

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 44/2024 OF 10TH APRIL 2025

BETWEEN

KEDDY ENTERPRISES LIMITED..... APPLICANT

AND

THE PRINCIPLE SECRETARY,

STATE DEPARTMENT OF HOUSING AND

URBAN DEVELOPMENT1ST RESPONDENT

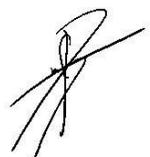
STATE DEPARTMENT OF HOUSING AND

URBAN DEVELOPMENT2ND RESPONDENT

Review against the decision of the Accounting Officer, State Department of Housing and Urban Development in relation to Tender No. MLPWHUD/HUD/AHP/411/2023-2024 for the Proposed Construction of the Machakos New City AHP Project (Phase 1) in Machakos Township Constituency in Machakos County (With Associated Social Amenities and Infrastructure).

BOARD MEMBERS PRESENT

1. Mr. George Murugu FCI Arb - Chairperson
2. Mr. Stanslaus Kimani - Member
3. Eng. Lilian Ogombo - Member



IN ATTENDANCE

1. Ms. Sarah Ayoo -Holding Brief for the Board Secretary
2. Ms. Evelyn Weru - Secretariat

PRESENT BY INVITATION

APPLICANT

KEDDY ENTERPRISES LIMITED

1. Mr. Anthony Simiyu - Advocate, ASW Law Advocates LLP
2. Mr. Michael Mutea - Advocate, Mutea Muthuri & Company Advocates

RESPONDENTS

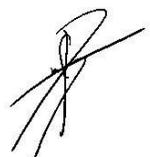
THE PRINCIPLE SECRETARY, STATE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT & STATE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

- Mr. Benard Oloo - Representing Head of Procurement and appearing for both the 1st and 2nd Respondents

BACKGROUND OF THE DECISION

The Tendering Process

1. The State Department of Housing and Urban Development, the Procuring Entity and the 2nd Respondent herein invited qualified and interested tenderers to submit sealed tenders in response to Tender No. MLPWHUD/HUD/AHP/411/2023-2024 for the Proposed Construction of the Machakos New City AHP Project (Phase 1) in Machakos Township Constituency in Machakos County (With



Associated Social Amenities and Infrastructure) (hereinafter referred to as the "subject tender") by use of open competitive method (National). The invitation was by way of an advertisement on 27th June 2024 in the Star Newspaper and on the 2nd Respondent's website www.housingandurban.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 tender submission deadline of the subject tender was initially scheduled on 8th August 2023 at 09.00 a.m.

Addenda

2. The Procuring Entity subsequently issued, on various dates, nine (9) Addenda which sought to vary, to some extent, certain information provided in the blank Tender Document while extending the submission deadline to 24th September 2024.

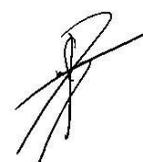
Submission of Tenders and Tender Opening

3. According to the Minutes of the subject tender's opening held on 24th September 2024 signed by members of the Tender Opening Committee on 20th December 2023 (hereinafter referred to as the 'Tender Opening Minutes') and which Tender Opening Minutes were part of confidential documents furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') by the 1st Respondent pursuant to Section 67(3)(e) of the Public Procurement and Asset



Disposal Act, 2015 (hereinafter referred to as the 'Act'), a total of fourteen (14) tenders were submitted in response to the subject tender. The said fourteen (14) tenders were opened in the presence of tenderers' representatives present at the tender opening session, and were recorded as follows:

| Bidder No. | Name |
|-------------------|---|
| 1. | Padaa Enterprises Ltd |
| 2. | Kiu Construction Ltd |
| 3. | Asken Yapi Group Insaat Limited |
| 4. | Highpoint Company Ltd |
| 5. | Blue Swift Contractors and General Supplies Ltd |
| 6. | Sava Builders Ltd |
| 7. | Keddy Enterprises Ltd |
| 8. | Aditi Construction Ltd |
| 9. | Zaky Infra Ltd |
| 10. | Neelcon Construction Services Ltd |
| 11. | Custom General Construction Ltd |
| 12. | Sahjanad Construction Ltd |
| 13. | Devdan Enterprises Ltd and Leeds Entrepreneur |
| 14. | Parklane Construction Limited |

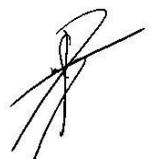


Evaluation of Tenders

4. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1st Respondent undertook evaluation of the fourteen (14) tenders as captured in an Evaluation Report for the subject tender signed by members of the Evaluation Committee on 28th November 2024 in the following stages:
 - i Preliminary Evaluation;
 - ii Technical Evaluation; and
 - iii Financial Evaluation.

Preliminary Evaluation

5. The Evaluation Committee was required to carry out a Preliminary Evaluation and examine tenders for responsiveness using the criteria provided under Clause A Preliminary and Mandatory Requirements Checklist of Section III- Evaluation and Qualification Criteria at page 31 of 157 to 32 of 157 of the Tender Document. Tenderers were required to meet all the mandatory requirements at this stage to proceed for Technical Evaluation.
6. At the end of evaluation at this stage, twelve (12) tenders were determined non-responsive, while two (2) tenders, being Bidder No. 1's tender and the Applicant's tender, were determined responsive and proceeded to Technical Evaluation.

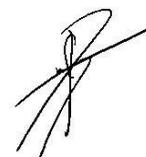


Technical Evaluation

7. The Evaluation Committee was required to carry out a Technical Evaluation using the criteria provided under Stage 2: Technical Evaluation Criteria for the Bidders of Section III- Evaluation and Qualification Criteria at page 33 of 157 to 34 of 157 of the Tender Document. Tenderers were required to attain the minimum score of 70 points so as to progress for further evaluation.
8. At the end of evaluation at this stage, the two (2) tenders were determined responsive and proceeded to Financial Evaluation.

Financial Evaluation

9. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria provided under Clause D Financial Evaluation of Section III – Evaluation and Qualification Criteria at page 34 of 157 to 35 of 157 of the Tender Document.
10. The Evaluation Committee upon checking for the completeness of the BoQ noted that Bidder No. 1 Bill of Quantities for builder's works was not submitted and proceeded to disqualify the said bidder from further evaluation. Upon checking for arithmetic errors, the evaluation Committee found that the Applicant's tender had an error of 4.13 % (Kshs.76,538,958.62) to their disadvantage. The Applicant was subsequently notified of its arithmetic error vide letter dated 25th November 2024 and it confirmed and accepted the error vide letter dated 28th November 2024.



11. At the end of evaluation at this stage, the Evaluation Committee ranked the responsive bids as follows:

Table 14: Ranking of Bids

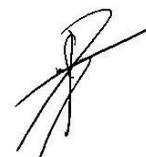
| Bid No. | Name Of Tenderer | Corrected Bid amount (Kshs) | Bid amount (Kshs) | Rank |
|----------------|------------------------------|------------------------------------|--------------------------|-------------|
| 7 | <i>Keddy Enterprises Ltd</i> | 1,928,145,473.62 | 1,851,606,515.00 | 1 |

Evaluation Committee's Recommendation

12. The Evaluation Committee recommended award of the subject tender to M/s Keddy Enterprises Limited of P.O BOX 24470 -00100, Nairobi at its quoted tender sum of Kenya Shillings One Billion, Eight Hundred Fifty-One Million, Six Hundred and Six Thousand, Five Hundred Fifteen and zero cents (Kshs1,851,606,515.00) only being the lowest evaluated bidder.

Due Diligence

13. According to the Due Diligence Report dated 20th January 2025, the Evaluation Committee carried out due diligence in accordance with Section 83 of the Act on the lowest responsive bidder. The scope of the due diligence entailed (a) visiting the offices of the responsive bidder to establish their physical address and assess their capacity, (b) ascertaining the authenticity of the bid security and Line of credit submitted by the tenderers, (c) ascertaining the authenticity of the



firm's experience by confirming completion status of at least one sample project among the projects submitted by the bidder. Being satisfied with the results of the due diligence exercise, the Evaluation Committee recommended award of the subject tender to M/s Keddy Enterprises Limited of P.O BOX 24470 -00100, Nairobi at its quoted tender sum of Kenya Shillings One Billion, Eight Hundred Fifty-One Million, Six Hundred and Six Thousand, Five Hundred Fifteen and zero cents (Kshs1,851,606,515.00) only being the lowest evaluated bidder.

First Professional Opinion

14. In a Professional Opinion dated 28th January 2025 (hereinafter referred to as the "First Professional Opinion"), the Head Supply Chain Manager, Mr. John Maina reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender.

15. However, the 1st Respondent did not approve the First Professional Opinion and directed for re-evaluation of all bids in the subject tender.

Re-Evaluation of the subject tender

16. The Head of Supply Chain Management returned the Evaluation Report to the Evaluation Committee via memo dated 4th February 2025 with the following instructions from the 1st Respondent: (a) Refer to KRA report on this bidder, (b) Evaluate next qualified bidder, (c) N/B Re-



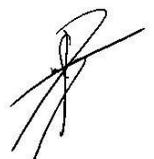
evaluate all bids noting minor deviations especially on not stamping special form, and (d) confirm with NCA on overseas companies.

Extension of Tender Validity Period

17. Vide letters dated 25th February 2025, bidders were notified of extension of the tender validity period for 30 days up to and including 27th March 2025.

Evaluation Review

18. The Evaluation Committee noted in the Evaluation Review Report signed by members of the Evaluation Committee on 10th March 2025, that the 1st Respondent noted from submitted audited financial statements and bank statements that the sales (turnover) far surpassed the cash movements in the bank statements and wrote to Kenya Revenue Authority for verification of the turnover against the VAT records submitted to KRA for purposes of due diligence vide letter dated 18th December 2024. In response, KRA vide letter dated 10th January 2025 indicated that the Applicant had filed its returns as at 2/01/2025 but had outstanding VAT liabilities for the period between February 2018 and January 2022 and that it carried out a tax evasion investigation in 2024 and extra taxes demanded from the Applicant. However, the Applicant appealed against the investigation findings and the matter was ongoing before the Tax Appeals Tribunal.



19. In conclusion, the Evaluation Committee opined that the Applicant was tax compliant as evidenced by the Tax Compliance Certificate issued by KRA and recommended award of the subject tender to the Applicant.

Second Professional Opinion

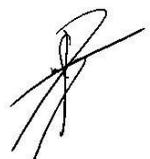
20. In a Professional Opinion dated 13th March 2025 (hereinafter referred to as the "Second Professional Opinion"), Mr. Benard Oloo for the Head Supply Chain Manager reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender.

Notification to Tenderers

21. Tenderers were allegedly notified of termination of the subject tender pursuant to Section 63(1)(f) vide letters dated 26th March 2025 copies of which were submitted to the Board as part of the confidential file.

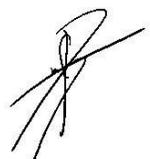
REQUEST FOR REVIEW NO. 44 OF 2024

22. On 10th April 2025, Keddy Enterprises Limited, the Applicant herein, filed a Request for Review dated 10th April 2025 together with a Statutory Statement sworn on 10th April 2025 by Evangeline Kiende its Director and another Statutory Statement sworn on 10th April 2025 by Emma Wangai Njeru, its employee (hereinafter referred to as the



'instant Request for Review') seeking the following orders from the Board in verbatim:

- a) A declaration does hereby issue that the Respondents' failure to declare the evaluation outcome in respect of Tender No. MLPWHUD/HUD/AHP/411/2023-2024 for the Proposed Construction of the Machakos New City AHP Project (Phase 1) in Machakos Township Constituency in Machakos County (With Associated Social Amenities and Infrastructure) within the tender period to the detriment of the Applicant as the lowest evaluated bidder constituted a breach of Sections 80(6) and 86(1)(a) of the Public Procurement and Asset Disposal Act (Cap 412C).***
- b) The Respondents be and are hereby directed not to re-advertise Tender No. MLPWHUD/HUD/AHP/411/2023-2024 for the Proposed Construction of the Machakos New City AHP Project (Phase 1) in Machakos Township Constituency in Machakos County (With Associated Social Amenities and Infrastructure).***
- c) The tender validity period in respect of Tender No. MLPWHUD/HUD/AHP/411/2023-2024 for the Proposed Construction of the Machakos New City AHP Project (Phase 1) in Machakos Township Constituency in Machakos County (With Associated Social Amenities and Infrastructure) be and***



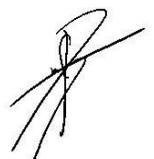
is hereby extended for further period of 90 days from 27th March 2025 to allow for the conclusion of the procurement process in the said tender.

d) The Respondents be and are hereby directed to issue a letter of award in respect of Tender No. MLPWHUD/HUD/AHP/411/2023-2024 for the Proposed Construction of the Machakos New City AHP Project (Phase 1) in Machakos Township Constituency in Machakos County (With Associated Social Amenities and Infrastructure) to the Applicant as the lowest evaluated bidder.

e) The Respondents be and are hereby directed to execute a contract with the Applicant in respect of Tender No. MLPWHUD/HUD/AHP/411/2023-2024 for the Proposed Construction of the Machakos New City AHP Project (Phase 1) in Machakos Township Constituency in Machakos County (With Associated Social Amenities and Infrastructure) within 21 days from the date of the Board's Decision.

f) The Applicant be and is hereby awarded costs in respect of this Request for Review.

g) Any other relief that would serve the interests of justice in the circumstance.

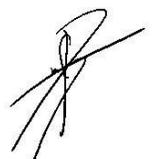
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23. In a Notification of Appeal and a letter dated 10th April 2025, Mr. James Kilaka, the Acting Board Secretary of the Board notified the 1st and 2nd Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the 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 10th April 2025.

24. Vide a Hearing Notice dated 23rd April 2024, the Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the Request for Review slated for 25th April 2025 at 11.00 a.m., through the link availed in the said Hearing Notice.

25. On 24th April 2025, the Respondents jointly filed through PS Charles M. Hinga, CBS, CA (SA), the 1st Respondent herein, a Response on Appeal of the subject tender dated 24th April 2025 together with a file containing confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

26. Vide letter dated 24th April 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

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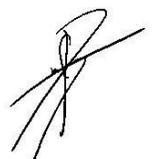
Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the tender within three (3) days.

27. Vide email dated 25th April 2025, parties were notified that hearing of the instant Request for Review had been rescheduled to 28th April 2025 at 11.00 a.m.

28. On 25th April 2025, the Applicant filed Written Submissions dated 25th April 2025 together with a letter of even date.

29. At the hearing of the instant Request for Review on 28th April 2025 at 11.00 a.m., the Applicant was represented by Mr. Anthony Simiyu and Mr. Michale Muteu while the 1st and 2nd Respondents were represented by Mr. Benard Oloo. The Board read out the documents filed by parties in the matter and having noted the letters of notification to bidders dated 26th March 2025 whose contents was to the effect that the subject tender was terminated for non-responsiveness under Section 63 of the Act, the Board pointed out that this raised a jurisdictional issue by virtue of Section 167(4)(b) of the Act and asked parties to address it on the same as part of their submissions.

30. In response, Mr. Simiyu submitted that though he was ready to proceed, the Applicant had not received the said termination letter and the issue of termination had just been raised and was coming to its

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attention for the first time. He pointed out that the proceedings before the Board per the instant Request for Review were not in any way related to termination of the subject tender and requested the Board to issue directions on how to proceed in the circumstances.

31. The Board then directed the Secretariat to serve both parties with the said letter dated 26th March 2025 for their perusal and sought to know if the Respondents had effected service of the same. In response, Mr. Oloo indicated that the said letters were shared to the respective bidders' email addresses in the first instance, as shall be demonstrated later in this decision, Mr Oloo changed this submission pointing out that indeed the said letter which communicated termination of the tender proceedings had not been sent to the bidders for reasons later captured hereinbelow.

32. Upon confirmation by parties of receipt of the letter dated 26th March 2025 having been shared by the Secretariat, the Board allocated parties 5 minutes to acquaint themselves with the contents therein.

33. Counsel for the Applicant, Mr. Simiyu indicated that he had conferred with his clients and having established that the notification letter dated 26th March 2025 was not served upon the Applicant and that the cause of action in the Request for Review was not related to termination, they were not ready to proceed with the matter as if it is a termination matter. Counsel further indicated that he was ready to proceed with the matter as is and if the Respondents are to maintain that they served

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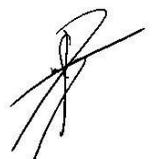
the Applicant with the termination notice, they ought to adduce evidence to this effect.

34. The Board for a second time sought to know if the termination notice was served upon bidders and when the decision to terminate the subject tender was arrived at by the 1st Respondent. In response, Mr. Oloo submitted that the termination notice was signed on 26th March 2025 and by the time the instant Request for Review was filed on 10th April 2025, the Respondents had not forwarded the letter communicating the termination of the subject tender to bidders and has not been sent to date by the Respondents as the the proceedings stood suspended from the date of filing the present Review.

35. Mr. Simiyu proceeded to propose for parties to enter into a consent to extend the tender validity period and for directions to be issued to the Respondents to dispatch the notification letters to all bidders who participated in the subject tender.

36. In response, Mr. Oloo indicated that though he was not sure if the tender validity period could be extended, he was not opposed to extension of the same.

37. The Board brought it to the attention of parties that pursuant to its powers provided under Section 173 of the Act, it can in deserving cases extend the tender validity period.

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38. Having considered parties' submissions retreated to deliberate and issued the following directions in the instant Request for Review:

- i The 1st Respondent be and is hereby directed to forthwith issue all bidders who participated in the subject tender with the termination notice dated 26th March 2025.
- ii The tender validity period with respect to the subject tender be and is hereby extended for a period of 120 days from 28th April 2025.

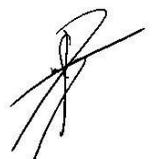
39. In the circumstances, the Request for Review dated 10th April 2025 and filed on even date is hereby marked as settled.

FINAL ORDERS

40. 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 dated 10th April 2025 and filed on even date:

A. The Applicant's Request for Review dated 10th April 2025 and filed on even date be and is hereby marked as settled.

B. The 1st Respondent be and is hereby directed to forthwith issue all bidders who participated in Tender



No. MLPWHUD/HUD/AHP/411/2023-2024 for the Proposed Construction of the Machakos New City AHP Project (Phase 1) in Machakos Township Constituency in Machakos County (With Associated Social Amenities and Infrastructure) with the termination notice dated 26th March 2025.

C. The tender validity period with respect to Tender No. MLPWHUD/HUD/AHP/411/2023-2024 for the Proposed Construction of the Machakos New City AHP Project (Phase 1) in Machakos Township Constituency in Machakos County (With Associated Social Amenities and Infrastructure) be and is hereby extended for a period of 120 days from 28th April 2025.

D. There shall be no orders as to costs

Dated at NAIROBI this 29th Day of April 2025.

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CHAIRPERSON
PPARB


.....
SECRETARY
PPARB

