

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 89/2020 OF 30TH JUNE 2020

BETWEEN

SIMCA AGENCIES LIMITED.....APPLICANT

AND

THE ACCOUNTING OFFICER,

KENYA PORTS AUTHORITY.....1ST RESPONDENT

KENYA PORTS AUTHORITY.....2ND RESPONDENT

AND

OLLREGGY INVESTMENTS.....INTERESTED PARTY

Review against the conduct and decision of Kenya Ports Authority with respect to Tender No. KPA/104/2019-20/ADM for Provision of Housekeeping Services (Supplementary).

BOARD MEMBERS

- | | |
|---------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Dr. Joseph Gitari | -Member |
| 3. Ms. Phyllis Chepkemboi | -Member |

IN ATTENDANCE

- | | |
|-----------------------|----------------------------------|
| 1. Mr. Stanley Miheso | -Holding brief for the Secretary |
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BACKGROUND TO THE DECISION

The Bidding Process

Kenya Ports Authority (hereinafter referred to as “the Procuring Entity”) advertised Tender No. KPA/104/2019-20/ADM for Provision of Housekeeping Services (Supplementary) (hereinafter referred to as “the subject tender”) in MyGov Publication Website on 4th February 2020 inviting sealed bids from eligible bidders to submit bids in response to the said advertisement.

Bid Submission Deadline and Opening of Bids

The Procuring Entity received a total of thirty-four (34) No. of bids by the bid submission deadline of 25th February 2020. The same were opened shortly thereafter by a Tender Opening Committee at the Procuring Entity’s Conference Room in the presence of bidders’ representatives.

Evaluation of Bids

Having appointed an Evaluation Committee, evaluation of bids in the subject tender was carried out 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 criterion under Clause 27. Preliminary Examination of Tenders of Section II. Instructions to Tenderers of the Document for Provision of Housekeeping Services (Supplementary) (hereinafter referred to as "the Tender Document"). Having subjected the 34 No. of bidders to Preliminary Evaluation, the Evaluation Committee found 11 No. of bidders responsive to the mandatory requirements listed in the Tender Document, hence proceeded to Technical Evaluation.

2. Technical Evaluation

At this stage, the Evaluation Committee applied the criterion under Clause 28 of Section II. Instructions to Tenderers read together with Clause 28.2 of Section III. Tender Data Sheet of the Tender Document. Bidder were also required to attain a minimum technical score of 75% in order to proceed to Financial Evaluation. At the end of Technical Evaluation, the 11 No. of bidders attained the following scores: -

| No | Bidder | Marks attained |
|-----------|--------------------------------|-----------------------|
| 1 | M/s Frizel Investments Ltd | 72% |
| 2 | M/s Gedlinks General Supplies | 63% |
| 3 | M/s Simca Agencies Limited | 100% |
| 4 | M/s Monyangih Investments | 73% |
| 5 | M/s Keby General Suppliers Ltd | 90% |
| 6 | M/s RicoTech (K) Ltd | 95% |
| 7 | M/s Nakaj Services Ltd | 100% |
| 8 | M/s Virgin Clean Ltd | 55% |
| 9 | M/s Ollreggy Investment | 80% |
| 10 | M/s Blue Sea Service Ltd | 69% |

| No | Bidder | Marks attained |
|-----------|---------------------|-----------------------|
| 11 | M/s Maeji Kaiho Ltd | 80% |

From the foregoing table, only 6 No. of bidders attained the minimum technical score, hence proceeded to Financial Evaluation.

Financial Evaluation

At this stage, the Evaluation Committee applied the criterion under Clause 29. Financial Evaluation read together with Clause 34.1 of Section II. Instructions to Tenderers of the Tender Document, which specified that award of the subject tender shall be made to the bidder that submitted the lowest evaluated tender price. Having opened the financial bids of the 6 bidders who made it to Financial Evaluation, the Evaluation Committee recorded their tender prices as follows:-

| Bidder No. | Name of Bidder | Prices offered (Kshs) |
|-------------------|--------------------------------|------------------------------|
| 3 | M/s Simca Agencies Limited | 988,268.98 |
| 5 | M/s Keby General Suppliers Ltd | 726,921.00 |
| 6 | M/s RicoTech (K) Ltd | 655,945.28 |
| 7 | M/s Nakaj Services Ltd | 731,660.00 |
| 9 | M/s Ollreggy Investment | 603,400.00 |
| 11 | M/s Maeji Kaiho Ltd | 696,530.00 |

Recommendation

Based on the Financial Evaluation and having noted that M/s Ollreggy Investment submitted the lowest evaluated price, the Evaluation Committee recommended award of the subject tender to the said bidder.

Professional Opinion

In a Statement of Professional Opinion dated 2nd June 2020, the Procuring Entity's Head of Procurement and Supplies reviewed the evaluation process whilst explaining the manner in which procurement of the subject tender was conducted from inception. He concurred with the Evaluation Committee that award of the subject tender be made to M/s Ollreggy Investment at its tender price of Kshs. 603,400.00 inclusive of VAT. He therefore urged the Procuring Entity's Acting Managing Director to approve award of the subject tender to the said bidder as recommended by the Evaluation Committee. The said professional opinion was approved on 11th June 2020.

Notification

In letters dated 17th June 2020, the Procuring Entity notified the successful bidders and unsuccessful bidders of the outcome of their bids.

THE REQUEST FOR REVIEW

Simca Agencies Limited (hereinafter referred to as "the Applicant") lodged a Request for Review dated 29th June 2020 and filed on 30th June 2020 together with an Affidavit in Support of the Request for Review sworn on 29th June 2020, through the firm of Cheboi Kiprono Advocates, seeking the following orders: -

- 1. An order annulling the entire procurement proceedings in Tender No. KPA/104/2019-20/ADM for Provision of Housekeeping Services (Supplementary);**
- 2. An order nullifying the notification of award dated 17th June 2020 addressed to Ollreggy Investment Limited and letters of notification of unsuccessful bid dated 17th June 2020;**
- 3. An order directing the Procuring Entity to prepare fresh Tender Document and re-tender for Provision of Housekeeping Services;**
- 4. An order awarding costs of the Request for Review to the Applicant; and**
- 5. Any other relief that the Review Board deems fit to grant under the circumstances.**

In response, the 1st and 2nd Respondents lodged a Memorandum of Response dated 6th July 2020 and filed on 7th July 2020, together with an Affidavit in Support of the Respondents' Memorandum of Response, which Affidavit is sworn on 6th July 2020 and filed on 7th July 2020 through Addraya Dena Advocate while the Interested Party lodged a Replying Affidavit sworn on 8th July 2020 and filed on 9th July 2020 through the firm of Mogaka, Omwenga & Mabeya 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 disease. 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 and filed on 10th July 2020, the Procuring Entity lodged its Written Submissions dated and filed on 16th July 2020 whereas the Interested Party lodged Written Submissions dated 15th July 2020 and filed on 16th July 2020.

BOARD'S DECISION

The Board has considered all parties' pleadings and written submissions, together with the 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 finds that the following issues call for determination: -

- I. Whether the Procuring Entity evaluated bids in the subject tender within the statutory period specified under section 80 (6) of the Act;**
- II. Whether the Evaluation Report on review of Technical Evaluation undertaken on 23rd April 2020, was issued in accordance with section 80 (7) of the Act;**
- III. Whether the Letters of Notification to successful and unsuccessful bidders dated 17th June 2020 were issued by a person authorized in law; and**
- IV. Whether the Applicant was prejudiced as a result of the Procuring Entity's failure to disclose the amount at which award of the subject tender was made to the Interested Party.**

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

On the first issue for determination, the Board notes that at paragraph 1 (a) of its Request for Review and paragraph 11 of its Affidavit in support of the Request for Review, the Applicant avers that the Procuring Entity's Evaluation Committee acted in breach of section 80 (6) of the Act by carrying out evaluation of bids in the subject tender beyond the stipulated period of

30 days. The Applicant further states at paragraph 12 of its Affidavit in Support of the Request for Review that failure by the Procuring Entity to carry out evaluation of bids within the statutory period of 30 days was contrary to the principles of public procurement under section 3 of the Act and Articles 10, 227 and 232 of the Constitution.

In response, the Procuring Entity states at paragraph 3 to 5 of its Memorandum of Response that the Evaluation Committee conducted evaluation at the Preliminary and Technical Evaluation Stages on 11th to 17th March 2020. Upon submission of the Evaluation Report, the Evaluation Committee was requested to conduct a review of their evaluation. According to the Procuring Entity, the progress of evaluation was immediately affected by the Covid-19 pandemic whose first case was registered in the Kenya on 12th March 2020 and that the Procuring Entity's operations were affected by the said pandemic. The Procuring Entity further states that the Government declared the Procuring Entity an epicenter and that its entire user department which had 2 members in the Evaluation Committee were sent on compulsory isolation following an unfortunate demise of a member of staff from the said department. According to the Procuring Entity, the Evaluation Committee met again on 23rd April 2020 to conduct a review of the Technical Evaluation and that six bidders who qualified at the end of Technical Evaluation were invited for the Financial Opening of bids on 15th May 2020. Subsequently thereafter, Financial Evaluation was conducted on 21st and 22nd May 2020 and that the Evaluation Committee recommended award of the subject tender to the Interested Party. The Procuring Entity

further states that on 17th June 2020, all bidders were notified of the outcome of their bids in accordance with section 87 of the Act.

Whilst supporting the Procuring Entity, the Interested Party avers at paragraph 15 of its Replying Affidavit that it is a matter of public notoriety which should be accorded judicial notice that the evaluation process in the subject tender fell within the period when Kenya started to experience the Covid-19 Pandemic and that the Procuring Entity's staff were amongst those directly affected. To support this averment, the Interested Party referred the Board to a Newspaper Article dated 14th April 2020 attached to the Interested Party's Replying Affidavit, with the title, "**KPA closes Bandari clinic after recording 7 Covid-19 cases**" appearing in the Daily Nation Newspaper. The Interested Party further states at paragraph 17 of its Replying Affidavit, that Mombasa County (where the Procuring Entity's Headquarters are located and from where the subject procurement process took place) was declared an epicenter for Covid-19 pandemic to the extent that a 24-hour curfew was imposed for the Old Town, Mombasa for a period of about 21 days and that court operations in Mombasa were also suspended due to a number of court staff having been infected by the pandemic. As a result, the Interested Party urged the Board to determine the period undertaken to evaluate in the subject tender bearing in mind the peculiar circumstances specifically, the effects of Covid-19 pandemic on the subject procurement process.

Having considered each of the parties' cases, the Board observes that section 80 (6) of the Act states that: -

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

Section 80 (6) of the Act requires an Evaluation Committee to carry out evaluation of tenders for a maximum period of 30 days. In determining the period when the Procuring Entity evaluated bids in the subject tender, the Board deems it necessary to consider the meaning of the word **"Evaluation"**.

Ronald Finch in his book, **Guide to Tendering: For Construction Projects (2011)** defines the term **"Bid Evaluation"** as follows: -

Bid evaluation is the organized process of examining and comparing bids to select the best offer in an effort to acquire goods, works and services necessary to achieve the goals of an organization. The best offer recommended as a result of bid evaluation is referred to as the lowest responsive evaluated bid

On the other hand, section 80 (4) of the Act, requires an Evaluation Committee to undertake the following: -

"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."

From the foregoing, the Board notes that "Evaluation of Bids" is the process within which an evaluation committee examines and compares bids to select the best offer in its effort to acquire goods, works and services necessary to achieve the goals of a procuring entity. Upon completing an evaluation, an evaluation committee recommends the best offer to be awarded the tender depending on the method of procurement used. In this case where the Procuring Entity applied open method of tendering where the Request for Proposal method was not used, award of the tender was recommended to the lowest evaluated responsive bidder. Thereafter, the evaluation committee submits a signed Evaluation Report containing the summary of evaluation and comparison of tenders as required in section 80 (4) of the Act. This therefore means, the period of evaluation of tenders is the number of days that an evaluation committee meets to conduct an evaluation of bids with a view of recommending the bidder to be awarded the tender and the date when the Evaluation Report is signed ought to be a true reflection of the date when the evaluation process was concluded.

The Board studied the Procuring Entity's confidential file submitted pursuant to section 67 (3) (e) of the Act and notes that the Evaluation Committee first

met on 11th March 2020 to conduct Preliminary and Technical Evaluation and submitted a signed Evaluation Report dated 23rd March 2020. Having received a letter dated 3rd April 2020 directing it to conduct a review of the Technical Evaluation, the Evaluation Committee conducted the said review on 23rd April 2020 and submitted a report that is signed on 27th April 2020 (i.e. by an evaluation committee member and a secretary) and on 6th May 2020 (by another evaluation committee member). Further, on 21st and 22nd May 2020, the Evaluation Committee conducted Financial Evaluation.

From the above sequence of events, the Board notes that Preliminary and Technical Evaluation was undertaken between 11th March to 23rd March 2020 (i.e. 13 days), review of the Technical Evaluation was undertaken between 23rd April 2020 to 6th May 2020 (i.e. 14 days, if the latest date when the evaluation report was signed is taken into account) and Financial Evaluation was undertaken on 21st and 22nd May 2020 (i.e. 2 days). This means that the Procuring Entity's Evaluation Committee conducted evaluation of bids in the subject tender for a period of 29 days (i.e. 13+14+2).

This Board would like to make an observation that section 80 (6) of the Act, does not clarify from what date the period of 30 days for evaluation of tenders ought to start running. However, it is expected that the accounting officer of a procuring entity would take reasonable steps to appoint an evaluation committee before tender opening, or shortly thereafter, to ensure that evaluation of bids is not delayed after tenders have been opened. The Board has also considered the Procuring Entity's submissions on the effect

of Covid-19 pandemic on its staff and notes that despite the circumstances, evaluation of bids in the subject tender was carried out in 29 days, which was within the maximum period of 30 days specified under section 80 (6) of the Act.

Accordingly, the Board finds that the Procuring Entity evaluated bids in the subject tender within the statutory period specified under section 80 (6) of the Act.

On the second issue for determination, the Board notes that at paragraph 7 of its Affidavit in support of the Memorandum of Response, the Procuring Entity on its own volition avers that notwithstanding the prevailing circumstances and taking note of the Government directives issued to contain the spread of Covid-19 pandemic, the Evaluation Committee met on 23rd April 2020 (in the absence of one of the members affected by the mandatory isolation requirements) to conduct a review of the Technical Evaluation report prepared by its Secretary and later for signing by the members.

This prompted the Board to study the Evaluation Report on Review of Technical Evaluation to establish whether the Procuring Entity's Evaluation Committee issued the Evaluation Report in accordance with the Act and the Board proceeds to make the following findings: -

Section 80 (7) of the Act provides that: -

"The evaluation report shall be signed by each member of evaluation committee."

According to section 46 (4) (b) and (c) of the Act, an Evaluation Committee comprises of the following: -

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;

(c) have as its secretary, the person in charge of the procurement function

According to section 46 (4) (b) of the Act an Evaluation Committee comprises of a minimum number of three members and a maximum number of five members appointed on a rotational basis comprising heads of user department and two other departments or their representatives. Where necessary, a procuring entity may have procured consultants or professionals, who shall advise on the evaluation of the tender and give a recommendation on the same to the committee within a reasonable time. Further, the Evaluation Committee must have a Secretary who is not part of the evaluation team of 3 to 5 members specified in section 46 (4) (b) of the Act.

The Board observes that the Evaluation Report on review of Technical Evaluation was signed by a Chairperson, one member and a Secretary. However, another member identified as Mr. Julius Yiampoi did not sign the said Evaluation Report therefore, a space is left blank against his name as follows: -

| No | Name | Position | Signature | Date |
|-----------|-----------------------|-----------------|------------------|--------------------------|
| 1 | Mr. William O. Omwalo | Chairman | [Affixed] | 27/04/2020 |
| 2 | Mr. Julius Yiampoi | Member | | |
| 3 | Ms. Mary W. Munyi | Member | [Affixed] | 6 th May 2020 |
| 4 | Ms. Asha Athman | Secretary | [Affixed] | 27/4/2020 |

The Board notes that the Evaluation Report on review of Technical Evaluation fails to meet the threshold of section 46 (4) (b) and 80 (7) of the Act, in that the same ought to have been signed by at least 3 members of the Evaluation Committee. However, the Evaluation Report that is before the Board was signed by only 2 members of the Evaluation Committee. This raises the question whether Mr. Julius Yiampoi undertook evaluation of bids at all, or whether he was not available on the signing date. Section 46 (4) (b) and 80 (7) of the Act are expressed in mandatory terms and thus the failure of the Evaluation Report on review of Technical Evaluation to meet the threshold of section 46 (4) (b) and 80 (7) of the Act cannot be overlooked since the failure to satisfy the said provisions renders the said report null and void.

Accordingly, the Board finds that the Evaluation Report on review of Technical Evaluation undertaken on 23rd April 2020, fails to meet the threshold of section 46 (4) (b) and 80 (7) of the Act.

On the third issue for determination, the Board observes that at paragraph 1 (c) of the Request for Review, the Applicant contended that the notification letters issued to the successful and unsuccessful bidders offend the mandatory provisions of section 87 of the Act since the same were issued by the Acting Head of Procurement and Supplies and not the Accounting Officer of the Procuring Entity. In response, the Procuring Entity avers at paragraph 7 of its Memorandum of Response that section 2 of the Act adopts the definition of an Accounting Officer given in section 67 (1) of the Public

Finance Management Act, 2012. The Procuring Entity further refers the Board to section 5 of the Kenya Ports Authority Act to support its view that the control and executive management of the Procuring Entity is vested on the Managing Director (i.e. the Accounting Officer) of the Procuring Entity and that section 61 (2) thereof provides that any act, decision or notification of the Board (of the Procuring Entity) or the Managing Director may be signified under the hand of an employee authorized for that purpose. In light of the foregoing, the Procuring Entity avers that the letters of notification signed by the Head of Procurement and Supplies on behalf of the Managing Director are proper and lawful.

Having heard parties' submissions on the person who issues letters of notification and whether another person can be authorized to issue notification letters to bidders, the Board proceeds to make the following findings: -

Section 87 of the Act states as follows: -

"(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.

(2)

(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof

From the above provision, it is clear that the accounting officer is the one that issues notification letters to successful and unsuccessful bidders alike. It is worth noting that section 2 of the Act refers one to the Public Finance Management Act, 2012 in so far as the meaning of an accounting officer is concerned. Accordingly, the Board considered the meaning of an accounting officer provided in section 2 of the Public Finance Management Act which states as follows: -

"accounting officer" means—

(a) an accounting officer of a national government entity referred to in section 67"

Further, section 67 of the Public Finance Management Act provides that: -

"The Cabinet Secretary, except as otherwise provided by law, shall in writing designate accounting officers to be responsible for the proper management of the finances of the

different national government entities as may be specified in the different designations”

Section 5 of the Kenya Ports Authority Act. Chapter 391, Laws of Kenya states that: -

- “(1) There shall be a Managing Director who shall be appointed by the Minister after consultation with the Board and whose terms and conditions of service shall be determined by the Minister in the instrument of appointment or otherwise in writing from time to time.***
- (2) Subject to this Act, the control and executive management of the Authority shall be vested in the Managing Director.”***

On its part, section 61 (2) of the Kenya Ports Authority Act provides as follows: -

“Any act or decision or notification thereof, of the Board or the Managing Director under this Act may be signified under the hand of an employee authorized for that purpose

It is not in dispute that the Accounting Officer of the Procuring Entity herein is the Managing Director joined as a 1st Respondent to the Request for Review. From the above provisions, the Board notes that the Kenya Ports

Authority Act allows a notification to be given by the Board of the Procuring Entity or by the Managing Director and that such notification may be signified under the hand of an employee authorized for that purpose. In this instance, the Board considered the provision of section 61 (2) of the Kenya Ports Authority Act against section 87 of the Act since the Managing Director is the Accounting Officer of the Procuring Entity and identified in section 87 of the Act as the one who issues notification letters to successful and unsuccessful bidders. As regards the question whether an accounting officer can delegate his authority to issue notification letters, section 61 (2) of the Kenya Ports Authority Act suggests that authority must have been given to the employee in question to issue such notification.

The Board further notes that section 37 of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya provides that: -

"Where by or under an Act, powers are conferred or duties are imposed upon a Minister or a public officer, the President, in the case of a Minister, or the Minister, in the case of a public officer, may direct that, if from any cause the office of that Minister or public officer is vacant, or if during any period, owing to absence or inability to act from illness or any other cause, the Minister or public officer is unable to exercise the powers or perform the duties of his office, those powers shall be had and may be exercised and those duties shall be performed by a Minister designated by the President or by a

person named by, or by the public officer holding an office designated by, the Minister; and thereupon the Minister, or the person or public officer, during that period, shall have and may exercise those powers and shall perform those duties, subject to such conditions, exceptions and qualifications as the President or the Minister may direct.

The above provision specifies that a public officer, such as the Accounting Officer herein may delegate his authority because of inability to act in certain circumstances. However, in exercise of his function as a public officer, the Accounting Officer is bound by principles of leadership and integrity under the Constitution and other legislation. Article 10 (2) (c) of the Constitution outlines national values and principles of governance that bind all State organs, State officers and public officers including "*good governance, integrity, transparency and accountability*". Article 232 (1) (e) of the Act puts it more strictly, that "*the values and principles of public service include accountability for administrative acts*".

Section 5 of the Public Service (Values and Principles) Act No. 1 A of 2015 requires public officers to maintain high standards of professional ethics in that: -

"5 (1) Every public officer shall maintain high standards of professional ethics

- (2) For purposes of subsection (1), a public officer maintains high standards of professional ethics if that public officer**
- (a)**
 - (b)**
 - (c) is transparent when executing that officer's functions;**
 - (d) can account for that officer's actions;**
 - (e)**
 - (f)**
 - (g)**
 - (h) observes the rule of law.**

From the above provisions, the Board notes that the Accounting Officer has the obligation to maintain high standards of professional ethics as he is held accountable for administrative acts, whether performed personally or through delegated authority.

The above provisions demonstrate that the Accounting Officer has power to delegate his authority, but he must still remain accountable for acts performed by persons to whom he has delegated authority to act on his behalf. In order to observe the national values and principles of governance,

it is more efficient for an accounting officer to specify the tender for which the delegated authority is given to avoid instances where such authority is exercised contrary to the manner in which he had specified. The person to whom the authority is delegated may use such delegated authority to undermine the Accounting Officer.

The Constitution and the aforementioned legislation gives responsibilities to all persons in the public service including the Procuring Entity's Accounting Officer to take necessary steps to ensure that his authority, when delegated, is specific, is given in writing and not open to misuse contrary to the manner he had specified.

It is the Board's finding that to achieve the underlying principles and national values of governance, the delegated authority by an accounting officer must be in writing and specific to a particular tender to avoid instances where such authority is exercised contrary to the manner in which he had specified, thus undermining the accounting officer.

With respect to delegation of authority, the Board finds that the Accounting Officer has the power to delegate his authority in writing to issue letters of notification to successful and unsuccessful bidder.

The Board observes that the letters dated 17th June 2020 addressed to all bidders who participated in the subject procurement process were executed as follows: -

"...Your Faithfully

[signature affixed]

Aza N. Dzengo

Ag. Head of Procurement & Supplies

FOR: Ag. MANAGING DIRECTOR"

From the foregoing, the Board notes that the Procuring Entity's Acting Head of Procurement & Supplies signed notification letters for the Procuring Entity's Acting Managing Director. This prompted the Board to study the confidential file submitted to it to establish whether there was a letter of delegation of authority given to the Procuring Entity's Acting Head of Procurement & Supplies to issue notification letters to the successful and unsuccessful bidders in the subject tender. However, the Board did not find a letter delegating authority to the Acting Head of Procurement and Supplies to issue notification of letters to successful and unsuccessful bidders. Having considered the provision of section 61 (2) of the Kenya Ports Authority Act, section 37 of the Interpretation and General Provisions Act and section 5 (1) and (2) of the Public Service (Values and Principles) Act, this Board arrives at the conclusion that their ought to be evidence adduced by the Procuring Entity that the Head of Procurement and Supplies (being an employee of the

Procuring Entity) was authorized in writing to issue notification letters to the unsuccessful and successful bidders.

It is trite law that **“he who alleges must proof”**. The Procuring Entity is the party alleging that such authorization was issued but has failed to discharge its burden of proof by furnishing the Board with a letter specifically delegating authority to the Head of Procurement and Supplies (i.e. authorizing the Head of Procurement and Supplies) to issue notification letters to the successful bidder and unsuccessful bidders with respect to the subject tender.

In the circumstances, the Board is inclined to find that the letters of Notification to successful and unsuccessful bidders dated 17th June 2020 were issued by a person who is not authorized in law.

On the fourth issue for determination, the Board observes that at paragraph 5 of its Affidavit in Support of the Request for Review, the Applicant avers that it received a letter dated 13th May 2020 from the Procuring Entity inviting it to attend the opening of financial bids scheduled to take place on 15th May 2020 and that subsequently, it received a letter dated 17th June 2020 informing it that its bid was unsuccessful because it was not the lowest evaluated bidder. According to the Applicant, the said notification letter failed to indicated the amount at which award of the subject tender was made to the Interested Party.

In response, the Procuring Entity at paragraph 4 of its Memorandum of Response states that the Procuring Entity invited 6 bidders who qualified for Financial Evaluation to attend the opening of financial bids through letters dated 15th May 2020 and that the said bids were opened on the scheduled dates in the presence of representatives of all the 6 bidders. At paragraph 7 of its Replying Affidavit, the Interested Party avers that the Applicant admits to the fact that it attended the opening of the financial bids, which process was open and transparent in accordance with section 3 of the Act and Article 227 (1) of the Constitution. According to the Interested Party, the Procuring Entity's Tender Opening Committee read out the amounts quoted by the Applicant and the Interested Party as Kshs. 988,268.98 and Kshs. 603,400.00 respectively, which is sufficient proof that the Interested Party's tender price was the lowest tender amount.

Having considered the foregoing submissions, the Board observes that section 87 (3) of the Act cited hereinbefore requires the accounting officer of a procuring entity to notify unsuccessful bidders of the outcome of their bids at the same time the successful bidder is notified. In doing so, the accounting officer is required to specify the reasons why a bidder was unsuccessful and to disclosing the successful bidder if one has already been determined.

The Board is cognizant of section 3 of the Act which outlines the guiding principles for public procurement and asset disposal proceedings carried out under the Act as follows: -

- "(a) the national values and principles provided for under Article 10;***
- (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..."***

Article 10 (2) (c) and 227 (1) of the Constitution further provide as follows:

-

- "10 (1)***
- (2) The national values and principles of governance include—***
- (a)***
- (b)***
- (c) good governance, integrity, transparency and accountability***

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”

One of the guiding principles that applies to public procurement and asset disposal proceedings is the principle of transparency. The Act and the Constitution require a procuring entity to be accountable to the public on the manner in which it uses funds in a procurement process. This in the Board’s view, explains why the event of tender opening is very important in a procurement process. Section 78 of the Act which explains the event of tender opening states as follows: -

"78. Opening of tenders

(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) Those submitting tenders or their representatives may attend the opening of tenders.

(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

(7)

(8) The accounting officer of a procuring entity shall, on request, provide a copy of the tender opening register to a person submitting a tender.

(9) The tender opening committee shall prepare tender opening minutes which shall set out—

(a) a record of the procedure followed in opening the tenders; and

(b) the particulars of those persons submitting tenders, or their representatives, who attended the opening of the tenders

It is evident from the foregoing that the underlying objective of the events of tender opening is to promote the principle of transparency and accountability to bidders and the public at large of how the Procuring Entity handles bids submitted to it once they are opened including the requirement that the amounts submitted by bidders must be read out loud and recorded in the Tender Opening Register, which the Applicant may have obtained from the Procuring Entity if it wished to do so pursuant to section 78 (4) of the Act.

In a one-enveloped tender, the price quoted by bidders is announced at the tender opening before evaluation begins. In a two-enveloped tender (such as was the case herein), the price quoted by all bidders is announced at the financial opening of bids wherein bidders who qualified for Financial Evaluation are invited to attend the event and to witness as the bids are being opened and to have knowledge of the amounts quoted by bidders. These events are then reduced in writing in a document referred to as tender opening minutes as stated in section 78 (9) of the Act.

The Applicant admits that it was invited to the opening of financial bids scheduled for 15th May 2020, through a letter dated 13th May 2020. From the Procuring Entity's Financial Opening Minutes, the following bidders' representatives were present: -

| No | Name | Firm |
|-----------|--------------|----------------------------|
| 1 | Mr. Ken Oloo | M/s Nakaj Services Limited |

| | | |
|---|----------------------|-----------------------------------|
| 2 | Ms. Lydia Munga | M/s Kebby General Suppliers |
| 3 | Ms. Vallerie R. Dibo | M/s RicoTech Kenya |
| 4 | Mr. David Simwa | M/s Simca Agencies Limited |
| 5 | Ms. Regina Kithuku | M/s Ollreggy Investment |
| 6 | Mr. Otieno | M/s Maeji Kaiho International Ltd |

Clause 3.1 of the said financial minutes outlined each of the prices quoted by bidders and the Tender Opening Committee noted the following: -

"All bids from the six tenderers were systematically opened and the Chair read out the quoted prices in the form of tender as follows: -

| No | Name | Prices in the Form of Tender |
|----|-----------------------------------|------------------------------|
| 1 | M/s Nakaj Services Limited | Kshs. 731,660.00 |
| 2 | M/s Kebby General Suppliers | Kshs. 726,921.00 |
| 3 | M/s RicoTech Kenya | Kshs. 654,945.28 |
| 4 | M/s Simca Agencies Limited | Kshs. 988,268.98 |
| 5 | M/s Ollreggy Investment | Kshs. 603,400.00 |
| 6 | M/s Maeji Kaiho International Ltd | Kshs. 696,530.00 |

The Board observes that the Applicant's representative, Mr. David Simwa was present at the opening of the financial bids, witnessed as the bids were being opened and noted the prices quoted by each of the bidders that made it to Financial Evaluation, as the prices were being read out. Furthermore, the Applicant was well aware that this was an open tender where award would be made to the lowest evaluated bidder in accordance with section 86 (1) (a) of the Act. Hence, it was very likely that the tender would be awarded

to the Interested Party herein upon conclusion of the Financial Evaluation. The Procuring Entity acted in a manner that is transparent and accountable to bidders therefore the Applicant was not prejudiced by the Procuring Entity's failure to specify the amount at which award of the subject tender was made. The Applicant already knew the bidder who had the lowest tender amount having attended the opening of financial bids and this bidder is the Interested Party who was very likely to be declared the lowest evaluated bidder.

Accordingly, the Board finds that the Applicant was not prejudiced as a result of the Procuring Entity's failure to disclose the amount at which award of the subject tender was made to the Interested Party, in the letter of notification of unsuccessful bid dated 17th June 2020 addressed to the Applicant.

In determining the appropriate orders to grant in the circumstances, the Board has established that the Procuring Entity's Evaluation Report on review of Technical Evaluation was not signed in accordance with section 46 (4) (b) and 80 (7) of the Act, therefore making the said report null and void. The Board has also established that the Procuring Entity failed to provide evidence to the satisfaction of the Board that the Acting Head of Procurement and Supplies had written authority to issue notification letters to the successful bidders and unsuccessful bidders. Section 173 (b) of the Act states that: -

"Upon completing a review, the Review Board may do any one or more of the following: -

(a);

(b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings"

The Board deems it necessary to direct the Procuring Entity to comply with section 46 (4) (b) and 80 (7) of the Act. Furthermore, the Procuring Entity must bear in mind that authority given to the Acting Head of Procurement and Supplies to issue notification letters to successful and unsuccessful bidders must be in writing and specific to 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 Public Procurement and Asset Disposal Act, 2015, the Board makes the following orders in the Request for Review: -

- 1. The Procuring Entity's Letter of Notification of Award dated 17th June 2020 addressed to the Interested Party with respect to Tender No. KPA/104/2019-20/ADM for Provision of**

Housekeeping Services (Supplementary), be and is hereby cancelled and set aside.

- 2. The Procuring Entity's Letter of Notification of Unsuccessful bid dated 17th June 2020 addressed to the Applicant and all other unsuccessful bidders with respect to the subject tender, are hereby cancelled and set aside.**
- 3. The Procuring Entity's Review Evaluation Report on the evaluation carried out on 23rd April 2020 containing a summary of evaluation and comparison of tenders in the subject tender, at the Preliminary and Technical Evaluation Stages, be and is hereby cancelled and set aside.**
- 4. The Procuring Entity is hereby directed to re-admit all bids at the Preliminary Evaluation Stage and conduct a re-evaluation at the Preliminary Evaluation Stage, taking into consideration the provisions of section 46 (4) (b) read together with section 80 (4) of the Act, and the Board's findings in this case.**
- 5. Further to Order No. 4 above, the Procuring Entity is hereby directed to proceed with the procurement process to its logical conclusion including the making of an award and issuance of notification letters in accordance with section 87 of the Act 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 21st day of July 2020

CHAIRPERSON

SECRETARY

PPARB

PPARB