

THE REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 70/2021 OF 11TH MAY 2021

BETWEEN

PEESAM LTD.....APPLICANT

AND

THE ACCOUNTING OFFICER,

COMMUNICATIONS AUTHORITY OF KENYA.....1ST RESPONDENT

COMMUNICATIONS AUTHORITY OF KENYA.....2ND RESPONDENT

NEWLOOK CONSTRUCTION COMPANY

LIMITED.....INTERESTED PARTY

Review against the decision of the Accounting Officer of Communications Authority of Kenya in relation to Tender No. CA/PROC/OT/37/2020-2021 for Provision of Grounds and Landscape Maintenance Services for CA Centre, South B and Kahawa Station (Reserved for Women, Youth and Persons with Disability).

BOARD MEMBERS

- | | |
|---------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Dr. Paul Jilani | -Member |
| 3. Mrs. Njeri Onyango | -Member |
| 4. Ms. Isabella Juma, CPA | -Member |
| 5. Eng. Mbiu Kimani, OGW | -Member |

IN ATTENDANCE

Mr. Stanley Miheso

-Holding brief for the Acting Board
Secretary

BACKGROUND TO THE DECISION

The Bidding Process

Communications Authority of Kenya (hereinafter referred to as “the Procuring Entity”) invited sealed tenders for Tender No. CA/PROC/OT/37/2020-2021 for Provision of Grounds and Landscape Maintenance Services for CA Centre, South B and Kahawa Station (Reserved for Women, Youth and Persons with Disability) (hereinafter referred to as “the subject tender”) through an advertisement published in MyGov Publication Newspaper on 2nd March 2021.

Bid Submission Deadline and Opening of Bids

The Procuring Entity received a total of twenty-four (24) bids by the bid submission deadline of 24th March 2021. The bids were opened shortly thereafter by a Tender Opening Committee and recorded as follows:

Bidder No.	Bidder Name
1	M/s Colnet Limited
2	M/s Gar Gar Construction Limited
3	M/s Simpson Lane Services Limited
4	M/s Aimat Company Ltd
5	M/s Super Broom Services
6	M/s Quadcore Investment Ltd
7	M/s CleanMark Ltd
8	M/s Envirocare General Agencies Ltd
9	M/s Organic Environmental
10	M/s Liga Holdings Ltd
11	M/s Kamtix Cleaners Co. Ltd
12	M/s Inyelllic Enterprise
13	M/s Cymar Investment Ltd

Bidder No.	Bidder Name
14	M/s Dinle Enterprise Ltd
15	M/s Peesam Ltd
16	M/s Best Solution Suppliers Ltd
17	M/s Spin Africa Limited
18	M/s Hygiene Cleaning & Supplies Ltd
19	M/s Afriscape Ltd
20	M/s Newlook Construction Company Ltd
21	M/s Ice Clean Care
22	M/s Samia Ventures Ltd
23	M/s Kleansley Hygiene Ltd
24	M/s Petals Hygiene and Sanitation

Evaluation of Bids

An Evaluation Committee appointed by the Procuring Entity's Acting Director General evaluated bids in the following stages:

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

1. Mandatory Requirements/Preliminary Evaluation

The Evaluation Committee evaluated bids against the criteria outlined in Clause 2.22 (A) of the Appendix to Instructions to Tenderers of the Tender Document. At the end of Preliminary Evaluation, Bidder No. 1, 2, 3, 6, 11, 13, 14, 15, 20, 21, 23 satisfied all the requirements at this stage, thus were found responsive and eligible to proceed to the Technical Evaluation Stage.

2. Mandatory Technical Evaluation

At this stage, the Evaluation Committee evaluated bids against the criteria outlined in Clause 2.22 (B) of the Appendix to Instructions to Tenderers of

the Tender Document on a PASS/FAIL basis. Bidder No. 2, 13 and 20 satisfied all the requirements at the Technical Evaluation Stage, thus qualified to proceed to the Financial Evaluation Stage.

3. Financial Evaluation

At this stage, the Evaluation Committee evaluated bids against the criteria outlined in Clause 2.22 (C) of the Appendix to Instructions to Tenderers of the Tender Document to determine the bidder with the lowest evaluated price for recommendation of award of the subject tender. The prices quoted by the remaining bidders were recorded as follows:

Bidder No.	Cost for one month	Cost for one year	Cost for three years	Ranking
2 M/s Gar Gar Construction Limited	541,720.00	6,500,640.00	19,501,920.00	2
13 M/s Cymar Investment Ltd	583,000.00	6,996,000.00	20,988,000.00	3
20 M/s Newlook Construction Company Ltd	437,320.00	5,247,840.00	15,743,520.00	1

Recommendation

The Evaluation Committee recommended award of the subject tender to M/s Newlook Construction Company Ltd at its tender price of Kshs. 437,320.00 per month, translating to Kshs. 15,743,520.00 for a period of three years having established the said bidder submitted the lowest evaluated price.

Professional Opinion

In a professional opinion dated 15th April 2021, the Procuring Entity's Acting Director of Procurement reviewed the manner in which the subject procurement process was undertaken including evaluation of bids. He concurred with the Evaluation Committee's recommendation thus advised the Procuring Entity's Acting Director General to award the subject tender to M/s Newlook Construction Company Ltd at its tender price of Kshs. 437,320.00 per month, translating to Kshs. 15,743,520.00 for a period of three years for submitting the lowest evaluated price. The Acting Director General approved the said award recommendation through a Certificate of Award dated 16th April 2021.

Notification to Bidders

In letters dated 23rd April 2021, the Acting Director General notified all bidders of the outcome of their respective bids.

THE REQUEST FOR REVIEW

M/s Peesam Ltd (hereinafter referred to as "the Applicant") lodged a Request for Review dated 11th May 2021 and filed on even date together with a Supporting Affidavit sworn on 11th May 2021 and filed on even date through the firm of Karugu Mbugua & Co. Advocates, seeking the following orders:

a) An order annulling the award;

- b) An order re-admitting the Applicant's bid for Financial Evaluation;***
- c) An order awarding costs of the application to the Applicant; and***
- d) Any other orders that the Board deems just and fit to grant.***

In response, the Respondents lodged a Response to the Request for Review in form of a Letter dated 19th May 2021 addressed to the Acting Board Secretary. On the other hand, the Interested Party lodged a Replying Affidavit sworn on 24th May 2021 and filed on 26th May 2021 through the firm of Kibungei & Company Advocates.

Pursuant to the Board's Circular No. 2/2020 dated 24th March 2020, detailing an administrative and contingency 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. Accordingly, the Interested Party lodged Written Submissions dated 26th May 2021 and filed one even date. The Applicant and the Respondents did not file written submissions.

BOARD'S DECISION

The Board has considered each of the parties' pleadings and confidential documents submitted by the 1st Respondent pursuant to section 67 (3) (e)

of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as “the Act”) and finds that the following issue calls for determination: -

I. Whether the Board has jurisdiction to entertain the Request for Review.

Depending on the outcome of the first issue:

II. Whether the Procuring Entity evaluated the Applicant’s bid at the Mandatory Technical Evaluation Stage in accordance with section 80 (2) of the Act with respect to the following criteria:

It is a well settled principle that jurisdiction is everything. In the case of **Peter Gichuki King’ara v. Independent Electoral and Boundaries Commission & 2 others (2013) eKLR**, the Court expressed itself thus, on the question of jurisdiction:-

“It is our considered view that passage or lapse of time does not and cannot confer jurisdiction; jurisdiction is a continuum, jurisdiction cannot lack today and by passage or lapse of time exist tomorrow. Jurisdiction is either present ab initio or absent forever.”

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

(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty

imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed...

Regulation 203 (2) of the Public Procurement and Asset Disposal Regulations 2020 (hereinafter referred to as "Regulations 2020") further states that: -

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

(2) The request referred to in paragraph (1) shall—

(a) state the reasons for the complaint including any alleged breach of the Constitution the Act or these Regulations

(b) be accompanied by such statements as the applicant considers necessary in support of its request

(c) be made within fourteen days of—

(i) the occurrence of the breach complained of where the request is made before the making of an award

- (ii) the notification under section 87 of the Act or***
- (iii) the occurrence of the breach complained of where the request is made after making of an award to the successful bidder”***

Section 167 (1) of the Act read together with Regulation 203 (2) (c) of Regulations 2020, provide that a request for review is filed within fourteen days of; (i) the occurrence of the breach complained of, where the request is made before the making of an award, (ii) the notification under section 87 of the Act or (iii) the occurrence of the breach complained of where the request is made after making of an award to the successful bidder.

The Interested Party deponed at paragraph 11 of its Replying Affidavit that the Request for Review was filed 18 days after notification of the outcome of evaluation was sent to the Interested Party and all other bidders. In the Interested Party’s view, this is contrary to the requirement of section 167 (1) of the Act and Regulation 203 (1) (c) of Regulations 2020 which requires a request for review to be filed within 14 days from the date of notification. While making reference to section 107 of the Evidence Act, Chapter 80, Laws of Kenya, the Interested Party avers at paragraph 13 of its Written Submissions that the Applicant has not provided evidence of having received notification on 5th May 2021.

At paragraph 1.6 of their Response to the Request for Review, the Respondents aver that after a decision on award of the subject tender was made, the Procuring Entity sent a letter of notification of intention to award

the subject tender to the Interested Party and debriefing letters to unsuccessful bidders on 23rd April 2021.

The Applicant on the other hand deponed at paragraph 5 of its Supporting Affidavit that it received its letter of notification of unsuccessful bid dated 23rd April 2021, on 5th May 2021.

Having considered parties' rival cases, the Board notes that section 87 of the Act gives responsibility to the 1st Respondent of notifying bidders of the outcome of their bids. This provisions states that: -

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

(2);

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

In effect, the 1st Respondent being the person responsible for notifying bidders of the outcome of their bids, should provide evidence of the date letters of notification were dispatched to all bidders. The confidential documents submitted to the Board do not contain any documentation

demonstrating the manner in which bidders were notified, neither did the 1st Respondent attached any documents in its Response to the Request for Review to that effect.

In **Civil Appeal No. 53 of 2017, Eunice Wayua Munyao v. Mutilu Beatrice & 3 Others [2017] eKLR**, the court considered the burden of proof as provided in section 107, 108 and 109 of the Evidence Act, Chapter 80 of the Laws of Kenya and held as follows:

"Sections 107, 108 and 109 of the Evidence Act Cap 80 Laws of Kenya clearly captures the aspects of burden of proof and they provide as follows:-

107. Burden of proof

(1) whoever desires any court to give judgement 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.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

It is trite law that the onus of proof is on he who alleges'

Further, the Supreme Court in **Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others [2014] eKLR** held that:

"The person who makes an allegation must lead evidence to prove the fact. He or she bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already-discharged initial burden. "The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue" [Cross and Tapper on Evidence, (Oxford University Press, 12th ed, 2010, page 124)]."

In the instant case, the 1st Respondent did not provide any evidence of dispatch of notification letters to bidders thus failed to discharge its burden of proving the date when bidders were notified of the outcome of their bids.

On the other hand, the Interested Party is the party alleging the Applicant was notified on 23rd April 2021, thus bears the legal burden of proving that the Applicant was indeed notified of the outcome of its bid on 23rd April 2021. This legal burden has not been discharged throughout these proceedings because no evidence was provided by the Interested Party to support its allegation. The Interested Party merely attached its letter of notification of award to its Replying Affidavit which does not indicate the date when the letter was received by the Interested Party. The Board observes that another letter dated 27th April 2021 attached to the Interested Party's Replying Affidavit shows the Interested Party accepted award of the subject tender and the said letter of acceptance was received by the Procuring Entity on 28th April 2021. This is because of the Procuring Entity's stamp affixed on the said letter bearing the date of 28th April 2021. However, this letter does not assist in establishing the date when the Applicant received its letter of notification of unsuccessful bid.

The evidentiary burden of proof is a shifting one and is required as a response to an already discharged initial burden of proof. Since the Interested Party failed to discharge its burden of proof, this legal burden cannot shift to the Applicant. The Board is only required to determine the date when the Applicant was notified of the outcome of its bid, on a balance of probabilities.

The Applicant stated that it received its letter of notification on 5th May 2021; an assertion that was not controverted by the 1st Respondent as the party with responsibility of notifying bidders. As already established, the Interested Party's attempts to controvert the Applicant's position have failed.

In the absence of proof to the contrary and having noted the Applicant's assertion remains uncontroverted, the Board finds that the Applicant was notified of the outcome of its bid on 5th May 2021.

Section 57 (a) of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya which deals with computation of time specified in written law states that: -

"(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done"

Section 57 (a) of the Interpretation and General Provisions Act provides that the day an event happens is excluded when computing the time taken for doing an act or thing. This means, 5th May 2021, being the date when the Applicant received its letter of notification is excluded from computation of time. If this date is considered, then the Applicant had up to 19th May 2021 to file a Request for Review. The Applicant filed its Request for Review on 11th May 2021, thus the same is within the statutory period of 14 days specified in section 167 (1) of the Act.

Accordingly, the Board finds that it has jurisdiction to entertain the Applicant's Request for Review.

The second issue for determination relates to evaluation of the Applicant's bid at the Technical Evaluation Stage.

The Applicant's letter of notification of unsuccessful bid dated 23rd April 2021 contains the following details:

"Tender for Provision of Grounds and Landscape Maintenance Services for CA Centre, South B and Kahawa Station (Reserved for Women, Youth and Persons with Disability) Tender No. CA/PROC/OT/37/2020-2021.

Reference is made to the above subject matter CA/PROC/OT/37/2020-2021 and your subsequent bid submission.

The tender evaluation process has been completed and we regret to inform you that your bid was unsuccessful because of the following reasons:

- You did not provide sworn Affidavit for supervisor's availability for assignment***
- You provided certificates of good conduct that were more than a month old***
- You did not provide commitment letter to pay minimum gross wage of Kshs. 12,000 per month for general Gardeners and Kshs. 20,000 per month for Supervisor***
- You did not provide a list, photo and details for chemicals that will be used during the service"***

We would like to inform you that the tender has been awarded to M/s Newlook Construction Company Ltd of P.O BOX 101733-00101 Nairobi at a Monthly cost of Kenya Shillings Four Hundred and Thirty-Seven Thousand, Three Hundred and Twenty (437,320.00) inclusive of other services/rates quoted which translates to Kshs. 15,743,520.00 for three (3) year contract”

Having considered parties’ rival cases on evaluation of the Applicant’s bid at the Mandatory Technical Evaluation Stage, the Board proceeds to make the following findings:

a) Affidavit for supervisor’s availability for assignment

Clause B (3). Mandatory Technical Evaluation of the Appendix to Instructions to Tenderers of the Tender Document provides as follows:

No	Evaluation Attribute	Documents Needed	Pass/Fail
3	Qualifications: Provide Details of any relevant certifications and/or Trainings. Such certifications/Trainings may be for your Company or for your individual staff as relevant to Providing ground maintenance services. (At least one contract Manager/Supervisor with one-year experience in supervising ground maintenance team including not less than one year	<ul style="list-style-type: none"> • Relevant Certificates for minimum 5 staff • Relevant Certificate for supervisor • Signed Curriculum Vitae for supervisor • <u>Affidavit for supervisor’s availability for the assignment</u> 	

Even though the criterion of Qualifications outlined four documents required by the Procuring Entity, the issue in contention relates to the question

whether the Applicant provided an Affidavit for supervisor's availability for the assignment.

In response to this criterion, the Applicant provided an Affidavit on page 11 of its original bid with the following details:

"I, SAMUEL NG'ANG'A of P.O BOX 29006-00100 NAIROBI, being a resident of THIKA in the Republic of Kenya do hereby make oath and state as follows

- 1. THAT I am the Chief Executive/Managing Director/Principal Officer/Director of PEESAM LTD which is a Candidate in respect of Tender Number Tender REF NO. CA/PROC/OT/37/2020-2021 to supply goods, render services and/or carry out works Communications Authority of Kenya (CA) and duly authorized and competent to make this Affidavit***
- 2. THAT the supervisor shall be available for the assignment***

SWORN at Nairobi by the said SAMUEL NG'ANG'A

Chief Executive/Managing Director/Principal Officer/Director

[signature affixed]

On this 26th day of February 2021

}

}

***}* Deponent**

Before me } NELSON GATUNGO

[signature and Commissioner for Oaths stamp affixed]

At page 29 of its original bid, the Applicant provided its Organizational Structure which shows that Mr. Timothy Kamau and Ms. Frachia Wanjiku are the proposed supervisors for the project to be executed under the subject tender. Thus, the Affidavit sworn by its Chief Executive/Managing Director/Principal Officer/Director (Mr. Samuel Ng'ang'a) confirms the availability of Mr. Timothy Kamau and Ms. Frachia Wanjiku for the assignment.

Accordingly, the Board finds that the Applicant satisfied the criterion under Clause B (3). Mandatory Technical Evaluation of the Appendix to Instructions to Tenderers of the Tender Document because the Applicant provided an Affidavit sworn on 26th February 2021 by its Chief Executive/Managing Director/Principal Officer/Director (Mr. Samuel Ng'ang'a) confirming availability of the Applicant's supervisors for the assignment.

b) Certificates of Good Conduct

Clause B (4). Mandatory Technical Evaluation of the Appendix to Instructions to Tenderers of the Tender Document provides as follows:

No	Evaluation Attribute	Documents Needed	Pass/Fail
4	Certificates of Good Conduct	<ul style="list-style-type: none"> • One month old or current Certificate for Supervisor • One month old or current Certificates for 5 field workers 	

In response to this criterion, the Applicant provided the following:

- *At page 73 of its original bid, a Police Clearance Certificate issued on 13th July 2020 by the Directorate of Criminal Investigations to Esther Watiri Irungu showing the said person has no previous record of offences or trial;*
- *At page 107 of its original bid, a Police Clearance Certificate issued on 6th March 2020 by the Directorate of Criminal Investigations to Ngarasi Stephen Chacha showing the said person has no previous record of offences or trial;*
- *At page 108 of its original bid, a Police Clearance Certificate issued on 7th March 2020 by the Directorate of Criminal Investigations to Mark Osiya showing the said person has no previous record of offences or trial;*
- *At page 109 of its original bid, a Police Clearance Certificate issued on 15th February 2020 by the Directorate of Criminal Investigations to Sarah Alungata Okodoi showing the said person has no previous record of offences or trial;*
- *At page 110 of its original bid, a Police Clearance Certificate issued on 21st February 2020 by the Directorate of Criminal Investigations to Elizabeth Wanja Muthoni showing the said person has no previous record of offences or trial; and*
- *At page 111 of its original bid, a Police Clearance Certificate issued on 7th February 2020 by the Directorate of Criminal Investigations to Evans Kawa Patrick showing the said person has no previous record of offences or trial.*

The Board visited the Official Website of the Directorate of Criminal Investigations (cid.go.ke) and notes that the purpose of a Certificate of Good Conduct (also known as a Police Clearance Certificate) and the period of its validity is explained as follows:

"A Certificate of Good Conduct is also referred to as a Police Clearance Certificate and is issued by the Criminal Investigation Department. The certificate of good conduct used to have a validity period of one year which was reduced to six months.

Currently, there is no fixed period for the validity of the good conduct certificate. The validity itself is dependent on whoever is requesting the certificate and so technically, the certificate cannot expire. How recent the certificate is will be determined using the date of issuance that is printed on the certificate.

Whereas a Certificate of Good Conduct used to be valid for a period of one year, the validity period later changed to a period of six months. Currently, there is no fixed period for the validity of a Certificate of Good Conduct. According to the above excerpt, the validity of a Certificate of Good Conduct is dependent on whoever is requesting the certificate and is determined using the date of issuance on the printed Certificate of Good Conduct.

Clause B (4). Mandatory Technical Evaluation of the Appendix to Instructions to Tenderers of the Tender Document required bidders to provide a Certificate of Good conduct that is one month old or a current certificate. This means, bidders were required to either provide a Certificate of Good

Conduct that is not more than one month old from the tender submission deadline of 24th March 2021 or a current certificate which in the Board's view would mean a certificate that is issued on 24th March 2021. In essence, a bidder could provide a Certificate of Good Conduct issued between 23rd February 2021 to 24th March 2021.

The Certificates of Good Conduct provided in the Applicant's original bid are more than one month old from the tender submission deadline of 24th March 2021, thus cannot be said to be current Certificates of Good Conduct.

Accordingly, the Board finds that the Applicant failed to satisfy the criterion under Clause B (4). Mandatory Technical Evaluation of the Appendix to Instructions to Tenderers of the Tender Document having provided Certificates of Good Conduct that are more than one month old from the tender submission deadline of 24th March 2021 thus cannot be said to be current Certificates of Good Conduct.

c) Commitment letter on payment of minimum gross wage to General Cleaners and Supervisors

Clause B (10). Mandatory Technical Evaluation of the Appendix to Instructions to Tenderers of the Tender Document provides as follows:

No	Evaluation Attribute	Documents Needed	Pass/Fail
10	Minimum wage	<ul style="list-style-type: none">• Commitment letter to pay minimum gross wage of kshs. 12,000.00 per month to general cleaners and kshs.20, 000.00 per month to supervisor	

In response to this criterion, the Applicant provided a letter dated 24th March 2021 at page 14 of its original bid, addressed to the 1st Respondent stating as follows:

"Tender Ref No. CA/PROC/OT/37/2020-2021

Ladies/Gentlemen

We, the undersigned, commit to pay minimum gross wage of Kshs. 12,000.00 per month to General Grounds Maintenance Staff and Kshs. 20,000.00 per month to supervisor.

We remain,

Yours sincerely,

[signature affixed]

PENINA NKIROTE

OPERATIONS MANAGER

PEESAME LTD

P.O BOX 29006-00100

NAIROBI"

The Board observes that the Applicant provided a Commitment letter signed by its Operations Manager committing to pay a minimum gross wage of Kshs. 12,000.00 per month to General Grounds Maintenance Staff and Kshs. 20,000.00 per month to the Supervisor in satisfaction of the criterion under consideration.

Accordingly, the Board finds that the Applicant satisfied the criterion under Clause B (10). Mandatory Technical Evaluation of the Appendix to Instructions to Tenderers of the Tender Document because the Applicant provided a Commitment letter signed by its Operations Manager committing to pay a minimum gross wage of Kshs. 12,000.00 per month to General Grounds Maintenance Staff and Kshs. 20,000.00 per month to the Supervisor.

d) Pesticides/Chemicals to be used for Maintenance

Clause B (8). Mandatory Technical Evaluation of the Appendix to Instructions to Tenderers of the Tender Document provides as follows:

No	Evaluation Attribute	Documents Needed	Pass/Fail
8	Pesticides/Chemicals to be used for Maintenance	<ul style="list-style-type: none">• List, photo and details of any chemicals that will be used during the service (minimum 4 items)	

The Board observes that the Applicant challenged the criterion provided in Clause B (8). Mandatory Technical Evaluation of the Appendix to Instructions to Tenderers of the Tender Document, by stating at paragraph 9 (b) of its Supporting Affidavit that the attachment of photographs of chemicals to be used during the service was unlawful. According to the Applicant, attaching such photographs without authorization of the manufacturer would expose the Applicant to claims of infringement of trademarks and copyrights.

In response, the Interested Party avers at paragraph 20 and 21 of its Written Submissions that the Applicant subjected itself to the subject procurement

process without questioning the alleged unlawful criteria. In the Interested Party's view, the Applicant ought to have filed a request for review challenging the said criteria in accordance with section 167 (1) of the Act before participating in the subject tender. Having waived that right, the Interested Party took the view that the Applicant cannot challenge the criteria through the instant Request for review.

The Board already addressed its mind on the import of section 167 (1) of the Act read together with Regulation 203 of Regulations 2020. The Board established that a request for review is filed within fourteen days of; (i) the occurrence of the breach complained of, where the request is made before the making of an award, (ii) the notification under section 87 of the Act or (iii) the occurrence of the breach complained of where the request is made after making of an award to the successful bidder.

The Applicant obtained the Tender Document before the tender submission deadline of 24th March 2021, was well aware of the criterion under Clause B (8). Mandatory Technical Evaluation of the Appendix to Instructions to Tenderers of the Tender Document but failed to seek clarifications from the Procuring Entity on its allegation of infringement of copyrights and trademarks of a manufacturer.

Instead, the Applicant participated in the subject procurement process and is now challenging the criterion provided in Clause B (8). Mandatory Technical Evaluation of the Appendix to Instructions to Tenderers of the

Tender Document to suit its circumstances because its bid was found non responsive on a mandatory technical requirement that was known to it from the onset. The Applicant is estopped from challenging the criteria under Clause B (8). Mandatory Technical Evaluation of the Appendix to Instructions to Tenderers of the Tender Document because its participation in the subject procurement proceedings shows that the Applicant was well aware of this requirement and was comfortable with the same having participated in the subject tender. In any case, the time required to challenge this criterion was fourteen (14) days from 24th March 2021 and the said period lapsed on 7th April 2021. This is because, the Applicant learnt of an alleged breach by 24th March 2021 which was before notification of award.

Given the Applicant subjected itself to the subject tender whilst being aware of the criteria under Clause B (8). Mandatory Technical Evaluation of the Appendix to Instructions to Tenderers of the Tender Document, the Board shall now determine whether the Applicant satisfied the said criteria.

Having studied the Applicant's original bid, the Board notes that the Applicant provided a List of Pesticides and Chemicals at page 17 of its original bid as follows:

Zeta-cypermethrin (Mustang Max)	Zeta-cyfluthrin + Bifethrin (Hero)
Beta cyfluthrin (Baythroid XL)	Methomly (Lannet LV)
Bifenthrin (Brigade)	Spinosad (Tracer)
Acephate (Othene)	Methoxyfenozide (Intrepid 2F)
Flubendiamine (Belt SC)	Indoxacarb (Steward EC)

The Board studied the Applicant's original bid in its entirety but did not find photographs for the Pesticides and Chemicals listed on page 17 of the Applicant's original bid, thus failed to satisfy the criterion provided in Clause B (8). Mandatory Technical Evaluation of the Appendix to Instructions to Tenderers of the Tender Document.

Accordingly, the Board finds that the Applicant did not satisfy the criterion under Clause B (8). Mandatory Technical Evaluation of the Appendix to Instructions to Tenderers of the Tender Document because the Applicant did not provide photographs of the pesticides and chemicals that will be used during execution of the subject tender.

Section 80 (2) of the Act provides that:

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

Further, Article 227 (1) of the Constitution requires State organs and other public entities to contract for goods and services in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

Evaluation of bids is done using the procedures and criteria set out in the Tender Document. In doing so, the Evaluation Committee must treat bidders fairly. In the instant case, the Evaluation Committee evaluated the Applicant in an unfair manner by finding the Applicant non-responsive to the criteria under Clause B (10). Mandatory Technical Evaluation of the Appendix to

Instructions to Tenderers on providing a commitment letter and Clause B (3). Mandatory Technical Evaluation of the Appendix to Instructions to Tenderers of the Tender Document on providing an Affidavit for supervisor's availability for the assignment.

Accordingly, the Board finds that the Procuring Entity failed to evaluate the Applicant's bid at the Mandatory Technical Evaluation Stage in accordance with section 80 (2) on the criterion provided in Clause B (3) and Clause B (10). Mandatory Technical Evaluation of the Appendix to Instructions to Tenderers of the Tender Document.

In determining the appropriate orders to grant in the circumstances, the Board observes that evaluation of bids is a role given to an evaluation committee established pursuant to section 46 of the Act. Section 173 (b) of the Act gives the Board a discretionary power to **"give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings."**

The circumstances in the instant case requires the 1st Respondent to direct the Evaluation Committee to re-instate the Applicant's tender together with all other tenders that made it to the Mandatory Technical Evaluation Stage and to conduct a re-evaluation at the Mandatory Technical Evaluation Stage in respect of Clause B (3) and Clause (B) (10). Mandatory Technical Evaluation of the Appendix to Instructions to Tenderers of the Tender Document only, taking into consideration the Board's findings in this Review.

In totality, the Request for Review succeeds in terms of the following specific orders: -

FINAL ORDERS

In exercise of the powers conferred upon it by section 173 of the Act, the Board makes the following orders in the Request for Review:

- 1. The Accounting Officer of the Procuring Entity's Letters of Notification of Tender No. CA/PROC/OT/37/2020-2021 for Provision of Grounds and Landscape Maintenance Services for CA Centre, South B and Kahawa Station (Reserved for Women, Youth and Persons with Disability) dated 23rd April 2021 and addressed to the Applicant and all other unsuccessful bidders, be and are hereby cancelled and set aside.**
- 2. The Accounting Officer of the Procuring Entity's Letter of Notification of Tender No. CA/PROC/OT/37/2020-2021 for Provision of Grounds and Landscape Maintenance Services for CA Centre, South B and Kahawa Station (Reserved for Women, Youth and Persons with Disability) dated 23rd April 2021 and addressed to the Interested Party herein, be and is hereby cancelled and set aside.**
- 3. The Accounting Officer of the Procuring Entity is hereby ordered to direct the Evaluation Committee to re-instate the**

Applicant's tender and all other tenders that made it to the Mandatory Technical Evaluation Stage, at the Mandatory Technical Evaluation Stage and conduct a re-evaluation at the Mandatory Technical Evaluation Stage in respect of the following criteria only:

- a) Affidavit for Supervisor's availability for the assignment under Clause B (3). Mandatory Technical Evaluation of the Appendix to Instructions to Tenderers of the Tender Document;**
- b) Commitment Letter to pay minimum gross wage under Clause B (10). Mandatory Technical Evaluation of the Appendix to Instructions to Tenderers of the Tender Document.**

4. Further to Order No. 3 above, the Accounting Officer of the Procuring Entity is hereby directed to proceed with the subject procurement proceedings to its logical conclusion including the making of an award to the lowest evaluated bidder in accordance with Clause 2.24.3 of the Appendix to Instructions to Tenderers of the Tender Document read together with section 86 (1) (a) of the Act and issuance of notification letters to all tenderers in accordance with section 87 of the Act and Regulation 82 of Regulations 2020.

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

Dated at Nairobi this 31st day of May 2021

CHAIRPERSON

SECRETARY

PPARB

PPARB