

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 29/2021 OF 25<sup>TH</sup> FEBRUARY 2021**  
**BETWEEN**

**BIOSECT VENTURES LIMITED.....APPLICANT**

**AND**

**THE ACCOUNTING OFFICER,**

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

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

**ALL AND SUNDRY SERVICES.....1<sup>ST</sup> INTERESTED PARTY**

Review against the decision of the Accounting Officer of Kenya Airports Authority with respect to Tender No. KAA/OT/JKIA/0038/2020-2021 for Provision of Pest Control at Jomo Kenyatta International Airport and KAA Headquarters (Reserved for Youth, Women and People Living with Disability).

**BOARD MEMBERS**

- |                            |              |
|----------------------------|--------------|
| 1. Ms. Faith Waigwa        | -Chairperson |
| 2. Dr. Paul Jilani         | -Member      |
| 3. Arch. Steven Oundo, OGW | -Member      |
| 4. Mrs. Njeri Onyango      | -Member      |
| 5. Qs. Hussein Were        | -Member      |

## **IN ATTENDANCE**

1. Mr. Philemon Kiprop -Member

## **BACKGROUND TO THE DECISION**

### **The Bidding Process**

Kenya Airports Authority (hereinafter referred to as “the Procuring Entity”) invited sealed tenders for Tender No. KAA/OT/JKIA/0038/2020-2021 for Provision of Pest Control at Jomo Kenyatta International Airport and KAA Headquarters (Reserved for Youth, Women and People Living with Disability) (hereinafter referred to as “the subject tender”) through an advertisement published in MyGov Publication Newspaper, the Procuring Entity’s Website and the Public Procurement Information Portal on 3<sup>rd</sup> November 2020.

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

The Procuring Entity received a total of seven (7) bids by the bid submission deadline of 25<sup>th</sup> November 2020. The same were opened shortly thereafter by a Tender Opening Committee and recorded as follows: -

<b>NO</b>	<b>NAME OF BIDDER</b>
1	HALE PEST CONTROL SERVICES LIMITED
2.	BIOTEL EAST AFRICA LIMITED
3.	ALL AND SUNDRY SERVICES
4.	BIOSECT VENTURES LTD

NO	NAME OF BIDDER
5.	ICE CLEAN CARE GROUP COMPANY LIMITED
6.	LIMAH E.A LTD
7.	PEESAM LTD

### **Evaluation of Bids**

An evaluation committee appointed by the Procuring Entity's Managing Director evaluated bids in the following stages: -

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

#### **1. Mandatory Requirements/Preliminary Evaluation**

At this stage, the Evaluation Committee applied the criterion outlined in Clause (a) of the Appendix to Instructions to Tenderers of the Tender Document. Having subjected the seven bidders to an evaluation, the following five bidders were found responsive, thus eligible to proceed to Technical Evaluation: -

Bidder No.	Bidder
2	Biotel East Africa Limited
3	All and Sundry Services
4	Biosect Ventures Ltd
6	Limah E.A Ltd
7	Peesam Ltd

## **2. Technical Evaluation**

At this stage, the Evaluation Committee applied the criterion outlined in Clause (b) of the Appendix to Instructions to Tenderers of the Tender Document, based on mandatory technical requirements to be satisfied so as to proceed to Financial Evaluation. Having subjected the remaining five bidders to evaluation at this stage, the following four bidders were found responsive, thus eligible to proceed to Financial Evaluation: -

<b>Bidder No.</b>	<b>Bidder</b>
3	All and Sundry Services
4	Biosect Ventures Ltd
6	Limah E.A Ltd
7	Peesam Ltd

## **3. Financial Evaluation**

At this stage the Evaluation Committee applied the criterion specified in the Appendix to Instructions to Tenderers at page 21 of the Tender Document to determine the lowest evaluated price. The Evaluation Committee recorded the prices quoted by the remaining four bidders and determined that M/s Biosect Ventures Limited had the lowest evaluated tender price.

## **Recommendation**

The Evaluation Committee recommended award of the subject tender to M/s Biosect Ventures Ltd at their quoted price of Kenya Shillings Ten Million, One hundred and four thousand and twenty-four shillings only (Kshs. 10,104,024.00) Inclusive of 14% VAT for a period of two (2) years.

## **Professional Opinion**

In a professional opinion dated 18<sup>th</sup> December 2020, the Procuring Entity's General Manager (Procurement & Logistics) reviewed the manner in which the subject procurement was undertaken including evaluation of bids. He concurred with the Evaluation Committee's recommendation that the subject tender be awarded to M/s Biosect Ventures Ltd at their quoted price of Kenya Shillings Ten Million, One hundred and four thousand and twenty-four shillings only (Kshs. 10,104,024.00) Inclusive of 14% VAT for a period of two (2) years.

## **Notification to Tenderers**

In letters dated 18<sup>th</sup> December 2020, the Procuring Entity notified tenderers of the outcome of their respective bids.

## **Confirmation of Qualification Information**

On 31<sup>st</sup> December 2020, the Procuring Entity received a complaint from a concerned Kenyan regarding the qualifications of M/s Biosect Ventures Ltd.

In a letter dated 5<sup>th</sup> January 2021, the Procuring Entity notified M/s Biosect Ventures Ltd that a complaint was received regarding its qualifications as a tenderer. The Procuring Entity informed M/s Biosect Ventures Ltd that they have sought confidential references from persons that the said bidder had prior engagement with, and requested M/s Biosect Ventures Ltd to submit inter alia the following information: -

- A copy of the Local Service Order issued by Port Health Services, Inland Container Depot under Reference No. PHS/ICDN/20/2020 dated 26<sup>th</sup> June 2020 duly certified by the Head of Procurement, Ministry of Health Headquarters; and

The Procuring Entity contacted various institutions to confirm and verify the qualifications of M/s Biosect Ventures Ltd and *inter alia* made the following findings:

- On 4<sup>th</sup> January 2021, the Procuring Entity addressed a letter to Port Health Services Inland Container Depot requesting verification whether M/s Biosect Ventures Ltd was sub-contracted to carry out services of provision of fumigation and disinfection services on used import textiles at Inland Container Depot, Nairobi at the sum of Kshs. 650,500.00. In another letter dated 21<sup>st</sup> January 2021 addressed to the Principal Secretary, Ministry of Health, the Procuring Entity notified the said Ministry that M/s Biosect Ventures Ltd participated in the subject tender and provided an LPO from the said Ministry as evidence of having provided similar services (being procured by the Procuring Entity) to the Ministry. The Procuring Entity sought confirmation whether the said Local Service Order (LSO) was authentic and issued by the Ministry. In a letter dated 1<sup>st</sup> February 2021, the Ministry of Health stated that having consulted its Department of Health which purportedly issued the LSO No. PHS/ICDN/20/2020 containing the receiving stamp of M/s Biosect Ventures Ltd dated 10<sup>th</sup> November 2020, they confirm that the LSO is not authentic and was not issued by the Port Health Services Inland Container Depot as alleged;

## **Second Professional Opinion**

In a professional opinion dated 8<sup>th</sup> February 2021, the Procuring Entity's General Manager (Procurement and Logistics) outlined the manner in which the subject procurement process was undertaken whilst noting that the Evaluation Committee previously recommended award of the subject tender to M/s Biosect Ventures Ltd. He further outlined the process of confirmation of qualification of M/s Biosect Ventures Ltd undertaken after receiving a complaint regarding the said bidder's qualifications. In his view, the process of confirmation of qualification established there was fraudulent and a misrepresentation of facts by the said bidder, thus advised that the said bidder ought to be disqualified from award of the subject tender pursuant to section 66 of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act"). To that end, he advised the Procuring Entity's Acting Managing Director to award the subject tender to the next lowest evaluated bidder, M/s All and Sundry Services at their quoted price of Kshs. 13,677,154.48 inclusive of VAT for a period of two (2) years. The Acting Managing Director approved the said professional opinion.

## **Notification**

In a letter dated 8<sup>th</sup> February 2021, the Procuring Entity notified M/s All and Sundry Services that pursuant to a verification exercise, M/s Biosect Ventures Ltd was disqualified from entering into a contract with the Procuring Entity with respect to the subject tender pursuant to section 66 (3) of the Act. As a result, M/s All and Sundry Services was determined to be the successful

tenderer at its quoted price of Kshs. 13,677,154.48 inclusive of VAT for a period of two (2) years.

### **THE REQUEST FOR REVIEW**

M/s Biosect Ventures Limited (hereinafter referred to as “the Applicant”) lodged a Request for Review dated 25<sup>th</sup> February 2021 and filed on even date together with a Statement in Support of the Request for Review sworn on 25<sup>th</sup> February 2021 and filed on even date, through the firm of Okubasu, Munene & Kazungu Advocates LLP, seeking the following orders: -

- a. An order declaring the Procuring Entity acted contrary to the provisions of section 3, 55, 59, 66, 79, 80, 83 and 137 of the Public Procurement and Asset Disposal Act in disqualifying the Applicant and awarding the tender to the Interested Party, M/s All and Sundry;***
- b. An order compelling the Procuring Entity to enter into a contract with the Applicant in respect of TENDER NO. KAA/OT/JKIA/0038/2020-2021 and/or a valid contract of the same effect to be deemed to exist between the Procuring Entity and the Applicant.***
- c. An order awarding costs of the review to the Applicant.***
- d. Any other relief that the Review Board deems fit to grant, having regard to the circumstances of this case in order to give effect to the Board’s orders.***



In response, the Respondents lodged a Reply to the Request for Review dated 3<sup>rd</sup> March 2021 and filed on 4<sup>th</sup> March 2021, through the Procuring Entity's General Manager, Procurement and Logistics. The 1<sup>st</sup> Interested Party did not lodge a Response to the Request for Review.

Pursuant to the Board's Circular No. 2/2020 dated 24<sup>th</sup> March 2020 detailing the Board's administrative and contingency management plan to mitigate Covid-19 pandemic, the Board dispensed with physical hearings and directed that all request for review applications be canvassed by way of written submissions. Clause 1 at page 2 of the said Circular further specified that pleadings and documents would be deemed as properly filed if they bear the official stamp of the Board.

### **BOARD'S DECISION**

The Board has considered each of the parties' pleadings together with the confidential documents submitted to it pursuant to section 67 (3) (e) of the Act and finds that the following issue calls for determination: -

***Whether the Procuring Entity rightfully disqualified the Applicant from entering into a contract with the Procuring Entity in respect to the subject procurement proceedings.***

The Board will therefore proceed to address the issue framed for determination as follows:

At paragraph 1 to 4 of its Request for Review, the Applicant avers that it participated in the subject procurement process and received a letter of notification of intention to enter into a contract dated 18<sup>th</sup> December 2020 informing it that it had been awarded the subject tender at its quoted price of Kshs. 10,104,024.00. According to the Applicant, before the said notification of award the Procuring Entity carried out a verification exercise on the Applicant by contacting; M/s Glosspark Limited, M/s Joymacx Enterprises and Port Health Services Inland Container Depot, Nairobi who had confirmed their satisfaction of the services provided by the Applicant.

The Applicant further states at paragraphs 7 to 10 of its Request for Review that vide a letter dated 5<sup>th</sup> January 2021, the Procuring Entity informed the Applicant of a complaint from a “concerned citizen” lodged against it. In addition to this, the Applicant states that the Procuring Entity sought additional documentation and without being heard on the complaint, the Applicant was disqualified through a letter dated 8<sup>th</sup> February 2021 on grounds that the verification process purportedly revealed that one of the documents, being an LSO Reference No. PHS/ICDN/20/2020 was not authentic. The Applicant was also informed that the subject tender was awarded to M/s All and Sundry Services.

The Applicant alleges at paragraphs 17 to 19 of its Request for Review that the actions of the Procuring Entity offend the national values and principles of governance outlined in Article 10 (2) of the Constitution and constitute gross violation of the values and principles outlined in Article 232 of the Constitution. In the Applicant’s view, the Procuring Entity adopted a criterion that is outside the Tender Document in disqualifying the Applicant’s bid

because the Procuring Entity requested for additional information and failed to provide the Applicant an opportunity to be heard on the allegations leveled against it.

In response, the Respondents allege at paragraphs 4 to 7 of their Response to the Request for Review that they received an anonymous email on 31<sup>st</sup> December 2020 containing a complaint against the Applicant regarding its qualifications for award of the subject tender. To safeguard the Procuring Entity's interest against any misrepresentation of facts, the Procuring Entity wrote to the Applicant informing it of the allegations levelled against it, thus giving the Applicant an opportunity to respond to the said allegations and further, seeking documentation for a verification exercise by the Procuring Entity.

The Respondents allege at paragraphs 8 to 11 of their Response that a Response dated 1<sup>st</sup> February 2021 from the Ministry of Health revealed that the LSO purported to have been issued from the said Ministry's Department of Health was in fact, not issued by them. The Respondents further state that they conducted an investigation on the matter and has since submitted a report on the investigation as part of the Procuring Entity's confidential file to the Board. Subsequently, the Applicant's bid was disqualified pursuant to section 66 of the Act on grounds that the LSO provided in its bid as having been issued by the Ministry of Health was not authentic. In concluding its submissions, the Respondents aver that they have the mandate of ensuring all information provided by bidders in a procurement process is accurate, thus could not engage a bidder through signing of a contract when such

bidder provided false or inaccurate information while participating in the subject procurement process.

The Complaint raised by the Applicant in a nutshell is that its tender had gone through all the stages, preliminary, technical and financial evaluation and had been found to be responsive. It had indeed been found to be the most responsive in all aspects and thereafter a Notification dated 18<sup>th</sup> December 2020 had been issued to it. It is the Applicant's argument therefore that the current steps taken by the procuring entity to revoke the said award are in violation of the applicable provisions of the Act.

The Board has reviewed the Tender Document and notes the same set out the documents required at Clause 2.3.1 of Section II. Instructions to Tenderers including a schedule of requirements at section 2.3.1 (IV). At section 2.7, documents composing the tender, it was required that the documents **shall** comprise the following components;

- a) A tender form and a price schedule completed in accordance with paragraph 9,10 and 11 below***
- b) Documentary evidence established in accordance with Clause 2.11 that the tenderer is eligible to tender and is qualified to perform the contract if its tender is accepted;***
- c) Tender security furnished is in accordance with Clause 2.12***
- d) Confidential business questionnaire***

Clause 2.11.12 of Section II. Instructions to Tenderers of the Tender Document explains a tenderer's eligibility and qualifications as follows: -

***"The documentary evidence of the tenderer's qualifications to perform the contract if its tender is accepted Shall establish to the procuring entity's satisfaction that the tenderer has the financial and technical capability necessary to perform the contract."***

The Tender Document also contained an evaluation matrix for Technical Requirements, of importance to the current Application is requirement No.

1. The tenderer was required to provide;

***"Proof of similar work experience in similar works in pest Control at least one running contract with a value of not less than Kshs. 500,000/= per annum (proof to be inform of contract agreement or LPO/LSO)" (emphasis ours).***

This was a mandatory requirement under the technical qualification. Therefore, for any of the submitted bids, the presence of a document meeting this requirement will lead to a determination that the bidder would pass or fail in the Technical Evaluation stage.

According to the procuring entity, the process of evaluating the bids submitted was carried out in line with the requirements of the tender document. All bids went through the preliminary evaluation and technical evaluation. The Evaluation committee then found the Applicant's bid to be the most responsive. A Notification was then issued on 18<sup>th</sup> December, 2020 wherein the Applicant was informed that due diligence would be conducted

and the contract would then only be executed once the procuring entity was satisfied with the outcome of such exercise.

It is not in dispute that the Applicant participated in the subject procurement process by submitting a tender in response to the Procuring Entity's advertisement published in MyGov Publication Newspaper, the Procuring Entity's Website and the Public Procurement Information Portal on 3<sup>rd</sup> November 2020. The Procuring Entity received a total of seven (7) bids by the bid submission deadline, proceeded to conduct an evaluation process and the Evaluation Committee recommended award of the tender to the Applicant herein. The Applicant and the Respondents both confirm that, initially, the Applicant received a letter of notification of intention to enter into a contract dated 18<sup>th</sup> December 2020 which contained the following details: -

***"Reference is made to your bid submitted on 25<sup>th</sup> November 2020 on the above subject tender***

***The evaluation process for the subject tender has been finalized and we are pleased to inform you that your bid has been determined to be the lowest evaluated at your quoted bid price of Kenya Shillings Ten Million, One Hundred and Four Thousand and Twenty-Four Shillings (Kshs. 10,104,024.00) only inclusive of 14% VAT for a period of 2 years***

***You are requested to submit your acceptance within fourteen (14) days from the date of this letter and to submit a performance guarantee in the form of a bank guarantee for a***

***sum of 1% of the contract price to facilitate preparation of the contract documents. The contract shall be signed by the parties within the tender validity period but not earlier than fourteen (14) days from the date of this letter.***

***This letter of notification is issued in accordance with the Public Procurement and Asset Disposal Act, 2015”***

Despite this notification, the Board observes that from the confidential documents submitted pursuant to section 67 (3) (e) of the Act, an email dated 31<sup>st</sup> December 2020 was received by the Procuring Entity from a concerned Kenyan whose name is indicated in the said email with the following details: -

***"Sent: 09 January 2021 09:28***

***To: pparb@ppra.go.ke***

***Cc: scan@ppra.go.ke; report@integrity.go.ke; eacc@integrity.go.ke; director@cid.go.ke; info@odpp.go.ke; info@royalmedia.co.ke; Procurement1; Corruption Watch***

***Subject: Whistle blow on the Awarded Tender; Provision of Pest Control at Jomo Kenyatta International Airport and KAA Headquarters Tender No. KAA/OT/JKIA/0038/2020-2021***

***Season's greetings***

***Your attention is drawn to the recently concluded tender on Provision of Pest Control at Jomo Kenyatta International Airport and KAA Headquarters Tender No. KAA/OT/JKIA/0038/2020-2021 and its eventual award to***

***M/s Biosect Ventures Ltd at Kshs. 10,104,024/- however as a concerned citizen, let me make a few observations about the vendor, M/s Biosect, its integrity and suitability***

- 1. It is a legal requirement for any company to have a physical office matching the description given at the certificate of incorporation as opposed to briefcase offices. M/s Biosect Ventures Ltd have no office currently***
- 2. The mandatory requirements i.e. NHIF, NSSF Business Permit and AGPO/YAGPO compliance certificates for the vendor of choice should be subjected to integrity test***
- 3. The LPOs/LSOs provided by the vendor as proof for the capacity to deliver service worth 500,000.00 should be scrutinized thoroughly verified otherwise they are all fake***
- 4. The bank statements audited accounts and the tenderer's capacity to access line of credit/liquid of not less than half a million are all awash***

***In conclusion therefore, the procuring entity is at crossroads to make a critical decision to retain its corrupt free image. I shall soon enough willingly volunteer this information to; Public Procurement Review Board (PPRA), DCI, EACC and the media to spark light to the public on the ongoing events***

***Regards,***

.....

***Concerned Kenyan"***



The above email (which was also copied to this Board, the Ethics and Anti-Corruption Commission, other public agencies and the media), prompted the Procuring Entity to conduct an additional verification exercise and to alert the Applicant of the allegations levelled against it. In a letter dated 5<sup>th</sup> January 2021 addressed to the Applicant, the Procuring Entity stated as follows: -

***"Reference is made to your bid submitted on 25<sup>th</sup> November 2020 and our letter of notification of intention to enter into a contract dated 18<sup>th</sup> December 2020.***

***We are in receipt of a complaint regarding the documentations that you submitted in your bid in respect to your qualifications as a tenderer***

***In order for us to further verify your clarifications as a tenderer we have sought confidential references from persons with whom you had indicated your prior engagements. In order for us to respond appropriately to the complainant, kindly submit to us the following additional information:***

- 1. Certified copies of your bank statements for the period between 1<sup>st</sup> March 2018 and 31<sup>st</sup> October 2020. Ensure you highlight each receipt in respect to each of the contract that you have indicated in your bid document;***
- 2. Copies of your invoices for the services rendered to each of your references and the Kenya Revenue Authority VAT***

***withholding certificates relating to each payment received for the following references:***

- i. The sub-contract from M/s Glosspark Limited for pest control at Kenya Rural Roads Authority at a price of Kshs. 580,000.00 per annum;***
  - ii. The sub-contract from M/s Joymacx Enterprises for pest control at Comacon Limited at a price of Kshs. 780,000.00 per annum;***
  - iii. The sub-contract from Port Health Services, Inland Container Depot for provision of fumigation and disinfection services on used imported textiles at Inland Container Depot, Nairobi at a price of Kshs. 650,500.00 for a period of six months.***
- 3. A copy of the Local Service Order issued by Port Health Services, Inland Container Depot under Reference No. PHS/ICDN/20/2020 dated 26th June 2020 duly certified by the Head of Procurement, Ministry of Health Headquarters; and***
- 4. Copies of the payrolls of M/s Biosect Ventures Ltd for the months of August 2020, September 2020 and October 2020 duly certified by the bank of M/s Biosect Ventures Ltd***

***We wish to draw your attention to the provisions of section 66 of the Public Procurement and Asset Disposal Act, 2015, which states: -***

- (1) A person to whom this Act applies shall not be involved in any corrupt, coercive, obstructive, collusive or fraudulent practice; or conflicts of interest in any procurement or asset disposal proceeding.***
- (2) A person referred to under subsection (1) who contravenes the provisions of that sub-section commits an offence.***
- (3) Without limiting the generality of the subsection (1) and (2), the person shall be—***
  - (a) disqualified from entering into a contract for a procurement or asset disposal proceeding; or***
  - (b) if a contract has already been entered into with the person, the contract shall be voidable.***
- (4) The voiding of a contract by the procuring entity under subsection (7) does not limit any legal remedy the procuring entity may have***

***You are required to provide your response with supporting documentation as indicated within seven (7) days from the date of this letter, failure to which without further recourse, you shall be disqualified from entering into this contract pursuant to the provisions of the Act***

***This letter is issued in accordance with the Public Procurement and Asset Disposal Act, 2015”***

In response, the Applicant addressed a letter dated 11<sup>th</sup> January 2021 to the Procuring Entity stating as follows: -

***"We wish to acknowledge receipt of your letter dated 5<sup>th</sup> January 2021 which states there is a complaint concerning our bid which was submitted on 25<sup>th</sup> November 2020. Biosect Ventures Limited wish to make the following correspondences***

- 1. We submitted our bid as per the tender document requirements i.e. Mandatory/Technical***
- 2. We do request your office to share the specific complaints which were lodged regarding our bid documentations.***

***Biosect Ventures Limited wish to get the above requested information promptly to enable us respond back to the complaint appropriately***

***We do wish to draw your attention to the provisions, section 137 of the Public Procurement and Asset Disposal Act, 2015 which states:***

***"The accounting officer of a procuring entity shall not request or require, as a condition of awarding a contract, that a person who submitted a tender undertakes responsibilities not set out in the tender documents"***

In another letter dated 15<sup>th</sup> January 2021 addressed to the Applicant, the Procuring Entity stated as follows: -

***"Reference is made to your letter dated 11<sup>th</sup> January 2021 in response to our letter dated 5<sup>th</sup> January 2021 regarding your bid submitted on 25<sup>th</sup> November 2020 and our letter of notification of intention to enter into a contract dated 18<sup>th</sup> December 2020***

***...The complaint is quoted below:***

*"Your attention is drawn to the recently concluded tender on Provision of Pest Control at Jomo Kenyatta International Airport and KAA Headquarters Tender No. KAA/OT/JKIA/0038/2020-2021 and its eventual award to M/s Biosect Ventures Ltd at Kshs. 10,104,024/- however as a concerned citizen, let me make a few observations about the vendor, M/s Biosect, its integrity and suitability*

- 1. It is a legal requirement for any company to have a physical office matching the description given at the certificate of incorporation as opposed to briefcase offices. M/s Biosect Ventures Ltd have no office currently*
- 2. The mandatory requirements i.e. NHIF, NSSF Business Permit and AGPO/YAGPO compliance certificates for the vendor of choice should be subjected to integrity test*
- 3. The LPOs/LSOs provided by the vendor as proof for the capacity to deliver service worth 500,000.00 should be scrutinized thoroughly verified otherwise they are all fake*

4. *The bank statements audited accounts and the tenderer's capacity to access line of credit/liquid of not less than half a million are all awash"*

***Our request for the additional information is in order to ensure that we respond to the complainant with factual information that supports our earlier decision to award you this tender as well as demonstrate that our process has been fair, equitable, transparent, competitive and cost-effective.***

***You are required to provide your response with supporting documentation requested in our letter dated 5<sup>th</sup> January 2021 by not later than Tuesday, 19<sup>th</sup> January 2021 failure to which without any further recourse, you shall be disqualified from entering into this contract pursuant to provisions of the Act.***

***This letter is issued in accordance with the Public Procurement and Asset Disposal Act, 2015"***

Finally, on 18<sup>th</sup> January 2021, the Applicant addressed a letter to the Procuring Entity stating as follows: -

***"We wish to acknowledge receipt of your letters dated 5<sup>th</sup> and 15<sup>th</sup> January 2021 which states there is a complaint concerning our bid which was submitted on 25<sup>th</sup> November 2020 and the other which states the complaints respectively. We wish to make the following correspondences.***

### ***1. Office***

***Biosect Ventures Limited wish to state that our physical office is available and open for visit at Donholm.***

- 2. Mandatory requirement documents which we requested for in the bid documents i.e. NHIF, NSSF, BUSINESS PERMIT AND AGPO/YAGPO as per the complaint are obtained from government agencies/authority, KAA can contact the agencies/authority for verification.***
- 3. The LPOs/LSOs provided in the bid document. KAA can carry out due diligence from our clients for authentication.***
- 4. The bank statement, audited accounts and our capacity to access line of credit can be sought from Cooperative Bank of Kenya for verification as per the provided statements.***
- 5. Tax withholding certificates/payroll; as per the tender document we provided a tax compliance certificate which was required furthermore the company is being run by the director who doesn't draw salary from the company and do engages casuals on a need basis which are paid wages on completion of assignments.***
- 6. Client payment records***
  - i. Gloss park ltd***

***We have indicated payments on the tender requested bank statement. We do have pending bills from Gloss park ltd. Find the attached.***

***ii. Port Health Services***

***We have indicated the payments on the tender requested bank statement. Other payments fall behind and after the 3 months' tender document requirements. Find the attached statements.***

***iii. Joymackx Ltd***

***It is unfortunate that we were operating a different bank account at the stipulated time which was closed.***

***In addition, the tender document requested for the last 3 months' statements which fall between July, August, September and part of October 2020 for evaluation purposes.***

***We would like to observe that the letter from the authority sounded so conclusive, intimidating and judgmental. Kindly let's refrain from such threats since we in smooth communication***

***We wish to draw your attention once more to the provisions, section 137 of the Public Procurement and Asset Disposal Act, 2015 which states:***

***"The accounting officer of a procuring entity shall not request or require, as a condition of awarding a contract, that a person who submitted a tender undertake responsibilities not set out in the tender documents."***



***Finally, we do feel the complainant has defamed our company and thereon tainted our name with falsehood and we could thereon request for all details pertaining him/her and confirmation that they participated in this particular tender as we are to sue for damages”***

On its part, the Procuring Entity contacted various institutions to confirm and verify the qualifications of the Applicant and inter alia made the following findings: -

- *On 4<sup>th</sup> January 2021, the Procuring Entity addressed a letter to Port Health Services Inland Container Depot requesting verification whether the Applicant was sub-contracted to carry out services of provision of fumigation and disinfection services on used import textiles at Inland Container Depot, Nairobi at the sum of Kshs. 650,500.00. In another letter dated 21<sup>st</sup> January 2021 addressed to the Principal Secretary, Ministry of Health, the Procuring Entity notified the said Ministry that the Applicant participated in the subject tender and provided an LPO from the said Ministry as evidence of having provided similar services (being procured by the Procuring Entity) to the Ministry. The Procuring Entity sought confirmation whether the said Local Service Order (LSO) was authentic and issued by the Ministry. In a letter dated 1<sup>st</sup> February 2021, the Ministry of Health stated that having consulted its Department of Health which purportedly issued the LSO No. PHS/ICDN/20/2020 containing the receiving stamp of the Applicant dated 10<sup>th</sup> November 2020, they confirm that the LSO is not authentic*

*and was not issued by the Port Health Services Inland Container Depot as alleged.*

Following the outcome of the above verification exercise, the Procuring Entity confirmed the LSO Ref. No. PHS/ICDN/20/2020 submitted by the Applicant was not authentic on the basis that Port Health Services Inland Container Depot did not issue the said LSO as alleged. In a second Professional Opinion dated 8<sup>th</sup> February 2021, the Procuring Entity's Head of Procurement function advised the 1<sup>st</sup> Respondent that it was proper to disqualify the Applicant from award of the subject tender pursuant to section 66 of the Act and to award the subject tender to the next lowest evaluated bidder, M/s All and Sundry Services (the 1<sup>st</sup> Interested Party herein) at their quoted price of Kshs. 13,677,154.48 inclusive of VAT for a period of two (2) years.

Upon approval of the said professional opinion by the 1<sup>st</sup> Respondent, the Applicant received a letter of notification of unsuccessful bid dated 8<sup>th</sup> February 2021 with the following details: -

***"Reference is made to your bid submitted on 25<sup>th</sup> November 2020 on the above subject tender.***

***Following our letter of Notification of Intention to enter into a contract dated 18<sup>th</sup> December 2020, we received a complaint alleging that the qualification documents that you submitted were not authentic.***

***We have undertaken a verification process of your documents that you submitted, however, the Ministry of Health has***

***stated that an LSO reference number PHS/ICND/20/2020 that you submitted in support of your qualifications for this tender is not authentic and was not issued by the Port Health Services Inland Container Depot as alleged.***

***This is therefore to inform you that pursuant to the provisions of section 66 (1) (3) of the Public Procurement and Asset Disposal Act, 2015, you have been disqualified from entering into a contract for the subject tender.***

***Consequently, the bidder who has been determined to be the successful tenderer is M/s ALL and Sundry Services at their quoted price of Kshs. 13,677,154.48 inclusive of 14% VAT as per their form of tender and price schedule for a period of two (2) years being the second lowest evaluated bidder.***

***This letter of notification is issued in accordance with the Public Procurement and Asset Disposal Act, 2015”***

The letter of unsuccessful bid dated 8<sup>th</sup> February 2021 prompted the Applicant to file the instant Request for Review challenging the Procuring Entity’s decision of disqualifying the Applicant’s bid pursuant to section 66 (1) (3) of the Act.

With the above sequence of events in mind, it is important for the Board to first address its mind as to whether an additional process of verifying the qualifications of a tenderer was justified in the circumstances, having noted a complaint was received by the Procuring Entity on 31<sup>st</sup> December 2020,

after award of the subject tender had been made to the Applicant on 18<sup>th</sup> December 2020.

At paragraph 32 of the decision of the Supreme Court of India in **Civil Appeal No. 2197 Of 2020 [Arising out of Special Leave Petition (C) No. 11915 OF 2018], The Bharat Coking Coal Ltd. & Ors. Vs. AMR Dev Prabha & Ors**, it was held as follows: -

**"In tender matters, a party may seek to hold the State to its duty of treating all persons equally or prohibit it from acting arbitrarily. The person seeking a relief must also actively satisfy the Court that the right it is seeking is justifiable. In doing so, a balance is maintained between the need for commercial freedom and the very real possibility of collusion, illegality and squandering of public resources."**

It is evident from the foregoing case that a balance ought to be made between; the remedies sought by a bidder before this Board and the duty imposed on a procuring entity to act fairly and not arbitrarily when grave allegations are made after notification of award to a particular bidder. We say so because, a procuring entity is required to award a tender to a bidder who meets all tender conditions during evaluation and after positive responses are received after a due diligence exercise. It is however important to emphasize that in certain circumstances, adverse information on the qualification of a successful bidder may come to the knowledge of a procuring entity after award of a tender but prior to the signing of a contract,

which may require a procuring entity, to undertake an additional verification exercise. In the instant scenario, allegations were made against the qualification of the Applicant after award of the subject tender to it, which basically points to the question whether the Applicant provided misleading information in its bid which would amount to a misrepresentation that was possibly made by it, so as to secure an award of the subject tender.

The dictionary meaning of the word "**fraudulent**" is **deceiving others and not telling the truth** (untrustworthy, devious, deceitful). Further, the Black's Law Dictionary, 9<sup>th</sup> Edition, page 1091, defines the term "**misrepresentation**" as follows: -

***"A misrepresentation, is a false assertion of fact, and commonly takes the form of spoken or written words. Whether a statement is false, depends on the meaning of the words in all the circumstances, including what may fairly be inferred from them.***

***An assertion may also be inferred from conduct other than words, Concealment or even non-disclosure may have the effect of a misrepresentation"***

In an Article by Frank Cavico called "**Fraudulent, Negligent, and Innocent Misrepresentation**" (Volume 20, Issue 1, Campbell Law Review), the author discusses three different types of misrepresentation as follows: -

***"Fraudulent Misrepresentation requires evidence that the defendant was aware that he or she was consciously and***

***purposefully deceiving the victim. Misrepresentation liability for the maker of a representation who honestly believes the representation to be true, but whose carelessness has rendered the representation false or misleading, is governed by the doctrine of negligent misrepresentation. When a party makes a representation that he or she honestly believes to be true, and there is no negligence in the formation of this belief, yet the misrepresentation actually falsely represents material facts, the misrepresenting party is only liable for an innocent misrepresentation, not a fraudulent or negligent one. If such an innocent misrepresentation occurs, the aggrieved party can rescind the contract or transaction as well as seek restitution, but the party cannot ordinarily recover damages.***

The term "**fraudulent misrepresentation**" is defined in the same dictionary as: -

***"A false statement that is known to be false or is made recklessly without knowing or caring whether it is true or false and that is intended to induce a party to detrimentally rely on it. A misrepresentation is fraudulent if the maker intends his assertion to induce a party to manifest his assent and the maker (a) knows or believes that the assertion is not in accord with the facts, or (b) does not have the confidence that he states or implies in the truth of the assertion, or (c) knows that he***

***does not have the basis that he states or implies for the assertion."***

The elements of fraudulent misrepresentation as explain in the above definition are: -

- *The maker of a statement knows or believes that the assertion is not in accord with the facts; or*
- *The maker of a statement does not have the confidence in what he states or implies in the truth of the assertion; or*
- *The maker of a statement knows that he does not have the basis for what he states or implies for the assertion.*

The use of the word "or" in defining the term fraudulent misrepresentation shows that any of the three elements listed above may exist for fraudulent misrepresentation to be established.

At paragraphs 26 and 27 of the **Civil Case No. 33 of 2020, Kenneth Maweu Kasinga v Cytonn High Yield Solution LLP & another [2020] eKLR**, Justice Joel Ngugi held that: -

***"26. There is a difference in the Law of Contracts between fraud and misrepresentation. While sometimes the term "misrepresentation" is used generically to refer to all three categories of misrepresentations whether innocent; negligent or fraudulent, when used on its own it denotes a distinction between a statement not in accord with the facts innocently or negligently made; and one***

**fraudulently made, that is, with the willful intention to deceive.**

**27. Only the second types of statements which are not in accord with the facts (that statements which are consciously false and intended to mislead) would come within the category of misrepresentations which are non-arbitrable. Further, the misrepresentation must be material.**

Lewis Silkin in his Article, **Misrepresentation: the pitfalls of pre-contract statements” (September 2019)** explains that: -

**“Prior to the conclusion of a contract parties will often make statements to each other - during negotiations, in tender documents and in a variety of other ways. Most pre-contract statements are carefully considered. But sometimes statements are made which are false or misleading. When false statements induce an innocent party to enter into a contract the consequences can be serious.**

**The remedies available for misrepresentation depend on whether the misrepresentation was fraudulent, negligent or innocent. Broadly speaking, however, the two types of available remedy are rescission and damages. The effect of rescission is that the contract is reversed, as if there had been no contract.**



***Damages for fraudulent misrepresentation are awarded on the tortious basis. The aim of a damages award is to restore a claimant to the position it would have been in, had the misrepresentation not been made"***

As regards issues of misrepresentation discovered by a procuring entity **after award of a tender but before signing of a contract**, the World Bank in its Handbook called "**Fraud and Corruption Awareness Handbook: A handbook for civil servants involved in public procurement**" published in 2013, explains at page 39 thereof as follows: -

***"fraud is defined as "any act or omission, including a misrepresentation that knowingly or recklessly misleads, or attempts to mislead, a party to obtain a financial or other benefit or to avoid an obligation." As used here, a "fraudulent bid" is a bid or proposal that contains knowingly or recklessly misleading information, submitted in order to gain an unfair advantage in the selection process"***

The World Bank further explains in its Handbook that: -

***"The evaluation of written submissions to bid solicitations is the foundation of a fair procurement system. A prominent risk to the procurement system is the undermining of the evaluation process by bidders providing false or misleading information in their bids and supporting documentation. When false information is relied upon to make procurement***

***decisions, the impact is often manifested in poor quality of works, goods and services, and failure to meet developmental objectives.***

***Typically, additional due diligence through database or Internet searches and document checks would be sufficient to clarify matters.***

It is therefore evident that nothing stops a procuring entity such as the one herein from undertaking additional verification exercise (even if a due diligence exercise was already undertaken) to clarify allegations of misrepresentation by a tenderer (in this case, allegations made by a concerned citizen against the Applicant).

Justice Odunga in **Miscellaneous Civil Application No. 338 of 2016, Republic v Kenya Airports Authority Ex-Parte Seo & Sons Limited [2018] eKLR** when considering the import of section 66 of the Public Procurement and Asset Disposal Act, 2015 held as follows: -

***"In this case it is clear that vide a letter dated 20<sup>th</sup> July, 2016, the Respondent herein terminated the award of the subject tender while expressing itself inter alia as hereunder:***

*Upon receipt of a report on further due diligence, a decision has been made to terminate the award based on misrepresentation in respect of your qualification for the award of tender; constituting an offence under section 66 (2), (3) and 83 of the Public Procurement and Asset Disposal Act.*

*Kindly note that the aforementioned Award is hereby terminated.*

***For avoidance of doubt the legal provisions that were relied upon provide as hereunder:***

***66 (1) A person to whom this Act applies shall not be involved in any corrupt, coercive, obstructive, collusive or fraudulent practice; or conflicts of interest in any procurement or asset disposal proceeding.***

***(2) A person referred to under subsection (1) who contravenes the provisions of that sub-section commits an offence.***

***(3) Without limiting the generality of the subsection (1) and (2), the person shall be—***

***(a) disqualified from entering into a contract for a procurement or asset disposal proceeding; or***

***(b) if a contract has already been entered into with the person, the contract shall be voidable.***

***As regards section 66, it is clear that the same can only be invoked where it is found that a person to whom an award of a tender is given is involved in any corrupt, coercive, obstructive, collusive or fraudulent practice; or conflicts of interest in any procurement or asset disposal proceeding.***

It is clear from the above case that; if a contract has already been entered into with a person engaged in fraud or misrepresentation, the contract is voidable pursuant to section 66 (3) (b) of the Act. On the other hand, if a person to whom an award of a tender is given is involved in any corrupt, coercive, obstructive, collusive or fraudulent practice; or conflicts of interest in any procurement or asset disposal proceedings, then a procuring entity may: (1) undertake a further verification to verify allegations levelled against a recommended bidder issued with a letter of notification of award (2) and if the outcome of the further verification exercise confirms the allegations of fraud or misrepresentation, such a bidder should be disqualified from award of a tender and the award notification revoked by the Procuring Entity pursuant to section 66 (3) (a) of the Act.

Section 55 (5) of the Act which deals with eligibility to bid provides that: -

***"State organ or public entity shall consider as ineligible a person for submitting false, inaccurate or incomplete information about his or her qualifications"***

The Board observes that the moment a procuring entity discovers a person submitted false, inaccurate or incomplete information about his or her qualifications, such person is considered ineligible to bid. In the instant case, information was obtained by the Procuring Entity after the Applicant participated in the subject tender as a bidder and was previously awarded the tender. After a verification exercise, the Procuring Entity confirmed that the LSO reference number PHS/ICND/20/2020 submitted by the Applicant was not authentic and was not issued by the Port Health Services Inland

Container Depot as alleged. It therefore means, the Applicant was ineligible to bid for a contract in the subject tender, even though this ineligibility was discovered only after a verification exercise was undertaken by the Procuring Entity pursuant to allegations raised by a concerned citizen.

Furthermore, Clause 2.8.2 of Section II. Instructions to Tenderers of the Tender Document already informed bidders that: -

**"The procuring entity will reject a proposal for award if it determines that the tenderer recommended for award has engaged in corrupt or fraudulent practices in competing for the contract in question"**

The Applicant was well aware that disqualification of a tenderer for engagement in corrupt or fraudulent practices so as to be awarded a tender was inevitable given the same was a condition specified in the Tender Document.

The Applicant has stated that it was not given an opportunity to respond to the queries made by the Procuring entity. Whilst making this averment, the Applicant at paragraph 7 and 8 of its Request for Review admits that it was notified vide a letter of 5<sup>th</sup> January 2021 that a Complaint had been lodged regarding its documents.

It is also worth noting that at all material times while conducting an additional verification exercise on the qualifications of the Applicant, the Procuring Entity engaged the Applicant, thus giving the Applicant an opportunity to controvert the allegations made against it by a concerned

citizen on 31<sup>st</sup> December 2020. On 5<sup>th</sup> January 2021, the Procuring Entity alerted the Applicant of the said allegations. In the letter dated 15<sup>th</sup> January 2021, the Procuring Entity outlined the specific allegations made against the Applicant after the Applicant requested for the same in its letter dated 11<sup>th</sup> January 2021.

Further, the Procuring Entity provided all the correspondences made to the Applicant's clients and other statutory institutions in its confidential file submitted to the Board demonstrating that the process was transparent and was meant to verify the allegations levelled against the Applicant. The Board further notes that in an Investigation Report dated 19<sup>th</sup> February 2021 (found in the Procuring Entity's confidential file) from the Procuring Entity's Integrity Officer, interviews were undertaken on some officers of the Ministry of Health, Port Health Services-Inland Contained Depot together with a verification exercise of the emails sent to various clients of the Applicant and other statutory institutions, including the Local Service Order (LSO) No. PHS/ICDN/20/2020 containing the receiving stamp of the Applicant dated 10<sup>th</sup> November 2020. The purpose of the said Investigation Report was to determine whether there were any officers in the Ministry of Health that would be held accountable having noted that the Ministry stated the LSO was not authentic. Secondly as noted in the said investigation report, the Procuring Entity would inform the Ministry of Health for further administrative action and the Applicant would be informed of the findings made after the verification exercise. As already noted by the Board, the letter of notification of unsuccessful bid dated 8<sup>th</sup> February 2021 informed the Applicant that after a verification process of its documents, the Ministry of

Health stated that an LSO reference number PHS/ICND/20/2020 submitted by the Applicant was not authentic and was not issued by the Port Health Services Inland Container Depot as alleged.

The Applicant merely stated an earlier verification exercise confirmed its qualifications as being proper but did not controvert the findings of the additional verification exercise undertaken by the Procuring Entity wherein the Procuring Entity confirmed the LSO was not authentic on the basis that Port Health Services Inland Container Depot did not issue the said LSO as alleged. It was and still is incumbent upon the Applicant to show that that LSO was and is authentic. Even in this Request for Review Application, the Applicant has been silent on that aspect.

It is the Board's considered finding that the Procuring Entity took reasonable steps to verify the allegations made against the Applicant. The Procuring Entity was justified in doing so, because it is required to award a tender and enter into a contract with a bidder who meets all tender conditions during evaluation and after positive responses are received after a verification exercise conducted so as to verify allegations levelled against the successful tenderer after award but prior to signing of a contract.

The Board is of the considered view that even in a situation where a contract had been executed, the procuring Entity having established that the Local Service Order was not authentic would have been entitled to take steps to void the contract on grounds of material misrepresentation. Section 137 relied upon by the Applicant in the Board's view, relates to changes in

responsibilities in the execution of the contract beyond those that were set out in the scope of works in the tender. With respect, that provision does not bar the procuring entity from taking steps to authenticate a tenderers' documents prior to execution of the contract, and especially in circumstances such as the present instance where a complaint has been received regarding those documents.

The Board is satisfied that the Applicant was granted due notice of the complaint regarding its Local Service Order and was availed sufficient opportunity to dispel the Claims that the same was not authentic or fraudulent. The Applicant has not sufficiently dispelled that Claim either before or in these proceedings. The Board is of the view therefore that the Procuring Entity was well advised and acted legally in taking steps to disqualify the Applicant, withdrawing its notification of the award of tender and thereby taking steps to award the same to the second best evaluated responsive bidder. The action by the Procuring Entity therefore is in accordance with the provisions of the Act and Article 227 of the Constitution.

Accordingly, the Board finds that the Procuring Entity rightfully disqualified the Applicant's bid from entering into a contract with the Procuring Entity in respect to the subject procurement proceedings.

The Applicant at paragraph 19 of the Request for Review has stated as follows;

***"The actions of the Procuring Entity contrive sections***



***3,55,59,66,79,80,83 and 137 of the Public Procurement and Disposal Act read with regulations 33, 74, 80 of the Public Procurement and Asset Disposal Regulations 2020 to wit:***

***Instead, and by dint of Section 55, it is M/s ALL AND SUNDRY SERVICES given the claimed association with the Procuring Entity's General Manager"***

In response, the Procuring Entity has denied that there is any connection between its General Manager and the Interested Party.

The Board has perused all the documents filed and is unable to find anything that points to any connection between the said General Manager and the Interested Party. Section 66 (5) (a) to (c) bars any association by officers of procuring entities to bidders. It is a requirement of the Law that he who alleges must provide proof of the allegations made.

In this instance, the Applicant has made considerably serious allegations of breach of requirements of the Act by the Procuring Entity's General Manager. The Applicant has however not made any effort to put before the Board any material that would directly or even remotely point at the alleged existence of a relationship between the said General Manager and the Interested Party, at best, the statements remain to be unsupported allegations. The Board is therefore unable to entertain this allegation in the absence of evidence in support thereof. In essence, the Applicant's allegation of an alleged existence of a relationship between the said General Manager and the Interested Party, have not been substantiated.

The Board on Review of the Applicant's documents has taken note that the Applicant attached (to its Request for Review) confidential reference letters written by the Procuring Entity to clients of the Applicant together with responses received by the Procuring Entity from the said clients, without providing explanation as to how it (the Applicant) obtained those letters and responses. There is nothing to show that the said documents, letters and emails attached to the Application, were in any way copied to the Applicant or that they were in any way intended to reach the Applicant. These were documents seeking confidential confirmation of the authenticity of the documents relied upon by the Applicant in its bid.

The Board is mindful that correspondences between a procuring entity and a tenderer's clients are confidential references obtained for purposes of a verification exercise and form part of the confidential documents submitted to the Board pursuant to section 67 (3) (e) of the Act, thus the Applicant should not be in possession of the same. The Board wonders how the Applicant got this information without any explanation to the Board, which action makes the Applicant's conduct questionable.

Having found the Procuring Entity rightfully disqualified the Applicant's bid from entering into a contract with the Procuring Entity in respect to the subject procurement proceedings, the Request for Review fails and the Board proceeds to grant the following orders: -

## **FINAL ORDERS**

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

- 1. The Request for Review filed by the Applicant on 25<sup>th</sup> February 2021 with respect to Tender No. KAA/OT/JKIA/0038/2020-2021 for Provision of Pest Control at Jomo Kenyatta International Airport and KAA Headquarters (Reserved for Youth, Women and People Living with Disability) be and is hereby dismissed.**
- 2. Each party shall bear its own costs in the Request for Review.**

**Dated at Nairobi this 17<sup>th</sup> day of March 2021**

**CHAIRPERSON**

**SECRETARY**

**PPARB**

**PPARB**