

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 2/2021 OF 15TH JANUARY 2021

BETWEEN

JOWHAR INVESTMENTS LIMITED.....APPLICANT

AND

ACCOUNTING OFFICER, KENYA URBAN ROADS

AUTHORITY.....1ST RESPONDENT

KENYA URBAN ROADS AUTHORITY.....2ND RESPONDENT

AND

MOLUCK INTERNATIONAL COMPANY

LIMITED.....INTERESTED PARTY

Review against the decision of the Accounting Officer of Kenya Urban Roads Authority in relation to Tender No. KURA/RMLF/HQ/228/2020-2021 for Improvement of Access Road in Yamin Estate (Off Mombasa Road).

BOARD MEMBERS

- | | |
|---------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mr. Ambrose Ogetto | -Member |
| 3. Ms. Phyllis Chepkemboi | -Member |
| 4. Mr. Nicholas Mruttu | -Member |

IN ATTENDANCE

- | | |
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| 1. Mr. Stanley Miheso | -Holding brief for the Secretary |
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BACKGROUND TO THE DECISION

The Bidding Process

Kenya Urban Roads Authority (hereinafter referred to as “the Procuring Entity”) invited eligible bidders to bid for Tender No. KURA/RMLF/HQ/228/2020-2021 for Improvement of Access Road in Yamin Estate (Off Mombasa Road) (hereinafter referred to as “the subject tender”) through a Tender Notice published on MyGov Publication Website, the Public Procurement Information Portal and the Procuring Entity’s Website on 3rd November 2020.

Bid Submission Deadline and Opening of Bids

The Procuring Entity received a total of sixteen (16) bids by the bid submission deadline of 23rd November 2020. The same were opened shortly thereafter at the Procuring Entity’s Head Office by a Tender Opening Committee and recorded as follows: -

No.	Name of Bidder	Financial Amount as Read out	Number of copies provide		Remarks
1.	Jowhar Investment Ltd	90,838,734	1 Original 1 Copy	297	Serialized
2.	Prime Auto & General Trading Enterprises	111,400,914	1 Original 1 Copy	323	Serialized
3.	Serve Kenya Limited	104,147,388	1 Original 1 Copy	203 S	Serialized
4.	Jaf Company Limited	125,033,490	1 Original 1 Copy	368	Serialized
5.	Moluck International Co. Ltd	119,999,763	1 Original 1 Copy	344	Serialized
6.	Causeway Engineering Solutions Ltd	115,629,288	1 Original 1 Copy	372	Serialized
7.	Maalyeel Holdings Limited	112,272,444	1 Original 1 Copy	459	Serialized
8.	Sana East Africa LTD	118,782,984	1 Original 1 Copy	270	Serialized

No.	Name of Bidder	Financial Amount as Read out	Number of copies provide		Remarks
9.	Lyra Investment Group Limited	117,103,764	1 Original 1 Copy	254	Serialized
10.	Samgat Constructions Ltd	69,701,652	1 Original 1 Copy	359	Serialized
11.	Kimberly Construction Company Ltd	96,393,042	1 Original 1 Copy	289	Serialized
12.	Taiz Construction Co. Ltd	118,400,058	1 Original 1 Copy	297	Serialized
13.	Dennix Limited	111,677,934	1 Original 1 Copy	318	Serialized
14.	Tripe N. Capital Venture Limited	108,220,998	1 Original 1 Copy	418	Serialized
15.	Unicom Builders Limited	116,814,888	1 Original 1 Copy	340	Serialized
16.	Pacificon Investment Limited	110,973,528	1 Original 1 Copy	355	Serialized

Evaluation of Bids

An Evaluation Committee appointed by the Procuring Entity's Director General evaluated bids in the following three stages: -

- i. Completeness and Responsiveness (Preliminary Evaluation);
- ii. Technical Evaluation; and
- iii. Financial Evaluation.

1. Preliminary Evaluation

At this stage, the Evaluation Committee determined the completeness and responsiveness of bid documents submitted by bidders against the criteria outlined in Table 1: Pre- Qualification Checklist for Completeness and Responsiveness of the Appendix to Instructions to Tenderers of the Tender

Document. The Evaluation Committee found the following seven (7) bidders responsive and thus eligible to proceed to Technical Evaluation: -

Bidder No.	Bidder	Responsiveness
1.	Jowhar Investment Ltd	Responsive
5.	Moluck International Co. Ltd	Responsive
9.	Lyra Investment Group Limited	Responsive
12.	Taiz Construction Co. Ltd	Responsive
13.	Dennix Limited	Responsive
14.	Tripe N. Capital Venture Limited	Responsive
16.	Pacificon Investment Limited	Responsive

2. Technical Evaluation

At this stage, the Evaluation Committee evaluated bids against the Qualification Criteria outlined in pages 20 to 23 of the Tender Document which was based on a "YES/NO" scoring method. The results of Technical Evaluation were recorded as follows: -

Bidder No.	Bidders' Name	Remarks
1.	Jowhar Investment Ltd	NO
5.	Moluck International Co. Ltd	YES
9.	Lyra Investment Group Limited	NO
12.	Taiz Construction Co. Ltd	NO
13.	Dennix Limited	NO
14.	Tripe N. Capital Venture Limited	NO
16.	Pacificon Investment Limited	NO

From the above table, it is only M/s Moluck International Co. Limited that was found responsive and thus eligible to proceed to Financial Evaluation.

3. Financial Evaluation

At this stage, the Evaluation Committee applied the criterion under Clause 30.8 of Section II. Instructions to Tenderers of the Tender Document so as to determine the lowest evaluated tenderer. The bid price submitted by M/s Moluck International Co. Limited was recorded as follows: -

Bidder No.	Bidder's Name	Bid Sum (Kshs)
5.	Moluck International Co. Ltd	119,999,763.00

Recommendation

The Evaluation Committee recommended award of the subject tender to M/s Moluck International Co. Limited at its tender price of Kshs. 119,999,763.00 having determined the said bidder submitted the lowest evaluated bid.

Due Diligence

A due diligence exercise was conducted on M/s Moluck International Co. Ltd pursuant to section 83 (1) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act"). The findings of the due diligence exercise were recorded as follows: -

No.	Company Name	Projects Undertaken	Contract Sum	Organization	Remarks
5	Moluck International company limited	Routine maintenance of Kakamega-Navagoro-Musikoma road CGK/16/18/047	60,054,460	County Government of Kakamega	Completed
		Improvement to Bitumen Standard & Performance Based Routine Maintenance of Isiolo Township Contract No. KERRA/16/1/RWC174/VOL.1/(3835)	57,924,999	Shibli Enterprises Limited	Completed

The Evaluation Committee was satisfied that M/s Moluck International Co. Ltd completed the above referenced project successfully and thus found the said bidder competent to implement the subject tender.

Professional Opinion

In a professional opinion dated 16th December 2020, the Procuring Entity's Deputy Director, Supply Chain Management reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and the due diligence exercise. He thus advised the Procuring Entity's Director General to award the subject tender to M/s Moluck International Co. Limited at its tender price of Kshs. 119,999,763.00 for being the lowest evaluated tenderer. The said professional opinion was approved by the Director General on 17th December 2020.

Notification to Bidders

In letters dated 17th December 2020, the Procuring Entity's Director General notified the successful tenderers and all unsuccessful tenderers of the outcome of their bids.

THE REQUEST FOR REVIEW

M/s Jowhar Investments Limited (hereinafter referred to as “the Applicant”) lodged a Request for Review dated 12th January 2021 and filed on 15th January 2021 together with a Statement in Support of the Request for Review sworn on 12th January 2021 and filed on 15th January 2021 and a Further Statement sworn on 29th January 2021 and filed on 1st February 2021 through the firm of Ochieng’ Achach & Kaino Advocates, seeking the following orders: -

- i. An order setting aside the decision of the Procuring Entity communicated to the Applicant through a letter dated 17th December 2020 and awarding TENDER NO. KURA /RMLF/HQ/228/2020-2021 FOR IMPROVEMENT OF ACCESS ROAD IN YAMIN ESTATE (OFF MOMBASA ROAD) to the Interested Party be set aside.***
- ii. An order substituting and/or amending the decision of the Procuring Entity and thereafter, awarding TENDER NO. KURA /RMLF/HQ/228/2020-2021 FOR IMPROVEMENT OF ACCESS ROAD IN YAMIN ESTATE (OFF MOMBASA ROAD) to the Applicant after reviewing all the records submitted in the procurement process including the Directorship of the Applicant, the form and substance of the Applicant’s tender document;***
- iii. In the alternative to prayer (ii) above, an order directing the Procuring Entity to proceed with the procurement process to its***

logical conclusion inclusive of the Applicant at the Financial Evaluation stage and to make an award within seven (7) days; and

iv. An order compelling the 1st Respondent to pay the full costs of and incidental to these proceedings.

In response, the Respondents lodged a Preliminary Objection dated 19th January 2021 and filed on 20th January 2021 together with a Memorandum of Response dated 22nd January 2021 and filed on 25th January 2021 through Peter Ogamba Bosire Advocate while the Interested Party lodged a Preliminary Objection dated 26th January 2021 and filed on 27th January 2021 together with a Replying Affidavit sworn on 26th January 2021 and filed on 27th January 2021 through the firm of Mbugwa, Atudo & Macharia Advocates.

On 24th March 2020, the Board issued Circular No. 2/2020 detailing the Board's administrative and contingency management plan to mitigate Covid-19 pandemic. Through this circular, the Board dispensed with physical hearings and directed that all request for review applications would be canvassed by way of written submissions. Clause 1 at page 2 of the said Circular further specified that pleadings and documents would be deemed as properly filed if they bear the official stamp of the Board.

Accordingly, the Applicant lodged Written Submissions dated 29th January 2021 and filed on 1st February 2021. The Respondents and the Interested Party did not lodge written submissions.

BOARD'S DECISION

The Board has considered each of the parties' pleadings including confidential documents submitted to it pursuant to section 63 (1) (e) of the Act and finds that the following issues call for determination: -

I. Whether the Board has jurisdiction to entertain the Request for Review

In determining the above issue, the Board will address the following: -

a) Whether the Request for Review was filed outside the statutory period of 14 days specified in section 167 (1) of the Act, thus ousting the jurisdiction of the Board.

Depending on the outcome of sub-issue (a): -

b) Whether the Procuring Entity and the Interested Party signed a contract in relation to the subject tender in accordance with section 135 (3) of the Act, thus ousting the jurisdiction of the Board pursuant to section 167 (4) (c) of the Act.

Depending on the outcome of Issue (I): -

II. Whether the Applicant satisfied the following criterion so as to proceed to the Financial Evaluation Stage: -

- a) *Completion Certifications specified in Clause 4.2 (b). Specific Construction Experience of Section 4. Qualification Criteria of the Tender Document;*
- b) *Program of Works/Work Methodology specified in Clause 6. Work Methodology of Section 4. Qualification Criteria, Clause 5.3 and Clause 1.2 of Section II. Instructions to Tenderers and Condition of Tender read together with Clause 49.1 of the Appendix to Form of Bid of the Tender Document; and*
- c) *Audited Balance Sheets or other Financial Statements specified in Clause 3.1. Financial Performance of Section 4. Qualification Criteria of the Tender Document.*

The Board now proceed to address the above issues as follows: -

It is a well settled principle in law that jurisdiction is so central in determining whether a court or other decision making body can determine a case filed before it. Nyarangi, JA, in the case of the **Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited [1989] KLR 1** expressed himself as follows on the issue of jurisdiction: -

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings..."

Jurisdiction is defined in Halsbury's Laws of England (4th Edition), Volume 9 as: -

"The authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision."

The Black's Law Dictionary, 9th Edition, defines jurisdiction as: -

"The Court's power to entertain, hear and determine a dispute before it."

In his book, **"Words and Phrases Legally Defined"**, Vol. 3, John Beecroft Saunders defines jurisdiction as follows: -

"By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court [or other decision making body] is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given." [Emphasis by the Board]

Assumption of jurisdiction by courts and other decision making bodies in Kenya is a subject regulated by the Constitution, by statute law, or both. This position was expressed by the Supreme Court in **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & Others (2012) eKLR** where it was held as follows: -

"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law." [Emphasis by the Board]

From the foregoing, it is sufficiently settled that the jurisdiction of a court, tribunal or any other decision making body is derived from the Constitution, an Act of Parliament or both. This Board is a creature of an Act of Parliament owing to the provisions of section 27 of the Act with specific functions expressed in section 28 of the Act as follows: -

"27. Establishment of the Public Procurement Administrative Review Board

(1) There shall be a central independent procurement appeals review board to be known as the Public Procurement Administrative Review Board as an unincorporated Board.

(2)

28. Functions and powers of the Review Board

(1) The functions of the Review Board shall be—

(a) reviewing, hearing and determining tendering and asset disposal disputes; and

(b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law."

In order to invoke the jurisdiction of the Board, the conditions set out in section 167 (1) of the Act must be satisfied. The said provision states as follows: -

"Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed"

Section 167 (1) of the Act gives aggrieved candidates and tenderers who claim to have suffered or risk suffering loss or damage due to a breach of a duty imposed on a procuring entity by the Act or the Public Procurement and Asset Disposal Regulations 2020 (hereinafter referred to as "Regulations 2020"), a right to seek administrative review within fourteen days of; notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process. Regulation 203 (2) (c) of Regulations 2020 expounds on the manner in which the fourteen-day period for seeking administrative review can be applied as follows: -

"203 (1) A request for review under section 167(1) of the Act shall be made in the Form set out in the Fourteenth Schedule of these Regulations

(2) The request referred to in paragraph (1) shall

(a)

(b)

(c) be made within fourteen days of—

- (i) **the occurrence of the breach complained of where the request is made before the making of an award**
- (ii) **the notification under section 87 of the Act or**
- (iii) **the occurrence of the breach complained of where the request is made after making of an award to the successful bidder”**

The Respondents raised a preliminary objection on the grounds that the Board lacks jurisdiction to determine the Request for Review because in the Respondent’s view, the same was lodged outside the fourteen (14) day-period specified in section 167 (1) of the Act read together with Regulation 203 (2) (c) of Regulations 2020. To support this view, the Respondents state at paragraph 2 of their preliminary objection and paragraph 29 of their Memorandum of Response that the Applicant was first notified of the outcome of its bid through a notification sent to the Applicant on 21st December 2020 through an email supplied by the Applicant in its Confidential Business Questionnaire Form as “**abdirizac4mal@gmail.com**”. In the Respondent’s view, since it notified the Applicant of the outcome of its bid on 21st December 2020, the Applicant ought to have lodged a Request for Review within 14 days from that date.

The Applicant on the other hand, averred at paragraph 4 of its Request for Review that it received a letter of notification of unsuccessful bid dated 17th

December 2020, on 11th January 2021 only after it wrote to the Respondents on 7th January 2021, enquiring about the status of the subject procurement process. In the Applicant's view, since it received its letter of notification on 11th January 2021 via email and lodged its Request for Review on 15th January 2021, it was well within the statutory period of 14 days specified in section 167 (1) of the Act. Having heard sight of the Respondents' pleadings, the Applicant deponed at paragraph 6 of its Further Affidavit that the email it provided in its Confidential Business Questionnaire Form was "**abdirizackm91@gmail.com**" and not "**abdirizac4mal@gmail.com**" as alleged by the Respondents. The Applicant maintained its position that it received the letter of notification dated 17th December 2020, on 11th January 2021 through "**abdirizackm91@gmail.com**".

Having considered the Applicant's and Respondent's rival cases, the Board deems it necessary to address an important principle of the law of evidence. At page 2 of the decision in **Civil Appeal Case 3 of 2017, M'Bita Ntiro v Mbae Mwirichia & another [2018] eKLR**, the Honourable Justice P.M Njoroge cited with approval the decision of the Honourable Justice Majanja in **Evans Otieno Nyakwana v Cleophas Bwana Ongaro [2015] eKLR** and held as follows: -

"The rule of evidence is clear that "He who alleges must prove" and this maxim was in favour of the 1st respondent herein. The maxim has been grounded in law under Section 107 of the Law of Evidence. The same was enunciated by Justice Majanja in Evans Otieno Nyakwana v Cleophas Bwana Ongaro [2015]

eKLR when he said that: "...As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107 (1) of the Evidence Act (Chapter 80 of the Law of Kenya), which provides:

"107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist..."

It is clear from the above case that the burden of proof lies upon the party who invokes ay legal right or liability and substantially asserts the existence of some facts. In the instant case, the Respondents assert that the letter of notification dated 17th December 2020, was first sent to the Applicant on 21st December 2020. To support this view, the Respondents furnished the Board with; (a) an email screenshot titled **"Sent Items - jchepngeno@kura.go.ke -Outlook"** and (b) a copy of the Applicant's duly completed Confidential Business Questionnaire Form. According to the Respondents' email screenshot, the Applicant's letter of notification of unsuccessful bid was sent to an email address termed as **"abdirizac4mal@gmail.com"**. The Respondents assert this email was provided in the Applicant's duly Completed Confidential Business Questionnaire Form. This assertion prompted the Board to study the Applicant's Confidential Business Questionnaire Form found at page 135 of the Applicant's original bid. Upon studying the same, the Board observes that the email cited therein appears as **"abdirizac4m91@gmail.com"**.

It is evident from the foregoing that, the email in the Applicant's Confidential Business Questionnaire Form which appears as "**abdirizac4m91@gmail.com**" is not the same as the email of "**abdirizac4mal@gmail.com**" contained in the screenshot provided by the Respondents to this Board. The Respondents had the onus of proving that the email provided in the Applicant's Confidential Business Questionnaire Form (that is, "**abdirizac4m91@gmail.com**") is similar to the one used on 21st December 2020, so as to arrive at the conclusion that notification was sent to the Applicant on 21st December 2020. This burden of proof has not been discharged because the two emails referred to by the Respondents are different and thus the Board is not persuaded by the assertion that the Applicant was notified of the outcome of its bid on 21st December 2020.

The Applicant on the other hand averred that it received its letter of notification via email sent by the Respondents on 11th January 2021 whilst relying on an email screenshot attached to the Applicant's Further Affidavit which we note appears as follows: -

"Akinyi Ouko <a.okoko49@gmail.com> to me

.....Forwarded message.....

From Judith Chepngeno <jchepngeno@kura.go.ke>

Date: Mon, 11 Jan 2021, 15:55

Subject: 228 jowharinvestment ltd (2020).pdf

To: abdirizackm91@gmail.com <abdirizackm91@gmail.com

Hi

Attached for your action"

The Board observes that the email address of **jchepngeno@kura.go.ke** cited hereinbefore is similar to the email titled **jchepngeno@kura.go.ke** contained in the Respondent's screenshot titled **"Sent Items-jchepngeno@kura.go.ke -Outlook"**. That notwithstanding, the email of **"abdirizackm91@gmail.com"** relied upon by the Applicant as its correct email, is not similar to the email appearing as **"abdirizac4m91@gmail.com"** in the Applicant's Confidential Business Questionnaire Form. As a result, the Applicant has failed to discharge its burden of proof that it received the letter of notification on 11th January 2021.

The Board is only left with the letter addressed to the 1st Respondent by the Applicant which has the following details: -

"Re: Tender No. KURA/RMLF/HQ/228/2020-2021 for Improvement of Access Road in Yamin Estate (Off Mombasa Road).

We make reference to the above matter in which our company bid

Whereas we submitted our tender and participated in the tender opening, we are yet to receive any notification as to

the outcome of the evaluation. Kindly but urgently advise us on the position of the evaluation and outcome of the tender”

The Board observes that a receiving stamp of the Procuring Entity is affixed on the face of the above letter, showing the same was received by the Procuring Entity on 7th January 2021. The Respondents did not respond to the Applicant’s allegation nor deny having received the letter dated 7th January 2021. As a result, the Board can only rely on the date of 7th January 2021 because on that date, the Applicant enquired about the status of the subject procurement process and there is a receiving stamp to show the said letter was received by the Procuring Entity. This, in the Board’s view supports the Applicant’s assertion that, as at 7th January 2021, it did not know of the status of the subject procurement process and thus requested to be informed of the same. Given that the Applicant lodged its Request for Review on 15th January 2021, attaching its letter of notification to the said application, the Board finds the Applicant may have received its letter of notification on 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th or 15th January 2021 because the Procuring Entity received the Applicant’s letter of enquiry on 7th January 2021 and may have sent the letter of notification to the Applicant on the aforelisted dates.

In computing time within which the Applicant ought to have lodged its Request for Review, the Board observes that section 57 (a) of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya guides on this aspect as it states as follows: -

"In computing time for the purposes of a written law, unless the contrary intention appears—

(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done"

If the earliest date of 7th January 2021 is taken into account, the Board observes the said date is an excluded day for purposes of computing time pursuant to section 57 (a) of the Interpretation and General Provisions Act and thus, the last day of the period of 14 days after 7th January 2021 ends on 21st January 2021. The Applicant lodged its Request for Review on 15th January 2021 and the same is within the statutory period specified in section 167 (1) of the Act.

Accordingly, the Board finds the Applicant's Request for Review was filed within the statutory period of 14 days specified in section 167 (1) of the Act.

On the second sub-issue of the first issue for determination, the Respondents raised a second preliminary objection to the jurisdiction of the Board by alleging a contract was already signed on 13th January 2021 between the Procuring Entity and the Interested Party by the time the Applicant lodged its Request for Review on 15th January 2021. On its part, the Interested Party averred at paragraph 1 of its Notice of Preliminary Objection that the Board lacks jurisdiction under section 167 (4) (c) of the Act to entertain the Request

for Review because a valid contract was executed on 13th January 2021 between the Procuring Entity and the Interested Party. To support this view, the Interested Party deponed at paragraphs 5 to 12 of its Replying Affidavit that, after receiving a letter of notification of award dated 17th December 2020, it gave a formal acceptance of the award within 7 days as requested by the Respondents. According to the Interested Party, it then presented a performance security to the Respondents on 4th January 2021 and that following the expiry of 14 days, a contract was signed between the Procuring Entity and the Interested Party on 13th January 2021. Thereafter, the Interested Party mobilized 6 machines and set up a site office on 15th January 2021 to execute the subject tender. At paragraph 5 of its Further Affidavit, the Applicant deponed that execution of a contract between a successful bidder and the Procuring Entity is only permissible after the lapse of 14 days from the date notification is made to bidders by the Procuring Entity.

Having considered the foregoing pleadings, the Board observes that section 167 (4) (c) of the Act cited by the Interested Party states that: -

"167 (1)

(2)

(3)

(4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)—

- (a)
- (b); and
- (c) **where a contract is signed in accordance with section 135 of this Act**

Section 167 (4) (c) of the Act suggests that the jurisdiction of the Board can only be ousted if a contract is signed in accordance with section 135 of the Act. In the instant case, the Board is dealing with one of the conditions that ought to be satisfied for a procurement contract to be valid. Section 135 (3) of the Act provides that: -

"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"

A procurement contract is signed within the tender validity period but not before the lapse of 14 days after notification. The 14 days specified in section 135 (3) of the Act is a stand-still period that enables aggrieved tenderers to exercise their right to administrative review pursuant to section 167 (1) of the Act, if they wish to do so. The stand-still period of 14 days starts running a day after notification is received by bidders because it was the intention of the legislature that procuring entities would notify successful and unsuccessful bidders of the outcome of their bids at the same time. This is evident from the wording of section 87 (3) of the Act read together with Regulation 82 (1) of Regulations 2020 which state as follows: -

"Section 87 (3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof

Regulation 82 (1) The notification to the unsuccessful bidder under section 87 (3) of the Act shall be in writing and shall be made at the same time the successful bidder is notified"

A procuring entity that fails to notify unsuccessful bidders of the outcome of their bids the same time the successful bidder is notified undermines the overriding objective of section 87 (3) of the Act read together with Regulation 82 (1) of Regulations 2020 and such omission cannot be used to defeat an aggrieved tenderer's right to administrative review.

The Board has established that the Applicant had 14 days between 7th January 2021 to 21st January 2021 to file its Request for Review and thus the Procuring Entity and the Interested Party could only sign a contract from 22nd January 2021, being the earliest date after the lapse of the 14-day stand-still period specified in section 135 (3) of the Act. It is also worth noting that despite having received the Applicant's letter on 7th January 2021 enquiring about the status of the subject tender, the Respondents still signed a contract with the Interested Party on 13th January 2021 with full knowledge

of the period of 14 days available to the Applicant who had not received its notification as at 7th January 2021. This in the Board's view was a calculated move aimed at depriving the Applicant of its right to administrative review specified in section 167 (1) of the Act. Even if the Interested Party states it already mobilized resources to implement the subject tender, a contract that goes against express provisions of the law is null and void ab initio and any action undertaken thereafter cannot be used as a basis of denying the Applicant an opportunity to exercise its right to administrative review. Such a contract cannot be allowed to stand because the same offends the provisions of section 135 (3) of the Act read together with section 167 (1) of the Act.

Accordingly, the Board finds that the Procuring Entity and the Interested Party failed to sign a contract in accordance with section 135 (3) of the Act and thus cannot rely on section 167 (4) (c) of the Act in ousting the jurisdiction of the Board.

In totality of the first issue, the Board finds that it has jurisdiction to entertain the Request for Review and thus dismisses the Respondents' Preliminary Objection filed on 20th January 2021 and the Interested Party's Notice of Preliminary Objection filed on 27th January 2021. The Board now proceeds to address the substantive issue in the Request for Review.

The Applicant's letter of notification of unsuccessful bid dated 17th December 2020 contained the following details: -

"...Pursuant to the provisions of section 87 (3) of the Public Procurement and Asset Disposal Act, 2015, this is to notify you that Kenya Urban Roads Authority has finalized processing of the above Tender and your bid was unsuccessful due to the reasons stated below:

- Bidder did NOT attach the specified number of competition certificates- Attached only one (1) completion certificate of works above 50 M***
- Program of works submitted does not cover entire proposed period of 9 months***
- Bank statement attached are not for the last six months"***

Having considered parties' cases on the reasons why the Applicant's bid was found non-responsive, the Board proceeds to make the following findings: -

i. Completion Certificates

This criterion is provided under Clause 4.2 (b). Specific Construction Experience of Section 4. Qualification Criteria at page 22 of the Tender Document as follows: -

No.	Subject	Requirement	Bidder	Submission Requirements
4.2 (b)	Specific Construction Experience	Participation as a road's contractor, management contractor or subcontractor, <u>in at least three (3) contracts each with a value of at least Kshs. 50 Million (Fifty million), successfully and substantially completed. One (1) of the</u>	Must submit as required and bidders who meet the requirement, are marked YES, those	Section 2, Schedule 6A

		contracts should be in a City and that are similar to the <u>proposed works</u> . The similarity shall be based on the physical size, complexity, methods/technology or other characteristics as described in Section 2.	that do not meet are marked NO	
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The foregoing criterion required bidders to demonstrate their participation as a road’s contractor, management contractor or subcontractor, in at least three (3) contracts each with a value of at least Kshs. 50 Million which are successfully and substantially completed, provided that One (1) of the contracts should be in a City and that the works are similar to the proposed works in the subject tender based on the physical size, complexity, methods/technology or other characteristics described in Section 2 of the Tender Document. The provisions of Section 2 referenced in the above table deal with “Materials and Testing of Materials” done in accordance with the Standard Specifications specified in the Tender Document.

To demonstrate their compliance with the criterion under consideration, bidders were required to complete **“Schedule 6 A- Schedule of Roadworks carried out by the Bidder in the last five years”** found at page 141 of the Tender Document and to attach relevant copies of completion certificates. The said Schedule 6 A has the following details: -

DESCRIPTION OF WORKS	NAME OF CLIENT	VALUE OF WORKS (KSHS)	YEAR COMPLETED/ REMARKS

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I certify that the above works were successfully carried out by this Bidder and hereby attach relevant copies of completion certificates.

.....

(Signature of Bidder)

.....

(Date)

In response to this criterion, the Applicant attached the following: -

- *At page 235 of its original bid, a Completion Certificate issued by Kenya Rural Roads Authority for Sub-Contract Award for Upgrading to Bitumen Standard and Maintenance of Kimutwa-Makaveti-Kwamutisya Road at a contract sum of **Kshs. 83,000,000.00** for a period of 6 months with a commencement date of 11th June 2019 and completion date of 14th November 2019;*
- *At page 244 of its original bid, a Taking-Over Certificate issued by Wajir County Government for Improvement of Manyalo Road to Bitumen Standards (Part) at a contract sum of **Kshs. 22,370,543.16** for a period of 32 months with a commencement date of 24th February 2017 and completion date of 25th October 2019;*
- *At page 247 of its original bid, a Certificate of Practical Completion issued by Wajir County Government for the Proposed Gravelling at Lolkuta town roads at a contract sum of **Kshs. 3,393,000.00** for a*

period of one month with a commencement date of 10th January 2020 and completion date of 5th February 2020;

- *At page 249 of its original bid, a Project Completion Certificate issued by Northern Water Services Board for the Construction of Adan Awale Lot 11 Water Supply at a contract sum of **Kshs. 16,063,220.30** with a commencement date of August 2017 with no completion date specified therein; and*
- *At page 251 of its original bid, a Completion Certificate issued by Kajaja Construction Company Limited for Upgrading to Bitumen Standards & Performance Based Routine Maintenance of Odda-Bute-Danaba Road at a contract sum of **Kshs. 85,250,385.00** for a period of 5 months with no commencement and completion dates.*

From the foregoing, the Board observes that the Applicant did not specify the works that were specifically undertaken in a city. Whereas the works amounting to Kshs. 83,000,000.00 (Upgrading to Bitumen Standard and Maintenance of Kimutwa-Makaveti-Kwamutisya Road) and the works amounting to Kshs. 85,250,385.00 (Upgrading to Bitumen Standards & Performance Based Routine Maintenance of Odda-Bute-Danaba Road) are above 50 Million Kenya Shillings, the Applicant failed to specify the commencement and completion dates for the works amounting to Kshs. 85,250,385.00 for the Evaluation Committee to ascertain whether they were undertaken within the last five years from the bid submission deadline of 23rd November 2020.

Accordingly, the Board finds that the Applicant failed to satisfy the criterion under Clause 4.2 (b). Specific Construction Experience of Section 4. Qualification Criteria at page 22 of the Tender Document.

ii. Program of Works/Work Methodology

Clause 6. Work Methodology of Section 4. Qualification Criteria at page 29 of the Tender Document provides as follows: -

No.	Subject	Requirement	Bidder	Submission Requirements
6	Work Methodology	Submission of a brief work methodology in accordance with sub-clause 5.3	Must submit as required and bidders who meet the requirement, are marked YES, those that do not meet are marked NO	Section 2 Standard Specifications

On its part, Clause 5.3 of Section II. Instructions to Tenderers and Condition of Tender of the Tender Document provided as follows: -

"Bidders shall also submit proposals of work methods and schedule in sufficient detail to demonstrate the adequacy of the bidders' proposals to meet the technical specifications and the completion time referred to in Clause 1.2 above."

On the other hand, Clause 1.2 of Section II. Instructions to Tenderers and Condition of Tender read together with Clause 49.1 of the Appendix to Form of Bid of the Tender Document states as follows: -

"Clause 1.2. The successful bidder will be expected to complete the Works within the period stated in the Appendix to Form of Bid from the date of commencement of the Works.

Clause 49.1. Time for completion: 9 months"

The Board observes that Clause 1.2 of Section II. Instructions to Tenderers and Condition of Tender required the successful bidder to complete works in the subject tender within a period of 9 months specified in the Appendix to Form of Bid. This means that, it was permissible for a successful bidder to complete works in the subject tender before the lapse of 9 months provided the successful bidder does not exceed the time limit of 9 months specified in the Appendix to Form of Bid of the Tender Document. The Applicant provided a document known as **"Revised Resourced Program of Works Superimposed with Cash Flow Projections"** at page 171 of its original bid showing works in the subject tender will be completed in 6 months (that is, January 2021 to June 2021).

It is the Board's considered view that the Applicant's Program of Works was within the period for completion of works in the subject tender having noted that the Tender Document merely provided a time-limit within which works ought to be completed and thus nothing stops bidders from completing works at a period that is earlier than 9 months. Furthermore, the Respondents have not provided any real and tangible evidence to show completion of works before the lapse of 9 months would mean such works

would not meet the standard specifications specified in Part 2 of Section V of the Tender Document.

Accordingly, the Board finds the Applicant satisfied the criterion under Clause 6. Work Methodology of Section 4. Qualification Criteria, Clause 5.3 and Clause 1.2 of Section II. Instructions to Tenderers and Condition of Tender read together with Clause 49.1 of the Appendix to Form of Bid of the Tender Document.

iii. Audited Balance Sheets or other Financial Statements

Clause 3.1. Financial Performance of Section 4. Qualification Criteria of the Tender Document specified this criterion in the following terms: -

No.	Subject	Requirement	Bidder	Submission Requirements
3.1. Financial Performance	(a) Submission of <u>audited balance sheets</u> or <u>other financial statements</u> acceptable to the Employer, <u>for the last two [2] years</u> and <u>authenticated bank statements for the last six (6) months</u> to demonstrate: (b) the current soundness of the applicants financial position and its prospective long term profitability, and	Must submit as required and bidders who meet the requirement, are marked YES, those that do not meet are marked NO	Must submit as required and bidders who meet the requirement, are marked YES, those that do not meet are marked NO	Attach evidence on the requirement of Section 2, Schedule 8 a) All pages must be initialized and stamped by both a practicing Auditor registered with ICPAK and one of the Directors. Auditor's practicing membership number

	(c) capacity to have a cash flow equivalent to 20% of the tender sum			from ICPAK must be indicated. Non adherence to this to part a, b and c leads to disqualification. (b) All pages in the bank statement must be initialized and stamped by the issuing bank.
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Schedule 8 referred to in the table outlined hereinbefore appears as follows:-

SCHEDULE 8: FINANCIAL STANDING

	Year 1 (2017)	Year 2 (2018)
	Ksh.	Ksh.
Road works		
Other civil Engineering works		
Other (specify)		
Total		

The Board observes that bidders were required to submit: audited balance sheets or other financial statements acceptable to the Procuring Entity for the last two [2] years and authenticated bank statements for the last six (6) months attaching documents specified in the table under Clause 3.1. Financial Performance of Section 4. Qualification Criteria of the Tender

Document. In response to this criterion, the Applicant attached the following:-

- *At pages 187 to 191 of its original bid, Certified Statement of Accounts issued by First Community Bank for transactions made between 1st January 2018 to 12th October 2020;*
- *At pages 193 to 216 of its original bid, Annual Report and Financial Statements for the year ended 31st December 2019 audited by Ababsy & Associates;*
- *At pages 217 to 230 of its original bid, Annual Report and Financial Statements for the year ended 31st December 2018 audited by Ababsy & Associates; and*
- *At page 192 of its original bid, an Annual Practising Licence issued by ICPAK to Ababsy & Associates to practice in Kenya as a licenced to practice as a Certified Public Accountant, which certificate is valid up to 31st December 2020.*

From the foregoing, the Board notes that the Applicant provided certified statement of accounts for the last 2 years (that is, 1st January 2018 to 12th October 2020) and Audited Annual Reports and Financial Statements for the last 2 years (i.e. year ended 31st December 2019 and the year ended 31st December 2018).

The Applicant's certified statement of accounts already cover a period of 6 months between 23rd November 2020 (which was the tender submission deadline) and 23rd May 2020. Even if the Applicant's certified statement of accounts extend to a period of 2 years (that is, 1st January 2018 to 12th

October 2020), the period required by the Procuring Entity was already catered for by the Applicant in its certified statement of accounts. It is the Board's considered view that the Applicant satisfied the criterion under consideration and the mere fact that the Applicant's statement of accounts is over and above the period required should not be a ground to disqualify the Applicant's bid.

Accordingly, the Board finds that the Applicant satisfied the criterion under Clause 3.1. Financial Performance of Section 4. Qualification Criteria of the Tender Document.

The Board observes that the three criteria considered hereinbefore were evaluated at the Technical Evaluation Stage which was based on a **"YES/NO"** evaluation criteria. The Applicant did not satisfy the criterion on Completion Certificates provided in Clause 4.2 (b). Specific Construction Experience of Section 4. Qualification Criteria at page 22 of the Tender Document so as to proceed to the Financial Evaluation Stage. Section 80 (2) of the Act requires the Evaluation Committee to ***"undertake evaluation and comparison of tenders using the procedures and criteria set out in the tender documents."*** Given that Technical Evaluation was based on **"YES/NO"** criteria, a bidder's failure to satisfy any of the criteria at the Technical Evaluation Stage would leave the Evaluation Committee with no option but to find such bid non-responsive.

To that end, the Board finds that the Applicant failed to satisfy the criterion on Completion Certificates provided in Clause 4.2 (b). Specific Construction Experience of Section 4. Qualification Criteria at page 22 of the Tender Document and thus could not proceed to Financial Evaluation Stage.

The Board has found the Applicant's bid failed to satisfy the criterion on Completion Certificates provided in Clause 4.2 (b). Specific Construction Experience of Section 4. Qualification Criteria at page 22 of the Tender Document and thus cannot proceed to Financial Evaluation. On the other hand, the Board nullified the contract dated 13th January 2021 signed between the Procuring Entity and the Interested Party because the same offends the provision of section 135 (3) of the Act. Simply put, the contract dated 13th January 2021 between the Procuring Entity and the Interested Party lacks the attributes of legality, so cherished under section 135 (3) of the Act.

The question that follows is what would be the appropriate reliefs in the circumstances of this case? Having concluded that the Applicant failed to satisfy the criterion on completion certificates under Clause 4.2 (b). Specific Construction Experience of Section 4. Qualification Criteria at page 22 of the Tender Document so as to proceed to Financial Evaluation, this alone could have disposed this application in favour of the Respondents and the Interested Party. However, the Board has also held that the contract dated 13th January 2021 signed between the Procuring Entity and the Interested Party offends the provision of section 135 (3) of the Act. This being a clear

position of the law, then this is a proper case for the Board to fashion appropriate reliefs.

At paragraph 157 of his decision in **Miscellaneous Application No. 284 of 2019, Republic v Public Procurement Administrative Review Board, & Another Ex Parte CMC Motors Group Limited [2020] eKLR**, the Honourable Justice Mativo cited the decision of the South African Constitutional Court in **Minister of Health & Others v Treatment Action Campaign & Others (No 2) (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR 1033 (5 July 2002)** where it was held as follows:-

"Perhaps the most precise definition of "appropriate relief" is the one given by the South African Constitutional Court in Minister of Health & Others v Treatment Action Campaign & Others thus:-

"...appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus, or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the court may even have to fashion new remedies to secure the protection and enforcement of these all important rights...the courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if need be to achieve this goal."

The Board fully adopts the definition in the above case and given the circumstances in the instant Request for Review, it is only just to direct the 1st Respondent to ensure a contract is signed between the Procuring Entity and the Interested Party in accordance with section 135 of the Act. The Board now proceeds to grant the following specific orders: -

FINAL ORDERS

In exercise of the powers conferred upon it by section 173 of the Act, the Board makes the following orders in the Request for Review: -

- 1. The Request for Review filed by the Applicant on 15th January 2021 with respect to Tender No. KURA/RMLF/HQ/228/2020-2021 for Improvement of Access Road in Yamin Estate (Off Mombasa Road), be and is hereby dismissed.**
- 2. The Contract between the Procuring Entity and the Interested Party signed on 13th January 2021 with respect to Tender No. KURA/RMLF/HQ/228/2020-2021 for Improvement of Access Road in Yamin Estate (Off Mombasa Road), be and is hereby cancelled and set aside.**
- 3. The Accounting Officer of the Procuring Entity is hereby directed to execute a contract with the lowest evaluated tenderer in respect of Tender No. KURA/RMLF/HQ/228/2020-**

2021 for Improvement of Access Road in Yamin Estate (Off Mombasa Road) in accordance with section 135 of the Act.

4. Each party shall bear its own costs in the Request for Review.

Dated at Nairobi this 4th day of February 2021

CHAIRPERSON

SECRETARY

PPARB

PPARB