

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 15/2017 OF 10<sup>TH</sup> FEBRUARY, 2017**

**BETWEEN**

**MAGIC GENERAL**

**CONTRACTORS LIMITED.....APPLICANT**

**AND**

**ATHI WATER SERVICES BOARD.....Procuring Entity**

Review against the decision of Athi Water Services Board in the matter of Tender No. BADEA/AWSB/OWSP/GoK/01/2015 for Oloitokitok Water Supply and Sanitation project: rehabilitation of water supply and sewerage for Oloitokitok town project.

**BOARD MEMBERS PRESENT**

- |                       |            |
|-----------------------|------------|
| 1. Paul Gicheru       | - Chairman |
| 2. Hussein Were       | - Member   |
| 3. Nelson Orgut       | - Member   |
| 4. Rosemary Gituma    | - Member   |
| 5. Peter Ondieki, MBS | - Member   |

**IN ATTENDANCE**

- |                 |                                |
|-----------------|--------------------------------|
| 1. Philip Okumu | - Sitting in for the Secretary |
|-----------------|--------------------------------|

**Present by invitation**

**Applicant –Magic General Contractors Ltd**

1. George K. Kamau - Advocate
2. Sylvia Waiganjo - Advocate
3. Wilson Mbaria - Director

**Procuring Entity–Athi Water Services Board**

1. Charles Agwarra - Advocate
2. Justus Omollo - Advocate
3. Julius Serei - Engineer
4. Jones Kilonzi - SCM

**Interested Party**

1. Charles Njuguna - Advocate
2. Jane Mubangi - Advocate
3. Samuel Waweru - Accounts

**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 Government of Kenya received funding from the Arab Bank for Economic Development in Africa (BADEA) for implementation of the Rehabilitation of Water Supply and Sewerage for Oloitokitok Town Project. The implementing agent is Athi Water Services Board (AWSB), a state corporation in the Ministry of Water and Irrigation which intends to apply part of the proceeds for implementation of the Oloitokitok Water Supply and Sanitation project.

The Project Area is within the County of Kajiado, Oloitokitok Sub-County and shall cover Oloitokitok and Illasit towns, the KRA Border post and the surrounding areas. The scope of works is summarized below:

1. Rehabilitation of Nol Turesh springs Source works and associated works;
2. Rehabilitation of the intermediate pumping station and associated works;
3. Supply, Construction and installation, by a nominated sub-contractor, of Photovoltaic power system consisting of 250W monocrystalline photovoltaic modules, 15 KW-3 phase solar inverter, DC control unit and distribution boards at Nol Turesh Springs Source Works;
4. Construction of water kiosks and water supply distribution system in Oloitokitok Town and associated works;
5. Construction of approximately 14km Trunk and lateral sewers of diameter meters between 225mm, and 375mm, in precast concrete and UPVC pipes including ablution blocks;
6. Construction of waste Stabilization Ponds Sewage Treatment Works.

## Invitation of Bids

The Athi Water Services Board, invited tenders for the REHABILITATION AND AUGMENTATION OF OLOITOKITOK WATER SUPPLY AND SANITATION PROJECT through an advertisement published in *The Standard* and *The Daily Nation* newspapers on 22<sup>nd</sup> October, 2015. A pre-bid site visit was conducted on 5<sup>th</sup> November, 2015 as specified in Clause 5.6 of the Instructions to Bidders in the tender document. Clarifications sought by the bidders on Bills No. 2, 3, 4, 8, 10, 11, 12 and S were responded to. A total of 58 firms were issued with the bid documents from AWSB.

## Bid Opening

Out of the 58 firms that were provided with the bid documents, a total of 14 firms submitted their bids by the deadline for bid submission, which was 3<sup>rd</sup> December, 2015 at 12.00 noon. The bids were received and opened in the presence of bidders' representatives who chose to attend. The bid prices as entered in the Forms of tender for each bidder and read out at tender opening were are as shown in Table 1 below.

**Table 1: Bid Prices as read out during bid opening**

No	Name of Firm	Bid Price as read out (Kshs)	Ranking of Read Out Bid Price
1.	Yomason Contractors Ltd	980,392,212.35	13
2.	Machiri Limited	912,793,505.52*1	10
3.	Abdulhakim Ahmed Bayusuf & Sons	875,555,937.47*2	7
4.	Penelly Construction & Engineering Ltd	845,223,494.38	4
5.	Lee Construction Ltd	895,831,031.64	9
6.	Unibee Construction Ltd	679,738,830.15	1

7.	Zamawa Construction Co. Ltd	1,150,376,036	14
8.	Vaghjiyani Enterprises Limited	894,941,801	8
9.	Javaland Contractors Ltd	732,399,907.00	2
10.	Telemart Ltd	853,885,591.78	5
11.	Njuca Consolidated Co. Ltd	924,354,671.36	12
12.	Newage Developers & Construction Co. Ltd	920,777,640.98	11
13.	Magic General Contractors	868,021,884.25*3	6
14.	NGM Co. and Funan Contractors Ltd JV	838,044,823.68	3

\*1 Bidder No. 2 gave a 3% discount on all billed items without the Prime Cost (PC) sum. This was indicated in the Letter of Tender (See Annex 7 - Calculation of Discounted Bid Price).

### EVALUATION OF BIDS

The evaluation committee commenced the evaluation exercise on 6<sup>th</sup> December, 2015 and concluded with the report on 27<sup>th</sup> January, 2016 recommending that the tender be awarded to Messrs Machiri Ltd being the lowest evaluated bidder at a contract sum of Kshs 887,173,642.75. The Tender Committee approved the evaluation team's recommendation and, taking account of BADEA's *No Objection* letter, awarded the tender to Messrs Machiri Ltd.

### THE REQUEST FOR REVIEW NO. 17 OF 2016

Two bidders, Magic General Contractors Ltd and Unibee Construction Ltd disputed the decision to award the tender to Machiri Ltd and lodged Requests for Review with the Public Procurement Administrative Review Board *vide* Request for Review No. 17/2016. The Board heard the disputes and delivered a decision on 30<sup>th</sup> March 2016 in which it allowed the Request for Review. The

Board further directed Athi Water Services Board (the Procuring Entity) to readmit Magic General Contractors Ltd into the procurement process and evaluate its financial proposal alongside those of three other bidders who had made it to the financial evaluation stage.

#### **Re-evaluation of tender and award**

Upon the conclusion of what the Procuring Entity stated was the re-evaluation process awarded the tender for 'Rehabilitation and Augmentation of Oloitoktok Water Supply and Sanitation Project' to Machiri Ltd at a sum of Kshs 890,475,606.97, inclusive of all taxes.

#### **THE REQUEST FOR REVIEW NO. 27 OF 2016**

Magic General Contractors Limited (the Applicant herein) filed a second Request for Review Number 27/2016 dated 20<sup>th</sup> April, 2016 against the decision of the Procuring Entity to award Tender Number BADEA/AWSB/OWSP/GOK-01/2015 for Rehabilitation and Augmentation of the Loitoktok Water Supply and Sanitation Project to Messrs Machiri Limited. The Board heard the parties and rendered a decision in Request for Review Number 27/2016 on 11<sup>th</sup> May, 2016 in which decision the Board annulled the decision of the Procuring Entity to award the tender to Messrs Machiri Ltd and substituted the decision of the Procuring Entity with the decision of the Board awarding the tender to the Applicant. The Board further directed the Procuring Entity to issue a letter of award to the Applicant and complete the procurement process within 14 days of the decision.

#### **JUDICIAL REVIEW APPLICATION NO. 235/2016 & 240/2016**

The Procuring Entity and Machiri Ltd (the Successful bidder) disputed the decision of the Board and filed Judicial Review in the High Court under

Miscellaneous Application Number 240 of 2016 (consolidated with Miscellaneous Application Number 235 of 2016) for orders to quash the Board's decision delivered on 11<sup>th</sup> May 2016 in Request for Review Number 27 of 2016 to the extent that the Board awarded the subject tender to the Applicant. The Honourable Judge G. Odunga, in a ruling dated 9<sup>th</sup> January 2017, granted the orders sought and directed the Procuring Entity to subject the Applicant's tender to financial evaluation alongside those of three bidders who made it to the financial evaluation stage.

#### **Further re-evaluation of tender and award**

Pursuant to the orders of the High Court issued in Miscellaneous Application Number 240 of 2016, the Procuring Entity subjected the four tenders including the Applicant's tender to financial evaluation wherein the Applicant's tender price after correction of arithmetic errors, was Kshs 1,274,736,874.80 thus resulting to a tender price variation of up to 47%. The Successful Bidder's tender price, after correction of errors, was Kshs 887,173,642.75. The Procuring Entity concluded that the Applicant was therefore not the lowest evaluated tender and as such could not be awarded the tender. The Procuring Entity, in a letter dated 27<sup>th</sup> January 2017 and without naming the successful bidder, notified the Applicant that its bid was not the lowest financially evaluated, a decision disputed by the Applicant herein *vide* this Request for Review.

#### **THE REQUEST FOR REVIEW NO. 15 OF 2017**

The Request for Review was lodged by Magic General Contractors Limited (hereinafter "the Applicant") on 10<sup>th</sup> February, 2017 in the matter of Tender Number BADEA/AWSB/OWSP/GoK/01/2015 for the Rehabilitation and

Augmentation of Oloitoktok Water Supply and Sanitation Project for Athi Water Services Board (hereinafter “the Procuring Entity”).

The Applicant sought the following orders of the Board:

1. That the decision of the Respondent as communicated by the letter dated 27<sup>th</sup> January 2017 under Tender No. CONTRACT NO BADEA/AWSB/OWSP/GOK-01/2015 for the Rehabilitation and Augmentation of Oloitoktok Water Supply and Sanitation Project to the unnamed contractor be nullified;
2. That the Board substitute its decision for that of the Accounting Officer of the procuring entity in as per the decision of the Procuring Entity communicated by the letter dated 27<sup>th</sup> January 2017 under Tender No. CONTRACT NO BADEA/AWSB/OWSP/GOK-01/2015 for the Rehabilitation and Augmentation of Oloitoktok Water Supply and Sanitation Project to the unnamed contractor with an award of the same to the Applicant;
3. That the Board declares that the Procuring Entity does not possess the requisite objectivity, integrity, fairness and transparency to undertake any other element of this evaluation and give such directions to ensure that such integrity is duly protected and upheld;
4. That the Board orders investigations into the conduct of the Accounting Officer of the Procuring Entity and the officers handling this procurement process with a view to ensuring that emerging integrity issues are addressed in line with the Constitution, the Public Procurement and Asset Disposal Act, the Leadership and Integrity Act 2012 and all other applicable laws and regulations;



5. That the Respondent be compelled to pay the costs to the Applicant arising from/and incidental to this Application; and
6. That the Board to make such and further orders as it may deem fit and appropriate in ensuring that the ends of justice are fully met in the circumstances of this Request for Review.

During the hearing of the Request for Review, the Applicant was represented by Mr. George Kamau, Advocate while the Procuring Entity was represented by Mr. Charles Agwarra, Advocate. The successful bidder on the other hand was represented by Mr. Charles Njuguna, Advocate.

The Applicant raised twenty grounds of review which it argued as follows:

#### **APPLICANT'S CASE**

The Applicant avers that the High Court in Judicial Review Miscellaneous Application Number 240 of 2016 (consolidated with Miscellaneous Application Number 235 of 2016) issued orders on 9<sup>th</sup> January 2017 quashing the Board's decision delivered on 11<sup>th</sup> May 2016 in the Request for Review No. 27 of 2016 to the extent that the Board awarded the tender to the Applicant and directed the Procuring Entity to issue a letter of award.

The Applicant avers that the Court directed the Procuring Entity to subject its tender to Financial Evaluation alongside those of the three bidders who made it to the financial evaluation stage.

The Applicant avers that on 20<sup>th</sup> January 2017, the Procuring Entity wrote a letter requesting it to confirm a number of errors that had been identified in its bid during financial evaluation.

The Applicant avers that the Procuring Entity informed it that the errors highlighted plus other small errors in its Bills of Quantities increased its bid price by 47% to Kshs. 1,274,736.874.80 and asked the Applicant to confirm the errors.

The Applicant avers that by a letter dated 27<sup>th</sup> January 2017, it informed the Procuring Entity that pursuant to Clause 5.5 of the tender document, it was willing to undertake the works at the sum indicated in the bid its submitted.

The Applicant avers that Clause 5.5 of the Tender document states:

*“If the corrected tender sum is higher than the Total Tender sum, then the original Total Tender Sum shall be deemed to be the Total Tender Sum upon which the contract agreement shall be based.”*

The Applicant avers that a reading of Clause 5.5 clearly shows that the original tender sum it quoted will be deemed to be the total tender sum in the event that the corrected tender sum is higher than the total tender sum. The Procuring Entity should therefore have proceeded to consider the original tender sum for purposes of award.

The Applicant avers that on 27<sup>th</sup> January 2017, the Procuring Entity informed it that their bid was for a total sum of Kshs. 1,274,736,874.80 and therefore they were not the lowest financially evaluated bidder.

The Applicant avers that the Procuring Entity in arriving at the decision, failed to take into consideration provisions of the tender document which is in contravention of Section 66(2) of the Act which provides that evaluation and

comparison of tenders shall be done using the procedures and criteria set out in the tender documents.

The Applicant avers that under the circumstances, the Procuring Entity failed to apply the criteria under Clause 5.5 which if applied, its bid would remain the lowest financially evaluated bid.

The Applicant avers that there are very intentional and sustained efforts by the Procuring Entity towards ensuring that it does not become the successful bidder by any means necessary. The Procuring Entity has employed a variety of reasons at every point along the way to ensure that the Applicant's bid is a failure.

The Applicant avers that as a result, the parties will now be appearing before the Board for the third time on the same matter. At all points, the Procuring Entity has been instructed to undertake Financial Evaluation of the Applicant's bid and each time it has refused. This time around, pursuant to the order of the High Court, the Procuring Entity agreed to undertake the Financial Evaluation but again blatantly acted in breach of the law as outlined above.

The Applicant avers that due to the conduct of the Procuring Entity, a lot of time has been lost and numerous resources spent due to a Procuring Entity determined to ensure that the award must be awarded to a specific bidder and must not be awarded to the Applicant despite clear demonstration of its capacity and the fact that its bid has been demonstrated to be the lowest upon evaluation.

The Applicant avers that its total submitted bid of Kshs. 868,021,884.25 remains within the price range estimated by the Procuring Entity and also within the price range of Kshs. 912,793,505.52 previously awarded but lower and as such a saving to the Kenyan taxpayer.

The Applicant avers that the insinuation by the Procuring Entity that it declined to award the bid to the Applicant due to the "above errors and numerous other

small errors" in the BOQ which had "increased your bid price by 47% to Kshs. 1,274,736,874.80" is not only incorrect but also not based on any law. The Tender Document is clear about how an error should be treated and the bidder accorded an opportunity to elect to proceed with the lower figure or the corrected figure. The Applicant avers that the allegations of 47% variation and "numerous other small errors" were included to imply that its error was of such magnitude that the Procuring Entity could not allow its bid to be considered. The Applicant contends that this is not only openly prejudicial to its bid but also reiterates that this consideration is not based on the law but only intended to ensure that no award is made to the Applicant.

The Applicant avers that it is now clear that after several blatant refusals to evaluate its Financial Bid despite several findings of the Board that the same should be considered, and upon concurrence of the same finding by the High Court, the Procuring Entity has no intention of undertaking these proceedings within the law as this time around it has clearly violated the applicable legal requirements.

The Applicant requests the Board to exercise its discretion to ensure that the alleged process of correction of errors is undertaken within the law and the Applicant's decision to proceed with the quoted amount be allowed; that the Procuring Entity does not continue to evaluate this tender regardless of the outcome of these proceedings as it has demonstrated lack of objectivity and open bias and prejudice against the Applicant; that the conduct of the Procuring Entity in this procurement process be investigated with a view to ensuring that emerging integrity issues are addressed in line with the Constitution, the Act, the Leadership and Integrity Act 2012 and all other applicable laws and regulations.

The Applicant avers that in undertaking a procurement process, a Procuring Entity is bound by the provisions of Article 227 of the Constitution which requires a Procuring Entity to ensure that the process is conducted in accordance with a system which is fair, equitable, transparent, competitive and cost effective.

The Applicant asserts that public procurement is enshrined in the Constitution and statute and a Procuring Entity therefore undertakes the processes in trust for the general public and as such, in undertaking the processes the Procuring Entity has been imposed with a duty to act fairly, equitably, transparently, in a manner that promotes competition and efficiency with an obligation to promote integrity in the process. The Applicant has totally failed to achieve these standards.

#### **PROCURING ENTITY'S RESPONSE**

In response the Procuring Entity avers that the High Court considered the matter, heard all the parties and rendered its decision vide its judgment dated and delivered on 9<sup>th</sup> January, 2017 and determined the matter and issued the following orders;-

- 1. In the result, an order of certiorari is hereby issued removing to this Honourable Court for purposes of being quashed the decision of the Public Procurement Administrative Review Board dated and delivered on 11th May, 2016 in Review Application No. 27 of 20th April, 2016: MAGIC GENERAL CONTRACTORS LIMITED =VERSUS= ATHI WATER SERVICES BOARD in respect of tender number BADEA/AWSB/OWSP/GoK/01/2015 for Rehabilitation Of Water Supply And Sewerage for Oloitoktok Town Project, to the extent that the Respondent awarded the said tender to the Interested Party M/s Magic General Contractors Limited and directed the 1st*

*Applicant to issue a letter of award and complete the procurement within fourteen (14) days from the date of the decision, which decision is hereby quashed.*

2. *For avoidance of doubt the 1st Applicant, if minded to proceed with the tender and subject to the provisions relating to termination of the tender, is hereby directed to subject the Interested Party's tender to Financial Evaluation alongside those of three bidders who made it to the financial evaluation stage.*
3. *In the circumstances of this case, each party will bear own costs of these proceedings and those before the Respondent.*

The Procuring Entity avers that the judgment of the High Court was made upon hearing all the parties and considering the matters before it. The Judgment was not challenged by any of the parties and is therefore final and binding upon all the parties including the Review Board.

The Procuring Entity avers that the orders of the High Court delivered on 9<sup>th</sup> January, 2017 therefore enjoined it, *"if minded to proceed with the tender... to subject the Interested Party's tender to Financial Evaluation alongside those of three bidders who made it to the financial evaluation stage"*.

In response the Procuring Entity avers that it duly complied with the orders of the High Court and subjected the four tenders to Financial Evaluation wherein the Applicant's financially evaluated tender price after necessary correction of arithmetic errors, in accordance with the applicable law, was Kshs. 1,274,736,874.80 thus resulting to a tender price variation of up to 47%.

In response the Procuring Entity avers that the Applicant's letter dated 25<sup>th</sup> January, 2017 in response to the request to confirm the arithmetic errors is

evasive and self-serving and did not amount to a response to the request for confirmation of errors.

The Procuring Entity avers that Clause 5.5 of the Tender Document is only applicable to the lowest evaluated tender price under Section 66 of the Act as read together with Regulation 50(2) of the Public Procurement and Disposal Regulations (as amended) and Clause 9.1 of the tender document and not the lowest tender price as read out during the Tender Opening stage.

In response the Procuring Entity avers that the Procuring Entity avers that the applicable law is Section 63 of the Act which does not allow the tenderer an election but rather states that if a tenderer rejects the corrections of arithmetic errors the tender shall be rejected and therefore the question of awarding the contract based on an election made by the tenderer does not arise.

The Procuring Entity avers that the Applicant has deliberately failed to appreciate the distinction between the lowest tender price read out at the tender opening stage and the lowest evaluated tender price under Section 66 of the Act as read together with Regulation 50(2) of the Public Procurement and Disposal Regulations (as amended) as well as Clause 9.1 of the tender document.

In response the Procuring Entity avers that the Request for Review is a deliberate effort by the Applicant to frustrate its implementation of the judgment of the High Court delivered on 9<sup>th</sup> January, 2017 and curtail the completion of the procurement process.

The Procuring Entity avers that the Request for Review turns on alleged failure of the Procuring Entity to carry out the orders of the High Court in accordance with the law and therefore seeks to irregularly enforce and/or implement the said orders of the High court before the Board.

The Procuring Entity avers that this Board lacks jurisdiction to supervise the implementation and/or determine non-compliance with the orders contained in the judgment of the High Court delivered on 9<sup>th</sup> January, 2017 and the said Judgment can only be enforced by the High Court.

The Procuring Entity avers that the subject tender is for the provision of water and sewerage services, which services are necessary and guaranteed by the Constitution and the provision of the same should not be curtailed purely on the selfish interest of the Applicant who believes that it must be the one to carry out the subject project despite lacking the requisite capacity and its tender not being the lowest evaluated bid.

The Procuring Entity avers that the Board has the jurisdiction and the inherent powers to bring this matter to close and stop the circus which the Applicant is trying to engage it in at the expense of the residents of Oloitokitok Town and its environs who are in dire need of this water and the sewerage project.

The Procuring Entity avers that it is unfair and unjust for the Applicant to purport to file a Review Application on a matter that has been heard and conclusively determined by both the Board and the High Court and expect the Board to re-hear the matter for the third (3rd) time despite being fully aware that the High Court has already determined the matter and any person aggrieved with the implementation of the judgment of the High Court ought to go back to the same Court and not the Procuring Entity.

In response the Procuring Entity states that the Applicant's bid was not the lowest evaluated tender and that having accepted the correction of the arithmetic errors amounting to 47% of the tender price, the Applicant's bid was in any event not financially responsive.



In response the Procuring Entity avers that in the circumstances, the Applicant being fully aware that the High Court has already determined the matter ought to appreciate that any person aggrieved with the implementation of the said judgment of the High Court ought to go back to the same Court and not this Honourable Board.

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

The Board has considered the documents lodged before it by the parties and the oral submissions made before it. The Board has also looked at the Evaluation Report undertaken by the Procuring Entity pursuant to the decisions of the Board, the orders and the directions given by the Board and the High Court in respect of the tender and has identified the following issue for determination in this Request for Review:

- (i) *Whether the Procuring Entity carried out a financial re-evaluation pursuant to the High Court Miscellaneous Application No. 240 of 2016 orders and directions given on 9<sup>th</sup> January, 2017 and whether in doing so the Procuring Entity complied with the law.*

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

#### **ISSUE NO. I**

**Whether the Procuring Entity carried out a financial re-evaluation pursuant to the High Court Miscellaneous Application No. 240 of 2016 orders and directions given on 9<sup>th</sup> January, 2017 and whether in doing so the Procuring Entity complied with the law.**

The Board observes that it is common ground that Tender Number BADEA/AWSB/OWSP/GOK-01/2015 for Rehabilitation and Augmentation

of the Loitoktok Water Supply and Sanitation Project for Athi Water Services Board was advertised on 22<sup>nd</sup> October, 2015 and 14 bids received and opened on 3<sup>rd</sup> December 2015. The bids were evaluated and Machiri Limited emerged the successful bidder and was awarded the tender at a sum of Kshs 887,173,642.75. It is further common ground that the Applicant herein challenged the decision of the Procuring Entity in the award of the tender, through Request for Review number 17 of 2016 which Request for Review was upheld by the Board and the Procuring Entity ordered to readmit the Applicant into the procurement process and evaluate its financial proposal alongside those of three other bidders who had made it to the financial evaluation stage. It is also common ground that the Procuring Entity re-evaluated the Applicant's tender as directed by the Board and awarded the tender, for the second time, to Machiri Limited but this time at Kshs 890,475,606.97 a decision which was, once again, contested by the Applicant through Request for Review Number 27 of 2016 filed on 20<sup>th</sup> April 2016. The Board upheld Request for Review Number 27 of 2016 in its decision of 11<sup>th</sup> May, 2016 and substituted the decision of the Procuring Entity with the decision of the Board awarding the tender to the Applicant. The Board further directed the Procuring Entity to issue a letter of award to the Applicant and complete the procurement process within 14 days of the decision.

A fact not in dispute, and which the Board takes note of, is that the Procuring Entity and the successful bidder moved to the High Court for Judicial Review in Miscellaneous Application Number 240 of 2016 (consolidated with Miscellaneous Application Number 235 of 2016) for orders to quash the Board's decision delivered on 11<sup>th</sup> May 2016 in Request for Review Number 27 of 2016 to the extent that the Board awarded the subject tender to the Applicant. The Procuring Entity and the Successful bidder succeeded in their

prayer at the High Court and, in its ruling delivered on 9<sup>th</sup> January 2017, the High Court issued the following orders: -

1. *In the result, an order of certiorari is hereby issued removing to this Honourable Court for purposes of being quashed the decision of the Public Procurement Administrative Review Board dated and delivered on 11th May, 2016 in Review Application No. 27 of 20th April, 2016: Magic General Contractors Limited =Versus= Athi Water Services Board in respect of Tender Number BADEA/AWSB/OWSP/GoK/01/2015 for Rehabilitation of Water Supply And Sewerage for Oloitoktok Town Project, to the extent that the Respondent awarded the said tender to the Interested Party M/s Magic General Contractors Limited and directed the 1st Applicant to issue a letter of award and complete the procurement within fourteen (14) days from the date of the decision, which decision is hereby quashed.*
2. *For avoidance of doubt the 1st Applicant, if minded to proceed with the tender and subject to the provisions relating to termination of the tender, is hereby directed to subject the Interested Party's tender to Financial Evaluation alongside those of three bidders who made it to the financial evaluation stage.*
3. *In the circumstances of this case, each party will bear own costs of these proceedings and those before the Respondent.*

It is further not in dispute that the Procuring Entity, in purporting to carry out the orders of the Honourable Judge issued on 9<sup>th</sup> January 2017 in Miscellaneous Application Number 240 of 2016, wrote a letter dated 20<sup>th</sup> January 2017 to the Applicant requesting the Applicant to confirm errors that had been identified in the Applicant's bid. The letter stated as follows:

*"In compliance with High Court ruling of 9<sup>th</sup> January 2017 your bid is undergoing financial evaluation. In order for us to conclude this process, you are required to confirm the following errors identified in your bid during financial evaluation;*

- *Bill No. 1 (Preliminaries & General) – a positive summation error on item A241.2, increasing your bid price by Kshs 2,562,000,00 (see schedule of office furniture and equipment),*
- *Bill No. 1 (Preliminaries & General) – a positive summation error on item A243.1, increasing the your bid price by Kshs 2,463,000,00 (see schedule of office furniture and equipment),*
- *Bill No. 2 (Pipeline) – a positive summation error on item K232.1 and other items, increasing the your bid price by Kshs 16,059,175.56,*
- *Bill No. 3 (Oloitoktok Town Water Distribution Pipeline R5-R6) – the first page of this Bill is missing,*
- *Bill No. 10 (Oloitoktok Town Water Distribution Pipeline R6-A10) – positive error on item 131\*1 increasing bid price by Kshs 5,931,900,*
- *Bill II (Oloitoktok Town Water Distribution Pipeline R6-A10 B2-G5) – positive error on item 131\*1 increasing bid price by Kshs 13,914,900,*
- *Bill I (Rehabilitation of existing water supply system) – positive error on item A5.6.10 increasing bid price by Kshs 4,500,000,*
- *Bill No. 23 (Ablution Blocks Type III) – positive summation error increasing bid price by Kshs 4,770,000,*
- *Bill No. 23 (Ablution Blocks Type III) – Pages 107 and 112 of this Bill are missing,*
- *Bills for sewers have positive errors increasing the bid price by Kshs 76,906,899.60,*
- *Bills on waste stabilization ponds have positive errors increasing bid price by Kshs 217,439,515,*

- *Bill No. S (Photovoltaic System) Item S2 has a positive error increasing bid price by Kshs 13,500,000."*

*"All the above errors plus numerous other smaller errors in your BOQs have increased your bid price by 47% to Kshs 1,274,736,874.80.*

*In line with ITB Clause 5.5, you are required to confirm the errors identified above. Your corrected bid amount is Kshs 1,274,736,874.80."*

It is also not in contention that, by letter dated 25<sup>th</sup> January 2017, the Applicant informed the Procuring Entity that pursuant to clause 5.5 of the tender document, the Applicant was willing to undertake the works at the sum indicated in the bid the Applicant had submitted. The Applicant's letter stated in part as follows:

*"Pursuant to Clause 5.5 of the tender document, we hereby confirm that we shall undertake the whole works at our tender sum as indicated in the form of tender."*

Upon which the Procuring Entity wrote to the Applicant the letter dated 27<sup>th</sup> January 2017 stating as follows:

*"Following financial evaluation of the bidding documents, in accordance with the High Court ruling of 9<sup>th</sup> January 2017, your bid was not successful due to the following:*

- i) Financial Evaluation of your bid confirmed that your bid is for a total sum of Kshs 1,274,736,874.80 inclusive of taxes. This was communicated to you vide AWSB's letter Ref: BADEA/AWSB/OWSP/GOK/01/2015 (01) (JS) dated 20<sup>th</sup> January 2017 and noted in your letter Ref: MG/BM/tw.2.2017 dated 25<sup>th</sup> January, 2017".*
- ii) Your bid was therefore not the lowest financially evaluated."*

Further, it is common knowledge that it is the Procuring Entity's letter dated 27<sup>th</sup> January 2017 that triggered the filing of this Request for Review by the Applicant.

To determine this issue the Board takes into account the High Court ruling in Miscellaneous Application Number 240 of 2016 delivered on 11<sup>th</sup> May 2016; the Procuring Entity's re-evaluation of tenders pursuant to the High Court ruling; the provisions of the tender document on evaluation of tenders particularly clause 5.5; and the provisions of Section 66 (2) of the Public Procurement and Disposal Act, 2005 (repealed) (hereinafter "the Act").

The Board notes that the Order of the High Court at paragraph 136 stated as follows:

*"For avoidance of doubt the 1<sup>st</sup> Applicant, if minded to proceed with the tender and subject to the provisions relating to termination of the tender, is hereby directed to subject the Interested Party's tender to Financial Evaluation alongside those of three bidders who made it to the financial evaluation stage."*

The Board observes that the Procuring Entity indeed undertook financial evaluation of the Applicant's tenders alongside those of the other three bidders who made it to the financial evaluation stage. It has been shown in this decision that the Procuring Entity checked the Applicant's tender for arithmetic errors and wrote to the Applicant highlighting the errors in the Applicant's tender.

As to whether the re-evaluation was done in accordance with the Act and the tender document, the Board refers to Section 63 of the Act and clause 5.5 of the tender document. Section 63 of the Act states as follows:-

*Section 63 (1) "The procuring entity may correct an arithmetic error in a tender.*

*(2) The procuring entity shall give prompt notice of the correction of an error to the person who submitted the tender.*

*(3) If the person who submitted the tender rejects the correction, the tender shall be rejected and the person's tender security shall be forfeited."*

The Board's refers to the requirements of Regulation 50(1) on financial evaluation that states that;

*Regulation 50 (1) "Upon completion of the technical evaluation under Regulation 49, the evaluation committee shall conduct a financial evaluation and comparison to determine the evaluated price of each tender*

*(2) The evaluated price for each bid shall be determined by-*

*(a) taking the bid price, as read out at the bid opening;*

*(b) taking into account any corrections made by a procuring entity relating to arithmetic errors in a tender;*

*....."*

Clause 5.5 of the tender document states as follows:

*"The Total Tender Sum entered in the Bills of Quantities and the Form of Tender shall be deemed to be the basis of the Tender. In cases of error of additional or extension and the consequent corrected tender sum is lower than the above Total Tender Sum, then the corrected tender sum shall be deemed to be the Total Tender Sum upon which the Contract Agreement shall be based.*

*If the corrected tender sum is higher than the Total Tender Sum, then the original Total Tender Sum shall be deemed to be the Total Tender Sum upon which the contract Agreement shall be based. In case of error the rates where such errors occur shall be altered accordingly to meet the Total Tender Sum.*

*Where the Engineer at his sole discretion considers that the items in which errors occur cannot be suitably altered the Engineer may then alter any such rates that he deemed to be applicable in order to meet the Total Tender Sum."*

The Board finds that the financial evaluation was carried out and also finds that the Applicant's Form of Tender set out a price of Kshs. 868,021,884.24, but the Applicant in its Letter of Acceptance of the corrected tender sum accepted to do the works at the corrected tender sum of Kshs. 1,274,736,874.80.

The Board has on several occasions upheld the supremacy of the Form of Tender. The Board made the following observations on this issue in the case of *Alfatech Contractors Ltd -vs- Kenya National Highways Authority (PPRBA No. 38 of 2009)*:-

*"The Board holds that the form of tender is the document in which the offer is communicated to a specified employer. It is the offer that the procuring entity would consider and either accept or reject. The Board finds that the form of tender is a very vital document which communicates every essential information based on which a contract is created.*

By accepting to now carry out the works at the corrected tender sum of Kshs. 1,274,736,874.80, the Applicant had simply went outside the price offered in its Form of Tender to a new but higher price offer and there is no way the Procuring Entity could have awarded the tender to it. The successful bidder's



price therefore became the lowest evaluated price and the successful bidder was entitled to be awarded the tender.

On the issue of the provisions of Clause 5.5 referred to above, the Board finds that in carrying out a financial evaluation of a tender, the Procuring Entity was obliged to comply with the provisions of Regulation 50 of the Regulations.

Regulation 50(3) then requires the procuring entity to rank the bidders upon evaluation of the tenders.

The said Regulation reads as follows:-

**50(3): "Tenders shall be ranked according to their evaluated price and the successful tender shall be the tender with the lowest evaluated price in accordance with Section 66(4) of the Act".**

Upon carrying out the evaluation both Regulation 50(3) and Section 66(4) of the Public Procurement and Disposal Act, 2005 which governed this tender required the tender to be awarded to the lowest evaluated bidder.

The Board has looked at the financial evaluation report and finds that this is exactly what the Procuring Entity did and its decision cannot be faulted.

This being the position, this Request for Review fails and is accordingly dismissed.

### **FINAL ORDERS**

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

- a) The Request for Review filed by the Applicant on 10<sup>th</sup> February, 2017 in respect of Tender No. BADEA/AWSB/OWSP/GOK-01/2015 for the augmentation of Oloitokitok Water Supply and Sanitation for Athi Water Services Board be and is hereby disallowed.
- b) The award of the Tender the subject matter of this request for Review to M/s Machiri Limited be and is hereby upheld and affirmed.
- c) The Procuring Entity is directed to enter into a contract with the successful bidder in view of the length of time that this litigation has taken.
- d) The Board however directs that each party shall bear its own costs of this Request for Review.

Dated at Nairobi on this 3<sup>rd</sup> day of March, 2017

  
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**CHAIRMAN**  
**PPARB**

  
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**SECRETARY**  
**PPARB**