

THE REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 124/2020 OF 31ST AUGUST 2020

BETWEEN

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

AND

THE ACCOUNTING OFFICER,

KENYATTA NATIONAL HOSPITAL.....1ST RESPONDENT

KENYATTA NATIONAL HOSPITAL.....2ND RESPONDENT

AND

KAMTIX CLEANERS CO. LIMITED.....INTERESTED PARTY

Review against the decision of Kenyatta National Hospital with respect to Tender No. KNH/T/35/2020-2021 for Provision of Gardening Services.

BOARD MEMBERS

- | | |
|-----------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mr. Ambrose Ogetto | -Member |
| 3. Ms. Rahab Chacha | -Member |

IN ATTENDANCE

- | | |
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| 1. Mr. Philip Okumu | -Holding brief for the Secretary |
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BACKGROUND TO THE DECISION

The Bidding Process

Kenyatta National Hospital (hereinafter referred to as “the Procuring Entity”) advertised Tender No. KNH/T/35/2020-2021 for Provision of Gardening Services (hereinafter referred to as “the subject tender”) through MyGov Publication Website (www.mygov.go.ke) on 16th June 2020 inviting sealed tenders from eligible tenderers to bid for the same.

Bid Submission Deadline and Opening of Bids

The Procuring Entity received a total of thirteen (13) bids by the bid submission deadline of 8th July 2020. The same were opened shortly thereafter by a Tender Opening Committee in the presence of tenderer’s representatives and recorded as follows: -

Bidder No.	Firm Name
1.	M/s. Dechrip EA Ltd
2.	M/s. Remarc Cleaning Services Ltd
3.	M/s Peesam Ltd
4.	M/s. The Gardens & Wedding Centre
5.	M/s. Sender Services Co Ltd
6.	M/s. Purple Heart Landscapers Ltd
7.	M/s. Super Broom services
8.	M/s. Fastklean Kenya Ltd
9.	M/s. Ice Clean Care Group Co Ltd
10.	M/s. Environcare General Agencies Ltd

Bidder No.	Firm Name
11.	M/s. Karmtix Cleaners Co Ltd
12.	M/s. Colnet Ltd
13.	M/s. Noor Consult Ltd

Evaluation of Bids

Having appointed an Evaluation Committee, evaluation of bids in the subject tender was undertaken in the following three stages: -

- i.** Preliminary Evaluation;
- ii.** Technical Evaluation; and
- iii.** Financial Evaluation.

1. Preliminary Evaluation

At this stage, the Evaluation Committee applied the evaluation criteria outlined in Clause 2.24 (1) of the Appendix to Instructions to Tenderers of the Tender Document. At the end of Preliminary Evaluation, the Evaluation Committee found the following 6 bidders non-responsive and therefore eligible to proceed to Technical Evaluation: -

- M/s Dechrip EA Ltd;
- M/s Peesam Ltd;
- M/s Sender Services Co. Ltd;
- M/s Ice Clean Care Group Co. Ltd;
- M/s Environcare General Agencies Ltd; and
- M/s Kamtix Cleaners Co. Ltd.

2. Technical Evaluation

At this stage, the Evaluation Committee applied the criteria outlined in Clause 2.24 (2) of the Appendix to Instructions to Tenderers of the Tender Document which outlined several categories to be considered for evaluation. According to the aforementioned provision, tenderers were required to achieve a score of 100% [i.e. Experience (15 points), Professional and Technical Qualification (15 points) and Site Visit (20 points) x 100] in order to proceed to due diligence exercise at the Technical Evaluation Stage. The Due Diligence undertaken at the Technical Evaluation Stage carried a total score of 50 points. The Procuring Entity would then weight the scores achieved in the two limbs of Technical Evaluation to determine the tenderers that achieved an overall weighted score of 80%. Having completed the first limb of Technical Evaluation, the Evaluation Committee subject ten tenderers to a due diligence exercise at the Technical Evaluation Stage based on the following criteria outlined in Clause 2.24 (2) of the Appendix to Instructions to Tenderers of the Tender Document: -

- Physical Location and Organization structure;
- Working Tools; and
- Adherence to Labour Laws.

At the end of Technical Evaluation, the Evaluation Committee observed that the six tenderers met the minimum overall technical score required to proceed to Financial Evaluation.

3. Financial Evaluation

At this stage, the Evaluation Committee applied the criterion under Clause 2.24 (3) of the Appendix to Instructions to Tenderers of the Tender Document. The Evaluation Committee recorded the prices quoted by the six tenderers as follows: -

Bidder No.	Unit Cost inclusive of Taxes per Month (Kshs)	Total Cost Inclusive of Taxes Per Year (Kshs)	Ranking
01	581,160.00	6,973,920.00	3
03	660,000.00	7,920,000.00	6
05	527,800.00	6,333,600.00	2
09	582,505.00	6,990,000.00	4
10	598,300.00	7,179,600.00	5
11	495,000.00	5,940,000.00	1

Recommendation

The Evaluation Committee recommended award of the subject tender to M/s Kamtix Cleaners Co. Limited at its tender sum of Kshs. 5,940,000.00 having submitted the lowest evaluated tender price.

Professional Opinion

In a professional opinion dated 13th August 2020, the Procuring Entity's Acting Director, Supply Chain Management reviewed the Evaluation Report whilst outlining the manner in which the Procuring Entity undertook the subject procurement process. According to him, the subject procurement process complied with provisions of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") and the Constitution.

He therefore urged the Procuring Entity's Chief Executive Officer to approve award of the subject tender to M/s Kamtix Cleaners Co. Limited at its tender sum of Kshs. 5,940,000.00. The Chief Executive Officer approved the said professional opinion on 14th August 2020.

Notification to Tenderers

The Procuring Entity notified all the successful and unsuccessful tenderers of the outcome of their bids in letters dated 17th August 2020.

THE REQUEST FOR REVIEW

M/s The Gardens and Weddings Centre Ltd (hereinafter referred to as "the Applicant") lodged a Request for Review dated 31st August 2020 and filed on even date together with a Supporting Affidavit sworn on 31st August 2020 and filed on even date, through the firm of Karugu Mbugua & Co. Advocates, seeking the following orders: -

- a) An order annulling the award to M/s Kamtix Cleaners Co. Ltd;***
- b) An order cancelling the entire Tender;***
- c) An order awarding costs of the application to the applicant;
and***
- d) Any other orders that the Honorable Board may deem just
and fit to grant.***

In response, the 1st and 2nd Respondents lodged a Memorandum of Response dated 4th September 2020 and filed on even date together with a Supporting Affidavit sworn on 4th September 2020 and filed on even date through the Procuring Entity's Board while the Interested Party lodged a Replying Affidavit sworn on 4th September 2020 and filed on even date through the firm of CK Advocates.

On 16th March 2020, the Board issued Circular No. 1/2020 and the same was published on the Public Procurement Regulatory Authority's website (www.ppra.go.ke) in recognition of the challenges posed by the Covid-19 pandemic. Through the said Circular, the Board instituted certain measures to restrict the number of representatives of parties that may appear before the Board during administrative review proceedings in line with the presidential directives on containment and treatment protocols to mitigate against the potential risks of the virus.

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

Accordingly, the Applicant lodged Written Submissions dated 9th September 2020 and filed on 18th September 2020, while the Interested Party lodged Written Submissions dated 4th September 2020 and filed on 7th September 2020. The Respondents did not lodge written submissions.

BOARD'S DECISION

The Board has considered all the pleadings and written submissions filed before it, including the confidential documents submitted to it pursuant to section 67 (3) (e) of the Act and finds that the following issues call for determination: -

I. Whether the Board has jurisdiction to entertain the Applicant's allegation that the Procuring Entity failed to provide clear and quantifiable evaluation criteria in accordance with section 80 (3) of the Act.

Depending on the outcome of the above issue: -

II. Whether the Procuring Entity failed to provide clear and quantifiable evaluation criteria in accordance with section 80 (3) of the Act.

III. Whether the Board has jurisdiction to entertain the Applicant's allegation that Clause 2.24 (2) of the Appendix to

Instructions to Tenderers of the Tender Document contravenes section 83 of the Act.

Depending on the outcome of the above issue: -

IV. Whether Clause 2.24 (2) of the Appendix to Instructions to Tenderers of the Tender Document contravenes Section 83 of the Act.

V. Whether the Procuring Entity complied with Clause 2.24 of Section II. Instructions to Tenderers of the Tender Document and Section 83 of the Act before awarding the subject tender to the Interested Party.

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

It has well been an enunciated principle that jurisdiction is everything following the decision in **The Owners of Motor Vessel 'Lillian 'S' vs Caltex Oil Kenya Ltd 1989 K.L.R 1**, where Justice Nyarangi held that: -

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no

basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

Further in **Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Ltd and 2 Others, Civil Application No. 2 of 2011**, the court had occasion to interrogate the instruments that arrogate jurisdiction to courts and other decision making bodies. The court held as follows: -

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."

This Board is a creature of statute owing to the provision of section 27 (1) of the Act which provides that: -

"27. Establishment of the Public Procurement Administrative Review Board

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

Further, Section 28 of the Act provides as follows: -

"28. Functions and powers of the Review Board

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

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

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

The above provisions demonstrate that the Board is a specialized, central independent procurement appeals review board with its main function being reviewing, hearing and determining tendering and asset disposal disputes. To invoke the jurisdiction of this Board, a party must file its Request for Review in accordance with section 167 (1) of the Act, which provides that: -

"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"[Emphasis by the Board]

Section 167 (1) of the Act gives candidates and tenderers the right to seek administrative review of the decision of a procuring entity within fourteen days of notification of award or date of occurrence of an alleged breach at any stage of the procurement process or disposal process. In addressing the first issue, the Board first considered parties' pleadings and notes that according to paragraph 1 of the Request for Review and paragraph 6 of the Applicant's Supporting Affidavit, the Applicant avers that the Procuring Entity breached section 80 (3) of the Act by failing to provide clear and quantifiable evaluation criteria. The Procuring Entity avers at paragraph 13 of its Memorandum of Response that the criteria set out in the Tender Document complied with section 3, 80 (1) and (2) of the Act and Article 227 (1) of the Constitution noting that the same was applied in evaluating all bids including that of the Applicant.

Having considered parties' pleadings, the Board observes that the Applicant is challenging the contents of the Tender Document, specifically, the criteria set out in the Appendix to Instructions to Tenderers of the Tender Document, which enumerates criteria to be applied at the Preliminary, Technical and Financial Evaluation Stages. It is worth noting that, candidates are one of the persons under section 167 (1) of the Act that have a right to seek administrative review of the decision of a procuring entity within fourteen days of the date of occurrence of an alleged breach at any stage of the procurement process or disposal process, especially in this instance where the evaluation criteria was set out in the Tender Document obtained by candidates who wished to participate in the subject procurement process.

Section 2 of the Act defines the term “candidate” as: -

“a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity”

The Applicant herein obtained the Tender Document pursuant to the Tender Invitation Notice dated 16th June 2020 by the Procuring Entity thus meets the definition of a candidate under section 2 of the Act. The Applicant who was a candidate in the subject procurement process ought to have sought clarifications from the Procuring Entity regarding the evaluation criteria to be applied by the Procuring Entity and if the clarifications given by the Procuring Entity do not meet the threshold of section 80 (3) of the Act, the Applicant was at liberty to approach this Board seeking administrative review at the early stages of the subject procurement process before subjecting itself to the said evaluation criteria. Even without first seeking clarification from the Procuring Entity, nothing stopped the Applicant from approaching this Board by the tender submission deadline of 8th July 2020 or fourteen (14) days thereafter, which would lapse on 22nd July 2020.

The Board studied the Procuring Entity’s confidential file submitted pursuant to section 67 (3) (e) of the Act and notes that there is no evidence of any candidate and/or tenderers seeking clarifications from the Procuring Entity in so far as the evaluation criteria to be applied by the Procuring Entity is concerned. Furthermore, the Applicant obtained the Tender Document, had

sight of the evaluation criteria to be applied by the Procuring Entity but still went ahead to subject itself to the evaluation criteria, without seeking any clarifications and/or challenging the said evaluation criteria through administrative review by the tender submission deadline or fourteen (14) days thereafter in accordance with section 167 (1) of the Act.

The Applicant in this instance; (i) already subjected itself to the evaluation criteria contained in the Tender Document which it obtained before the tender submission deadline of 8th July 2020, (ii) had a cause of action from 8th July 2020 and (iii) could have approached this Board within fourteen days from 8th July 2020 pursuant to section 167 (1) of the Act but failed to do so within the required statutory timelines. The Applicant is now estopped from raising an issue with the evaluation criteria in the Tender Document so late in the day after subjecting itself to the said evaluation criteria and after the lapse of the statutory period of 14 days specified in section 167 (1) of the Act noting further that the Applicant was only motivated to challenge the evaluation criteria because its bid was found non-responsive.

Accordingly, the Board finds that it lacks jurisdiction to address the question whether the Procuring Entity failed to provide clear and quantifiable evaluation criteria contrary to section 80 (3) of the Act. The effect of this finding is that the Board shall not address the second issue for determination and now moves to the third issue framed for determination.

On the third issue, the Board observes that the Applicant avers at paragraph 2 of its Request for Review and paragraph 7 of its Supporting Affidavit that the Procuring Entity breached section 83 (1) of the Act by stating that due diligence will be carried out at the Technical Evaluation Stage. Having considered the foregoing, the Board would like to simply reiterate that the Applicant had full knowledge of the criteria to be applied during evaluation at the Technical Evaluation Stage, the same having been outlined in Clause 2.24 (2) of the Appendix to Instructions to Tenderers of the Tender Document which reads as follows: -

2. Technical Evaluation Criteria				
No	Requirements	Evidence	Max. Score	Score Awarded
1	Experience	Recommendation letters of good performance from three previous customers for the last two years.(5 marks for each customer stated)	15	
2	Professional and Technical Qualification	Workman Injury Benefit Insurance	15	
3	Site Visit	Site visit certificate duly signed by KNH respective shall be attached to the bid documents	20	
	Sub Total		50	
Only bidders who score 100% will be proceed to Due diligence stage				
1	Registered office	Physical Location and Organization structure	10	
2	Working tools	At least 2 No. Lawn Mower At least 2 No. Brush Cutter Knapsack Sprayer General Garden Tools	10 10 5 5	
3	Adherence to labour laws	Evidence to adherence to minimum wage(payload) Occupational safety(PPE)	5 5	
		Sub Total	50	
	Total Score		100	

Only bidders who score 80% and above will be proceed to financial evaluation stage. Those who score below 80% will be eliminated at this stage from the entire evaluation process and will not be considered further.

The Applicant participated in the subject procurement process by submitting its bid by the tender submission deadline of 8th July 2020 and never challenged the criteria outlined in Clause 2.24 (2) of the Appendix to Instructions to Tenderers of the Tender Document within the timelines specified section 167 (1) of the Act. The Applicant ought to have approached this Board within fourteen (14) days after 8th July 2020 and this period lapsed on 22nd July 2020. The Applicant only challenged the Technical Evaluation Criteria which included a component on due diligence through the instant Request for Review that was filed on 31st August 2020. This period is clearly outside the statutory period under section 167 (1) of the Act, noting that the Applicant already learnt of an alleged breach of duty by the tender submission deadline of 8th July 2020 since it obtained the Tender Document but only raised a complaint with the criteria to be applied at the Technical Evaluation Stage after its bid was found non-responsive.

The Board would like to make an observation that the fourteen-day statutory period under section 167 (1) of the Act ensures that candidates and tenderers exercise their right to administrative review in good time, so that by the time the Board has completed a review, a procurement process can continue without undue delay. That's why a candidate or a tenderer ought to approach this Board during the early stages of a procurement process

when such candidate or tenderer learns of an alleged breach of duty by a Procuring Entity. It was therefore not the intention of the legislature for tenderers to wait until they receive letters of notification of the outcome of their bids in order to challenge an alleged breach of duty discovered before such notification is given, especially in a case where a tenderer already learnt of an alleged breach before evaluation has been completed and before notification of the outcome of evaluation has been done by a procuring entity.

This Board has noted the rising number of tenderers who abuse the options under section 167 (1) of the Act, whereby they learn of an alleged breach of duty during the early stages of a procurement process but such tenderers wait for the outcome of their bids, and if such outcome is not favourable, they feel motivated to file a request for review against a procuring entity, raising complaints that could have been raised during the early stages of a procurement process, i.e. before participating in the procurement process by submitting a bid as was the case applicable to the Applicant herein. It is a well-established principle that **"Equity aids the vigilant and not the indolent"**. The Court of England in the case of **Lindsay Petroleum Co. v. Hurd (1874) ALL ER** while considering the maxim that states ***"Equity aids the vigilant and not the indolent"*** held as follows: -

"Our courts of equity applied the maxim that states "equity aids the vigilant and not the indolent" to address instances of unreasonable delay by litigants to bring their cause of action before a court and the effect of the delay on the case, whereby

a litigant may no longer have a cause of action because of a statutory limitation of time”

Having considered the finding in the foregoing case, the Board observes that the Applicant’s delay in challenging the criteria of due diligence to be conducted at the Technical Evaluation Stage amounts to an unreasonable delay given that it subjected itself to the said criteria and more importantly, the Applicant knew of the statutory limitation of 14 days under section 167 (1) of the Act, within which to challenge an alleged breach of duty by a procuring entity at any stage of the procurement process. Equity has never come to the aid of the indolent such as the Applicant herein, who sat on its right to administrative review. The Applicant waited patiently for the outcome of its bid and is similar to a player in a playing field who participates in a game and only complains about the game after it has lost to an opponent.

Having established that the Applicant was a candidate in the subject procurement process, did not seek any clarification regarding the criteria to be applied at the Technical Evaluation Stage, but participated in the subject procurement process with full knowledge that a component of due diligence would be applied at the Technical Evaluation Stage and failed to approach this Board within the required statutory timeline, the Board is of the considered view that the Applicant is estopped from raising an issue with the Technical Evaluation Stage so late in the day, only because its bid was found non-responsive.

Accordingly, the Board finds that it lacks jurisdiction to address the Applicant's allegation that Clause 2.24 (2) of the Appendix to Instructions to Tenderers of the Tender Document contravenes section 83 of the Act. The effect of this finding is that the Board shall not address the fourth issue framed for determination and shall now move to the fifth issue for determination.

On the fifth issue, the Board notes that at paragraph 3 of its Request for Review and paragraph 8 of its Supporting Affidavit, the Applicant contends that in the event the Procuring Entity carried out a due diligence exercise on the Interested Party, the findings of the said due diligence exercise would not have been favourable to the Interested Party. In the Applicant's view, there is public information on the Nairobi City County online licensing platform indicating that the Interested Party paid its Nairobi City County Licence way after the tender opening date (i.e. a date that is similar to the tender submission deadline of 8th July 2020). In response, the Procuring Entity avers at paragraph 13 of its Memorandum of Response that section 83 of the Act gives it discretion to verify and confirm the qualifications of the bidder determined to be the lowest evaluated tenderer prior to making a decision to award the subject tender. At paragraph 18 of its Written Submissions, the Interested Party states that section 83 of the Act envisages a situation where a procuring entity may, through its evaluation committee, conduct a due diligence exercise on the successful tenderer. In the Interested Party's view, a procuring entity may choose to investigate the qualifications of a successful tenderer to determine whether the successful

tenderer has the requisite capacity to execute a tender but that such procuring entity has no obligation conduct such an exercise.

Having considered parties' pleadings and written submissions, the Board would like to point out that Clause 2.24 (2) of the Appendix to Instructions to Tenderers of the Tender Document specified that tenderers who scored 100% would be proceed to due diligence exercise at the Technical Evaluation Stage. This criterion was challenged by the Applicant and the Board has already determined that it lacks jurisdiction to entertain the question whether the said provision contravenes section 83 of the Act. With that in mind, the Board would like to note that the Tender Document also provided for a post-qualification exercise (which is a due diligence exercise conducted on the lowest evaluated responsive tenderer) outlined in Clause 2.24 of Section II. Instructions to Tenderers of the Tender Document as follows: -

"2.24.1 In the absence of pre-qualification, the Procuring entity will determine to its satisfaction whether the tenderer that is selected as having submitted the lowest evaluated responsive tender is qualified to perform the contract satisfactorily.

2.24.2 The determination will take into account the tenderer's financial and technical capabilities. It will be based upon an examination of the documentary evidence of the tenderers qualifications submitted by the tenderer, pursuant

to paragraph 2.1.2, as well as such other information as the Procuring entity deems necessary and appropriate.

2.24.3 An affirmative determination will be a prerequisite for award of the contract to the tenderer. A negative determination will result in rejection of the Tenderer's tender, in which event the Procuring entity will proceed to the next lowest evaluated tender to make a similar determination of that Tenderer's capabilities to perform satisfactorily."

The Applicant did not challenge the criterion on post-qualification as provided in Clause 2.24 of Section II. Instructions to Tenderers of the Tender Document, but contends that the due diligence exercise conducted on the Interested Party (if at all the same was undertaken) failed to meet the threshold of section 83 of the Act. The Procuring Entity and the Interested Party advanced arguments that due diligence conducted pursuant to section 83 of the Act is at the Procuring Entity's discretion, since it may choose whether or not to undertake the same on the lowest evaluated tenderer. Having considered parties' arguments and the Board having established that the Applicant is not challenging the criterion under Clause 2.24 of Section II. Instructions to Tenderers of the Tender Document, the Board finds it necessary to address the import of section 83 of the Act vis-à-vis Clause 2.24 of Section II. Instructions to Tenderers of the Tender Document and to

interrogate the manner in which the Procuring Entity conducted a due diligence exercise on the Interested Party if the same was undertaken.

In doing so, the Board observes that Clause 2.24.1 of Section II. Instructions to Tenderers of the Tender Document expressly states that in the absence of pre-qualification, the Procuring entity will determine to its satisfaction whether the tenderer that is selected as having submitted the lowest evaluated responsive tender is qualified to perform the contract satisfactorily. This prompted the Board to study the Procuring Entity's confidential file submitted pursuant to section 67 (3) (e) of the Act and we note that there is no evidence of a pre-qualification exercise undertaken in the subject tender. This therefore means that the Procuring Entity was required by Clause 2.24 of Section II. Instructions to Tenderers of the Tender Document to determine whether the lowest evaluated responsive tender is qualified to perform the subject tender satisfactorily. In essence, since the Procuring Entity did not carry out a pre-qualification exercise in the subject tender, it was mandatory, as opposed to discretionary, for the Procuring Entity to conduct a post-qualification exercise, the same having been provided in the Tender Document.

It is worth noting that the Applicant contended that in the event the Procuring Entity carried out a due diligence exercise on the Interested Party, the findings of the said due diligence exercise would not have been favourable to the Interested Party since there was public information on

Nairobi City County online licensing platform indicating that the Interested Party paid its Nairobi City County Licence way after the tender opening date. To address this allegation, the Board observes that Criteria MR 10 of Clause 2.24 (1) of the Appendix to Instructions to Tenderers of the Tender Document provides as follows: -

"Registration by County Government – Gardening Services/Landscaping"

Tenderers were required to provide evidence of registration by County Government in the area of Gardening Services/Landscaping. In response to the said criterion, the Interested Party provided a Single Business Permit at page 21 of its original bid, valid between **1st January 2020 to 31st December 2020** issued by Nairobi City County to engage in the business of Cleaning, Gardening and Garbage Collection. This demonstrates that the Single Business Permit issued to the Interested Party was valid as at the tender submission deadline of 8th July 2020. That notwithstanding, the Procuring Entity was required to undertake a due diligence exercise pursuant to Clause 2.24.1 of Section II. Instructions to Tenderers of the Tender Document with a view of determining whether the Interested Party is qualified to perform the contract satisfactorily, since no prequalification was undertaken in the subject tender. It is the Board's considered view that such a due diligence exercise would include verification of the Single Business Permit issued to the Interested Party.

It is worth noting that, post-qualification is conducted only on the lowest evaluated responsive tender pursuant to section 83 of the Act, which provides as follows: -

- "(1) 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.***
- (2) The conduct of due diligence under subsection (1) may include obtaining confidential references from persons with whom the tenderer has had prior engagement.***
- (3) To acknowledge that the report is a true reflection of the proceedings held, each member who was part of the due diligence by the evaluation committee shall—***
- (a) initial each page of the report; and***
- (b) append his or her signature as well as their full name and designation."***

The Court in **Miscellaneous Civil Application No. 551 of 2017, Consortium of H. Young & Co (E.A) Limited & Yantai Jereh Petroleum Equipment and Technologies Company Limited v Public Procurement Administrative Review Board & 2 others [2017] eKLR** while considering the import of section 83 of the Act held as follows: -

"Since the evaluation committee's parameters of conducting due diligence are circumscribed by the Act, the committee must, in the exercise of that power, confine itself within the four corners of the said provision. If it acts outside the same, it would be construed to have acted outside its powers or in excess hereof. Firstly, the conduct of due diligence pursuant to the said provisions can only be undertaken after tender evaluation, but before the award of the tender. Secondly the purpose of the due diligence is restricted to the confirmation and verification of the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with the Act. In other words, the Committee cannot purport to conduct due diligence in respect of any other tenderer save for the lowest evaluated responsive tender to be awarded the contract in accordance with the Act."

Having considered the finding of the High Court in the aforementioned case together with the import of section 83 of the Act, the Board observes that section 83 (1) of the Act provides that the purpose of due diligence is to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender. In conducting a due diligence exercise, the following procedure must be adhered to: -

Due diligence should be conducted by the Evaluation Committee after tender evaluation but prior to award of the tender to confirm and verify the qualifications of the bidder determined by the Procuring Entity to have submitted the lowest evaluated responsive tender. Further, an Evaluation Committee is the one that conducts a due diligence exercise. Section 46 (4) (b) of the Act provides that: -

"Section 46 (1) An Accounting officer shall ensure that an ad hoc evaluation committee is established in accordance with this Act and Regulations made thereunder and from within the members of staff, with the relevant expertise

(2);

(3);

(4) An Evaluation Committee established under subsection (1) shall: -

(a);

(b) consist of between three and five members appointed on a rotational basis comprising heads of user department and two other departments or their representatives and where necessary, procured consultants or professionals, who shall advise on the evaluation of the tender documents and give a

recommendation on the same to the committee within a reasonable time”

From the above provision, the minimum number required to constitute an Evaluation Committee is 3. On the other hand, section 83 (3) of the Act directs that it is only the Evaluation Committee members who took part in the due diligence that sign and initial the due diligence report. Even though it is not mandatory that all Evaluation Committee members participate in a due diligence exercise, the minimum number of three stipulated under section 46 (4) (b) of the Act must be maintained noting that it is an Evaluation Committee that conducts a due diligence exercise.

Prior to commencing the due diligence exercise, the Evaluation Committee must first conclude evaluation of tenders at the Preliminary, Technical and Financial Evaluation Stages and recommend the lowest evaluated responsive tenderer for award of the tender. At this stage, due diligence has not been conducted yet, hence the date appearing at the end of the Evaluation Report should be a true reflection of when evaluation at the Preliminary, Technical and Financial stages were concluded. After concluding the exercise, a due diligence report must be prepared outlining how due diligence was conducted together with the findings of the process. The said report is signed only by members of the Evaluation Committee who took part in the due diligence exercise, and they must include their designation. Further, the report must be initialed on each page.

If the qualifications of the lowest evaluated tenderer are satisfactory, the report is submitted to the Head of Procurement function for his professional opinion and onward transmission to the Accounting Officer who will consider whether or not to award the tender to that lowest evaluated tenderer.

Assuming the lowest evaluated tenderer is disqualified after the first due diligence exercise, this fact must be noted in the Due Diligence Report with reasons. In view of the findings of this report that the lowest evaluated tenderer be disqualified after due diligence, the Evaluation Committee then recommends award to the next lowest evaluated tenderer. Thereafter, a similar due diligence process is conducted on such tenderer. This procedure is applied until the successful tenderer for award of the tender is determined.

The Board studied the Procuring Entity's confidential file and notes that there is no evidence of a due diligence exercise carried out on the Interested Party pursuant to Clause 2.24 of Section II. Instructions to Tenderers of the Tender Document and section 83 of the Act whereby the Single Business Permit found in the Interested Party's original bid could have been verified by contacting Nairobi City County. The Procuring Entity did not furnish the Board with a due diligence report for the Board to verify whether or not the requirements of section 83 of the Act, as outlined hereinbefore were complied with. The circumstances of this case did not give the Procuring Entity leeway to choose whether or not to conduct a due diligence exercise since the same was adopted in the Tender Document, pursuant to Clause

2.24 of Section II. Instructions to Tenderers and was applicable in this instance where no pre-qualification took place. Such an exercise ought to have conformed to the procedure provided in section 83 of the Act, evidenced by a Due Diligence Report for the Board to verify how such exercise was undertaken.

Having established that the Procuring Entity did not provide evidence that it conducted a due diligence exercise on the Interested Party, the Board finds that the Procuring Entity failed to comply with Clause 2.24 of Section II. Instructions to Tenderers of the Tender Document and section 83 of the Act before awarding the subject tender to the Interested Party.

In totality, the Request for Review succeeds only with respect to the finding by the Board that the Procuring Entity failed to comply with Clause 2.24 of Section II. Instructions to Tenderers of the Tender Document and section 83 of the Act and the Board proceeds to make 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 in the Request for Review: -

- 1. The Procuring Entity's Letter of Notification of Award of Tender No. KNH/T/35/2020-2021 for Provision of Gardening**

Services addressed to the Interested Party herein, be and is hereby cancelled and set aside.

- 2. The Procuring Entity is hereby directed to conduct a due diligence exercise on the Interested Party's tender in accordance with Clause 2.24 of Section II. Instructions to Tenderers of the Tender Document and section 83 of the Act.**
- 3. Further to Order No. 2 above, the Procuring Entity is hereby directed to proceed with the procurement process in Tender No. KNH/T/35/2020-2021 for Provision of Gardening Services, including the making of an award within seven (7) days from the date of this decision, taking into consideration the Board's findings in this Review.**
- 4. Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.**

Dated at Nairobi this 21st day of September 2020

CHAIRPERSON

SECRETARY

PPARB

PPARB