

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION No. 46/2017 OF 22ND MAY, 2017

BETWEEN

ALWAHAB ENTERPRISE LIMITED.....APPLICANT

AND

**NORTHERN WATER
SERVICES BOARD (Procuring Entity).....1ST RESPONDENT**

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

Review against the decision of the Northern Water Services Board in the matter of Tender Number NWSB/TI CW/028/2016 - 2017 for the Construction of Arda Hagarsu Water Pan in Mandera North Sub-county.

BOARD MEMBERS PRESENT

- | | |
|------------------------------|-----------------------|
| 1. Mr.Hussein Were | - Member in the Chair |
| 2. Mrs. Gilda Odera | - Member |
| 3. Mr. Peter B. Ondieki, MBS | - Member |
| 4. Mrs. Rosemary K. Gituma | - Member |
| 5. Eng.Weche R.Okubo, OGW | - Member |

IN ATTENDANCE

- | | |
|-------------------|---------------|
| 1. Stanley Miheso | - Secretariat |
| 2. Maureen Namadi | - Secretariat |

PRESENT BY INVITATION

Applicant - Alwahab Enterprise Limited

1. Mbuthia Kinyanjui - Advocate, Mbuthia Kinyanjui & Co Adv.

First Respondent (Procuring Entity) - Northern Water Services Board

1. Mwaniki Gachuba - Advocate, Onyoni Opini & Gachuba Adv.
2. Benedict Kinwaki - Procurement Officer

Second Respondent - Ministry of Water and Irrigation

1. Stella Mwendu - Advocate, S.K Mwendu & Co. Adv.
2. Rose A. O. Nyakwana - Principal State Counsel

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, has received Equalization funds from Government of Kenya for use during financial year 2016-2017 and intends to use part of the proceeds towards Construction of Arda Hagarsu Water pan 40,000 M³ in Mandera North Sub County of Mandera County.

1.2. Project Scope

The works involve but is 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. Invitation to bid

The tender was 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. A total of four bids were received as tabulated here under.

Bid No	Bidder's Name	Address	Tender Price In Kshs
1.	Nurki Construction Company	P.O Box 15 Elwak	37,014,672.00
2.	Alwahab Enterprise Ltd	P.O Box 4570-00100 Nairobi	42,984,781.00
3.	Spring Chase Service Ltd	P.O Box 826-60300 Isiolo	47,118,353.20
4.	Nasirker Construction Limited	P.O Box 897 Garissa	30,007,700.00

1.4. The Evaluation Team

The Accounting Officer of NWSB appointed the evaluation committee members for Tender No NWSB/T/CW/028/20 16 - 2017, Arda Hagarsu

Water Pan on the 30th March 2017 *vide* letter Ref NWSB/RPT/42/VOL 1 (165).

2. TENDER EVALUATION

2.1 Preliminary examination of bids

The Four bidders 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
MR2	Must submit a copy of valid tax compliance certificate
MR3	Must fill the bill of quantities in the format provided
MR4	Must fill the form of tender in the format provided and signed by the authorized person
MR5	Must Submit a tender security of Kes 300,000 Valid 30 days beyond the bid validity i.e 150 days
MR6	Power of attorney <i>proof</i> authorizing the signatory of the tender to commit the tenderer.
MR7	Must be registered with NCA 6 Water works and above

Bidder Nos. 1, 2, 3 and 4 were found to be responsive to the above tabulated mandatory requirements and were hence taken to technical evaluation stage.

2.2 Technical Evaluation

The bidders were subjected to technical evaluation criteria given in tender document with a cut off score of 70% to be considered for financial evaluation. The criteria and score was as follows:-

No.	PARAMETER	MAXIMUM SCORE
1	Relevant Experience	30
	Experience as prime contractor in the construction of at least two project of a similar nature and complexity equivalent to the Works for the last 2 years	
	X number of project 30/2	
2	Equipment	

No.	PARAMETER		MAXIMUM SCORE	
	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 ration 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		7.5	
	30/2 x amount			
	Bank statements (last six months to date of tender)		4	
	Proposed program (Work methodology and schedule)		10	
	Total		100%	

The Bidders scored as follows:

Maximum Score	Bidder			
	01	02	03	04
100%	57%	87%	91%	28%

Bidder 01 and 04 failed the technical assessment while Bidders 02 and 03 met the requisite pass mark of 70% were hence ranked as tabulated below.

2.3 Ranking of Bidders

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

Bidder No.	Bidder's Name	Tender Price In Kshs	Ranking
02	Alwahab Enterprise Ltd	42,984,781.00	1
03	Spring Chase Service Ltd	47,118,353.20	2

2.4 Recommendation

The committee made the following recommendation: That the contract for the Construction of Arda Hagarsu Water Pan be awarded to Alwahab Enterprise Ltd at a cost of Kenya shillings Forty two Million, Nine Hundred and Eighty Four Thousand, Seven Hundred Eighty One (Kshs 42,984,781.00).

PROFESSIONAL OPINION

The Head of Procurement issued a professional opinion pursuant to Section 47 and 84 of the Public Procurement and Asset Disposal Act, 2015 as follows: *The subject procurement is duly budgeted for and included in the Equalization funds procurement plan for the current financial year duly approved by the Accounting Officer. The availability of funds to meet the result an obligation was confirmed by finance manager through approval from the Ministry vide their letter ref. WD/3/3/1399 (5).*

In my professional opinion, I consider that the subject procurement has satisfied the constitutional requirement of Article 227(1) and statutory requirement of the Public Procurement and Asset Disposal Act, 2015.

You may therefore award the tender to Alwahab Enterprise Ltd at the tender sum of Kshs 42,984,781.00, inclusive of VAT as per the Evaluation Committee recommendations.

THE REQUEST FOR REVIEW

The Request for Review was lodged by M/s Alwahab Enterprise Ltd on 2SecondMay, 2017 in the matter of the tender No. NWSB/CW/T/028/2016 - 2017 construction of Arda Hagarsu Water pan 40,000 M³ in Mandera North Sub County.

The Applicant sought the following orders:

- 1. That the Honourable Board do set aside the re-advertisement No NWSB/CW/T/028/2016-2017 for the construction of Arda Hagarsu water pan 40,000 M³ by the Second Respondent.*
- 2. That the Honourable Board directs that the First Respondent herein to honour the letter of notification of award dated 18th April 2017 and to sign the Contract with the Applicant herein forthwith.*
- 3. Cost of the review be awarded to the Applicant.*

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.

APPLICANT'S CASE

The Applicant submitted that the First Respondent (the Procuring Entity) advertised Tender No. NWSB/CW/T/028/2016-2017 for Construction of Arda Hagarsu Water pan on 21st February 2017 with a closing date of 15th March 2017. It submitted further that it was awarded the tender through

letter of notification of award dated 18th April, 2017 and that the contract was to be signed within twenty eight (28) days but not earlier than fourteen (14) days. It also submitted that on 2nd May 2017, it accepted the tender award and stated that it would wait for the signing of the contract on or before the 30th May 2017. The Applicant added that to its dismay the Second Respondent in an advertisement in the *Daily Nation* newspaper on 9th May 2017 invited tenders for construction of Arda Hagarsu Water Pan despite the First Respondent having already finalized the procurement process for the same project.

The Applicant stated that the First Respondent issued the notification of award on 2nd May 2017 indicating specifically that the contract would be signed within 28 days of the date thereof. It stated further that after notification of the award by the First Respondent no appeal was filed by any of the tenderers and that no objection had been raised to date on the First Respondent's decision to award the tender to the Applicant. The Applicant therefore contended that the contract 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 that:-

"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 Applicant submitted that the First Respondent, after taking the Applicant through the procurement process, could not at the tail end of it purport to go silent and fail to execute the contract. The Applicant 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 a contract with the Applicant.

As to whether the First Respondent was an agent of the Second Respondent, the Applicant 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 Applicant submitted that it was unclear under what circumstances the same ministry re-advertised a tender 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 Applicant cited certain 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 Applicant’s submission that it cannot be the National Treasury’s intention to endorse double procurement of goods and services by the same ministry. It submitted further that if indeed that was the National Treasury’s intention then the same pointed toward an unfair and inefficient process designed to deny award to a successful bidder in one tender by engaging in another procuring process which would be a gross violation of the Constitution and public policy. The Applicant also submitted that re-advertisement of the tender could only be done upon cancellation of the tender advertised on 21st February 2017 by the First Respondent.

The Applicant 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**. It was 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 morals standards that no sensible person who had applied his mind to the quest to be decided could have arrived at it"

Arguing that the conduct of the Second Respondent was nothing short of this, the Applicant urged the Board to find that the advertisement and invitation to tender of 9th May 2017 was illegal.

1ST RESPONDENT'S RESPONSE

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

- (a) That the Applicant was awarded the tender 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 purported to stop the procurement proceeding by the First Respondent.

The Procuring Entity submitted that the Second Respondent appointed it as its agent to implement projects funded under the Equalisation Fund including the project in issue and requested it to start the procurement process and award the contracts to successful bidders. It submitted further that it discharged its duty as an agent until the Second Respondent purported to withdraw the agency. It also submitted that as an agent of the Second 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 Second Respondent (Ministry of Water and Irrigation).

The Procuring Entity submitted that in the case of *Debonair Travel Limited v Erastus Gitonga & 2 others* [2015] eKLR Seron 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."

The Procuring Entity submitted that in any event, the Applicant had not faulted the process it conducted except for the delay to sign the contract which delay was caused by the purported midstream withdrawal of the agency by the Second Respondent. The delay was not of its making, having been put in the quandary by the Second Respondent, it was reasonable for the First Respondent to seek counsel on how to wriggle out of the unique situation it found itself in.

The Procuring Entity 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

averred further 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.

In the case the First Respondent cited of **Republic v Public Procurement Administrative Review Board & 2 others Ex-parte Peter Jumah Kuria t/a Scope Designs Systems [2015] eKLR Korir J** was ready to award costs where the Applicant had been engaged in a futile procurement exercise.

The Procuring Entity therefore urged the Board to dismissed with costs the Request for Review as against the First Respondent and be upheld as against the Second Respondent.

2ND RESPONDENT'S RESPONSE

The Second Respondent submitted that the request for review was for the decision contained in the letter of award dated the 18th April, 2017 and which was addressed to the Applicant by the First Respondent in respect of Tender No. NWSB/CW/T/028/2016- 2017. It submitted further that the Procuring Entity in this particular tender was the First Respondent and not the Second Respondent. It also submitted that the Accounting Officer of the First Respondent was therefore the person responsible for the tender.

The Second Respondent averred that although the First Respondent had progressed the procurement process up to notification of award, the Ministry of Water and Irrigation, through the State department of Water Services *vide* letter dated 19th April 2017, advised it to stop the project preparation which included design, tendering and construction of works.

The reason for the advice emanated from the approval by the National Treasury for the implementation of the projects by the State Departments for Irrigation *vide* letter dated 23rd April, 2017. It averred further that the initial invitation to tender was done by the First Respondent under the State Department for Water, which was a separate entity from the State Department for Irrigation. It stated that the two State Departments implemented their mandates independently as each was headed by a different Principal Secretary who managed funds from Treasury as accounting officers. The areas of Water Services and Irrigation were distinct in terms of requirements of technical knowhow to facilitate implementation.

The projects to be covered by each were clearly stated in the letter of 23rd April, 2017 and that the Arda Hagarsu Dam project fell under the State Department for Irrigation. It argued that the State Department for Irrigation did not participate in the tender No. NWSB/CW/T/028/2016-2017 and had not been enjoined in the review as an independent state department but rather the entire Ministry of Water and Irrigation had been enjoined in the review proceedings. It also stated that the First Respondent sought advice from the Public Procurement Regulatory Authority *vide* their letter dated 4th May, 2017 and was given guidance on the matter *vide* letter dated 10th May, 2017 especially on the issues related to termination of the tender.

The Second Respondent contented that the application sought for review of the decision contained in the letter dated 18th April, 2017 of the Northern Water Services Board) (NWSB) to award the tender and added the letter was a notification of award and that there was nothing to review.

The Second Respondent argued that the purported re-advertisement on the 9th May, 2017 *vide* Tender No MWI/SDI/OT/019/2016-2017 by the Ministry

of Water and Irrigation was not a re-advertisement but a fresh Invitation to Tender for which the Applicant was also eligible. The tender was separate and by a different Procuring Entity. It argued further that the Applicant did not bid for the tender advertised by the State Department for Irrigation and has not sought for review of the same. It also argued that the First Respondent was the one to adhere to the provisions of Section 63 of the Act in respect of the tender subject of the request for review.

The Second Respondent stated that the First Respondent was not its agent at all and that it was a parastatal under the State Department of Water, a body corporate capable of suing and being sued. It urged the Board to restrict itself to the Tender No NSWB/CW/T/028/2016-2017 and not to any other tender. The Second Respondent submitted that Section 87(4) of the Act provides that:-

“For greater certainty, a notification under sub section (1) does not form a contract nor reduce the validity period for a tender or tender security”.

The Second Respondent added that Section 135(1) states that:-

“The existence of a contract shall be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract be signed by the accounting officers or an officer authorized in writing by the accounting officers of the procurement entity...”.

The Second Respondent submitted that the First Respondent was the Procuring Entity herein and hence the accounting officer was the one to sign the contract adding that no contract had been signed. It submitted further that it also had Accounting Officers who did not authorize the signing of the

contract owing to the directions by the National Treasury who are the custodians of the Equalization fund. It added that the scenario presented could not allow the initial tenders to proceed since the Applicant risked not being paid.

With regard to the issue of agency, the Second Respondent averred that the Act does not provide for agency between Government Ministries and Parastatals at all. It averred further that the Second Respondent through the State Department for Irrigation had proceeded to invite tenders which the Applicant failed to participate in but instead sought for a Review adding that the Applicant had not been debarred from participating in the tenders advertised on 9th May 2017.

The Second Respondent relied on the case of **EpcO Builders Ltd Vs County Government of Kilifi** where the Court found that issuance of an award does not constitute an enforceable contract and that the overriding interest is for the beneficiaries of the projects.

In view of the foregoing, the Second Respondent humbly prayed that:-

1. The Board deals with the Tender No. NWSB/CW/T/028/2016-2017 Independently from Tender No. MWI/SDI/OT/019/2016-2017 since the procuring entities were different.
2. The Board does not interfere with Tender No. MWI/SDI/OT/019/2016-2017 as to allow the Ministry to provide water to the residents of Mandera County who were in dire need of the same.

APPLICANT'S REPLY

The Applicant, in reply, submitted that the Second Respondent could not separate departments from itself to run away from its responsibilities adding

that all correspondences from the Second Respondent to the First Respondent were forwarded from the Second Respondent as a ministry which is a legal entity. It submitted further that the second advertisement of 9th May 2017 was from the Ministry of Water and Irrigation.

The Applicant argued the letter dated 19th of April, 2017 from the Second Respondent stopping the tendering process was seven days too late since it was received on 25th April 2017 and the letter of award had already been issued on 18th of April. It argued further that from its submissions the First Respondent did not appear to have any problem completing the project as per the instruction or transferring the same to the principal. On the other hand, argued the Applicant even further, the Second Respondent, from its own pleadings knew that there was no other way out, either have the process transferred to it or the contract be executed by the First Respondent and the Second Respondent do their bit of financing.

In conclusion, the Applicant prayed that the board finds in its favour and compels either the First or the Second Respondent to sign the contract and have the same implemented or the First Respondent to sign the contract and the Second Respondent to finance the project.

THE BOARD'S FINDINGS

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

- 1. Whether the Northern Water Service Board was an agent of the Ministry of Water and Irrigation for the purpose of this procurement.*
- 2. Whether Tender No. MWI/SDI/OT/019/2016-2017 of 9th May, 2017 was in respect of the same subject matter as Tender No.*

NWSB/CW/T/028/2016-2017 of 21st February, 2017 thereby rendering the act of the Second Respondent a wasteful exercise.

3. *Whether the Procuring Entity failed to enter into a written contract within the period specified in the notification 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 Northern Water Service Board was an agent of the Ministry of Water and Irrigation for the purpose of this procurement and hence conducted a valid tender process.

The Board notes the following undisputed facts in this request for review:

- a) The Second Respondent vide 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 letter advertised Tender No. NWSB/CW/T/028/2016-2017 for the Construction of Arda Hargasu Water Pan on 21st February, 2017.
- c) Four 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.
- e) The Applicant emerged victorious and was awarded the tender on 18th April 2017 at a tender sum of Kshs 42,984,781.00, inclusive of taxes.
- f) The Applicant accepted the award through its letter to the First Respondent dated 2nd May 2017.

- g) The notification of award stated that the contract would be signed by the parties within 28 days but not earlier than 14 days from the date of the letter of notification.
- h) On 9th May 2017 the Second Respondent advertised for Tender Number MWI/SDI/OT/019/2016-2017 for construction of Arda Hargasu Water Pan, among other dams.
- i) The Second Respondent wrote to the First Respondent on 19th April 2017 instructing the First Respondent to stop the tender process.
- j) The Applicant filed this request for review on 22nd May 2017.

The Board notes that the First Respondent advertised for Tender No. NWSB/CW/T/028/2016-2017 and awarded it to the Applicant, under instructions of the Second 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 the Second Respondent invited tenders for the construction of Arda Hargasu Water Pan, among other dams, all under Tender No. MWI/SDI/OT/019/2016-2017 on 9th May 2017.

It is clear to the Board that, through the letter of 1st February, 2017 authored by Principal Secretary Fred H.K. Sergor, the Second Respondent authorised the First Respondent to undertake the procurement process and manage the contracts while the Second Respondent's role was to facilitate payments. The Second Respondent admitted in its response to the request for review that it authorized the First Respondent to start the procurement process. More than two months after it had issued instructions to the First Respondent to start procurement proceedings the Second Respondent notified that the project had been removed from the First Respondent and re-directed to the State Department for Irrigation pursuant to a National Treasury approval on 5th April 2017.

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 principal, being the Second Respondent. Arising from the foregoing, the Board is satisfied that the First Respondent is 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 is an agent of the Second Respondent in the tender for Construction of Arda Hargasu Water Pan and is therefore the Procuring Entity in the said tender.

The Board, having determined that the First Respondent is the Procuring Entity and an agent of the Second Respondent in Tender No NWSB/CW/T/028/2016-2017 for the Construction of Arda Hagarsu Water Pan, notes that withdrawal of the agency is 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 the letter dated 8th June, 2017 to Mrs Zeinab A. Hussein, his counterpart in the State Department for Irrigation in the same ministry. 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 Board also notes that the First Respondent as the Procuring Entity is the only one who has the authority under the Act to terminate the procurement proceedings. Even then such termination can only be done in accordance with the provisions of Section 63 of the Act. There is nothing in these proceedings to show that there has been an attempt to terminate the tender subject of this request for review in the manner prescribed in the Act.

As to whether Tender No. MWI/SDI/OT/019/2016-2017 of 9th May, 2017 was in respect of the same subject matter as Tender No. NWSB/CW/T/028/2016-2017 of 21st February, 2017 thereby rendering the act of the Second Respondent a wasteful exercise

The Board notes that the advertisement of 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 Arda Hargasu Water Pan 40,000 m³ in Mandera North 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 -

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/028/2016-2017 of 21st February 2017 and Tender Number MWI/SDI/OT/019/2016-2017 of 9th May, 2017 - contained the item for construction of *Arda Hargasu Water Pan in Mandera North Sub-county of Mandera County* a fact not disputed by the First and Second Respondent.

The Board notes that the tender subject of the Request for Review appears in the two invitations to tenderers, numbers NWSB/CW/T/028/2016-2017 of 21st February 2017 by the First Respondent and MWI/SDI/OT/019/2016-2017 of 9th May, 2017 by the Second Respondent. It is therefore the finding of the Board that the Second Respondent was engaged in the self-same procurement proceedings as the First Respondent which is a state corporation in the Second Respond's ministry. The Board finds the

behaviour of the Second Respondent to be strange in that it commenced procurement proceedings in a tender that was alive and without even bothering to find out if the tender had been terminated in the first place. This kind of action by the Second Respondent risks exposing procuring entities to costs at the tax payers' expense, which costs would otherwise be avoided. The Board therefore proceeds to allow this ground of review.

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

The Board notes that the tender No. NWSB/CW/T/028/2016-2017 was advertised by the First Respondent, evaluated and an award made, a fact not disputed by all the parties including the Second Respondent. 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 tender vide letter dated 18th April, 2017 and the Applicant accepted the award on 2nd May 2017 in accordance with 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 award and before the expiry of fourteen days after notification, there was 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 notification of award expired on or about 31st May 2017 with not written contract having been entered into in respect of the tender.

Taking the above into consideration and the determination of the Board elsewhere in this decision that the First Respondent was an agent of the Second Respond, the Board finds that the Procuring Entity violated the provisions of Section 135 (3) of the Act by failing to enter into a written

contract with the Applicant within the period of 28 days but not before fourteen days had elapsed following the giving of the notification of award. This ground of the request for review therefore succeeds and is allowed.

FINAL ORDERS

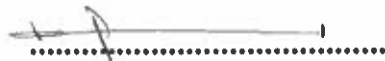
In view of all the above findings and in the exercise of the powers conferred upon it by the Provisions of Section 173 of the Public Procurement and Asset Disposal Act, the Board makes the following orders on this Request for Review.

- a) The Request for Review in respect of tender No. NWSB/CW/T/028/2016-2017 for construction of Arda Hargasu water pan 40,000 m³ in Mandera North Sub-county 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 Arda Hargasu water pan in Mandera County.
- c) The 1st Respondent is hereby directed to complete the procurement process including the signing of the contract with the Applicant within fourteen (14) days from the date of this decision.
- d) For greater certainty the Ministry of Water & Irrigation, through the State Department of Irrigation, shall finance the project.
- e) To give effect to the orders in this request for review, the Ministry of Water & Irrigation is directed to re-organize its administrative

functions in order to comply with the National Treasury's approval contained in the latter's letter dated 5th April, 2017.

f) Since all parties still have an opportunity to work together, each party shall bear its own costs.

Dated at Nairobi on this 12th day of June, 2017.



CHAIRMAN
PPARB



SECRETARY
PPARB

