

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO.84 /2017 OF 25TH SEPTEMBER, 2017**

**BETWEEN**

**BARAKI INTERNATIONAL LIMITED.....APPLICANT**

**AND**

**KENYA URBAN ROADS AUTHORITY.....PROCURING ENTITY**

Review against the decision of the Kenya Urban Roads Authority in the matter of Tender No. KURA/DEV/LVSUR/313/2016 - 2017 Tender for Construction of Wajir Bypass Phase I, Wajir County.

**BOARD MEMBERS PRESENT**

1. Mr. Paul Gicheru - Chairman
2. Mr. Nelson Orgut - Member
3. Mrs. Rosemary Gituma - Member
4. Gilda Odera - Member

**IN ATTENDANCE**

1. Philemon Kiprop - Holding Brief for Secretary
2. Maryanne Karanja - Secretary

## **PRESENT BY INVITATION**

### **Applicant: Baraki International Ltd**

1. Ms Diana Waititu - Advocate
2. Yussuf Mohammed - Director
3. Mohammed Adinow - Director

### **Procuring Entity: Kenya Urban Roads Authority**

1. Peter Bosire - Chief Legal officer
2. Loise Mburu - SPO

## **THE BOARD'S DECISION**

Upon hearing the representations of the parties and interested candidates before the Board and upon considering the information and all the documents before it, the Board decides as follows:-

## **BACKGROUND OF AWARD**

### **Introduction**

The project is located in Wajir Town in Wajir County with a total road length of approximately 6.0 Km along Wajir Bypass Road. The existing alignment comprises a gravel/earth road traversing predominantly residential and commercial areas within Wajir Town characterized by a generally flat terrain. The site of the works shall be the area within the road reserve and any other places as may be designated in the Contract. Any other works shall be as directed by the Engineer.

## **Extent of Contract**

The major works to be executed under the Contract comprise mainly of but are not limited to the following:

1. Provision of facilities to the supervising Engineers
2. Construction of 450mm improved subgrade of minimum CBR > 14% as shown on the drawings or as instructed by the Engineer.
3. Construction of 150mm Gravel Sub base of minimum CBR of 50% on carriageway and shoulders.
4. Provision of 150mm Cement Improved Gravel base of minimum CBR of 160% (CIG160) on carriageway and shoulders
5. Laying of 50mm Asphalt Concrete Type I wearing course on carriageway and shoulders.
6. Laying of 25mm Asphalt Concrete Type I wearing course on the 2m wide walkway on one side of the carriageway.
7. The carriageway shall be 6.0m wide ;Pipe culverts and drainage works
8. Installation of road furniture; Passage of traffic, Day works
9. Maintenance of works during construction and during defects liability period.

## **Procurement Process**

The method of procurement used was that of an open tender.

## **Invitation to Bid**

Members of the public were invited through an Advertisement placed in

the Nation and Standard Newspapers of 9<sup>th</sup> May, 2017. A Notice of the same was also placed in the Kenya Urban Roads Authority (KURA) Website. Eligible Contractors for this Tender were those Registered with the National Construction Authority in **Category 2 and Pre-bid Site Visit** A Mandatory Pre-bid site meeting was conducted on 16<sup>th</sup> May, 2017 at 10.00am by Kenya Urban Roads Authority. Bidders were represented by Technical Persons with Civil Engineering Background who went with the National Identification Cards or Passports and an introduction letter from the Bidders. Seventeen (17) bidders /representatives were present.

Two addenda were issued and communicated to all bidders on 19<sup>th</sup> May, 2017 and 23<sup>rd</sup> May 2017. Bid Opening the Ag. Director General, vide his Memo Ref. No. KURA/PROC/27/Vol.1 (204) dated 25<sup>th</sup> May, 2017 appointed Tender Opening Committee.

The Tender Box was closed at exactly 10.00am on 30<sup>th</sup> May, 2017 as stipulated in the advertisement. The Bids were opened in the presence of the Bidders' Representatives on 30<sup>th</sup> May, 2017.

The opening session involved the Chairman of the Tender Committee opening the Bids, announcing the names of the Bidders and the Bid Sum in the Form of Bid. The bids were then stamped and endorsed.

Nine (9) bidders submitted bids for the above mentioned tender. The bids opened were from the firms listed below:-

S/No	Names	Tender price	Bid Bond	Remarks
1.	Global Construction Co. Ltd	540,742,732.20	500,000	serialized
2.	Lilaaf Construction Limited	455,963,937.60	500	serialized
3	Anole Construction Limited	529,899,112.00	500	serialized
4	Dadaj Limited	502,546,055.56	500	serialized
5	Baraki International	506,807,016.00	500,000	Serialised
6	Pacificon Investments Limited	568,032,292.00	500,000	Serialised
7	Kenasia Holding Limited	575,184,700.80	500,000	Serialised
8	Possible Limited	495,085,735.68	500,000	Serialised
9	Coolio Enterprises Limited	540,846,705.60	500,000	Serialised

### **Bid Evaluation Committee**

A Tender Evaluation Committee was appointed by the Ag. Director General and was subsequently notified vide a Memo Ref. KURA/F&A/PROC/27/ Vol. (211) dated 7<sup>th</sup> June, 2017 to carry out a comprehensive evaluation in accordance with Section 80 (1-4) of the Public Procurement and Asset Disposal Act, 2015 and submit Tender Evaluation Reports to Ag. Director General through the Manager Procurement.

## **Evaluation Criterion**

The evaluation exercise was conducted in the following three (3) stages in accordance with the criteria set out in the Tender Document:

- i. Stage 1: Completeness and Responsiveness;
- ii. Stage 2: Technical Evaluation; and
- iii. Stage 3: Financial Evaluation.

## **Evaluation Proceeding & Recommendation**

Out of the Nine (9) bidders who submitted tenders only **M/s Coolio Enterprises Limited** met all the requirements of the qualification criteria while the other bidders were disqualified due to non-responsiveness.

The committee subjected **M/s Coolio Enterprises Limited** to technical evaluation since their bid was responsive. Technical evaluation was based on the bidder meeting the criteria on financial capacity, Construction turnover, bidders experience, Key personnel and equipment capacity as set out in the evaluation criteria. **M/s Coolio Enterprises Limited** passed the technical evaluation and was then subjected to financial evaluation.

From the financial evaluation, it was been determined that **M/s Coolio Enterprises Limited** is the lowest responsive and post-qualified bidder considering the tender sum and technical capability.

Consequently, the bid submitted by **M/s Coolio Enterprises Limited** was found to be competitive in all cases considered, and more advantageous to the Employer. The committee recommended that the tender for

Construction of Wajir Bypass Phase I, Wajir County [Tender No.: KURA/DEV/LVSUR/313/2016-2017] be awarded to M/s Coolio Enterprises Limited at their tender sum of Kshs. 540, 846, 705.60 (Kenya Shillings Five Hundred and Forty Million, Eight Hundred and Forty Six Thousand, Seven Hundred and Five Cents Sixty Only having satisfied the conditions for responsiveness, technical criteria and is the lowest evaluated bidder and minimum point scale criteria of 80%.

### PROFESSIONAL OPINION

The head of Procurement noted that there were some bidders considered to be Canvassing for the said tender on their favour which contravenes the principle of procurement and Section 66 (1) of PPADA 2015, for the purpose of upholding confidentiality, fairness and integrity it is my opinion pursuant to section 63 (1) (e) of PPADA 2015 due to material governor's issues detected greatly affects the awarding of the tender to any bidder.

Based on the above she recommended the termination of the procurement proceeding of tender for **Construction of Wajir Bypass Phase I, Wajir County Tender No.: KURA/DEV/LVSUR/313/2016-2017.**

She requested the Accounting Officer to approve the termination of the procurement process as recommended in compliance with section 63 1(e) of the Public Procurement and Asset Disposal Act, 2015.

## **THE REVIEW**

This Request for Review was lodged by Baraki International Limited on 25<sup>th</sup> September, 2017, against the decision of the Kenya Urban Roads Authority in the matter of tender No. KURA/DEV/LVSUR/313/2016 - 2017 Tender for Construction of Wajir Bypass Phase I, Wajir County.

The Applicant sought for the following orders:-

1. *This Request for Review be allowed;*
2. *The Public Procurement Administrative Review Board, in exercise of its powers under Section 173 of the Act:-*
  - a) *Declares that Clauses 30.3 and 32.1 of the Procuring Entity's Instructions to Bidders which purport to grant the Procuring Entity the authority to terminate the procurement proceedings at any time before the award of contract, are contrary to Section 63 (1) of the Public Procurement and Asset Disposal Act No. 33 of 2015, and are therefore null and void;*
  - b) *Annuls the Notification of Termination dated 14th September 2017;*
  - c) *Annuls, in whole, the decision of the Procuring Entity to terminate Tender Number KURA/DEV/LVSUR/313/2016-2017; and*
  - d) *For sufficient cause demonstrated, substitutes the decision of the Procuring Entity to terminate Tender Number KURA/DEV/LVSUR/313/2016-2017, with an award of Tender Number KURA/DEV/LVSUR/313/2016-2017 to the Applicant, and the procurement process be completed within 15 days of the decision of the Review Board.*



***3. That the Procuring Entity be condemned to pay costs of this Request for Review to the Applicant***

During the hearing of this Request for Review, the Applicant was represented by Ms. Diana Waititu, Advocate from the firm of M/s Michael, Daud & Associate Advocates while the Procuring Entity was represented by Mr. Peter O. Bosire the Chief Legal Officer for the Procuring Entity. The Interested M/s Coolio Enterprises Limited was represented by Mr. J K Mwangi, Advocate.

**The parties submissions**

The following were the parties respective cases and submissions before the Board.

**The Applicant's submissions**

The Applicant relied on its Request for Review dated 22<sup>nd</sup> September, 2017, the supplementary grounds of review dated 5<sup>th</sup> October, 2017 together with all the annextures annexed to the said documents.

It was the Applicant's case as contained in the Request for Review, the supplementary grounds of review and in the submissions by Counsel for the Applicant that the Procuring Entity advertised the tender which is the subject matter of this request for review in the Daily Nation and the Standard Newspapers of 9<sup>th</sup> May, 2017 and that pursuant to the said advertisement the Applicant among other bidders submitted its tender for consideration by the Procuring Entity.

It was the Applicant's further case that the tenders submitted by interested bidders were opened on 30<sup>th</sup> May, 2017 in the presence of the bidder's representatives as stipulated by the provisions of the Public Procurement and Asset Disposal Act, 2015.

The Applicant Submitted in support of the first ground of review that the Procuring Entity subjected its tender to the process of evaluation and that by a letter dated 1<sup>st</sup> September, 2017, the Procuring Entity notified the Applicant that its tender was successful and accordingly issued it with a letter of award which the Applicant accepted on 5<sup>th</sup> September, 2017. The Applicant produced the letter of notification of award and the letter of acceptance of the award of the tender as annexures 2 and 4 to its Request for Review.

Counsel for the Applicant however submitted that notwithstanding the above facts, the Procuring Entity issued a letter dated 14<sup>th</sup> September, 2017 terminating the procurement process herein on the ground that it had detected material governance issues warranting a termination of the procurement process as per the provisions of Section 63(1)(e) of the Public Procurement and Asset Disposal Act.

Counsel for the Applicant contended that the Procuring Entity's decision to terminate the tender was unlawful and the first ground she relied upon in challenging the said termination was that under the provisions of Section 63(1) of the Public Procurement and Asset Disposal Act a Procuring Entity can only terminate a procurement process prior to the notification of

award. The Applicant however contended that having issued a letter of notification of award on 1<sup>st</sup> September, 2017, the Procuring Entity could not therefore terminate the procurement process under the provisions of Section 63(1) of the Act.

Counsel for the Applicant submitted that following the Procuring Entity's decision to terminate the procurement process herein, the Applicant's advocates wrote a letter dated 15<sup>th</sup> September, 2017 to the Procuring Entity requiring it to withdraw its letter of termination dated 14<sup>th</sup> September, 2017 but that the Procuring Entity did not heed the Applicant's demand.

On the second ground of review and which was attacking the Procuring Entity's contention that it could terminate the procurement process at any stage of the procurement proceedings under the provisions of clauses 30.3 and 32.1 of the instructions to bidders contained in the tender document, Counsel for the Applicant submitted that such an interpretation of the said clauses of the tender document was unlawful since it would contravene the provisions of Section 63 of the Public Procurement and Asset Disposal Act.

It was her further contention that under the provisions of the Act, no state organ could create bidding documents which are against the provisions of the Act and if it did so, the provisions of the Act would supercede any clauses in the tender document which were in direct conflict with the provisions of the law.

She therefore urged the Board to declare the provisions of clauses 30.3 and 32.1 of the tender document as unlawful as they were in direct conflict with the provisions of Section 63(1) of the Act.

On the third ground of review which appeared as ground 3 in the Request for Review and ground 3A in the supplementary grounds of review, Counsel for the Applicant submitted that it learnt during the hearing of the Request for Review that its tender had been declared non-responsive allegedly on the ground that it had failed to meet certain preliminary mandatory requirements set out in the tender document and that the Applicant's tender did not therefore proceed to the technical and the financial evaluation stages.

It was however the Applicant's contention that the Procuring Entity's decision to declare its tender as unresponsive at the preliminary evaluation stage was unlawful because the Applicant had complied with all the preliminary requirements of the tender. Counsel for the Applicant while referring to the pre-qualification checklist for completeness and responsiveness appearing at pages 40 and 41 of the tender document stated that the Applicant complied with all the 24 pre-qualification requirements set out in the tender document and cited some of the requirements that the Applicant complied with as the provision of a duly filed in form of bid, an appendix to the form of bid, a bid security, a duly completed Power of Attorney and a Tax Compliance Certificate among other requirements.

At the conclusion of her submissions, Counsel for the Applicant urged the Board to allow the Applicant's Request for Review as prayed.

### **The Procuring Entity's submissions**

Mr. Peter O. Bosire the Procuring Entity's Chief Legal Officer opposed the Applicant's Request for Review and relied on the two responses which it filed with the Board on 2<sup>nd</sup> and 6<sup>th</sup> October, 2017 respectively.

On the issue of the Applicant's responsiveness to the preliminary mandatory requirements set out in the tender document, Counsel for the Procuring Entity submitted that the Applicant was declared non-responsive at the preliminary evaluation stage for having failed to meet several mandatory requirements in the tender documents such as the failure to counter sign sections of the Bills of Quantities and failing to provide a duly filled in form on litigation history.

Counsel for the Procuring Entity urged the Board to peruse the original tender document submitted by the Applicant in order to verify the correctness of the grounds for the Applicant's disqualification at the preliminary evaluation stage and further stated that the tender document annexed to the Request for Review and that submitted by the Applicant to the Procuring Entity showed that the tender document supplied by the Applicant in the Request for Review appeared to have been corrected(sanitized) to omit the anomalies and the omissions which the Procuring Entity had identified during evaluation. He therefore urged the Board to look at both documents and argued that upon doing so the Board

so, it would come to the inevitable conclusion that the two documents were different in which event the Board should rely on the original tender document in arriving at its determination.

On the issue of termination of the procurement process, Counsel for the Procuring Entity conceded that the Procuring Entity indeed terminated the procurement process herein by its letters dated 14<sup>th</sup> September, 2017 addressed to various bidders including the Applicant and the interested party. On the reason for termination, Counsel for the Procuring Entity submitted that this had been caused by the detection of material governance issues arising from incessant canvassing by some bidders in contravention of the applicable law and principles.

Counsel for the Procuring Entity referred the Board to the professional opinion contained in a memorandum dated 26<sup>th</sup> July, 2017 addressed to the AG. Director General of the Procuring Entity and which was signed by one Saadia H. AdanKhalif setting out the grounds for disqualification.

Turning to the Applicant's contention that the Procuring Entity had issued it with a letter of notification of award on 1<sup>st</sup> September, 2017, Counsel for the Procuring Entity submitted that the letter of award was issued in error since the Applicant was not the party recommended for award of the tender having been disqualified at the preliminary evaluation stage.

Counsel for the Procuring Entity concluded his submissions by urging the Board to dismiss the Applicant's Request for Review and uphold the termination.

## The Interested Party submissions

Mr. J. K Mwangi advocate who appeared on behalf of the interested party Coolia Enterprises Limited associated himself with the submissions made by Counsel for the Procuring Entity to the extent that the Procuring Entity had asserted that the Applicant was properly declared as non-responsive at the preliminary evaluation stage for failure to meet some of the preliminary mandatory requirements set out in the tender document. He submitted that he had read the entirety of the documents presented before the Board by the Applicant and the Procuring Entity and had come to the conclusion that the Applicant's bid was non-responsive and that the Applicant could not have therefore been declared the successful bidder under the provisions of Section 86 of the Public Procurement and Asset Disposal Act.

Counsel for the interested party further stated that Counsel for the Applicant did not demonstrate in her submissions the ways in which the Applicant's bid was responsive. He stated that to the contrary, the evaluation report filed by the Procuring Entity with the Board had clearly demonstrated that the interested party was the lowest evaluated bidder and was the party in whose favour the Procuring Entity had made a recommendation of award.

On the issue of termination of the procurement process, Counsel for the interested party differed with the submissions made by Counsel for the Procuring Entity and asserted that the Procuring Entity's decision to

terminate the Procurement process herein was unlawful and that the termination was intended to ensure that the tender in question was floated afresh.

He further argued that the contention that the ground for termination namely the emergence of some governance issue based on canvassing by certain bidders was too general and was not supported by any evidence and that in any event the Procuring Entity had not stated what form the canvassing took, who participated in it and at what stage of the procurement process the alleged canvassing occurred.

He stated that the allegation of canvassing by the Procuring Entity was based on speculation and that the best that the Board could do was to dismiss the said allegation in the absence of any evidence to support it.

Counsel for the interested party urged the Board to take into account the fact that terminating the procurement process herein would cost the tax payers and bidders additional expenses in terms of floating another tender, inviting bids and evaluating them. He stated that such an action would not amount to a prudent use of public resources.

In conclusion Counsel for the interested party urged the Board to find that the interested party was the lowest evaluated bidder and that the Procuring Entity's decision to terminate the procurement process was unlawful.



**The Applicant's Response to the submissions made by Counsel for the Procuring Entity and Counsel for the interested party.**

In a short response to the submissions made by Counsel for the Procuring Entity and Counsel for the interested party, Counsel for the Applicant reiterated her earlier submissions and disputed the allegation by the Procuring Entity that there had been canvassing by her client. She submitted that an issue relating to canvassing which in appropriate circumstances would also amount to fraudulent conduct was a serious allegation that required evidence to prove. She additionally asserted that there was no evidence in the evaluation report to prove any allegation of canvassing and that the statement in the evaluation report was a bare statement which did not contain any particulars of when, by whom and how the alleged canvassing was conducted.

Counsel for the Applicant further submitted that even if any ground for termination existed, then under the provisions of Section 63(1) of the Public Procurement and Asset Disposal Act a termination on whatever ground could only be effected prior to the notification of a tender award which in this case occurred on 1<sup>st</sup> September, 2017.

On the grounds for disqualification of the Applicant at the preliminary evaluation stage and particularly on the ground set out in the Procuring Entity's response that the Applicant had not submitted a Power of Attorney which was properly filled in and signed, Counsel for the Applicant referred the Board to page 101 of the Applicant's tender

document and stated that the Applicant submitted a Power of Attorney that complied with the requirements of the law and the tender document.

In reference to the other alleged areas of non-responsiveness to the preliminary requirements, Counsel for the Applicant submitted that if there were any instances of non-compliance in the tender documents, then the same amounted to minor errors or deviations which did not materially affect the substance of the tender. She further submitted that under the provisions of clause 31.1 of the instructions to bidders, the Procuring Entity reserved the right to waive such minor defects or deviations which did not in any event affect the Applicant's capacity to perform the contract resulting from the award of the tender.

By way of illustration the minor deviations, Counsel for the Applicant cited the requirement on pagination and stated that the presence or absence of pagination in one or more pages of the tender documents did not materially affect the substance of the tender or affect the Applicant's capacity to undertake the works.

In conclusion Counsel for the Applicant urged the Board to find for the Applicant and allow the Request for Review.

### **THE BOARD'S DECISION**

The Board has carefully considered the Request for Review, the supplementary grounds of review together with all the documents filed by the Applicant before the Board in support of the Request for Review and

has also considered all the responses filed by the Procuring Entity and the interested party in opposition of the Request for Review.

The Board has also carefully considered the oral submissions made by Counsel for the three parties named above in support or in opposition to the Applicant's Request for Review and it is evident from the documents filed and the submissions made that this Request for Review raised the following three issues for the Board's consideration;-

**The issues for determination**

- a) Whether the Procuring Entity's decision to terminate the procurement process herein was valid and lawful under the provisions of Section 63 of the Public Procurement and Asset Disposal Act.
- b) Whether the letters notification of award issued to both the successful and the unsuccessful bidders were lawful.
- c) What orders or directions should the Board make in the circumstances.
- d) Who should pay the costs of this Request for Review.

**ISSUE NO. 1**

Whether the Procuring Entity's decision to terminate the procurement process herein was valid and lawful under the provisions of Section 63 of the Public Procurement and Asset Disposal Act.

As a first step to the determination of the first issue framed for determination, the Board wishes to state that the Board's jurisdiction to hear and determine any issue touching on the termination of a procurement process is now settled and has been affirmed in several decisions given by the courts.

The often referred to decision on this issue is the High Court decision in the case of **Republic =vs= The Public Procurement Administrative Review Board, the Kenya Civil Aviation Authority and Thales Air Systems Ex-parte Selex Sistemi Intergrati [Nai HC Misc. Appl. No. 1260 of 2007]** where the High Court held that both the Review Board and the High Court have the jurisdiction to hear and determine an issue touching on the termination of a procurement process.

The High Court (The Honourable Justice G. Dulu) stated as follows in regard to the Board's jurisdiction to consider an issue touching on the termination of a procurement process.

**"In our present case the purported termination was done after award of Tenders was communicated as confirmed by both the Applicant and the Interested Party and even the 2<sup>nd</sup> Respondent. This cannot be a situation covered by the ouster clause under Section 36(1) of the Act. It is my finding and decision that the ouster clause under Section 36(1) of the Act does not apply to the present case as the tender was already awarded. There is no subsequent event from parties other than the procuring entity that**

actuated the proceedings. I therefore hold that both the 1<sup>st</sup> Respondent and this court have jurisdiction to consider and review the decision of the 2<sup>nd</sup> Respondent, the procuring entity to terminate the awarded tender”.

The Board adopted the above decision in the above case in the case of **AON Kenya Insurance Brokers Ltd -vs- Teachers Service Commission (PPARB APPL. No. 8 of the 2015)** where it stated as follows:-

“The Board has considered the court’s judgment and finds that what the court held was that a procuring entity cannot purport to terminate an award once a successful bidder is notified that its tender was successful. As the Board has already stated, the Applicant in the case before the Board was notified that its tender was successful on 17<sup>th</sup> November, 2014 and accepted the award to it on 18<sup>th</sup> November, 2014 while the letter of the purported termination was issued on 16<sup>th</sup> January, 2015”.

Whereas the above two decisions related to the interpretation of the provisions of Section 36 of the repealed Public Procurement and Disposal Act 2005, the High Court has reaffirmed that the Board has similar powers while considering a question of termination under the provisions of Section 63 of the new and now operational Public Procurement and Asset Disposal Act (2015).

One of the most recent decisions on this issue is the case of **Republic -vs- The Public Procurement Administrative Review Board, Intertek Testing Services (E.A) Limited Ex-parte SGS Kenya Limited [NaiHC Milimani**

Law Courts J.R Misc. Appl. No. 496 of 2017] where the High Court (the Hon. Justice John M. Mativo) reaffirmed the jurisdiction of the court and the Board to consider any question relating to the propriety of a termination of a procurement process under the provisions of the new Act.

In his said decision, the learned judge while also setting out the test of the nature of the information or the evidence the Board would be required to consider in determining the propriety or otherwise of a termination process under the provisions of Section 63 of the new Act stated as follows at paragraphs 40, 41, 42 and 43 appearing at pages 13 and 14 of the Court's decision which the Board also adopts for the purposes of the consideration of the dispute now before it.

*"40. It is my view that section 63 of the Act imposes a statutory obligation upon the first interested party to terminate the tender award only on any of the grounds stated therein, and that those grounds are not stated therein for cosmetic purposes.*

*41. In order to discharge its burden under section 63 of the Act, the interested party must provide evidence that there is real and substantial technological change. The proper approach to the question whether a party invoking the said provision has discharged its burden under section 63 is therefore to ask whether the such a party has put forward sufficient evidence for a court to conclude that, on the probabilities, the technological change cited is of such a nature that it renders it imprudent for the contract to proceed on the original terms and the nature of the change and how is substantially affects*

*the contract ought to be clearly stated. To me, that was the intention of the draftsman and the scheme and architecture of the Act so as to prevent or protect innocent bidders from being unfairly disadvantaged or deprived of the tender on flimsy grounds.*

42. *It is my considered view that the mere recitation of the statutory language of the ground(s); as has happened in this case is not sufficient for the first interested party to show that there exists 'technological change. Nor are mere ipse dixit affidavits proffered by the first interested party. The evidence tendered before the Review Board must provide sufficient information to bring the grounds within the provisions of the law. This recognizes that the tender process and in particular, the termination, must be done in a transparent and accountable and legal manner as the law demands.*
43. *Ultimately, the question whether the information put forward is sufficient to place the termination within the ambit of the law as claimed will be determined by the nature of the reasons given. The question is not whether the best evidence to justify termination has been provided, but whether the evidence provided is sufficient for a reasonable tribunal or body to conclude, on the probabilities, that the grounds relied upon falls within any of the grounds under section 63 of the Act. If it does, then the party so claiming has discharged its burden under section 63. If it does not, then the body in question has only itself to blame".*

Having established that the Board has the jurisdiction to hear and determine the dispute now before it and having set out the test for the consideration of whether the information or the evidence relied upon by a Procuring Entity is sufficient to terminate a procurement process, the Board will now proceed to consider the first issue framed for determination based on all the material placed before it.

The undisputed evidence placed before the Board in this case was that upon the Procuring Entity publishing an invitation inviting members of the public to submit tenders in this procurement process, nine (9) bidders including the Applicant submitted tenders to the Procuring Entity which were opened on 30<sup>th</sup> May, 2017. The tenders submitted to the Procuring Entity were then subjected to an evaluation process.

The further evidence placed before the Board and more particularly the evaluation report which was signed by the members of the Procuring Entity's tender evaluation committee comprising of Eng. Musa Murunga, Richard Yagan, Moses Simiyu and Halima Dolal on 12<sup>th</sup> June, 2017 recommended an award of the subject tender to the firm of M/s Coolio Enterprises Limited at their tender sum of Kshs. 540,846,705.60 (Kenya Shillings Five Hundred and Forty Million, Eight Hundred and Forty Six Thousand, Seven Hundred and Five and Six cents only).

The additional evidence placed before the Board shows that the Procuring Entity issued a letter of notification of award of the tender to the Applicant on 1<sup>st</sup> September, 2017. The Applicant accepted the award of the tender by



a letter dated 5<sup>th</sup> September, 2017 but by a letter dated 14<sup>th</sup> September, 2017, the Procuring Entity terminated the procurement process herein and wrote letters of termination to all the bidders who had submitted tenders in this procurement process. The Procuring Entity produced the nine letters of termination issued to the nine bidders who participated in this tender as appendix G which was attached to the Procuring Entity's response filed with the Board on 2<sup>nd</sup> October, 2017.

The evidence placed before the Board also shows that the Procuring Entity came up with the decision to terminate the tender in question pursuant to the professional opinion prepared by the Procuring Entity's procurement Manager on 26<sup>th</sup> July, 2017 which was produced as Appendix F to the Procuring Entity's response filed with the Board on 2<sup>nd</sup> October, 2017.

The reason cited for recommending the termination of the procurement process and which the Board wishes to reproduce verbatim was as follows:-

*Conclusion*

*"In my professional opinion, I consider that there was some bidders considered to be canvassing for the said tender in their favour which contravenes the principle of procurement and Section 66(1) of the Public Procurement and Asset Disposal Act 2015, for the purpose of upholding confidentiality, fairness and integrity it is my opinion pursuant to Section 63 (1)(e) of Public Procurement and Asset*

*Disposal Act 2015 due to material governor's issues detected greatly affects the awarding of the tender to any bidder (sic).*

*Based on the above I recommend the termination of the procurement proceeding of tender for Construction of Wajir Bypass Phase I, Wajir County Tender No. KURA/DEV/LVSUR/313/2016-2017.*

*You may therefore approve the termination of procurement process as recommended in compliance with Section 63 1(e) of the Public Procurement and Asset Disposal Act, 2015''*

*Prepared and signed by Procurement Manager*

*Name: Saadia H. Adankhalif''.*

The Board has considered all the above facts and documents which are relevant to the issue of termination and has come to the unavoidable conclusion that the termination of the procurement process herein was unlawful and was not based on any valid ground.

The first basis for finding that the decision to terminate the procurement process herein was unlawful is contained in the provisions of Section 63(1) of the Public Procurement and Asset Disposal Act 2015. The said Section of the law expressly states that an accounting officer of a Procuring Entity can only terminate or cancel a procurement proceeding at any time prior to notification of a tender award. As the Board has already stated, the Procuring Entity herein issued a letter of award whether rightly or wrongly to the Applicant on 1<sup>st</sup> September, 2017 with the consequence that by the

time the Procuring Entity purported to terminate the procurement process herein on 14<sup>th</sup> September, 2017, there was already in force a letter of award however unsatisfactory it was, issued in respect of the tender in question.

During the hearing of this Request for Review, Counsel for the Procuring Entity termed the letter issued on 1<sup>st</sup> September, 2017 as having been issued in error. The Board is of the view that may as well be so. The Board is however of the respectful view that if the letter of notification was infact issued in error, the Procuring Entity ought to have withdrawn or recalled the said letter or taken steps to have the letter of award annulled by the Board but not to terminate the entire procurement process merely because there was an error in issuing the letter of notification.

The provisions of the Section 63 (1) of the Act which are relevant to the issue under consideration provide as follows:-

*63(1): An accounting officer of a Procuring Entity may at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies”.*

*a) The subject procurement have been overtaken by:-*

*i) Operation of law; or*

*ii) Substantial technological change.*

*b) Inadequate budgetary provision;*

*c) No tender was received;*

*d) There is evidence that prices of the bids are above market prices.*

- e) Material governance issues have been detected;*
- f) All evaluated tenders are non-responsive;*
- g) Force majeure;*
- h) Civil commotion, hostilities or an act of war; or*
- i) Upon receiving subsequent evidence of engagement in fraudulent or corrupt practices by the tenderer”.*

It is apparent from a plain reading of the provisions of Section 63(1) of the Act that a decision to terminate a procurement process can only be made by an Accounting Officer of a Procuring Entity but not by a procurement manager or the Head of the Procuring Entity's procurement unit. A look at all the letters of termination dated 14<sup>th</sup> September, 2017 however shows that the same were signed by the Procuring Entity's procurement manager and not by the Procuring Entity's Accounting Officer.

The Board wishes to state that the role of the Head of a Procuring Entity's procurement unit in a process which may lead to a termination of procurement proceedings is limited to giving a professional opinion to the Procuring Entity's Accounting Officer and does not extend to signing of a letter of termination of the process.

Thirdly and more importantly and as the High Court held in the case of **Republic -vs- The Public Procurement Administrative Review Board, the Kenya Civil Aviation Authority and Thales Air Systems Exparte Selex Sistemi Intergrati (Nai HC Misc. Appl. No. 1260 of 2007)** and in the more recent case of **Republic =vs= The Public Procurement Administrative**

Review Board Intertek Testing Services Limited Exparte SGS Kenya Limited (Nai HC Milimani Law Courts JR Appl. No. 496 of 2017) where the High Court stated that where the decision of a Procuring Entity to terminate a procurement process is challenged before the Board, the Procuring Entity is under a duty to place sufficient reasons or evidence before the Board to justify and support the termination of the procurement process under challenge.

Put differently, where a Procuring Entity decides to terminate a procurement process then such a termination cannot be a mere mechanical process or to use the words of the judge in the SGS case the grounds set out therein cannot be for a cosmetic purpose but the same must be based on the lawful grounds set out in Section 63 of the Public Procurement and Asset Disposal Act and the termination must be supported by evidence.

As the Board has previously stated in this decision, a fact which is apparent on the face of the letters of termination dated 14<sup>th</sup> September, 2017 which were issued to various bidders, the Procuring Entity's procurement manager decided to commence and eventually effect the termination of the procurement process which is the subject matter of this Request for Review based on an alleged detection of a material governance issue arising from an alleged incessant canvassing by some bidders in an alleged contravention of the applicable law and principles.

The Board has considered the above reason against the provisions of Section 63 of the Act and finds that the said allegation was far from proved.

The Board has further looked through all the documents placed before it and has not come across a single document supporting the allegation of canvassing leveled or proved against any bidder.

Counsel for the Procuring Entity admitted during the hearing of this Request for Review that there was no evidence of canvassing by any bidder which was placed before the Board other than the general statement contained in the Procuring Entity's procurement manager's professional opinion which she signed on 26<sup>th</sup> July, 2017.

The Board also finds that the Procuring Entity's decision to term the alleged canvassing as a governance issue for purposes of termination of the procurement process under the provisions of Section 63(1)(e) of the Act was erroneous since canvassing in a procurement process amounts to either a fraudulent or a corrupt practice by a tenderer or tenderers under the provisions of Section 63(1)(i) of the Act.

In order to terminate a procurement process, the Act requires any of the grounds set out under Section 63(1)(i) of the Act to be supported by evidence (emphasis added) to prove that a tenderer has engaged in fraudulent or corrupt practices.

The law is also clear that fraud and corrupt practices amount to criminal offences under the provisions of Sections 176(1) (d), (g) & (i) of the Public Procurement and Asset Disposal Act 2015 which criminalizes any conduct that is fraudulent or which is geared towards influencing the outcome of an evaluation or procurement process.

The said Sections 176(1), (d), (g) & (i) of the Act provide as follows:-

*"176(1). A person shall not:-*

*a) ... ..*

*b) ... ..*

*c) ... ..*

*d) Unduly influence or exert pressure on any member of an opening committee evaluation committee and disposal committee or on any employee or agent of a Procuring Entity or the accounting officer to take a particular action which favours or tends to favour a particular tenderer;*

*e) ... ..*

*f) ... ..*

*g) Inappropriately influence tender evaluations;*

*h) ... ..*

*i) Commit a fraudulent act".*

Under the provisions of Section 176(2) of the said Act, any person who is adjudged to have committed an offence under the provisions of Section 176(1) of the Act is liable to a fine not exceeding the sum of Kenya Shillings Four Million or to imprisonment for a period of time not exceeding ten years or to both. The Board further finds that neither the procurement manager nor any other officer of the Procuring Entity swore any affidavit or produce any evidence to show that the Procuring Entity or any of its officers had lodged a formal complaint against any tenderer either with the police, the Director of Criminal Investigations, the Director of Public

Prosecutions, the Ethics and Anti-Corruption Commission or had lodged an application for debarment of any bidder with the Director General of the Public Procurement Regulatory Authority.

Further the professional opinion on the basis of which the procurement proceedings herein were terminated shows that the allegation contained therein constitutes of what in law amounts to a general allegation. The Procuring Entity did not state when the alleged canvassing took place, who were involved in the alleged canvassing, how the alleged canvassing was conducted, what was the nature of the canvassing, where the alleged canvassing took place among many other particulars that would have gone into establishing the said allegation.

In the absence of all the above ingredients, particulars and pieces of evidence, the Board cannot be reasonably expected to uphold a termination process which not only contravenes the law but which is also not supported by any evidence.

Finally, the Board wishes to state that even if the Procuring Entity had produced any of the evidence referred to above, the Board as a responsible statutory body would still not have deemed the allegation of canvassing which is criminal in nature as having been proved unless the Procuring Entity placed before it evidence of a criminal conviction or a decision given by the Director General of the Public Procurement Regulatory Authority debarring the tenderer in question from participating in any procurement proceedings within the Republic of Kenya.



Based on all the above findings, the Board therefore finds and holds that the Procuring Entity's decision to terminate the procurement process herein was unlawful.

## **ISSUE NO. II**

**Whether the letters notification of award issued to both the successful and the unsuccessful bidders were lawful.**

On the second issue framed for determination and as the Board has already stated above, the evaluation report which the Procuring Entity produced and which was signed by the members of the tender evaluation committee whose names have been set out elsewhere in this decision shows that at the end of the evaluation process herein, the Procuring Entity recommended the award of the tender in question to the interested party herein M/s Coolio Enterprises Limited at their tender sum of Kshs. 540,846,705.60.

The evidence placed before the Board and which the Board set out earlier in this decision shows that the Procuring Entity issued a letter of award dated 1<sup>st</sup> September, 2017 notifying the Applicant that it had been successful in the procurement process in dispute.

It is therefore clear on the face of the documents placed before the Board that the party recommended for award and the party which was notified that its tender was successful are two different legal entities.

The law does not however contemplate a situation where a recommendation of award is made in favour of one party and the decision to award the tender is made in favour of a different party.

Further, under the provisions of Section 87 of the Public Procurement and Asset Disposal Act, the law sets out specific requirements regarding notification which a Procuring Entity ought to comply with while issuing a letter of notification. A letter of notification which sets out particulars which are not true cannot be deemed as a proper letter of notification under the provisions of the Act and in view of the contradiction between the tender evaluation committee's recommendation of award and the letter of notification dated 1<sup>st</sup> September, 2017 the Board cannot arrive at any other conclusion but to find that the letters of notification issued to both the successful and the unsuccessful bidders were unlawful.

### **ISSUE NO. III**

**What orders or directions should the Board make in the circumstances.**

Before setting out the orders and the directions that the Board shall grant in this Request for Review, it is apparent from all the facts and the findings that the Board has made that the Procuring Entity commenced this procurement process and evaluated the tenders which were submitted to it by the bidders in accordance with the law upto 12<sup>th</sup> June, 2017.

However, instead of complying with the provisions of the law by completing the procurement process in accordance with the law, the Head

of Procuring Entity's Procuring unit (Manager Procurement) decided to embark on a futile termination process which that was not based on the law and which was further not supported by any evidence.

In addition to making a decision which was not based on the law and any evidence, the decision to terminate the procurement process herein slowed down and brought confusion and uncertainty to what was otherwise a simple procurement process thereby causing unnecessary inconvenience to bidders.

The Board wishes to observe that it is the duty of the Head of procurement of every Procuring Entity to give proper guidance and advice to a Procuring Entity on how a procurement process should be undertaken. Some of the many duties and obligations placed on the Head of Procurement of a Procuring Entity by law and general prudence is to ensure that all the documents prepared and issued under his or her watch are in tandem and speak to each other. It would however be an abdication of that duty if the Head of Procurement of a Procuring Entity were to issue documents whose contents are contradictory or fail to ensure that all the documents issued under his or her watch reflect the accurate position as was the case in this procurement.

This is therefore a case where the Board must step in and correct what are without doubt unlawful actions coming in between a procurement process and thereby bring back the process on course.

Before issuing its orders in this Request for Review, the Board wishes to observe that the Applicant set out a number of grounds and arguments whose import was to challenge the Procuring Entity's decision to declare its tender as non-responsive at the preliminary evaluation stage. The Board however wishes to state having annulled and set aside the termination of the procurement process herein and having restored the said process back on track and having further determine that the letters of notification dated 1<sup>st</sup> September, 2017 were issued irregularly, it is the Boards view that it would be premature for it to consider the issues of responsiveness or otherwise of the Applicant's tender at this stage under the provisions of Section 167(1) of the Public Procurement and Asset Disposal Act. Such a determination should therefore await the Procuring Entity's final decision at the conclusion of the procurement process once a letter of notification of the outcome of the tender is issued to the Applicant under the provisions of Section 87 of the Public Procurement and Asset Disposal Act.

Finally, there is no doubt that the actions of the Procuring Entity inconvenienced the two bidders who participated in this Request for Review and the only fair and just orders that the Board can make in this application is to allow the Applicant's Request for Review which was filed with Board on 25<sup>th</sup> September, 2017 on the following terms.

## **FINAL ORDERS**

In view of all the above findings and in the exercise of the powers conferred upon it by the Provisions of Section 173 of the Public Procurement and Asset Disposal Act 2015, the Board makes the following orders on this Request for Review:-


- a) **The Applicant's Request for Review which was filed with the Board on 25<sup>th</sup> September, 2017 in respect of tender number KURA/DEV/LVSUR/313/2016-2017 for the construction of the Wajir Bypass Phase 1, Wajir County be and is hereby allowed.**
- b) **The Procuring Entity's decision terminating the procurement process in respect of tender number KURA/DEV/LVSUR/313/2016-2017 for the construction of the Wajir Bypass Phase 1, Wajir County as contained in the letters of notification dated 14<sup>th</sup> September, 2017 which were issued by the Procuring Entity's in favour of the bidders in this procurement process be and are hereby annulled and the same are set aside forthwith.**
- c) **All the letters of notification dated 1<sup>st</sup> September, 2017 notifying any of the bidders of the outcome of this procurement process be and are hereby annulled and set aside forthwith.**
- d) **For the purposes of an orderly and lawful completion of the procurement process herein, the Procuring Entity is directed to complete the procurement process herein including the making of**

an award of the tender in question based on the recommendations contained in the tender evaluation committee's report which was signed on 12<sup>th</sup> June, 2017 within a period of Seven (7) days from today's date.

- e) Upon completing the procurement process herein as directed in order (d) above, the Procuring Entity shall issue letters of notification under the provisions of Section 87 of the Public Procurement and Asset Disposal Act to the successful and the unsuccessful bidder/bidders herein.
- f) Both the Applicant and the interested party shall be at liberty to challenge the decision of the Procuring Entity as contained in the letters of notification to be issued under the provisions of Section 87 of the Act pursuant to order number (e) above depending on the reasons set out in the letter or letters of notification. This liberty shall also extend and apply in the event that the Procuring Entity fails to comply with any of the orders issued by this Board.
- g) For the avoidance of doubt and having previously exercised the right to terminate the procurement process herein under the provisions of Section 63 of the Public Procurement and Asset Disposal Act, the Procuring Entity shall not re-exercise the same right again.

- h) In order to give effect to the orders of this Board, the Procuring Entity shall extend the tender validity period and shall also take steps to extend the tender security validity period by such period of time as it shall require for the purposes of enabling it complete the procurement process herein.
- i) The Board orders that each party shall bear its own costs of this Request of Review in view of the fact that the two bidders who participated in this procurement process now have another opportunity to participate in the process to conclusion.

Dated at Nairobi on this 11<sup>th</sup> day of October, 2017.

  
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**CHAIRMAN**  
**PPARB**

  
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**SECRETARY**  
**PPARB**

