

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. bs12020 OF sTH JULY 2020

ETWEEN

MARQI:JEE SERVICES LIM TD.....APPL CANT

AND

THE ACCOUNTING OFF CER,
KENYA LITERATURE BUREAUJ.....⁵ RESPONDENT

PEARLTEK K LIMITED.....₁.....₂No RESPONDENT

Review against the decision of the Kenya Literature Bureau with respect to Tender No. SCC/KLB/06/2019 for Proposed . Space Optimization and Re-organization of the Printing Piress Area

BOARD MEMBERS

- | | |
|------------------------|------------------|
| 1. Mr. Nicholas Mruttu | -Member Chairing |
| 2. Ms. Robl Chacha | -Member |
| 3. Mr. Ambrose Ogeto | -Member |

NATTENDANCE

- | | |
|----------------------|------------------------------|
| 1. Mr. Phillip Okumu | -Holding brief for Secretary |
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BACKGROUND TO THE DECISION

The Bidding Process

The Kenya Literature Bureau (hereinafter referred to as "the Procuring Entity") invited seven (7) prequalified Builders Works Contractors to submit bids in response to Tender No. SCC/KLB/06/2019 for Proposed Space - Optimization and Re-organization of the Printing Press Area (hereinafter referred to as "the subject tender"), which was uploaded on the Procuring Entity's website www.klb.co.ke.

Bid Submission Deadline and Opening of bids

A total of six (6) firms/bidders submitted bids and the same were opened on 21st May 2020 in the presence of bidders and their representatives who chose to attend, which bids were recorded as follows:

Sl. No.		Name
1		DiGe General Contracts Limited
2		Marquee Services Limited
3		Pearltek K. Limited
4		pushpa Enterprises Limited
5		Dallo Holdings Limited
6		Asal Frontiers Limited

Evaluation of Bids

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

- .. Preliminary Evaluation Stage; .
- Technical Evaluation Stage;

- Financial Evaluation Stage.

1. Preliminary Evaluation Stage

At this stage of evaluation, bids were analyzed for conformity with the following requirements: -

NO.	REQUIREMENTS
MR 1	Valid copy of Certificate of Incorporation/Registration
MR 2	Valid copy of current KRA Valid Tax Compliance Certificate
MR 3	Valid copy of NCA 4 and above registration certificate in the relevant field
MR 4	Duly filled stamped and signed tender questionnaire
MR 5	Duly filled stamped and signed Confidential Business questionnaire
MR 6	Anti-corruption pledge duly signed and stamped
MR 7	Submission of original and one (copy) of tender document
MRS	Submitted tender documents must be properly TAPE BOUND and paginated in the correct sequence and all pages must be initialled/signed/stamped. NB: Spiral Binding and use of Spring or Box Files will not be allowed and will result in automatic disqualification
MR9	Mandatory Site visit on 8th May, 2020 at 10:00 am, attendance certificate will be signed by all representatives. All prospective Tenderers shall assemble at the KLB HQs South C by 1000 a.m . Tenders who fail to attend the mandatory pre-tender Meeting shall also be considered non-responsive.
MR10	Valid Copy of Single Business permit
MR11	Tender Security (Bid Bond) of Kshs. 715,000.00 in

	! form Bank Guarantee ,from a reputable Bank or ! ! reputable insurance company as approved by PPRA valid for 150 days from the date of Tender Opening.
MR12	Submission of valid CR12 form showing the list directors /shareholding (issued within the last 1 earl or National identity Card for Sole Proprietor
MR13	Current annual contractors practicing iicense from NCA in the relevant Field
MR14	Dully filled stamped and signed Form of Tender
MR15	Provide proof of Power of attorney (of Tender Sianatory)
MR16	Non-debarment statement form duly signed stamed

Accordingly, the tenderers who did not satisfy any of the above requirements would be considered non-responsive and their tenders were not evaluated further.

The Evaluation Committee made the following observation: -

a) Spiral binding does not affect in any substantial way the scope, quality, or performance of the works and therefore it was agreed to be waived to all bidders. This only applied to bidders who chronologically paginated their bid document.

Upon conclusion of Preliminary Evaluation, Five Bidders, that is, B1, B2, B3, B5, B6 met the mandatory requirements hence qualified for Technical Evaluation.

One bidder, B4, did not qualify for Technical Evaluation for the following reasons:

a) Confidential Business Questionnaire was not signed and duly filled;

- b) CR12 is expired hence invalid;
- c) Form of tender is not signed or filled.

2. Technical Evaluation Stage

At this stage of evaluation, bids for the five (5) responsive bidders were compared with the technical requirements as stipulated in Clause 2.2 of the instructions to Tenderers in the Tender Document as shown in the table below: -

S/NO	DESCRIPTION	POINT EXPECTED	FIRMS AWARDED				
1	Director of the firm		81	82	83	BS	86
	Holder of degree or diploma in a relevant Engineering field --- 5						
	Holder of certificate in relevant Engineering field --- 3	5	0	5	a	s	a
	Holder of trade test certificate in relevant Engineering field --- 2						
	No relevant certificate ----- 0						
	At least 1 No. degree/diploma of the key personnel in relevant Engineering field	5					
	With over 10 years relevant experience ----- 5		5	5	5	5	3
	With over 5 years relevant experience 3						
	With under 5 years relevant experience --- 2						
	At least 2 No. certificate holder of key personnel in relevant Engineering field	5					
	With over 10 years relevant experience ----- 5		5	5	5	5	5
	With over 5 years relevant experience ----- 3						
	At least 1 No. certificate holder of key personnel in relevant Engineering field						
	With over 10 years relevant experience ----- 5						
	With over 5 years relevant experience ----- 3						
	At least 1 No. certificate holder of key personnel in relevant Engineering field						
	With over 10 years relevant experience ----- 5						
	With over 5 years relevant experience ----- 3						

	SUB TOTAL	15	10	15	10	15	8
2	Contract completed in the last five (5) years; a max of 3 No. projects						
	Project of similar nature, complexity and magnitude using the proposed-- -- , ---- 3	15					
	Project of similar but lower value than the one in consideration ----- ----- 2marks	10	9	6	12	0	9
	Project of similar magnitude --1	5					
	No completed project of similar nature ----0						
	SUB TOTAL	15	9	6	12	0	9

3	On-going projects (A max of 2 No. projects),attach evidence		BI	B3	B3	BS	B6
	Project of similar nature, complexity and magnitude using the-----5	10					
	Project of similar nature but of lower value than the one in consideration ----- ----- 2	4	5	10	0	0	0
	No ongoing project of similar nature ---- -	0					
	SUB TOTAL	10	5	10	0	0	0
4	Schedules of contractor's equipment						
	For each specific equipment required in the construction work being tendered for. (Maximum No. of equipment to be considered – 5 No.) ----- 3 marks	15	15	15	15	15	9
	SUB TOTAL	15	15	15	15	15	9
5	Sanctity of tender document						
	Having the document intact (not tampered with in any way)10	10	10	10	10	10	10

	Having mutilated or modified the tender document--0	0							
	SUB TOTAL	10	10						
6	Financial report								
	Audited financial report (last three [3] years) 2015-2018								
	Turn over greater or equal to 5 times the cost of the project ----- 15	15							
	Turn over greater or equal to 3 times the cost of the project ----- 6	6	15	15	15	15	15	15	
	Turn over greater or equal to the cost of the project -----4	4							
	Turn over below the cost of the project -----2	2							
	SUB TOTAL	15	15	15	15	15	15	15	

7	Evidence of financial resources (cash in hand, lines of credit, overdraft facility etc)								
	Has financial resources equal or above the cost of the project----- 15	15							
	Has financial resources below the cost of the project, but over 50% of the cost of the project -----10	10							
	Has financial resources below 50% of the cost of the project or has not given evidence for the financial resources ----- 0	0							
	SUB TOTAL	15	0	15	15	15	15	15	
8	Litigation History								
	Has <i>no</i> construction-related litigation or arbitration case in the last five years ---- 5	5							
	Has <i>not more than three</i> construction-related litigation or arbitration cases in the last five years -----2	2							

	Has <i>more than three</i> construction-related litigation or arbitration cases in the last five years ---0 . .	0					
	SUB TOTAL	5	5	5	5	5	5
	TOTAL	100	69	91	82	75	71

Upon conclusion of this stage of evaluation, **81** scored below the 70% set pass mark and did not qualify for financial evaluation.

82, 83, 85 and **86** scored above 70% (the set pass mark) and thus qualified for financial evaluation.

4. Financial Evaluation

Financial evaluation was conducted in two stages:

- a) Determination of Arithmetic Errors;
- b) Comparison of Rates

a) Determination of the Arithmetic Errors

82, 83, 85 and **86** were checked for arithmetic errors based on the rates and the total sums indicated in their bills of quantities.

The results are as shown in the table below: -

Arithmetic Errors

Item	Bidder's Name	Tender Sum	Corrected Sum	Tender	Error Sum
1	Bidder B2	45,068,880.00	11,999,700.00		33,069,180.00
2	Bidder B3	10,980,610.00	10,980,610.00		0.00
3	Bidder BS	11,108,428.00	11,108,808.00		-380.00
4	Bidder B6	11,193,641.00	11,193,894.00		-253.00

- **Bidder B2** had a positive error of Thirty-Three Million, Sixty-Nine Thousand, One Hundred and Eighty Kenya Shillings Only (Kshs. 33,069,180.00). The tenderer had however included prime cost sums in their bid, which is equal to the error.
- **Bidder B3** had no error.
- **Bidder BS** had a negative error of Three Hundred and Eighty Kenya Shillings Only (Ksh. 380.00)
- **Bidder 86** had a negative error of Two Hundred and Fifty-Three Kenya Shillings Only (Ksh. 253.00)

a) Comparison of rates.

Item	B2	B3	BS	B6	Engineer's Estimate
100mm thick concrete slab ..	1,300.00	1,500.00	1,745.00	1,575.00	1,450.00
Gypsum Partitions	12,500.00	5,500.00	5,565.00	5,775.00	4,300.00
Aluminium partitions	10,000.00	9,500.00	9,785.00	9,975.00	11,500.00

- The market rate for Class 25 concrete ranges from Kshs. 13,500 – Kshs. 16,000 per cubic meter. All the bidders were within the market rate

- The market rate for gypsum partitions with rockwool infill ranges from Kshs. 4,000 – Kshs. 6,000 per square meter. **B2's** rate was more than double the market rates. **B3, BS** and **B6** were within the market rate.
- the market rate for aluminum partitions ranges from Kshs. 10,500 – Kshs. 15,000 per square meter. All the bidders were lower than the market rate.

The Evaluation Committee's Recommendation

In view of the evaluation process, the Evaluation Committee recommended award of the subject tender to **Bidder No 3, M/s Pearltek K. Limited of P.O Box 30179, 00100 Nairobi** having presented the lowest evaluated bid at a submitted tender sum of **Kenya Shillings Ten Million, Nine Hundred and Eighty Thousand, Six Hundred and Ten Only (Kshs. 10,980,610.00)**.

Professional Opinion

The Head of Procurement Function concurred with the recommendation of award made by the Evaluation Committee which was duly approved by the Accounting Officer on 25th June 2020.

REQUEST FOR REVIEW NO. 94 OF 2020

M/s Marquee Services Limited (hereinafter referred to as "the Applicant")! lodged a Request for Review dated and filed on 5th July 2020 (hereinafter referred to as "the Request for Review") together with

an Affidavit Statement in Support of the Request for Review sworn and filed on even date (hereinafter referred to as "the Applicant's Affidavit"), through the firm of Caroline Oduor & Associates.

In response, the Procuring Entity lodged a Response to the Request for Review dated 15th July 2020 and filed on 20th July 2020 (hereinafter referred to as "the Procuring Entity's Response") through the firm of Munyao, Muthama & Kashidi Advocates. The Procuring Entity further filed a Notice of Preliminary Objection dated and filed on 15th July 2020.

M/s Pearltek Limited (hereinafter referred to as "the 2nd Respondent"), lodged a Replying Affidavit dated and filed on 20th July 2020 (hereinafter referred to as "the 2nd Respondent's Affidavit") through the firm of Chepkuto Advocates.

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

- i. An order directing the 1st Respondent to furnish the Applicant with the summary of preliminary and technical evaluation report of the subject tender;***
- ii. An order substituting the decision of the Procuring Entity that is determined to be unfair and/or unlawful as mandated under section 173 (c) of the Act; with an independent decision of the Board following the Board***

- review of the tender evaluation reports and related documentation;*
- iii. An order cancelling/ setting aside the 1st Respondent's decision in its letter dated 2, sth June 2020;*
 - iv. An order annulling/setting aside the subject procurement proceedings undertaken by the 1st Respondent in relation to preliminary evaluation;*
 - v. An order directing the 1st Respondent to conduct preliminary evaluation and other tender evaluation processes in accordance with the Jawarid in compliance with the subject tender document requirements;*
 - vi. In the alternative, an order annulling/setting aside the tender process herein in its entirety;*
 - vii. An order directing the Respondent to pay the costs of the review;*
 - viii. Any such further orders as are necessary for the ends of justice.*

On 16th 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) 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 24th March 2020, the Board issued Circular No. 2/2020 further detailing the Board's administrative and contingency management plan to mitigate the COVID-19 disease. 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 filed Written Submissions dated 22nd July 2020 on even date whereas the Procuring Entity filed Written Submissions dated 23rd July 2020 on even date. The 2nd Respondent 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 arise for determination are as follows:-

I. Whether the contract dated 11th July 2020 with respect to the subject tender executed between the Procuring Entity and M/s Pearltek Kenya Limited was signed in accordance with section 135 (3) of the Act as read together with section 168 of the Act thus ousting the jurisdiction of this Board;

Depending on the outcome of the first issue: -

II. Whether the Procuring Entity issued the Applicant with a letter of notification of unsuccessful bid in accordance with section 87 (3) of the Act;

III. Whether the Procuring Entity evaluated the 2nd Respondent's bid at Preliminary Evaluation in accordance with section 80 (2) of the Act as read together with Article 227 (1) of the Constitution with respect to the following mandatory requirement: -

a) MR B: Submitted tender documents must be properly TAPE BOUND and paginated in the correct sequence and all pages must be initialled/signed/stamped. NB Spiral binding and use of Spring or Box Files will not be allowed and will result in automatic disqualification.

IV. *Whether the 2nd Respondent submitted more than one bid in response to the subject tender contrary to Clause 1.9 of Part II Instructions to renderers on page 8 of the Tender Document.*

The nature of a preliminary objection, was explained in *Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd* [1969] E.A. 696 as followst -

"A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit."

The Board observes that the Procuring Entity raised a Preliminary Objection to the Request for Review challenging the jurisdiction of this Board on the following ground:

"The Procuring Entity and the successful bidder having entered into a binding contract in accordance with section 135 of the Act; the Public Procurement Administrative Review Board lacks jurisdiction to entertain the present Request for Review - pursuant to section 167 (4) (c) of the Act."

It is trite law that courts and decision making bodies can only act in cases where they have jurisdiction. In the Court of Appeal case of The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) KLR 1 it was stated that jurisdiction is everything and without it, a court or any *other decision making body* has no power to make one more step the moment it holds that it has no jurisdiction

The Supreme Court in the case of Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Ltd and 2 Others, Civil Application No. 2 of 2011 held that:

' court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with Counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings.'

Similarly, in the case of Kakuta Maimai Hamisi vs. Peris Pesi Tobiko & 2 Others (2013) eKLR the Court of Appeal emphasized on the centrality of the issue of jurisdiction and stated thus:

"So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. "

Accordingly, once a jurisdictional issue is before a court or a decision making body, it must be addressed at the earliest opportune moment and it therefore behooves upon this Board to determine whether it has the jurisdiction to entertain the substantive Request for Review.

The jurisdiction of this Board flows from section 167 of the Act which states as follows: -

(1) 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.

2. J#a ;

3. Jca Mlu ;

(4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)-

iJ.}aa n;

b;

(c) where a contract is signed in accordance with section 135 of this Act.

Section 1'67_ (4) (c) of the Act expressly stipulates that the jurisdiction of this Board is ousted only if a contract is signed in accordance with section 135 (3) of the Act.

The Board studied section 135 (3) of the Act which reads as follows: -

"The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period."

This means that a written contract shall be entered into within the period specified in the notification but not before the lapse of fourteen days following the giving of a notification of award and within the tender validity period.

The Board notes that the notification referred to under section 135 (3) of the Act is issued pursuant to section 87 of the Act which states as follows: -

is(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the JHOCuring entity shall notify in

writing the person

submitting the successful tender that his tender has been accepted.

(2) *The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.*

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

(4) *For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security.* "[Emphasis by Board]

Accordingly, a procuring entity must notify, in writing, the bidder who submitted the successful tender, that its tender was successful at the same time . it notifies unsuccessful bidders, before the expiry of the tender validity period.

It is important to note that once a procuring entity issues a letter of

notification of award to a successful bidder under a subject tender, this

notification marks the beginning of the fourteen (14) day stand still period within which a procuring entity and a successful bidder are precluded from entering into a written contract pursuant to the right to administrative review afforded to an aggrieved candidate or tenderer under section 167 (1) of the Act.

This is in line with the public procurement principles as espoused under Article 227 (1) of the Constitution which states 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 costeffective."[Emphasis by the Board] .

Hence, a public procurement system must be seen to be fair and equitable to all bidders, including unsuccessful bidders, by protecting their right to administrative review of public procurement proceedings.

Turning to the circumstances of the case, the Procuring Entity submitted that it entered into a contract with the 2nd Respondent on 10th July 2020 with respect to the subject tender. It was therefore the Procuring Entity's submission that in view of this contract, the Board lacked jurisdiction to hear and determine the Applicant's Request for Review in accordance with section 167 (4) (c) of the Act.

The Board examined the Procuring Entity's confidential file submitted to it in accordance with section 67 (3) (e) of the Act and observes that the Procuring Entity issued a letter of notification of award to the successful bidder, that is, the 2nd Respondent herein, dated 25th June 2020, which read as follows: -

"The tendering process for the above tender in which you participated has been completed. The Bureau is pleased to inform you that your bid was successful for award of the tender at your tender sum of Kenya Shillings Ten Million, Nine Hundred and Eighty Thousand Six Hundred and Ten Only (Kshs 10,980,610.00) only (inclusive of taxes).

Kindly furnish us with a 5% performance security equivalent to the value of the contract amount within twenty eight (28) days from the date of this letter.

Please acknowledge your acceptance of this offer within seven (7) days"

Accordingly, the Procuring Entity notified the 2nd Respondent that a contract would be signed between the two parties within twenty eight (28) days from the date of this letter, that is, from 25th June 2020, upon the successful bidder's acceptance of the award.

However It is not clear from the pleadings before the Board when the 2nd Respondent received its letter of notification of award.

The Board further examined the Procuring Entity's confidential file and observes that a contract was signed between the Procuring Entity and the successful bidder on 10th July 2020, more than fourteen days from the date of the letter of the notification of award to the successful bidder dated 25th June 2020.

It is worth noting that, the Applicant herein lodged its Request for Review on 8th July 2020. The Procuring Entity was then notified of the existence of the Request for Review application on 10th July 2020, on the same date it entered into a contract with the 2nd Respondent with respect to the subject tender.

The Board observes, although it is not clear when the Applicant received its letter of unsuccessful bid to determine when the stand-still period under section 167 (1) of the Act started running, we note, no challenge has been raised as to the time at which the Applicant ought to have approached this Board.

However, the Board notes, once a request for review application is lodged before the Board, all procurement proceedings are suspended, pursuant to section 168 of the Act..

This was explained by the Honourable Lady Justice Nyamweya in her decision in Judicial Review Application 540 of 2017 Republic v Public Procurement Administrative Review Board; Kenya Power & Lighting Company Limited (Interested Party) Exparte Transcend Media Group Limited [2018] eKLR where she opined as follows: -

"...section 168 of the Act provides that upon receiving a request for a review under section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed. The effect of a stay is to suspend whatever action is being stayed, including applicable time limits, as a stay prevents any further steps being taken that are required to be taken, and is therefore time -specific and time-bound.

Proceedings that are stayed will resume at the point they were, once the stay comes to an end, and time will continue to run from that point, at least for any deadlines defined by reference to a period of time, which in this case included the tender validity period."

This means that upon filing of a request for review application, an automatic stay of procurement proceedings takes effect which suspends all procurement proceeding_s and prevents any further steps from being taken with respect to the tender in question. Further, procurement

proceedings shall resume at the point they were, when the stay comes to an end, once the request for review application has been heard and determined by the Board.

Accordingly, even though the Procuring Entity was only notified of the existence of the Request for Review on 10th July 2020, an automatic stay, that is, suspension of procurement proceedings under section 168 of the Act including execution of a contract, already existed as at 5th July 2020, when the Applicant filed its Request for Review.

In this regard therefore, the Board finds that the contract dated 10th July 2020 was entered into by the Procuring Entity and the 2nd Respondent after a Request for Review Application had been filed before the Board which filing stayed any further steps being taken with respect to the subject procurement as from 3rd July 2020 and thus has no effect in law.

Accordingly, it is the finding of this Board that it has jurisdiction to hear the Request for Review application filed on 5th July 2020.

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

The Applicant contended that the Procuring Entity did not disclose the reasons why the 2nd Respondent's bid was successful contrary to section 87 (3) of the Act. In response, the Procuring Entity submitted that the letter of notification issued to the Applicant disclosed the reasons why

the Applicant's bid was unsuccessful, the identity of the successful tenderer and the amount at which the subject tender was awarded. It was therefore the Procuring Entity's submission that the said notification dated 25th June 2020 issued to the Applicant satisfied all the requirements as stipulated under section 87 (3) of the Act.

Having considered parties' submissions, the Board studied section 87 of the Act which states as follows:-

- "(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.*
- (2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.*
- (3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereot*

(4) For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security.'; [Emphasis by Board]

According to the said provision, 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 notify other bidders who participated in the subject tender that their respective bids were not successful when notifying the successful bidder that its tender was 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.

The question that now arises is who is a successful tenderer?

The interpretation section of the Act defines the word tender as:

"an offer in writing by a tenderer to supply goods, services or works at a price; or to acquire or dispose stores, equipment or other assets at a price, pursuant to an

invitation to tender, request for quotation or proposal by a procuring entity"

Moreover, it further defines a "tenderer" as: -

"....a person who submitted a tender pursuant to an invitation by a public entity

From the foregoing definitions, the Board observes that a tenderer is a person who submits an offer in writing to supply goods, services or works at a price; or to acquire or dispose stores, equipment or other assets at a price, pursuant to an invitation to tender, request for quotation or proposal by a procuring entity.

Notably, section 86 (1) of the Act provides the ways in which a procuring entity may arrive at a successful tenderer as follows: -

(1) The successful tender shall be the one who meets any one of the following as specified in the tender document-

- (a) the tender with the lowest evaluated price;*
- (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;

(c) the tender with the lowest evaluated total cost of ownership; or

(d) the tender with the highest technical score, where a tender is to be evaluated based on procedures regulated by an Act of Parliament which provides guidelines for arriving at applicable professional charges.

Accordingly, a procuring entity may arrive at the successful tender depending on the method of procurement used. For example, in an open tender (where a Request for Proposal method is not used) the successful tender is arrived at by determining the lowest evaluated price in accordance with section 86 (1) (a) of the Act.

It is also worth noting that once an evaluation committee concludes evaluation of tenders at the Preliminary, Technical and Financial Evaluation stages, the evaluation committee may recommend a bidder to be awarded a tender depending on the method of procurement used. For example, if the procuring entity used open method of tendering (where a Request for Proposal method was not used) the evaluation committee may recommend award of a tender to the bidder who submitted the lowest evaluated price.

This recommendation is contained in an evaluation report which is submitted to the Head of Procurement function in accordance with section 80 (4) of the Act which states as follows: -

"The evaluation committee shall prepare an evaluation report containing a summary of the evaluation and comparison of tenders and shall submit the report to the person responsible for procurement for his or her review and recommendation."

Section 84 of the Act further provides that: -

"84. Professional opinion

- (1) The head of procurement function of a procuring entity shall, alongside the report to the evaluation committee as secretariat comments, review the tender evaluation report and provide a signed professional opinion to the accounting officer on the procurement or asset disposal proceedings.*
- (2) The professional opinion under sub-section (1) may provide guidance on the procurement proceeding in the event of dissenting opinions between tender evaluation and award recommendations.*
- (3) In making a decision to award a tender, the accounting officer shall take into account the views of the head of procurement in the signed professional opinion referred to in subsection (1)"*

From the foregoing provision, the Board notes, a Professional Opinion is prepared by the Head of Procurement function in order to guide the accounting officer of a procuring entity in making a decision whether or not to award a tender in accordance with the applicable award criteria under section 86 (1) of the Act. Once the accounting officer awards a tender, such a tender is deemed to be the successful tender and the person submitting the successful tender, is called the successful tenderer.

In this regard therefore, a successful tenderer is the person who submitted an offer which has been recommended for award upon conclusion of evaluation at the preliminary, technical and financial evaluation stages and determined to be the best offer (i.e. successful tender) after award by an accounting officer of a procuring entity has been made depending on the award criterion that applies to the procurement method used by a procuring entity.

Turning to the circumstances of this case, the Board examined the letter of notification of unsuccessful bid issued to the Applicant dated 25th June 2020 which read as follows: -

"The tendering process for the above tender in which you participated has been completed. We regret to inform you that your bid was not successful at the financial evaluation stage.,

M/s Pearltek K Limited was awarded the tender at a tender sum of Kenya Shillings Ten Million, Nine Hundred and Eighty Thousand, Six Hundred and Ten Only (Kshs 10,980,610.00) only (inclusive of taxes).

We thank you for participating in the tender and look forward to your participation in our future tenders."

From the foregoing letter of notification it is evident that the Procuring Entity disclosed to the Applicant the identity of the successful bidder and the amount at which the subject tender was awarded.

Notably, a procuring entity is required under section 87 (3) of the Act as cited hereinbefore, to disclose the identity of the successful bidder in a tender, in order to afford the unsuccessful bidders the opportunity to establish if the successful bidder satisfied the eligibility criteria as set out in the Tender Document, that is, whether the successful bidder was qualified to participate in the subject tender and challenge the same if need be.

The obligation of a procuring entity to disclose the identity of a successful bidder in addition to the amount the tender was awarded is central to the principle of transparency as outlined in Article 227 of the Constitution 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 fa/9 equitable, transparent, competitive and cost-effective."/Emphasis by the Board]

This means that all processes within a procurement system, including notification of unsuccessful bid, must be conducted in a fair, equitable and transp 9.c n manner.

Having established who a successful tenderer is, it is the Board's considered view that the Procuring Entity did not need to disclose the reasons why the successful tenderer was successful as it is evident that the successful tenderer is the tenderer that was determined by the Procuring Entity to be the lowest evaluated and most responsive tenderer, upon conclusion of an evaluation process at the preliminary, technical and financial evaluation stages.

Furthermore, the Applicant has full knowledge of the provision of section 82 of the Act which states 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"

Having noted that the tender sum cannot be adjusted and that in an open tender (vvhere a Request for Proposals is not used) award is made to the lowest evaluated tenderer, the Applicant already. knew that the subject tender would be awarded to the lowest evaluated tenderer.

h 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 in accordance with section 87 (3) of the Act.

On the third issue for determination, the Applicant contended that the 2nd Respondent's bid was spiral bound contrary _to Mandatory Requirement No. 8 of the Tender Document. The 2nd Respondent denied this allegation and contended that its bid was tape bound and not spiral bound as alleged by the Applicant.

Mandatory Requirement No. 8 of the Tender Evaluation Criteria on page 19 of the Tender Document provides as follows: -

"Submitted tender documents must be properly TAPE BOUND and paginated in the correct sequence and all pages must be initialled/signed/stamped.

NB: Spiral Binding and use of Spring or Box Files will not be allowed and will result in automatic disqualification"

Accordingly, all bids submitted in response to the subject tender were required to be tape bound and paginated in the correct sequence with all pages initialled, signed and stamped. Moreover, spiral binding and use of spring or box files would not be allowed and would result in automatic disqualification of a bid.

The Procuring Entity furnished the Board with all the original bids submitted in the subject tender which forms part of the Procuring Entity's confidential file submitted pursuant to section 67 (3) (e) of the Act.

The Board examined the 2nd Respondent's original bid and observes that its bid document was tape bound, paginated in the correct sequence from page 1 to page 231, and was initialled, signed and stamped as required by the mandatory requirement under consideration.

The Board then studied the Procuring Entity's Evaluation Report and observes on page 7 thereof that the 2nd Respondent was found to have met this mandatory requirement.

In this regard therefore.. the Board finds the 2nd Respondent satisfied Mandatory Requirement No. 8 of the Tender Evaluation Criteria on page 19 of the Tender Document and the Applicant's allegation that the 2nd Respondent's bid was spiral bound has not been substantiated.

Accordingly, it is the finding of this Board that the Procuring Entity evaluated the 2nd Respondent's bid in accordance with Mandatory Requirement No. 8 of the Tender Evaluation Criteria on page 19 of the Tender Document and section 80 (2) of the Act as read together with Article 227 (1) of the Constitution.

On the fourth issue for determination, the Applicant submitted that it observed during the tender opening of bids, that the completed tender documents for the 2nd Respondent, M/s .Oallo Holdings Limited and M/s Asal Frontiers Limited were submitted by the same person.

The Applicant further submitted that it sought to obtain further particulars of the three bidders, that is, the 2nd Respondent, M/s Dallo Holdings Limited and M/s Asal Frontiers Limited from the Registrar of Business Registration Services and from their respective CR 12 documents, the Applicant . observed that the registered telephone numbers of the three companies were similar.

It was therefore the Applicant's submission that the three companies belong to one and the same entity or are substantially related in their respective ownership and as such their participation in the subject tender amounted to improper practice which compromised fair competition in the subject procurement proceedings.

On its part, the Procuring Entity submitted that the information obtained by the Applicant with respect to the 2nd Respondent, M/s Dall'o" Holdings Limited and M/s Asal Frontiers Limited clearly indicated that the three are distinct companies with different shareholding as none of the names appeared in more than one CR 12 document.

Moreover, the Procuring Entity contended that a company is a distinct legal entity capable of engaging in business activities and may not be held to be one and the same as another company based on similarity of telephone numbers.

In response, the 2nd Respondent submitted that it personally instructed one Mr Felix Mutavi Mululu to submit its bid on its behalf. Further, that M/s Dallq Holdings Limited and M/s Asal Frontiers Limited do not belong to the 2nd Respondent or to its directors thereof.

The 2nd Respondent contended that from the CR 12 documents attached to the Applicant's Affidavit, the directors of the three companies are different persons and more so telephone numbers are not proof of ownership of a company. It was therefore the 2nd Respondent's submission that the Applicant's allegation is unfounded and should be deemed as an attempt by the Applicant to disqualify the 2nd Respondent from the tendering process.

Having considered parties' submissions, the Board studied Clause 1.9 of Part I Instructions to Tenderers on page 8 of the Tender Document which reads as follows: -

"Each tenderer shall submit only one tender, either individually or as a partner in a joint venture. A tenderer who submits or participates in more than one tender (other than as a subcontractor or in cases of alternatives that have been permitted or requested) will cause all the

proposals with the tenderer's participation to be disqualified."

Accordingly, bidders were required to submit only one bid in response to the subject tender and in the event a bidder submitted or participated in more than one tender, other than as a sub-contractor or as may be permitted by the Procuring Entity, all the proposals submitted by the said bidder would be disqualified.

The Board examined the Procuring Entity's Tender Opening Minutes dated 21st May 2020 and observes therein on page 1 that the Procuring Entity received bid documents from the 2nd Respondent, M/s Dallo Holdings Limited and M/s Asal Frontiers Limited. The minutes further indicate that the bidders whose representatives were present during the tender opening included M/s Pushpa Enterprises, M/s Marquee Services Limited (the Applicant) and M/s Dice General Contracts Limited but surprisingly, did not indicate the names of the bidders' representatives who attended the tender opening ceremony.

Further, the Board observes, the Procuring Entity's- Tender Opening Minutes including the -Procuring Entity's Tender Opening Register also dated 21st May 2020, have no record of who submitted the 2nd Respondent's bid or bids with respect to M/s Dallo Holdings Limited and M/s Asal Frontiers Limited.

The Board then examined the CR 12 documents attached to the Applicant's Request for Review application and observes that Exhibit

'ADM3a appears to be the CR 12 document of the 2nd Respondent and outlines its company details as follows: - .

"Company - Pearltek Kenya Limited

.Company Number - CPR/2014/155581

Nominal Share Capital - 100,000.00

.Number and Type of Shares (Value per share) – Ordinary: ' . 1000 (KES 10000 EACHO

Date of Registration. - 2014-08-11

Registered Office - P.O. Box 1387, Garissa

Telephone +254722365890

PEARLTEKLIMITED@GMAIL.COM

County: District, Locality

Street: Chiromo Lane, Building: Lotta House

Postal Address P.I. Box 1387 Garissa

<i>NAME</i>	<i>DESCRIPTION</i>	<i>ADDRESS</i>	<i>COUNTRY</i>	<i>SHARES</i>
<i>ABDI ALI MOHAMMED</i>	<i>DIRECTOR/ SHAREHOLDER</i>	<i>P.O. BOX 25425 GPO NAIROBI</i>	<i>KENYA</i>	<i>ORDINARY: 200</i>
<i>MUHIDIN I ADAN AU</i>	<i>DIRECTOR/ SHAREHOLDER</i>	<i>P.O. BOX 25425 GPO NAIROBI</i>	<i>KENYA</i>	<i>ORDINARY: 800</i>

Further, Exhibit 'ADM3b' appears to be the CR 12 document of M/s Dalla Holdings Limited and outlines its company details as follows: -

"Company - Dalio Holdings Limited

Company Number - CPR/2013/95953

Nominal Share Capital - 100,000.00

*Number and Type of Shares (Value per share) – Ordinary:
1000 (KES 100.00 EACH)*

Date of Registration_ - 2013-02-27

Registered Office – P.O. Box 639, Ngara Road

Telephone +254722365890

DALLOHOLDINGSLIMITED@GMAIL.COM

County: District, Locality

*Street: Jabavu Lane, Building,
Silverpool Suites Offices*

Postal Address Pw O. Box 639 Ngara Road

<i>NAME</i>	<i>DESCRIPTION</i>	<i>ADDRESS</i>	<i>COUNTRY</i>	<i>SHARES</i>
<i>NURIA ABDULLAHI HUSSEIN</i>	<i>DIRECTOR/SHAREHOLDER</i>		<i>KENYA</i>	<i>ORDINARY: 1000</i>

Finally, Exhibit 'ADM3c' appears to be the CR 12 document of M/s Asal
Frontiers Limited and outlines its company details as follows: -

"Company - Asal Frontiers Limited

Company Number - CPR/2014/155582

Nominal Share Capital - 100,000.00

*Number and Type of Shares (Value per share) -: Ordinary:
1000 (KES 100.00 EACH)*

Date of Registration – 2014-08-11

Registered Office – P.O.Box 30179 GPO Nairobi

Telephone +254722365890

ASALFRONTIERSLIMITED18@GMAIL.COM

*County: Nairobi District,: Nairobi East
District*

*Street: Mpaka Street Nairobi, Building
L.R No.209/192/64*

Postal Address P.O.Box 30179 GPO Nairobi

<i>NAME</i>	<i>DESCRIPTION</i>	<i>1</i>	<i>ADDRESS[Country]</i>	<i>SHARES</i>
<i>FATUMA ABDI MAHAMUO</i>	<i>DIRECTOR/ SHAREHOLDER</i>	<i>P.O, Box 30179 GPO Nairobi</i>	<i>KENYA</i>	<i>ORDINARY: 80</i>

From the three CR 12 documents adduced by the Applicant cited hereinabove, we observe that the 2nd Respondent, M/s Dallo Holdings Limited and M/s Asal Frontiers Limited appear to have the same telephone number, that is, +254722365890. However, the directors and shareholders of the three companies in addition to the other registration particulars in their respective CR 12 documents are not similar.

The Board then examined the original bid documents of the 2nd Respondent, M/s Dallo Holdings Limited and M/s Asa! Frontiers United

and compared the CR 12 documents submitted by the three bidders in their respective bid documents with the CR 12 documents annexed to the Applicant's Request for Review and observes that the company registration details in both set of documents appear to be one and the same.

The Board observes, from the website of the Office of the Attorney General and Department of Justice [www.statelaw.go. ke](http://www.statelaw.go.ke) that the Business Registration Service Act, 2015 established the Business Registration Service (hereinafter referred to as "BRS") as a semi-autonomous body under the Office of the Attorney General and Department of Justice. This body is mandated to oversee the operations of several departments including the Registrar of Companies which is defined as the central repository of public statutory information on Kenyan companies and business names.

According to the website, one of the services provided by the Registrar of Companies is the issuance of a document known as a CR 12.

From the information on the aforementioned website, the Board observes that a CR 12 document is in essence an official confirmation by the Registrar of Companies in Kenya detailing the ownership of a Limited Company. It outlines the directors and shareholders of a company and further confirms that the company's records exist at the Registrar of Companies.

With this in mind, the Board observes from the CR 12 documents of the 2nd Respondent, M/s Dalio Holdings Limited and M/s. Asal Frontiers Limited, the three companies have different directors and shareholders as evidenced from the details of directors and shareholders as outlined in their respective CR 12 documents.

However, we note that the three bidders appear to have the same telephone number in their respective CR 12 documents.

More importantly the Board notes, this allegation has been raised with respect to the 2nd Respondent, that is, the successful tenderer in the subject tender.

From a perusal of the Procuring Entity's Evaluation Report dated 18th June 2020 / it is evident that the Procuring Entity did not conduct a due diligence exercise with respect to the 2nd Respondent prior to award of the tender.

The Board observes on page 29 of the Tender Document the following clause: -

"Particulars of post qualification is applicable. The Client (Kenya Literature Bureau) may inspect the premises and under due diligence to seek further clarification/ confirmation if necessary to confirm authenticity/compliance of any condition of the

tender/qualifications of the tenderer in line with section 3 of the Public Procurement and Asset Disposal Act; 2015."

According to the above clause, the Procuring Entity may seek further clarification/confirmation if necessary to confirm the authenticity/compliance of any condition of the tender/qualifications of the tenderer.

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

In this regard therefore, a procuring entity may conduct due diligence to verify and confirm the qualifications of the lowest evaluated responsive tenderer, which exercise - would be based on documents and qualifications considered during evaluation that met the minimum eligibility and mandatory requirements of the Tender Document.

Section 83 of the Act as outlined herein below clearly stipulates the procedure that must be followed in a due diligence process as follows:-

"(1) _ An evaluation committee may, -after tender evaluation. but prior to the award of the tender. conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who

submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act

(2) The conduct of due diligence under subsection (1) may include obtaining confidential references from persons with whom the tenderer has had prior engagement.

(3) To acknowledge that the report is a true reflection of the proceedings held, each member who was part of the due diligence by the evaluation committee shall-

(a) initial each page of the report; and

(b) append his or her signature as well as their full name and designation."

For one, due diligence is conducted after tender evaluation but prior to award of the tender to confirm and verify the qualifications of the tenderer determined by the Procuring Entity to be the lowest evaluated responsive tenderer.

Secondly, the Procuring Entity must prepare a due diligence report outlining how due diligence was conducted and the findings of the process. The said report is signed only by members of the Evaluation Committee who took part in the due diligence exercise and they must include their designation. Further, the report must be initialled on each page.

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

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

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

Having established that the 2nd Respondent, M/s Dallo Holdings Limited and M/s Asal Frontiers Limited appear to have the same telephone contact in their respective CR 12 documents, the Board finds that the Procuring Entity ought to conduct due diligence on the 2nd Respondent as the lowest evaluated and responsive tenderer, to confirm the veracity of the particulars of the 2nd Respondent as captured in its CR 12 document, specifically its telephone contact in order to determine

whether the telephone contact in the 2nd Respondent's CR 12 document is registered in an Individual's name or a company name.

The Board notes, the requirement to conduct due diligence was part of the Procuring Entity's Tender Document and noting that the said allegation has been brought to the attention of this Board, it is only fair and just that the Procuring Entity conducts a due diligence on the lowest evaluated responsive bidder prior to award of the subject tender in accordance with the provision on due diligence in the Tender Document read together with section 83 of the Act, taking into consideration the procedure outlined hereinbefore for conducting due diligence.

In the event the telephone contact in the 2nd Respondent's CR 12 document is registered in an individual's name, the Procuring Entity ought to establish whether or not the said individual is associated or connected in any way to the other two bidders, that is, M/s Dalio Holdings Limited and M/s Asal Frontiers Limited, in order to verify and establish whether the 2nd Respondent submitted more than one bid in response to the subject tender contrary to Clause 1.9 of Part II Instructions to Tenderers on page 8 of the Tender Document.

Due to the nature of the allegations made with respect to the 2nd Respondent, and two other bidders that is, M/s Dalio Holdings Limited and M/s Asal Frontiers Limited with respect to the subject procurement process, we note, nothing bars the Director General of the Public Procurement Regulatory Authority (hereinafter referred to as "the

Authority") from conducting an investigation to confirm the findings of the Procuring Entity as captured in its due diligence report in line with its mandate as outlined under section 9 (h) of the Act to *'investigate and act on complaints received on procurement and asset disposal proceedings'*.

h this regard therefore, upon conclusion of *due*: diligence, the Procuring Entity ought to file a report capturing the findings of the said exercise with the Authority prior to award of the tender, for the Authority's further action, if need be.

h totality, the Board holds that the Request for Review succeeds only with respect to the following specific orders:-

FINAL ORDERS

h 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 Procuring Entity's Notification <>if ntention to Enter into a Contract dated 25th June 2020 with respect to Tender No. SCC/ KLB/06/ 2019 for Proposed Space Optimization and Re-organization of the Printing Press Area addressed to M/s Pearltek Kenya Limited be and is hereby cancelled and set aside.

2 The Procuring Entity's Letters of Notification of Unsuccessful bid dated 25th June 2020 with respect to Tender No. : SCC/KLB/ 06/ 2019 for Proposed Space Optimization and Re-organization of the Printing Press Area addressed to the Applicant and all other unsuccessful bidders be and are hereby cancelled and set aside.

3 The Procuring Entity is hereby directed to conduct due diligence on the lowest evaluated responsive tenderer in accordance with the provision of due diligence in the Tender Document read together with section 83 of the Act and proceed with the subject procurement process to its logical conclusion within fourteen (14) days from the date hereof, taking into consideration the Board's findings in this Request for Review.

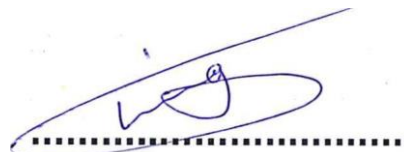
4 Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.

Dated at Nairobi, this 29th Day of July, 2020



CHAIRPERSON

PPARB



SECRETARY

PPARB