

REPUBLIC OF KENYA  
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD  
APPLICATION NO. 34/2015 OF 7th JULY, 2015

BETWEEN

FRONTIER ENGINEERING LIMITED.....Applicant

AND

MARSABIT COUNTY GOVERNMENT.....Procuring Entity

The Review against the decision of Marsabit County Government in the matter of Tender No. MBT/COU/WATER/113/2014-15 for the construction of Badan Rero II Water Pan in Moyale.

BOARD MEMBERS PRESENT

- |                               |            |
|-------------------------------|------------|
| 1. Mr. Paul Gicheru           | - Chairman |
| 2. Mrs. Josephine W. Mong'are | - Member   |
| 3. Mr. Nelson Orgut           | - Member   |
| 4. Mrs. Rosemary K. Gituma    | - Member   |

IN ATTENDANCE

- |                       |               |
|-----------------------|---------------|
| 1. Mr. Stanley Miheso | - Secretariat |
| 2. Ms. Shelmith Miano | - Secretariat |

PRESENT BY INVITATION

Applicant - FRONTIER ENGINEERING LIMITED

- |                |            |
|----------------|------------|
| 1. Alex Masika | - Advocate |
|----------------|------------|

2. Akelola Drammen - Advocate
3. Ismail Adan - Director Frontier Engineering Ltd

**Procuring Entity - MARSABIT COUNTY GOVERNMENT**

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1. Godana Yatani - Advocate
  2. Yaltani Halakhe - Supplies Manager,
  3. Joseph Mirgichan - Director
  4. Husein Alinoor - Chief Officer, Finance
  5. Molu Huqa - Chief Officer, Roads

**Interested Parties**

1. Roba Abkul - Operations Manager Dikus Transporters Ltd
2. Jumal Edin - Director, Hilah Construction Co. Ltd
3. Ibrahim Adano - Director Salsabil Construction Ltd
4. Mohamed Said - Operation Manager, Ordofa Construction Ltd

**BOARD'S DECISION**

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

**BACKGROUND OF AWARD**

The tender that was advertised in the local dailies on 29<sup>th</sup> May, 2015. Sixteen firms bought tender documents. The opening was held on 17<sup>th</sup> June, 2015. Ten bidders responded. The tenders were opened in the presence of tenderers and/or their representatives.

**EVALUATION**

The tender was evaluated in three stages i.e.

1. Tender responsiveness
2. Technical analysis
3. Financial analysis

### TENDER RESPONSIVENESS

In accordance with the requirements of the conditions of tendering under Clause 23.1, 23.3 and 23.4 only substantially responsive tenders are to be subjected to detailed evaluation.

The mandatory evaluation results are as follows:-

Bidder Name	NCA Reg	Official RCPT	Tax Compl	Bid Bond	PIN	Cert of Reg./ Incorp.	Site Visit	R/NR
Ordofa Construction Company Limited	YES	YES	YES	YES	YES	YES	YES	R
El-Adi Construction	YES	YES	YES	YES	YES	YES	YES	R
Hilal Construction Co	YES	YES	YES	NO	YES	YES	YES	NR
Pioneer Engineering	YES	YES	YES	YES	YES	YES	YES	R
Red Rock Enterprise	YES	YES	NO	YES	YES	YES	YES	NR
Saroba Enterprises	YES	YES	YES	NO	YES	YES	YES	NR
Al- Hussein Investment	YES	YES	YES	NO	YES	YES	YES	NR
Blue Seal Hardware	YES	YES	YES	NO	YES	YES	YES	NR
Ya Lamlam Investment	YES	YES	YES	NO	YES	YES	YES	NR
Frontier Engineering	YES	YES	YES	YES	YES	YES	YES	R

For purposes of determining responsiveness, the technical evaluation committee set the minimum requirements for responsiveness as:-

1. Within plus or minus 15% of estimate
2. Any other two from the following:-
  - a. Class of registration
  - b. Official receipt
  - c. Tax compliance
  - d. Certificate of incorporation

e. Bidders visit to the site

Bidder Name	Fully filled confidential business questionnaire	Fully filled bills of quantities	+/- 15% Engineers Estimate	Fully filled tender questionnaire	Fully filled forms of tender
Ordofa Construction Company Limited	YES	YES	YES	YES	YES
El-Adi Construction	YES	YES	NO	YES	YES
Hilal Construction Co	YES	YES	YES	YES	YES
Pioneer Engineering	YES	YES	YES	YES	YES
Red Rock Enterprise	YES	YES	YES	YES	YES
Saroba Enterprises	YES	YES	YES	YES	YES
Al- Hussein Investment	YES	YES	YES	YES	YES
Blue Seal Hardware	YES	YES	NO	YES	YES
Ya Lamlam Investment	YES	YES	YES	YES	YES
Frontier Engineering	YES	YES	NO	YES	YES

The responsive bidders were further evaluated.

### TECHNICAL ANALYSIS

The technical analysis was scored as follows:-

		Ordofa Construction Company Limited	El-Adi Construction	Pioneer Engineering
Highest qualification	Certificate Diploma Graduate	0	6	6
Work experience	< 5m 5-10m > 20m	0	6	6
More than 2 projects	< 5m 5-10m > 20m	0	10	6
Similar work done (single contract done) in Marsabit		0	10	0
Equipment available	Tipper	0	8	6

		Ordofa Construction Company Limited	El-Adi Construction	Pioneer Engineering
	4x4 p/up Mixer Grader Loader Bowser			
Financial Statement Audited report	2012 2013	0	6	6
<b>TOTAL SCORE %</b>		<b>0%</b>	<b>46%</b>	<b>30%</b>

### FINANCIAL ANALYSIS

TENDERERS NAME	-/+ DEVIATION IN PERCENTAGE
Ordofa Construction Company Limited	24
El-Adi Construction	23
Pioneer Engineering	26

### COMBINED SCORE

The committee scored the combined technical and financial analysis as follows:-

	Bidder Name	Technical Score	Financial Score	Total/ combined score
1	Ordofa Construction Company Limited	0%	24%	24%
2	El-Adi Construction	46%	23%	79%
3	Pioneer Engineering	30%	26%	56%

## TENDER EVALUATION COMMITTEE'S RECOMMENDATIONS

The Tender evaluation committee approved the award of this tender to M/s El-Adi Construction Co. Ltd at the tender sum of Kshs. 32,174,920.

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## THE TENDER COMMITTEE'S AWARD

The tender committee approved the award of the tender to M/s El-Adi construction co. Ltd at the recommended tender prices of Kshs. 32,174,920

## THE REQUEST FOR REVIEW

The Request for Review was lodged by M/s Frontier Engineering Limited on 7<sup>th</sup> July, 2015 in the matter of the tender for the Construction of Bada Rero II Water Pan in Moyale Tender No. MBI/COU/WATER/113/2014-15.

The Applicant seeks for the following orders:

- 1. Annul in whole the decision of the tender committee of the Procuring Entity.*
- 2. The procuring entity to re-tender.*
- 3. The Procuring Entity be condemned to pay Costs of this Request for Review to the Applicant.*

The Applicant raised five grounds in support of the Request for Review namely:

- 1. The tender committee of the Procuring Entity acted in breach of Regulation 67(2) of PPDA, 2005 as read together with Regulation 66 of the PPD Regulations 2006 (as amended) and Clause 28.2 of the Tender Document by proceeding to award the tender to the*

*successful tenderer without simultaneously notifying the Applicant of the outcome of the tender. The Applicant states that it has not received any proper or valid notification letter from the Procuring Entity to-date.*

- 2. That despite complying with all the mandatory requirements of the tender, including specific eligibility and qualifications requirements of the tender, the Procuring Entity acted in breach of Section 64 of PPDA, 2005, as read together with Regulation 48 of the PPD Regulations 2006 (as amended) and Clause 23.2 of the Tender Document for failing to find the Applicant's tender was responsive and conformed to all the mandatory requirements and as a consequence whereof the Applicant was unfairly evaluated and wrongfully disqualified at the Financial evaluation stage.*
- 3. That the tender committee of the Procuring Entity acted in breach of Section 52(3(i) of PPDA, 2005 as read together with Regulation 38 of the PPD Regulations 2006 (as amended) for failing to set concisely and with precision the procedures and criteria to be employed in the evaluation and comparison of tenders. As a consequence whereof the tender was devoid of competitiveness and open for abuse resulting in the tender being unfairly evaluated and wrongfully awarded to one of the Applicant's competitors.*
- 4. That the entire process largely lacked transparency contrary to Section 2 of the PPDA, 2005 as the entire tender was unfairly evaluated and the tender process conducted in secrecy without promotion of integrity and fairness in the procedure. Furthermore, the tender was awarded to M/s Dikus Transporters Ltd who were in any event NOT the lowest evaluated bidders in terms of price*

*and as a consequence whereof the Procuring Entity acted in breach of the salient provisions of Section 64(4) of the PPDA, 2005.*

*5. As a result of the Procuring Entity's actions, the Applicant is bound to suffer loss and damage that include:*

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- i) Loss of profit it would have made from the tender not forgetting the benefits that could have accrued to the Procuring Entity and the public in terms of quality construction works in question and at a competitive price*
- ii) Loss of earnings it could have accrued from this contract as the same has been unfairly awarded to a competitor*
- iii) It has been unfairly denied an opportunity of undertaking the contract and probably at a reasonable minimum cost*
- iv) It has expended considerable amounts of money towards preparing and making itself ready for the entire tendering process*

Before proceeding to consider the parties arguments in this matter, the Board wishes to observe that the Applicant filed a consolidated notice of Preliminary Objection in Review application numbers 33, 34 and 35 but the Board directed during the hearing of the Request for Review that the said points of Preliminary objective be heard as part of the main Request for Review.

The Parties to this Request for Review adopted their submissions in Request for Review No. 33 of 2015 and for purposes of completeness the Board will restate the submissions made by the parties in the Request for Review No. 33 of 2015.



## THE APPLICANT'S CASE

Mr. Alex Masika who appeared in these proceedings on behalf of the Applicant stated that the Applicant had information that the award of the subject tender had been made on 30<sup>th</sup> June 2015 and realizing that it had not been served with a letter of Notification in accordance with Section 67 of the Act, he proceeded to file this Request for Review on 7<sup>th</sup> July 2015. Mr. Masika submitted said he had noted from the Procuring Entity's response to the Request for Review that a letter of notification had been written on 26<sup>th</sup> June 2015 to his client but he stated that he had examined the letter contained in the response and contended that the format of the one sent to the successful bidder was different in form from that addressed to the Applicant. Counsel for the Applicant additionally submitted that the failure to serve the Applicant was in clear breach of the Provision clause 28.2 of the tender document on "Notification of Award" which states as follows:-

*"At the same time that the Employer notifies the successful tenderer that his tender has been accepted, the Employer shall notify the other tenderers that their tenders have been unsuccessful".*

Mr Masika went on to submit that the Procuring Entity had purportedly gone ahead to sign a contract dated 13<sup>th</sup> July, 2015 with the successful bidder contrary to the Provisions of Section 68 of the Act. He further contended that the Applicant had complied with all the specific requirements and qualifications for the award of the tender and had returned the most responsive bid in terms of price. He faulted the Procuring Entity for breaching the Provisions of Section 64 of the Act as

read together with Regulation 48. He asserted that the evaluation criteria was not precisely set out in the tender document and thereby resulting in the process lacking competitiveness and fairness among competitors since there was no precise criteria on the basis of which the competitors in this tender could be evaluated and weighed.

Counsel for the Applicant further submitted that the Procuring Entity had awarded the subject tender to a bidder namely M/s El-Adi Construction Co. Limited which was not the lowest evaluated bidder in violation of the Provisions of Section 66(4) of the Act.

Mr. Masika concluded his submissions by asking the Board to grant the prayers set out in the Request for Review.

In response to the submissions by Counsel for the Applicant Mr Godana Yatani, the Legal Services Director of the County Government of Marsabit who appeared on behalf of the Procuring Entity, opposed the Applicant's application and stated that the difference in the format of the Notification letter dated 26<sup>th</sup> June, 2015 addressed to both the successful bidder and the unsuccessful bidders was immaterial. He stated that that the Procuring Entity had sent out letters of regret to the other bidders including the Applicant and was certain that those letters had been received and could not understand what could have prevented the Applicant from receiving it's letter. He however alleged that the letters were sent out to the all bidders by ordinary post and not by registered post as required by the Provisions of clause 28.1 of the tender document which states as follows:-

*“prior to the expiration of the period of tender validity prescribed by the Employer, the Employer will notify the successful tenderer by cable, telefax or telex and confirmed in writing by registered letter that the his tender has been accepted.....”* and it goes on to state in clause 28.2 how the unsuccessful tenderers would be similarly notified.

As regards the legality of the signed contract, Mr Yatani, stated that the moment notifications had gone out, the Procuring Entity had the discretion to enter into a contract with the successful bidder within 14 days. He stated that the Procuring Entity received the notification regarding the filing of this Request for Review on 15<sup>th</sup> July, 2015 and that the contract was signed after the requisite 14 days window within which any Request for Review against the award should have been lodged. He therefore reiterated that the contract was signed in accordance with the provisions of the law and that the Board did not therefore have jurisdiction to hear and determine the Request for Review under Section 93(2) (c) of the Act. Reacting to an inquiry from the Board on whether the Provisions of Section 68 of the Act were applicable where all the bidders had not been duly notified, Mr Yatani stated that as far as the Procuring Entity was concerned, all the bidders except the Applicant had confirmed receipt of the notification letters and he could not understand why the Applicant had not.

On the question of the existence of an award criteria, Mr Yatani referred the Board to the minutes of the tender evaluation committee signed on

24<sup>th</sup> June, 2015 which he reckoned were self explanatory in terms of the stages that all the bidders were to be subjected to in order to determine the most responsive bid. He stated that this tender was evaluated at the Preliminary, technical and the financial stages to determine the issue of it's responsiveness with the mandatory requirements and compliance with the technical and the financial requirements. He further submitted that some of the mandatory requirements were outlined in the advertisement notice and that bidders were subjected to the said requirements. As to whether the tender had been awarded to the lowest evaluated bidder, Mr Yatani maintained that the term the lowest evaluated bidder and the lowest price quoted were two different things. He however confirmed that this was an open tender and that the bidders were to be assessed according to the criteria as set by the tender committee.

Counsel for the Procuring Entity therefore urged the Board to dismiss the Applicant's Request for Review with costs.

In reply to the submissions made by Counsel for the Procuring Entity, Mr. Masika for the Applicant referred the Board to the Provisions Regulation 77 of the Public Procurement and Disposal Regulations 2005 which require a Preliminary Objection to be filed within 5 days from the date of notification of the filing of a Request for Review with the Board. He pointed out that the Preliminary Objection was filed on 21<sup>st</sup> July, 2015 and even if it were to be assumed that the Procuring Entity got to know about the Request for Review on 15<sup>th</sup> July, 2015 the Preliminary Objection should have been filed by 20<sup>th</sup> July, 2015 at the very least. Mr.

Masika stated that a letter from the Secretariat was dispatched to parties the moment the Request for Review was filed on 7<sup>th</sup> July, 2015 and it is inconceivable that it took up to 15<sup>th</sup> July, 2015 for the Procuring Entity to be aware of the filing of the Request for Review. He added that the Procuring Entity had not discharged the burden of proving the manner in which it had served the letter of notification on the Applicant. Mr Masika concluded his response by stating that the signed contract could only stand if there was evidence to show that the Applicant had been duly notified and referred the Board to the case **Betech Contractors versus The Tender Committee of Mogotio District (PPRBA No. 42 of 2010)** in which the Board held that where a contract had not been signed in accordance with the Provisions of the Act, then the Board has the jurisdiction to hear the matter. On the issue of the appeal being filed out of time, Mr Masika maintained that, in the absence of evidence that the letter of notification had been served on the Applicant by the Procuring Entity, the time for the filing of the Request for Review could only start running from the date when the Applicant was notified of the outcome of it's tender and that therefore the Request for Review was properly before the Board.

#### THE DECISION OF THE BOARD

The Board has heard the submissions made by the parties and has additionally read the documents filed by the parties in support of and in opposition to this Request for Review. The Board has framed the following issues for determination based on the notice of Preliminary Objection and the Request for Review:-

1. Whether the Request for Review had been filed out of time and therefore whether it was properly before the Board
2. Whether the contract signed on 13<sup>th</sup> July, 2015 between the Procuring Entity and El -Adi Construction Company Ltd, the successful bidder herein was done in accordance with the law.
3. Whether the tender document contained any criteria for evaluation and whether all the bidders were treated fairly and competitively in accordance with the Provisions of Sections 64 and 66(2) of the Act
4. Whether the tender was awarded to the lowest evaluated bidder in accordance with the provisions of Section 66(4) of the Act.

The Board will now proceed to determine each issue and pronounce its findings.

#### ISSUE NO. 1

**Whether the Request for Review has been filed out of time and therefore not properly before the Board**

In order to determine whether Board has jurisdiction to hear the Request for Review as filed, it is necessary to establish the factual issue of when the Applicant was notified and when the legal time for the filling of the Request for Review started running in order to determine whether the towards 7<sup>th</sup> July when the Request for Review was filed within time.

The Board has examined the notification letter dated 26<sup>th</sup> June, 2015 addressed to the successful Bidder, M/S El-Adi Construction Company Limited.

The Board has also looked at other letters titled "Regret Letter" dated 26<sup>th</sup> June 2015 addressed to the unsuccessful bidders. There is nothing in the documents submitted to the Board to show that any of the recipients acknowledged receipt of any of the letters despite the Procuring Entity's assertion during his submissions that "all the Bidders that received the regret letters acknowledged receipt of the letters except the Applicant.

Under Clause 28.1 and 28.2, at page 20 of the tender document the said clause specifically states that *as follows:-*

*"the Employer will notify the successful tenderer by cable, telefax or telex and confirmed in writing by registered letter that his tender has been accepted .....".* And in clause 28.2 it states *"at the same time that the Employer notifies the successful tenderer that his tender has been accepted, the Employer shall notify the other tenderers that their tenders have been unsuccessful."*

The Applicant in his submissions stated that it learnt on 30<sup>th</sup> June, 2015 that the tender had been awarded. The Procuring Entity did not however provide any evidence of service in the form of a cable, telefax, telex or a certificate of service by way of registered post to demonstrate that it effected service of the notification on the successful bidder in terms of clause 28.2 of the tender document.

In the absence of any evidence of service of the letter of notification upon the Applicant, the Board has no other option but to find that the Procuring Entity did not effect service of the notification on the

Applicant and that this Request for Review was filed within time and is competently before the Board.

This ground of the Applicant's Request for Review therefore fails and is accordingly dismissed.

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## ISSUE NO. 2

Whether the contract signed on 13<sup>th</sup> July 2015 between the Procuring Entity and M/s El-Adi Construction Co. Ltd, the successful bidder herein was done in accordance with the Provisions of Section 68 of the Act

The second issue, just like the first one, is hinged on the issue of notification. If notification is taken as having not been served the Procuring Entity would have no basis to sign a contract with the successful Bidder.

Section 68(2) of the Act provides that *"The written contract shall be entered into within the period specified in the notification under Section 67(1) but not until at least fourteen days have elapsed following the giving of that notification."*

Section 67(1) provides that *"Before the expiry of the period during which tenders must remain valid, the procuring entity shall notify the person submitting the successful tender that his tender has been accepted."* And Section 67(2) provides that *"At the same time as the person submitting the successful tender is notified, the procuring entity shall notify all other persons submitting tenders that their tenders were not successful."*



The foregoing therefore means that where the Provisions of Sections 67(1) and 67(2) have not been complied with a contract cannot be deemed to have been properly entered into under the Provisions of Section 68(2) of the Act.

The Board has previously held so in various cases including the case of **Betech Contractors – vs- The Tender Committee of Mogotio District PPRBA No. 42 of 2010.**

The Board has further had occasion to look at the form of contract dated 13<sup>th</sup> July, 2015 which was entered into between the successful bidder and the Procuring Entity against the contents of the tender documents and finds that whereas the Procuring Entity as per the contents of the tender document is the County Government of Marsabit, the purported agreement was entered into between the Department of Water Environment and Natural resources and the successful bidder.

The said department was not the Procuring Entity for the purposes of this tender and any agreement could only have been entered into between the Procuring Entity which is a Country Government with the power to enter into contracts in it's own legal right.

The Board further wishes to state that once an order of stay of any further procurement proceedings is issued by the Board, no contract can lawfully be entered in regard to the subject procurement and it therefore follows that the contract purportedly entered into between the successful bidder and the above department cannot take away the jurisdiction of the Board to hear and determine this matter.

It follows then that the contract signed between the Department of Water, Environment and Natural Resources. M/s El-Adi Construction Company Limited of P.O Box 51687 -00200 Nairobi in the matter of tender No. MBI/COU/WATER/113/2014-15 Construction of medium level dam Badan Bero 11 water pan for the tender sum Ksh 32,174,920 is hereby annulled. Consequently, the Preliminary Objection based on the signing that particular contract is similarly dismissed.

The Preliminary objection raised by the Procuring entity on this ground accordingly fails and is hereby dismissed.

### ISSUE NO. 3

Whether the tender document contained any criteria for evaluation and whether all the bidders were treated fairly and competitively in accordance with the Provisions of Section 66(2) of the Act

The Board has carefully looked at clause 27 (Award Criteria) of the tender document and specifically at clause 27.1 where it provides as follows: *“Subject to Sub-clause 27.2, the Employer will award the Contract to the tenderer whose tender is determined to be substantially responsive to the tender documents and who has offered the lowest evaluated tender price subject to possessing the capability and resources to effectively carry out the Contract Works as required in Sub-clause 2.1 and 2.2 hereabove”.*

Sub-clause 2.1(Eligibility requirements) page 6 of the tender document provides as follows: *“This invitation to tender is open to all tenderers*

*who are qualified as stated in the appendix (page 22 of the tender document).*

The tender document at Page 17 of the tender document - clause 23(Determination of Responsiveness) sets out how the determination of the most responsive tender was to be carried out. Instead of using the tender document to evaluate, the tender evaluation committee came up with a separate evaluation report of their own titled "County Government of Marsabit - Evaluation Report" with clauses 1-5 purporting to set out the parameters for evaluation committee went ahead to use the evaluation criteria they themselves had set up in determining the are completely different from what is contained in the tender document. They went ahead to use this to determine the winning Bidder and submitted the results to the Chairman of the tender committee for award. In addition instead of awarding the tender as per a normal open tender, the tender processing committee combined the scores from technical and financial evaluation to arrive at the winning bidder. All this was outside what is contained in the tender document and in direct violation of Section 66(2) which provides:

*"The evaluation and comparison of tenders shall be done using the procedures and the criteria set out in the tender documents and no other criteria shall be used."*

It is obvious that the tender evaluation committee created its own evaluation criteria not contained in the tender document.

This Board has severally held that a Procuring Entity can only evaluate tenders based on the evaluation criteria set out in the tender document and no other criteria shall be used.

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In the case of **Richardson Company Ltd -vs- The Registrar of the High Court of Kenya (2008 - 2010 PPRB at page 232** the Board stated as follows:-

“He Board has examined the tender documents and noted that the financial evaluation parameters were not set out in the Tender Documents. At the hearing, the Procuring Entity stated that those parameters are set out in the International Financial Reporting Standards (IFRS). However the tender documents did not provide that those parameters or the IFRS would apply. As the Board held severally, a Procuring Entity can only use the criteria set out in the Tender Document for Evaluation. This is clearly stated in Section 66(2) which states as follows”.

The Court has further held **JGH Marine A/S Western Marine Services Ltd CNPC Northeast Refining & Chemical Engineering Co. Ltd/Price Enterprises -vs- the Public Procurement Administrative Review Board (Judicial Review No. 137 of 2015)** that where the Board finds that there was a problem in the tender document, it ought to direct the Procuring Entity to retender.

As the Board has observed the tender document in this tender did not contain a criteria for the technical evaluation of bidders setting out how the marks for each item would be awarded. The tender processing committee instead opted to come up with it's own criteria which was not contained in the tender document.

In view of the above glaring shortcomings the Board has no option but to allow this ground of the Applicant's Request for Review.

#### ISSUE NO. 4

Whether the tender was awarded to the lowest evaluated bidder in accordance with the provisions of Section 66(4) of the Act.

Section 66(4) provides that for the purposes of an open tender, *"The successful tender shall be the tender with the lowest evaluated price."* By failing to observe Section 66(2) it follows that Section 66(4) was also violated in equal measure. The Board finds that this all exercise of evaluation was a sham and will not hesitate to discredit the method of evaluation that was carried out together with its outcome.

The Board has observed from the evaluation report that whereas the Applicant was not financially evaluated M/s Pioneering Engineering offered the lowest tender price of Kshs. 31,118,160 among the bidders who made it to the final stage of evaluation but the bidder who was awarded the subject tender had the higher price of Kshs. 32,174,920 which was contrary to the express provisions of Section 66(4) of the Act since the successful bidder was not the lowest bidder.

A perusal of Clause 27.1 of the tender document for this tender further shows that the Procuring Entity had clearly set out the award criteria for this tender in the following terms:-

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#### **Award criteria**

27.1"Subject to sub-clause 27.2, the Employer will award the contract to a the tenderer whose tender is determined to be substantially responsive to the tender documents and who has offered the lowest evaluated tender price subject to possessing the capability and resources to effectively carry out the contract walks as required in sub-clause 2.1 and 2.2 hereinabove;"

It is abundantly clear from the above Clause of the tender document that the award of the tender was to be made to the lowest evaluated bidder and the Board therefore wonders where the Procuring Entity obtained the criteria of awarding the tender to a tenderer who had attained the highest combined technical and financial score as set out in the tender evaluation committee's report.

This ground of the Applicant's Request therefore also succeeds and is allowed.

## THE FINAL ORDERS OF THE BOARD

In view of all the above findings and in exercise of the powers conferred upon the Board by the Provisions of Section 98 of the Act, the Board makes the following orders:

1. The Request for Review filed by the Applicant on 7<sup>th</sup> July 2015 in respect of Tender No. MBT/COU/WATER/113/2014-15 is hereby allowed.
2. The award of the subject tender to M/s El-Adi Construction Co. Ltd together with the entire procurement process herein is hereby annulled.
3. The Procuring Entity is directed to retender afresh for the subject tender on the basis of a tender document that clearly sets out the evaluation criteria and how the said criteria is to be evaluated.
4. THAT the Procuring Entity shall retender and complete the entire process within a period of 30 days from the date hereof.
5. In view of the orders made above, each party shall bear its own costs of this Request for Review.

Dated at Nairobi on this 28<sup>th</sup> day of July, 2015

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CHAIRMAN  
PPARB

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SECRETARY  
PPARB

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