

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 136/2020 OF 30TH OCTOBER 2020

BETWEEN

CHANIA CLEANERS LIMITED.....APPLICANT

AND

THE ACCOUNTING OFFICER,

NATIONAL SOCIAL SECURITY FUND.....1ST RESPONDENT

NATIONAL SOCIAL SECURITY FUND.....2ND RESPONDENT

Review against the conduct and decision of the National Social Security Fund with respect to Tender No. NSSF 06/2020 for Procurement of Cleaning & Gardening, Fumigation and Sanitary Services for various NSSF Properties (Commercial & Residential) (Reserved for Women and Persons with Disabilities).

BOARD MEMBERS

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

IN ATTENDANCE

- | | |
|------------------------|----------------------------------|
| 1. Mr. Philemon Kiprop | -Holding brief for the Secretary |
|------------------------|----------------------------------|

BACKGROUND TO THE DECISION

The Bidding Process

National Social Security Fund (hereinafter referred to as "the Procuring Entity") invited firms to bid for Tender No. NSSF 06/2020 for Procurement

of Cleaning & Gardening, Fumigation and Sanitary Services for various NSSF Properties (Commercial & Residential) (Reserved for Women and Persons with Disabilities) (hereinafter referred to as "the subject tender") through an advertisement published in the Standard Newspaper on 27th August 2020.

Bid Submission Deadline and Opening of Bids

The Procuring Entity received a total of 57 bids by the bid submission deadline of 11th September 2020. The same were opened shortly thereafter by a Tender Opening Committee in the presence of tenderers' representatives who chose to attend and recorded as follows: -

BID NO	NAME OF THE COMPANY
1	Cebeth Enterprises Ltd
2	Lavender Limited
3	Cockrid (K) Ltd
4	Virgin Clean Ltd
5	Jepco Services & Renovators Ltd
6	Hamethyst Limited
7	MACBI Enterprises
8	Lucky Blue Ltd
9	Rosey International Ltd
10	Stellalizer Ltd
11	Outland Express Services Ltd
12	Aqron Group Ltd
13	ZAP Cleaners
14	Grand Cleaning Services Ltd
15	Saharry Logistics
16	Cleanmark Limited
17	Volt Cleaning & Gardening Services Ltd
18	Kenma Homecare Services
19	Mersa Cleaning Services
20	Remark Cleaning Services
21	Super Broom Services Limited
22	Professional Clean Care Ltd

BID NO	NAME OF THE COMPANY
23	Lupart Cleaning Services
24	Top Image Cleaning
25	Karek Agencies
26	Cheshire Cleaning
27	Pin Point Hygiene Services
28	Dorlian Enterprises Ltd
29	Dechrip East Africa Limited
30	Krystalline Company Ltd
31	Roan Services
32	Gledix Limited
33	Belam Cleaning
34	CD Clean Ltd
35	Digital Sanitation Services
36	Chania Cleaners
37	Liga Holdings Limited
38	Asena Sparkling Ventures
39	Sender Services Co. Ltd
40	Colnet Limited
41	Spic 'N' Span Cleaning Services Ltd'
42	Lynne Cleaning & Hygiene Services
43	Nadia Investments Ltd
44	Oneway Cleaning Services Ltd
45	Spec and Glow
46	Peesam Limited
47	Shirlab Enterprises
48	Aimat Company Ltd
49	Getros Co. Limited
50	Robu Cleaning Services Ltd
51	Crystal Consolidated Ltd
52	Mwewe Cleaning
53	Fanisi Company Limited
54	Dekings Traders Ltd
55	Ice Clean Care Group Ltd
56	Black Tar Builders Ltd
57	Jimmon Cleaning

Evaluation of Bids

Having appointed an Evaluation Committee, evaluation of bids in the subject tender was undertaken in the following stages: -

- i.** Preliminary Evaluation;
- ii.** Technical Evaluation; and
- iii.** Financial Evaluation.

1. Preliminary Evaluation

At this stage, the Evaluation Committee applied the criteria outlined in Clause (ii) of Stage 1. Preliminary Evaluation of the Appendix to Instructions to Tenderers of the Tender Document. At the end of evaluation at this stage, only 35 tenderers were found responsive and thus eligible to proceed to Technical Evaluation.

2. Technical Evaluation

At this stage, the Evaluation Committee applied the criteria outlined in Stage 2. Technical Evaluation of the Appendix to Instructions to Tenderers of the Tender Document. At the end of evaluation, 12 tenderers were found responsive and thus eligible to proceed to Financial Evaluation.

3. Financial Evaluation

At this stage, the Evaluation Committee applied the criteria outlined in Stage 3. Financial Evaluation of the Appendix to Instructions to Tenderers of the

Tender Document, which involved a determination of the tenderers with the lowest evaluated tender price in each of the 3 lots in the subject tender.

Recommendation

The Evaluation Committee recorded the prices quoted by tenderers in the respective lots and recommended award of the subject tender as shown below: -

- **Lot 1.**

Table 1

PROPERTY	Bidder Name	Amount
Social Security House- Nairobi - Block "A"	Remark Cleaning Services	KES 1,100,700 Per Month
Social Security House Nairobi - Block "B"		
Social Security House Nairobi - Block "C"		
SSH Annex		
Social Security House- Mombasa	Spec and Glow	KES 287,300 Per Month
Bruce House	Spec and Glow	KES 253,500 Per Month
View Park Towers	Remark Cleaning Services	KES 279,734 Per Month
Hazina Towers	Saharry Logistics	KES 273,700 Per Month
Hazina Trade Centre	Saharry Logistics	KES 194,800 Per Month
Hazina Shopping Complex	Peesam Limited	KES 58,020 Per Month
Nyayo Estate Embakasi (Phase I & II)	Top Image Cleaning Services	KES 1,117,184 Per Month

Nyayo Estate Embakasi (Phase III, IV, V & VI)	Top Image Cleaning Services	KES 1,112,816 Per Month
---	-----------------------------	--------------------------------

- **Lot. 2**

Table 2

PROPERTY	Bidder Name	Amount
Social Security House- Nairobi Block "A"	Cockrid K Limited	KES 78,880 Per Quarter
Social Security House Nairobi Block "B"		
Social Security House Nairobi Block "C"		
SSH Annex		
Social Security House- Mombasa	Colnet Limited	KES 16,500 Per Quarter
Bruce House	Colnet Limited	KES 21,000 Per Quarter
View Park Towers	Cockrid K Limited	KES 27,000 Per Quarter
Hazina Towers	Sender Services	KES 25,148 Per Quarter
Hazina Trade Centre	Sender Services	KES 16,343 Per Quarter
Hazina Shopping Complex	Peesam Limited	KES 25,000 Per Quarter

- **Lot 3**

Table 3

PROPERTY	Bidder Name	Amount
Social Security House- Nairobi - Block "A"	Cockrid K Limited	KES 87,000 Per Month
Social Security House Nairobi - Block "B"		

Social Security House Nairobi - Block "C"		
SSH Annex		
Social Security House- Mombasa	Aimat Co. Limited	KES 25,536 Per Month
Bruce House	Aimat Co. Limited	KES 19,152 Per Month
View Park Towers	Cockrid K Limited	KES 20,880 Per Month
Hazina Towers	Sender Services	KES 22,400 Per Month
Hazina Trade Centre	Sender Services	KES 7,200 Per Month
Hazina Shopping Complex	Nadiah Investments	KES 2,784 Per Month

Professional Opinion

In a professional opinion dated 16th October 2020, the Procuring Entity's Acting Procurement Manager outlined the manner in which the subject procurement process was undertaken whilst reviewing the Evaluation Report dated 15th October 2020. He urged the Procuring Entity's Chief Executive Officer/Managing Trustee to award the subject tender to the lowest evaluated tenderers in the respective lots of the subject tender. The said professional opinion was approved on 20th October 2020.

Notification to Bidders

In letters dated 21st October 2020, the Procuring Entity's Accounting Officer notified all successful and unsuccessful tenderers of the outcome of their respective bids.

THE REQUEST FOR REVIEW

M/s Chania Cleaners Limited (hereinafter referred to as "the Applicant") lodged a Request for Review dated 4th November 2020 (which seems to have been an erroneous date) and filed on 30th October 2020 together with a Statement in Support of the Request for Review sworn on 4th November 2020 (which seems to have been an erroneous date) and filed on 30th October 2020 and a Supplementary Affidavit sworn on 14th November 2020 and filed on 16th November 2020, through the firm of Marrirmoi Chemurgor & Company Advocates seeking the following orders: -

- 1. An order nullifying the entire procurement proceedings in the Tender No. NSSF 06/2020 for Procurement of Cleaning & Gardening, Fumigation and Sanitary Services for various NSSF Properties (Commercial & Residential) (Reserved for Women and Persons with Disabilities), be nullified in its entirety;***
- 2. An order directing the Respondents to award the applicant Tender No. NSSF 06/2020 for Procurement of Cleaning & Gardening, Fumigation and Sanitary Services for various NSSF Properties (Commercial & Residential) (Reserved for Women and Persons with Disabilities) for being the most substantially responsive tenderer;***
- 3. In the alternative, an order directing the Procuring Entity to re-evaluate all the submitted bids within the law;***
- 4. In the alternative, an order directing the Procuring Entity to prepare fresh Tender Document and re-tender for provision of***

cleaning, gardening, fumigation and sanitary services for NSSF commercial and residential services;

5. An order awarding costs of the Request for Review to the Applicant; and

6. Any other relief that the Review Board deems fit to grant under the circumstances.

In response, the Respondents lodged a Response to the Request for Review dated and filed on 6th November 2020 through the firm of G.M Gamma Advocates LLP.

On 16th March 2020, the Board issued Circular No. 1/2020 and the same was published on the Public Procurement Regulatory Authority's website (www.ppra.go.ke) in recognition of the challenges posed by Covid-19 pandemic. Through the said Circular, the Board instituted certain measures to restrict the number of representatives of parties that may appear before the Board during administrative review proceedings in line with the presidential directives on containment and treatment protocols to mitigate against the potential risks of the pandemic.

On 24th March 2020, the Board issued Circular No. 2/2020 further detailing the Board's administrative and contingency management plan to mitigate Covid-19 pandemic. Through this circular, the Board dispensed with physical hearings and directed that all request for review applications would be canvassed by way of written submissions. Clause 1 at page 2 of the said

Circular further specified that pleadings and documents would be deemed as properly filed if they bear the official stamp of the Board.

Accordingly, the Applicant lodged Written Submissions dated 14th November 2020 and filed on 16th November 2020. The Respondents lodged Written Submissions dated 18th November 2020 and filed on 19th November 2020.

BOARD'S DECISION

The Board has considered the pleadings filed before it, including the 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 finds that the following issues call for determination: -

- I. Whether the Procuring Entity failed to carry out a tender opening exercise in the subject tender as required in Clause 2.18.1 of Section II. Instructions to Tenderers of the Tender Document read together with section 78 (6) of the Act.**
- II. Whether the Procuring Entity evaluated the Applicant's bid at the Preliminary Evaluation Stage in accordance with Clause (ii) of Stage 1. Preliminary Evaluation of the Appendix to Instructions to Tenderers and Clause 2.20.5 of Section II. Instructions to Tenderers of the Tender Document read together with section 79 (1) of the Act.**

III. Whether the Procuring Entity carried out evaluation of bids in the subject tender outside the statutory period specified in section 80 (6) of the Act.

Before addressing the above issues, the Board would like to dispense with a preliminary aspect regarding a new ground introduced by the Applicant in its Supplementary Affidavit. At paragraph 3 of its Supplementary Affidavit, the Applicant depones that the letter of termination of the subject tender was in breach of section 87 (3) of the Act as it did not disclose the successful tenderer and appropriate reasons thereof. In its Written Submissions, the Respondents submitted that the Applicant's Supplementary Affidavit, which raises a new ground for review interferes with its (Respondent's) right to a fair hearing provided in Article 50 of the Constitution thus ought to be disregarded and expunged on account of being unprocedural.

In addressing this issue, the Board observes that the Applicant never challenged the contents of the letter of notification dated 21st October 2020 (which the Board notes is a letter of notification of unsuccessful bid and not a letter of notification of termination of procurement proceedings) issued to it by the Procuring Entity as one of the grounds of its Request for Review, but instead, raised the same as a new ground in its Supplementary Affidavit. This Board is cognizant of section 167 (1) of the Act which gives aggrieved tenderers a right to seek administrative review of the decision of a procuring entity within fourteen days of notification of award or date of occurrence of

the alleged breach. In order to invoke the jurisdiction of the Board under section 167 (1) of the Act, such tenderer must file a Request for Review which must comply with the requirements of the Regulation 202 (2) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "Regulations 2020") which provides as follows: -

"(2) The request referred to in paragraph (1) shall—

(a) state the reasons for the complaint including any alleged breach of the Constitution the Act or these Regulations

(b) be accompanied by such statements as the applicant considers necessary in support of its request

(c) be made within fourteen days of—

(i) the occurrence of the breach complained of where the request is made before the making of an award

(ii) the notification under section 87 of the Act or

(iii) the occurrence of the breach complained of where the request is made after making of an award to the successful bidder

(d) be accompanied by the fees set out in the Fifteenth Schedule of these Regulations which shall not be refundable"

The Fourteenth Schedule to Regulations 2020 provide a sample Form for Review applicable when filing Request for Review applications. The same appears as follows: -

FORM FOR REVIEW
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO.....OF.....20.....

BETWEEN

..... **APPLICANT (Review Board)**

AND

.....**RESPONDENT (Procuring Entity)**

Request for review of the decision of the..... (Name of the Procuring Entity.....dated the...day of20.....in the matter of Tender No.....of20..... for(Tender description).

REQUEST FOR REVIEW

I/We.....,the above named Applicant(s), of address: Physical address.....P.O. Box No..... Tel. No.....Email, hereby request the Public Procurement Administrative Review Board to review the whole/part of the above mentioned decision on the following grounds, namely:

- 1.**
- 2.**

By this memorandum, the Applicant requests the Board for an order/orders that:

- 1.**

2.

SIGNED(Applicant) **Dated on**.....day of
...../...20.....

FOR OFFICIAL USE ONLY Lodged with the Secretary Public
Procurement

Administrative Review Board on.....day of
20.....

SIGNED

Board Secretary

Pursuant to Regulations 2020 and the Fourteenth Schedule thereof, the Request for Review must state the reasons for the complaint (i.e. grounds of the Request for Review) including any alleged breach of the Constitution, the Act or Regulations 2020. This means that, an aggrieved Applicant cannot introduce reasons for its complaint in a Supplementary Affidavit, if such reason/ground was not stated in the Request for Review. Furthermore, outlining all the grounds in the Request for Review, gives all respondents and interested parties the opportunity to respond to the said grounds, thus promoting the right to a fair hearing afforded to all persons by dint of Article 50 of the Constitution.

It is also worth noting that the Request for Review is filed within fourteen days of notification of award or date of occurrence of an alleged breach by the Procuring Entity. The Applicant alleges that it received its letter of notification of unsuccessful bid on 28th October 2020, therefore had the right to file a Request for Review within fourteen days after 28th October 2020 (whilst including the allegation of breach of section 87 (3) of the Act as one of the grounds of the Request for Review), which period lapsed on 11th November 2020. This means, the ground raised in the Supplementary Affidavit filed on 16th November 2020 is out of time. In essence, the Applicant's alleged breach of section 87 (3) of the Act is not only out of time stipulated in section 167 (1) of the Act, but also, was not raised in the Applicant's Request for Review in accordance with Regulation 202 (2) of Regulations 2020, thus interfering with other parties' right to a fair hearing.

Accordingly, the Board shall not address the Applicant's alleged breach of duty imposed on the Procuring Entity pursuant to section 87 (3) of the Act, because the same has been raised out of time, offends the provisions of Regulation 202 (2) of Regulations 2020 and is a calculated move to deny the Respondents their right to respond to the said ground, if they wish to do so.

Having dispensed with the above preliminary aspect, the Board now proceeds to address the above issues as follows: -

On the first issue for determination, the Board notes that at paragraph 1 (c) of the Request for Review and paragraph 7 of its Statement in Support of the Request for Review, the Applicant states that the Respondents are in breach of section 78 (6) of the Act for excluding the Applicant from the public tender opening exercise that was to be carried out in accordance with Clause 2.18 of Section II. Instructions to Tenderers of the Tender Document by indicating to the Applicant that the Procuring Entity would not be opening and reading bids in public due to excessive number of submitted bids. In response to this averment, the Respondents at paragraph 6 of the Response to the Request for Review aver that they did not breach section 78 (6) of the Act, thus putting the Applicant to strict proof thereof. According to the Respondents, the subject tender was closed on 11th September 2020 at 12 noon and opened immediately thereafter in the presence of tenderers' representatives pursuant to provisions of the Act and the Tender Document.

Having considered parties' pleadings, the Board observes that pursuant to section 78 (1) and (3) of the Act, an accounting officer of a procuring entity has an obligation to appoint a tender opening committee and once such tender opening committee is appointed, it has an obligation to open all tenders received before the tender submission deadline. Section 78 (4) of the Act further states that: -

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

Section 78 (4) of the Act gives tenderers or their representatives the right to choose whether or not to attend the tender opening exercise. This right is also provided for in Clause 2.18.1 of Section II. Instructions to Tenderers of the Tender Document as follows: -

"The Procuring Entity will open all tenders in the presence of tenderers' representatives who choose to attend, on 11th September 2020 at 12.00 pm and in the location specified in the invitation to tender. The tenderers' representatives who are present shall sign a register evidencing their attendance"

The Procuring Entity specified the location of tender opening as NSSF, 4th Floor Reception, Social Security House, Nairobi. The Board observes that whereas the Tender Document specified that the Procuring Entity would carry out a tender opening exercise on 11th September 2020 and that tenderers' representatives were at liberty to attend such exercise, section 78 (6) of the Act already recognizes this as a requirement in law. In the Board's view, the tender opening exercise ensures the principle of transparency can be achieved in line with Article 227 (1) of the Constitution which provides that: -

"When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective"

The tender opening exercise gives all tenderers an opportunity to witness the opening of their respective bids, to learn of the identity of their

competitors and ensures that public procurement and asset disposal processes are not shrouded in mystery. This means the Procuring Entity is required by law to carry out a tender opening exercise on the date specified in Clause 2.18.1 of Section II. Instructions to Tenderers of the Tender Document or in the alternative, to postpone such exercise to another date and communicate such alternative date to all tenderers through an Addendum issued in accordance with section 75 (1) of the Act which states as follows: -

"A procuring entity may amend the tender documents at any time before the deadline for submitting tenders by issuing an addendum without materially altering the substance of the original tender"

Having established that tender opening is a requirement under section 78 (6) of the Act and that the same was further specified in Clause 2.18.1 of Section II. Instructions to Tenderers of the Tender Document, it is incumbent upon this Board to determine whether indeed the Procuring Entity carried out a tender opening exercise in the subject tender. From the confidential file submitted pursuant to section 67 (3) (e) of the Act, the Board notes that no addendum was issued by the Procuring Entity amending Clause 2.18.1 of Section II. Instructions to Tenderers of the Tender Document. This therefore means, the tender opening would take place on 11th September 2020 at 12 pm or immediately thereafter.

The Board was furnished with the Tender Attendance Register dated 11th September 2020 signed by representatives of the Procuring Entity and

various representatives of tenderers who participated in the subject tender. These tenderers' representatives specified their names, the company they were representing and provided their respective email addresses in case of any communication by the Procuring Entity regarding the subject procurement process. Having studied the Tender Attendance Register dated 11th September 2020, the Board did not find any representative of the Applicant.

The Board has also perused the **"Minutes of Tender Opening Committee- Tender No. NSSF 06/2020 for Procurement of Cleaning & Gardening, Fumigation and Sanitary Services for various NSSF Properties (Commercial & Residential) (Reserved for Women and Persons with Disabilities) held on 11th September 2020 in the NSSF, 4th Floor Reception, Social Security House"** where it is recorded as follows: -

"MIN: 3/06/2020-2021: OPENING OF TENDERS

3.1. The Chairman called the meeting to order at 12.30 pm. He brought to the attention of the Committee Members present that, the agenda of the meeting was to open Tender No. 06/2020-2021- Procurement of Cleaning & Gardening, Fumigation and Sanitary Services for various NSSF Properties (Commercial & Residential) (Reserved for Women and Persons with Disabilities)

3.2. The parcels were confirmed that they were Fifty-Seven (57No) and allocated an identification number as it was being opened. Since this was a one enveloped tender, the Chairman read out aloud the bid numbers, the names of the bidders, their respective Tender Securing Declaration Form and their quoted Bid Sums.

3.3 At the end of the tender opening, Fifty-Seven (57No) firms submitted their documents and the same were recorded as attached.

MIN 4/06/2020-2021: ANY OTHER BUSINESS”

There being no other business to transact for the day, the Chairman thanked the Committee members present for taking part in the tender opening session. The meeting ended at 6.30 pm.”

The foregoing documentation demonstrates that the Procuring Entity carried out a tender opening exercise as required by section 78 (6) of the Act and as communicated to bidders through Clause 2.18.1 of Section II. Instructions to Tenderers of the Tender Document. The Applicant’s allegation that it was informed by the Procuring Entity that no tender opening exercise would take place because of the numerous number of bids received is not substantiated because such allegation does not change the fact that the Applicant is presumed to have knowledge of section 78 (6) of the Act which makes tender opening a mandatory exercise undertaken after the tender submission deadline. In any case, the Applicant knew the Tender Document specified

the date of tender opening and nothing stopped the Applicant's representatives from attending the tender opening exercise. Furthermore, as already established by the Board, the Procuring Entity did not issue an addendum communicating a different date scheduled for tender opening since all communications between a procuring entity and bidders in public procurement and asset disposal processes must be in writing as stated in section 64 (1) of the Act. That provision states as follows: -

"All communications and enquiries between parties on procurement and asset disposal proceedings shall be in writing"

In the absence of any addendum issued to all bidders postponing the date of tender opening to an alternative date, the tender opening date and time was 11th September 2020 at 12.00 pm, a fact that was known to all bidders including the Applicant herein pursuant to Clause 2.18.1 of Section II. Instructions to Tenderers of the Tender Document and nothing stopped the Applicant from attending the tender opening exercise. In a nutshell, the Applicant has failed to prove the Procuring Entity did not carry out a tender opening exercise in the subject tender, given that the documentation provided in the Procuring Entity's confidential file demonstrates that the tender opening exercise was undertaken on the date communicated to all bidders.

In the absence of any proof to the contrary, the Board finds that the Procuring Entity carried out a tender opening exercise in the subject tender

in accordance with Clause 2.18.1 of Section II. Instructions to Tenderers of the Tender Document read together with section 78 (6) of the Act.

The second issue for determination revolves around the Applicant's allegation at paragraph 1 (b) of the Request for Review that the Procuring Entity fraudulently and/or maliciously plucked and/or removed the Applicant's National Social Security Compliance Certificate dated 2nd September 2020 from the Applicant's bid submitted in a sealed envelope in accordance with section 77 of the Act. At paragraph 6 and 12 of the Statement in Support of the Request for Review, the Applicant reiterates that it submitted the said National Social Security Compliance Certificate dated 2nd September 2020 together with all other mandatory documents required in the Tender Document, and was therefore wrongfully found non-responsive. In response, the Respondents at paragraph 5 of the Response to the Request for Review aver that they did not pluck and/or remove the Applicant's NSSF Compliance Certificate or at all and thus, have put the Applicant to strict proof thereof. In the Respondents' view, the Applicant's deliberate failure and/or neglect to furnish the Procuring Entity with a valid NSSF Compliance Certificate which was a mandatory requirement in the Tender Document, rendered the Applicant's bid non-responsive.

To address the second issue, the Board notes that all parties to the Request for Review are in agreement that submission of a Valid Current NSSF Compliance Certificate formed part of the mandatory requirements under Clause (ii) of Stage 1. Preliminary Evaluation of the Appendix to Instructions

to Tenderers at page 14 of the Tender Document. The said mandatory requirements are listed in the aforementioned provision as follows: -

- 1. Registration Certificate/Certificate of Incorporation.**
- 2. Valid Current AGPO Certificate-Women and PWDs.**
- 3. Valid Current Tax Compliance Certificate.**
- 4. Valid Current NSSF Compliance Certificate.**
- 5. Details of Directorship/Ownership with respective shareholding citizenship (Attach CR 12).**
- 6. Duly Signed Tender Securing Declaration Form.**
- 7. Letter from the Bank showing bidder's financial resources or access to lines of credit from the Bank.**
- 8. Proven Physical Location and Address of the company/firm - attach Business Permit.**
- 9. Mandatory Business questionnaire. All sections of the questionnaire must be filled in; failure to duly complete the confidential business questionnaire will automatically lead to disqualification.**

It is also not disputed that Clause 2.20.5 of Section II. Instructions to Tenderers of the Tender Document expressly states that: -

"If a tender is not substantially responsive, it will be rejected by the Procuring Entity and may not subsequently be made responsive by the tenderer by correction of the non-conformity"

It therefore follows that failure to submit any of the 9 mandatory requirements listed hereinbefore would render a tender non-responsive and thus would not proceed to Technical Evaluation.

The Applicant's allegation that the Procuring Entity fraudulently and/or maliciously plucked and/or removed the Applicant's NSSF Compliance Certificate from the Applicant's original bid prompted the Board to study the Applicant's original bid forming part of the confidential file submitted to the Board and the copy of the Applicant's bid attached to the Request for Review. Having compared the two documents, the Board proceeds to make the following findings: -

Firstly, the Applicant's original bid and copy of the Applicant's bid are not serialized as required by section 74 (1) (i) of the Act which provides as follows: -

"(1) The accounting officer shall ensure the preparation of an invitation to tender that sets out the following—

...(i) requirement of serialization of pages by the bidder for each bid submitted

This requirement was specified in Clause (i) (e) of Stage 1. Preliminary Evaluation at page 14 of the Tender Document which states: -

"Tenders shall be subjected to a preliminary evaluation to determine whether: -

(e) the bid document has been serialized (numbered back to back)

The importance of serialization of bid documents has been the question of discussion before our Courts when handling procurement and asset disposal disputes. In **Judicial Review Miscellaneous Application No. 312 of 2018, Republic v Public Procurement Administrative Review Board; Nairobi City Water & Sewerage Company Limited & another (Interested Parties) Ex parte Fourway Construction Company Limited [2019] eKLR**, the Court held as follows: -

"The ordinary meaning of serialization is to publish or present something in the form of a serial. The Concise Oxford English Dictionary defines a serial as "consisting of, forming part of, or taking place in a series" and further defines "to serialize" as "to arrange in a series". A "series" is on the other hand defined as "a number of similar or related things coming one after another". Therefore, the ordinary meaning and interpretation of serialization of pages is that each page must be arranged and presented in a manner that it is evident that a page is coming after another page.

For a purposive interpretation of the provisions of the law regarding serialization of the pages of bid documents, one needs to consider the principles and objectives underlying public procurement law, which are stipulated under both

under the Constitution and the Act. Article 227(1) of the Constitution in this regard provides that when a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

Two key principles and objectives come to play in the requirement for serialization of every page of a bid document. The first is that following laid down rules of procedure is an important aspect of fairness, non-discrimination and equal treatment.

...Compliance with the requirement of serialization of every page of a bid document is crucial for good governance, transparency, and accountability. Non-conformity with this requirement will be open to abuse by procuring entities and bidders, who can deliberately plant documents, and use the opportunity for correction to advance their own interests. In addition, the possibility of accepting non-conforming tenders as regards serialization of every page will require that discretion is given to procuring entities or reviewing bodies to judge whether or not to waive or allow correction of the particular non-conformity, and such discretion can be abused to favour certain bidders.

The Court in the foregoing case took the position that compliance with the requirement of serialization of every page of a bid document is crucial for

good governance, transparency, and accountability because non-conformity with this requirement will be open to abuse by procuring entities and bidders, who can deliberately plant documents, and use the opportunity for correction to advance their own interests.

It is worth noting that whereas the Applicant has alleged that its NSSF Compliance Certificate dated 2nd September 2020 was plucked/removed from its original bid by the Procuring Entity without any evidence of such allegation, its original bid (and copy of its bid) is not serialized. Assuming the Applicant had serialized its bid as "001" (being the first page) to "150" (being the last page), and that its NSSF Compliance Certificate took the serialization of "149", it would have been easier for the Board to note a missing page between "148" and "150" of the Applicant's original bid to ascertain that indeed page "149" of the said bid was removed.

Secondly, the Applicant's original bid is spiral bound (as opposed to being tape-bound) making it susceptible to any person, either the Applicant in collusion with the Procuring Entity, or the Procuring Entity to remove or plant any document to give the Applicant an unfair advantage over other bidders. The Applicant's allegation that the Procuring Entity on its own volition removed the Applicant's NSSF Compliance Certificate dated 2nd September 2020 from the Applicant's original bid is not supported by any evidence especially in this instance where the Applicant's spiral bound bid document does not indicate any torn pages and in the Board's considered view, a spiral bound bid document that is not serialized is susceptible to manipulation. It

is important to emphasize that such manipulation may be undertaken by the Applicant in collusion with the Procuring Entity, or the Procuring Entity on its own volition to advance their own interests. That notwithstanding, the Applicant has not provided supporting evidence that such manipulation was undertaken by the Procuring Entity on its own volition because its bid is not serialized and tape bound as this would have been a safer way to present the Applicant's original bid to protect the sanctity of the said bid.

Thirdly, the Applicant's original bid contains a Table of Contents with the following details: -

TABLE OF CONTENT

- 1. Form of Tender**
- 2. Price Schedule for Services**
- 3. Tender Securing Declaration Forms**
- 4. Confidential Business Questionnaire**
- 5. Signed Site Visit Forms**
- 6. Bank Reference Letter**
- 7. Company Profile**
- 8. ISO 9001:2015 Certificate**
- 9. Certificate of Registration under Special Category**
- 10. CR 12**
- 11. Kenya National Chamber of Commerce & Industry Membership**
- 12. ISSA Member Certificate**

- 13. Certificate of Incorporation**
- 14. Tax Compliance Certificate**
- 15. VAT Certificate**
- 16. PIN Certificate**
- 17. Current Trade Licence**
- 18. NEMA Certificates on Environmental Management**
- 19. Recommendation Letters and Signed Contracts**
- 20. Work Plan, Manuals, Procedures and Checklists**
- 21. Environmental and Safety and Quality Policy**
- 22. Tools and Machinery**
- 23. List of Chemicals and Material Safety Data Sheet (MSDS)**
- 24. Audited Accounts**
- 25. Insurance Cover**
- 26. Proof of Compliance with Existing Labour Laws (NSSF and NHIF Compliance Certificate, Ministry of Labour Compliance)**
- 27. Directors/Technical Personnel CVs**
- 28. Information Regarding Litigation**
- 29. Forms of Annual Returns**
- 30. Organization Structure**
- 31. Pest Control Certificate**

On the other hand, the copy of the Applicant's bid (referred to by the Applicant as "**Exhibit JN3**" of the Request for Review) contains a Table of Contents appearing as follows: -

TABLE OF CONTENT

- 1. Form of Tender**
- 2. Duly Filled and Stamped Confidential Business Questionnaire**
- 3. Duly Filled Anti-Corruption Declaration Commitment Pledge**
- 4. Duly Filled and Stamped Tender Security Declaration Form**
- 5. Disinfection Certificate**
- 6. Bank Reference Letter and Bank Statement**
- 7. Company Profile**
- 8. ISO 9001:2015 Certificate**
- 9. Certificate of Registration under Special Category**
- 10. CR 12**
- 11. Kenya National Chamber of Commerce & Industry Membership**
- 12. ISSA Member Certificate**
- 13. Certificate of Incorporation**
- 14. Tax Compliance Certificate**
- 15. VAT Certificate**
- 16. PIN Certificate**
- 17. Current Trade Licence**
- 18. NEMA Certificates on Environmental Management**
- 19. Recommendation Letters and Signed Contracts**
- 20. Work Plan, Manuals, Procedures and Checklists**
- 21. Environmental and Safety and Quality Policy**
- 22. Tools and Machinery**
- 23. List of Chemicals and Material Safety Data Sheet (MSDS)**

24. Audited Accounts

25. Insurance Cover

26. Proof of Compliance with Existing Labour Laws (NSSF and NHIF Compliance Certificate, Ministry of Labour Compliance)

27. Directors/Technical Personnel CVs

28. Information Regarding Litigation

29. Forms of Annual Returns

30. Organization Structure

31. Pest Control Certificate

From the foregoing, the Board observes that Items 2, 3, 4 & 5 of the Table of Contents found in the Applicant's original bid differs from Items 2, 3, 4 & 5 of the Table of Contents found in **Exhibit JN3**, whilst Item 6 of the Table of Contents found in the Applicant's original bid is referred to as a "**Bank Reference Letter and Bank Statement**" whereas Item 6 of the Table of Contents found in **Exhibit JN3** is referred to as a "**Bank Reference Letter**". The Board finds the difference in the two Tables of Contents to be very unusual especially because both Tables of Contents contain the Applicant's Company Letterhead and thus the Table of Contents in **Exhibit JN3** ought to be a true copy (and reflection) of the Table of Contents in the Applicant's original bid. These differences prompted the Board to study all documents attached to the Applicant's original bid in comparison to those attached to **Exhibit JN3** and we note that: -

- **Exhibit JN3** contains a duly completed Price Schedule for Services for Lot I which contains different figures from the duly completed Price Schedule for Services for Lot 1 attached to the Applicant's original bid;
- **Exhibit JN3** contains a duly completed Price Schedule for Services for Lot II which contains different figures from the duly completed Price Schedule for Services for Lot II attached to the Applicant's original bid;
- The Applicant's original bid contains NHIF Compliance Certificate Serial No. 44104 that is valid up to 18th September 2020. However, this document cannot be found in **Exhibit JN3**; and
- In addition to relying on a copy of NSSF Compliance Certificate dated 2nd September 2020, the Applicant also attached NSSF Compliance Certificate dated 26th February 2020, which was valid for 6 months from that date thus had already expired by the tender opening date of 11th September 2020 and the same cannot be found in the Applicant's original bid.

The Court in **Environment and Land Case No. 373 of 2014, Micheal J C K Kapsot v Kotut arap Too [2020] eKLR** while considering the burden of proof held as follows: -

"The law is clear that he who alleges must prove. Whoever desires any court to give judgment as to why any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. When a person is

bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

In this case, the Applicant alleges that its NSSF Compliance Certificate dated 2nd September 2020 was removed from its original bid, therefore bears the burden of proof. However, such burden of proof has not been discharged to the satisfaction of the Board having found that (i) the Applicant never took into account the provisions of section 74 (1) (i) of the Act and Clause (i) (e) of Stage 1. Preliminary Evaluation at page 14 of the Tender Document which make serialization of bids a mandatory requirement at the Preliminary Evaluation Stage, (ii) in addition to its failure to serialize its bid document, the Applicant submitted a spiral bound bid document which was susceptible to manipulation either by the Applicant in collusion with the Procuring Entity to advance their own interests or the Procuring Entity on its own volition to the detriment of other bidders, (iii) the Applicant’s Annexure JN3 has a Table of Contents that differs from the Table of Contents found in the Applicant’s original bid and (iv) some documents in the Applicant’s original bid are either different or missing from Annexure JN3 (and vice versa), thus casting doubt as to whether the Applicant submitted a true copy of its original bid for the Board’s consideration. The Applicant is the author of its own misfortune for the foregoing reasons and this Board is not persuaded by the Applicant’s allegations.

In the absence of proof to the contrary, the Board finds that the Applicant did not submit a Valid Current NSSF Compliance Certificate as required in

Clause (ii) of Stage 1. Preliminary Evaluation of the Appendix to Instructions to Tenderers at page 14 of the Tender Document, as part of its original bid.

This Board and the Courts have on numerous occasions addressed the importance of eligibility and mandatory requirements, which is the first hurdle that bidders ought to overcome before they are considered for further evaluation. In **PPARB Application No. 79 of 2020, Madison General Insurance Kenya Limited v. The Accounting Officer, County Government of Kwale & 2 Others**, it was held as follows: -

"The Board is cognizant that section 79 (1) of the Act defines a responsive bid as "one that conforms to the eligibility and mandatory requirements specified in the tender document". In determining responsiveness of bidders, Article 227 (1) of the Constitution requires all State organs and other public entities to contract for goods and services in a system that is fair, equitable, transparent, competitive and cost-effective. "

The High Court in **Miscellaneous Civil Application No. 214 of 2019, Republic v Public Procurement Administrative Review Board; Principles Styles Limited & another (Interested Parties) Ex Parte Accounting Officer, Kenya Water Towers Agency & another [2020] eKLR** while considering the issue of responsiveness of bids held as follows:

-

"Indeed, public procurement practically bristles with formalities which bidders often overlook at their peril.

Such formalities are usually listed in bid documents as mandatory requirements – in other words they are a sine qua non for further consideration in the evaluation process. The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing, empowerment etc. Bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome.

It is evident from the foregoing cases that the Applicant's failure to submit a Valid Current NSSF Compliance Certificate in its original bid means that its bid would not be considered for further evaluation. Evaluation criteria are the standards and measures used to determine whether a tenderer met all the eligibility and mandatory requirements (including technical specifications) identified in the Tender Document. Any bidder who is unable to satisfy any of these requirements is deemed to be non-responsive because such bidder would be incapable of performing the contract once it is awarded a tender. It is on the basis of eligibility and mandatory requirements (including technical specifications) that responsive tenders are established. In this case, the Applicant's allegation that its Applicant's NSSF Compliance Certificate dated 2nd September 2020 was plucked and/or removed from its original bid has not been substantiated leading the Board to conclude that

the Applicant did not submit the said NSSF Compliance Certificate dated 2nd September 2020 as part of its original bid.

Accordingly, the Board finds that the Procuring Entity evaluated the Applicant's bid at the Preliminary Evaluation Stage in accordance with Clause (ii) of Stage 1. Preliminary Evaluation of the Appendix to Instructions to Tenderers and Clause 2.20.5 of Section II. Instructions to Tenderers of the Tender Document read together with section 79 (1) of the Act.

On the third issue for determination, the Board notes that according to paragraph 1 (d) of the Request for Review and paragraph 15 of its Statement in Support of the Request for Review, the Applicant avers that the Respondents' Evaluation Committee acted in breach of section 80 (6) of the Act in carrying out evaluation of bids beyond the stipulated statutory period of 30 days.

To address this issue, the Board considered the provision of section 80 (6) of the Act which states as follows: -

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

The Board further studied the provisions of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "Regulations 2020") and notes that the Third Schedule thereof provides a sample format for

preparation of an Annual Procurement Plan for use by procuring entities. In the said annual procurement plan, **"Tender Evaluation"** is described as follows: -

"Tender evaluation — is the process used to identify the most preferred bidder technically and financially. This process should not take more than 30 calendar days"

Having considered the provision of section 80 (6) of the Act and the Third Schedule to Regulations 2020, the Board observes that both provisions confirm that evaluation of open tenders ought to take a period of thirty days (i.e. calendar days). However, these provisions do not clarify from what date such 30 days ought to start running. Having established that evaluation is the process of identifying the most preferred bidder technically and financially, it means that the period of 30 days for evaluation ought to be the number of days taken by an evaluation committee to identify the most preferred bidder that is technically and financially responsive. Therefore, the number of days between commencement of evaluation and signing of the evaluation report would constitute the period taken to determine the preferred bidder that is both technically and financially responsive. To buttress this position, the Board observes that the Act recognizes that a Tender Opening Committee is separate from an Evaluation Committee. On one hand, section 78 (3) of the Act provides that the Tender Opening Committee's role is to open tenders received before the tender submission deadline. On the other hand, section 80 (1) of the Act provides that the Evaluation Committee appointed by the accounting officer pursuant to section 46 of the Act, shall evaluate and compare the responsive tenders.

This therefore leads the Board to conclude that a Tender Opening Committee is separate from an Evaluation Committee thus undertake separate and distinct roles. This explains why the tender opening exercise is separate from the evaluation exercise because it is only through evaluation that the most preferred bidder that is technically and financially responsive.

In determining the number of days taken to evaluate bids in the subject tender, the Board ought to consider the period taken by the Evaluation Committee to determine the bidder that was technically and financially responsive for award of the subject tender. In doing so, the Board notes that the Evaluation Report dated 15th October 2020 which forms part of the confidential file submitted to the Board pursuant to section 67 (3) (e) of the Act does not specify the date when the Evaluation Committee began evaluation of bids in the subject tender. Page 3 of the said Evaluation Report shows the 1st Respondent appointed an Evaluation Committee, however, the date when such appointment was made is not specified, neither was the Board furnished with appointment letters of the said committee members for the Board to ascertain when the Evaluation Committee was appointed in order to commence evaluation of tenders.

The Board was not furnished with any documentation to ascertain the date when evaluation of bids in the subject tender began, especially in this instance where the Board has established that the Act and Regulations 2020 are silent regarding the date from which the period of 30 days for evaluation of tenders should start running, save that evaluation should not exceed 30

calendar days. Furthermore, the Applicant only alleged that it has reason to believe evaluation was undertaken outside the statutory period of 30 days without providing evidence to support its allegation, thus failed to discharge its burden of proof.

In the absence of any proof to the satisfaction of the Board, the Board finds that there is no evidence to show that the Procuring Entity carried out evaluation of bids in the subject tender outside the statutory period of 30 days specified in section 80 (6) of the Act.

In determining the appropriate orders to grant in the circumstances, the Board observes that at paragraph 1 (e) of the Request for Review, the Applicant avers that the Procuring Entity failed to declare the Applicant's bid as the most responsive proposal and thus was in breach of the Act. Accordingly, the Applicant urged the Board to direct the Procuring Entity to award it (Applicant) the subject tender or in the alternative, to direct the Procuring Entity to re-evaluate all bids in the subject tender. The Applicant also prayed that the Board directs the Procuring Entity to prepare a fresh Bidding Document and retender for the services under the subject tender.

Having considered the prayers in the Request for Review, the Board is mindful of its finding that the Procuring Entity rightfully evaluated the Applicant's bid at the Preliminary Evaluation Stage and thus could not proceed to further evaluation. Even assuming the Applicant was responsive after Preliminary Evaluation, it would have been appropriate in those

circumstances for the Board to direct the Procuring Entity to reinstate the Applicant's bid at the Technical Evaluation Stage and to conduct a re-evaluation at the Technical Evaluation Stage, where the Applicant would compete with other tenderers and if found responsive, the Applicant would proceed to Financial Evaluation with tenderers qualified for that stage. The Evaluation Committee would then determine the lowest evaluated tenderer (s) in the respective lots of the subject tender. However, the obtaining circumstances do not justify award of the subject tender to the Applicant neither do they justify an order for a re-evaluation. An order for preparation of a fresh Tender Document and retendering is also not justified having found no fault in the Tender Document (which was never challenged) or any reason to direct a retender. In the Board's view, the Applicant only wants a second bite at the cherry despite its failure to comply with mandatory provisions in the Tender Document. In the circumstances, the Board is left with no option but to find that the Applicant's Request for Review lacks merit and thus dismisses the same.

FINAL ORDERS

In exercise of the powers conferred upon it by section 173 of the Act, the Board makes the following orders in the Request for Review: -

- 1. The Request for Review filed on 30th October 2020 by the Applicant herein with respect to Tender No. NSSF 06/2020 for Procurement of Cleaning & Gardening, Fumigation and Sanitary Services for various NSSF Properties (Commercial &**

Residential) (Reserved for Women and Persons with Disabilities), be and is hereby dismissed.

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

Dated at Nairobi this 20th day of November 2020

CHAIRPERSON

SECRETARY

PPARB

PPARB