

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 27/2025 OF 13TH MARCH 2025

BETWEEN

ZERAKU CONSTRUCTION COMPANY 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/143/2023-2024 for Routine Maintenance of Mtito Andei – Salaita Road (E693) in Tsavo West National Park.

BOARD MEMBERS PRESENT

- | | |
|------------------------|----------------------------------|
| 1. Ms. Alice Oeri | - Vice Chairperson & Panel Chair |
| 2. QS Hussein Were | - Member |
| 3. Mr. Robert Chelagat | - Member |
| 4. Mr. Joshua Kiptoo | - Member |

IN ATTENDANCE

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

APPLICANT ZERAKU CONSTRUCTION COMPANY LIMITED

for Mr. Brance Ken - Advocate, Ken, Daniel & Henry Advocates

1. Ms. Ismene Feksi - Advocate, Kenya Wildlife Service
2. Eng. Christopher Gichuki - Kenya Wildlife Service
3. Ms. Leah Koech - Kenya Wildlife Service
4. Ms. Leah Naisoi - Kenya Wildlife Service

1. Kenya Wildlife Service, the Procuring Entity herein, invited sealed tenders in response to Tender No. KWS/ONT/RMLF/143/2023-2024 for Routine Maintenance of Mtito Andei – Salaita Road (E693) in Tsavo West 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'), nine (9) bidders submitted bids in the subject tender as follows:

Bid No.	Name Of The Firm
1.	Ventura Ventures and Enterprises Limited
2.	Freemark Traders Company Limited
3.	Daima Contractors Limited

4.	Guba Investment Limited
5.	Almic Investment Limited
6.	Zeraku Construction Company Limited
7.	Chekon Contractors Limited
8.	Borderland Systems Company Limited
9.	Navitas Construction 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, seven (7) tenders were determined non-responsive, while two (2) tenders, amongst them being the Applicant's tender, 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, being the Applicant's 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 Freemark Traders Company 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 Freemark Traders Company 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 Freemark Traders Company Limited, being the lowest responsive evaluated bidder at its tender price of Kenya Shillings Thirty Million Five Hundred and Thirty-Seven Thousand Five Hundred and Eighty Only (Kshs. 30,537,580.00) 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 Freemark Traders Company 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 December 2024 (hereinafter referred to as "the Professional Opinion"), the SAD Supply Chain Management, Ms. Leah Naisoi (signed on 15th January 2025) 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 Freemark Traders Company Limited, being the lowest responsive evaluated bidder, at its tender price of Kenya Shillings Thirty Million Five Hundred and Thirty-Seven Thousand Five Hundred and Eighty Only (Kshs. 30,537,580.00) inclusive of all taxes.

15. The Professional Opinion was approved as recommended by the 1st Respondent, Prof. Erustus Kanga, PhD, EBS on 16th January 2025.

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. 10 OF 2025

17. On 4th February 2025, Zeraku Construction Company Limited, the Applicant herein, filed a Request for Review dated 4th February 2025 together with a Supporting Affidavit sworn on 4th February 2025 by Zephaniah Kurgat through Sisule & Associates (hereinafter referred to as "Request for Review No. 10 of 2025") seeking the following orders from the Board:

a) THAT the Procuring Entity is mandated and/ or directed to immediately notify the Applicant in writing of the outcome of the tender proceedings in Tender No. KWS/ONT/RMLF/143/2023-2024- ROUTINE MAINTENANCE OF MTITO ANDEI- SALAITA ROAD (E693) IN TSAVO WEST NATIONAL PARK, including disclosing any successful tenderer, and reasons as to why the Applicant's bid has been deemed unresponsive, and in any case, within

three (3) Business Days of the decision of the Public Procurement Administrative Review Board ;

b) THAT where the Procuring Entity's actions exceed the omission to notify candidates in the subject procurement proceedings, and involve substantial disregard of the basic procurement rules in the evaluation of the submitted bids, an Order terminating the procurement process and commencement of a new procurement process which abides by the safeguards put in place by the Constitution of Kenya, 2010, the Public Procurement and Asset Disposal Act, 2015, and other attendant laws and regulations, do issue;

c) THAT owing to the conduct of the Procuring Entity, costs of the present proceedings be awarded to the Applicant, including the deposit or assessed fees for lodging the Request for Review, as well as appropriate legal fees as assessed by the Public Procurement Administrative Review Board.

18. The Board considered the parties' pleadings, documents, written and oral submissions, the list and bundle of authorities together with the confidential documents submitted by the Respondents to the Board

pursuant to Section 67(3) (e) of the Act and found the following issues called for determination in the Request for Review No. 10 of 2025:

A. Whether the Board has jurisdiction to hear and determine the instant Request for Review.

In determining the first issue, the Board shall make a determination on whether the instant Request for Review has been instituted in accordance with Section 167(1) of the Act.

B. 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.

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

19. On 25th February 2025, and in exercise of the powers conferred upon it under the Act, the Board made the following final orders with respect to Request for Review No. 10 of 2023:

A. The Respondents' Notice of Preliminary Objection dated 12th February 2025 and filed on even date be and is hereby dismissed.

B. 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/143/2023-2024 for Routine Maintenance of Mtito Andei – Salaita Road (E693) in Tsavo West National Park be and are hereby nullified and set aside.

C. The 1st Respondent is hereby directed to issue Notification of Intention to Enter into a Contract in Tender No. KWS/ONT/RMLF/143/2023-2024 for Routine Maintenance of Mtito Andei – Salaita Road (E693) in Tsavo West National Park in accordance with Section 87 of the Act read with Regulation 82 of Regulations 2020 within three (3) days from the date hereof taking into consideration the Board's findings herein.

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

20. No evidence has been tendered by any party demonstrating that a party to the Request for Review No.10 of 2025 sought judicial review by the High Court of the Board's Decision dated 25th February 2025 in Request for Review No. 10 of 2025. In the absence of such evidence, it is just to hold that the Board's Decision dated 25th February 2025 in Request for Review No. 10 of 2025 became final and binding to all parties to Request for Review No. 10 of 2025 after the lapse of 14 days from 25th February 2025 in accordance with Section 175(1) of the Act.

Notification to Tenderers

21. Pursuant to the Board's orders in Request for Review No. 10 of 2025, tenderers were notified of the outcome of the evaluation of the subject tender vide a Notification of Intention to Award transmitted on 27th February 2025.

REQUEST FOR REVIEW NO. 27 OF 2025

22. The Applicant, being dissatisfied with the Decision of the Procuring Entity, filed Request for Review No. 27 of 2025 dated 12th March 2025 together with a Statement in Support of the Request for Review made by Rabby Chepchirchir on 12th March 2025 (hereinafter referred to as "the instant Request for Review") through the firm of Ken, Daniel & Henry Advocates seeking the following orders from the Board:

a) An order annulling and setting aside the Procuring Entity's decision contained in the letter dated 27th February 2025 declaring the Applicant's bid for Tender No. KWS/ONT/RMLF/143/2023-2024 for ROUTINE MAINTENANCE OF MTITO ANDEI- SALAITA ROAD (E693) unsuccessful.

b) An order annulling and setting aside the Procuring Entity's intention to award Tender No. KWS/ONT/RMLF/143/2023-2024 to the suggested bidder.

c) An order directing the Procuring Entity to re-evaluate the Applicant's bid for Tender No. KWS/ONT/RMLF/143/2023-2024 on the financial stage and to give due consideration of the mandatory provisions of Articles 10 and 227(1) of the Constitution of Kenya and Sections 79(1), 79(2) and 81 of the Public Procurement and Asset, Disposal Act, 2015.

d) An order that costs of this review be borne by the Respondent.

23. In a Notification of Appeal and a letter dated 13th March 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 13th March 2025.

24. On 21st March 2025, the Respondent filed through Ismene Feksi Advocate a Memorandum of Response to Request for Review dated 17th March 2025 together with the confidential documents concerning the subject tender in line with Section 67(3)(e) of the Act.

25. *Vide* letter dated 24th March 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.

26. *Vide* a Hearing Notice dated 21st March 2025, the Acting Board Secretary, notified parties and all tenderers of an online hearing of the instant Request for Review slated for 27th March 2025 at 2:00 p.m. through the link availed in the said Hearing Notice.

27. At the hearing on 27th March 2025 at 2.30 p.m. the Board read out the pleadings filed by parties in the matter and parties were allocated time to highlight their respective cases. Thus, the instant Request for Review proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

Applicant's Submissions

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

29. He submitted that the Applicant submitted a competitive bid in the subject tender which strictly complied with the evaluation criteria set out

in the Tender Document as read with Sections 79, 80(2) and 86 of the Act. He further submitted that the Applicant was notified that its bid was rendered non-responsive for the reason that the line of credit from Rafiki Micro Finance that was applied by the Applicant was for a period indicated as KWS/ONT/RMLF/143/2024-2025 as opposed to KWS/ONT/RMLF/143/2023-2024.

30. He indicated that the issue for determination by the Board is whether the referencing of the line of credit as KWS/ONT/RMLF/143/2024-2025 as opposed to KWS/ONT/RMLF/143/2023-2024 is an error that falls under Section 79(2) of the Act. He submitted in the affirmative that the Applicant's line of credit's reference to 2024-2025 was an offspring of an error for the reason that it provided in exactitude the name of the project, the contract title, and the procuring entity having stated that *'we also confirm that the client has the capacity to access a line of credit equivalent to Ksh. 20,000,000.00 to execute road works for Tender Number KWS/ONT/RMLF/143/2024-2025 for Routine Maintenance of Mtito Andei-Salaita Road (E693).'*

31. Counsel submitted that the project and road cluster E693 had been clearly stated in no uncertain terms and consequently thereto the said line of credit was for all intents and purposes in reference to Tender Number KWS/ONT/RMLF/143/2024-2025 for Routine Maintenance of Mtito Andei-Salaita Road (E693).

32. With regard to the response to the instant Request for Review filed by the Respondent, Mr. Wanyama submitted that the Respondent considers that the error creates an ambiguity and he proceeded to counter this argument by indicating that Section 81 of the Act cures such ambiguity and enjoins the Procuring Entity in respect of such errors to request for clarifications. He pressed on that there was no material placed before the Board showing that clarification was sought from the Applicant. Counsel submitted that the principle of prudence and value for money as emphasized in the Act is a clear indication that clarification ought to have been sought by the Procuring Entity. In support of his argument, he referred the Board to the holding in *PPARB Application No. 8 of 2024 Hilnoh Technologies Enterprise Limited v The Accounting Officer Kenya Wildlife Service*.

33. He urged the Board to allow the instant Request for Review with costs as prayed.

Respondent's submissions

34. In her submissions, Ms. Feksi relied on the documents filed before the Board on behalf of the Respondent in the instant Request for Review together with the confidential documents with respect to the subject tender.

35. Counsel submitted that the deviation in the Applicant's line of credit was not a minor deviation and that considering that this is a financial issue, a

deviation from a financial commitment is a major deviation and it is thus not sufficient to say that the same can be clarified in reliance with Section 81 of the Act.

36. She asserted that the deviation created an ambiguity as to what the financial commitment was for in that one question if it was for the tender 2024-2025 or tender 2023-2024. Counsel reiterated that the deviation was material and a mere clarification would not have been enough to sanitize it.

37. Ms. Feksi urged the Board to dismiss the instant Request for Review with costs.

Applicant's Rejoinder

38. In a rejoinder, Mr. Wanyama submitted that almost any error or minor deviation in a bid submitted by a party can be rectified pursuant to Section 79(2) of the Act. He stated that the only errors or deviations that cannot be clarified are with regard to the tender sum as stipulated under Section 82 of the Act.

39. On the issue of ambiguity, he indicated that there was no existing ambiguity for the reason that there was no tender advertised referenced 2024-2025 and as such, there cannot be an ambiguity for a non-existent tender.

40. He reiterated that the Procuring Entity failed in its duty by not seeking for clarification from the Applicant and urged the Board to grant the prayers sought in the instant Request for Review.

CLARIFICATIONS

41. The Board called on the Respondent to confirm to it that the only challenge with the Applicant's bid as far as the tendering process and description of the tender is concerned was with regard to the issue of the line of credit. In response, Eng. Gichuki submitted that the main issue with the Applicant's bid was with regard to the line of credit's reference which was a key requirement under the financial evaluation criteria as provided in the Tender Document. He further submitted that the purpose of the line of credit is to confirm that the bidder has access to funds to finance maintenance activities on the road in the subject tender and that the Procuring Entity is cognizant of the fact that the bidder and other bidders may also be participating at the same time in other tenders and that the reason the Procuring Entity insists that the line of credit be pegged and tied to the specific tender as advertised is so as to confirm to the procuring entity that upon award, the contractor will be able to meet its financial obligations in executing the work. He reiterated that in this regard, the line of credit has to be addressed to the procuring entity, be valid and recent, and tied to the tender in question since the procuring entity can hold the contractor liable upon award. He indicated that the Applicant's line of credit was not pegged to the subject tender and that this was a major deviation.

42. Eng. Gichuki pointed out that the tender reference in the procurement process is the key identifier for that tender that is presented and indicated in the cover page of the bid document, the form of tender and in other sections of the bid document and upon award, this reference is carried forward to contract and as such, any other indication aside from the subject tender amounts to a major deviation.
43. Asked to clarify whether the Procuring Entity had issued any other tender with the same project name, contract title, road cluster as the subject tender but only with a different year, Eng. Gichuki submitted that none had been issued.
44. Asked to clarify whether any clarification was sought by the Procuring Entity with regard to the ambiguity of the issue raised pertaining to the Applicant's bid, Mr. Wanyama submitted that no clarification was sought from the Applicant in regard to its line of credit as submitted in its bid document.
45. When asked to expound on the provision under the Tender Document with respect to the line of credit, whether this requirement for line of credit was a mandatory requirement and the stage at which it was being evaluated, Eng. Gichuki submitted that the line of credit requirement was a key mandatory requirement under financial evaluation as provided under Financial Capability Evaluation Criteria of the Tender Document. He indicated that bidders were required to provide either (i) a line of credit

which particularly stated that the document shall be original, referenced to the tender and signed on the financial institution's letterhead containing the address and contact information or (ii) a bank statement within the last six months from the date of the tender opening authenticated by the issuing financial institution, or (iii) provide evidence of an incumbent real assets in the form of title deed within the last six months and the real assets ought to be in the name of the tenderer or at least one of the directors, or (iv) any other authorized credit facility accredited by relevant laws in Kenya such as Youth Fund, Women Enterprise Fund.

46. He confirmed that the Applicant provided a line of credit which is under contention and did not provide any other source of financing for the project and as such, the evaluation committee solely relied on its line of credit in its evaluation. He pointed out that if there were any bank statements in the Applicant's bid, they did not meet the threshold required for the line of credit.

47. As to whether a successful bidder would have the option of securing financing from any other institution after award other than the one indicated in its bid, Eng. Gichuki submitted that there is no clause in the Tender Document that prevents a bidder from accessing financing from any other source though at the time of bidding, it is upon the bidder to prove and demonstrate that it can be able to meet the contractual obligations in the subject tender.

48. He further submitted that the ambiguity in the Applicant's line of credit as referred to in the Respondent's Memorandum of Response is a major ambiguity that results to failing to meet the requirements of the subject tender and seeking a clarification on the same would be disadvantageous to other bidders who might also have had such deviations in their bid documents. He confirmed that the Applicant's bid was found non-responsive at Part A of the Technical Evaluation stage noting that the requirement for the line of credit was under the financial capability criteria which was a component under the Technical Evaluation criteria.
49. As to whether the incorrect referencing affects the originality of the line of credit supplied by the Applicant, Eng. Gichuki submitted that the issue was not so much on originality but on the commitment from the bidder through the financial institution to avail funding for the particular contract. He indicated that it was a document which upon award the Procuring Entity can hold the contractor liable for breach of contract in instances of slow progress of works since it is a commitment that these particular funds are available for this particular project.
50. The Board called upon the Respondent to address it on the line of credit supplied by the successful bidder in the subject tender in terms of the date indicated therein being that it was provided in 2023. In response, Eng. Gichuki submitted that in the event that the date was indicated as 2023, this would not be considered current noting that the subject tender was advertised in 2024.

51. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 13th March 2025 was due to expire on 3rd April 2025 and that the Board would communicate its decision to all parties to the Request for Review via email.

BOARD'S DECISION

52. 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 Procuring Entity's Evaluation Committee unfairly disqualified the Applicant's tender at Part A of the Technical Evaluation stage.

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

As to whether the Procuring Entity's Evaluation Committee unfairly disqualified the Applicant's tender at Part A of the Technical Evaluation stage.

53. Central to this instant Request for Review is the Applicant's grievance that the Respondent erred in law and in fact in declaring its bid unresponsive on the sole premise of an error in the referencing of the line of credit submitted in its bid document. The Applicant submitted that it erroneously stated the tender reference as 2024-2025 in its line of credit

whereas the correct reference was 2023-2024. The Applicant further submitted that despite this error, it provided in exactitude the name of the project, the contract title, the procuring entity and that the project in the subject tender and the road cluster, E693 were clearly stated in no uncertain terms and as such, the Procuring Entity ought to have sought clarification from it so as to assist in the evaluation and comparison of its tender

54. On the other hand, the Respondent contend that they adhered to the provisions of the Constitution, the Act and the Tender Document in evaluating the Applicant's bid. The Respondent submitted that the requirement for a correctly referenced line of credit is not a mere formality but a fundamental compliance aspect which ensures that the financial commitment unequivocally aligns with the specific tender under evaluation. It is the Respondent's case that the deviation in the line of credit reference was a major deviation and introduced ambiguity with regard to the Applicant's financial commitment's linkage with the subject tender.

55. The question that has arisen is whether of the Applicant's tender was fairly disqualified. 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)"***

56. The legislation contemplated in Article 227(2) of the Constitution is the Act. Section 80 (1) and (2) 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 under Section 82(3).***
- (2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this***

Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.

(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) ”

57. Section 80(2) of the Act as indicated above requires 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. A system that is fair is one that considers equal treatment of all tenders against a criteria of evaluation known by all tenderers since such criteria is well laid out for in a tender document issued to tenderers by a 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 a tender document.

58. 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.

59. 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.

60. The Applicant was notified vide letter of 27th February 2025 that its tender was unsuccessful for the reason that:

***"Line of Credit from Rafiki Micro Finance as
KWS/ONT/RMLF/143/2024-2025 -
KWS/ONT/RMLF/143/2023-2023"***

61. It is not in doubt that the above letter of notification is the trigger that set off the instant Request for Review.

62. A perusal of the Evaluation Report submitted to the Board as part of the confidential documents by the Respondent pursuant to Section 67(3)(e) of the Act reveals that the Applicant's tender was disqualified at Part A of

the Technical Evaluation stage as can be discerned at pages 14 of 26, 15 of 26 and 19 of 26 of the Evaluation Report which reads as follows:

STAGE TWO (2) TECHNICAL EVALUATION PART A

Table 9: Below Show the Technical Evaluation Part A and Outcome as Per Section iii of the Tender Document

TENDER NAME: ROUTINE MAINTENANCE OF MTITO ANDEI – SALAITA ROAD (E693) IN TSAVO WEST NATIONAL PARK						
TENDER NO: KWS/ONT/RMLF/143/2023-2024						
TECHNICAL EVALUATION CRITERIA Part A						
Item No.	Qualification Subject	Qualification Requirement	Documents To be Completed and Submitted by the Tenderer	Instructions- Indicate Met/Not Met	Bidders Evaluated:	
(i) Financial Evaluation Criteria					B2	B6
1	Financial Capabilities	<i>(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</i>	The tenderer to provide sources of funding meeting the requirements in the form of:-			

		cash flow requirements estimated as Kes6,850,000.00 net of the Tenderer's other commitments.				
		(ii) The Tenderers shall also demonstrate, to the satisfaction of Kenya Wildlife Service, that it has adequate sources of finance to meet the cash flow requirements on works currently in progress and for future contract commitments.	i) Sources of Finance	Met/Not Met	Met	Not Met
			The tenderer to provide sources of funding meeting the requirements in the form of:-			
			· Line of Credit (Valid for the last 6 months from date of tender Opening/Closing)			
			· Bank Statement (Current last 6 Months from date of tender Opening/Closing)			
			· Unencumbered real assets (evidence in the form of duly certified (by registered valuer/ realtors) copy of: - title deed, recent Search and valuation report within the last 6 months).			

			<p>Any other authorized credit facility accredited by relevant laws in Kenya (e.g. Youth fund, Sacco, Women Enterprise Fund etc.)</p> <p>The above sources of funding should either be cumulatively or individually equivalent to at least Kes. 6,850,000.00</p>			
		<p>(iii) The audited balance sheets or, if not required by the laws of the Tenderer's country, other financial statements acceptable to Kenya Wildlife Service, for the last 3 years shall be submitted and must demonstrate the current soundness of the Tenderer's financial position and</p>	<p>ii) Financial Ratio</p> <p>Provide fully filled signed and stamped computations of the financial ratios in Form FIN 3.1. The form to be signed by the auditor registered with ICPAK and one of the directors.</p> <p>Computation shall be made for the following ratios and marks awarded to each of the ratios:</p>	<p>Met/Not Met</p>	<p>Met</p>	<p>Met</p>

		indicate its prospective long-term profitability.	Liquidity Ratio (≥ 1)	Met/Not Met	Met	Met
			Return on Capital Employed (ROCE) $\geq 5\%$	Met/Not Met	Met	Met
			iii) Audited Accounts.			
			Provide the above with all pages initialized and stamped by a practicing auditor registered with ICPAK and one of the directors.	Met/Not Met	Met	Met
			Auditor's practicing membership number must be indicated and a copy of the valid practicing license attached.	Met/Not Met	Met	Met

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Non-Responsive Bidders

The following one (1) bidder were disqualified at the technical stage part A and could not proceed to the technical evaluation part B

Table 10: Unsuccessful bidders after technical Evaluation PART A for Tender No. KWS/ONT/RMLF/143 /2023-2024

<i>BID NO.</i>	<i>BIDDER NAME</i>	<i>REASONS FOR DISQUALIFICATION</i>
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6	ZERAKU CONSTRUCTION COMPANY LIMITED	<ul style="list-style-type: none"> • <i>Line of credit from Rafiki Micro Finance referenced as KWS/ONT/RMLF/143/2024 – 2025 - Not KWS/ONT/RMLF/143/2023 – 2024.</i>
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Responsive Bidders after Technical Evaluation Part A

One (1) Bidder qualified at the Technical Evaluation Part A stage and proceeded to the Technical Evaluation Part B

Table 11: Successful Bidders Based on Technical Evaluation Part A of Tender No. KWS/ONT/RMLF/143/2023-2024

<i>BIDDER NO.</i>	<i>BIDDER NAME</i>
<i>2</i>	<i>FREEMARK TRADERS COMPANY LIMITED</i>

63. We note that the Tender Document is the key guide in the evaluation of tenders submitted in response to any tender invitation. Item No. 1 of the Technical Evaluation Criteria Part A at page 31 of the Tender Document in the subject tender provided for the Financial Capability Evaluation Criteria as follows:

<i>TECHNICAL EVALUATION CRITERIA Part A</i>				
<i>Item No</i>	<i>Qualification Subject</i>	<i>Qualification Requirement</i>	<i>Documents to be Completed and Submitted by the Tenderer</i>	<i>For KWS Use (Qualification met or Not Met)</i>
<i>(i) Financial Capability Evaluation Criteria</i>				
<i>1.</i>	<i>Financial Capabilities</i>	<i>(i) The Tenderer shall demonstrate that it has access to, or has available, liquid</i>	<i>Form FIN – 3.1, with attachments The tenderer to provide sources of funding</i>	<i>Met/Not Met</i>

		<p>assets, unencumbered real assets, lines of credit, and other financial means (independent of any contractual advance payment) sufficient to meet the construction cash flow requirements estimated as Ksh. 6,850,000.00 net of the Tenderer's other commitments.</p> <p>(ii) The Tenderers shall also demonstrate, to the satisfaction of Kenya Wildlife Service, that it has adequate sources of finance to meet the cash flow requirements on works currently in progress and for future contract commitments.</p> <p>(iii) The audited balance sheets</p>	<p>meeting the requirements in the form of:</p> <p>i) Sources of Finance The tenderer to provide sources of funding meeting the requirements in the form of:-</p> <ul style="list-style-type: none"> • Line of Credit (The document shall be original, referenced to the tender and signed on the financial institution's letterhead containing addresses and contact information.) • Bank Statement (Current last 6 Months from date of tender Opening/Closing and authenticated by the issuing financial institution) • Unencumbered real assets (evidence in the form of duly 	
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		<p>or, if not required by the laws of the Tenderer's country, other financial statements acceptable to Kenya Wildlife Service, for the last 3 years shall be submitted and must demonstrate the current soundness of the Tenderer's financial position and indicate its prospective long-term profitability.</p>	<p>certified (by registered valuer / realtors) copy of: - title deed, recent Search and valuation report within the last 6 months). The real asset should be in the name of the tenderer or at least one of the directors.</p> <ul style="list-style-type: none"> • Any other authorized credit facility accredited by relevant laws in Kenya (e.g. Youth fund, Sacco, Women Enterprise Fund etc.) <p>The above sources of funding should either be cumulatively or individually equivalent to at least Ksh. 6,850,000.00 net of the Tenderer's other commitments.</p> <p>ii) Financial Ratio Provide</p>	
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			<p>fully filled signed and stamped computations of the financial ratios in Form FIN – 3.1. The form to be signed by the auditor registered with ICPAK and one of the directors.</p> <p>Computation shall be made for the following ratios and marks awarded to each of the ratios:</p> <ul style="list-style-type: none"> • Liquidity Ratio (≥ 1) • Return on Capital Employed (ROCE) $\geq 5\%$ <p>iii) Audited Accounts.</p> <p>a) Provide the above with all pages initialized and stamped by a practicing auditor registered with ICPAK and one of the directors.</p>	
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			<i>b) Auditor's practicing membership number must be indicated and a copy of the valid practicing license attached.</i>	
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64. In essence, a bidder was required, *inter alia*, to demonstrate with regard to its sources of finance that (a) it has access to or has available, liquid assets, unencumbered real assets, lines of credit and other financial means sufficient to meet the construction cash flow estimated at Kshs. 6,850,000.00 net of its other commitments, (b) it has adequate sources of finance to meet the cash flow requirements on works currently in progress and future contract commitments and (c) its audited balance sheets or other financial statements for the last 3 years are currently sound of the tenderer's financial position and indicate its prospective long-term profitability.

65. In response to the above criteria, the Applicant submitted (a) at page 344 to 370 of its original bid in the subject tender Bank Statements from KCB Bank Kenya Ltd and Rafiki Microfinance Bank Ltd, and (b) a line of credit at page 372 of its original bid in the subject tender from Rafiki Microfinance Bank Limited that was original, and signed on the financial institution's letterhead. The line of credit reads in part:

"

**RE: LINE OF CREDIT FOR ZERAKU CONSTRUCTION COMPANY
LIMITED A/C: XXX**

***We hereby advise that the above named is an esteemed client
of Rafiki Microfinance Bank (K) Ltd.***

***We further confirm that the above mentioned are of good
financial standing and consider them good for normal
business transactions. We also confirm that the client has the
capacity to access a line of credit equivalent to Ksh.
20,000,000 to execute road works TENDER NO:
KWS/ONT/RMLF/143/2024-2025 for ROUTINE
MAINTENANCE OF MTITO ANDEI – SALAITA ROAD (E693) IN
TSAVO WEST NATIONAL PARK which is subject to bank
approval.***

.....”

66. The Respondent took issue with the fact that the Applicant failed to correctly reference its line of credit to the subject tender, and that this was a major deviation since its financial commitment did not align with the subject tender and created ambiguity regarding whether its financial institution intended to support the subject tender in question. On its part, the Applicant argued that the error in referencing its line of credit was a minor deviation and had clarification been sought by the Procuring Entity, this issue would have been resolved without materially affecting the substance of its tender as stipulated under Section 79(2) of the Act.

67. We note that Section 79(2) and (3) of the Act provides for minor deviations, errors and oversights as follows:

"(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."

68. 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.

69. 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**, the High Court considered what amounts to a minor deviation and found that:

"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.”

70. 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.

71. It is also evident from the foregoing case law 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.

72. The Board having perused the successful bidder’s tender (i.e. Freemark Traders Co. Limited) as submitted to it by the Respondent pursuant to Section 67(3)(e) of the Act sought clarification during the hearing from the Respondent with regard to the line of credit supplied by Freemark Traders Co. Limited from Sidian Bank having observed that it was provided on 9th September 2023 yet the subject tender was advertised on 27th August 2024 and despite this, its tender was rendered responsive to the stipulated evaluation criteria. In his response, Eng. Gichuki for the Respondent indicated to the Board that the date of 9th September 2023

would ideally not be considered current in view of when the subject tender was advertised.

73. Notably, Section 81 of the Act provides for clarifications by a procuring entity 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."

74. The import of the above provision is that a procuring entity in the course of evaluation of bids may request for a clarification of a tender from a tenderer so as to assist in the evaluation and comparison of tenders.

75. This Board has not had sight of any clarifications sought from either the successful bidder or the Applicant with regard to anomalies identified in their respective lines of credits as submitted in the subject tender. We are of the considered opinion that the oversight in referencing the tender in the Applicant's line of credit is an oversight that could be corrected following issuance of a clarification to the procuring entity without affecting the substance of the Applicant's bid document. This is in view of the fact that a similar oversight with regard to the successful bidder's line of credit was not arrested by the Evaluation Committee during evaluation at Part A of the Technical Evaluation stage yet it was progressed for further evaluation.

76. In the Respondent's submission, the Applicant failed to correctly reference its line of credit to the subject tender, and that this was a major deviation since its financial commitment did not align with the subject tender and created ambiguity regarding whether its financial institution intended to support the subject tender in question. By this position of the Respondent the Applicant's tender was disqualified from the evaluation process. Several fundamental questions arise here:

- i) Was the Applicant's tender found to be outrightly unresponsive to the requirement on the line of credit or was it merely ambiguous?
- ii) Was the line of credit a mandatory requirement of the tender document or there were other means for a tenderer to demonstrate financial capability to carry out the tender?
- iii) Did the line of credit bind the issuing financial institution or the tenderer was at liberty to source for funds elsewhere for the project?
- iv) Did the Procuring Entity have a budget for the subject tender or it relied solely on the line of credit issued by the tenderer?

77. The Board had an opportunity to pose the above questions and from the responses of the Procuring Entity it is clear that the Applicant was disqualified because of ambiguity in the referencing of the line of credit and not due to outright failure to meet the tender requirement on this particular item. It is the respectful view of the Board that public procurement is a serious business and Procuring Entities ought to treat tenders submitted to it in response to invitations to tender with due

seriousness. In the Board's view disqualifying a tender on a mere suspicion of non-responsiveness to a tender requirement does not amount to a serious handling of the procurement process. In any case, tools exist at the disposal of the procuring entity in the form of seeking clarification under Section 81 of the Act which, if it had been deployed, would have erased any ambiguity the procuring entity had.

78. It is a further position of the Respondents that a tenderer was required to demonstrate with regard to its sources of finance, *inter alia*, that (a) it has access to or has available, liquid assets, unencumbered real assets, lines of credit and other financial means sufficient to meet the construction cash flow estimated at Kshs. 6,850,000.00 net of its other commitments, (b) it has adequate sources of finance to meet the cash flow requirements on works currently in progress and future contract commitments and (c) its audited balance sheets or other financial statements for the last 3 years are currently sound of the tenderer's financial position and indicate its prospective long-term profitability. This goes to show that line of credit was not a mandatory requirement of the tender document but merely one of the many ways of showing financial capability of a tenderer. It is not lost to the Board that mandatory requirements of the tender were listed under the preliminary evaluation stage of the tender document and line of credit was not one of them.

79. It is also evident that line of credit was not the only source of project financing open to the Applicant. Others like liquid assets, unencumbered

real assets and other financial means sufficient to meet the construction cash flow, its audited balance sheets or other financial statements for the last 3 years. It is therefore, in the Board's view, misleading for the Respondents herein to state that the line of credit was binding to the financial institution issuing it. The Board has perused the Tender Document and does not find it to have stated as such.

80. Further, it is clear that the Procuring Entity had a budget for the subject tender. It therefore follows that the responsibility to finance the project lay entirely with the Procuring Entity. The financial capability of a tenderer was limited to construction cash flow of up to Kshs 6,850,000.00 to bridge the gap between the overall project financing by the Procuring Entity. It is not plausible that the financial institution issuing the letter of credit would be held liable for any financial shortfalls that would occur in the project of the subject tender.

81. It would therefore only be fair for the Applicant to be afforded an opportunity to progress for further evaluation at Part B of the Technical Evaluation stage. In saying so, we are cognizant of the provisions of Article 47(1) of the Constitution on procedural fairness as follows:

"(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."

82. The Board notes that procedural fairness is a constitutional requirement in administrative action and goes beyond the traditional meaning of the duty to afford one an opportunity of being heard. Even in instances where there is no express requirement for a person to be heard before a decision is made, the authority entrusted with the mandate of making the decision must act fairly. In **Civil Appeal 52 of 2014 Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR**, the Court of Appeal held that:

"Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in Article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed."

83. In **Judicial Review Miscellaneous Application No. 36 of 2016 Republic v National Police Service Commission Exparte Daniel**

Chacha Chacha [2016] eKLR the court while addressing the elements of procedural fairness referred to the case by the Supreme Court in **Baker v. Canada (Minister of Citizenship & Immigration) 2 S.C.R. 817** 6 where it was held that:

"The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions.

53. The Court further emphasized that procedural fairness is flexible and entirely dependent on context. In order to determine the degree of procedural fairness owed in a given case, the court set out five factors to be considered: (1) The nature of the decision being made and the process followed in making it; (2) The nature of the statutory scheme and the term of the statute pursuant to which the body operates; (3) The importance of the decision to the affected person; (4) The presence of any legitimate expectations; and (5) The choice of procedure made by the decision-maker. [Emphasis ours]

84. From the foregoing, we find that the Procuring Entity's Evaluation Committee unfairly disqualified the Applicant's tender at Part A of the Technical Evaluation stage.

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

85. Having established that the Applicant's tender was unfairly disqualified at Part A of the Technical Evaluation stage, any action undertaken thereafter emanating from an unfair and unlawful evaluation cannot be allowed to stand because such actions are consequently null and void. The Board therefore deems it fit to order the Respondent to direct the Evaluation Committee to re-admit the Applicant's tender for evaluation at Part B of 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

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

FINAL ORDERS

87. 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 27th February 2025 addressed to the successful bidder, the Applicant and other unsuccessful bidders with respect to Tender No. KWS/ONT/RMLF/143/2023-2024 for Routine Maintenance of Mtito Andei – Salaita Road (E693) in Tsavo West 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 back into the procurement process and re-evaluate its tender at Part B of the Technical Evaluation stage and to proceed with the procurement process to its logical conclusion including the making of an award with respect to Tender No. KWS/ONT/RMLF/143/2023-2024 for Routine Maintenance of Mtito Andei – Salaita Road (E693) in Tsavo West National Park for Kenya Wildlife Service.

C. Further to Order B above, the Respondent is ordered to complete the procurement process of the subject tender within 21 days of this decision, taking into consideration the Board's findings herein.

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

Dated at NAIROBI this 2nd Day of April 2025



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PANEL CHAIRPERSON

PPARB



.....

SECRETARY

PPARB