

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 28/2025 OF 13TH MARCH 2025

BETWEEN

CAXON DIS AND WORKS 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/144/2023-2024 for Routine Maintenance of Kitani-Maktau-Jipe Road (UNCL_TWNP_2) in Tsavo West National Park.

BOARD MEMBERS PRESENT

- | | |
|-----------------------|---------------------|
| 1. Mr. Jackson Awele | - Panel Chairperson |
| 2. Mr. Daniel Langat | - Member |
| 3. Eng. Lilian Ogombo | - Member |

IN ATTENDANCE

- | | |
|--------------------------|--|
| 1. Ms. Sarah Ayoo | - Holding brief for Acting Board Secretary |
| 2. Ms. Evelyn Weru | - Secretariat |
| 3. Ms. Christabel Kaunda | - Secretariat |

4. Mr. Erickson Nani - Secretariat

PRESENT BY INVITATION

APPLICANT

Mr. Michael Wanyama

CAXON DIS AND WORKS LIMITED

-Advocate, Kipkorir & Wanyama
Advocates LLP

RESPONDENT

Ms. Imene Feksi

Eng. Christopher Gichuki

Ms. Lilian Koech

THE ACCOUNTING OFFICER, KENYA WILDLIFE SERVICE

- Advocate, Kenya Wildlife Service

- Kenya Wildlife Service

- 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/144/2023-2024 for Routine Maintenance of Kitani-Maktau-Jipe Road (UNCL_TWNP_2) 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 17th September 2024 at 10.00 a.m. which was later on extended to 24th 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 24th September 2024 at 10.00 a.m. as provided in the Revised Schedule of Road Tenders FY 2023-2024.

Submission of Tenders and Tender Opening

3. According to the Tender Opening Minutes signed by members of the Tender Opening Committee on 24th 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'), fourteen (14) bidders submitted bids in the subject tender as follows:

Bid No.	Name Of The Firm
1.	Shuriye Contactors Ltd
2.	Abmo Links Limited
3.	Mutindi General Contractors
4.	Cantam Investments Limited

5.	Maash General Suppliers Ltd
6.	Shix Ltd
7.	Jikmir Enterprises Limited
8.	Gajesh Enterprises Ltd
9.	Antco Investments Ltd
10.	Skylim Solutions Ltd
11.	Parkton Ventures Ltd
12.	Hogla Construction Company Ltd
13.	Colossus Investments Ltd
14.	Caxon Dis & Works Ltd

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, ten (10) tenders were determined non-responsive, while four (4) tenders, amongst them being the Applicant's tender and the successful 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, three (3) tenders, including 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 Antco Investments 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 Antco Investments 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 Antco Investments Limited, being the lowest responsive evaluated bidder at its tender price of Kenya Shillings Twenty-Six Million Three Hundred and Sixty-Seven Thousand Nine Hundred and Seven and Thirty-Eight Cents Only (Kshs. 26,367,907.38) 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 Antco Investments 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 Antco Investments Limited, being the lowest responsive evaluated bidder, at its tender price of Kenya Shillings Twenty-Six Million Three Hundred and Sixty-Seven Thousand Nine Hundred and Seven and Thirty-Eight Cents Only (Kshs. 26,367,907.38) 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.

Notification of Award.

17. *Vide* Notification of Intention to Award letter dated 28th February 2025, parties that participated in the subject tender were informed of the outcome of the evaluation with the remaining bidders, Applicant inclusive, being informed of the various reasons why their respective bids were unsuccessful.

REQUEST FOR REVIEW

18. On 13th March 2025, Caxon Dis and Works Limited, the Applicant herein, filed a Request for Review dated 12th March 2025 together with a Statement in Support for Request for Review sworn on 12th March 2025 by Bethwel Kipngetich through Messrs. Kipkorir & Wanyama Advocates LLP seeking the following orders from the Board:

- a) An order annulling and setting aside the Procuring Entity's decision contained in the letter dated 28th February 2025 declaring the Applicant's bid for Tender No. KWS/ONT/RMLF/144/2023-2024 unsuccessful.***

- b) An order annulling and setting aside the Procuring Entity's intention to award Tender No. KWS/ONT/RMLF/144/2023-2024 to the suggested bidder.***
- c) An order directing the Procuring Entity to re-evaluate the Applicant's bid for Tender No. KWS/ONT/RMLF/144/2023-2024 at the technical and 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) of the Public Procurement and Asset Disposal Act, 201***
- d) In the alternative to prayer (3) above, an order directing the respondent to award Tender No. KWS/ONT/RMLF/144/2023-2024 to the Applicant herein.***
- e) An order that costs of this review be borne by the Respondent.***

19. In a Notification of Appeal and a letter dated 13th March 2025, Mr. James Kilaka, the Acting Secretary of the Board notified the Respondent 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.

20. On 21st March 2025, counsel for the Respondent, Ms. Ismene Feksi filed a Memorandum of Response dated 16th August 2024 on behalf of the Respondent.
21. *Vide* a Hearing Notice dated 24th March 2025, the Acting Board Secretary, notified parties and all tenderers of an online hearing of the instant Request for Review slated for 28th March 2025 at 11:00 a.m. through the link availed in the said Hearing Notice.
22. At the hearing on 28th March 2025 parties confirmed with the Board the pleadings they would be relying on in support of their respective cases. Counsel for the Applicant Mr. Wanyama confirmed that the Applicant would be relying on the instant Request for Review together with oral submissions to be made at the hearing. On the Respondent's part, counsel Ms. Feksi confirmed that the Respondent would be relying on the Memorandum of Response dated 16th August 2024, bundle of documents submitted to the Board pursuant to Section 67(3)(e) of the Act and oral submissions to be made at the hearing.
23. Parties were thereafter allocated time to highlight their respective cases and the instant Request for Review proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

Applicant's Submissions

24. In his submissions, Mr. Wanyama relied on the documents filed before the Board on behalf of the Applicant and submitted that the Respondent erred in finding the Applicant's submitted tender bid as non-responsive for what the Applicant termed an immaterial deviation in line with the provisions of Section 79(2) of the Act.
25. Mr. Wanyama submitted that the Applicant in its tender submission had been responsive in all material aspects and that if there had been any deviations then the same were immaterial deviations which did not warrant the entire tender bid being found non-responsive.
26. Counsel further submitted that a reading of the blank tender document relating to the subject tender and specifically page 34 of the same under Technical Evaluation Criteria required tenderers to provide proof of ownership of the equipment to be used in carrying out the works in the form of NTSA TIMs Account printout including logbooks.
27. Counsel submitted that in view of the said particular requirement, the Applicant submitted its logbooks in compliance with the same, with the understanding that what the Respondent had been looking for was proof of ownership and according to the Applicant, nothing else conferred ownership of a motor-vehicle under the laws of Kenya than a logbook to the said motor-vehicle. In submitting so, counsel was cognizant of issues arising such as Sale Agreements *et al*/ but that with respect to the matter at hand, the Applicant had submitted a copy of a logbook.

28. Counsel submitted that having submitted a copy of the said logbook, then it was the Applicant's contention that they had satisfied the requirements under the said provision. Counsel thereafter submitted that the failure by the Applicant in submitting an NTSA TIMs printout was therefore a minor deviation.

29. In support of the Applicant's case, counsel Mr. Wanyama placed reliance on Clauses 29(2) and 30 of the blank tender document at page 13. Counsel submitted that Section 29(2) provided that a substantially responsive bidder was one that met the requirements of the tender document without material deviation, reservation or omission.

30. Counsel thereafter submitted that the Respondent went ahead to define what a material deviation, reservation or omission was in the following terms:

- i. A material deviation, reservation or omission was one that if accepted would affect in any substantial way the scope, quality or performance of works specified in the contract; or
- ii. Or limited in any substantial way, inconsistent with the tender document, the Procuring Entity's right or the tenderer's obligation under the proposed contract or if rectified would unfairly affect the competitive position of other tenderers presenting substantially responsive bids.

31. Counsel therefore submitted with respect to the foregoing that there was no way that an NTSA TIMs account printout, which the Respondent would have verified on its own, could affect performance of the works under the Tender thus to that effect, the same was a minor deviation.
32. Counsel also submitted on Clause 30 of the blank tender document on material non-conformities that the same held that provided that the tender was substantially responsive then the Procuring Entity would waive any non-conformities in the tender.
33. Counsel also submitted on Clause 32 of the tender document which provided that where the tender was substantially responsive the Procuring Entity could request that the tenderer submit to it the necessary information within a reasonable period of time to rectify non-material conformities.
34. Counsel submitted that it was therefore evident that the Respondent had envisaged a scenario where a tenderer could have submitted a substantially responsive bid but having a minor deviation as was the instant case and had provided a cure for the same, being either waiving it or requesting for additional information. Counsel further emphasized on the obligations of the tenderer in line with provisions of Section 81 of the Act.
35. Counsel thereafter submitted that there was no proof of the Respondent seeking any further clarification from the Applicant with respect to the

proof of ownership provided, being the submitted logbook, despite the Applicant's bid being substantially responsive as the same had passed the preliminary and mandatory evaluation stage.

36. Counsel therefore argued that the Respondent had therefore failed in their mandate under Sections 79(2) and 81 of the Act as an NTSA TIMs account printout was easily accessible from the NTSA portal thus the Respondent would have clarified for themselves or requested for that information from the Applicant.

37. In further support of the Applicant's case, counsel invited the Board to consider the finding at paragraph 44 of the decision in ***Republic v Public Procurement Administrative Review Board; Kenya Medical Supplies Authority (KEMSA) (Interested Party) Ex parte Emcure Pharmaceuticals Limited [2019] eKLR*** on the definition of a minor informality.

38. Counsel further emphasized that a defect was immaterial when it did not affect price, quality or delivery and urged the Board to consider the ***Emcure Pharmaceuticals Limited [supra]*** decision together with the provisions of Section 82 of the Act providing that the only aspect incapable of clarification was the price of the tender.

39. Counsel in urging the Board to uphold the instant Request for Review also urged the Board to find that the actions of the Respondent would

cost the taxpayer an additional Kshs 6,000,000/ and that there was no other ground disqualifying the Applicant other than the said particular immaterial deviation.

Respondent's submission

40. In her submissions, Ms. Feksi relied on the Memorandum of Response dated 16th August 2024 and bundle of documents submitted to the board by the Respondent pursuant to Section 67(3)(e) of the Act.

41. Counsel for the Respondent Ms. Feksi submitted that the failure to supply NTSA TIMs Account printouts was a deviation from the mandatory requirements as set out under Section A of the Technical Evaluation Criteria.

42. Counsel further submitted if the bidder owned the equipment then the bidder was required to show proof of ownership through copies of NTSA TIMs Account printouts, a fact the Applicant admitted to not doing.

43. Counsel further submitted that the actions of the Applicant in only providing NTSA TIMs Account printouts for some equipment and not others was questionable and could not be explained away.

44. Counsel thus submitted that the submission of NTSA TIMs Account printouts being a material requirement, the same was not subject to clarification and the Respondent was well within their mandate to disqualify the bidder on failure to provide the same and that nothing

would have been easier for the Applicant that complying with the technical requirements as set out in the tender document.

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

Applicant's Rejoinder

46. In a rejoinder, Mr. Wanyama submitted that it was the wish of every party to comply and submit everything as required of it but acknowledged that certain deviations could occur out of inadvertent mistake.

47. Counsel further submitted that upon occurrence of such, one had to check whether the said deviation presented as material or minor as the Respondent had no duty to seek clarifications on material deviations but the same could not be said for minor deviations for which the Respondent obliged to seek clarification on.

48. He reiterated that the failure to submit the NTSA TIMs Account printout was a minor deviation as what was required was proof of ownership, which included a NTSA TIMs printout and a logbook. Counsel contended that the logbook, being the primary ownership document had been submitted.

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CLARIFICATIONS

49. The Board sought clarification from the Respondent on what documents the successful bidder had submitted with respect to the subject evaluation criteria. Counsel Ms. Feksi while stating that she did not have the successful bidder's documents to comment on the specifics, she was certain that based on the criteria provided of a log book and NTSA TIMs printout for owned equipment and either a letter from Mechanical Transport Division showing proof of an agreement to obtain the same or a lease agreement together with a log book and NTSA TIMs printout, it had met the same.

50. The Board sought clarification from counsel for the Respondent on her oral submission made before it that the Applicant had availed proof of ownership of equipment had been provided in some equipment and not others to which Counsel Ms. Feksi responded in the affirmative.

51. The Board then sought further clarification from counsel in terms of distinction on the equipment in question and for which of the said equipment had there been compliance *vis-à-vis* where there had been none.

52. Counsel Ms. Feksi responded by stating that for the grader the Applicant only provided a copy of the logbook without the accompanying NTSA TIMs Account printout but that it had duly provided both copies of logbooks and NTSA TIMs Account printouts for other motor-vehicles.

53. When asked for further clarification by the Board, Eng. Gichuki for the Respondent clarified that there were 9 different motor-vehicle equipment required by the tender document for purposes of carrying out the proposed works. Eng. Gichuki further clarified that of the 9 equipment, 4 were graders and that of the 4 graders in question, the Applicant had failed to submit a NTSA TIMs Account printout for 1 grader, which was the equipment in contention in the present Application.
54. The Board sought clarification from Counsel for the Applicant Mr. Wanyama whether the submission made by Ms. Feksi was true to which counsel responded that he did not have the said information from the Applicant to speak on the same.
55. The Board sought clarification from parties whether the said requirement formed part of the preliminary mandatory requirements or technical evaluation requirements.
56. In response thereto, both parties confirmed that the same formed part of the technical evaluation criteria. Eng. Gichuki also appearing for the Respondent further clarified that the same was a technical evaluation requirement appearing under the Contractor's Key Equipment under technical evaluation Part A of the Tender Document.
57. The Board sought further clarification from parties what they understood of material and immaterial deviations in line with the facts pertaining to

the instant matter and why the Applicant did not make a request for clarification with regard to the omission.

58. Eng. Gichuki for the Respondent began by submitting that a minor deviation was one that did not result to significant impact on the performance, quality or price. He further touched on the significance of the equipment listed in the tender document.

59. Eng. Gichuki submitted that the Procuring Entity advertised 70 tenders inviting prospective bidders to participate in and that each tender had its requirements of the number and type of equipment based on the scope of work.

60. He submitted that it was therefore imperative for a bidder to indicate that it had access to the said equipment, as failure to do so as the Applicant had done with 3 instead of the 4 graders required meant that there would be a deficiency in performance of the contract.

61. Eng. Gichuki further clarified that the Procuring Entity's Evaluation Committee had thus been unable to ascertain proof of access to all the requisite graders as a copy of the logbook did not indicate current ownership of the said equipment, hence requiring corroboration by the NTSA TIMS Account printout.

62. He further clarified that the Respondent did not carry out a request for clarification in the spirit of fairness as the same would have been prejudicial to other bidders who participated in the subject tender and

provided the same thus they were guided by and constrained to the requirements of the tender.

63. The Board sought further clarification from the Respondent whether there was due-diligence to be done at the technical evaluation stage to which Eng. Gichuki responded by stating that the tender document only provided for post qualification evaluation which did not include the standard for proof of ownership of equipment as the same formed part of technical evaluation under construction turnover.

64. The Board sought further clarification from the Respondent on the issue of *prima facie* proof of ownership affecting performance of the contract and what made the requirement for providing NTSA TIMs Account printouts so critical a deviation in light of logbooks being confirmation of ownership. The Board also sought clarification from the Respondent why it had created the provision for seeking clarifications from bidders with respect to bids that had deviated if it did not plan on carrying out the same.

65. Eng. Gichuki responded by stating that the reason the NTSA TIMs account requirement was critical to parties was that it was a better way of ascertaining ownership of equipment at the tender opening date as opposed to copies of logbooks which the Respondent had no way of ascertaining were current. He further reiterated that it was imperative that the bidder demonstrated access to the equipment as failure to utilize a component of the same would severely affect performance of the works.

66. He further submitted that there was a difference in quotes in relation to bidders who owned their respective equipment to those who would be leasing the same to those who would be obtaining the same from the Mechanical Transport Division.
67. Eng. Gichuki concluded by stating that because the Procuring Entity's Evaluation Committee had been unable to corroborate the ownership of the equipment as reflected in the submitted logbook, it was of the view that it was plausible that the logbook might have been an outdated one thus inviting the Applicant for clarification on the same would potentially open an avenue for them to regularize ownership information to the prejudice of other participating bidders.
68. The Board then turned the same over to counsel for the Applicant who then submitted in response that upon transfer of a motor-vehicle one was to turn in the old logbook with the regulatory authority for issuance of an updated logbook in favor of the purchaser thus at all material times, the NTSA TIMs Account printout would tally with the logbook contents.
69. Eng. Gichuki interjected at this juncture in rejoinder that turning in the old logbook with the regulatory authority did not bar a seller from making copies of the same that could then be subsequently used for other engagements thus even when the Procuring Entity received copies of logbooks on their own, it had no way of ascertaining whether the same related to the equipment's current ownership or previous ownership.

70. The Board thereafter sought clarification from the Respondent's representative Eng. Gichuki whether it considered carrying out due diligence on just the impugned logbook given that that was the only reason the Applicant had been given for being termed unresponsive in view of the fact that the Applicant's bid was Kshs. 6,000,000 less than that of the deemed successful bidder as a means of saving on the Procuring Entity's budget. The Board also sought further clarification from the Respondent on how it measured performance and fairness of the said measure applied across-board in view of the fact that even the technical evaluation requirements appeared to be preliminary mandatory requirements.

71. Eng. Gichuki in response thereto stated that there were several factors at play to consider with respect to savings thus there was a balance between savings on one hand and compliance on the other as there were scenarios where even after evaluation, no responsive bidder emerged and for which the Procuring Entity had incurred costs in preparing the tender.

72. Eng. Gichuki also further stated that in any event, the tenders were subject to several audits and that they had on several occasions received letters highlighting discrepancies with compliance arising from deviations, particularly for requirements that had been explicitly stated in the tender documents.

73. On the aspect of the technical evaluation requirements, Eng. Gichuki listed four criteria that guided the Procuring Entity's Evaluation

Committee, being capacity to finance works, past experience, equipment evaluation criteria and work methodology evaluation criteria. He further stated that the same was uniformly applied to all bidders.

BOARD'S DECISION

74. The Board has considered each of the parties' pleadings, oral submissions, authorities together with confidential documents submitted to the Board by the Respondent pursuant to Section 67(3)(e) of the Act and finds the issues that arise for determination are:

i. Whether the Applicant's bid was fairly evaluated by the Procuring Entity's Tender Evaluation Committee at the Technical Evaluation stage in line with the provisions of Clause 9.2: Technical Evaluation Criteria at pages 31 to 36 of 239 of the Tender Document.

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

The Board will now proceed to address the issues framed for determination as follows:

Whether the Applicant's bid was fairly evaluated by the Procuring Entity's Tender Evaluation Committee at the Technical Evaluation stage in line with the provisions of Clause 9.2: Technical Evaluation Criteria at pages 31 to 36 of 239 of the Tender Document

75. Prior to the Board delving into its determination of the issues at hand, it is necessary that it addresses itself on the Respondent's pleadings, particularly the Memorandum of Response dated 16th August 2024, which was deemed duly filed and served upon parties and relied upon at the hearing of the instant Application thus properly on record.

76. The Board notes that the date of the said Memorandum of Response, being 16th August 2024, is a date prior to even advertisement of the subject tender itself, which was advertised to members of the public and prospective bidders on 27th August 2024.

77. The Board is therefore cognizant that logically, the Memorandum of Advertisement is incapable of predating the tender document itself and by extension, the steps to be followed before such a document can come into existence. The Board therefore surmises that the same could only infer a typographical error on the part of the Respondent, which error was not caught on by parties during the hearing of the matter.

78. The Board is further aware, in its capacity as a quasi-judicial body and in line with the provisions of Section 100 of the Civil Procedure Act, Chapter 21 Laws of Kenya that it can, *suo moto*, amend any defect or error in any proceedings in a suit for purposes of determining the real question or issue raised by or depending on the proceeding.

79. The Board is further guided by the finding in ***Ali Okata Watako V Mumias Sugar Co. Ltd [2012] KEHC 139 (KLR)*** where the Court

similarly addressed itself on the issue of a typographical error on the face of pleadings and found that the same was amendable thus not fair in the interests of justice for a suit to be dismissed on such a discrepancy.

80. Similarly, the Board finds that it would not be in the interests of justice for it to disregard the Respondent's Memorandum of Response dated 16th August 2024 in support of its case on account of the typographical error on the face of it.

81. On to the issue at hand, the Board understands the Applicant's case to be that its submitted tender bid was unfairly evaluated by the Procuring Entity's Tender Evaluation Committee in being found non-responsive for an issue it termed as an immaterial deviation capable of being cured by way of clarification.

82. It was the Applicant's case that in any event, the Procuring Entity in its blank tender document had foreseen such scenarios arising, that is, instances where participant bidders for one reason or the other ended up with minor/immaterial deviations, thus made the provision allowing for clarifications from said bidders or waiving the same.

83. It was the Applicant's further case that their submitted tender document was substantially responsive in that it had complied with all the requirements asked of bidders at the technical evaluation stage save for provision of a NTSA TIMs Account printout accompanying a copy of the logbook to grader motor vehicle registration number KBA 254Q.

84. It was thus the Applicant's contention that in view of the fact that it had provided a copy of a logbook to the said grader, which according to it was the superior instrument confirming ownership of the same, that failure to provide the accompanying NTSA TIMs Account printout was not a material deviation but in fact a minor/immaterial deviation for which the tender document itself had provided remedies. Further, it was the Applicant's case that Section 81 of the Act allowed for clarifications on submitted bids by the affected tenderers.

85. The Board therefore understands the Applicant's position to be that because the deviation did not affect price, quality or delivery, that the same was a minor deviation and had it been called upon to clarify the same, it would have done so, thus leading it to be deemed the lowest responsive bidder as its bid was Kshs. 6,000,000 lower than that of the declared successful bid.

86. The Board understands the Respondent's case to be that failure to supply NTSA TIMs Account printouts was a deviation from the mandatory requirements as set out under Section A of the Technical Evaluation Criteria and also questionable in the face of compliance in all but one of the equipment subjected to evaluation.

87. It was the Respondent's further case that it was necessary for a bidder to display access to the said equipment it submitted for evaluation as lack thereof would severely hamper performance of the works. The Board

further understands the Respondent's contention that the requirement went in tandem because the NTSA TIMs Account printout was necessary to corroborate the copy of logbook submitted for the criterion in question.

88. The Board further understands the Respondent's position that it was unable to verify the accuracy of the copy of logbook submitted as at the date of tender opening and evaluation as it was possible for individuals to present outdated copies of logbooks to motor-vehicle equipment.

89. The Board thus understands the Respondent's further case to be that such omission by the Applicant in failing to submit a NTSA TIMs account printout was incapable of correction by way of invitation to clarify by the Applicant as it was likely that at the point of clarification, the Applicant would sneak in fresh and accurate documentation to the detriment of other participant bidders who had been found non-responsive for similar omissions.

90. Section 80 of the Act as considered together with the specified Tender Documents provide the basis for evaluation of Tender Bids submitted to a Procuring Entity by prospective tenderers in respect to tenders. Section 80(2) specifically of the Act provide as follows:

"(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.”

91. The Board has had an opportunity to peruse the confidential documents submitted to it by the Respondent, particularly the Tender Evaluation Report dated 14th January 2025 and the blank tender document, hear the parties’ respective cases and consider the respective pleadings filed herein in narrowing down the issue for determination to being whether the reason for which the Applicant’s bid was found non-responsive was a material or non-material non-conformity.

92. It is not in dispute that the Applicant failed to attach a NTSA TIMs Account printout to accompany the logbook to one of the grader motor-vehicles it had made reference to in its submitted bid. In line with the relevant provisions of the blank tender document, the same is an omission on the part of the Applicant.

93. Clause 28(1)(c) at page 13 of the blank tender document defines Omissions as follows:

“c) “Omission” is the failure to submit part or all of the information or documentation required in the Tender document.”

94. The Board notes that the subject tender’s blank tender document at Clause 29 of the blank tender document at page 13 in giving a framework

for the determination of responsiveness of bids also addresses the effect of material deviations as follows:

"29. Determination of Responsiveness

29.1 The Procuring Entity's determination of a Tender's responsiveness is to be based on the contents of the tender itself, as defined in ITT 11.

29.2 A substantially responsive Tender is one that meets the requirements of the Tender document without material deviation, reservation, or omission. A material deviation, reservation, or omission is one that, if accepted, would:

- a) Affect in any substantial way the scope, quality, or performance of the Works specified in the Contract; or**
- b) limit in any substantial way, inconsistent with the tender document, the Procuring Entity's rights or the tenderer's obligations under the proposed contract; or**
- c) if rectified, would unfairly affect the competitive position of other tenderers presenting substantially responsive tenders.**

29.3 The Procuring Entity shall examine the technical aspects of the tender submitted in accordance with ITT 16, to confirm that all requirements of Section VII, Works' Requirements have been met without any material deviation, reservation or omission.

29.4 If a tender is not substantially responsive to the requirements of the tender document, it shall be rejected by the

Procuring Entity and may not subsequently be made responsive by correction of the material deviation, reservation, or omission."

95. The Board notes that the blank tender document also addresses itself on the effect of non-material nonconformities at clause 30 of the blank tender document as follows:

"30. Non-material Non-conformities

30.1 Provided that a tender is substantially responsive, the Procuring Entity may waive any non-conformities in the tender.

30.2 Provided that a Tender is substantially responsive, the Procuring Entity may request that the tenderer submit the necessary information or documentation, within a reasonable period of time, to rectify nonmaterial non-conformities in the tender related to documentation requirements. Requesting information or documentation on such non-conformities shall not be related to any aspect of the price of the tender. Failure of the tenderer to comply with the request may result in the rejection of its tender.

30.3 Provided that a tender is substantially responsive, the Procuring Entity shall rectify quantifiable nonmaterial non-conformities related to the Tender Price. To this effect, the Tender Price shall be adjusted, for comparison purposes only,

to reflect the price of a missing or non-conforming item or component in the manner specified in the TDS.”

96. The Board thus notes that the issue left for its determination is whether the Procuring Entity’s assessment of the omission by the Applicant as a material deviation was a fair evaluation of the Applicant’s bid at the technical evaluation stage.

97. The omission in question relates to failure on the part of the Applicant to attach one (1) NTSA TIMs Account printout to accompany the copy of the logbook submitted with respect to grader motor-vehicle registration KBA 254Q out of the nine (9) types of equipment for which prospective bidders were expected to show clear ownership and access to.

98. The Board appreciates the argument made by the Respondent with respect to the possibility of a bidder submitting an incorrect and/or outdated copy of a logbook hence needing an NTSA TIMs Account printout to essentially corroborate the same.

99. Section 8 of the Traffic Act, Cap 403 Laws of Kenya states as follows:

“8. Owner of vehicle

The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.”

100. The Board aligns itself with the interpretation of the afore-stated provision by the Court in ***Ignatius Makau Mutisya v Reuben Musyoki Muli 2015 KECA612 (eKLR)*** where the trial court held as follows:

"It is trite law that the ownership of a motor-vehicle is to be proved by the registration of a person as the owner of the motor-vehicle, unless proved otherwise. Section 8 of the Traffic Act provides that;

"The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle." (emphasis supplied).

This section has been interpreted to mean that the registration of the motor-vehicle is not conclusive proof of ownership. In the case of Osapil vs Kaddy [2000] 1 EALA 187 the Court of Appeal of Uganda held that a registration card or logbook was only prima-facie evidence of title to a motor vehicle. The person in whose name the vehicle was registered was presumed to be the owner thereof unless proved otherwise.

This Court adopted the interpretation above in the case of Securicor Kenya Ltd vs Kyumba Holdings Civil Appeal No. 73 of 2002 (Tunoi, O'Kubasu' Deverell JJ.A) and held that;

"Our holding finds support in the decision in OSAPIL VS. KADDY [2000] 1 EALA 187 in which it was held by the Court

of Appeal of Uganda that a registration card or logbook was only prima facie evidence of title to a motor vehicle and the person whose name the vehicle was registered was presumed to be the owner thereof unless proved otherwise. The appellant had, indeed, proved otherwise."

Also recently, this Court in the case of Joel Muga Opinja v. East Africa Sea Food Ltd [2013] eKLR restated this position as follows:-

"We agree that the best way to prove ownership would be to produce to the Court a document from Registrar of Motor Vehicles showing who the registered owner is but when the abstract is not challenged and is produced in Court without any objection, the contents cannot later be denied"

All this goes to show that the presumption that the person registered as owner of a motor vehicle in the log book is the actual owner is rebuttable. Where there exists other compelling evidence to prove otherwise, then the Court can make a finding of ownership that is different from that contained in the log book."

101. Following a perusal of the confidential documents submitted to it by the Respondent, the Board confirms that the Applicant had submitted a copy

of a logbook in its name with respect to grader motor-vehicle registration number KBA 254Q.

102. In view of the foregoing, the Board in aligning itself with the reasoning in ***Ignatius Makau Mutisya [supra]*** on the status of a logbook being rebuttable proof of ownership, finds that the Applicant had substantially responded with respect to the criterion thereon in submitting a copy of a logbook for grader motor-vehicle registration number KBA 254Q in its name pursuant to Part III (Equipment Evaluation Criteria) of the Technical Evaluation Criteria.

103. At this juncture, the Board shall address itself on what constitutes a non-material omission as defined in the blank tender document. The Board takes note of the exhaustive definition of material deviations, reservations or omissions as per Clause 29.2 reproduced hereunder:

"29.2 A substantially responsive Tender is one that meets the requirements of the Tender document without material deviation, reservation, or omission. A material deviation, reservation, or omission is one that, if accepted, would:

a) Affect in any substantial way the scope, quality, or performance of the Works specified in the Contract; or

b) limit in any substantial way, inconsistent with the tender document, the Procuring Entity's rights or the tenderer's obligations under the proposed contract; or

c) if rectified, would unfairly affect the competitive position of other tenderers presenting substantially responsive tenders.”

104. The Board notes that because the afore-stated clause is exhaustive, anything not included or eliciting such a response as listed therein therefore qualifies as one of a non-material deviation, reservation or omission.

105. The Board notes that because the primary justification for evaluation like so with respect to the equipment by the Respondent lay in the fact that according to them, a bidder needed to prove access to and/or ownership of the said equipment, then by virtue of an Applicant providing a copy of a logbook in its name, it had submitted *prima facie* and rebuttable proof of ownership of the equipment.

106. In this instance, the Board finds that the omission therefore by the Applicant in failing to provide a NTSA TIMS Account printout, in the face of already providing a copy of a logbook, did not amount to a material omission with respect to the criterion in question.

107. Having found that the omission by the Applicant was therefore immaterial, the Board therefore finds that the situation warranted a request for clarification pursuant to clause 30.2 (reproduced earlier in this decision) of the tender document to allow the Applicant an opportunity to provide the said NTSA TIMs Account within the stipulated timeline before

proceeding to evaluate it based on the outcome of the clarification exercise.

108. The Board further finds that in any event, clarification is provided for by dint of the provisions of Section 81 of the Act as follows:

“81. Clarifications

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

(2) A clarification shall not change the terms of the tender.”

109. The Board therefore finds fault in the manner in which the Procuring Entity carried out its technical evaluation of the Applicant’s bid in deeming the Applicant’s omission as material when in fact the same was non-material and warranted an invitation for clarification by the Applicant.

110. The Board therefore ultimately finds that the Applicant’s bid was unfairly evaluated by the Procuring Entity’s Tender Evaluation Committee at the Technical Evaluation stage in line with the provisions of Clause 9.2: Technical Evaluation Criteria at pages 31 to 36 of 239 of the Tender Document.

111. Consequently, the Applicant’s Request for Review Application succeeds in that regard.

112. The Board also takes note of the significant difference in bid amounts by the Applicant and the successful bidder as determined by the Procuring Entity, being Kshs. 5,582,700.03.

113. The Board is alive to the guiding principles in public procurement aptly set out in Section 3 of the Act as follows:

"3. Guiding principles

Public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of the Constitution and relevant legislation—

(a) the national values and principles provided for under Article 10;

(b) the equality and freedom from discrimination provided for under Article 27;

(c) affirmative action programmes provided for under Articles 55 and 56;

(d) principles of integrity under the Leadership and Integrity Act, 2012 (No. 19 of 2012);

(e) the principles of public finance under Article 201;

(f) the values and principles of public service as provided for under Article 232;

(g) principles governing the procurement profession, international norms;

(h) maximisation of value for money;

(i) promotion of local industry, sustainable development and protection of the environment; and
(j) promotion of citizen contractors.”

114. The Board notes from the Evaluation Report submitted to it that whereas the successful bidder's bid was within budget of the Procuring Entity, the Procuring Entity had a duty to uphold the guiding principles of public procurement in ensuring that the bid it determined to be the lowest responsive evaluated bid conformed to the principle of maximization of value for money.

115. The Board is therefore convinced that the best recourse with respect to the subject tender in ensuring that the ends of public procurement are met are to open it up for re-evaluation of the participant bidders thus give it an opportunity to conform with the afore-stated guiding principle.

What orders the Board should grant in the circumstances?

116. The Board finds that the Applicant's bid was unfairly evaluated by the Procuring Entity's Tender Evaluation Committee at the Technical Evaluation stage in line with the provisions of Clause 9.2: Technical Evaluation Criteria at pages 31 to 36 of 239 of the Tender Document.

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

FINAL ORDERS

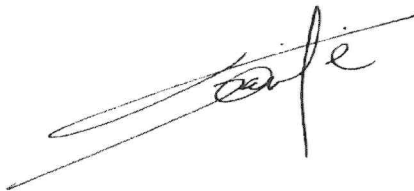
118. In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the instant Request for Review:

- 1) The Notification Letters dated 28th February 2025 addressed to the successful bidder, the Applicant and other unsuccessful bidders with respect to Tender No. KWS/ONT/RMLF/144/2023-2024 for Routine Maintenance of Kitani-Maktau-Jipe Road (UNCL_TWNP_2) in Tsavo West National Park be and are hereby nullified and set aside.**
- 2) The Procuring Entity is hereby directed to re-invite the Applicant's, the successful bidder's and all other parties' bids that had successfully qualified for technical evaluation for Technical Evaluation in accordance with the provisions of Clause 9.2: Technical Evaluation Criteria at pages 31 to 36 of 239 of the Tender Document taking into consideration the Board's findings herein.**
- 3) The Procuring Entity hereby directed to proceed with and conclude the tender proceedings concerning Tender No. KWS/ONT/RMLF/144/2023-2024 for Routine Maintenance of Kitani-Maktau-Jipe Road (UNCL_TWNP_2) in Tsavo West**

National Park to its logical conclusion within the tender validity period.

- 4) In view of the fact that the procurement process is not complete, each party shall bear its own costs in the Request for Review.

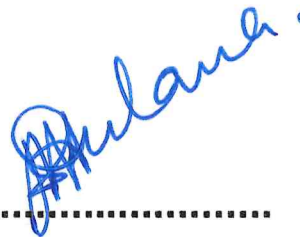
Dated at NAIROBI this 1ST Day of April 2025.



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PANEL CHAIRPERSON

PPARB



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SECRETARY

PPARB