

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 56/2021 OF 16TH APRIL 2021

BETWEEN

KOTAA EAST AFRICAN LIMITED.....APPLICANT

AND

THE ACCOUNTING OFFICER,

KENYA PORTS AUTHORITY.....1ST RESPONDENT

KENYA PORTS AUTHORITY.....2ND RESPONDENT

JONA PESTCON.....INTERESTED PARTY

Review against the decision of the Accounting Officer of Kenya Ports Authority in relation to Tender No. KPA/074/2020-21/MO for Provision of Pest Control Services.

BOARD MEMBERS

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

IN ATTENDANCE

- | | |
|---------------------|-------------------------|
| 1. Mr. Philip Okumu | -Acting Board Secretary |
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BACKGROUND TO THE DECISION

The Bidding Process

Kenya Ports Authority (hereinafter referred to as "the Procuring Entity") invited sealed tenders for Tender No. KPA/074/2020-21/MO for Provision of Pest Control Services (hereinafter referred to as "the subject tender") through an advertisement published in the Star Newspaper on 5th November 2020.

Bid Submission Deadline and Opening of Bids

The Procuring Entity received a total of forty-seven (47) bids by the bid submission deadline of 30th November 2020. The same were opened shortly thereafter by a Tender Opening Committee and recorded as follows: -

No.	Company Particulars
1.	M/s. Master Services
2.	M/s. Annekam Ventures Ltd
3.	M/s. Robmos Ventures
4.	M/s. Connex International Ltd
5.	M/s. Chriscam Services Ltd
6.	M/s. Preticon Ltd
7.	M/s. Timeswrap Enterprises
8.	M/s. Atwood Services Ltd
9.	M/s. Dockyard Investments
10.	M/s. Tech Africa
11.	M/s. Jona Pestcon
12.	M/s. Ollreggy Investment
13.	M/s. CESPA Healthcare Ltd
14.	M/s. Rosalija Enterprises Ltd
15.	M/s. Salmit Ventures
16.	M/s. Kenagro Supplies Ltd
17.	M/s. Pollucon
18.	M/s. Frankwood Enterprises
19.	M/s. Dryne Ltd
20.	M/s. Sanjud Enterprises Ltd
21.	M/s. Digital Sanitation Services
22.	M/s. Somakim Construction & Services Trading Ltd
23.	M/s. Prudence Marine services
24.	M/s. Virgin Clean Ltd

No.	Company Particulars
25.	M/s. Nakaj Services
26.	M/s. Jonstac Supplies
27.	M/s. Life Link Clean Space
28.	M/s. Hals Solution Ltd
29.	M/s. Tamia Ltd
30.	M/s. Danley Co. Ltd
31.	M/s. Rentokil Initial
32.	M/s. Kotaa East African Ltd
33.	M/s. Ephstacia Ltd
34.	M/s. Roan Services
35.	M/s. Qzone Integrated Pest Management Ltd
36.	M/s. Kenraps Ltd
37.	M/s. Krystalline Co. Ltd
38.	M/s. Space Contractors & Suppliers Ltd
39.	M/s. Grand Gee General Supplies
40.	M/s. Kulty Supplies Ltd
41.	M/s. Norjen Enterprises Ltd
42.	M/s. Morace Enterprises Ltd
43.	M/s. Remarc Cleaning Services Ltd
44.	M/s. Maeji Kaiho International Ltd
45.	M/s. Zeina Ventures
46.	M/s. Neral Holdings
47.	M/s. Sender Services Co. Ltd

Evaluation of Bids

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

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

1. Preliminary Evaluation

At this stage, the Evaluation Committee subjected bids to an evaluation against the mandatory documents listed in Clause 2.20 of the Appendix to Instructions to Tenderers at page 16 and 25 of the Tender Document. Twenty-Seven bidders were found non-responsive mandatory requirements.

On the other hand, the following twenty (20) bidders were responsive to the mandatory requirements, thus proceeded to the next stage of Technical evaluation:

No.	Company Particulars
1.	M/s. Preticon Ltd
2.	M/s. Timeswrap Enterprises
3.	M/s. Atwood Services Ltd
4.	M/s. Dockyard Investments
5.	M/s. Jona Pestcon
6.	M/s. Ollreggy Investment
7.	M/s. Salmit Ventures
8.	M/s. Sanjud Enterprises Ltd
9.	M/s. Digital Sanitation Services
10.	M/s. Somakim Construction & Services Trading Ltd
11.	M/s. Virgin Clean Ltd
12.	M/s. Nakaj Services
13.	M/s. Life Link Clean Space
14.	M/s. Halsia Solution Ltd
15.	M/s. Kotaa East African Ltd
16.	M/s. Qzone Integrated Pest Management Ltd
17.	M/s. Krystalline Co. Ltd
18.	M/s. Space Contractors & Suppliers Ltd
19.	M/s. Norjen Enterprises Ltd
20.	M/s. Zeina Ventures

2. Technical Evaluation

At this stage, the Evaluation Committee subjected bids to the Technical Specifications and criteria specified in Clause 2.22 of the Appendix to Instructions to Tenderers of the Tender Document. The Evaluation Committee recommended the following **Fifteen (15) firms** to proceed to the next stage of Financial Evaluation for having scored above the minimum pass mark of **80%**:

No.	Company Particulars	Percentage %
1.	M/s. Timeswrap Enterprises	88
2.	M/s. Dockyard Investments	98
3.	M/s. Jona Pestcon	94
4.	M/s. Ollreggy Investment	88
5.	M/s. Salmit Ventures	95
6.	M/s. Sanjud Enterprises Ltd	96
7.	M/s. Digital Sanitation Services	93

No.	Company Particulars	Percentage %
8.	M/s. Somakim Construction & Services Trading Ltd	92
9.	M/s. Virgin Clean Ltd	96
10.	M/s. Nakaj Services	92
11.	M/s. Life Link Clean Space	100
12.	M/s. Norjen Enterprises Ltd	87
13.	M/s. Krystalline Co. Ltd	94
14.	M/s. Space Contractors & Suppliers Ltd	94
15.	M/s. Kotaa East African Ltd	92

3. Financial Evaluation

At this stage, the Evaluation Committee applied the criterion under Clause 2.24 of Appendix to Instructions to Tenderers of the Tender Document which required recommendation of award to be made to the lowest evaluated bidder per zone.

3.1. Price comparison

The Evaluation committee compared prices of the bidders and recommended award of the subject tender as follows: -

- **Zone 4: M/s. Jona Pestcon at Kshs. 122,640.00 VAT inclusive**
- **Zone 8: M/s. Space Contractors & Suppliers Ltd at Kshs. 288,840. VAT Inclusive**
- **Zone 1: M/s. Ollreggy Investments at Kshs. 210,320.00, VAT Inclusive**
- **Zone 2: M/s. Norgen Enterprise Ltd at Kshs. 253,712.02 VAT Inclusive**
- **Zone 3: M/s. Kotaa East African Ltd at Kshs. 234,784.00 VAT Inclusive**
- **Zone 5: M/s. M/s. Digital Sanitation Services at Kshs. 321,480.00 VAT Inclusive**

- **Zone 6: M/s. Virgin Clean Ltd at Kshs. 271,365.60 VAT Inclusive**
- **Zone 7: M/s. Nakaj Services at Kshs. 353,525.71 VAT Inclusive**

Professional Opinion

In a professional opinion dated 17th March 2021, the Procuring Entity's Head of Procurement and Supplies, advised the Accounting Officer to award the eight (8) lots of the subject tender to M/s Jona Pestcon, being the lowest evaluated bidder for each Lot at their respective quoted prices for a period of three years. The Accounting Officer approved the said Professional Opinion on 18th March 2021.

Notification to Bidders

In letters dated 9th April 2021, the Procuring Entity informed the successful bidder and all other unsuccessful bidders of the outcome of their bids.

THE REQUEST FOR REVIEW

M/s Kotaa East African Limited (hereinafter referred to as "the Applicant") lodged a Request for Review dated 13th April 2021 and filed on 16th April 2021 together with a Statement in Support of the Request for Review sworn on 13th April 2021 and filed on 16th April 2021 and a Reply to the Interested Party's Grounds of Opposition and Replying Affidavit, dated 28th April 2021 and filed on 30th April 2021, through the firm of CK Advocates, seeking the following orders: -

- (a) An order cancelling and setting aside the Procuring Entity's decision as communicated to the Applicant in the letter dated 9th April 2021;***
- (b) An order cancelling and setting aside any letter of award of tender arising from TENDER NO. KPA/074/2020-21/MO TENDER FOR THE PROVISION OF PEST CONTROL SERVICES issued by the Procuring Entity to Jona Pestcon;***
- (c) An order directing the 1st Respondent to award TENDER NO. KPA/074/2020-21/MO TENDER FOR THE PROVISION OF PEST CONTROL SERVICES in the manner hereinafter set out after reviewing the procurement and proceedings leading to the decision by the procuring entity to award the tender to Jona Pestcon;***
- (d) An order directing a re-evaluation at the Financial Evaluation Stage of the tender arising from TENDER NO. KPA/074/2020-21/MO TENDER FOR THE PROVISION OF PEST CONTROL SERVICES in a manner that complies with the provisions of the law and the tender document and TENDER NO. KPA/074/2020-21/MO TENDER FOR THE PROVISION OF PEST CONTROL SERVICES be awarded to the Applicant for being the lowest evaluated in one of the zones;***
- (e) In the alternative but without prejudice to the request for re-evaluation under prayer (d) hereinabove, an order annulling the entire tender process in its entirety and compelling the***

***Respondents to commence a fresh procurement with respect to
TENDER FOR THE PROVISION OF PEST CONTROL SERVICES in
accordance with the established law and procedures;***

***(f) An order directing the Respondents to pay the costs of and
incidental to these proceedings; and***

***(g) Any other relief that the Honourable 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 Memorandum of Response dated 22nd April 2021 and filed on 26th April 2021 together with an Affidavit in support of the Respondents' Memorandum of Response, sworn on 22nd April 2021 and filed on 26th April 2021 through Addraya E. Dena Advocate. The Interested Party lodged Grounds of Opposition dated 28th April 2021 and filed on 29th April 2021 and a Replying Affidavit sworn on 28th April 2021 and filed on 29th April 2021 through Dubow and Company Advocates.

Pursuant to the Board's Circular No. 2/2020 dated 24th 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.

Accordingly, the Applicant lodged Written Submission dated 28th April 2021 and filed on 30th April 2021 while the Interested Party lodged Written Submissions dated 28th April 2021 and filed on 29th April 2021. The Respondents did not file written submissions.

BOARD'S DECISION

After careful consideration of the parties' pleadings and written submissions, the documents and authorities in support thereof and confidential documents submitted to the Board pursuant to section 67 (3) (e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") the Board finds that the following issues crystallize for determination: -

- I. Whether the Request for Review is fatally incompetent for joinder of the successful bidder as an Interested Party instead of a Respondent;**

Depending on the outcome of the above issue: -

- II. Whether the Procuring Entity's award of the subject tender to the Interested Party met the threshold of Article 10, 47, 201, 227 and 232 of the Constitution; and**
- III. Whether the Applicant's letter of notification of unsuccessful bid dated 9th April 2021 meets the threshold of section 87 (3) of the Act and Regulation 82 of the Public**

**Procurement and Asset Disposal Regulations, 2020
(hereinafter referred to as "Regulations 2020").**

On the first issue for determination, the Board observes that the Interested Party alleged in its Grounds of Opposition filed on 29th April 2021 that the Request for Review is incompetent because the Applicant cited it as an Interested Party and not as a Respondent. According to the Interested Party, it ought to have been joined as a Respondent pursuant to section 170 of the Act and not an Interested Party, thus making the Request for Review fatally incompetent. In response to this allegation, the Applicant stated in its Reply to the Grounds of Opposition filed by the Interested Party that the Applicant complied with the requirement of section 170 of the Act dealing with parties to a request for review.

In addressing the first issue, the Board considered the meaning of the word **"Respondent"** and **"Interested Party"** and notes that:

The Black's Law Dictionary, 9th Edition defines the term **"Respondent"** as follows: -

"In legal proceedings, the person against whom action or relief is prayed, or who opposes the prayer of the application, is called the "respondent."

In **Petition No. 37 & 49 of 2017 (Consolidated), Kenya Medical Laboratory Technicians and Technologists Board & 6 others v**

Attorney General & 4 others [2017] eKLR, the court defined the term **"Interested Party"** as: -

"a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation"

Section 170 of the Act which deals with parties to a review provides as follows: -

"The parties to a review shall be—

- (a) the person who requested the review;*
- (b) the accounting officer of a procuring entity;*
- (c) the tenderer notified as successful by the procuring entity; and*
- (d) such other persons as the Review Board may determine."*

Having considered the two definitions outlined hereinbefore, the Board notes that a person against whom an action or a relief is prayed, or a person who opposes the prayer of an application is called a **"Respondent"**. In a request for review application, applicants normally seek relief against the decision of an accounting officer of a procuring entity, therefore joining an accounting officer of a procuring entity as a respondent and in compliance with section 170 (b) of the Act.

On the other hand, bidders who participate in a procurement process have an identifiable stake in the legal proceedings (especially the successful bidder) relating to a procurement process because they might be directly affected by the outcome of a request for review, hence are normally joined as interested parties to a request for review. In the case of a successful bidder, if an applicant is challenging an award to a successful bidder, the successful bidder's role is limited to supporting the applicant or supporting the respondent's case. The successful bidder usually supports the respondent's case because the successful bidder would agree on the procuring entity's decision on award of the tender to it.

This Board has had instances where successful bidders (and other bidders who participated in a procurement process) have been joined as respondents to a request for review. A successful bidder is best suited as an interested party because applicants do not seek remedies against successful bidders but seek remedies against decisions of an accounting officer in their bids. Any candidate or tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity, may seek administrative review (by filing a Request for 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 in accordance with section 167 of the Act. Such a candidate or tenderer who moves the Board by way of a Request for Review filed under section 167 of the Act is known as an applicant.

Section 170 (c) of the Act requires the successful tenderer to be joined as a party to a request for review. This provision does not specify whether such a party should be joined as a respondent or an interested party. The Applicant herein already joined the Interested Party, the successful bidder, as a party to the Request for Review in compliance with section 170 (c) of the Act.

The rationale behind section 170 (c) of the Act is to give successful bidders (and all other bidders) the right to be heard pursuant to Article 50 of the Constitution because a decision of this Board may adversely affect them.

The Interested Party was rightfully joined as an interested party in the proceedings, thus exercised its right to a fair hearing, by filing pleadings in response to the grounds raised in the Request for Review.

Accordingly, the Board finds that the Request for Review is not fatally incompetent because the Interested Party was rightfully joined as an interested party to the Request for Review pursuant to section 170 (c) of the Act.

A brief background to the Request for Review is necessary in addressing the second issue for determination.

The Procuring Entity initiated the subject procurement process through open tendering method whereby all members of the public were invited to submit their bids in response to an advertisement dated 5th November 2020 published in the Star Newspaper. The Procuring Entity directed prospective bidders to download the Tender Document from the Procuring Entity's Website (www.kpa.co.ke) and Government of Kenya's Tenders Portal

(www.tenders.go.ke). According to Section VII. Scope of Works at page 38 of the Tender Document, the subject tender would be implemented in eight (8) zones divided as follows: -

Zone 1	Bandari College, White House, Dockyard, G-Section, Marine tower and environs, Port police, baggage hall and environs, BP 1-4, RORO, Conventional cargo One Stop Centre and environs, SOT to Westmont (all areas from Bandari college to Westmont) Note: To include Quarterly special external fogging against Chikungunya, dengue fever and any emerging vector borne disease outbreak
Zone 2	Kapenguria, Headquarters including K-Section, yards, Gates 18, 20 and environs, Kipevu clinic, One-stop centre, shift manager, terminal engineering, second container terminal 1 and 2 (All areas from Kapenguria to Container Terminal 2) Note: To include Quarterly special external fogging against Chikungunya, dengue fever and any emerging vector borne disease outbreak
Zone 3	Kilindini High Level estate including Bandari Staff Clinic Mbaraki Low/High Estate Shimanzi estate Gorofani estate including the club Makupa Asian Estate Naval base, Tudor block 104/115, Mbaraki block 104/115, Kizingo Block No. 17, CMC Block, Tudor Nora block 99, Pumzika block (Tudor), Kafoka, Liwatoni blocks Old Port, Light House, Executive House-Kizingo, Mbaraki sports club Note: To include Quarterly special external fogging against Chikungunya, dengue fever and any emerging vector borne disease outbreak
Zone 4	Marine crafts (Tugboats, Pilot boats, Mooring Boats, Water barge) -Tug Boats (Simba, Eugene, Duma, Nyangumi, Kiboko) -Pilot Boats (Nyota, Tangelizi, Rubani, Albina, Nahodha, Baharia) -Mooring Boats (KMB 2, KMB 3, KMB 4, KMB 5, KMB 6, KMB 7, KMB 8) -Pollution Control Vessel- Fagio -Water Barge
Zone 5	ICD Nairobi- All premises
Zone 6	ICD Kisumu- All premises including estate Kisumu pier/port including slipway/dockyard
Zone 7	ICD Naivasha- All premises
Zone 8	LAMU port (New port)- All premises

Pursuant to Addendum No. 2 dated 20th November 2020, the Procuring Entity gave instructions on the following additional information: -

“(a) The scope of work in zones 1, 2, 5, 6, 7 and 8 includes all premises and cargo handling equipment as tabled below. The equipment will only be attended to when we have reported cases of pest infestations.

No.	Equipment	Zone 1	Zone 2	Zone 5	Zone 6	Zone 7	Zone 8
1	STS	-	13	-	-	-	
2	RMG	-	6	4	-	-	
3	RTG	2	48	8	-	-	
4	Terminal Tracker	10	100	20	2	7	
5	Reach stacker	3	10	8	1	4	
6	Mobile Harbour crane	3	2	-	5	1	

(b) The scope of work for zone 6 also includes the 8 Marine crafts shown to the bidders during site visit

(c) The price breakdown for marine vessels should indicate monthly cost of treatment

All other conditions of the tender remain the same”

The Applicant was among 47 bidders who submitted their respective bids by the tender submission deadline of 30th November 2020 in response to the Procuring Entity’s Advertisement Notice. The Procuring Entity evaluated the bids received by it and awarded all the zones of the subject tender to the Interested Party herein. The Applicant on the other hand, received a letter of notification of unsuccessful bid dated 9th April 2021, thus challenged that outcome through this Request for Review. The Applicant’s letter of notification states as follows: -

"Reference is made to your participation in the above captioned tender

This is to inform you that pursuant to section 87 (3) of the Public Procurement and Asset Disposal Act, 2015, your bid was not successful because you were not the lowest evaluated bidder.

The successful bidder in regard to this tender is M/s Jona Pestcon

Your tender security of Kshs. 100,000.00 from M/s Family Bank Ltd shall be returned to you for your record after the expiry of the 14 days' appeal period.

We thank you for your participation in the tender and look forward to working with you in future. Should you require any further clarification, please do not hesitate to contact the office of the undersigned.

Yours Faithfully,

[signature affixed]

Johnson G. Ngure

For: Head of Procurement and Supplies

For Ag. Managing Director"

The Board observes that the issue in contention relates to a determination of the applicable criteria for award of the subject tender. Section II. Instructions to Tenderers of the Tender Document alerted bidders of the fact that evaluation of bids would be undertaken in the subject tender by stating under Clause 2.20 and Clause 2.22 thereof that the Evaluation Committee would first conduct a **"Preliminary Examination and Responsiveness of bids"** followed by **"Detailed Evaluation of bids"**. Thereafter, a **"Comparison of Prices"** would be undertaken as stated in Clause 2.22.2 of Section II. Instructions to Tenderers of the Tender Document.

Turning to the Appendix to Instructions to Tenderers, the Board observes that, according to the **"Notes on the Appendix to the Instructions to Tenderers"** on page 21 of the Tender Document, the purpose of the Appendix to Instructions to Tenderers is described as follows: -

- "1. The Appendix to Instructions to Tenderers is intended to assist the procuring entity in providing specific information in relation to the corresponding clause in the instructions to tenderers included in Section II and has to be prepared for each specific procurement.***
- 2. The procuring entity should specify in the appendix, information and requirements specific to the circumstances of the procuring entity, the goods to be procured and the tender evaluation criteria that will apply to the tenders.***

3. *In preparing the Appendix the following aspects should be taken into consideration.*

a) The information that specifies and complements provisions of Section II to be incorporated

b) Amendments and/or supplements if any, to provisions of Section II as necessitated by the circumstances of the goods to be procured to be also incorporated.

4. *Section II should remain unchanged and can only be amended through the Appendix.*

a) Clauses to be included in this part must be consistent with the public procurement law and regulations.”

The “**Notes to the Appendix to Instructions to Tenderers**” outlined hereinbefore state that the Appendix to Instructions to Tenderers would assist the procuring entity in providing specific information in relation to the corresponding clause in the instructions to tenderers included in Section II. Instructions to Tenderers and specify the tender evaluation criteria that will apply to the tenders.

The Board studied the provisions in the Appendix to Instructions to Tenderers of the Tender Document to determine whether specific information was provided regarding the tender evaluation criteria applicable to tenders received in the subject tender. In that regard, Clause 2.20 and Clause 2.22 of the Appendix to Instructions to Tenderers (which relates to

the corresponding Clause 2.20 and Clause 2.22 in Section II. Instructions to Tenderers) of the Tender Document provided the procedures and criteria for evaluation at the Preliminary (**"Preliminary Examination and Responsiveness of bids"**), Technical (**"Detailed Evaluation of Bids"**) and Financial Evaluation (**"Comparison of Prices"**) Stages.

Clause 2.15.1 read together with Clause 2.22 (i) of the Appendix to Instructions to Tenderers of the Tender Document deals with the Mandatory Documents considered by the Evaluation Committee when evaluating bids at the Preliminary Evaluation Stage. Further, Clause 2.22 (ii) of the Appendix to Instructions to Tenderers of the Tender Document provided the parameters of Technical Evaluation including an obligation imposed on bidders to attain an overall score of 80% so as to proceed to Financial Evaluation.

Regarding Financial Evaluation, Clause 2.22 (iii) of the Appendix to Instructions to Tenderers of the Tender Document provided the procedure and criteria for evaluation in the following terms: -

"Financial Evaluation- lowest evaluated bidder from the highest/largest zone to the lowest"

It is therefore evident that the Appendix to Instructions to Tenderers provided the procedures and criteria for evaluation of tenders in the subject tender as directed by the Notes to the Appendix to Instructions to Tenderers on page 21 of the Tender Document.

On the same Appendix to Instructions to Tenderers, Clause 2.24 thereof provided an award criterion as follows: -

"Award of Tender shall be to the lowest evaluated bidder per zone"

Further, the Appendix to Instructions to Tenderers stated **"the Authority reserves the right to limit the number of zones awarded to a bidder to ensure fair and equitable distribution with due consideration to economy and efficiency."**

The issue under consideration relates to interpretation of the Award Criteria provided under Clause 2.24 of the Appendix to Instructions to Tenderers against the Clause found at the foot of Section VIII. Price Schedule of Services on page 44 of the Tender Document.

Section VIII of the Tender Document deals with Price Schedule of Services, which specified key areas that bidders were required to complete when quoting their tender prices in each of the eight zones. This Price Schedule of Services is listed as one of the Standard Forms under Section IX on page 45 of the Tender Document. The Price Schedule of Services appears as follows:

"Section VIII. Price Schedule of Services

(a) Schedule of Contract Price per zone

No.	Zone	Total Rate per month VAT Inclusive (Kshs)
1	1	
2	2	
3	3	
4	4	

5	5	
6	6	
7	7	
8	8	

(b) Detailed Breakdown of the Lump-Sum Price into Cost Elements Per Month for each zone

Name of Tenderer.....Tender Number.....

Zone No.....

No.	Cost Elements	Rate Per Month Kshs.	VAT Kshs.
1	Rates for equipment usage 1. Vehicle (including fuel) ... 2. Equipment including fogging machines, knapsack sprayers. 3. Chemicals Personal Protective equipments for staff	.....	.....
2	Staff Costs: Supervisor Other Staff	.....	.....
3	Other overheads and profit	.....	.....
TOTAL		.....	.....
16% VAT		.....	.....
GRAND TOTAL		.....	.....

Signature of tenderer.....

Note:

- **This detailed breakdown should be done for each zone quoted for.**
- **Award shall be per zone. No bidder shall be awarded more than one zone"**

Having studied the Standard form for Price Schedule of Services, it is worth noting that the same provided a schedule to be completed by bidders with respect to the total contract price (per month) for each zone that a bidder has bidden for. Further, bidders would complete a separate price schedule giving a detailed breakdown of the lump-sum price they had provided under Clause (a) Schedule of Contract Price per zone.

The Price Schedule of Services did not provide; the mandatory documents to be evaluated at the Preliminary Evaluation, or the parameters of Technical Evaluation including the overall minimum technical score applicable during Technical Evaluation. Further, the said Price Schedule of Services did not provide the criteria applicable during Financial Evaluation. It is only the foot of the said Price Schedule of Services that stated:

"Award shall be per zone. No bidder shall be awarded more than one zone"

With that in mind, the Board observes that 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"**. The procedures and criteria for evaluation of bids in the subject tender are all provided in the Appendix to Instructions to Tenderers of the Tender

Document. As a matter of fact, the Notes to the Appendix to Instructions to Tenderers stated that the Appendix would specify the tender evaluation criteria that will apply to tenders (that is, tender received in the subject tender). It therefore follows that, any clause that appears to suggest an evaluation criteria other than the criteria provided in the Appendix to Instructions to Tenderers would not supersede the evaluation criteria in the Appendix to Instructions to Tenderers.

Pursuant to section 80 (2) of the Act, the Evaluation Committee was bound by the procedures and criteria for evaluation and comparison of tenders, which we have found was provided in the Appendix to Instructions to Tenderers of the Tender Document and was applicable to all tenders submitted in response to the Procuring Entity's Advertisement dated 5th November 2020.

This therefore raises the question whether the Procuring Entity could abandon the award criteria of **"Lowest evaluated bidder per zone"** provided under Clause 2.24 of the Appendix to Instructions to Tenderers of the Tender Document, so as to apply the clause found at the foot of the Standard Forms for Price Schedule of Services on page 44 of the Tender Document which provided: **award shall be per zone and that no bidder shall be awarded more than one (1) zone.**

The Board has established that Section VIII of the Tender Document deals with Price Schedule of Services which required bidders to state their quoted

prices in the respective zones. This section does not form part of the procedures and criteria for evaluation and award of the subject tender as provided in the Appendix to Instructions to Tenderers of the Tender Document. It was poor drafting of the Tender Document by the Procuring Entity adding a clause on award criteria under Section VIII of the Tender Document which deals with Price Schedule of Services, because the award criteria, was already stated in Clause 2.24 of the Appendix to Instructions to Tenderers of the Tender Document.

The award criteria provided in Clause 2.24 of the Appendix to Instructions to Tenderers of the Tender Document supersedes the provision that is found at the foot of Section VIII. Price Schedule of Services at page 44 of the Tender Document. Our position is fortified by the Board's earlier finding that Clause 2.22 and Clause 2.24 of the Appendix to Instructions to Tenderers of the Tender Document provided the evaluation and award criteria, respectively therefore making the said provisions applicable pursuant to section 80 (2) of the Act.

The Financial Evaluation Criteria in the subject tender was that of **"lowest evaluated bidder from the highest/largest zone to the lowest"**. The Interested Party bid for all the eight zones and quoted the following prices in the respective eight zones as can be seen from the duly completed **"Schedule of Contract Price per zone"** at page 18 of its original bid: -

No.	Zone	Total Rate per month VAT Inclusive (Kshs)
1	1	116,940
2	2	110,100
3	3	104,400
4	4	122,640

5	5	122,640
6	6	124,920
7	7	136,320
8	8	136,320
	GRAND TOTAL	974,280

The Board compared the prices quoted by the Interested Party against prices quoted by other bidders who reached the Financial Evaluation Stage and notes the following:

Zone 1

No.	Firm Name	Price in Ksh VAT Inclusive
1.	M/s Sanjud Enterprises Ltd	671,606.60
2.	M/s. Salmit Ventures	456,645.60
3.	M/s. Life Link Clean Space	444,037.10
4.	M/s. Dockyard Investment	415,387.50
5.	M/s. Kotaa East African Ltd	395,836.00
6.	M/s. Nakaj Services	353,525.71
7.	M/s. Timeswrap Enterprises	308,160.00
8.	M/s. Space Contractors & Suppliers Ltd	288,840.00
9.	M/s. Digital Sanitation Services	272,164.00
10.	M/s. Virgin Clean Ltd	259,965.60
11.	M/s. Norgen Enterprise Ltd	255,011.62
12.	M/s. Ollreggy Investment	210,320.00
13.	M/s. Jona Pestcon	116,940.00

Zone 2

No.	Firm Name	Price in Ksh VAT Inclusive
1.	Sanjud Enterprises Ltd	671,606.60
2.	Dockyard Investment	490,428.00
3.	Salmit Ventures	462,445.60
4.	Life Link Clean Space	444,037.10
5.	Nakaj Services	353,525.71
6.	Timeswrap Enterprises	330,834.00
7.	Digital Sanitation Services	307,042.00
8.	Kotaa East African Ltd	296,960.00
9.	Space Contractors & Suppliers Ltd	288,840.00
10.	Virgin Clean Ltd	265,665.60
11.	Norgen Enterprise Ltd	253,712.02
12.	Ollreggy Investment	210,320.00
13.	M/s. Jona Pestcon	110,100.00

Zone 3

No.	Firm Name	Price in Ksh VAT Inclusive
1.	M/s. Sanjud Enterprises Ltd	650,300.00
2.	M/s. Dockyard Investment	543,637.50
3.	M/.s Nakaj Services	420,225.71
4.	M/s. Life Link Clean Space	408,327.10
5.	M/s. Salmit Ventures	375,445.60
6.	M/s. Timeswrap Enterprises	330,834.00
7.	M/s. Digital Sanitation Services	327,226.00
8.	M/s. Virgin Clean Ltd	322,665.60
9.	M/s. Kotaa East African Ltd	234,784.00
10.	M/s. Norgen Enterprise Ltd	216,434.02
11.	M/s. Ollreggy Investment	210,320.00
12.	M/s. Space Contractors & Suppliers Ltd	210,122.40
13.	M/s. Jona Pestcon	104,400.00

Zone 4

No.	Firm Name	Price in Ksh VAT Inclusive
1.	M/s. Dockyard Investment	398,772.00
2.	M/.s Nakaj Services	353,525.71
3.	M/s. Salmit Ventures	352,245.60
4.	M/s. Timeswrap Enterprises	330,834.00
5.	M/s. Digital Sanitation Services	315,352.00
6.	M/s Sanjud Enterprises Ltd	285,500.00
7.	M/s. Ollreggy Investment	275,020.00
8.	M/s. Life Link Clean Space	237,187.10
9.	M/s. Virgin Clean Ltd	208,665.60
10.	M/s. Norgen Enterprise Ltd	186,748.42
11.	M/s. Kotaa East African Ltd	157,064.00
12.	M/s. Space Contractors & Suppliers Ltd	132,936.00
13.	M/s. Jona Pestcon	122,640.00

Zone 5

No.	Firm Name	Price in Ksh VAT Inclusive
1.	M/s Sanjud Enterprises Ltd	671,606.60
2.	M/s. Dockyard Investment	521,420.00
3.	M/s. Salmit Ventures	456,645.60
4.	M/s. Life Link Clean Space	444,037.10
5.	M/.s Nakaj Services	420,225.71
6.	M/s. Timeswrap Enterprises	350,841.00
7.	M/s. Kotaa East African Ltd	332,920.00
8.	M/s. Digital Sanitation Services	321,480.00

No.	Firm Name	Price in Ksh VAT Inclusive
9.	M/s. Space Contractors & Suppliers Ltd	288,840.00
10.	M/s. Virgin Clean Ltd	271,365.60
11.	M/s. Norgen Enterprise Ltd	255,490.42
12.	M/s. Ollreggy Investment	210,320.00
13.	M/s. Jona Pestcon	122,640.00

Zone 6

No.	Firm Name	Price in Ksh VAT Inclusive
1.	M/s. Dockyard Investment	523,887.00
2.	M/s. Salmit Ventures	479,845.60
3.	M/s. Life Link Clean Space	444,037.10
4.	M/s. Nakaj Services	420,225.71
5.	M/s. Digital Sanitation Services	408,405.00
6.	M/s. Timeswrap Enterprises	350,841.00
7.	M/s. Kotaa East African Ltd	310,880.00
8.	M/s. Space Contractors & Suppliers Ltd	288,840.00
9.	M/s. Virgin Clean Ltd	271,365.60
10.	M/s. Norgen Enterprise Ltd	255,490.42
11.	M/s. Ollreggy Investment	210,320.00
12.	M/s. Jona Pestcon	124,920.00
13.	M/s Sanjud Enterprises Ltd	No amount quoted

Zone 7

No.	Firm Name	Price in Ksh VAT Inclusive
1.	M/s Sanjud Enterprises Ltd	702,728.60
2.	M/s. Salmit Ventures	491,445.60
3.	M/s. Life Link Clean Space	444,037.10
4.	M/s. Digital Sanitation Services	408,405.00
5.	M/s. Kotaa East African Ltd	374,680.00
6.	M/s. Nakaj Services	353,525.71
7.	M/s. Timeswrap Enterprises	317,496.00
8.	M/s. Space Contractors & Suppliers Ltd	288,840.00
9.	M/s. Virgin Clean Ltd	271,365.60
10.	M/s. Ollreggy Investment	259,200.00
11.	M/s. Norgen Enterprise Ltd	253,575.22
12.	M/s. Jona Pestcon	136,320.00
13.	M/s. Dockyard Investment	No amount quoted

Zone 8

No.	Firm Name	Price in Ksh VAT Inclusive
1.	M/s. Salmit Ventures	613,245.60

No.	Firm Name	Price in Ksh VAT Inclusive
2.	M/s. Kotaa East African Ltd	563,760.00
3.	M/s. Nakaj Services	529,766.94
4.	M/s. Life Link Clean Space	444,037.10
5.	M/s. Digital Sanitation Services	410,543.00
6.	M/s. Virgin Clean Ltd	322,665.60
7.	M/s. Timeswrap Enterprises	317,496.00
8.	M/s. Space Contractors & Suppliers Ltd	288,840.00
9.	M/s. Ollreggy Investment	247,800.00
10.	M/s. Jona Pestcon	136,320.00
11.	M/s Sanjud Enterprises Ltd	No amount quoted
12.	M/s. Norgen Enterprise Ltd	No amount quoted
13.	M/s. Dockyard Investment	No amount quoted

Just like the Interested Party, the Applicant bid for all the eight zones and quoted the following prices in the respective eight zones as can be seen from the duly completed “**Schedule of Contract Price per zone**” at page 44 of its original bid:

No.	Zone	Total Rate per month VAT Inclusive (Kshs)
1	1	395,836.00
2	2	296,960.00
3	3	234,784.00
4	4	157,064.00
5	5	332,920.00
6	6	310,880.00
7	7	374,680.00
8	8	563,760.00
	GRAND TOTAL	2,666,884.00

The procedure and criteria for Financial Evaluation under Clause 2.22 (iii) of the Appendix to Instructions to Tenderers of the Tender Document, gave the Evaluation Committee an obligation of determining the “**lowest evaluated bidder from the highest/largest zone to the lowest**”. Evidently, the Interested Party was the lowest evaluated tenderer in all the eight zones. Consequently, the Interested Party would be recommended for award of the

subject tender in accordance with the award criteria of **"Lowest evaluated bidder per zone"** provided under Clause 2.24 of the Appendix to Instructions to Tenderers of the Tender Document. In essence, the Evaluation Committee could not abandon the award criteria provided in Clause 2.24 of the Appendix to Instructions to Tenderers of the Tender Document after applying the financial evaluation criteria under Clause 2.22 (iii) of the Appendix to Instructions to Tenderers of the Tender Document.

The Applicant deponed at paragraph 10 of its Statement in Support of the Request for Review that award of all the eight zones to the Interested Party offends the principle of equity as provided in Article 227 (1) of the Constitution. The Applicant also cited Article 10, 47, 201 and 232 of the Constitution to support its position that the Procuring Entity failed to promote fair competition, thus denied other bidders equal opportunity of award of the subject tender. In the Applicant's view, the subject procurement process was discriminatory, thus falling short of the principles enshrined in the Constitution.

In response, the Respondents deponed at paragraph 16 of their Replying Affidavit that the subject procurement process adhered to the principles enshrined in the Constitution. In the Respondents' view, the criteria for evaluation was applied to all bidders in strict adherence to the values and principles of public procurement which requires efficient, effective and economic use of public resources. The Respondents further depone that the Constitution aims at ensuring procuring entities attain value for money and

that award of the subject tender to the Interested Party as the lowest evaluated tender in all the eight zones is cost-effective.

The Interested Party on the other hand, deponed at paragraph 4 of its Replying Affidavit that the Procuring Entity invited all members of the public to bid for various zones without any limitation thus promoting fair competition.

Having considered parties' rival arguments, the Board observes that Article 10 of the Constitution lists the national values and principles of governance that bind all State organs, State officers, public officers and all persons which include equality, good governance, integrity, transparency and accountability, among others. Article 47 of the Constitution deals with fair administrative action and provides in subsection 1 thereof that:

"Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair"

As already established by the Board, the Procuring Entity applied open tendering method wherein all members of the public were invited to bid for the subject tender. Further, there is no provision in the Tender Document that limited the number of zones that a bidder could bid for. The Applicant bid for all the eight zones in the subject tender, was subjected to the same procedures and criteria for evaluation together with all other bidders who participated in the subject tender. At the Financial Evaluation stage, the Applicant, including fifteen (15) other bidders that made it to Financial Evaluation were subjected to the financial evaluation criteria provided in

Clause 2.22 (iii) of the Appendix to Instructions to Tenderers of the Tender Document. In addition to this, all the 15 bidders were subjected to the award criteria provided in Clause 2.24 of the Appendix to Instructions to Tenderers of the Tender Document. This gave the Applicant an opportunity to compete on an equal footing with other bidders who made it to the Financial Evaluation Stage so as to determine the lowest evaluated bidder per zone.

Article 201 of the Constitution provides for the principles of public finance including the requirement that public money shall be used in a prudent and responsible way pursuant to subsection (d) thereof. Further, Article 227 (1) of the Constitution provides that:

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

On its part, Article 232 (1) (b) and (c) of the Constitution provide that the values and principles of public service include:

"232 (1) (a);"

(b) efficient, effective and economic use of resources;

(c) responsive, prompt, effective, impartial and equitable provision of services;"

The Applicant cited the principle of equity to support its position that the Procuring Entity ought to have awarded the subject tender to one bidder per zone, so that a bidder does not receive notification of award in more than one zone.

Harry Jones, in his Article known as **"Equity in development: Why it is important and how to achieve it"**, published by the Overseas Development Institute (Working Paper 311, November 2011) explains the equity principle at page 3 to 7 of the said Article as follows:

"Equity is the idea that, despite many differences, all people share a common humanity or human dignity and, as a result of this, we must consider how each of them should be treated. This is not the same as treating people equally, as we shall see; rather, it is the idea that all people count in the moral calculus.

Equity, is not concerned primarily with what the final distribution of some good is. Rather, it operates at a higher argumentative level, requiring that goods be distributed according to principles that respect people's common humanity. This involves looking at how the distribution respects the nature of the goods and certain features of the people between whom they are being distributed. For example, an equitable principle says that health care should be provided according to how much health care each person needs.

To advance equality, the principle of equity strives to give equal concern for people's needs: Some goods/services are matters of necessity and should be distributed proportional to people's level of need and nothing else. Positions in society and rewards should be distributed to reflect differences in effort and ability, based on fair competition"

Having considered how the principle of equity applies as explained in the foregoing excerpt, the Board observes that the principle of equity ensures equal and fair distribution of resources according to each person's level of needs. Further, all persons are given an opportunity for fair competition so that distribution of resources reflect such persons' differences, effort and ability.

In the instant case, the Procuring Entity did not bar any bidder from submitting a tender for more than one zone. Bidders were subjected to the same evaluation criteria and award criteria which was outlined in the Appendix to Instructions to Tenderers of the Tender Document. The manner in which the subject procurement process was undertaken allowed fair competition so that each bidder can demonstrate their ability of submitting the lowest evaluated price in each of the eight zones in the subject tender.

The Interested Party participated in all the zones and was found to have submitted the lowest evaluated bid in all the eight zones. On the other hand, the Applicant participated in all the zones, but did not submit the lowest evaluated bid in any of the eight zones.

It is the Board's considered view that all bidders participated in the subject tender by competing on an equal footing for award of the subject tender. Given the Procuring Entity did not bar any bidder from quoting for more than one zone, it was a likelihood that a bidder would emerge as the lowest evaluated in all the zones, provided such bidder submitted the lowest evaluated tender price in each of the eight zones.

The principle of equity provided in Article 227 (1) of the Constitution must be considered against all other principles provided in the aforesaid provision. In effect, the Procuring Entity had an obligation of awarding the subject tender in a cost-effective manner, thus could not consider the next lowest evaluated bidder in Zone 2 (or any other zone) simply because the Interested Party already had the lowest evaluated bid in Zone 1.

The Board observes that if the clause on **"limiting award of the subject tender to one bidder per zone"** is considered, as recommended by the Evaluation, then it would mean awarding the subject tender as follows:

Zone	Bidder	Amount
Zone 1	M/s Ollreggy Investment	210,320.00
Zone 2	M/s Norgen Enterprise Ltd	253,712.02
Zone 3	M/s Kotaa East African Ltd	234,734.00
Zone 4	M/s Jona Pestcon	122,640.00
Zone 5	M/s Digital Sanitation Services	321,480.00
Zone 6	M/s Virgin Clean Ltd	271,365.00
Zone 7	M/s Nakaj Services	353,525.71
Zone 8	M/s Space Contractors & Suppliers Ltd	288,840.00
TOTAL		2,056,667.33

The Interested Party's grand total amount of award in the eight zones amounts to Kshs. 974,280.00 whereas the above table shows **"limiting award of the subject tender to one bidder per zone"** would mean the Procuring Entity would award the eight zones at a total amount of Kshs. 2,056,667.33. This demonstrates the Procuring Entity would spend Kshs. 1,082,387.33 more of tax payer's money. Evidently, limiting award of the subject tender to one bidder per zone, undermines the principle of cost-effectiveness under Article 227 of the Constitution and the requirement for all state organs to use public money in a prudent and responsible way in line with Article 201 (d) of the Constitution. The principle of cost-effectiveness requires the Procuring Entity to achieve value for money by awarding a tender to the lowest evaluated bidder, even if in the circumstances, the lowest evaluated bidder was only one bidder in all the eight zones that make up the subject tender.

It is not lost to the Board that the Appendix to Instructions to Tenderers stated **"the Authority reserves the right to limit the number of zones awarded to a bidder to ensure fair and equitable distribution with due consideration to economy and efficiency."** The Macmillan English Dictionary, 7th Edition, defines the term **"reserving a right"** as: -

"(i) to have the right to do something if you later think it is necessary.

(ii) a phrase used to tell someone that you have the right to do something specific, and that you will use that right if you feel it is necessary”

The foregoing definitions demonstrate that the phrase provided in the Appendix to Instructions to Tenderers was directory and not mandatory. In the instant case, the Procuring Entity would go against the principle of cost-effectiveness if it were to limit the number of zones to be awarded to a bidder for the reasons stated hereinbefore. Similarly, it would not amount to fair competition to allow a bidder to quote prices for all the zones only to deny award of the tender to that bidder in some zones, yet such bidder was the lowest evaluated bidder in all the eight zones.

This Board is persuaded that had the Applicant emerged the lowest evaluated bidder in all the eight zones, it is unlikely that it would have challenged that outcome neither would it make a proposal to the Procuring Entity for the Applicant to retain one zone while other zones are awarded to other bidders, yet other bidders did not have the lowest evaluated tender prices.

It is the Board's considered finding that the Procuring Entity's award of all the eight zones of the subject tender to the Interested Party meets the threshold of Article 10, 47, 201 (d), 227 (1) and 232 (1), (b) and (c) of the Constitution.

On the third issue for determination, the Applicant challenged the letter of notification of unsuccessful bid dated 9th April 2021 issued to it by the Procuring Entity on two grounds. In the Applicant's view, its letter of

notification does not meet the requirements of section 87 (3) of the Act because (i) it was issued by a person who is not an accounting officer and (ii) the same did not disclose the tender sum quoted by the successful tenderer.

Section 87 of the Act provides as follows: -

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

(2)

(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.

Further, Regulation 82 of the 2020 Regulations provides as follows: -

"(1) The notification to the unsuccessful bidder under section 87 (3) of the Act, shall be in writing and shall be made at the same time the successful bidder is notified.

(2) For greater certainty, the reason to be disclosed to the unsuccessful bidder shall only relate to their respective bids.

(3) The notification in this regulation shall include the name of the successful bidder, the tender price and the reason why the bid was successful in accordance with section 86 (1) of the Act.”[Emphasis by Board]

On the first limb of the third issue, the Board observes that pursuant to section 87 of the Act, an accounting officer of a procuring entity is the one that issues notification letters to successful and unsuccessful bidders.

In determining whether this duty can be delegated, the Board notes that section 37 of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya provides that: -

"Where by or under an Act, powers are conferred or duties are imposed upon a Minister or a public officer, the President, in the case of a Minister, or the Minister, in the case of a public officer, may direct that, if from any cause the office of that Minister or public officer is vacant, or if during any period, owing to absence or inability to act from illness or any other cause, the Minister or public officer is unable to exercise the powers or perform the duties of his office, those powers shall be had and may be exercised and those duties shall be performed by a Minister designated by the President or by a person named by, or by the public officer holding an office designated by, the Minister; and thereupon the Minister, or the person or public officer, during that period, shall have and may exercise those powers and shall perform those duties,

subject to such conditions, exceptions and qualifications as the President or the Minister may direct."

The above provision specifies that a public officer, such as the Accounting Officer herein may delegate his authority because of inability to act in certain circumstances. However, in exercise of his function as a public officer, the Accounting Officer is bound by principles of leadership and integrity under the Constitution and other legislation. Article 10 (2) (c) of the Constitution outlines national values and principles of governance that bind all State organs, State officers and public officers including "*good governance, integrity, transparency and accountability*". Article 232 (1) (e) of the Act puts it more strictly, that "*the values and principles of public service include accountability for administrative acts*".

Further, Section 5 of the Public Service (Values and Principles) Act No. 1 A of 2015 requires public officers to maintain high standards of professional ethics in that: -

"5 (1) *Every public officer shall maintain high standards of professional ethics*

(2) *For purposes of subsection (1), a public officer maintains high standards of professional ethics if that public officer*

(a) *.....;*

(b) *.....;*

- (c) is transparent when executing that officer's functions;***
- (d) can account for that officer's actions;***
- (e);***
- (f);***
- (g);***
- (h) observes the rule of law.***

From the above provisions, the Board notes that the Accounting Officer has the obligation to maintain high standards of professional ethics as he is held accountable for administrative acts, whether performed personally or through delegated authority.

The above provisions demonstrate that the Accounting Officer has power to delegate his authority, but he must still remain accountable for acts performed by persons to whom he has delegated authority to act on his behalf. In order to observe the national values and principles of governance, it is more efficient for an accounting officer to specify the tender for which the delegated authority is given to avoid instances where such authority is exercised contrary to the manner in which he had specified. The person to whom the authority is delegated may use such delegated authority to undermine the Accounting Officer.

The Constitution and the aforementioned legislation gives responsibilities to all persons in the public service including the Procuring Entity's Accounting Officer to take necessary steps to ensure that his authority, when delegated,

is specific, is given in writing and not open to misuse contrary to the manner he had specified. To achieve the underlying principles and national values of governance, the delegated authority by an accounting officer must be in writing and specific to a particular tender to avoid instances where such authority is exercised contrary to the manner in which he had specified, thus undermining the accounting officer.

With respect to delegation of authority, the Board finds that the Accounting Officer has the power to delegate his authority in writing to issue letters of notification to successful and unsuccessful bidder.

Having studied the letter of notification issued to the Applicant, the Board observes that the same was signed by one Johnson G. Ngure for the Head of Procurement and Supplies, for the Acting Managing Director of the Procuring Entity.

From the documentation provided to the Board pursuant to section 67 (3) (e) of the Act, the Acting Managing Director of the Procuring Entity issued a letter of delegation of Authority dated 24th March 2021 to the Procuring Entity's Head of Procurement and Supplies, Mr. Cosmas G. Makori. The letter of 24th March 2021 states as follows: -

**"DELEGATION OF AUTHORITY TO SIGN DOCUMENTS UNDER
THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT, 2015.**

**KPA/074/2020-2021/MO: PROVISION OF PEST CONTROL
SERVICES**

The Public procurement and Asset Disposal Act, 2015 vests the responsibility with the Accounting Officer in the performance of various roles in the supply chain function. Section 69 (4) provides that no procurement approval shall be made by a person exercising delegated authority as an accounting officer or head of procurement function unless such delegation has been approved in writing by the accounting officer or the Head of Procurement unit respectively.

I delegate to you as Head of Procurement and Supplies, the responsibility of issuing notification letters to all persons/bidders who submitted tenders including termination of procurement proceedings.

This delegation applies only to the subject tender.

Your Faithfully

[signature affixed]

Rashid K Salim, IEng. IMarEng

AG. MANAGING DIRECTOR"

The Procuring Entity furnished to the Board, another letter of delegation of Authority dated 29th March 2021 written by the Procuring Entity's Head of Procurement and Supplies, Mr. Cosmas G. Makori and addressed to the Procuring Entity's Principal Procurement Officer stating as follows: -

"DELEGATION OF AUTHORITY TO SIGN DOCUMENTS UNDER THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT, 2015.

The Public Procurement and Asset Disposal Act, 2015 vests the responsibility with the Accounting Officer in the performance of various roles in the supply chain function. Section 69 (4) provides that no procurement approval shall be made by a person exercising delegated authority as an accounting officer or head of procurement function unless such delegation has been approved in writing by the accounting officer or the Head of Procurement unit respectively.

I delegate to you as acting Head of Procurement and Supplies, all the function of the office including responsibility of issuing notification letters to all persons/bidders who submitted tenders including termination of procurement proceedings.

This delegation applies until 9th April 2021.

Your Faithfully

[signature affixed]

Cosmas G. Makori

HEAD OF PROCUREMENT AND SUPPLIES"

Lastly, the Board has had the benefit of perusing a letter of delegation of Authority dated 29th March 2021 written by the Procuring Entity's Acting

Managing Director and addressed to the Procuring Entity's Principal Procurement Officer (Stock Control & PP), Mr. Johnson Gachanja Ngure which reads as follows: -

"DELEGATION OF AUTHORITY TO SIGN DOCUMENTS UNDER THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT, 2015.

The Public procurement and Asset Disposal Act, 2015 vests the responsibility with the Accounting Officer in the performance of various roles in the supply chain function. Section 69 (4) provides that no procurement approval shall be made by a person exercising delegated authority as an accounting officer or head of procurement function unless such delegation has been approved in writing by the accounting officer or the Head of Procurement unit respectively.

To hasten the procurement processes and ensure that the acquisition of goods, services and works is not delayed, I delegate the following functions to you as the Ag. Head of Procurement and Supplies: -

- 1. Confirmation that the Kenya Ports Authority does not commence any procurement proceedings until satisfied that sufficient funds to meet the obligations of the resulting contract are reflected in the procurement plan and approved budget estimates**

- 2. Ensuring that the Kenya Ports Authority uses the standard procurement and asset disposal documents issued by the Public Procurement Regulatory Authority in all procurement and asset disposal proceedings.**
- 3. Be responsible for issuing letters to all persons who submitted tenders including termination of procurement proceedings.**
- 4. Preparation of tender documents and quotation documents in consultation with the user and other relevant departments.**

This delegation applies from 29th March 2021 to 9th April 2021, both dates inclusive while answering for Mr. Cosmas Makori, Head of Procurement and Supplies, who is on emergency leave.

[signature affixed]

Rashid K. Salim, IEng, IMarEng

Ag. Managing Director”

Having considered the contents of the three letters set out hereinbefore, the Board notes that in the letter dated 24th March 2021, the 1st Respondent initially delegated authority to the Procuring Entity’s Head of Procurement and Supplies, Mr. Cosmas G. Makori, thus allowing him to issue notification letters to bidders specifically in relation to subject tender. This authority was

specifically delegated to the Head of Procurement and Supplies and was limited to **issuance of notification letters to all persons/bidders who submitted tenders including termination of procurement proceedings in the subject tender.**

In a subsequent letter dated 29th March 2021, the Head of Procurement and Supplies delegated authority to Mr. Johnson Gachanja Ngure as Acting Head of Procurement and Supplies to **issue notification letters to all persons/bidders who submitted tenders including termination of procurement proceedings** without specifying the tender for which such further delegation was given.

The latin maxim on delegation of authority known as ***"Delegatus Non Potest Delegare"*** is described in the Black's Law Dictionary in the following terms: -

"A person to whom an authority or decision-making power has been delegated to from a higher source, cannot, in turn, delegate again to another, unless the owner of the Authority explicitly authorized further delegation."

In **Judicial Review Miscellaneous Application No. 9 of 2019, Republic v University of Nairobi & 2 others; Ex-parte: Mwangi Emma Wahito & another [2020] eKLR**, the High Court considered application of the above maxim and held as follows at paragraph 22 thereof:

"It is the general position in law that a person to whom powers or duties are delegated cannot delegate their performance to someone else under the principle expressed by the maxim delegatus non potest delegare (a delegate has no powers to delegate). A power to delegate further can only arise where it is within the scope of the primary delegate's authority and is expressly authorized by that primary delegate."

The Board concurs with the finding of the Court in the foregoing case and adopts the position that the 1st Respondent ought to have expressly authorized the Head of Procurement and Supplies (Mr. Cosmas Makori) to further delegate the authority to **issue notification letters to all persons/bidders who submitted tenders including termination of procurement proceedings** whilst specifying the applicable tender for such further delegation. The Respondents did not provide any evidence to this Board demonstrating that the 1st Respondent authorized further delegation of his authority to Mr. Johnson Gachanja Ngure as Acting Head of Procurement and Supplies.

In the absence of any proof to the contrary, the Board finds that the letter dated 29th March 2021 from the Head of Procurement and Supplies (Mr. Cosmas Makori) addressed to the Procuring Entity's Principal Procurement Officer (Stock Control & PP), Mr. Johnson Gachanja Ngure in his capacity as Acting Head of Procurement and Supplies was null and void because the Head of Procurement and Supplies had no authority to delegate, what had been delegated to him by the Accounting Officer.

Lastly, in a letter dated 29th March 2021, the 1st Respondent delegated authority to the Procuring Entity's Principal Procurement Officer (Stock Control & PP), Mr. Johnson Gachanja Ngure in his capacity as Acting Head of Procurement and Supplies, because Mr. Cosmas Makori (the Head of Procurement and Supplies) was on emergency leave. However, the 1st Respondent did not specify the tender for which the delegation was given.

One of the duties of the 1st Respondent under section 44 (2) (j) of the Act is to ensure compliance with any other responsibilities assigned by the Act or any other Act of Parliament or as may be prescribed in Regulations. This responsibility cannot be achieved in instances where the 1st Respondent delegates authority in a manner that allows abuse by the person to whom authority has been delegated. Failure to specify the tender for which delegation was given to the Acting Head of Procurement and Supplies makes such delegation susceptible to abuse in a manner that may undermine the 1st Respondent. The 1st Respondent must have known the implication of general delegation because in the letter dated 24th March 2021, the 1st Respondent gave specific delegation by specifying the tender to which delegation of authority to the Head of Procurement and Supplies, relates. At page 49 of the decision of this Board in **PPARB Application No. 69 of 2019, CMC Motors Group Limited v. Principal Secretary, State Department of Interior, Ministry of Interior and Coordination of Government & Another**, the Board while addressing the issue of delegation of authority held as follows: -

"The above provisions demonstrate that the Accounting Officer has power to delegate his authority, but he must still remain accountable for his acts. To meet the national values and principles of governance, it is more efficient for the Accounting Officer to specify the tender for which the delegated authority is given to curb any abuse that may occur without his knowledge. A general delegated authority is open to abuse and the person to whom the authority is delegated may use such delegated authority to undermine the Accounting Officer. "

It is therefore the Board's considered finding that the 1st Respondent's letter of delegation of authority dated 29th March 2021, addressed to the Procuring Entity's Principal Procurement Officer (Stock Control & PP), Mr. Johnson Gachanja Ngure in his capacity as Acting Head of Procurement and Supplies does not satisfy the threshold required in law.

To that end, the Applicant's letter of notification of unsuccessful bid dated 9th April 2021, signed by the Acting Head of Procurement and Supplies (Mr. Johnson Ngure) *for* the Head of Procurement and Supplies (Mr. Cosmas Makori), *for* the Acting Managing Director (1st Respondent herein), was not issued by a person authorized in law.

On the second limb of the second issue, the Board is mindful of its finding that the award criteria applicable in the subject tender was that of lowest

evaluated tenderer (per zone). The award criteria of lowest evaluated price, is recognized in section 86 (1) (a) of the Act which states as follows:

"The successful tender shall be the one who meets any one of the following specified in the tender documents-

(a) the tender with the lowest evaluated price;

In view of the provisions of section 86 (1) (a) and 87 (3) of the Act read together with Regulation 82 of Regulations 2020, the Board observes that a procuring entity must notify, in writing, the bidder who submitted the successful tender, that its tender was successful before the expiry of the tender validity period. This section further requires that in the same breath, a procuring entity notifies other bidders who participated in the subject tender that their respective bids were not successful.

Moreover, a procuring entity's notification of unsuccessful bid to a bidder should disclose the reason (s) why the bid of the unsuccessful bidder was non-responsive. Further, a procuring entity should disclose the successful tenderer in a procurement process, including the successful bidder's tender price and the reason why the successful bidder's tender was found successful. The applicable reason to be given why the successful bidder was found successful in the instant case should be that the tender of the successful bidder had the lowest evaluated price per zone and the amount at which such award was made per zone, must be stated.

Disclosure of the identity of a successful bidder in addition to the amount at which a tender was awarded is central to the principle of transparency as

outlined in Article 227 of the Constitution. This means that all processes within a procurement system, including notification to unsuccessful bidders, must be conducted in a transparent manner.

Having examined the contents of the Applicant's letter of notification dated 9th April 2021, it is evident that, amount at which award was made to the Interested Party in each of the eight zones was not disclosed. Nothing could have been easier than to outline the amount at which award was made to the Interested Party per zone in the Applicant's letter of notification of unsuccessful bid dated 9th April 2021.

The Board therefore finds that the Applicant's letter of notification does not satisfy the threshold of section 87 (3) of the Act read together with Regulation 82 of Regulations 2020 because the amount at which award was made to the Interested Party in each of the eight zones, was not disclosed.

In totality of the foregoing, the Request for Review succeeds only in respect of the Board's finding that the Applicant's letter of notification of unsuccessful bid dated 9th April 2021, signed by the Acting Head of Procurement and Supplies *for the* Head of Procurement and Supplies, *for the* Acting Managing Director, was not issued by a person authorized in law. The instant application also succeeds as a result of the Board's finding that Applicant's letter of notification does not satisfy the threshold of section 87 (3) of the Act read together with Regulation 82 (1) and (3) of Regulations 2020

because the amount at which award was made to the Interested Party in each of the eight zones, was not disclosed.

Accordingly, the Board proceeds to make 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 in the Request for Review: -

- 1. The Accounting Officer of the Procuring Entity's Letters of Notification of Unsuccessful bid in Tender No. KPA/074/2020-21/MO for Provision of Pest Control Services dated 9th April 2021 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 Award in Tender No. KPA/074/2020-21/MO for Provision of Pest Control Services dated 9th April 2021 addressed to the Interested Party, be and is hereby cancelled and set aside.**
- 3. The Accounting Officer of the Procuring Entity is hereby directed to issue notification letters of the outcome of the subject tender to all bidders who participated in the subject tender in accordance with section 87 of the Act and**

Regulation 82 of Regulations 2020 within seven (7) days from the date of this decision, taking into consideration the Board's findings in this Review.

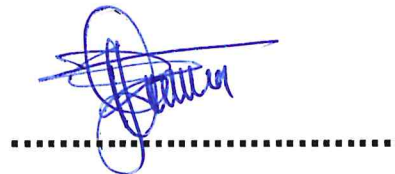
4. Each party shall bear its own costs in the Request for Review.

Dated at Nairobi this 6th day of May 2021



CHAIRPERSON

PPARB



SECRETARY

PPARB

