

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO's. 72, 73, 74 & 75 OF 2018 (CONSOLIDATED)**

**BETWEEN**

**SBI INTERNATIONAL HOLDINGS**

**AG-KENYA BRANCH .....APPLICANT**

**AND**

**KENYA RURAL ROADS AUTHORITY.....PROCURING ENTITY**

Review against the decision of Kenya Rural Roads Authority in the matter of Tender No. RWC 457 - Ndaragwa - Maili Kumi/Ndaragwa- Kanyagia - Subuku/Ndaragwa Ngamini Uruko - 40 Km, Tender No. RWC 458 - Subuku - Shamata - Kaka/Mairo Inya - Shauri - Ndogino, Salama - 38km, Tender No. RWC 479 - Maili Kumi - Gakoe - Olborosat - Kaka - Kariamu Junction C69 Road - 30km and Tender No. 397 - Mogotio - Migurin - Maji Moto - Lake Bogoria - Lobio - 63 Km.

**BOARD MEMBERS PRESENT**

- |                                 |            |
|---------------------------------|------------|
| 1. Mr. Paul Gicheru             | - Chairman |
| 2. Mr. Hussein Were             | - Member   |
| 3. Mr. Peter Bitia Ondieki, MBS | - Member   |
| 4. Mrs. Rosemary Gituma         | - Member   |

## **IN ATTENDANCE**

### **PRESENT BY INVITATION**

#### **APPLICANT**

##### **1. Rose Ochieng**

**Procuring Entity- Kenya Rural Roads Authority**

1. Justine Rapando - Legal Officer, KERRA

### **BOARD'S DECISION**

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

#### **BACKGROUND**

The Applicants filed separate Requests for Review on various dates seeking for extensions of time to enable the Procuring Entity complete the evaluation and the award processes in respect of the following roads and other related works.

- a) Tender No. RWC 457 - Ndaragwa - Maili Kumi/Ndaragwa- Kanyagia  
- Subuku/Ndaragwa Ngamini Uruko - 40 Km.
- b) Tender No. RWC 458 - Subuku - Shamata - Kaka/Mairo Inya - Shauri  
- Ndogino, Salama - 38km.
- c) Tender No. RWC 479 - Maili Kumi - Gakoe - Olborosat - Kaka -  
Kariam Junction C69 Road - 30km.
- d) Tender No. 397 - Mogotio - Migurin - Maji Moto - Lake Bogoria - Lobio  
- 63 Km.

## THE REQUESTS FOR REVIEW

The Applicant filed separate applications in respect of the procurement relevant to it owing to the fact that the tenders bore different tender numbers. Owing to the commonality of the facts surrounding the applications and the similarity of the responses and in order to save time all the applications were consolidated and were heard together.

The Applicant's cases in each of the above Requests for Review were similar save for the different tender numbers and descriptions. The Procuring Entity's responses were also similar and were as follow:-

## APPLICANT'S CASE

It was the Applicant's case that the Applicant, among other bidders, tendered for the projects which are the subject matters of the respective applications and that they submitted their bids to the Procuring Entity for evaluation in the anticipation that the said exercise would be completed and awards made.

The Applicant further contended that the Procuring Entity opened the tenders on or about February, 2017, and that a considerable amount of time had passed since the tenders were opened.

The Applicant averred that they were aware of the provisions of Section 80 (6) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") which requires evaluation of a tender to be carried out within a maximum period of 30 days of tender opening and to date the tenders had not been awarded to any of the bidders within the tender evaluation period of thirty (30) days.

The Applicant additionally stated that there was therefore an existing breach of the duties imposed upon the Procuring Entity by the Act, Regulations, 2006 and the tender Document.

The Applicant further stated that there had been no communication on whether or not their bids were successful as required by the provisions of Section 87(1) and/or 87(3) of the Act, despite the fact that it submitted a competitive bid as provided for in Section 86(1)(a) of the Act.

The Applicant also stated that Article 227(1) of the Constitution of Kenya provides that the procurement process must be fair, equitable, transparent, competitive and cost-effective and that they were being denied a reasonable expectation to secure an award of the respective tenders.

They consequently prayed that their respective Requests for Review be allowed as prayed.

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

In response to the above averments, the Procuring Entity stated that it carried out this procurement process in accordance with the provisions of the Act and the relevant Regulations.

The Procuring Entity further submitted that the Evaluation Committee was appointed on 1<sup>st</sup> March, 2017 and submitted its report on 20<sup>th</sup> April, 2017 with the opinion by the Head of Procurement Unit provided on 9<sup>th</sup> May, 2017. It further averred that its Accounting Officer, on the advice of the Head of the

Procurement Section however referred the said report back to the Evaluation Committee for consideration of a fundamental issue that had an effect on the recommendation by the Evaluation Committee.

The Procuring Entity additionally stated that the Evaluation Committee considered the comments raised by the Accounting Officer and submitted to the Head of the Procurement Unit on 20<sup>th</sup> February, 2018 for a professional opinion and onward transmission to the Accounting Officer.

The Procuring Entity further stated that on 30<sup>th</sup> June, 2017 when the evaluation process was on-going, the budget for the financial year 2016/2017 under which the project was being procured became unavailable.

The Procuring Entity finally stated that on 31<sup>st</sup> January, 2018, a reallocation was made under the 2017/2018 financial year budget to provide for funds for this project. The Procuring Entity finally averred that it was keen to conclude this tender processes within a period of 21 days if the Board was minded to grant it an extension of time.

### **THE BOARD'S FINDINGS**

The Board has considered the law and the submissions made by the parties to the consolidated Requests for Review and finds that the various applications were not contested. The Procuring Entity in fact admitted that there had been delay in completing the procurement processes herein and gave the reasons for the delay. It also indicated its willingness to conclude the same.

The Board notes that there have been several previous applications of a similar nature which have been filed before it relating to the same circumstances and seeking for the same remedies, namely Applications numbers 30, 32, 33, 35, 46, 47, 50, 52 and 54 all of 2018 among others.

The Board considered the said Applications and the circumstances giving rise to the delay which are similar to the case now before the Board and held that it has the jurisdiction to extend the time within which a Procuring Entity can complete a procurement process.

In holding as it did, the Board relied on the High Court decision in the case of **Republic -vs- The Public Procurement Administrative Review Board, Transcend Media Group Ltd and Scanad Kenya Ltd (Nai HC JR Misc. Application No. 302 of 2016)** where the High Court held that the Board can give directions on how a Procuring Entity should proceed with a procurement process which has not been completed.

The Board has considered the explanations given and the fact that there was no serious objection to the said Applications and finds that the same are merited and the explanations given plausible.

In the above circumstances, the consolidated Applications numbers 72, 73, 74 and 75 all of 2018 are allowed in terms of the following orders:-

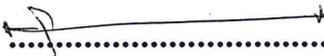
## **FINAL ORDERS**

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 these Requests for Review.

- a) **The consolidated Requests for Review numbers 72, 73, 74 and 75 in respect of the following tenders be and are hereby allowed and the Procuring Entity is granted an extension of Thirty (30) days from today's date to enable it complete the procurement processes herein including the making of an award.**
- i. Tender No. RWC 457 - Ndaragwa - Maili Kumi/Ndaragwa-Kanyagia - Subuku/Ndaragwa Ngamini Uruko - 40 Km.
  - ii. Tender No. RWC 458 - Subuku - Shamata - Kaka/Mairo Inya - Shauri - Ndogino, Salama - 38km.
  - iii. Tender No. RWC 479 - Maili Kumi - Gakoe - Olborosat - Kaka - Kariamu Junction C69 Road - 30km.
  - iv. Tender No. 397 - Mogotio - Migurin - Maji Moto - Lake Bogoria - Lobio - 63 Km.
- b) **The tender validity period of the subject tenders is hereby extended by a further period of forty five (45) days to enable the Procuring Entity complete the procurement process subject to any bidder's right to challenge the process.**

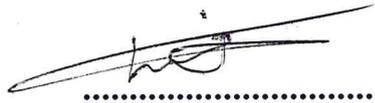
c) Each party shall however bear its own costs of the Request for Review since the orders granted above are beneficial to all parties.

Dated at Nairobi on this 20<sup>th</sup> day of June, 2018.



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**CHAIRMAN**  
**PPARB**



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**SECRETARY**  
**PPARB**