

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 125/2024 OF 20TH DECEMBER 2024

BETWEEN

NYONJORO EAST AFRICA LIMITED..... APPLICANT

AND

THE ACCOUNTING OFFICER,

NORTH RIFT VALLEY WATER WORKS DEVELOPMENT

AGENCY 1ST RESPONDENT

NORTH RIFT VALLEY WATER WORKS DEVELOPMENT

AGENCY..... 2ND RESPONDENT

MABAC ENTERPRISES LIMITED INTERESTED PARTY

Review against the decision of the Accounting Officer North Rift Valley Water Works Development Agency in relation to Tender No. NRV/GoK/EMC/MARON-SIBOW/2024-2025/01 for Construction Works for Maron-Sibow Water Project

BOARD MEMBERS PRESENT

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



IN ATTENDANCE

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

PRESENT BY INVITATION

APPLICANT

NYONJORO EAST AFRICA LIMITED

Mr. Mbakaya

- Advocate, Muchemi & Co. Advocates

1ST & 2ND RESPONDENT

THE ACCOUNTING OFFICER, NORTH RIFT VALLEY WATER WORKS DEVELOPMENT AGENCY & NORTH RIFT VALLEY WATER WORKS DEVELOPMENT AGENCY

1. Mr. Aim Yoni

- Advocate, Wachira Wekhomba Aim & Associates Advocates

2. Mr. Ochieng Brian

-Advocate, Wachira Wekhomba Aim & Associates Advocates

INTERESTED PARTY

MABAC ENTERPRISES LIMITED

Mr. Thuita

- Advocate, Thuita Law Advocates



BACKGROUND OF THE DECISION

The Tendering Process

1. North Rift Valley Water Works Development Agency, the Procuring Entity and 2nd Respondent herein invited sealed tenders in response to Tender No. NRV/GoK/EMC/MARON-SIBOW/2024-2025/01 for Construction Works for Maron-Sibow Water Project (hereinafter referred to as "the subject tender"). The invitation was by way of an advertisement on 3rd September 2024 published on My Gov Newspaper, the Procuring Entity's website www.nrvwwda.go.ke and the Public Procurement Information Portal www.tenders.go.ke where the blank tender document for the subject tender issued to tenderers by the Procuring Entity (hereinafter referred to as the Tender Document') was available for download. The initial subject tender's submission deadline was scheduled on 20th September 2024 at 12.00 noon.

Addenda

2. The Procuring Entity issued Addendum No.1 on 9th September 2024 providing clarifications on the technical criteria and Addendum No. 2 on 17th September 2024 which included, inter alia, an update to the Bill of Quantities and an extension of the tender submission deadline to 3rd October 2024.

Submission of Tenders and Tender Opening

3. According to the Tender Opening Minutes signed by members of the Tender Opening Committee and which Tender Opening Minutes were part



of confidential documents furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') by the 1st Respondent pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act') twenty-five (25) bidders submitted bids in the subject tender as follows:

Bid No.	Name Of The Firm
1.	Nyonjoro East Africa LTD
2.	Glakos Investment Limited
3.	Smooth Engineering Construction CO.LTD
4.	Saarma General Construction and Supplies Ltd
5.	High Point Company Limited
6.	Fatah Construction & Civil Works Ltd
7.	Sanaag Investment Limited
8.	Mimosa Granites Holdings Ltd
9.	Pearltek Kenya Limited
10.	Rumhas Construction Company Limited
11.	Western Cross Express Co. Limited
12.	Riang International Limited
13.	Test Investments Limited
14.	Machine Centre Limited
15.	Dachi Limited
16.	Mabac Enterprises Limited
17.	Beban & Benson Limited
18.	Miliki Development Company Limited

19.	Venus (208) Engineering & Construction Limited
20.	Thiru Holdings Limited
21.	Urban Building Contractors Limited
22.	Sawasawa Company Limited
23.	Tramtek Limited
24.	Perfect Zone Limited
25.	Western Express Limited

Evaluation of Tenders

4.A Tender Evaluation Committee appointed by the 1st Respondent undertook evaluation of the submitted bids as captured in a Tender Evaluation Report for the subject tender in the following stages:

- i Preliminary Evaluation
- ii Detailed Evaluation – Post Qualification
- iii Technical Evaluation
- iv Financial Evaluation

Preliminary Evaluation

5.The Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Stage I: Preliminary evaluation requirement are as follows: (All are Mandatory) of Section III- Evaluation and Qualification Criteria of the Tender Document. Tenderers were required to meet all the mandatory requirements at this stage to proceed for Technical Evaluation.



6. At the end of evaluation at this stage, eleven (11) tenders were determined non-responsive, while fourteen (14) tenders were determined responsive and proceeded to the Detailed Evaluation- Post Qualification.

Detailed Evaluation – Post Qualification

7. The Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Clause 7 Post Qualification and Contract Award of Section III- Evaluation and Qualification Criteria of the Tender Document.

8. At the end of evaluation at this stage, the fourteen (14) tenders were determined responsive and proceeded to Technical Evaluation.

Technical Evaluation

9. The Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Stage II: Technical Evaluation Criteria of Section III- Evaluation and Qualification Criteria of the Tender Document. Tenderers were required to score a pass mark of 85% at this stage to proceed for Financial Evaluation.

10. At the end of evaluation at this stage six (6) tenders were determined non-responsive, while eight (8) tenders were determined responsive and proceeded to Financial Evaluation.



Financial Evaluation

11.The Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Clause 3. Price Evaluation Criteria of Section III- Evaluation and Qualification Criteria of the Tender Document. Tender were checked for arithmetic errors, compared and ranked as follows:

TENDER NO.	Tenderer's Name	Read out Tender Price Inclusive of Discount	Ranking
1.	B10- Rumhas Construction Company Limited	301,926,924.58	1
2.	B6- Fatah Construction & Civil Works Limited	302,823,799.89	2
3.	B13- Test Investment Limited	305,829,835.43	3
4.	B5- High point Company Limited	306,311,625.93	4
5.	B3-Smooth Engineering Construction Company Limited	312,464,893.55	5
6.	B12- Riang International Group Limited	315,055,514.91	6

Evaluation Committee's Recommendation

12.The Evaluation Committee recommended award of the subject tender to M/s Rumhas Construction Company Limited at a total cost of Kenya Shillings Three Hundred and One Million, Nine Hundred and Twenty-Six Thousand, Nine Hundred and Twenty-Four and Fifty-Eight Cents (Kshs. 301,926,924.58) only inclusive of VAT and other applicable taxes.

Professional Opinion

13. In a Professional Opinion dated 9th December 2024, the Manager Supply Chain Management, Mr. Isaac Chirchir reviewed the manner in which the procurement process in the subject tender was undertaken including evaluation of tenders and concurred with the Evaluation Committee's recommendation of award of the subject tender.

14. The Professional Opinion was approved as recommended by the 1st Respondent, Mr. Edwin Rotich, on 9th December 2024.

Notification to Tenderers

15. Tenderers were notified of the outcome of evaluation of the subject tender vide letters dated 9th December 2024.

REQUEST FOR REVIEW NO. 125 OF 2024

16. On 20th December 2024, Nyonjoro East Africa Limited, the Applicant herein, filed a Request for Review dated 20th December 2024 together with a Statement in Support of the Request for Review sworn by Samwel Njoroge on 20th December 2024 (hereinafter referred to as "the instant Request for Review") through Muchemi & Co. Advocates seeking the following orders from the Board:

a) The Procuring Entity's Letter of Notification of regret with respect to Tender No. TENDER NO. NRV/GoK/EMC/MARION-SIBOW/2024-2025/01:



PROCUREMENT OF WORKS FOR THE CONSTRUCTION OF MARION-WATER PROJECT dated 9th December, 2024, addressed to the Applicant and/ all bidders be and are hereby cancelled and set aside.

b) That the intended award by the 2nd Respondent to M/S Rumhas Construction Company Limited, the interested Party herein be cancelled and an Order of substitution be made awarding TENDER NO. NRV/GoK/EMC/MARION-SIBOW/2024-2025/01: PROCUREMENT OF WORKS FOR THE CONSTRUCTION OF MARION-WATER PROJECT to the Applicant.

c) In the alternative, an Order directing the Procuring Entity to reinstate the Applicant's bid and proceed with the procurement process of TENDER NO. NRV/GoK/EMC/MARION-SIBOW/2024-2025/01: PROCUREMENT OF WORKS FOR THE CONSTRUCTION OF MARION-WATER PROJECT.

d) The procuring Entity is hereby directed to proceed with the procurement process to its logical conclusion, including the making of an award within Seven (7) days from the date of this decision.

17. In a Notification of Appeal and a letter dated 20th December 2024, Mr. James Kilaka, the Acting Secretary of the Board notified the 1st and 2nd



Respondents of the filing of the Request for Review and the suspension of the procurement proceedings of the subject tender, while forwarding to the said Procuring Entity 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 Procuring Entity was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 20th December 2024.

18. Vide a letter dated 30th December 2024, the Acting Board Secretary sent a reminder to the Respondents referring to the Notification of Appeal for the instant Request for Review dated 20th December 2024 and notified the Respondents of the provisions under Regulation 205(3) & (4) of the Public Procurement and Asset Disposal Regulations 2020 (hereinafter referred to as "Regulations 2020") with regard to the five (5) days within which they were required to submit a response being on or about 25th December 2024 noting that the operations of the Board are time bound and require matters to be concluded within 21 days.

19. Vide a Hearing Notice dated 30th December 2024, the Acting Board Secretary, notified parties and all tenderers of an online hearing of the instant Request for Review slated for 3rd January 2025 at 11:00 a.m. through the link availed in the said Hearing Notice.



20. On 31st December 2024, the Applicant filed an Amended Request for Review amended on 31st December 2024 together with a Statement in Support of the Request for Review sworn by Samwel Njoroge on 31st December 2024.

21. On 31st December 2024, the 1st and 2nd Respondents filed via email, through the 1st Respondent, Mr. Edwin C. Rotich, part of the confidential documents concerning the subject tender in line with Section 67(3)(e) of the Act.

22. On 2nd January 2024, the 1st and 2nd Respondents filed through the 1st Respondent, Mr. Edwin C. Rotich, filed a response to the instant Request for Review dated 31st December 2024 together with hard copies of the confidential documents concerning the subject tender in line with Section 67(3)(e) of the Act.

23. Vide letters dated 2nd January 2025, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the 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 tender within three (3) days.

24. Vide email of 2nd January 2025, the 1st Respondent, Mr. Edwin Rotich, sought for an adjournment of the hearing of the matter slated for 3rd



January 2025 to enable the Respondents engage an advocate to represent them in the proceedings.

25. Vide email of 3rd January 2025, the Applicant through its advocates opposed the application for adjournment and indicated that the Respondent's response was out of time. On the same 3rd January 2025, the Applicant filed its Written Submissions dated 3rd January 2025 and an Applicant's List Digest and Bundle of Authorities dated 3rd January 2025.

26. On 3rd January 2025, the Interested Party filed through Thuita Law Advocates a Notice of Appointment of Advocates dated 3rd January 2025.

27. The Board having considered the Respondent's application for adjournment and pleadings filed in the matter directed (a) the application for adjournment be allowed and hearing of the matter be deferred to Monday, 6th January 2025 at 3.00 p.m., (b) in view of the Applicant's objection, it be granted leave to file and serve any preliminary objection and any additional submissions by 6.00 p.m. on 3rd January 2025, (c) the Respondents and any Interested Party desirous of joining the proceedings to file and serve their pleadings including written submissions by 11.00 a.m. on Monday, 6th January 2025, and (d) Parties to ensure that all pleadings and submissions filed have been served.

28. Vide email dated 3rd January 2025, the Acting Board Secretary served the Board's Directions to parties and all tenderers in the instant Request for Review.



29. On 5th January 2025, the 1st and 2nd Respondents filed through Wachira Wekhomba Aim & Associates Advocates a Notice of Appointment of Advocates dated 5th January 2025 together with the Respondent's Notice of Preliminary Objection dated 5th January 2025.
30. On 6th January 2025, the 1st and 2nd Respondents filed through their advocates the Respondent's Memorandum of Response dated 5th January 2025, the Respondent's Supporting Affidavit in Support of its Memorandum of Response sworn on 5th January 2025 by Edwin Rotich and Written Submissions dated 5th January 2025.
31. Vide email of 6th January 2025, Mr. Edwin Rotich, the 1st Respondent filed a 1st and 2nd Respondents' Memorandum of Response dated 5th January 2025 and a 2nd Respondent's Replying Affidavit sworn by Edwin Rotich on 6th January 2025.
32. Vide email of 6th January 2025 sent at 10:58 a.m, Mr. Aim for the Respondents withdrew the Respondent's Preliminary Objection and indicated that he would not argue the same at the hearing.
33. At the hearing on 6th January 2025 at 3.00 p.m., the Board read out the pleadings filed by parties in the matter. Having noted that Mr. Thuita for the Interested Party had not filed any pleadings in the matter, the Board directed that his participation was restricted to witnessing the proceedings.



34.The Board allocated time for parties to highlight their respective cases. Thus the instant Request for Review proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

Applicant's submissions

35.In his submissions, Mr. Mbakaya for the Applicant relied on the documents filed by the Applicant before the Board in the instant Request for Review.

36.Counsel submitted that the responses to the instant Request for Review as filed by the Respondents ought to be struck out as they were filed out of time and beyond the 5 days from the date of notification of the review contrary to Regulation 205 of Regulations 2020.

37.As to whether the Applicant's bid submitted in the subject tender was responsive pursuant to Section 79 of the Act, counsel referred the Board to the provisions of Section 79 of the Act and Regulation 74(2) of Regulations 2020 and the Applicant's notification letter dated 9th December 2024 and submitted that the two areas of focus on this issue are in regard to arithmetic errors and the bill of quantities rates and process.

38.He argued that the arithmetic errors that were highlighted in the notification letter as grounds for disqualifying the Applicant's bid have been addressed by Section 79(2)(a) and (b) of the Act and expounded



by the Board in PPARB Application No. 144 of 2020 County Builders Limited Vs. The Accounting Officer, Ministry of Transport, Housing, Infrastructure, Urban Development and Public Works, State Department of Housing where the inconsistency between Section 79(2)(b) of the Act and Regulation 74(2) of Regulations 2020 was addressed. Counsel further submitted that where an inconsistency arises between the provisions of the Act and subsidiary legislation, the provisions of the Act supersede and as such Section 79(2)(b) and 82 of the Act prevails.

39.Mr. Mbakaya submitted that the errors in the Applicant's bid as pointed out by the Respondents did not at any point materially depart from the requirements set out in the Tender Document and that in any event, these errors and margins were so minor that their correction could not in any way have affected the substance of the bid as insinuated by the Respondents. He argued that the provisions under Section 79(2)(a) and (b) and 81(1) and (2) of the Act ought to have been applied in the evaluation process in that the Respondents would have sought clarification with respect to the arithmetic errors and accord the Applicant an avenue to respond to the same. Counsel faulted the Respondents for disqualifying the Applicant's bid on the basis of arithmetic errors with regard to the Bill of Quantities and referred to the holding in PPARB Application No. 64 of 2022 Com Twenty-One Limited V The Director General, Communication Authority of Kenya.

40.On the issue of the Bill of Quantities rates and prices, counsel submitted that failure to duly fill item 3.15 which pertains to excavations of pipeline



with a quantity of 5,920M has been well addressed and cured by Section I ITT 14.2 of the Tender Document which the Respondents failed to appreciate. In support of his argument, counsel referred the Board to the holding in Republic v Public Procurement Administrative Review Board Ex Parte Athi Water Services Board & 2 Others [2017] and argued that failure to complete the BOQ does not in any way render the Applicant's bid as non-responsive.

41. As to whether the successful bidder complied with all the requirements in the subject tender as to render its tender responsive, counsel referred the Board to the provisions under clause 7 of Section III of the Tender Document on conditions that were required to be met by bidders and argued that the condition of a minimum 5 years was ignored by the Respondents. He took issue with averments made by the Respondents at paragraph 5 page 4 of their Response and argued that the condition therein required a company to have been in existence for the last 5 years. He queried how a company could give evidence of works and contracts executed within the last 5 years yet it was non-existent as at 1st August 2019 and submitted that the Respondents failed to adhere to the requirements set out at Clause 7 of Section III of the Tender Document. In support of his argument, he referred the Board to the holding in Sinopec International Petroleum Service Corporation V Public Procurement Administrative Review Board & 3 Others (Civil Appeal E012 of 2024) [2024] Keca 184 (Klr) (23 February 2024) and Republic Vs Public Procurement Administrative Review Board; Arid Contractors & General



Supplies (Interested Party) Ex Parte Meru University of Science & Technology [2019] Eklr.

42. It is the Applicant's case that the Procuring Entity in awarding the subject tender to Rumhas Construction Company Limited blatantly disregarded the provisions laid out in the Tender Document and Addendums which required a bidder to have 5 years of experience as evidenced by its company registration.

43. Mr. Mbakaya while referring to Article 227 of the Constitution and Section 80 of the Act and submitted that Rumhas Construction Company Limited was not the lowest evaluated bidder having quoted a tender price of Kshs. 301,926,924/= and that the decision to disqualify the Applicant's bid whose price of Kshs. 297,418,813/= was lower is a breach of Section 86 of the Act.

44. He further submitted that the failure by the Respondents to uphold the provisions of the law has exposed the Applicant to the risk of loss and damage of business opportunity for work which it is duly qualified to execute. Counsel urged the Board to allow the instant Request for Review with costs as prayed.

1st and 2nd Respondents' submissions

45. In his submissions, counsel for the Respondents, Mr. Aim relied on the documents filed by the Respondents before the Board in the instant Request for Review.



46. In response to the application by the Applicant to strike out the Respondents' response in the instant Request for Review, counsel urged the Board to consider the provisions of the Interpretations & General Provisions Act, Cap 2 of the Laws of Kenya with regard to the time when the matter was filed and the holidays that fell in between.

47. On the issue of disqualification of the Applicant's bid, counsel submitted that the Applicant's bid was properly disqualified at the Financial Evaluation Stage for being unresponsive to Mandatory Requirements under Clause III under items No. 3.15 and 3.21 of the Bill of Quantities. Counsel referred the Board to the provisions under Clause 29 of the Tender Document on determination of responsiveness of a tender and submitted that the omission by the Applicant in not tabulating the requirements under item No. 3.15 and 3.21 of the Bill of Quantities was a substantial and major error rendering the Applicant's bid as non-responsive.

48. He further referred the Board to the computations of the Evaluation Committee as deposed at paragraph 21 of the Respondents Replying Affidavit and submitted that the Evaluation Committee carried out an average costing under item 3.15 quoted by the eight bidders who proceeded to the Financial Evaluation stage came to a total of Kshs. 3,269,166.29/- and based on this amount, the omission by the Applicant resulted in a bid that deviated significantly and its performance would be substantially affected.



49.He referred to Clause 31 of the Tender Document providing for arithmetic errors and submitted that any errors in the submitted tender arising from a miscalculation of unit price, quantity, subtotal and total bid price would be considered as a major deviation that affects the substance of the tender and would lead to the disqualification of the tender for being non-responsive.

50.Counsel argued that in evaluating the subject tender, the Evaluation Committee would be guided by the criteria provided under Section III – Evaluation and Qualification Criteria of the Tender Document to arrive at the lowest evaluated bid and as such, the lowest evaluated bid was not only required to meet the qualification criteria but to also be determined as substantially responsive.

51.On the issue of eligibility of the successful bidder, counsel submitted that there was no requirement for the number of years that a bidder was required to have been in operation and that the Tender Document only required a bidder to prove that in the last five years from 1st August 2019 to date, it had carried out the minimum works valued at an equivalent of Kshs. 50 Million and Kshs. 100 Million as stipulated under Clause 7 of Section III of the Tender Document. He pointed out that it was not in dispute that the successful bidder, Rumhas Construction Company Limited, had competed a certain number of projects within the last five years and that award of the subject tender was one in accordance with the Act and Regulations 2020.



52.He urged the Board to dismiss the instant Request for Review with costs.

Applicant's Rejoinder

53.In a rejoinder, Mr. Mbakaya submitted that pursuant to paragraph 7 of Section III of the Tender Document, it was perplexing that the successful bidder, Rumhas Construction Company Limited, was awarded the subject tender yet it was not clear how it could give evidence of works and contracts executed within the last 5 years if it was non-existent as at 1st August 2019.

54.As to the arithmetic errors in the Applicant's bid, counsel submitted that the same ought not to have led to disqualification of the Applicant's bid in light of Section 79(2) (a) and (b) and 82 of the Act.

55.He urged the Board to find the instant Request for Review as merited and to grant the prayers sought.

CLARIFICATIONS

56.When asked to explain if there was any good reason why the Applicant failed to fill in Item No. 3.15 of the Bill of Quantities, Mr. Mbakaya submitted that this was an unfortunate oversight on the part of the Applicant when filling its bid document.

57.As to the significance of Item No. 3.15 in completing the project concerning the subject tender, Mr. Mbakaya submitted that this was not a technical requirement per se in view of ITT 14.2 of the Tender



Document which provided that a bidder would fill in the rates and prices of works described in the Bill of Quantities and fir items against which no rate or price was entered, it would be deemed covered by the rates of other items in the Bill of Quantities and would not be paid for separately by the Procuring Entity.

58. With regard to Rumhas Construction Company Limited qualifications and responsiveness in the subject tender, Mr. Mbakaya submitted that the Tender Document and Addendum No. 1 were clear that a bidder who be considered responsive if it had completed works specified for the last 5 years starting 1st August 2019 to date and Rumhas Construction Company Limited had not been incorporated as at 1st August 2019 and could not possibly have undertaken such contracts.

59. When asked to clarify if filling of Item No. 3.15 of the Bill of Quantities was a mandatory requirement, Mr. Mbakaya submitted that this had not clearly been indicated as a mandatory requirement and either way the rates or prices would be covered within the tender sum and not paid for separately by the Procuring Entity as provided under ITT 14.2 of Section I of the Tender Document.

60. When asked to explain to the Board his understanding of Section 79 (3)(b) of the Act and whether failure to fill Item No. 3.15 of the Bill of Quantities was a minor deviation that did not materially depart from the requirements set out in the Tender Document and the effect on bidders who were compliant to the requirements of the subject tender, Mr.



Mbakaya submitted that Section 79(3) of the Act concerned deviations under Section 79(2)(a) of the Act while the issue with the Applicant's bid fell under Section 79 (2)(b) of the Act which provides that errors and oversights can be corrected without affecting the substance of the tender and as such, this could not form the basis of disqualifying the Applicant's bid.

61. On whether the Procuring Entity was required to determine what deviation it would accept as minor pursuant to Section 79(2) of the Act and in view of the Financial Evaluation Criteria provided under Regulation 77 of Regulations 2020, Mr. Mbakaya submitted that the primary legislation ought to prevail over any conflicting provision of the subsidiary legislation and as such, provisions of Section 79(2) of the Act prevail over Regulation 77 of Regulations 2020.

62. On his part, Mr. Aim submitted that Section 79 (2) of the Act ought to be given a subjective interpretation in the sense that it ought to be read holistically together with the Tender Document considering that the provisions of the Tender Document extensively lays out what bidders are required to submit and the evaluation criteria to be adhered to by the Procuring Entity. He further submitted that Item No. 3.15 of the Bill of Quantities was a critical component of the subject tender and by conduct can be interpreted as a mandatory requirement. Counsel was of the view that the discretion ought to be left to the Procuring Entity to determine whether a deviation was minor or major in light of Section 79(2) of the Act and Regulation 77 of Regulations 2020.



63. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 20th December 2024 was due to expire on 9th January 2025 (meant to be 10th January 2025) and that the Board would communicate its decision to all parties to the Request for Review via email.

BOARD'S DECISION

64. The Board has considered each of the parties' submissions and documents placed before it and find the following issues call for determination.

- A. Whether the Respondents' responses in the instant Request for Review as filed are time barred and ought to be struck out.**

- B. Whether the Procuring Entity rightfully disqualified the Applicant's bid submitted in the subject in strict compliance with the provisions of the Tender Document, the Act and the Constitution.**

- C. Whether the Procuring Entity improperly evaluated and awarded the subject tender to Rumhas Construction Company Limited against the provisions of the Tender Document.**



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

Whether the Respondents' responses in the instant Request for Review as filed are time barred and ought to be struck out.

65. During the hearing, Mr. Mbakaya for the Applicant made an application for striking out the Responses filed by the Respondents in the instant Request for Review for being time barred and having been filed outside the 5 days' period stipulated under Regulation 205 of Regulations 2020.

66. In response, Mr. Aim urged the Board to consider the provisions of the Interpretations & General Provisions Act, Cap 2 of the Laws of Kenya with regard to the time when the matter was filed and the holidays that fell in between since the review application was filed.

67. The Board is cognizant of the provisions of Regulation 205 of Regulations 2020 which state that:

"(1) The Secretary shall, immediately after the filing of the request under regulation 203, serve a notice thereof to the accounting officer of a procuring entity in accordance with section 168 of the Act.

(2) The notification of the filing of the request for review and suspension of procurement proceedings shall be communicated, in writing, by the Review Board Secretary



(3) Upon being served with a notice of a request for review, the accounting officer of a procuring entity shall within five days or such lesser period as may be stated by the Secretary in a particular case, submit to the Secretary a written memorandum of response to the request for review together with such documents as may be specified.

(4) An accounting officer of a procuring entity who fails to submit the document within the stipulated period under paragraph (3), commits an offence and shall be liable to a fine not exceeding four million shillings or to imprisonment for a term not exceeding ten years, or to both.

(5) The Review Board Secretary shall immediately notify all other parties to the review upon receipt of such documents from a procuring entity under paragraph (3)."

68. In essence, the Board's Secretary serves a notice to the accounting officer of a procuring entity in accordance with Section 168 of the Act upon receipt of a request for review. Upon service of the notice of the request for review, the accounting officer is under an obligation to file a response together with all confidential document in the procurement proceedings within five days of the notice or such lesser period as may be specified. Failure by the accounting officer to submit a response and documents requested within the stipulated time is an offence which attracts a fine not exceeding four million shillings or imprisonment for a term not exceeding ten years or both.



69. Turning to the circumstances in the instant Request for Review, the Board notes that the instant Request for Review was filed on 20th December 2024 and the Respondents notified on the same day of existence of the Request for Review Application.

70. In computing time when the Respondent ought to have filed its response pursuant to Regulation 205(3) of Regulations 2020, the Board is guided by the provisions of Section 57 of the Interpretation and General Provisions Act which provides as follows:

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.

71. In computing time when the Respondent ought to have filed its response upon receipt of the filed Request for Review, the 20th December 2024 is excluded pursuant to Section 57(a) of the IGPA being the day that the Respondent was duly served with the Request for Review. As such, 5 days started running from 21st December 2024 and lapsed on 25th December 2024. We note that Section 57 (b) and (d) of the IGPA specifies the circumstances under which excluded days shall not be reckoned in the computation of time being that '***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.***' As such, when the period of the happening of an act or proceeding is less than 6 days, excluded days ought not to be reckoned in the computation of time.

72. With this in mind, we note that within this period, the 21st December 2024 being a Saturday was an official non-working day while 22nd December 2024 being a Sunday was an unofficial working day and ought



not to be reckoned in computation of time. The 5 days' timeline issued to the Respondents therefore started running on 23rd December 2024 and ought to have lapsed on 27th December 2024. However, within this period 25th December 2024 was Christmas day and a public holiday in addition to 26th December 2024 being Boxing day. The next official working day was on 27th December 2024 which was on a Friday. The 28th December 2024 was a Saturday and an official non-working day while the 29th December 2024 was a Sunday and an unofficial working day.

73. The Respondent therefore had the 23rd 24th 27th 30th and 31st December 2024 to file its response to the instant Request for Review. From the Board's records, we note that the Respondents filed with the Board Secretary via email on 31st December at 11:59 a.m. several documents in response to the instant Request for Review while indicating that that all documents listed in Part D of Schedule 1, Form 5 would be hand-delivered on 2nd January 2025.

74. Upon the request by the Respondents, the Board adjourned the hearing slated for 3rd January 2025 to enable the Respondents engage an advocate to represent them in these proceedings which subsequently led to filing of additional responses by the Respondents Advocates in the matter on 6th January 2025 pursuant to Directions issued by the Board on 3rd January 2025.

75. It is equally not lost on us that the Applicant, on the 31st December, 2024 filed an Amended Request for Review, essentially triggering fresh running



of time invariably leading to a different computation of time which meant the Respondents were to file their responses to the Amended Request for Review by 6th January 2025 noting that 1st January 2025 is an excluded day being New Year and a public holiday and as such, the responses by the Respondents were within time.

76. We are cognizant of provisions of **Article 159(2)(d)** of the Constitution which provide that justice shall be administered without undue regard to procedural technicalities. However, this provision should not be used to trash procedural provisions as the rules are the handmaidens of justice. It has however been reiterated that courts should not pay undue attention to procedural technicalities and requirements at the expense of substantive justice. The Supreme Court of Kenya in the case of **Raila Odinga v I.E.B.C & Others (2013) eKLR**, held that:

"Article 159(2)(d) of the Constitution simply means that a Court of Law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Court."

77. In the Board's considered view, Regulation 205 (3) & (4) of Regulations 2020 seeks to cure the mischief where procuring entities delay in submitting responses to allegations by candidates and tenderers of breach of a duty imposed by the Act or Regulations considering the



limited timelines within which administrative reviews ought to be heard and determined or altogether fail to respond or submit confidential documents thus frustrating the Board in reviewing and determining administrative reviews.

78. This Board has a duty to do substantive justice to parties while at the same time considering whether a matter before it has been properly filed. The Board is cognizant of the need to exercise its discretion with utmost care when faced with an application to strike out pleadings for having been filed out of time as striking out pleadings is a draconian action which may have the consequence of slamming the door of justice on the face of one party without according it an opportunity to be heard. This was the position held by Madan JA (as he then was) in **DT Dobie & Co (K) Ltd V Muchina, [1982] KLR**, where the Court of Appeal expressed itself as follows:

"The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is usually fully informed so as to deal with the merits without discovery, without oral evidence tested by cross-examination in the ordinary way ... no suit



ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward"

79. Further, the Board notes that the power to strike out a pleading is a discretionary one as held in **Crescent Construction Co Ltd V Delphis Bank Limited, [2007] eKLR**, where the Court of Appeal stated as follows:

"However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realisation that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter."



80.Guided by the holding in the above cases and noting the circumstances of this review, we find that no prejudice was occasioned on the Applicant as none has been presented in filing of the Respondent's pleadings in the instant Request for Review. All parties have indeed filed and served their respective pleadings and confidential documents as requested and attended the virtual hearing as scheduled. The Respondents Memorandum of Response as filed together with the annexures and confidential documents filed with the Board have enabled the Board have an informed view of the procurement proceedings in the subject tender and to review the instant Request for Review. Having filed their response and the confidential documents, we find that the Respondent is not subject to the sanctions provided under Regulations 204 (4) of Regulations 2020. We would have held otherwise if the Respondents had not filed any response to the Request for Review or submitted confidential documents to the Board in accordance with Section 67(3) of the Act and perhaps escalated the matter to PPRA for relevant action to be taken.

81.In the circumstances, we find that the Respondent's Responses as filed in the instant Request for Review are properly before the Board and are deemed as properly filed and may be relied upon in these proceedings.

Whether the Procuring Entity rightfully disqualified the Applicant's bid submitted in the subject in strict compliance with the provisions of the Tender Document, the Act and the Constitution

82.We understand the Applicant's case to be that its bid was responsive and it ought to have been declared as the successful bidder in the subject tender irregardless of the errors and omissions pointed out by the



Procuring Entity in its notification letter since they did not materially depart from the requirements stipulated in the Tender Document. The Applicant contends that failure to fill in Item 3.15 of the Bill of Quantities was not a mandatory requirements and has been cured by ITT 14.2 under Section I – Instructions to Tenderers of the Tender Document.

83. In response, the Respondents contend that they adhered to the set out evaluation criteria in the Tender Document and that the Applicant's bid was properly disqualified at the Financial Evaluation stage for being unresponsive to stipulated mandatory requirements pertaining to Item 3.15 and 3.21 of the Bill of Quantities for failure to provide correct details on the same in its bid and this non-compliance to a mandatory requirement could not possibly be deemed as a minor deviation.

84. We note that the objective of public procurement is to provide quality goods and services in a system that implements the principles specified in Article 227 of the Constitution which provides as follows:

"227. Procurement of public goods and services

- (1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.***
- (2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and***



asset disposal shall be implemented and may provide for all or any of the following –

a).....d)”

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

“80. Evaluation of tender

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

- (2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and,***

- (3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)-***
 - (a) The criteria shall, to the extent possible, be objective and quantifiable;***
 - (b) each criterion shall be expressed so that it is applied, in accordance with the procedures, taking***



***into consideration price, quality, time and service for the purpose of evaluation; and
(4)***"

86. Section 80(2) of the Act is clear on the requirement for the Evaluation Committee to evaluate and compare tenders in a system that is fair using the procedures and criteria set out in the Tender Document. The Board's interpretation of a system that is fair is one that considers equal treatment of all tenders against criteria of evaluation known by all tenderers having been well laid out in the tender document issued by the procuring entity. Section 80(3) of the Act requires for such evaluation criteria to be as objective and quantifiable to the extent possible and to be applied in accordance with the procedures provided in the tender document.

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

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

88. Responsiveness serves as an important first hurdle for tenderers to overcome. From the above provision, a tender only qualifies as a responsive tender if it meets all eligibility and mandatory requirements set out in the tender documents. In the case of **Republic v Public Procurement Administrative Review Board & another; Premier**



**Verification Quality Services (PVQS) Limited (Interested Party)
Ex Parte Tuv Austria Turk [2020] eKLR** the High Court stated that:

"In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions."

88. Further, the High Court in **Miscellaneous Civil Application 85 of 2018 Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party)**



[2019] eKLR (hereinafter referred to as Miscellaneous Civil Application No. 85 of 2018) held:

"Briefly, the requirement of responsiveness operates in the following manner: - a bid only qualifies as a responsive bid if it meets 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. Indeed, public procurement practically bristles with formalities which bidders often overlook at their peril. 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. 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, empowerment or post qualification. 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....."

.....Mandatory criteria establish the basic requirement of the invitation. Any bidder that is unable to satisfy any of these requirements is deemed to be incapable of



performing the contract and is rejected. It is on the basis of the mandatory criteria that "competent" tenders are established. . . . "

89. It is settled law that mandatory requirements are the first hurdle that tenderers must overcome for further consideration in an evaluation process. A bidder found to be non-responsive is excluded from the bid process regardless of the merits of its tender.

90. The Applicant in the instant Request for Review is aggrieved by the notification letter dated 9th December 2024 which reads in part as follows:

".....

The evaluation process is now finalized, and we regret to inform you that your bid was unsuccessful due to the following reason:

- i The bill of quantities item 3.21 had a major arithmetic error.***
- ii The bidders subtotal in bill 4 was KES 113,784,850.00 upon verification, it was found that the correct calculation should be KES 113,804,850.00, resulting in a discrepancy of KES. 20,000.00***
- iii The Grand summary of the Bill of quantities had a major arithmetic error***



iv The Bidder did not duly fill item 3.15 which pertains to excavations of pipeline with a quantity of 5,920M

..... ”

91. From the above notification letter, it is clear that the Applicant’s tender was disqualified at the Financial Evaluation stage.

92. The Board takes note of Section 86 of the Act that provides for the successful tender as follows:

"(1) The successful tender shall be the one who meets any one of the following as specified in the tender document—

(a) the tender with the lowest evaluated price;

(b) the responsive proposal with the highest score determined by the procuring entity by combining, for each proposal, in accordance with the procedures and criteria set out in the request for proposals, the scores assigned to the technical and financial proposals where Request for Proposals method is used;

(c) the tender with the lowest evaluated total cost of ownership; or

(d) the tender with the highest technical score, where a tender is to be evaluated based on procedures regulated by an Act of Parliament which



provides guidelines for arriving at applicable professional charges:

Provided that the provisions of this subsection shall not apply to section 141 of this Act.

(2) For the avoidance of doubt, citizen contractors, or those entities in which Kenyan citizens own at least fifty-one per cent shares, shall be entitled to twenty percent of their total score in the evaluation, provided the entities or contractors have attained the minimum technical score.”

93. Regulation 77 of Regulations 2020 provides for Financial Evaluation as follows:

"77. Financial evaluation

(1) Upon completion of the technical evaluation under regulation 76 of these Regulations, the evaluation committee shall conduct a financial evaluation and comparison to determine the evaluated price of each tender.

(2) The evaluated price for each bid shall be determined by—

(a) taking the bid price in the tender form;

(b) taking into account any minor deviation from the requirements accepted by a procuring entity under section 79(2)(a) of the Act;



(c) where applicable, converting all tenders to the same currency, using the Central Bank of Kenya exchange rate prevailing at the tender opening date;

(d) applying any margin of preference indicated in the tender document.

(3) Tenders shall be ranked according to their evaluated price and the successful tender shall be in accordance with the provisions of section 86 of the Act."

94. From the aforementioned provisions, an evaluation committee while evaluating tenders at the financial evaluation stage is required inter alia to determine the evaluated price for each tender **by taking into account any minor deviation from the requirements accepted by a procuring entity under section 79(2)(a) of the Act** and rank tenders according to their evaluated bid price and the successful tender shall be determined in accordance with the provisions of Section 86 of the Act.

95. We note that Section 79 (2) and (3) of the Act provides as follows with respect to minor deviations:

"(2) A responsive tender shall not be affected by-

(a) minor deviations that do not materially depart from the requirements set out in the tender document; or



(b) errors or oversights that can be corrected without affecting the substance of the tender.

(3) A deviation described in subsection (2)(a) shall-

(a) be quantified to the extent possible; and

(b) be taken into account in the evaluation and comparison of tenders."

96. The import of the above provision is that **a responsive tender** shall not be affected by any minor deviations that do not materially depart from the requirements set out in the Tender Document and that do not affect the substance of a tender. This provision details a minor deviation as one that can be quantified to the extent possible and shall be taken into account in the evaluation and comparison of tenders.

97. The High Court in **Miscellaneous Civil Application No. 85 of 2018** considered what amounts to a minor deviation and determined as follows:

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



and appropriately taken account of in the evaluation of tenders. A tender shall be rejected if it is not acceptable....
In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions."

98. It is evident that a procuring entity cannot waive a mandatory requirement or term it as a "minor deviation" since a mandatory requirement is instrumental in determining the responsiveness of a tender and is a first hurdle that a tender must overcome in order to be considered for further evaluation. It is clear from the foregoing case that a minor deviation (a) does not materially alter or depart from the



characteristics, terms, conditions and other requirements set out in the tender documents; (b) may be an error or oversight that can be corrected without touching on the substance of the tender; and (c) can be quantified, to the extent possible, and appropriately taken account of in the evaluation of tenders.

99. Turning to the circumstances in the instant Request for Review, it is not in contest that there is an admitted error by the Applicant in its bid document with regard to Mandatory Requirement No. 18 under Stage I: Preliminary Evaluation Requirement of Section III – Evaluation and Qualification Criteria which pertains to failure to fill Item 3.15 of the Bill of Quantities.

100. Having carefully studied the Tender Document, we note that the evaluation procedure and criteria for the tender subject of this Request for Review is set out at Section III- Evaluation and Qualification Criteria of the Tender Document as provided under Clause 1.1 of the General Provisions which reads:

"This section contains the criteria that the Employer shall use to evaluate tender and qualify tenderers. No other factors, methods or criteria shall be used other than specified in this tender document....."

101. The above is buttressed by ITT 35.2(e) of Section II- Tender Data Sheet (TDS) of the Tender Document which provides for evaluation and comparison of tenders as follows:



"Additional requirements apply. These are detailed in the evaluation criteria in Section III, Evaluation and Qualification Criteria."

102. In essence, Clause 1.1 of the General Provisions at Section III- Evaluation and Qualification Criteria of the Tender Document as read with ITT 35.2(e) of Section II- Tender Data Sheet (TDS) of the Tender Document categorically provides the procedures and criteria that the Evaluation Committee is required to adhere to in evaluating bids submitted in the subject tender. Notably Section II –Tender Data Sheet (TDS) of the Tender Document provides that the specific data therein shall complement, supplement, or amend the provisions in the Instructions to Tenderer (ITT) and whenever there is a conflict, the provisions therein shall prevail over those in the ITT.

103. We note that Mandatory Requirement No. 18 under Stage I: Preliminary Evaluation Requirement of Section III – Evaluation and Qualification Criteria provides as follows:

Stage I: Preliminary evaluation requirement are as follows: (All are Mandatory)

<i>Item No.</i>	<i>Qualification Requirements</i>	<i>Instructions</i>	<i>Qualification Responsive or Not Responsive</i>
.....

18	Bill of Quantities	Bidders are required to fill on the provided BOQ as a Mandatory requirement for Uniformity during Evaluation). Bidders are required to ensure that all financial alterations if any must be countersigned	
*****	*****	*****	*****

104. In essence, it is an express mandatory requirement for a bidder to fill on the provided Bill of Quantities for uniformity during the evaluation process.

105. As such, the argument by Mr. Mbakaya for the Applicant that filing of Item 3.15 of the Bill of Quantities was not necessary a mandatory requirement and that failure to fill the same was curable ITT 14.2 under Section I – Instructions to Tenderers of the Tender Document cannot



hold. We say so because the Tender Document was expressly clear that bidders were, as a mandatory requirement, required to fill on the provided Bill of Quantities and to ensure that all financial alterations if any must be countersigned.

106. We note that ITT 14.2 under Section I – Instructions to Tenderers of the Tender Document relied upon by the Applicant provides that:

"The Tenderer shall fill in rates and prices for all items of the Works described in the Bill of Quantities. Items against which no rate or price is entered by the Tenderer shall be deemed covered by the rates for other items in the Bill of Quantities and will not be paid for separately by the Procuring Entity. An item not listed in the priced Bill of Quantities shall be assumed to be not included in the Tender, and provided that the Tender is determined substantially responsive notwithstanding this omission, the average price of the item quoted by substantially responsive Tenderers will be added to the Tender price and the equivalent total cost of the Tender so determined will be used for price comparison."

107. From the above, it is clear that the tender price as quoted by a bidder ought to take into consideration that:

- i The bidder shall have filled in rates and prices for all items of the works described in the Bill of Quantities;



- ii Items against which no rate or price is provided shall be deemed covered by rates of other items in the Bill of Quantities and will not be paid for separately by the Procuring Entity; and
- iii Provided that a tender is determined to be substantially responsive notwithstanding the omission, the item not listed shall be assumed to be not included in the bid and the average price of the item quoted by substantially responsive tenderers will be added to the tender price and the equivalent total cost of the tender so determined will be used for price comparison.

108. The Applicant having failed to comply with Mandatory Requirement No. 18 under Stage I: Preliminary Evaluation Requirement of Section III – Evaluation and Qualification Criteria of the Tender Document rendered its tender as not being substantially responsive hence incurable under ITT 14.2 under Section I – Instructions to Tenderers of the Tender Document. It would have been different had the Tender Document not made it a mandatory requirement for bidders to fill in the Bill of Quantities. It would also have been different had the Applicant's bid only been rendered as substantially unresponsive on account of the arithmetic errors identified by the Evaluation Committee with regard to Item 3.21 of the Bill of Quantities and the Grand Summary of the Bill of Quantities bearing in mind that the provisions of Section 79(2) (a) and (b) as read with Section 82 of the Act.



109. The Evaluation Committee is under a duty to confine itself to the procedures and criteria set out in the Tender Document when evaluating bids as read with provisions of the Act, Regulations 2020 and the Constitution. In view of the foregoing analysis, this Board is left with the inevitable conclusion that the Evaluation Committee rightfully disqualified the Applicant's bid submitted in the subject in strict compliance with the provisions of the Tender Document, the Act and the Constitution.

110. In the circumstances, the Board finds that the Procuring Entity's Evaluation Committee rightfully disqualified the Applicant's bid submitted in the subject in strict compliance with the provisions of the Tender Document, the Act and the Constitution. Accordingly, this ground of review fails.

Whether the Procuring Entity improperly evaluated and awarded the subject tender to Rumhas Construction Company Limited against the provisions of the Tender Document

111. The Applicant contends that Rumhas Construction Company Limited, the successful bidder in the subject tender ought to have been deemed as non-responsive and was improperly evaluated since it failed to comply with provisions stipulated under Clause 7 Post Qualification and Contract Award of Section III – Evaluation and Qualification Criteria of the Tender Document.



112. Clause 7 Post Qualification and Contract Award of Section III – Evaluation and Qualification Criteria of the Tender Document provides:

".....

(b) In case the tender was not subject to post-qualification, the tender that has been determined to be the lowest evaluated tenderer shall be considered for contract award, subject to meeting each of the following conditions.

- 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 construction cash flow of Kenya Shillings One Hundred Million (100 Million)**
- ii Minimum average annual construction turnover of Kenya Shillings Two Hundred Million (Kshs. 200,000,000/=) equivalent calculated as total certified payments received for contracts is progress and/ or completed within the last 5 years.**
- iii Minimum number of 2 contracts of a similar nature executed within Kenya, or at the East African Community or abroad, that have been satisfactorily and 100%**



completed as a prime contractor, or joint venture member or sub-contractor within the last 5 years starting 1st August, 2019 each of minimum value of Kenya Shillings One Hundred Million (Kshs. 100,000,000/=) equivalent.

iv A minimum number of two contracts under general construction contracts in the role of prime contractor, JV member, sub-contractor or management contractor of the last 5 years, starting 1st August, 2019 to date each if minimum value of Kenya Shillings Fifty Million (50,000,000/=) ”

113. The Applicant argued that the above conditions required a bidder to have been in existence as at 1st August 2019 for it to give evidence of works and contracts executed within the last 5 years and as at 1st August 2019, Rumhas Construction Company Limited was non-existent and could not possibly have undertaken such contracts. The Applicant in support of its argument produced into evidence exhibit marked SN5 being a CR 12 of Rumhas Construction Company Limited which indicates that it was registered on 2nd April 2020 which was only 4 years ago.

114. Mr. Mbakaya argued that this position is further supported by the contents of Addendum No. 1 dated 9th September 2024 which provided



for clarification on the Technical Evaluation Criteria with regard to the Specific Construction Experience as follows:

S/No	TECHNICAL EVALAUTION CRITERIA	
1.	<i>Specific construction Experience</i>	<i>Clarification</i>
	<i>A minimum number of Two similar contract specified below that have been satisfactorily and 100% competed as a prime contractor, joint venture member, management contractor or sub-contractor. (This may be verified with the respective Contracting Authority) for the last 5 years, starting 1st August 2019 to Date of minimum value of 100 Million each</i>	<i>A minimum number of Two similar contracts specified below that have been satisfactorily and 100% competed as a prime contractor, joint venture member, management contractor or sub-contractor. (This may be verified with the respective Contracting Authority) for the last 5 years, starting 1st August 2019 to Date of minimum value of 150 Million each</i>
...	<i>.....</i>	<i>.....</i>

115. We note that the issue in contest relates to the interpretation of the term “within the last 5 years starting from 1st August 2019.” Mr. Aim for the Respondents submitted that the Tender Document only required a bidder to prove that in the last 5 years as from 1st August 2019, it had

carried out the specified minimum number of works at the provided value as stipulated under Clause 7 Post Qualification and Contract Award of Section III – Evaluation and Qualification Criteria of the Tender Document and that the Evaluation Committee on evaluation of the bid submitted by Rumhas Construction Company Limited satisfied itself that this requirement was met.

116. It is the Board's considered opinion that the provisions under Clause 7 Post Qualification and Contract Award of Section III – Evaluation and Qualification Criteria of the Tender Document as read with Addendum No. 1 relate to the experience of a bidder within the last 5 years starting from 1st August 2019 and did not necessarily require the bidder to have been in existence as at 1st August 2019. In saying so, we note that Cambridge Dictionary defines the term 'within' to mean 'insider or not further than an area or period; inside the limits of something for example the law or a set of rules, and allowed by it'. In essence the evidence that a bidder was required to submit in meeting this requirement of the Tender Document ought to have been works completed inside or confined to a period of 5 years starting from 1st August 2019 to the date of the subject tender.

117. In the circumstances, the Board finds that the Procuring Entity properly evaluated and awarded the subject tender to Rumhas Construction Company Limited in line with the provisions of the Tender Document as read with the Act, Regulations 2020 and the Constitution.



What orders the Board should grant in the circumstances?

118. The Board has established that the Respondents' Responses as filed in the instant Request for Review are properly before the Board.

119. The Board has found that the Procuring Entity's Evaluation Committee rightfully disqualified the Applicant's bid submitted in the subject in strict compliance with the provisions of the Tender Document, the Act and the Constitution.

120. The Board has also found that the Procuring Entity properly evaluated and awarded the subject tender to Rumhas Construction Company Limited.

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

FINAL ORDERS

122. 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 this Request for Review:


A. The Request for Review dated 20th December 2024 and amended on 31st December 2024 be and is hereby dismissed.




B. The 1st Respondent be and is hereby directed to proceed with Tender No. NRV/GoK/EMC/MARON-SIBOW/2024- 2025/01 for Construction Works for Maron-Sibow Water project to its logical and lawful conclusion taking into consideration the Board’s findings in this Decision.

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

Dated at NAIROBI this 10th Day of January 2025.


.....
CHAIRPERSON
PPARB


.....
SECRETARY
PPARB

