

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 148/2019 OF 31<sup>ST</sup> DECEMBER 2019**

**BETWEEN**

**JUBILANT CLEANING SERVICES LIMITED.....APPLICANT**

**AND**

**NYERI WATER &**

**SANITATION COMPANY LIMITED.....RESPONDENT**

Review against the decision of the Nyeri Water & Sanitation Company Limited with respect to Tender No. NWSC/OT/23/2019/2020 for Provision of Cleaning Services at Kamakwa Treatment Plant

**BOARD MEMBERS**

- |                         |              |
|-------------------------|--------------|
| 1. Ms. Faith Waigwa     | -Chairperson |
| 2. Mr. Alfred Keriolale | -Member      |
| 3. Mr. Ambrose Ngari    | -Member      |
| 4. Ms. Rahab Chacha     | -Member      |

**IN ATTENDANCE**

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

## **PRESENT BY INVITATION**

### **APPLICANT**

1. Mr. A. G. Mugo
2. Mr. James Maingi
3. Mr. Samuel Kariuki

### **-JUBILANT CLEANING SERVICES LIMITED**

- Advocate, Gikenye Mugo & Rienye Advocates
- Managing Director
- Operations Director

### **1<sup>ST</sup> AND 2<sup>ND</sup> RESPONDENTS**

1. Ms. Keziah Nyambura
2. Mr. Peter Gichaaga
3. Mr. Andrew Karani
4. Mr David Ndumo

### **-NYERI WATER & SANITATION COMPANY LIMITED**

- Legal Manager
- Managing Director
- Procurement Officer
- Head of Corporate Service

## **BACKGROUND TO THE DECISION**

### **The Bidding Process**

The Nyeri Water and Sanitation Company Limited (hereinafter referred to as "the Procuring Entity") advertised Tender No. NWSC/OT/23/2019/2020 for Provision of Cleaning Services at Kamakwa Treatment Plant (hereinafter referred to as "the subject tender"), in The Standard Newspaper on 11<sup>th</sup> October, 2019. Interested eligible bidders were directed to download the tender documents from the Procuring

Entity's website [www.nyewasco.ke](http://www.nyewasco.ke) and email their names, contact details and tender number to [info@nyewasco.co.ke](mailto:info@nyewasco.co.ke).

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

A total of twenty fourteen (14) bidders' submitted bids and the same were opened on 28<sup>th</sup> October 2019 in the presence of bidders and their representatives who chose to attend and bids were recorded as follows:

<b>Item</b>	<b>Bidder(s)</b>
1.	Spewax Four Ltd
2.	Fidotech Solution
3.	Cecilia Holdings Ltd
4.	Nitrogen Cleaning
5.	Prime Revolution Works
6.	Jubilant Cleaning Services
7.	Trucare
8.	Sterling Grand Services
9.	Easy Foam Detergents
10.	Zeamyly
11.	Mimak
12.	Terrenial Investment Ltd
13.	Jubilant Cleaning Services Ltd
14.	Freshness Hygiene Services

### **Evaluation of Bids**

The Evaluation Committee conducted evaluation of bids in the following two stages:-

- Technical Evaluation;
- Financial Evaluation.

## 1. Preliminary/Technical Evaluation

At this stage of evaluation, bidders were required to submit the following mandatory items to enable the Procuring Entity to determine the responsiveness of their bids.

The validity of **Tax compliance certificates** and **AGPO certificates** were further verified online through [www.kra.go.ke](http://www.kra.go.ke) and [www.agpo.go.ke](http://www.agpo.go.ke) websites respectively.

The results were as follows: -

Item		Valid incorporation cert/registration cert	Pin Copy attached	AGPO Certificate	Valid TCC	VERDICT
1.	Spewax Four Ltd	Yes	Yes	No	No	<b>Fail</b>
2.	Fidotech Solution	Yes	Yes	No	Yes	<b>Fail</b>
3.	Cecilia Holdings Ltd	Yes	Yes	Yes	Yes	<b>Pass</b>
4.	Nitrogen Cleaning	Yes	Yes	Yes	Yes	<b>Pass</b>
5.	Prime Revolution Works	Yes	Yes	Yes	Yes	<b>Pass</b>
6.	Jubilant Cleaning Services	Yes	Yes	No	Yes	<b>Fail</b>
7.	Trucare	Yes	Yes	Not Verifiable	No	<b>Fail</b>
8.	Sterling Grand Services	Yes	Yes	No	Yes	<b>Fail</b>
9.	Easy Foam Detergents	Yes	Yes	No	Yes	<b>Fail</b>
10.	Zeamyly	Yes	Yes	No	Yes	<b>Fail</b>

Item		Valid incorporation cert/registration cert	Pin Copy attached	AGPO Certificate	Valid TCC	VERDICT
11.	Mimak	Yes	Yes	No	No	<b>Fail</b>
12.	Terrenial Investment Ltd	Yes	Yes	Yes	Yes	<b>Pass</b>
13.	Jubilant Cleaning Services Ltd	Yes	Yes	No	Yes	<b>Fail</b>
14.	Freshness Hygiene Services	Yes	Yes	No	Yes	<b>Fail</b>

## 2. Financial Evaluation

Four (4) bids qualified for financial evaluation. At this stage of evaluation, bid prices were compared and evaluated to determine the lowest evaluated responsive bid.

The results were as follows: -

Item	Applicant	Quoted Amount (Ksh)
1.	Nitrogen	174,000
2.	Cecilia Holdings	250,000
3.	Terrenial	117,000
4.	Prime Revolution Works	80,000

### The Evaluation Committee's Recommendation

In view of the evaluation process, the Evaluation Committee recommended award of the subject tender to **M/s Prime Revolution Works of P.O Box 666-10100 Nyeri** for the award of Cleaning Services for being the lowest evaluated responsive bidder, at a monthly cost of **Ksh. 80,000.00 (Eighty Thousand Shillings Only)**

The Evaluation Committee further observed the need to align the technical evaluation tool to the technical specifications requirement.

### **Professional Opinion**

The Head of Procurement reviewed the Evaluation Report and concurred with the recommendation of award made by the Evaluation Committee which recommendations were approved by the Procuring Entity's Managing Director on 9<sup>th</sup> December 2019.

### **THE REQUEST FOR REVIEW**

M/s Jubilant Cleaning Services Limited (hereinafter referred to as "the Applicant"), lodged a Request for Review dated and filed on 31<sup>st</sup> December 2019 (hereinafter referred to as "the Request for Review") together with a Supporting Affidavit sworn and filed on 31<sup>st</sup> December 2019 (hereinafter referred to as "the Applicant's Affidavit").

In response, Nyeri Water and Sanitation Company Limited (hereinafter referred to as "the Procuring Entity") filed a Memorandum of Response dated and filed on 9<sup>th</sup> January 2020 (hereinafter referred to as "the Procuring Entity's Response").

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

- i. An order for review of the Respondent's decision made on 17<sup>th</sup> December 2019 to quash and/or set aside the same;***
- ii. An order for cancellation of any eventual award arising from Tender No. NWSC/OT/23/2019/2020;***
- iii. An order that the Applicant be declared as the successful bidder of Tender Number NWSC/OT/23/2019/2020;***
- iv. An order for costs of this proceeding to be borne by the Respondent.***

During the hearing, the Applicant was represented by Mr. Mugo on behalf of the firm of Gikenye, Mugo & Rienye Advocates whereas the Procuring Entity was represented by its Legal Manager, Ms. Nyambura.

## **PARTIES' SUBMISSIONS**

### **The Applicant's Submissions**

In his submissions, Counsel for the Applicant, Mr Mugo, fully relied on the Request for Review, the Applicant's Affidavit and supporting documentation thereto.

Mr Mugo submitted that the Applicant's Request for Review was based on two grounds that is, the Applicant was not notified of the successful bidder in the subject tender and that the Procuring Entity rejected the Applicant's bid on the basis that its AGPO certificate was invalid.

Mr Mugo submitted that the Procuring Entity erred in that it did not use the proper website to verify the Applicant's AGPO certificate. Mr Mugo submitted that the Applicant had annexed a sample search result from the correct website, that is, [www.ppoa.go.ke](http://www.ppoa.go.ke) which clearly stated that it verified certificates issued from October 2018. It was therefore the Applicant's submission that the Procuring Entity's verification through the AGPO website was wrong and therefore the decision to find the Applicant's tender non-responsive was based on wrong data.

Mr. Mugo submitted that a search result from the PPOA website, which was annexed to the Applicant Request for Review as exhibit JKM4 clearly demonstrated that the Applicant's AGPO certificate was issued on 15<sup>th</sup> January 2018 and was valid as at the submission date.

Mr Mugo submitted that this notwithstanding and without prejudice to its earlier submission, Mr. Mugo submitted that according to Clause 2.22.4 on page 15 of the Tender Document, the Procuring Entity's determination of a tender's responsiveness was to be based on the contents of the tender itself without recourse to seek evidence and therefore by going to verify this certificate, the Procuring Entity was in violation of the aforementioned clause.

Mr. Mugo contended that the Procuring Entity should have taken the Applicant's documents at face value without verifying its contents at the preliminary stage and any verification should have been done at a later stage in order to give the Applicant an opportunity to clarify as provided



for under the Public Procurement and Asset Disposal Act (hereinafter referred to as "the Act").

In response to an enquiry from the Board with respect to prayer number three in the Applicant's Request for Review, as to whether the Applicant wanted the Board to sit as an evaluation committee, Mr Mugo submitted that the Applicant sought to withdraw the prayer in question.

Finally, Mr Mugo reiterated the prayers as sought from the Board and urged the Board to grant any other order that it may deem necessary to grant in the Request for Review application.

### **The 1<sup>st</sup> & 2<sup>nd</sup> Respondents'/Procuring Entity's Submissions**

In her submissions, the Procuring Entity's Legal Manager, Ms. Nyambura, fully relied on the Procuring Entity's Response and supporting documentation thereto.

In response to the issue of the Procuring Entity's failure to notify the Applicant of the identity of the successful bidder, Ms Nyambura submitted that the Applicant did not request from the Procuring Entity such information and if the Applicant had made such a request, the Procuring Entity would have availed the same.

As far as the AGPO certificate was concerned, Ms Nyambura submitted that verification of the same was conducted at the preliminary

evaluation stage. In her submissions, Ms Nyambura explained that at the preliminary evaluation stage, the Procuring Entity checked on the documents as availed by bidders as per the evaluation criteria.

Ms Nyambura submitted that the purpose of due diligence was to confirm whether a bidder/supplier existed in the first place and whether they had a physical office or shop and also to check whether the documents as submitted to the Procuring Entity by the bidder were valid. She submitted that due diligence ought to be conducted at technical evaluation depending on the nature of the tender.

As to the verification of the Applicant's AGPO certificate, Ms. Nyambura submitted that the Procuring Entity at the time of evaluation attempted to verify the Applicant's AGPO certificate and it was not possible to verify the same on both the PPOA and the AGPO websites. She submitted that the details on the AGPO certificate on the website did not match the details on the AGPO certificate submitted to the Procuring Entity. As a result, the Procuring Entity could not verify the Applicant's AGPO certificate and on this basis the Applicant was disqualified at this stage of evaluation.

Ms. Nyambura submitted that in the unlikely event that the Board finds that the Procuring Entity erred in its evaluation of the Applicant's bid, the Board should direct that the Applicant's bid be readmitted for re-evaluation and should not order for re-advertising of the subject tender.

## **The Applicant's Rejoinder**

In a rejoinder, Mr. Mugo contended that no verification was conducted by the Procuring Entity using the PPOA website as the said website did not verify an AGPO certificate using a certificate number. Mr. Mugo submitted that the PPOA website provided a list of companies with valid AGPO certificates and their details, which can be downloaded from the website. In support of its submission, Mr Mugo submitted that the Applicant had annexed a sample of a search result from the PPOA website to its review application for the Board's consideration. Counsel therefore contended that a search on the AGPO website would not have yielded any result with respect to verification of the Applicant's AGPO certificate, contrary to the Procuring Entity's submissions.

In conclusion, Mr. Mugo urged the Board to find merit in the Applicant's Request for Review Application and grant the orders as sought therein.

## **BOARD'S DECISION**

The Board has considered each of the parties' cases, the documents before it, including confidential documents submitted to it pursuant to section 67 (3) (e) of the Public Procurement and Asset Disposal Act (hereinafter referred to as "the Act") and the oral submissions by all parties to the Request for Review.

The issues for determination are as follows:-

***I. Whether the Procuring Entity issued the Applicant with a letter of notification of unsuccessful bid that meets the threshold of section 87 (3) of the Act;***

***II. Whether the Procuring Entity evaluated the Applicant's bid in accordance with section 80 (2) of the Act as read together with Article 227 (1) of the Constitution of Kenya 2010 with respect to the following mandatory requirement in the Tender Document:***

*a) "A3 - Certificate of registration of youth, women and PWD owned enterprises issued by the National Treasury/Other institution (Attach copy)".*

***III. Whether the Applicant is entitled to the orders as sought in the Request for Review***

The Board will now proceed to determine the issues framed for determination as follows:

A brief background to the Request for Review is that the Procuring Entity advertised the subject tender on 11<sup>th</sup> October 2019 and invited interested and eligible bidders to submit bids in response to the subject tender.

By the bid submission deadline of 28<sup>th</sup> October 2019, the Procuring Entity received a total of fourteen (14) bids which were opened and read out by the Procuring Entity's Tender Opening Committee in the presence of bidders and their representatives.

At the conclusion of the evaluation process, the Procuring Entity's Evaluation Committee recommended award of the tender to M/s Prime Revolution Works Limited for having the lowest evaluated responsive bid which was approved by the Procuring Entity's Accounting Officer, having been reviewed by the Head of Procurement function. The successful bidder including all unsuccessful bidders, were duly notified of the outcome of their bids.

The Applicant's notification of unsuccessful bid from the Procuring Entity dated 17<sup>th</sup> December 2019 stated as follows: -

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

***You did not meet all the preliminary requirements which were mandatory. Your AGPO certificate was verified online through [www.agpo.go.ke](http://www.agpo.go.ke) website and was found to be invalid.***

***We thank you for your interest to do business with us and how that you will be successful next time."***

Aggrieved with the Procuring Entity's decision, the Applicant moved the Board through this Request for Review.

The Applicant contended that the Procuring Entity failed to disclose the successful bidder in its letter of notification of unsuccessful bid dated 17<sup>th</sup> December 2019.

In response, the Procuring Entity argued that the Applicant did not request the Procuring Entity to disclose the successful bidder of the subject tender and if the Applicant had made such a request, the Procuring Entity would have duly provided the necessary details in its response to the Applicant.

In its determination of this issue, the Board studied section 87 of the Act which 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) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.***
- (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.***
- (4) For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security.” [Emphasis by Board]***

Section 87 of the Act is instructive on the manner in which notification ought to be carried out. A Procuring Entity must notify, in writing, the bidder who submitted the successful tender, that its tender was successful before the expiry of the tender validity period. This section further requires that in the same breath, a Procuring Entity must also notify other bidders who participated in the subject tender that their respective bids were not successful.

Moreover, a procuring entity’s notification of unsuccessful bid to a bidder should disclose the reasons why its bid was unsuccessful and further disclose the successful bidder in the procurement process therein.

The requirement to disclose the unsuccessful bidder of a subject tender as stipulated under section 87 (3) of the Act, affords unsuccessful bidders the opportunity to establish if the successful bidder satisfied the eligibility criteria as set out in the Tender Document, that is, whether the successful bidder was qualified to participate in the subject tender and challenge the same if need be.

The obligation of a procuring entity to disclose the identity of a successful bidder in addition to the amount the tender was awarded is central to the principle of transparency as outlined in Article 227 of the Constitution which provides that: -

***"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."* [Emphasis by the Board]**

This means that all processes within a procurement system, including notification of unsuccessful bid, must be conducted in a fair, equitable and transparent manner.

The Board notes, from the contents of the Applicant's letter of notification of unsuccessful bid, the Procuring Entity did not disclose the identity of the successful bidder in the subject tender. However, despite the Procuring Entity's omission, the Applicant was able to approach this Board within the statutory period imposed under section 167 (1) of the Act to challenge the Procuring Entity's decision given that the reason



why the Applicant's bid was disqualified was disclosed therein, hence the Applicant suffered no prejudice.

This does not mean that a procuring entity is at liberty to choose whether or not to comply with express provisions of the Act.

The Board finds that the Procuring Entity's letter of notification of unsuccessful bid issued to the Applicant does not meet the threshold of section 87 (3) of the Act since the Procuring Entity failed to disclose the successful bidder of the subject tender.

The Board will now proceed to the second issue for determination: -

***II. Whether the Procuring Entity evaluated the Applicant's bid in accordance with section 80 (2) of the Act as read together with Article 227 (1) of the Constitution of Kenya 2010 with respect to the following mandatory requirement in the Tender Document:***

- a) "A3 - Certificate of registration of youth, women and PWD owned enterprises issued by the National Treasury/Other".*

Mandatory Requirement A3 of the Evaluation Criteria I for AGPO Registered Special Groups (Youth, Women and PWD only) provides as follows: -

***"A3 – Certificate of Registration of youth, women and PWD owned enterprises issued by the National Treasury/Other (Attach copy)"***

According to this mandatory requirement, bidders were required to submit a certificate of registration of youth, women and PWD owned enterprises issued by the National Treasury or other institution.

In its submissions, the Applicant argued that the Procuring Entity erred in finding that the Applicant did not satisfy the aforementioned mandatory requirement in the subject tender on the basis that the Procuring Entity verified the Applicant's AGPO certificate online through [www.agpo.go.ke](http://www.agpo.go.ke) website and found the same to be invalid.

The Applicant submitted that the Procuring Entity ought to have verified the same through the Public Procurement Oversight Authority (now known as the Public Procurement Regulatory Authority) website, that is, [www.ppoa.go.ke](http://www.ppoa.go.ke) and not the AGPO website, which only verifies AGPO certificates issued post October 2018.

Further, the Applicant referred the Board to Clause 2.22.4 of the Tender Document which states as follows: -

***"Prior to the detailed evaluation, pursuant to paragraph 2.23 the Procuring Entity will determine the substantial responsiveness of each tender to the tender documents. For purposes of these paragraphs, a substantially***

***responsive tender is one, which conforms to all the terms and conditions of the tender documents without material deviations. The Procuring Entity's determination of a tender's responsiveness is to be based on the contents of the tender itself without recourse to extrinsic evidence.***

Referring to the abovementioned clause, the Applicant submitted that the Procuring Entity' determination of a tender's responsiveness at Preliminary Evaluation should be based on the contents of the tender itself without recourse to extrinsic evidence. The Applicant argued that the Procuring Entity should not have attempted to verify the Applicant's AGPO certificate at the Preliminary Evaluation Stage which in its view amounted to resorting to extrinsic evidence in its evaluation of the Applicant's bid. It was the Applicant's submission that the Procuring Entity ought to have merely examined the Applicant's AGPO certificate at face value and made a determination on the same.

In the Applicant's view, due diligence or verification of bid documents ought to be conducted either at tender opening or at a later stage of evaluation in order to provide an opportunity to bidders to clarify their documents if need be, and for the Procuring Entity to satisfy itself as to the authenticity of the documents submitted by the bidders.

On this basis therefore, the Applicant contended that the Procuring Entity ought to have sought clarification from the Applicant with respect

to its AGPO certificate in order to determine whether the AGPO certificate in question was valid or not.

In response, the Procuring Entity submitted that it conducted due diligence of all the documents submitted by bidders including the Applicant's AGPO certificate at Preliminary Evaluation. The Procuring Entity contended that it was not possible to verify the authenticity of the Applicant's AGPO certificate on either the AGPO website or the PPOA website as the Applicant's AGPO certificate number did not yield positive results on either website.

The Procuring Entity contended that in any event, the Applicant herein would not have emerged the lowest evaluated bidder if its bid had proceeded to financial evaluation, as it did not submit the lowest bid among the fourteen bids as received by the Procuring Entity.

In its determination of this issue, the Board finds it necessary to first establish what a due diligence exercise is, and its purpose.

Black's Law Dictionary, Ninth Edition at page 523 defines 'due diligence as ***"the diligence reasonably expected from, and ordinarily exercised by a person who seeks to satisfy a legal requirement or discharge an obligation"*** with the term 'diligence' meaning ***"the attention and care required from a person in a given situation"***.

A due diligence exercise is therefore a fundamental element of a procurement process that assists a procuring entity to exercise the attention and care required to satisfy itself that the lowest evaluated responsive tenderer can execute a tender.

Further, section 83 of the Act provides as follows: -

- "(1) An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act.***
- (2) The conduct of due diligence under subsection (1) may include obtaining confidential references from persons with whom the tenderer has had prior engagement.***
- (3) To acknowledge that the report is a true reflection of the proceedings held, each member who was part of the due diligence by the evaluation committee shall—***
  - (a) initial each page of the report; and***
  - (b) append his or her signature as well as their full name and designation."***

Accordingly, a procuring entity may elect to conduct a due diligence exercise to satisfy itself of the qualifications of the tenderer determined to be the lowest evaluated responsive tenderer.

In conducting such a due diligence exercise, a procuring entity must bear in mind that when it advertises a tender, bidders submit their tender documents attaching evidence of their qualifications.

In arriving at the responsive tenderer, the procuring entity considers documents that support the eligibility and mandatory requirements specified in the Procuring Entity's Tender Document.

Section 79 of the Act is instructive on this aspect as it states:-

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

These eligibility and mandatory documents/requirements are considered at the Preliminary and Technical Evaluation stages after which Financial Evaluation is conducted. During Financial Evaluation in open tenders, where Request for Proposal method of tendering is not used, award of a tender is based on the criteria of lowest evaluated responsive tender. Hence, when the accounting officer awards the tender, he or she does so to the tenderer determined to have submitted the lowest evaluated responsive tender.

This means the lowest evaluated responsive tenderer is determined by looking at its qualifications that meet the minimum eligibility and mandatory requirements in the Tender Document.

When conducting a due diligence exercise to verify and confirm the qualifications of the lowest evaluated responsive tenderer, such due diligence would be based on documents and qualifications considered during evaluation that met the minimum eligibility and mandatory requirements of the Tender Document.

Section 83 (3) of the Act as outlined hereinabove, further stipulates that a due diligence report must be prepared, outlining how due diligence was conducted and the findings of the process. The said report is signed only by members of the Evaluation Committee who took part in the due diligence exercise, and they must include their designation. Further, the report must be initialled on each page.

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

If the lowest evaluated tenderer is disqualified after due diligence, this fact must be noted in the Due Diligence Report with reasons. In view of the findings of this report that the lowest evaluated tenderer be disqualified after due diligence, the Evaluation Committee then recommends award to the next lowest evaluated tenderer, subject to a similar due diligence process conducted on such tenderer, as outlined hereinbefore.

This procedure is applied until the successful tenderer for award of the tender is determined.

In the instant case, the Board studied the Procuring Entity's evaluation report where the Evaluation Committee outlined the stages of evaluating bids under the subject tender, that is: -

- a) Preliminary Evaluation, which included Due Diligence and;
- b) Financial Evaluation

On page 9 of the Evaluation Report, the Evaluation Committee explained as follows with regard to the due diligence process: -

***"The validity of Tax compliance certificate and AGPO certificates were verified online through [www.kra.go.ke](http://www.kra.go.ke) and [www.agpo.go.ke](http://www.agpo.go.ke)"***

From the foregoing, it is evident that due diligence was conducted on all bidders during preliminary evaluation and prior to financial evaluation. In



this instance, a due diligence exercise ought to have been conducted by the Procuring Entity's Evaluation Committee after tender evaluation but prior to award of the tender to confirm and verify the qualifications of the tenderer determined by the Procuring Entity to have submitted the lowest evaluated responsive tender. This is pursuant to section 83 (1) of the Act which stipulates that a due diligence exercise is conducted on the lowest evaluated responsive tender to confirm and verify qualifications of such tenderer.

With respect to the due diligence exercise that was conducted by the Procuring Entity, the Board heard submissions from the Applicant that the Procuring Entity ought to have verified the certificate of registration of youth, women and PWD owned enterprises issued by the National Treasury or other institution or what it referred to as the AGPO certificate through the PPOA website and not the AGPO website, which the Applicant submitted, only verifies AGPO certificates issued post October 2018.

The question now before the Board is what is a certificate of registration of youth, women and PWD owned enterprises issued by the National Treasury or other institution and what is the process of verification?

The Board first studied Article 260 of the Constitution of Kenya, 2010 which defines a marginalised group as follows: -

**"marginalised group means a group of people who, because of laws or practices before, on, or after the**

**effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27(4)”**

This means that a marginalised group is a group of people who because of certain laws or practices were or are disadvantaged by discrimination on one or more grounds outlined under Article 27 (4) of the Constitution.

Article 27 (4) of the Constitution outlines these grounds to include: -

***“The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.”***

According to the above article, these grounds of discrimination include race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. This Article obligates the state and state organs to address the needs of the vulnerable in the society including children, youth, women, older persons, persons with disabilities and marginalized communities.

Further, Article 227 (2) (b) of the Constitution of Kenya, 2010 provides for the development of a framework under the Public Procurement and Asset Disposal Act, 2015 within which policies relating to procurement and asset disposal shall be implemented and may provide for: -

***"the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination"***

The Act, in its interpretation section defines 'disadvantaged groups' as provided for under Article 227 (2) (b) of the Constitution as follows: -

***"persons denied by mainstream society access to resources and tools that 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 of groups or categories or persons without regard to their individual qualities, and includes enterprises in which a majority of their members or shareholders are youth, women, person with disability or categories as shall be prescribed."***

Accordingly, the Act defines disadvantaged groups as persons denied by mainstream society access to resources and tools useful for their survival or individuals subjected to prejudice or cultural bias because of their identities as members of groups or categories without regard to their individual qualities. This section further provides that disadvantaged groups include enterprises owned by youth, women and persons with disabilities.

In furtherance of the constitutional requirement to develop a framework for the protection and advancement of enterprises owned by youth, women and persons with disabilities, section 53 of the Act directs

government institutions in the planning of their procurement and asset disposal processes to:

***"...reserve a minimum of thirty per cent of the budgetary allocations for enterprises owned by women, youth, persons with disabilities and other disadvantaged groups"***

According to the Public Procurement Regulatory Authority (hereinafter referred to as "PPRA") website [www.ppra.go.ke](http://www.ppra.go.ke), His Excellency the President, Uhuru Kenyatta on 16<sup>th</sup> October, 2013 officially launched the Access to Government Opportunities (hereinafter referred to as "AGPO") in order to implement the legal requirement for women, youth and persons with disabilities to access thirty percent (30%) of public procurement opportunities as stipulated under section 53 of the Act.

The Board studied the AGPO website ([www.agpo.go.ke](http://www.agpo.go.ke)) and notes therein that Circular No. 1/2015 of 15<sup>th</sup> January 2015 (hereinafter referred to as "the 2015 Circular"), provides for the requirements for implementation of the 30% Public Procurement Reservations and Preference Scheme for youth, women and persons with disabilities. It further stipulates that in order to obtain an AGPO certificate, applicants in the aforementioned categories are required to submit certain documents including a 'Business Registration Certificate/ Certificate of Incorporation'. This AGPO certificate is what is referred to as the certificate of registration of youth, women and PWD owned enterprises issued by National Treasury or other designated institution.

With respect to verification of this certificate, the Board studied the AGPO website and notes that verification of an AGPO certificate is to be done using the certificate number, that is, for AGPO certificates issued from October 2018. The AGPO website further directs that any other certificate shall be verified on the PPOA (now PPRA) website.

The Board further studied the PPRA website which includes three lists of enterprises registered to benefit from the 30% Public Procurement Reservations and Preference Scheme for youth, women and persons with disabilities. The lists are as follows: -

- a) AGPO List at 10<sup>th</sup> November 2017
- b) AGPO List for missing companies January 2018
- c) AGPO list as at 17<sup>th</sup> September 2019

The website further stipulates that companies older than two years that have not renewed their certificates are not listed, and that the list is updated every one or two months.

Turning to the circumstances of the case, the Board notes that the Applicant's AGPO certificate was issued on 15<sup>th</sup> January 2018. It therefore follows that the same could only be verified on the PPOA website as it was issued prior to October 2018.

From the three lists of companies on the PPOA website, the Board perused the AGPO list of companies as at 17<sup>th</sup> September 2019, noting that the Applicant's AGPO certificate was issued on 15<sup>th</sup> January 2018

and confirmed that the Applicant is indeed registered as an AGPO enterprise with the following details: -

Jubilant Cleaning Services Limited

CPR/2013/95075254726969121

P.O BOX 103-10100 Nyeri

[tabbywnderitu@gmail.com](mailto:tabbywnderitu@gmail.com)

Security/Cleaning Services

Youth Registered Company

Nairobi

The Board notes from the letter of notification of unsuccessful bid addressed to the Applicant dated 17<sup>th</sup> December 2019 and from the Procuring Entity's submissions, that the Procuring Entity claimed to have verified the Applicant's AGPO certificate through the AGPO website and found the same to be invalid.

From the foregoing it is evident that it was not possible for the Procuring Entity to verify the Applicant's AGPO certificate on the AGPO website as it was issued prior to October 2018 and therefore the Board cannot rely on the Procuring Entity's submission that it indeed verified the Applicant's AGPO certificate. The Board notes that the Procuring Entity ought to have verified the Applicant's AGPO certificate on the PPRA website and not the AGPO website.

The Board therefore finds that the Procuring Entity unfairly evaluated the Applicant's bid with respect to Mandatory Requirement A3 of Evaluation Criteria I for AGPO Registered Special Groups (Youth, Women and PWD only) at page 34 of the Tender Document, noting the Procuring Entity's failure to correctly verify the Applicant's AGPO certificate on the PPOA website.

The Board is now left with the question as to what are the appropriate reliefs to grant in the circumstances.

The Board takes note of the Applicant's prayer urging the Board to direct the Procuring Entity to cancel the subject tender and re-tender the subject tender afresh and would like to make the following observations:

The Board notes that cancellation of the subject tender would unnecessarily delay the subject procurement process, taking into consideration that timelines on matters of public procurement should be strictly adhered to, as any delays in the procurement of public goods and services affects the economic rights of citizens including the right to benefit from procurement through maximization of value for money.

Having found that the Procuring Entity unfairly evaluated the Applicant's bid with respect to Mandatory Requirement A3 of Evaluation Criteria I on page 34 of the Tender Document, it is the Board's considered view that the most appropriate orders in these circumstances would be to right

the wrong and direct the Procuring Entity to re-admit the Applicant's bid at Preliminary Evaluation and re-evaluate the same as the failure by the Procuring Entity to fairly evaluate the Applicant's bid with respect to the aforementioned mandatory requirement can be remedied through a re-evaluation of the Applicant's bid in accordance with the law and the findings of the Board herein without prejudicing other bidders.

In totality, the Board holds that 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 Award of Tender No. NWSC/OT/23/2019/2020 for Provision of Cleaning Services at Kamakwa Treatment Plant to M/s Prime Revolution Works be and is hereby cancelled and set aside.**
  
- 2. The Procuring Entity's Letter of Notification of unsuccessful tender addressed to the Applicant in Tender No. NWSC/OT/23/2019/2020 for Provision of Cleaning Services at Kamakwa Treatment Plant be and is hereby cancelled and set aside.**



**3. The Procuring Entity is hereby directed to re-admit the Applicant's bid at the Preliminary Evaluation stage and to conduct a re-evaluation of the Applicant's bid at the Preliminary Evaluation Stage with respect to the following mandatory requirement taking into consideration the findings of the Board in this case:**

**a) A3: Certificate of registration of youth, women and PWD owned enterprises issued by the National Treasury/Other under the Evaluation Criteria I for AGPO Registered Special Groups (Youth, Women and PWD only) at page 34 of the Tender Document**

**4. Further to Order 3 above, the Procuring Entity is hereby directed to conclude the procurement process including making of an award within fourteen (14) days from the date of this decision.**

**5. Each party shall bear its own costs in the Request for Review.**

**Dated at Nairobi, this 21<sup>st</sup> day of January, 2020**

**CHAIRPERSON**

**SECRETARY**

**PPARB**

**PPARB**

**Delivered in the presence of: -**

- i.** Mr Owange holding brief for Mr Mugo for the Applicant;
- ii.** Ms. Nyambura for the Respondent.