REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 153/2020 OF 18TH DECEMBER 2020

BETWEEN

SPACE CONTRACTORS &

SUPPLIERS INVESTMENT LIMITED.....APPLICANT

AND

THE ACCOUNTING OFFICER,

KENYA MARITIME AUTHORITY.....1ST RESPONDENT

KENYA MARITIME AUTHORITY.....2ND RESPONDENT

VIRGIN CLEAN LIMITED.....1ST INTERESTED PARTY

SIMCA AGENCIES LIMITED.....2ND INTERESTED PARTY

Review of the conduct and decision of Kenya Maritime Authority with respect to Tender No. KMA/ONT/CL/01/2020-21 for Provision of General Cleaning and Landscaping Services (Reserved for Women, Youths and Persons with Disability).

BOARD MEMBERS

1. Ms. Faith Waigwa	-Chairperson
2. Arch. Steven Oundo, OGW	-Member
3. Mr. Alfred Keriolale	-Member
4. Ms. Rahab Chacha	-Member
5. Ms. Njeri Onyango	-Member

IN ATTENDANCE

1. Mr. Stanley Miheso -Holding brief for Secretary

BACKGROUND TO THE DECISION

The Bidding Process

Kenya Maritime Authority (hereinafter referred to as "the Procuring Entity") invited interested and eligible bidders to submit bids in response to Tender No. KMA/ONT/CL/01/2020-21 for Provision of General Cleaning and Landscaping Services (Reserved for Women, Youths and Persons with Disability) (hereinafter referred to as "the subject tender") via an advertisement in MyGov pull-out newspaper on 20th October 2020.

Bid Submission Deadline and Opening of bids

A total of twenty-five (25) bidders/firms submitted bids in response to the subject tender which were opened on 12th November 2020 in the presence of bidders and their representatives who chose to attend and which bids were recorded as follows: -

Bidder No.	Name of Firm
1.	Petals Hygiene and Sanitation Services Limited
2.	Quick Shine Ventures Limited
3.	Fyldercon Enterprises Limited
4.	Ollreggy Investments
5.	Ephstacia Limited

Bidder No.	Name of Firm
6.	Belam Cleaning Services
7.	Sender Services Co. Limited
8.	Nadiah Investments
9.	Gati Cleaning Agency Limited
10.	Remarc Cleaning Services Limited
11.	Tashan Enterprises
12.	First Class Facility Cleaners Limited
13.	Generations Cleaning Services
14.	Tripple-A Agencies & General Suppliers
15.	Kaniala Enterprises
16.	Space Contractors & Suppliers Investment Limited
17.	Kotaa East African Limited
18.	Simca Agencies Limited
19.	Macada Enterprises
20.	Wayulett General Services
21.	Lifeway Solutions Limited
22.	Virgin Clean Limited
23.	Envirocare General Agencies Limited
24.	Zanelencia Company Limited
25.	Ever Harvest Enterprises Limited

Evaluation of Proposals

The evaluation process was 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 in the Tender Document as follows: -

1. The Bidder will be required to submit one (1) Original and (1) copy of their original bid marked "**ORIGINAL**" and "**COPY**" (**Mandatory**)

2. There shall be a **mandatory** pre-bid site visit

   Pre-bid visits (**mandatory**) as follows;

   1. Headquarter
   2. RMRCC
   3. Lamu
   4. Kisumu
   5. Lodwar

3. Shall have a table of contents page clearly indicating 'Sections' and 'Page Numbers' (**Mandatory**).

4. Shall have pages in the whole document numbered in the correct sequence including all appendixes and attachments **(Mandatory**).

5. Shall be firmly bound and should not have any loose pages. Spiral binding and files (spring and box) are not acceptable (**Mandatory**).

6. Shall be submitted in one original and a copy of the original. This shall apply to the technical and financial bids. (**Mandatory**).

7. Shall be signed (where signatures are required) by a duly authorized representative of the firm or any other officer appointed and evidenced by a Power of Attorney (**Mandatory**).

8. Certificate of Registration/Incorporation (**Mandatory**).

9. Valid/Current Tax Compliance Certificate from KRA (**Mandatory**).

10. Valid/current Business Permit for the year 2020 issued by relevant government agency (**Mandatory**).

11. CR12 Letter from Registrar of Companies or equivalent to show names of Directors of the tendering company (in case of a company), Name of Proprietor (for Sole Proprietor and Business Name) and Names of Partners (for Partnerships) – as applicable (**Mandatory**).

12. Duly filled, signed and stamped Confidential Business Questionnaire (**Mandatory**).

13. Self-declaration that the person/tenderer is not debarred in the matter of the Public Procurement and Asset Disposal Act 2015 (**Mandatory**).

14. Duly filled, signed and stamped declaration that tenderer will not engage in any corrupt or fraudulent practice (**Mandatory**).

15. Valid and current Certificate of Registration in a target group issued by the National /County Treasury (**Mandatory**).

16. Duly filled, signed and stamped Tender–Securing Declaration Form (**Mandatory**).

17. List of personal protective equipment/clothing (PPE/C) specific to the job, to be provided during the contract period (**Mandatory**).

18. Price Schedule. (**Mandatory**).

Price Schedule shall contain: -

i. Form of Tender

ii. Schedule of Prices per zone in the format provided.

iii. Detailed breakdown of the lump-sum price per zone into cost elements below: -

- Rates for Equipment Usage or Rental or for Personnel (Key Personnel and other Personnel)
- Staff costs.
- Overheads and Profit

Upon conclusion of Preliminary Evaluation, twenty (20) firms were found non-responsive to the mandatory requirements, including the Applicant herein, that is, Bidder No. 16 M/s Space Contractors & Suppliers Investment Limited who's bid was found non-responsive for the following reasons: -

- The Bidder did not mark the two tender documents submitted to indicate the 'Original' and 'Copy' contrary to Requirement 1.

- The Tender Securing Declaration Form on paragraph two, *period of time for suspension in the event of breach and the start date of this period* (months/years) and date not indicated contrary to Mandatory Requirement No. 16.

Five (5) firms were found responsive to the mandatory requirements hence considered for further evaluation, namely: -

1. M/s Simca Agencies Limited (B18);
2. M/s Macada Enterprises (B19);
3. M/s Wayulett General Services (B20);
4. M/s Virgin Clean Limited (B22);
5. M/s Envirocare General Agencies Limited (B23)

2. Technical Evaluation

At this stage of evaluation, bids were subjected to the following technical evaluation criteria: -

Tender Requirements	**Criteria for Distribution of Marks**	**Max (%)**
1. **Personnel Capability**: CVs of at least one management staff - minimum degree holder (Environmental Studies, /Science/Mgt/Health) and one supervisor - minimum diploma holder (Environmental Studies, /Science/Mgt/Health).	i. Qualifications and experience of one (1) management personnel: - • Minimum degree holder (Environmental Studies, /Science/Mgt/Health) **(5 marks)** • At least 5 years' experience **(5 marks)** • Detailed CVs and copies academic/professional certification of the personnel **(5 marks)** i. Qualifications and experience of supervisor: - • Minimum Diploma holder in Environmental Studies/Science/Mgt/Health **(5 marks)** • At least 3 years' experience **(5 marks)**	**30**

Tender Requirements	Criteria for Distribution of Marks	Max (%)
	• Detailed CVs and copies academic/professional certification of the personnel **(5 marks)**	
2. **Method of work Statement**	• Schedule of Work**.** This should include Working timelines, Key activities, activity frequency, and deployment of staff during weekdays, weekends and public holidays. **(25 marks)** • Attach salary pay slips for a minimum of THREE different employees of your organization for the months of July 2020, August 2020 and September 2020 respectively **(8marks).** • A written undertaking that the tenderer will comply with payment of minimum wage approved by the Ministry of Labour. This must also reflect in financial bid. **(4 marks).** • Written undertaking that should the tenderer be awarded the contract they shall process to have a Third-Party Public Liability policy (**4 marks).** • Written undertaking that should the tenderer be awarded the contract they shall process to have a Work Injury Benefits Act (WIBA) policy (**4 marks**). • A Evidence of previous experience from at least three (3) major corporate clients who can be contacted or visited to confirm that you have been rendering such services to them i.e. LPOs, recommendations letters or contracts **(15 marks)**	**60**
3. **Organization structure**	• Organization structure and company profile	**10**
TOTAL		**100**

Bidders were to score a minimum of 80% to proceed to the next stage of evaluation.

The results were as follows: -

	Description	B18 (Simca Agencies	B19 (Macada Enterprises)	B20 (Wayulett General	B22 (Virgin Clean	B23 (Envirocare General

		Limited)		**Services)**	**Limited)**	**Agencies Limited)**
	Total Score.	400	336.5	385	400	354
	Average Score	100	84.125	96.25	100	88.5

All the five (5) bidders who were subjected to technical evaluation attained above the minimum score of 80% and thus qualified to proceed to the next stage of evaluation.

3. Financial Evaluation

At this stage of evaluation, the Evaluation Committee conducted a comparison and analysis of tender prices of the five (5) bidders found responsive at the Technical Evaluation Stage which were then ranked as follows: -

BIDDER	**PRICE QUOTED**
Simca Agencies Limited	8,586,020.89
Macada Enterprises	6,685,196.79
Wayulett General Services	17,325,720.00
Virgin Clean Limited	4,623,840.00
Envirocare General Agencies Limited	6,284,085.84

Upon conclusion of Financial Evaluation, the Evaluation Committee recommended that due diligence be conducted on Bidder No. 22 **M/s Virgin Clean Limited** to verify the qualifications of the bidder and further obtain confidential responses from persons with whom the bidder had prior engagement with as per section 83 (1) (2) (3) of the Public Procurement and Asset Disposal Act, No. 33 of 2015, before award of tender at their total tender price of **Kshs. 4,623,840.00/-.**

Due Diligence

The Evaluation Committee, visited the offices of Bidder No. 22 **M/S Virgin Clean Limited** in order to conduct a due diligence exercise.

The Evaluation Committee established that the firm is located at Kizingo, Enzi Centre Block Three, Dedan Kimathi Avenue. The firm was established in 2006 and has over 13 years of experience. It has a well-established office with employees handling various activities. The firm has several running contracts with several institutions including Moi International Airport, Kenya Ports Authority, Bandari Maritime College, Kenya Medical Training College Port Reiz, and ICRH Hospital in Nairobi among others.

The Evaluation Committee perused the firm's original documents and was satisfied that all documents were current and authentic. The documents perused included current business permit, current tax compliance certificate, CR12, certificate of incorporation, current NHIF compliance certificate and current NSSF compliance certificate.

The Director of the firm informed the Evaluation Committee that they have several detergents and a brand of tissue paper that they provide and further indicated that in the event the Authority had a preferred detergent, paper towel and toilet tissue paper, the firm can provide on request.

The working hours for the employees are eight hours and a day with flexibility of adjusting to the Authority's timings if requested. The Director further confirmed that the firm had no problem working during public holidays when requested to do so.

Below is a summary of the information obtained from one of its clients, Kenya Ports Authority: -

Criteria	**Feedback from Kenya Ports Authority**
Relationship	Very good and interactive
Service rendered	Cleaning, fumigation and housekeeping Services
Period of time working with firm	Since 2015 including an ongoing contract with them
Customer satisfaction	The Senior Procurement Officer informed team that; - -The firm services are professional; - That the firm has been awarded several contracts and they meet their contractual requirements.
Challenges	No challenge cited with the firm
Recommendation	The Senior Procurement Officer recommended Clean Virgin limited to KMA

In view of the findings of the evaluation process and the due diligence exercise, the Evaluation Committee was satisfied that Bidder No. 22 **M/s Virgin Clean Limited** has the necessary qualifications, capability and experience in provision of cleaning and landscaping services and therefore recommended the bidder for award of the subject tender at its total tender price of **Kshs. 4,623,840.00/-.**

Professional Opinion

The Assistant Director, Supply Chain Management reviewed the Evaluation Report and concurred with the Evaluation Committee's recommendation vide a Professional Opinion dated 3rd December 2020.

The Accounting Officer of the Procuring Entity approved the Evaluation Committee's recommendation on 4th December 2020.

REQUEST FOR REVIEW NO. 153 OF 2020

Space Contractors & Suppliers Investment Limited (hereinafter referred to as "the Applicant"), lodged a Request for Review dated and filed on 18th December 2020 together with an Affidavit in Support of the Request for Review sworn and filed on even date through the firm of Cheboi Kiprono Advocates.

In response, the Procuring Entity, lodged a Memorandum of Response dated 28th December 2020 and filed on 29th December 2020 together with an Affidavit in Support of the Memorandum of Response sworn on

28th December 2020 and filed on 29th December 2020, through its Corporation Secretary and Head of Legal Services, Ms. Jane Otieno.

Virgin Clean Limited (hereinafter referred to as "the 1st Interested Party") lodged a Memorandum of Response dated 30th December 2020 and filed on 4th January 2021 together with a Supporting Affidavit sworn on 30th December 2020 and filed on 4th January 2021 through the firm of Abdiaziz & Company Advocates.

Simca Agencies Limited (hereinafter referred to as "the 2nd Interested Party") lodged a Replying Affidavit dated and filed on 29th December 2020 through the firm of Keaton and Keaton Advocates.

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

a. ***An order nullifying in its entirety the entire procurement proceedings in Tender No. KMA/ONT/01/2020-2021 for Provision of General Cleaning and Landscaping Services (Reserved for Women, Youths and Persons with Disability);***
b. ***An order nullifying the notification of award dated 10th December 2020 addressed to Virgin Clean Limited and notification of unsuccessful bids dated 10th December 2020;***

c. ***An order directing the Procuring Entity to re-admit the Applicant's bid for technical evaluation;***

d. ***In the alternative, an order directing the Procuring Entity to prepare fresh tender documents and re-tender for Provision of General Cleaning and Landscaping Services (Reserved for Women, Youths and Persons with Disability);***

e. ***An order for costs of the Request for Review to be awarded to the Applicant;***

f. ***Any other relief that the Board deems fit to grant under the circumstances.***

On 24th March 2020, the Board issued Circular No. 2/2020 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 30th December 2020 on even date, the 1st Interested Party lodged written submissions dated 30th December 2020 on 4th January 2021 whereas the 2nd Interested Party lodged written submissions dated 29th December 2020 on even date. The Procuring Entity did not lodge any written submissions.

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 issues that arise for determination are as follows: -

I. **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 the following mandatory requirements: -**

   a) *The Bidder shall be required to submit one (1) original and one (1) copy of their original bid marked '**ORIGINAL**' and '**COPY**'*

   b) *Duly filled, signed and stamped Tender Securing Declaration Form*

II. **Whether the Procuring Entity evaluated tenders received in response to the subject tender 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 Clause 1.4 of Section One: Invitation to Tender on page 3 of the Tender Document;

III. **Whether the 1st Interested Party attended the mandatory pre-bid conference and site visit scheduled for the Procuring Entity's Lodwar Office in compliance with Clause 1.4 of Section One: Invitation to Tender on page 3 of the Tender Document;**

IV. **Whether the 1st Interested Party's bid complies with the minimum wage requirement as required under Labour Laws and Regulations;**

V. **Whether the Procuring Entity conducted due diligence in the subject tender in accordance with Clause 2.24 of Section II Instructions to Tenderers on page 15 of the Tender Document read together with section 83 of the Act**

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

The 2nd Interested Party lodged a Replying Affidavit on 29th December 2020 in support of the Request for Review whereby the 2nd Interested Party raised the following ground for review in paragraphs 6, 7 and 8 therein: -

"6. That on or about 11th December 2020, I received an unsigned letter of regret through email dated 10th December 2020. (Annexed herewith and marked DLS1 is a copy of the said letter of regret.)

7. That on the same day I received another regret letter from Respondents which letter I strongly believe that it was not signed by the 1st Respondent. (Annexed herewith and marked DLS2 is a copy of the said letter.)

8. That I have compared the signatures of the 1st Respondent contained in our letter of regret and that of the Applicant and they are not similar and clearly not signed by the same person/1st Respondent."

From the foregoing excerpt, the Board observes that the 2nd Interested Party has raised a ground for review which was not canvassed in the instant Request for Review, touching on an interest specific to the 2nd Interested Party.

The Black's Law Dictionary (Ninth Edition) defines an' interested party' as follows: -

"A party who has a recognizable stake (and therefore standing) in the matter"

Further, Order 10 Rule 2 of the Civil Procedure Rules (2010) further states that an Interested Party is one: -

> ***"…. whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit…."***

Accordingly, an interested party is a party who has a recognizable stake or interest in a matter, whose presence may be necessary to enable a court or any adjudicating body to effectually and completely settle all questions raised therein.

The role of an Interested Party in legal proceedings was explained by the Honourable Justice Munyao in the case of **Civil Case 172 of 2012 Marigat Group Ranch & 3 others v Wesley Chepkoimet & 19 others [2014] eKLR** where he stated as follows: -

> ***"An interested party would be a person who has a close connection to the subject matter of the suit yet not claiming any rights over it."***

An Interested Party is therefore a person who is closely connected to the subject matter of a suit but who's role in the proceedings is limited in that they cannot claim any rights with respect to the matter under review or determination.

In this regard therefore, an interested party in administrative review and disposal proceedings may be a tenderer who participated in a procurement process that is the subject of review proceedings before the Board.

It is important to note that once the Applicant filed the Request for Review, all tenderers who participated in the subject tender were notified of the existence of the request for review application by the Board Secretary and were invited to submit any information with respect to the request for review application within three (3) days from the date of notification, failure to which the review proceedings would proceed in their absence.

It is the Board's considered view that the ground for review raised by the 2nd Interested Party which as mentioned hereinbefore was not raised by the Applicant in the Request for Review and touches on an interest specific to the 2nd Interested Party, would ordinarily be canvassed in a request for review application but in this instance has been raised through the 'back door' as an Interested Party.

In doing so, the 2nd Interested Party advanced its case without filing a request for review application and intentionally or not, avoided the responsibility of filing a request for review application and paying the requisite filing costs which would be incurred in this respect.

The Board notes, the 2nd Interested Party was at liberty to file a request for review application and approach this Board as an applicant pursuant to section 167 (1) of the Act. If the 2nd Interested Party had moved the Board as an applicant, the Board would exercise its discretion to consolidate the 2nd Interested Party's request for review application with that of the Applicant pursuant to Regulation 215 of the Public

Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "the 2020 Regulations") which provides as follows: -

> ***"Where two or more requests for review are instituted arising from the same tender or procurement proceeding, the Review Board may consolidate the requests and hear them as if they were one request for review."***

Accordingly, the Board finds that the ground for review raised by the 2nd Interested Party was not properly filed before this Board and is hereby struck out forthwith from the record of these review proceedings.

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

The Applicant depones in paragraph 5 of its Affidavit in Support of the Request for Review that on or about 11th December 2020, it received a notification letter from the Procuring Entity dated 10th December 2020 informing the Applicant that its tender was unsuccessful for the following reasons: -

> ***"- Did not mark the two tender documents submitted to indicate the 'Original' and 'Copy'***
>
> ***- The Tender Securing Declaration Form on paragraph two, period of time for suspension in the event of breach and the start date of this period (months/years) and date not indicated"***

Aggrieved, the Applicant moved this Board through the instant Request for Review.

The Applicant contends that the reasons why its bid was disqualified from further evaluation were completely unfounded and false and argues that it sealed the original and each copy of its tender document in separate envelopes and duly marked the envelopes as original and copy in compliance with Clause 2.15.1 of the Tender Document. Further, it is the Applicant's assertion that it clearly indicated in its Tender Securing Declaration Form in paragraph 2 therein, the period of time for suspension in the event of breach and the start date of this period.

On its part, the Procuring Entity contends in paragraph 9 of its Memorandum of Response that the Applicant did not comply with Clause 2.15.1 of the Tender Document which required bidders to prepare two copies of their respective tender document, with each marked 'Original Tender' and 'Copy of Tender' as appropriate. Instead, the Procuring Entity avers that the Applicant marked the envelopes holding its tender documents as 'Original Tender' and 'Copy of Tender'. In doing so, it was the Procuring Entity's contention that it could not distinguish the Applicant's original tender document from a copy of its tender document contrary to the tender requirements.

Further, the Procuring Entity contends in paragraph 11 of its Memorandum of Response that all tenderers were required to complete

their tender securing declaration forms under Section VIII of the Tender Document in accordance with the instructions provided therein and as required under Section 61 of the Act. It was therefore the Procuring Entity's contention that the Applicant's tender was rightfully declared non-responsive for failure to comply with stipulated mandatory requirements.

In determining whether or not the Applicant 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, the Board addressed its mind to each of the mandatory requirements against which the Applicant's bid was found non-responsive as follows: -

i. **The bidder will be required to submit one (1) original and one (1) copy of their original bid marked 'ORIGINAL' and 'COPY' (MANDATORY)**

According to this criterion, bidders were required to submit one original and one copy of their original tender document and further mark the two tender documents as 'ORIGINAL' and 'COPY' respectively. Non-compliance with this mandatory requirement would automatically result in disqualification from the evaluation process.

The Board examined the Procuring Entity's original and confidential file submitted to the Board in accordance with section 67 (3) (e) of the Act and observes therein Tender Opening Minutes dated 16th November 2020. The Board observes on page 4 thereof the following remarks

made by the Procuring Entity's Tender Opening Committee with respect to the Applicant's bid submission: -

> ***"The Committee noted that the said tender document was well sealed and properly labeled as per instructions in the tender document. Upon opening the envelope, the committee noted that there were two documents submitted, an ORIGINAL and a COPY…."***

As recorded by the Tender Opening Committee, the Applicant submitted two tender documents in response to the subject tender, that is an original and a copy.

However, upon further examination of the Procuring Entity's original and confidential file with respect to the subject tender, the Board observes that the Procuring Entity delivered to the Board only one of the tender documents it received from the Applicant. Nonetheless, the Board studied the said tender document and observes that the same was not marked 'Original' or 'Copy' and therefore it was not possible for the Board to ascertain whether the tender document before it was the original or a copy of the Applicant's original tender document.

In fact, the Applicant in paragraph 8 of its Request for Review admitted as follows: -

> ***"8. That the reason advanced by the respondents that we did not mark the two tender documents submitted to indicate the 'Original' and is completely unfounded and untrue as we sealed the original and each copy of the***

tender in separate enveloped and <u>duly marked the envelope as Original and Copy</u> in compliance with Clause 2.15.1.."

Notably, the Applicant sealed its two tender documents which it submitted to the Procuring Entity in separate envelopes and marked the <u>envelopes</u> as 'Original' and 'Copy' and not its respective tender documents.

The Board notes that the criterion in issue required bidders to submit one original and one copy of their original tender document and further <u>mark the two tender documents as 'ORIGINAL' and 'COPY' respectively</u>.

In this regard therefore, the Board finds that the Applicant did not satisfy mandatory requirement '*The bidder will be required to submit one (1) original and one (1) copy of their original bid marked 'ORIGINAL' and 'COPY' (MANDATORY)*' as provided for under Clause 2.15.1 Preliminary Mandatory Requirements of Section III Appendix to Instructions to Tenderers on page 28 of the Tender Document.

ii. **Duly filled, signed and stamped Tender Securing Declaration Form (MANDATORY)**

According to this criterion, bidders were required to submit a <u>duly filled</u>, <u>signed</u> and <u>stamped</u> Tender Securing Declaration Form. Non-compliance with this mandatory requirement would automatically result in disqualification from the evaluation process.

The Board examined the Applicant's bid document and observes on page 22 therein the Applicant's Tender Securing Declaration Form which reads as follows in paragraph 2 thereof: -

> ***"I/We accept that I/We will automatically be suspended from being eligible for tendering in any contract with the Purchaser for the period of time of [insert number of months or years] starting on [insert date], if we are in breach of our obligations(s) under the bid conditions, because we -..."***

From the above except, it is evident that the Applicant did not insert the number of months or years or the start date of the period for the bidder's suspension in the event of breach of its obligations in the subject tender and thus the Applicant's tender securing declaration was not complete or duly filled as required under the mandatory requirement in issue.

In this regard therefore, the Board finds that the Applicant did not satisfy the mandatory requirement in issue, that is, `*Duly filled, signed and stamped Tender Securing Declaration Form (MANDATORY)* as provided for under Clause 2.15.1 Preliminary Mandatory Requirements of Section III Appendix to Instructions to Tenderers on page 28 of the Tender Document, for failure to provide a duly filled tender securing declaration form.

The Board is cognizant of section 79 of the Act which provides as follows: -

> ***"A tender is responsive if it conforms to all the <u>eligibility</u> and other <u>mandatory requirements</u> in the tender documents."***

Accordingly, a responsive tender is one that conforms to all the eligibility and mandatory requirements in the tender document. In this regard therefore, a bidder is required to satisfy <u>all</u> mandatory requirements in order to qualify to proceed for further evaluation.

Having established that the Applicant failed to satisfy two mandatory requirements, that is, "*The Bidder shall be required to submit one (1) original and one (1) copy of their original bid marked 'ORIGINAL' and 'COPY'* and '*Duly filled, signed and stamped Tender Securing Declaration Form*' as provided for under Clause 2.15.1 Preliminary Mandatory Requirements of Section III Appendix to Instructions to Tenderers on page 28 of the Tender Document, the Board finds that the Applicant's bid was found non-responsive at the Preliminary Evaluation Stage in accordance with section 80 (2) of the Act in accordance with Article 227 (1) of the Constitution.

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

Clause 1.4 of Section One Invitation to Tender on page 3 of the Tender Document reads as follows: -

"There shall be a mandatory pre-bid conference and site visit scheduled as follows: -

a. .....

b. .....

c. .....

d. Lodwar Office – Monday 2nd November 2020 from 11:00 AM bidders to meet at KMA office Lodwar

Note: All bidders shall be required to sign an attendance register as evidence of having participated in the site visit. ALL bidders shall be issued with a Site Visit Certificate that must be duly filled and signed by the bidder or his representative and also the KMA representative (must be duly signed and stamped at every zone.)" **[Emphasis by the Board]**

Accordingly, bidders were required to attend a pre-bid conference and site visit scheduled for *interalia* the Procuring Entity's Lodwar Office on Monday 2nd November 2020 from 11:00 AM. Further, all bidders shall be issued with a site visit certificate which must be duly signed by the bidder or its representative and also signed and stamped by the Procuring Entity's representative at Lodwar.

The Applicant in paragraph 13 of its Affidavit in Support of its Request for Review contends that the Procuring Entity is in breach of the aforementioned mandatory requirement as it did not stamp the site visit certificates issued to bidders at its Lodwar office and therefore none of

the bidders who participated in the subject procurement process complied with the said mandatory requirement. It is therefore the Applicant's submission that the Procuring Entity ought to have found all bidders non-responsive in this respect and terminated the subject procurement proceedings in accordance with section 63 (1) (f) of the Act.

In response, the Procuring Entity contends that all bidders who attended the site visit at the Lodwar Office were informed of the unavailability of an official stamp and that all site visit certificates would be marked 'No KMA stamp available' and signed by the Procuring Entity's representative at the said office, which submissions were reiterated by the 1st Interested Party in its Memorandum of Response.

The Board examined the Procuring Entity's original file with respect to the subject tender and observes therein a register titled '*Site Visit of Cleaning and Landscaping Services, Lodwar*' dated 2nd November 2020. From the said register, the Board observes, twenty-one (21) bidders' representatives signed therein, including one Scholastica Nataan who signed on behalf of the Applicant.

The Board examined the site visit certificate issued to the Applicant dated 2nd November 2020 and observes that the same was signed by Scholastica Nataan, the Applicant's representative. Further, at the tail end of the certificate the Board observes the following remarks: -

"Station Official Stamp

Note: No KMA stamp available

(signature)"

The site visit certificate indicated that the Procuring Entity's stamp was not available. However, the said certificate was duly signed by the Procuring Entity's representative at the Lodwar office. Notably, the same remarks were made by the Procuring Entity on each of the site visit certificates issued to bidders with respect to the Lodwar office.

The Board further examined the Evaluation Report dated 1st December 2020 and observes that no bidder was disqualified from further evaluation due to the absence of the Procuring Entity's stamp on bidders' site visit certificates with respect to the Lodwar Office, which in the Board's view is in line with the public procurement principle of fairness as espoused under Article 227 (1) of the Constitution which reads as follows: -

> ***"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 the Board]***

Article 227 (1) of the Constitution recognizes fairness as one of the principles that guide public procurement processes in Kenya. This therefore means that the absence of the Procuring Entity's stamp on bidders' site visit certificates with respect to the Lodwar Office cannot be visited upon any tenderer to its detriment, noting the unavailability of the Procuring Entity's stamp at its Lodwar Office.

Notably, the Applicant was issued with a site visit certificate for the Lodwar Office which did not have the Procuring Entity's stamp and it is evident that this information was within the Applicant's knowledge when it submitted its bid to the Procuring Entity. For the Applicant to challenge this position and further seek a cancellation of the tender on this basis, after being disqualified from the subject procurement proceedings is a clear demonstration of bad faith on the part of the Applicant.

Having established that no bidder was disqualified from further evaluation with respect to this mandatory requirement, the Board finds that the Procuring Entity evaluated tenders received in response to the subject tender 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 Clause 1.4 of Section One: Invitation to Tender on page 3 of the Tender Document.

On the third issue for determination, the Applicant contends that the 1st Interested Party did not attend the mandatory pre-bid conference and site visit scheduled for the Lodwar Office on 2nd November 2020, in compliance with Clause 1.4 of Section One: Invitation to Tender on page 3 of the Tender Document.

The Procuring Entity and the 1st Interested Party refute the Applicant's claims in totality, and the latter contends that it duly attended the

mandatory pre-bid conference and site visit undertaken at the Procuring Entity's Lodwar Offices as evidenced by the site visit certificate it received from the Procuring Entity and further signed the site visit register on the said date.

In support of its contention, the 1st Interested Party annexed to its Memorandum of Response a site visit certificate for the Procuring Entity's Lodwar Office marked Exhibit AA-2.

In view of parties' written submissions, the Board examined the Procuring Entity's confidential file and observes therein a register titled '*Site Visit of Cleaning and Landscaping Services, Lodwar*' dated 2nd November 2020. From the said register, the Board observes that one Phelix Mulunda signed on behalf of the 1st Interested Party, as its representative at the mandatory pre-bid conference and site visit held at the Procuring Entity's Lodwar Office.

Further, the Board observes from the Procuring Entity's confidential file, a copy of a site visit certificate dated 2nd November 2020 issued to one 'Virgin Clean', the 1st Interested Party, signed by one Phelix Mulunda on behalf of the 1st Interested Party. Notably, this certificate is similar to the site visit certificate attached to the 1st Interested Party's Memorandum of Response.

In view of the foregoing and in the absence of any evidence to the contrary, the Board finds that the 1st Interested Party attended the mandatory pre-bid conference and site visit held at the Procuring Entity's Lodwar Office on 2nd November 2020 in compliance with Clause 1.4 of Section One: Invitation to Tender on page 3 of the Tender Document.

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

The Applicant in paragraph 17 of its Affidavit in Support of the Request for Review contends that the 1st Interested Party's financial proposal did not conform with the minimum wage requirement as provided under Kenyan Labour laws and regulations.

In response, the 1st Interested Party submits that its bid fully complies with all the requirements of the law, including Kenyan Labour Laws and depones in paragraph 4.3 of its Memorandum of Response that it submitted to the Procuring Entity as part of its bid document a letter of compliance from the Labour Office in Mombasa, which was only issued to the 1st Interested Party after a representative of the Labour Office visited the 1st Interested Party's offices and scrutinised pay slips and all employment contracts.

At this juncture, the Board finds it necessary to first answer the question, 'what is minimum wage'?

The Cambridge English Dictionary defines 'minimum wage' as follows: -

> ***"the smallest amount of money that employers are legally allowed to pay someone who works for them"***

Further, the International Labour Organization in its website www.ilo.org defines minimum wage as follows: -

> ***"minimum amount of remuneration that an employer is required to pay wage earners for the work performed during a given period, which cannot be reduced by collective agreement or an individual contract"***

Section 47 (1) of the Labour Relations Act, No. 12 of 2007 (hereinafter referred to as "the Labour Act") provides that minimum wage or what it refers to as the 'minimum rate of remuneration' is set out in a 'wage order' which is in turn prepared by a 'Wage Council' whose functions are outlined under section 44 (1) and (2) of the Labour Act as follows: -

> ***"The functions of a wages council are to—***
>
> ***(a) investigate the remuneration and conditions of employment in any sector;***
>
> ***(b) invite and consider written and oral representations, in the prescribed manner, from interested parties; and***
>
> ***(c) make recommendations to the Minister on minimum wage remuneration and conditions of employment.***

(2) Recommendations made to the Minister in accordance with subsection (1)(c) may include recommendations on any matter that the Minister may include in a wages order."

Further, section 48 of the Labour Act provides as follows: -

"(1) Notwithstanding anything contained in this Act or any other written law—

(a) <u>the minimum rates of remuneration or conditions of employment established in a wages order constitute a term of employment of any employee to whom the wages order applies and may not be varied by agreement</u>;

(b) if the contract of an employee to whom a wages order applies provides for the payment of less remuneration than the statutory minimum remuneration, or does not provide for the conditions of employment prescribed in a wages regulation order or provides for less favourable conditions of employment, then the remuneration and conditions of employment established by the wages order shall be inserted in the contract in substitution for those terms.

(2) An employer who fails to—

(a) pay to an employee to whom a wages regulation order applies at least the statutory minimum remuneration; or

(b) provide an employee with the conditions of employment prescribed in the order,

commits an offence."

According to the above provision, remuneration or conditions of employment of any employee must at least be equal to the minimum wage as set out in a wages order, which may not be varied by agreement. Further, any employer who fails to pay at least the statutory minimum wage or provide a worker with conditions of employment as provided under a wages order commits an offence.

Turning to the instant case, the Board notes from the Applicant's pleadings that it did not provide any proof to substantiate its allegation that the 1st Interested Party's financial proposal did not comply with the minimum wage requirement as provided under the Labour Act whose provisions are outlined hereinbefore.

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

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

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

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

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

This means that the burden of proving that the 1st Interested Party's financial proposal did not comply with the minimum wage requirement rested squarely with the Applicant.

This notwithstanding, the Board examined the 1st Interested Party's Financial Proposal and observes a document therein titled 'Staff Payroll Summary; August 2020'. From the said document, the Board identified the following amounts as the minimum and maximum salaries for the 1st Interested Party's staff: -

Staff	***Minimum pay (Kshs)***	***Maximum pay (Kshs)***
Admin Staff	***18,000***	***60,000***
House keepers	***35,800***	***46,520***
Waste Collection Department	***14,573***	***18,500***
Cleaning Department	***14,573***	***14,573***

The Board then examined the Schedule of the Regulation of Wages (General) (Amendment) Order, 2018, as amended by Legal Notice No. 2 of 2019, which the Board observes is the general wage order in force to date and observes therein the monthly remuneration for the aforementioned categories of staff, noting that the 1st Interested Party is based in Mombasa: -

Staff	***Minimum pay (Kshs)***
Admin Staff	***13,572.90***
House keepers	***13,572.90***
Waste Collection Department	***13,572.90***
Cleaning Department	***13,572.90***

Evidently, the 1st Interested Party paid a minimum of Kshs 14,573, which is above the minimum wage for all the categories of its staff as provided for under the Schedule of the Regulation of Wages (General) (Amendment) Order, 2018.

In the absence of any proof to the contrary, the Board finds that the 1st Interested Party's bid complied with the minimum wage requirement as provided for under section 48 of the Labour Act read together with the Schedule of the Regulation of Wages (General (Amendment) Order, 2018.

On the fifth issue for determination, the Applicant alleges that the Procuring Entity failed to carry out due diligence on the successful bidder in contravention of the provisions of the Act and thus prejudiced bidders who participated in the subject procurement process.

In response, the Procuring Entity contends that the Applicant's allegation is not credible and designed to frustrate the subject procurement process.

The Black's Law Dictionary (9th 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".***

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 may 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 subject tender, the process of due diligence is provided under Clause 2.24 of Section II Instructions to Tenderers on page 15 of the Tender Document as follows: -

"Award of Contract

(a) Post qualification

2.24.1 In the absence of pre-qualification, the Procuring entity will determine to its satisfaction whether the tenderer that is selected as having submitted the lowest evaluated responsive tender is qualified to perform the contract satisfactorily.

2.24.2 The determination will take into account the tenderer's financial and technical capabilities. It will be based upon an examination of the documentary evidence of the tenderers qualifications submitted by the tenderer, pursuant to paragraph 2.1.2, as well as such other information as the Procuring entity deems necessary and appropriate.

2.24.3 An affirmative determination will be a prerequisite for award of the contract to the tenderer. A negative determination will result in rejection of the Tenderer's tender, in which event the Procuring entity will proceed to the next lowest evaluated tender to make a similar determination of that Tenderer's capabilities to perform satisfactorily."

Accordingly, the Procuring Entity is required to conduct a due diligence on the tenderer who is determined to have submitted the lowest

evaluated responsive tender, in order to determine to its satisfaction that the said tenderer is qualified to perform the contract satisfactorily. This due diligence or post-qualification exercise shall involve an examination of the documentary evidence of the tenderer's qualifications submitted by the tenderer, as well as such other information as the Procuring Entity may deem necessary and appropriate.

The Board examined the Procuring Entity's confidential file and observes from the Evaluation Report dated 1st December 2020, that the Evaluation Committee made the following remarks on page 12 thereof upon conclusion of the subject evaluation process: -

> ***"The Evaluation Committee having examined all the information/documentation submitted for consideration by the bidders in the Request for provision of cleaning and landscaping services for Kenya Maritime Authority, Tender No. KMA/ONT/CL/01/2020-2021 wishes to recommend to the Head of Procurement that: Due Diligence be conducted to M/s Virgin Clean Limited to verify the qualifications of the Tenderer and further obtain confidential responses from persons with who Tenderer had prior engagement with as per section 83 (1) (1) (3) of PPADA, 2015 before award of tender at their total tender price of Kshs 4,623,840.00."***

The Evaluation Committee recommended due diligence to be conducted on M/s Virgin Clean Limited, the 1st Interested Party, prior to award of

the subject tender at the firm's quoted tender price of Kshs 4,623,840.00/.

Following this recommendation, the Board observes that a due diligence exercise was carried out on the 1st Interested Party as captured in the Procuring Entity's due diligence report dated 3rd December 2020, contrary to the Applicant's allegations in this regard.

However, the Board considered the Procuring Entity's submissions whereby it claimed to have conducted a due diligence exercise on the documents submitted by the Applicant in its bid document, specifically its Tax Compliance Certificate and AGPO Certificate. In this respect the Procuring Entity alleges that the Applicant's tax compliance certificate could not be verified in the Kenya Revenue Authority Tax Compliance Certificate Checker. Further, the search results for the AGPO Certificate submitted by the Applicant indicated that the said certificate belonged to a different company and not the Applicant. It is therefore the Procuring Entity's submission that the Applicant submitted forged certificates and has committed a grave offence as per section 176 of the Act.

Upon perusal of the Procuring Entity's confidential file, the Board notes that there is no report therein indicating that a due diligence exercise was conducted on the Applicant by the Procuring Entity's Evaluation Committee.

In any event, the Board notes from the Evaluation Report dated 1st December 2020, that the Applicant was found non-responsive at the Preliminary Evaluation Stage and therefore disqualified from further evaluation as captured on page 7 thereof. It is important to note that due diligence is only conducted on the bidder who submitted the lowest evaluated responsive tender to verify and confirm the qualifications in its bid document. The Procuring Entity therefore ought not to have undertaken due diligence on the Applicant, unless the Evaluation Committee had recommended the Applicant for award of the subject tender as the tenderer who submitted the lowest evaluated responsive tender.

In totality of this issue for determination, the Board finds that the Procuring Entity conducted due diligence in the subject tender in accordance with Clause 2.24 of Section II: Instructions to Tenderers on page 15 of the Tender Document read together with section 83 of the Act, noting the Procuring Entity's Due Diligence Report dated 3rd December 2020.

In view of the foregoing, the Board holds that the Request for Review lacks merit and the same is hereby dismissed.

FINAL ORDERS

In exercise of the powers conferred upon it by section 173 of the Public Procurement and Asset Disposal Act, 2015, the Board makes the following orders in the Request for Review: -

1. **The Request for Review dated and filed on 18th December 2020 with respect to Tender No. KMA/ONT/CL/01/2020-21 for Provision of General Cleaning and Landscaping Services (Reserved for Women, Youths and Persons with Disability) be and is hereby dismissed.**

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

Dated at Nairobi, this 8th Day of January 2021

CHAIRPERSON	**SECRETARY**
PPARB	**PPARB**