

REQUEST FOR REVIEW
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 91/2020 OF 30TH JUNE 2020

BETWEEN

JUBILANT CLEANING SERVICES LTD.....APPLICANT

AND

THE ACCOUNTING OFFICER (MANAGING DIRECTOR),

NYERI WATER & SANITATION COMPANY LTD.....1ST RESPONDENT

NYERI WATER & SANITATION COMPANY LTD.....2ND RESPONDENT

AND

STEMAR COMMERCIAL AGENCIES.....INTERESTED PARTY

Review against the decision of the Accounting Officer of Nyeri Water and Sanitation Company Ltd with respect to Tender No. NWSC/OT/17/2020/2021 for Provision of Cleaning Services.

BOARD MEMBERS

- | | |
|----------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Arch. Steven Oundo, OGW | -Member |
| 3. Ms. Phyllis Chepkemboi | -Member |

IN ATTENDANCE

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

The Bidding Process

Nyeri Water & Sanitation Company Limited (hereinafter referred to as “the Procuring Entity”) published an advertisement of Tender No. NWSC/OT/17/2020/2021 for Provision of Cleaning Services (hereinafter referred to as “the subject tender”) on 7th May 2020 in the Standard Newspaper inviting 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 18 No. of bids by the bid submission deadline of 21st May 2020. The same were opened shortly thereafter by a Tender Opening Committee at the Procuring Entity’s Boardroom 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.** Mandatory Requirements/Preliminary Evaluation;
- ii.** Technical Evaluation; and
- iii.** Financial Evaluation.

1. Mandatory Requirements/Preliminary Evaluation

At this stage, the Evaluation Committee applied the criterion under Clause B. Preliminary Requirements at page 34 of the Tender Document. Having subjected the bids received to Preliminary Evaluation, found that only fifteen bidders qualified for Technical Evaluation.

2. Technical Evaluation

At this stage, the Evaluation Committee recorded the technical scores achieved by the remaining bidders as follows: -

Anne Muema Supplier	20.2
Top Ace Cleaning	48.2
Prime Revolution	24
Potters Spring	42
Sterling Grand Services	54.2
Hever the Co.	62.2
Flosa Kenya Ltd	41.2
Zeamily Co. Ltd	75.4
Flost Ventures	28.8
Stemar Comm Agencies	72.4
Aimat Co. Ltd	83
Edunt Solutions Ltd	37.4
Fidco Chemicals	90.4
Jubilant Cleaning Services Ltd	66.8
Shean General Supplies	46.6

The Evaluation Committee noted that four firms attained the minimum technical score of 70% specified in the Evaluation Criteria at page 35 of the Tender Document and were therefore qualified for Financial Evaluation.

3. Financial Evaluation

At this stage, the Evaluation Committee recorded the prices offered by the remaining four bidders that made it to Financial Evaluation in order to determine the lowest evaluated bidder in accordance with Clause 2.27.4 of Section II. Instructions to Tenderers of the Tender Document.

Recommendation

At the end of Financial Evaluation, the Evaluation Committee recommended award of the subject tender to M/s Stemar Commercial Agencies at its tender price of Kshs. 154,900.00 per month for being the lowest evaluated bidder.

Professional Opinion

In a Statement of Professional Opinion dated 15th June 2020, the Procuring Entity's Procurement Officer reviewed the Evaluation Report dated 15th June 2020 whilst explaining the manner in which the procurement process was undertaken. He concurred with the Evaluation Committee's recommendation that the subject tender be awarded to M/s Stemar Commercial Agencies at its tender price of Kshs. 154,900.00 per month for being the lowest evaluated bidder, therefore urged the Procuring Entity's Managing Director to approve the said recommendation. The Procurement Officer's Professional Opinion was approved on the same date of 15th June 2020.

Notification to Bidders

In letters dated 16th June 2020, the Procuring Entity's Managing Director notified the successful bidder and all unsuccessful bidders of the outcome of their bids.

THE REQUEST FOR REVIEW

M/s Jubilant Cleaning Services Ltd (hereinafter referred to as "the Applicant") lodged a Request for Review dated 29th June 2020 and filed on 30th June 2020 together with a Statement in Support of the Request for Review sworn and filed on even date and a Further Statement sworn on 10th July 2020 and filed on 14th July 2020, through the firm of A.E. Kiprono & Associates Advocates, seeking the following orders: -

- 1. An order annulling the award of the tender to Stemar Commercial Agencies at the tender sum of Kshs. 154,900/- per month;***
- 2. An order quashing the Respondent's decision contained in the letter dated 16th June 2020 declaring that the Applicant's technical bid did not attain the 70% threshold;***
- 3. An order directing the Respondent's to re-evaluate the Applicant's technical bid taking into consideration the Board's directions;***
- 4. In the alternative, an order substituting the Respondent's decision with the Board's decision awarding the tender to the Applicant at the tender sum of Kshs. 144,000/- per month;***

- 5. An order awarding costs of the request for review to the Applicant; and***
- 6. 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 and filed on 6th July 2020 through the firm of Kamotho, Njomo & Company Advocates whereas the Interested Party did not lodge a response to the Request for Review, despite having been notified on 7th July 2020 of the existence of the Request for Review and furnished with a copy of the pleadings filed by the Applicant

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 14th July 2020 whereas the 1st and 2nd Respondents lodged their Written Submissions dated 16th July 2020 and filed on 17th July 2020. The Interested Party did not file Written Submissions.

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 issue calls for determination: -

Whether the Procuring Entity evaluated the Applicant's bid at the Technical Evaluation Stage in accordance with section 80 (3) (a) of the Act read together with Article 227 (1) of the Constitution.

Before addressing the above issue, the Board would like to dispense with a sub-issue raised by the Applicant in its Request for Review.

The Procuring Entity notified the Applicant of the outcome of its bid in a letter dated 16th June 2020 stating as follows: -

"We refer to the above tender and regret to inform that you were not successful

You met all the preliminary requirements which were mandatory however you scored 66.8% on technical evaluation based on the questionnaire and supporting documents

The tender was awarded to Stemar Commercial Agencies...at a monthly cost of Kshs. 154,900.00 (One Hundred Fifty-Four Thousand Nine Hundred Only)

We thank you for your interest to do business with us"

In response, the Applicant addressed a letter dated 18th June 2020 to the Procuring Entity stating as follows: -

"We refer to the above tender and acknowledge with thanks receipt of your letter dated 16th June 2020 whose contents we have noted.

Please note that we are aggrieved with the contents of the said letter and intend to file a request for review at the Review Board. To that end, kindly but urgently let us have a summary of the evaluation of our technical document and in particular how the score of 66.8% was arrived at. Please note that we make this request pursuant to section 67 (4) of the Public Procurement and Asset Disposal Act, 2015.

We look forward to your response noting that time is of the essence.”

Having received the Applicant’s response letter, the Procuring Entity, through a letter dated 18th June 2020, informed the Applicant that it was reviewing the Applicant’s letter and would revert substantively within the statutory timelines. Subsequently in a letter dated 22nd June 2020, the Procuring Entity wrote to the Applicant stating as follows: -

“Reference is made to your letter dated 18th June 2020 and our response thereto of even date

Please find hereunder our substantive response as guided by sections 67 and 68 of the Public Procurement and Asset Disposal Act.

A. Tender Opening

The Tender Opening Committee was appointed as per section 78 of the PPDA. The Tender Opening Committee assembled at

the company reception on 21st May 2020 shortly after 11.00am, where the tender for FY 2020/2021 had been deposited by tenderers.

A total number of 658 envelopes and parcels (boxes/cartons) containing a total of 226 open tenders and 491 registration of suppliers documents were removed from the tender boxes. Some boxes contained water meter samples from some tenderers.

Under Tender No. NWSC/OT/17/2020/2021, Provision of Cleaning of Services which was reserved for Special Groups, a total of 17 Tender bids were opened.

B. Evaluation of Tenders

Evaluation of tenders is carried out by an Evaluation Committee consisting of 3 to 5 members as guided by section 46 of the PPDA. In this instance, the Committee was composed of 5 members.

Further, the criteria employed during the instant evaluation process is as detailed on pages 34 and 35 of the Original Tender Document for Tender No. NWSC/OT/17/2020/2021 as circulated to the public. The same indicate that the pass mark for evaluation as 70%.

Further, that the tenders are evaluated based strictly on the documents presented as against the Evaluation Criteria.

Notably page 35 thereof is part of your tender document and marked page (8) by hand indicating acceptance of the bid to be subjected to the set out evaluation criteria for the entire period of the tender.

On 2nd June 2020, all the tender documents were presented to the Evaluation Committee at the Company's Boardroom for evaluation. All the appointed committee members were present. Evaluation for Cleaning Services was undertaken on 4th June 2020 as follows: -

NWSC/OT/17/2020/2021									
Mandatory requirements	Bolym erp Soluti ons	Liste Prod uct	Spe wax Four Ltd	Ann Muem a Suppli ers	Top Ace Clean ing	Prime Revolu tion	Pott ers Spri ng	Sterli ng Gran d Servi ces	Hev er Co m Ltd
Valid Certificate of Incorporation/Business Registration	YES	YES	YES	YES	YES	YES	YES	YES	YES
Personal Identification Number (PIN)	YES	YES	YES	YES	YES	YES	YES	YES	YES
Certificate of registration of youth, women & PWD owned enterprises issued by the National Treasury/Other	NO	NO	NO	YES	YES	YES	YES	YES	YES
Current/Valid Tax Compliance Certificate for the	YES	YES	YES	YES	YES	YES	YES	YES	YES

group/enterprise									
Decision	Fail	Fail	Fail	Pass	Pass	Pass	Pass	Pass	Pass
Technical Evaluation				20.2	48.2	24	42	54.4	62.2
Decision				Fail	Fail	Fail	Fail	Fail	Fail

Mandatory requirements	Flosa Kenya Ltd	Zeamily Co. Ltd	Flost Ventures	Stemar Com Agencies	Aimat Co. Ltd	Edunt Solutions Ltd	Fidco Chemicals	Jubilent Cleaning Services	Shean General Suppliers
Valid Certificate of Incorporation/Business Registration	YES	YES	YES	YES	YES	YES	YES	YES	YES
Personal Identification Number (PIN)	YES	YES	YES	YES	YES	YES	YES	YES	YES
Certificate of registration of youth, women & PWD owned enterprises issued by the National Treasury/Other	YES	YES	YES	YES	YES	YES	YES	YES	YES
Current/Valid Tax Compliance Certificate for the group/enterprise	YES	YES	YES	YES	YES	YES	YES	YES	YES
Decision	Pass	Pass	Pass	Pass	Pass	Pass	Pass	Pass	Pass
Technical Evaluation	41.2	75.4	28.8	72.4	83	37.4	90.4	66.8	46.6
Decision	Fail	Pass	Fail	Pass	Pass	Fail	Pass	Fail	Fail

Through a letter dated 24th June 2020 addressed to the Procuring Entity, the Applicant stated as follows: -

"We refer to the above tender and acknowledge with thanks receipt of your letter dated 22nd June 2020 whose contents we have noted

Please note that we had requested to know the breakdown of how you arrived at 66.8% in the technical evaluation. Your response did not address our question hence we feel dissatisfied."

Kindly but urgently provide us with the summary of how we scored on each item of the technical evaluation of the tender"

In response to the letter dated 24th June 2020, the Procuring Entity addressed a letter dated 26th June 2020 to the Applicant citing sections 67 and 68 of the Act, whilst stating as follows: -

"Reference is made to previous communication on the matter resting with your letter dated 24th June 2020

" Please note that our response was guided by the provisions of sections 67 and 68 of the Public Procurement and Asset Disposal Act, 2015 (PPDA), the said section of the law was alluded to in your initial letter dated 18th June 2020.

For avoidance of doubt, the relevant sections are outlined below: -

.....

Our substantive response to the letter dated 22nd June 2020 is compliant with the provisions of the PPDA as it provided a summary of the opening of tenders, evaluation and comparison of tenders as carried out.

Kindly note that the procuring entity its employees and agents are statute bound to confidentiality above failing which there are penalties prescribed in law. "

The Board observes that the Applicant at paragraph 8 of its Statement in Support of the Request for Review avers that the Procuring Entity gave it a summary of the evaluation report but did not indicate how the Applicant's score of 66.8% was arrived at yet the Applicant had specifically requested for the same. At paragraph 13 of the Procuring Entity's Memorandum of Response, the Procuring Entity avers that it gave the Applicant a detailed summary of the proceedings of the opening of tenders, evaluation and comparison of tenders and the individual scores awarded to bidders during Technical Evaluation.

Having considered parties' submissions, the Board observes that the Applicant admits to the fact that the Procuring Entity gave it a summary of

the evaluation report save that, in the Applicant's view, the summary did not indicate how the Procuring Entity arrived at the score of 66.8%. In the Applicant's view, it ought to have been given a breakdown of the scores awarded on each criterion considered at the Technical Evaluation. The Board further notes that section 67 and 68 of the Act, that was cited by the Procuring Entity provide as follows: -

"Section 67 (1).....;

(2)

(3) This section does not prevent the disclosure of information if any of the following apply—

(a) the disclosure is to an authorized employee or agent of the procuring entity or a member of a board or committee of the procuring entity involved in the procurement proceedings;

(b) the disclosure is for the purpose of law enforcement;

(c) the disclosure is for the purpose of a review under Part XV or requirements under Part IV of this Act;

(d) the disclosure is pursuant to a court order; or

(e) the disclosure is made to the Authority or Review Board under this Act.

(4) Notwithstanding the provisions of subsection (3), the disclosure to an applicant seeking a review under Part XV shall constitute only the summary referred to in section 67 (2) (d) (iii)."

[i.e. section 68 (2) (d) (iii) of the Act]

Section 68 (1)

(2) The records for a procurement shall include—

(a)

(b)

(c)

(d) for each tender, proposal or quotation that was submitted—

(i) the name and address of the person making the submission;

(ii) the price, or basis of determining the price, and a summary of the other principal terms and conditions of the tender, proposal or quotation; and

(iii) a summary of the proceedings of the opening of tenders, evaluation and comparison of the tenders, proposals or quotations, including the evaluation criteria used as prescribed

Pursuant to section 67 (4) (c) and 68 (2) (d) (iii) of the Act, an applicant seeking a review is only entitled to **a summary of the proceedings of the opening of tenders, evaluation and comparison of the tenders, proposals or quotations, including the evaluation criteria used**. This prompted the Board to examine the summary of the evaluation report contained in the letter dated 22nd June 2020 addressed to the Applicant against what is contained in the original evaluation report dated 15th June 2020, which forms part of the confidential documents submitted to the Board, to determine whether what was provided to the Applicant satisfied the said provisions.

Having compared the two aforementioned documents, the Board observes that the Procuring Entity reproduced the two tables which contains the outcome of evaluation of all bidders at the Mandatory Requirements/Preliminary Evaluation stage and the scores awarded at the Technical Evaluation stage. The original Evaluation Report dated 15th June 2020 contains a determination whether bidders have passed or failed the Preliminary Evaluation Stage, the total scores awarded to the bidders who

made it to Technical Evaluation and a determination whether or not they have passed or failed the Technical Evaluation Stage, which is the same information contained in the letter dated 22nd June 2020 addressed to the Applicant. In essence, the Procuring Entity provided the Applicant with the information contained in the original Evaluation Report as is, even though it would have been more prudent for the Procuring Entity to provide the Applicant with its own outcome of Preliminary Evaluation and Technical Evaluation scores and not the outcome of evaluation of all other bidders.

It is evident that the original Evaluation Report does not contain a breakdown of scores awarded at the Technical Evaluation Stage. That notwithstanding, the Applicant was informed of its total score at the Technical Evaluation Stage in addition to the outcome of evaluation of other bidders and has challenged the manner in which the Technical Evaluation was conducted, since in the Applicant's view, the same was not objective and quantifiable.

The Board notes that, section 68 (2) (d) (iii) of the Act does not guide procuring entities whether **a summary of the proceedings of the opening of tenders, evaluation and comparison of the tenders, proposals or quotations, including the evaluation criteria** should contain a breakdown of scores awarded on each criterion considered during Technical Evaluation. The question whether or not the Procuring Entity conducted the said evaluation in an objective and quantifiable manner is an issue that can be addressed by this Board in the Request for Review in order

to guide the Procuring Entity whether or not it is supposed to have a breakdown of scores awarded on each criterion considered during Technical Evaluation.

The Applicant promptly exercised its right to administrative review under section 167 (1) of the Act, has admitted that it was given a summary of the Evaluation Report dated 15th June 2020 in terms of what was available to be given in the circumstances, having found that the original Evaluation Report does not contain a breakdown of scores at the Technical Evaluation Report. As a result, the Applicant suffered no prejudice noting further that the Board shall address the question whether the Procuring Entity evaluated the Applicant's bid at the Technical Evaluation Stage in accordance with section 80 (3) (a) of the Act. The Board's determination on this question will guide procuring entities going forward on the manner in which evaluation at the Technical Evaluation stage is conducted in order to ensure that the guiding principles under the Act and the Constitution can be achieved in so far as public procurement and asset disposal proceedings are concerned.

Turning to the main issue for determination, the Board observes that at paragraph 3 of the Statement in Support of the Request for Review, the Applicant avers that for a tenderer to succeed in the subject tender, such tenderer had to: -

- a) Meet the preliminary requirements at Clause 2.22 of the Tender Document;*

- b) Attain a pass mark of 70% at the Technical Evaluation Stage; and*
- c) Submit the lowest evaluated tender/price as per clause 2.27.4 of the Tender Document.*

The Applicant further states at paragraph 14 of its Request for Review that an objective evaluation of items C1, C2, C3, C4, C7, C8 and C9 of the Technical Evaluation Criteria at pages 34 and 35 of the Tender Document would have earned the Applicant a score of more than 70% at the Technical Evaluation Stage. The Applicant further submits that the Board has the mandate of examining the scores awarded to it by the Procuring Entity for the Board to arrive at its own findings.

At paragraph 7 of its Memorandum of Response, the Procuring Entity avers that in awarding scores at the Technical Evaluation Stage, each of the individual members of the Evaluation Committee gave his or her points based on the criteria spelt out in the Tender Document and thereafter, a mean score was awarded to each of the tenderer. The Procuring Entity further states at paragraph 22 of its Memorandum of Response that whereas the Applicant submitted documents required in the evaluation criteria the same did not automatically mean that the Applicant met all the requirements under C1 to C9 for the reason that the Evaluation Committee is required to review the Applicant's documents for relevance, weight and veracity. The Procuring Entity further states that the Applicant had a total of 334 marks which was

divided by 5 to arrive at the score of 66.8%. In the Procuring Entity's view, it complied with provisions of the Act in evaluating the Applicant's tender.

In determining whether the Procuring Entity conducted Technical Evaluation in accordance with section 80 (3) (a) of the Act, the Board observes that the definition of the word '**Review**' in the Black's Law Dictionary, is as follows:

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"A reconsideration, second view, examination, revision for purposes of correction."

Annika Engelbert in his Article, "**Administrative review systems in public procurement and their potential for anti-corruption impact: Kenya, Uganda and Tanzania in a comparative perspective**" (2009) explains the nature of review systems on public procurement in Kenya, Uganda and Tanzania whilst stating as follows: -

"Art. 9 (1) (d) United Nations Convention against Corruption (UNCAC) requires signatory states to set up at least a two-tier challenge system for public procurement, consisting of an administrative and a judicial review stage. Review systems, i.e. the legal mechanisms that allow suppliers to challenge public procurement decisions and to obtain relief where it can be shown that procurement rules were not adhered to, are considered an important compliance mechanism in general and a crucial anti-corruption instrument in particular."

The Board notes that Kenya is a signatory of the United Nations Convention against Corruption, 2004, which provides at Article 9 thereof as follows: -

"Article 9. Public procurement and management of public finances

1. Each State Party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption. Such systems, which may take into account appropriate threshold values in their application, shall address, inter alia:

- (a) The public distribution of information relating to procurement procedures and contracts, including information on invitations to tender and relevant or pertinent information on the award of contracts, allowing potential tenderers sufficient time to prepare and submit their tenders;***
- (b) The establishment, in advance, of conditions for participation, including selection and award criteria and tendering rules, and their publication;***
- (c) The use of objective and predetermined criteria for public procurement decisions, in order to facilitate***

the subsequent verification of the correct application of the rules or procedures;

(d) An effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established pursuant to this paragraph are not followed;

(e) Where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements.

It is worth noting that the United Nations Convention against Corruption requires State Parties to establish domestic review systems to ensure legal recourse and remedies are available to candidates and tenderers who have participated in a procurement process. This Board is an administrative review body established under section 27 (1) of the Act which provides that: -

"27. Establishment of the Public Procurement Administrative Review Board

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

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

"28. Functions and powers of the Review Board

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

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

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

The above provisions demonstrate that the Board is a specialized, central independent procurement appeals review board with its main function being reviewing, hearing and determining tendering and asset disposal disputes. In doing so, the Board is guided by Article 227 (1) of the Constitution which states as follows: -

"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.

(2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented..."

In reviewing the decision of a procuring entity, the Board determines whether such procuring entity applied a system that is fair, equitable, transparent, competitive and cost-effective. The Board further notes that the Act of Parliament referred to in Article 227 (2) of the Constitution (i.e. the 2015 Act) specifies bodies that have different functions in a procurement process and in particular, an evaluation committee is established by an accounting officer to undertake certain functions including the following: -

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

(2);

(3);

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

(a);

(b);

(c);

(d);

(e) adopt a process that shall ensure the evaluation process utilized adheres to Articles 201 (d) and 227 (1) of the Constitution.”

Further section 80 (1), (2) and (3) of the Act provides that: -

- "(1) The evaluation committee appointed by the accounting officer pursuant to section 46 of the Act shall evaluate and compare the responsive tenders***
- (2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents...***
- (3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2):***
-
- (a) the criteria shall, to the extent possible, be objective and quantifiable***

In **Miscellaneous Application No. 309 of 2018, Republic v Public Procurement Administrative Review Board & 2 others; Ex-Parte Central Kenya Fresh Merchants Limited [2018] eKLR**, the Court held that: -

Once a particular administrative process is prescribed by law, it is subject to the norms of procedural fairness codified in the Fair Administrative Action Act. Deviations from the procedure will be assessed in terms of those norms of the constitutional and statutory requirements, conformity with the Regulations, conformity with tender requirements and compliance with the procedural fairness. Where the administrators depart from procedures, the basis for doing so will have to be reasonable

and justifiable, and the process of change must be procedurally fair.

Having considered the foregoing provisions and the court's finding in the above case, it is the Board's considered view that in conducting a review of the Procuring Entity's decision, the Board's role is to determine whether the Procuring Entity's Evaluation Committee properly discharged its functions under section 46 and 80 of the Act in accordance with the principle of fairness provided in Article 227 (1) of the Constitution. Therefore, as regards the manner in which evaluation is conducted at the Technical Evaluation Stage, the Board determines whether the criteria used was objective and quantifiable to the extent that the scores awarded to a bidder on each criterion considered at the Technical Evaluation Stage ought to be fair. However, the Board does not award scores to a bidder since this is a function of an evaluation committee.

The Board studied the Tender Document and notes that Clause C. General Requirements of Registration of Suppliers at pages 34 and 35 of the Tender Document provides for the criteria to be applied at the Technical Evaluation Stage as follows: -

EVALUATION CRITERIA II – General Public

The method of evaluation will be Merit Point System

The criteria of evaluation and the points to be awarded on each criterion will be as follows: -

.....

C.	GENERAL REQUIREMENTS	
C1.	Supplier Availability: Postal Address (2) Telephone Number (2) Contact Person (2) Website (2) Email Address (2)	10
C2.	Business Ownership: Company/Business Profile -Disclosure of Directors/Partners /Sole Proprietor	10
C3.	Financial Capability: Audited Accounts for the last 2 years. Attach Bank Statements for the last 6 months	20
C4.	Financial Stability – Evidence of profit making in the attached 2 years audited reports	10
C5.	Experience: Indicate having undertaken similar assignment with at least 3 firms (Attach Proof: copies of LPOs, Letters of Award, Completion Certificates, Contracts)	10
C6	Past Performance with NYEWASCO or any other Organization. (Attach copies of letters of recommendation with full details of contact person(s))	10
C7	Supply Capacity: Maximum Volume of Business handled in the (last two years) - Kshs. 2,000,001.00 and above (12) - Kshs. 1,500,001.00 – Kshs. 2,000,000.00 (9) - Kshs. 1,000,001.00 – Kshs. 1,500,000.00 (6) - Kshs. 500,000.00 – Kshs.1,000,000.00 (3)	12
C8	Credit Period: Indicate Credit Period willing to offer - 90 Days (12) - 60 Days (9) - 30 Days (6) - Less than 30 days (3)	12
C9	Eligibility & Disclosure of litigation history (Must be commissioned)	6
TOTAL		100

On the other hand, the Evaluation Report dated 15th June 2020 contains overall technical scores awarded to bidders who made it to Technical Evaluation as follows: -

	Ann Muema Suppliers	Top Ace Cleaning	Prime Revolution	Potters Spring	Sterling Grand Services	Hever Com Ltd
Technical Evaluation	20.2	48.2	24	42	54.4	62.2
Decision	Fail	Fail	Fail	Fail	Fail	Fail

	Flosa Kenya Ltd	Zeamily Co. Ltd	Flost Ventures	Stemar Comm Agencies	Aimat Co. Ltd	Edunt Solutions Ltd	Fidco Chemicals	Jubilant Cleaning Services	Shean General Suppliers
Technical Evaluation	41.2	75.4	28.8	72.4	83	37.4	90.4	66.8	46.6
Decision	Fail	Pass	Fail	Pass	Pass	Fail	Pass	Fail	Fail

It is evident that whereas the Tender Document specified the total number of scores to be awarded on each criterion considered during Technical Evaluation, the Procuring Entity did not indicate the scores awarded to the Applicant on each of the nine (9) criteria evaluated at the Technical Evaluation Stage. It is the Board's considered view that an objective and quantifiable criteria requires the Evaluation Committee to indicate the scores awarded to the Applicant in the nine criteria and such scores will be added and converted to a percentage upon conclusion of the Technical Evaluation to arrive at the Applicant's overall technical score. The Tender Document gave a breakdown of the total scores on each of the nine criteria outlined hereinabove. This provided guidance to bidders so that they attach adequate

documentation in their respective bids that would justify an award of scores that were already enumerated (through a breakdown of scores) in the Tender Document.

Article 9 (1) (c) of the United Convention against Corruption requires the Procuring Entity to use objective criteria in order to facilitate the subsequent verification of the correct application of the rules or procedures, i.e. the criteria specified in the Tender Document. The Procuring Entity only provided an overall technical score to the Applicant's bid to the effect that there is no way of verifying if the Procuring Entity fairly evaluated the Applicant's bid on each criterion at the Technical Evaluation Stage.

One of the reasons that section 80 (2) of the Act requires the Procuring Entity to apply the procedures and criteria specified in the Tender Document during evaluation is to safeguard the integrity of the government procurement process. In this instance, the criteria and procedure specified in the Tender Document was that each criterion at the Technical Evaluation Stage had its own specified score. In total disregard of its own Tender Document, the Procuring Entity proceeded to award bidders an overall technical score without first awarding scores on each of the 9 criterion at the Technical Evaluation Stage.

It is the Board's considered view that, awarding scores on each of the criteria considered during Technical Evaluation is aimed at preventing corruption and

collusion between a procuring entity and bidders. The crucial point to note is that a procuring entity may act in a mischievous way by colluding with a bidder or bidders in deciding the overall score to be awarded to ensure certain bidders do not proceed to the Financial Evaluation Stage. Had there been a breakdown of scores, it is possible to interrogate those scores against the documents provided in the Applicant's original bid and assess whether the Applicant was fairly evaluated. Secondly, it would be easier to compare the documentation provided by other bidders and those provided by the Applicant in order to determine whether they all competed on an equal footing during evaluation.

It is in the public interest that the Procuring Entity complies diligently with provisions of the Tender Document read together with section 80 (3) (a) of the Act and Article 227 of the Constitution. The foregoing provisions assist in promoting transparency and accountability in procurement processes and the prevention of corrupt practices. The Procuring Entity failed to adhere to the above provisions and this Board is persuaded that evaluation of bids at the Technical Evaluation Stage was neither objective nor quantifiable.

Accordingly, the Board finds that the Procuring Entity failed to evaluate the Applicant's bid at the Technical Evaluation Stage in accordance with section 80 (3) (a) of the Act read together with Article 227 (1) of the Constitution.

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 Unsuccessful bid dated 16th June 2020 addressed to the Applicant with respect to Tender No. NWSC/OT/17/2020/2021 for Provision of Cleaning Services, be and is hereby cancelled and set aside.**
- 2. The Procuring Entity's Letter of Notification of Award dated 16th June 2020 addressed to the Interested Party with respect to the subject tender, be and is hereby cancelled and set aside.**
- 3. The Procuring Entity is hereby directed to reinstate the Applicant's bid and all other bidders that made it to Technical Evaluation, at the Technical Evaluation Stage and conduct a re-evaluation at the Technical Evaluation Stage.**
- 4. Further to Order No. 3 above, the Procuring Entity is hereby directed to proceed with the procurement process to its logical conclusion including the making of an award within fourteen (14) days from the date of this decision, taking into consideration the Board's findings in this case.**

5. 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