

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 18/2024 OF 5TH MARCH 2024

BETWEEN

INFINITY POOL LIMITED.....APPLICANT

AND

THE ACCOUNTING OFFICER

KENYA WILDLIFE SERVICE.....RESPONDENT

Review against the decision of the Accounting Officer, Kenya Wildlife Services in relation to Tender No. KWS/ONT/RMLF/35/2023-2024 for Routine Maintenance of Old Murera Gate-Kindani-Junct 22 Road & Rhino Base Hq-Signage 30 Road.

BOARD MEMBERS PRESENT

1. Ms. Alice Oeri - Panel Chairperson
2. Mr. Jackson Awele - Member
3. Ms. Jessica M'mbetsa - Member

IN ATTENDANCE

- Mr. James Kilaka - Ag. Board Secretary
- Mr. Philemon Kiprop - Secretariat
- Mr. Anthony Simiyu - Secretariat

PRESENT BY INVITATION

APPLICANT

INFINITY POOL LIMITED

Mr. Michael Wanyama

-Advocate, S Kipkorir & Kömen Law Advocates

Mr. S. Kipkorir

- Advocate, S Kipkorir & Komen Law Advocates.

RESPONDENT

ACCOUNTING OFFICER, KENYA WILDLIFE SERVICES

Ms. Ismene Feski

-Advocate, Kenya Wildlife Services

BACKGROUND OF THE DECISION

The Tendering Process

1. Kenya Wildlife Services, the Procuring Entity together with the 1st Respondent herein, invited submission of tenders in response to Tender No. KWS/ONT/RMLF/35/2023-2024 for Routine Maintenance of Old Murera Gate-Kindani-Junct 22 Road & Rhino Base Hq-Signage 30 Road in Meru National Park using an open tender method. The subject tender was reserved for Youth and Women Enterprises and the submission deadline set for Friday, 15th December 2023 at 10:00 a.m. EAT.

Submission of Tenders and Tender Opening

2. According to the signed Tender Opening Minutes for 15th December 2023, submitted under the Confidential File by the Procuring Entity, the following 20 tenderers were recorded as having submitted their respective tenders in response to the subject tender by the tender submission deadline:

No.	Name of Tenderer
1.	Njehari Traders Limited
2.	Kaikai Trading Company Limited
3.	Mersha Solutions Limited
4.	Iwate Arai Systems
5.	Nanisha Enterprises Limited
6.	Eloizza Company Limited
7.	JG Ecoboi Solutions Limited
8.	Hammath General Construction Company Limited
9.	Sadop Construction Company Limited
10.	Ninety Percent Ventures Limited
11.	Infinity Pool Limited
12.	Daevels Logistics Limited
13.	Linton Civil Engineering Limited
14.	Jovance Investments Limited
15.	Adentech Associate Limited
16.	Anjilu Ventures Limited
17.	Volquest Investments Limited
18.	Iyuki Limited
19.	Bluetime Investments Limited
20.	Siteman Management Limited

Evaluation of Tenders

3. The 1st Respondent constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") which was to undertake an evaluation of the received tenders in the following 3 stages as captured in the Tender Document
- i. Preliminary Evaluation
 - ii. Technical Evaluation
 - iii. Financial Evaluation

Preliminary Evaluation Stage

4. At this stage of the evaluation, the submitted tenders were to be examined using the criteria set out in Clause A. Preliminary examination-Determination of Responsiveness under Section III – EVALUATION AND QUALIFICATION CRITERIA on pages 36 to 38 of the Tender Document.
5. The evaluation was to be on a Yes/No basis and tenderers who failed to meet any criterion outlined at this Stage would be disqualified from further evaluation.
6. At the end of evaluation at this stage, 18 tenders were found to be unresponsive with only 2 tenders including that of the Applicant qualifying for evaluation at the Technical Evaluation Stage.

Technical Evaluation Stage

7. The Evaluation Committee was required at this stage to examine tenders that were successful at the Preliminary Stage using the criteria set out as Technical Evaluation Criteria under Section III – EVALUATION AND QUALIFICATION CRITERIA on pages 39 to 44 of the Tender Document.
8. Evaluation at this Stage was to be carried out in two stages i.e. Technical Evaluation Criteria Part A and Technical Evaluation Criteria Part B. Under Technical Evaluation Criteria Part A, tenders were required to meet all the tender requirements at that stage before proceeding to the Technical Evaluation Criteria Part B.
9. At the Technical Evaluation Criteria Part B, tenders were to be evaluated against the weighted scores of the requirements under this Stage.

Tenderers, had to garner a minimum of 80 marks to qualify for further evaluation at the Financial Stage.

10. At the end of the evaluation at this stage, all the tenders that qualified for evaluation at this stage were found unresponsive and thus disqualified from further evaluation.

Financial Evaluation Stage

11. At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the Criteria set out as Financial Evaluation (under Section III– EVALUATION AND QUALIFICATION CRITERIA) on page 45 of the Tender Document.
12. Tenders were to be examined by price comparison but not limited to sensitivity and credibility analysis to detect abnormally high or low bids or unbalanced or front-loaded bids.
13. However, owing to the disqualification of all the tenderers, no tender was evaluated at this stage.

Evaluation Committee's Recommendation

14. Accordingly, the Evaluation Committee recommended the termination and re-tendering of the subject tender on account of the finding that none of the tenderers was responsive to the requirements under the Tender Document.

Professional Opinion

15. In a signed Professional Opinion dated 12th February 2024 (hereinafter referred to as the "Professional Opinion"), the Procuring Entity's SAD-Supply Chain Management, Ms. Leah Naisoi 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 termination of the subject tender
16. Thereafter on the same day, 12th February 2024, the Accounting Officer, Dr. Erustus Kanga, EBS, HSC expressed his concurrence with the Professional Opinion.

Notification to Tenderers

17. Accordingly, tenderers were notified of the outcome of the evaluation of the tenders in the subject tender vide letters dated 21st February 2024.

REQUEST FOR REVIEW

18. On 5th March 2024, the Applicant through the firm of S Kipkorir & Komen Law Advocates, filed a Request for Review dated 4th March 2024 supported by an Affidavit sworn on 4th March 2024 by Patrick Kipkosgei Chemelil, a Director at the Applicant, seeking the following orders from the Board in verbatim:

1. A declaration that the respondent's blanket decision terming the applicant's bid as non-responsive violates and falls short of the provisions of Articles 10 and 227 of the Constitution of Kenya and the provisions of the Public Procurement and Asset Disposal Act;

- 2. That the Procuring Entity's decision of 21st February 2024 to cancel the entire tenders [sic] be set aside;***
- 3. That the Procuring Entity be compelled to produce Evaluation Reports and the results thereof;***
- 4. That the Procuring Entity be and is hereby prohibited from re-advertising and or calling for submission of fresh bids on the subject tender pending the hearing and determination of this application for review;***
- 5. That the Respondent be compelled to finalize the evaluation process and issue awards in strict adherence to the provisions of Articles 10 and 227 of the Constitution of Kenya and the provisions of the Public Procurement and Asset Disposal Act;***
- 6. Any other or further relief or reliefs as the Board shall deem just and expedient; and***
- 7. That costs of this review be borne by the Respondent.***

19. In a Notification of Appeal and a letter dated 5th March 2024, 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 24th 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 5th March 2024.

20. On 11th March 2024, the Respondent through Ismene Feski-Advocate filed a Notice of Appointment and a Memorandum of Response, both dated 11th March 2024. The Respondent also forwarded to the Board the confidential documents in the subject tender pursuant to Section 67(3) (e) of the Act.
21. Vide letters dated 12th March 2024, 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 3 days from 12th March 2024. None of the tenderers filed any response.
22. On 18th March 2024, the Acting Board Secretary, sent out to the parties a Hearing Notice dated 18th March 2024 notifying parties and all tenderers in the subject tender that the hearing of the instant Request for Review would be by online hearing on 20th March 2024 at 1:00 p.m through the link availed in the said Hearing Notice.
23. On 20th March 2024, the Applicant filed Written Submissions dated 19th March 2024\.
24. On 20th March 2024, the the parties through their respective Advocates joined the scheduled online hearing session.
25. The Board read out to the parties the documents that had been filed in the Request for Review and sought for each party to confirm that each of

the said documents had been served upon them. Parties' Advocates confirmed having filed and been served with each of the documents in the Request for Review.

26. The Board then gave directions on the hearing and the order of address being that the Applicant would go first, thereafter the Respondent with the Applicant closing with a rejoinder on the Respondent's submissions.

PARTIES SUBMISSIONS

Applicant's Submissions

27. Counsel for the Applicant, Mr. Wanyama, indicated that the Applicant would be relying on its filed documents i.e. Request for Review and Written Submissions dated 4th March 2024 and 20th March 2024 respectively.
28. Counsel argued that the Respondent issued a letter terminating the subject tender without outlining the specifics or supporting material for the termination. According to Counsel, the failure to supply the reasons for such termination, was a breach of the values espoused under Article 10 and 227 of the Constitution of Kenya 2010 as well as the principles under Section 3 of the Act.
29. Relying on ***R v PPARB & another Ex parte SGS Kenya Limited***, Counsel submitted that a Procuring Entity is required to produce evidence to support grounds for termination and to the extent that the Respondent failed to provide the reasons for the termination of the subject tender, the Respondent was in breach of the Act.

30. Further, Mr. Wanyama argued that the Applicant met the requirements under the Tender Document. He argued that though the response from the Respondent indicates that the letter of Line of Credit from Kenya Commercial Bank was not referenced to the tender, the said letter should be read alongside the letter of authority at page 53 of the Applicant's tender. According to Counsel, the authority aptly captures the tender reference and that absence of a tender reference in the letter of line of credit was a mere formality. He submitted further that under Section 79 of the Act, a responsive tender should not be affected by minor deviations.
31. He relied on ***R v PPARB & anor; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex parte Tuv Austria Turk*** for the proposition that in cases of minor deviations, a Procuring Entity is required to ask for compliance on the part of the tenderer. Thus, in the present case, prudence required that the Procuring Entity requests the Applicant to furnish a letter of Line of Credit that is referenced to the tender.
32. Counsel noted that the Respondent in the response to the Request for Review indicated that the Applicant's bank balance was Kshs. 460,218.05 against the required Kshs. 2.5 Million. Mr. Wanyama submitted on behalf of his client that the Applicant provided a line of credit of Kshs. 20 Million from Kenya Commercial Bank that ought to have covered any shortfall.
33. On annual construction turnover of Kshs. 22 Million, Counsel referred the Board to page 75 of the Applicant's tender where he submitted that, the Applicant had provided its audited accounts for the years 2020, 2021 and

2022 with an average construction turnover of Kshs. 39,809,658, which surpasses the required Kshs. 22 Million.

34. Mr. Kipkorir, equally appearing for the for the Applicant argued that at the heart of the Request for Review was the conduct of the Procuring Entity and whether it acted in accordance with the Act in terminating the subject tender.
35. Counsel posited that the Respondent acted contemptuously towards the Applicant's request to be furnished with particulars as to why its tender was non-responsive. He indicated that the Applicant's request was met with a response that can only likened to the statement "go to the Board, we cannot offer you a response". Counsel argued that as an organization run on public funds, it ought to have handled the Applicant's inquiry in a better way as its conduct was devoid of accountability. He therefore asked the Board to allow the Request for Review.

Respondent's Submissions

36. Counsel for the Respondent, Ms. Feksi, argued that the Procuring Entity complied with the law in notifying the tenderers of the non-viability of the subject tender and that the reason was that none of the tenders was non-responsive.
37. She argued that the Respondent complied with Section 63 of the Act which outlines non-responsiveness of tenders as a reason for termination. According to Counsel there was no requirement under Section 63 of the Act for a Procuring Entity to particularize the reasons beyond those listed under Section 63 of the Act.

38. She further argued that the reason why the Applicant was found to be unresponsive to the requirements under the Tender Document cannot be termed as minor deviations. She highlighted that the reasons were contained in page 284 of the Respondent's Bundle and that the same were shared through the Tender Evaluation Report submitted on the Public Procurement Information Portal.
39. She submitted further that the Procuring Entity's response to the Applicant's inquiry did not deviate from the Act as it reiterated the position required by law and thus the Applicant could not argue that the termination of the subject tender was shrouded in mystery. Further, that the Respondent supplied documents supporting the reasons for termination of the subject tender to the Authority.

Applicant's Rejoinder

40. In a brief rejoinder, Counsel for the Applicant, Mr. Kipkorir, reiterated the position that a Procuring Entity must provide evidence supporting its grounds for terminating a tender and that the reason supplied by the Respondent in its letter terminating the subject tender could not reasonably be understood as providing cogent reasons as it simply indicated that the Applicant's tender was non-responsive without any particulars.

CLARIFICATIONS

41. The Board inquired from the Respondent whether its letter terminating the subject tender outlined the specific reasons as to why the Applicant's tender was non-responsive and whether such particulars ought to have been provided. Counsel for the Respondent, Ms. Feksi indicated that the

letter contained the reason as outlined under statute. Further that additional documents were not given to the Applicant as there was no such requirement under law.

42. The Board also sought for the Applicant to offer clarity on whether it supplied as part of its tender, completion certificates and bank statements for payment of at least Kshs. 22 Million for the last 3 years. Counsel for the Applicant, Mr. Kipkorir, indicated that the Applicant provided both completion certificates and bank statements and from the statements it is clear that the Applicant's average turnover was Kshs. 39,809,658 which was way above the Kshs. 22 Million requirement under the Tender Document.
43. The Board also requested the Applicant to clarify whether the Applicant provided a tender reference in its letter of line of credit to which Mr. Kipkorir answered in the affirmative. He however indicated that in the event that, the Tender reference was not provided in the said Letter, then that was a minor deviation that did not warrant the termination of the tender.
44. The Board invited the Applicant to offer its comment on the use of the word "shall" in the requirements under the Tender Document with respect to the letter of Line of Credit being referenced to the Tender. Counsel for the Applicant, Mr. Kipkorir pointed out that the word connoted something mandatory or obligatory.
45. The Board invited the Respondent to offer their comment on Sections 63(3) and 63(1) on the reasons for termination of a tender. Counsel for the Respondent Ms. Feksi indicated that the notification to the Authority

on the termination of a tender is more detailed as it constitutes a report but the notification to tenderers is less particularized as it is a mere notification.

46. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 5th March 2024 had to be determined by 26th March 2024. Therefore, the Board would communicate its decision on or before 26th March 2024 to all parties via email.

BOARD'S DECISION

47. 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:
- I. ***Whether the Procuring Entity properly terminated the subject tender?***
 - II. ***Whether the evaluation was conducted in accordance with the law and the subject Tender Document?***
 - III. ***What orders should the Board issue in the circumstance?***

Whether the Procuring Entity properly terminated the subject tender?

48. The Applicant brought the instant Request for Review taking issue with the manner in which the Respondent terminated the subject tender. Counsel for the Applicant, Mr. Wanyama, argued that the Respondent issued a letter terminating the subject tender without outlining the specifics or supporting material for the termination. According to Counsel,

the failure to supply the reasons was a breach of the values espoused under Articles 10 and 227 of the Constitution of Kenya 2010 as well as the principles under Section 3 of the Act. Additionally, it was Counsel's submission that in fact, the Applicant met all the requirements under the Tender Document.

49. Mr. Kipkorir, equally appearing for the for the Applicant posited that the Respondent acted contemptuously towards the Applicant's request to be furnished with particulars as to why its tender was deemed non-responsive.
50. On the flip side, the Respondent maintained that the termination of the subject tender was lawfully done under Section 63 of the Act as the reason for the termination of the tender was that all the submitted tenders were non-responsive.
51. Counsel for the Respondent, Ms. Feksi, argued that there was no requirement under Section 63 of the Act for a Procuring Entity to particularize the reasons beyond those listed under Section 63 of the Act. She further argued that the reason why the Applicant was found unresponsive to the requirements under the Tender Document cannot be termed as minor deviations. She highlighted that the reasons were contained in page 284 of the Respondent's Bundle and the same were also shared through the Tender Evaluation Report submitted on the Public Procurement Information Portal.
52. She argued that the Procuring Entity's response to the Applicant's inquiry did not deviate from the Act as it reiterated the position required by law and thus the Applicant could not argue that the termination of the subject

tender was shrouded in mystery. Further, that the Respondent supplied documents supporting the reasons for termination of the subject tender to the Authority.

53. From the foregoing, the Board is therefore invited to interrogate the lawfulness of the circumstances under which the subject tender was terminated, a subject that brings about a jurisdictional question on the appropriateness of the instant Request for Review being heard and determined by this Board.
54. This Board acknowledges the established legal principle that courts and decision-making bodies can only preside over cases where they have jurisdiction and when a question on jurisdiction arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before doing anything concerning such a matter in respect of which it is raised.
55. Black's Law Dictionary, 8th Edition, defines jurisdiction as:
"... the power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties ... the power of courts to inquire into facts, apply the law, make decisions and declare judgment; The legal rights by which judges exercise their authority."
56. On its part, Halsbury's Laws of England (4th Ed.) Vol. 9 defines jurisdiction as:
"...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision."

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

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction."

58. In the case of *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others [2013] eKLR*, the Court of Appeal emphasized the centrality of the issue of jurisdiction and held that:

"...So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain...."

59. This Board is a creature of statute owing to its establishment as provided for under Section 27(1) of the Act which provides that:

"(1) There shall be a central independent procurement appeals review board to be known as the Public Procurement Administrative Review Board as an unincorporated Board."

60. Further, Section 28 of the Act provides for the functions of the Board as:

"The functions of the Review Board shall be— reviewing, hearing and determining tendering and asset disposal disputes; and to perform any other function conferred to the Review Board by this Act, Regulations or any other written law."

61. The jurisdiction of the Board is provided for under Part XV – Administrative Review of Procurement and Disposal Proceedings and specifically at Section 167 of the Act which provides for what can and cannot be subject to review of procurement proceedings before the Board. More so sections 172 and 173 of the Act provides for the powers that the Board can exercise upon completing a review as follows:

PART XV — ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS

167. Request for a review

(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date

of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.

(2)

(3)

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

(a) the choice of a procurement method;

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

(c) where a contract is signed in accordance with section 135 of this Act. [Emphasis by the Board]

168.

169.

170.

171.

172.

172. Dismissal of frivolous appeals

Review Board may dismiss with costs a request if it is of the opinion that the request is frivolous or vexatious or was solely for the purpose of delaying the procurement proceedings or performance of a contract and the applicant shall forfeit the deposit paid.

173. Powers of Review Board

Upon completing a review, the Review Board may do any one or more of the following—

(a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;

(b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;

(c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;

(d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and

(e) order termination of the procurement process and commencement of a new procurement process.

62. Section 167 of the Act above, extends an opportunity to candidates and tenderers disgruntled with a public tender process to approach the Board for redress. However, subsection (4) of the Section divests the Board's jurisdiction on a myriad of subject matters including the termination of a procurement process.
63. Termination of public procurement proceedings is governed by Section 63 of the Act. Superior Courts of this country have on numerous occasions offered guidance on the interpretation of Section 167(4) of the Act and the ousting of the Board's jurisdiction on account of the subject matter relating to termination of tenders:

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

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

See also Nairobi High Court Judicial Review Misc. Application No. 117 of 2020; Parliamentary Service Commission v Public Procurement Administrative Review Board & Ors v Aprim Consultants

65. The above judicial pronouncements mirror the position of this Board in its previous decisions in ***PPARB Application No. 14 of 2024; Emkay***

Construction Limited v Managing Director, Kenya reinsurance Corporation Limited; PPARB Application No. 29 of 2023; Craft Silicon Limited v Accounting Officer Kilifi County Government & anor; and PPARB Application No. 9 of 2022; and PPARB Application No. 5 of 2021; Daniel Outlet Limited v Accounting Officer Numeric Machines Complex Limited

66. Drawing from the above judicial pronouncements, this Board will first interrogate the termination of the subject tender to establish whether the termination of the subject tender was in accordance with the requirements under Section 63 of the Act. It is only upon satisfying itself that the said requirements have been met, that the Board can down its tools in the matter. However, where any requirement has not been met, the Board will exercise its jurisdiction to hear and determine the Request for Review.

67. Section 63 of the Act, on termination of tenders provides as follows:

"63. Termination or cancellation of procurement and asset disposal Proceedings

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

(a) ...

(b) ...

(c) ...

(d) ...

(e) ...

(f) all evaluated tenders are non-responsive;

(g) ...

(h) ...

(i) ...

(2) An accounting officer who terminates procurement or asset disposal proceedings shall give the Authority a written report on the termination within fourteen days.

(3) A report under subsection (2) shall include the reasons for the termination.

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

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

69. Effectively, an Accounting Officer is under a duty to provide sufficient reasons and evidence to justify and support the ground of termination of the procurement process under challenge. The Accounting Officer must

also demonstrate that they have complied with the substantive and procedural requirements set out under the provisions of section 63 of the Act.

70. On the one hand, the substantive requirements relate to a Procuring Entity outlining the specific ground under section 63(1) of the Act as to why a tender has been terminated and the facts that support such termination.
71. On the other hand, the procedural requirements include the requirements under Section 63(2), (3), and (4) of the Act i.e. (i) the submission of a Written Report to the Authority on the termination of a tender within 14 days of such termination and (ii) the issuance of notices of termination of tender to tenderers who participated in the said tender outlining the reasons for termination within 14 days of such termination.
72. The Board shall now interrogate the circumstances under which the subject tender was terminated:
73. The Board has sighted the Procuring Entity's letter dated 21st February 2024 on the termination of the subject tender at page 668 of the Request for Review and the same is contained in the confidential file. The same is herein reproduced for ease of reference:

"KWS/ONTRMFL/35/202302024

INFINITY POOL LIMITED

P.O. BOX (Details withheld)

NAIROBI

TEL (Details withheld)

Email (Details withheld)

Dear Sir/Madam,

RE: ROUTINE MAINTENANCE OF OLD MURERA GATE-KINDANI-JUNCT 22 ROAD & RHINO BASE HQ- SIGNAGE 30 ROAD IN MERU NATIONAL PARK

We appreciate your participation in the tender for the Routine Maintenance of OLD Murera Gate-Kindani-Junct 22 Road & Rhino Base HQ-Signage 30 Road in Meru National Park. The Kenya Wildlife Service has thoroughly evaluated all the bids that were submitted, and we understand the work and time you dedicated to your proposal.

However, we regret to inform you that none of the bids were found to be responsive. We are sorry for any inconvenience this may have caused you.

We value your interest in doing business with us and encourage you to participate in our future tenders. We believe that your expertise and experience could be of great value to our organization, and we are looking forward to an opportunity to work together in the future.

Thank you for your time and effort.

Yours faithfully,

Signed

Leah Naisoi.

74. The above letter communicates to the Applicant that the subject tender was terminated for the reason that none of the submitted tenders in response to the invitation to tender in the subject tender was found to be

responsive. However, the letter does not communicate on the particulars as to why the Applicant's tender was non-responsive.

75. Superior courts in this country have previously offered guidance on this issue to the effect that termination notices under Section 63 of the Act should provide further information and go beyond the mere restatement of the grounds of termination listed under the said Section:
76. In ***Republic v Public Procurement Administrative Review Board Exparte Nairobi City & Sewerage Company; Webtribe Limited t/a Jambopay Limited (Interested Party) [2019] eKLR ; Nairobi High Court Judicial Review Application 437 of 2018*** the High Court considered a judicial review application challenging the decision of this Board that had found that the Procuring Entity irregularly terminated the tender under consideration. In dismissing the judicial review application, the Court sounded a warning to Procuring Entities that mere recitation of grounds of termination of a tender under Section 63 of the Act without information establishing the alleged ground of termination is insufficient to justify such termination as quoted below:

45. The mere recitation of the statutory language, as has happened in this case is not sufficient to establish the grounds or sufficient reasons. The reasons for the termination must provide sufficient information to bring the grounds within the provisions of the law. This is because the tender process and in particular, the termination, must be done in a transparent and accountable and legal manner as the law demands. This is because the question whether the information put forward is sufficient to place the termination within the ambit of the

law will be determined by the nature of the reasons given. The question is not whether the best reasons to justify termination has been provided, but whether the reasons provided are sufficient for a reasonable tribunal or body to conclude, on the probabilities, that the grounds relied upon fall within any of the grounds under section 63 of the Act. If it does, then the party so claiming has discharged its burden under section 63

77. The Procuring Entity's letter dated 21st February 2024 terminating the subject tender did not offer any specific reason(s) as to why the Applicant's tender in the subject tender was found to be non-responsive. The said letter simply mentions that the Applicant's tender was found non-responsive without giving particulars of the non-responsiveness. Plausibly, this vagueness informed the Applicant's Advocates letter dated 27th February 2024 being Annexure PK-4 annexed to the Affidavit of Patrick Kipkosgei in support of the Request for Review, which is hereinafter reproduced:

***"Director General
Kenya Wildlife Service
P.O. Box 40241-00100
NAIROBI
Email: kws@kws.go.ke***

Dear Sirs,

***RE: DEMAND FOR INFORMATION PURSUANT TO ARTICLE
35(1) OF THE CONSTITUTION OF KENYA AS READ TOGETHER
WITH SECTION 4 OF THE ACCESS TO INFORMATION ACT 2016***

2016 & SECTION 63(4) OF THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT, 2025

OUR CLIENTS ZERAKU CONSTRUCTION CO. LIMITED, KESUM HOLDINGS LTD AND IINFIINITY POOL LIMITED

We act for ZERAKU CONSTRUCTION CO. LIMITED, KESUM HOLDINGS LTD AND IINFIINITY POOL LIMITED

Our Client informs us that during the period ended 2023, the Service floated various tenders with an invitation to interested parties to bid. Pursuant thereto, Our Clients submitted bids for the following tenders

Zeraku Construction Company Limited- Tender No. KWS/ONT/RMFL/24/2023-2024 under Tender Name REHABILITATION AND PERFORMANCE BASED MAINTENANCE OF OL TUKAI (C103)-PARK BOUNDARY -MAKUTANO JUNCT (C102) ROAD IN AMBOSELI NATIONAL PARK

Kesum Holdings Limited- Tender No. KWS/ONT/RMFL/19/2023-2024 under Tender Name ROUTINE MAINTENANCE OF MTITO ANDEI (A109)- SALAITA ROAD E693 AND ZIWANI (JUNE E693)-MBUYUNI (A23) OAD IN TSAVO WEST NATIONAL PARK.

Infinity Pool Limited- ROUTINE MAINATENANCE OF OLD MUREGA GATE KINDANI-JUNCT 22 RAOD & RHINO BASE HQ-SIGNAGE 30 ROAD IN MERU NATIONAL PARK.

Having complied with all the requirements as obligated under the aforesaid tenders, our clients had well-founded legitimate

expectation to win the awards and, in the alternative, to be offered with a plausible reason(s) for failure to award. Notably, vide letters (dated and undated), you issued notices to our clients informing them that none of the bids submitted by all the parties were responsive. Our Client reads foul play and mischief in the said blanket communique. The reason, albeit outlined in law requires additional evidentiary material of probative value. Accordingly, the reasons advanced by yourselves are bereft of specifics and particulars hence falling short of the required legal threshold established in law and espoused in the spirit of Our Constitution. It is a mere recital of the statutory language.

Premised on the foregoing, our instructions are to demand, and we hereby DO THAT:

- a) You furnish us with the copies of the evaluation report for the tenderers in the respective tenders; and***
- b) You stop forthwith any process and or intention to readvertise the subject tenders pending the resolution of the subject issue.***

TAKE NOTICE that unless we receive WITHIN THREE (3) days of the date hereof the copies of the evaluation report and a written undertaking in terms of demand (c) above, our instructions are to move to the appropriate forum for orders that

- a) The decision to cancel the entire tenders be quashed and be declared null and void;***

- b) The procuring entity be compelled to produce the evaluation reports and the results thereof for all the forty-two (42) tenders ; and***
- c) The procuring entity be compelled to finalise the evaluation process and issue awards in strict adherence to the Public Procurement & Asset Disposal Act.***
- d) All the officers responsible be personally and jointly held to account for this grievous harm to the bidders on a full indemnity basis including but not limited to being cited for abuse of office and public trust.***

FURTHER NOTICE that our client reserves the right to prosecute this claim in the court of public opinion both on the mainstream media and social media platforms.

We trust that this shall not be necessary and look forward to receiving your positive response within the afore-stipulated deadline.

FOR:- S. KIPKORIR & KOMEN LAW

Yours faithfully

Signed

S. KIPKORIR

CC:

- 1. Clients***
- 2. Public Procurement Regulatory Authority***
- 3. The Public Procurement Administrative Review Board***

78. The Board has equally sighted the Respondents letter dated 27th February 2024 in response to the above letter:

"27th February 2024

Kipkorir & Komen Advocates

P.O. Box (Details Withheld)

Nairobi

Email: (Details withheld)

Dear Sir,

RE: DEMAND FOR INFORMATION PURSUANT TO ARTICLE 35(1) OF THE CONSTITUTION OF KENYA AS READ TOGETHER WITH SECTION 4 OF THE ACCESS TO INFORMATION ACT 2016 2016 & SECTION 63(4) OF THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT, 2025

Reference is made to your letter ref SKK/2023/50 dated 27th February 2024.

The report was reviewed by the head of the procurement section under Section 63(1) of the PPADA 2025 and Reg. 48(1) of the PPADR, 2020 and confirmed that the tenders were non-responsive. Furthermore, all bidders who participated in the procurement process were formally advised citing the outcome of the evaluation process of the tenders as due process demands.

We further wish to notify you that the termination process is complete, all bidders were informed as per section 63(4) of

the PPADA 2015 reported to the Public Procurement Regulatory Authority (PPRA) as per section 63(2) of the same. As a public entity, Kenya Wildlife Service continues to adhere to Article 227(1) of the Constitution of Kenya, 2010 and strictly complies with the Public Procurement and Asset Disposal Act, 2015. We always ensure that all our procurement processes are fair, equitable, competitive and cost-effective. In the spirit of transparency, kindly note that you are at liberty to make any procurement-related complain on the PPRA website info@pppra.go.ke or complaints@pppra.go.ke as guided by part ITT 50.1 of the tender document.

We hope that the information provided herein will suffice and in the event you need further clarification, please do not hesitate to contact us.

Yours faithfully,

Signed

Dr. Erustus Kanga, EBS, HSC

DIRECTOR GENERAL

79. From the letter dated 27th February 2024 above, the Procuring Entity restated that all the tenders in the subject tender were non-responsive and that this was communicated to the tenderers. Further that the Authority had been furnished with a report on the termination of the subject tender. The Respondent further communicated in the said Letter that the Applicant was at liberty to seek further clarification or file a procurement related complaint on the Authority's website. However, the letter still did not outline the specific reason(s) as to why the Applicant's

tender was found to be non-responsive to the requirements under the Tender Document.

80. Guided by the ***Nairobi City & Sewerage Company Case*** above, the Board finds that the termination notice contained in the Procuring Entity's letter dated 21st February 2024 and addressed to the Applicant was not written in accordance with the provisions of Section 63 of the Act as it did not state the reason(s) **that *provide sufficient information to bring the reason of non-responsiveness of the Applicant's Tender within the provisions of the law.***
81. The Board does not agree with the Applicant's Counsel's submission that the Procuring Entity was not obligated under Section 63 of the Act to disclose to the individual tenderers the reasons for the disqualification of their tenders. We say so because, participants in any tender that has been terminated have a legitimate expectation to know the circumstances under which the tender has been terminated for them to make an informed decision on whether to challenge any such termination or not.
82. Further, Article 227(1) of the Constitution of Kenya, 2010 underpins the principles of transparency and openness in the conduct of public tenders. It would therefore be a contravention of the said Article for a Procuring Entity not to communicate to all the tenderers who participated in the tender, the details as to why the tender is being terminated. Accordingly, the Procuring Entity should have disclosed to the individual tenderers in the notification of termination of the tender the specific reason(s) why their tenders were unsuccessful.

83. Having been notified of its failure to furnish the detailed reasons for the termination in the letter terminating the tender by Counsel for the Applicant vide its letter dated 27th February, 2024, the Procuring Entity should have taken the opportunity to explain the reasons behind the termination when they received the Applicant's Advocates' letter dated 27th February 2024.
84. To fully satisfy the substantial requirement under Section 63 of the Act, the Respondent as the Accounting Officer had the onus of leading evidence to prove evidence on reason for termination. However, in view of the Board's observation that the undated letter of termination did not specify the reasons behind the unresponsiveness of the tenders in the subject tender, the Respondent effectively failed to meet the substantial requirement under the subject tender.
85. Turning to the procedural requirement i.e. on sending notifications on termination to the tenderers and preparation of a Written Report to the Authority, the Respondents produced the letters dated 31st January 2024, and 22nd February 2024 respectively.
86. First, on notifications to the tenderers, the Respondents exhibited letters of termination dated 21st February 2024 and addressed to each of the tenderers, notifying them of the termination of the subject tender. Copies of the said letters are also part of the Confidential Documents submitted to the Board. The Applicant did not contest having been served with its copy of the said letter within the statutory 14 days' timeline. The Board therefore presumes that the same was regularly served within the statutory timelines.

87. Turning to the Report to the Authority, the Respondent indicated at paragraph 22 of the response to the Request for Review that the Authority had been notified of the termination of the subject tender. During hearing, Counsel for the Respondent Ms. Feksi argued that a Report was filed on the Public Procurement Information Portal. The Applicant did not contest this and therefore the Board presumes that the Authority was notified of the termination of the subject tender within statutory 14 days. The Board therefore finds that the Report to the Authority was duly submitted.
88. In view of the foregoing, the Respondents satisfied the procedural requirements but failed to meet the substantive requirement for termination of a tender as contemplated under Section 63 of the Act.
89. Accordingly, the Procuring Entity did not terminate the subject procurement process in accordance with Section 63 of the Act and thus the jurisdiction of the Board over the instant Request for Review is not ousted. We will accordingly proceed to adjudicate on this matter and give our determination on the request for review.

Whether the evaluation was conducted in accordance with the law and the subject Tender Document?

90. The Applicant took issue with the manner in which its tender was disqualified for being non-responsive to the requirements under the Tender Document. Counsel for the Applicant Mr. Wanyama argued that the Applicant met the requirements under the Tender Document. He argued that though the response from the Respondent indicates that the letter of line of credit from Kenya Commercial Bank was not referenced,

the said letter should be read alongside the letter of authority at page 53 of the Applicant's tender. According to Counsel the authority aptly captures the tender reference and that absence of a tender reference in the letter line of credit was a mere formality. He submitted that under Section 79 of the Act, a responsive tender is not affected by minor deviations, that could have been cured by asking for compliance on the part of the Applicant. Thus, in the present case, prudence required that the Procuring Entity requests the Applicant to furnish it with the tender reference.

91. Counsel noted that the Respondent in the response to the Request for Review indicated that the Applicant's bank balance was Kshs. 460,218.05 against the required Kshs. 2.5 Million. Mr. Wanyama argued that the Applicant had provided a line of credit of Kshs. 20 Million from Kenya Commercial Bank to cover for any shortfall.
92. On annual construction turnover of Kshs. 22 Million, Counsel referred the Board to page 75 of the Applicant's tender where it provided the audited accounts for the years 2020, 2021 and 2022 and noted that the average construction turnover of the Applicant was Kshs. 39,809,658, which surpasses the required Kshs. 22 Million.
93. On the flip side, the Respondent maintained that the evaluation of the tenders leading to the termination of the subject tender was properly conducted in compliance with the Act and Regulations 2020. Counsel for the Respondent, Ms. Feksi, argued that the reason why the Applicant was found to be non-responsive to the requirements under the Tender Document cannot be termed as a minor deviation. She highlighted that the reasons were contained in page 284 of the Respondent's Bundle and

that the same were shared through the Tender Evaluation Report submitted on the Public Procurement Information Portal.

94. The Board is therefore invited to interrogate the circumstances leading to the disqualification of the Applicant's tender
95. For starters, 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 tenders

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

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

96. 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; 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.”

97. 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 [sic] 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 ***Nairobi High Court Judicial Review Misc. Application No. 407 of 2018; Republic v Public Procurement Administrative Review Board; Arid Contractors & General Supplies (Interested Party) Ex parte Meru University of Science & Technology [2019] eKLR.***

98. 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 specifications of the actual requirement as set out in the Tender Document.
99. The Respondent in their response to the instant Request for Review cited the following 3 reasons for finding the Applicant’s tender to be non-responsive:
 - i. The Letter of line of credit from Kenya Commercial Bank availed by the Applicant was not tender referenced which was a mandatory requirement under Technical Evaluation Part A.
 - ii. The Applicant’s furnished bank statements indicated a bank balance of Kshs. 460,218.05, way below the required Kshs. 2.5 Million;
 - iii. The Applicant failed to meet the annual construction turnover of Kshs. 22 Million.

100. The Board shall now examine each of the above reasons against the provisions of the Tender Document in order to determine the responsiveness or otherwise of the Applicant's Bid. Clause 3 of the Tender Document, at pages 39 to 42 of the Document provides as follows:

3. Assessment of adequacy of Technical Proposal with Requirements

Kenya Wildlife Service will evaluate the Technical Proposals of all responsive tenders using the following criteria, sub-criteria and assessment system for the evaluation of the Technical Proposals

TECHNICAL EVALUATION CRITERIA Part A				
Item No.	Qualification subject	Qualification Requirement	Documents To be Completed and Submitted by the Tenderer	For KWS Use (Qualification Met or Not Met)
(i) Financial Evaluation				
1	Financial Capabilities	(i)The tenderer shall demonstrate that it has access to, or has available liquid assets, unencumbered real assets, lines of credit, and other financial means (independent of any contractual advance payment) sufficient to meet the	Form FIN-3.1, with attachments The Tenderer to provide sources of funding meeting the requirements in the form of:- (i)Sources of Finance The Tenderer to provide sources of funding meeting the requirements in the form of: • Line of credit (The document shall be original, referenced to the tender and signed on the financial	

		<p><i>construction cashflow requirements estimated as Kenya Shillings 2.5 Million equivalent for the subject contract(s) net of the Tenderer's other commitments.</i></p> <p><i>(ii)The Tenderers shall also demonstrate, to the satisfaction of Kenya Wildlife Service, that it has adequate sources of finance to meet the cashflow requirements in works currently in progress and for future contract commitments</i></p> <p><i>(iii)The audited balance sheets or, if not required by the laws of the Tenderer's country, other financial statements acceptable to Kenya Wildlife Service, for the last 3 years shall</i></p>	<p><i>institution's letterhead containing the addresses and contact information)</i></p> <ul style="list-style-type: none"> • <i>Bank statement (Current last 6 months from the date of tender opening/closing and authenticated by the issuing financial institution.</i> • <i>Unencumbered real assets (evidence in the form of duly certified (by registered valuer /realtors) copy of : title deed, recent search and valuation report within the last 6 months). The real assets should be in the name of the tenderer or at least one of the directors</i> • <i>Any other authorized credit facility accredited by relevant laws in Kenya (e.g. Youth Fund, Sacco, Women Enterprise Fund etc)</i> <p><i>The above sources of funding should either be cumulatively or individually equivalent to 2.5 Million, net of the Tenderer's other commitments</i></p> <p><i>(ii)Financial Ratio</i></p> <p><i>Provide fully filled signed and stamped computations of the financial ratios in the Form</i></p>	
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		<p><i>be submitted and must demonstrate the current soundness of the Tenderer's financial position and indicate its prospective long-term profitability</i></p>	<p><i>FIN-3. The form to be signed by the auditor registered by the auditor registered with IICPAK and one of the directors.</i></p> <p><i>Computation shall be made for the following ratios and marks awarded to each of the ratios:</i></p> <p><i>Liquidity ratio(>/1)</i></p> <p><i>Return on Capital Employed (ROCE) >/5%</i></p> <p><i>(iii) Audited Accounts</i></p> <p><i>a) Provide the above with all pages initialized and stamped by a practicing auditor registered with ICPAK and One of the Directors</i></p> <p><i>b) Auditor's practicing membership number must be indicating and a copy of the valid practicing licence attached.</i></p>	
2.	<p><i>Average Annual Construction Turnover</i></p>	<p><i>Minimum average annual construction turnover of Kenya Shillings 22 Million equivalent calculated as total certified payments received for contracts in progress and/or completed</i></p>	<p><i>Properly fill, sign and stamp FIN-3.2</i></p> <p><i>Attach duly certified copies of letters of award and completion certificates/ taking over certificates for each project</i></p>	<p><i>Met/ Not Met</i></p>

		<i>within the last 3 years, divided by 3 years</i>		

101. From the above, a tenderer was required to demonstrate financial capability to access liquid assets or unencumbered property sufficient to meet a construction cashflow of Kshs. 2.5 Million. To demonstrate such capability, a tenderer was to furnish as part of its tender a duly filled Form FIN-3 and attach documents showing sources of financing and this included a line of credit, bank statement and property titles.

i. Alleged failure to reference the subject tender in the Letter of line of credit from Kenya Commercial Bank

102. Where a line of credit was used, the Tender Document required that its document be original, **referenced to the tender** and signed on the financial institution's letterhead containing the address and contact information. Accordingly, where a tenderer opted for a line of credit but failed to have the letter of line of credit comply with the requirements aforesaid, their tender would be deemed to be non-responsive.

103. The Board has studied the Applicant's tender and spotted the Applicant's Line of Credit document from Kenya Commercial Bank at page 85 of the Applicant's tender. The document is hereinafter reproduced:

14th Dec 2023

Director General

Kenya wildlife Service

P.O. Box 41241-00100

Nairobi, KENYA

Dear Sir/Madam,

RE: INFINITY POOL LIMITED ACCOUNT NO. 1283179369

This is to confirm that INFINITY POOL LIMITED is our valued customer of good standing and the conduct of the account is satisfactory with a credit line limit of KES 20,000,000.00 subject to our terms and conditions.

Any assistance will be highly appreciated.

This information is given in strict confidence for private use only, without any obligations or liability on the part of the Bank or any of its officials.

Signed

Yours faithfully,

FRANK KOIMETT

MANAGER SQC

Cc: Regional Business Manager, Great Rift Region

104. From the above letter, it is clear that the same is not referenced to the subject tender and therefore in breach of the requirement under the Tender Document, that where a line of credit document is attached, the same ought to be referenced to the tender.
105. It was submitted on behalf of the Applicant that the failure to reference the letter of Line of credit to the tender was a minor deviation. However,

a scrutiny of the Tender document on requirements for attachments to Form-FIN 3.1 reveals that the requirement for the letter of Line of Credit was couched in mandatory terms, to wit: the document **shall** be original, **referenced to the tender** and signed on the financial institution's letterhead containing the address and contact information. It then follows that the use of the modal verb **shall** made compliance with the requirement of referencing the Letter of Line of credit to the tender, mandatory. It could therefore not be termed as a minor deviation as submitted by counsel for the Applicant.

106. Guided by the dictum of the High Court in the ***BABS Security Services Limited Case*** above, that failing to disqualify tenders non-compliant to tender requirements amounts to unfairness to compliant tenders, we then proceed to find, which we hereby do, that the Evaluation Committee's disqualification of the Applicant on the said ground of failure to reference the Letter of line of credit to the subject tender was indeed merited.

107. The Applicant's failure in that regard cannot and should not be deemed to be minor deviation, since doing so, would be excusing it from a mandatory requirement under the Tender Document when the other tenderers went to great lengths to ensure compliance with the requirement.

ii. Alleged failure to meet the Construction Cashflow of Kshs. 2.5 Million

108. From the above excerpt of the Tender Document, a tenderer was required to demonstrate having construction cashflow of Kshs. 2.5 Million and different sources of funding were listed including lines of credit, bank statements, valuation reports etc. The Tender Document did not however indicate that the source of financing should be wholly from a single source.
109. The Applicant produced bank statements from Kenya Commercial Bank indicating a bank balance of Kshs. 460,218.05, and equally provided a letter of line of credit from the same bank for Kshs. 20 Million. The Board therefore finds fault in the Evaluation Committee's disqualification of the Applicant on the ground that its bank balance was below Kshs. 2.5 Million as the Applicant had demonstrated it had access to a credit limit of up to Kshs. 20 Million from Kenya Commercial Bank and this amount surpassed the required construction cashflow of Kshs. 2.5 Million.

iii. Alleged failure to meet the Annual Construction turnover of Kshs. 22 Million.

110. The Tender Document as reproduced above required a tenderer to demonstrate having an average construction turnover of Kshs. 22 Million for the last 3 years . Regarding this requirement, a tenderer had to submit a duly filled Form FIN-3.2 and certified copies of letters of award, completion certificates and taking over certificates.
111. The Board has perused the Applicant's tender and spotted at pages 144 to 151, 2 sets of letters of award and Completion Certificates of works

done for the County Government of Nandi and Kenya Red Cross valued at Kshs. 9,393,926 and Kshs. 13,790,412 respectively. The said letters are also for the years 2022 and 2023. The Board has also spotted 2 other completion Certificates for Works the Applicant undertook for the County Government of Baringo in 2023 and are valued at Kshs.2,481,008 and 2,485,977.64 respectively.

112. Two comments suffice at this stage. First, the Applicant supplied documents in respect of 4 construction projects it had undertaken in response to the requirement for Annual Construction Turnover under the subject tender. Secondly, when the average annual turnover is computed for the provided set of documents the same comes to Kshs. 7,037,830.91 which is below the Kshs. 22 Million annual threshold required under the Tender Document. The Board therefore finds that the Evaluation Committee was correct in disqualifying the Applicant on account of the requirement minimum annual construction turnover.
113. In light of the foregoing analysis, the Board finds that the evaluation was conducted in accordance with the law and the subject Tender Document.

What orders the Board should grant in the circumstances?

114. The Board has found that the Procuring Entity did not terminate the subject procurement process in accordance with Section 63 of the Act and thus the jurisdiction of the Board over the instant Request for Review is not ousted.
115. The Board has equally found that the Procuring Entity's Evaluation Committee properly disqualified the Applicant from the subject tender.

116. The upshot of our finding is that the Request for Review dated 4th March 2024 in respect of Tender No KWS/ONT/RMLF/35/2023-2024 for Routine Maintenance of Old Murera Gate-Kindani-Junct 22 Road & Rhino Base Hq- Signage 30 Road in Meru National Park partially succeeds in the following specific terms:

FINAL ORDERS

In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review dated 4th March 2024:

- A. The Procuring Entity's letter dated 21st February 2024 issued to the Applicant and other tenderers in the subject tender communicating the decision to terminate the procurement proceedings with respect to Tender No. KWS/ONT/RMLF/35/2023-2024 for Routine Maintenance of Old Murera Gate-Kindani-Junct 22 Road & Rhino Base Hq- Signage 30 Road be and is hereby nullified and set aside.**
- B. The Respondent be and is hereby directed to issue fresh letters terminating Tender No. KWS/ONT/RMLF/35/2023-2024 for Routine Maintenance of Old Murera Gate-Kindani-Junct 22 Road & Rhino Base Hq- Signage 30 which shall include particulars of and the reasons for the termination within 14 days of this decision.**

c. The Respondent is hereby ordered to ensure that the procurement process with respect to Tender No. No. KWS/ONT/RMLF/35/2023-2024 for Routine Maintenance of Old Murera Gate-Kindani-Junct 22 Road & Rhino Base Hq-Signage 30 Road proceeds to its logical conclusion taking into consideration the Board's findings herein.

D. Given the subject procurement proceedings are not complete; each party shall bear its own costs in the Request for Review.

Dated at NAIROBI, this 26th Day of March 2024.



.....

PANEL CHAIRPERSON

PPARB



.....

SECRETARY

PPARB