

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 138/2019 OF 3RD DECEMBER 2019

BETWEEN

THE GARDENS AND WEDDINGS CENTRE LIMITED....APPLICANT

AND

THE ACCOUNTING OFFICER,

MINISTRY OF INDUSTRY, TRADE AND COOPERATIVES,

STATE DEPARTMENT FOR TRADE.....1ST RESPONDENT

AND

MINISTRY OF INDUSTRY, TRADE AND COOPERATIVES,

STATE DEPARTMENT FOR TRADE.....2ND RESPONDENT

AND

SPRILES ENTERPRISES.....INTERESTED PARTY

Review against the decision of Ministry of Industry, Trade and Cooperatives, State Department for Trade with respect to Tender No MITC/SDT/OT/003/2019-2020 for Provision of Cleaning and Sanitary Services

BOARD MEMBERS

- | | |
|----------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Dr. Joseph Gitari | -Member |
| 3. Mr. Ambrose Ngari | -Member |
| 4. Ms. Rahab Chacha | -Member |

IN ATTENDANCE

- | | |
|-------------------------|------------------------------|
| 1. Mr. Stanley Miheso | -Holding brief for Secretary |
| 2. Ms. Maryanne Karanja | -Secretariat |

PRESENT BY INVITATION

APPLICANT

1. Mr. Nathan Karugu
2. Mr. Daniel Gathogo

-THE GARDENS AND WEDDINGS CENTRE LIMITED

- | |
|---|
| -Advocate, Karugu, Mbugua & Company Advocates |
| -Officer, The Gardens & Weddings Centre |

1ST & 2ND RESPONDENT

1. Ms. Beatrice K. Kahiu

-MINISTRY OF INDUSTRY, TRADE & COOPERATIVES

- | |
|--------|
| -PSCMO |
|--------|

- | | |
|--------------------------|---------|
| 2. Mr. Hosea Kinyua | -SCMO |
| 3. Ms. Mercy Wachira | -SCMO |
| 4. Ms. Fauzia Shauri | -D.A |
| 5. Ms. Beatrice Adhiambo | -Intern |
| 6. Mr. Patrick Magaiwa | -SCMO |

INTERESTED PARTIES

A. SPRILES ENTERPRISES

- | | |
|---------------------|----------|
| 1. Ms. Janet Akinyi | -Manager |
|---------------------|----------|

B. JEPSCO SERVICES & RENOVATORS

- | | |
|------------------------|-----------------------|
| 1. Ms. Beatrice Kadeli | -Office Administrator |
|------------------------|-----------------------|

C. GLACIER E.A. LIMITED

- | | |
|-------------------------|-------------------|
| 1. Mr. Frederick Otieno | -Supplies Officer |
|-------------------------|-------------------|

BACKGROUND TO THE DECISION

The Bidding Process

The Ministry of Industry, Trade and Cooperatives, State Department of Trade (hereinafter referred to as "the Procuring Entity") invited bids from eligible tenderers in response to Tender No MITC/SDT/OT/003/2019-2020 (hereinafter referred to as "the subject tender") by placing an advertisement in *MyGov* pullout on 3rd September, 2019.

Bid Submission Deadline and Opening of bids

Bids were opened/closed on 25th September 2019 at 10.00 a.m. where a total of twenty one (21) firms submitted their bids to the Procuring Entity as follows:-

S/No	Firm/ Individual	Form of Tender Amount Bids Quote)
1	Village Mastars Limited	3,164,616.70
2	Spriles Enterprise	5,465,000.00
3	Nadiah Investment Limited	876,436.00 per month
4	Brenian East Africa Limited	425,096.64
5	Spec & Glow Cleaning Solution Limited	349,639.85 per month
6	Soset Shidders Services Ltd	4,495,067.00 per year
7	Ice Clean Care Group Co Ltd	5,130,149.52 per year
8	Vinstar Express Supplies Ltd	3,255,372.00 per year
9	Nitrogen Cleaning & Hygiene Solutions	5,757,762.00 per year
10	Clean Edge Hygiene Solutions Ltd	5,237,591.76
11	Seniko Cleaning Srevices	7,397,907.00
12	Garfield Promotions Ltd	8,071,438.80
13	Jepco Services& Renovators Ltd.	483,722.92 per month
14	Aimat Company Ltd	7,098,926.40 per year
15	Superbroom Services Ltd	4,184,453.16
16	Glacier East Africa Ltd	3,180,000.00 per year

S/No	Firm/ Individual	Form of Tender Amount Bids Quote)
17	Cebeth Enterprises Ltd	11,599,238.14 per year
18	Dawn Cleaning Services	5,046,480.00
19	Galaxy Cleaning & Floral Works	4,666,219.27
20	Sparkling Cleaning Service Ltd	7,191,140.24
21	Mwewe Cleaning Services Ltd	4,445,626.80 per year
22	Tidy Site Services Ltd	4,736,260.00
23	Kenma Homecare Services	2,018,400.00 per year
24	Robu Cleaning Services Ltd	5,507,856 per year
25	The Gardens & Weeding Center Ltd	4,212,000.00
26	Petals Hygiene & Fumigation Ltd	5,416,512.00 per year
27	Shine Masters Ltd	5,634,487.57 per year

Evaluation of Bids

The Procuring Entity's Evaluation Committee conducted evaluation of bids in the following stages: -

1. Preliminary Evaluation
2. Technical Evaluation
3. Financial Evaluation

1. Preliminary Evaluation

At this stage of evaluation, bids were evaluated for compliance with the following mandatory requirements: -

No.	Requirements
MR1	Must Submit a copy of certificate of Registration/Incorporation.
MR2	Must Submit a copy of Valid Tax Compliance certificate
MR3	Must Fill the Price Schedule in the Format provided
MR4	Must Fill the Form of Tender in the Format provided
MR5	Must submit a Tender Securing Declaration Form in the format provided

MR6	Must Provide Evidence of Workers' Injury Benefit (WIBA) Insurance Policy
MR7	Must Submit evidence of being registered with NSSF as an employer.
MR8	Must Submit evidence of being registered with NHIF as an employer.
MR9	Must submit a dully filled up Confidential Business Questionnaire in format provided
MR 10	The submitted tender document must be serialized/paginated
MR 11	Dully filled, signed and stamped Self declaration that the person/tenderer will not engage in any corruption or fraudulent practice.
MR 12	Duly filled, sign and stamp Undertaking to comply with the labour laws and wage regulation guidelines
MR 13	Dully filled, signed and stamped Self declaration that the person/tenderer is not debarred in matter of the public procurement and asset disposal act 2015

Non-responsive bidders were as follows

Bidder No	Reasons
Bidder No. 1	<ul style="list-style-type: none"> • Did not Provide Evidence of Workers' Injury Benefit (WIBA) Insurance Policy • Did not submit evidence of being registered with NHIF as an employer. • Did not submit Self declaration that the person/tenderer will not engage in any corruption or fraudulent practice. • Did not declare whether debarred or not debarred in the form
Bidder No. 3	Did not declare whether debarred or not debarred in the form
Bidder No. 4	<ul style="list-style-type: none"> • Did not Provide Evidence of Workers' Injury Benefit (WIBA) Insurance Policy • Did not submit evidence of being registered with NSSF as an employer. • Did not submit evidence of being registered with NHIF as an employer. • Did not submit Self declaration that the person/tenderer will not engage in any corruption or fraudulent practice. • Did not submit Undertaking to comply with the labour laws and wage regulation guidelines • Did not declare whether debarred or not debarred in the form
Bidder No. 5	• Did not declare whether debarred or not debarred in the form
Bidder No. 6	Did not declare whether debarred or not debarred in the form
Bidder No. 7	Did not declare whether debarred or not debarred in the form
Bidder No. 8	Did not declare whether debarred or not debarred in the form
Bidder No.9	<ul style="list-style-type: none"> • Did not submit evidence of being registered with NHIF as an employer. • Did not declare whether debarred or not debarred in the form • Did not submit evidence of being registered with NHIF as an employer.
Bidder No. 10	The submitted tender document were not serialized/paginated
Bidder No. 11	<ul style="list-style-type: none"> • Did not submit evidence of being registered with NHIF as an employer. • Did not fill Confidential Business Questionnaire in form as provided
Bidder No. 12	<ul style="list-style-type: none"> • Did not Provide Evidence of Workers' Injury Benefit (WIBA) Insurance Policy • Did not submit evidence of being registered with NHIF as an employer.

Bidder No	Reasons
Bidder No. 13	<ul style="list-style-type: none"> • Did not fill Confidential Business Questionnaire in form as provided • Did not declare whether debarred or not debarred in the form
Bidder No. 14	Did not declare whether debarred or not debarred in the form
Bidder No.15	Did not declare whether debarred or not debarred in the form
Bidder No.16	<ul style="list-style-type: none"> • Did not submit evidence of being registered with NSSF as an employer. • Did not declare whether debarred or not debarred in the form
Bidder No. 17	Did not declare whether debarred or not debarred in the form
Bidder No. 18	<ul style="list-style-type: none"> • Did not submit a copy of Valid Tax Compliance certificate • Did not submit evidence of being registered with NSSF as an employer. • Did not submit evidence of being registered with NHIF as an employer. • Did not declare whether debarred or not debarred in the form
Bidder No. 19	<ul style="list-style-type: none"> • Did not Fill the Price Schedule in the Format provided • Did not Fill the Form of Tender in the Format provided • Did not declare whether debarred or not debarred in the form
Bidder No. 21	Did not submit evidence of being registered with NHIF as an employer
Bidder No. 22	<ul style="list-style-type: none"> • Did not Fill the Form of Tender in the Format provided • Did not submit a Tender Securing Declaration Form in the format provided • Did not submitted tender document must be serialized/paginated • Did not declare whether debarred or not debarred in the form
Bidder No. 23	Did not declare whether debarred or not debarred in the form
Bidder No. 24	<ul style="list-style-type: none"> • Did not Fill the Price Schedule in the Format provided • Did not declare whether debarred or not debarred in the form
Bidder No. 25	Did not declare whether debarred or not debarred in the form
Bidder No.26	Did not declare whether debarred or not debarred in the form
Bidder No. 27	Did not declare whether debarred or not debarred in the form

Only two bidders, that is, Bidder No. 2 and Bidder No. 20 met all the mandatory requirements and qualified for the next stage of evaluation.

2. Technical Evaluation

At this stage of evaluation, bids were allocated scores and marked out of a maximum of 100%; Only bidders who scored 70% and above were subjected to financial evaluation. Those who scored below 70% were eliminated at this stage of evaluation.

Below are the technical evaluation criteria: -

S/NO.	Evaluation Attribute	Weighting Score	Max Score
T.S. 1	Provide Details of any relevant certifications and/or trainings. Such certifications / trainings may be for your company or for your individual staff as relevant to providing cleaning services. . Attach evidence.	<ul style="list-style-type: none"> • Details of at least 5 certifications and/or trainings with proof – 10 marks Number of certifications and/or trainings 	10
T.S. 2	Certificates of Good Conduct	Provide copies of certificates of good conduct from the Kenya Police, Criminal Investigations Department for at least 10 staff members (1 marks for each)	10
T.S. 3	Cleaning Equipment and accessories owned by the firm and to be directly assigned to State Department of Trade during the contract period.	Provide details / list of at least five (5) equipment and accessories and explain what they will be used for. (1 marks for each)	5
T.S. 5	No of Cleaning staff to be deployed directly to State Department	• Minimum 5 (2 Marks for each)	10
T.S. 6	Organization structure	Give structure with details of responsibilities	5
T.S. 7	Detergents / Chemicals to be used for cleaning	Provide List	10
T.S. 8	Detailed cleaning work plan	Provide details how cleaning will be carried out throughout the day	15
T.S. 9	Submit a Sample checklist for cleaning services for the different cleaning sites	<ul style="list-style-type: none"> • Carpeted areas (3 Marks) • Tiled Kitchen (3 Marks) • Washrooms with Non-Carpeted floors (3 Marks) To be evaluated on the quality through demonstration of measurable items that will help in simplifying the management and supervision of the cleaning services	15
T.S. 10	NEMA licence	Provide copy of Certificates	10
T.S. 11	Register by NSSF as an employer	Provide copy of certificate	3
T.S. 12	Register NHIF as an employer	Provide copy of certificate	3
T.S. 13	Past experience	Provide documentary evidence e.g.	4

S/NO.	Evaluation Attribute	Weighting Score	Max Score
		LSO, contracts letter of recommendation	
TOTAL			100

The results were as follows: -

Bidder No.	Scores
2	91
20	90

From the above score sheet, Bidder No. 2 and Bidder No. 20 qualified for Financial Evaluation, having scored more than 70% of the total marks (100%).

3. Financial Evaluation

At this stage of evaluation, the two bidders, that is Bidder No. 2 and Bidder No. 20 were subjected to a price comparison to determine the successful bidder.

Their quoted tender sums were as follows: -

Bidder No.	Amount Quoted per year (ksh.)
2	5,465,000.4
20	7,191,114.24

From the above Price Comparison Sheet and scores table the following *Combined Technical and Financial Scores* for the two bidders were as follows: -

Bidder No.	Scores
2	93.7
20	85.799

The Evaluation Committee's Recommendation

In view of the evaluation process, the Evaluation Committee recommended that Bidder No. 2, that is, **M/s. Spriles Enterprise**, be considered for the award of tender for provision of cleaning and sanitary services, having qualified in all the three stages of evaluation and having the highest score and the lowest tender price of **Kshs 5,465,000.40/-** (*Five million, four hundred and sixty five thousands and forty cents only*).

Professional Opinion

The Procuring Entity's Head of Supply Chain Management Services, in her professional opinion dated 31st October 2019, signified her satisfaction that the evaluation was carried out in accordance with the requirements of the Act and the Tender Document.

The Procuring Entity's Accounting Officer approved the Evaluation Committee's recommendation of award on 4th November 2019.

THE REQUEST FOR REVIEW

M/s The Gardens and Weddings Centre Limited (hereinafter referred to as the "Applicant") lodged a Request for Review dated and filed on 3rd December 2019 (hereinafter referred to as "the Request for Review") together with a Supporting Affidavit dated and filed on 3rd December 2019 (hereinafter referred to as "the Applicant's Supporting Affidavit").

The Applicant sought for the following orders in the Request for Review:-

- i. An order allowing the Request for Review;***
- ii. An order directing the Procuring Entity to readmit the Applicant's bid back to the procurement process for further re-evaluation;***
- iii. An order extending the tender validity period;***
- iv. Any other orders that the Board may deem just and fit.***

In response, the Procuring Entity lodged a Replying Affidavit to the Request for Review filed on 11th December 2019 (hereinafter referred to as "the Procuring Entity's Replying Affidavit").

During the hearing, the Applicant was represented by Mr. Nathan Karugu, on behalf of the firm of Karugu Mbugua & Co. Advocates. The Procuring Entity was represented by its Head of Procurement, Ms. Beatrice Kahi, u,

while the Interested Party was represented by its Manager, Ms. Janet Akinyi.

PARTIES' SUBMISSIONS

The Applicant's Submissions

In his submissions, Counsel for the Applicant, Mr. Mbugua, fully relied on the Request for Review, the Applicant's Supporting Affidavit and supporting documentation thereto.

Mr. Mbugua submitted that the Request for Review emanated from a letter of unsuccessful bid dated 4th November 2019 that was sent via email to the Applicant on 19th November 2019, which indicated that the Applicant's bid was unsuccessful for the reason that it did not declare whether it was debarred or not in the form as required under the Tender Document. Mr Mbugua submitted that the said form, that is MR13, was a mandatory requirement under the subject tender and was a standard form provided for in the Tender Document. Counsel submitted that the said form was duly completed by the Applicant and submitted as part of the Applicant's original bid to the Procuring Entity.

Mr Mbugua submitted that the said form, in its heading, indicated that it was a "*Self declaration that the person/tender is not debarred in the*

matter of Public Procurement and Asset Disposal Act". Mr Mbugua submitted that paragraph two of the self declaration form created an ambiguity when read together with the heading of the said form. It was therefore the Applicant's submission that the Procuring Entity made a mistake in the self declaration form which Counsel contended should not be used by the Procuring Entity as a reason for disqualifying the Applicant's bid from the subject procurement process. In any event, Counsel argued that the Procuring Entity ought to have treated the said ambiguity as a minor deviation and not disqualified the Applicant's bid from further evaluation.

Mr Mbugua submitted that Clause 2.14.3 of the Tender Document did not allow the Applicant to make any erasures or overwriting on its bid except to correct a mistake made by it in its tender. Mr Mbugua submitted that the very essence of the self declaration form was to confirm whether bidders had been debarred from participating in public procurement proceedings. In this regard, Mr Mbugua argued that it was the duty and obligation of the Procuring Entity to ensure that the information in the Tender Document, including the forms therein, were correct and proper.

In response to an enquiry from the Board as to when the Applicant discovered the ambiguity in the self declaration form, Mr Mbugua submitted that it only discovered the same when it received a letter of

regret from the Procuring Entity on 19th November 2019. Mr Mbugua submitted that although the Applicant was well versed with the contents of the Tender Document, the Applicant had not fully read the form at the point of signing the same as the heading intimated that it was a proper form for purposes of executing that declaration.

In conclusion, the Applicant urged the Board to allow the Request for review and grant the orders therein.

The Procuring Entity's Submissions

In her submissions, the Procuring Entity's Head of Procurement, Ms Beatrice Kahiu, fully relied on the Procuring Entity's Replying Affidavit and supporting documentation thereto.

Ms. Kahiu submitted that all the mandatory requirements within the Tender Document were required to be met by bidders. Ms. Kahiu submitted that the Applicant was therefore required to read, understand and fill in all the required information in the self-declaration form which was a mandatory requirement as stipulated under Clause 2.22 of the Tender Document. Ms. Kahiu further submitted that if the Applicant was not clear on what was required with respect to the self declaration form, it ought to have sought clarification from the Procuring Entity.

In response to an observation from the Board that twenty five (25) out of twenty seven (27) bidders had been disqualified from further evaluation due to the failure to complete the self declaration form correctly, Ms Kahiu submitted that this was not the only reason the said twenty five (25) bidders were disqualified as some of them were disqualified for failing to comply with more than one mandatory requirement. However, Ms Kahiu argued that the form was very straightforward in that if a bidder stated clearly that he/she had been debarred, then the only recourse available to an Evaluation Committee was to disqualify the said bidder.

In conclusion, Ms. Kahiu urged the Board to dismiss the Request for Review with costs to the Procuring Entity.

The Interested Party's Submissions

The Interested Party through its Manager, Ms Janet Akinyi made brief submissions before the Board.

Ms Akinyi submitted that the Interested Party received its letter of award dated 4th November 2019 from the Procuring Entity via post on 11th November 2019. Ms Akinyi submitted that the Interested Party accepted award of the subject tender and entered into a contract with the Procuring

Entity on 3rd December 2019 and subsequently began implementation of the same on 4th December 2019.

The Applicant's Rejoinder

In a rejoinder, Mr. Mbugua submitted that in response to the Procuring Entity's submission that it filed its Request for Review out of time, it was the Applicant's submission that time started running on 20th November 2019, after it received its letter of regret and that the Applicant filed its Request for Review on the fourteenth day and was therefore well within time.

Mr Mbugua contended that section 75 of the Act was not couched in mandatory terms and therefore it was not mandatory for the Applicant to seek clarification at the point of submission of its bid.

In response to an enquiry from the Board as to when a bidder is supposed to approach the Board in case of any breach of law or any provisions of the Tender Document, Mr Mbugua submitted that a bidder can only approach the Board once a decision had been made by a procuring entity with respect to a tender and the said decision had been conveyed to the respective bidders who participated in the subject tender.

Finally, Mr Mbugua urged the Board to find merit in the Request for Review and allow review application accordingly.

BOARD'S DECISION

The Board has considered each of the parties' cases, the documents before it, including confidential documents submitted to it pursuant to section 67 (3) (e) of the Public Procurement and Asset Disposal Act (hereinafter referred to as "the Act") and the oral submissions by all parties to the Request for Review.

The issues for determination are as follows:-

I. Whether the Request for Review was filed outside the statutory period under section 167 (1) of the Act thereby ousting the jurisdiction of this Board;

Depending on the outcome of the above issue: -

II. Whether the Procuring Entity evaluated the Applicant's bid at the Preliminary Evaluation Stage in accordance with section 80 (2) of the Act as read together with Article 227 (1) of the Constitution of Kenya 2010 with respect to the following mandatory requirement in the Tender Document:

a) MR13: Dully filled, signed and stamped self declaration that the person/tenderer is not debarred in the matter of the Public Procurement and Asset Disposal Act, No. 33 of 2015

III. Whether the Applicant is entitled to the orders sought in the Request for Review.

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

It is trite law that courts and decision making bodies can only act in cases where they have jurisdiction. In the Court of Appeal case of **The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) KLR 1** it was stated that jurisdiction is everything and without it, a court or any *other decision making body* has no power to make one more step the moment it holds that it has no jurisdiction.

The Supreme Court in the case of **Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Ltd and 2 Others, Civil Application No. 2 of 2011** held that:

"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 Counsel 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."

Similarly, in the case of **Kakuta Maimai Hamisi vs. Peris Pesi Tobiko & 2 Others (2013) eKLR** the Court of Appeal emphasized on the centrality of the issue of jurisdiction and stated thus:

"So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. "

Accordingly, once a jurisdictional issue is before a court or a decision making body, it must be addressed at the earliest opportune moment and it therefore behooves upon this Board to determine whether it has the jurisdiction to entertain the substantive Request for Review.

The jurisdiction of this Board flows from section 167 (1) of the Act which 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."

The Board observes that section 167 (1) of the Act has two limbs within which a candidate or tenderer may file a Request for Review namely;

- **Within fourteen days of notification of award; or**
- **Within fourteen days from the date of occurrence of an alleged breach at any stage of the procurement process, or disposal process.**

The Board considered the use of the word 'or' and notes that the Concise Oxford English Dictionary (11 Edition, Oxford University Press) defines "or" as a '***conjunction used to link alternatives.***'

Applying the foregoing construction, the Board notes that the use of the word "or" in section 167 (1) of the Act connotes a conjunction that gives alternatives. The first option which an aggrieved candidate or tenderer has, is to file its Request for Review within fourteen (14) days of notification of award.

The alternative option is to file a Request for Review within fourteen (14) days from the date the aggrieved candidate or tenderer learns of the alleged breach by the Procuring Entity at any stage of the procurement process or disposal process.

It is important to note that the legislature imposed the right to lodge a Request for Review within fourteen (14) days from notification of award as the first option. Due to prevailing circumstances such as the delay or failure by a procuring entity to notify a candidate or tenderer of the outcome of its bid at any stage of the evaluation process, an aggrieved candidate or tenderer can exercise the second option.

The legislature must have also considered that there would be need for an aggrieved candidate or tenderer to approach the Board earlier than at the time notification is issued, if an alleged breach already occurred at an earlier date so that once the Board dispenses with the review application,

depending on the Board's orders, the procurement process can be allowed to proceed to its logical conclusion without undue delay.

It is the Board's considered view that, it was not the intention of the legislature that bidders abuse the options under section 167 (1) of the Act such as instances where a bidder may have learnt of the occurrence of an alleged breach but sits on the right to administrative review waiting for the outcome of evaluation and that if such bidder is found non-responsive and notified of such outcome, decides to lodge a Request for Review even though it could have done so when it learnt of the alleged breach at an earlier stage of the procurement process.

The jurisdiction of this Board under section 167 (1) of the Act was challenged as a ground raised in the Procuring Entity's Response to the Request for Review. The Procuring Entity submitted that the Applicant received its letter of notification of unsuccessful bid on 19th November 2019. In view of section 167 (1) of the Act, it was the Procuring Entity's contention that the Request for Review was filed outside the statutory period (i.e. 14 days from the date of notification of the outcome of the Applicant's bid), hence the Board had no jurisdiction to entertain the Request for Review application.

In response, the Applicant submitted that it received its letter of notification of unsuccessful bid from the Procuring Entity on 19th November 2019. It was the Applicant's submission that in line with section 167 (1) of the Act, it relied on the notification of unsuccessful bid as received from the Procuring Entity and therefore fourteen days started running on the 20th of November 2019. Since the Request for Review was filed on 3rd December 2019, the Applicant submitted that the same was filed well within the statutory period under section 167 (1) of the Act.

Upon considering parties' submissions, the Board notes that, to determine the period within which the Applicant ought to have filed the Request for Review, the Board must first examine the Request for Review application which raises one ground for review as follows: -

- a) **Ground No. 1** – The Procuring Entity breached section 79 (2) of the Public Procurement and Asset Disposal Act, No. 33 of 2015 as read together with Clauses 2.14.1 and Clause 2.20.3 of the Tender Document by declaring the Applicant's bid non-successful on the basis that they did not declare whether they had been debarred from participating in public procurement whereas the Applicant had properly filled and attached the self-declaration form as had been provided by the Procuring Entity in the standard Tender Document.

A cursory examination of the above ground for review reveals that in the Applicant's view, the Procuring Entity breached section 79 (2) of the Act by declaring that the Applicant's bid unsuccessful for failure to declare whether it had been debarred from participating in public procurement proceedings.

The Board heard submissions from the Applicant that it complied with the mandatory requirements under the subject tender and submitted a duly filled, signed and stamped self-declaration form as provided for on page 41 of the Tender Document. However, the Applicant contended that the sample self-declaration form as provided on page 41 of the Procuring Entity's Tender Document had an error in its contents as follows: -

"SELF DECLARATION THAT THE PERSON/TENDER IS NOT DEBARRED IN THE MATTER OF THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT 2015

I.....of Post Office Box.....Being a resident of.....In the Republic ofdo hereby make a statement as follows: -

THAT I am the Chief Executive/Managing Director/Principal Officer/Director of.....(insert name of the Company) who is a bidder in respect of Tender No.....for(insert tender

title/description) for(insert name of the procuring entity) and duly authorized and competent to make this statement.

1. THAT i am the Company Secretary/Chief Executive/Managing Director/Principal Officer/Director of.....(insert name of the Company) who is a bidder in respect of Tender No.for(insert tender title/description) for(insert name of the procuring entity) and duly authorized and competent to make this statement.

2. THAT the aforesaid bidder, its directors and sub-contractors have been debarred from participating in procurement proceedings under Part IV of the Act.

3. THAT what is deponed to herein above is true to the best of my knowledge, information and belief..... ”

The Applicant submitted that the heading of the self-declaration form states that the form is a '*Self declaration that a person/tender is not*

debarred in the matter of the Public Procurement and Asset Disposal Act, 2015. However, contrary to its heading, the contents of the self-declaration form indicate that the bidder, its directors and sub-contractors “*have been debarred from participating in procurement proceedings under Part IV of the Act*”.

As a result of this error, the Applicant submitted that upon duly completing the said form, it inadvertently indicated that it had been debarred from procurement proceedings and its bid was therefore disqualified from further evaluation.

According to the Applicant, any mistakes or errors in the contents of the Tender Document should not be visited upon the Applicant and its tender ought not to have been disqualified for failure to declare whether it was debarred or not, noting the error in the self-declaration form in the Procuring Entity’s Tender Document.

In response, the Procuring Entity submitted that according to Clause 2.3.2 of the Tender Document, the Applicant had an obligation to read and understand the Tender Document in its entirety prior to submission of its bid documents to the Procuring Entity. It was therefore the Procuring Entity’s submission that, as communicated in the letter of notification, the

Applicant did not declare whether or not it was debarred from procurement proceedings and its bid was therefore disqualified from further evaluation.

From the above submissions, it is evident that the alleged breach forming the crux of the Request for Review involves the ambiguity in the self-declaration form on page 41 of the Tender Document.

To establish the time the Applicant learnt of the alleged breach by the Procuring Entity, that is, the ambiguity in the self-declaration form on page 41 of the Tender Document, which is the subject of review proceedings before this Board, we find it necessary to give a brief background to the subject procurement process.

The Procuring Entity invited interested and eligible tenderers to submit their bids with respect to the subject tender on 3rd September 2019. By the tender closing date of 25th September 2019, the Procuring Entity received a total of twenty one (21) bids which were evaluated by the Procuring Entity's Evaluation Committee.

Through an Evaluation Report dated 25th October 2019, the Procuring Entity's Evaluation Committee recommended award of the subject tender to the lowest evaluated responsive bidder.

The Accounting Officer approved the recommendation made by the Evaluation Committee, having been reviewed by the Head of Procurement function. All successful and unsuccessful bidders were duly notified of the outcome of their bids via letters dated 4th November 2019.

The Applicant, upon receiving its letter of notification of unsuccessful bid on 18th November 2019, wrote to the Procuring Entity requesting the details of the winning bidder in the subject tender. Vide an email dated 19th November 2019, the Procuring Entity apologised for not disclosing the successful bidder and further attached a letter of notification of unsuccessful bid to its email which read as follows: -

"This is to inform you that the Ministry of Trade and Cooperatives, State Department for Trade, has finalized the evaluation and deliberation on the above stated tender.

We regret to inform you that your bid was not successful for this reason (s)

- ***Did not declare whether debarred or not debarred in the form***

The winning firm was M/s Spriles Enterprises @ Kshs 5,465,000.00/-"

The Applicant submitted that it only became aware of the ambiguity in the self declaration form on page 41 of the Tender Document when it received the above letter of notification of unsuccessful bid on 19th November 2019. The Applicant further confirmed that it did not seek any clarifications with respect to this ambiguity in the self declaration form from the Procuring Entity.

From the above sequence of events and parties' submissions, the question that arises is when was the date of occurrence of the alleged breach in this instance for the fourteen-day period under section 167 (1) of the Act to start running.

The Board examined the Tender Document and notes Clause 2.3.2 Section II Instructions to Tenderers which provides as follows: -

"The Tenderer is expected to examine all instructions, forms, terms and specifications in the Tender Document. Failure to furnish all information required by the Tender Document or to submit a tender not substantially responsive to the Tender Document in every respect will be at the tenderer's risk and may result in the rejection of its tender"

Further, Clause 2.4.1 Section II Instructions to Tenderers on page 5 of the Tender Document reads as follows: -

"A prospective candidate making inquiries of the Tender Document may notify the Procuring Entity in writing or by post, fax or email at the entity's address indicated in the Invitation for tenders. The Procuring Entity will respond in writing to any request for clarification of the tender documents, which it receives no later than seven (7) days prior to the deadline for the submission of tenders, prescribed by the procuring entity. Written copies of the Procuring Entity's response (including an explanation of the query but without identifying the source of inquiry) will be sent to all prospective tenderers who have received the tender documents"

Accordingly, a tenderer was required to examine all instructions, forms, terms and specifications in the Tender Document and thereafter submit its tender in response to same. A prospective tenderer would further seek clarification from the Procuring Entity with respect to the provisions of the Tender Document, if at all it appeared that the contents of the Tender Document were not clear to any bidder.

It therefore follows that once a bidder submits its bid documents to a procuring entity in response to an invitation to tender, it is presumed that a

bidder has carefully examined the contents of the Tender Document and is well versed with the same.

A bidder is therefore *estopped* from later claiming that it did not fully read and understand a particular provision in the Tender Document, particularly if that bidder failed to seek any clarification from the procuring entity on any provision in the Tender Document.

In view of the foregoing, this Board is persuaded that from the time the Applicant was seized with the Tender Document, it was in a position to discover the ambiguity in the self-declaration form on page 41 of the Tender Document. It therefore follows that when the Applicant submitted its bid to the Procuring Entity, the Applicant intimated that it was well conversant with the contents of the Tender Document.

This means, before the date of close of tenders, the Applicant ought to have raised any ambiguity in the self declaration form with the Procuring Entity by seeking clarifications and/or challenged the said ambiguity through a Request for Review application.

The Board observes that the Procuring Entity closed the subject tender on 25th September 2019. An alleged breach of duty could therefore only occur

on or before 25th September 2019, being the date the Applicant submitted its bid together with all the other bidders who participated in the subject procurement process. This means that the Applicant became aware of the ambiguity in the tender document, which it now seeks to challenge, at the time of obtaining the tender documents and at the time the tender was scheduled to close.

The Applicant ought to have approached this Board, at least, within fourteen days after 25th September 2019, being the tender closing date of the subject tender. Even assuming the Procuring Entity's Confidential file contained the exact date the Applicant obtained the blank Tender Document, fourteen days within which the Applicant ought to have approached this Board would start running earlier than 25th September 2019, since the Applicant obtained the Tender Document prior to this date.

Given that the Request for Review was filed on 3rd December 2019, which was sixty nine (69) days after the tender closing date, the Board finds that the Request for Review was filed outside the statutory period stipulated under section 167 (1) of the Act.

The Board would like to make an observation that the fourteen-day period expressly provided under section 167 (1) of the Act, ensures that this Board cannot bend or circumvent the same in favour of one party over

another and further guarantees that the process of review is expeditious and in line with the principles under section 4 of the Fair Administrative Action Act No. 4 of 2015 which states as follows:-

"Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair."

In **Judicial Review Case No. 21 of 2015, Republic v Public Procurement Administrative Review Board & 2 others [2015] eKLR**, the High Court while considering the purpose of the statutory timeline imposed under section 167 (1) of the Act held as follows:-

"The jurisdiction of the Board is only available where an application for review has been filed within 14 days from the date of the delivery of the results of the tender process or from the date of the occurrence of an alleged breach where the tender process has not been concluded. The Board has no jurisdiction to hear anything filed outside fourteen days..."

The timelines in the PP&DA [that is, the 2015 Act] were set for a purpose. Proceedings touching on procurement matters ought to be heard and determined without undue delay. Once a party fails to move the Board within the time set by

the Act, the jurisdiction of the Board is extinguished in so far as the particular procurement is concerned...

[Emphasis by the Board]

Further, in **Miscellaneous Civil Application No. 85 of 2018, Republic v. Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/s Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR**, the High Court held as follows: -

"The Respondent's (that is the Board) wide powers under section 173 of the Act can only be invoked if there is a competent Request for Review before it. Invoking powers under section 173 where there is no competent Request for Review or where the Request for Review is filed outside the period prescribed under the law is a grave illegality and a ground for this court to invoke its Judicial Review Powers."

[Emphasis by the Board]

The Board concurs with the findings of the High Court in the abovementioned decisions and would hasten to add that the period set under section 167 (1) of the Act is a statutory timeline which must be

adhered to by an aggrieved candidate or tenderer including all players in a procurement process.

This statutory period provides an opportunity within which an aggrieved candidate or tenderer may exercise its right to administrative review to challenge a procurement process in view of a breach of duty by a procuring entity as soon as the breach occurs. Once the Board dispenses with a review application, depending on the Board's orders, the procurement process can then proceed to its logical conclusion for the public good.

Accordingly, having established that the Request for Review was filed outside the statutory period imposed under section 167 (1) of the Act, the Board holds that it lacks the jurisdiction to entertain the substantive issues raised in the Request for Review and proceeds to down its tools at this point.

In totality, the Request for Review is hereby struck out for want of jurisdiction and the Board makes the following orders: -

FINAL ORDERS

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

I. The Request for Review filed on 3rd December 2019 with respect to Tender No MITC/SDT/OT/003/2019-2020 for Provision of Cleaning and Sanitary Services be and is hereby struck out.

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

Dated this 23rd Day of December 2019

.....

CHAIRPERSON

PPARB

.....

SECRETARY

PPARB

Delivered in the presence of: -

- i.** Mr Geoffrey Jomo on behalf of the Applicant;
- ii.** Ms. Catherine Mirugi on behalf of the 1st & 2nd Respondent;
- iii.** Ms. Janet Akinyi on behalf of the Interested Party.