submit as part of their tender, evidence of ownership or lease agreement in respect of an excavator, concrete mixer, vibrator, and means of transport and any other relevant construction equipment;

71. The Board has independently studied the Applicant's tender and noted that it submitted a number of documents at pages 264 to 271 of its tender:
72. The Applicant submitted at Page 264 of its tender a letter dated 23<sup>rd</sup> February 2023 from Mataanow Construction Co. Limited whose contents are reproduced hereinbelow:

***"23<sup>rd</sup> February, 2023***

***Muhafsa Construction Co. Ltd***

***P.O. Box (Details withheld)***

***NAIROBI, KENYA***

***Dear Sir,***

***RE: LEASE HIRE OF EQUIPMENT***

***We refer to the above mentioned and hereby accept to lease you the below listed equipment as per your request to enable you carry out future awarded projects.***

- ***1 No. KHMA 985G Caterpillar Roller Grader Crane***
- ***1No. KBH 553M Tipper Truck***
- ***1No. KCB 922Q Tipper Truck***
- ***1No. KHMA 820J Dozer Caterpillar Crawler***
- ***1No. KBV 582K Toyota Hilux***

- ***1KHMA 766H Excavator Crawler***
- ***1No. Backhoe case 580G***
- ***1No. Motor Grader 120G***
- ***1No. Water tanker 12000lts***
- ***1No. Mobile Concrete Mixer***
- ***2No, Porker Vibrator***

***We look forward to a good working relationship in future.***

***Yours faithfully***

***Signed and Stamped with the stamps for both Mataanow Construction Limited and Muhafsa Construction Company Limited***

***HUSSEIN MUHUMED***

***Director: MATAANOW CONSTRUCTION CO. LTD***

73. The Board finds that the above letter cannot be termed a lease agreement as it fails to disclose duration of the purported lease and the consideration offered. The letter is equally not separately executed by the directors of both Mataanow Construction Company Limited and the Applicant.
74. The Applicant equally supplied the following documents as parts of its tender:
- i. Logbook for Motorcycle KMEX540M in the name of Spring Valley Machinery

- ii. Logbook for Roller Grader Crane KHMA985G in the name of Mataanow Construction Company Limited
- iii. Logbook for Motor vehicle (Prime Mover) KBH553M in the name of Mataanow Construction Company Limited
- iv. Logbook for Motor vehicle (Lorry Truck) KCB922Q in the name of Mataanow Construction Company Limited
- v. Logbook for Crawler KHMA820J in the name of Mataanow Construction Company Limited
- vi. Logbook for Motor vehicle (Pick up) KBV582K in the name of Mataanow Construction Company Limited
- vii. Logbook for Excavator KHMA766H in the name of Yarrow Construction Company Limited.

75. The Board has observed a number of discrepancies in the Applicant's documents:

- i. Though the Applicant provided a logbook for the Excavator KHMA766H in the name of Yarrow Construction Company Limited, no lease agreement was provided as part of the tender. The Board equally noted that the Excavator KHMA766H was equally included in the list of items leased to the Applicant under the letter dated 23<sup>rd</sup> February 2023 but the attached logbook reads Yarrow Construction Company Limited.
- ii. Though the Applicant provided a copy of the logbook for Motorcycle KMEX540M in the name of Spring Valley Machinery no lease agreement from the said Spring Vally Machinery was provided.

76. The Board has noted The Board has checked the Procuring Entity's Report and notes that the Evaluation Committee scored the Applicant 11.67 marks under Item (iv) Machine and Equipment. It is not clear how the Evaluation Committee quantified this score as the Tender Document did not split the marks under this requirement. Further it is equally curious how scoring was being done under this requirement since the Interested Party garnered a score of 14.33 marks under this requirement for the same reason that scoring points were not quantifiable.
77. Item (v) on Litigation History requirements attracting a maximum of 10 marks required tenderers to give information on their historical contract non-performance, pending litigation and history. In order to garner all the 10 marks, tenderers had to submit as part of their tender, a duly filled FORM CON-2 which was provided at page 38 of the blank Tender Document. We have hereinafter reproduced the Form for ease of reference:

***63 FORM CON-2***

***Historical Contract Non-Performance, Pending Litigation and Litigation History***

***Tenderer's Name:***

***Date:***

***JV Member's Name***

***ITT No. and title***

<b><i>Non-performed Contracts in accordance with Section III, Evaluation and Qualification Criteria</i></b>
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***Contract non-performance did not occur since 1<sup>st</sup> January [insert year] specified in Section III, Evaluation and Qualification Criteria, Sub-Factor 2.1***  
***Contract(s) not performed since 1<sup>st</sup> January [insert year] specified in Section III, Evaluation and Qualification Criteria, requirement 2.1***

<b><i>Year</i></b>	<b><i>Non-performed portion of contract</i></b>	<b><i>Contract Identification</i></b>	<b><i>Total Contract Amount (current value, currency exchange rate and Kenya Shilling equivalent)</i></b>
<b><i>[insert year]</i></b>	<b><i>[insert amount and percentage]</i></b>	<b><i>Contract Identification:</i></b> <b><i>[indicate complete contract name/ number, and any other identification]</i></b>  <b><i>Name of the Procuring Entity:</i></b> <b><i>[insert full name]</i></b>  <b><i>Address of Procuring Entity:</i></b> <b><i>[insert street/city/country]</i></b>  <b><i>Reason(s) for nonperformance: [indicate main reason(s)]</i></b>	<b><i>[insert]</i></b>

***Pending Litigation, in accordance with Section III, Evaluation and Qualification Criteria.***

☐ ***No pending litigation in accordance with Section III, Evaluation and Qualification Criteria, sub-Factor 2.3***

☐ ***Pending litigation in accordance with Section III, Evaluation and Qualification Criteria, Sub-Factor 2.3 as indicated below.***

<b><i>Year of dispute</i></b>	<b><i>Amount in dispute (currency)</i></b>	<b><i>Contract Identification</i></b>	<b><i>Total Contract Amount (currency), Kenya Shilling Equivalent (exchange rate)</i></b>
		<b><i>Contract Identification:</i></b> <b><i>Name of Procuring Entity:</i></b> <b><i>Matter in dispute:</i></b> <b><i>Party who initiated the disputed:</i></b> <b><i>Status of dispute:</i></b>	
		<b><i>Contract Identification:</i></b> <b><i>Name of Procuring Entity:</i></b> <b><i>Matter in dispute:</i></b> <b><i>Party what initiated the dispute:</i></b>	

		<b><i>Status of dispute:</i></b>	
<b><i>Litigation History in accordance with Section III, Evaluation and Qualification Criteria</i></b>			
<input type="checkbox"/> <b><i>No Litigation History in accordance with Section III, Evaluation and Qualification Criteria, Sub-Factor 2.4</i></b>			
<input type="checkbox"/> <b><i>Litigation History in accordance with Section III and Qualification Criteria, Sub-Factor 2.4 as indicated below.</i></b>			
<b><i>Year of award</i></b>	<b><i>Outcome as percentage of Net Worth</i></b>	<b><i>Contract Identification</i></b>	
<b><i>[insert year]</i></b>	<b><i>[insert year]</i></b>	<b><i>Contract Identification: [indicate complete contract name, number, and any other identification]</i></b> <b><i>Name of Procuring Entity: [insert full name]</i></b> <b><i>Address of Procuring Entity: [insert street/city/country]</i></b> <b><i>Matter in dispute: [indicate main issues in dispute]</i></b> <b><i>Party who initiated the dispute: [indicate main issues in dispute]</i></b> <b><i>Reason(s) for Litigation and award decision [indicate main reason(s)]</i></b>	

78. From the reproduced FORM CON-2 above, the Form had blank spaces that needed to be filled as well as check boxes that required tenderers to tick where appropriate. Accordingly, a duly filled Form CON-2 would be that whose blank spaces had been filled and appropriate check boxes ticked. Any tender whose Form was duly filled was to garner the full 10 marks. Conversely, any tender whose Form was not duly filled was to be scored 0 marks.
79. The Board has independently scrutinized the Applicant's tender and noted that the Applicant supplied its filled FORM CON-2 at pages 55 to 56 of its Tender. From the Applicant's FORM CON-2 none of the check boxes have been ticked. It therefore follows that the Applicant's Form CON-2 was not duly filled.
80. A look at the Evaluation Report however reveals that the Applicant garnered a score of 7.33 marks out of the possible 10 marks. The report however does not record why the score was assigned as such.
81. The score is curious as Item (v) on Litigation History requirements required tenderers to submit a duly filled FORM CON-3. Accordingly, a duly filled Form would attract 10 marks whereas a Form that was not duly filled would attract 0 marks. It is therefore unconceivable that the Applicant garnered a score of 7.33 marks while the Interested Party garnered 8.33 marks. These tenderers ought to have scored 10 marks or 0 marks and not anything in between.



82. Item (vi) on Sanctity of the Tender Document requirements attracting a maximum of 10 marks was on sanctity of the tender document. For this, tenderers had to submit a serialized and neat tender document.
83. The Board has looked at the Applicant's tender and confirmed from the Procuring Entity's Evaluation Report that the Evaluation Committee awarded the Applicant 5.67 marks out of the possible 10 marks.
84. The Board has equally looked at the Interested Party's original tender and confirmed from the Procuring Entity's Evaluation Report that the Evaluation Committee awarded the Interested Party 7.67 marks out of the possible 10 marks.
85. From the Board's observation of the tenders, both of them are serialized and neatly spiral bound. However, it is unclear to the Board as to why the tenders garnered the different scores of 5.67 and 7.67 marks for the Applicant and Interested Party respectively. The Evaluation Report is unhelpful in this regard as it only assigns the two scores without any comments accompanying the said scoring. This seriously calls to question the objectivity of the scores the Evaluation Committee assigned to the tenderers on this tender requirement.
86. Article 227(1) of the Constitution espouses the principles of fairness, equity, transparency, competition and cost-effectiveness in the conduct of public procurement processes. These principles serve to instill confidence in the public and among suppliers that public funds are prudently spent and that tenders submitted in response to any tender are objectively processed.

87. Unfortunately, the conduct of the subject tender points to lack of objectivity as the Evaluation Committee's assigning of marks at the Technical Evaluation Stage appears not to have anchored on any objective observation during the evaluation exercise. The scores were being assigned whimsically without any objective quantifiable way of identifying the basis for the scoring.
88. In view of the foregoing, the Board finds that the Procuring Entity's Evaluation Committee failed to properly evaluate the Applicant's tender in accordance with Sections 79 and 80 of the Act as well as the provisions of the Tender Document

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

89. The Board has found that the Procuring Entity's Evaluation Committee failed to properly evaluate the Applicant's tender in accordance with Sections 79 and 80 of the Act.
90. The upshot of our finding is that the Request for Review dated 18<sup>th</sup> December 2023 in respect of Tender No. 131367699-2023/2024 for Cluster 10 Proposed Roads Construction and Maintenance under 10 KM Per Ward Program in East Kabras, Chemceh and Manda/Shivanga Wards in Malava Sub-County succeeds in the following specific terms:

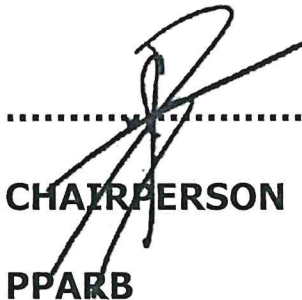
## **FINAL ORDERS**

91. 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 18<sup>th</sup> December 2023:
- 1. The letter of Notification of Intention to Award dated 4<sup>th</sup> December 2023 and addressed to the successful tenderer in respect of Tender No. 1367699-2023/2024 for Cluster 10 Proposed Roads Construction and Maintenance under 10 KM Per Ward Program in East Kabras, Chemceh and Manda/Shivanga Wards in Malava Sub-County be and is hereby cancelled and set aside;**
  - 2. The letters of Notification of Intention to Award dated 4<sup>th</sup> December 2023 and addressed to the unsuccessful tenderer in respect of Tender No. 1367699-2023/2024 for Cluster 10 Proposed Roads Construction and Maintenance under 10 KM Per Ward Program in East Kabras, Chemceh and Manda/Shivanga Wards in Malava Sub-County be and are hereby cancelled and set aside;**
  - 3. The Respondent is hereby directed to reconvene the Procuring Entity's Evaluation Committee for purposes of re-evaluating at the Technical Evaluation Stage, all tenders that were previously successful at the Preliminary Evaluation Stage in the subject**

tender within 7 days of this Decision taking into account the findings of the Board in this Decision.

4. The Respondent is hereby ordered to direct the Procuring Entity's Evaluation Committee to evaluate the re-admitted tenders at the Technical Evaluation Stage while interpreting the criteria in the Tender Document in a manner that is lawful, objective, quantifiable and fair to all the tenders.
5. Given Board's finding above, each party shall bear its own costs in the Request for Review.

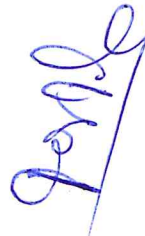
Dated at NAIROBI, this 9<sup>th</sup> Day of January 2024.



.....

**CHAIRPERSON**

**PPARB**



.....

**SECRETARY**

**PPARB**