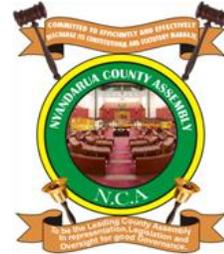


**REPUBLIC OF KENYA
NYANDARUA COUNTY ASSEMBLY**



**REPORT OF THE WATER, ENVIRONMENT AND NATURAL
RESOURCES COMMITTEE**

**RESPONSE TO THE STATEMENT REQUESTED BY HON. PETER GITHINJI
NGUMBA (MAGUMU WARD MCA)
CONCERNING THE PURPORTED ENGAGEMENT OF THE ISRAEL
GOVERNMENT OR COMPANY AND THE NYANDARUA COUNTY
GOVERNMENT ON THE DEVELOPMENT OF WATER AND SANITATION
FACILITIES IN NYANDARUA COUNTY**

Dated 9th June 2015

ACRONYMS AND ABBREVIATIONS

CEC	County Executive Committee
CECM	County executive Committee Member
JICA	Japan International Cooperation Agency
TARDA	Tana Athi River Development Authority
PPDA	Public Procurement and Disposal Act 2013
CIDP	County Integrated Development Plan
PPPA	Public Private Partnership Act

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SUMMARY OF KEY FINDINGS

Mr. Speaker

The committee established that, a contract was signed by the Governor and the Tahal Consulting Engineers Ltd instead of the Accounting Officer Finance as required by the Public Procurement and Disposal Act and the Public Private Partnership Act 2013. A legal opinion was sought concerning the contract and letters provided to show the procurement process which was directly sourced.

The Public Private Partnership Act as well as the Public Procurement Act clearly states that the signatory to Government contracts is the Accounting Officer and this begs the question if the contract signed is legally binding.

The contract scope as clearly stipulated in the contract document indicates that the first phase of the project will cost the US\$625000 approximately 50 million but the other documents presented to the committee shows figures of 270 million which seems out of place but in addition to this, the TARDA budget 2015/2016 stated the cost as 200 million therefore eliciting a lot of questions on which are the correct figures for the contract noting that the contract has clearly stipulated that the second phase of the contract was to be determined after the completion of the first stage and approval of the inception report for the Nyandarua County Water Master Plan. However it is worth noting that the contract scope includes the second stage whose cost price is undefined.

Tahal had no obligation to fund the project since the cost was incumbent to Nyandarua county Government but Tahal would assist the county to solicit for customized loans to fund the project.

Mr. Speaker

As we speak, the first stage of the project is concluded and here with me are copies of the inception report for the Nyandarua County Water Master Plan and the design review of the Ol Kalou sewerage design report which were submitted to His Excellency the Governor during his visit to Israel on, 9th November 2014.

ACKNOWLEDGEMENTS

Mr. Speaker

I wish to thank you for the support given to my committee during the whole process of fact finding and facilitating the committee during the report writing exercise. Preparation of this report would not have been successful without the support of the office of the Clerk, the CEC member for Water, Environment and Natural Resources and Hon members of the committee who were committed to seeing this report completed in time but were at times frustrated by the delay in submission of the documents from the executive arm of our government.

I thank the committee members for their useful insights and contributions for the up-to-date deliberations. I cannot forget the wonderful secretariat that made sure that all Committee members were furnished with all relevant documents submitted to the committee once availed and their technical assistance while coming up with this report.

These were the members who contributed significantly in preparation of this report;

Committee Composition

- | | |
|----------------------------|----------|
| 1. Hon. Paul K. Mburu | Chairman |
| 2. Hon. Moses Mwicigi | V/Chair |
| 3. Hon. Mwangi Gichuki | Member |
| 4. Hon. Paul Maina Nderitu | Member |
| 5. Hon. Kimani Njiraini | Member |
| 6. Hon. Monicah W. Kariuki | Member |
| 7. Hon. Teresiah Njoki | Member |

Secretariat

- | | |
|-------------------|------------------|
| 1. Grace Ng'ang'a | Committee Clerk |
| 2. Samuel Gicheha | Committee Clerk |
| 3. Meshack Waweru | Research Officer |

EXECUTIVE SUMMARY

Mr. Speaker

This Report is in response to questions raised by Magumu Member Hon. Peter Githinji Ngumba on 17/7/2014 regarding the Tahal Engagement with Nyandarua County government which by the was not confirmed.

To provide valid and reliable information, the Committee had an opportunity to probe on issues of Cost of the project, obligation of the County Government and the Israel Government with respect to this project, the extent and the scope of engagement, compliance of public procurement act, whether the County had taken a similar venture and the issue of requisition of goods and services for the project.

The major challenge faced by the committee was access of relevant documents form the executive arm of government as they were provided in bits thus delaying the conclusion of the matter.

The CEC member in charge of the Water, Environment and Natural Resources who has appeared before the committee on several occasions justified the choice of the project which she said is a flagship project in the CIDP and the need to cater for the whole County's Water needs in a sustainable manner.

A few discrepancies noted in terms of the contract should however be avoided in the future to safeguard the interests of the Nyandarua County and its resources such as signing a contract with some undefined elements as found in the Stage two of the contract.

INTRODUCTION

Mr. Speaker

Nyandarua County Government through the department of Water, Environment and Natural resources identified the need and embarked on development of a County Water Master Plan and a Design Review of the Ol kalou Town Sewerage System Design report.

The consultancy services for the review of the Ol kalou town Sewerage Design was to improve on the one done by the National Government funded by JICA in 2009 which catered for a small town and not a capital city of the Nyandarua County.

The need for a county Water Master Plan was informed by the need to have a comprehensive plan that will inform on the right investments that will suit each area noting that different zones in the County needs different inputs to serve the residents with adequate water.

It is in this regard that the Nyandarua County through his Excellency the Governor signed a contract with TAHAI to offer consultancy services on these two key areas on the 30/4/2014. This contract was indefinite to members of the County Assembly until the question was raised in this House.

Mr. Speaker, to this effect the Committee had several meetings with the CEC member for Water, Environment and Natural Resources and also looked at several documents requested from the executive arm of government relating to the matter and came up with the deliberations given herein under together with its recommendation and findings.

BACKGROUND

Mr. Speaker

On 17th of July 2014, the member for Magumu Ward Hon. Peter Githinji Ngumba requested for a statement on the purported engagement of the Israel Government or company and the Nyandarua County Government on the development of Water and Sanitation facilities in Nyandarua County.

The statement was sought under the standing order number 44 whereby Hon. Githinji wanted a clarification on the following:-

- i. The extent and scope of engagement between the County Government and the Israel Government or Company,
- ii. The total cost and expenditure to be incurred in the project and the amount of money paid to that end if any,
- iii. The obligations of the County Government and the Israeli governments as to the cost,
- iv. The requisition of any good or service to the cost of the project,
- v. Compliance of the same with the procurement applicable laws, and
- vi. Whether the County Government has undertaken other similar venture.

The Hon. Speaker on his Ruling made on the 23rd July 2014 concerning the matter directed the committee on Water, Environment and Natural Resources to issue a statement on the issue.

Mr. Speaker, the committee severally invited the CEC member in charge of Water, Energy, Environment and Natural resources, Ms. Grace Gitonga, and the CEC member for Agriculture to committee meetings to clarify on the issues raised by the Hon members in the House. The CEC members provided some information concerning the said project. This information was both oral and documentary.

Some documents were not presented in time causing the delay in completing this report which my committee wanted to be factual and supported by the right documents.

Documents Submitted to the Committee

The committee was furnished with copies of the following documents by the CECM for Water, Energy, Environment and Natural Resources:

- The contract of the Engagement,
- The invoice for the down payment as per contract,
- The consultants Bank guarantee,
- Report of the CECM concerning the project.
- Minutes of the Tender committee authorizing the single sourcing on 10/4/2014.
- Terms of reference for feasibility studies, final design and environmental impact assessment,
- Terms of reference for development of County water master plan
- Ol kalou Sewers layout plan,
- A written legal opinion of the contract,
- Projects previously undertaken by Tahal in Kenya, Africa and other countries.
- An extract of the private partnership Act 2013 and
- Format for Advance payment (blank form).
- Payment voucher for the down payment/advance payment.
- Draft public Private Partnerships (County Governments) Regulations, 2014
- Inception reports for the Design review of Ol Kalou Town sewerage system design
- Inception report of the County Water Master Plan

COMMITTEE FINDINGS

Mr. Speaker

1. The extent and scope of engagement between Nyandarua County and the Israel Government or Company.

The CEC member confirmed that there is a contractual agreement between Nyandarua County and an Israel owned private company called Tahal Group International. The contract is to Develop County Water Master Plan and Review of Ol' Kalou Town Sewerage System Design.

The said contract was signed on the 30th April 2014 by the Governor of the County H.E Daniel Waithaka Mwangi and the Tahal Consulting Engineers in the presence of the CEC member in charge of Water, Environment and Natural resources, Ms. Gitonga as a witness.

Mr. Speaker, according to the CEC member for Water, Environment and Natural Resources, Israel Government through their Ambassador to Kenya facilitated the connection with TAHAL as he proposed the company which has done several successful projects in Israel and other Countries in Africa.

Who is TAHAL

T AHAL Group International B.V is a global engineering design and construction firm owned by the Kardan Group and ranks among the top companies of its kind, offering its clients unique value-added integrated solutions. Based in Amsterdam, the company has two main business units;

1. TAHAL Assets B.V- for strategic investments
2. TAHAL Group B.V-for project execution.

TAHAL was established in 1952 with the aim of meeting Israel's greatest challenge – transforming its arid, ancient lands into the fertile fields of the modern state, starting with the design of the National Water Carrier project to many other national infrastructure projects. Since that time, and following hundreds of successful projects in more than 50 countries, TAHAL has

become a key player in water, sanitation and agricultural development, with unparalleled expertise in mobilization of funds and investments.

Tahal specializes in various fields such as water resources development and management, water and waste systems, integrated rural and agricultural development , environmental and solid waste solutions, energy and natural gas systems and also offers services in planning and engineering designs, supervision and management, turnkey and PPP projects and project financing.

The contract between the Nyandarua County government and the Tahal Group was signed on the 30th April 2014 under the terms and conditions listed and is expected to be implemented in two stages. (see Annexed copy of contract)

2. Total Cost of the Program

Mr. Speaker

According to the information provided in the contract, the Nyandarua County Water Master Plan and Design Review of the Ol Kalou Sewerage System Design report's cost price for the services and products included in stage one is a total lump sum amount of US \$ 625,000 (six hundred and twenty five thousands US dollars. This is approximately 50,000,000 Ksh (Fifty million) shillings but subject to fluctuations in the money market and also subject to schedule of payments stipulated under the contract.

The County Government has so far paid the Advance deposit of 50% as per the contract which is US \$312,500 which is equivalent to 25,000,000 Ksh. This was paid against a Bank Guarantee on the 15th May 2014 to secure the County against any default by the Company. (See attached invoice and TAHAL Bank Guarantee and Nyandarua County government's Payment voucher).

The CEC member however clarified that once the County water master Plan is presented, the implementation of the plan is expected to cost approximately 2 billion shillings which will be sourced from the County Revenue and other development partners. Tahal Company will only assist to source such funds from development agencies owing to its experience and connections in such projects.

Other documents submitted to the committee and involving TARDA as a development partner were not clear and the committee wishes that the second phase be well clarified before approval.

3. Obligations of the Nyandarua County and Israeli Government as to the Cost

Mr. Speaker

The County Government is expected to foot the cost of the County Water master Plan and the Design review of the Ol Kalou sewerage design report in totality.

The total cost of implementation of the projects after the master plan is also incumbent upon the County Government while the Tahal Group International is expected to link the County with international development agencies for funding of such projects. The Israel Government is not liable in any way as per the contract as the two parties who signed the agreement are the Tahal Group representative and the Governor for the County Government.

The CEC member clarified that the implementation of the water master plan will be borrowing a lot from TAHAL's expertise in sourcing for funds as it has done in other Countries where it has operated in.

A copy of a memorandum of understanding was presented to the committee in the initial parts of the facts finding but it is not clear if it was signed at one point between the government of Israel and the county government of Nyandarua. (see attached copy of memorandum)

4. The requisition of any good or service to the cost of the project

Mr. Speaker,

According to the information given on the contract the scope of the contract is the consultancy service for the development of a County water master plan and the review of the design of Ol kalou town sewerage system for the County Government.

Implementation of the plans will be conducted by the County government and therefore contracts to be awarded during implementation will be carried out by the County Government and other implementation agents involved. TARDA has been cited as a probable implementation agent if

funds are sourced from the National government or international agencies.(See attached Budget from TARDA)

5. Compliance of the contract with the procurement applicable laws.

Mr. Speaker

The CEC member in charge of water informed the committee that the procurement of services from the Tahal group was initiated by the Governor and that she was appointed by the Governor to follow up the Water related issues in collaboration with a Liaison Officer at the Israel Embassy.

The contract which went through the direct procurement process after seeking permission from the Tender committee on a meeting held on the 10/4/2014 minute number Min 8/NYA/TC/08/09/2014. This complies with the public Procurement and Disposal Act provisions and the Public Private Partnership Act and answers the question of the justifications for the single sourcing owing to the amounts involved.

The CEC member said that she sought a legal opinion from the Legal department and the National Treasury's Public Private Partnerships unit and the Contract was sanctioned borrowing from the provisions of The Public Private Partnerships Act 2013

The CEC member confirmed that pursuant to the Public Private Partnership Act, 2013 the contract was awarded without the competitive procurement process owing to complexity occasioned by the nature of engagement between a County Government and a Private Company from another Country and the amount involved in the whole process. She also explained that the TAHAL group is specialized in such highly skilled jobs.

Mr. Speaker,

It should be noted that the Public Procurement and Disposal Act provides for the procedure and pre-conditions of a direct procurement process. Sections 74 and 75 of this Act should be complied with. For direct procurement procedure to be applied the provisions of section 29(3) of the Act comes into play requiring a *written approval of the tender committee and written reasons for using that procurement procedure.* Section 74(2) of the Act provides as follows:-

“A procuring entity may use direct procurement if the following are satisfied:-

- a) *There is only one person who can supply the goods, works or services being procured,*
- b) *There is no reasonable alternative or substitute for the goods, works or service.”*

6. Whether the County Government has undertaken other similar venture:

The committee found out that there was a Water and Sewerage Design report of Ol Kalou Town done by the National Government and funded by JICA in 2009 under the Rift Valley Water Services Board which had not considered the Town as a city hence the need to review the plan to incorporate the projected growth of the town into a city for sustainable development. The CEC member added that the County Water Master Plan as opposed to the National Master Plan will fill in the gaps left by mapping all water resources in each ward. The master plan by the national Government only provided for one dam per sub-county which is insufficient for the County development.

KEY FINDINGS

There is an actual contract which has been signed. However the validity of the contract is questionable since it was signed by the Governor who is not accounting officer of the County. It should be noted that (section 22) of the Public Private Partnerships Act 2013 provides for the execution of a project agreement. It states that, “where a contracting authority intends to enter into a public private partnership, a person shall not, unless he is the accounting officer of the authority, enter into a project agreement in relation to that project on behalf of the authority”.

Mr. Speaker, the Governor is not the accounting officer of Nyandarua County Government and therefore violated section 22 of PPPA by signing this contract.

- 1.** The committee received documentary evidence as pertaining to the advance payment of the contract and a payment voucher from the Finance officer.
- 2.** From all along there has been a misconception that TAHAL is the one funding the project. However Tahal is not incurring any cost. The total cost of the project is to be borne by Nyandarua County.
- 3.** Stage two price is indefinite as compared to phase one which is clearly stated in the contract. This means that a contract exists with undefined price and hence the need to unbundle the ambiguous second phase and cost it.
- 4.** The first phase of the project is complete and as per the contract, the payments for the first stage as per the defined schedule should be paid to avoid further interest that may accrue from any delay by the client.
- 5.** There was no advertisement for competitive bidding.
- 6.** That the proposal was not submitted to a unit (Public Private Partnership Processing) as required by the law.

7. That a letter coming from the County Treasury stated that the officer was open to considering the request to single source but not approval for the same though it is in the tender committee minutes.
8. That the Legal Opinion was sought after the Contract had been signed. The contract was signed on 30th April 2014 while the legal opinion was received by the CECM on 5th May 2014. This simply means that the said legal opinion was of no effect unless the contract was amended.
9. That there are conditions that should be met before engaging in privately initiated proposals. Section 61 (1) of the PPPA 2013 states that, “A contracting authority may consider a privately initiated investment proposal for a project and procure the construction or development of a project or the performance of a service by negotiation without subjecting the proposal to a competitive procurement process where;

(a) There is an urgent need for continuity in the construction, development, maintenance or operation of a facility or provision of a service and engaging in the competitive procurement process would be impractical:

Provided that the circumstances giving rise to the risk of disruption were not foreseeable .by the contracting authority or the result of an unreasonable failure to act by the contracting authority;

(b) The costs relating to the intellectual property in relation to the proposed design of the project is substantial;

(c) there exists only one person or firm capable of undertaking the project, maintaining the facility or providing the 'service or such person or firm has exclusive rights over the use of the intellectual property, trade secrets or other exclusive rights necessary for the construction, operation or maintenance of the facility or provision of the service; or

(d) There exists any of the circumstance as the Cabinet Secretary (in our case the CECM) may prescribe.

Section 61(2) further states that, “A contracting authority shall, before commencing negotiations with a private party under this section;

(a) Prescribe a criteria against which the outcome of negotiations shall be evaluated;

(b) Submit the proposal to the unit for consideration and recommendation;

- (c) Upon obtaining the recommendations of the unit, apply for and obtain approval from the Committee to negotiate the contract; and
- (d) Conduct the negotiations and award the tender in accordance with the prescribed process in the regulations to this Act.

RECOMMENDATIONS

My committee recommends:

1. That the County government pays its obligations with the Consultant as agreed upon for the first stage but have the second stage defined before approval and commissioning.
2. That the County should comply with the law in such engagements and therefore a Public Partnership Procurement Unit be formed to streamline such engagements in the future.
3. That in future before the government entities enter into a contract, it should clarify whether the entity is the government or individual/private Company.
4. That the County Attorney should advice on the validity of the contract since it was signed by an authorized person whether it should be terminated or customized.
5. That the County Assembly should be informed of any intended engagement involving the Public Private Partnership and other Governments.
6. That the value for money be a guiding principal in initiating such partnerships in the future.

CONCLUSION

Mr. Speaker,

The Committee is aware of the importance of water not only in Nyandarua Country but in the whole Country at large. We appreciate the goodwill of the governor in pursuing the blueprint for provision of water and sanitation to the residents of our county. However the committee also noted some ignorance in the procurement process which we believe can be avoided in the future in order to safeguard the County from engaging in unorthodox manner in its endeavours.

I also wish to table a copy of the two inception reports tabled before the committee and inform member that other documents not annexed to this report can be acquired from the office of the clerk.

Thank you, Mr. Speaker.

REPORT SIGNED BY:

HON PAUL KIRUKA MBURU

CHAIRMAN WATER, ENVIRONMENT AND NATURAL RESOURCES COMMITTEE