

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 15/2020 OF 29<sup>TH</sup> JANUARY 2020**

**BETWEEN**

**ALL AND SUNDRY SERVICES.....APPLICANT**

**AND**

**COMMISSIONER GENERAL,**

**KENYA REVENUE AUTHORITY.....RESPONDENT**

**AND**

**PETALS HYGIENE AND SANITATION SERVICES**

**LIMITED.....1<sup>ST</sup> INTERESTED PARTY**

**AND**

**PEESAM LIMITED.....2<sup>ND</sup> INTERESTED PARTY**

Review against the decision of Kenya Revenue Authority with respect to Tender No. KRA/HQS/NCB-010/2019-2020 for Provision of Cleaning and Garbage Collection for KRA offices and Residual Houses Countrywide.

**BOARD MEMBERS**

- |                            |              |
|----------------------------|--------------|
| 1. Ms. Faith Waigwa        | -Chairperson |
| 2. Arch. Steven Oundo, OGW | -Member      |
| 3. Dr. Joseph Gitari       | -Member      |

**IN ATTENDANCE**

- |                     |                                  |
|---------------------|----------------------------------|
| 1. Mr. Philip Okumu | -Holding brief for the Secretary |
|---------------------|----------------------------------|

2. Ms. Maryanne Karanja

- Secretariat

**PRESENT BY INVITATION**

**APPLICANT**

1. Mr. Mwaniki Gachuba

**-ALL AND SUNDRY SERVICES**

-Advocate, Mwaniki Gachuba  
Advocates

**PROCURING ENTITY**

1. Mr. Reuben Rotich Kiprono

**-KENYA REVENUE AUTHORITY**

-A.M

2. Mr. Benson Kiruja

-Manager

3. Ms. Carol Mburugu

-Manager

4. Ms. Angela Ndolo

-Pupil

5. Ms. Florence Korir

-Pupil

6. Mrs. Grace Murichu-Kariuki

-Deputy Commissioner

7. Mr. Moses Muia

-Deputy Commissioner

**INTERESTED PARTIES**

**A. PEESAM LIMITED**

1. Mr. Sang Dennis

-Advocate, Cheboi Kiprono  
Advocates

2. Mr. Duncan Kiprono

-Advocate, Cheboi Kiprono  
Advocates

3. Mr. Samuel Mburu

-Director

## **B. PETALS HYGIENE AND SANITATION SERVICES LIMITED**

1. Ms. Winnie Maina -Director

## **C. SMARTLINE LTD**

1. Mr. Allan Njenga -Business Development

## **D. ONEWAY CLEANING SERVICES LTD**

1. Ms. Cynthia Mary -Business Development

2. Ms. Doreen Kuria -Director

## **E. SPACE CONTRACTORS**

1. Ms. Getrude Alunga -Employee

## **F. NITROCTEN CLEANING**

1. Mr. Ephantus Wachira -MD, Operations

## **G. ALMAT COMPANY LTD**

1. Mr. Matheri Kahiri -Operations

## **H. LIGA HOLDINGS LTD**

1. Ms. Betty Mutwiri -Director

## **BACKGROUND TO THE DECISION**

Kenya Revenue Authority (hereinafter referred to as “the Procuring Entity”) advertised Tender No. KRA/HQS/NCB-010/2019-2020 for Provision of Cleaning and Garbage Collection for KRA offices and Residual Houses Countrywide (hereinafter referred to as “the subject tender”) on MyGov Publication Website on 17<sup>th</sup> September 2019 inviting eligible bidders to submit bids for the same.

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

The Procuring Entity received twenty-four (24) bids by the tender submission deadline of 15<sup>th</sup> October 2019. The same were opened thereafter by a Tender Opening Committee.

### **Evaluation of Bids**

Having appointed an Evaluation Committee, the 24 No. bids were evaluated in four stages namely; Tender Responsiveness, Vendor Evaluation, Clause by Clause Technical Evaluation and Financial Evaluation.

#### **1. Tender Responsiveness**

At this stage, the Evaluation Committee evaluated bidders against the mandatory requirements summarized in Table 3 at page 3 of the Evaluation Report. At the end of evaluation at this stage, eight (8) bidders met all the mandatory requirements in the Tender Document, therefore proceeded to the next stage of evaluation.

## **2. Vendor Evaluation**

At this stage, the Evaluation Committee applied the criterion provided for in Section 5.3 of the Tender Document which entailed a scrutiny of the documents submitted for vendor responsiveness to determine the capability/suitability of the bidders. At the end of evaluation at this stage, the eight bidders met the overall cut-off score of 15 marks out of 20 marks, therefore proceeded to the next stage of evaluation.

## **3. Technical Clause-by-Clause Specific Evaluation**

At this stage, the Evaluation Committee carried out a Technical Clause-by-Clause evaluation of the 8 bids as summarised in Table 5 of the Evaluation Report at page 9 thereof. Bidders were required to fill in a form confirming that they read, understood and will comply with all the technical specifications of the tender, thereafter signing of a declaration response form. At the end of evaluation at this stage, all the 8 bidders met the clause by clause technical requirements therefore proceeded to the next stage of evaluation.

## **4. Financial Evaluation**

At this stage, the Evaluation Committee determined the lowest evaluated bidders in the respective lots; Lot 1, 2, 3, 4, 5, 6, 7 & 8 and recommended them for award of the subject tender as follows:-

- Lot 1A, B & C -Bidder 13, M/s Peesam Limited

- Lot 2 -Bidder 14, M/s Peesam Limited
- Lot 3 -Bidder 14, M/s Peesam Limited
- Lot 4 -Bidder 20, M/s Nadiah Investments Limited
- Lot 5 -Bidder 14, M/s Peesam Limited
- Lot 6 -Bidder 13, M/s All and Sundry Services Limited
- Lot 7 -Bidder 14, M/s Peesam Limited
- Lot 8 -Bidder 4, M/s Petals Hygiene and Sanitation Services Ltd

### Professional Opinion

In the Professional Opinion signed on 17<sup>th</sup> January 2020, the Head of Procurement Function reviewed the Evaluation Report and noted that the Tender Document provided for award of the tender based on addendum issued on 4<sup>th</sup> October 2019 that "Award shall be per lot. Bidders can bid for all the lots but a bidder shall only be awarded a maximum of two (2) lots with less scope of works that is, lot 3, 4, and 6. A bidder who wins either Lot 1, 2, 7 & 8 shall not be entitled to another lot due to the huge scope of work. In consideration of the said requirement of the Addendum issued on 4<sup>th</sup> October 2019, he noted that a possible combination of awards could be achieved as follows:-

	Option 1		Option 2	
	Firm	Cost	Firm	Cost
Lot 1	PEESAM	56,214,463.36	PEESAM	56,214,463.36
Lot 2	DECHRIP	49,588,142.64	ALL & SUNDRY	46,071,122.37
Lot 3	ONE WAY CLEANING	11,236,273.25	ONE WAY CLEANING	11,236,273.25
Lot 4	NADIAH	5,081,670.00	NADIAH	5,081,670.00
Lot 5	NADIAH	7,146,040.00	NADIAH	7,146,040.00
Lot 6	LIGA HOLDINGS	29,194,222.50	LIGA HOLDINGS	29,194,222.50

Lot 7	ALL & SUNDRY	40,808,002.96	PETALS HYGIENE	49,506,189.00
Lot 8	PETALS HYGIENE	35,478,746.16	DECHRIP	38,742,722.84
	<b>TOTAL</b>	<b>234,747,560.87</b>		<b>243,192,703.32</b>

	<b>Option 3</b>		<b>Option 4</b>	
	Firm	Cost	Firm	Cost
Lot 1	ALL & SUNDRY	57,823,434.32	PEESAM	56,214,463.36
Lot 2	PEESAM	43,339,048.58	ALL & SUNDRY	46,071,122.37
Lot 3	PETALS HYGIENE	7,671,303.13	LIGA HOLDINGS	14,766,800.00
Lot 4	NADIAH	5,081,670.00	NADIAH	5,081,670.00
Lot 5	NADIAH	7,146,040.00	NADIAH	7,146,040.00
Lot 6	PETALS HYGIENE	19,886,427.00	LIGA HOLDINGS	29,194,222.50
Lot 7	ONE WAY CLEANING	83,799,536.35	ONE WAY CLEANING	83,799,536.35
Lot 8	DECHRIP	38,742,722.84	PETALS HYGIENE	35,478,746.16
	<b>TOTAL</b>	<b>263,490,182.22</b>	<b>TOTAL</b>	<b>277,752,600.74</b>

	<b>Option 5</b>	
	Firm	Cost in Kshs
Lot 1	Peesam Limited	56,214,463.36
Lot 2	Peesam Limited	43,339,048.58
Lot 3	Peesam Limited	5,690,438.49
Lot 4	Nadiah Investments Limited	5,081,670.00
Lot 5	Peesam Limited	6,522,363.32
Lot 6	Peesam Limited	14,189,465.33
Lot 7	Peesam Limited	33,801,880.23
Lot 8	Petals Hygiene and Sanitation Services Limited	35,478,746.16
	<b>TOTAL</b>	<b>200,318,075.47</b>

He therefore concluded that the above options represent the possible combination of awards based on the requirements for award stipulated in the Addendum of 4<sup>th</sup> October 2019 and advised the Accounting Officer to award the subject tender in the respective lots based on Option 5 outlined

hereinabove. The said Professional Opinion was approved by the Procuring Entity's Commissioner General on the same date of 17<sup>th</sup> January 2020.

### **Notification to Bidders**

In letters dated 17<sup>th</sup> January 2020, successful bidders in the respective lots and unsuccessful bidders were notified of the outcome of their bids

### **THE REQUEST FOR REVIEW**

M/s All and Sundry Services (hereinafter referred to as "the Applicant") lodged a Request for Review dated 24<sup>th</sup> January 2020 and filed on 29<sup>th</sup> January 2020 together with a Supporting Affidavit sworn on and filed on even date (hereinafter referred to as "the Applicant's Supporting Affidavit") and a Reply to the Respondent's Response dated 7<sup>th</sup> February 2020 and filed on 12<sup>th</sup> February 2020 (hereinafter referred to as "the Applicant's Further Response"). In response, the Respondent/Procuring Entity lodged a Memorandum of Response dated 4<sup>th</sup> February 2020 and filed on 5<sup>th</sup> February 2020 (hereinafter referred to as "the Procuring Entity's Response") together with a List and Bundle of Authorities. On its part, the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties filed a Response to the Request for Review dated and filed on 10<sup>th</sup> February 2020 (hereinafter referred to as "the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties' Response").

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



- a) An order annulling the tender proceedings, evaluation, award of Tender No. KRA/HQS/NCB-010/2019-2020 for Provision of Cleaning and Garbage Collection for KRA offices and Residual Houses Countrywide and the notifications;***
- b) An order directing the accounting officer to re-tender for the Provision of Cleaning and Garbage Collection for KRA Offices and Residual Houses Countrywide; and***
- c) An order awarding costs of the application.***

During the hearing, the Applicant was represented by Mr. Mwaniki Gachuba on behalf of the firm of Mwaniki Gachuba Advocates, the Procuring Entity was represented by Ms. Carol Mburugu, while the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties were represented by Mr. Dennis Sang appearing together with Mr. Duncan Kiprono on behalf of the firm of Cheboi Kiprono Advocates.

## **PARTIES' SUBMISSIONS**

### **Applicant's Submissions**

In his submissions, Counsel for the Applicant, Mr. Mwaniki Gachuba, fully relied on the Request for Review, the Applicant's Supporting Affidavit and Further Response.

Mr. Gachuba submitted that the Request for Review raises two grounds based on section 80 (2) and 86 (1) (a) of the Public Procurement and Asset

Disposal Act, 2015 (hereinafter referred to as "the Act"). He began his submissions by stating that the evaluation and award of the subject tender as conducted by the Procuring Entity was not in accordance with the clarification dated 4<sup>th</sup> October 2019 wherein at paragraph 5, the Procuring Entity had specified how award of the subject tender would be undertaken.

He then referred the Board to Annexure 2 of the Request for Review which is a letter of notification of award dated 17<sup>th</sup> January 2020 wherein M/s Peesam Limited, the 2<sup>nd</sup> Interested Party herein was awarded Lot 1, 2 and 7 among others contrary to paragraph 5 of the letter dated 4<sup>th</sup> October 2019. Counsel further submitted that at page 2 and 3 of the Procuring Entity's Response, it is asserted that some options were considered in awarding the subject tender i.e. Options 1, 2, 3, 4 and 5 and that the award was based on Option 5, which were not previously provided for in the letter dated 4<sup>th</sup> October 2019 or in the Tender Document itself. According to Counsel, the letter dated 4<sup>th</sup> October 2019 operationalized the principle of equity as provided for in Article 227 (1) of the Constitution save that the Procuring Entity seemed to subject the principle of equity to the other principle of cost-effectiveness provided for in the said provision. He therefore took the view that the Procuring Entity's award decision was contrary to Article 47 and 227 (1) of the Constitution.

On the second issue raised in the Request for Review, Counsel took the view that the evaluation process was conducted outside the maximum period of

30 days. However, Counsel submitted that upon perusing the Procuring Entity's Response, it appears that evaluation was conducted within the statutory period of 30 days and only urged the Board to confirm whether this was the true position.

While making reference to paragraphs 7 and 8 of the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties' Response, Counsel submitted that the Request for Review addresses the issue of evaluation and award criteria in ground 1 and that the Applicant was a stranger to the issue raised in paragraph 8 of the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties' Response and further stated that the Applicant did not raise any issue regarding section 87 (1) of the Act and would therefore not address the same as pointed out in the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties' Response.

### **Smartline Limited's Submissions**

Mr. Allan Njenga for Smartline Limited submitted that the 1<sup>st</sup> Interested Party, Petals, Hygiene and Sanitation Services Limited did not submit a bid price for Lot 8, yet was awarded the tender.

### **Procuring Entity's Submissions**

In her submissions, Counsel for the Procuring Entity, Ms. Carol Mburugu, fully relied on the Procuring Entity's Response, the List and Bundle of Authorities and further made reference to the confidential documents submitted by the Procuring Entity pursuant to section 67 (3) (e) of the Act.

Ms. Mburugu submitted that Article 227 (1) of the Constitution requires public entities to undertake its procurement process in a cost-effective manner. She further made reference to the guiding principles in section 3 of the Act read together with Article 201 (d) of the Constitution wherein public entities are required to maximize value for money and use public money in a prudent and responsible way. In that regard, Ms. Mburugu submitted that once the evaluation and award criteria in the letter dated 4<sup>th</sup> October 2019 was applied, 5 options came up, that is, Options 1, 2, 3, 4 and 5 and that the Procuring Entity settled on Option 5 based on the lowest evaluated bid in each lot and that this criterion was applied to the bidders who were technically and financially responsive.

Ms. Mburugu further made reference to sections 84 and 85 of the Act to support her view that award of a tender goes through a 3 tier process, wherein the Head of Procurement first reviews the Evaluation Report, then gives his Professional Opinion, which must be approved by the Accounting Officer in making a decision to award a tender. In her view, these persons were satisfied with the Option 5 adopted by the Evaluation Committee in recommending award of the subject tender. To support this view, she referred the Board to **Judicial Review No. 46 of 2017, Republic v. Public Procurement Administrative Review Board & Another ex parte Kenya Ports Authority** at paragraph 26 thereof, where the High Court held that to award a tender contrary to the principles of public finance would amount to improper use of public funds.

As regards to parties to a review, Ms. Mburugu submitted that the Applicant failed to join the successful bidders as parties to the Request for Review. She however submitted that she took note of the fact that the successful bidders were present and participating in the instant review proceedings and sought guidance from the Board as to whether the same should be addressed as a point of law that would render the Request for Review incompetent.

Upon enquiry by the Board, Mrs. Grace Murichu, the Procuring Entity's Deputy Commissioner, submitted that the original Tender Document provided the award criteria of lowest evaluated bidder and that the clarification given vide addendum dated 4<sup>th</sup> October 2019 adjusted this. She further submitted that the Evaluation Committee was unable to apply the award criteria as per addendum of 4<sup>th</sup> October 2019. She explained that the Addendum introduced capping of the lots and that the rationale for this was based on Risk Management since the subject tender is reserved for Women, Youth and Persons with Disability. She confirmed that, the Evaluation Committee realized it was difficult to apply the award criteria as per the clarification given on 4<sup>th</sup> October 2019 at the time of evaluation.

On further enquiry by the Board, Ms. Mburugu submitted that the Procuring Entity complied with the law in awarding the tender to the lowest evaluated bidder. Counsel then submitted that the Applicant was disqualified at the Financial Evaluation stage, wherein a computational error was found in its

bid, hence the Procuring Entity disqualified the Applicant on that basis. Upon enquiry by the Board, Mrs. Murichu submitted that section 82 of the Act does not allow correction of errors and that a procuring entity is supposed to disqualify such a bid.

In response to an issue raised by M/s Smartline Limited, Ms. Mburugu submitted that there was an error made by the Tender Opening Committee, since the bid of the 1<sup>st</sup> Interested Party, Petals, Hygiene and Sanitation Services Limited was submitted to the Board and the same can confirm that the 1<sup>st</sup> Interested Party did submit a bid in respect of Lot 8 of the subject tender.

The Board further urged Mrs. Murichu to point out the Blank Tender Document since the subject tender was an e-procurement and documents were submitted in soft copy to the Board. She further clarified that the Addendum of 4<sup>th</sup> October 2019 moved the Times Tower Station from Lot 1 (A) to Lot 8.

### **1<sup>st</sup> and 2<sup>nd</sup> Interested Party's Submissions**

In his submissions, Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties, Mr. Dennis Sang, fully relied on the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties' Response.

Mr. Sang associated himself with submissions by the Procuring Entity and submitted that the evaluation and award criteria was applied uniformly to all bidders and that the Applicant failed to demonstrate any prejudice it suffered as a result of the criteria applied by the Procuring Entity. He further urged the Board to make public policy considerations as it makes a determination on the Request for Review application since the subject tender will provide essential services to the Procuring Entity and the public and ought not be delayed any further.

Upon enquiry by the Board as to the award criteria prior to issuance of the Addendum and after the same was issued, Mr. Sang submitted that he is unable to read it aloud to the Board and that the Procuring Entity would be in a better position to confirm the correct position.

### **Applicant's Rejoinder**

In a rejoinder, Counsel for the Applicant, Mr. Gachuba submitted that the Procuring Entity failed to respond to application of the principle of equity to the subject tender as raised by the Applicant in its oral submissions and that the Procuring Entity's Response only dealt with the principle of cost-effectiveness as provided for in Article 227 (1) of the Constitution. To this regard, Counsel took the view that the principle of equity does not take precedence over the principle of cost-effectiveness, since Article 227 (2) (a) and (b) of the Constitution all deal with the principle of equity.

Mr. Gachuba then submitted that contrary to the Procuring Entity's submission that the subject tender was reserved for special groups, the successful bidders do not represent the said groups. He therefore took the view that the Procuring Entity breached the principles of transparency and accountability on its award decision in the subject tender.

On the issue of correction of errors, Counsel submitted that while section 82 of the Act does not allow correction of errors, the same does not direct a procuring entity to disqualify a bidder based on an error in its bid. According to Mr. Gachuba, the Procuring Entity unlawfully disqualified the Applicant's bid if that was the reason why its bid was found non-responsive. In his view, a bidder is awarded a tender at the price it quoted in its bid. Upon enquiry by the Board as to how the error in the Applicant's bid would be taken against the principle of cost-effectiveness, Counsel submitted that the Applicant stated in its Form of Tender that it would be bound by the price in its Form of Tender. He took the view that, it is a bidder who suffers if awarded a tender at a price lower (that is, the price in the Form of Tender) than the one in its Bill of Quantities and not the Procuring Entity.

On the question whether the 1<sup>st</sup> Interested Party submitted a bid in respect of Lot 8, Mr. Gachuba referred the Board to paragraph 7 of the Applicant's Supporting Affidavit wherein the issue was raised and urged the Board to consider the provisions of section 78 (6) of the Act to arrive at the conclusion whether or not the Procuring Entity complied with the aforesaid provision.



Mr. Gachuba then submitted that no public policy consideration would override the Constitution and the Act with regards to the manner in which the Procuring Entity conducted the subject procurement process, and urged the Board to dismiss the arguments by the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties.

On the issue of joinder of the successful bidders as parties to the Request for Review, Mr. Gachuba submitted that the Applicant submitted 12 bound copies of its Request for Review with the understanding that the Board would serve all bidders who participated in the subject procurement process. He further urged the Board to note that the successful bidders were present at the hearing actively participating in the same, hence suffered no prejudice by the Applicant's failure to join them as a parties to the Request for Review.

In conclusion, Counsel urged the Board to grant the prayers sought in the Request for Review.

### **BOARD'S DECISION**

The Board has considered each of the parties' cases, the documentation filed 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 oral submissions of the parties.

The issues for determination are as follows: -

- I. Whether the Procuring Entity undertook evaluation of bids in the subject tender within the statutory period provided for in section 80 (6) of the Act;***
- II. Whether the Procuring Entity took into account the provision in paragraph 5 at page 4 of the Addendum dated 4th October 2019, read together with section 75 (4) and 86 (1) (a) of the Act, Regulation 19 of the Public Procurement and Disposal (Preference and Reservation) Regulations, 2011 as amended by Regulation 6 of the Public Procurement and Disposal (Preference and Reservation) (Amendment) Regulations, 2013 when awarding the subject tender;***
- III. Whether the Procuring Entity disqualified the Applicant's bid from award of Lot 6 of the subject tender in violation of section 82 and 86 (1) (a) of the Act; and***
- IV. What are the appropriate reliefs to grant in the circumstances?***

Before addressing the above issues, the Board would like to dispense with two preliminary aspects raised by the Procuring Entity and a representative of M/s Smartline Limited.

According to Counsel for the Procuring Entity, the Applicant failed to join the successful bidders as required by section 170 of the Act which states as follows:-

***"The parties to a review shall be—***

***(a) the person who requested the review;***

***(b) the accounting officer of a procuring entity;***

***(c) the tenderer notified as successful by the procuring entity; and***

***(d) such other persons as the Review Board may determine."***

The Board observes that the Procuring Entity took note that the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties, who are among the successful bidders in the subject tender, were present at the hearing and actively participating in the Request for Review proceedings. On his part, Counsel for the Applicant took the view that the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties suffered no prejudice as a result of the Applicant's failure to join them as parties to the Request for Review.

The Board having considered parties' oral submissions on this issue observes that, the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties who were present on the hearing date, did not challenge the Applicant's failure to join them as parties to the Request for Review. On the other hand, the Procuring Entity acknowledged that the two successful bidders were present and actively participating in the instant Request for Review proceedings.

The court in **Miscellaneous Application No. 36 of 2016, Republic v National Police Service Commission Ex parte Daniel Chacha [2016] eKLR** while considering the principles of natural justice held that:-

***"Therefore, the principles of natural justice concern procedural fairness and ensure a fair decision is reached by an objective decision maker. Maintaining procedural fairness protects the rights of individuals and enhances public confidence in the process. The ingredients of fairness or natural justice that must guide all administrative decisions are, firstly, that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision-maker; secondly, that no one ought to be a judge in his or her own cause and this is the requirement that the deciding authority must be unbiased when according the hearing or making the decision; and thirdly, that an administrative decision must be based upon logical proof or evidence material."*** [Emphasis by the Board]

According to High Court in the above case, one of the rules of natural justice is that every person must be given adequate opportunity to present their case where certain interests and rights may be adversely affected by the decision of this Board. This therefore means, all bidders, including the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties have the right to participate in the present

proceedings, if at all a decision with respect to the awards made to them by the Procuring Entity may adversely affect them.

From the instant scenario, the Board observes that the Secretary to the Board duly addressed a letter dated 6<sup>th</sup> February 2020 to bidders who participated in the subject tender informing them of the existence of the Request for Review and attaching a copy of the Request for Review application. The letter of 6<sup>th</sup> February 2020 stated as follows:-

***"Please refer to the above tender invited by the Kenya Revenue Authority in which you were one of the participants***

***We would like to inform you that on 29<sup>th</sup> January 2020, a Request for Review was lodged with the Public Procurement Administrative Review Board (PPARB) regarding the award of the above tender. You are required to forward to this Board any information and arguments about the tender.***

***Further note that the hearing date for the Review has been scheduled for Wednesday, 12<sup>th</sup> February 2020 at 2.30pm at the 10<sup>th</sup> Floor Boardroom, the National Bank Building, Harambee Avenue, Nairobi, Kenya***

***If you fail to appear the Applicant may proceed with the complaint and determination by order of the Board may be made in your absence. A copy of the grounds for Review is attached hereto for your reference."***

This provided all bidders an opportunity to file documents in support of, or in opposition of the Request for Review, if they wished to do so, and to address the Board by way of oral submissions on the hearing date.

When the matter came up for hearing, the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties were represented by Advocates, that is, Mr. Sang appearing together with Mr. Kiprono on behalf of the firm of Cheboi Kiprono Advocates who proceeded to make oral submissions before the Board when allowed to do so and never challenged the Applicant's failure to join them as parties to the Request for Review. The 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties actively participated throughout the Request for Review proceedings, hence suffered no prejudice by the Applicant's failure to join them as parties to the Request for Review.

The Board further makes an observation that M/s Nadiah Investments Limited who was also a successful bidder in Lot 4 of the subject tender did not make oral submissions before the Board. This prompted the Board to confirm whether or not any representative of M/s Nadiah Investments Limited signed the Attendance Register on the hearing date and found that there was none. However, on 7<sup>th</sup> February 2020, the Board Secretariat's courier services sent a copy of the Request for Review to M/s Nadiah Investments Limited and obtained a Certificate of Posting Registered from Postal Corporation of Kenya. This was followed up by an email sent by the Board Secretariat to M/s Nadiah Investments Limited's email (i.e. [nadahinvest@gmail.com](mailto:nadahinvest@gmail.com)) on 7<sup>th</sup> February 2020 attaching the hearing notice

dated 6<sup>th</sup> February 2020 together with a copy of the Request for Review application. It is therefore evident that M/s Nadiah Investments Limited chose not to attend the hearing of the Request for Review despite being served with the hearing notice and a copy of the Request for Review.

The Board observes that all successful bidders were given adequate opportunity to participate in the instant Request for Review proceedings as they were all aware of the date when the Request for Review came up for hearing and furnished with a copy of the Request for Review by the Board thereby facilitating the active participation by two of the successful bidders, that is, the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties throughout the proceedings. On its part, M/s Nadiah Investments Limited chose not to appear on the hearing date, despite having been duly served with a copy of the Request for Review application by email and instructed to file any documents in support or in opposition of the Request for Review, if they wished to do so and informed of the hearing date vide the hearing notice of 6<sup>th</sup> February 2020.

The Board finds that the Applicant's failure to join the successful bidders to the Request for Review does not render the Request for Review fatally defective noting the active participation of the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties in the instant Request for Review proceedings and the voluntary action by M/s Nadia Investments Limited of not filing documents before the Board or attending the hearing upon being served with a copy of the Request for

Review via courier services and the hearing notice dated 6<sup>th</sup> February 2020 via email.

A second preliminary issue was raised by M/s Smartline Limited, in that, the Procuring Entity awarded Lot 8 of the subject tender to the 1<sup>st</sup> Interested Party, yet the 1<sup>st</sup> Interested Party did not submit a bid in respect of the said lot.

During the hearing, the Board referred the Procuring Entity to page 2 of its Tender Opening Minutes dated 15<sup>th</sup> October 2019 which contains "Table 1. Summary of bids for the above tender". On the said table, Entry No. 4 represents the lots bid for by the 1<sup>st</sup> Interested Party. However, Entry No. 4 against Lot 8 is left blank.

In order to establish whether or not the 1<sup>st</sup> Interested Party submitted a bid in respect of Lot 8 of the subject tender, the Board studied Section VI. Description of Services at pages 36 to 48 of the Tender Document and notes that Lot 1 A previously included the following stations:-

- i. Times Towers;**
- ii. City Square-PPO;**
- iii. I-Tax Nairobi Railways Club;**
- iv. Sameer Park Offices;**
- v. Forodha House JKIA Nairobi;**
- vi. Pepe Offices-Athi River;**
- vii. Wilson Customs Offices at Wilson Airport;**



- viii.** ICD Embakasi;
- ix.** Podo Park, Westlands;
- x.** Ushuru Pension Towers (Former CBC-Upper Hill) Offices;
- xi.** Ushuru Pensions Plaza (Fortis Park) Westlands;
- xii.** Namanga OSBP; and
- xiii.** Loitoktok

However, the Addendum/Clarification dated 4<sup>th</sup> October 2019, at paragraph 5 thereof made the following changes:-

***"Times Tower which was part of LOT 1 A has been separated and treated as a standalone Lot i.e. LOT 8***

***Bidders are therefore advised to treat Times Tower station as LOT 8"***

During the hearing, Counsel for the Applicant and Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties, both confirmed that Times Towers which was previously part of Lot 1 A was moved to Lot 8 as can be seen from paragraph 5 of the Addendum/Clarification dated 4<sup>th</sup> October 2019.

The Applicant referred the Board to section 78 (6) of the Act which summarizes what a tender opening committee ought to record in a tender opening register. The said provision states as follows:-

***"78 (1) An accounting officer of a procuring entity shall appoint a tender opening committee specifically for***

***the procurement in accordance with the following requirements and such other requirements as may be prescribed—***

***(2) .....***

***(3) .....***

***(4) .....***

***(5) .....***

***(6) As each tender is opened, the following shall be read out loud and recorded in a document to be called the tender opening register***

***(a) the name of the person submitting the tender;***

***(b) the total price, where applicable including any modifications or discounts received before the deadline for submitting tenders except as may be prescribed; and***

***(c) if applicable, what has been given as tender security.”***

The above provision guides the Tender Opening Committee of the details that it ought to read out loud and record in a tender opening register as each tender is opened. In the instant case, the Procuring Entity’s Tender Opening Register indicates that the 1<sup>st</sup> Interested Party did not submit a bid price in

respect of Lot 8 of the subject tender. However, upon enquiry by the Board, the Procuring Entity explained that the entry was erroneously left blank and confirmed that the 1<sup>st</sup> Interested Party submitted a bid in respect of Lot 8 of the subject tender.

This prompted the Board to study the original bid of the 1<sup>st</sup> Interested Party since the said bid forms part of the confidential documents furnished to the Board by dint of section 67 (3) (e) of the Act. The Board notes that at page 444 to 448 thereof, the 1<sup>st</sup> Interested Party provided a Grand Summary of the amounts quoted in all the lots it bid for, that is; Lot 1 (A), (B), (C), 2, 3, 4, 5, 6 and 7 of the subject tender. At page 444, the 1<sup>st</sup> Interested Party specified the amount of Kshs. 35,478,746.16 for Times Towers Station under Lot 1 (A). This therefore means, the 1<sup>st</sup> Interested Party did not treat Times Towers Station as Lot 8 as directed by the Addendum of 4<sup>th</sup> October 2019, but still treated the said Station as forming part of Lot 1 (A). It is however clear that the 1<sup>st</sup> Interested Party submitted a bid in respect of Times Tower Station which it ought to have indicated as being under Lot 8 and not Lot 1 (A).

This explains why the Tender Opening Committee left Lot 8 blank when recording the details provided for in the 1<sup>st</sup> Interested Party's Grand Summary, since a cursory look at the 1<sup>st</sup> Interested Party's Price Schedule would lead one to assume no bid price was specified against Lot 8. However, given that the Addendum of 4<sup>th</sup> October 2019 moved Times Towers Station

to Lot 8, it is evident that the bid price submitted by the 1<sup>st</sup> Interested Party for Times Tower Station belongs to Lot 8 and not Lot 1 (A).

From the Evaluation Report dated 13<sup>th</sup> November 2019, the Evaluation Committee, when evaluating the Financial Proposals received in respect of the subject tender, recorded a Summary of the Financial Proposals submitted by bidders in respect of Times Towers Station. Notably, the Evaluation Committee correctly noted that Times Towers Station belongs to Lot 8 as can be seen at pages 147 to 158 of the Evaluation Report. The bid price of Kshs. 35,478,746.16 submitted by the 1<sup>st</sup> Interested Party with respect to Times Towers Station was captured under Lot 8 of the Summary of the Financial Proposals and not Lot 1 A.

In his professional opinion, the Procuring Entity's Head of Procurement function advised the Accounting Officer, among other things, to award Lot 8 of the subject tender based on the price quoted by the 1<sup>st</sup> Interested Party as reproduced hereinbefore. This amount is also reproduced in the letter of notification of award dated 17<sup>th</sup> January 2020 addressed to the 1<sup>st</sup> Interested Party.

From the foregoing, the Board finds that the Procuring Entity awarded Lot 8 of the subject tender to the 1<sup>st</sup> Interested Party who submitted a bid in respect of the said Lot save for the 1<sup>st</sup> Interested Party's failure to capture

the amount quoted for Times Tower Station under Lot 8 as opposed to Lot 1 (A) of the subject tender.

Having dispensed with the above preliminary aspects, the Board shall now turn to address the main issues framed for determination.

On the first issue, the Board observes that at paragraph 8 of its Supporting Affidavit, the Applicant avers as follows:-

***"THAT I further deduced that the evaluation was conducted beyond thirty (30) days from the date of the opening"***

In response to this averment, the Procuring Entity, at paragraph 21 of its Response avers as follows:-

***"In response to paragraph 8 of the Supporting Affidavit of Wangari Maina, we state that the evaluation was concluded within 30 days and the evaluation report signed on 13<sup>th</sup> November 2019, two (2) days before expiry of the 30-day period. We refer to the evaluation report submitted as part of the confidential documents to the Review Board in Form 5"***

The Board observes that the Applicant in its oral submissions noted the Procuring Entity's assertion that it concluded evaluation within 28 days.

However, Counsel for the Applicant urged the Board to confirm whether evaluation was indeed concluded within the statutory period of 30 days.

Section 80 (6) of the Act which provides for the period of evaluation of open tenders where the Request for Proposal method of tendering is not used states as follows:-

***"The evaluation shall be carried out within a maximum period of thirty days."***

In order to establish whether the Procuring Entity complied with this provision, the Board studied the confidential documents filed before it and notes that tenders were opened on 15<sup>th</sup> October 2019 as recorded in the Tender Opening Minutes. From the Evaluation Report, all Evaluation Committee members signed the said report on 13<sup>th</sup> November 2019 upon concluding evaluation and comparison of tenders. Section 80 (4) and (7) of the Act provides that:-

***"80 (1) .....***

***(2) .....***

***(3) .....***

***(4) The evaluation committee shall prepare an evaluation report containing a summary of the evaluation and comparison of tenders and shall submit the report to the person responsible for***

**procurement for his or her review and recommendation.**

**(5) .....**

**(6) .....**

**(7) The evaluation report shall be signed by each member of evaluation committee.” [Emphasis by the Board]**

From the above provision, the moment the Evaluation Committee submitted a signed Evaluation Report containing a summary of evaluation and comparison of tenders, this marked the end of evaluation. This means, evaluation of bids in the subject tender was concluded by 13<sup>th</sup> November 2019 within the maximum period of 30 days provided for in section 80 (6) of the Act.

Accordingly, the Board finds that the Procuring Entity evaluated the bids received in the subject tender within the maximum period of 30 days provided for in section 80 (6) of the Act.

On the second issue for determination, the Board heard submissions by the Applicant that the Procuring Entity failed to award the subject tender in accordance with the award criteria provided for in paragraph 5 at page 4 of the Addendum dated 4<sup>th</sup> October 2019. Counsel further submitted that the Procuring Entity seemed to subject the principle of equity to that of cost-

effectiveness outlined in Article 227 (1) of the Constitution, in order to determine award of the subject tender.

On the other hand, Counsel for the Procuring Entity submitted that evaluation and subsequent award of the subject tender took into account the guiding principles under section 3 (e), (f) & (h) of the Act read together with Articles 201 (d), 227 and 232 of the Constitution. In Counsel's view, since this was a tender reserved for Women, Youth and Persons with Disability who fall under the Access to Government Procurement Opportunities (AGPO) target groups, the Procuring Entity capped the number of lots that would be awarded to a bidder while still ensuring that such award is made to the lowest evaluated bidder. Counsel further submitted that during evaluation, several options arose from the evaluation, that is Options 1, 2, 3, 4 and 5 and that the Procuring Entity settled on Option 5 thereby proceeded to award the lowest evaluated tenderers in the respective lots based on Option 5.

The Board having considered parties' submissions on the second issue for determination, notes that Clause 2.24.4 of Section II. Instructions to Tenderers of the Tender Document previously provided the award criteria as follows:-

***"Subject to paragraph 2.29, the KRA will award the contract to the successful tenderer whose tender has been determined 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”***

Paragraph 5 at page 4 of the Addendum dated 4<sup>th</sup> October 2019 modified this award criterion by providing as follows:-

***“Award shall be per LOT. Bidders can bid for all Lots but a bidder shall only be awarded a maximum of two (2) lots for the lots with less scope of work i.e. Lot 3, Lot 4, Lot 5 and Lot 6.***

***A bidder who wins either of Lot 1, Lot 2, Lot 7 or Lot 8 shall not be entitled to another lot due to the huge scope of work”***

According to the Procuring Entity’s Response at paragraph 10 to 13 thereof it was noted that:-

***“10. The Professional Opinion cited that there were several options arising from the recommendation to award pursuant to the addendum dated 4<sup>th</sup> October 2019. Analysis of the options is provided in the professional opinion submitted as part of the documents in Form 5 and summarised in paragraph 11 below;***

**11.**

	<b>Option 1</b>	<b>Option 2</b>
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	Firm	Cost	Firm	Cost
Lot 1	PEESAM	56,214,463.36	PEESAM	56,214,463.36
Lot 2	DECHRIP	49,588,142.64	ALL & SUNDRY	46,071,122.37
Lot 3	ONE WAY CLEANING	11,236,273.25	ONE WAY CLEANING	11,236,273.25
Lot 4	NADIAH	5,081,670.00	NADIAH	5,081,670.00
Lot 5	NADIAH	7,146,040.00	NADIAH	7,146,040.00
Lot 6	LIGA HOLDINGS	29,194,222.50	LIGA HOLDINGS	29,194,222.50
Lot 7	ALL & SUNDRY	40,808,002.96	PETALS HYGIENE	49,506,189.00
Lot 8	PETALS HYGIENE	35,478,746.16	DECHRIP	38,742,722.84
	<b>TOTAL</b>	<b>234,747,560.87</b>		<b>243,192,703.32</b>

	<b>Option 3</b>		<b>Option 4</b>	
	Firm	Cost	Firm	Cost
Lot 1	ALL & SUNDRY	57,823,434.32	PEESAM	56,214,463.36
Lot 2	PEESAM	43,339,048.58	ALL & SUNDRY	46,071,122.37
Lot 3	PETALS HYGIENE	7,671,303.13	LIGA HOLDINGS	14,766,800.00
Lot 4	NADIAH	5,081,670.00	NADIAH	5,081,670.00
Lot 5	NADIAH	7,146,040.00	NADIAH	7,146,040.00
Lot 6	PETALS HYGIENE	19,886,427.00	LIGA HOLDINGS	29,194,222.50
Lot 7	ONE WAY CLEANING	83,799,536.35	ONE WAY CLEANING	83,799,536.35
Lot 8	DECHRIP	38,742,722.84	PETALS HYGIENE	35,478,746.16
	<b>TOTAL</b>	<b>263,490,182.22</b>	<b>TOTAL</b>	<b>277,752,600.74</b>

	<b>Option 5</b>	
	Firm	Cost in Kshs
Lot 1	Peesam Limited	56,214,463.36
Lot 2	Peesam Limited	43,339,048.58
Lot 3	Peesam Limited	5,690,438.49
Lot 4	Nadiah Investments Limited	5,081,670.00

Lot 5	Peesam Limited	6,522,363.32
Lot 6	Peesam Limited	14,189,465.33
Lot 7	Peesam Limited	33,801,880.23
Lot 8	Petals Hygiene and Sanitation Services Limited	35,478.746.16
	<b>TOTAL</b>	<b>200,318,075.47</b>

The Procuring Entity and the Applicant cited principles that guide procurement which include the following:-

***Section 3:***

***Public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of the Constitution and relevant legislation—***

- (a) .....***;
- (b) .....***;
- (c) .....***;
- (d) .....***;
- (e) the principles of public finance under Article 201;***
- (f) the values and principles of public service as provided for under Article 232;***
- (g) .....***;
- (h) maximisation of value for money;***
- (i) .....***; and
- (j) .....***

Further, Articles 201 (d), 227 (1) and 232 of the Constitution provide as follows:-

***201: The following principles shall guide all aspects of public finance in the Republic—***

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

***(b) the public finance system shall promote an equitable society and in particular***

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

***(ii) .....***;

***(iii) expenditure shall promote the equitable development of the country, including by making special provision for marginalised groups and areas***

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

***(d) public money shall be used in a prudent and responsible way***

***227 (1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective***

**232 (1) The values and principles of public service include—**

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

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

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

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

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

**(f) .....**

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

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

**(i) affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of—**

**(i) men and women;**

**(ii) the members of all ethnic groups; and**

**(iii) persons with disabilities**

The above provisions guide a procuring entity when contracting for goods and services to do so in a prudent and responsible way since the moneys used in a public procurement process are tax payer’s money. The Board

would like to make an observation that the Applicant took the view that the Procuring Entity subjected the principle of equity to cost-effectiveness.

**Khi V. Thai** in the book *International Handbook of Public Procurement, (CRC Press, 28 Aug 2008)* while addressing the principle of equity as it applies to public procurement stated as follows at page 363 thereof:-

***"Equity is a measure that compares one group with another. Instead of treating all groups exactly the same, groups that face different levels of resources and development are required to receive different treatment. When reference is made to, for the present purposes, the contracting for goods or services in accordance with a system that is equitable, it means that, account should be taken of the different levels of resources and development of different groups. The reference to "equitable" does not mean "equal shares" or "equal opportunities", but rather that procurement should be aimed at improving the position of vulnerable groups. Procurement should be used as a means to address past inequalities and unfair discriminatory policies and practices"***

From the foregoing, the Board notes that the principle of equity as it relates to public procurement requires that procurement processes are carried out

with a view of improving the societal position of vulnerable groups in order to address past inequalities and unfair discriminatory policies and practices.

This Board would like to point out that the principles that guide public procurement as provided for in Article 227 (1) of the Constitution do not rank as one being superior to the other. In that regard, the principle of equity cannot be said to be superior to the principle of cost-effectiveness neither does the principle of cost-effectiveness rank superior than the principle of equity. This being an AGPO tender, the Procuring Entity has a further obligation to ensure maximum participation of women, youth and persons with disability in order to promote the principle of equity, but still ensure the tender is awarded in a system that is cost-effective.

The Procuring Entity herein reverted back to the criteria of lowest evaluated bidder as provided for in Clause 2.24.4 of Section II. Instructions to Tenderers of the Tender Document and awarded the subject tender to the bidders who submitted the lowest evaluated bid prices in the respective lots. However, it did not apply the amendment to the Award Criteria introduced by paragraph 5 at page 4 of the Addendum dated 4<sup>th</sup> October 2019. At this juncture, the Board would like to address its mind to the purpose of issuance of Addenda to bidders.

Section 75 of the Act provides as follows:-

- "(1) A procuring entity may amend the tender documents at any time before the deadline for submitting tenders by issuing an addendum without materially altering the substance of the original tender.***
- (2) An amendment may be made on the procuring entity's own initiative or in response to an inquiry by a candidate or tenderer.***
- (3) A procuring entity shall promptly provide a copy of the addendum to each person to whom the procuring entity provided copies of the tender documents.***
- (4) The addendum shall be deemed to be part of the tender documents.***"

According to section 75 of the Act, a procuring entity has the discretion to amend its tender document prior to the tender submission deadline without materially changing the substance of the tender. Such amendment is made on the procuring entity's own initiative or in response to an inquiry by a candidate or tenderer. The amendment is issued in the form of an addendum to each person provided with copies of the procuring entity's tender documents, which in the Board's view, ensures that such persons take the Addendum into account in the preparation of their tenders.



More importantly, section 75 (4) of the Act directs that the addendum shall be deemed to be part of the tender documents. Hence, the Addendum dated 4<sup>th</sup> October 2019 which introduced the manner in which the Procuring Entity would award the subject tender, became part of the tender document, previously issued in September 2019.

It is thus important for this Board to establish whether the Award Criteria introduced by the Addendum dated 4<sup>th</sup> October 2019 would ensure the principles of equitability and cost-effectiveness are still achieved in awarding the subject tender. Having studied paragraph 5 at page 4 of the Addendum dated 4<sup>th</sup> October 2019, the Board notes that the Procuring Entity capped the number of lots that could be awarded to bidders as follows:-

- *A bidder could be awarded a maximum of 2 lots for the lots with less scope of work, i.e. Lot 3, 4, 5 & 6;*
- *A bidder who wins either Lot 1, 2, 7 & 8 would not be entitled to another Lot due to the huge scope of work.*

In order to understand the rationale behind capping the number of lots to be awarded to bidders, and having noted that this was an AGPO tender, the Board deems it fit to interrogate the provisions of the Act that guide procuring entities in providing preference and reservation schemes for women, youth and persons with disabilities. Section 53 of the Act states as follows:-

***"All procurement and asset disposal planning shall reserve a minimum of thirty per cent of the budgetary allocations for enterprises owned by women, youth, persons with disabilities and other disadvantaged groups"***

Further, section 155 (2) and (10) of the Act provides that:-

***"155 (1) .....;***

***(2) Subject to subsection (8), the Cabinet Secretary shall, in consideration of economic and social development factors, prescribe preferences and or reservations in public procurement and asset disposal***

***(3) .....;***

***(4) .....;***

***(5) .....;***

***(6) .....;***

***(7) .....;***

***(8) In applying the preferences and reservations under this section—***

***(a) exclusive preferences shall be given to citizens of Kenya where—***

- (i) the funding is 100% from the national government or county government or a Kenyan body; and*
  - (ii) the amounts are below the prescribed threshold;*
  - (iii) the prescribed threshold for exclusive preference shall be above five hundred million shillings;*
- (b) a prescribed margin of preference shall be given—*
- (i) in the evaluation of tenders to candidates offering goods manufactured, assembled, mined, extracted or grown in Kenya; or*
  - (ii) works, goods and services where a preference may be applied depending on the percentage of shareholding of the locals on a graduating scale as prescribed*

*(9) .....*

**(10) Despite subsection (2) or any other provisions of this Act, every procuring entity shall ensure that at least thirty percent of its procurement value in**

**every financial year is allocated to the youth, women and persons with disability'**

The above provisions require procuring entities to ensure 30% of their budgetary allocation in every financial year is allocated to the youth, women and persons with disability. In a circular dated 15<sup>th</sup> January 2015, the Cabinet Secretary for the National Treasury directed Accounting Officers of Procuring Entities to undertake the following:-

***"Separation of Tenders for the Target Group***

***To increase the uptake of women, youth and persons with disabilities owned enterprises and to address unfair competition, clear separation of the tenders targeting the groups should be dealt as follows:-***

- 1. Advertisement should clearly state and separate the tenders targeting each group***
- 2. Persons with disabilities owned enterprises must be awarded not less than 2% of the 30% set aside***
- 3. Of the target groups (youth, women and persons with disabilities) no category shall be awarded more than 50% of the 30% set aside"***

In issuing the said Circular, the Cabinet Secretary of the National Treasury attached the Public Procurement and Disposal (Preference and Reservation) Regulations, 2011) (hereinafter referred to as "the 2011 Regulations") in

order for procuring entities to address their minds to preference and reservation schemes as they apply to AGPO tenders.

The Board studied Regulation 6 of the Public Procurement and Disposal (Preference and Reservation) Amendment Regulations, 2013 (hereinafter referred to as "the 2013 Amendment Regulations") (which amended Regulation 19 of the 2011 Regulations") and notes the following:-

**"19. (1) For the purpose of ensuring maximum participation of citizen contractors, disadvantaged groups, small and micro-enterprises in public procurement, procuring entities may unbundle goods works and services in practicable quantities pursuant to section 31(7) of the Act.**

**(2) For greater certainty, a procuring entity in unbundling procurements in paragraph (1), may be lot goods, works or services in quantities that are affordable to specific target groups participating in public procurement proceedings"**

It is the Board's considered view that unbundling of procurements means that a procuring entity procures goods, works or services in the form of lots in quantities that are affordable to specific target group participating in a public procurement process. Pursuant to the provision of Regulation 19 (2) of the 2011 Regulations as amended by Regulation 6 of the 2013

Amendment Regulations, a procuring entity, in unbundling procurements into lots would ensure maximum participation of disadvantaged groups. Section 2 of the 2011 Regulations defines disadvantaged groups as:-

***"persons perceived to be denied, by mainstream society access to resources and tools which are useful for their survival in a way that disadvantages them, or individuals who have been subjected to prejudice or cultural bias because of their identities as members or groups without regard to their individual qualities and includes enterprises owned by women, the youth and persons with disabilities"***

It is therefore the Board's considered view that this being a tender that was reserved for the target groups falling under the AGPO category, the Procuring Entity had the obligation to promote equitable share of resources while still promoting the principle of cost-effectiveness as provided for in Article 227 (1) of the Constitution. This would be achieved by ensuring the services required in the subject tender are procured in lots in practicable quantities affordable to the AGPO target groups.

Therefore, once the Procuring Entity unbundled the subject tender into lots and capping the number of lots that a bidder could be awarded, this would ensure maximum participation by enterprises owned by women, youth and persons with disability, while still ensuring the subject tender is awarded to the firms that had the lowest evaluated bid.

The Procuring Entity referred the Board to the decision of Justice Ogola in **Judicial Review No. 46 of 2017, Kenya Ports Authority v. Public Procurement Administrative Review Board & Another (2018) eKLR** where it was held as follows:-

***"The third instance on illegality is in making an award contrary to the principles of public finance in Article 201 of the Constitution and section 3 of the PPDA 2015. The award to Eazy Sales was at the price of USD 485,801.43. The award to Mantrad as recommended by the Board is at the price of USD 647,428.00. The disparity in prices is USD 161,626.57. If allowed, this action would amount to improper use of public money"***

The court in the above case held that it would amount to improper use of public money if a tender is awarded to a bidder that did not submit the lowest evaluated tender. Notably, section 86 (1) (a) of the Act provides for the award criteria for open tenders (where the Request for Proposal method of tendering is not used) as that of lowest evaluated bidder.

It is not lost to the Board that even upon unbundling the subject tender into lots, it is possible that only one firm may emerge the lowest evaluated bidder in all the lots. However, the Addendum dated 4<sup>th</sup> October 2019 cured this eventuality by capping the number of lots that could be awarded to a bidder

depending on the scope of work of the respective lots, to ensure maximum participation by the target groups under AGPO.

Accordingly, the Board finds that the Procuring Entity failed to take the provision in paragraph 5 at page 4 of the Addendum dated 4<sup>th</sup> October 2019, read together with section 75 (4) and 86 (1) (a) of the Act, Regulation 19 of the 2011 Regulations as amended by Regulation 6 of the 2013 Amendment Regulations, into account when awarding the subject tender.

On the third issue framed for determination, the Board heard submissions by the Procuring Entity that the Applicant's financial bid had computational errors and was therefore disqualified from award of the subject tender. Upon enquiry by the Board, the Procuring Entity confirmed that section 82 of the Act prohibits correction of errors during evaluation, but took the view that the option that the Procuring Entity had, having noted the computational errors in the Applicant's bid, was to disqualify it from further evaluation.

Counsel for the Applicant submitted that section 82 of the Act does not allow correction of errors in a financial bid neither does it direct a procuring entity to disqualify a bidder as a result of a computational error that is noted during financial evaluation.

In addressing this issue, the Board notes that section 82 of the Act states as follows:-



**"The tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be the subject of correction, adjustment or amendment in any way by any person or entity"**

Kenya's 2015 Act on public procurement borrowed most of its provisions from the United Nations International Trade Law (Model Law) on Public Procurement, 2011. Article 16 of the said Model Law provides as follows:-

**"Article 16. Clarification of qualification information and of submissions**

- 1. At any stage of the procurement proceedings, the procuring entity may ask a supplier or contractor for clarification of its qualification information or of its submission, in order to assist in the ascertainment of qualifications or the examination and evaluation of submissions.**
- 2. No substantive change to qualification information or to a submission, including changes aimed at making an unqualified supplier or contractor qualified or an unresponsive submission responsive, shall be sought, offered or permitted.**

- 3. *No negotiations shall take place between the procuring entity and a supplier or contractor with respect to qualification information or submissions, nor shall any change in price be made pursuant to a clarification that is sought under this article.***

A similar position is taken by the World Bank Regulations for IPF Borrowers, Procurement in Investment Project Financing Goods, Works, Non-Consulting and Consulting Services, July 2016 (Revised November 2017 and August 2018). Clause 4.7 at page 94 thereof states as follows:-

***"For a lump-sum contract, the Consultant is deemed to have included all prices in its financial Proposal, so neither arithmetical corrections nor price adjustments shall be made; the total price, net of taxes as per paragraph 4.6 of this Annex, included in the financial Proposal is considered the offered price"***

The United Nations Model Law on public procurement and the World Bank Regulations both take the position that a bidder is deemed to have included all prices in its financial bid, and that changes made to the price by a bidder are usually aimed at making an unqualified supplier or contractor qualified or an unresponsive submission responsive.

The Board further compared the provisions of the Repealed Public Procurement and Disposal Act, 2005 (hereinafter referred to as “the Repealed Act”) and their resultant regulations, that is, the 2006 Regulations, against the provisions of the 2015 Act, in an attempt to establish the reason why the Act aligned itself to international practice when it comes to the tender sum quoted by bidders.

The Board notes that under the Repealed Act, a bidder in a procurement process would quote a tender price, or what was referred to as the total price of a tender which would be read out by a procuring entity at the time of opening of tenders in accordance with section 60 (5) (b) of the Repealed Act which provided as follows:-

***“As each tender is opened, the following shall be read out loud and recorded in a document to be called the tender opening register —***

***(a) the name of the person submitting the tender;***

***(b) the total price of the tender including any modifications or discounts received before the deadline for submitting tenders except as may be prescribed;”***

Further, section 66 (4) of the Repealed Act provided that:-

***"The successful tender shall be the tender with the lowest evaluated price."***

Consequently, an award of a tender would be based on the lowest evaluated price as determined by the procuring entity at the conclusion of Financial Evaluation. The procuring entity in arriving at the lowest evaluated price during Financial Evaluation would correct arithmetic errors as explained in section 63 of the Repealed Act which stated that:-

- "(1) The procuring entity may correct an arithmetic error in a tender.***
- "(2) The procuring entity shall give prompt notice of the correction of an error to the person who submitted the tender.***
- "(3) If the person who submitted the tender rejects the correction, the tender shall be rejected and the person's tender security shall be forfeited."***

Pursuant to this provision, a procuring entity would determine if there were any discrepancies in the amount quoted in a bid during the process of financial evaluation of bids. If any discrepancies or errors were detected, a procuring entity would correct arithmetic errors only if the bidder in question accepted the corrections made by the procuring entity. If the respective

bidder rejected the corrections, the bid in question would be rejected at this stage of evaluation. The process of arriving at the lowest evaluated price was further explained in Regulation 50 of the 2006 Regulations, made pursuant to the Repealed Act. The said provision states as follows: -

- "(1) Upon completion of the technical evaluation under Regulation 49, the evaluation committee shall conduct a financial evaluation and comparison to determine the evaluated price of each tender.***
- (2) The evaluated price for each bid shall be determined by-***
- (a) taking the bid price, as read out at the bid opening;***
  - (b) taking into account any corrections made by a procuring entity relating to arithmetic errors in a tender;***
  - (c) taking into account any minor deviation from the requirements accepted by a procuring entity under section 64(2) (a) of the Act;***
  - (e) where applicable, converting all tenders to the same currency, using a uniform exchange rate prevailing at the date indicated in the tender documents;***
  - (f) applying any discounts offered in the tender;***
  - (g) applying any margin of preference indicated in the tender documents.***

***(3) Tenders shall be ranked according to their evaluated price and the successful tender shall be the tender with the lowest evaluated price in accordance with section 66(4) of the Act (now section 86 (1) in the 2015 Act)” [Emphasis by the Board]***

This Regulation introduced steps for arriving at the lowest evaluated price during Financial Evaluation. This is due to the fact that, inevitably, a bid may contain arithmetic errors, minor deviations, and there may be need to convert tenders to the same currency using the prevailing exchange rates in the case of international competitive bids, to apply discounts offered by a tender and to apply a margin of preference as specified in the Tender Document and as required by the Act.

As far as corrections were concerned, a procuring entity in determining the evaluated price of a bid would include any corrections made by it relating to arithmetic errors in a tender in accordance with Regulation 50 (2) (b) of the 2006 Regulations. As explained and outlined hereinbefore, pursuant to section 63 of the Repealed Act, a procuring entity would correct arithmetic errors only if there was concurrence with the bidder in question. Following acceptance of these corrections by a bidder, and taking into consideration the other factors listed under Regulation 50 of the 2006 Regulations, a procuring entity would arrive at the evaluated price of a bid.

A procuring entity would then proceed to rank bidders in order to determine the lowest evaluated bidder in accordance with Regulation 50 (3) of the 2006 Regulations. An award of tender would then be made based on the lowest evaluated price pursuant to section 66 (4) of the Repealed Act and which evaluated price would be different from the tender price, now known as the tender sum under section 82 of the Act.

Moving forward, the Board notes, the enactment of the 2015 Act changed the manner in which a procuring entity should treat any discrepancies or errors that it may find in a bid during Financial Evaluation. As explained hereinbefore, section 82 of the Act expressly prohibits any alterations or corrections to the tender sum which remains absolute and final and is not subject to any correction, adjustment or amendment.

Accordingly, any corrections made by a procuring entity to a bidder's tender sum would therefore serve no purpose because the procuring entity cannot use such corrections to rank the bidders or amend the tender sum in the Form of Tender, which remains absolute and final in accordance with section 82 of the Act.

It is the Board's considered view that the mischief the 2015 Act has cured is a scenario where a bidder can quote a figure 'X' as its tender sum in the

Form of Tender in anticipation of being the lowest evaluated bidder. However, upon realization that such a bidder is the second lowest evaluated bidder, it would collude with a procuring entity to correct errors which it 'deliberately' created in its breakdown of prices comprising of the amount in the Form of Tender so that upon correction, its tender sum is revised downwards, lower than the initial lowest bidder and be awarded the tender based on the corrected sum and vice versa.

The provision of section 82 of the Act is couched in mandatory terms and leaves no room for any other interpretation. It is not lost to the Board that section 86 (1) (a) of the Act states that "the successful tender shall be the one who meets any one of the following as specified in the tender document—

***(a) the tender with the lowest evaluated price"***

Evidently, the lowest evaluated price, is still a factor that determines the successful tender. However, the reason why the legislature must have retained the provision that award of a tender, in open tenders (where no Request for Proposal method is used) be made to the tender with "the lowest evaluated price", is because arriving at the lowest evaluated price has several components such as application of a margin of preference which is a provision in the Act that seeks to promote local and citizen contractors as part of the objectives under section 3 (i) and (j) of the Act.



However, correction of errors goes against the principle of a cost-effective procurement process, noting that award of a tender is made on the price quoted in the Form of Tender, but only after the responsiveness of a bidder to eligibility and mandatory requirements (including technical specifications) has been conducted during Preliminary and Technical Evaluation stages.

The Board studied the Evaluation Report dated 13<sup>th</sup> November 2019 to establish what transpired when evaluating the Applicant's bid with respect to Lot 6 of the subject tender, together with the opinion of the Head of Procurement function in the Professional Opinion dated 17<sup>th</sup> January 2020 and notes the following:-

At page 157 of the Evaluation Report, the Evaluation Committee made the following recommendation:-

***"Award of Contract for Lot 6 to Bidder 13, All and Sundry Services Limited at a Grand Annual Total of Kshs. 10,337,197.97 being the lowest evaluated bidder as per the tabulated summary and attached Lot 6 price schedules***

<b>NORTHERN REGION</b>	<b>Description</b>	<b>Bidder 13</b>
Embu	Offices	2,107,052.54
Meru	Offices	1,482,913.23
Machakos	Offices	1,286,096.50
Kitui	Offices	699,648.18
Kajiado	Offices	324,332.15
Isiolo	Offices	1,675,764.06
Wajir Airport	Offices	748,738.30
Wajir Office		

Diffu-Wajir	Offices	290,062.39
Moyale	Offices & Residential	4,265,019
Mandera	Offices and Residential	1,911,305.71
Garissa	Offices and Residential	750,607.60
Liboi	Offices and Residential	304,765.75
Elwak	Offices	390,935.05
<b>Grand Total (To be carried to Form of Tender as Lot 6</b>		<b>10,337,197.97</b>

The Head of Procurement function, having reviewed the Evaluation Report, proceeded to make the following Observations on Financial Analysis for Lot 6 at pages 13 and 14 of his Professional Opinion, as it relates to the Applicant:-

***"Wajir Airport: Bidder 13 did not provide the cots for the item 4: Shampooing of all carpeted areas (offices, waiting rooms, board rooms, etc)***

***Moyale: Bidder 13 did not provide the cost for item 3: Vacuum cleaning of all carpeted areas (offices, waiting rooms, board rooms, etc) and item 4: Shampooing of all carpeted areas (offices, waiting rooms, board rooms, etc)***

***Mandera: Bidder 13 did not provide the cost for item 3 Vacuum cleaning of all carpeted areas (offices,***

***waiting rooms, board rooms, etc) and item 4: Shampooing of all carpeted areas (offices, waiting rooms, board rooms, etc)***

**Summary of Specific Observation**

***Bidders 1, 4, 5, 13 and 14 did not provide costs for various items in Lot 6. The committee considered the issues as minor deviations. Bidder 13 quoted for combined costs for Wajir Airport and offices which was considered responsive”***

At page 20 of the Professional Opinion, it was further observed as follows:-

***“Lot 6: The Evaluation Committee had recommended Bidder 13, All and Sundry Services Limited at an annual total of Kshs. 10,337,197.97. However, their annual summary had an error with the figure that ought to have been carried forward to the form of tender being Kshs. 16,237,240.46. They were therefore not considered for award and instead Bidder 14 (Peesam Limited) was recommended for award in this lot at a form of tender price of Kshs. 14,189,465.33”***

The Board computed the Grand Total of the Applicant’s Price and Delivery Schedule for Lot 6 appearing at page 390 of the Applicant’s original bid, which is further reproduced in the Evaluation Report as noted hereinbefore and notes that, the Grand Total amounts to Kshs. 16,237,240.56 as noted by the Head of Procurement function, and not Kshs. 10,337,197.97 as indicated by the Applicant in its Form of Tender.

From the Evaluation Report and Professional Opinion, this error was not corrected, adjusted or amended but was used as a basis for disqualifying the Applicant from award of Lot 6 of the subject tender. The Board already noted hereinbefore that section 82 of the Act does not allow any correction, adjustment or amendment of the tender sum submitted by a bidder. In addition to this, section 82 of the Act does it expressly state that a procuring entity should disqualify a bidder where an error is noted in such a bidder's financial bid.

Therefore, it is important to establish what steps the Procuring Entity ought to have taken upon noting the computational error in the Applicant's financial bid.

The Procuring Entity herein ought to have first determined whether or not the Applicant was the lowest evaluated bidder upon concluding Financial Evaluation based on the tender sum quoted by the Applicant in its Form of Tender as Kshs 10,337,197.97, given that the Applicant's responsiveness to eligibility and mandatory requirements (including technical specifications) was already established during the Preliminary and Technical Evaluation stages.

The Procuring Entity would then proceed to seek clarification from the Applicant with a view of establishing whether or not the Applicant wishes to remain bound by its tender sum despite the error noted in its financial bid in so far as Lot 6 is concerned. If the Applicant accepts the error noted in its bid in so far as Lot 6 is concerned, and accepts to be bound by the amount quoted in its Form of Tender, the Procuring Entity would proceed to award the Applicant as the lowest evaluated bidder, based on the tender sum of Kshs. 10,337,197.97 quoted in its Form of Tender in respect of Lot 6 of the subject tender.

When the Applicant submitted the amount of Kshs. 10,337,197.97 for Lot 6, it represented its capability to execute the subject tender at that amount. Award would still be made to the Applicant based on the tender sum for Lot 6 as contained in its Form of Tender (only upon concurrence by the Applicant once clarification is sought signifying its intention to remain bound by the tender sum of Kshs 10,337,197.97 in its Form of Tender), save that an Error Correction Factor would be taken into account in determining the percentage of the difference between the tender sum and the corrected amount during contract administration (and not during evaluation) so that a bidder is not overpaid or underpaid. In that respect, payment to the Applicant for providing the services under Lot 6 would only be based on its tender sum of Kshs. 10,337,197.97 as contained in its Form of Tender.

If the Applicant refuses to acknowledge the error in its financial bid, then it means that it would not be in a position to execute all the services in the subject tender at the amount of Kshs. 10,337,197.97 quoted in the Applicant's Form of Tender leaving the Procuring Entity with no option but to proceed to award the next lowest evaluated bidder.

From the foregoing, the Board finds that the Procuring Entity unlawfully disqualified the Applicant's bid given the Procuring Entity's failure to take section 82 of the Act read together with section 86 (1) (a) of the Act into account in awarding Lot 6 of the subject tender.

In determining the appropriate orders to issue in the circumstances as the last issue for determination, the Board observes that section 46 (4) (a) of the Act requires an Evaluation Committee to undertake the following:-

**"46 (1) .....**

**(2) .....**

**(3) .....**

**(4) An evaluation committee established under subsection (1), shall—**

**(a) deal with the technical and financial aspects of a procurement as well as the negotiation of the process including evaluation of bids, proposals for**

***prequalification, registration lists, Expression of Interest and any other roles assigned to it;***

Section 80 (2) of the Act further provides that:-

***"The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents..."***

The Board already noted that section 75 (4) of the Act deems an addendum issued by a procuring entity to be part of the tender documents. Hence, in conducting an evaluation, the Evaluation Committee must comply with the procedures and criteria set out in the tender documents, which includes the Addendum dated 4<sup>th</sup> October 2019 issued prior to the tender submission deadline.

It is the Board's considered view therefore that, the Evaluation Committee ought to be given an opportunity to properly discharge its mandate under section 46 (4) (b) read together with section 80 (2) of the Act in conducting financial evaluation while taking into consideration the provision of section 82 of the Act read together with section 86 (1) of the Act and the findings made by the Board in that regard. This therefore means that the most appropriate relief in these circumstances is for the Procuring Entity to conduct a re-evaluation at the Financial stage with respect to the lots specified in the final orders hereinafter.

Upon concluding Financial Evaluation, and having considered the effect of paragraph 5 at page 4 of the Addendum dated 4<sup>th</sup> October 2019, the Procuring Entity has a further obligation to take such Addendum into account together with the provisions of section 75 (4) of the Act and Regulation 19 of the 2011 Regulations as amended by Regulation 6 of the 2013 Amendment Regulations, when awarding the subject tender.

In totality, the Request for Review succeeds in terms of the following specific 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 Unsuccessful bid dated 17<sup>th</sup> January 2020 addressed to the Applicant herein in respect of Tender No. KRA/HQS/NCB-010/2019-2020 for Provision of Cleaning and Garbage Collection for KRA offices and Residual Houses Countrywide, be and is hereby cancelled and set aside.**
  
- 2. The Procuring Entity's Letter of Notification of Award dated 17<sup>th</sup> January 2020 addressed to M/s Peesam Limited in**



**respect of Lots 1A, B & C, 2, 3, 5, 6 and 7 of the subject tender, be and is hereby cancelled and set aside.**

- 3. For the avoidance of doubt, the Procuring Entity's Letter of Notification of Award dated 17<sup>th</sup> January 2020 addressed to M/s Petals Hygiene and Sanitation Services Limited in respect of Lot 8 of the subject tender, be and is hereby upheld.**
  
- 4. Further to Order No. 3 above and for the avoidance of doubt, the Procuring Entity's Letter of Notification of Award dated 17<sup>th</sup> January 2020 addressed to M/s Nadiah Investments Limited in respect of Lot 4 of the subject tender, be and is hereby upheld.**
  
- 5. The Procuring Entity is hereby directed to re-instate the Applicant's bid at the Financial Evaluation stage together with all other bidders who made it to the Financial Evaluation stage and conduct a re-evaluation process at the Financial Evaluation stage with respect to Lots 1, 2, 3, 5, 6 & 7 including the making of an award in the respective lots of the subject tender listed herein, within fourteen (14) days from the date of this decision taking into consideration, the Board's findings in this case.**

**6. 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 19<sup>th</sup> day of February 2020**

**CHAIRPERSON**

**SECRETARY**

**PPARB**

**PPARB**

**Delivered in the presence of:-**

- i.** Mr. Jared Mwaniki holding brief for Mr. Mwaniki Gachuba for the Applicant;
- ii.** Ms. Lilian Nyaringita holding brief for Ms. Carol Mburugu for the Respondent; and
- iii.** Mr. Duncan Kiprono for the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties.