

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION No.61/2017 OF 30TH JUNE, 2017

BETWEEN

MASAAL GENERAL AGENCIES LIMITED.....APPLICANT

AND

NORTHERN WATER

SERVICES BOARD1ST RESPONDENT

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

Review against the decision of the Northern Water Services Board in the Matter of Tender No. NWSB/CW/029/2016-2017 for the Construction of Sarai Water Pan 40,000 m³ in Laisamis Sub-County of Marsabit County

BOARD MEMBERS PRESENT

- | | |
|------------------------------|-----------------------|
| 1. Hussein Were | - Member in the Chair |
| 2. Mrs. Gilda Odera | - Member |
| 3. Mr. Peter B. Ondieki, MBS | - Member |
| 4. Mr. Paul Ngotho | - Member |
| 5. Eng. Weche R. Okubo, OGW | - Member |
| 6. Mr. Nelson Orgut | - Member |

IN ATTENDANCE

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

PRESENT BY INVITATION

Applicant – Masaal General Agencies Limited

1. Mbuthia Kinyanjui - Advocate, Mbuthia Kinyajui Advocates

Procuring Entity – Northern Water Services Board

1. Mwaniki Gachuba - Advocate, Onyoni Opini & Gachuba Adv.
2. A. N. Osman - Chief Executive Officer, NWSB
3. Benedict Kimwaki - Procurement Officer, NWSB

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:

1. INTRODUCTION

1.1. General

Northern Water Services Board (hereinafter referred to as "NWSB" or the "1st Respondent" or "the Procuring Entity"), 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 Sarai Mbagas Water Pan 40,000M³ in Laisamis Sub-County of Marsabit County.

1.2. Project Scope

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

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

1.3. Invitation to bid

The tenders were advertised in the *Daily Nation* on 21st February 2017 and on the website www.nwsb.go.ke, and opened on 16th March 2017 in the presence of NWSB officials and bidders representatives.

1.4. Tender Opening

The tenders were opened on the 16th March 2017 at 11.30 am in the presence of NWSB officials and bidders representatives.

A total of 22 bids were received as tabulated here under.

Bid No	Bidder's Name	Tender Price In Kshs
1.	Scan Construction Ltd	26,774,679.00
2.	Bitat Co.Ltd	24,326,742.80
3.	Famo Contractors Co. Ltd	24,792,726.00
4.	Equi Continental Construction Ltd	24,918,540.00
5.	Baslum Hardware Ltd	24,667,191.00
6.	Qmar Salim Baslum Co. Ltd	24,426,120.00
7.	Falam Construction .Ltd	25,045,096.00
8.	IBSE Construction Co. Ltd	22,399,286.80
9.	Anzal Engineering Ltd	24,280,656,.00
10.	Fanke Agencies .Ltd	55,562,283.20

Bid No	Bidder's Name	Tender Price In Kshs
11.	Masaal General Agencies Ltd	22,166,672.00
12.	Sunspikes Construction Ltd	23,018,680.20
13.	Tawakal Construction Co. Ltd	28,493,895.20
14.	Rayfa Construction Company Ltd	22,871,587.00
15.	Pioneer Engineering & Construction Co. Ltd	25,829,998.40
16.	Muani Contractors Co Ltd	25,594,495.20
17.	Northern Services Co. Ltd	25,630,816.00
18.	Nasmi Enterprises Ltd	25,377,668.00
19.	Fatmin Enterprises Ltd	25,508,110.00
20.	Northern Liberty Builders Co. Ltd	28,455,450.00
21.	Saku Investment Ltd	22,544,542.00
22.	Gummi Contractors Ltd	25,520,232.00

2. TENDER EVALUATION

The Evaluation Committee evaluated the tender through three stages of preliminary evaluation, technical evaluation and financial evaluation.

2.1 Preliminary examination of bids

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

No.	Requirement
MR 1	Must submit a copy of certificate of registration/Incorporation
MR 2	Must submit a copy of valid tax compliance certificate
MR 3	Must fill the bill of quantities in the format provided
MR 4	Must fill the form of tender in the format provided and signed by the authorized person
MR 5	Must submit tender security of KES 300,000 valid 30 days beyond the bid validity period i.e. 150 days.
MR 6	Power of attorney proof authorizing the signatory of the tender to commit the tenderer.
MR 7	Must be registered with NCA 6 Water works and above

Results of Preliminary Examination

Seven bidders were found to be non-responsive and did not proceed to the next stage of evaluation. The non-responsive bidders and the reasons for disqualified were as follows.

Bidder No.	Reasons for Disqualification
07	Did not provide power of attorney
09	Did not provide power of attorney
12	Did not provide power of attorney
13	Did not provide power of attorney
16	Did not provide NCA 6 Water Works
21	Did not provide any mandatory requirements
22	<ul style="list-style-type: none">- Did not provide power of attorney- Bid bond validity expiry date was 16 April, 2017 instead of 13 August, 2017

Fifteen bidders were found to be responsive and their bids taken through technical evaluation stage.

Technical Evaluation

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

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

The Bidders scored as follows:

MAXIMUM SCORE	BIDDER NUMBER & SCORE															
	01	02	03	04	05	06	08	10	11	14	15	17	18	19	20	
100%	69%	88%	81%	73%	92%	83%	75%	90%	81%	88%	78%	81%	65%	90%	89%	

Results of Technical Evaluation

Of the 15 bidders subjected to technical evaluation, two failed because they did not make a mark of 70% and above. These were Bidders 01 and 18. Thirteen bidders met the requisite pass mark of 70% hence were ranked at financial evaluation stage.

2.2 Financial Evaluation(Ranking of Bidders)

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

Bid No	Bidder's Name	Tender Price In Kshs	Ranking
2.	Bitat Co. Ltd	24,326,742.80	4
3.	Famo Contractors Co. Ltd	24,792,726.00	7
4.	Equi Continental Construction Ltd	24,918,540.00	8
5.	Baslum Hardware Ltd	24,667,191.00	6
6.	Qmar Salim Baslum Co. Ltd	24,426,120.00	5
8.	IBSE Construction Co. Ltd	22,399,286.80	2
10.	Fanke Agencies .Ltd	55,562,283.20	13
11.	Masaal General Agencies Ltd	22,166,672.00	1
14.	Rayfa Construction Company Ltd	22,871,587.00	3
15.	Pioneer Engineering & Construction Co. Ltd	25,829,998.40	11
17.	Northern Services Co. Ltd	25,630,816.00	10
19.	Fatmin Enterprises Ltd	25,508,110.00	9
20.	Northern Liberty Builders Co. Ltd	28,455,450.00	12

2.3 Recommendation

The evaluation committee recommended that the contract for the Construction of Sarai Mbagas Water Pan in Laisamis be awarded to Masaal General Agencies Ltd at a cost of Kenya Shillings Twenty Two Million, One Hundred and Sixty Six Thousand, Six Hundred Seventy Two (Kshs 22,166,672.00).

2.4 Professional Opinion

The Head of Procurement issued a professional opinion dated 13th April, 2017 to the Chief Executive Officer pursuant to Section 47 and 84 of the Public Procurement and Asset Disposal Act, 2015 in which he stated that the subject procurement had satisfied the constitutional requirement of Article 227(1) and statutory requirement of the Public Procurement and Asset Disposal Act, 2015 (hereinafter "the Act"). He advised that the Chief Executive Officer may award the tender to **Masaal General Agencies Ltd** at the tender sum of **Kshs 22,166,672.00 inclusive of VAT** as per the Evaluation Committee's recommendation.

2.5 Advertisement for Tender No. MWI/SDI/OT/019/2016-2017

The Second Respondent wrote to the First Respondent on 19th April 2017 instructing the First Respondent to stop the tender processes. On 9th May 2017, the Second Respondent advertised for Tender Number MWI/SDI/OT/019/2016-2017 for Construction of Sarai Mbagas Water Pan in Laisamis, among other dams. Owing to the advertisement by the Second Respondent the contract for the subject tender was not signed leading the Applicant to file this request for review.

THE REQUEST FOR REVIEW

The Request for Review was lodged by M/s Masaal General Agencies Limited (hereinafter "the Applicant") on 30th June, 2017 in the matter of Tender Number NWSB/CW/T/029/2016-2017 for the Construction of Sarai Mbagas Water Pan 40,000 m³ in Laisamis Sub-County of Marsabit County.

The Applicant sought for the following orders from the Board:-

- 1. That the Honourable Board do set aside any advertisement or re-advertisement of the tender by the 1st and 2nd Respondents.*
- 2. That the Honourable Board do set aside any subsequent award of tender for the Construction of Sarai Water Pan by the 2nd Respondent.*
- 3. That the letter of notification of award dated 18th April 2017 be honoured and that the 1st respondent be directed to sign the Contract.*

The Applicant was represented by Mr. Mbuthia Kinyanjui, Advocate from the firm of Mbuthia Kinyanjui & Co. Advocates while the 1st Respondent was represented by Mr. Mwaniki Gachuba, Advocate from the firm of Onyoni Opini & Gachuba Advocates. The 2nd Respondent was not represented either in person or by counsel although it had been served with a hearing notice.

The Procuring Entity, in its written response dated 4th July 2017 and filed on 5th July 2017 admitted the contents of the Request for Review save for that which fell within the purview of the 2nd Respondent and was not opposed to the prayers thereof except for the prayer for costs on the ground that as an agent of the 2nd Respondent it was not liable.

APPLICANT'S CASE

At the hearing, Counsel for the Applicant Mr. Mbuthia Kinyanjui sought to address the Board, from the outset, on what he termed as a new development in the matter. Mr. Mbuthia informed the Board that the 1st Respondent had signed the contract with the Applicant in the tender the subject matter of the review and hence a key ground of the Request for Review had been dispensed with. Arising from this new development the Applicant's counsel sought to address the Board on grounds for the two pending prayers, namely, the advertisement for the same tender by the 2nd Respondent and the cost of review.

On the issue of the advertisement, the Applicant averred that the Second Respondent advertised for Tender Number MWI/SDI/OT/019/2016-2017 for Construction of Sarai Mbagas Water Pan in Laisamis, among other dams on 9th May 2017. It argued that the advertisement by the Second Respondent was in respect of the same tender as the tender subject of this Request for Review and that it amounted to duplication. The Applicant referred to the Board's decisions in similar matters in **PPARB Review No. 46/2017** and **PPARB Review No. 55/2017** and urged the Board to cancel or nullify the advertisement by the Second Respondent together with any consequent actions taken by the Second Respondent as result of that particular advertisement.

On the issue of costs, the Applicant submitted that this was the third time the Board was being moved over tenders that were advertised by the Second Respondent after letters of award had been given by the 1st Respondent to the respective Applicants. It submitted further that after the first and the second instances when the Board was moved, the 1st Respondent ought to have acted

in line with the orders given in Review No. 46/2017 - Alwahab Enterprise Vs. Northern Water Services Board and Ministry of Water & Irrigation and in Review No. 55/2017 Earth Construction Limited and two others Vs. Northern Water Services Board and Ministry of Water & Irrigation and proceeded to sign the contract. Instead, the Applicant went on to submit, the 1st Respondent waited until this application was filed for them to act. In the cited cases, according to the Applicant, the Board found in similar circumstances that the 1st Respondent had violated the provisions of the Public Procurement and Asset Disposal Act. The Applicant urged the Board to award costs in its favour.

THE FIRST RESPONDENT'S RESPONSE

Mr. Gachuba for the First Respondent (the Procuring Entity) submitted that the First Respondent had since signed the contract with the Applicant and requested the Board to mark the issue as settled.

On costs, the First Respondent averred that since it had now established a contractual relationship with the Applicant, it would only be fair that the relationship goes on smoothly and prayed that the Board be lenient with the 1st Respondent and spare it the costs of the review. It further averred that by signing the contract it had shown goodwill and respect to the Board and did not wish to waste the Board's time by engaging in a lengthy hearing adding that it had duly noted the sentiments of the Board in previous similar matters. The First Respondent went on to aver that if the Board was inclined to award costs then the same should be visited upon the second Respondent who it claimed had orchestrated the current state of affairs. It also urged the Board to secure the position of the first Respondent as an agent of the second

Respondent by directing the second Respondent to pay for the contract that had already been signed, in line with the agency agreement or the letter that was created and, further, nullify any other contract that may have been awarded by the second Respondent.

During the hearing Mr. Gachuba made an application in respect of **Review PPARB No. 55/2017 - Earth Construction Limited and two others Vs. Northern Water Services Board and Ministry of Water & Irrigation**. He requested the Board to review its orders in the said decision and exempt the First Respondent from paying costs. Mr. Gachuba stated that the First Respondent was moving the Board under Fair Administrative Actions Act, 2015 which empowers the Board to review its orders.

Mr. Gachuba argued in support of his application that the Board's orders in **Review PPARB No. 46/2017 - Alwahab Enterprise vs. Northern Water Services Board and Ministry of Water & Irrigation** were specific to that review and that the 1st Respondent had since complied with the orders and signed the contract. He argued further that the first Respondent had demonstrated goodwill to this Board and had, not only signed the contract in **Review PPARB No. 46/2017**, but had also signed three other contracts as directed in **Review PPARB No. 55/2017**. Mr. Gachuba also argued that since the First Respondent was already in contractual relationships with the Applicants and further that since the first Respondent was an agent of the second Respondent, it ought to be spared the burden of costs adding that the first Respondent had no budget of its own in these tenders. He therefore urged the Board to vary its order on costs in **Review PPARB No. 55/2017** believing that this is a board whose decisions are tampered with mercy.

In the second application Mr. Gachuba prayed for directions of the Board regarding eight or so remaining tenders that were part of the series of tenders that included the tender subject of this review. The tenders in question were the following:

1. NWSB/T/CW/22/2016-2017 - Abagaile Water Pan, Dadaab
2. NWSB/T/CW/23/2016-2017 - Dela Water Pan, Eldas
3. NWSB/T/CW/24/2016-2017 - Madahiliba Water Pan, WajirSth
4. NWSB/T/CW/25/2016-2017 - Tito Water Pan, Eldas
5. NWSB/T/CW/30/2016-2017 - Bargasi Kargi Water Pan, Laisamis
6. NWSB/T/CW/31/2016-2017 - Huri Hill Water Pan, North Horr
7. NWSB/T/CW/32/2016-2017 - Bothota Water Pan, Moyale
8. NWSB/T/CW/33/2016-2017 - Ele Borr Water Pan, Moyale
9. NWSB/T/CW/34/2016-2017 - Godoma Water Pan, Moyale

Mr. Gachuba submitted that the tenders were awarded to successful bidders but the contracts had not been signed because of the turn of events where the second Respondent purported to withdraw the agency of the First Respondent. Counsel submitted further that the Board had determined in **Review PPARB No. 46/2017** and **Review PPARB No. 55/2017** that the First Respondent was an agent of the second Respondent. The First Respondent therefore found itself in an awkward position given that the 2nd Respondent, being the principal, had purported to withdraw that agency at some point. He argued that what the First Respondent was seeking was the protection of the Board to sign the contracts without being exposed in case the second Respondent accused it of signing the contract without its authority. He added that the First Respondent was moving the Board in a pre-emptive manner to make some general orders in the instant review in respect of the remaining

tenders to avoid the costs that come with the filing of separate Requests for Review.

The First Respondent, in conclusion, urged the Board to dismiss with costs the Request for Review as against it and grant its prayers.

SECOND RESPONDENT'S RESPONSE

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

THE APPLICANT'S REPLY

Mr. Mbuthia, in reply on behalf of the Applicant, submitted that the 1st Respondent had within its power the ability to avoid costs of review, more so after the outcome of PPARB No. 46/2017. Unfortunately, its failure to act and to cushion itself from such costs forced it to move this tribunal in application number PPARB No. 55/2017 and that found itself in the same position in the present matter, submitted the Applicant. It also submitted that the First Respondent's actions were after the events and that it would only be fair that the First Respondent be condemned to pay costs in both PPARB No. 55/2017 and the present application.

While agreeing that the Fair Administrative Action Act provides for the Board to review its own orders, Mr. Mbuthia at the same time contended that an application for the review of the orders in review PPARB No. 55/2017 ought to have been made in that particular review and not the in current one. He contended further that although the decision in Review PPARB No. 55/2017 may have an influence on the present Request for Review, the two were

different applications and added that the right forum was to review in their respective case files. He also contended that delay defeats equity, arguing that whatever Counsel for the first Respondent was seeking would be an equitable remedy. He added that had the First Respondent moved when it was supposed to move, it would not have been subjected to costs and that the remedy they are seeking was therefore not available to them at this particular stage. The Applicant opposed the application for review of the orders in PPARB No. 55/2017 and prayed that the same be upheld and the First Respondent be condemned to pay costs in both matters.

THE BOARD'S FINDINGS

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

1. *Whether the 1st Respondent failed to enter into a written contract within the period specified in the notification of award contrary to the provisions of Section 135 (3) of the Act.*
2. *Whether Tender No. MWI/SDI/OT/019/2016-2017 of 9th May, 2017 was in respect of the same procurement proceedings as Tenders No. NWSB/CW/T/029/2016-2017 dated 21st February, 2017 and hence duplication.*
3. *Whether the First Respondent is entitled to a review of the Board's orders in PPARB No. 55/2017 with regard to costs and to its prayers on uncompleted tender processes.*

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

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

The Board takes cognisance of the Applicant's averment that it signed the contract with the 1st Respondent after the Applicant moved the Board in the subject tender. The Board also takes cognisance of the 1st Respondent's averment that it has indeed signed the contract in respect of Tender Number NWSB/CW/T/029/2016-2017 for the Construction of Sarai Water Pan 40,000 m³ in Laisamis Sub-county of Marsabit County.

The Board finds that the Procuring Entity and the Applicant, having already entered into a signed contract, this ground and the prayer sought under it are now spent. Consequently, the Board will not pronounce itself on this issue.

2. **As to whether Tender No. MWI/SDI/OT/019/2016-2017 of 9th May, 2017 was in respect of the same procurement proceedings as Tender No. NWSB/CW/T/029/2016-2017 dated 21st February, 2017 hence duplication**

The Board has examined all the documents placed before it and has heard the parties' submissions and finds that the following facts are not in dispute:

- a) The Second Respondent *vide* a letter dated 1st February, 2017 instructed the First Respondent to start the procurement process and award the contracts to successful bidders for the construction of water dams.
- b) The First Respondent, acting on the Second Respondent's instructions advertised Tender Number NWSB/CW/T/029/2016-2017 for the Construction of Sarai Mbagas Water Pan in Laisamis Sub-county of Marsabit County.

- c) Tenders were received and opened by the First Respondent on 16th March 2017.
- d) The tenders which were received were evaluated through three stages of preliminary, technical and financial evaluation.
- e) The Applicant emerged victorious and was awarded the tender on 18th April 2017 at a tender sum of Kshs 22,166,672.00.
- f) The notification of award stated that the contract was to be signed by the parties within 28 days but not earlier than 14 days from the date of notification.
- g) On 9th May 2017, the Second Respondent advertised for Tender Number MWI/SDI/OT/019/2016-2017 for construction of Sarai Mbagas Water Pan, among other dams.
- h) The First Respondent instructed by the Second Respondent *vide* the letter dated 19th April 2017 to stop the tender processes.
- i) The Applicant filed this request for review on 30th June 2017.

The Board observes that it has had occasion in the past to handle similar matters arising from the same series of tenders involving the same Respondents. The Board, in Review PPARB No. 46/2017 - Alwahab Enterprise vs. Northern Water Services Board and Ministry of Water & Irrigation and in Review PPARB No. 55/2017 - Earth Construction Limited and two others Vs. Northern Water Services Board and Ministry of Water & Irrigation, held that:

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

which agency was not revoked by the Second Respondent, being the principal. Arising from the foregoing, the Board is satisfied that the First Respondent was acting as an agent of the Second Respondent for purposes of procurement proceedings.... The Board finds and holds that the First Respondent was an agent of the Second Respondent in the tender"

The Board found in the cited reviews that the 1st Respondent was an agent of the 2nd Respondent. The Board observes that the instant Request for Review bears similar hallmarks in all respects like in reviews PPARB No. 46/2017 and PPARB No. 55/2017. The Board therefore, in the instant Request for Review, returns a similar finding, namely, that the First Respondent is an agent of the 2nd Respondent in the procurement process for Tender Number NWSB/CW/T/029/2016-2017 for the Construction of Sarai Mbagas Water Pan 40,000 m³ in Laisamis Sub-County of Marsabit County.

Having determined that the First Respondent is an agent of the 2nd Respondent in the tender the subject matter of this Request for Review, the Board now turns to establish if there is any nexus between Tender No. NWSB/CW/T/029/2016-2017 advertised on 21st February, 2017 by the First Respondent and Tender No. MWI/SDI/OT/019/2016-2017 advertised by the Second Respondent on 9th May, 2017. The tender of 21st February, 2017 reads 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 -

Marsabit -

- *'NWSB/T/CW/029/2016-2017 – Construction of Sarai Water Pan 40,000 m³ in Laisamis 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 –

Marsabit County – Sarai Water Pan

Tana River County

The scope of the works for each structure includes, 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/029/2016-2017 of 21st February 2017 and Tender Number MWI/SDI/OT/019/2016-2017 of 9th May, 2017 - contained the items for Construction of Sarai Water Pan in Moyale Sub-county of Marsabit County.

The Board notes that the tender subject of this Request for Review appears in both advertisements, the one of 21st February 2017 by the First Respondent and the one of 9th May, 2017 by the Second Respondent. It is, accordingly, the finding of the Board that the tender subject of this Request for Review is a common denominator in the two advertisements. The Board finds that the Second Respondent, after authorising the First Respondent to undertake tender proceedings in respect of the tender embarked on the same venture as the First Respondent. The Board finds that the action of the second Respondent was repetitive and wasteful of the resources of the Kenyan taxpayer. The Board therefore holds that the Second Respondent engaged in procurement proceedings for a tender that was still alive and will therefore allow this ground of review.

3. As to whether First Respondent is entitled to a review of the Board's orders in PPARB No. 55/2017 with regard to costs and to its prayers on the uncompleted tender processes

The Board observes that Counsel for the First Respondent while submitting on the response to the issues raised in the instant Request for Review introduced two new prayers. In the first prayer, Mr. Gachuba requested the Board to review its orders in Review PPARB No. 55/2017 - Earth Construction Limited and two others Vs. Northern Water Services Board and Ministry of Water & Irrigation and exempt the First Respondent from

paying costs to the Applicant. Counsel for the First Respondent stated that he was moving the Board under the Fair Administrative Actions Act, 2015 which empowers the Board to review its orders. He argued that the First Respondent had complied with the orders of the Board and not only signed the contract in Review Application No. PPARB No. 46/2017, but had also signed three other contracts as directed in Review PPARB No. 55/2017 thereby demonstrating goodwill to this Board. Mr. Gachuba also argued that since the First Respondent was an agent of the 2nd Respondent, it ought to be spared the burden of costs.

In the second prayer Mr. Gachuba asked for directions of the Board regarding eight or so remaining tenders that were part of the series of tenders that included the tender the subject matter of this review. He stated that the tenders had been awarded but the contracts were not signed because the second Respondent had purported to withdraw the agency of the First Respondent. Mr. Gachuba's further argued that what the First Respondent was seeking was the protection of the Board by way of general orders to sign the contracts without being exposed in case the second Respondent accused it of signing the contracts without authority.

Mr. Mbutia advocate for the Applicant objected to the request by the First Respondent and submitted that the First Respondent's failure to act and to cushion itself from such costs after the outcome of PPARB No. 46/2017 forced it to move this tribunal in matter PPARB No. 55/2017 and that it had found itself in the same position in the present matter.

The Board has heard the arguments by the parties for and against the prayers sought by the Interested Party and finds as follows:

The Board issued orders in **Review PPARB No. 55/2017 - Earth Construction Limited and two others vs. Northern Water Services Board and Ministry of Water & Irrigation** on 10th July 2017. The Board observes that there has been no challenge to its decision by way of appeal or judicial review in the High Court. The Board further observes that the instant Request for Review **PPARB No. 61/2017 – Masaal General Agencies –vs- Northern Water Services Board and Ministry of Water & Irrigation** has only one Applicant being Masaal General Agencies. The grounds of review and the responses filed in opposition thereto did not contain prayers for the Board to review its decision in **Review PPARB No. 55/2017** nor request for orders on tenders which are not part of this review.

The Board has severally held that parties are bound by their pleadings. It is the observation of the Board that the Interested Party's pleadings in the instant Review do not contain the prayers sought which prayers, if granted, will have far reaching implications including to the parties that are not before the Board. The Board finds that the First Respondent's prayers as stated cannot be granted since they relate to different tenders awarded to firms which are not parties to this Request for Review.

COSTS

The law is that a successful party in any suit ought to be awarded costs. The Board does not wish to depart from that norm in this application. It is the view of the Board that the Request for Review filed by the Applicants on 30th June 2017 has merit. The Board also notes that the matter before it is the third similar matter involving the same Respondents and arising from the same tender advertisement. In the instant Request for Review, the Board however

takes into account the step taken by the First Respondent to resolve the dispute by signing the contract and will therefore exempt it from costs of the review. The Second Respondent will however pay costs to the Applicant which are assessed as follows:-

i)	Filing fees	Kshs 100,000.00
ii)	Legal fee	Kshs 150,000.00
	Total	Kshs 250,000.00

The Second Respondent shall therefore pay to the Applicant total costs of Kshs 250, 000.00 for the review.

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/029/2016-2017 for Construction of Sarai MbagasWater Pan in Laisamis Sub-county of Marsabit 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 Sarai MbagasWater Pan in Laisamis Sub-county of Marsabit County and any contract signed pursuant to the said advertisement be and is hereby cancelled.**

c) The First Respondent is hereby directed to furnish the Board with a copy of the signed contract for the subject tender within fourteen (14) days from the date of this decision.

d) The Second Respondent shall pay costs of Kshs. 250,000 to the Applicant and shall furnish proof of payment of the said costs to the Board within fourteen days from the date of this decision.

Dated at Nairobi on this 14th day of July, 2017.



CHAIRMAN
PPARB



SECRETARY
PPARB