

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 8/2025 OF 29TH JANUARY 2025

BETWEEN

HILNOH TECHNOLOGIES ENTERPRISE LIMITED APPLICANT

AND

THE ACCOUNTING OFFICER,

KENYA WILDLIFE SERVICE RESPONDENT

Review against the decision of the Accounting Officer Kenya Wildlife Service in relation to Tender No. KWS/ONT/RMLF/135/2023-2024 for Routine Maintenance of Voi Gate – Sala Gate, C103 Road (E682) in Tsavo East National Park.

BOARD MEMBERS PRESENT

- | | |
|------------------------|----------------------------------|
| 1. Ms. Alice Oeri | - Vice Chairperson & Panel Chair |
| 2. CPA Alexander Musau | - Member |
| 3. Mr. Robert Chelagat | - Member |

IN ATTENDANCE

- | | |
|--------------------|--|
| 1. Ms. Sarah Ayoo | - Holding brief for Acting Board Secretary |
| 2. Ms. Evelyn Weru | - Secretariat |

PRESENT BY INVITATION

APPLICANT HILNOH TECHNOLOGIES ENTERPRISE LIMITED

1. Mr. Michael Wanyama - Advocate, Kipkorir & Wanyama LLP
2. Mr. Kipkorir - Advocate, Kipkorir & Wanyama LLP

RESPONDENT THE ACCOUNTING OFFICER, KENYA WILDLIFE SERVICE

Mr. Leon Kalisto h/b

for Ms. Feksi - Advocate, Kenya Wildlife Service

BACKGROUND OF THE DECISION

The Tendering Process

1. Kenya Wildlife Service (hereinafter referred to as “the Procuring Entity”) invited sealed tenders in response to Tender No. KWS/ONT/RMLF/135/2023-2024 for Routine Maintenance of Voi Gate – Sala Gate, C103 Road (E682) in Tsavo East National Park (hereinafter referred to as “the subject tender”). The invitation was by way of an advertisement on My Gov Publication on 27th August 2024, on the Procuring Entity’s website www.kws.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 16th September 2024 at 10.00 a.m. which was later on extended to 23rd September 2024 at 10.00 a.m.

Addenda

2. The Procuring Entity issued five (5) Addenda which clarified and amended various provisions of the Tender Document while extending the tender submission deadline to 23rd September 2024 at 10.00 a.m. as provided in the Revised Schedule of Road Tenders FY 2023-2024 attached to Addendum No. 5 dated 13th September 2024.

Submission of Tenders and Tender Opening

3. According to the Tender Opening Minutes signed by members of the Tender Opening Committee on 23rd September 2024 and which Tender Opening Minutes were part of confidential documents furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board' pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), nineteen (19) bidders submitted bids in the subject tender as follows:

Bid No.	Name Of The Firm
1.	Kinde Engineering Works Ltd
2.	Hussamo Investments Limited
3.	SS Mehta & Sons Limited
4.	Vijay Limited

5.	Wan Wan Limited
6.	Symsons & Dots Limited
7.	Frontier Engineering Limited
8.	Kika Power & Construction Limited
9.	Ventair Construction Limited
10.	Hilnoh Technologies Enterprises Limited
11.	Mbuvo Contractors Limited
12.	Sinoe Construction Limited
13.	Shabana Industries Limited
14.	Flokam Enterprises Limited
15.	Nyonjoro EA Limited
16.	Kemluk Commercial Agencies Limited
17.	Gold Lakes Investments Limited
18.	Lawswood Investments Limitd
19.	Diligent Supplies (K) Limited

Evaluation of Tenders

4. A Tender Evaluation Committee undertook evaluation of the submitted bids as captured in a Tender Evaluation Report dated 14th January 2025 for the subject tender in the following stages:
- i Preliminary Evaluation
 - ii Technical Evaluation
 - iii Financial Evaluation

Preliminary Evaluation

5. The Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Preliminary Evaluation Criteria of Section III- Evaluation and Qualification Criteria at page 28 to 30 of the Tender Document. Tenders 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, seventeen (17) tenders were determined non-responsive including the Applicant's tender, while two (2) tenders were determined responsive and proceeded to Technical Evaluation.

Technical Evaluation

7. The Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Technical Evaluation Criteria of Section III- Evaluation and Qualification Criteria at page 31 to 37 of the Tender Document. The Technical Evaluation comprised of two stages namely:
 - (a) Part A – Assessment of financial capacity, past experience and equipment - Bidders were required to meet the stipulated requirements at this stage so as to progress for further evaluation. At the end of evaluation at this stage, one (1) tender was determined non-responsive while one (1) tender was found to be responsive and progressed for further technical evaluation under Part B of the Technical Evaluation Criteria.

(b) Part B – Contractor’s Key personnel and work methodology – Bidders were required to attain the set minimum required pass mark of 80% at this stage to proceed for Financial Evaluation.

8. At the end of evaluation at Part B of the Technical Evaluation Criteria one (1) tender by M/s Symsons and Dots Limited was determined responsive having met the required pass mark and proceeded to Financial Evaluation.

Financial Evaluation

9. The Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Financial Evaluation of Section III – Evaluation and Qualification Criteria at page 37 of the Tender Document. Award of the subject tender would be to the lowest evaluated bidder who would be subjected to Financial Evaluation which included but was not limited to sensitivity and credibility analysis of the rates to detect abnormally low bids or abnormally high bids or unbalanced tenders or front loaded bids.

10. The Evaluation Committee proceeded to verify the tender price by M/s Symsons and Dots Limited which was determined to be correct without any multiplication or computation errors.

Evaluation Committee’s Recommendation

11. The Evaluation Committee recommended award of the subject tender to M/s Symsons and Dots Limited, being the lowest responsive evaluated

bidder at its tender price of Kenya Shillings Twenty- Eight Million One Hundred and Twenty-Eight Thousand Nine Hundred and Fifty-Six (Kshs. 28,128,956.00) inclusive of all taxes.

Due Diligence

12. The Procuring Entity was required to carry out due diligence on the bidder's documentation as detailed under Schedule 2 – Schedule of Basic Materials and Derivation of Unit Cost.

13. According to the Evaluation Report, the Evaluation Committee carried out due diligence as provided under Section 83 of the Act as read with Regulation 80 of the Public Procurement and Asset Disposal Regulations 2020 (hereinafter referred to as "Regulations 2020") by subjecting M/s Symsons and Dots Limited, the lowest responsive evaluated bidder, to post qualification/due diligence on statutory documents and the establishing the rate analysis of the said bidder.

Professional Opinion

14. In a Professional Opinion dated 15th January 2025 (hereinafter referred to as "the Professional Opinion"), the SAD Supply Chain Management, Ms. Leah Naisoi reviewed the manner in which the procurement process in the subject tender was undertaken including evaluation of tenders and recommendation of award and concurred with the Evaluation Committee's recommendation to award the subject tender to M/s M/s Symsons and Dots Limited, being the lowest responsive evaluated bidder, at its tender

price of Kenya Shillings Twenty- Eight Million One Hundred and Twenty- Eight Thousand Nine Hundred and Fifty-Six (Kshs. 28,128,956.00) inclusive of all taxes.

15. The Professional Opinion was approved as recommended by the Respondent, Prof. Erustus Kanga, PhD, EBS.

Extension of Tender Validity Period

16. *Vide* letter dated 16th January 2025, bidders were notified that the subject tender's validity period had been extended for an additional 30 days effective from 27th January 2025 to allow the Procuring Entity to finalize the Procurement Process.

REQUEST FOR REVIEW NO. 8 OF 2025

17. On 29th January 2025, Hilnoh Technologies Enterprise Limited, the Applicant herein, filed a Request for Review dated 29th January 2025 together with a Statement in Support for Request for Review sworn on 29th January 2025 by Hillary Kipngetch Katam through Kipkorir & Wanyama LLP Advocates seeking the following orders from the Board:

a) The Procuring Entity's decision on non-issuance of a notice of intention to award was irregular, illegal and unconstitutional hence null and void ab initio.

b) The Procuring Entity be compelled to issue a legally compliant notice of intention to award to the Applicant herein within such time as the board deems fit.

c) A declaration that the respondent's decision on non-issuance of the notice of intention to award in Tender No. KWS/ONT/RMLF/135/2023-2024 of September 2024 violates the provisions of Articles 10 and 27 of the Constitution of Kenya 2010.

d) The Board does allow the parties to interrogate the substantive reasoning of the respondent upon provision of notice of intention to award and if it deems fit proceed to issue such orders including but not limited to an order to award the tender aforesaid to the Applicant herein.

e) Costs of this review be borne by the Respondent.

18. In a Notification of Appeal and a letter dated 29th January 2025, Mr. James Kilaka, the Acting Secretary of the Board notified the 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 Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 29th January 2025.

19. On 4th February 2025, the Respondent filed through Ismene Feksi Advocate a Notice of Appointment dated 3rd February 2025, a Memorandum of Response to Request for Review dated 3rd February 2025 together with the confidential documents concerning the subject tender in line with Section 67(3)(e) of the Act.

20. *Vide* letter dated 4th February 2025, the Acting Board Secretary notified all tenderers in the subject tenders 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.

21. *Vide* a Hearing Notice dated 7th February 2025, the Acting Board Secretary, notified parties and all tenderers of an online hearing of the instant Request for Review slated for 12th February 2025 at 2:00 p.m. through the link availed in the said Hearing Notice.

22. When the matter first came up for hearing on 12th February 2025 at 2.00 p.m., Mr. Wanyama for the Applicant submitted to the Board that he was not served with the Hearing Notice and was thus unaware of the scheduled hearing. Despite confirmation by the Board's Secretariat that

the Applicant's advocates were served with the Hearing Notice via email on 7th February 2025 at around 18:41 hrs, Mr. Wanyama reiterated that he was not served and that his colleague Mr. Kipkorir had sought to know the position of the matter on 11th February 2025. He further sought for an adjournment and submitted that he was not ready to proceed and that he had not been served with the Respondent's response to the Request for Review and required to be served with the said response to enable him study the same. In response, Mr. Kalisto submitted that the Applicant and his advocate were served with the Respondent's response in the matter and indicated that he was amenable to taking directions on reschedule hear the matter on another date.

23. Having considered parties' submissions, the Board allowed the application for adjournment and directed (a) the Respondent to immediately serve the Applicant's advocates with its Memorandum of Response to the Request for Review, and (b) that the matter would proceed for hearing on 14th February 2025 at 12.00 noon.

24. At the hearing on 14th February 2025 at 12.00 noon, the Board read out the pleadings filed by parties in the matter and 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

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

26. Mr. Wanyama pointed out that the requirement for bidders to be supplied with a notification of award is not an optional mandate on the part of the Procuring Entity and that issuance of a notification of award is a mandatory requirement under Section 87(3), 126(4), and 176(1)(k) of the Act.

27. He submitted that the Applicant did not receive a notification of intention to award the subject tender which prompted it to issue a demand dated 22nd January 2025 upon the Respondent through its advocates which is annexed at page 6 of the Applicant's Bundle of Documents and that the same not having been responded to, a follow up was done via email of 23rd January 2025.

28. Counsel argued that the burden fell upon the Respondent to prove that it served the notification of intention to award as stipulated in Section 87(3) of the Act. He further argued that the issue of service of the notification of intention to award is a factual issue which ought to be proved by the Respondent.

29. With regard to the Respondent's averments that service was done by way of postal address, counsel submitted that no postal address had been provided and it was unclear on what address the said service was

allegedly made. He further submitted that where service is made by postal address, it was incumbent upon the Respondent to furnish the Board with a certificate of postage to demonstrate that indeed service was made and the same was delivered.

30. Mr. Wanyama indicated that the Respondent has not provided the original dispatch book or an extract thereof to show that indeed the notification of intention to award was disseminated from its offices. He pressed on that it would have been prudent for the Respondent in response to the Request for Review to attach a copy of the notification of intention to award that was allegedly dispatched for purposes of demonstrating to the Board that it has nothing to hide.

31. In support of his argument, counsel referred the Board to the holding in *R v Public Procurement Administrative Review Board and another; Dochar Construction and Trade Incorporation Limited (Interested Party) Ex parte Extreme Engineering Service Limited (2019) eKLR* and submitted that the gist of this decision is that for the Procuring Entity to prove its case with respect to service, it only needed to furnish to the Board evidence of postage used as a mode of communication of the outcome of the evaluation process.

32. At this juncture, Mr. Kipkorir submitted that the argument by the Respondent that the Applicant was served via the postal address provided in its Confidential Business Questionnaire in the absence of a certificate of postage cannot be sustained. He pointed out that one of the contents

of a certificate of postage is evidence showing that service was effected on a given postal address which is provided therein and that it assists the Board in comparing the postal address in the Confidential Business Questionnaire against the address provided in the Certificate of Postage. Further, that it helps the Board in knowing when that service by way of registered post was effected.

33. He reiterated that evidence of service is not a burden on the Applicant and that it is a negative obligation which can only be proven by the Respondent.

34. Counsel argued that the Applicant is entitled to the orders sought while referring to the holding by the High Court in the case of *Cecilia Karuru Ngayu v Barclays Bank of Kenya & another (2016) eKLR* and urged the Board to allow the instant Request for Review with costs as prayed.

Respondent's submissions

35. In his submissions, Mr. Kalisto relied on the documents filed before the Board on behalf of the Respondents in the instant Request for Review.

36. Mr. Kalisto submitted that the Respondent issued the letters of notification of intention to award to all bidders, including the Applicant herein, and that the same were transmitted on 15th January 2025 in line with Section 87 of the Act. He indicated that this transmission was by registered post to the address provided in the Confidential Business Questionnaire. He further submitted that the said documents referred to

had been uploaded on the public procurement portal for purposes of confirmation of the same.

37. He indicated that as per the notification letter, the Applicant was duly informed of the reasons why its tender was unsuccessful and that it was true that it wrote a demand notice requesting to be issued with the notification for award letter. Counsel submitted that the Respondent duly and comprehensively responded to the Applicant's Demand Notices and at some point, it equally received a letter seeking clarification from the Board with respect to the issues before it.

38. Counsel indicated that the Respondent complied with the law in the procurement process of the subject tender as envisaged under Article 227 of the Constitution and that the same was awarded to the successful bidder and parties were at an advanced stage of signing a procurement contract. He argued that the instant Request for Review was devoid of merit and is meant to delay the procurement process

39. Mr. Kalisto urged the Board to dismiss the instant Request for Review with costs.

Applicant's Rejoinder

40. In a rejoinder, Mr. Kipkorir submitted that upon filing of the instant Request for Review on 29th January 2025 pursuant to Section 167 (1) of the Act, the procurement proceedings in the subject tender came to a

standstill and the Respondent cannot purport to proceed with award of the subject tender.

41. He further submitted that the legal obligation on the Respondent per Section 87(1) of the Act is for it to notify the bidders of the outcome of evaluation of the subject tender through the addresses provided in the Confidential Business Questionnaire and it is not for the Respondent to post such information on the public procurement portal since postage of such information does not waive its statutory obligation provided under Section 87(1) of the Act.

CLARIFICATIONS

42. When asked to clarify to the Board if the Respondent had availed any evidence to prove that it posted the letters of notification, Mr. Kalisto submitted that evidence of postage was shared as part of the confidential bundle of documents submitted to the Board pursuant to Section 67(3)(e) of the Act and this included a certificate of postage. Counsel indicated that as to the mode of service, where a bidder had provided its email address, the notification was sent on email and where emails bounced, the Procuring Entity used registered post. He further indicated that there was a probability that the Applicant's email address was not provided hence the reason why the Procuring Entity opted to use postal service and in the event that the email was given, there was a chance that it wasn't going through and may have bounced.

43. On his part, Mr. Wanyama submitted that information pertaining to the Applicant's email address and phone contacts was provided and that Mr. Kalisto has not substantiated or pleaded allegations as to bouncing of the email sent by the Procuring Entity. He further referred the Board to the holding in *Lordship Africa Limited v Public Procurement Administrative Review Board and 2 others* (2018) eKLR and submitted that the court held that the method used to serve the successful bidder should be common for all other bidders who participated in the tender.

44. As to whether the inquiry letters from the Applicant were received and responded to, Mr. Kalisto confirmed that the same were received and responded to. On his part, in opposition, Mr. Kipkorir submitted that attempts to first serve a physical copy of the demand letter of 22nd January 2025 were thwarted since the Procuring Entity sent away his process server leading him to effect service via email which was not responded to. He indicated that reminder sent on 24th January copied to the Public Procurement Regulatory Authority was responded to by the Procuring Entity via a physical letter delivered physically to his office whereby the Procuring Entity indicated that it had dispatched the notices but did not give reasons why the Applicant's tender was disqualified.

45. In a rejoinder, Mr. Kalisto submitted that the allegation that the process server was sent away by the Procuring Entity is untrue and there is no affidavit filed to this effect as evidence.

46. As to whether the Applicant was aware of the reasons why its bid was disqualified in the subject tender, Mr. Kipkorir submitted that the Applicant is not aware of why its bid was disqualified given that the notification of intention to award under Section 87 of the Act was not issued to the Applicant and it is also not aware of the successful bidder and reasons thereof, nor why its bid was declared unresponsive which is the reason it lodged the review application with the Board. He stated that the Applicant had sought for this information from the Respondents on three occasions though its correspondence was not responded to substantively and that even from the present proceedings, there has been no evidence that a response was issued which is contrary to the principles of transparency and accountability.

47. On his part, Mr. Wanyama submitted that he had hoped that on filing the request for review application, the Respondent would be forced to serve the Applicant with the letter of notification of award to enable it know why its tender was disqualified and in turn, based on prayer 4 of the Request for Review, allow it to proceed to amend the review application to conform with the position of the Applicant as to the reason for disqualification. He indicated that had the Applicant received the reason for disqualification and realized that it indeed its bid was non-responsive, it would have resorted to withdraw the application.

48. Mr. Kipkorir submitted that it should be noted that the Applicant was not abusing the court process by litigating in piecemeal since it does not have

information pertaining to why its tender was disqualified and it cannot do anything further challenging the substantive reason.

49. When asked to clarify to the Board the consideration given for the reason issued for disqualification of the Applicant's bid being that the ID number for the person given the power of attorney read 25161824 was found to be different from the ID number of the person given the authority to sign the tender document which read 25161825, Mr. Kalisto confirmed that the variation was on the last digit only and submitted that the Procuring Entity considered the provisions of Section 79(2) of the Act in arriving at its decision as evidenced from the documents submitted in the confidential bundle.

50. He further submitted that it was a requirement under the evaluation criteria for each bidder to provide accurate information without any variation or inconsistency.

51. As to whether the procurement proceedings in the subject tender had been suspended following filing of the instant Request for Review, counsel confirmed that the procurement proceedings in the subject tender were suspended upon the receipt by the Respondent of the Notification of Appeal by the Board Secretary informing him of existence of the instant Request for Review.

52. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 29th January 2025

was due to expire on 18th February 2025 and that the Board would communicate its decision to all parties to the Request for Review via email.

BOARD'S DECISION

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

A. Whether the Respondent met the threshold required in Section 87(3) of the Act read with Regulation 82 of Regulations 2020 with regard to notification of intention to enter into a contract in the subject tender.

B. Whether the Procuring Entity's Evaluation Committee in disqualifying the Applicant's tender acted in breach of the provisions of the Tender Document, Section 80(2) of the Act as read with Article 227(1) of the Constitution.

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

As to whether the Respondent met the threshold required in Section 87(3) of the Act read with Regulation 82 of Regulations 2020 with regard to notification of intention to enter into a contract in the subject tender.

54. We understand the Applicant's case on this issue to be that the Respondent failed to issue it with a notification of intention to enter into a contract in the subject tender contrary to Section 87 of the Act as read with Regulation 82 of Regulations 2020. It is the Applicant's case that this omission by the Respondent goes against provisions under Article 10 and 227(1) of the Constitution and the doctrine of legitimate expectation.

55. We understand the Respondent's case on this issue to be that it issued letters of notification of intention to enter into a contract in the subject tender on compliance with Section 87 of the Act as read with Regulation 82 of Regulations 2020. It is the Respondent's case that the notification letter dated 15th January 2025 that was issued to the Applicant was transmitted to the Applicant via registered post to the address provided by the Applicant in its Confidential Business Questionnaire and this was done simultaneously when also notifying the successful bidder in the subject tender. Further, that from the said notification letter, the Applicant was issued with reasons why its tender was unsuccessful and that the Applicant's demand notices and request for clarification were responded to.

56. The Board is alive to the objective of public procurement which is to provide quality goods and services in a system that implements the principles stated in Article 227 of the Constitution which provides as follows:

Article 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)"**

57. The legislation contemplated in Article 227(2) of the Constitution is the Act. Section 87 of the Act is instructive on how notification of the outcome of evaluation of the successful and unsuccessful tenderers should be conducted by a procuring entity and provides as follows:

"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.

(4) For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security."

58. Section 87 of the Act recognizes that notification of the outcome of evaluation of a tender is made in writing by an accounting officer of a procuring entity. Further, the notification of the outcome of evaluation ought to be done simultaneously to the successful tenderer(s) and the unsuccessful tenderer(s). A disclosure of who is evaluated as the successful tenderer is made to the unsuccessful tenderer with reasons thereof in the same notification of the outcome of evaluation.

59. The procedure for notification under Section 87(3) of the Act is explained by Regulation 82 of Regulations 2020 which provides as follows:

"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 and the reason why the bid was successful in accordance with Section 86(1) of the Act.”

60. 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 tenderers 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 86(1) of the Act and at what price is the successful tenderer awarded the tender. These reasons and disclosures are central to the principles of public procurement and public finance of transparency and accountability enshrined in Article 227 and 232 of the Constitution. This means all processes within a public

procurement system, including notification to unsuccessful tenderers must be conducted in a transparent manner.

61. In **Judicial Review Miscellaneous Application No. 531 of 2015, Republic v Public Procurement Administrative Review Board & 2 others ExParte Akamai Creative Limited** (hereinafter referred to as “the Akamai Case”) the High Court held as follows:

"In my view, Article 47 of the Constitution requires that parties to an administrative proceeding be furnished with the decision and the reasons thereof within a reasonable time in order to enable them decide on the next course of action. It is not merely sufficient to render a decision but to also furnish the reasons for the same. Accordingly, where an administrative body unreasonably delays in furnishing the parties with the decision and the reasons therefor when requested to do so, that action or inaction may well be contrary to the spirit of Article 47 aforesaid"

62. From the above case, the Board observes that the High Court was basically expounding on one of the rules of natural justice as provided for in Article 47 (2) of the Constitution which provides:

"If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action"

63. In essence, the rules of natural justice as provided for in Article 47 of the Constitution require that a procuring entity promptly notifies tenderers of the outcome of evaluation to afford an unsuccessful tenderer the opportunity to challenge such reasons if need be. Further, the Act does not require that an unsuccessful tenderer to seek clarification in order for the accounting officer to provide it with the outcome of evaluation or reasons leading to its disqualification in a tendering process.

64. Turning to the circumstances in the instant Request for Review, we note that the Respondent submitted that it transmitted a notification letter dated 15th January 2025 to the Applicant by way of registered post to the address provided in the Confidential Business Questionnaire and that it gave reasons why the Applicant's tender was disqualified. During the hearing, Mr. Kalisto for the Respondent informed the Board that the mode of transmission adopted by the Respondent was by both email and registered post where an email bounced. He further pointed the Board to the confidential bundle of documents submitted by the Respondent pursuant to Section 67(3)(e) of the Act with regard to evidence of service to the Applicant by way of registered post.

65. Having carefully perused the confidential documents submitted to the Board by the Respondent, we note that the Respondent submitted a Report from Postal Corporation of Kenya on Unclosed Bulk Items Details dated 30th January 2025 with the sender being the Procuring Entity. This report indicates that it is in regard to Batch Number: 38906 where 1052 letters were dispatched to various recipients. However, there is no

indication on whether (a) part of these letters that were dispatched were to the bidders in the subject tender and (b) were in the nature of notification letters envisioned under Section 87 of the Act as read with Regulation 82 of Regulations 2020.

66. In this regard, we note that though the Respondent availed photocopies of notification letters dated 15th January 2025 addressed to various bidders as part of the confidential bundle of documents, it did not proffer any evidence in the form of a dispatch register, certificates of postage or copies of the emails that were allegedly sent to bidders (including the Applicant), or the alleged bounced emails that led it to resort to transmission by way of registered post so as to back the assertion that it notified bidders, including the Applicant, on the outcome of evaluation of the subject tender as provided under Section 87 of the Act as read with Regulation 82 of Regulations 2020. In the absence of such evidence, it is reasonable to conclude that the Applicant was not notified of the outcome of evaluation of the subject tender as pleaded.

67. In the circumstances, we find that the Respondent failed to meet the threshold required in Section 87(3) of the Act read with Regulation 82 of Regulations 2020 with regard to notification of intention to enter into a contract in the subject tender.

As to whether the Procuring Entity's Evaluation Committee in disqualifying the Applicant's tender acted in breach of the

provisions of the Tender Document, Section 80(2) of the Act as read with Article 227(1) of the Constitution.

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

Section 80 - Evaluation of tender:

(1) "....."

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

(3) ***.....;***"

69. 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.

70. Having perused the copy of the letter of Notification dated 15th January 2025 that forms part of the confidential documents submitted to the Board pursuant to Section 67(3)(e) of the Act, it is noted that the reason for disqualification of its bid was laid out as follows:

- ***The ID number for person given the power of attorney (25161824) is different from the ID of the person given the authority to sign the tender document (25161825)***

71. According to the Evaluation Report submitted to the Board by the Respondent with respect to the subject tender, we note that the Applicant was disqualified at the Preliminary Evaluation stage for the reason that the ID number for person given the power of attorney (25161824) is different from the ID of the person given the authority to sign the tender document (25161825).

72. In essence, the Applicant was disqualified at the Preliminary Evaluation stage for the reason that the ID number of the person issued with the Power of Attorney (25161824) differed from the ID number of the person issued with authority to sign the bid document (25161825).

73. During the hearing, counsel for the Applicant was asked by the Board to address it on the evaluation criteria adopted in evaluating and disqualifying the Applicant's tender based on the variance that was identified in the ID numbers given by the person who was issued with the Power of Attorney and the person who signed the Applicant's bid document.

74. Mr. Kalisto submitted that the variation with regard to the ID number was on the last digit only and the Procuring Entity considered the provisions of Section 79(2) of the Act in arriving at its decision to disqualify

the Applicant's tender as evidenced from the documents submitted in the confidential bundle. He further submitted that it was a requirement under the evaluation criteria for each bidder to provide accurate information without any variation or inconsistency.

75. On its part, the Applicant pleaded at ground 7 of the Request for Review as follows:

"Without prejudice to the foregoing, the Applicant's bid was competitive and in strict compliance with the evaluation criteria in the tender document and in consonance with Section 79, 80(2) and 86 of the Public Procurement and Asset Disposal Act, 2015."

76. The Board has carefully studied the Tender Document and notes that Mandatory Requirement No. 14 under the Preliminary Evaluation Criteria set out in Section III-Evaluation and Qualification Criteria at page 29 of the Tender Document provided as follows:

<i>Item No.</i>	<i>Qualification Subject</i>	<i>Qualification Requirement</i>	<i>Document to be Completed by Tenderer</i>	<i>For Procuring Entity's Use (Qualification met or Not Met)</i>
<i>.....</i>	<i>.....</i>	<i>.....</i>	<i>.....</i>	<i>.....</i>
<i>14</i>	<i>Power of Attorney</i>	<i>Form of Tender & ITT 20.3</i>	<i>Duly executed</i>	

			Power of Attorney	
.....

77. Further, the Tender Document at ITT 20.3 of Section II – Tender Data Sheet (TDS) at page 23 of the Tender Document provided that:

Reference to ITC Clause	Particulars of Appendix to Instructions to Tenderers
ITT 20.3	<p>The written confirmation of authorization to sign on behalf of the Tenderer shall consist of:</p> <p>A CURRENT VALID AUTHORIZATION LETTER FROM THE FIRM (ADMINISTERED BY A COMMISSIONER OF OATHS) PERMITTING THE DESIGNATED OFFICAIL TO SIGN THE DOCUMENT ON ITS BEHALF.</p> <p>THIS LETTER MUST BE ORIGINAL AND REFERENCED TO THE TENDER.</p> <p>IN ADDITION, THE PERSON GIVEN POWER OF ATTORNEY MUST HAVE HIS/HER CERTIFIED IDENTIFICATION DOCUMENT ATTACHED</p>

78. Having perused the Applicant’s original tender submitted to the Board as part of the confidential documents pursuant to Section 67(3)(e) of the Act in respect to Mandatory Requirement No. 14 under the Preliminary Evaluation Criteria, we note that:

- a) The Applicant submitted at page 64 of its bid document a duly signed General Power of Attorney nominating Hillary Kipngetich Katam of ID 25161824 to sign all documents related to the subject tender on behalf of the Applicant and enclosed a certified copy of the ID of Hillary Kipngetich Katam Number 25161824 to the General Power of Attorney.

- b) The Applicant submitted in its bid document several affidavits at pages 57, 60, 61 where the ID Number of Hillary Kipngetich Katam was captured as 25161824.

- c) The Applicant, in compliance with ITT 20.3 of Section II – Tender Data Sheet (TDS) at page 23 of the Tender Document submitted at page 69 of its bid document an Authority to Sign Tenders on its Letterhead that was addressed to the Respondent and where it indicated that Hillary Kipngetich Katam of ID Number 25161825 is authorized to engage the Procuring Entity in all matters pertaining to the subject tender. Enclosed to the Authority to Sign Tenders, the Applicant attached a certified copy of the ID of Hillary Kipngetich Katam bearing the Number 25161824.

79. The Board's observes that as a result of the discrepancy by the last digit in the ID number of Hillary Kipngetich Katam as captured in the Power of Attorney and in the Authority to Sign Tenders, the Evaluation Committee resulted to disqualify the Applicant's tender.

80. Noting that Mandatory Requirement No.17 under the Preliminary Evaluation Criteria required a bidder to submit a complete set of tender documents as per the instructions to tenderers and also ensure that all forms and schedules as provided were properly filled for completeness, it is our considered view that the Evaluation Committee ought to have taken note of the certified copy of the ID of Hillary Kipngetch Katam bearing the Number 25161824 that was provided at various segments of the Applicant's bid document and considered the provisions of Section 79(1) and (2)(b) as read with Section 81(1) of the Act.

81. 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."

82. In essence, a responsive tender is one that conforms to all the eligibility and mandatory requirements in the tender document. These eligibility and mandatory requirements were considered by 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) where it 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....."

83. In essence, a responsive tender is one that meets all the mandatory requirements as set out in the Tender Document which are in essence the first hurdle that tenderers must overcome for further consideration in an evaluation process. These eligibility and mandatory requirements are mostly considered at the Preliminary Evaluation Stage following which other stages of evaluation are conducted. Further, tenderers found to be non-responsive are excluded from the bid process regardless of the merits of their tenders.

84. Further, Section 79(2) and (3) of the Act provides that:

"(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."

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

that can be quantified to the extent possible and shall be taken into account in the evaluation and comparison of tenders.

86. 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.

87. 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.

88. We note that Section 81 of the Act provides for clarifications as follows:

"A procuring entity may, in writing, request a clarification of a tender from a tenderer to assist in the evaluation and comparison of tenders."

89. In view of the foregoing, it is our considered view that nothing prevented the Procuring Entity from seeking a clarification as to the variance in the

last digit of the ID number of Hillary Kipngetich Katam as captured in the Authority to Sign Tenders as 25161825 noting that at all other segments of the Applicant's bid, including its duly executed Power of Attorney and the attached certified copies of the ID of Hillary Kipngetich Katam, the ID number is indicated as 25161824. Such an oversight in the Applicant's Authority to Sign Tenders could have been corrected without affecting the substance of the Applicant's bid document noting that the requirement under ITT 20.1 and 20.3 of Section II – Tender Data Sheet (TDS) at page 22 and 23 of the Tender Document, had been met *albeit* the variance in the last digit as captured in the Applicant's Authority to Sign Tenders. The Applicant had not only submitted a duly executed Power of Attorney but also a current Valid Authorization letter.

90. Consequently, the Board finds that the Procuring Entity's Evaluation Committee in disqualifying the Applicant's tender at the Preliminary Evaluation stage acted contrary to the provisions of the Tender Document, Section 80(2) of the Act as read with Article 227(1) of the Constitution.

As to what orders the Board should grant in the circumstances?

91. Having established that the Respondent failed to meet the threshold required in Section 87(3) of the Act read with Regulation 82 of Regulations 2020 with regard to notification of intention to enter into a contract in the subject tender, the Board deems it just and fit to nullify the Letters of Notification dated 15th January 2025 to enable all tenderers be notified of

the outcome of their tenders in accordance with Section 87 of the Act read with Regulation 82 of Regulations 2020.

92. We have also established that the Evaluation Committee acted contrary to the provisions of the Tender Document, Section 80(2) of the Act as read with Article 227(1) of the Constitution by disqualifying the Applicant's bid at the Preliminary Evaluation stage.

93. Section 173 of the Act provides for powers of the Board as follows:

173. Powers of Review Board

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

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

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

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

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

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

94. It is our considered view that the most appropriate orders in the circumstances is to order the Respondent to direct the Evaluation Committee to re-admit the Applicant's tender to the procurement process and re-evaluate the Applicant's tender at the Technical Evaluation stage and proceed with the subject procurement process to its logical conclusion including issuance of notification letters to all bidders of the outcome of the evaluation process in accordance with the provisions of the Tender Document, the Act and the Constitution while taking into consideration the findings of the Board in this matter.

95. The upshot of the findings is that the instant Request for Review succeeds in the following terms:

FINAL ORDERS

96. 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 instant Request for Review:

A. The Notification Letters dated 15th January 2025 addressed to the successful bidder, the Applicant and other unsuccessful bidders with respect to Tender No. KWS/ONT/RMLF/135/2023-2024 for Routine Maintenance of

Voi Gate – Sala Gate, C103 Road (E682) in Tsavo East National Park be and are hereby nullified and set aside.

B. The Respondent is hereby ordered to direct the Evaluation Committee to re-admit the Applicant’s tender to the procurement process and re-evaluate the Applicant’s tender at the Technical Evaluation stage and to complete the procurement process to its logical conclusion including issuance of notification letters of the outcome with respect to Tender No. KWS/ONT/RMLF/135/2023-2024 for Routine Maintenance of Voi Gate – Sala Gate, C103 Road (E682) in Tsavo East National Park in accordance with the Tender Document, the Act, the Constitution and Regulations 2020 within 14 days of this decision while taking into consideration the Board’s findings herein.

C. Given our findings herein, each party shall bear its own costs in the Request for Review.

Dated at NAIROBI this 19th Day of February 2025.

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**PANEL CHAIRPERSON
PPARB**

**SECRETARY
PPARB**