

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 28/2021 OF 23<sup>RD</sup> FEBRUARY 2021**

**BETWEEN**

**RIANG INTERNATIONAL GROUP LIMITED.....APPLICANT**

**AND**

**THE ACCOUNTING OFFICER,**

**CENTRAL RIFT VALLEY WATER**

**WORKS DEVELOPMENT AGENCY.....1<sup>ST</sup> RESPONDENT**

**CENTRAL RIFT VALLEY WATER**

**WORKS DEVELOPMENT AGENCY.....2<sup>ND</sup> RESPONDENT**

Review against the decision of The Central Rift Valley Water Works Development Agency with respect to Tender No. RVWWDA/LVN/AfDB/KTSWSSP/W/KAKAMEGA/2019-2020 Last Mile Connectivity Works for Eldoret and Kakamega Towns Lot II: Kakamega Town.

**BOARD MEMBERS**

- |                      |              |
|----------------------|--------------|
| 1. Ms. Faith Waigwa  | -Chairperson |
| 2. Qs. Hussein Were  | -Member      |
| 3. Mr. Jackson Awele | -Member      |
| 4. Mr. Ambrose Ngare | -Member      |
| 5. Ms. Rahab Chacha  | -Member      |

**IN ATTENDANCE**

- |                       |                                     |
|-----------------------|-------------------------------------|
| 1. Mr. Stanley Miheso | -Holding brief for Acting Secretary |
|-----------------------|-------------------------------------|

## **BACKGROUND TO THE DECISION**

Central Rift Valley Water Works Development Agency (hereinafter referred to as "the Procuring Entity") invited interested and eligible bidders to submit bids in response to Tender No. RVWWDA/LVN/AfDB/KTSWSSP/W/KAKAMEGA/2019-2020 Last Mile Connectivity Works for Eldoret and Kakamega Towns Lot II: Kakamega Town (hereinafter referred to as "the subject tender") via an advertisement published in the United Nations Development Business (UNDB) website [www.devbusiness.un.org](http://www.devbusiness.un.org) on 24<sup>th</sup> February 2020 and in the local Daily Nation Newspaper on 26<sup>th</sup> February 2020.

### **Pre-Bid Meeting/Conference**

Bidders were invited for a Pre-Bid Conference which was held at the Kakamega County Water and Sanitation Company (KACWASCO) Offices in Kakamega Town on 10<sup>th</sup> March 2020 at 10.00 am followed by site visits to the project areas on the same day.

### **Bid Submission Deadline and Opening of bids**

A total of three (3) bidders/firms submitted bids in response to the subject tender which were opened in the presence of bidders and their representatives who chose to attend and which bids were recorded as follows: -

<b>Bidder No.</b>	<b>Firm</b>
1.	Northern Green Developers Ltd.
2.	Phenix Logistiques Centre Ltd.
3.	Riang International Group Ltd.

## **Evaluation of Proposals**

The evaluation process was to be conducted in four stages:

1. Preliminary Examination of Bids;
2. Technical Responsiveness;
3. Detailed Examination of Bids;
4. 'Post'-Qualification

### **1. Preliminary Examination of Bids**

At this stage of evaluation, bids were examined to ascertain if all the required documentation had been submitted and if they were in compliance with the mandatory requirements of the Tender Document.

The purpose of this stage of evaluation was to identify and reject bids that were incomplete, invalid, or substantially non-responsive to the Tender Document and therefore were not to be considered further. It entailed the following:

- Verification
- Eligibility
- Bid Security
- Completeness of Bid
- Substantial Responsiveness

Bids were evaluated against the Preliminary Evaluation Criteria as follows: -

Item		Description	Reference BDS or SBEG
Verification		Letter of Bid Duly signed	Letter of Bid
		Joint Venture Agreement duly signed	ITB 4.1 Pg. 1-26 / Pg. 1-6
		Power of Attorney	ITB 20.2 Page 1-26
		Bid validity (Should be valid for <b>120 days</b> 6 <sup>th</sup> August 2020)	Letter of Bid
Eligibility	Nationality	Nationality in accordance with ITB 4.2.	ELI 1.1 and 1.2
	Conflict of Interest	No- conflicts of interests as described in ITB 4.3.	Letter of Bid
	Bank Ineligibility	Not having been declared ineligible by the Bank as described in ITB 4.4.	Letter of Bid
	Government Owned Entity	Compliance with conditions of ITB 4.5	ELI 1.1 and 1.2
	Ineligibility based on a United Nations resolution or Borrower's country law	Not having been excluded as a result of the Borrower's country laws or official regulations, or by an act of compliance with UN Security Council resolution, in accordance with ITB 4.8	Letter of Bid
Bid Security (Original Bank Guarantee)		Consistency of the wording with the Bid Security Form provided in the Bidding document section IV Bidding Forms	Page 1-14 / Page 1-62
		The amount - <b>KES.500,000</b>	Page 1-26 (ITB 19.1)
		Validity 120 days i.e. Bid validity deadline i.e. <b>6<sup>th</sup> August 2020</b>	Page 1-14 (ITB 18.1 / ITB 19)

Item		Description	Reference BDS or SBEG
		Joint Venture Bid Security should be in the name of all the partners in the Joint Venture as per clause 19.8	ITB 19.3 (Correspondent Financial Institution in Kenya), Page 1-15
Completeness of Bid		Completeness of Bid Forms as in Schedule IV	Page 1-12
		Letter of Bid	
		Bills of Quantities	
		Schedule of Adjustment Data	
		Summary of payment currencies	
		Form of Bid Security (Bank Guarantee)	
		Technical Proposal Forms	
		Site Organization	
		Method Statement	
		Mobilization Schedule	
		Construction Schedule	
		Contractors Equipment	
		Proposed Personnel	
		Bidders Qualification	
		ELI -1.1 and 1.2	
		<ul style="list-style-type: none"> <li>• Registration certificate / Incorporation of Bidder (which year?)</li> <li>• JV agreement</li> <li>• In case of Government Entity document proofing Autonomy</li> </ul>	
		All plus attachments	
		Initialization of erasures, Interlineations, additions or cancellation of items in Bill of Quantity as per clause 1.3.1 and 20.4 of ITB.	Page 1-16
	Completeness of the Bill of Quantities - Adequately filled	Page 1-12 (ITB 14.3) SBEF(5d) Page 1-22	
	Completeness of Bid Forms as in Schedule IV	ITB 11.1( c )	
	Form CON 2		
	Form CCC		
	Form FIN 3.1 (AAT for the last 3 years)		
	Form FIN 3.2		
	Form FIN 3.3 (AAT for the last 3 years)		

Item		Description	Reference BDS or SBEG
		Form Exp 2.4.1	
		Form Exp 2.4.2(a)	
		Form Exp 2.4.2(b)	
		Other documents	Page 1-15 / Page 1-26
		• Tax Compliance Certificates	
		• Registration with relevant Authorities	
		(To be verified at post Qualification)	

The results of this stage of evaluation were as follows: -

B. No.	Name of The Bidder	Verification	Eligibility	Bid Security	Completeness of Bid	Substantial Technical / Financial Responsiveness	Accepted for Second Technical Evaluation
1	Northern Green Developers Ltd.	No	Yes	No	No	Yes	No
2	Phenix Logistiques Centre Ltd.	Yes	Yes	Yes	Yes	Yes	Yes
3	Riang International Group Ltd.	Yes	Yes	Yes	Yes	Yes	Yes

Bidder No. 1 was found non-responsive whereas Bidder No. 2 and Bidder No. 3 were found responsive at this stage of evaluation and thus qualified to proceed for Technical Responsiveness Evaluation.

## 2. Technical Responsiveness Evaluation

At this stage of evaluation, bids were examined on their technical aspects, to confirm all the requirements outlined under Section III of the Tender Document were met without any material deviation, reservation, or omission.

Bids were evaluated against the following technical criteria: -

<b>Item</b>	<b>Description</b>	<b>Reference BD or SBEF</b>
<b>Site Organization</b>	Analyse for practicability and compliance with works requirement.	Page 1-61
<b>Method Statement</b>	<ul style="list-style-type: none"> <li>• General – Setting up and Mobilization</li> <li>• Pipework- Water Distribution pipelines, HDPE</li> <li>• Pipework – Sewer lines, uPVC</li> <li>• Ancillaries – chambers, valves, washouts, meters</li> <li>• Rehabilitation works for Wastewater Treatment Works and sewers</li> <li>• EHS</li> <li>• Quality Control</li> <li>• Electromechanical Works</li> <li>• Capacity Building</li> <li>• Operation and maintenance during DLP</li> </ul>	Page 1-62
<b>Construction schedule (to comply with 12 months construction and 12 months DLP timeline)</b>	Analyse for compliance with the stipulated timeframe	Page 1-64
<b>Mobilization Schedule (Work plan)</b>	Analyse for practicability and compliance to the stipulated timeframe	Page 1-63

The results were as follows: -

<b>No.</b>	<b>Criteria</b>	<b>Bidder No</b>	
		<b>2</b>	<b>3</b>
(a)	Method statement	<u>No</u>	Yes
(b)	Mobilization Schedule	Yes	Yes
	Construction Schedule	Yes	Yes
(c)	Equipment	<u>No</u>	Yes
(d)	Personnel	<u>No</u>	<u>No</u>
(e)	Site Organization	Yes	Yes
		<b><u>NR</u></b>	<b><u>NR</u></b>

Upon conclusion of Technical Responsiveness Evaluation, Bidder No. 2 and Bidder No. 3 were found non-responsive and therefore did not qualify to proceed to the next stage of evaluation.

### **The Evaluation Committee's Recommendation**

In view of the evaluation process, the Evaluation Committee recommended that the subject works be re-tendered and a reasonable amount of time be allowed for submission of new bids to ensure that more competitive and responsive bids were received by the Procuring Entity.

### **Professional Opinion**

The Supply Chain Manager reviewed the Evaluation Report and concurred with the Evaluation Committee's recommendation vide a Professional Opinion dated 2<sup>nd</sup> November 2020.

The Managing Director of the Procuring Entity approved the Evaluation Committee's recommendation on 2<sup>nd</sup> November 2020.

### **REQUEST FOR REVIEW NO. 141 OF 2020**

Riang International Group Limited (hereinafter referred to as "the Applicant"), lodged Request for Review No. 141 of 2020 dated and filed on 19<sup>th</sup> November 2020 together with a Statement sworn and filed on even date, a Further Statement sworn and filed on 1<sup>st</sup> December 2020,



through the firm of SESLaw Advocates LLP, seeking the following orders:

-

- a. An order declaring that the Procuring Entity breached the provisions of the Public Procurement and Asset Disposal Act;***
- b. An order cancelling and/or setting aside the Respondent's advertisement and invitation to tender issued via the Daily Nation on 6<sup>th</sup> November 2020 following the termination of the tender and an order barring the Respondent from receiving and evaluating any bids arising therefrom;***
- c. An order annulling and setting aside the Respondent's decision dated 2<sup>nd</sup> November 2020 as regards Tender No RVWWDA/LVN/AfDB/KTSWSSP/W/KAKAMEGA/2019-2020 Last Mile Connectivity Works for Eldoret and Kakamega Towns Lot II: Kakamega Town;***
- d. In the alternative, an order directing the Respondent to re-evaluate Tender No RVWWDA/LVN/AfDB/KTSWSSP/W/KAKAMEGA/2019-2020 Last Mile Connectivity Works for Eldoret and Kakamega Towns Lot II: Kakamega Town in strict adherence of the Act and Regulations made thereunder and award the party qualifying the said tender;***
- e. An order awarding costs to the Applicant herein.***

The Board having considered parties' cases and the documents filed before it, including confidential documents submitted to it pursuant to

section 67 (3) (e) of the Public Procurement and Asset Disposal Act, No. 33 of 2015 (hereinafter referred to as 'the Act') ordered as follows in its decision dated 10<sup>th</sup> December 2020 in **PPARB Application No. 141/2020, Riang International Group Limited v. The Accounting Officer, Central Rift Valley Water Works Development Agency & Another** (hereinafter referred to as "Review No. 141/2020"):

- i. The Decision of the Accounting Officer of the Procuring Entity terminating the procurement proceedings with respect to Tender No. RVWWDA/LVN/AfDB/KTSWSSP/W/KAKAMEGA/2019-2020 Last Mile Connectivity Works for Eldoret and Kakamega Towns Lot II: Kakamega Town be and is hereby nullified.**
- ii. The Accounting Officer of the Procuring Entity's Regret Letters dated 2<sup>nd</sup> November 2020 with respect to Tender No. RVWWDA/LVN/AfDB/KTSWSSP/W/KAKAMEGA/2019-2020 Last Mile Connectivity Works for Eldoret and Kakamega Towns Lot II: Kakamega Town addressed to all bidders, be and are hereby cancelled and set aside.**
- iii. The Accounting Officer of the Procuring Entity's Regret Letter dated 18<sup>th</sup> November 2020 with respect to Tender No. RVWWDA/LVN/AfDB/KTSWSSP/W/KAKAMEGA/2019-2020 Last Mile Connectivity Works for Eldoret and Kakamega Towns Lot II: Kakamega Town addressed to the Applicant, be and is hereby cancelled and set aside.**

- iv. The Accounting Officer of the Procuring Entity is hereby directed to re-instate the Applicant's bid together with all other bidders who made it to Technical Evaluation, at the Technical Evaluation Stage and conduct a re-evaluation at the Technical Evaluation Stage with respect to Clause 2.5 Personnel of Section III Evaluation and Qualification at page 44 of the Tender Document, in accordance with the provisions of the Act and the Constitution, taking into consideration the Board's findings in this Review.**
- v. Further to Order No. 3 above, the Accounting Officer of the Procuring Entity is hereby directed to proceed with the procurement process to its logical conclusion, including issuance of letters of notification of the outcome of evaluation to all bidders in accordance with section 87 (3) of the Act, within fourteen (14) days from the date of this decision.**
- vi. Each party shall bear its own costs in the Request for Review.**

### **RE-EVALUATION OF BIDS AT THE TECHNICAL EVALUATION STAGE**

As per the Board's decision in Review No. 141/2020, the Evaluation Committee conducted a re-evaluation of bids at the Technical Evaluation Stage as follows: -

Bids submitted by Bidder No. 2 M/s Phenix Logistiques Centre Limited and Bidder No. 3 Riang International Group Limited were examined on their technical aspects, to confirm all the requirements outlined under Section III of the Tender Document were met without any material deviation, reservation, or omission.

Upon conclusion of technical re-evaluation, Bidder No. 2 was found non-responsive whereas Bidder No. 3 was found responsive and thus qualified to proceed for Detailed Examination.

### **Detailed Examination of Bids**

This stage of evaluation entailed checking and correcting/adjusting bid prices for the following, where applicable: -

- Arithmetic errors, modifications and discounts;
- Single currency conversion;
- Additions, adjustments and priced deviations;
- Margin of preference for Domestic bidders

Upon conclusion of this stage of evaluation, Bidder No. 3 was found responsive and was ranked first since it was the only bidder to qualify for this stage of evaluation. Bidder No. 3 M/s Riang International Group Limited was found to be the lowest evaluated responsive bidder and was consequently subjected to Post Qualification examination.

### **Post-Qualification Evaluation**

At this stage of evaluation, Bidder No. 3 M/s Riang International Group Limited was assessed based on the criteria set out in the Tender Document with respect to Eligibility, Historical Contract Non-Performance, Financial Capability, Experience, Personnel and Equipment. However, Bidder No. 3 did not meet the Qualification Criteria for '*Specific Construction and Management Experience*'.

In view of its findings, the Evaluation Committee concluded that Bidder No. 3 M/s Riang International Group Limited was not suitably qualified for award of the subject tender. The Evaluation Committee therefore recommended that the subject works be re-tendered and new bids requested from prospective bidders, including all who were invited to submit bids in the first instance and a reasonable amount of time be allowed for the submission of new bids.

### **Second Professional Opinion**

In a professional opinion dated 8<sup>th</sup> February 2021, the Supply Chain Manager considered the Evaluation Committee's report and recommended termination of the subject procurement process. The Accounting Officer approved termination of the subject tender on 8<sup>th</sup> February 2021.

Letters of Notification of Termination to bidders were issued on 9<sup>th</sup> February 2021.

## **REQUEST FOR REVIEW NO. 28 OF 2021**

The Applicant lodged Request for Review No. 28 of 2021 dated 22<sup>nd</sup> February 2021 and filed on 23<sup>rd</sup> February 2021 together with a Statement sworn on 22<sup>nd</sup> February 2021 and filed on 23<sup>rd</sup> February 2021, a Further Statutory Statement sworn on 4<sup>th</sup> March 2021 and filed on 8<sup>th</sup> March 2021 and written submissions dated 4<sup>th</sup> March 2021 and filed on 8<sup>th</sup> March 2021 through the firm of SESLaw Advocates LLP, seeking the following orders: -

- i. An order declaring that the Procuring Entity breached the provisions of the Public Procurement and Asset Disposal Act;***
- ii. An order nullifying the decision of the Accounting Officer of the Procuring Entity terminating the procurement proceedings with respect to Tender No. RVWWDA/LVN/AfDB/KTSWSSP/W/KAKAMEGA/2019-2020 Last Mile Connectivity Works for Eldoret and Kakamega Towns Lot II: Kakamega Town;***
- iii. An order nullifying and setting aside the Accounting Officer of the Procuring Entity's Regret Letter dated 9<sup>th</sup> February 2021 with respect to Tender No. RVWWDA/LVN/AfDB/KTSWSSP/W/KAKAMEGA/2019-2020 Last Mile Connectivity Works for Eldoret and Kakamega Towns Lot II: Kakamega Town;***
- iv. An order declaring the Applicant's bid the most responsive and substituting the Respondent's letter dated 9<sup>th</sup> February 2021 as regards Tender No.***

***RVWWDA/LVN/AfDB/KTSWSSP/W/KAKAMEGA/2019-***

***2020 Last Mile Connectivity Works for Eldoret and Kakamega Towns Lot II: Kakamega Town with an award letter to the Applicant thereof;***

- v. An order cancelling and setting aside the Respondent's advertisement and invitation to tender issued on the 6<sup>th</sup> of November 2020 and the procurement proceedings thereon be terminated and the Respondent be barred from receiving and evaluating any bids arising therefrom;***
- vi. An order directing for an investigation of the conduct of the Respondent's evaluation committee by the relevant authorities including the Public Procurement Regulatory Authority as regards the propriety of the procurement proceedings herein;***
- vii. In the alternative to prayer (iv), an order directing the Respondent to appoint a new evaluation committee to re-evaluate the tender herein No. RVWWDA/LVN/AfDB/KTSWSSP/W/KAKAMEGA/2019-2020 Last Mile Connectivity Works for Eldoret and Kakamega Towns in strict adherence to the order of the Board dated 10<sup>th</sup> December 2020, the Act and Regulations made thereunder and award the party qualifying the said tender.***
- viii. An order awarding costs to the Applicant herein.***

In response, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents through its Chief Executive Officer, lodged a Memorandum of Response dated 1<sup>st</sup> March 2021 and filed on 2<sup>nd</sup> March 2021.

Pursuant to the Board's Circular No. 2/2020 dated 24<sup>th</sup> March 2020 detailing the Board's administrative and contingency management plan to mitigate Covid-19 pandemic, the Board dispensed with physical hearings and directed that all request for review applications be canvassed by way of written submissions. Through this circular, the Board dispensed with physical hearings and directed that all request for review applications be canvassed by way of written submissions. The Board further cautioned all parties to adhere to the timelines as specified in its directive as the Board would strictly rely on documentation filed before it within the timelines specified to render its decision within twenty-one days of filing of the request for review in accordance with section 171 of the Act.

### **BOARD'S DECISION**

The Board has considered each of the parties' cases, the pleadings and written submissions filed before it, including confidential documents submitted by the Procuring Entity pursuant to section 67 (3) (e) of Act and finds that the issues that arise for determination are as follows: -

- I. Whether the Procuring Entity terminated the subject procurement proceedings in accordance with the substantive and procedural requirements for termination of a tender specified in section 63 of the Act, thus ousting**



**the jurisdiction of the Board in accordance with section 167 (4) (b) of the Act;**

Depending on the determination of the first issue: -

- II. Whether the Procuring Entity complied with the orders of the Board issued on 10<sup>th</sup> December 2020 in PPARB Application No. 141/2020, Riang International Group Limited v. The Accounting Officer, Central Rift Valley Water Works Development Agency & Another; and**
- III. Whether the Applicant's bid satisfied the Qualification Criteria for 'Specific Construction and Management Experience' at the Post Qualification Evaluation Stage in accordance with Clause 2.4.2 of Section III Evaluation and Qualification Criteria of the Tender Document read together with section 80 (2) of the Act**

The Board will now proceed to address the first issue framed for determination as follows: -

Termination of procurement and asset disposal proceedings is governed by section 63 of the Act. If such termination meets the requirements of section 63 of the Act, the jurisdiction of this Board is ousted pursuant to section 167 (4) (b) of the Act which provides as follows: -

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

***(a) .....***

***(b) a termination of a procurement or asset disposal proceedings in accordance with section 62 of this Act” [i.e. section 63 of the Act] Emphasis by the Board***

In **Miscellaneous Civil Application No. 1260 of 2007, Republic v. Public Procurement Administrative Review Board & Another Ex parte Selex Sistemi Integrati (2008) eKLR** (hereinafter referred to as “the Selex Sistemi Integrati Case”), the court while determining the legality of sections 36 (6) and 100 (4) of the repealed Public Procurement and Disposal Act, 2005 (hereinafter referred to as “the Repealed Act”) that dealt with termination of procurement proceedings held as follows: -

***“I now wish to examine the issues for determination. The first issue is whether the Public Procurement and Disposal Act, 2005, section 100 (4) ousts the jurisdiction of the court in judicial review and to what extent the same ousts the jurisdiction of the Review Board. That question can be answered by a close scrutiny of section 36 (6) of the said Act which provides: -***

***“A termination under this section shall not be reviewed by the Review Board or a court.”***

***In the literal sense, section 36 (6) quoted above purports to oust the jurisdiction of the court and the Review Board. The Court has to look into the ouster clause as well as the challenged decision to ensure that justice is not defeated. In our jurisdiction, the principle of proportionality is now part of our jurisprudence. In the case of Smith v. East Elloe***

***Rural District Council [1965] AC 736 Lord Viscount Simonds stated as follows: -***

***"Anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal."***

***It is a well settled principle of law that statutory provisions tending to oust the jurisdiction of the Court should be construed strictly and narrowly... The court must look at the intention of Parliament in section 2 of the said Act which is inter alia, to promote the integrity and fairness as well as to increase transparency and accountability in Public Procurement Procedures.***

***To illustrate the point, the failure by the 2<sup>nd</sup> Respondent [i.e. the Procuring Entity] to render reasons for the decision to terminate the Applicant's tender makes the decision amenable to review by the Court since the giving of reasons is one of the fundamental tenets of the principle of natural justice. Secondly, the Review Board ought to have addressed its mind to the question whether the termination met the threshold under the Act, before finding that it lacks jurisdiction to entertain the case before it on the basis of a mere letter of termination furnished before it.***

The court in the Selex Sistemi Integrati Case held that this Board (as was constituted then) had the duty to question whether a decision by a procuring entity terminating a tender met the threshold of section 100 (4) of the Repealed Act, and that the Board's jurisdiction was not ousted by mere existence of a letter of termination furnished before it.

Further, in **Judicial Review Miscellaneous Application No. 142 of 2018, Republic v. Public Procurement and Administrative Review Board & Another ex parte Kenya Veterinary Vaccines Production Institute (2018) eKLR** (hereinafter referred to as "JR No. 142 of 2018") it was held as follows: -

***"The main question to be answered is whether the Respondent [Review Board] erred in finding it had jurisdiction to entertain the Interested Party's Request for Review of the Applicant's decision to terminate the subject procurement..."***

***A plain reading of section 167 (4) (b) is to the effect that a termination that is in accordance with section 63 of the Act is not subject to review. Therefore, there is a statutory pre-condition that first needs to be satisfied in the said sub-section namely that the termination proceedings are conducted in accordance with the provisions of section 63 of the Act, and that the circumstances set out in section 63 were satisfied, before the jurisdiction of the Respondent can be ousted.***

***As has previously been held by this Court in Republic v Kenya National Highways Authority Ex Parte Adopt –A-Light Ltd [2018] eKLR and Republic v. Secretary of the Firearms Licensing Board & 2 others Ex parte Senator Johnson Muthama [2018] eKLR, it is for the public body which is the primary decision maker, [in this instance the Applicant as the procuring entity] to determine if the statutory pre-conditions and circumstances in section 63 exists before a procurement is to be terminated...***

***However, the Respondent [Review Board] and this Court as review courts have jurisdiction where there is a challenge as to whether or not the statutory precondition was satisfied, and/or that there was a wrong finding made by the Applicant in this regard...***

***The Respondent [Review Board] was therefore within its jurisdiction and review powers, and was not in error, to interrogate the Applicant's Accounting Officer's conclusion as to the existence or otherwise of the conditions set out in section 63 of the Act, and particularly the reason given that there was no budgetary allocation for the procurement. This was also the holding by this Court (Mativo J.) in R v. Public Procurement Administrative Review Board & 2 Others Ex-parte Selex Sistemi Integrati which detailed the evidence that the Respondent would be required to consider while determining the propriety of a***

***termination of a procurement process under the provisions of section 63 of the Act”***

The Court in JR No. 142 of 2018 affirmed the decision of the Court in the *Selex Sistemi Integrati Case* that this Board has the obligation to first determine whether the statutory pre-conditions of section 63 of the Act have been satisfied to warrant termination of a procurement process, in order to make a determination whether the Board’s jurisdiction is ousted by section 167 (4) (b) of the Act.

In **Judicial Review Application No. 117 of 2020, Parliamentary Service Commission vs. Public Procurement Administrative Review Board & Another**, the Honourable Justice Nyamweya addressed the question whether this Board has jurisdiction to determine whether the statutory pre-conditions for termination of a tender have been met. At paragraph 51 of the said judgement, the Court held as follows: -

***“This being the case, the Respondent and this Court ..... have jurisdiction to determine whether or not the statutory pre-condition was satisfied....***

***Therefore, from the outset, the Respondent [Review Board] has jurisdiction to determine if the conditions of section 63 have been met when a tender is terminated on any of the grounds listed thereunder, and a termination under the section does not automatically oust the Respondent’s jurisdiction. It is only upon a finding that the termination was conducted in accordance with section 63***

***of the Act that the Respondent is then divested of jurisdiction and obliged to down its tools”***

It is therefore important for this Board to determine whether the Procuring Entity terminated the subject tender in accordance with provisions of section 63 of the Act, which determination can only be made by interrogating the reason (s) cited by the Procuring Entity and whether or not the Procuring Entity satisfied the statutory pre-conditions for termination outlined in section 63 of the Act.

In its pleadings before the Board, the Applicant contends that the Procuring Entity’s decision dated 9<sup>th</sup> February 2021 terminating the subject tender on the basis that all evaluated bids were non-responsive failed take into account the fact that the Applicant had fully complied with the eligibility and mandatory requirements under the Tender Document as provided under section 79 of the Act. The Applicant alleges that the Procuring Entity introduced new grounds for analyzing and re-evaluating bids, which criteria was not provided for in the Tender Document. The Applicant submits that the Procuring Entity’s decision dated 9<sup>th</sup> February 2021 resulted from a flawed evaluation process and thus should not be allowed to stand.

On its part, the Procuring Entity contends that it undertook the subject procurement process in accordance with the African Development Bank Procurement Policy for Bank Group Funded Operations of October 2015, as indicated in the Invitation to Tender. According to the Procuring

Entity, it conducted a re-evaluation of bids in accordance with the Board's orders in Review No. 141/2020 using the evaluation criteria stipulated in the Tender Document. However, at the post-qualification stage, the Procuring Entity avers that the Applicant failed to demonstrate specific experience on construction and management as required under the Tender Document and thus its bid did not qualify for award of the subject tender. It is therefore the Procuring Entity's contention that it terminated the subject tender in accordance with section 63 (1) (f) of the Act as all evaluated bids were found non-responsive.

Having considered parties' pleadings, the Board notes that section 63 of the Act specifies the statutory pre-conditions for termination of a tender which include substantive and procedural requirements 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) .....***

***(b) .....***

***(c) .....***

***(d) .....***

***(e) .....***

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



**(g)** .....

**(h)** .....

**(i)** .....

**(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.**

Given that the 1<sup>st</sup> Respondent terminated the subject tender on grounds that all tenders were non-responsive, the Board must now establish whether or not the Procuring Entity rightfully arrived at the decision of unresponsiveness of the Applicant's bid having noted that it challenged the reason why its bid was found non-responsive through the instant Request for Review.

The Applicant's letter of notification dated 9<sup>th</sup> February 2021 informed the Applicant that its bid was unsuccessful since it did not meet the qualification criteria for '*Specific Construction & Contract Management Experience*'.

This leads the Board to establish what qualification criteria was outlined in the Tender Document and in order to do so, the Board examined the Procuring Entity's Tender Document and observes in the Preface as outlined on page 2 therein the following details: -

***"This Bidding Document for Procurement of Works has been prepared by Rift Valley Water Works Development Agency and is based on the Standard Bidding Document for Procurement of Works issued by the African Development Bank dated June 2010.***

***The Standard Bidding Document for Procurement of Works reflects the structure and the provisions of the Master Document for Procurement of Works issued by the Multilateral Development Banks, except where specific considerations within the African Development Bank have required a change."***

Notably, the Procuring Entity's Tender Document (Bidding Document) was prepared based on the Standard Bidding Document for Procurement of Works issued by the African Development Bank dated June 2010 and for the most part (except where specific considerations by the African Development Bank have been included) reflects the structure and provisions of the Master Document for Procurement of Works issued by Multilateral Development Banks.

The Board observes Clause 11.1 (g) of Section I Instructions to Bidders on page 14 of the Tender Document provides as follows: -

***"The Bid shall comprise the following: -***

***a) .....***

***b) .....***

- c) .....
- d) .....
- e) .....
- f) .....

***g) documentary evidence establishing the Bidder’s qualifications in accordance with the requirements of Section III, Evaluation and Qualification Criteria, using the relevant forms furnished in Section IV, Bidding Forms”***

Further, Clause 32 of Section I Instructions to Bidders on page 24 of the Tender Document provides as follows: -

***“32.1 The Employer shall determine to its satisfaction whether the Bidder that is selected as having submitted the lowest evaluated and substantially responsive bid meets the qualifying criteria specified in Section III, Evaluation and Qualification Criteria.***

***33.1 The determination shall be based upon an examination of the documentary evidence of the Bidder’s qualifications submitted by the Bidder, pursuant to ITB 16.***

***33.2 An affirmative determination shall be a prerequisite for award of the Contract to the Bidder. A negative determination shall result in disqualification of the bid, in which event the Employer shall proceed to the next lowest evaluated bid to make a similar determination of that Bidder’s qualifications to perform satisfactorily.***

***33.3 The capabilities of the manufacturers and subcontractors proposed in its Bid to be used by the lowest evaluated Bidder for identified major items of the Requirements will also be evaluated for acceptability in accordance with the criteria and methodologies defined in Section III, Evaluation and Qualification Criteria. Their***

***participation should be confirmed with a letter of intent between the parties, as needed. Should a manufacturer or subcontractor be determined to be unacceptable, the Bid will not be rejected, but the Bidder will be required to substitute an acceptable manufacturer or subcontractor without any change to the bid price."***

According to the foregoing provisions, bidders' qualifications with respect to the subject tender would be evaluated in accordance with the criteria specified in Section III Evaluation and Qualification Criteria of the Tender Document. Moreover, the Procuring Entity shall determine to its satisfaction that the bidder selected as having submitted the lowest evaluated and substantially responsive bid satisfied the qualifying criteria as specified in the said section of the Tender Document.

The Board examined Section III Evaluation and Qualification Criteria in the Tender Document and observes the following provision on page 31 therein: -

***"This Section contains all the criteria that the Employer shall use to evaluate bids and qualify Bidders. In accordance with ITB 28 and ITB 32, no other factors, methods or criteria shall be used. The Bidder shall provide all the information requested in the forms included in Section IV, Bidding Forms."***

On page 33 of the Tender Document, the Board observes the following table titled 'Qualification (Without Prequalification)' with the following details therein: -

<b>2</b>	<b><i>Qualification (Without Prequalification)</i></b>
<b>2.1</b>	<b><i>Eligibility (TABLE)</i></b>
<b>2.2</b>	<b><i>Historical Contract Non-Performance (TABLE)</i></b>

<b>2.3</b>	<b><i>Financial Situation (TABLE)</i></b>
<b>2.4</b>	<b><i>Experience (TABLE)</i></b>
<b>2.5</b>	<b><i>Personnel (TABLE)</i></b>
<b>2.6</b>	<b><i>Equipment (TABLE)</i></b>

From the foregoing provisions, the Board observes that qualification of the lowest evaluated and substantially responsive bid in the subject tender would be undertaken with respect to six criteria; (i) Eligibility (ii) Historical Contract Non-Performance (iii) Financial Situation (iv) Experience (v) Personnel and (vi) Equipment, as outlined in the form of tables in the Tender Document.

Noting that the Applicant was disqualified with respect to '*Specific Construction & Contract Management Experience*', the Board examined the table on the criteria titled '*Experience*' and observes Clause 2.4.2 on Specific Experience with the following details therein: -

<b>Factor</b>	<b>2.4 Experience</b>					<b>Documentati on Required</b>
<b>Sub- Factor</b>	<b>Criteria</b>		<b>Bidder</b>			
	<b>Requirement</b>	<b>Single Entity</b>	<b>Joint Venture, Consortium or Association</b>			
			<b>All partners combined</b>	<b>Each partn er</b>	<b>At least one partner</b>	
<b>2.4.1 General Experien ce</b>	.....	.....	.....	.....	.....	.....
<b>2.4.2 Specific Experien ce</b>	(a) Participation as contractor, management contractor, or subcontractor, in at least one (1) contract within the last five (5) years, with a value of at least <b>Kenya Shillings One</b>	Must meet requireme nt	Must meet requiremen ts for all characteristi cs	N / A	Must meet requireme nt for one characteris tic	Form EXP 2.4.2(a)

	<p><b>Hundred and Fifty Thousand Only (KES 150,000,000)</b></p> <p>that has been successfully and substantially completed and that is similar to the proposed Works. The similarity shall be based on the physical size, complexity, methods/technology or other characteristics as described in Section IV, Bidding Forms</p>					
<b>2.4.2 Specific Experience</b>	<p>b) For the above or other contracts executed during the period stipulated in 2.4.2(a) above, a minimum experience in the following key activities:</p> <p>i. Experience in Laying of Sewer Pipelines Contractor should have laid uPVC / Precast Concrete/ Ferrous Pipes, size <b>400mm dia. and above</b> at an average production rate of <b>at least 3.5 km a month</b> in congested Central Business (CBD) areas.</p> <p>ii. Experience in laying of water supply pipeline Contractor should have laid HDPE/ Ferrous Pipes, size <b>400mm dia. and above</b> at an</p>	Must meet requirements	Must meet requirements	N / A	Must meet requirements	Form EXP-2.4.2(b)

	<p>average production rate of <b>at least 3.5 km a month</b> in congested Central Business (CBD) areas</p> <p>iii. Experience and expertise in undertaking micro-tunnelling works under permanent roads for water or sewer pipelines of diameters ranging from 110mm to 200mm and minimum total length of 200m micro-tunnelling works.</p>	Must meet requirements	Must meet requirements	N/A	Must meet requirements	Form EXP-2.4.2(b)
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From the foregoing table, the Board observes that at qualification stage the lowest evaluated and substantially responsive bid was required to demonstrate the following through documentation with respect to 'Specific Experience':

- a) Participation as a contractor, management contractor, or subcontractor in at least one (1) contract within the last five (5) years (between 2015 – 2020), with a value of at least **Kenya Shillings One Hundred and Fifty Thousand Only (KES 150,000,000)** that has been successfully and substantially completed and that is similar to the proposed Works. Similarity shall be based on the physical size, complexity,

methods/technology or other characteristics as described in Section IV, Bidding Forms

b) Demonstrate minimum experience in a contract (submitted for General Experience in paragraph a) above or any other contract) with respect to the following works; (i) experience in laying of sewer pipelines, (ii) experience in laying of water supply pipelines and (iii) experience and expertise in undertaking micro-tunnelling works under permanent roads for water or sewer pipelines of diameters ranging from 110mm to 200mm and minimum total length of 200m micro-tunnelling works.

Further, the lowest evaluated and substantially responsive bidder was required to complete and submit Form EXP. 2.4.2 (a) and Form EXP. 2.4.2 (b) as outlined in Section IV Bidding Forms in the Tender Document, with a summary of the details of the projects submitted by bidders in response to Clause 2.4.2 (a) and (b) of Section III Evaluation and Qualification Criteria of the Tender Document respectively.

Notably, a bidder participating in the subject tender as an individual tenderer, such as the Applicant, was required to comply with the requirements as outlined in Clause 2.4.2 (a) and (b) of Section III Evaluation and Qualification Criteria of the Tender Document and failure to comply would lead to disqualification from further evaluation.

The Board would like to point out that in Review No. 141/2020, it addressed in detail the interpretation of the phrase 'similar work' in the



subject tender and made the following determination in pages 60 to 61 thereof: -

***"The Tender Document does not provide the meaning of the word "similar work", hence, the Board considered the ordinary meaning of the word "similar" as defined in the dictionary, and the meaning of the word "work" as defined under the Act and the Tender Document.***

***The Collins Dictionary of English, 7<sup>th</sup> Edition, defines the word "similar" as "alike to another, but not necessarily identical".***

***The interpretation section of the Act defines the term 'work' to mean: -***

***"a combination of goods and services for the construction, repair, renovation, extension, alteration, dismantling or demolition of buildings, roads or other structures and includes: -***

- (a) The designing, building, installation, testing, commissioning and setting up of equipment and plant;***
- (b) Site preparation; and***
- (c) Other incidental services."***

***Taking the definition of "similar and "works" into account, it can be said that "similar works" means works to be provided by a tenderer, that are alike but not necessarily identical to the works of the Procuring Entity, which refers***

***to a combination of goods and services for the construction, repair, renovation, extension, alteration, dismantling or demolition of buildings, roads or other structures***

***Section VI Scope of Works describes 'works' under the subject tender to comprise the following: -***

*"1. Extension/Augmentation of water distribution network involving laying HDPE pipelines, total length 15,689m, diameters ranging from 90 – 160mm;*

*2. Rehabilitation of sewers total length 1,798m, diameters ranging from 160 – 315mm;*

*3. Rehabilitation of Shirere Wastewater Treatment Plant involving Installation of flow measurement device;*

*4. Rehabilitation of Masinde Muliro University (MMUST) Wastewater Treatment Plant involving:*

*i. Installation of flow measurement device;*

*ii. Fencing of the ponds;*

*iii. Installation of power line to the office building."*

***It is the interpretation of this Board that 'similar works' will include works that are alike but not necessarily identical to the scope of works as outlined by the Procuring Entity under the subject tender."***

With this interpretation in mind, the Board examined the Applicant's original bid which forms part of the Procuring Entity's confidential file in order to establish what the Applicant submitted in response to Clause 2.4.2 (a) and (b) 'Specific Experience' of Section III Evaluation and Qualification Criteria on pages 41 to 43 of the Tender Document.

The Board observes on page 407 of the Applicant's original bid that the Applicant submitted a list which it referred to as '*Riang International Group Limited Specific Experience Projects for the Last Five Years*' with the following details therein: -

<b>CONTRACT PERIOD</b>	<b>CONTRACT NAME</b>	<b>DESCRIPTION OF WORKS</b>	<b>AMOUNT OF CONTRACT</b>	<b>NAME OF EMPLOYER &amp; ADDRESS</b>	<b>ROLE OF BIDDER</b>	<b>STATUS</b>
11 <sup>th</sup> Feb 2018 – 10 <sup>th</sup> Nov 2018	Construction of Nairobi City Settlement Infrastructure Improvement Works (Roads/Footpaths)	Earth works of 15,000m <sup>3</sup> /Day, Site Clearance and Excavations, Road Signs and marking Pavement Works Pre-cast Concrete Works Micro-Tunneling Works	193,847,500	Zhongmei Engineering Works	Sub-Contractor	Completed
April 2015 – October 2016 (extended)	Construction works of Chemase Irrigation Scheme	Intake Works, laying of 33km water pipeline of DN 400mm, 315mm Upvc and GI pipe, electro-mechanical works, hydraulic structures, Drip sets, Conveyance Works	172,200,500.85	National Irrigation Board	Main Contractor	Complete

Accordingly, the Applicant submitted two projects for consideration with respect to Clause 2.4.2 (a) and (b) 'Specific Experience' of Section III Evaluation and Qualification Criteria at pages 41 to 43 of the Tender Document.

The Board observes that at pages 408 to pages 413 of the Applicant's original bid, the Applicant submitted the following documents as captured in the table herein below: -

Clause No.	Criteria	Submission by Applicant	Works
2.4.2	(a) Participation as contractor, management contractor, or subcontractor, in at least one (1) contract within the last five (5) years, with a value of at least <b>Kenya Shillings One Hundred and Fifty Shillings Only (KES 150,000,000)</b> that has been successfully and substantially completed and that is similar to the proposed Works. The similarity shall be based on the physical size, complexity, methods/technology or other characteristics as described in Section IV, Bidding Forms	<p>- <b>Completed Form Exp 2.4.2 (a)</b></p> <p>- <b>Letter of Notification of Award</b></p> <p><i>'Sub-contract for Construction of Nairobi City Settlements Infrastructure Improvement Works (Roads/Footpaths)</i></p> <p><b>Dated</b> 11<sup>th</sup> January 2018</p> <p>Executed as a Sub-contractor</p> <p><b>Client:</b> Zhongmei Engineering Group Limited</p> <p><b>Value:</b> Kshs 193,847,500</p> <p>- <b>Certificate of Substantial Completion of Works</b></p> <p><i>'Sub-contract for Construction of Nairobi City Settlements Infrastructure Improvement Works (Roads/Footpaths)</i></p> <p><b>Issued on</b> 25<sup>th</sup> November 2018</p> <p><b>Completion date:</b> 10<sup>th</sup> November 2018</p> <p><b>Value:</b> Kshs 193,847,500</p>	<p>a) Earthworks of 15,000m<sup>3</sup>/Day</p> <p>b) Pavement works of two layers of hand packed hardcore for sub-base and base final layers with asphalt concrete as binder course an 35mm asphalt concrete as wearing course</p> <p>c) Site clearance and excavations</p> <p>d) Road signs and marking</p> <p>e) Construction of major road (6m wide carriage way with double side drain and 1.5m both side footpaths with total length of 5.3km)</p> <p>f) All the works as described on the bill of quantities therein.</p>
2.4.2	<p>b) For the above or other contracts executed during the period stipulated in 2.4.2(a) above, a minimum experience in the following key activities:</p> <p>i. Experience in Laying of Sewer</p>	<p>- <b>Completed Form Exp 2.4.2 (b)</b></p> <p>- <b>Letter of Notification of Award</b></p>	<p>a) Earthworks of 15,000m<sup>3</sup>/Day</p> <p>b) Pavement works of two</p>

	<p>Pipelines Contractor should have laid uPVC / Precast Concrete/ Ferrous Pipes, size <b>400mm dia. and above</b> at an average production rate of <b>at least 3.5 km a month</b> in congested Central Business (CBD) areas.</p> <p>ii. Experience in laying of water supply pipeline Contractor should have laid HDPE/ Ferrous Pipes, size <b>400mm dia. and above</b> at an average production rate of <b>at least 3.5 km a month</b> in congested Central Business (CBD) areas</p> <p>iii. Experience and expertise in undertaking micro-tunnelling works under permanent roads for water or sewer pipelines of diameters ranging from 110mm to 200mm and minimum total length of 200m micro- tunnelling works.</p>	<p><b>Award</b> <i>'Sub-contract for Construction of Nairobi City Settlements Infrastructure Improvement Works (Roads/Footpaths)</i></p> <p><b>Dated</b> 11<sup>th</sup> January 2018</p> <p>Executed as a Sub-contractor</p> <p><b>Client:</b> Zhongmei Engineering Group Limited</p> <p><b>Value:</b> Kshs 193,847,500</p> <p>- <b>Certificate of Substantial Completion of Works</b></p> <p><i>'Sub-contract for Construction of Nairobi City Settlements Infrastructure Improvement Works (Roads/Footpaths)</i></p> <p><b>Issued on</b> 25<sup>th</sup> November 2018</p> <p><b>Completion date:</b> 10<sup>th</sup> November 2018</p> <p><b>Value:</b> Kshs 193,847,500</p>	<p>layers of hand packed hardcore for sub-base and base final layers with asphalt concrete as binder course an 35mm asphalt concrete as wearing course</p> <p>c) Site clearance and excavations</p> <p>d) Road signs and marking</p> <p>e) Construction of major road (6m wide carriage way with double side drain and 1.5m both side footpaths with total length of 5.3km)</p> <p>f) All the works as described on the bill of quantities therein.</p>
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Notably, the Applicant submitted a 'Letter of Notification of Award' and a 'Certificate of Substantial Completion of Works' pertaining to a project titled '*Sub-contract for Construction of Nairobi City Settlements Infrastructure Improvement Works (Roads/Footpaths)*' in response to Clause 2.4.2 (a) and Clause 2.4.2 (b) of Section III Evaluation and Qualification Criteria.

The Board observes that with respect to Clause 2.4.2 (a) of Section III Evaluation and Qualification Criteria, the said contract met the minimum value of Kshs. 150,000,000, was executed within the last five years (completed on 10<sup>th</sup> November 2018) and was executed by the Applicant in its capacity as a sub-contractor. However, the works executed in the said contract were not alike to the scope of works as outlined in Section VI Scope of Works on page 91 of Volume I of the Tender Document as cited hereinbefore in terms of physical size, complexity, methods/technology or other characteristics, since the said works were for construction of infrastructure improvement of roads and footpaths whereas the subject works involved water and sewerage works.

As concerns Clause 2.4.2 (b) of Section III Evaluation and Qualification Criteria, the Board observes that the said contract did not demonstrate (i) experience in laying of sewer pipelines, (ii) experience in laying of water supply pipelines and (iii) experience and expertise in undertaking micro-tunnelling works under permanent roads for water or sewer pipelines.

At pages 414 to pages 421 of the Applicant’s original bid, the Board observes that the Applicant submitted the following documents as captured in the table herein below: -

<b>Clause No.</b>	<b>Criteria</b>	<b>Submission by Applicant</b>	<b>Works</b>
2.4.2	(a) Participation as contractor, management contractor, or subcontractor, in at least one (1) contract within the last five (5) years, with a value of at least <b>Kenya Shillings One Hundred and Fifty Shillings</b>	- <b>Completed Form Exp 2.4.2 (a)</b>  - <b>Substantial Completion Certificate</b>	Project components include: - Intake Works - Conveyance - Drip Sets

	<p><b>Only (KES 150,000,000)</b> that has been successfully and substantially completed and that is similar to the proposed Works. The similarity shall be based on the physical size, complexity, methods/technology or other characteristics as described in Section IV, Bidding Forms</p>	<p><i>`Construction of Chemase Irrigation Scheme</i></p> <p>Executed as a Contractor</p> <p><b>Client:</b> National Irrigation Board</p> <p><b>Completion Date:</b> -25<sup>th</sup> October 2016</p> <p><b>Value:</b> Kshs 172,200,500.85</p> <p>- <b>Letter of Notification of Tender Award</b></p> <p><i>`Tender for Construction Works of the Chemase Irrigation Scheme Development Project, Nandi County</i></p> <p><b>Dated</b> 27<sup>th</sup> March 2015</p> <p><b>Value:</b> Kshs 172,200,500.85 (inclusive of taxes)</p>	
2.4.2	<p>b) For the above or other contracts executed during the period stipulated in 2.4.2(a) above, a minimum experience in the following key activities:</p> <p>i. Experience in Laying of Sewer Pipelines Contractor should have laid uPVC / Precast Concrete/ Ferrous Pipes, size <b>400mm dia. and above</b> at an average production rate of <b>at least 3.5 km a month</b> in congested Central Business (CBD) areas.</p> <p>ii. Experience in laying of water supply pipeline Contractor should have laid HDPE/ Ferrous Pipes, size <b>400mm dia. and above</b> at an average production rate of <b>at least 3.5 km a month</b> in congested Central Business (CBD) areas</p> <p>iii. Experience and expertise in undertaking micro-tunnelling works under permanent roads for water or sewer pipelines of diameters ranging from 110mm to 200mm and minimum total</p>	<p>- <b>Completed Form Exp 2.4.2 (a)</b></p> <p>- <b>Substantial Completion Certificate</b></p> <p><i>`Construction of Chemase Irrigation Scheme</i></p> <p>Executed as a Contractor</p> <p><b>Client:</b> National Irrigation Board</p> <p><b>Completion Date:</b> -25<sup>th</sup> October 2016</p> <p><b>Value:</b> Kshs 172,200,500.85</p> <p>- <b>Letter of Notification of Tender Award</b></p> <p><i>`Tender for Construction Works of the Chemase Irrigation Scheme</i></p>	<p>Project components include:</p> <ul style="list-style-type: none"> <li>- Intake Works</li> <li>- Conveyance</li> <li>- Drip Sets</li> </ul>

	length of 200m micro- tunnelling works.	<i>Development Project, Nandi County</i>  <b>Dated</b> 27 <sup>th</sup> March 2015  <b>Value:</b> Kshs 172,200,500.85 (inclusive of taxes)	
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Notably, the Applicant submitted a 'Letter of Notification of Award' and a 'Substantial Completion Certificate' pertaining to a project titled '*Tender for Construction Works of the Chemase Irrigation Scheme Development Project, Nandi County*' in response to Clause 2.4.2 (a) and Clause 2.4.2 (b) of Section III Evaluation and Qualification Criteria of the Tender Document.

The Board observes that with respect to Clause 2.4.2 (a) of Section III Evaluation and Qualification Criteria, the said contract met the minimum value of Kshs. 150,000,000, was executed within the last five years (completed on 25<sup>th</sup> October 2016) by the Applicant in its capacity as a contractor and works were alike but not necessarily identical to the scope of works as outlined in Section VI Scope of Works on page 91 of Volume I of the Tender Document.

However, as concerns Clause 2.4.2 (b) of Section III Evaluation and Qualification Criteria, the Board observes that the said contract did not demonstrate (i) experience in laying of sewer pipelines, and (ii) experience and expertise in undertaking micro-tunnelling works under permanent roads for water or sewer pipelines.



As noted hereinbefore, the qualifying criteria as provided in Clause 2.4.2 (a) and (b) of Section III Evaluation and Qualification Criteria in the Tender Document were mandatory criteria and thus failure to comply with the said criteria in its entirety would result in disqualification from further evaluation.

In this regard therefore, the Board finds that the Applicant's bid did not satisfy the Qualification Criteria for '*Specific Construction and Management Experience*' at the Post Qualification Evaluation Stage in accordance with Clause 2.4.2 of Section III Evaluation and Qualification Criteria of the Tender Document thus the Procuring Entity found the Applicant's bid unresponsive in accordance with section 80(2) of the Act read together with Clause 2.4.2 of Section III Evaluation and Qualification Criteria of the Tender Document.

Notably, the Board observes that the qualifying criteria as stipulated under Clause 2.4.2 (b) of Section III Evaluation and Qualification Criteria of the Tender Document, required bidders to have specific experience as follows: -

***For the above or other contracts executed during the period stipulated in 2.4.2(a) above, a minimum experience in the following key activities:***

***i. Experience in Laying of Sewer Pipelines***

***Contractor should have laid uPVC / Precast Concrete/ Ferrous Pipes, size 400mm dia. and above at an***

**average production rate of at least 3.5 km a month in congested Central Business (CBD) areas.**

**ii. Experience in laying of water supply pipeline**

**Contractor should have laid HDPE/ Ferrous Pipes, size 400mm dia. and above at an average production rate of at least 3.5 km a month in congested Central Business (CBD) areas**

**iii. Experience and expertise in undertaking micro-tunneling works under permanent roads for water or sewer pipelines of diameters ranging from 110mm to 200mm and minimum total length of 200m micro-tunneling works.** [Emphasis by the Board]

In view of this provision, the Board is alive to the fact that the specific experience sought by the Procuring Entity as outlined hereinabove further required some specificity as can be seen from the underlined passages above.

The Board would like to point out that section 60 (1) of the Act provides as follows: -

***"(1) An accounting officer of a procuring entity shall prepare specific requirements relating to the goods, works or services being procured that are clear, that give a correct and complete description of what is to be procured and that allow for fair and open competition among those who may wish to participate in the procurement proceedings"***

(2) .....

(3) .....

**(4) The technical requirements shall not refer to a particular trademark, name, patent, design, type, producer or service provider or to a specific origin unless—**

**(a) there is no other sufficiently precise or intelligible way of describing the requirements; and**

**(b) the requirements allow equivalents to what is referred to.”**

Further, section 70 of the Act states as follows: -

***“70 (1) The Authority shall issue standard procurement and asset disposal documents and formats as prescribed for use by procuring entities.***

***(2) A procuring entity shall use standard procurement and asset disposal documents prescribed under subsection (1), in all procurement and asset disposal proceedings***

***(3) The tender documents used by a procuring entity pursuant to subsection (2) shall contain sufficient information to allow fair competition among those who may wish to submit tenders”***

According to the foregoing provisions, the discretion of preparing specific requirements relating to goods, works or services being

procured rests on the Accounting Officer. Further, the specific requirements of a tender should not *interalia* refer to a particular design or type, unless where there is no other way to describe the technical requirements in issue or the requirements allow equivalents to what is referred to. This is to ensure public procurement proceedings allow for fair and open competition among bidders in line with Article 227 (1) of the Constitution.

The Board would like to point out that section 70 (1) and (2) of the Act, cited hereinbefore directs procuring entities to seek guidance from the Authority on Standard Tender Documents that they can use and customize to fit their needs in a procurement process. In this instance, it is the Board's considered view that it would be prudent for the Procuring Entity to seek guidance from the Public Procurement Regulatory Authority on a Standard Tender Document that the Procuring Entity can customize to suit its needs in order to ensure fair and open competition in future procurement processes.

The statutory pre-conditions for termination of a tender requires this Board to consider both substantive and procedural requirements for termination outlined in section 63 of the Act whenever a procuring entity relies on the said provision to terminate a tender. In **Republic v. Public Procurement Administrative Review Board & another ex parte Kenya Veterinary Vaccines Production Institute (2018) eKLR**, the court held that: -

***"In a nutshell therefore, the procuring entity is under duty to place sufficient reasons and evidence to justify and support the ground of 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 procedural requirements set out under the provisions of section 63 of the Public Procurement and Asset Disposal Act, 2015"***

Having considered the finding in the foregoing case, the Board notes that, in addition to citing and proving any of the reasons listed in section 63 (1) of the Act, a procuring entity must also comply with the procedural requirements for termination of a tender specified in section 63 (2), (3) and (4) of the Act. Section 63 (2) and (3) of the Act gives the Procuring Entity an obligation to submit a written report on the termination to the Authority within fourteen days from the date of termination.

The Board observes in the Procuring Entity's confidential file a letter dated 19<sup>th</sup> February 2021 with the subject heading '*Termination of a Tender Process – Reporting Tender Name: Construction Works for Last Mile Connectivity Works For Eldoret and Kakamega Towns Lot 2: Kakamega Town*' addressed to the Director General, Public Procurement Regulatory Authority and issued by the Chief Executive Officer, together with a report of termination of the subject procurement process dated 22<sup>nd</sup> February 2021, which the Board notes was issued within fourteen days of termination disclosing the reason thereof.

Further, the Board observes in the Procuring Entity's confidential file that the Procuring Entity issued letters of notification of termination dated 9<sup>th</sup> February 2021 to all bidders who participated in the subject procurement process, within fourteen days of termination disclosing the reason thereof. It is worth noting that the Applicant's bid was the only bid that proceeded to Detailed Examination of Bids stage and thereafter to Post Qualification Evaluation stage where it was determined to be non-responsive in accordance with section 80(2) of the Act read together with Clause 2.4.2 of Section III Evaluation and Qualification Criteria of the Tender Document. In this regard therefore, the Board finds that the Procuring Entity complied with the substantive and procedural requirements stipulated under section 63 (2), (3) & (4) of the Act in terminating the subject tender.

It is important to emphasize that both substantive and procedural requirements for termination of a tender must be satisfied for the Board to find such a termination satisfied the statutory pre-conditions for termination specified in section 63 of the Act. It is therefore the finding of this Board that the Procuring Entity terminated the subject procurement proceedings in accordance with the substantive and procedural requirements provided for in section 63 of the Act. The effect of this finding is that the Board does not have jurisdiction to address the substantive issues raised in the Request for Review.

Accordingly, the Board downs its tools and will not proceed to address the remaining issues framed in the instant Request for Review.

## **FINAL ORDERS**

In exercise of the powers conferred upon it by section 173 of the Public Procurement and Asset Disposal Act No. 33 of 2015, the Board makes the following orders in the Request for Review: -

- 1. The Request for Review filed by the Applicant on 23<sup>rd</sup> February 2021 with respect to Tender No. RVWWDA/LVN/AfDB/KTSWSSP/W/KAKAMEGA/2019-2020 Last Mile Connectivity Works for Eldoret and Kakamega Towns Lot II: Kakamega Town be and is hereby struck out for want of jurisdiction.**
- 2. Each party shall bear its own costs in the Request for Review.**

**Dated at Nairobi this 15<sup>th</sup> Day of March 2021**

**CHAIRPERSON**

**SECRETARY**

**PPARB**

**PPARB**