

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 25/2020 OF 24TH FEBRUARY 2020

BETWEEN

LIMAH EAST AFRICA LIMITED.....APPLICANT

AND

MINISTRY OF HEALTH.....1ST RESPONDENT

THE MEDICAL SUPERINTENDANT,

MATHARI NATIONAL

TEACHING & REFERRAL HOSPITAL.....2ND RESPONDENT

DECHRIP EAST AFRICA LIMITED.....3RD RESPONDENT

Review against the decision of The Accounting Officer, The Ministry of Health Mathari National Teaching and Referral Hospital with respect to Tender No. MOH/MAT/001/2019-2020 for Provision of Cleaning Services

BOARD MEMBERS

- | | |
|-------------------------|------------------|
| 1. Mr. Steven Oundo | -Member Chairing |
| 2. Mr. Alfred Keriolale | -Member |
| 3. Mr. Nicholas Mruttu | -Member |

IN ATTENDANCE

- | | |
|---------------------|------------------------------|
| 1. Mr. Philip Okumu | -Holding brief for Secretary |
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2. Ms. Judy Maina -Secretariat

PRESENT BY INVITATION

APPLICANT

-LIMAH EAST AFRICA LIMITED

- 1. Ms. Samantha Mugo -Advocate, Eyase Kanyuira & Associates
- 2. Ms Vivienne Eyasi -Counsel, Eyase Kanyuira & Associates
- 3. Mr. Stanley Chege -General Manager

1ST AND 2ND RESPONDENTS

-MINISTRY OF HEALTH

- 1. Ms. Josephine Mwangi -SCMO
- 2. Mr. Dickson Mugonzo -Head, Supply Chain Management

3RD RESPONDENT

-DECHRIP EAST AFRICA LIMITED

- 1. Mr. Hilary Chelimo -Advocate, Marrirmoi & Chemurgor Co. Advocates
- 2. Mr. Mustafa Otieno -Litigation Clerk, Marrirmoi & Chemurgor Co. Advocates
- 3. Mr. Chris Kamau -Manager

OTHER INTERESTED PARTIES

A. JEPSCO SERVICES

1. Mr. Peter Nyangoge -SS

B. MERU (K) LIMITED

1. Mr. Willy Ombati -Logistics

C. KAMTIX CLEANERS

1 Mr. Patrick Oboa -Procurement

D. AIMAT CO.

1. Ms Lilian Wambui -Manager

BACKGROUND TO THE DECISION

The Bidding Process

The Mathari National Teaching and Referral Hospital (hereinafter referred to as "the Procuring Entity") advertised Tender No. MOH/MAT/001/2019-2020 for Provision of Cleaning Services (hereinafter referred to as "the subject tender") on 10th December 2019 in both The Standard Newspaper and the Ministry of Health's website (www.health.go.ke)

Bid Submission Deadline and Opening of bids

Bids were opened on 24th December 2019 at 10.00 a.m. in the presence of bidders and their representatives which were read out and recorded by the Procuring Entity's Tender Opening Committee as follows: -

Bidder no.	Name of the firm
1.	Superbroom Services Ltd
2.	Faulu & Bidii Ventures
3.	Jepco Services and Renovators Ltd
4.	Pinpoint Hygiene Services Ltd
5.	Topkline Cleaning services
6.	Virgin Clean Ltd
7.	Njaane enterprises
8.	Betaway Cleaning Services
9.	Neru K Ltd
10.	Petals Hygiene and Sanitation services
11.	Limah E.A. Ltd
12.	Kamtix Cleaning Company Ltd
13.	Dechrip E.A. Limited
14.	Aimat Company Ltd

Evaluation of Bids

The evaluation process was conducted from 13th to 15th January 2020 and was conducted in the following stages:-

- Preliminary Evaluation;
- Technical Evaluation;
- Financial Evaluation

1. Preliminary Evaluation

At this stage of evaluation, bidders were evaluated against the mandatory requirements as stipulated in the Tender Document and bidders who were found responsive proceeded to the next stage of evaluation. Any bidder who failed to comply with any of the mandatory

requirements was declared non responsive and did not proceed for technical evaluation.

The results were as follows: -

Bidder No	Bidder's Name	Responsive / Non Responsive	Reasons for being non-responsive
B1	Superbroom Services Ltd	NR	NEMA Certificate for use and distribution of primary industrial plastic packaging.
B2	Faulu & Bidii Ventures	R	N/A
B3	Jepco Services and Renovators Ltd	NR	NEMA Certificate for use and distribution of primary industrial plastic packaging.
B4	Pinpoint Hygiene Services Ltd	NR	-Registration of the work place Certificate from DOSHS (Directorate of Occupational Safety and Health) - NEMA Certificate for use and distribution of primary industrial plastic packaging
B5	Topkline Cleaning services	NR	-Debarment form duly signed and filled -NEMA Certificate for use and distribution of primary industrial plastic packaging
B6	Virgin Clean Ltd	NR	-Current Compliance Certificate from National Hospital Insurance Fund (NHIF) - NEMA Certificate for use and distribution of primary industrial plastic packaging
B7	Njaane enterprises	NR	-Current Compliance Certificate from National Social Security Fund (NSSF). -Current Compliance Certificate from National Hospital Insurance Fund (NHIF) - NEMA Certificate for use and distribution of primary industrial plastic packaging
B8	Betaway Cleaning Services	NR	-Registration of the work place Certificate from DOSHS (Directorate of Occupational Safety and

Bidder No	Bidder's Name	Responsive / Non Responsive	Reasons for being non-responsive
			Health) -Bank reference letter -Dully filled, signed and stamped Form of Tender -Current Compliance Certificate from National Social Security Fund (NSSF). -Current Compliance Certificate from National Hospital Insurance Fund (NHIF) -Must provide a copy of Work Injury Benefit Insurance Cover (WIBA) for the staff -Declaration on compliance to labour laws, minimum pay etc -Indicate a Tender validity period of 90 days from the tender closing date -NEMA Certificate for use and distribution of primary industrial plastic packaging.
B9	Neru K Ltd	NR	-Must provide a copy of Work Injury Benefit Insurance Cover (WIBA) for the staff -NEMA Certificate for use and distribution of primary industrial plastic packaging.
B10	Petals Hygiene and Sanitation services	R	N/A
B11	Limah E.A. Ltd	R	N/A
B12	Kamtix Cleaning Company Ltd	NR	-NEMA Certificate for use and distribution of primary industrial plastic packaging.
B13	Dechrip E.A Limited	R	N/A
B14	Aimat Company Ltd	NR	-NEMA Certificate for use and distribution of primary industrial plastic packaging.

2. Technical Evaluation

At this stage of evaluation, only bidders who scored 80% and above were subjected to financial evaluation. However, those who scored below 80% were disqualified at this stage of evaluation.

The results were as follows: -

BIDDER NO	NAME OF BIDDER	FINAL SCORES	REMARKS
B2	Faulu & Bidii Ventures	93	Pass
B10	Petals Hygiene and Sanitation services	85	Pass
B11	Limah E.A. Ltd	100	Pass
B13	Dechrip E.A Limited	100	Pass

3. Financial Evaluation

At this stage of evaluation, bidders were evaluated against the financial evaluation criteria based on value for money, taking into consideration the various financial aspects especially the labor cost.

The results were as follows: -

Bidder No.	Name of Bidder	Bid amount per month	Bid amount per year	Bid amount for two years
B2	Faulu & Bidii Ventures	1,499,900.00	17,998,800.00	35,997,600.00
B10	Petals Hygiene and Sanitation services	1,833,482.00	22,001,784.00	44,003,568.00
B11	Limah E.A. Ltd	1,191,005.36	14,292,064.32	28,584,128.64

B13	Dechrip Limited	E.A	1,167,288.00	14,007,456.00	28,014,912.00
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The Evaluation Committee's Recommendations

In view of the evaluation process, the Evaluation Committee recommended as follows;

1. Bidder No. 13, M/s Dechrip E.A Limited, of P. O. Box 41176-00100, Nairobi is recommended to provide comprehensive cleaning services at Mathari National Teaching and Referral Hospital at the cost of Kshs. 1,167,288.00 per month totaling to Kshs. 14,007,456.00 per year.
2. The contract shall run for a duration of 1 (one) calendar year from the date of contract signing, with 1 (one) year extension subject to satisfactory performance of the bidder in year 1 (one).

The Professional Opinion

The Head, Supply Chain Management reviewed the Evaluation Report submitted by the Tender Evaluation Committee together with the submitted tender documents and recommended as follows:-

"In view of the above observations, the Head of Supply Chain Management Services pursuant to sections 47(2) and 84-86(1a) of the Public Procurement and Asset Disposal Act 2015 and Regulation 2(10c) of the Public Procurement and Disposal Regulations 2006(amendment 2013) hereby recommends to the Accounting Officer approval of M/s Dechrip E.A Limited, of P. O. Box 41176-00100, Nairobi to provide comprehensive cleaning services at Mathari National Teaching and Referral Hospital at a

cost of Kshs. 1,167,288.00 per month and a total cost of Kshs. 14,007,456.00 per year.”

The Professional Opinion was issued on 24th January, 2020 and signed by both the Head of Supply Chain and the Accounting Officer on the same date.

Letters of Notification of Outcome of the tender proceedings were prepared dated 13th February, 2020 and issued to all bidders.

THE REQUEST FOR REVIEW NO. 25 OF 2020

M/s Limah East Africa Limited (hereinafter referred to as “the Applicant”), lodged a Request for Review dated and filed on 24th February 2020 (hereinafter referred to as “the Request for Review”) together with an Affidavit in Support of the Request for Review sworn and filed on the same date (hereinafter referred to as “the Applicant’s Affidavit”). The Applicant further filed a Replying Affidavit in Support of the Request for Review (hereinafter referred to as “the Applicant’s Supporting Affidavit”) sworn and filed on 11th March 2020.

In response, the Ministry of Health (hereinafter referred to as “the Procuring Entity”) lodged a Replying Affidavit to the Request for Review sworn and filed on 9th March 2020 (hereinafter referred to as “the Procuring Entity’s Response”).

Further, M/s Dechrip East Africa Limited (hereinafter referred to as "3rd Respondent") lodged a Replying Affidavit sworn on 9th March 2020 and filed on 10th March 2020 (hereinafter referred to as "the 3rd Respondent's Response").

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

- i. An order allowing the Request for Review;**
- ii. An order annulling the award in the subject tender;**
- iii. An order declaring that the Procuring Entity breached the provisions of the Public Procurement and Asset Disposal Act, 2015 and Article 47 and 227 of the Constitution;**
- iv. An order declaring that the Medical Superintendant is the Accounting Officer of the Procuring Entity;**
- v. An order nullifying the award and the entire procurement proceedings of the Tender Number MOH/MAT/001/2019-2020 for Provision of Cleaning Services;**
- vi. An order directing the 1st and 2nd Respondents to award the Tender Number MOH/MAT/001/2019-2020 for Provision of Cleaning Services to the Applicant for being the substantially responsive and lowest evaluated bidder;**
- vii. In the alternative, an order directing the 1st and 2nd Respondents to prepare a fresh tender document and re-tender Tender Number MOH/MAT/001/2019-2020 for Provision of Cleaning Services;**

viii. An order directing for review of all the Applicants' bids;

ix. An order awarding costs to the Applicant

x. Any other order that the Honourable Board may deem just and fit.

During the hearing, the Applicant was represented by Ms. Mugo on behalf of the firm of Eyase Kanyuira & Associates. The Procuring Entity was represented by its Supply Chain Manager, Ms. Mwango whereas the 3rd Respondent was represented by its Advocate, Mr Chelimo on behalf of the firm of Marrirmoi & Chemurgor Co. Advocates.

PARTIES SUBMISSIONS

The Applicant's Submissions

In her submissions, Counsel for the Applicant, Ms. Mugo, relied on the Request for Review, the Applicant's Affidavit, Replying Affidavit and supporting documentation thereto.

Ms Mugo submitted that the first ground for review was that the Procuring Entity failed to communicate on time the outcome of the evaluation process. Ms. Mugo submitted that the letter of notification addressed to the Applicant dated 13th February 2020 was received by the Applicant on 26th February 2020, a day to the expiry of the fourteen day period within which an aggrieved party may lodge a request for review before this Board. Ms Mugo contended that the delay by the

Procuring Entity was intentional, malicious and aimed towards locking the Applicant out of time to file a request for review.

On the second ground for review, Ms Mugo submitted that it was not clear who was the Accounting Officer of the Procuring Entity as in PPARB Application No. 131/2019, a representative of the Ministry of Health confirmed that the Accounting Officer of the Procuring Entity was the Medical Superintendent of the Hospital and therefore any communication with respect to this tender ought to have been from the Medical Superintendent. It was therefore the Applicant's submission that the Procuring Entity should clarify why the letters of notification to bidders were signed off by an employee of the Ministry of Health as opposed to the Medical Superintendent of the Hospital contrary to section 87 of the Act.

Ms Mugo submitted that a member of the tender opening committee also sat in the evaluation committee contrary to section 78 of the Act and the same is averred in the Applicant's Replying Affidavit by one Mr Stanley Chege. Ms Mugo submitted that one Mr Stanley Chege averred that one Mr Mwaura was known to him and was present at the tender opening yet in the tender opening minutes his name does not appear. Further, Ms Mugo submitted that in the tender opening minutes, the name of one Mr Chege Macharia appears, yet Mr Stanley Chege averred that Mr Chege Macharia was also not present during the tender opening. Ms. Mugo submitted that the tender opening minutes were doctored and

as evidenced by the averments of one Mr Stanley Chege, the evaluation committee was not properly constituted.

Counsel submitted that one Mr Mwaura informed the Applicant's employees at the Procuring Entity's premises that they were not going to provide the service in the following year as the Applicant would not be awarded the tender which demonstrated that a decision to award the tender had been made before the Procuring Entity's Evaluation Committee had completed the process. It was therefore the Applicant's contention that the move by the Procuring Entity to deny the Applicant the tender was not just or fair and was contrary to the Act and the Constitution.

In conclusion, Ms Mugo urged the Board to compel the Procuring Entity to re-tender and conduct a fair process of evaluation and subsequently award the subject tender in accordance with the provisions of the Act and the Constitution.

The 1st and 2nd Respondent/Procuring Entity's Submissions

In her submissions, the Procuring Entity's Supply Chain Manager, Ms. Mwango, relied on the Procuring Entity's Response, and supporting documentation thereto.

Ms. Mwango submitted that on the first issue raised by the Applicant, it was the Procuring Entity's submission that despite the allegations made

by the Applicant that it received its letter of notification on 26th February 2020, after filing its Request for Review, the Applicant was still able to serve the Procuring Entity and the successful bidder, whose identity the Applicant would only have known once it received its letter of regret from the Procuring Entity.

On the issue of who was the Accounting Officer of the Procuring Entity, Ms. Mwango submitted that one Ms. Susan Mochache was the Accounting Officer, in charge of all the departments in the Ministry of Health, including Mathare Teaching Hospital which falls under the Ministry of Health. Ms. Mwango submitted that the officer who signed the notification of award was the Head of Procurement who according to the law had delegated responsibility to sign letters of notification to bidders.

With respect to the constitution of the evaluation committee, Ms Mwango contended that this information was contained in confidential documents to which the Applicant should not be privy to. Nevertheless, Ms Mwango submitted that one Mr Mwaura was the secretary to the evaluation committee and one Mr Chege was the secretary to the opening committee as per the attached tender opening minutes and the evaluation committee minutes.

In response to the allegation made by the Applicant that the successful bidder did not attach one of the documents required under the subject

tender, Ms. Mwango submitted that this was also confidential information that the Applicant should not be privy to.

Ms. Mwango submitted that this was the second time the Applicant had brought the Procuring Entity before the Board with respect to this tender Ms Mwango informed the Board that the Applicant was the current service provider of the subject services and was being paid Kshs. 2.5 million per month.

Ms Mwango submitted that the successful bidder was awarded the tender at an amount of Kshs 1.1 million which would save the Procuring Entity almost half the amount that it was current paying the Applicant. In this regard therefore, Ms Mwango contended that the Applicant's Request for Review was an attempt to prevent the subject tender from being awarded to any other bidder and therefore urged the Board to dismiss the review application as frivolous and without merit.

The 3rd Respondent's Submissions

In his submissions, Counsel for the 3rd Respondent, Mr. Chelimo, relied on the 3rd Respondent's Response and supporting documentation thereto.

Mr. Chelimo submitted that in response to the allegation made by the Applicant that the successful bidder did not attach a NEMA certificate which was one of the documents required under the subject tender, Mr

Chelimo contended that the Procuring Entity had confirmed that the successful bidder submitted the said document in its bid documents and therefore the allegation by the Applicant was unsubstantiated. Counsel referred the Board to its decision in Application No. 94/2018 where the Board made it clear that it was not the mandate of the Board to look into bid documents to establish whether a particular document had been submitted by a bidder or not.

On the issue of the Applicant's letter of notification, Mr Chelimo submitted that the Procuring Entity proved that it had dispatched the Applicant's letter of notification and therefore it was not the work of the Procuring Entity to follow up with the Post Master on the same. Mr Chelimo contended that it was the work of the Applicant to check their mail box on time.

Mr Chelimo submitted that from the Applicant's submissions it was evident that the Applicant may have had access to some confidential documents which amounted to canvassing and therefore the Applicant should be disqualified. Mr Chelimo pointed out that the Applicant admitted in its submissions that it was in contact with one Mr Mwaura from the Procuring Entity, yet bidders were not supposed to communicate with the Procuring Entity during a procurement process as it amounted to canvassing.

On the issue of responsiveness of the Applicant's bid, Mr Chelimo submitted that the Applicant was not the lowest responsive bidder and

under section 30 of the Public Finance Management Act and Article 227 (1) of the Constitution a procurement process should be conducted in a cost-effective, transparent and accountable manner. Mr Chelimo submitted that the Procuring Entity had an opportunity to save the taxpayer almost Kshs 1.4 million and in the 3rd Respondent's view, the review application was frivolous, geared at frustrating the procurement process in an attempt to find a legal loophole to unjustly enrich the Applicant.

In conclusion, Mr Chelimo submitted that the review application should be dismissed as the Applicant approached the Board with unclean hands having previously filed a similar review application before the Board.

The Applicant's Rejoinder

In a rejoinder, Ms Mugo submitted that the Applicant checked its mailbox daily and it only received its letter of notification of unsuccessful bid on 26th February 2020 and therefore the submission made by the 3rd Respondent that the Applicant was indolent on its rights was untrue.

In response to the allegations made by the Procuring Entity and the 3rd Respondent that the Applicant canvassed and acquired confidential information with respect to the subject tender, Ms Mugo submitted that all the information alluded to was availed to the Applicant in its visits to the Procuring Entity's offices and therefore the accusations made by both the Procuring Entity and the 3rd Respondent were unfounded.

Ms Mugo submitted that contrary to the allegations made by the Procuring Entity and the 3rd Respondent, the shortfall between the Applicant's bid price in the subject tender and the successful bidder's bid price was significantly less than Kshs 1.4 million.

Ms Mugo contended that the Applicant became aware that the successful bidder was not NEMA compliant from the NEMA offices, which information was not confidential.

Ms Mugo submitted that the submission made by the Procuring Entity that Ms Mochache was the Accounting Officer of the Procuring Entity was untrue as in a previous application before this Board, that is, Application No. 131/2019, the Procuring Entity submitted that the Medical Superintendent of Mathare Hospital was the Accounting Officer of the Procuring Entity. Further, as can be seen from the Procuring Entity's invitation to tender, Ms Mugo submitted that tenders were to be addressed to the Medical Superintendent of Mathare Hospital and therefore any communication with respect to the subject tender should have come from the Medical Superintendent and not from one Ms. Mochache.

Ms Mugo submitted that the Applicant was not fishing for an avenue or forcing the Board to award it the subject tender. It was the Applicant's submission that the procurement process should be conducted fairly and in accordance with the provisions of the Act and the Constitution. She

contended that the Procuring Entity should not continue to flaunt the rules time and time again. She therefore urged the Board to uphold the Request for Review and grant the orders therein.

BOARD'S DECISION

The Board has considered each of the parties' cases, the documents filed 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 in accordance with section 87 (3) of the Act;***
- II. Whether the Procuring Entity's Evaluation Committee which evaluated bids in the subject tender was properly constituted in accordance with section 46 (4) (b) of the Act;***
- III. Whether the Procuring Entity evaluated the successful bidder's bid in accordance with section 80 (2) of the Act as read with Article 227 (1) of the Constitution with respect to the following criterion: -***

a) MR 19: NEMA Certificate for use and distribution of primary industrial plastic packaging.

IV. What are the appropriate orders to issue in the circumstances?

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 10th December 2019 and invited interested and eligible bidders to submit their bids in response to the same.

By the bid submission deadline of 24th December 2019, the Procuring Entity received a total of fourteen (14) bids which were opened on the same date by the Procuring Entity's Tender Opening Committee.

At the conclusion of the evaluation process, the Procuring Entity's Evaluation Committee recommended award to M/s Dechrip East Africa Limited, the 3rd Respondent herein, for having the lowest evaluated responsive bid. The recommendation of award was approved by the Procuring Entity's Principal Secretary, Ms Susan Mochache, having 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 contended that by the time it lodged its Request for Review before this Board on 24th February 2020, it had not received a letter of notification from the Procuring Entity informing it of the outcome of its bid.

According to the Applicant, it only received its letter of notification of unsuccessful bid on 26th February 2020, a day to the lapse of the fourteen day period within which it could lodge a complaint with respect to the subject tender before this Board. In the Applicant's view, this delay by the Procuring Entity to issue it with its letter of notification was intentional and malicious and in contravention of section 87 of the Act.

On the Procuring Entity's part it submitted that it duly notified the Applicant of the outcome of its bid through a letter of notification sent via registered post to the Applicant's postal address as indicated in its bid documents. In support of its assertion, the Procuring Entity adduced a Copy of its Registry Mail Records which in its view demonstrated that notifications were sent to all bidders, including the Applicant herein, via registered post.

Further, the Procuring Entity disputed the Applicant's submission that it only received its letter of notification on 26th February 2020 and contended that by the time the Applicant lodged its Request for Review before the Board on 24th February 2020, it was clearly aware who the successful bidder was with respect to the subject tender, which the

Applicant could only have known upon receiving its letter of notification from the Procuring Entity.

In its determination of the first 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]

According to the above provision, a procuring entity is required to 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, who is determined at the conclusion of an evaluation process.

We are cognisant that notification to an unsuccessful bidder under section 87 (3) of the Act is a fundamental process within any procurement process for the following reasons:

Firstly, it provides a period of 14 days within which a procuring entity and a successful bidder are precluded from entering into a written contract for an unsuccessful bidder to seek redress before the Board, if need be.

Secondly, it protects the right of the unsuccessful bidder to administrative review by disclosing the specific reasons why its tender

was unsuccessful, in order for a respective bidder to challenge the same before the Board.

However, the Board notes that the Act does not provide for the specific mode of delivery of the letter of notification to both successful and unsuccessful bidders. However, it is worth noting that the High Court in **Judicial Review No. 589 of 2017 Lordship Africa Limited v Public Procurement Administrative Review Board & 2 others [2018] eKLR** specified as follows with regards to the mode of delivery of notification to both successful and unsuccessful bidders: -

"I reiterate that albeit the Act does not state that the letters of notification must be delivered by the same mode, it is only rational that if the notification be done at the same time, then the mode of delivery of that notification be the same so as to give all the bidders equal time and opportunity for receiving notifications so that they can make decisions as to whether to challenge the award or not.

To deliver a notification to a successful bidder by hand and hitherto post the notification to an unsuccessful bidder would be an act deliberately designed to oust the unsuccessful bidder from challenging the decision of the procuring entity within the stipulated timeframe of 14 days since the unsuccessful bidder would have no means of knowing whether its letter of notification had been

posted, to camp at the Post Office to receive its notification on the same day of posting or within 14 days of posting.

Accordingly, the same mode of delivery of notification should be used for successful and unsuccessful bidders alike so as to give all bidders equal time and opportunity for receiving notifications and further provide unsuccessful bidders the opportunity to decide whether or not to challenge the award as made by the Procuring Entity.

In the instant case, the procedure to be followed in notification was stipulated under Clause 2.25 of Section II Instructions to Tenderers on page 16 of the Tender Document which reads as follows: -

"2.25.1 Prior to expiration of the tender validity, the Procuring Entity will notify the successful tenderer in writing that its tender has been accepted.

2.25.2 The notification of award will signify the formation of the contract subject to the signing of the contract between the tenderer and the procuring entity pursuant to clause 2.29. Simultaneously, the other tenderers shall be notified that their tenders have not been successful."

The above provision requires that notification of award to a successful bidder should be done prior to expiration of the tender validity period. Further, both successful and unsuccessful bidders are to be notified of the outcome of their bids simultaneously.

In the instant case, the Board heard submissions from the Procuring Entity that it sent notifications to all bidders, including the Applicant herein, via registered post, as evidenced by the Copy of Registry Mail Records which it adduced before the Board. It was also the Procuring Entity's submission that the Applicant had received its letter of notification by the time it lodged its Request for Review on 24th February 2020 and disputed the Applicant's assertion that it received its letter of notification on 26th February 2020.

In this regard, the Board first considered the service of documents upon a company as specified in section 1010 of the Companies Act No. 17 of 2015 (hereinafter referred to as "the Companies Act") which provides as follows: -

"A document may be served on a company registered under this Act by leaving it at, or sending it by post to, the company's registered office."

Further, section 1011 of the Companies Act provides as follows: -

"(1) A document may be served on a person to whom this section applies by leaving it at, sending it by post to, the person's registered address."

(2) This section applies to the following persons:

(a) a director or secretary of a company;...”

In view of the provisions referred to hereinabove and noting that the bidders who participated in the subject tender are companies, it is the Board's considered view that the provisions of the Companies Act relating to service of documents to companies applies in this instance.

The Board notes that documents may be served on a company either by: -

- (a) personally serving it on an officer of the company, or
- (b) sending it by post to the registered postal address of the company in Kenya, or
- (c) leaving it at the registered office of the company.

From the foregoing, the question that therefore arises is, what is registered post or registered mail?

The Black's Law Dictionary defines registered mail as: -

"A service at the post office in which a receipt is issued to the sender of a mail and the mail's destination address is recorded in a register. When delivered, the recipient's signature is taken as proof of delivery."

This means that registered mail is a form of service at the post office whereby a receipt is issued to the sender of a mail. Once mail is delivered to the recipient at the destination address recorded in a register at the Post Office, the recipient's signature acts as proof of delivery.

Further, the Board considered section 3 (5) of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya, which makes certain provisions on service by registered post as follows: -

"Where any written law authorizes or requires a document to be served by post, whether the expression "serve" or "give" or "send" or any other expression is used, then, unless a contrary intention appears, the service shall be deemed to be effected by properly addressing to the last known postal address of the person to be served, prepaying and posting, by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of the post." [Emphasis by Board]

From the above provision, it is worth noting that, when a letter is sent via registered post, it should be properly addressed to the last known postal address of the intended recipient and delivery is only effected the time at which the letter would be delivered in the ordinary course of the post.

The Board notes that the High Court in **Kenya Safari Lodges & Hotels Ltd v Tembo Tours & Safaris Ltd [1975] eKLR** considered the ordinary practice of delivery of documents by registered mail and stated as follows: -

"In the first place I must take judicial notice, as a matter of general or local notoriety, of the practice of the post office authorities in Nairobi of sending to the addressee of a registered postal package at the Post Office a printed notification informing him/her of the fact that the package is awaiting collection at the local post office. The procedure is that the package is then delivered to the addressee in exchange for the printed notification duly signed by him as a receipt."

The ordinary practice therefore in the delivery of documents by registered mail is that once a sender instructs the Post Office to deliver documents via registered mail, a printed notification is sent to the intended recipient informing him/her that there is a letter or package awaiting collection at the Post Office. This letter or package is then delivered into the hands of the intended recipient in exchange for the printed notification duly signed by him/her as evidence of receipt of the document.

In this regard, the Board examined the Copy of Registry Mail Records as submitted before this Board by the Procuring Entity and observes that the same consists of three photocopied pages.

The Board observes that the date 18th February 2020 is indicated at the top of the first page. Further, that the page consists of a list of eight bidders/companies and what appears to be their postal addresses and an amount of Kshs 50/- indicated against the name of each bidder/company.

On the second page, the Board observes that the date 10th February 2020 is indicated at the top of the page. Further, that the page also consists of a list of three bidders/companies together with their postal addresses and an amount of Kshs 50/- indicated against the name of each bidder.

Finally, on the third page of the Procuring Entity's Copy of Registry Mail Records, the Board observes on the top of the page the date 18th February 2020. Further that the page consists of a list of three bidders/companies together with their postal addresses and an amount of Kshs 50/- indicated against the name of each bidder/company.

From the foregoing examination, it is not clear whether letters of notification were indeed sent via registered letter to the fourteen companies/bidders as listed in the Procuring Entity's Copy of Registry

Mail Records, as the said records do not demonstrate that letters of notification were signed and stamped received by the Post Office for onward transmission to bidders.

Where the service of a letter of notification is disputed by a bidder, the Procuring Entity is under an obligation to provide evidence to establish that the said letter was either personally served upon the bidder or produce an email of the notification sent to the bidder's address or avail a certificate of posting as proof of service.

The Board notes that in this instance the Procuring Entity did not provide a certificate of posting as proof that it dispatched the Applicant's letter of notification via registered letter and that the said letter was signed and/or stamped received by the Post Office for onward transmission to the Applicant on a particular date. In the absence of such proof, the Board therefore cannot rely on the Procuring Entity's submission that it sent the Applicant its letter of notification via registered mail and that the Applicant had received its letter of notification of the outcome of its bid by the time it lodged its Request for Review before the Board on 24th February 2020.

The Board is now left with the Applicant's assertion that it only received its letter of notification on 26th February 2020, two days after it lodged its Request for Review.

The Board examined the Applicant's letter of notification of unsuccessful bid dated 13th February 2020 which reads as follows: -

"Reference is made to your participation in the above tender.

The procurement process in respect to the above tender has been concluded and we regret to inform you that your tender was not successful. The under listed reasons made your bid unsuccessful:

- Your quoted tender sum of Kshs 1,191,005.36 (One Million, One Hundred and Ninety One thousand, Five Shillings and Thirty Six Cents) per month was not the lowest evaluated bid.***
- The lowest evaluated bidder awarded this tender was M/s Dechrip E.A. Limited of P.O. Box 41176 – 00100 Nairobi at their quoted tender sum of Kshs 1,167,288.00 per month (One million, One Hundred and Sixty Seven thousand Two Hundred and Eighty Eight shillings only) being the lowest evaluated bidder and a total cost of Kshs 14,007,456.00 per year (Fourteen Million, Seven Thousand, Four Hundred and Fifty Six shillings only).***

We look forward to your participation in our future tenders."

It is clear from the contents of the Applicant's letter of notification of unsuccessful bid that the Procuring Entity provided specific reasons why

the Applicant's bid was not successful and further disclosed the identity of the successful bidder in the subject tender.

Noting the Applicant's submission that it received its letter of notification on 26th February 2020, two days after it lodged its Request for Review, the Board observes that the Request for Review was set for hearing on 10th March 2020. By this date, the Applicant had sight of its letter of notification which contained specific reasons why the Procuring Entity found its bid non-responsive.

On the said hearing date, the Applicant challenged those reasons and was afforded sufficient time and opportunity to support its assertion that it ought to have been awarded the subject tender because in its view, it submitted the lowest evaluated bid and further challenged the award made to the successful bidder. This is in line with Article 50 (c) of the Constitution of Kenya, 2010, which states that every person has a right to a fair hearing which includes the right to have adequate time and facilities to prepare a defence.

In essence therefore, the Board finds that the Applicant was afforded a fair hearing in accordance with Article 50 (c) of the Constitution of Kenya, 2010.

The second sub-issue raised by the Applicant regarding its letter of notification relates to the manner in which the letter was issued. The tail end of the letter dated 13th February 2020 appears as follows: -

".....We look forward to your participation in our future tenders.

Dickson Lugonzo

For: Principal Secretary"

It was the Applicant's submission that its letter of notification was not issued by the Procuring Entity's Accounting Officer, but was issued by an officer of the Procuring Entity, in contravention of section 87 of the Act. The Applicant took the view that as indicated by the Procuring Entity in a previous matter before this Board, that is **PPARB Application No. 131 of 2019**, the Medical Superintendent of Mathari National Teaching & Referral Hospital is the Accounting Officer of the Procuring Entity, who is authorised to issue all communication to bidders.

In response, the Procuring Entity submitted that its Accounting Officer is Ms. Susan Mochache, the Principal Secretary of the Ministry of Health, who is in charge of all the departments in the Ministry of Health, including Mathari National Teaching & Referral Hospital. The Procuring Entity further submitted that the officer who signed and issued notifications to all bidders is the Procuring Entity's Head of Procurement,

who has delegated responsibility under law to issue notifications to all bidders.

In its determination of the second issue, the Board first sought to address the question; who is an accounting officer?

In order to answer this question, the Board studied section 2 of the Act which states that an accounting officer has the meaning specified under section 2 of the Public Finance Management Act, 2012 (hereinafter referred to as the "Public Finance Management Act"). The latter provision refers one to section 67 (1) of the Public Finance Management Act which states as follows:-

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.

An Accounting Officer is deemed to be responsible for the administration of a State Department as reiterated in section 12 of the National Government Coordination Act No. 1 of 2013 read together with Article 155 of the Constitution of Kenya, 2010 which provide as follows:-

Section 12 (1) Pursuant to Article 155(2) of the Constitution, each Principal Secretary shall be

responsible for the administration of a State department.

Article 155

(1) There is established the office of Principal Secretary, which is an office in the public service.

(2) Each State department shall be under the administration of a Principal Secretary.

It is therefore evident that the Accounting Officer in the Ministry of Health is the Principal Secretary.

Further, the Board examined the Procuring Entity's Invitation to Tender dated 10th December 2019 and observes at the tail end of the invitation the following statement: -

"MINISTRY OF HEALTH

TEDNER INVITATION NOTICE

***PROVISION OF CLEANING SERVICES FOR MATHARI NATIONAL
TEACHING AND REFERRAL HOSPITAL***

.....
.....
.....

HEAD SUPPLY CHAIN MANAGEMENT SERVICES

For: Principal Secretary [Emphasis by the Board]

Accordingly, the Invitation to Tender with respect to the subject tender was advertised by the Head Supply Chain Management Services of the Ministry of Health, on behalf of the Principal Secretary.

With this in mind, the Board notes that section 87 of the Act as cited hereinabove stipulates 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.

(4);

The above provision clearly stipulates that the accounting officer of a procuring entity issues notification letters to successful and unsuccessful bidders.

As to whether an accounting officer can delegate his authority to issue notification letters, this Board in **PPARB Application No. 9 of 2020 Internet Solutions (K) Limited v. Kenya Airports Authority** stated as follows: -

"As regards the question whether an accounting officer can delegate his authority to issue notification letters, 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 functions 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 outlined national values and principles of governance that bid all 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: -

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

(2) For the 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); and

(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."

From the above excerpt, it is clear that an accounting officer of a procuring entity may delegate his/her authority to issue letters of notification to successful and unsuccessful bidders alike due to his/her inability to act in certain circumstances. Nevertheless, as a public officer, an accounting officer is bound by principles of leadership and integrity under the Constitution and other relevant legislation cited hereinabove and therefore remains accountable for acts performed by persons to whom he has delegated authority to act on his behalf.

Moreover, in order to ensure that any delegated authority is not exercised in order to undermine an accounting officer, it is necessary for

the delegated authority to be in writing and specific, in that the accounting officer should specify the tender for which the delegated authority is given as such delegated authority may be prone to abuse and exercised contrary to the manner in which the accounting officer had specified.

Turning to the circumstances of the case, the Board heard submissions from the Procuring Entity that the Head of Procurement signed and issued notifications to all bidders, including the Applicant herein, who was acting on delegated responsibility.

The Board examined the Procuring Entity's confidential file submitted to the Board in accordance with section 67 (3) (e) of the Act and observes that the notifications sent to all bidders dated 13th February 2020 were signed and issued by the Procuring Entity's Head of Procurement, one Mr Dickson Lugonzo.

The Board further examined the Procuring Entity's confidential file and observes therein no letter, memo or instrument therein issued by the Procuring Entity's Accounting Officer, specifically delegating responsibility to the Procuring Entity's Head of Procurement to sign and issue letters of notification of the outcome of bids to all bidders, with respect to the subject tender.

In this regard therefore, the Procuring Entity failed to demonstrate that the Procuring Entity's Accounting Officer expressly delegated his authority in writing, to sign and issue notification letters to bidders as provided for under section 87 of the Act, to the Procuring Entity's Head of Procurement.

It is therefore the finding of this Board that the Procuring Entity's Head of Procurement, one Mr Dickson Lugonzo, who signed notification letters on behalf of the Accounting Officer, acted without authority, since there is no evidence before this Board demonstrating that the Accounting Officer expressly delegated such authority to him.

Hence, the letters of notification issued to both the successful and unsuccessful bidders (including the one issued to the Applicant herein) dated 13th February 2020 signed and issued on behalf of the Procuring Entity's Accounting Officer, are hereby null and void.

In totality of this issue therefore, the Board finds that the Procuring Entity failed to issue the Applicant with a letter of notification of unsuccessful bid in accordance with section 87 (3) of the Act.

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

The Board heard submissions from the Applicant that the Procuring Entity's Evaluation Committee, who evaluated bids received under the

subject tender, was not properly constituted in accordance with section 46 (4) (b) of the Act.

According to the Applicant, one of the members of the Procuring Entity's Tender Opening Committee also sat in the Tender Evaluation Committee contrary to section 78 of the Act. As sworn in the Applicant's Replying Affidavit filed on 11th March 2020, one Mr Stanley Ngechu Chege, the Applicant's General Manager, averred that one Mr Chege Macharia did not attend the tender opening ceremony but was captured as a member of the Procuring Entity's Tender Opening Committee for the subject tender. Moreover, one Mr Mwaura Gichuhi chaired the Procuring Entity's Tender Opening Committee for the subject tender and also sat as a member of the Procuring Entity's Tender Evaluation Committee, contrary to section 78 of the Act.

In response, the Procuring Entity submitted that the details of the composition of both the Procuring Entity's Tender Opening and Tender Evaluation Committees were contained in confidential documents of which the Applicant is not privy to. The Procuring Entity thus urged the Board to ascertain how the Applicant became aware of these details.

Further, the Procuring Entity contended that one Mr Mwaura was the secretary to the Tender Evaluation Committee as evidenced in the Tender Opening Minutes and Mr. Chege was the secretary to the Tender Opening Committee as per the attached Tender Evaluation Committee minutes.

In its determination of the second issue, the Board studied section 78 (1) of the Act which clearly outlines the membership of a tender opening committee as follows: -

"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—

- (a) the committee shall have at least three members; and***
- (b) at least one of the members shall not be directly involved in the processing or evaluation of the tenders.***

According to the above provision, an accounting officer shall appoint a tender opening committee specifically for a procurement and the committee shall consist of at least three members. Further, one of the members appointed to the tender opening committee shall not be directly involved in the processing or evaluation of the tenders.

Further, the Board studied section 46 (4) (b) of the Act which is clear on the membership of an evaluation committee which states as follows:-

"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”

This section clearly stipulates that an evaluation committee shall consist of between three to five members, who are appointed on a rotational basis and shall comprise of heads of user department and two other departments or their representatives. This provision further provides that where necessary, procured consultants or professionals shall advise on the evaluation of the tender documents and give a recommendation on the same to the evaluation committee within a reasonable time.

With this in mind, the Board studied the Procuring Entity’s confidential file and observes therein the Tender Opening Minutes dated and signed on 24th December 2019 and observes that the membership of the tender opening committee comprised of 4 members, including one Mr Chege Macharia, who is identified in the said minutes as the Secretary of the Tender Opening Committee. The Board further observes that one Ms. Mercy Mitaki, chaired the Tender Opening Committee and not Mr Mwaura Gichuhi as alleged by the Applicant.

The Board further examined the Procuring Entity’s Tender Evaluation Report dated and signed on 15th January 2020 and observes that the membership of the evaluation committee comprised of four members, in addition to a secretary and a member of the secretariat. Moreover, one Mr Daniel Mwaura is identified as a member of the Secretariat to the Evaluation Committee.

In this regard the Board would like to make the following observations: -

Firstly, it is not clear whether Mr Daniel Mwaura who is indicated in the Evaluation Report as a member of the Secretariat to the Evaluation Committee is the same person as the said Mr Mwaura Gichuhi, who the Applicant alleged chaired the Procuring Entity's Tender Opening Committee for the subject tender and also sat as a member of the Procuring Entity's Tender Evaluation Committee.

In any event, the Board notes that section 78 of the Act clearly stipulates that at least one of the members appointed to the tender opening committee shall not be directly involved in the processing or evaluation of the tenders. This does not mean that a member appointed to a tender opening committee cannot be involved in the processing and evaluation of tenders. Where such a member of the tender opening committee is involved in the processing and evaluation of tenders, it is the Board's considered view that in line with section 78 (1) of the Act, the constitution of the tender opening and tender evaluation committees shall not be invalidated on this basis, as long as at least one member of the tender opening committee is not involved in the processing and evaluation of tenders.

Secondly, it is also not clear how the Applicant became aware of the constitution of the tender evaluation committee. When queried by the Board, the Applicant submitted that the information it acquired concerning the tender evaluation committee was brought to its attention

by one Mr Mwaura who verbally informed the Applicant's staff that their services would soon be terminated as the tender would be awarded to a different bidder.

The Board observes that section 67 (1) of the Act stipulates as follows: -

"During or after procurement proceedings and subject to subsection (3), no procuring entity and no employee or agent of the procuring entity or member of a board, commission or committee of the procuring entity shall disclose the following—

(a) information relating to a procurement whose disclosure would impede law enforcement or whose disclosure would not be in the public interest;

(b) information relating to a procurement whose disclosure would prejudice legitimate commercial interests, intellectual property rights or inhibit fair competition;

(c) information relating to the evaluation, comparison or clarification of tenders, proposals or quotations; or

(d) the contents of tenders, proposals or quotations.

This provision is categorical that during or after procurement proceedings, a procuring entity including its employees or agents, shall not disclose information pertaining to a procurement process including information relating to the evaluation, comparison or clarification of tenders, proposals or quotations.

Nevertheless, in the absence of any written communication confirming the statements made by one Mr Mwaura, the Board cannot make a conclusive determination on this issue, noting section 64 (1) of the Act which provides that: -

"All communications and enquiries between parties on procurement and asset disposal proceedings shall be in writing." [Emphasis by the Board]

Accordingly, all communication and enquiries between a procuring entity and bidders should be in writing.

In view of the foregoing, it is therefore the finding of this Board that the Procuring Entity's Evaluation Committee that evaluated bids in the subject tender was properly constituted in accordance with section 46 (4) (b) of the Act.

On the third issue for determination, the Board heard submissions from the Applicant that the Procuring Entity failed to comply with the requirements of the Tender Document by awarding the tender to the 3rd Respondent herein, who did not submit a valid National Environmental Management Authority (hereinafter referred to as "NEMA") certificate for use and distribution of primary industrial plastic packaging.

In response, the Procuring Entity submitted that the 3rd Respondent's bid was found to be technically responsive by the Procuring Entity's

Evaluation Committee as the 3rd Respondent's bid met all the requirements as set out in Tender Document.

On its part, the 3rd Respondent submitted that it duly supplied a NEMA certificate as part of its bid documents and that the allegation made to the contrary by the Applicant was an afterthought, malicious and farfetched.

The Board examined the Procuring Entity's Tender Document and observes Mandatory Requirement No 19 under Clause 2.22 of the Appendix to Instructions to Tenderers on page 20 of the Tender Document which reads as follows: -

"NEMA Certificate for use and distribution of primary industrial plastic packaging"

Accordingly, bidders were required to provide a '*NEMA Certificate for use and distribution of primary industrial plastic packaging*' and failure by a bidder to adhere to this mandatory requirement would render its bid non-responsive.

The Board examined the 3rd Respondent's original bid and observes on page 49, a letter issued in what appears to be the letterhead of NEMA titled '*Clearance for Primary Industrial Plastic Packaging*' dated 13th September 2019. This certificate is further signed and sealed by a person identified as NEMA's Director General. Further, the letter states that the clearance is valid for twelve (12) months from the date of issue.

From the foregoing, it is clear that the 3rd Respondent submitted a NEMA Clearance Certificate for use and distribution of primary industrial plastic packaging valid for twelve months from the date of issue, which the Board notes is valid upto 13th September 2020.

Upon examination of the Procuring Entity's Evaluation Report dated and signed on 15th January 2020, the Board observes on page 7 of the report that the 3rd Respondent was found responsive at Preliminary Evaluation and was recommended for further evaluation.

In view of the foregoing, the Board finds that the Applicant satisfied Mandatory Requirement No 19 under Clause 2.22 of the Appendix to Instructions to Tenderers on page 20 of the Tender Document and that the Procuring Entity evaluated the successful bidder's bid in accordance with section 80 (2) of the Act as read together with Article 227 (1) of the Constitution.

The Board is now left with determining the appropriate reliefs to grant in the circumstances.

The Board takes cognizance of section 173 (b) of the Act, which 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...”

Having found that the letters of notification issued to both the successful and unsuccessful bidders are null and void, it is our view that the Procuring Entity cannot be allowed to benefit from an act that is null and void, hence it should be held accountable for its administrative acts.

In the circumstances, the Board therefore finds that the most appropriate order is to direct the Procuring Entity to issue new notification letters simultaneously to the successful and unsuccessful bidders alike, in accordance with section 87 (1) and (3) of the Act, taking into consideration the Board’s findings on the manner in which delegated authority may be exercised and further, the manner in which notification letters should be issued to bidders.

In totality of the foregoing, the Board holds that the Request for Review succeeds only in respect 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 Intention to enter into a contract dated 13th February 2020 addressed to M/s Dechrip East Africa Limited with respect to Tender No. MOH/MAT/001/2019-2020 for Provision of Cleaning Services, be and is hereby cancelled and set aside.**

- 2. The Procuring Entity's Letters of Notification of Unsuccessful bid dated 13th February 2020 addressed to all unsuccessful bidders, including the Applicant herein, with respect to Tender No. MOH/MAT/001/2019-2020 for Provision of Cleaning Services, be and is hereby cancelled and set aside.**

- 3. The Procuring Entity is hereby directed to issue new letters of notification to the successful bidder and to all unsuccessful bidders in accordance with section 87 (1) and (3) of the Act within seven (7) days from the date of receipt of the signed decision of this Board, taking into consideration the findings of this Board in this matter.**

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

Dated at Nairobi, this 16th Day of March 2020

CHAIRPERSON

SECRETARY

PPARB

PPARB

Delivered in the presence of: -

- i.** Mr. Stanley Chege for the Applicant;
- ii.** Ms. Josephine Mwango for the 1st & 2nd Respondent;
- iii.** Mr. Hillary Chelimo for the 3rd Respondent.