

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 2 OF 2018 DATED 3<sup>RD</sup> JANUARY, 2018**

**BETWEEN**

**MAALIN TRADING COMPANY LIMITED .....APPLICANT**

**AND**

**MINISTRY OF WATER & IRRIGATION .....PROCURING ENTITY**

Review against the decision of the Ministry of Water & Irrigation in the matter of Tender No. MWI/SDI/ONT/002/2017-2018 for Construction of Water Pans/Small Dams.

**BOARD MEMBERS PRESENT**

- |                            |          |
|----------------------------|----------|
| 1. Paul Gicheru            | - Chair  |
| 2. Mrs. Rosemary Gituma    | - Member |
| 3. Paul Ngotho             | - Member |
| 4. Nelson Orgut            | - Member |
| 5. Mrs. Gilda Odera        | - Member |
| 6. Hussein Were            | - Member |
| 7. Mrs. Josephine Mong'are | - Member |

### **IN ATTENDANCE**

1. Mr. Philip Okumu - Sitting in for the Secretary
2. Ms. Maryanne Karanja - Secretariat (taking the proceedings)

### **PRESENT BY INVITATION**

#### **APPLICANT- MAALIN TRADING COMPANY LIMITED**

1. Mbuthia Kinyanjui - Advocate, Mbuthia Kinyanjui & Co.
2. Mohamed Hassan - Director

#### **PROCURING ENTITY- MINISTRY OF WATER & IRRIGATION**

1. Rose A. Nyakwana - SPSC
2. Peter I. Kenyatta - CSCMO
3. James Yatich - Director
4. Gitonga Mbijiwe - PLRO
5. Nicholas Kitya - Chief Economist

### **INTERESTED PARTIES**

1. Ruth W. Mugwe - Company Rep.; Raken Limited
2. Ronald Okeyo - Director; BPM Solutions Ltd
3. Ahmed I. Ogle - Advocate; Ogle Sheikh Shariff Advocates

### **BOARD'S DECISION**

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

## **BACKGROUND OF AWARD**

### **Introduction**

### **OBJECTIVE OF THE PROJECT**

To carry out construction works for water pans/ small dams under national water harvesting and ground water exploitation programme. The works will include mobilization, site clearance, excavations and laying of pipework, backfilling and commissioning.

### **TENDERING PROCESS**

Bids for construction works for water pans/ small dams under national water harvesting and ground water exploitation programme were invited through Government Supplier Portal on 29<sup>th</sup> August, 2017 and the *Daily Nation* and *Standard* newspapers on 29<sup>th</sup> August, 2017 and also in the Ministry's website: [www.water.go.ke](http://www.water.go.ke) in accordance with section 96 (1, 2 and 3) of the PPADA 2015.

The tenderers were advised to deposit their bids at the tender box on or before 11.00 am on 12<sup>th</sup> September, 2017.

The bids were opened immediately thereafter in the 6<sup>th</sup> floor Board Room, Maji House, Nairobi. The tender documents were opened, read out and numbered in order of opening. One thousand two hundred firms responded.

The evaluation was carried out between 15<sup>th</sup> October, 2016 and 29<sup>th</sup> October, 2016. The committee agreed that the bid documents should be sorted and evaluated per constituency

Evaluation was carried out in three stages namely: preliminary, technical and financial stage.

**i. Preliminary stage**

The preliminary evaluation was carried out to verify whether the tenderers attached the following requirements: Certificate of Incorporation, duly filled Tender Security form, Form of Tender duly filled and signed, valid NCA Certificate, valid Tax Compliance Certificate, duly filled BoQ's, Valid AGPO Certificate or Bid Bond and Power of Attorney.

**ii. Technical stage**

At this stage bids that had passed the preliminary stage were evaluated against the technical requirements as indicated in the tender documents. These included;

- Experience of the contractor in similar nature and volume in the last five years including.
- Qualification of Contractor's key personnel.
- Programme of works (methods and work schedule).
- List and evidence of available essential equipment proposed for use in the project.
- Liquid assets and/or credit line or commitment by a bank to lend the contractor on entering into a contract with Ministry of Water and Irrigation state department of Irrigation.

**iii. Financial stage**

In this stage price for the bids that had passed the technical stage were compared and the lowest responsive bidder recommended for award.

## NOTES

- a. In this tender eighty seven (87) seven sites/constituencies had been identified across eighteen (18) counties. Each constituency was evaluated separately.
- b. This was an open tender hence all interested bidders were invited to participate.
- c. The committee however agreed that any bidder registered under the national treasury under the disadvantaged group should be given special treatment in regards to submission of bid bond, as long as the bidder had attached a valid AGPO registration certificate and filled the bid securing declaration form as required by section 61(5) of the PPADA (2015).

## SUMMARY OF RECOMMENDATIONS OF AWARD (WATER PANS/SMALL DAMS)-2016-2017

COUNTY	CONSTITUENCY	PROJECT SITE	RECOMMENDED BIDDER	TENDER PRICE	CATEGORY
Laikipia	Laikipia East	Mirera Water Pan	NYONJORO EAST AFRICA LTD	19,050,897.80	WOMEN
Laikipia	Laikipia West	Dimcon	COFARD CONTRACTORS (K) LTD	17,983,229.00	YOUTH
Laikipia	Laikipia West	Ndururumo	VISROM COMPANY LIMITED	19,887,780.00	WOMEN
Laikipia	Laikipia North	Mutirithia water pan	LAMA ENGINEERING CO. LTD	18,243,026.00	WOMEN
Samburu	Samburu North	Lesepe Water Dam	CREATIVE INSIGHTS HOLDINGS LTD	19,790,963.50	YOUTH
Samburu	Samburu West	Mugur Sub surface dam	LINSRING SUPPLIES AND MERCHANDISE	20,992,048.00	WOMEN
Samburu	Samburu East	Londungokwe Water Pan	GOLDENWING HOLDINGS EA LTD	19,764,148.25	WOMEN
Marsabit	Laisamis	Dadach Manchure	DIDOWS TRADING COMPANY LTD	22,062,826.50	YOUTH
Marsabit	Moyale	Dabel -Golbo	DANBLAQ COMPANY LIMITED	19,489,019.00	WOMEN

COUNTY	CONSTITUENCY	PROJECT SITE	RECOMMENDED BIDDER	TENDER PRICE	CATEGORY
Marsabit	saku	Badasa	MALFANA CONSTRUCTION COMPANY LTD	17,686,262.00	WOMEN
Marsabit	North Hor	Kalacha	BRISAM AGENCIES LTD	19,808,376.50	GENERAL
Wajir	Eldas	Tito water pan	HALGAN MEGABIDS LTD	18,755,367.20	YOUTH
Wajir	Wajir East	Andaki water pan	SOUTHPOLE CONSTRUCTION COMPANY LTD	18,444,459.5	WOMEN
Wajir	Wajir North	Burte water pan	MAALIN TRADING COMPANY LIMITED	20,116,514.00	YOUTH
Wajir	Wajir South	Habaswen water pan	KONACHE INVESTMENT LIMITED	18,560,126.00	YOUTH
Wajir	Wajir West	Boji yare water pan	NEW WORLD CHOICES LTD	20,496,190.00	YOUTH
Wajir	Tarbaj	Mansa water pan	QUTECH HOLDINGS LIMITED	20,876,417.00	GENERAL
Garissa	Township	Haar Adey	MADOGASHE CONSTRUCTION AND TRANSPORTSITATION CO. LTD	22,462,00.00	YOUTH
Garissa	Lagdera	Hawar Walid	BUDUL INVESTMENT COMPANY LTD	17,546,226.50	WOMEN
Garissa	Balambala	Dogob	PARAMOUNT CONSTRUCTION COMPANY LTD	18,824,870.90	YOUTH
Garissa	Dadaab	Lil Sheel	HAMAD CONSTRUCTION AND TRANSPORT COMPANY LTD	19,371,513.00	YOUTH
Mandera	Lafey	Fino water pan	STRATEGIC SUUPPLIES LIMITED	18,923,854.35	YOUTH
Mandera	Mandera South	Dirib Bamba water pan	GOLBO DEVELOPERS & GENERAL CONTRACTORS LTD	24,975,357.00	WOMEN
Mandera	Mandera North	Shekoley water pan	ADABLA GENERAL CONSTRUCTION CO.LTD	18,680,167.00	YOUTH
Mandera	Mandera East	Arabia 2 water pan	UPZ ENTERPRISES LTD	19,331,114.00	GENERAL
Mandera	Mandera West	Lag Karo water pan	SAMALE GENERAL CO.LTD	18,568,385.00	WOMEN
Mandera	Banisa	Birkan water pan	HANAMAL CONSTRUCTION LIMITED	24,677,065.00	YOUTH
Isiolo	Isiolo South	Kina water pan	NAKS LTD	19,302,116.90	YOUTH
Isiolo	Isiolo North	Charri water pan	QALBI ENTERPRISES LIMITED	17,251,432.00	YOUTH

COUNTY	CONSTITUENCY	PROJECT SITE	RECOMMENDED BIDDER	TENDER PRICE	CATEGORY
Tana River	Galole	Wayu Bultumulito	GAMACHU CONSTRUCTION CO.LTD	19,804,444.00	GENERAL
Tana River	Garsen	Idi	DIDO & SONS	19,274,288.00	WOMEN
Tana River	Bura	Bisic Water Pan	ALNAIM CONSTRUCTION AND TRANSPORTERS LTD	19,549,068.00	GENERAL
Kwale	Lunga Lunga	Kilima Ngodo	MAKLYN SUPPLIES LTD	24,680,073.00	GENERAL
Kwale	Kinango	Mwadimu	NALIYE AGENCY LIMITED	20,149,635.00	AGPO/Y
Kwale	Msambweni	Chiziamkara	ENDS INTERNATIONAL LTD	19,928,944.00	
Kilifi	Kilifi South	Gongoni Kolewa	ARISTON CONSTRUCTION CO. LTD	19,826,576.00	GENERAL
Kilifi	Kilifi North	Kibarani	TEZO CONSTRUCTION CO.LTD	23,524,787.00	GENERAL
Kilifi	Rabai	Mawesa	ALNOSEE ENTERPRISES LIMITED	17,529,149.00	WOMEN
Kilifi	Ganze	Muroka	NEW CENTURY INVESTMENTS LTD	17,839,811.00	GENERAL
Kilifi	Kaloleni	Kaoya mambo	ABALATIRO LTD	21,948,665.20	YOUTH
Kilifi	Magarini	Thoroveni	XTREME ENGINEERING LTD	19,505,480.00	GENERAL
Taita Taveta	Taveta	Mata	MANGURO CONSTRUCTION COMPANY LTD	20,891,881.10	GENERAL
Taita Taveta	Voi	Ufunguo	EMERSON KENYA LIMITED	19,662,995.00	WOMEN
Taita Taveta	Mwatate	Eastleigh	NORLAND INTERNATIONAL LTD	21,672,761.00	WOMEN
Kitui	Mwingi Central	Kalovoto	OLOW INVESTMENT LTD	22,462,000.00	GENERAL
Kitui	Kitui East	Kanduu	BELTED HOLDINGS LIMITED	18,341,856.50	DISABILITY
Kitui	Kitui South	Kwa Ngindu	KINLIX LTD	19,472,040.50	YOUTH
Kitui	Kitui Rural	Kwa Musemi	BLOOMERG AFRICA LIMITED	19,068,489.00	YOUTH
Kitui	Mwingi West	Nzewani	DEVOTE LIMITED	18,923,802.70	WOMEN
Kitui	Mwingi Central	Kithayani	PITBUL ABENCIES LTD	19,465,891.50	YOUTH
Kitui	Mwingi North	Kyeleni	OLKAMA CONTRACTORS LTD	19,249,615.00	DISABILITY
Machakos	Yatta	Kanyongo	NYENDWA CONTRACTORS LTD	19,795,931.10	YOUTH
Machakos	Masinga	Kithayooni	SHAMO INVESTMENT LIMITED	20,981,147.00	WOMEN
Machakos	Mwala	Kimangu	GUZMANIA GENERAL CONTRACTORS LTD	19,431,610.00	WOMEN
Makueni	Kibwezi West	Malembwa	CHOGI'S GARAGE LIMITED	19,559,045.00	WOMEN
Makueni	Makueni	Londokwe	WOTE GREENLAND GENERAL ENTERPRISES	19,991,092.00	WOMEN

COUNTY	CONSTITUENCY	PROJECT SITE	RECOMMENDED BIDDER	TENDER PRICE	CATEGORY
Makueni	Kaiti	Kwakithyoma	MARSH CONSTRUCTION CO. LTD	16,994,136.50	YOUTH
Makueni	Kibwezi East	Kiange	DONGJING INTERNATIONAL LTD	19,785,865.00	YOUTH
Kajiado	Kajiado West	Torosei	SYPRUS ENGINEERING COMPANY	20,079,108.50	YOUTH
Kajiado	Kajiado Central	Ntumarro	MISKY GENERAL LIMITED	20,325,899.00	GENERAL
Kajiado	Kajiado East	Nkuso	SERVE KENYA	18,461,564.35	GENERAL
Kajiado	Kajiado South	Nchakita	VLADKEN CONTRACTORS LTD	19,275,595.90	GENERAL
Baringo	Mogotio	Sirata water pan	MINION LTD	19,150,375.20	GENERAL
Baringo	Baringo East (Tiaty)	Kaptuya pan	SAWASAWA COMPANY LTD	19,371,055.00	WOMEN
Baringo	Baringo South	Keringet small dam	WESTERN ENTERPRISES LTD	19,857,909.50	YOUTH
Baringo	Baringo Central	Site to be confirmed	ZAKHUR ENTERPRISES COMPANY LTD	19,900,265.00	GENERAL
Baringo	Baringo North	Site to be confirmed	DALLO HOLDINGS LIMITED	20,260,559.00	WOMEN
West Pokot	Pokot South	Mongorin	MARACHI ELECTRONIC LTD	19,310,538.50	YOUTH
West Pokot	Kapenguria	Kitelakapel	NEWBORNES CONSTRUCTION COMPANY LTD	19,345,736.30	YOUTH
Tharaka Nithi	Tharaka South	Uturini	SENSEI LIMITED	19,643,140.00	GENERAL
Tharaka Nithi	Tharaka North	Kamwathu	MUSDEN ENTERPRISES LTD	19,130,848.00	WOMEN
Tharaka Nithi	Igamba Ng'ombe	Ntendera	NEW CRYSTAL CLEAR CONTRACTORS LTD	18,037,860.00	WOMEN
Turkana	Turkana East	Site to be confirmed	RHINO TECHNICAL WORKS	19,763,122.50	WOMEN
Turkana	Turkana Central	Site to be confirmed	MBIWA CONSTRUCTION LTD	20,331,440.00	GENERAL

## PROFESSIONAL OPINION

The Procuring Entity's Head of Procurement issued a Professional Opinion dated 17<sup>th</sup> November, 2017 in which he commented as follows:-



"Pursuant to section 84 of Public Procurement and Assets Disposal Act (PPADA) 2015 The Accounting officer may note the following:

1. That the state department of Irrigation call Bids for construction works for water pans/ small dams under national water harvesting and ground water exploitation programme;
2. Bids were invited through Government Supplier Portal on 29<sup>th</sup>August, 2017 and the Nation and Standard newspapers on 29<sup>th</sup>August, 2017and also in the Ministry's website: [www.water.go.ke](http://www.water.go.ke);
3. That section 96 (1, 2 and 3) of the PPADA 2015, was followed when carrying out the request for the bids;
4. Various firms were awarded to construct water pans/small dams at various constituencies of counties;
5. That the prices quoted by the bidders did not compare well competitively as it various (sic) from one area to another;
6. That the technical team in the department did not presented to the Accounting Officer the price analysis from one area to another to create uniformed and basis of award on price standard.
7. The prices analysis of the technical team as summary report should have guided the evaluation team;
8. That the absence of price summary sheet from one area to another, did not give clear picture on prices competitively.

The Head of Procurement of the Procuring Entity therefore recommended as follows:-

1. That the works be re-advertised;
2. That the price summary sheet be prepared by the technical teams depending on the distance coverage, type of rock and other technical issues to ensure fare (sic) pricing on each area of drilling;
3. The technical teams to prepare fresh bills of quantities of 80,000m<sup>3</sup> of water pans and boreholes to ensure that the department gets value for money;
4. That the water engineer must give a guarantee that the site provided is suitable without cost of adjustment.

The Accounting Officer of the Procuring Entity, in regard to the recommendations of the Professional Opinion of the Head of Procurement, issued guidance as follows:

**“1- I concur with the professional opinion and hereby guide that you cancel Tender No. MWI/SDI/ONT/002/2017-2018 .....with immediate effect through a notice in the local dailies of wide circulation and in My Gov publication of Tuesday 21<sup>st</sup> November, 2017....”**

The Procuring Entity re-advertised the same tender through the Government Supplier Portal, the Daily Nation and Standard newspapers of 21<sup>st</sup> December, 2017 and the ministry’s website.

### **THE SUBMISSIONS**

The Request for Review was lodged by M/S Maalin Trading Company Limited, the above named Applicant, whose address for purposes of the

application is c/o Mbuthia Kinyanjui & Co. Advocates, P. O. Box 104622-00101, Nairobi, on 3<sup>rd</sup> January, 2018 in the matter of Tender No. MWI/SDI/ONT/002/2017-2018 for Construction of Water Pans/Small Dams.

**The Applicant sought for the following orders:**

- (a) The termination of the procurement proceedings be annulled*
- (b) The tenders re-advertised by the Procuring Entity on 21<sup>st</sup> December, 2017 be annulled, to wit:*
  - (i) Tender for construction of water pans/small dams, drilling and equipping of boreholes (Tender No. MWI/SDI/ONT/002/2017-2018)*
- (c) The procuring entity be compelled to produce the evaluation reports compiled by the evaluation committee on construction of Burte Water dam in Wajir North and Kanyongo earth dam in Yatta Machakos*
- (d) The procuring entity be compelled to complete the tender process and issue a letter of award for Burte Water dam in Wajir North and Kanyongo earth dam in Yatta Machakos*
- (e) The Procuring Entity do pay the Applicant the costs of this application.*

During the hearing of the Request for Review the Applicant was represented by Mr. Mbuthia Githinji Advocate while the Procuring Entity was represented by M/s Rose A. Nyakwana advocate who represented their respective clients cases as follows:-

Counsel for the Applicant submitted that what was before the Board was the application for review dated 3<sup>rd</sup> January 2018. He stated that the Applicant was challenging the termination of the procurement proceedings as a result of the advertisement of tender no.MWI/SDI/ONT/002/2017-18. He stated that the Procuring Entity advertised the first tender herein on 29<sup>th</sup> August 2017 for

construction of water pans and small dam including the drilling and equipping of the boreholes. The Applicant stated that it he bid for two water pans on 12<sup>th</sup> September, 2017 when the tender was closed and the said bids were opened. It further stated that no communication took place between the applicant and the Procuring Entity after the date of tender opening.

Counsel for the Applicant stated that the applicant was later only surprised to see the same tender being re-advertised on 21<sup>st</sup> of December 2017. Counsel for the Applicant however stated that the law is clear on how a tender should be terminated. While conceding that a Procuring Entity through its accounting officer can terminate a procurement process Counsel for the Applicant however stated that the right to terminate must be undertaken in strict compliance with the provisions of Section 63 of the Act before a valid termination can take place.

He further submitted that under the provisions of Section 63( 2), (3) and (4) of the Act an accounting officer who terminates a procurement or asset disposal proceeding shall give the Director General of the Authority a written report of the termination within 14 days. He however stated that in the present matter, the Applicant stated that it did not know whether the notification to the Authority was given because it was not privy to those proceedings. He further stated that a closer look at the proceedings and the response that had been filed it was safe to say that none took place. He stated that look the report that is made reference to in sub-section 2 should include the reasons for termination and most importantly the accounting officer should notify all persons who submitted tenders of the termination within 14 days of termination and such notice shall also contain the reasons for termination. He however stated that in the present case no communication whatsoever was made to the applicant

despite having participated in the tender process. On the reasons for the termination given in the statement of response he stated that the same were being given way after 14 days and that the same were being given from the bar as the Procuring Entity did not file any affidavit to rebut the Applicant's statement.

He stated that the advertisement in the newspaper cancelling the tender did not cite any reasons whatsoever. He stated that the same cancellation which the Procuring Entity was claiming to be the notification of the cancellation just stated that the notice just cancelled the earlier advertisement and did not cite reasons and did not give any justification and as such does not conform with the strict provisions of the Law. He further stated that when you look at paragraph 6 of the same letter, the Procuring Entity indicated the cancellation was in line with the provisions of Section 63(1)(d) of the Act there was evidence that prices of bids were above market prices. He stated tht there was no expert analysis or a 3<sup>rd</sup> party analysis on what should be the cost then that cannot be the reason for them to cite that as the reason for cancellation or termination of the tender.

The Applicant relied on the case of **Republic vs PPARB and another Exparte SGS Kenya Ltd** (Nai JR Appl. No. 496 of 2017) in support of the contention that the purported termination/cancellation was unlawful and that the Application be allowed.

### The Respondent's case

In response to the submissions made by Counsel for the Applicant, Counsel for the Respondent relied on the response signed by the principal secretary. She submitted that the Respondent within the law to have cancelled the tender she stated that the response did rely on the provisions of Section 63(1), (b) &(d)

of the Act to cancel and re-advertise of the tender. She stated that the Procurement processes that the Ministry handles is that a lot of documentation is received and so many bidders access and apply. She alleged that the Ministry did communicate before the cancellation. She said that in the advertisement for the cancellation of the first tender did not indicate on the face of it the reason for cancellation of the tender. She stated that the use of the newspaper to cancel the first tender was because there were so many bidders and sending out individual letters was impractical. She said the Procuring Entity could not write letters to each and every bidder to notify them of the cancellation. She stated that the cancellation was in good faith to correct the errors and the Ministry did inform the Board within 14 days of the intention to cancel vide the letter dated 8<sup>th</sup> January 2018 and received by the board on 9<sup>th</sup> January 2018.

The termination was done as per section 63(1)(b) & (d) that is inadequate budgetary provision and evidence that the prices of the bids were above the market price. She also alleged that there were also flaws on average cost per project and there was a difference of Kshs. 386 million above what the Ministry had anticipated and therefore the accounting officer decided to cancel the tenders and that the reason to cancel the tenders was not in any way careless or given without concern to the bidders but it was for the purposes of correcting anomalies and was done in good faith. She submitted that there was no need for an expert opinion with regard to the prices the subject matter of the tender. She stated that the contents of the tender documents were known to the bidders before they bid but they did not ask for an expert opinion to understand the prices and the information therein. She stated that there was no need for an expert opinion to understand the prices but it was done in good

faith and the corrections were made in the current re-advertised tender. She further stated that the cancellation were done in strict compliance with the law. She submitted that it was true that there were constraints with regard to the amount and the budget that resulted from the previous tender and that is why the ministry could not proceed, the bidders were privy by way of notice, there was no specific letter and this had been demonstrated that even the case of Burte dam and Kanyongo dam, the amounts that were quoted in the tender document that were handed over to the board that the amounts of the money that were earlier quoted were higher than the actual prices for the boreholes and the dams. She submitted that the Ministry had provided sufficient evidence providing the justification for the cancellation and the subsequent re-advertisement of this tender.

She further urged that the Request for Review be dismissed with costs.

### **The Applicant's Response**

In response to the submissions made by Counsel for the Respondent he stated that in their own documents and submissions filed before the Board the Respondent had confirmed that there was no express communication from the respondent to the applicant. He stated that what they are terming as a response was an advertisement in the newspaper. He stated that Counsel for the Respondent had confirmed that the advertisement concluding the earlier tender did not set out reasons and that the Respondent did not follow the law. He further stated that the Respondent in this particular case was not been able to demonstrate to the Board that it actually followed the law during the purported cancellation and as such he prayed that the application for review be allowed with costs.

## **THE BOARD'S DECISION**

The Board has considered the submissions made before it by Counsel for the Applicant and Counsel for the Responding/Procuring Entity in this Request for Review which relates to the Procuring Entity's alleged termination/cancellation of the Procurement process of Burte Water Pan in Wajir North Constituency Wajir County and the Kanyongo Water Pan in Yatta Constituency Machakos County both of which were advertised under Tender Number MWI/SDI/ONT/001/2017-2018 which advertisement was generally inviting bids for the construction of water pans/small dams within the Republic of Kenya.

Based on the submissions made by the advocates the appeared for the two parties in this review and the documents placed before the Board, the Board has determined that this Request for Review raised the following three issues for determination:-

- a) **Whether or not the Procuring Entity lawfully terminated the tender in respect of the construction of the Burte and Kanyongo water pans in Wajir North Constituency and Yatta Constituency respectively under tender number MWI/SDI/ONT/001/2017-2018.**
- b) **Depending on the answer to issue number 1 above, whether the Procuring Entity could lawfully re-advertise the tender for the two water pans under Tender No. MWI/SDI/ONT/002/2017-2018.**
- c) **What orders should the Board make in the circumstances of this review.**

The Board will therefore proceed to consider and determine the three issues but before addressing the above issues, the Board will begin by setting out the law on termination which is as follows:-



One of the leading decisions on the issue of termination is the case of **Republic –vs- The Public Administrative Review Board, The Kenya Civil Aviation Authority and Thales Air Systemi Intergrati (Nai HC Misc. Appl. No. 1260 of 20017)** where Justice Nyamu (as he then was) and Justice G. Dulu while considering the provisions of Sections 36 and 100 of the repealed public Procurement and Disposal Act 2005 held that the Board has the jurisdiction to hear and determine a question challenging a purported termination of a procurement process by the Procuring Entity.

The Board has adopted the above decision and reasoning in several of its decisions as illustrated by the case of **AON Kenya Insurance Brokers Ltd –vs- The Teachers Service Commission (PPARB Appl. No. 8 of 2015)**.

Whereas the above two decisions related to the interpretation of the provisions of the repealed Public Procurement and Disposal Act 2005, the High Court reaffirmed the Board’s jurisdiction to consider the propriety of a termination and the circumstances under which a Procuring Entity can resort to such power under the provisions of the Public Procurement and Asset Disposal Act (the new Act) in the case of **Republic –vs- The Public Procurement Administrative Review Board, Intertek Testing Services (E.A) Limited Exparte SGS Kenya Ltd (Nai HC Milimani law court’s J. R Misc. Appl. NO. 496 of 2017)** where the High Court (The Hon. Justice John M. Mativo) also set out the test and the nature of the information and the evidence that the Board would be required to consider while determining the propriety of the termination of a procurement process under the provisions of Section 63 of the new Act.

The High Court inter-alia stated as follows at pages 13 and 14 of the said decision.

**“It is my view that section 63 of the Act imposed a statutory obligation upon the first interested party to terminate the tender award only on any of the grounds stated therein and that those grounds are not stated therein for cosmetic purposes.**

**.....the evidence tendered before the Review Board must provide sufficient information to bring the grounds within the provisions of the law. This recognizes that the tender process and in particular the termination must be done in a transparent and accountable and legal manner as the law demands.**

**Ultimately, the question whether the information put forward is sufficient to place the termination within the ambit of the law as claimed will be determined by the nature of the reasons given. The question is not whether the best evidence to justify termination has been provided, but whether the evidence provided is sufficient for a reasonable tribunal or body to conclude, on a balance of probabilities that the grounds relied upon fall within any of the grounds under Section 63 of the Act. If it does, then the party so claiming has discharged its burden under Section 63. If it does not, then the body in question has only itself to blame”.**

What the Board understands the learned judge to have been stating in the above decision is that where the decision of a procuring Entity to terminate a procurement process is challenged before the Board, the procuring Entity is under a duty to place sufficient reasons or evidence before the Board to justify and support the termination of the procurement process under challenge. The Procuring Entity must in addition to providing sufficient evidence also demonstrate that it has complied with the substantive and the procedural

requirements set out under the provisions of Section 63 of the Public Procurement and Asset Disposal Act 2015 which provides as follows:-

*“63 (1) An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies—*

*(a) the subject procurement have been overtaken by—*

*(i) operation of law; or*

*(ii) substantial technological change*

*(b) inadequate budgetary provision;*

*(c) no tender was received;*

*(d) there is evidence that prices of the bids are above market prices;*

*(e) material governance issues have been detected;*

*(f) all evaluated tenders are non-responsive;*

*(g) force majeure;*

*(h) civil commotion, hostilities or an act of war; or*

*(i) upon receiving subsequent evidence of engagement in fraudulent or corrupt practices by the tenderer.*

*(2) An accounting officer who terminates procurement or asset disposal proceedings shall give the Authority a written report on the termination within fourteen days.*

*(3) A report under subsection (2) shall include the reasons for the termination.*

*(4) An accounting officer shall notify all persons who submitted tenders of the termination within fourteen days of termination and such notice shall contain the reason for termination."*

The Board will therefore proceed to determine the issues which fall for determination in this Request for Review based on the evidence placed before it for the purposes of determining whether the law was complied with while undertaking the purported termination.

It was an uncontested fact before the Board that the Procuring Entity advertised the tender in issue for the first time under tender number MWI/SDI/ONT/001/2017-2018 on 29<sup>th</sup> August, 2017 and that the tender closed on 12<sup>th</sup> September, 2017. It was further common ground during the hearing that there were 74 water pans/small dams or thereabouts that were to be tendered for under the said tender.

The undisputed evidence before the Board shows that the Applicant inter-alia tendered for the Burte and the Kanyango water pans.

It was however the Applicant's case that it did not receive any letter of notification from the Procuring Entity informing it of the outcome of its tender and that upon inquiring about the status of its tender from the Procuring Entity, the Applicant was informed that the tender had been cancelled through an advertisement placed in the Daily Newspapers of 22<sup>nd</sup> November, 2017 which the Applicant later managed to obtain from the National archives and which he produced as annexure MHM4 annexed to its Request for Review.

The Board has considered the submissions made by the parties, the initial tender advertisement dated 29<sup>th</sup> August, 2017 and which was produced as annexure MHM2 and the advertisement marked as annexure MHM4 which purported to cancel the initial tender and finds on the face of the said

documents that the purported cancellation of the tenders in issue was unlawful and contrary to the Provisions of Section 63 of the Act for the following reasons:-

Firstly while terminating a procurement process, the accounting officer of the Procuring Entity must prepare letters of notification notifying all persons who submitted tenders within fourteen (14) days of termination and that such notice/notices shall contain the reason or reasons for the termination.

The Board however notes a fact that was conceded by Counsel for the Procuring Entity that the Procuring Entity did not prepare any letter or letters of notification addressed to any bidder informing it of its decision to terminate the tenders in issue and all that it conveniently did was to reproduce the advertisement dated 29<sup>th</sup> August, 2017 which it then stamped with the bold words "cancelled" and re-advertised the same advertisement in the Daily Newspaper of 22<sup>nd</sup> November, 2017.

A perusal of the said cancelled advertisement shows that the same was not addressed to any bidder, the same did not state that the procurement process in issue was being terminated and more importantly the same did not give any reasons why the tender in issue was being terminated.

Secondly and for the obvious reasons set out above, no letter of notification under the provisions of Section 63(4) of the Act was issued to the Applicant regarding the termination of its two tenders which are the subject matter of this Request for Review.

Thirdly the advertisement published in the Newspaper dated 22<sup>nd</sup> November, 2017 cannot suffice for the purposes of terminating a procurement process and a Procuring Entity which desires to do so must fully comply with the provisions of Section 63 of the Act. It is clear from the Newspaper

advertisement of 22<sup>nd</sup> November, 2017 that what the Procuring Entity merely did was to cancel an earlier advertisement but did not terminate the process. There is however a clear distinction between the purposes of an advertisement and a decision to terminate a tender process. The purposes of an advertisement which is also referred to in the procurement law as an invitation to tender is to invite members of the public to submit bids in a particular procurement process.

Once such bids have been received as was the case in the subject procurement placing the same advertisement in the Newspaper and then stamping it stamped "cancelled" is entirely unnecessary and ineffectual since the objective sought to be achieved through the advertisement would already have been achieved and the initial advertisement would have been overtaken by events. The law is clear that once tenders have been received pursuant to an advertisement such as the one which was placed in the Newspaper dated 29<sup>th</sup> August, 2017, the Procuring Entity was bound by law to evaluate the tenders submitted to it in accordance with the law.

Fourthly, Counsel for the Procuring Entity did not place any material before the Board to show that it complied with the Provisions of Section 63(2) & (3) of the Act which requires the Accounting Officer of a Procuring Entity to give a written report containing reasons for the termination to the Director General of the Authority within a period of fourteen (14) days from the date of the purported termination.

In the absence of any evidence to show that the Procuring Entity did not comply or even attempt to comply with the provisions of Section 63 of the Public Procurement and Asset Disposal Act, the Board finds that the purported cancellation of the first tender in so far as the same relates to the

two water-pans in issue as contained in the Newspaper advertisement placed in the Daily Newspapers of 22<sup>nd</sup> November, 2017 was ineffectual to terminate the procurement process herein.

On the reason or the justification for the purported cancellation, Counsel for the Procuring Entity submitted that this was because of inadequate funds to perform the tenders if awarded to the Applicant. The Procuring Entity on which the burden of proof lies did not however produce any evidence to show what the budgetary allocation for the two tenders in issue were and what were the prices all the bidders quoted for the two water pans in issue.

What Counsel for the Procuring Entity resorted in to doing was to give evidence from the bar without any documentary proof.

As the court held in the case of **Republic -vs - Public Procurement Administrative Review Board & Another Exparte SGS Kenya Ltd (Nai HC JR Appl. 496 of 2017** a Procuring must produce evidence to support any ground of termination and where it fails to do so it can only have itself to blame.

The Procuring Entity's purported termination of tender No. MWI/SDI/ONT/001/2017-2018 was therefore terminated. One essential step for a termination to take effect is that all bidders who participated in the tender and the Director General of the Authority must be notified before a tender can lawfully be terminated.

These essential requirements were set out by the Board in the case of **Muema Associates -vs- Turkana County Council (PPARB Appl. No. 35 of 2008)** where the Board held that in order for there to be a lawful termination, a Procuring Entity must among other things do the following.

- i. Give sufficient notice to all bidders of the decision to terminate the procurement proceedings.
- ii. Give sufficient reasons for the decision to terminate.
- iii. Give a report to the Authority regarding the decision to terminate procurement proceedings.

The second issue which fails for consideration herein is whether the Procuring Entity could proceed to re-advertise the same tender before lawfully concluding the evaluation of or terminating the first tender as advertised on 29<sup>th</sup> August, 2017.

The additional uncontested evidence before the Board was that upon placing the advertisement dated 22<sup>nd</sup> November, 2017 in the Newspaper indicating that the tender in issue had been cancelled, the Procuring Entity re-advertised the same tender in the print media on 21<sup>st</sup> December, 2017 as evidenced by the annexure marked as annexure MHM 3 annexed to the Request for Review.

The Board has already determined under the first issue that the first tender number MWI/SDI/ONT/001/2017-2018 was not lawfully terminated. The Procuring Entity could not therefore lawfully re-advertise the tender a second time since the first advertisement was still alive.

The effect of the above findings is therefore that the earlier tender is still alive. Where one tender in respect of a particular procurement process is still in force, a Procuring Entity must conclude the procurement process in respect of the said tender. It is not therefore tenable to have two parallel procurement processes in respect of the same procurement going on at the same time. The Board further wishes to observe but without prejudice to the Procuring Entity's right to terminate a procurement process under the provisions of Section 63 of the Act that the provisions of Section 87 of the Act and other



provisions of the law enjoin a Procuring Entity to complete the evaluation of tenders and make an award to the successful and the unsuccessful bidders at the conclusion of the exercise.

Under the provisions of Section 176(1) (c) of the Act it is an offence for the Procuring Entity or any of its staff to fail to evaluate and award a tender within the time frame set out by the Act and the Regulations.

The said Section 176(1) (c) of the Public Procurement and Asset Disposal Act provides as follows:-

**Section 176 (1)** *“A person shall not—*

- a) .....*
- b) .....*
- c) delay without justifiable cause the opening or evaluation of tenders, the awarding of contract beyond the prescribed period or payment of contractors beyond contractual period and contractual performance obligations.*

Having therefore held that the first tender is still in force and having further held that the advertisement of tender number MWI/SDI/ONT/02/2017-2018 was irregular, the Board holds that the second procurement process in so far as it relates to the two water pans which are in issue in this application was unlawful, illegal null and void.

A Procuring Entity or the staff of a procuring Entity which decides to terminate a procurement process for no valid reason and thereafter restart the said process a fresh also stand the danger of having the second process annulled and the persons involved stand danger of being personally directed to bear any costs and expenses arising from the re-advertised tender and those of any

proceedings instituted to challenge the termination process in addition to being liable to prosecution or to numerous suits for damages on account of an unlawful termination of procurement processes.

A procuring Entity must therefore exercise the power of termination with abundant caution and only after satisfying itself that there are valid and lawful grounds for termination. The Procuring Entity must also ensure that it has fully complied with the law before effecting any termination.

The Board has in the recent past noted an increased number of incidences where Procuring Entities are terminating procurement process arbitrarily without following the law and thereafter proceeding to re-advertise, evaluate and award the same tenders afresh pursuant to the said re-advertisement while in some cases even ignoring the decisions made by the Board and the court.

As regards the Procuring Entity now before the Board namely the Ministry of Water and Irrigation, the Board wishes to note that the Procuring Entity pursued the same approach and ignored the decisions made by the Board in inter-alia the following cases **Alwahab Enterprise Limited –vs- Northern Water Services Board and the Ministry of Water and Irrigation (PPRB Appl. No. 46 of 2017)**, **Earth Construction Ltd, Dabel Construction Company Ltd & Diwafa investments Limited –vs- Northern Water Services Board and the Ministry of Water and Irrigation [PPRB Appl. No. 55 of 2017]** and in the case of **Masaai General Agencies Limited –vs- Northern Water Services Board & the Ministry of Water and Irrigation (PPRBA NO. 61 of 2017)**.

The Board is unaware of any applications for judicial review or appeals which were lodged before the High Court and or the court of Appeal against the Board's decisions in the above cases.

The Board therefore wishes to bring to the attention of the Procuring Entity the following provisions of the Act and case law for the purposes of clarifying the law on this area owing to the central role that the Procuring Entity plays in achieving the development objectives of the National Government and more particularly to objective on achieving sustainable food security.

Under the provisions of Section 175(1) and (6) of the Act, where a Procuring Entity fails to file an appeal or apply for judicial review against a decision made by the Board, the decision of the Board becomes final, binding and must be obeyed.

The said Sections 175(1) and (6) of the Act provide as follows:-

**“175(1) A person aggrieved by a decision made by the Review Board may seek judicial review before the High Court within fourteen days from the date of the Review Board’s decision, failure to which the decision of the Review Board shall be final and binding to both parties.”**

**“175(6) A party to the review which disobeys the decision of the Review Board or the High Court or the Court of Appeal shall be in breach of this Act and any action by such party contrary to the decision of the Review Board or the High Court or the Court of Appeal shall be null and void.”**

The High Court has restated the above position in several decisions such as in the case of **Ethics and Anti-Corruption Commission –vs- Horsebridge Networks & Another** (Nairobi High Court No. 69 of 2015) where the court held that in the absence of an appeal or an application for Judicial Review, the Board’s decision becomes final and must be obeyed.

It is a matter of law and practice that a Procuring Entity must obey all the lawful orders issued by the Board or a court of law. It is not therefore open to a Procuring Entity to decide whether it will obey the orders issued by the Board.

In addition to the above general legal position, the provisions of Section 176(1) (m) of the Public Procurement and Asset Disposal Act requires any party involved in any proceedings before the Review Board to obey all the orders issued by the Board and that Section makes it an offence for any party to wilfully disobey an order of the Board.

The Act further provides that any action undertaken in contravention of a lawful order issued by the Board is illegal null and void.

The position that lawful orders by any judicial and quasi-judicial body must be obeyed well illustrated by the case of **Republic –vs- Chairman Land Disputes Tribunal Kirinyaga District & Another Exparte Kariuki (2005) 2 KLR 10**. The Honourable Justice Khamoni (as he then was) expressed the law on this issue in the following simple but clear statement in the above decision. **“A court judgment or court order whether lawful or unlawful, regular or irregular, null or valid, void or legal must be respected and obeyed by all until lawfully discharged”**.

Owing to the numerous disputes touching on termination of procurement processes which are now being filed before it, the Board wishes to adopt the following observations which were recently made by the court of appeal in its opening remarks statement in the case of **Rentco East Africa Limited, Lantech Africa Limited, Toshiba Corporation Consortium v Public Procurement Administrative Review Board & another (NAI Civil Appeal 24 of 2017)**.

**“The object of procurement laws enacted in the recent past in Kenya is to improve public financial management, promote efficient use of State resources in order to foster national development; enhance harmony with international procurement laws; foster competition, efficiency, transparency, integrity and accountability; facilitate ease procurement administration; and ensure value for money. Article 227 of the Constitution enjoins State organs and other public entities that contract for the supply of goods or services, to do so in accordance with a procurement system that is fair, equitable, transparent, competitive and cost-effective. Similar values of maximization of economy and efficiency, promotion of integrity, competition, fairness, transparency, accountability, public confidence in the procurement procedures, equality and freedom from discrimination, run through the Public Procurement and Asset Disposal Act, 2015 as well as the repealed Public Procurement and Disposal Act, 2005”.**

**“But these values and principles will mean little, if the persons and institutions responsible for ensuring compliance are themselves in violation of the law. As a nation, our economic advancement will be hampered if grand projects that are intended to be the catalyst of growth are delayed due to controversies that can be avoided if the process set out in the law is faithfully followed. If the number of suits instituted in the courts in the recent past arising from disputes relating to procurement is any guide, it is real that very little progress will be made in achieving the economic goals within the set timelines, and aspirations like Kenya Vision 2030, Sustainable Development Goals will come a cropper.”**

The Court of Appeal made the following further relevant observations at the conclusion of its decision in the above case.

**“The letter by the 2<sup>nd</sup> Respondent purporting to terminate the award of the tender to the Appellant was for the reasons we have given, a nullity without legal effect, having been written in breach of decisions of the 1<sup>st</sup> Respondent and that of the High Court. It was not only *ultra vires* the Public Procurement and Asset Disposal Act, but also illegal.**

**In terms of Section 100 of the Public Procurement and Disposal Act, 2005 and Section 175 of the Public Procurement and Asset Disposal Act, 2015, the decision of the 1<sup>st</sup> Respondent, in the absence of an appeal or review was final. That decision received support of the High Court when it was affirmed. During the pendency of the two decisions and in an act of utter contempt, the 2<sup>nd</sup> Respondent pulled the rug from under the feet of the 1<sup>st</sup> Respondent, the High Court and the Appellant. Its action undermined the administration of justice and amounted to an abuse of the court process. Section 175(6) of the Public Procurement and Asset Disposal Act, 2015 caution that:-**

**“(6) A party to the review which disobeys the decision of the Review Board or the High Court or the Court of Appeal shall be in breach of this Act and any action by such party contrary to the decision of the Review Board or the High Court or the Court of Appeal shall be null and void”.**

**“The purported termination of the tender by the 2<sup>nd</sup> Respondent was therefore was null and void”.**

**What orders should the Board make in the circumstances of this case**

**It is apparent that the procurement under consideration was for the construction of 74 water pans and or dams and which on the Procuring Entity’s admission the tender attracted over 1200 bidders in the first tender advertised on 29<sup>th</sup> August, 2016. The Board is however unaware of how many bidders submitted their tenders in the tender re-advertised on 21<sup>st</sup> December, 2017.**

The Board further notes that this Request for Review only challenged the tenders for two water pans namely the Burte water pan and the Kanyongo water pan. The two water pans were therefore the only subject matter of this Request for Review.

The Board appreciates the general legal position that the Board can only grant relief to such person or persons as have sought relief before it.

For the purposes of avoiding a situation where the Board grants reliefs to parties who are not before it, or where it grants relief in cases where third parties are likely to be affected by the orders of the Board without according the said parties an opportunity to be heard, the Board will treat each case coming before it on this procurement process on its own peculiar facts and circumstances and will thus restrict its orders to the prayers sought by the Applicant in this case.

The upshot of all the above findings and observations is therefore that the Applicant's Request for Review succeeds and is allowed in the following terms:-

### **FINAL ORDERS**

In view of all the above findings and in the exercise of the powers conferred upon it by the Provisions of Section 173 of the Public Procurement and Asset Disposal Act, 2015 the Board makes the following orders on this Request for Review.

- a) **The purported termination of the procurement proceedings in respect of tender number MWI/SDI/ONT/001/2017-2018 for the construction of water pans and dams as relates to the Burte water pan and the**

Kanyongo water pan as contained in the Procuring Entity's advertisement dated 22<sup>nd</sup> November, 2017 be and is hereby annulled and set aside.

- b) The advertisement dated 21<sup>st</sup> December, 2017 in respect of tender number MWI/SDI/ONT/002/2017-2018 for the construction of water pans and dams in so far as the same relate to the Burte Water Pan and Kanyongo water pan be and is hereby annulled and the same is set aside.
- c) The Procuring Entity is hereby directed to complete the procurement process in respect for the award of Burte water pan/dam in Wajir North and the Kanyongo earth dams in Yatta Machakos under tender number MWI/SDI/ONT/001/2017-2018 advertised on 29<sup>th</sup> August, 2017 and complete the entire process including the award of the two water pans/dams in line with the recommendations contained in the tender evaluation report dated 11<sup>th</sup> November, 2017 within a period of fourteen (14) days from today's date.
- d) The Procuring Entity shall file with this Board and the Director General of the Authority a report showing compliance with the above orders of the Board by 9<sup>th</sup> February, 2018.
- e) In view of the nature of the orders made above which will work in favour of both parties, each party shall bear its own costs of this Request for Review.

Dated at Nairobi on this 24<sup>th</sup> day of January, 2018.

  
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**CHAIRMAN**

**PPARB**

  
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**SECRETARY**

**PPARB**