

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 43/2024 OF 13TH MAY 2024

BETWEEN

KISUMU EARTH MOVING AND MINING LIMITEDAPPLICANT

AND

MINISTRY OF TOURISM AND WILDLIFE,

STATE DEPARTMENT FOR WILDLIFE.....1ST RESPONDENT

ACCOUNTING OFFICER,

MINISTRY OF TOURISM AND WILDLIFE,

STATE DEPARTMENT FOR WILDLIFE.....2ND RESPONDENT

Review against the decision of the Accounting Officer, Ministry of Tourism and Wildlife, State Department for Wildlife in relation to Tender No. SDW/ONT/013/2023-2024 for Construction of Water Pans in Various Parts of Kenya.

BOARD MEMBERS PRESENT

1. Mr. George Murugu, FCI Arb - Chairperson
2. Mr. Joshua Kiptoo - Member
3. Ms. Jessica M'mbetsa - Member

IN ATTENDANCE

- Mr. Philemon Kiprop - Secretariat
- Mr. Anthony Simiyu - Secretariat

Submission of Tenders and Tender Opening

2. According to the signed Tender Opening Minutes dated 21st February 2024, submitted under the Confidential File submitted by the Procuring Entity, the following seventy-three (73) tenders were recorded as having submitted in response to the subject tender by the tender submission deadline:

#	Name of Tenderer
1.	Startback Engineering and Consulting Limited
2.	Brlal Supplies Limited
3.	Earth Construction Ltd
4.	Miti Kwanza Africa Ltd
5.	Bfc Africa Ltd
6.	Aim Growth K Ltd
7.	Pioneer Engineering Construction Ltd
8.	Zavon Ltd
9.	Fahawanmasile Company Ltd
10.	Gray Void Engineering Ltd
11.	Sentro Ent Ltd
12.	Abyey Ltd
13.	Maow Holdings Ltd
14.	Rimda Supplies Ltd
15.	Restah Co. Ltd
16.	Roks Trading Co. Ltd
17.	Mairer Gen Supplies Ltd
18.	Soft Provider Company
19.	Arclife Construction Ltd

20.	Kyl Ellys Ltd
21.	Prime Build Ltd
22.	Prime Build Ltd
23.	Six Eleven Energy Contractors Ltd
24.	Tsalim Global Ventures Ltd
25.	Easyway Gen Trading and Transporters Ltd
26.	Maimen Enterprise Ltd
27.	Ultimate Planet Ltd
28.	Aftich East Africa Ltd
29.	Wizpro Enterprise Ltd
30.	Oloip Gen Construction Ltd
31.	Hydratech Building Contractors and Supplies Ltd
32.	Lastborn Investments Ltd
33.	Maimen E. Ltd
34.	AliImran Investment Ltd
35.	Sakenya Ltd
36.	Smartways Holdings Ltd
37.	Calsdan Gen Ltd
38.	Moonlight Con Ltd
39.	Northface Investment Ltd
40.	Next Solution Ltd
41.	Nepro Capital Investment Ltd
42.	Nepro Capital Investment Ltd
43.	Hosani East A Ltd
44.	Borderland Systems Co. Ltd
45.	Abro Links Ltd
46.	Jikmir Enterprises Ltd
47.	Adabla Co. Ltd

48.	Abmo Links Ltd
49.	Samlex Investment Ltd
50.	Maimen Ent Ltd
51.	Property World Ltd
52.	Kilda Investments Ltd
53.	Dadsons Services Ltd
54.	Infotrac Investment Ltd
55.	Keema Investment Ltd
56.	Finwork Development Ltd
57.	Specla Construction Ltd
58.	Rightleap Solutions Ltd
59.	Keema Investment Ltd
60.	Visrom Co. Ltd
61.	Patience Services Ltd
62.	Jesken Enterprises Ltd
63.	Kisumu Earth Moving and Mining Co. Ltd
64.	Bansu General Trading
65.	Waki Clearing and Forwarding Agents Ltd
66.	Hakmoh Enterprises Ltd
67.	Jan Container Solutions Ltd
68.	Eco Dynamic Solutions Ltd
69.	Eco Dynamic Solutions Ltd
70.	Eldan Co Ltd
71.	Chridal Enterprises Ltd
72.	Abyey Co. Ltd
73.	Ebrahimis Mohammed Kassim General Contractors Ltd

Evaluation of Tenders

3. The Procuring Entity's Accounting Officer constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") to undertake an evaluation of the received tenders in the following 4 stages as captured in the Evaluation Report
 - i. Preliminary Evaluation
 - ii. Technical Evaluation
 - iii. Financial Evaluation
 - iv. Recommendation

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 at pages 31 of 130 to 33 of 130 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 the evaluation at this stage, 41 tenders, including that of the Applicant, were established as non-responsive with only 28 tenders being found responsive and thus qualifying for further evaluation at the Technical Evaluation Stage.

Technical Evaluation

7. The Evaluation Committee was required at this stage to examine tenders successful at the Preliminary Stage using the criteria set out as Table 2: Evaluation on Capacity to Deliver the Contract under Section III – EVALUATION AND QUALIFICATION CRITERIA at pages 33 of 130 to 35 of 130 of the Tender Document.
8. Tenders were to be evaluated against the requirements at this stage, which requirements contained a weighted score. In order to qualify for further evaluation, a tenderer had to garner a minimum score of 70 marks.
9. At the end of the evaluation at this stage, 12 tenders were found unresponsive with only 16 tenders qualifying for further evaluation at the Financial Evaluation Stage.

Financial Evaluation

10. At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the Criteria set out as Stage 3: Financial Evaluation/ price evaluation under Section III– EVALUATION AND QUALIFICATION CRITERIA at page 35 of 130 of the Tender Document.
11. The tenders were at this stage separated in accordance with the Lots that tenderers tendered. The tender prices in tenders were then to be compared and the successful tender would be that established as the lowest evaluated tender successful tender under any Lot would be the tender whose tender price is established to be the lowest under that specific lot.

12. At the end of the evaluation at this stage, it was established that the tenders of the following tenderers were established as the lowest evaluated tenders under each of the lots:

- i. Lot 1- Maow Holding Limited
- ii. Lot 2- AliImran Investment Limited
- iii. Lot 3- Bansu General Trading
- iv. Lot 4- Jesken Enterprises Limited
- v. Lot 5- Abyey Company Limited

Recommendation

13. At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the Criteria set out as Stage 4: Recommendation under Section III– EVALUATION AND QUALIFICATION CRITERIA at page 35 of 130 to 36 of 130 of the Tender Document.

14. The Evaluation Committee was at liberty to conduct due diligence on the tenderers submitting the lowest evaluated tenders under their respective lots.

Evaluation Committee's Recommendation

15. Accordingly, the Evaluation Committee recommended the award of the 5 Lots of the subject tender to the above 5 tenderers at their respective tender prices.

Professional Opinion

16. In a Professional Opinion dated 23rd April 2024 (hereinafter referred to as the "Professional Opinion"), the Procuring Entity's Deputy Director, Supply Chain Management Service, Mr. Justus M. Areri 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.

17. On 24th April 2024, the Procuring Entity's Accounting Officer, Ms. Silvia Museiya concurred with the Professional Opinion .

Notification to Tenderers

18. Accordingly, the tenderers was notified of the outcome of the evaluation of the tenders in the subject tender vide letters dated 29th April 2024.

REQUEST FOR REVIEW

19. On 13th May 2024, the Applicant through the firm of Triple OK Law Advocates LLP, filed a Request for Review dated 9th May 2024 supported by an Affidavit sworn on 9th May 2024 by John Otieno Ochieng, a Director at the Applicant, seeking the following orders from the Board in verbatim:

- a) The Notification of Award letter dated 29th April 2024 and the decision it contains that the Applicant's bid did not conform with MR12 be nullified and set aside;*
- b) The award of the Tender to M/S Maow Holdings Limited and M/S AliImran Investment Limited in respect to Lot 1 and 2 be nullified and set aside;*
- c) A declaration be issued declaring the Applicant's bid successful in respect to Lots Number 1 and 2 in respect of TENDER NO: SDW/ONT/013/2023-2024 for being the lowest evaluated bid;*
- d) The Respondents pay the costs of the Request for Review;*

e) Such other reliefs and the Board deems just and expedient.

20. In a Notification of Appeal and a letter dated 13th May 2024, Mr. James Kilaka, the Acting Board Secretary of the Board notified the Respondents 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 Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondent were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 13th May 2024.
21. On 21st May 2024, the Respondents filed response in the form of a letter dated 17th May 2024 by one John Chelimo on behalf of the Accounting Officer. The Respondents also forwarded to the Board the Confidential Documents pursuant to Section 67(4) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act").
22. On 23rd May 2024 the Applicant filed a Further Statement in the form of an Affidavit sworn on even date by John Otieno Ochieng.
23. On 24th May 2024, the Acting Board Secretary, sent out to the parties a Hearing Notice notifying parties that the hearing of the instant Request for Review would be by online hearing on 29th May 2024 at 11:00 a.m. through the link availed in the said Hearing Notice.
24. On 28th May 2024, the Applicant filed their Written Submissions dated 28th May 2024.

25. On 29th May 2024 at 11:00 a.m., when the Board convened for the online hearing, only Counsel for the Applicant and the Applicant's representatives were present. The Respondents were unrepresented despite being notified of the details of the hearing. The Board was equally not quorate and in the circumstances directed that hearing be adjourned to 30th May 2024 with directions to the Secretariat to inform the Respondents of the new date.
26. On 30th May 2024 at 11:00 a.m., when the Board reconvened for the online hearing the Respondents were once again not present. Counsel for the Applicant and the Applicant's representatives were nonetheless present. The Respondents' absence of representation was despite the Secretariat's service upon them of the Board's directions of the hearing being adjourned to 30th May 2024 at 11:00 a.m.
27. The Board once again adjourned the hearing to 31st May 2024 at 11:00 a.m. with directions that the Respondents be served with the new hearing date. The Board equally directed that the scheduled hearing of 31st May 2024 would proceed notwithstanding the absence of any party.
28. On the same day, 30th May 2024, immediately after the adjourned hearing session, the Secretariat sent a copy of the Board's directions to the Respondents by way of email. This was also followed up by a telephone call to the Respondents reminding them of the hearing scheduled for 31st May 2024.
29. Once again ,when the Board reconvened on 31st May 2024 at 11:00 a.m. for the online hearing the Respondents were still absent and unrepresented. Counsel for the Applicant Mr. Njuguna was present

alongside other representatives from the Applicant. Having satisfied itself that the Respondents were notified of the day's hearing, the Board proceeded to issue directions for the Applicant to prosecute its Request for Review.

30. The Board read out to the Applicants all documents including the Respondents that had been filed in the Request for Review and sought that they to confirm that each of the said documents had been served upon it.

PARTIES SUBMISSIONS

Applicant's Submission

31. Counsel for the Applicant, Mr. Njuguna, submitted that the Respondents, under an open tender, invited suppliers to submit their tenders in respect of the subject tender which had 5 Lots. Further, that the Applicant submitted what it termed a responsive tender in respect of Lots 1 and 2 of the subject tender.
32. Mr. Njuguna argued that the Applicant was therefore surprised when on 29th April 2024 it received a Notification of Intention to Award communicating that it was unsuccessful in the subject tender for non-compliance with Mandatory Requirement No. 12 which required tenderers to indicate the tender validity period on their Form of Tender submitted under its tender.
33. Counsel contended that the Applicant had indicated the tender validity period on its Form of Tender forming part of its submitted tender and therefore it was erroneous on the part of the Respondents to disqualify the Applicant on such an account.

34. Mr. Njuguna argued that the Applicant sought a debriefing session with the Respondents where it emerged that the Applicant was indeed compliant with Mandatory Requirement No. 12 on indicating the tender validity period on the Form of Tender. He however indicated that the Respondents attempted to cite other alternative reasons that were not previously communicated in the notification for the Applicant's disqualification of 29th April 2024.
35. Counsel contended that the evolving streak of reasons cited by the respondent not contained in the previous notification spilled to the present proceedings such that the Respondents' response to the Request for Review purported to give new and distinct reasons for the Applicant's disqualification from the subject tender. He submitted that the cited reasons were variously false, not premised on the Tender Document or not material deviation from the tender requirements.
36. Mr. Njuguna relied on ***Republic v Pubic Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex parte Tuv Austria Turk [2020]eKLR*** for the proposition that Procuring Entities should consider tenders when they contain material deviations that do not alter or depart from the requirements under a Tender Document.
37. Counsel equally relied on ***Republic v Public Procurement Administrative Review Board & anor Ex parte Hyosung Ebara Company Limited [2011]eKLR*** faulting the Respondents for introducing an evaluation criteria not provided for in the Tender Document.

38. Counsel for the Applicant argued that it was not open for the Respondents to give varied reasons for the disqualification of the Applicant. He contended that the reason for disqualification of the Applicant, if any, ought to be indicated in the Notification of Intention to Award under Section 87(3) of the Act.
39. Relying on ***Republic v Public Procurement administrative Review Board & 2 Ors Ex parte Coast Water Services Board & anor [2016]eKLR*** Counsel for the Applicant argued the Respondents were under a duty to give a full disclosure on the reasons the Applicant was disqualified through the Notification of Intention of Award.
40. Mr. Njuguna therefore urged the Board to allow the Request for Review.

Respondents' Case

41. Even though the Respondents, were unrepresented during the hearing, the Board directed that they would consider the totality of all the documents presented before it including the Respondents' response which was made by the letter dated 17th May 2024..
42. From an analysis of the letter dated 17th May 2024, the following appears to be the Respondents' case in these proceedings:
43. The Respondents contend that the subject tender was advertised on 6th February 2024 and the submitted tenders were opened on 21st February 2024 by members of the Tender Opening Committee. Further that the Evaluation Committee evaluated the tenders as per the requirements under the Tender Document.

44. It was contended that the Applicant sought debriefing through a verbal request and not through an official letter. Further, that the Respondents offered a debrief to the Applicant who appeared dissatisfied with the process hence the present proceedings.
45. The Respondents maintained that the Applicant was in a joint venture with Multiplex Enterprises Limited on a 50%-50% basis. They indicated that from evaluation it was noted that the said Joint Venture Partner, Multiple Enterprises:
- i. Attached a copy of a CR12 Form dated 5th November 2022 which was not within the stipulated period;
 - ii. Attached a copy of a Tax Compliance Certificate that was not certified by a Commissioner for Oaths
 - iii. Attached a copy of an NCA Certificate that was not certified by a Commissioner for Oaths
 - iv. Attached a copy of a Water License from the Ministry of Water that was not certified by a Commissioner for Oaths
 - v. Did not fulfill any of the Requirements of MR 7 and MR15 nor did they countersign the mandatory forms
 - vi. Did not attach a copy of Single Business Permit issued by an any County Government
46. The Respondents also faulted the Applicant for not attaching a copy of Water License from the Ministry of Water.
47. The Respondents' case was that because of the above, the Applicant did not qualify for further evaluation beyond the Preliminary Evaluation Stage.

CLARIFICATIONS

48. The Board sought for the Applicant to offer clarity on the date it indicated in its Form of Tender as constituting the expiry date of the validity of its tender, to which Counsel for the Applicant, Mr. Njuguna indicated 18th September 2024.
49. The Board equally asked the Applicant to clarify whether there were any minutes for the debriefing session it had with the Respondents. Counsel for the Applicant confirmed that the debriefing session was verbal, the Applicant was not aware if any minutes were prepared. He indicated that Clause 48 of the Tender Document contemplated an oral debrief.
50. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 13th May 2024 had to be determined by 3rd June 2024. Therefore, the Board would communicate its decision on or before 3rd June 2024 to all parties via email.

BOARD'S DECISION

51. The Board has considered all documents, 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 Applicant's disqualification from Lots 1 and 2 of the subject tender was in keeping with the provisions of the Constitution of Kenya, 2010, Act, Regulations 2020 and the Tender Document?***
 - II. ***Whether the reasons fronted in the Respondents' response to the Request for Review muster the threshold for***

disqualifying the Applicant at the Preliminary Evaluation Stage?

III. *What orders should the Board issue in the circumstance?*

52. Before delving in to an analysis of the issues framed above, the Board wishes to highlight that subsequent to the close of the hearing of this Request for Review on 31st May 2024 at 11:51 a.m. the Respondents through one Shadrack Ngene sent an email to the Secretariat requesting for a link to join the already concluded session. In his email he indicated that he went to Board's office which according to him was on 7th Floor of KISM Towers where he was informed that the hearing was proceeding virtually.
53. For starters the Board's offices are on 5th Floor of KISM Towers. Additionally, the Board satisfied itself that the Secretariat sent out the link to the email address of the said Shadrack Ngene before the start of the hearing. Accordingly, the email by the said Shadrack Ngene was misguided.

Whether the Applicant's disqualification from Lots 1 and 2 of the subject tender was in accordance with the provisions of the Constitution of Kenya, 2010, Act, Regulations 2020 and the Tender Document?

54. The Applicant instituted the present proceedings taking issue with the manner in which its submitted tender was evaluated with the result that it was disqualified at the Preliminary Evaluation Stage on account noncompliance with Mandatory requirement No. 12. Counsel for the

Applicant maintained that the Applicant complied with the said Mandatory Requirement as it indicated the tender validity period on the Form of Tender forming part of its submitted tender.

55. Counsel contended that the Respondents had on 3 separate occasions i.e. through the notification sent to the Applicant; during the verbal debrief session; and through the present proceedings given varying reasons for the Applicant's disqualification from the subject tender. He argued that the Respondents' were estopped from adducing different reasons from that contained in the Notification of Intention to Award. The Applicant equally faulted the reasons cited by the Respondents for the Applicant's disqualification.
56. On the flip side, the Respondents took the position that the Applicant was properly disqualified from the subject tender having submitted a non-responsive tender. According to the Respondents' letter dated 17th May 2024, the Applicant submitted its tender under a joint venture but its joint venture partner failed attach copies of a commissioned tax compliance certificate, NCA Certificate, Water License. Further that partner did not also attach a copy of Single Business Permit and that its attached copy of CR12 was not within the stipulated period. The respondents equally noted that the joint venture partner did not countersign the mandatory forms. Therefore, according to the Respondents, the Applicant was properly disqualified.
57. This Board is at this stage invited to interrogate the circumstances under which the Applicant's tender was evaluated to ascertain whether its disqualification from the subject tender at the Preliminary Evaluation Stage was in accordance with the law.

58. 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."

59. 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."

60. 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; Republic v Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex parte Tuv Austria Turk [2020]eKLR* and *Republic v Public Procurement Administrative Review Board & anor Ex parte Hyosung Ebara Company Limited [2011]eKLR*

61. 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.
62. Turning to the instant case, the Applicant received a Letter of Notification of Intention to Award dated 29th April 2024. A copy of the said letter is in the confidential file and was also produced at page 131 to 134 of the Request for Review. Below are relevant excerpts of the letter:

"Ref: SDW/ONT/013/2023-2024 Date: 29th April 2024

***M/S Kisumu Earth Moving and Mining Company
P.O. Box (Details withheld)***

***For the attention of the Tenderer's Authorized Representative
FORM NO. 1: NOTIFICATION OF INTENTION TO AWARD***

*Date of transmission : [email] on 29th April 2024 (local time)
This Notification us sent by Head of Supply Chain
Management Services*

1. Notification of Intention to Award

Procuring Entity: State Department for Wildlife

Project: Construction of Water Pans in Various Parts of the country

Country: Kenya

Contract No: SDW/ONT/013/2023-2024

This Notification of Intention to Award (Notification) notifies you of our decision to award the above contract. The transmission of this Notification begins the Standstill Period. During the Standstill Period, you may:

- 2. Request a debriefing in relation to the evaluation of your tender*
- Submit a Procurement-related complaint in relation to the decision to award the contract:*

The successful tenderers were as follows"

LOT NO	BIIDDER NAME	ITEM DESCRIPTION	TENDERED SUM
Lot 1	M/S Maow Holding Limited P.O. Box (Details withheld)	Construction of Water Pan at Kabarion Conservancy, Baringo County	18,245,325

Lot 2	M/S AliImran Investment Limited P.O. Box (Details withheld)	Construction of Water Pan at Mara Ripoi Conservancy, Narok County	18,613,160
Lot 3	Bansu General Trading P.O. Box (Details withheld)	Construction of Water Pan at Olosira Conservancy, Kajiado County	18,603,300
Lot 4	M/S Jesken Enterprises Ltd P.O. Box (details withheld)	Construction of Water Pan at Shakako Conservancy, Tana River County	18,278,325
Lot 5	M/S Abyey Co. Ltd P.O. Box (details withheld)	Construction of Water Pan at Taita Ranch Conservancy, Taita Taveta County	17, 875,325

Your tender was unsuccessful for the following reasons:

- **MR 12 tender validity period was not indicated on the form of tender**

DEADLINE: The deadline to request a debriefing expires at midnight on 13th May 2024...

...

Signed

Silvia Museiya, CBS

PRINCIPAL SECRETARY

..

63. From the above letter, it is apparent that according to the notification sent to the Applicant, the Applicant was disqualified from the subject tender on account of failing to indicate the tender validity period on its Form of Tender as required under Mandatory Requirement No 12.
64. The Board has keenly studied the Tender Document in the subject tender and it bears reproducing Mandatory Requirement No. 12, which is traceable at page 32 of 130 of the blank Tender Document:

***Stage 1: Preliminary examination/Mandatory Requirements/
Mandatory Requirements***

The following mandatory requirements must be met notwithstanding other requirements in the document.

<i>S/No</i>	<i>REQUIREMENTS</i>	<i>REQUIREMENT</i>	<i>WEIGHT</i>	<i>REMARKS</i>
<i>1.</i>	<i>...</i>	<i>...</i>	<i>...</i>	
<i>...</i>	<i>...</i>	<i>...</i>	<i>...</i>	
<i>12</i>	<i>Submit a duly filled form of tender with a valid for 180 days on stationery</i>	<i>Attach</i>	<i>Mandatory</i>	

	<i>Company's letter head using the format provided in this document</i>			
13	<i>Submit Power of Attorney giving the name of the person who should be signing the bid, authorizing him to submit / execute the agreement as a binding document</i>	Attach	Manadary	

65. From the above, for tender to be considered responsive to Mandatory Requirement No. 12, it had to (i) contain a duly filed Form of Tender; (ii) the Form of Tender must be on the tenderer's letterhead and (iii) the Form of Tender has to bear on its face tender validity period of not less than 180 days. Conversely, it would follow that any tender that failed to meet any of the above would be properly deemed unresponsive to Requirement No. 12 and effectively duly filled and signed by the person authorized.

66. The Form of Tender to be duly filled by tenderers was provided for at page 57 to 59 of 130 of the Tender Document. Page 57 of 130 contains Clause 3 under which the tender validity period was to be filled and the same is hereinafter reproduced for ease of reference:

OTHER FORMS

(Amended and issued pursuant to PPRA CIRCULAR No. 02/2022)



INSTRUCTIONS TO TENDERERS

....

Date of this tender submission:....[insert date (as day, month and year) of Tender submission]

Tender name and identification:... [insert identification]

Alternative No:...[insert identification No if this is a Tender for an alternative]

To:....[insert complete name of Procuring Entity]

Dear Sirs,

1...

2...

3. We agree to adhere by this tender until _____ [insert date], and shall remain binding upon us and may be accepted at any time before that date..

4...

67. The Board has keenly perused the Applicant's original tender as forwarded to the Board by the Respondents and noted that the Applicant submitted its Form of Tender at page 83 of its tender. We have hereinafter reproduced an excerpt of the relevant parts of the Applicant's Form of Tender, which is on the Applicant's letterhead:

OTHER FORMS

5.FORM OF TENDER

Date of this Tender submission: 21ST FEBRUARY 2024 AT 10:00 AM

Name and Identification: CONSTRUCTION OF WATER PANS IN VARIOUS PARTS OF KENYA; TENDER NO.:SDW/ONT/013/2023-2024

To

STATE DEPARTMENT FOR WILDLIFE

P.O. BOX 41394-00100

NAIROBI, KENYA

Dear Sirs,

1.

2.

3. We agree to adhere by this tender until September 18, 2024 [insert date], and it shall remain binding upon us and may be accepted at any time before that date.

...

68. From the above it is apparent that the Applicant filled 18th September 2024 as the expiry of its tender validity period and duly signed by the person with the power of attorney Mr. John Otieno Ochieng . Accordingly, it is not correct as suggested in the Respondents' Notification of 29th April 2024 that the Applicant did not fill the tender validity period in its Form of Tender.

69. The only thing that the Board is required to ascertain at this stage is whether the 18th September 2024 date meets the 180 days minimum tender validity period provided for in the Tender Document.

70. The subject tender closed on 21st February 2024 and thus this marks the benchmark date to ascertaining when was the earliest date that a tender responsive to Mandatory Requirement No. 12 would bear.

71. In computing the 180 days contemplated under the Act, we take guidance from section 57 of the Interpretation and General Provisions Act:

"57. Computation of time

In computing time for the purposes of a written law, unless the contrary intention appears—

(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;

(b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;

(c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;

(d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time"

72. When computing the period of 180 , 21st February 2024 is excluded as per Section 57(a) of the IGPA being the day that the Applicant received the Notification of Intention of Award. This means time started to run on 22nd February 2024 and lapsed on 19th August 2024. In essence, a tender

responsive to Mandatory Requirement No. 12 would at the earliest indicate 19th August 2024 as the expiry of its tender validity period.

73. The Applicant indicated 18th September 2024 as the expiry date of its tender validity period, which is clearly above the minimum tender validity period under the subject tender. Accordingly, the Board finds that the Applicant satisfied Mandatory Requirement under the Tender Document and thus the Applicant was improperly disqualified.
74. In view of the foregoing, the Board therefore finds that the Applicant's disqualification from Lots 1 and 2 of the subject tender was not in accordance with provisions of the Constitution of Kenya, 2010, Act, Regulations 2020 and the Tender Document.

Whether the reasons fronted in the Respondents' response to the Request for Review muster the threshold for disqualifying the Applicant at the Preliminary Evaluation Stage?

75. During the hearing, the Applicant took issue with the Respondents' consistently giving inconsistent reasons on the Applicant's disqualification from the subject tender. Counsel for the Applicant Mr. Njuguna lamented that the reasons for the disqualification of the Applicant as contained in the notification were different from those communicated during the verbal debriefing session as well as those indicated in the Respondents' response to the Request for Review.
76. Owing to the Applicant's indication that the debriefing session was verbally conducted and that no there were minutes taken of what

transpired, the Board cannot ascertain the reasons the Respondents gave for the Applicant's disqualification during the said debriefing session. Further, the Respondents were neither present nor represented during the hearing and thus there was no representative from the Respondents to confirm whether the reasons cited by the Applicant were the same ones that were offered during the debriefing session. Nonetheless, the Board is properly equipped to address itself on any inconsistency, if any, that is apparent from the reasons contained in the Respondents' response to the Request for Review and that in the Notification sent to the Applicant on 29th April 2024.

77. The Board has already pointed out in the foregoing paragraphs that the Notification dated 29th April 2024 identified one reason for the disqualification of the Applicant i.e. that the Applicant's tender was not responsive to Mandatory Requirement No. 12 under the Tender Document. The accuracy of the reason as contained in the said notification has already been addressed in the preceding issue for determination.
78. The Board has equally sighted the Respondents' response to the Request for Review in form of a letter dated 17th May 2024. In the said letter, the Respondents points to 8 reasons as to why the Applicant's tender was disqualified in the subject tender. It bears reproducing the relevant parts of the letter:

"That the M/s Earth Moving and Mining Company was in a joint venture with M/s Multiplex Enterprises Limited as a joint venture on a 50%-50% under a joint venture agreement. From the evaluation it was noted that:

- 1. M/s Multiplex Enterprises Limited attached a copy of CR12 dated 5th November 2022 which was not within the stipulated period (copy attached).**
 - 2. M/s Multiplex Enterprises Limited attached a copy of tax compliance that was not certified by a commissioner for oaths (copy attached)**
 - 3. M/s Multiplex Enterprises Limited attached a copy of NCA that was not certified by a commissioner for oaths (copy attached)**
 - 4. M/s Multiplex Enterprises Limited attached a copy of water license from the Ministry of Water that was not certified by a commissioner for oaths (copy attached)**
 - 5. M/s Kisumu Earth Moving and Mining Limited did not attach a copy of Water License from the Ministry of Water**
 - 6. M/s Multiplex Enterprises Limited did not fulfill any requirements of MR7 to MR15 neither did they jointly sign the mandatory forms (copies attached)**
 - 7. M/s Multiplex Enterprises Limited did not attach any copy Single Business Permit issued by any County Government**
- From the joint venture agreement, it was stated that Mr. John Otieno Ochieng would sign for M/s Kisumu Earth Moving and Mining Limited and Eng. Dennis Oduor would sign for M/s Multiplex Enterprises Limited**
- The documents presented revealed that they were not jointly signed by the authorized representatives.**
- From the reasons stated above the bidder did not qualify to move to the next stage of the evaluation"**

79. From the above, it is apparent that the Respondents in their response to the Request for Review gave 8 reasons for the disqualifying the Applicant's tender from further evaluation. Further, it is also clear that all these 8 reasons are different from the reason contained in the Letter of Notification dated 29th April 2024.

80. At this stage of the proceedings, the Board is called upon to establish whether these 8 reasons constitute good reasons for the disqualification of the Applicant.

81. For starters Section 87 of the Act reads:

87. Notification of intention to enter into a contract

(1) Before the expiry of the period during which tenders must remain valid, the

accounting officer of the procuring entity shall notify in writing the person submitting

the successful tender that his tender has been accepted.

(2) The successful bidder shall signify in writing the acceptance of the award

within the time frame specified in the notification of award.

(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.

82. From Section 87(3) above, the Accounting Officer is mandated to communicate to both the successful and unsuccessful candidates in any

tender at the same time. In respect of the unsuccessful tenderers, the Accounting Officer is mandated to disclose the identity of the successful tenderer as well as the reasons as why the unsuccessful tenderer ended up unsuccessful.

83. Regulation 82 of the Regulations 2020 further reinforces that the reasons given to the unsuccessful tenderers should relate to their specific tenders:

82. Notification of intention to enter into a contract

(1) The notification to the unsuccessful bidder under section 87(3) of the Act, shall be in writing and shall be made at the same time the successful bidder is notified.

(2) For greater certainty, the reason to be disclosed to the unsuccessful bidder shall only relate to their respective bids.

(3) The notification in this regulation shall include the name of the successful bidder, the tender price

84. Article 227(1) of the Constitution of Kenya, 2010 espouses the principles of fairness, equitableness, transparency and accountability in public procurement processes. It would therefore stand to logic that Procuring Entities are under an obligation to communicate to stakeholders in public procurement processes, in clear terms the reasons for its procurement decisions. In the instant case, the Procuring Entity is under an obligation at the point of communicating to unsuccessful tenderers offer clarity on the reasons why a particular tenderer's tender was found unresponsive.

85. In ***PPARB Application No. 12 of 2023; Royal Taste Kitchen v CEO, National Social Security Fund & Anor*** this Board pronounced itself on the import of Section 87 of the Act and Regulation 82 as follows:

"In view of the provisions of Section 87 of the Act read with Regulation 82 of Regulations 2020, the Board observes an accounting officer of a procuring entity must notify, in writing, the tenderer who submitted the successful tender, that its tender was successful before the expiry of the tender validity period. Simultaneously while notifying the successful tenderer, an accounting officer of a procuring entity notifies other unsuccessful tenderer of their unsuccessfulness, giving reasons why such tenderers are unsuccessful, disclosing who the successful tenderer is, why such a tenderer is successful in line with section 87(1) of the act and at what price the successful tenderer was awarded the tender. These reasons and disclosures are central to the principles of public procurement and public finance as they speak to transparency and accountability enshrined in Article 227 and 232 of the Constitution. This means all processes with a public procurement system, including notification to unsuccessful tenderers must be conducted in a transparent manner."

86. From the above it is apparent that Procuring Entities are under an obligation to conduct their procurement processes with utmost transparency and integrity in their processes and decision making.

87. In the instant case, the Board has independently looked up the Evaluation Report forming part of the Confidential Documents forwarded to it to identify the reason the Evaluation Committee gave for disqualification of the Applicant. We have observed that page 29 of the Evaluation Report indicates that the Evaluation Committee disqualified the Applicant on

account of failing to indicate the tender validity period on the Form of Tender. This is the very reason that was contained in the Notification dated 29th April 2024. Nowhere does the Evaluation Report feature any of the 8 reasons indicated in the Respondents' response to the Request for Review and the other parameter's the Applicant was found to be responsive .

88. We are in the circumstances inclined to agree with the Applicant that the reasons for disqualification of the Applicant as advanced by the Respondents through their response to the Request for Review constitute an afterthought. Section 46 of the Act designates the responsibility of evaluation of tenders to the Evaluation Committee. In the present case, the Evaluation Committee evaluated the tenders received in the subject tender and particularly pointed out one reason for the disqualification of the Applicant i.e. alleged failure to indicate the tender validity period on the Form of Tender. It is therefore not open for the Respondents to purport to attribute the disqualification of the Applicant on reasons different from those indicated in the Evaluation Report or claim that the Applicant did not attach a copy of Water License from the Ministry of Water when the same is clearly attached in the Applicant bid as to the question of validity or lack of the same can be authenticated during due diligence stage.

89. Notwithstanding the above, the Board has also independently reviewed the Applicant's tender against the 8 reasons indicated in the respondents' response and finds all of them as baseless:

- i. The Applicant and its Joint Venture partner, Multiplex Enterprises Limited submitted compliant CR12 Form, Tax Compliance

Certificate, NCA Certificate, Water License and Single Business Permit.

- ii. The tender document and the evaluation criteria did not provide separate criteria for each of the joint venture to meet and the absence of such precondition the qualification the same cannot be introduced at this stage of the procurement process.
- iii. ITT 22.3 at page 17 of 130 of the Tender Document provided for a tender to be signed by the person authorized to sign on behalf of the tenderer. The Applicant appointed Mr. John Otieno Ochieng to sign on its behalf and thus it cannot be argued that Multiplex Enterprises Limited's representative had to equally sign the Applicant's tender.

90. The Board therefore finds that the reasons fronted in the Respondents' response to the Request for Review do not muster the threshold for disqualifying the Applicant in the evaluation process.

What orders the Board should grant in the circumstances?

91. The Board has found that the disqualification of the Applicant from Lots 1 and 2 of the subject tender was not in accordance with provisions of the Constitution of Kenya, 2010, Act, Regulations 2020 and the Tender Document.
92. The Board has equally found that the reasons fronted in the Respondents' response to the Request for Review do not muster the threshold for disqualifying the Applicant at the Preliminary Evaluation Stage.

93. The upshot of our finding is that the Request for Review dated 9th May 2024 in respect of Tender No. SDW/ONT/013/2023-2024 for Construction of Water Pans in Various Parts of Kenya succeeds in the following specific terms:

FINAL ORDERS

94. 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 9th May 2024:

- 1. The Letters of Notification of Intention of Award dated 29th April 2024 issued to the Applicant and all other unsuccessful tenderers under Lots 1 and 2 of Tender No. SDW/ONT/013/2023-2024 for Construction of Water Pans in Various Parts of Kenya be and are hereby cancelled and set aside.**
- 2. The Letters of Notification of Intention of Award dated 29th April 20024 issued to the successful tenderers under Lots 1 and 2 of Tender No. SDW/ONT/013/2023-2024 for Construction of Water Pans in Various Parts of Kenya be and are hereby cancelled and set aside.**
- 3. The Applicant's tender together with all tenders successful at the Preliminary Evaluation Stage in respect of lots 1 and 2 of the subject tender be and are hereby re-admitted for purposes of re-evaluation at the Technical Evaluation Stage.**
- 4. The 2nd Respondent be and is hereby directed to reconvene the Evaluation Committee for purposes of re-evaluating the**

Applicant's tender together with all other qualifying tenders at the technical evaluation stage in respect of lots 1 and 2 and progress the re-valuation process of such tenders to its lawful and logical conclusion .

5. The 2nd Respondent be and is hereby directed to proceed with tender processes in respect of Lots 3, 4 and 5 of Tender No. SDW/ONT/013/2023-2024 for Construction of Water Pans in Various Parts of Kenya, to their lawful and logical conclusion ,as these Lots remain unaffected by this Decision.

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

Dated at NAIROBI, this 3rd Day of June 2024.


.....
CHAIRPERSON

PPARB


.....
SECRETARY

PPARB

