

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 110/2020 OF 24<sup>TH</sup> JULY 2020**

**BETWEEN**

**ASHFORD KINOTI MURIUNGI.....APPLICANT**

**AND**

**KENYA BROADCASTING CORPORATION.....RESPONDENT**

**AND**

**JOSEPH GITONGA.....INTERESTED PARTY**

Review against the decision of the Kenya Broadcasting Corporation with respect to Tender No. 9/KBC/2019-2020 for Lease out for Parcel of Land (Marania TX)

**BOARD MEMBERS**

- |                        |              |
|------------------------|--------------|
| 1. Ms. Faith Waigwa    | -Chairperson |
| 2. Mr. Steven Oundo    | -Member      |
| 3. Mr. Nicholas Mruttu | -Member      |

**IN ATTENDANCE**

- |                        |                              |
|------------------------|------------------------------|
| 1. Mr. Philemon Kiprop | -Holding brief for Secretary |
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## **BACKGROUND TO THE DECISION**

### **The Bidding Process**

The Kenya Broadcasting Corporation (hereinafter referred to as “the Procuring Entity”) invited eligible and interested bidders to submit their bids in response to Tender No. 9/KBC/2019-2020 for Lease out for Parcel of Land (Marania TX) (hereinafter referred to as “the subject tender”). The subject tender was advertised in the Star Newspaper, the Procuring Entity’s website [www.kbc.co.ke](http://www.kbc.co.ke) and on [www.tenders.go.ke](http://www.tenders.go.ke) on 28<sup>th</sup> February 2020.

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

A total of ten (10) firms/bidders submitted bids and the same were opened on 12<sup>th</sup> February 2020. The following firms submitted bids in response to the subject tender: -

<b>Bidder No.</b>	<b>Bidders/Firms</b>
1.	M/s Stanley Mwiti Mungania
2.	M/s Regional Business Connection
3.	M/s Silas Mutwiri
4.	M/s Abraham Mugambi
5.	M/s Elijah Nabea Mukaria
6.	M/s Leslie Murithi Muthamia
7.	M/s Beth Kagwiria
8.	M/s Ashford Kinoti Muriungi
9.	M/s James Kiogora
10.	M/s James Gitonga

### **Evaluation of Bids**

Vide a memo dated 18<sup>th</sup> February 2020, the Procuring Entity’s Accounting Officer appointed an evaluation committee to carry out evaluation of bids received in response to the subject tender.

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

- Preliminary Evaluation
- Technical Evaluation;
- Financial Evaluation.

### **1. Preliminary Evaluation**

At this stage of evaluation, the Evaluation Committee perused bidders' documents and agreed to evaluate bidders on scores and weights at the Technical Evaluation Stage.

### **2. Technical Evaluation**

At this stage of evaluation, bids were evaluated against the following requirements: -

<b>NO.</b>	<b>REQUIREMENTS</b>
1.	Deposit of Kshs 100,000 (Land is 146.96 acres)
2.	Proof of Firm implements Farm Implements
3.	Site visit Certificate
4.	PIN Certificate
5.	Current and Valid Tax Compliance Certificate
6.	Bank Statement (6 months)
7.	Certificate of Good Conduct (added advantage)
8.	Copy identity card or Certificate of Incorporation

9.	Filed confidential business questionnaire
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Each bidder had to score 80% to proceed to financial evaluation.

The following four (4) bidders scored 80% and above and qualified to proceed to financial evaluation: -

- a) Bidder No 1 – M/s Stanley Mwiti Mungania **98.75%**
- b) Bidder No 2 – M/s Regional Business Connection **100%**
- c) Bidder No 8 – M/s Ashford Kinoti Muriungi **85%**
- d) Bidder No 10 – M/s Joseph Gitonga **91.25%**

### 3. Financial Evaluation

At this stage of evaluation, the four (4) bidders' financial bids were evaluated as follows: -

FIRM NO.	TECHNICAL SCORES	FINANCIAL BID	TOTAL ACREAGE/YEAR	TOTAL THREE YEAR LEASE COST	RANKINGS
1	79/80 = 98.75%	25,110.00 per acre	3,690,165.60	11,070,496.80	3 <sup>rd</sup>
2	80/80 = 100%	25,000.00 per acre	3,674,000.00	11,022,000.00	4 <sup>th</sup>
8	68/80 = 85.00%	25,905.00 per acre	3,806,998.80	11,420,996.40	2 <sup>nd</sup>
<b>10</b>	<b>73/80 = 91.25%</b>	<b>35,500.00 per acre</b>	<b>5,217,080.00</b>	<b>15,651,240.00</b>	<b>1<sup>st</sup></b>

### The Evaluation Committee's Recommendation

In view of the evaluation process, the Evaluation Committee recommended award of the subject tender to **M/s Joseph Gitonga** at a total cost of Kenya Shillings **Fifteen Million, Six Hundred and**

**Fifty-One Thousand, Two Hundred and Forty Only (15,651,240.00) only** for a period of three years.

**REQUEST FOR REVIEW NO. 26 OF 2020**

M/s Elijah Nabea Mukaria lodged a Request for Review dated and filed on 25<sup>th</sup> February 2020 together with a Statement in Support of the Request for Review sworn and filed on even date.

In response, the Procuring Entity lodged a Memorandum of Response dated 3<sup>rd</sup> March 2020 and filed on 6<sup>th</sup> March 2020. The Procuring Entity further lodged a Notice of Preliminary Objection dated 3<sup>rd</sup> March 2020 and filed on 6<sup>th</sup> March 2020.

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

-

- i. An order declaring that the Applicant herein was the successful tenderer;***
- ii. An order substituting the decision of the Procuring Entity with the finding in prayer (i);***
- iii. An order awarding costs of the review to the Applicant herein;***
- iv. Any other order that the Board shall deem fit.***

The Board having considered parties' cases and the documents filed before it, including confidential documents submitted to it pursuant to section 67 (3) (e) of the Act ordered as follows in its decision dated 17<sup>th</sup> March 2020: -

- 1. The Request for Review filed on 25<sup>th</sup> February 2020 with respect to Tender No. 9/KBC/2019-2020 for Lease out for Parcel of Land (Marania TX) be and is hereby dismissed.**
- 2. The Procuring Entity is at liberty to proceed with the subject procurement process to its logical conclusion.**
- 3. Each party shall bear its own costs in the Request for Review.**

### **REQUEST FOR REVIEW NO. 73 OF 2020**

M/s Elijah Nabea Mukaria lodged a Request for Review dated 8<sup>th</sup> June 2020 and filed on 9<sup>th</sup> June 2020 together with a Supporting Affidavit sworn and filed on even date, through the firm of Ishmael & Company Associates.

In response, the Procuring Entity lodged a Memorandum of Response dated 15<sup>th</sup> June 2020 and filed on 17<sup>th</sup> June 2020 through its Legal Counsel, Ms. Velma Kwang'a. The Procuring Entity further lodged a Notice of Preliminary Objection dated and filed on even date.

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

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- i. An order annulling the award of Tender No. 9/KBC/2019-2020 for Lease out for Parcel of Land (Marania TX);***
- ii. An order declaring that the Applicant's tender is the successful tender in Tender No. 9/KBC/2019-2020 for Lease out for Parcel of Land (Marania TX);***
- iii. An order directing the Respondent to enter into a contract with the Applicant in Tender No. 9/KBC/2019-2020 for Lease out for Parcel of Land (Marania TX);***
- iv. Any other relief that the Board may deem fit and just to grant;***
- v. Costs of the Review.***

The Board having considered parties' cases and the documents filed before it, including confidential documents submitted to it pursuant to section 67 (3) (e) of the Act ordered as follows in its decision dated 30<sup>th</sup> June 2020: -

- 1) The Procuring Entity's Letter of Notification of Award of Tender No. 9/KBC/2019-2020 for Lease out for Parcel of Land (Marania TX) addressed to Joseph Gitonga dated 19<sup>th</sup> May 2020, be and is hereby cancelled and set aside.**
- 2) The Procuring Entity's Letters of Notification of Unsuccessful Bid with respect to Tender No. 9/KBC/2019-**

**2020 for Lease out for Parcel of Land (Marania TX) addressed to all unsuccessful bidders dated 19<sup>th</sup> May 2020, be and are hereby cancelled and set aside.**

**3) The Procuring Entity is hereby directed to re-admit all bids that were found responsive at the Mandatory Evaluation Stage at the Technical Evaluation Stage and conduct a re-evaluation at the Technical Evaluation Stage taking into consideration the Board's finding in this case, and proceed with the procurement process including the making of an award within fourteen (14) days from the date of this decision.**

**4) 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**

Following the decision of the Board, the Procuring Entity's Evaluation Committee conducted a re-evaluation of bids at the Technical Evaluation Stage.

All the ten (10) bidders were found responsive and qualified to proceed to the Financial Evaluation Stage.



## Financial Evaluation

At this stage of evaluation, bids were ranked as follows: -

FIRM NO.	FINANCIAL BID (per acre)	TOTAL ACREAGE/YEAR	TOTAL THREE YEAR LEASE COST	RANKINGS
1	25,110.00	3,690,165.60	11,070,496.80	9 <sup>th</sup>
2	25,000.00	3,674,000.00	11,022,000.00	10 <sup>th</sup>
3	27,000.00	3,967,920.00	11,903,760.00	7 <sup>th</sup>
4	29,510.00	4,336,789.00	13,010,368.80	5 <sup>th</sup>
5	32,250.00	5,180,340.00	15,541,020.00	2 <sup>nd</sup>
6	27,605.00	4,056,830.00	12,170,490.00	6 <sup>th</sup>
7	33,304.00	4,894,355.84	14,683,067.52	3 <sup>rd</sup>
8	25,905.00	3,806,998.80	11,420,996.40	8 <sup>th</sup>
9	31,405.00	4,615,278.00	13,845,836.40	4 <sup>th</sup>
<b>10</b>	<b>35,500.00 per acre</b>	<b>5,217,080.00</b>	<b>15,651,240.00</b>	<b>1<sup>st</sup></b>

## The Evaluation Committee's Recommendation

In view of the re-evaluation process, the Evaluation Committee recommended award of the subject tender to **M/s Joseph Gitonga** at a total cost of Kenya Shillings **Fifteen Million, Six Hundred and Fifty-One Thousand, Two Hundred and Forty Only (15,651,240.00) only** for a period of three years.

## **THE REQUEST FOR REVIEW NO. 110 OF 2020**

M/s Ashford Kinoti Muriungi (hereinafter referred to as "the Applicant") lodged a Request for Review dated 23<sup>rd</sup> July 2020 and filed on 24<sup>th</sup> July 2020 (hereinafter referred to as "the Request for Review") together with a Supporting Affidavit sworn on 23<sup>rd</sup> July 2020 and filed on 24<sup>th</sup> July 2020 (hereinafter referred to as "the Applicant's Affidavit") through the firm of Ishmael & Company Associates.

In response, the Procuring Entity lodged a Memorandum of Response sworn and filed on 3<sup>rd</sup> August 2020 through its Legal Counsel, Ms. Velma Kwang'a.

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

-

- i. An order annulling the award of Tender No. 9/KBC/2019-2020 for Lease out for Parcel of Land (Marania TX);***
- ii. An order that the Applicant's tender be declared the successful tender in respect of Tender No. 9/KBC/2019-2020 for Lease out for Parcel of Land (Marania TX);***
- iii. An order directing the Respondent to enter into a contract with the Applicant in respect of Tender No. 9/KBC/2019-2020 for Lease out for Parcel of Land (Marania TX);***
- iv. Any other relief that the Board may deem fit and just to grant;***
- v. An order for costs of the Review.***

On 16<sup>th</sup> March 2020, the Board issued Circular No. 1/2020 and the same was published on the Public Procurement Regulatory Authority (hereinafter referred to as "the PPRA") website ([www.ppra.go.ke](http://www.ppra.go.ke)) in recognition of the challenges posed by the COVID-19 pandemic and instituted certain measures to restrict the number of representatives of parties that may appear before the Board during administrative review proceedings in line with the presidential directives on containment and treatment protocols to mitigate against the potential risks of the virus.

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

The Board further cautioned all parties to adhere to the strict timelines as specified in its directive as the Board would strictly rely on the documentation filed before it within the timelines specified to render its decision within twenty-one days of filing of the request for review in accordance with section 171 of the Public Procurement and Asset Disposal Act, No. 33 of 2015 (hereinafter referred to as "the Act").

The Applicant lodged the Request for Review Application on 24<sup>th</sup> July 2020. Thereafter, the Procuring Entity was served with a physical copy of the Request for Review on 27<sup>th</sup> July 2020.

The Board observes, M/s Joseph Gitonga, the Interested Party herein, was informed by the Board Secretariat of the existence of the Request for Review via email on 3<sup>rd</sup> August 2020.

However, the Board observes that the Interested Party did not file any pleadings before the Board in Response to the Request for Review.

Accordingly, the Applicant filed written submissions dated 10<sup>th</sup> August 2020 on even date whereas the Procuring Entity lodged written submissions dated 3<sup>rd</sup> August 2020 on even date. The Interested Party did not file any written submissions.

### **BOARD'S DECISION**

The Board has considered each of the parties' cases, the documents filed before it, including confidential documents filed in accordance with section 67 (3) (e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") together with parties' written submissions.

The issues that call for determination are as follows: -

- I. Whether the Procuring Entity issued the Applicant with a letter of notification of unsuccessful bid that meets the threshold under section 87 (3) of the Act;**
- II. Whether the Procuring Entity evaluated the Applicant's bid at Financial Evaluation Stage in accordance with**

**Clause 2.15 and 2.16 of Section II Instructions to Tenderers on page 10 of the Tender Document, section 80 (2) of the Act read together with Article 227 (1) of the Constitution;**

Before the Board put its mind to the issues framed for determination, the Board would like to make the following observation: -

The Board observes that the Applicant raised the following grounds for review in its written submissions filed on 10<sup>th</sup> August 2020: -

***"a) On page 4 of the Applicant's Written Submissions: -***

*"The Respondent ...re-admitted the Interested Party's tender which was clearly non-complaint with Clause 5.4 of the Section V of the Tender Document. This clause required that tenders should have a site survey certificate signed by respective engineer in charge and must accompany the tender document submitted. The Interested Party's site visit certificate was a product of fraud it is a Mr. Charles Mwiti Alexander who allegedly visited the parcel of land but it is Joseph Gitonga who signed the certificate..."*

***b) On page 4 – 5 of the Applicant's Written Submissions: -***

*"The Interested Party's bid was not responsive at all as it did not comply with section I (Clause 1.1.3) of the Tender Document by failing to pay in advance the required and refundable Kshs 100,000/- deposit. Further, the Interested*

*Party did not comply with the mandatory requirement captured in section 11 (Clause 2.7.1) of the Tender Document on the Kshs 100,000 refundable deposit. This clause was coached in mandatory terms and there is no evidence of compliance by the Interested Party”*

***c) On page 5 of the Applicant’s Written Submissions the Applicant stated as follows:***

*“There was evidence adduced by the Applicant that the Interested Party has gone ahead and started working on the farm. Exhibit A-05 being photographs but the Respondent has not commented on this fact...”*

The Board notes, the foregoing grounds for review were not canvassed in the Request for Review Application filed by the Applicant on 24<sup>th</sup> July 2020 but were raised for the first time in the Applicant’s written submissions filed on 10<sup>th</sup> August 2020.

The questions that the Board must now answer is what are written submissions and what are their purpose?

The Black’s Law Dictionary defines ‘submit’ as:

***“To propound; as an advocate submits a proposition for the approval of the court. Applied to a controversy, it means to place it before a tribunal for determination.”***

From this definition, submissions can be interpreted to mean a litigant's position in a matter that is placed before a court or any other adjudicating body for its consideration and determination. This ordinarily consists of a summary of the relevant facts, the law and a proposed analysis of the dispute in a particular matter. Notably, submissions can either be oral or written.

The purpose of submissions was explained by the Court of Appeal in **Civil Appeal 172 of 2012 Fibre Link Limited v Star Television Production Limited [2015] eKLR** whereby Honourable Justice Aburili opined as follows: -

***Submissions are not evidence.....Submissions by counsel from the bar have never been a means of the parties tendering their evidence in court. Submissions are only meant to clarify issues and not for purposes of giving evidence. Furthermore, counsel's role in proceedings has never been that of witness giving evidence on behalf of their clients unless they are called as witnesses in which event they would then relinquish their role as advocates for the party and step into the witness box to be cross examined, or unless they are parties to a particular dispute. That is not the case here.***

Accordingly, submissions are only meant to clarify issues and not for purposes of giving evidence.

This Board in its decision in **PPARB Application No. 107, 108 and 109 of 2020 (Consolidated)** had an opportunity to explain the purpose of written submissions as follows: -

***"Written Submissions, as the Board understands them have a dual role, that is, to introduce a decision maker to a party's case and to persuade the decision maker to accept it. As regards the second step of persuasion, the decision maker must understand the reasons why it should decide in that party's favour on the issues and not find in favour of the party's opponent. In essence, written submissions sum up the facts of the case, the legal issues arising (i.e. issues that were already raised by parties in their pleadings that were filed before any written submissions were made), how the law applies to those legal issues and a conclusion wherein a party would be persuading the decision maker to find in its favour."***

From the above excerpt, it is evident that written submissions introduce a decision maker to a party's case and persuade the decision maker to accept it. Written submissions therefore sum up a party's case in order to persuade a decision maker to decide in its favour.

Section 167 (1) of the Act, clearly provides as follows: -

***"Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek***



***administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.”***

Accordingly, a candidate or tenderer who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity may lodge a request for review application before this Board within fourteen days of notification of award or date of occurrence of alleged breach.

Regulation 203 (1) and (2) of the Public Procurement and Asset Disposal Regulations (hereinafter referred to as “Regulations 2020”) provide a procedure for filing a request for review as follows: -

***“203. (1) A request for review under section 167(1) of the Act shall be made in the Form set out in the Fourteenth Schedule of these Regulations.***

***(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."***

Further, Regulation 205 of the 2020 Regulations provides as follows: -

**"(1) The Secretary shall, immediately after the filing of the request under regulation 203, serve a notice thereof to the accounting officer of a procuring entity in accordance with section 168 of the Act.**

***(2) The notification of the filing of the request for review and suspension of procurement proceedings shall be communicated, in writing, by the Review Board Secretary.***

**(3) Upon being served with a notice of a request for review, the accounting officer of a procuring entity shall within five days or such lesser period as may be stated by the Secretary in a particular case, submit to the Secretary**

**a written memorandum of response to the request for review together with such documents as may be specified.**

**(4) An accounting officer of a procuring entity who fails to submit the document within the stipulated period under paragraph (3), commits an offence and shall be liable to a fine not exceeding four million shillings or to imprisonment for a term not exceeding ten years, or to both.**

**5) The Review Board Secretary shall immediately notify all other parties to the review upon receipt of such documents from a procuring entity under paragraph (3)."**

From the above regulations the Board notes, the grounds raised by an applicant in its request for review application enables the procuring entity and other parties to a request for review to respond to the said grounds before all parties sum up their cases through written submissions. In this regard therefore, 'new' grounds for review cannot be introduced by way of written submissions.

Accordingly, the Board finds that the 'new' grounds of review raised by the Applicant in its written submissions were not properly filed before the Board.

The Board will now address the first issue for determination as follows: -

The Applicant contended that vide a letter of notification of unsuccessful bid dated 10<sup>th</sup> July 2020, the Procuring Entity informed the Applicant that its bid was unsuccessful on the basis that the Applicant was not the highest bidder.

Further, that the Procuring Entity failed to specify in the said letter of notification the following information: -

- a) The exact expectations on the technical score;
- b) The parameter for determining the same; and
- c) The references and determinants of its finding.

It was therefore the Applicant's contention that the failure by the Procuring Entity to provide sufficient and explained reasons for disqualification of its bid in its letter of notification of unsuccessful bid, contravened the requirements of section 87 (3) of the Act.

On its part, the Procuring Entity submitted that it duly informed the Applicant that it was not the highest evaluated bidder vide a letter of notification of unsuccessful bid dated 10<sup>th</sup> July 2020 and thus it fully complied with the requirements as provided under section 87 (3) of the Act.

In its determination of the first issue, the Board studied section 87 of the Act which states as follows: -

**"(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.**

**(2) .....**

**(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.**

**(4) ..... "[Emphasis by Board]**

According to the above provision of the Act a Procuring Entity must notify, in writing, the bidder who submitted the successful tender, that its tender was successful before the expiry of the tender validity period. This section further requires that in the same breath, a Procuring Entity must also notify other bidders who participated in the subject tender that their respective bids were not successful.

Moreover, a procuring entity's notification of unsuccessful bid to a bidder should disclose the reasons why its bid was unsuccessful and further

disclose the successful bidder in the procurement process therein, who is determined at the conclusion of an evaluation process.

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

Section 87 (3) of the Act further imposes a mandatory obligation on a procuring entity to outline the reasons why a bidder's bid was unsuccessful, which reasons ought to be specific and not general.

The Board is cognisant that providing a bidder with reasons why its bid was found unsuccessful is an issue that goes to the root of the rules of natural justice, one of them being, "the right to a fair hearing" including the right to have adequate time and facilities to prepare a defence as stated under Article 50 (2) (c) of the Constitution.

A bidder cannot adequately exercise this right when specific reasons are not afforded to it by a procuring entity. In contrast, providing a bidder with specific reasons why its bid was unsuccessful enables such bidder to have clear grounds that form its request for review lodged before this Board, if it wishes to do so.

Turning to the circumstances in the instant case, the Board examined the letter of notification of unsuccessful bid issued to the Applicant dated 10<sup>th</sup> July 2020 which read as follows: -

***"Reference is made to the above mentioned tender in which you participated.***

***This is to notify you that your offer for the lease of Marania Tx Station Parcel of Land was not successful for the following reason: -***

- ***Your firm was not the highest bidder***

***On behalf of Management, we thank you for your participation and encourage you to participate in future tenders..."***

Accordingly, the Procuring Entity informed the Applicant that its bid in response to the subject tender was not successful since the Applicant was not the highest bidder.

It is important to note that a procuring entity's evaluation committee ordinarily conducts evaluation of bids in three stages, that is, Preliminary/Mandatory Evaluation, Technical Evaluation and Financial Evaluation. During Financial Evaluation in open tenders, where Request for Proposals method is not used, award of a tender is based on the criteria of lowest evaluated responsive tender.

The Board examined the Procuring Entity's Tender Document and observes, the Procuring Entity sought to lease out parcels of land in Marania Tx for a period of three (3) years.

Further, Clause 2.16 Award Criteria of Section II Instructions to Tenderers of the Tender Document which reads as follows: -

***"2.16.1 The Corporation will award the contract to the successful tenderer(s) whose tender has been determined to be substantially responsive and has been determined to be the highest evaluated bidder, subject to the reserve price"***

Accordingly, the Procuring Entity was required to award the subject tender to the successful tenderer whose tender has been determined to be substantially responsive and the highest evaluated bidder. This means that upon conclusion of Financial Evaluation, the Procuring Entity would award the subject tender to the highest evaluated bidder.

Moreover, the Board is cognisant of section 82 of the Act which provides as follows: -

***"The tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be the subject of correction, adjustment or amendment in any way by any person or entity."***



Accordingly, the tender sum as read out at the tender opening shall be absolute and final and shall not be the subject of correction, adjustment or amendment in any way by any person or entity.

Having noted that the tender sum cannot be adjusted, the Board notes, the Applicant was in full knowledge that the tender would be awarded to the highest evaluated bidder in accordance with Clause 2.16 Award Criteria of Section II Instructions to Tenderers of the Tender Document upon conclusion of financial evaluation.

In view of the foregoing, it is the finding of this Board that the Procuring Entity issued the Applicant with a letter of notification of unsuccessful bid that meets the threshold under section 87 (3) of the Act.

With respect to the second issue for determination, the Applicant contended that its bid was substantially responsive and had the highest practical bid price at its tender sum of Kshs 25,905 per acre and in its view, it was the successful bidder in the subject tender. It was therefore the Applicant's contention that the Procuring Entity awarded the Interested Party the subject tender in breach of the express provisions of section 86 (1) (b) of the Act and Clause 2.15.1 to Clause 2.16.1 of the Tender Document.

On its part, the Procuring Entity submitted that pursuant to the Board's decision rendered in **PPARB Application No. 73 of 2020**, the

Procuring Entity re-admitted all bids found responsive at the Mandatory Evaluation Stage, including the Applicant's bid and conducted a re-evaluation of bids at the Technical Evaluation Stage. At the Financial Evaluation Stage, the Applicant was ranked eighth whereas the Interested Party was ranked first as the highest evaluated bidder and thus awarded the subject tender.

As stated hereinbefore, the Procuring Entity through the subject tender sought to lease out parcels of land in Marania Tx for a period of three (3) years.

The Black's Law Dictionary (2<sup>nd</sup> Edition) defines a 'lease' as follows: -

***"A conveyance of any lands or tenements, (usually in consideration of rent or other annual recompense,) made for life, for years, or at will"*** [Emphasis by the Board]

Accordingly, a lease is an agreement whereby an owner gives up possession and use of its land or property for rent or other valuable consideration, for a term as specified in the said agreement.

The Board examined the Procuring Entity's Tender Document and observes therein Clause 2.15 Evaluation and Comparison of Tenders of Section II Instructions to Tenderers on page 10 therein which reads as follows: -

***"2.15.1 The Corporation will examine the tenders to determine whether they are complete, whether any***

***computation errors have been made whether required deposits have been furnished, whether documents have been properly signed and whether the tenders are generally in order. After examination a tender that will be determined to be substantially non-responsive will be rejected by the Corporation.***

***2.15.2 The Corporation will evaluate and compare the tenders, which have been determined to be substantially responsive.***

***2.15.3 The tender evaluation committee shall evaluate the tender within 30 days of the validity period from the date of opening of the tender.”***

According to the above provision, the Procuring Entity's Evaluation Committee shall evaluate and compare tenders to determine whether they are substantially responsive or not, within 30 days of the validity period from the date of opening of the tender. Further, the Procuring Entity will examine the tenders received in response to the subject tender to determine whether they are complete, whether any computation errors have been made, whether required deposits have been furnished, whether documents have been properly signed and whether the tenders are generally in order.

Further, Clause 2.16 Award Criteria of Section II Instructions to Tenderers of the Tender Document stipulates as follows: -

***"2.16.1 The Corporation will award the contract to the successful tenderer(s) whose tender has been determined***

***to be substantially responsive and has been determined to be the highest evaluated bidder, subject to the reserve price”***

This means that the Procuring Entity will award the subject tender to the successful tenderer whose tender has been determined to be substantially responsive and the highest evaluated bidder.

At this juncture, the Board would like to point out that in accordance with Clause 2.16 Award Criteria of Section II Instructions to Tenderers of the Tender Document, the Accounting Officer of the Procuring Entity in this instance would award to the highest evaluated bidder and not the lowest evaluated bidder as required under section 86 (1) (a) of the Act, as the Procuring Entity would benefit more from an award to the highest bidder as this would provide the highest consideration to the Procuring Entity during the course of the lease agreement.

The Board considered the Applicant’s submission that the Procuring Entity ought to have awarded the subject tender in accordance with section 86 (1) (b) of the Act which provides as follows: -

***“1) The successful tender shall be the one who meets any one of the following as specified in the tender document—***

***(a).....;***

***(b) the responsive proposal with the highest score determined by the procuring entity by combining, for each proposal, in accordance with the procedures and criteria***

***set out in the request for proposals, the scores assigned to the technical and financial proposals where Request for Proposals method is used”***

In view of the foregoing clause, the Board notes, the Procuring Entity did not employ a request for proposals method of procurement in the subject tender, noting the lack of scoring at both the Technical Evaluation Stage and the Financial Evaluation Stage, thus this provision would not apply in this instance.

Notably, this tender was the subject of administrative review proceedings in **PPARB Application No. 73 of 2020**, where the Board observed that the Procuring Entity’s Evaluation Committee assigned scores to each bid with respect to the nine (9) technical specifications as outlined in Section V of the Tender Document and weighted these scores in percentages and determined that bidders who scored 80% and above would proceed to financial evaluation. This was done by the Procuring Entity’s Evaluation Committee despite the fact that the Procuring Entity’s Tender Document did not provide criteria for evaluation but merely provided the Technical Specifications for bids under Section V of the Tender Document.

The Board in its finding held that the Procuring Entity erred in this regard as it was required to evaluate bids received in response to the subject tender using the procedures and criteria set out in its Tender Document in accordance with section 80 (2) of the Act which provides as follows: -

***"The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents..."***

In this regard therefore, the Board was of the considered view that only bidders who met the technical specifications as outlined in the Tender Document, ought to proceed to financial evaluation. At financial evaluation, the Procuring Entity ought to award the subject tender to the bidder with the highest evaluated responsive bid.

The Board thus directed the Procuring Entity to re-admit all bids found responsive at the Preliminary/Mandatory Evaluation Stage at the Technical Evaluation Stage and conduct a re-evaluation at the Technical Evaluation Stage, taking into consideration the Board's finding in the said request for review application and in accordance with the provisions of the Tender Document, the Act and the Constitution.

The Board examined the Procuring Entity's confidential documents submitted to the Board in accordance with section 67 (3) (e) of the Act, and observes a Re-evaluation report therein dated 10<sup>th</sup> July 2020.

According to the Re-evaluation report, the Board observes that the Procuring Entity conducted a re-evaluation of bids found responsive at the Preliminary Evaluation Stage at the Technical Evaluation Stage whereby the Evaluation Committee perused bidders' respective bid documents to determine whether or not they complied with the technical

specifications outlined in the Tender Document. Upon conclusion of the Technical Evaluation Stage, the Evaluation Committee determined that all the ten (10) bidders qualified to proceed to the Financial Evaluation Stage.

At Financial Evaluation Stage, the Board observes that the Procuring Entity ranked the ten (10) bids in terms of their tender price, whereby the Interested Party was ranked first (1<sup>st</sup>) for having the highest evaluated bid price at Kshs 35,500/- per acre, whereas the Applicant was ranked eighth (8<sup>th</sup>) at its tender price of Kshs 25,905/- per acre.

The Procuring Entity's Evaluation Committee thus recommended the Interested Party for award of the subject tender for being the highest evaluated bidder.

In view of the foregoing, the Board finds that the Procuring Entity evaluated the Applicant's bid at Financial Evaluation Stage in accordance with Clause 2.15 and 2.16 of Section II Instructions to Tenderers on page 10 of the Tender Document, section 80 (2) of the Act read together with Article 227 (1) of the Constitution.

In totality, the Board holds that the Request for Review Application lacks merit and is hereby dismissed.

## **FINAL ORDERS**

In exercise of the powers conferred upon it by section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review: -

- 1) The Request for Review No. 110/2020 filed by the Applicant on 24<sup>th</sup> July 2020 is hereby dismissed.**
  
- 2) Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.**

**Dated at Nairobi on this 14<sup>th</sup> Day of August, 2020**

**CHAIRPERSON**

**PPARB**

**SECRETARY**

**PPARB**