

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 7/2020 OF 17TH JANUARY 2020

BETWEEN

THE GARDENS AND

WEDDINGS CENTRE LIMITED.....APPLICANT

AND

THE ACCOUNTING OFFICER,

COUNTY GOVERNMENT OF NAKURU/

THE RIFT VALLEY PROVINCIAL

GENERAL HOSPITAL.....1ST RESPONDENT

COUNTY GOVERNMENT OF NAKURU

THE RIFT VALLEY PROVINCIAL

GENERAL HOSPITAL.....2ND RESPONDENT

Review seeking compliance with the orders issued by the Review Board in Request for Review Application No. 140 of 2019 by Nakuru County Government – The Rift Valley Provincial General Hospital with respect to Tender No. NCG/MOH/PGH/T/5/2019-2021 For Maintenance of Grounds, Flowers, Hedges and Planting of Trees and Flowers

BOARD MEMBERS

- | | |
|----------------------|------------------|
| 1. Mr. Joseph Gitari | -Member Chairing |
| 2. Mr. Ambrose Ngare | -Member |

3. Ms. Rahab Chacha -Member

IN ATTENDANCE

1. Mr. Philip Okumu -Holding brief for Secretary

2. Ms. Maryanne Karanja -Secretariat

PRESENT BY INVITATION

APPLICANT

**-THE GARDENS AND
WEDDINGS CENTRE
LIMITED**

1. Mr. Nathan Karugu

-Advocate, Karugu, Mbugua &
Company Advocates

2. Mr. Daniel Gathogo

-Officer, The Gardens &
Weddings Centre

1ST AND 2ND RESPONDENTS

**-NAKURU COUNTY
GOVERNMENT – THE RIFT
VALLEY PROVINCIAL
GENERAL HOSPITAL**

1. Ms. Sandra Opiyo

-Advocate

2. Mr Kevin Gitau

-Procurement Officer

3. Dr Mburu Joseph

-Medical Superintendant

INTERESTED PARTY

BLUE SEAS SERVICES LIMITED

1. Mr. David Martin Muturi

-Managing Director, Blue Seas Services Limited

BACKGROUND TO THE DECISION

The Bidding Process

Nakuru County Government, Rift Valley Provincial General Hospital (hereinafter referred to as "the Procuring Entity") advertised Tender No. NCG/MOH/PGH/T/5/2019-2021 for Maintenance of Grounds, Flowers, Hedges and Planting of Trees and Flowers (hereinafter referred to as "the subject tender") on 31th May 2019 on *The Star Newspaper* and was closed on 14th June 2019 and opened on the same day by the tender opening committee.

First Evaluation of Bids

The first evaluation was done between 15th June 2019 to 17th June 2019 and the recommended bidders were awarded but a Request for Review was filed by The Gardens and Weddings to the Public Procurement Administrative Review Board (hereinafter referred to as "the Board") after receiving a regret letter. The Board ordered that a re-evaluation of the three categories be conducted in terms of the following specific orders:-

- 1) The Procuring Entity's Letter of Notification of Award of Tender No. Review against the decision of the Nakuru County Government-Rift Valley Provincial General Hospital with respect to Tender No. NCG/MOH/PGH/T/5/2019-2021 for the Maintenance of Grounds, Hedges, Flower Beds and Fences addressed to M/s Adah Design Limited, be and is hereby cancelled and set aside.**

- 2) The Procuring Entity's Letters of Notification of unsuccessful bid addressed to all bidders who participated in Review against the decision of the Nakuru County Government-Rift Valley Provincial General Hospital with respect to Tender No. NCG/MOH/PGH/T/5/2019-2021 for the Maintenance of Grounds, Hedges, Flower Beds and Fences are hereby nullified.**

- 3) The Procuring Entity's Due Diligence Report dated 4th July 2019 be and is hereby cancelled and set aside.**

- 4) The Procuring Entity's Evaluation Report dated 17th June 2019 be and is hereby cancelled and set aside.**

- 5) The Procuring Entity is hereby directed to reconstitute a new evaluation committee in accordance with section 46 (4) (b) of the Act and to re-evaluate the bids received in**

Tender No. NCG/MOH/PGH/T/5/2019-2021 for the Maintenance of Grounds, Hedges, Flower Beds and Fences, taking into consideration the Board's findings in this case and to proceed with the procurement process, including the making of an award within twenty-one (21) days from the date of this decision.

6) Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.

Re-evaluation of Bids

The tender re-evaluation exercise was carried out in three (3) stages starting with the evaluation of the mandatory requirements, technical evaluation and Financial Evaluation. The evaluation process was carried out by the tender evaluating committee comprising of four (4) members who were present. The evaluation team started by evaluating the documents presented. Thereafter mandatory documents were verified through various notification i.e. KRA, NSSF, DEPARTMENT OF LABOUR to verify if they were genuine.

Upon concluding re-evaluation, the Procuring Entity recommended award of the subject tender to M/s Higawa Enterprises Limited at Kshs.4, 816,320 (Four million Eight hundred and Sixteen Thousand Three Hundred and Twenty only per annum).

A due diligence exercise was conducted which returned a positive response that the tender be awarded to M/s Higawa Enterprises Limited.

The Accounting Officer having considered the Professional Opinion awarded the subject tender to M/s Higawa Enterprises Limited.

REQUEST FOR REVIEW NO. 107 OF 2019

M/s The Gardens and Weddings Centre Ltd lodged a Request for Review on 11th September 2019 seeking for the following orders:-

- a) An order annulling the award;***
- b) An order directing that a fresh evaluation of the bids be conducted as the Board may deem fit and the tender be awarded to the deserving/lowest bidder;***
- c) An order for costs of this Application be awarded to the Applicant; and***
- d) Any other orders that the Honourable Board may deem just and fit.***

The Board having considered each of the parties' submissions ordered as follows in its decision dated 2nd October 2019:-

- 1. The Contract dated 12th September 2019 signed between the Procuring Entity and M/s Higawa Enterprises Limited with respect to Tender No. NCG/MOH/PGH/T/5/2019-2021 for Provision of Maintenance for Grounds, Flowers,**

Hedges and Planting of Trees and Flowers, be and is hereby cancelled and set aside.

- 2. The Due Diligence Report signed on 28th August 2019 with respect to the subject tender is hereby cancelled and set aside.**
- 3. The letter of notification of unsuccessful bid dated 28th August 2019 addressed to the Applicant herein, be and is hereby cancelled and set aside.**
- 4. The Procuring Entity is hereby directed to conduct a re-evaluation of the Applicant's bid at the Preliminary Evaluation Stage with respect to the following criteria taking into consideration the findings of the Board in this case:-**
 - a) MR 7: Copy of Compliance with NSSF and PAYE; and**
 - b) MR 8: provide age limits of employees.**
- 5. Further to Order 4 above, the Procuring Entity is hereby directed to conclude the procurement process including the making of an award within fourteen (14) days from the date of this decision.**
- 6. Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.**

Professional Opinion

On 16th October 2019, the Head of Supply Chain Management issued a Professional Opinion stating as follows:-

- I. Having gone through the PPARB decision on the following cases (PPARB No. 106, 107, 108 & 109), the Procuring Entity requests the board to allow the procuring entity to re-tender due to lack of clarity in the bid document;
- II. Re-evaluation of the bids using the same evaluation criteria of providing age limits of employees may be a challenge to the Procuring Entity since concerns raised may not be addressed.

In view of the foregoing, he recommended that the tender be cancelled and be re-advertised after preparation of clear standard bid documents. His Professional Opinion was approved by the Accounting Officer on the same date of 16th October 2019.

Notification to Bidders

In letters dated 17th October 2019, the Accounting Officer notified all bidders that the subject tender has been cancelled and will be re-advertised after preparation of clear bid documents.

Notification to the Director-General of the Public Procurement Regulatory Authority

In a letter dated 18th October 2019, the Accounting Officer of the Procuring Entity notified the Public Procurement Regulatory on the procurement process and previous litigation before the Board. He then stated as follows:-

"In light of the foregoing, the Procuring Entity has pursuant to the provisions of section 63 of the PPAD Act taken the decision to terminate the procurement process to pave way for fresh tendering of the said three (3) tenders"

REQUEST FOR REVIEW NO. 123/2019

M/s The Gardens and Weddings Centre Ltd lodged a Request for Review on 22nd October 2019 seeking the following orders:-

- a) An order allowing the Request for Review;***
- b) An order substituting the decision of the Procuring Entity with a decision awarding the tender to the lowest bidder as per the Tender Evaluation Criteria;***
- c) An order extending the Tender Validity Period taking into account that the subject tender has been the subject of review before the Honourable Board on two occasions (PPARB Request for Review No. 84 of 2019 and PPARB Request for Review 107 of 2019);***
- d) An order holding the Procuring Entity for contempt of the Honourable Board;***

- e) An order awarding costs of this application and two previous related requests (PPARB Request for Review No. 84 of 2019 and PPARB Request for Review 107 of 2019) be awarded to the Applicant;***
- f) Any other orders that the Honorable Board may deem just and fit***

The Board having considered parties' cases and the documents before it, together with confidential documents submitted to it pursuant to section 67 of the Public Procurement and Asset Disposal Act, 2019, ordered as follows:-

- 1. The Procuring Entity's Notification of Termination of procurement proceedings in Tender No. NCG/MOH/PGH/T/5/2019-2021 for Maintenance of Grounds, Flowers, Hedges and Planting of Trees and Flowers dated 17th October 2019, that was addressed to all bidders who participated in the subject tender, be and is hereby cancelled and set aside.**
- 2. The Procuring Entity's Notification of Termination of the procurement proceedings in the subject tender addressed to the Director General of the Public Procurement Regulatory Authority which is dated 18th October 2019, be and is hereby cancelled and set aside.**

- 3. The Procuring Entity is hereby directed to comply with the orders of the Board issued in PPARB Application No. 107 of 2019, The Gardens and Weddings Centre Limited v. The Accounting Officer, Nakuru County Government-Rift Valley Provincial General Hospital & Higawa Enterprises Ltd within fourteen (14) days from the date of this decision, taking into account the Board's findings in this case.**

- 4. The Tender Validity Period of the subject tender is hereby extended for a further period of 45 days from 22nd October 2019.**

- 5. The Procuring Entity shall bear the costs of this Request for Review amounting to Kshs. 100,000/- to be paid to the Applicant.**

Re-evaluation pursuant to the orders issued on 12th November 2019 in PPARB Application Number 123 of 2019

On 15th November 2019 carried out a re-evaluation of all bids received by it at Preliminary, Technical and Financial Evaluation and determined M/s The Gardens and Weddings Centre Ltd to be the lowest evaluated tenderer.

Due Diligence

On 19th to 21st November 2019, the Procuring Entity conducted a due diligence exercise by visiting the Applicant's premises but found the Applicant non-responsive at the end of the due diligence exercise.

Professional Opinion

In his professional opinion dated 26th November 2019, the Procuring Entity's Head of Supply Chain Management, having reviewed the re-evaluation report and due diligence report, noted the Evaluation Committee's findings that no tenderer was responsive. He therefore recommended that the tender be cancelled and be re-advertised to pave way for fresh bidding.

Notification

i. To the Director General, Public Procurement Regulatory Authority

In a letter dated 26th November 2019, the Procuring Entity's Accounting Officer notified the Director General of the Public Procurement Regulatory Authority of its decision terminating the following tenders:-

- a) Tender No. NCG/MOH/PGH/T/6/2019-2021 for Provision of Comprehensive Cleaning Services;
- b) Tender No. NCG/MOH/PGH/T/5/2019-2021 for Provision of Maintenance of Grounds, Flowers, Hedges and Planting of trees and flowers;
- c) Tender No. NCG/MOH/PGH/T/4/2019-2021 for Provision of Sanitary Cleaning Services.

ii. To Bidders

In letters dated 26th November 2019, the Procuring Entity's Accounting Officer notified all bidders of the termination and outcome of their bids.

REQUEST FOR REVIEW NO. 140/2019

M/s The Gardens and Weddings Centre Ltd (hereinafter referred to as "the Applicant") lodged this Request for Review on 6th December 2019 seeking the following orders:-

- a) An order allowing the Request for Review;***
- b) An order substituting the decision of the Procuring Entity with a decision awarding the tender to the lowest bidder as per the Tender Evaluation Criteria;***
- c) An order extending the Tender Validity Period;***
- d) An order awarding costs of this application to the Applicant;***
- e) Any other orders that the Honorable Board may deem just and fit.***

The Board having considered parties' cases and the documents before it, together with confidential documents submitted to it pursuant to section 67 of the Public Procurement and Asset Disposal Act, 2019, ordered as follows:-

- 1. The Procuring Entity's Due Diligence Report signed on 22nd November 2019 in respect of Tender No. NCG/MOH/PGH/T/5/2019-2021 for Maintenance of Grounds, Flowers, Hedges and Planting of Trees and Flowers be and is hereby cancelled and set aside.**

- 2. The Procuring Entity's Letter of Notification of unsuccessful bid dated 26th November 2019 addressed to the Applicant, be and is hereby cancelled and set aside.**

- 3. The Procuring Entity is hereby directed to award the subject tender to the lowest evaluated responsive tenderer subject to a due diligence exercise conducted in accordance with section 83 of the Act, taking into consideration the Board's findings in this case and proceed with the procurement process to its logical conclusion within fourteen (14) days from the date of this decision.**

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

REQUEST FOR REVIEW NO. 7/2020

M/s The Gardens and Weddings Centre Ltd (hereinafter referred to as "the Applicant") lodged a Request for Review dated and filed on 17th January 2020 together with a Supporting Affidavit sworn and filed on 17th January 2020 (hereinafter referred to as "the Applicant's Affidavit") and a further Supporting Affidavit sworn and filed on 30th January 2020 (hereinafter referred to as "the Applicant's Further Affidavit").

In response, Nakuru County Government, Rift Valley Provincial General Hospital (hereinafter referred to as "the Procuring Entity") lodged a

Memorandum of Response dated 28th January 2020 and filed on 29th January 2020 (hereinafter referred to as “the Procuring Entity’s Reponse”).

The Applicant sought the following orders:-

- a) An order allowing the Request for Review;***
- b) An order substituting the decision of the Procuring Entity with a decision awarding the tender to the lowest bidder as per the tender evaluation criteria;***
- c) An order extending the tender validity period;***
- d) An order awarding costs of the application to the Applicant;***
- e) Any other orders that the Honourable Board may deem just and fit.***

During the hearing, the Applicant was represented by Mr. Mbugua on behalf of the firm of Karugu Mbugua & Company Advocates, while the Procuring Entity was represented by Ms. Opiyo, on behalf of the firm of A. E Kiprono Advocates

PARTIES’ SUBMISSIONS

Applicant’s Submissions

In his submissions, Counsel for the Applicant, Mr. Mbugua, fully relied on the Request for Review, the Applicant's Affidavit and the Applicant's Further Affidavit. Mr. Mbugua submitted that this was the fifth time the subject review proceedings were before the Board.

Mr. Mbugua submitted that the Procuring Entity had failed to comply with the orders of the Board dated 23rd December 2019 in Request for Review Application No. 140/2019 thereby prompting the Applicant to file this Request for Review.

Mr. Mbugua submitted that according to the order of the Board, the Procuring Entity had fourteen (14) days to complete the procurement process and make an award, that is, by 6th January 2020. Mr Mbugua contended that there was no compliance as yet by the Procuring Entity and the latter had not appealed or sought a review of the Board's decision thereby the said orders were final and binding on all parties. Mr Mbugua therefore argued that if the Board did not check on the conduct of the Procuring Entity, the integrity of the Board would be put into question.

Mr. Mbugua submitted that the Public Procurement Regulatory Authority (PPRA) had the powers to ensure compliance by procuring entities but where the tender validity period was still running, parties could still seek intervention from the Board.

Counsel contended that any actions taken by the Procuring Entity after 6th January 2020 were taken outside the fourteen day period as stipulated by the Board in its orders. He further argued that all allegations made by the Procuring Entity were baseless and were an attempt by the Procuring Entity to justify its own unlawful actions and the evidence being adduced in support of these allegations cannot be entertained as they run contrary to the provisions of the Evidence Act, Chapter 80 Laws of Kenya.

In conclusion, Mr Mbugua urged the Board to punish the Procuring Entity for failure to comply with the orders of the Board and to further grant the orders as prayed for in the Request for Review.

1st and 2nd Respondents/Procuring Entity's Submissions

In her submissions, Counsel for the Procuring Entity, Ms. Opiyo, fully relied on the Procuring Entity's Response and documents attached thereto.

Ms Opiyo submitted that the Procuring Entity was unable to comply with the Board's orders dated 23rd December 2019 owing to the fact that that particular period was the festive season. However, the Procuring Entity did take steps to ensure compliance with the Board's orders.

Ms Opiyo submitted that the Procuring Entity received the Board's decision on 3rd January 2020 after which it wrote to NSSF on 8th January

2020 requesting for information pertaining to the Applicant's NSSF compliance certificate. Ms Opiyo submitted that the Board Secretariat had informed the Procuring Entity that the decision would be ready on 24th December 2019 but the Procuring Entity was unable to pick the decision on the said date as its offices were closed.

Ms Opiyo submitted that the Procuring Entity further wrote to the Board on 10th January 2020, which letter it also emailed to the Applicant's Advocate, seeking extension of time from 6th of January 2020 to 20th January 2020, due to its inability to initiate and finalize the process of compliance during the time as directed by the Board. This letter was received by the Board on 13th January 2020 after which the Board responded on 14th January 2020 directing the Procuring Entity to file a Notice of Motion Application before it requesting for an extension of time. Ms Opiyo submitted that this response from the Board was received by the Procuring Entity on 20th January 2020, by which time the Applicant had already lodged the present Request for Review on 17th January 2020.

Ms Opiyo further submitted that pursuant to the Board's orders, the Procuring Entity was required to contact NSSF whose offices were closed during the festive season and therefore no response would have been forthcoming during this period. However, she submitted that on 14th January 2020, the Procuring Entity received a letter from NSSF informing them that the compliance letter submitted by the Applicant was issued as per procedure and in reference to the NSSF Act.

Ms. Opiyo submitted that on 23rd January 2020, the Procuring Entity wrote another letter to NSSF since they had omitted to address other enquiries in its initial letter including the number of employees covered by the Applicant's compliance certificate and also if NSSF could supply the Procuring Entity with copies of the supporting receipts for the payments made to NSSF by the Applicant. Ms Opiyo submitted that this information was necessary in order to confirm if the number of the Applicant's employees tally with its compliance certificate. However, according to Ms Opiyo, the Procuring Entity was yet to receive a response to this letter.

In response to an enquiry from the Board, Ms Opiyo submitted that seven days out of the fourteen days for compliance with the Board's orders, were affected by the holiday festive season, that is 25th and 26th December were holidays; 28th and 29th December was a weekend; 31st and 1st were holidays and 4th and 5th January 2020 was also a weekend.

Ms Opiyo contended that the Procuring Entity's delay to comply with the Board's orders was further occasioned by the intimidation and meddling with the Procuring Entity's request for information from NSSF by the Applicant, which it brought to the attention of the Review Board vide a letter dated 15th January 2020.

Ms Opiyo referred the Board to the Affidavit sworn by Mr Kevin Gitau Njoroge, the Procuring Entity's Head of Procurement, who averred that

one Mr. Geoffrey Jomo, an officer of M/s Gardens and Weddings Centre Limited, had sent him whatsapp messages on behalf of one Mr Mugo in order to intimidate, coerce and influence him to act in favour of the Applicant. Further, the said Mr Geoffrey sent Mr Njoroge a whatsapp message on 9th January 2020 of an extract of the section of offences under the Public Procurement and Asset Disposal Act, 2015 and a screen shot of a complaint letter from the Applicant's Advocate dated 6th January 2020 addressed to the Directorate of Public Prosecutions (DPP) and the Regional Head of the Ethics and Anti-Corruption Commission (EACC) requesting an investigation to be conducted regarding the procurement malpractices at the Procuring Entity.

From the said affidavit, Ms Opiyo further submitted that the said Mr Geoffrey sent Mr Njoroge the response from NSSF regarding the Applicant's compliance certificate, even before the Procuring Entity received it on 14th January 2020 which was a clear demonstration that the Applicant was colluding with some NSSF staff.

At this point in her submissions, Ms Opiyo requested the Board to invite the said Mr Njoroge to show the Board the messages he received from Mr Geoffrey Jomo since the Applicant had challenged the authenticity of the text messages in its submissions. This request was however challenged by the Applicant on the basis that Mr Geoffrey Jomo was not a party to the proceedings and it was therefore impossible to rule out the fact that these messages could have been tampered with and that the entirety of the Procuring Entity's allegations in this regard were both

unsubstantiated and baseless. This objection by the Applicant was upheld by the Board which held that it would examine the documents submitted by the Procuring Entity in support of its submissions and make a finding on the same.

Ms Opiyo argued nevertheless that it was evident that the Applicant had coerced and colluded with some NSSF officers to frustrate the subject procurement process which was an offence under section 176 of the Act. Ms Opiyo submitted that the Applicant should be disqualified from entering into a contract with the Procuring Entity and debarred due to its corrupt practices in accordance with section 41 (1) of the Act.

With respect to the orders sought by the Applicant in its Request for Review, Ms Opiyo submitted that the Procuring Entity did not object to prayer (c) seeking extension of the tender validity period as it will enable the Procuring Entity to conclude the exercise as directed by the Board.

However, Ms Opiyo submitted that the Applicant's prayer for award to the lowest bidder was premature as due diligence was yet to be concluded by the Evaluation Committee and the Review Board was incapable of making such an award as it was yet to determine if the Applicant or the lowest evaluated responsive bidder met the due diligence requirements of the Tender Document.

It was the Procuring Entity's submission that the Applicant had not suffered any prejudice as a result of the delay in compliance with the Board's orders and in any event, the Applicant was the party responsible for the delay by its own meddling in the procurement process.

In conclusion, Ms Opiyo urged the Board to dismiss the Request for Review and disqualify the Applicant from participating in the tender in accordance with section 66 and 176 (a) of the Act.

The Applicant's Rejoinder

In a rejoinder, Mr Mbugua submitted that with regards to the computation of time within which the Procuring Entity was required to comply with the Board's orders, he submitted that in the event an action is taken after the given time, it was subject to challenge as the law applied in equal measure to all with no exceptions.

Mr Mbugua contended that the Applicant had previously supplied the receipts for payments made to NSSF and therefore it was unclear why the Procuring Entity sought for copies of the same from NSSF.

On the issue of due diligence, Mr Mbugua submitted that this was the only issue to be verified by the Procuring Entity who had admitted in its submissions before the Board that the same had been verified by NSSF. In this regard therefore, the Procuring Entity's Evaluation Committee

had completed its work and the Procuring Entity should proceed and award the tender to the lowest evaluated responsive bidder

As this was the fifth time the Applicant had moved the Board seeking justice with respect to the subject tender, Mr Mbugua urged the Board to ensure compliance by the Procuring Entity and allow the Request for Review as prayed.

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, 2015 (hereinafter referred to as "the Act") and the oral submissions of parties to the Request for Review.

The issues that call for determination are as follows:-

- I. Whether the Procuring Entity complied with the orders of the Board issued on 23^d December 2019 in PPARB Application No. 140 of 2019, The Gardens and Weddings Centre Ltd v. The Accounting Officer, Nakuru County Government-The Rift Valley Provincial General Hospital & Another***

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

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

The Board in the decision rendered on 23rd December 2019 in **PPARB Application No. 140 of 2019, The Gardens and Weddings Centre Ltd v. The Accounting Officer, Nakuru County Government-The Rift Valley Provincial General Hospital & Another** (hereinafter referred to as PPARB Application No. 140 of 2019) directed as follows:-

- 1. The Procuring Entity's Due Diligence Report signed on 22nd November 2019 in respect of Tender No. NCG/MOH/PGH/T/5/2019-2021 for Maintenance of Grounds, Flowers, Hedges and Planting of Trees and Flowers be and is hereby cancelled and set aside.**
- 2. The Procuring Entity's Letter of Notification of unsuccessful bid dated 26th November 2019 addressed to the Applicant, be and is hereby cancelled and set aside.**
- 3. The Procuring Entity is hereby directed to award the subject tender to the lowest evaluated responsive tenderer subject to a due diligence exercise conducted in accordance with section 83 of the Act, taking into consideration the Board's findings in this case and proceed**

with the procurement process to its logical conclusion within fourteen (14) days from the date of this decision.

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

According to Order 3 above, the Procuring Entity was directed by this Board to award the subject tender to the lowest evaluated responsive tenderer subject to a due diligence exercise conducted in accordance with section 83 of the Act, taking into consideration the Board's findings in **PPARB Application No. 140 of 2019** and conclude the procurement process within fourteen days from the date of the decision.

It was the Applicant's contention that the Procuring Entity ought to have awarded the subject tender on or before 6th January 2020 but had failed to do so, contrary to the orders of the Board. The Applicant argued that the orders of the Board as issued on 23rd December 2019 were final and binding on all parties as the Procuring Entity had not challenged the said decision by way of judicial review at the High Court.

The Applicant further argued that the Applicant had not filed any substantive application before the Board seeking for more time to comply with the Board's orders and subsequently, any steps taken after 6th January 2020 were in total contempt of the Board's orders.

In response, the Procuring Entity submitted that due to the intervening Christmas and New Year Holidays it was unable to complete the due diligence exercise as directed by the Board. However, it was the Procuring Entity's submission that it took the necessary steps to initiate the process of compliance which it outlined as follows: -

The Procuring Entity submitted that it received the decision of the Board in **PPARB Application No. 140 of 2019** on 3rd January 2020. Vide a letter dated 8th January 2020, the Procuring Entity wrote to NSSF requesting for information on the Applicant's compliance certificate.

On 10th January 2020, the Procuring Entity, through its Advocates, wrote to the Board seeking for an extension of time until 20th January 2020 to comply with the orders of the Board in **PPARB Application No. 140 of 2019**.

On 13th January 2020, the Procuring Entity received a letter from NSSF verifying the Applicant's compliance certificate. However, according to the Procuring Entity, NSSF omitted to address the other enquiries raised by the Procuring Entity which included the number of employees covered by the Applicant's compliance certificate and copies of receipts in support of payments made by the Applicant to NSSF.

On 14th January 2020, the Procuring Entity received a response from the Board informing the Procuring Entity that if it wished to seek an

extension of time it may do so by filing a Notice of Motion Application before the Board.

On 17th January 2020, the Applicant lodged its Request for Review.

Finally, on 23rd January 2020, the Procuring Entity wrote again to NSSF enquiring on the number of employees covered by the compliance certificate and also requested for copies of receipts in support of the payments made to NSSF by the Applicant.

It was also the Procuring Entity's submission that the delay in complying with the Board's orders was further compounded by the Applicant's intimidation and meddling with the Procuring Entity's request for information from NSSF. Through an affidavit sworn by its Head of Procurement, the Procuring Entity argued that the Applicant interfered with the procurement process and the due diligence exercise by making direct contact with its Head of Procurement and NSSF staff which in its view amounted to coercion, obstruction and collusion, in violation of section 66 (1) of the Act.

It was also the Procuring Entity's contention that the Applicant had not suffered any prejudice as a result of the delay in concluding the due diligence exercise as it had also been instrumental in contributing to the delay by meddling in the process.

The Board is cognizant of its findings in **PPARB Application No. 140 of 2019** where it held as follows with respect to the due diligence exercise that was initially carried out by the Procuring Entity on the Applicant's bid: -

".....The Board studied the Tender Document and notes that no specific provision makes reference to a requirement for bidders to submit NSSF receipts prior to the date of tender opening. It is only criteria MR 7 at page 24 of the Tender Document considered during Mandatory Requirements/Preliminary Evaluation stage that is specific on the requirement for bidders to attach "a copy of compliance with NSSF and PAYE".

During the hearing of PPARB Applications No. 84 of 2019, 107 of 2019 and 123 of 2019 involving the same Procuring Entity, the Board having studied the Procuring Entity's original evaluation reports noted that the Procuring Entity evaluated this criterion with a view of establishing whether or not bidders provided a copy of NSSF compliance certificate, in so far as the first limb of NSSF under that criterion is concerned.

Despite no provision in the Tender Document requiring bidders to submit NSSF receipts, Criteria 5 which was applied during the due diligence exercise provides as follows:-

"Original NSSF compliance certificate with remittance receipts (for the period prior to the tender opening)"

..... Having considered the court's finding in the Meru University Case, the Board finds, the Procuring Entity in introducing a requirement of NSSF receipts, not previously considered during any of the three evaluation stages, failed to afford the Applicant a fair process, being one of the principles of public procurement enshrined in Article 227 (1) of the Constitution.

..... Having found that these receipts were not part of the criteria set out in the Tender Document, it is the Board's considered view that, what the Procuring Entity ought to have done, given that it found the Applicant responsive at the end of Preliminary Evaluation in so far as Criterion MR 7 is concerned, was to contact NSSF to confirm and verify whether the said organization issued the NSSF compliance certificate to the Applicant, which the Procuring Entity evaluated at Preliminary stage and copy thereof is found at page 20 of the Applicant's original bid.

In confirming the Applicant's NSSF compliance certificate, the Procuring Entity would further enquire from NSSF of the processes an applicant goes through before being issued with NSSF compliance certificate, and if receipts

are involved, to confirm the receipts that NSSF issued to the Applicant.

The Procuring Entity did not contact NSSF regarding the NSSF receipts neither did it verify the Applicant's NSSF compliance certificate, which it had previously evaluated at the Preliminary stage.

It is the Board's finding that the first limb of the Procuring Entity's due diligence exercise, fails to meet the threshold of section 83 (1) of the Act.

The Board takes cognizance that NSSF maintains a self-service portal on its official website accessible to the public under which NSSF payments can be made and that an applicant may obtain e-slips upon payment. However, nothing could have been easier than the Procuring Entity contacting NSSF to verify and confirm any processes and details pertaining to issuance of the NSSF compliance certificate obtained by the Applicant, which was a criterion evaluated at the Preliminary Evaluation stage. In confirming the Applicant's NSSF compliance certificate, the Procuring Entity would further enquire from NSSF of the processes an applicant goes through before being issued with NSSF compliance certificate. This would have assisted the Procuring Entity to verify whether e-slips

were generated by NSSF for the Applicant in the months of January, February, March, April and May cited in the Due Diligence Report.

The Board finds that the Procuring Entity's due diligence exercise based on NSSF receipts not tallying with payroll of employees and that the said NSSF receipts are without e-slips does not meet the threshold of section 83 (1) of the Act, since the Procuring Entity ought to have contacted NSSF to verify and confirm the NSSF compliance certificate issued to the Applicant. "

As noted from the above excerpt, it is evident that the Board outlined the specific steps that the Procuring Entity ought to take in order to carry out a due diligence exercise in accordance with its orders dated 23rd December 2019.

Notably, the Procuring Entity was required to comply with the orders of this Board dated 23rd December 2019 within fourteen days from the date of the decision, that is, by 6th January 2020. However, the Procuring Entity conceded that by 6th January 2020, it had not complied with the orders of this Board and attributed its lack of compliance to several factors which the Board will address as follows: -

The Board heard submissions from the Procuring Entity that it only obtained the decision of the Board on 3rd January 2020, as its offices were closed on 24th December 2019, this being the date that the Board directed parties to collect the signed decision in this matter. The Board notes that the Procuring Entity was present when the decision was delivered on 23rd December 2019 and was aware of the timeline of fourteen days that was imposed on it by the Board for implementation of its orders.

Moreover, the Board Secretariat took the necessary steps to ensure that a scanned copy of the decision was sent to the Procuring Entity on the 24th of December 2019. Notably, the Board only closed its offices on 24th and 25th December 2019, owing to the Christmas Holiday and Utamaduni Day breaks respectively. Subsequently, on 27th December 2019, the Board opened its offices and from the Board's Dispatch Register, a representative of the Applicant collected the signed decision of the Board in **PPARB Application No. 140 of 2019** whereas the Procuring Entity did not send any representative to collect the said decision. In any case, as mentioned hereinbefore, a scanned copy of the same was sent by the Board to the Procuring Entity on 24th December 2019 through the Board's official email (pparb@ppra.go.ke).

In the Board's view, the Procuring Entity should have taken it upon itself to ensure it obtained the decision in good time, noting that public procurements are time sensitive and timelines should be strictly adhered to by all parties involved.

The Procuring Entity further attributed its lack of compliance with the Board's orders in **PPARB Application No. 140 of 2019** to the intervening festive season. The Board however notes that the days affected by the festive season, that is, between 23rd December 2019 and 6th January 2020 were seven days in total. When the Procuring Entity was asked by the Board why compliance was not effected within the remaining seven days, the Procuring Entity reiterated that they received the decision on the 3rd of January 2020 and the Procuring entity took a few days, that is between the 3rd and the 6th of January 2020 to understand and process the Board's decision.

It was only on 10th January 2020, that the Procuring Entity communicated to the Board seeking an extension of time to comply with the orders in **PPARB Application No. 140 of 2019**, after the fourteen day period had already lapsed. In the Board's view, the Procuring Entity ought to have approached this Board prior to 6th January 2020 and sought an extension of time to comply with the Board's orders.

It is important to note that the orders in the decision rendered on 23rd December 2019 remain final and binding to all parties, since the same were not challenged under section 175 (1) of the Act. Moreover, the Procuring Entity has an obligation to comply with the orders of this Board and to inform all bidders, including the Applicant, of the progress made in implementation of the orders issued on 23rd December 2019.

The Board also finds it necessary to address submissions made by the Procuring Entity that its delay in complying with the Board's orders was further compounded by the Applicant's intermeddling and interference with the Procuring Entity's request for information from NSSF. According to the Procuring Entity, the Applicant was working in collusion with some of the NSSF staff to frustrate the due diligence exercise in order for NSSF to give a favourable outcome in response to the Procuring Entity's enquiries.

In support of its submissions, the Procuring Entity adduced an affidavit sworn by one Mr Kevin Gitau Njoroge, its Head of Procurement, dated 28th January 2020. The said Mr Kevin Gitau Njoroge averred that one Mr Geoffrey Jomo, an officer of the Applicant, sent him various whatsapp messages on behalf of the Applicant's director designed to intimidate, coerce and or influence him to act in a manner favourable to the Procuring Entity

The said Mr Kevin Gitau further averred that on 9th January 2020, one Mr Geoffrey Jomo sent him extracts of the list of offences under the Act and a computer screen shot of a letter dated 6th January 2020 from the Directorate of Public Prosecutions to the Regional Head of the Ethics and Anti-Corruption Commission requesting investigations regarding procurement malpractices to be carried out on the Procuring Entity. These photos were annexed to the Procuring Entity's Memorandum of Response.

The Board examined the photos annexed to the Procuring Entity's Memorandum of Response and considered their probative value in view of the allegations made against the Applicant.

The Board studied section 106B of the Evidence Act Chapter 80 of the Laws of Kenya which provides that: -

(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as "computer output") shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.

(2) The conditions mentioned in subsection (1), in respect of a computer output, are the following—

(a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;

(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

This means that any information stored in a computer which is then printed such as a photograph in this case, shall be treated like documentary evidence and will be admissible as evidence without production of the original.

However, for a computer output to be considered a document for admissibility under section 106B (1), it must satisfy the conditions in section 106B (2) namely that:

- a. The output must have been produced during regular use;
- b. It must be of a type expected in ordinary use;

- c. The computer generating the output must be operating properly or it must be shown that the accuracy of the computer is not otherwise affected; and
- d. Where multiple computers are involved, those operating in succession and considered as one.

The Board notes that in the present case, none of these conditions were met.

However, Section 106B (4) also provides that such electronic evidence will only be admissible if the following conditions are satisfied: -

"In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following –

(a) identifying the electronic record containing the Statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any matters to which conditions mentioned in subsection (2) relate; and

(d) Purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant

activities (whichever is appropriate) shall be evidence of any matter stated in the certificate and for the purpose of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge of the person stating it. [Emphasis by Board]

Accordingly, for electronic evidence to be deemed admissible it must be accompanied by a certificate in terms of Section 106 B (4). Furthermore, this certificate must satisfy three conditions:

- i. It must identify the electronic records and production process;
- ii. It must show the particulars of the producing device; and
- iii. It must be signed by the responsible person.

The Board observes that no such certificate has been submitted before it by the Procuring Entity. The Procuring Entity has also not supplied any information to this Board on the particulars of the device involved in receiving the photos or the computer involved in printing the photos.

In the Board's view, the Procuring Entity has failed to meet the requirements as stipulated in section 106B for the admissibility of electronic evidence. The Board therefore finds that the photos as adduced by the Procuring Entity have no probative value in these review proceedings.

Accordingly, the photographs adduced by the Procuring Entity are hereby expunged from the record of these proceedings.

It is trite law that **'he who alleges, must prove'**. This principle is firmly embedded in the **Evidence Act, Chapter 80, Laws of Kenya** which stipulates in section 107 thereof as follows: -

"(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

The same was enunciated by the Honourable Justice Majanja in the case of **Evans Otieno Nyakwana v Cleophas Bwana Ongaro [2015] eKLR** where he stated as follows: -

"...As a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue."

Accordingly, this Board notes that no evidence has been submitted by the Procuring Entity in support of the allegations made against the Applicant. We therefore cannot rely on the Procuring Entity's submissions and conclusively make a determination on this issue.

Nevertheless, the Board notes that the Procuring Entity wrote a letter to NSSF on 8th January 2020 requesting for information on the Applicant's compliance certificate and duly received a response from NSSF on 13th January 2020 verifying the Applicant's NSSF compliance certificate. The Procuring Entity further furnished copies of these letters before this Board which we have perused and confirmed the contents therein.

The Board notes that the document to be verified with respect to the Applicant's bid documents was "a copy of compliance with NSSF and PAYE", that is, criteria MR 7 at page 24 of the Tender Document considered during Mandatory Requirements/Preliminary Evaluation stage.

The Board in **PPARB Application No. 140 of 2019** held that the Procuring Entity in introducing a requirement of NSSF receipts, not previously considered during any of the three evaluation stages, failed to afford the Applicant a fair process, being one of the principles of public procurement enshrined in Article 227 (1) of the Constitution as it was not a requirement under the Tender Document. It is therefore not clear why the Procuring Entity requested for copies of these receipts from NSSF more so after NSSF had verified the Applicant's compliance certificate through its letter dated 13th January 2020.

In this regard therefore, it is evident that the Procuring Entity conducted a due diligence pursuant to the orders of the Board issued on 23rd December 2019, save that it failed to conduct the said process within

the timelines as issued and that it also failed to award the subject tender as directed by the Board.

Therefore, in determining the orders and relief to grant in this matter, and having found that the Procuring Entity has conducted a due diligence exercise as directed under **PPARB Application No. 140 of 2019**, it is the Board's view that all that remains is for the Procuring Entity to award and complete the procurement process to its logical conclusion.

The Board observes that this is the fifth time the Request for Review is coming up for hearing in respect of the same tenderer and procuring entity and we are of the firm view that there should be an end to litigation. In this regard therefore, the Board will again refer this matter to the Public Procurement and Regulatory Authority (PPRA) which is mandated under the Act to ensure public entities comply with the provisions of the Act and orders of this Board.

At this point, the Board would like to address its mind on the tender validity period of the subject tender.

When the Board rendered its decision in **PPARB Application No. 140 of 2019**, the Board found that the tender validity period of the subject tender of 70 days had 46 days remaining.

When the Applicant lodged this review application on 17th January 2020, the tender validity period had run for another 25 days and a total of 21 days were remaining, noting that the tender validity period remains suspended until conclusion of these review proceedings.

In this regard therefore, the Board is of the view that the tender validity period is still running and sufficient for the Procuring Entity to award and complete the subject procurement process.

In the circumstances, even though the Request for Review has succeeded the Board shall refrain from awarding costs to the Applicant herein as it will still have an opportunity to participate in this procurement process, in terms of the final orders herein.

In totality, the Board holds that the Request for Review succeeds only with respect to 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 is hereby directed to comply with the orders of the Board issued on 23rd December 2019 in**

PPARB Application No. 140 of 2019 with respect to Tender No. NCG/MOH/PGH/T/5/2019-2021 by specifically awarding the subject tender to the lowest evaluated responsive tenderer taking into consideration the Board's findings in this case within seven (7) days from the date of this decision and proceed with the procurement process to its logical conclusion

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

CHAIRPERSON

SECRETARY

PPARB

PPARB

Delivered in the presence of: -

- i.** Mr Nathan Karugu for the Applicant;
- ii.** Ms Sandra Opiyo for the 1st and 2nd Respondent.