

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 142/2020 OF 23<sup>RD</sup> NOVEMBER 2020**

**BETWEEN**

**ROYAL HISHAM LIMITED.....APPLICANT**

**AND**

**KENYA PORTS AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**THE ACCOUNTING OFFICER,**

**KENYA PORTS AUTHORITY.....2<sup>ND</sup> RESPONDENT**

**BIZCAN TRANSPORTERS.....3<sup>RD</sup> RESPONDENT**

Review against the decision of Kenya Ports Authority with respect to Tender No. KPA/005/2020-21/ADM Provision of Commuter Bus Services for ICD Nairobi and ICD Naivasha

**BOARD MEMBERS**

- |                      |              |
|----------------------|--------------|
| 1. Ms. Faith Waigwa  | -Chairperson |
| 2. Dr. Joseph Gitari | -Member      |
| 3. Dr. Paul Jilani   | -Member      |
| 4. Eng. Mbiu Kimani  | -Member      |
| 5. Mr. Jackson Awele | -Member      |

**IN ATTENDANCE**

## **BACKGROUND TO THE DECISION**

### **The Bidding Process**

Kenya Ports Authority (hereinafter referred to as "the Procuring Entity") invited interested and eligible bidders to submit bids in response to Tender No. KPA/005/2020-21/ADM Provision of Commuter Bus Services for ICD Nairobi and ICD Naivasha (hereinafter referred to as "the subject tender") via an advertisement in the Local Daily Newspapers on 12<sup>th</sup> August 2020 as well as publication in the Procuring Entity's website [www.kpa.co.ke](http://www.kpa.co.ke).

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

A total of thirteen (13) bidders/firms submitted bids in response to the subject tender which were opened on 16<sup>th</sup> September 2020 in the presence of bidders and their representatives who chose to attend and which bids were recorded as follows: -

<b>No.</b>	<b>Name of Firm</b>	<b>Tender security (Ksh. 200,000)</b>	<b>Financial envelope</b>	<b>No. of Copies</b>	<b>No. of Pages</b>
1.	M/s African Memsap Tech. Ltd.	√	√	3	101
2.	M/s Peter Vella Ltd.	√	X	2	Un-numbered
3.	M/s Fanaka Merchants Ltd.	√	√	3	174
4.	M/s Rwaken Investments Ltd	√	X	2	Un-numbered
5.	M/s Pewin Cabs Ltd	√	√	3	327
6.	M/s Bizcan Transporters	√	√	3	408

No.	Name of Firm	Tender security (Ksh. 200,000)	Financial envelope	No. of Copies	No. of Pages
7.	M/s Makam Technical Services Ltd	√	√	3	240
8.	M/s Amicabre Travel Services Ltd	√	√	3	Un-numbered
9.	M/s Royal Hisham Ltd.	√	√	3	329
10.	M/s Pride Drive Ltd	X	x	3	Un-numbered
11.	M/s Skyland Trading Ltd	√	√	3	205
12.	M/s Holiday Cars & Tours Ltd	√	√	3	471
13.	M/s Kenatco Taxis Ltd	√	√	3	267

## Evaluation of Proposals

The evaluation process was to be conducted in three stages:

1. Preliminary Evaluation;
2. Technical Evaluation;
3. Financial Evaluation.

### 1. Preliminary Evaluation

At this stage of evaluation, all bids were subjected to the Preliminary Evaluation criteria provided under Section II of the Tender Document and the Appendix to Instructions to Tenderers as follows: -

1. Valid Tender Security
2. Sealing and Marking
3. Table of Contents
4. Document page numbered
5. Binding

6. No. of Copies
7. Company background
8. Postal and physical address of the business
9. Email address
10. Certificate of Registration/Incorporation
11. Valid/Current Tax Compliance Certificate
12. Valid/current Business Permit
13. CR12 Letter from Registrar of Companies or equivalent
14. National Identity for owners/Directors
15. Duly filled, signed and stamped Confidential Business Questionnaire
16. Duly filled, signed, and stamped Anti-Corruption Declaration Commitment/ Pledge
17. Duly filled, signed, and stamped Declaration Form
18. Letter of Compliance issued by Ministry of Labour confirming compliance with labour requirements and in particular compliance to payment of minimum wage
19. Proof of ownership of fleet of buses
20. Other Details:
  - a. Year of manufacture
  - b. Valid Insurance Policy
  - c. Valid Inspection Stickers
  - d. Fitting with safety belts

- e. Must abide with TLB regulations including being fitted with appropriate and acceptable speed governors
- f. Capacity of at least 45 seated passengers with adequate spacing between seats, adjustable and comfortable, low stairs, adequate ventilation, fitted with supporting rails, with two (2) doors at the front and the rear, the buses to have ramps to facilitate accessibility by Persons with Disabilities.
- g. Modern buses designed for urban use.
- h. Maintenance schedule and general cleaning for the fleet.

#### 21. Three (3) Years audited Financial Statements

Upon conclusion of Preliminary Evaluation, nine (9) firms were found non-responsive to the mandatory requirements, including the Applicant, that is, M/s Royal Hisham Limited who's bid was found non-responsive for the following reason: -

- Provided a provisional single business permit instead of the required single business permit valid for the current year.

Four (4) firms were found responsive to the mandatory requirements hence considered for further evaluation, namely: -

1. M/s PTG Travel Ltd
2. M/s Bizcan Transporters
3. M/s Skyland Trading Ltd

#### 4. M/s Holiday Cars & Tours Ltd.

## 2. Technical Evaluation

At this stage of evaluation, bids were subjected to the technical evaluation criteria as provided in the Appendix to Instructions to Tenderers (Section II) and amended through Addendum No. 2.

The results were as follows: -

<b>No.</b>	<b>Firm</b>	<b>Total Score (%)</b>	<b>Remarks</b>
1.	M/s PTG Travel Ltd	61	Fail
2.	M/s Bizcan Transporters	93	Pass
3.	M/s Skyland Trading Ltd	96	Pass
4.	M/s Holiday Cars & Tours Ltd.	98	Pass

The Evaluation Committee made the following observations: -

- a) While the required capacity of at least 45 seated passengers can be verified from information provided in the buses' logbooks, the Evaluation Committee could not objectively confirm tenderers' responsiveness with reference to the following aspects of the buses:
  - i. Adequate spacing between seats
  - ii. Adjustability and comfortability of the seats
  - iii. Low stairs
  - iv. Adequate ventilation
  - v. Fitted supporting rails

- vi. Two (2) doors at the front and the rear
- vii. Ramps to facilitate accessibility by Persons with Disabilities.

Upon conclusion of this stage of evaluation, the Evaluation Committee recommended opening of Financial Bids (Envelope B) for the following firms who attained the pass mark:

1. M/s Bizcan Transporters
2. M/s Skyland Trading Ltd
3. M/s Holiday Cars & Tours Ltd.

### 3. Financial Evaluation

Financial bids were opened on 15<sup>th</sup> October 2020 and bid prices for the three (3) firms as contained in the Form of Tender were read out aloud and recorded as follows: -

No.	TENDERER	Quoted Price Per Month Vat Inclusive (Kshs)	No. of Copies
1	M/s Skyland Trading Ltd	3,160,140.00	3
2	M/s Bizcan Transporters	2,093,100.00	3
3	M/s Holiday Cars & Tours Ltd.	2,364,060.00	3

The Evaluation Committee proceeded to analyze the bids for the two zones – ICD Nairobi and ICD Naivasha. The firms offered to provide the services at the prices tabulated below:

No.	TENDERER	Schedule for Nairobi ICD Total Price Per Month (VAT Incl.)	Schedule for Naivasha ICD Total Price Per Month (VAT Incl.)	Total Quoted Price Inclusive Vat (Kshs)
1.	Skyland Trading Ltd	2,633,450.00	526,690.00	3,160,140.00
2.	Bizcan Transporters	1,808,100.00	285,000.00	2,093,100.00
3.	Holiday Cars & Tours Ltd.	2,156,484.00	207,576.00	2,364,060.00

### **The Evaluation Committee's Recommendation**

In view of the evaluation process, the Evaluation Committee recommended award of the subject tender to **M/s Bizcan Transporters** at their total quoted price of **Kshs. 2,093,100.00/- (Two Million, Ninety-Three Thousand, One Hundred Shillings Only)** per month; subject to the following: -

- i. As observed by the Evaluation Committee in its Technical Evaluation Report, the Authority would need to determine to its satisfaction that the lowest evaluated responsive tenderer is qualified to perform the contract satisfactorily.
- ii. The Procuring Entity's user department underscored the significance of commuter bus services to the ICDs core business. In this regard, prior to signing of the contract, it was imperative pursuant to Clauses 2.24 (a) of the Tender Document that the Authority visits the premises cited by the bidder in their technical submission for post-qualification due diligence on: -
  - a) Physical address to confirm the provided organization structure, and CVs/qualifications of named personnel, proof



of ownership, capacity, year of manufacture and valid insurance policy of the buses.

b) Location where the buses can be viewed to establish the authenticity of following aspects of the buses: -

- Adequate spacing between seats
- Adjustability and comfortability of the seats
- Low stairs
- Adequate ventilation
- Fitted supporting rails
- Two (2) doors at the front and the rear
- Ramps to facilitate accessibility by Persons with Disabilities.

c) Office and garage where the maintenance schedules and general cleaning are carried out.

## **Due Diligence**

The Evaluation Committee, visited the garage of **M/s Bizcan Transporters** on 2<sup>nd</sup> November 2020 in order to conduct a due diligence exercise. The Evaluation Committee made the following observations as captured in its Due Diligence report signed on 3<sup>rd</sup> November 2020: -

a) The local market for public bus transport service providers suffers inadequate capacity for low level double door buses equipped with ramps for PWDs' access. This was evidenced in the high number of bus

companies seeking to convert old units to create rear doors and accommodate ramps at the fabrication facility visited. Notably, at least four units, including two belonging to the second lowest bidder in this Tender (M/s Holiday Cars and Tours Ltd) were under conversion at Master Fabricators as shown in 2.1.9 above.

b) M/s Bizcan Transporters were fabricating new buses locally. This was in line with Government policy guidelines on **Buy Kenya Build Kenya**.

c) Given the environment under which the buses will be operating, the Evaluation Committee concurred with the bidder's concern on the technical specifications for low level buses and ramps. The bidder noted that whereas ramps were a regulatory requirement to cater for the needs of PWDs, low level buses were unrealistic and a biased specification considering the terrain/routes the buses shall ply e.g. Pipeline, Embakasi

d) The second lowest evaluated bidder, M/s Holiday Cars and Tours Ltd was the current service provider for ICD Nairobi. The buses in use were high chassis, single doors without ramps. As observed at Master Fabricators' premises, some of the buses were under conversion to create a second door and ramp.

e) The objective of the due diligence exercise was achieved since the Committee was able to verify information provided by the lowest

evaluated bidder as well as confirm the bidder's commitment to meeting tender requirements for smooth contract implementation.

The Evaluation Committee concluded that M/s Bizcan Transporters was qualified to perform the contract for Provision of Commuter Bus Service for Inland Container Depot Nairobi and Naivasha.

### **Professional Opinion**

The Acting Head of Procurement and Supplies reviewed the Evaluation Report and concurred with the Evaluation Committee's recommendation vide a Professional Opinion dated 5<sup>th</sup> November 2020.

The Acting Managing Director of the Procuring Entity approved the Evaluation Committee's recommendation on 6<sup>th</sup> November 2020.

### **REQUEST FOR REVIEW NO. 142 OF 2020**

Royal Hisham Limited (hereinafter referred to as "the Applicant"), lodged a Request for Review dated 20<sup>th</sup> November 2020 and filed on 23<sup>rd</sup> November 2020 together with an Affidavit in Support of the Request for Review (hereinafter referred to as "the Applicant's Affidavit") sworn on 20<sup>th</sup> November 2020 and filed on 23<sup>rd</sup> November 2020 through the firm of Chege & Sang Company Advocates.

In response, the Procuring Entity, lodged a 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Memorandum of Response dated 27<sup>th</sup> November 2020 and filed on 30<sup>th</sup>

November 2020 (hereinafter referred to as “the Procuring Entity’s Response”) together with an Affidavit in Support of the 1<sup>st</sup> & 2<sup>nd</sup> Respondents’ Memorandum of Response sworn on 27<sup>th</sup> November 2020 and filed on 30<sup>th</sup> November 2020, (hereinafter referred to as “the Procuring Entity’s Affidavit”) through its Advocate, Ms. Addraya Dena.

Bizcan Transporters (hereinafter referred to as “the 3<sup>rd</sup> Respondent”) lodged a Memorandum of Response dated 3<sup>rd</sup> December 2020 and filed on 4<sup>th</sup> December 2020 (hereinafter referred to as “the 3<sup>rd</sup> Respondent’s Response”) through the firm of Prof. Albert Mumma & Company Advocates.

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

-

- a. An order declaring that the Procuring Entity breached the provisions of the Public Procurement and Asset Disposal Act, 2015 and Article 47 and 227 of the Constitution;***
- b. An order nullifying in its entirety the award and the entire procurement proceedings in Tender No. KPA/005/2020-21/ADM for Provision of Commuter Bus Services for ICD Nairobi and ICD Naivasha;***
- c. An order directing the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to seek extension of the tender validity period so as to carry out fresh evaluation of the bids submitted in accordance***

***with the dictates of the Public Procurement and Assets Disposal Act;***

- d. That in the alternative to (c) above, an order directing the Procuring Entity to award Tender No. KPA/005/2020-21/ADM for Provision of Commuter Bus Services for ICD Nairobi and ICD Naivasha to the Applicant being the lowest responsive bid;***
- e. An order directing the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to prepare fresh tender document and re-tender for provision of commuter bus services for ICD Nairobi and ICD Naivasha;***
- f. An order for costs of the Request for Review to be awarded to the Applicant;***
- g. Any other relief that the Review Board deems fit to grant under the circumstances.***

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 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 COVID-19 pandemic. Through this circular, the Board dispensed with physical hearings and directed that all request for review applications 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 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 written submissions dated 8<sup>th</sup> December 2020 on even date, the Procuring Entity lodged written submissions dated 30<sup>th</sup> November 2020 on 2<sup>nd</sup> December 2020 whereas the 3<sup>rd</sup> Respondent lodged written submissions dated 9<sup>th</sup> December 2020 on 10<sup>th</sup> December 2020.

### **BOARD'S DECISION**

The Board has considered each of the parties' cases, the documents filed before it, 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") including parties' written submissions.

The main issue that arises for determination is: -

**Whether the Applicant's bid was found non-responsive at the Preliminary Evaluation Stage in accordance with section 80 (2) of the Act read together with Article 227 (1) of the Constitution with respect to Mandatory Requirement (f) of Clause 2.7 Appendix to Instructions to The Tenderers on page 27 of the Tender Document which provides as follows: -**

*a. Valid/current Business Permit where the business operations of tenderer are domiciled*

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

The Board observes that the Applicant raised the following ground for review in its written submissions filed on 8<sup>th</sup> December 2020: -

***"a) On page 5-6 of the Applicant's Written Submissions: -***

***"B. Was the evaluation conducted within the statutory timelines?***

*9. Honourable Chair, we submit that the evaluations were not transparent and were in breach of the legitimate expectations of bidders given the fact that as depicted from the Senior Procurement Officer's Affidavit at paragraph 4 the*

*tender opening was on 16<sup>th</sup> September 2020 whereas the regret letter/notifications was issued on 9<sup>th</sup> November 2020.*

*10. Honourable Chair, we submit that the evaluation was done contrary to section 80 of the Public Procurement and Asset Disposal Act .....*

*11. Your Honour it is our further submissions that if at all an award was issued, the same is a nullity for failure to adhere to statutory timelines for the evaluation and it is the duty of the Respondents to make a full and fair disclosure of this material facts....”*

The Board notes, the foregoing ground for review was not canvassed in the Request for Review Application filed by the Applicant on 23<sup>rd</sup> November 2020 but was raised for the first time in the Applicant’s written submissions filed on 8<sup>th</sup> December 2020, which submissions were filed after the Procuring Entity filed its own written submissions on 2<sup>nd</sup> December 2020 and therefore the Procuring Entity did not have an opportunity to respond to this ground for review.

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 the 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 from which the jurisdiction of this Board flows, 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 202 (1) and (2) of the Public Procurement and Asset Disposal Regulations (hereinafter referred to as "2020 Regulations") provide the procedure for filing a request for review as follows: -

***"202. (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 203 'Notification of the review and suspension of procurement proceedings' 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 aforementioned regulations the Board notes, once an applicant files a request for review application, the procuring entity including all tenderers who participated in the subject tender are notified of the existence of the request for review application by the Board Secretary and are invited to submit any information with respect to the request for review application in form of pleadings which are lodged before Board.

In this regard therefore, 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. This is in line with Article 50 (2) (c) of the Constitution which grants every person a right to a fair hearing including the right to have adequate time and facilities to prepare a defence.

In this regard therefore, 'new' grounds for review cannot be introduced by way of written submissions.

Accordingly, the Board finds that the 'new' ground for review raised by the Applicant in its written submissions was not properly filed before the Board and is hereby expunged forthwith from the Applicant's written submissions.

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

A brief background to the Request for Review is that the Procuring Entity invited interested and eligible bidders to submit their bids in response to the subject tender via an advertisement in the Local Daily Newspapers dated 12<sup>th</sup> August 2020.

By the bid submission deadline of 16<sup>th</sup> September 2020, the Procuring Entity received a total of thirteen (13) bids which were opened on the same date by the Procuring Entity's Tender Opening Committee.

Thereafter, the Procuring Entity's Evaluation Committee conducted an evaluation of the bids received and upon conclusion of the evaluation process, recommended award of the subject tender to the successful bidder, M/s Bizcan Transporters, the 3<sup>rd</sup> Respondent herein. The Accounting Officer of the Procuring Entity approved the Evaluation Committee's recommendation of award, following an overview of the evaluation process by the Head of Procurement Function.

The successful bidder and all unsuccessful bidders were notified of the outcome of the evaluation of their bids via letters of notification dated 9<sup>th</sup> November 2020.

As pleaded by the Applicant in paragraph 4 of its Request for Review Application, it received its letter of notification of unsuccessful bid on or about 10<sup>th</sup> November 2020, which letter read as follows: -

***"This is to inform you that pursuant to section 87 (3) of the Public Procurement and Asset Disposal Act, 2015, your bid was not successful because you provided a provisional single business permit instead of the required single business permit valid for the current year.***

***The successful bidder in regard to this tender is M/s Bizcan Transporters...***

***We thank you for your participation in the tender and look forward to working with you in future....”***

Aggrieved by the decision of the Procuring Entity, the Applicant moved this Board through the instant Request for Review.

The Applicant contends that the reason why its bid was unsuccessful is baseless and unfounded and in its view, it submitted a valid business permit as required under the Tender Document. According to the Applicant, it duly complied with this requirement as it provided in its bid a provisional single business permit, issued by the County Government of Mombasa pursuant to section 5(3) of the Mombasa County Finance Act, 2019.

The Applicant argues that a provisional single business permit is a valid permit issued by the Director of Trade and Licensing, prior to the issuance of a main trade license. It is therefore the Applicant's submission that the Procuring Entity is in breach of the duties imposed upon it by the provisions of the Act, the Regulations and the Constitution.



The Procuring Entity refutes the Applicant's submissions and contends that all bids received in response to the subject tender were evaluated in accordance with the provisions of the Tender Document, the Act and the Constitution. According to the Procuring Entity, the Applicant provided a provisional single business permit which was a clear deviation from the mandatory requirement in issue, that required bidders to submit a valid/current business permit.

The Procuring Entity contends that all the other bidders who submitted bids in response to the subject tender provided valid/current business permits and thus the Applicant's allegation that the tender is discriminatory is unfounded. The Procuring Entity submits that in its view the Applicant's admission of having provided a provisional single business permit only serves as an admission of criminality on its part, in breach of the laws enacted by the County Assembly of Mombasa, noting that the Applicant avers that it has been an active trader/service provider up to date and therefore should be in possession of a valid/current business permit for the year 2020.

It is therefore the Procuring Entity's submission that the Request for Review is unmerited and should be dismissed forthwith.

On its part, the 3<sup>rd</sup> Respondent submits that a provisional business permit is but a conditional temporary permit which is subject to approval and is only confirmed upon fulfilling stipulated conditions set by the County Government. Further, the 3<sup>rd</sup> Respondent submits that a

provisional business permit can be revoked at any juncture and more importantly is not evidence of a final permit from the County Government.

The 3<sup>rd</sup> Respondent is of the view that the provisional single business permit provided by the Applicant in its respective bid was issued on 25<sup>th</sup> August 2020 and was valid for one calendar month, thus did not conform to the mandatory requirement in issue. In support of the Procuring Entity's submissions, the 3<sup>rd</sup> Respondent submits that the Applicant's bid was rightfully disqualified from further evaluation and that the Request for Review ought to be dismissed for being frivolous, vexatious and lacking in merit.

Having considered parties' submissions, the Board examined the Tender Document and observes Mandatory Requirement (f) of Clause 2.7 Appendix to Instructions to The Tenderers on page 27 of the Tender Document which provides as follows: -

***"Particulars of Tendering Company to include: -***

***a. ....***

***b. ....***

***c. ....***

***d. ....***

***e. ....***

***f. Valid/current Business Permit where the business operations of tenderer are domiciled;"***

Accordingly, bidders were required to provide a valid/current business permit where the business operations of the respective tenderer are domiciled.

The question that now arises is what is a valid/current business permit?

The Cambridge English Dictionary defines the term 'valid' as: -

***"having legal force"***

Further, The Black's Law Dictionary (9<sup>th</sup> Edition) defines the term 'valid' as follows: -

***'of binding force. A deed, will or other instrument, which has received all formalities required by law, is said to be valid.'***

The term 'valid' can therefore be understood to mean having legal/binding force or having received all formalities required by law.

As regards the term 'current', the Cambridge English Dictionary assigns the following meaning to the term

***'of the present time'***

Notably, the two terms, that is, 'current' and 'valid' in the mandatory requirement in issue, are separated by a slash symbol, that is, '/'.

The Cambridge English Dictionary explains that the slash symbol can be used in two ways: -

***"the symbol / used in writing to separate letters, numbers, or words"***

And

***"used to mean "or", or to show that something has two uses"***

Accordingly, the slash symbol can be used to separate words, to mean the word 'or' which term demonstrates alternatives or to show that something has more than one use.

In determining the meaning of a 'business permit', the Board studied section 5 of the Mombasa County Finance Act, 2019 (hereinafter referred to as "the Mombasa County Act") which provides as follows: -

***"5. (1) A person shall not carry out any business or service within the county without a valid licence or permit issued by the relevant county office.***

***(2) A person who intends to carry out any of the businesses listed in the or under the schedule or the single business permit regulation shall apply for a licence or permit from any of the county offices or such other designated agents as shall be prescribed by the County Government from time to time.***

***(3) A person who applied for licence/single business permit under subsection (2) shall be issued with a licence***

**on the payment of the applicable fee, depending on the location and size of the business as specified in the schedule or the single business permit regulation.**

***(4) Licences and permits issued under subsection (3) must be visibly displayed at the business premise at all time.***

***(5) A person who contravenes any of the provisions of this section commits an offence.”***

From the foregoing provision, the Board observes as follows: -

A valid licence or permit is issued by the County Government of Mombasa’s relevant county office to a person who intends to carry out any business or service within Mombasa County. It can therefore be construed from an interpretation of section 5 (1) of the Mombasa County Act, as a necessary or compulsory legal requirement for any business or service that intends to conduct business within Mombasa County.

Further, it is evident that the County Government of Mombasa is responsible for issuing a single business permit to the various business types operating within Mombasa County. As provided in section 5 (3) of the Mombasa County Act, the issuance of a particular type of business permit will depend on the geographical location of the business, the number of employees, business type, and activities of the business among other factors.

Moreover, section 5 (2) of the Mombasa County Act is instructive on the application process for a business permit whereby it provides that an application for a single business permit shall be made from any of Mombasa County's offices or such other designated agents as shall be prescribed by the County Government of Mombasa from time to time.

In this regard therefore, a current/valid business permit can be understood to mean a business permit that is binding, having been issued according to the law, which is in force for the present time.

The Board would like to point out that a business permit is only valid or in force for the period of time within which it has been issued, thus it is both current and valid at the same time.

Moving forward, the Board examined the Applicant's original bid document which forms part of the Procuring Entity's original and confidential file, submitted to the Board pursuant to section 67 (3) (e) of the Act, and observes that the Applicant provided the following document in response to the criterion in issue: -

***"On page 27 of its bid: A Provisional Single Business Permit***

- ✓ ***Issued by the County Government of Mombasa***
- ✓ ***Issued to Royal Hisham Limited***
- ✓ ***Issued on 25<sup>th</sup> August 2020***
- ✓ ***For the period ending: 24<sup>th</sup> September 2020***
- ✓ ***Business Physical Address: General Hospital"***

Accordingly, the Applicant provided a provisional single business permit issued by the County Government of Mombasa valid for one calendar month. This in turn begs the question, what is a 'provisional single business permit'?

Notably, the Mombasa County Finance Act does not define the term 'provisional single business permit'. The Board therefore first considered the ordinary meaning of the word "provisional" as defined in the dictionary.

The Cambridge English Dictionary assigns the following meaning to the term 'provisional':

***'for the present time but likely to change'***

Also, the Black's Law Dictionary defines the term as: -

***'Temporary; preliminary, tentative'***

In this regard therefore, a provisional business permit can be understood to mean a business permit that is for the present time and temporary, that is, its status is likely to change.

The Board studied the County Government of Mombasa E-services website [www.eservices.mombasa.go.ke](http://www.eservices.mombasa.go.ke) and observes a pdf document

attachment therein titled 'Single Business Permit – Mombasa County Citizen's Work Manual Version No. 1.0', which provides the guidelines for applying for a single business permit from the County Government of Mombasa on its online platform.

The Board examined the said document and observes on page 5 therein the following remarks: -

***"A registered applicant will be able to submit their application for the Single Business Permit and make payments against the application. After filling online application for Single Business Permit you can review the information & be able to make changes if required and make payment against the activity code selected in the Business Information, after successful payment using e-payment Platform the Provisional Certificate will be issued. You can also print the provisional certificate."***

**[Emphasis by the Board]**

From the foregoing provision, the Board observes that a provisional certificate is issued to an applicant after successful payment following an application for a single business permit on the County Government of Mombasa e-services platform.

From the FAQ tab on the County Government of Mombasa e-services website, it is explained that an application for a single business permit should be reviewed within three (3) months, during which time an applicant will be provided with a provisional permit. This means that an



application for a single business permit is subject to review/consideration which perhaps would involve a process of inspection of an applicant's premises and verification of documents submitted by the applicant by the relevant office of the County Government of Mombasa, prior to the issuance of a single business permit. During this period, a provisional business permit is issued to an applicant during the period of review.

Further, a single business permit expires at the end of the calendar year, that is, 31<sup>st</sup> December of the year of application and will include the period covered by the provisional single business permit which was issued prior to the issuance of a single business permit.

From the foregoing, it is evident that a provisional single business permit is for all intents and purposes a valid and current business permit for reasons that it is issued by the relevant county office of a county government after all the formalities required for application of a provisional single business permit, which in this instance were outlined on the County Government of Mombasa E-services portal have been adhered to. It therefore has binding/legal effect and thus operates as a business permit during the period within which a county government takes to review an application for a single business permit. This is buttressed by the fact that once a single business permit is issued, its period of validity includes the period covered by the provisional single business permit, and thus it can be inferred that a provisional single

business permit is both legal and effective during the period it is in force.

In this regard, similarities can be drawn between a provisional single business permit and a provisional driving licence. For a person to be allowed to drive a motor vehicle in Kenya, they need to undergo a period of training in driving. During this period, a person is issued with a provisional driving licence, which is valid for a stipulated number of months. During this period of time, a provisional driving licence serves as a valid driving license that entitles the holder of a provisional driving licence to drive a motor vehicle until he/she is issued with a driving license.

The Board observes that the subject tender closed on 16<sup>th</sup> September 2020 and that the Applicant's provisional single business permit was '*for the period ending 24<sup>th</sup> September 2020*'. This means that by the tender submission deadline, the Applicant did provide a valid and current business permit that was in effect at the time it submitted its bid to the Procuring Entity.

Further, the Board observes from the Applicant's confidential business questionnaire on page 75 and page 76 of its bid, that its business premises are located at "*Bonden Road, 3<sup>rd</sup> Floor Utalii House*" and further that the Applicant's postal address, that is, '*P.O. Box 16523 – 80100 Mombasa*', is a Mombasa postal address, confirming that the Applicant did indeed provide a current/valid business permit issued by

the relevant authorities, that is, the County Government of Mombasa, where its business operations are domiciled.

The Board considered the submission made by the 3<sup>rd</sup> Respondent, in paragraph 7 of its Memorandum of Response, whereby it argues that a provisional single business permit can be revoked at any juncture and is therefore not evidence of a final permit from the County Government.

Arguably, a single business permit once issued may also be revoked or withdrawn if it is brought to the attention of the relevant county office that the applicant in question relied on falsehoods in order to secure the said permit. This submission by the 3<sup>rd</sup> Respondent is therefore not persuasive in this respect.

The 3<sup>rd</sup> Respondent further argues that a provisional single business permit is only valid for a period of one calendar month and therefore did not conform to the mandatory requirement in issue.

The Board observes that Clause 3.3.1 Section IV Special Conditions of Contract on page 34 of the Tender Document stipulates as follows: -

***"This contract shall be for a period of three (3) years."***

Notably, the operating period for the contract to be signed with respect to the subject tender, upon conclusion of the subject procurement proceedings is three years. This means that the successful bidder will

have to renew its single business permit during the contract period, noting that the said permit is valid for only one calendar year.

In this regard therefore, both a single business permit and a provisional business permit have an expiry date and more to the point, a single business permit is subject to renewal, therefore this argument propounded by the 3<sup>rd</sup> Respondent is also not persuasive in this respect.

It is important to note that the criterion in issue did not specify the period of validity of the business permit to be twelve months, as propounded by the Procuring Entity, but merely indicated that the business permit ought to be current.

In the event the authenticity of the Applicant's provisional single business permit is in doubt, the question that arises is, what recourse is available to a Procuring Entity in this instance?

The Black's Law Dictionary (9<sup>th</sup> Edition) at page 523 defines 'due diligence as follows: -

***"the diligence reasonably expected from, and ordinarily exercised by a person who seeks to satisfy a legal requirement or discharge an obligation"***

with the term 'diligence' meaning

***"the attention and care required from a person in a given situation".***

A due diligence exercise is therefore 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.

Due diligence is provided for under section 83 of the Act which provides 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."***

Accordingly, a procuring entity may elect to conduct a due diligence exercise to satisfy itself of the qualifications of the tenderer determined

by the evaluation committee to be the lowest evaluated responsive tenderer. The lowest evaluated responsive tenderer is one whose bid has been found to be responsive at the Preliminary, Technical and Financial evaluation.

In this regard therefore, a procuring entity conducts a due diligence exercise 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 (3) of the Act as outlined hereinabove, clearly stipulates the procedure that must be followed in a due diligence process. 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 professional opinion and onward transmission to the Accounting Officer who will consider whether or not to award the tender to that 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.

In the instant case, in the event the Applicant is determined to be the successful bidder upon conclusion of Financial Evaluation, the Procuring Entity may write to the issuer of the provisional business permit, this being the County Government of Mombasa, to confirm to the Procuring Entity's satisfaction the validity of the said permit as at the tender submission deadline, that is, 16<sup>th</sup> September 2020.

In conclusion, it is the Board's view that the Applicant did comply with the mandatory requirement in issue, noting that it provided a provisional single business permit, which is for all intents and purposes, a current/valid business permit.

The Board is guided by the provisions of the Constitution and the Act that regulate the evaluation of bids as follows: -

Article 227 (1) of the Constitution provides: -

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

And section 80 (2) of the Act states as follows:

***"The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered."* [Emphasis by the Board]**



Accordingly, it is the finding of this Board that the Applicant's bid was not found non-responsive in accordance with section 80 (2) of the Act read together with Article 227 (1) of the Constitution.

The Board takes cognizance of section 173 (b) of the Act, which states that: -

***"Upon completing a review, the Review Board may do any one or more of the following-***

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

***(b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings..."***

Having established that the Procuring Entity did not evaluate the Applicant's bid in accordance with 80 (2) of the Act read together with Article 227 (1) of the Constitution, the Board deems it fit to direct the Procuring Entity to re-admit the Applicant's bid together with all other bidders in the subject tender at the Preliminary Evaluation Stage and conduct a re-evaluation at the Preliminary Evaluation Stage with respect to Mandatory Requirement (f) of Clause 2.7 Appendix to Instructions to The Tenderers on page 27 of the Tender Document, whilst taking into consideration the Board's findings herein, in accordance with the provisions of the Act and the Constitution.

## **FINAL ORDERS**

In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, the Board makes the following orders in the Request for Review: -

- 1. The Accounting Officer of the Procuring Entity's Letter of Award dated 9<sup>th</sup> November 2020 with respect to Tender No. KPA/005/2020-21/ADM Provision of Commuter Bus Services for ICD Nairobi and ICD Naivasha addressed to M/s Bizcan Transporters, be and is hereby cancelled and set aside.**
  
- 2. The Accounting Officer of the Procuring Entity's Letters of Notification of Unsuccessful Bid dated 9<sup>th</sup> November 2020 with respect to Tender No. KPA/005/2020-21/ADM Provision of Commuter Bus Services for ICD Nairobi and ICD Naivasha, addressed to all unsuccessful bidders, including the Applicant herein, be and are hereby cancelled and set aside.**
  
- 3. The Accounting Officer of the Procuring Entity is hereby directed to re-instate the Applicant's bid together with all other bidders in the subject tender who made it to Preliminary Evaluation, at the Preliminary Evaluation Stage and direct the Evaluation Committee to conduct a re-evaluation at the Preliminary Evaluation Stage with**

**respect to Mandatory Requirement (f) of Clause 2.7 Appendix to Instructions to The Tenderers on page 27 of the Tender Document, in accordance with the provisions of the Act and the Constitution, taking into consideration the Board's findings in this Review.**

**4. Further to Order No. 3 above, the Accounting Officer of the Procuring Entity is hereby directed to proceed with the procurement process to its logical conclusion, including making of an award, within fourteen (14) days from the date of this decision.**

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

**Dated at Nairobi this 14<sup>th</sup> Day of December 2020**

**CHAIRPERSON**

**PPARB**

**SECRETARY**

**PPARB**