

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION No. 55/2017 OF 19TH JUNE, 2017

BETWEEN

EARTH CONSTRUCTION LTD.....1ST APPLICANT
DABEL CONSTRUCTION COMPANY LTD.....2ND APPLICANT
DIWafa INVESTMENTS LIMITED.....3RD APPLICANT

AND

NORTHERN WATER SERVICES BOARD1ST RESPONDENT

MINISTRY OF WATER AND IRRIGATION.....2ND RESPONDENT

Review against the decision of the Northern Water Services Board in the Matter of the following tenders:

1. Tender Number NWSB/CW/026/2016–2017 for the Construction of Lebehia Water Pan 80,000 m³ in Lafey Sub-county in Mandera County.
2. Tender Number NWSB/CW/027/2016–2017 for the Construction of Warangara Water Pan 80,000 m³ in Lafey Sub-county in Mandera County.
3. Tender Number NWSB/CW/035/2016–2017 for the Construction of Mader Kayo Water Pan 40,000 m³ in Moyale Sub-county in Marsabit County.

BOARD MEMBERS PRESENT

1. Mr. Paul Gicheru - Chairman
2. Hussein Were - Member
3. Mrs. Gilda Odera - Member
4. Mr. Peter B. Ondieki, MBS - Member
5. Mrs. Rosemary K. Gituma - Member
6. Eng. Weche R.Okubo, OGW - Member

IN ATTENDANCE

1. Stanley Miheso - Secretariat
2. Maryanne Karanja - Secretariat

PRESENT BY INVITATION

1st Applicant – Earth Construction Limited

1. Vivian Mutua Advocate, Mbuthia Kinyanjui & Co Adv.
2. Abdirizack Noor Director
3. Abdiaziz Ahmed Director

2nd Applicant – Dabel Construction Company Ltd

1. Vivian Mutua Advocate, Mbuthia Kinyanjui & Co Adv.

3rd Applicant – Diwafa Investments Limited

1. Vivian Mutua Advocate, Mbuthia Kinyanjui & Co Adv.

1st Respondent (Procuring Entity) – Northern Water Services Board

1. Mwaniki Gachuba - Advocate, Onyoni Opini & Gachuba Adv.
2. Benedict Kimwaki - Procurement Officer
3. Angela Merich - Pupil

2nd Respondent – Ministry of Water and Irrigation

Not represented

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:

INTRODUCTION

1.1. General

Northern Water Services Board (NWSB), a State Corporation under the Ministry of Water and Irrigation received equalization funds from the Government of Kenya for use during financial year 2016-2017 and intended to use part of the proceeds towards Construction of Libehia Water pan 80,000 m³ in Lafey Sub-county of Mandera County, Warangara Water pan 80,000 m³ in Lafey Sub-county of Mandera County and Mader Kayo Water pan 40,000 m³ in Moyale Sub-county of Marsabit County.

1.2. Project Scope

The works involved but was not limited to the following:-

- Excavation for Pan Reservoir

- Excavation of silt trap
- Forming and compaction of Embankments
- Excavation of spillway
- Excavation of cut off drain
- Fencing the pan reservoir

1.3. Invitations to bid

The tenders were advertised in the *Daily Nation* on 21st February 2017 and on the website www.nwsb.go.ke. The tenders were opened on 15th March 2017 in the presence of NWSB officials and bidders representatives.

2. TENDER EVALUATION

The Accounting Officer of NWSB appointed the evaluation committee members for the tenders on the 30th March 2017.

2.1 Preliminary examination of bids

The tenders received were checked against the criteria given in the tender document as follows:

No.	Requirement
MR 1	Must submit a copy of certificate of registration/Incorporation
MR 2	Must submit a copy of valid tax compliance certificate
MR 3	Must fill the bill of quantities in the format provided
MR 4	Must fill the form of tender in the format provided and signed by the authorized person
MR 5	Must Submit a tender security declaration
MR 6	Power of attorney <i>proof</i> authorizing the signatory of the tender to commit the tenderer.
MR 7	Must submit a copy of valid registration from National Treasury in the category of small works and Engineering
MR 8	Must be registered with NCA 6 Water works and above

2.2 Technical Evaluation

Responsive bidders at the preliminary evaluation stage were subjected to technical evaluation criteria which had a cut off score of 70%. The criteria and score were as follows:

No.	PARAMETER	MAXIMUM SCORE		
1	Relevant Experience			
	Experience as prime contractor in the construction of at least two projects of a similar nature and complexity equivalent to the Works for the last 2 years X number of project 30/2	30		
2	Equipment			
	Bulldozer, Excavator, Tipper, Roller, Pickup - proof of ownership and lease must be provided i.e. logbooks	Owned (Max 25 marks)	0-25	
		50% owned 50% leased (Max 20 marks)	0-20	
		100% leased (Max 15 marks)	0-15	
3	Key Personnel			
	Site Agent Max (8 marks)	Qualification -Civil Engineering	Degree	5
			HND	4
			Diploma	3
		Relevant experience - (5 years)	3 - 5 years	3
			0-2	2
	Plant Operator	Qualification - Plant Operator	Certificate	3
	Manson	Qualification	Certificate	2
	Driver	Qualification	Driving License	2
4	Financial Capacity			
	Audited Accounts- financial capability of the firm based on information provided in the last 2 years audited account (2014 - 2015)		6	
	Current Ratio = $\frac{\text{Current asset}}{\text{Current Liabilities}}$			
	A ratio of 1 and above (2 marks below 1 (1 marks for each year audited			
	Line of credit of 30 million		2.5	
	Annual volume (turn over) of construction work for the successful Tenderer in any of the last 2 years shall be: Ksh 30 million. Others 30/2 x amount		7.5	
	Bank statements (last six months to date of tender)		4	
	Proposed program (Work methodology and schedule)		10	
	Total		100%	

2.3 Financial Evaluation

Bidders who scored 70% and above at the technical evaluation stage were assessed at the financial evaluation stage and ranked based on their bid prices.

3. EVALUATION RESULTS OF TENDERS

3.1 Tender No. NWSB/CW/026/2016-2017 – Construction of Libehia Water Pan 80,000 m³ in Lafey Sub-county of Mandera County

a) Tender results

A total of seven bids were received as tabulated below.

Bid No	Bidder's Name	Address	Tender Price In Kshs
1.	Libahiya Enterprises Ltd	P.O Box 37297-00100 Nairobi	72,539,500.00
2.	Pinnie Agency Co. Ltd	P.O Box 104080-00101 Nairobi	78,058,915.00
3.	County Builders Ltd	P.O Box 6779-00610 Nairobi	79,215,070.00
4.	MAS Construction Ltd	P.O Box 536-70200 Mandera	73,386,195.08
5.	Earth Construction Ltd	P.O Box 28321-00100 Nairobi	69,955,845.08
6.	Six Eleven Energy Contractors Co.Ltd	P.O Box 16438-00610 Nairobi	61,666,768.80
7.	Lafey Construction Co. Ltd	P.O Box 120 Mandera	69,445,710.10

b) Preliminary Evaluation Results

Bidder Nos. 2, 3, 4 and 5 were found to be responsive to the mandatory requirements and were hence taken to the technical evaluation stage. Bidder Nos. 1 and 7 were found to be non-responsive for failure to provide a signed form of tender and for failure to provide a valid tax compliance certificate, respectively, and were hence disqualified at the preliminary evaluation stage.

c) Technical Evaluation Results

The Bidders scored as follows:

Maximum Score	Bidder				
	02	03	04	05	06
100%	70%	83%	78%	78%	50%

Bidder 06 failed the technical assessment while Bidders 02, 03, 04 and 05 met the requisite pass mark of 70% and were hence ranked at the financial evaluation stage.

d) Financial Evaluation Results (Ranking of Bidders)

The remaining bidders were ranked based on their bid prices as tabulated hereunder.

Bidder No.	Bidder's Name	Tender Price In Kshs	Ranking
02	Pinnie Agency Co. Ltd	78,058,915.00	3
03	County Builders Ltd	79,215,070.00	4
04	MAS Construction Ltd	73,386,195.08	2
05	Earth Construction Ltd	69,955,845.08	1

e) Recommendation

The evaluation committee recommended that the contract for the Construction of Libehia Duo Water Pan be awarded to Earth Construction Ltd at a cost of Kenya Shillings Sixty Nine Million, Nine Hundred and Ninety Five Thousand, Eight Hundred and Forty Five and Eight Cents (Kshs 69,995,845.08).

f) Professional Opinion

The Head of Procurement issued a professional opinion dated 13th April, 2017 to the Chief Executive Officer pursuant to Section 47 and 84 of the Public Procurement and Asset Disposal Act, 2015 in which he stated that the subject procurement had satisfied the constitutional requirement of Article 227(1) and statutory requirement of the Public Procurement and Asset Disposal Act, 2015. He advised that the Chief Executive Officer may award the tender to Earth Construction Ltd at the tender sum of Kshs 69,955,845.08 inclusive of VAT as per the Evaluation Committee recommendations.

3.2 Tender No. NWSB/CW/027/2016-2017 – Construction of Warangara Water Pan 80,000 m³ in Lafey Sub-county of Mandera County

a) Tender results

A total of eleven bids were received as tabulated below.

Bid No	Bidder's Name	Address	Tender Price In Kshs
01.	Warfa Building & Construction Limited	P.O Box 163 Mandera	56,948,508.00
02.	Rural Urban Construction Limited	P.O Box 75104-00200 Nairobi	70,207,956.00
03.	Libahiya Enterprises Limited	P.O Box 37297-00100 Nairobi	74,900,210.00
04.	Derow Construction Company Limited	P.O Box 106-70300 Nairobi	79,951,355.00
05.	Pinnie Agency Limited	P.O Box 104080-00101 Nairobi	79,813,536.00
06.	County Builders Limited	P.O Box 106-70300 Nairobi	78,980,572.00
07.	Possible Limited	P.O Box 23616-00100 Nairobi	74,767,836.00
08.	Mos Mos Limited	P.O Box 104303-00101 Nairobi	72,092,889.00
09.	Inforserve Network Limited	P.O Box 7364-00100 Nairobi	77,642,796.00
10.	Jurgen Construction Company Limited	P.O Box 41870-00100 Nairobi	76,666,279.20

11.	Diwafa Investment Limited	P.O Box 68693-006100 Nairobi	63,503,736.00
-----	---------------------------	---------------------------------	---------------

b) Preliminary Evaluation Results

Bidders Nos. 1, 2, 5, 6, 7, 9, 10 and 11 were found to be responsive to the mandatory requirements and were hence taken to technical evaluation stage. Bidders Nos. 3, 4 and 8 were found to be non-responsive for failure to provide signed form of tender, failure to provide power of attorney and for failure to provide valid tax compliance, respectively, and were hence disqualified at the preliminary evaluation stage.

c) Technical Evaluation Results

The Bidders scored as follows:

Maximum Score	Bidder							
	01	02	05	06	07	09	10	11
100%	60%	55%	81%	82%	69%	66%	87%	81%

Bidder 01, 02, 07 and 09 failed the technical assessment while Bidders 05, 06, 10 and 11 met the requisite pass mark of 70% and were hence ranked at financial evaluation stage.

d) Financial Evaluation Results (Ranking of Bidders)

The remaining bidders were ranked based on their bid prices as tabulated hereunder.

Bidder No.	Bidder's Name	Tender Price In Kshs	Ranking
------------	---------------	----------------------	---------

05	Pinnie Agency Co. Ltd	79,813,536.00	4
06	County Builders Ltd	78,980,572.00	3
10	Jurgen Construction Co. Ltd	76,667,279.20	2
11	Diwafa Investment Ltd	63,503,736.00	1

e) Recommendation

The evaluation committee recommended that the contract for the Construction of Warangara Water Pan in Lafey Sub-county Mandera County be awarded to Diwafa Investment Limited at a cost of Kenya Shillings Sixty Three Million, Five Hundred and Three Thousand Seven Hundred and Thirty Six Cents (Kshs 63,503,736.00).

f) Professional Opinion

The Head of Procurement issued a professional opinion dated 13th April, 2017 to the Chief Executive Officer pursuant to Section 47 and 84 of the Public Procurement and Asset Disposal Act, 2015 in which he stated that the subject procurement had satisfied the constitutional requirement of Article 227(1) and statutory requirement of the Public Procurement and Asset Disposal Act, 2015. He advised that the Chief Executive Officer may award the tender to Diwafa Investment Ltd at the tender sum of Kshs 63,503,736.00 inclusive of VAT as per the Evaluation Committee recommendations.

3.3 Tender No. NWSB/CW/035/2016-2017 – Construction of Mader Kayo Water Pan 40,000 m³ in Moyale Sub-county of Marsabit County

a) Tender results

A total of six bids were received as tabulated below.

Bid No	Bidder's Name	Address	Tender Price In Kshs
01.	Sky-Jet Enterprises Ltd	P.O Box 5302-00200 Nairobi	20,767,190.00
02.	Tumadisa Co. Ltd	P.O Box 1-60700 Moyale	20,789,056.00
03.	Muani Contractors Limited	P.O Box 138-60700 Moyale	25,582,895.20
04.	Dabel Construction Company Ltd	P.O Box 10294-00200 Nairobi	22,339,465.60
05.	Yatico Supplies & Construction	P.O Box 488-70100 Garissa	18,302,828.00
06.	Dieu Donne Ltd	P.O Box 16709-00620 Nairobi	57,904,532.00

b) Preliminary Evaluation Results

Bidders Nos. 4 and 6 were found to be responsive to the mandatory requirements and were hence taken to the technical evaluation stage. Bidders Nos. 1, 2, 3 and 5 were found to be non-responsive for various reasons and were hence disqualified at the preliminary evaluation stage.

c) Technical Evaluation Results

The Bidders scored as follows:

Maximum Score	Bidder	
	04	06
100%	80.5%	71%

Bidders 04 and 06 met the requisite pass mark of 70% and were hence ranked at financial evaluation stage.

d) Financial Evaluation Results (Ranking of Bidders)

The remaining bidders were ranked based on their bid prices as tabulated hereunder.

Bidder No.	Bidder's Name	Tender Price In Kshs	Ranking
04	Dabel Construction Co. Ltd	22,339,465.60	1
06	Dieu Donne Ltd	57,904,532.00	2

e) Recommendation

The evaluation committee recommended that the contract for the Construction of Mader Kayo Water Pan in Moyale Sub-county be awarded to Dabel Construction Company Ltd at a cost of Kenya Shillings Twenty Two Million, Three Hundred and Thirty Nine Thousand, Four Hundred and Sixty Five and Sixty Cents (Kshs 22,339,465.60).

f) Professional Opinion

The Head of Procurement issued a professional opinion dated 13th April, 2017 to the Chief Executive Officer pursuant to Section 47 and 84 of the Public Procurement and Asset Disposal Act, 2015 in which he stated that the subject procurement had satisfied the constitutional requirement of Article 227(1) and statutory requirement of the Public Procurement and Asset Disposal Act, 2015. He advised that the Chief Executive Officer may award the tender to **Dabel Construction Company Ltd** at the tender sum of **Kshs 22,339,465.60 inclusive of VAT** as per the Evaluation Committee recommendations.

THE REQUEST FOR REVIEW

The Request for Review was lodged by Earth Construction Ltd, the 1st Applicant, Dabel Construction Company Ltd, the 2nd Applicant and Diwafa Investments Limited, the 3rd Applicant on 19th June, 2017 in the Matter of Tenders No. NWSB/CW/T/026/2016-2017, NWSB/CW/T/035/2016-2017 and NWSB/CW/T/027/2016-2017 for the construction of Libehia Water Pan Mandera County, Mader Kayo Water Pan in Marsabit County and Warangara Water Pan in Mandera County, respectively.

The Applicants sought the following orders:

1. *That the Honourable Board do declare that the advertisement of tender No MWI/SDI/OT/019/2016-2017 dated 9th May, 2017 is the same tender advertised by the 1st Respondent on 21st February, 2017 including but not limited to tenders No's. NWSB/CW/T/026/2016-2017, NWSB/CW/T/035/2016-2017 and NWSB/CW/T/027/2016-2017*
2. *That the Honourable Board do declare that the advertisement for tender No. MWI/SDI/OT/019/2016-2017 is irregular, unreasonable and violates the provisions and the spirit of the Constitution, Public Procurement and Asset Disposal Act.*
3. *That the Honourable Board do set aside the advertisement No. MWI/SDI/OT/019/2016-2017*

4. That the Honourable Board directs that the 1st Respondent herein to honour the letters of notification of award dated 18th April 2017 and to sign the Contract with the Applicant herein forthwith.

5. Cost of the review be awarded to the Applicant.

The Applicants raised seven grounds in support of the Request for Review. On its part the Procuring Entity prayed that the Request for Review was ill advised as it was against it and therefore lacked merit and ought to be dismissed with costs. The Applicants in this Request for Review were represented by Ms. Vivianne Mutua, Advocate from the firm of Mbutia Kinyanjui & Co. Advocates while the 1st Respondent was represented by Mr. Mwaniki Gachuba, Advocate from the firm of Onyoni Opini & Gachuba Advocates. The 2nd Respondent was not represented either in person or by counsel though it had been served with a hearing notice.

APPLICANTS' CASE

The Applicants submitted that the First Respondent (the Procuring Entity) advertised Tenders No. NWSB/CW/T/026/2016-2017, NWSB/CW/T/035/2016-2017 and NWSB/CW/T/027/2016-2017 for Construction of Construction of Libehia Water Pan Mader Kayo Water pan and Warangara Water Pan on 21st February 2017 with a closing date of 15th March 2017. They further submitted that they were awarded the tender through letters of notification of award dated 18th April, 2017 and that the contracts were to be signed within twenty eight (28) days but not earlier than fourteen (14) days. They also submitted that on 27th April 2017, 2nd May 2017 and 26th April 2017, respectively, they accepted the tender award as well as

the contract price and waited for the signing of the contracts on or before 30th May 2017. The Applicants added that to their dismay the Second Respondent in an advertisement in the *Daily Nation* newspaper on 9th May 2017 invited tenders for construction of Libehia Water Pan, Mader Kayo water Pan and Warangara Water Pan despite the First Respondent having already finalized the procurement process for the same projects.

The Applicants stated that the First Respondent issued the notification of award on 18th April 2017 indicating specifically that the contracts would be signed within 28 days of the date thereof. They further stated that after notification of the award by the First Respondent no appeals were filed by any of the tenderers and that no objections had been raised to date on the First Respondent's decision to award the tenders to the Applicants. The Applicants therefore contended that the contracts ought to have been signed on or before 31st May 2017.

The Applicant referred the Board to Review No. 65 of 20th December, 2015 - INB IT Management & Consulting Limited- where the Board, in its decision stated as follows:-

"The board has variously held that a tender process is a serious exercise which should not be taken lightly and it is not therefore open to a Procuring Entity to unilaterally terminate an award or a procurement process without following the law and without any proper reasons or basis. A tender process involves expense for both the tenderers and the Procuring Entity. Funds expended by a Procuring Entity in inviting tenders are public money which should not be expended at the Procuring Entity's whim."

The Applicants submitted that the First Respondent, after taking the Applicants through the procurement process, could not at the tail end of it purport to go silent and fail to execute the contracts. The Applicants urged the Board to find that the First Respondent was in gross violation of Sections 87 and 135 of the Public procurement and Asset Disposal Act (hereinafter 'the Act') as it had failed and/or neglected to sign contracts with the Applicants.

The Applicants further referred the Board to its decision in **Review No. 46 of 2017 – Alwahab Enterprise Vs. Northern Water Services Board and Ministry of Water & Irrigation** where, according to the Applicants, the Board found in similar circumstances that the 1st Respondent had violated the Public Procurement and Asset Disposal Act.

As to whether the First Respondent was an agent of the Second Respondent, the Applicants submitted that while the First Respondent admitted to having advertised Tender Number NWSB/CW/T/028/2016-2017 and awarded the same to the Applicant, it did so under express instructions of the Second Respondent for whom it was acting as an agent adding that this was premised on the letter dated 1st February 2017 from the Principal Secretary, Ministry of Water & Irrigation, Prof. Fred H.K. Sergor. Arguing that it was a basic principle of the law of agency that the principal is bound by the actions of the agent, the Applicants submitted that it was unclear under what circumstances the same Ministry re-advertised tenders that had already been concluded by the First Respondent.

On the issue of the validity of the invitation to tender dated 9th May 2017 and the role of the National Treasury, the Applicants cited provisions of the Constitution and the Act, as follows:

Article 227 (1) of the Constitution provides that:

“When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.”

Section 7 (2) (g) of the Act, 2015 provides that:

“In the performance of its role under subsection (1), the National Treasury shall design and prescribe an efficient procurement management system for the national and county governments to ensure transparent procurement and asset disposal as contemplated by Article 227 of the Constitution”

It was the Applicants’ submission that it cannot be the National Treasury’s intention to endorse double procurement of goods and services by the same ministry. If indeed that was the National Treasury’s intention then the same pointed towards an unfair and inefficient process designed to deny award to successful bidders in tenders by engaging in other procuring processes, an act that would amount to gross violation of the Constitution and public policy, argued the Applicants. The Applicants also submitted that re-advertisement of the tender was only possible upon cancellation of the tenders advertised on 21st February 2017 by the First Respondent.

The Applicants stated that it was untenable for a Procuring Entity, it being a public body, to operate as it deemed fit and in total disregard of the law and cited the case of Republic V Public Procurement Administrative Review Board & 2 others Ex-parte Selex Sistemi Integrati [2008] eKLR in which the court held as follows:-

“...it was averred that the decision and ruling of the First Respondent was irrational and unreasonable as it purported to give the Second Respondent, a public body, unlimited and/or whimsical discretion in

terminating the Tender. Also the decision to terminate the Tender and restart afresh without reasons amounted to unreasonableness. Reliance was placed on the decision in the case of Associated Provincial Picture Houses Ltd -vs- Wednesday Corporation [1947] 2 All ER 689 in which it was stated –

So outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the quest to be decided could have arrived at it”

The Applicant argued that the conduct of the Second Respondent was entirely improper and urged the Board to find that the advertisement and invitation to tender dated 9th May 2017 was illegal and further urged the Board to grant their prayers.

FIRST RESPONDENT’S RESPONSE

The First Respondent (Procuring Entity) submitted that the following facts were not in dispute:

- a. That the Applicants were awarded the tenders in issue.
- b. That the Procuring Entity had not terminated or cancelled the procurement proceedings.
- c. That the Procuring Entity had nothing to do with the tender notice by the Second Respondent.
- d. That the Second Respondent, by a letter dated 19th April 2017 and which was received on 25th April 2017, purported to stop the procurement proceedings by the First Respondent.
- e. That on 26th April 2017 the 1st Respondent informed the 2nd Respondent on the status of the procurement proceedings and sought its advice on

how to transfer the procurement proceedings to it, which letter did not elicit any response.

- f. That on 4th May 2017, the 1st Respondent notified the Public Procurement Regulatory Authority (PPRA) of the developments and sought its guidance on how to terminate the tender without violating the Public Procurement and Asset Disposal Act, 2015 which advice was given on 10th May 2017 to the effect that the take-over of the procurement proceedings by the 2nd Respondent ought not to result to termination thereof.
- g. That on 9th May 2017 the 1st Respondent advertised the Tender for Construction of inter alia Libehia Water Pan, Mader Kayo Water Pan and Warangara Water Pan (Tender No. MWI/SDI/OT/019/2016-2017)
- h. That as a result of the foregoing, the 1st Respondent has not signed contracts with the Applicants.

The 1st Respondent submitted that the 2nd Respondent appointed it as its agent to implement the projects funded under the Equalisation Fund including the projects in issue and requested it to start the procurement process and award the contracts to successful bidders. It further submitted that it discharged its duty as an agent until the 2nd Respondent purported to withdraw the agency. It also submitted that as an agent of the 2nd Respondent, it could not suffer any liability, if any, arising out of the procurement proceedings adding that the proper Respondent in the proceedings ought to be the 2nd Respondent (Ministry of Water and Irrigation).

The 1st Respondent referred the Board to Section 49 of the Act which provides as follows:-

“A procuring entity or procuring entities with common interest may establish a procuring agency at national or county level for the purpose of procurement and distribution of sector-specific goods, works and services on behalf of procuring entities within the respective sector and shall be in accordance with this Act and the regulations made there under”.

It further cited the case of *Debonair Travel Limited v Erastus Gitonga & 2 others* [2015] eKLR Serگون J stated that:

“An agent is defined in the legal dictionary ‘the free dictionary’ as a person who is authorised to act for another (the agent’s principal) through employment, by contract or apparent authority. The agent can bind the principal by contract or create liability if he/she causes injury while in the scope of the agency. Who is an agent and what is his/her authority are often difficult and crucial factual issues. In view of the afore-going, the 3rd Respondent and was acting as an agent of the Appellant to which the Appellant is to be found responsible. It is trite law that in case of known principal and agent, no liability attaches on an agent.”

It also relied on the case *PPARB No. 46 of 2017 between Alwahab Enterprise Limited Vs Northern Water Services Board & Ministry of Water and Irrigation* where the Board held that,

“The letter dated 1st February, 2017 from the Ministry of Water and Irrigation gave the First Respondent the authority to commence procurement for the water pan. The Board finds that the said letter created an agency under which the First Respondent was acting and

which agency was not revoked by the Second Respondent, being the principal. Arising from the foregoing, the Board is satisfied that the First Respondent was acting as an agent of the Second Respondent for purposes of procurement proceedings in Tender No. NWSB/CW/T/028/2016-2017. The Board finds and holds that the First Respondent was an agent of the Second Respondent in the tender for Construction of Arda Hagarsu Water Pan and is therefore the Procuring Entity in the said tender”.

The 1st Respondent submitted that in any event, the Applicants had not faulted the process it conducted except for the delay in signing the contract which delay was caused by the purported midstream withdrawal of the agency by the 2nd Respondent. The 1st Respondent argued that the delay was not of its making, having been put in a quandary by the Second Respondent, it was reasonable for the 1st Respondent to seek counsel on how to wriggle out of the unique situation it found itself in.

The First Respondent averred that the purported advertisement of the same tender by the Second Respondent without explanation or lawful cause contravened the constitutional principles of transparency, openness, accountability, prudence, responsibility, value for money and efficiency. It further averred that given that the Second Respondent did not fault the process by the First Respondent, the procurement proceedings ought to be allowed to proceed and the proceeding initiated by the Second Respondent be annulled in order to save the public from incurring unnecessary financial burden in costs.

The Procuring Entity therefore urged the Board to dismiss with costs the Request for Review as against the First Respondent.

SECOND RESPONDENT'S RESPONSE

The Second Respondent neither entered an appearance nor filed a defence to this request for review despite having been notified and served.

THE APPLICANTS' REPLY

Ms. Mutua in a brief reply on behalf of the Applicants submitted that the 1st Respondent had admitted all the facts presented by the Applicants in as much as it indicated that it was put in a quagmire by the 2nd Respondent in terms of signing the contracts. She further submitted that the Act is clear regarding how a Procuring Entity should conduct itself, on how the contracts should be signed and the timelines for signing and ought not to have visited this tedious task on the Board to make a decision. She also submitted that the reasons advanced by the 1st Respondent for failure to sign the contracts were never passed on to the Applicants who have been kept in the dark throughout this process and as a result the Applicants had incurred huge amounts in terms of costs and filing fees. In conclusion, the Applicants prayed that the Board finds in their favour and compels the First Respondent to sign the contracts.

THE BOARD'S FINDINGS

The Board has considered the submissions made by parties and has further examined all the documents that were submitted to it and has identified the following issues for determination in this Request for Review:

- 1. Whether the 1st Respondent was an agent of the 2nd Respondent in the procurement proceedings the subject matter of this application and hence duly authorised to conduct a valid tender process.*

2. *Whether Tender No. MWI/SDI/OT/019/2016-2017 of 9th May, 2017 was in respect of the same procurement proceedings as Tenders No. NWSB/CW/T/026/2016-2017, NWSB/CW/T/035/2016-2017 and NWSB/CW/T/027/2016-2017 dated 21st February, 2017 hence a duplication.*
3. *Whether the 1st Respondent failed to enter into a written contract within the period specified in the notification of award contrary to the provisions of Section 135 (3) of the Act.*

The Board now proceeds to determine the issues framed for determination as follows:-

1. **As to whether the 1st Respondent was an agent of the 2nd Respondent in the procurement proceedings the subject matter of this application and hence duly authorised to conduct a valid tender process.**

The Board has examined all the facts and finds that the following facts were undisputed:-

- a) The Second Respondent vide a letter dated 1st February, 2017 instructed the First Respondent to start the procurement process and award the contracts to successful bidders for the construction of water dams.
- b) The First Respondent, acting on the Second Respondent's instructions advertised Tenders Number NWSB/CW/T/026/2016-2017, NWSB/CW/T/035/2016-2017 and NWSB/CW/T/027/2016-2017 on 21st February, 2017 for the Construction of Water Pans of Libehia, Mader Kayo and Warangara, respectively.
- c) Tenders were received and opened by the First Respondent on 15th March 2017.

- d) The received tenders were evaluated through three stages of preliminary, technical and financial evaluation.
- e) The Applicants emerged victorious and were awarded the respective tenders on 18th April 2017 as follows: tender sum of Kshs 69,995,845.00 to the 1st Applicant for Libehia Duo Water Pan; tender sum of Kshs 22,339,465.00 to 2nd Applicant for Mader Kayo Pan; and tender sum of Kshs 63,503,736.00 to 3rd Applicant for Warangara Water Pan.
- f) The Applicants accepted the awards through letters to the First Respondent dated 27th April 2017, 2nd May 2017 and 26th April 2017, respectively.
- g) The notifications of award stated that the contracts were to be signed by the parties within 28 days but not earlier than 14 days from the dates of notification.
- h) On 9th May 2017, the Second Respondent advertised for Tender Number MWI/SDI/OT/019/2016-2017 for construction of Libehia, Mader Kayo and Warangara Water Pans, among other dams.
- i) The Second Respondent wrote to the First Respondent on 19th April 2017 instructing the First Respondent to stop the tender processes.
- j) On 26th April 2017 the 1st Respondent wrote to the 2nd Respondent informing it on the status of the procurement proceedings and sought advice on how to transfer the procurement proceedings to the 2nd Respondent but the letter did not elicit any response.
- k) On 4th May 2017 the 1st Respondent sought the guidance of the Public Procurement Regulatory Authority (PPRA) on the developments and PPRA advised on 10th May 2017 that the take-over of the procurement proceedings by the 2nd Respondent ought not to result in the termination thereof.

1) The Applicants filed this request for review on 19th June 2017.

The Board notes that the 1st Respondent advertised for tenders in issue and awarded to the Applicants, under instructions of the 2nd Respondent conveyed through the letter dated 1st February 2017 which stated as follows:-

“You are requested to start the procurement process and award the contracts to successful bidders. You will then forward two original copies of the signed contracts to this office where we will retain one copy and send the other to the Equalization Fund secretariat.

As per the National Treasury approval you will be forwarding duly signed two copies of interim certificates and final certificates to this office to forward to the secretariat for processing and payment.

The contracts will be managed by your institution and only payments will be made by the National Treasury”

It is further noted that in a letter dated 19th April 2017 the Second Respondent stated that pursuant to a National Treasury approval on 5th April 2017 the projects were removed from the First Respondent and re-directed to the State Department for Irrigation.

Subsequent to the National Treasury approval, it is the Board's observation that the Second Respondent invited tenders for the construction of Libehia, Mader Kayo and Warangara Water Pans, among others, all under Tender No. MWI/SDI/OT/019/2016-2017 on 9th May 2017. It is the further observation of the Board that the Second Respondent, through the letter dated 1st February, 2017 authorised the First Respondent to undertake the procurement processes and manage the contracts, the role of the Second Respondent being to facilitate payments. It is also observed that in review case *PPARB No. 46 of*

2017 between Alwahab Enterprise Limited Vs Northern Water Services Board & Ministry of Water and Irrigation which dealt with a similar matter, the 2nd Respondent admitted that it authorized the First Respondent to start the procurement process for the subject tenders.

It is abundantly clear in Board's view that the Second Respondent, through the letter dated 1st February, 2017 signed by the Principal Secretary Prof. Fred H.K. Segor authorised the First Respondent to undertake the procurement processes and manage the tenders which were the subject of this Request for Review. The Board finds that the said letter created an agency which agency was not revoked by the Second Respondent being the principal. Arising from the foregoing, the Board is persuaded that the First Respondent was acting in the position of an agent of the Second Respondent in the procurement proceedings for Tender Numbers NWSB/CW/T/026/2016-2017, NWSB/CW/T/035/2016-2017 and NWSB/CW/T/027/2016-2017 for the Construction of Water Pans of Libehia, Mader Kayo and Warangara, respectively. The Board further finds and holds that the First Respondent was an agent of the Second Respondent in the tenders the subject matter of this Request for Review and is therefore Procuring Entity in the said tenders.

The Board, having determined that the First Respondent is the Procuring Entity and an agent of the Second Respondent in the tenders the subject matter of this application, notes that the transfer of the implementation is a matter that can be handled administratively as proposed by Prof. H. K. Segor, the Principal Secretary Ministry of Water and Irrigation, State Department for Water Services in his letter dated 8th June, 2017 to his counterpart in the State Department for Irrigation in the same ministry Mrs Zeinab A. Hussein. The letter stated as follows:

"That the projects (including the tender under review) had already been processed and notifications of award issued.

That the applicant herein was an independent Procuring Entity and as such another Procuring Entity could not interfere with its processes.

That if the state department had decided to use the procuring process undertaken by the Applicant, and then the Second Respondent would advise the First Respondent to submit the notifications of award and contracts to the state department for purposes of finalization and implementation.

That, alternatively, the State department should allow the First Respondent to proceed to sign contracts and implement the project."

The answer to first issue is therefore that the 1st Respondent was an agent of the 2nd Respondent in this procurement and was therefore the procuring entity for all intents and purposes.

2. As to whether Tender No. MWI/SDI/OT/019/2016-2017 of 9th May, 2017 was in respect of the procurement proceedings similar to Tenders No. NWSB/CW/T/026/2016-2017, NWSB/CW/T/035/2016-2017 and NWSB/CW/T/027/2016-2017 dated 21st February, 2017 hence a duplication

The Board notes that the advertisement dated 21st February, 2017 by the First Respondent, Tender No. NWSB/CW/T/028/2016-2017 read as follows:-

"Northern Water Services Board a State Corporation under the Ministry of Water and Irrigation, has received Equalization Funds from GOK for use during the financial year 2016-2017 and intends to use part

of these to cover eligible payments under the Contracts as tabulated below.

Garisa -

Wajir -

Mandera - `NWSB/T/CW/028/2016-2017 – Construction of Libehia Water Pan 80,000 m³ in Lafey Sub-county

- NWSB/T/CW/028/2016-2017 – Construction of Warangara Water Pan 80,000 m³ in Lafey Sub-county

Marsabit - -`NWSB/T/CW/028/2016-2017 – Construction of Mader Kayo Water Pan 40,000 m³ in Moyale Sub-county”.

The Board notes that Tender Number MWI/SDI/OT/019/2016-2017 advertised on 9th May, 2017 by the Second Respondent, State Department of Irrigation stated as follows:

“The State Department for Irrigation is responsible for National Irrigation, Water Storage and Flood Control among other functions. The Department, through the Equalization Fund, intends to develop Water Storage projects in Mandera, Marsabit and Tana River Counties. The projects to be constructed are:

Mandera County – Libehia Dam, Warangara Dam, Arda Hargasu Dam, Sarma Dam and Gaicha Dam

Marsabit County – Mader Kayo Water Pan

Tana River County

The scope of the works for each structure include, but is not limited to:

- Storage capacity between 40,000 m³ to 100,000 m³

- *Construction of spillway,*
- *Construction of cut-off drain,*
- *Construction of cattle troughs,*
- *Construction of water kiosks,*
- *Fencing of the reservoir area"*

The Board observes that both advertisements - Tender Number NWSB/CW/T/026/2016-2017, NWSB/CW/T/035/2016-2017 and NWSB/CW/T/027/2016-2017 all of 21st February 2017 and Tender Number MWI/SDI/OT/019/2016-2017 of 9th May, 2017 - contained the items for Construction of Libehia and Warangara Water Pans in Lafey Sub-county of Mandera County, and Mader Kayo Water Pan in Moyale Sub-county of Marsabit County, a fact which was admitted by the First Respondent.

The Board notes that the tenders subject of the Request for Review appear in the two invitations to tenderers namely the one of 21st February 2017 by the First Respondent one of 9th May, 2017 by the Second Respondent. It is accordingly the finding of the Board that the Second Respondent was engaged in the self-same procurement proceedings as the First Respondent, a state corporation in the Second Respondent's ministry. The Board therefore finds that the action of the Second Respondent in commencing procurement proceedings for a tender that is alive is not only duplicative but a waste of the tax payers money.

3. As to whether the Procuring Entity failed to enter into a written contract within the period specified in the notification of award contrary to the provisions of Section 135 (3) of the Act.

The Board notes that the Tender Numbers NWSB/CW/T/026/2016-2017, NWSB/CW/T/035/2016-2017 and NWSB/CW/T/027/2016-2017 were

advertised by the First Respondent, evaluated and awarded. It is further noted that the purported letter of stoppage by the Second Respondent dated 19th April, 2017 was received by the First Respondent on 25th April 2017, seven days too late. The First Respondent had already awarded the tenders vide letters dated 18th April, 2017 and the Applicants accepted the awards on 27th April 2017, 2nd May 2017 and 26th April 2017, respectively in accordance with the provisions of Section 87(2) of the Act, which states as follows:

- (1) *“Before the expiry of the period during which tenders must remain valid, the accounting officer of the Procuring Entity shall notify in writing the person submitting the successful tender that his tender has been accepted.*
- (2) *“The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.”*

To determine this issue, the Board takes cognisance of the provisions of Section 135 of the Act which states as follows:

- (1) *“The existence of a contract shall be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract shall be signed by the accounting officer or an officer authorized in writing by the accounting officer of the Procuring Entity and the successful tenderer.*
- (2) *An accounting officer of a Procuring Entity shall enter into a written contract with the person submitting the successful tender*

based on the tender documents and any clarifications that emanate from the procurement proceedings.

- (3) *The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period.*

The Board notes that prior to the acceptance of the awards and before the expiry of fourteen days after notification, there were no Request for Review lodged by any of the bidders pursuant to Section 87 of the Act. The Board further notes that the 28 days stated in the notifications of award expired on or about 31st May 2017 with no written contract having been entered into in respect of the tenders.

Taking the above into consideration and the determination of the Board elsewhere in this decision to the effect that the First Respondent was an agent of the Second Respondent, the Board finds that the Procuring Entity violated the provisions of Section 135 (3) of the Act when it failed to enter into written contracts with the Applicants within the period of 28 days but not before fourteen (14) days had elapsed following the notifications of award. This ground of the request for review therefore succeeds and is allowed.

COSTS

Before issuing its final orders in this Request for Review, the Board wishes to comment on the issue of costs. It is the view of the Board that the Request for Review filed by the Applicants on 19th June 2017 are merited and in a further view of the fact that this is the second time the Board is dealing with a similar matter involving the same 1st and 2nd Respondents, the Board shall award costs to the Applicants as follows:

i)	Filing fees	Kshs 360,000.00
ii)	Legal fee	Kshs 150,000.00
	Total	Kshs 510,000.00

The Applicants shall be paid total costs of Kshs 510,000.00 jointly and severally by the two respondents.

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, the Board makes the following orders on this Request for Review.

- a) **The Request for Review in respect of tender No. NWSB/CW/T/026/2016-2017, NWSB/CW/T/035/2016-2017 and NWSB/CW/T/027/2016-2017 for Construction of Water Pans of Libehia in Mandera County, Mader Kayo in Marsabit County and Warangara in Mandera County, respectively be and is hereby allowed.**
- b) **The Advertisement for Tender No. MWI/SDI/OT/019/2016-2017 by the Ministry of Water and Irrigation be and is hereby quashed in respect of the construction of Libehia Water Pan, Mader Kayo Water Pan and Warangara Water Pan and any contracts signed pursuant to the said advertisement be and are hereby cancelled.**
- c) **The First Respondent is hereby directed to complete the procurement process including the signing of the contracts with the Applicants**

within fourteen (14) days from the date of this decision and furnish proof thereof to the Board within the said 14 days.

- d) The First and Second Respondents shall pay costs of review as determined in this decision and shall furnish proof of payment to the Board within fourteen days from the date of this decision.

Dated at Nairobi on this 10th day of July, 2017.



CHAIRMAN
PPARB



SECRETARY
PPARB

