

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 61/2021 OF 27<sup>TH</sup> APRIL 2021**

**BETWEEN**

**PEESAM LTD .....APPLICANT**

**AND**

**THE ACCOUNTING OFFICER,**

**KENYA POWER & LIGHTING COMPANY LIMITED...1<sup>ST</sup> RESPONDENT**

**KENYA POWER & LIGHTING COMPANY LIMITED..2<sup>ND</sup> RESPONDENT**

**HOUNSLOW ENTERPRISE LIMITED.....1<sup>ST</sup> INTERESTED PARTY**

**ESPAT SOLUTIONS LIMITED.....2<sup>ND</sup> INTERESTED PARTY**

**KAMTIX CLEANERS COMPANY LIMITED....3<sup>RD</sup> INTERESTED PARTY**

**SYOSSET LIMITED.....4<sup>TH</sup> INTERESTED PARTY**

**DASH GROWTH CLEANING SERVICES LTD.5<sup>TH</sup> INTERESTED PARTY**

**SAPCO ENTERPRISES.....6<sup>TH</sup> INTERESTED PARTY**

**YIEWSLEY VENTURES LTD .....7<sup>TH</sup> INTERESTED PARTY**

**PREFERRRED IMAGE LIMITED.....8<sup>TH</sup> INTERESTED PARTY**

**SIMPSONS LANES SERVICES LIMITED.....9<sup>TH</sup> INTERESTED PARTY**

**M&M CLEANING SERVICES.....10<sup>TH</sup> INTERESTED PARTY**

**ICE CLEAN CARE GROUP LIMITED.....11<sup>TH</sup> INTERESTED PARTY**

**JEXTREEM LOGISTICSCO.LIMITED.....12<sup>TH</sup> INTERESTED PARTY**

**CLEANMARK LIMITED.....13<sup>TH</sup> INTERESTED PARTY**

**ZUZUMZ LIMITED .....14<sup>TH</sup> INTERESTED PARTY**

**TAMALINK COMMUNICATIONS.....15<sup>TH</sup> INTERESTED PARTY**

**GRAND CLEANING SERVICES LTD .....16<sup>TH</sup> INTERESTED PARTY**

Review against the decision of the Accounting Officer Kenya Power & Lighting Company Limited in relation to Tender No. KPI/9A.2/OT/22/ADM/20-21 for Provision of Cleaning Services Companywide Lot II Youth, Women and Persons with Disability- (YWPD) and Tender No. KPI/9A.2/OT/37/ADM/20-21 for Provision of Cleaning Services Companywide Lot II Youth, Women and Persons with Disability- (YWPD).

### **BOARD MEMBERS**

1. Ms. Faith Waigwa -Chairperson
2. Arch. Stephen Oundo, OGW -Member
3. Eng. Mbiu Kimani, OGW -Member
4. Mr. Ambrose Ogetto -Member

### **IN ATTENDANCE**

1. Mr. Stanley Miheso -Holding brief for the Secretary

### **THE REQUEST FOR REVIEW**

Peesam Ltd (hereinafter referred to as "the Applicant") lodged a Request for Review dated 27<sup>th</sup> April 2021 and filed on even date together with a Statement in Support of the Request for Review sworn on 26<sup>th</sup> April 2021 and filed on 27<sup>th</sup> April 2021 and a Supporting Affidavit dated 7<sup>th</sup> May 2021 and filed on even date through the firm of Karugu Mbugua & Co Advocates, seeking the following orders: -

***a) An order nullifying the award in Tender No. KPI/9A.2/OT/22/20-21 for Provision of Cleaning Services***

***Companywide Lot II Youth, Women and Persons with Disability (YWPD)***

***b) An order cancelling the entire Tender No. KPI/9A.2/OT/22/20-21 for Provision of Cleaning Services Companywide Lot II (Youth, Women and Persons with Disability-YWPD.***

***c) An order awarding the costs of this application to the Applicant***

***d) Any other orders that the Honourable Board may deem just and fit.***

In a letter dated 27<sup>th</sup> April 2021 addressed to the 1<sup>st</sup> Respondent, the Ag. Board Secretary notified the 1<sup>st</sup> Respondent of the existence of the Request for Review and suspension of procurement proceedings in Tender No. KPI/9A.2/OT/22/20-21 pursuant to section 168 of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act"). The Ag. Board Secretary further directed the 1<sup>st</sup> Respondent to forward to the Board, all confidential documents pertaining to the aforementioned tender including a list of bidders and their contact details while attaching the request for review and the Board's Circular No. 2/2020 of 24<sup>th</sup> March 2020. The Ag. Board Secretary informed the 1<sup>st</sup> Respondent that no contract should be signed in respect to the aforementioned tender until the Board has completed its review of the procurement proceedings of the aforementioned tender.

The Respondents in their Response to the Request for Review dated 3<sup>rd</sup> May 2021 and filed on 4<sup>th</sup> May 2021 at paragraph 4 thereof aver that on 19<sup>th</sup>

January 2021 they cancelled Tender No. KPI/9A.2/OT/22/ ADM/20-21 due to a technical hitch experienced in the Procuring Entity's SAP portal which resulted to some bidders not being able to access the system. Further, the Respondents aver that they notified all bidders of the cancellation of the subject tender vide a public advertisement published in the press on 19<sup>th</sup> January 2021.

The Respondents deny that they breached section 79(2) of the Act by declaring the Applicant's bid unsuccessful on an error or over sight that could have been corrected without affecting the substance of the tender. Further, the Respondents aver that the subject tender before the Honorable Board is not capable of being reviewed as the same was cancelled and or terminated in accordance with the Act. It is the Respondents claim that the aforementioned tender was terminated before opening and as such the allegations that the Respondents failed to disclose the prices submitted by other tenderers is frivolous and baseless and that the Respondents were not in breach of section 78 (6) of the Act.

On 10<sup>th</sup> May 2021, the Ag. Board's Secretary sent another letter addressed to the 1<sup>st</sup> Respondent clarifying that the Request for Review referred to two tenders namely Tender No. KPI/9A.2/OT/ADM/22/20-21 for Provision of Cleaning Services Companywide Lot II Youth, Women and Persons with Disability (YWPD) and Tender No. KPI/9A.2/OT/37/ADM/20-21 for Provision of Cleaning Services Companywide Lot II Youth, Women and Persons with

Disability (YWPD) (hereinafter referred to as “the subject tender”) and requested to be furnished with the confidential documents for both tenders.

In response, the Respondents vide a letter dated 13<sup>th</sup> May 2021 and signed by one Bernard Ngugi stated as follows:-

***"1. We seek clarification on the legal basis for the request for documents relating to Tender No. KPI/9A.2/OT/22/20-21 for Provision of Cleaning Services Companywide Lot II Youth, Women and Persons with Disability (YWPD) and Tender No. KPI/9A.2/OT/37/ADM/20-21 for Provision of Cleaning Services Companywide Lot II Youth, Women and Persons with Disability (YWPD) since the pleadings filed by the Applicant relate to Tender No. KPI/9A.2/OT/22/20-21 for Provision of Cleaning Services Companywide Lot II (Youth, Women and Persons with Disability-YWPD.***

***2. in our understanding and even in your own letter dated 27.04.21, the Board informed KPLC that a Request for Review had been filed in respect to Tender No. KPI/9A.2/OT/22/20-21 for Provision of Cleaning Services Companywide Lot II - Youth, Women and Persons with Disability (YWPD) and requested the Procuring Entity to submit the documents in respect of the aforementioned tender.***

***3. We on 04.05.21 complied with the directive and filed our response as well as the documents.***

***4. We have not been served with any amended Request for Review in regard to this matter.***

***The Contract for Tender No. KPI/9A.2/OT/37/ADM/20-21 for Provision of Cleaning Services Companywide Lot II-Youth, Women and Persons with Disability (YWPD) was signed on 27.05.21 in accordance with section 135 of the Public Procurement and Assets Disposal Act, 2015 and as such cannot be subjected for review pursuant to section 167(4) of the Act.***

***In view of the above, we seek your clarification on the Legal basis for the request.***

***Your support is most appreciated.”***

As such, the Respondents did not forward confidential documents relating to the subject tender to the Board as instructed.

Pursuant to the Board’s Circular No. 2/2020 dated 24<sup>th</sup> March 2020, 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.

The Respondents filed their written submissions dated 12<sup>th</sup> May 2021 and on 13<sup>th</sup> May 2021.

## **BOARD'S DECISION**

The Board has considered the Applicant's Request for Review, the Statement in Support of the Request for Review and a Supporting Affidavit and finds that the following issues call for determination: -

- I. **Whether the Procuring Entity breached section 79 (2) (b) of the Act by declaring the Applicant unsuccessful on an error or an oversight that could be corrected without affecting the substance of the tender**
- II. **Whether the Procuring Entity breached section 87(3) of the Act by failing to disclose the price that the respective tenderers had bided for in the letters of notification of regret to the Applicant dated 7<sup>th</sup> April 2021**

The Board notes, the Respondents vide a letter dated 13<sup>th</sup> May 2021 and signed by one Bernard Ngugi, informed the Ag. Board Secretary that a contract with respect to the subject tender had been executed on 27<sup>th</sup> May 2021 in accordance with section 135 of the Act and as such cannot be subjected for review pursuant to section 167 (4) (c) of the Act.

This allegation has not been substantiated by the Respondents because no proof of such a contract was furnished before the Board and secondly, the Respondents were not capable of signing a contract earlier than 28<sup>th</sup> April 2021. We say so because, one Sarah Karonei from the Procuring Entity forwarded the Notification of regret for the Subject tender to the Applicant

vide an email dated 13<sup>th</sup> April 2021. Section 135(3) of the Act mandates the Procuring Entity to enter into a contract during tender validity but not before fourteen (14) days have lapsed following the giving of notification. In computing 14 days from 13<sup>th</sup> April 2021, the Board is guided by section 57 (a) of the Interpretations and general provisions Act (cap 2) by excluding the date of 13<sup>th</sup> April 2021 and commencing computation from 14<sup>th</sup> April 2021. This then means that the 14 days lapsed on 27<sup>th</sup> April 2021 and the earliest available date for signing such a contract was 28<sup>th</sup> April 2021. In the circumstances any purported contract signed on 27<sup>th</sup> April 2021 would have been executed contrary to the provisions of section 135 (3) of the Act rendering the same null and void.

Accordingly, the subject tender is capable of being reviewed, the Board has jurisdiction to entertain the Request for Review with respect to the subject tender and shall now proceeds to consider the issues framed for determination.

The Applicant alleges that it participated in a tender for Provision of Cleaning Services advertised by the Procuring Entity. According to the Applicant, it submitted the tender and subsequently received a notification of unsuccessful bid on 13<sup>th</sup> April 2021 vide a letter dated 7<sup>th</sup> April 2021 a copy of the said notification is attached as annexure marked SN-1 in the Applicant's Statement in support of the Request for Review and reads as follows:-



**"RE: NOTIFICATION OF REGRET IN RESPECT OF TENDER FOR PROVISION OF CLEANING SERVICES COMPANYWIDE LOT II FOR YWPWD-TENDER NO.KPI/9A.2/OT/37/ADM/20-21**

***We refer to the above tender and regret to inform you that following the evaluation, your tender was unsuccessful. The brief reason is as follows:-***

- Details of service was not fully filled. Item no.58 &59***

***The successful bidders were:***

<b><i>No</i></b>	<b><i>Name of Company</i></b>	<b><i>No</i></b>	<b><i>Name of Company</i></b>
<b><i>1.</i></b>	<b><i>Hounslow Enterprise Limited</i></b>	<b><i>9.</i></b>	<b><i>Simpson Lanes Services Ltd</i></b>
<b><i>2.</i></b>	<b><i>Espat Solutions Ltd</i></b>	<b><i>10.</i></b>	<b><i>M &amp; M cleaning Services</i></b>
<b><i>3.</i></b>	<b><i>Kamtix Cleaners Company Limited</i></b>	<b><i>11.</i></b>	<b><i>Ice Clean Care Group Ltd</i></b>
<b><i>4.</i></b>	<b><i>Sysset Limited</i></b>	<b><i>12.</i></b>	<b><i>Jextreem Logistics Co. Ltd</i></b>
<b><i>5.</i></b>	<b><i>Dash Growth Cleaning Services Limited</i></b>	<b><i>13.</i></b>	<b><i>Cleanmark Limited</i></b>
<b><i>6.</i></b>	<b><i>Sapco Enterprises</i></b>	<b><i>14.</i></b>	<b><i>Zuzumz Ltd</i></b>
<b><i>7.</i></b>	<b><i>Yiewsley Ventures Ltd</i></b>	<b><i>15.</i></b>	<b><i>Tamalink Communications</i></b>
<b><i>8.</i></b>	<b><i>Preferred Image Limited</i></b>	<b><i>16.</i></b>	<b><i>Grand Cleaning Services Ltd</i></b>

***We thank you for the interest shown in participating in this tender and wish you well in all your future endeavors."***

On receiving the letter of notification of unsuccessful bid, the Applicant vide an email dated 13<sup>th</sup> April 2021 and attached to the Applicants statement in support of the Request for Review marked as SN-2 sought clarification from

the Procuring Entity on the details of the winning bidders with respect to the subject tender. The email reads,

***“Kindly, provide us with proper notification letter indicating the prices of the winning bidders.”***

In response, vide an email dated 14th April 2021 and annexed to the Applicant’s Statement in Support of the Request for Review as SN-2, one Sarah karonei from the Procuring Entity, informed the Applicant that they were not in a position to provide what was requested for by the Applicant as the award was based on the lowest bidder per depot/premise. The Board notes that to date the Respondents have not availed to the Board the confidential documents relating to the subject tender despite having been directed to submit the said confidential documents vide the Board’s Ag. Secretary’s letter dated 10<sup>th</sup> May 2021.

On the first issue for determination, the Applicant at paragraph 1 of its Request for Review avers that the Respondents breached section 79 (2) (b) of the Act since the Respondents found its tender unsuccessful on an error or an oversight that could be corrected without affecting the substance of its tender. The Applicant further averred that the said oversight did not materially affect the Applicant’s bid and the tender thereto.

The Board takes cognizance of section 79 of the Act which provides that: -

***(1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents.***

***(2) A responsive tender shall not be affected by—***

***(a) Minor deviations that do not materially depart from the requirements set out in the tender documents; or***

***(b) Errors or oversights that can be corrected without affecting the substance of the tender.***

***(3) A deviation described in subsection (2) (a) shall—***

***(a) Be quantified to the extent possible; and***

***(b) Be taken into account in the evaluation and comparison of tenders.***

It is not lost to the Board that section 79 (2) (b) of the Act provides for errors and oversights that can be corrected without affecting the substance of a tender.

Noting that the Respondents did not Furnish the Board with the Blank Tender for the subject tender [Tender No. KPI/9A.2/OT/37/ADM/20-21 for Provision

of Cleaning Services Companywide Lot II Youth, Women and Persons with Disability- (YWPD)] it is not clear what details of service items 58 and items 59 that is alleged not to have been fully filled contained. In the circumstances, the Board is not able to determine if the omission of those two items 58 & 59 is a minor deviation or a major deviation and more so because the Respondents have failed to furnish the Board with the Evaluation Report of the subject tender which forms part of the Confidential documentation requested for by the Ag. Board's Secretary in a letter dated 10<sup>th</sup> May 2021.

On the second issue for determination, the Board notes that when the Applicant requested to be furnished with details of the prices at which the subject tender was awarded to the winning bidders, the Respondents declined to grant the Applicants request.

Having considered the foregoing, the Board notes that section 87 (3) of the Act provides as follows:

***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 Public Procurement and Asset Disposal Regulations 2020 (herein after referred to as "Regulation 2020") states as follows:

**82 (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 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.**

In view of the provisions of section 87(3) and Regulation 82 of Regulations 2020 set out hereinbefore, the Board has severally held that, a notification must contain both the reason why the bidder's bid was found non-responsive as well as a disclosure of the winning bidder and the price at which award was made and the reason why a successful bidder was found successful in accordance with section 86(1) of the Act. This disclosure promotes the principle of transparency envisaged under Article 227 (1) of the Constitution.

The Board has considered the Respondents response to the Applicant's request in the Respondents in its email of 14<sup>th</sup> April 2021 as regards the requirement of Section 87 (3) of the Act and finds the same to be a misapprehension of the legal requirement of that provision as read together with Regulation 82 (2) of Regulations 2020.

In the Board's view, the disclosure of the price at which an award has been made to a successful bidder in a letter of notification provided to unsuccessful bidders cannot be a breach of confidentiality but rather is an express requirement of the law under Regulation 82 (3) of Regulations 2020.

Accordingly, the Board finds that the Applicant's letter of notification of unsuccessful bid dated 7<sup>th</sup> April 2021 issued to the Applicant in the subject Tender fails to meet the threshold set out in Section 87 (3) of the Act and Regulation 82 (3) of the Regulations 2020 for failure to disclose the tender prices for the successful bidders.

The upshot of the Board's finding is that the Request for review succeeds with respect to 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 unsuccessful bid in Tender No. KPI/9A.2/OT/37/ADM/20-21 for Provision of Cleaning Services Companywide Lot II Youth, Women and Persons with Disability (YWPD) dated 7<sup>th</sup> 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 Tender No. KPI/9A.2/OT/37/ADM/20-21 for Provision of Cleaning Services Companywide Lot II Youth, Women and Persons with Disability (YWPD) addressed to all the successful bidders herein, be and are hereby cancelled and set aside.**
- 3. The Accounting Officer of the Procuring Entity is hereby directed to issue fresh letters of notification of the outcome of the Tender No. KPI/9A.2/OT/37/ADM/20-21 for Provision of Cleaning Services Companywide Lot II Youth, Women and Persons with Disability (YWPD) to all Bidders in accordance with section 87 of the Act and Regulation 82 of Regulations 2020 within fourteen (14) days from the date of this decision taking into consideration the Board's findings herein.**
- 4. Each party shall bear its own costs in the request for Review.**

**Dated at Nairobi this 17<sup>th</sup> day of May, 2021.**

**CHAIRPERSON  
PPARB**

**SECRETARY  
PPARB**