

REPUBLIC OF KENYA
THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 140/2019 OF 6TH DECEMBER 2019

BETWEEN

**THE GARDENS AND WEDDINGS CENTRE
LTD.....APPLICANT**

AND

**THE ACCOUNTING OFFICER,
NAKURU COUNTY GOVERNMENT-
THE RIFT VALLEY PROVINCIAL GENERAL
HOSPITAL.....1ST RESPONDENT**

AND

**NAKURU COUNTY GOVERNMENT-
THE RIFT VALLEY PROVINCIAL GENERAL
HOSPITAL.....2ND RESPONDENT**

Review against the decision of the Accounting Officer, Nakuru County Government- The Rift Valley Provincial General Hospital in respect of Tender No. NCG/MOH/PGH/T/5/2019-2021 for Maintenance of Grounds, Flowers, Hedges and Planting of Trees and Flowers.

BOARD MEMBERS

- | | |
|----------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Dr. Joseph Gitari | -Member |
| 3. Mr. Ambrose Ngare | -Member |

4. Ms. Rahab Chacha -Member

IN ATTENDANCE

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

PRESENT BY INVITATION

APPLICANT

**-THE GARDENS AND WEDDINGS
CENTRE LTD**

1. Mr. Nathan Karugu Mbugua -Advocate, Karugu Mbugua & Co.
Advocates
2. Mr. Geoffrey Jomo -Officer
3. Mr. Daniel Gathogo -Officer

PROCURING ENTITY

-NAKURU COUNTY GOVERNMENT

1. Ms. Sandra Opiyo -A. E. Kiprono & Associates
2. Mr. Kevin Gitau -Head of Supply Chain Management
3. Dr. Mburu M. Joseph -Client
4. Ms. Mercy Jelimo -Procurement Officer
5. Mr. Dennis Kamau -Supply Chain Officer

BACKGROUND TO THE DECISION

The Bidding Process

Nakuru County Government, Rift Valley Provincial General Hospital (hereinafter referred to as "the Procuring Entity") advertised Tender No. NCG/MOH/PGH/T/5/2019-2021 for Maintenance of Grounds, Flowers, Hedges and Planting of Trees and Flowers (hereinafter referred to as "the subject tender") on 31th May 2019 on *The Star Newspaper* and was closed on 14th June 2019 and opened on the same day by the tender opening committee.

First Evaluation of Bids

The first evaluation was done between 15th June 2019 to 17th June 2019 and the recommended bidders were awarded but a Request for Review was filed by two Applicants Blue Sea Service Ltd and The Gardens and Weddings to the Public Procurement Administrative Review Board (hereinafter referred to as "the Board") after receiving regret letters. The Board ordered that a re-evaluation of the three categories be conducted in terms of the following specific orders:-

- 1) The Letter of Notification of Award of Tender No. Review against the decision of the Nakuru County Government-Rift Valley Provincial General Hospital with respect to Tender No. NCG/MOH/PGH/T/5/2019-2021 for Maintenance of**

Grounds, Flowers, Hedges and Planting of Trees and Flowers addressed to M/s Limah East Africa, be and is hereby cancelled and set aside.

- 2) The Letters of Notification of unsuccessful bid addressed to all bidders who participated in Review against the decision of the Nakuru County Government-Rift Valley Provincial General Hospital with respect to Tender No. NCG/MOH/PGH/T/5/2019-2021 for Maintenance of Grounds, Flowers, Hedges and Planting of Trees and Flowers are nullified.**
- 3) The Due Diligence Report dated 4th July 2019 be and is hereby cancelled and set aside.**
- 4) The Evaluation Report dated 17th June 2019 be and is hereby cancelled and set aside.**
- 5) The Procuring Entity is hereby directed to reconstitute a new evaluation committee in accordance with section 46 (4) (b) of the Act and to re-evaluate the bids received in Tender No. NCG/MOH/PGH/T/5/2019-2021 for Maintenance of Grounds, Flowers, Hedges and Planting of Trees and Flowers taking into consideration the Board's findings in this case and to proceed with the procurement process, including the making of an award within fourteen (14) days from the date of this decision.**

6) Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.

Re-evaluation of Bids

The tender re-evaluation exercise was carried out in three (3) stages starting with the evaluation of the mandatory requirements, technical evaluation and Financial Evaluation. The evaluation process was carried out by the tender evaluating committee comprising of four (4) members who were present. The evaluation team started by evaluating the documents presented. Thereafter mandatory documents were verified through various notification i.e. KRA, NSSF, DEPARTMENT OF LABOUR to verify if they were genuine.

Upon concluding re-evaluation, the Procuring Entity recommended award of the subject tender to Limah East Africa at Kshs.4, 816,320 (Four million Eight hundred and Sixteen Thousand Three Hundred and Twenty only per annum).

A due diligence exercise was conducted which returned a positive response that the tender be awarded to Limah East Africa. The Accounting Officer

having considered the Professional Opinion awarded the subject tender to Limah East Africa.

REQUEST FOR REVIEW NO. 107 OF 2019

M/s The Gardens and Weddings Centre Ltd lodged a Request for Review on 11th September 2019 seeking for the following orders:-

- a) An order annulling the award;***
- b) An order directing that a fresh evaluation of the bids be conducted as the Board may deem fit and the tender be awarded to the deserving/lowest bidder;***
- c) An order for costs of this Application be awarded to the Applicant; and***
- d) Any other orders that the Honourable Board may deem just and fit.***

The Board having considered each of the parties' submissions ordered as follows in its decision dated 2nd October 2019:-

- 1. The Contract dated 12th September 2019 signed between the Procuring Entity and M/s Limah East Africa with respect to Tender No. NCG/MOH/PGH/T/5/2019-2021 for Maintenance of Grounds, Flowers, Hedges and Planting of Trees and Flowers, be and is hereby cancelled and set aside.**

- 2. The Due Diligence Report signed on 28th August 2019 with respect to the subject tender is hereby cancelled and set aside.**
- 3. The letter of notification of unsuccessful bid dated 28th August 2019 addressed to the Applicant herein, be and is hereby cancelled and set aside**
- 4. The Procuring Entity is hereby directed to conduct a re-evaluation of the Applicant's bid at the Preliminary Evaluation Stage with respect to the following criteria taking into consideration the findings of the Board in this case:-**
 - a) MR 7: Copy of Compliance with NSSF and PAYE; and**
 - b) MR 8: provide age limits of employees.**
- 5. Further to Order 4 above, the Procuring Entity is hereby directed to conclude the procurement process including the making of an award within fourteen (14) days from the date of this decision.**
- 6. Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.**

Professional Opinion

On 16th October 2019, the Head of Supply Chain Management issued a Professional Opinion stating as follows:-

- I. Having gone through the PPARB decision on the following cases (PPARB No. 106, 107, 108 & 109), the Procuring Entity requests the board to allow the procuring entity to re-tender due to lack of clarity in the bid document;
- II. Re-evaluation of the bids using the same evaluation criteria of providing age limits of employees may be a challenge to the Procuring Entity since concerns raised may not be addressed.

In view of the foregoing, he recommended that the tender be cancelled and be re-advertised after preparation of clear standard bid documents. His Professional Opinion was approved by the Accounting Officer on the same date of 16th October 2019.

Notification to Bidders

In letters dated 17th October 2019, the Accounting Officer notified all bidders that the subject tender has been cancelled and will be re-advertised after preparation of clear bid documents.

Notification to the Director-General of the Public Procurement Regulatory Authority

In a letter dated 18th October 2019, the Accounting Officer of the Procuring Entity notified the Public Procurement Regulatory on the procurement

process and previous litigation before the Board. He then stated as follows:-

"In light of the foregoing, the Procuring Entity has pursuant to the provisions of section 63 of the PPAD Act taken the decision to terminate the procurement process to pave way for fresh tendering of the said three (3) tenders"

REQUEST FOR REVIEW NO. 123/2019

The Gardens and Weddings Centre Ltd lodged a Request for Review on 22nd October 2019 seeking the following orders:-

- a) An order allowing the Request for Review;***
- b) An order substituting the decision of the Procuring Entity with a decision awarding the tender to the lowest bidder as per the Tender Evaluation Criteria;***
- c) An order extending the Tender Validity Period taking into account that the subject tender has been the subject of review before the Honourable Board on two occasions (PPARB Request for Review No. 84 of 2019 and PPARB Request for Review 107 of 2019);***
- d) An order holding the Procuring Entity for contempt of the Honourable Board;***
- e) An order awarding costs of this application and two previous related requests (PPARB Request for Review No. 84 of 2019***

and PPARB Request for Review 107 of 2019) be awarded to the Applicant;

f) Any other orders that the Honorable Board may deem just and fit

The Board having considered parties' cases and the documents before it, together with confidential documents submitted to it pursuant to section 67 of the Public Procurement and Asset Disposal Act, 2019, ordered as follows:-

- 1. The Procuring Entity's Notification of Termination of procurement proceedings in Tender No. NCG/MOH/PGH/T/5/2019-2021 for Maintenance of Grounds, Flowers, Hedges and Planting of Trees and Flowers dated 17th October 2019, that was addressed to all bidders who participated in the subject tender, be and is hereby cancelled and set aside.**
- 2. The Procuring Entity's Notification of Termination of the procurement proceedings in the subject tender addressed to the Director General of the Public Procurement Regulatory Authority which is dated 18th October 2019, be and is hereby cancelled and set aside.**
- 3. The Procuring Entity is hereby directed to comply with the orders of the Board issued in PPARB Application No. 107 of 2019, The Gardens and Weddings Centre Limited v. The Accounting Officer, Nakuru County Government-Rift Valley**

Provincial General Hospital & Higawa Enterprises Ltd within fourteen (14) days from the date of this decision, taking into account the Board's findings in this case

4. The Tender Validity Period of the subject tender is hereby extended for a further period of 45 days from 22nd October 2019.

5. The Procuring Entity shall bear the costs of this Request for Review amounting to Kshs. 100,000/- to be paid to the Applicant.

Re-evaluation pursuant to the orders issued on 12th November 2019 in PPARB Application Number 123 of 2019

On 15th November 2019 carried out a re-evaluation of all bids received by it at Preliminary, Technical and Financial Evaluation and determined M/s The Gardens and Weddings Centre Ltd to be the lowest evaluated tenderer.

Due Diligence

On 19th to 21st November 2019, the Procuring Entity conducted a due diligence exercise by visiting the Applicant's premises but found the Applicant non-responsive at the end of the due diligence exercise.

Professional Opinion

In his professional opinion dated 26th November 2019, the Procuring Entity's Head of Supply Chain Management, having reviewed the re-evaluation report and due diligence report, noted the Evaluation Committee's findings that no tenderer was responsive. He therefore recommended that the tender be cancelled and be re-advertised to pave way for fresh bidding.

Notification

i. To the Director General, Public Procurement Regulatory Authority

In a letter dated 26th November 2019, the Procuring Entity's Accounting Officer notified the Director General of the Public Procurement Regulatory Authority of its decision terminating the following tenders:-

- a) Tender No. NCG/MOH/PGH/T/6/2019-2021 for Provision of Comprehensive Cleaning Services;
- b) Tender No. NCG/MOH/PGH/T/5/2019-2021 for Provision of Maintenance of Grounds, Flowers, Hedges and Planting of trees and flowers;
- c) Tender No. NCG/MOH/PGH/T/4/2019-2021 for Provision of Sanitary Cleaning Services.

ii. To Bidders

In letters dated 26th November 2019, the Procuring Entity's Accounting Officer notified all bidders of the termination and outcome of their bids.

REQUEST FOR REVIEW NO. 140/2019

M/s The Gardens and Weddings Centre Ltd (hereinafter referred to as “the Applicant”) lodged this Request for Review on 6th December 2019 seeking the following orders:-

g) An order allowing the Request for Review;

h) An order substituting the decision of the Procuring Entity with a decision awarding the tender to the lowest bidder as per the Tender Evaluation Criteria;

i) An order extending the Tender Validity Period;

j) An order awarding costs of this application to the Applicant;

k) Any other orders that the Honorable Board may deem just and fit.

During the hearing, the Applicant was represented by Mr. Mbugua on behalf of the firm of Karugu Mbugua & Company Advocates, the Procuring Entity was represented by Ms. Opiyo, holding brief for Mr. Kiprono on behalf of the firm of A. E Kiprono Advocates

PARTIES' SUBMISSIONS

All parties adopted their oral submissions in Request for Review Application Number 139 of 2019, subject to changes in Tender Number and Name and

the respective previous Request for Review applications applicable to the tender in question.

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, 2015 (hereinafter referred to as "the Act") and the oral submissions of parties to the Request for Review.

The issues that call for determination are as follows:-

- I. Whether the Procuring Entity terminated the procurement proceedings of the subject tender in accordance with section 63 of the Act, thus ousting the jurisdiction of this Board.***
- II. Whether the Procuring Entity complied with the orders of the Board issued on 12th November 2019 in PPARB Application No. 123 of 2019, The Gardens and Weddings Centre Ltd v. The Accounting Officer, Nakuru County Government-The Rift Valley Provincial General Hospital & Another.***

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

Termination of procurement proceedings is governed by section 63 of the Act. In addition to this, when the said termination meets the threshold of that provision, the jurisdiction of this Board is ousted by section 167 (4) (b) of the Act which states that:-

"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 63 of this Act..."

[Emphasis by the Board]

In the case of **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 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."

The failure by the 2nd 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 cited above, held that the Board has the duty to question whether a decision by a procuring entity terminating a tender meets the threshold of section 63 of the Act, and that this Board's jurisdiction is not ousted by mere existence of a letter of notification terminating procurement proceedings.

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") 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 precondition that first needs to be satisfied in the said subsection 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.

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"

The Court in JR No. 142 of 2018 affirmed the decision of the Court in the *Selex Sistemi Integrati* Case that this Board has jurisdiction to determine whether the statutory pre-conditions of section 63 of the Act have been satisfied to warrant termination of a procurement process.

It is therefore important to determine the legality, or lack thereof, of the Procuring Entity's decision terminating the subject tender.

The Board observes that the Applicant herein received a letter of notification dated 26th November 2019, which occasioned the lodging of this instant Request for Review, challenging the Procuring Entity's decision terminating the subject procurement proceedings. The said letter of notification states as follows:-

"Pursuant to section 63 of the Public Procurement and Asset Disposal Act, 2015, the Nakuru Level 5 Hospital has decided to cancel tender number NCG/MOH/PGH/T/6/2019-2021 for being non-responsive

In line with the above section your firm qualified at both mandatory and technical but after conducting due diligence on 19th November 2019, your firm lacked to provide the following:-

- ***NSSF receipts prior to the tender opening period. The firm complied later since NSSF receipts provided were remitted after tender opening and were remitted in the month of August 2019;***
- ***NSSF receipts provided were not tallying with the payroll of employees and without e-slips”***

The two issues raised in the Applicant’s letter of notification arose during the due diligence exercise conducted by the Procuring Entity on the Applicant. The Procuring Entity questioned NSSF receipts of the Applicant, which formed part of the Procuring Entity’s due diligence criteria and alleged that the Applicant failed to provide NSSF receipts prior to tender opening. According to the Procuring Entity, the NSSF receipts adduced during the due diligence exercise were remitted after tender opening. Secondly, that the NSSF receipts provided were not tallying with the payroll of employees and were without e-slips.

On the first issue raised pursuant to the Procuring Entity’s due diligence exercise on the Applicant, the Board notes that the Procuring Entity made reference to the Applicant’s alleged failure to provide NSSF receipts prior to tender opening. This prompted the Board to interrogate the requirements of the Tender Document that bidders were required to comply with prior to the date of tender opening.

Page 24 of the Tender Document outlines the Mandatory Requirements that bidders were subjected to during evaluation of their bids as follows:-

No.	Requirements	Responsive or not Responsive
MR 1	Must submit a copy of certificate of registration/incorporation	
MR 2	Must submit a copy of valid tax compliance certificate	
MR 3	Must fill the price schedule in the format provided	
MR 4	Must fill in the form of tender in the format provided	
MR 5	Must submit a dully filled up Confidential Business Questionnaire in the format provided	
MR 6	Must attach a copy of V.A.T registration certificate	
MR 7	Copy of compliance with NSSF and PAYE	
MR 8	Provide age limits of employees	
MR 9	Proof of minimum wage per employee as per the labor laws	
MR 10	Must attach a copy of a single business permit	
MR 11	Pagination and sanctity of the document	
	At this stage the tenderer's submission will either be responsive or non responsive. The non-responsive submissions will be eliminated from the entire evaluation process and will not be considered further	

At page 25 of the Tender Document, the Technical Evaluation Criteria was expressed thus:-

Technical Score (TS)			
This section (Technical Evaluation) will be marked out of 100 and will determine the technical score (TS)			
No.	Evaluation Attribute	Weighting Score	Max Score
T.S 1	Number of years Provision of Cleaning Services for Sanitary Accommodation Facility	5 years and above 10 marks Other prorated	10

			number of years x 10/5	
	T.S 2	Provide a list of client and references to which the company has done similar services in the last five years preferably in a hospital facility	10 clients with reference letters-20 marks Other prorated number of years x 20/5	20
	T.S 3	Financial strength provide audited accounts for the last two years (2016,,2017, 2018)	Two years audited accounts-20 marks One year audited accounts-10 marks	20
	T.S 4	Provide details of any relevant certifications and/or training. Such certifications and/or trainings may be for your company or for your individual staff as relevant to providing security services Attach evidence	Details of at least 3 certifications and/or trainings with proof-10 marks Other prorated number of certifications and trainings x 10/3	10
	T.S 6	Equipments and accessories owned by the firm that will be deployed to the hospital	Provide details/list of at least 5 equipments and accessories and explain what they will be used for (2 marks each)	20
	T.S 7	Physical facilities Provide details fo physical address and contact Attach evidence	Details of physical address and contact with copy of either title, lease documents or latest utility bill	10
	T.S 8	Attach relevant certificate from the public health	Attach evidence	10

As regards Financial Evaluation, the Procuring Entity provided a Price Comparison Schedule at page 30 of the Tender Document, and further specified that the award criterion shall be applied in accordance with clause

2.24.3 of Section II. Instructions to Tenderers of the Tender Document which provides as follows:-

"...the Procuring Entity will award the contract to the successful tenderer whose tender has been determine to be substantially responsive and has been determined to be the lowest evaluated tender, provided further that the tenderer is determined to be qualified to perform the contract satisfactorily"

Having studied the requirements of the Tender Document in relation to each stage of evaluation, the Board observes that section 83 (1) of the Act provides as follows in respect of a due diligence exercise:-

"An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act."

Due diligence is defined in Black's Law Dictionary, Ninth Edition at page 523 thereof as ***"the diligence reasonably expected from, and ordinarily exercised by a person who seeks to satisfy a legal requirement or discharge an obligation"***. Diligence on the other hand

is defined as ***"the attention and care required from a person in a given situation"***.

In essence, a due diligence exercise is an important component of a procurement process that assists a procuring entity to exercise the attention and care required to satisfy itself that the lowest evaluated responsive tenderer can execute a tender.

The Procuring Entity referred the Board to the decision of Justice Aburili in **Judicial Review Application No. 190 of 2016, Republic v. Public Procurement Administrative Review Board & Another ex parte University of Eldoret [2017] eKLR** (hereinafter referred to as "the University of Eldoret Case") to support its view that a due diligence exercise is an implied criterion, hence the Procuring Entity was at liberty to base its due diligence on any documents. In the Procuring Entity's view, the documents and information required by it, during its due diligence exercise on the Applicant were part of the Tender Document.

The Board studied the court's finding in the University of Eldoret Case, to understand the context of the Court's finding and note that at paragraphs 108 to 112 thereof, it was held as follows:-

"[108] In my humble view, there must be in every tender document, an implied criteria for due diligence without which there can never be an efficient, transparent and or accountable public procurement process. Tenderers would be quoting the lowest figures and once awarded the tenders, then they would be unable to perform or implement public projects, thereby swindling the tax payer of the much hard earned tax and rendering the whole process a waste of valuable time and financial resources.

[109] I would therefore, without hesitation find that the due diligence complained of is not an additional criterion but is an implied criteria in every tender document, and that the Procuring Entity is under a public duty to carry out due diligence and satisfy itself that the responsive bidders at the technical evaluation stage are capable of implementing the projects before considering the financial aspect for the bidders.

[110] In other words, all bidders in all public contracts should expect that they would be evaluated on their capability to implement the projects, notwithstanding their low value bids.

[111] It is for that reason that Section 83 of the 2015 Act stipulates that an evaluation Committee may, after the tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderers who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with the Act. The conduct of due diligence under Subsection (1) of section 83 of the Act may include obtaining confidential references from persons with whom the tenderer has had prior engagement.

[112] In the end, I find that the due diligence conducted by the Procuring Entity before recommending the award of the tender to the lowest evaluated tenderer who had passed the technical evaluation stage, being the interested party, was not an irregular undertaking and neither was due diligence an additional criterion that was introduced by the evaluation committee, but a legal requirement."

The Board having studied the decision in the University of Eldoret Case observes that, the court was dealing with the issue whether or not a procuring entity may conduct a due diligence exercise, if such procuring entity had not expressly stated that it would conduct a due diligence exercise in its Tender Document. Given that due diligence exercise is

provided for in section 83 of the Act, the court arrived at the conclusion that it is an implied criterion in every Tender Document, that a procuring entity may conduct a due diligence exercise to ascertain that the lowest evaluated tenderer will execute a tender satisfactorily. However, the court did not address the question whether, in conducting a due diligence exercise, a procuring entity is at liberty to introduce documents and information not previously provided for in the Tender Document.

In essence, the court was dealing with the due diligence exercise, itself being a legal requirement, but not the manner of conducting a due diligence exercise.

To determine the manner of conducting a due diligence exercise, the Board addressed its mind to the decision of Justice Mativo in **Judicial Review Miscellaneous Application Number 85 of 2018, Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology and M/S Aaki Consultants Architects and Urban Designers [2019] eKLR** (hereinafter referred to as "Meru University Case") where it was held as follows:-

"[43] In order to give meaning to section 83 of the act, the Regulations and the Tender documents, regard must be had to their wording, read in context, and having regard to the purpose of the entire act and the dictates of Article 227 of the Constitution. Read against this backdrop, the plain

wording of the relevant provisions and the scheme of section 83 of the act make it clear that the provisions are meant to ensure a fair, equitable, transparent, competitive procurement process which is consistent with the provisions of Article 227 of the Constitution...

[48] The Evaluation Committee is required to conduct a post-qualification of the lowest evaluated responsive tenderer, to determine the Tenderer's capability to perform the contract. Using the criteria for evaluation specified in the Bidding Documents, this review includes an assessment of the Tenderer's technical, financial and physical resources available to undertake the contract, including his current and past similar projects.” [Emphasis by the Board]

The Board observes that the court in the Meru University Case established the nexus between Article 227 of the Constitution, a due diligence exercise and criteria set out in a tender document. Article 227 of the Constitution provides that: -

"When a State Organ or any other public entity contracts for goods and services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective"

In order to support the principles enshrined under Article 227 of the Constitution, the court held that in conducting a due diligence exercise to confirm a bidder's capability to perform a contract, a procuring entity ought to use the evaluation criteria it had specified in its tender document, in order to assess the tenderer's technical, financial and physical resources available to undertake the contract, including his current and past similar projects.

This means that, in conducting a due diligence exercise, a procuring entity must bear in mind that when it advertises a tender, tenderers submit their tender documents attaching evidence of their qualifications. In arriving at the responsive tenderer, the procuring entity considers documents that support the eligibility and mandatory requirements, including technical specifications specified in the Procuring Entity's Tender Document. Section 79 of the Act is instructive on this aspect as it states:-

"A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents."

After eligibility and mandatory documents/requirements, including technical specifications are considered at Preliminary and Technical Evaluation stages, Financial Evaluation is conducted. During Financial Evaluation in open tenders, where Request for Proposal method of tendering is not used, award of a tender is based on the criteria of lowest evaluated responsive tender.

This means the lowest evaluated responsive tenderer is determined by looking at its qualifications that meet the minimum eligibility and mandatory requirements, including technical specifications in the Tender Document. Hence, when the accounting officer awards the tender, he or she does so to the tenderer determined to have submitted the lowest evaluated responsive tender

When conducting a due diligence exercise to verify and confirm the qualifications of the lowest evaluated responsive tenderer, such due diligence would be based on documents and qualifications considered during evaluation that met the minimum eligibility and mandatory requirements, including technical specifications of the Tender Document. These documents and information are what previously formed Preliminary, Technical and Financial Evaluation Criteria. After recommending a bidder for award of a tender, the Procuring Entity is left with a due diligence exercise to confirm and verify documents and information requested for in its Tender Document and forming part of the evaluation criteria used in the aforementioned stages.

The Board studied the Tender Document and notes that no specific provision makes reference to a requirement for bidders to submit NSSF receipts prior to the date of tender opening. It is only criteria MR 7 at page 24 of the Tender Document considered during Mandatory

Requirements/Preliminary Evaluation stage that is specific on the requirement for bidders to attach "a copy of compliance with NSSF and PAYE".

During the hearing of PPARB Applications No. 84 of 2019, 107 of 2019 and 123 of 2019 involving the same Procuring Entity, the Board having studied the Procuring Entity's original evaluation reports noted that the Procuring Entity evaluated this criterion with a view of establishing whether or not bidders provided a copy of NSSF compliance certificate, in so far as the first limb of NSSF under that criterion is concerned.

Despite no provision in the Tender Document requiring bidders to submit NSSF receipts, Criteria 5 which was applied during the due diligence exercise provides as follows:-

"Original NSSF compliance certificate with remittance receipts (for the period prior to the tender opening)"

At the end of due diligence, the Procuring Entity, in its Due Diligence Report noted as follows:-

"Receipts seen were remitted after the tender opening. No e-slips were provided. (For the month of Jan, Feb, March, April & May) We requested for copies but they denied."

The Due Diligence Report signed on 22nd November 2019 does not indicate whether or not the Procuring Entity verified the NSSF compliance certificate previously submitted by the Applicant prior to tender opening. Instead, the Procuring Entity only verified whether or not the Applicant had NSSF receipts, despite the same not being a requirement in the Tender Document.

Having considered the court's finding in the Meru University Case, the Board finds, the Procuring Entity in introducing a requirement of NSSF receipts, not previously considered during any of the three evaluation stages, failed to afford the Applicant a fair process, being one of the principles of public procurement enshrined in Article 227 (1) of the Constitution.

Even assuming for a moment the Tender Document required bidders to submit NSSF receipts, the question that the Board is grappling with is whether the Procuring Entity ought to have verified the said receipts from the Applicant, or from the issuer of the receipts.

The National Social Security Fund (Voluntary Registration) Regulations, 2013 provides for registration of employees and employers and the eligibility requirements for such registration. Regulation 7 thereof specifically provides that:-

"On receipt and approval of an application for voluntary contribution, the Managing Trustee of the Fund shall issue the applicant with a certificate for voluntary contributions for long-term benefits, and the holder of the certificate shall be liable to pay contributions in respect of those benefits in a manner prescribed by the Board"

Regulation 20 thereof further provides that:-

"The administrator of a funds' scheme shall:

(a) ensure it has systems capable of maintaining an accurate record of Protected Rights in respect of each member of the scheme including a record of Tier II Contributions received, Tier II Fund Credits and Protected Rights transfer credits if any..."

From the above provisions, the Board observes that the National Social Security Fund (hereinafter referred to as "NSSF") has the mandate to receive applications for registration from employers and employees as the case may be, and further maintains records of protected rights of each member of the scheme administered by NSSF.

It is therefore evident that NSSF being the organization that deals with registration of employers and employees, including maintenance of their records in respect of contributions in a scheme administered by NSSF, it

would be the best institution to confirm whether or not it issued the receipts attached to the Applicant's Request for Review application.

The Board further notes that the date of tender opening of the subject tender was 31st May 2019, whereas the Applicant's NSSF receipts are dated 20th May 2019 and 30th April 2019, thereby demonstrating that an application to NSSF was made by the Applicant before the date of tender opening. It is only one receipt attached to the Applicant's Request for Review that was issued on 12th June 2019, after the date of tender opening on 31st May 2019. Nonetheless, these receipts do not form part of the requirements of the Tender Document.

Having found that these receipts were not part of the criteria set out in the Tender Document, it is the Board's considered view that, what the Procuring Entity ought to have done, given that it found the Applicant responsive at the end of Preliminary Evaluation in so far as Criterion MR 7 is concerned, was to contact NSSF to confirm and verify whether the said organization issued the NSSF compliance certificate to the Applicant, which the Procuring Entity evaluated at Preliminary stage and copy thereof is found at page 21 of the Applicant's original bid.

In confirming the Applicant's NSSF compliance certificate, the Procuring Entity would further enquire from NSSF of the processes an applicant goes through before being issued with NSSF compliance certificate, and if

receipts are involved, to confirm the receipts that NSSF issued to the Applicant.

The Procuring Entity did not contact NSSF regarding the NSSF receipts neither did it verify the Applicant's NSSF compliance certificate, which it had previously evaluated at the Preliminary stage.

It is the Board's finding that the first limb of the Procuring Entity's due diligence exercise, fails to meet the threshold of section 83 (1) of the Act.

The Board notes that the Procuring Entity further informed the Applicant that, *"the NSSF receipts provided were not tallying with the payroll of employees and without e-slips"*

The Board would like to make an observation that the due diligence criteria outlined by the Procuring Entity had a criterion number 4 named as follows:-

"Scan through the organization payroll (for the period prior to tender opening"

Further, Criterion MR 9 required bidders to provide *"Proof of minimum wage per employee as per the labor laws"*. This means, in order to confirm

and verify the minimum wage of employees of the Applicant as per our labour laws, the Procuring Entity would be expected to verify the Applicant's payroll during a due diligence exercise.

What the Board wonders is whereas the Procuring Entity stated in the letter of notification that the NSSF receipts were not tallying with the Applicant's payroll, in its response to the Request for Review, the Procuring Entity avers at paragraph 37 thereof that:-

"...The following documents were requested for but not given

(a) Copies of the payroll"

In the Due Diligence Report, the Procuring Entity noted the following:-

***"Copies of pay slips for March & May 2019 were provided.
We requested for copies of payroll & pay slip but denied"***

If indeed the Procuring Entity requested for the Applicant's payroll and the same was not given, how then did the Procuring Entity establish that NSSF receipts were not tallying with the Applicant's payroll, which payroll the Procuring Entity was not furnished with during its due diligence exercise.

The Board observes that with respect to the due diligence exercise on the Applicant's payroll, there are inconsistencies, since the Procuring Entity's Response and Due Diligence Report show that the Applicant's payroll was not given upon request, but the Procuring Entity states it established that the Applicant's NSSF receipts were not tallying with the Applicant's payroll. In any case, the Procuring Entity hinged the Applicant's payroll on NSSF receipts, which the Board has found was not a requirement in the Tender Document.

It is the Board's finding that the due diligence exercise based on the Applicant's payroll fails to demonstrate a fair process that meets the threshold of Article 227 (1) of the Constitution.

Thirdly, the Procuring Entity at paragraph 37 of its Response further avers that ***"e-slips for the months of January to May 2019 were not given upon request"***

It is not clear from the Procuring Entity's Response whether the aforementioned e-slips relate to the NSSF receipts or the payroll of the Applicant's employees. However, in its Due Diligence Report, the Procuring Entity made comments concerning the said e-slips against NSSF receipts as follows:-

<p>Verify the original document of the following</p> <ul style="list-style-type: none"> ➤ Original NSSF compliance certificate with remittance receipts (For the period prior to the tender opening) 	<p>Receipts seen were remitted after the tender opening. No e-slips were provided. (For the month of Jan, Feb, March, April & May) We requested for copies but they denied</p>
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The Board takes cognizance that NSSF maintains a self-service portal on its official website accessible to the public under which NSSF payments can be made and that an applicant may obtain e-slips upon payment. However, nothing could have been easier than the Procuring Entity contacting NSSF to verify and confirm any processes and details pertaining to issuance of the NSSF compliance certificate obtained by the Applicant, which was a criterion evaluated at the Preliminary Evaluation stage. In confirming the Applicant’s NSSF compliance certificate, the Procuring Entity would further enquire from NSSF of the processes an applicant goes through before being issued with NSSF compliance certificate. This would have assisted the Procuring Entity to verify whether e-slips were generated by NSSF for the Applicant in the months of January, February, March, April and May cited in the Due Diligence Report.

The Board finds that the Procuring Entity’s due diligence exercise based on NSSF receipts not tallying with payroll of employees and that the said NSSF receipts are without e-slips does not meet the threshold of section 83 (1)

of the Act, since the Procuring Entity ought to have contacted NSSF to verify and confirm the NSSF compliance certificate issued to the Applicant.

The Procuring Entity further avers that the Applicant did not provide "**Copies of employee's ID Cards**". According to the Procuring Entity's Due Diligence Report, this was identified in criterion number 5 as:- "*Proof of age limits of employees (Provide copies of national ID)*". However, the letter of notification issued to the Applicant dated 26th November 2019, did not cite this as one of the reasons why the Applicant's bid was found non-responsive after the said due diligence exercise.

The Board observes that Article 47 (1) of the Constitution provides that:-

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

The Procuring Entity failed to take the principles enshrined under Article 47 (1) of the Constitution into consideration when notifying the Applicant of the reasons why its bid was non-responsive after the due diligence exercise, noting that "failure to provide copies of employees' ID cards" is not one of the reasons cited in the Applicant's letter of notification.

Upon determining that a tenderer is non-responsive after a due diligence exercise, the Procuring Entity must give all reasons and the same must be specific reasons. For example, a tenderer must be informed that "*a negative response was received after a due diligence exercise, because of reason (a), (b) and (c)*" as the case may be, in order for such tenderer to challenge the specific reasons cited, if need be.

The Applicant herein got to know that it was found non-responsive for "*failure to provide copies of employees' ID cards*" from the Procuring Entity's Response to the Request for Review and at the hearing when the Procuring Entity made reference to the same. This denied the Applicant sufficient time and opportunity to challenge the said reason before this Board.

Disclosing all the specific reasons why a bidder was found non-responsive promotes the principle of transparency enshrined under Article 227 (1) of the Constitution and the principles of fair administrative action stated in Article 47 of the Constitution cited hereinbefore.

The Board finds that, the Procuring Entity violated the Applicant's right to fair administrative action by the failure to disclose all the specific reasons why the Applicant was found non-responsive after the due diligence exercise.

Having established that the Procuring Entity introduced a criterion during its due diligence exercise that was not previously in the Tender Document and that the Procuring Entity violated the Applicant's right to fair administrative action, the Board finds that the Procuring Entity's due diligence exercise fails to meet the threshold of section 83 of the Act.

The Board noted earlier that responsiveness of a bidder as stipulated in section 79 (1) of the Act is arrived at by evaluating the eligibility and mandatory requirements, including technical specifications in the Tender Document. The Procuring Entity introduced a criterion that was not among its eligibility, mandatory and technical requirements during its due diligence exercise. It therefore follows that the decision determining the Applicant non-responsive after due diligence exercise was not founded in law and therefore makes the decision terminating the subject procurement process for the reason that all bidders were non-responsive, to be null and void.

Accordingly, the Board finds, the Procuring Entity's decision terminating the subject procurement process was not made in accordance with section 63 of the Act.

The result of this finding is that the Board has jurisdiction to entertain the second issue, which we now proceed to make a determination on, as follows:-

The Board in the decision rendered on 12th November 2019 in **PPARB Application No. 123 of 2019, The Gardens and Weddings Centre Ltd v. The Accounting Officer, Nakuru County Government-The Rift Valley Provincial General Hospital & Another** (hereinafter referred to as PPARB Application No. 123 of 2019) directed as follows:-

- 1. The Procuring Entity's Notification of Termination of procurement proceedings in Tender No. NCG/MOH/PGH/T/5/2019-2021 for Maintenance of Grounds, Flowers, Hedges and Planting of Trees and Flowers dated 17th October 2019, that was addressed to all bidders who participated in the subject tender, be and is hereby cancelled and set aside.**
- 2. The Procuring Entity's Notification of Termination of the procurement proceedings in the subject tender addressed to the Director General of the Public Procurement Regulatory Authority which is dated 18th October 2019, be and is hereby cancelled and set aside.**
- 3. The Procuring Entity is hereby directed to comply with the orders of the Board in PPARB Application No. 107 of 2019, The Gardens and Weddings Centre Limited v. The Accounting Officer, Nakuru County Government-Rift Valley Provincial General Hospital & Higawa Enterprises Ltd within fourteen**

(14) days from the date of this decision, taking into account the Board's findings in this case

4. The Tender Validity Period of the subject tender is hereby extended for a further period of 45 days from 22nd October 2019.

5. The Procuring Entity shall bear the costs of this Request for Review amounting to Kshs. 100,000/- to be paid to the Applicant

In determining whether or not the Procuring Entity complied with Order No. 3 above, the Board notes that the Procuring Entity was required to comply with the orders issued on 22nd October 2019 in **PPARB Application No. 107 of 2019, The Gardens and Weddings Centre Limited v. The Accounting Officer, Nakuru County Government-Rift Valley Provincial General Hospital & Higawa Enterprises Ltd** specifically in respect of the following:-

"The Procuring Entity is hereby directed to conduct a re-evaluation of the Applicant's bid at the Preliminary Evaluation Stage with respect to the following criteria taking into consideration the findings of the Board in this case:-

c) MR 7: Copy of Compliance with NSSF and PAYE; and

d) MR 8: provide age limits of employees.

Further to Order 4 above, the Procuring Entity is hereby directed to conclude the procurement process including the making of an award within fourteen (14) days from the date of this decision."

The Board studied the Procuring Entity's confidential file and notes that the Procuring Entity carried out a re-evaluation process on 15th November 2019 and found the Applicant to be the bidder who submitted the lowest evaluated tender. The Procuring Entity then conducted a due diligence exercise between 19th to 21st November 2019.

As noted earlier, a due diligence exercise is an important component of a procurement process that assists a procuring entity to exercise the attention and care required to satisfy itself that the lowest evaluated responsive tenderer can execute a tender. The Procuring Entity herein cannot be faulted for conducting a due diligence exercise before making a decision whether or not to award a tender in its attempts to comply with the orders of the Board.

Without prejudice to the finding that the said due diligence fails to meet the threshold of section 83 of the Act, the Board having studied the Procuring Entity's documents, finds that the Procuring Entity complied with Order No. 3 in PPARB Application No. 123 of 2019.

The Board further notes that the Procuring Entity furnished evidence of having fully paid the costs of PPARB Application No. 123 of 2019 to the Applicant as directed by the Board through Order No. 5 thereof.

In totality of the third issue, the Board finds that the Procuring Entity complied with the Orders of the Board issued on 12th November 2019 in PPARB Application No. 123 of 2019 in so far as conducting a re-evaluation is concerned with a view of determining the bidder to be awarded the subject tender and that the Procuring Entity was well within its right to undertake a due diligence exercise.

In determining the appropriate reliefs to grant, the Board notes that the Applicant herein urged the Board to set a mention date to confirm whether the Procuring Entity has taken reasonable steps to comply with the Board's orders, should we direct the accounting officer of the procuring entity on anything to be done or redone in the subject procurement process.

The Board in addressing this issue, observes that section 34 of the Act provides as follows:-

"Section 34. Powers to ensure compliance

A public entity shall provide the National Treasury or the Authority with such information relating to procurement and asset disposal as may be required in writing."

From the above provision, the Public Procurement Regulatory Authority (hereinafter referred to as “the Authority”) has the power to obtain information from a public entity relating to procurement and asset disposal as may be required in writing. The Act grants powers to the Authority to ensure public entities comply with the provisions of the Act and orders of this Board. This in our view, means, the Board may refer its decision to the Authority to follow up and ensure the Board’s orders are adhered to.

The Board observes that this is the fourth time the Request for Review is coming up in respect of the same tenderer and procuring entity. In the instant review, the Board has established that the Procuring Entity made reasonable steps to comply with the orders on 12th November 2019 in PPARB Application No. 123 of 2019. We also are of the view that there should be an end to litigation and it would serve the public good if the Authority follows up this matter, and we shall therefore refer this decision to the Authority.

At this point, the Board would like to address its mind on the tender validity period of the subject tender.

In PPARB Application No. 123 of 2019, the Board established the import of section 168 of the Act in computing the tender validity period of the subject tender. The Board found that 25 days were remaining as at 22nd October 2019 when the Applicant lodged its Request for Review, such that

the tender validity period remained suspended until conclusion of the review proceedings in PPARB Application No. 123 of 2019.

To give effect to its orders, the Board extended the tender validity period for a further 45 days from 22nd October 2019 in addition to the 25 days remaining, bearing in mind the fact that, this period would only resume running a day after the Board delivered its decision on 12th November 2019.

When the Applicant lodged this Request for Review on 6th December 2019, the tender validity period of 70 days had run for 24 days. Therefore, the tender validity period of the subject tender has 46 days remaining as at 6th December 2019.

As regards the issue of costs, the Supreme Court in **Jasbir Singh Rai & 3 Others v Tavlochan Singh Rai & 4 others (2014) eKLR** set out the following jurisprudential guidelines on the exercise of this discretionary power to award costs:-

"It emerges that the award of costs would normally be guided by the principle that costs follow the event; the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or

respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously exercised discretion of the court, accommodation of the special circumstances of the case, while being guided by the ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior to, during, and subsequent to the actual process of litigation

In determining whether or not to award costs in this application, the Board observes that having found that the Procuring Entity's decision terminating the subject procurement process does not meet the threshold of section 63 of the Act, the Applicant herein will still have an opportunity to participate in this procurement process, in terms of the final orders herein.

In the circumstances, even though the Request for Review has succeeded the Board shall refrain from awarding costs to the Applicant.

In totality, the Board holds that the Request for Review succeeds only with respect to the following specific orders:-

FINAL ORDERS

In exercise of the powers conferred upon it by section 173 of the Public Procurement and Asset Disposal Act, 2015, the Board makes the following orders in the Request for Review:-

- 1. The Procuring Entity's Due Diligence Report signed on 22nd November 2019 in respect of Tender No. NCG/MOH/PGH/T/5/2019-2021 for Maintenance of Grounds, Flowers, Hedges and Planting of Trees and Flowers be and is hereby cancelled and set aside.**
- 2. The Procuring Entity's Letter of Notification of unsuccessful bid dated 26th November 2019 addressed to the Applicant, be and is hereby cancelled and set aside.**
- 3. The Procuring Entity is hereby directed to award the subject tender to the lowest evaluated responsive tenderer subject to a due diligence exercise conducted in accordance with section 83 of the Act, taking into consideration the Board's findings in this case and proceed with the procurement process to its logical conclusion within fourteen (14) days from the date of this decision.**
- 4. Each party shall bear its own costs in the Request for Review.**

Dated at Nairobi, this 23rd day of December 2019

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CHAIRPERSON

PPARB

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SECRETARY

PPARB

Delivered in the presence of:-

- i.** Mr. Mbugua for the Applicant; and
- ii.** Ms. Opiyo holding brief for Mr. Kiprono for the Respondents.