

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 74/2021 OF 25TH MAY 2021

BETWEEN
THE GARDENS AND WEDDINGS CENTRE LIMITED.....APPLICANT

AND

THE ACCOUNTING OFFICER,
KISII UNIVERSITY.....1ST RESPONDENT
KISII UNIVERSITY.....2ND RESPONDENT
NEAT HYGIENE SERVICES LTD..... INTERESTED PARTY

Review against the decision of the Accounting Officer of Kisii University in respect of Tender No. KSU/T/09/2020-2021 for Provision of Cleaning Services.

BOARD MEMBERS

- | | |
|---------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Dr. Paul Jilani | -Member |
| 3. Mrs. Njeri Onyango | -Member |
| 4. Qs. Hussein Were | -Member |
| 5. Ms. Isabella Juma, CPA | -Member |

IN ATTENDANCE

Mr. Philemon Kiprop	-Holding brief for the Acting Board Secretary
---------------------	---

BACKGROUND TO THE DECISION

The Bidding Process

Kisii University (hereinafter referred to as "the Procuring Entity") invited sealed tenders from eligible candidates among disadvantaged groups (that

is, Women, Youth, Persons with Disabilities and Marginalized Groups) for Tender No. KSU/T/09/2020-2021 for Provision of Cleaning Services (hereinafter referred to as “the subject tender”) through an advertisement published in *The People Daily Newspaper* on 23rd February 2021. A mandatory site visit was conducted on 2nd March 2021.

Bid submission deadline and opening of bids

The Procuring Entity received a total of 16 bids by the bid submission deadline of 16th March 2021. The same were opened shortly thereafter by a Tender Opening Committee in the presence of bidders’ representatives and recorded as follows: -

Bid No.	Name of Firm
1.	M/S Aimat Company Limited
2.	M/S Envirocare General Agencies Limited
3.	M/S Hever The Company Limited
4.	M/S Ice Clean Care Group Limited
5.	M/S Jimanya Cleaning services Limited
6.	M/S Keansley Hygiene Plus Limited
7.	M/S Limah East Africa Limited
8.	M/S Neat Hygeine Services Limited
9.	M/S Peesam Limited
10.	M/S Petals Hygiene and Sanitization Service Limited
11.	M/S Robu Cleaning Services Limited
12.	M/S Sterizn International Limited
13.	M/S Super-Broom Device Limited
14.	M/S The Gardens and Weddings Center Limited
15.	M/S Vinstar Express Supplies Limited
16.	M/S Virgin Clean Limited

Evaluation of Bids

Having appointed an Evaluation Committee, evaluation of bids in the subject tender was undertaken in the following manner: -

1. Preliminary Evaluation

At this stage, the Evaluation Committee subjected the 16 bids received to the criteria outlined in Section A. Mandatory Requirements of the Tender Document. At the end of Preliminary Evaluation, the following five (5) bidders were found responsive and eligible to proceed to the Technical Evaluation stage: -

- Bidder 3, M/s Hever the Company Limited;
- Bidder 8, M/s Neat Hygiene Services Limited;
- Bidder 13, M/s Super-Broom Device Limited;
- Bidder 14, M/s The Gardens & Weddings Center Limited; and
- Bidder 15, M/s Vinstar Express Supplies Limited.

2. Technical Evaluation

At this stage, the Evaluation Committee subjected the remaining 5 bids to the criteria outlined in Section B. Technical Evaluation of the Tender Document which required bidders to achieve a minimum technical score of 50 Marks out of 70 Marks. At the end of Technical Evaluation, the five (5) bidders achieved the following scores:

Bidder 14	M/s The Gardens & Weddings Center Limited	68
Bidder 3	M/s Hever the Company Limited	60
Bidder 15	M/s Vinstar Express Supplies Limited	53
Bidder 13	M/s Super-Broom Device Limited	70
Bidder 8	M/s Neat Hygiene Services Limited	70

Thereafter, the Evaluation Committee recorded the tender sums quoted by the five bidders listed hereinbefore in an ascending order (lowest price to highest price) as can be seen from the table below:

	Tenderer	Tender amount quoted per month
	M/s The Gardens & Weddings Center Limited	Kshs. 711,431/-
	M/s Hever the Company Limited	Kshs. 1,109,380/-
	M/s Vinstar Express Supplies Limited	Kshs. 1,104,500/-
	M/s Super-Broom Device Limited	Kshs. 1,548,734.42
	M/s Neat Hygiene Services Limited	Kshs. 1,092,500/-

The Evaluation Committee visited the physical premises of the five (5) bidders to assess the following:

- Accessibility of the business;
- Nature of the business in relation to the tender;
- Existence of original registration documents;
- Existence of original project files of submitted projects;
- Neatness and availability of cleaning equipment;
- Existence of Supervisors' files; and
- Customer Service/After Sales Service.

At the end of the visit in each of the tenderer's premises, bidders were awarded the scores outlined below out of a total score of 40 marks:

	Name of Bidder	Average Score Achieved
1	The Gardens and Weddings Centre Limited	21
2	Hever the Company Limited	28
3	Vinstar Express Supplies Limited	27
4	Super-Broom Device Limited	34
5	Neat Hygiene Services Limited	32

M/s The Gardens & Weddings Centre Limited, M/s Hever the Company Limited and M/s Vinstar Supplies Limited did not achieve the average score of 30 marks. Consequently, the Evaluation Committee only recommended

two (2) bidders (that is, M/s Super-Broom, Device Limited and M/s Neat Hygiene Services Limited) to proceed to the Financial Analysis stage.

3. Financial Analysis

At this stage, the Evaluation Committee recorded the tender sums of the remaining bidders with a view of determining the lowest evaluated bidder.

The bidders' respective tender prices were recorded as follows:

Bidder 13	M/s Super-Broom Device Limited	Kshs 1,548,734.42
Bidder 8	M/s Neat Hygiene Services Limited	Kshs. 1,092,500.00

The Evaluation Committee undertook a "Cost Benefit Analysis" by confirming the cost incurred as at January 2020 as payment to University Cleaners/Halls and casual employees from the Procuring Entity's Salaries Department. The Evaluation Committee recorded the findings as follows:

No.	Item	Cost Per Month
1	University Cleaners/Halls and casual employees as at January 2020 Source: Salaries Department	2,369,616.28
2	Proposed Outsourcing of cleaning services	1,092,500.00
3	Savings per month	

Recommendation for Award

Having conducted a financial analysis on the remaining two bidders, the Evaluation Committee recommended award of the subject tender to M/s Neat Hygiene Services Limited at its tender price of Kshs. 1,092,500.00 (Kenya Shillings One Million, Ninety-Two Thousand Five Hundred) per month for being the lowest evaluated bidder.

Professional Opinion

In a Professional opinion dated 5th May 2021, the Procuring Entity's Senior Procurement Officer reviewed the manner in which the Evaluation Committee conducted the subject procurement process including evaluation of bids. He concurred with the Evaluation Committee's recommendation on award of the subject tender, thus advised the Procuring Entity's Vice Chancellor to award the subject tender to M/s Neat Hygiene Services Limited at its tender price of Kshs. 1,092,500.00 (Kenya Shillings One Million, Ninety-Two Thousand Five Hundred) per month for being the lowest evaluated tenderer evaluated. The Professional Opinion was approved by the Accounting Officer on 5th May 2021.

Notification to Bidders

In letters dated 5th May 2021, the Procuring Entity's Vice Chancellor notified all bidders of the outcome of their bids.

THE REQUEST FOR REVIEW

M/s The Gardens and Weddings Centre Limited (hereinafter referred to as "the Applicant") lodged a Request for Review dated 24th May 2021 and filed on 25th May 2021 together with a Supporting Affidavit sworn on 25th May 2021 and filed on even date and a Further Affidavit sworn on 4th June 2021 and filed on 9th June 2021 through the firm of Karugu Mbugua & Company Advocates, seeking the following orders: -

a) An order annulling the award;

- b) An order directing the Procuring Entity to carry out a re-evaluation of the subject tender and award the tender to the lowest evaluated bidder;***
- c) An order extending the tender validity;***
- d) An order awarding costs of the Application to the Applicant;***
and
- e) Any other orders that the Honourable Board may deem just and fit.***

In response, the Respondents lodged a Replying Affidavit sworn on 28th May 2021 and filed on 31st May 2021 through Mr. Seth A. Onguti, the Procuring Entity's Legal Officer, while the Interested Party lodged a Notice of Preliminary Point of Law dated 3rd June 2021 and filed on 8th June 2021 together with Grounds of Opposition dated 3rd June 2021 and filed on 8th June 2021 and a Replying Affidavit sworn on 3rd June 2021 and filed on 8th June 2021 through Mr. Festus Solo, the Interested Party's Director.

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. However, none of the parties filed 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 issues call for determination: -

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

Depending on the outcome of the above issue:

II. Whether the 1st Respondent complied with section 46 (4) (b) and (c) of the Act read together with Regulation 28 and 29 of the Public Procurement and Asset Disposal Regulations 2020 (hereinafter referred to as "Regulations 2020") in constituting an evaluation committee to undertake evaluation and comparison of tenders in the subject tender.

III. Whether the Procuring Entity evaluated the Applicant's bid during the Site Visit in accordance with Part B. Operational Assessment by Site Visit at page 41 to 42 of the Tender Document read together with section 80 (2) of the Act.

IV. Whether the Applicant's letter of notification of unsuccessful bid dated 5th May 2021 satisfies the threshold of section 87 (3) of the Act read together with Regulation 82 of Regulations 2020.

Before addressing our minds on the issues framed for determination, the Board would like to dispense with a preliminary aspect arising from a letter dated 4th June 2021 by the Managing Director of M/s Hever the Company Limited addressed to the Acting Board Secretary.

The Applicant's Request for Review filed on 25th May 2021, prompted the Acting Board Secretary to notify the 1st Respondent of the pending review and suspension of procurement proceedings pursuant to section 168 of the Act which provides as follows:

"Upon receiving a request for a review under section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed."

In a letter dated 25th May 2021 addressed to the 1st Respondent, the Acting Board Secretary informed the 1st Respondent of the following:

"You are hereby informed that on 25th May 2021, a Request for Review was filed with the Public Procurement Administrative Review Board in respect of the above tender Please submit your response in 11 bound copies within 5 days from the date of this letter, including a soft copy of the response on the Review, background to the tender evaluation report and procurement officer's professional opinion. Your response should be filed separately from the confidential reports which should not be availed to other parties except as

guided by section 67 of the Public Procurement and Asset Disposal Act 2015.

Please ensure that all documents submitted to the Review Board are properly paginated. You are required to complete the mandatory declarations in Part A of Schedule 1 Form 5 attached and submit the documents listed in Part D of the same Schedule. In addition, you are required to immediately submit to the undersigned the contact addresses of those who participated in this tender which should include their Postal address, Physical Address, Email, Telephone and Fax Numbers.

Please note that according to the Public Procurement and Asset Disposal Act 2015, the procurement process should be suspended and no contract subject to the Regulations can be signed between the Procuring Entity and the successful tenderers until the appeal has been finalized.

A copy of the Request for Review together with Schedule 1 Form 5 and PPARB Circular No. 02/2020 of 24th March 2021 are forwarded herewith."

On Friday, 28th May 2021 at 6.58pm, the Procuring Entity's Procurement Officer addressed an email to the Board Secretariat's official email (pparb@ppra.go.ke) forwarding all confidential documents relating to the subject tender, a list of bidders and their contact details and a Response to the Request for Review.

Subsequently on Monday, 31st May 2021, the Acting Board Secretary addressed letters to bidders who participated in the subject tender informing them of the Request for Review. The letter addressed to M/s Hever the Company Limited stated as follows:

"NOTIFICATION AND HEARING NOTICE FOR REVIEW TENDER NO. KSU/T/09/2020-2021 FOR PROVISION OF CLEANING SERVICES

Please refer to the above tender invited by the Accounting Officer, Kisii University in which you were one of the participants.

We would like to inform you that on 25th May 2021, a Request for Review was lodged at the Public Procurement Administrative Review Board regarding the processing of the above tender.

You are required to forward to this Board any information and arguments about the tender within three days of this mail pursuant to PPARB Circular No. 2/2020 dated 24th March 2020. Failure to submit your response within the stipulated 3 days may result in the Board declaring your response inadmissible. A copy of the grounds of Review plus PPARB Circular No. 2/2020 dated 24th March 2020 is attached for your reference."

In response to the above letter, the Managing Director of M/s Hever the Company Limited addressed a letter dated 4th June 2021 to the Acting Board Secretary stating as follows:

"We acknowledged receipt of your letter dated the 31st May 2021 which was served and received by a security guard who is neither our employee nor our representative on the 4th June 2021 at 7.40am. Therefore, in this essence the letter was not properly served to us and the time stated therein to allow our response had lapsed.

Nevertheless, we would like to state our displeasure in the manner in which the evaluation process was carried out by Kisii University. They stated that our company failed to meet the threshold set for lack of providing a relevant business permit of which we provided and also availed when they carried out the due diligence at our premises.

They failed to clearly indicate the kind of Business Permit they specifically needed in the mandatory requirements and therefore flawed in guiding the applicants accordingly.

We hope that this tender shall be subjected to a review and all applicants accorded a fair evaluation of their applications.

Yours faithfully,

[signature affixed]

Caroline Kamutu

Managing Director"

According to the Board's Dispatch Register, the letter dated 31st May 2021 was collected by courier services on 2nd June 2021 for delivery at the physical address of M/s Hever the Company Limited as provided by the 1st

Respondent noting further that 1st June 2021 was a Public Holiday (that is, Madaraka day). The letter was delivered at the offices of M/s Hever the Company Limited on 4th June 2021. Clause 3 of the Board's Circular No. 2/2020 dated 24th March 2021 (hereinafter referred to as "the Board's Circular") provides that:

"The tenderer notified as successful by an Accounting Officer of a Procuring Entity and/or such other persons as PPARB may determine shall file its/his/her response to the Request for Review together with its/his/her written submissions within 3 days of such Request for Review being served (electronically or hard copy) upon the said tenderer notified as successful and/or such other persons as determined by PPARB"

According to Clause 3 of the Board's Circular, M/s Hever the Company Limited had up to 7th June 2021 to file a Response to the Request for Review if it wished to do so. It is therefore not true for M/s Hever the Company Limited to state that time for filing a response to the Request for Review had lapsed because the period of 3 days started running a day after receiving a copy of the Request for Review. It is also worth pointing out that a copy of a request for review is served upon all bidders at the physical addresses provided by the accounting officer of a procuring entity.

The Board notes that M/s Hever the Company Limited challenged the outcome of its own bid through the letter dated 4th June 2021. According to the said bidder, the Procuring Entity failed to specify the type of Business Permit required in the subject tender but disqualified the bidder despite having provided its Business Permit during an alleged due diligence exercise.

These allegations demonstrate that M/s Hever the Company Limited is aggrieved by the manner in which evaluation of its own bid was conducted by the Procuring Entity.

Section 167 (1) of the Act provides the conditions that must be satisfied by an aggrieved candidate or tenderer who wishes to approach this Board on an alleged breach of duty by a procuring entity as follows:

"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"

Further, Regulation 203 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "Regulations 2020") provides that:

203. (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 and Regulation 203 (1), (2) and (3) of Regulations 2020 gives aggrieved tenderers who risk suffering or claim to have suffered loss as a result of a procuring entity's decision on their bids the right to seek administrative review by filing a request for review. 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 and (iii) the occurrence of the breach complained of, where the request is made after making of an award to the

successful bidder. Further, a request for review must comply with the format provided in the Fourteenth Schedule of Regulations 2020.

M/s Hever the Company Limited is aggrieved by the outcome of its bid but has failed to file a request for review that complies with the requirements of section 167 (1) of the Act read together with Regulation 203 of Regulations 2020.

The notification sent to other bidders who participated in a procurement process is not an opportunity for bidders to champion their own cause with respect to their bids, in an already existing Request for Review application. Such bidders ought to take into account the timelines specified under section 167 (1) of the Act, if they are aggrieved by the outcome of their bids.

In **PPARB Application No. 56 of 2021, Kotaa East Africa Limited v. The Accounting Officer, Kenya Ports Authority & Another**, the Board cited the decision in **Petition No. 37 & 49 of 2017 (Consolidated), Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others [2017] eKLR** when addressing its mind on the role of an interested party and held as follows:

“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"

Interested parties joined as parties to a request for review, they do not advance their own grievances in terms of challenging the outcome of their respective bids since their role is limited to supporting an applicant's case or the respondent's (i.e. the accounting officer of a procuring entity's) case. This is because 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."

The Board (as was constituted in the foregoing case) held that an interested party's role is limited to supporting an applicant (a candidate or tenderer who has filed a request for review) or a respondent's case (that is, accounting officer of a procuring entity). An interested party does not advance its own grievances in terms of challenging the outcome of its bid since its role is limited to supporting an applicant's case or the respondent's (i.e. the accounting officer of a procuring entity's) case.

The Board observes that M/s Hever the Company Limited is one of the bidders that participated in the subject procurement process. According to the definition of an Interested Party in the above case, there is a likelihood for the said bidder to be affected by the decision of this Board in the instant Request for Review.

The role of an Interested Party in the Board's view, is limited. Such a bidder should not champion its own grievances in relation to the outcome of its bid, but instead ought to either support the Applicant's case or the Respondents' case. At the very least, such an Interested Party responds to legal issues raised by the Applicant or the Respondents, if it wishes to do so, especially in instances where it may not have filed any documentation before the Board relating to factual issues. A bidder who fails to lodge a separate Request for Review may choose to be joined as a party to an existing Request for Review, where its role would be limited to supporting the Applicant's case, or supporting the Respondents in the existing request for review. Since M/s Hever the Company Limited is aggrieved by the outcome of its bid, it ought to have filed a separate Request for Review application as an applicant instead of raising new issues regarding its bid through a letter filed within an existing Request for Review. It is the Board's considered view that the letter dated 4th June 2021 by M/s Hever the Company Limited is not properly filed before this Board because the said bidder is challenging the outcome of its bid, thus ought to have filed a separate request for review in accordance with section 167 (1) of the Act read together with Regulation 203 of Regulations 2020.

In the circumstances, the Board shall not address the allegations of breach of duty by the Procuring Entity as stated in the letter dated 4th June 2021 in relation to the outcome of the bid of M/s Hever the Company Limited.

Having dispensed with the above preliminary aspect, the Board shall now determine whether it has jurisdiction to entertain the Request for Review.

The Interested Party lodged a Notice of Preliminary Point of Law on the following ground:

"The Request for Review brought violates the provisions of section 167 (1) of the Public Procurement and Asset Disposal Act of 2015"

The Interested Party also filed Grounds of Opposition stating as follows:

"The Interested Party, NEAT HYGIENE SERVICES LTD, opposes the Request for Review on the following grounds:

- 1) That the request for review violates the provisions of section 167 (1) of the Public Procurement and Asset Disposal Act of 2015 and should be struck off with costs to the interested party.***
- 2) Request for Review is filed out of time as the last day for filing was 19.05.2021 whereas the same was filed on 25.05.2021 in violation of S. 167 of the 2015 Act.***
- 3) That the interested party is ready to commence business and has started mobilizing."***

While reiterating that the Request for Review ought to be struck out, the Interested Party deponed at paragraph 7 of its Replying Affidavit that the Request for Review is a non-starter, the same having been filed outside the fourteen (14) days provided in law.

At paragraph 21 of the decision in **Petition No. E004 of 2021, Patrick Alouis Macharia Maina & 3 others v Shoprite Checkers Kenya Limited [2021] eKLR**, the Court cited the famous case of **Mukisa Biscuits Manufacturing Company Limited -vs- West End Distributors (1969) EA 696** and held as follows:

Law, J.A. in Mukisa Biscuits Manufacturing Company Limited - vs- West End Distributors (1969) EA 696 had the following to say on preliminary objections: -

So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.....

The Interested Party's Preliminary Point of Law raises a jurisdictional issue which we note ought to be addressed at this earliest opportune moment.

Jurisdiction is defined in **Halsbury's Laws of England (4th Edition) Volume 9** as "...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision."

Further, the Black's Law Dictionary, 9th Edition, defines jurisdiction as the Court's power to entertain, hear and determine a dispute before a court, tribunal or any other decision making body.

It is trite law that courts and decision making bodies can only act in cases where they have jurisdiction. In the Court of Appeal case of **The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) KLR 1**, it was held that jurisdiction is everything and without it, a court or any *other decision making body* has no power to make one more step the moment it holds that it has no jurisdiction. Further, the Supreme Court in the case of **Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Ltd and 2 Others, Civil Application No. 2 of 2011** held as follows:-

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with Counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality;

it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings."

The jurisdiction of the Board flows from section 167 (1) of the Act which was already outlined hereinbefore. The Board already addressed its mind on the import of section 167 of the Act read together with Regulation 203 of Regulations 2020 and established that the said provisions give aggrieved tenderers who risk suffering or claim to have suffered loss as a result of a procuring entity's decision on their bids the right to seek administrative review by filing a request for review. 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 and (iii) the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder. In the instant case, the Board is dealing with the question whether the Applicant's Request for Review was filed within fourteen days of notification under section 87 of the Act.

Section 87 of the Act gives responsibility to the 1st Respondent to notify bidders of the outcome of their bids. This provision 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 **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 effect, the 1st Respondent being the person responsible for notifying bidders of the outcome of their bids, should provide evidence of the date when letters of notification were dispatched to all bidders. The 1st Respondent furnished to the Board, an extract of Expedited Mail Service (EMS) Kenya Client Reference Number C001308 showing that the Applicant's Letter of Notification was dispatched on 11th May 2021 at 09:58am by the Procuring Entity for delivery at the Applicant's address indicated as **"The Garden Wedding Centre, Rentford House/Muindi Mbingu Street/Nairobi, Mob: 0723969754."**

Further, the Applicant deponed at paragraph 5 of its Supporting Affidavit that it received its letter of notification dated 5th May 2021 on 12th May 2021. To support this position, the Applicant attached an EMS extract Client Reference No. C001308 dated 11th May 2021 similar to the one provided by the Respondents showing that the Applicant's Letter of Notification was dispatched by the Procuring Entity on 11th May 2021 at 09:58am for delivery at the Applicant's address. The details provided on the face of the EMS extract shows the Applicant's letter was **"received by registered mail on 12/5/2021 at 3.10pm"** together with a stamp of the Applicant affixed thereto with the date indicated as **"12/5/2021"**.

The Interested Party alleged that the last day for filing the Request for Review was 19th May 2021 without providing any proof to support this allegation. Despite the Interested Party's failure to substantiate its allegation, the evidence provided by the Respondents and the Applicant supports the Board's finding that the Applicant was notified of the outcome of its bid on 12th 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. The event in this instance is the act of receiving a notification from the Procuring Entity on 12th May 2021. The Interested Party seems to have computed a period of 14 days from 5th May 2021 to arrive at the conclusion that the Request for Review ought to have been filed by 19th May 2021 because all letters of notification are dated 5th May 2021. This position is erroneous because the period within which a request for review is filed is not computed from the date provided in the letters of notification but the date when a notification is received by an unsuccessful bidder.

In the circumstances, the Board ought to take the date of 12th May 2021 into account and not 5th May 2021. Pursuant to section 57 (a) of the Interpretation and General Provisions Act, 12th 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 26th May 2021 to file a Request for Review. The Applicant filed its Request

for Review on 25th May 2021, thus the same is within the statutory period of 14 days specified in section 167 (1) of the Act.

The Board observes that the Interested Party alleged at paragraph 3 of its Grounds of Opposition that it is ready to commence business and has started mobilizing. Having found the Applicant had up to 26th May 2021 to file a Request for Review, it means the earliest date that the Procuring Entity could have signed a contract with the Interested Party so as to commence execution of works in the subject tender was 27th May 2021. However, the instant Request for Review was filed on 25th May 2021 thus leading to suspension of procurement proceedings pursuant to section 168 of the Act as reiterated by the Acting Board Secretary in his letter dated 25th May 2021 that was addressed to the 1st Respondent. Therefore, the Interested Party's allegation that it is ready to commence business and has started mobilizing lacks merit.

In totality of the first issue, the Board finds that it has jurisdiction to entertain the Applicant's Request for Review. Consequently, the Interested Party's Preliminary Point of Law and Grounds of Opposition fail.

On the second issue for determination, the Applicant alleged at paragraph 4 of its Request for Review and paragraph 15 (iv) of its Supporting Affidavit that the Procuring Entity breached section 46 of the Act by constituting a tender evaluation committee that exceeded five members. Further, at paragraph 5 of its Further Affidavit, the Applicant deponed that the Evaluation Committee's report is null and void because the Evaluation Committee that visited the Applicant's offices on 23rd April 2021 were seven

in total. To support this allegation, the Applicant referred the Board to Annexure "DGM-2" attached to its Further Affidavit which contains the following details:

"Name of Company Representative: Daniel

Position : Director

Date : 23/4/2021

Signature and stamp :[signature affixed] [stamp affixed]

Evaluation Committee Members:

Name	Designation	Signature	Date
1. Ms. Rose Ogata	Chairperson	.....	.....
2. Mr. Charles Maina	Member	.....	.....
3. Mr. Stephen Mokaya	Member	.....	.....
4. <u>Mr. David Basweti</u>	Member	.....	.....
5. Ms. Mary Kunyoria	Member	.....	.....
6. Mr. Hillary Sang	Secretariat	.....	.....
7. Mr. Festus Muema	Secretariat	.....	.....

In response, the Respondents allege at paragraph 9 of their Replying Affidavit that the Procuring Entity complied with section 46 of the Act by constituting a tender evaluation committee vide a memo referenced KSU/P&S/01/72 dated 8th March 2021 appointing the following four members of the Evaluation Committee:

- 1. Ms. Rose Ogata -Chairperson
- 2. Mr. Charles Maina -Member
- 3. Ms. Mary Kunyoria -Member
- 4. Mr. Stephen Mokaya -Member

In addressing parties' rival cases, the Board notes that section 46 (1) and (4) (b) & (c) of the Act provides as follows:

"46 (1) An Accounting officer shall ensure that an ad hoc evaluation committee is established in accordance with this Act and Regulations made thereunder and from within the members of staff, with the relevant expertise

(2)

(3)

(4) An evaluation committee established under subsection (1) shall

(a)

(b) consist of between three and five members appointed on a rotational basis comprising heads of user department and two other departments or their representatives and where necessary, procured consultants or professionals, who shall advise on the evaluation of the tender documents and give a recommendation on the same to the committee within a reasonable time;

(c) have as its secretary, the person in charge of the procurement function;"

Regulation 28 and 29 of Regulations 2020 further provide that:

- "28. (1) Pursuant to section 46 of the Act, an ad hoc evaluation committee shall be established for each procurement within the threshold specified in the matrix under the Second Schedule except for low value procurements.**
- (2) The accounting officer of a procuring entity shall appoint an evaluation committee for the purposes of carrying out the technical and financial evaluation of the tenders or proposals.**
- 29. (1) The ad hoc evaluation committee established and appointed under regulation 28 of these Regulations shall consists of—**
- (a) at least three members appointed on rotational basis comprising heads of user departments or their representatives; and**
- (b) a professional or consultant, where required.**
- (2) The accounting officer shall designate one of the members of the evaluation committee as the chairperson.**
- (3) The quorum for the conduct of business of the evaluation committee shall be at least three persons including the chairperson.**

- (4) The person in charge of the procurement function shall be the secretary of the ad hoc evaluation committee.**
- (5) The role of the secretary of the ad hoc evaluation committee shall be—**
- to provide technical input in terms of compliance with the Act and these Regulations;**
- (a) to avail all the relevant documents to the evaluation committee;**
- (b) to facilitate official communication with tenderers, where clarification is required;**
- (c) to provide logistical support to the evaluation committee**
- (d) to provide secretariat services to evaluation committee.**

Having studied section 46 (1) and (4) of the Act read together with Regulation 28 and 29 of Regulations 2020, the Board observes that the accounting officer of a procuring entity bears the responsibility of appointing an evaluation committee comprising of at least 3 members and a maximum of 5 members. Regulation 29 (5) of Regulations 2020 outlines the roles of a secretary including: (i) providing technical input in terms of compliance with the Act and Regulations 2020, (ii) providing all the relevant documents to the evaluation committee, (iii) facilitating official communication with tenderers, where clarification is required, (iv) providing logistical support to

the evaluation committee and (v) providing secretariat services to evaluation committee. This therefore means any person acting as a secretary to the evaluation committee is not a member of the evaluation committee because the roles outlined in section 46 (4) (c) of the Act read together with Regulation 29 (5) of Regulations 2020 do not include evaluation and comparison of tenders.

Turning to the Procuring Entity's confidential file, the Board notes that through an Internal Memo Reference No. KSU/P&S/01/72 dated 9th March 2021, the Procuring Entity's Senior Procurement Officer wrote to the Procuring Entity's Vice Chancellor (the 1st Respondent herein) seeking appointment of a proposed evaluation committee members to evaluate bids in the subject tender. In the said Internal Memo, the Procuring Entity's Senior Procurement Officer stated as follows:

SUBJECT: TENDER FOR OUTSOURCING OF CLEANING SERVICES KSU/T/09/2020-2021

The Tender for outsourcing of cleaning services and fumigation was dispatched on 23rd February 2021 and is due for opening on 16th Tuesday March, 2021 at 11.30am at the Administration block reception and thereafter is due for evaluation.

According to the Public Procurement and Asset Disposal Act 2015 Section 46 (1) "An Accounting Officer shall ensure that an ad hoc Evaluation Committee is established in accordance with this Act and Regulations made there under and form within the members of staff, with relevant expertise"

The purpose of this memo is to seek your consideration and approval of the following members of staff to undertake Evaluation of the Tender.

Members

- 1. Ms. Rose Ogata -Chairperson***
- 2. Mr. Charles Maina -Member***
- 3. Mary Kunyoria -Member***
- 4. Stephen Mokaya -Member***

Secretariat

- 1. Mr. Hillary Sang -Secretariat***
- 2. Mr. Festus Muema -Secretariat***

Kindly approve.”

The Board observes that the 1st Respondent approved appointment of four Evaluation Committee Members (that is, Rose Ogata as Chairperson of the Evaluation Committee, Charles Maina, Mary Kunyoria and Stephen Mokaya as the other members of the Committee) and two other persons (that is, Hillary Sang and Festus Muema) to provide secretariat services to the Evaluation Committee. Clause 1.1.5 at page 2 and 3 of the Evaluation Report executed on 4th May 2021, cites the four Evaluation Committee members listed hereinbefore as the ones appointed by the 1st Respondent to carry out evaluation of tender. Two other individuals (Mr. Hillary Sang and Mr. Festus Muema) provided secretariat services to the Evaluation Committee.

The Board observes that the Applicant's Annexure "DGM-2" cites Members of the Evaluation Committee as: Ms. Rose Ogata (Chairperson), Mr. Charles Maina, Mr. Stephen Mokaya, Mr. David Basweti, Ms. Mary Kunyori, Mr. Hillary Sang (Secretariat) and Mr. Festus Muema (Secretariat) as the ones who undertook a site visit at the Applicant's offices on 23rd April 2021. Mr. David Basweti is not cited in any of the confidential documents that were furnished to the Board neither does he form part of the Evaluation Committee appointed by the 1st Respondent vide an Internal Memo dated 9th March 2021. The Applicant merely provided a list of individuals who undertook a site visit at the Applicant's offices on 23rd April 2021 whilst citing Mr. David Basweti who was not part of the Evaluation Committee.

That notwithstanding, the 1st Respondent's Internal Memo dated 9th March 2021 supports the Board's position that the Evaluation Committee comprised of 4 members and two other persons providing secretariat services to the Evaluation Committee.

Accordingly, the Board finds that the 1st Respondent complied with section 46 (1) and (4) of the Act read together with Regulation 28 and 29 of Regulations 2020 in constituting an Evaluation Committee of 4 members to carry out evaluation and comparison of tenders in the subject tender and two other persons providing secretariat services to the Evaluation Committee.

On the third issue for determination, the Applicant alleged at paragraphs 1, 2 and 3 of its Request for Review that the Procuring Entity breached section

80 (2) of the Act by failing to consider the Applicant's bid in totality. In the Applicant's view, the Procuring Entity failed to appreciate that the Applicant submitted all the mandatory documents required in the subject tender. The Applicant further avers that the Procuring Entity breached section 83 of the Act by carrying out a due diligence exercise on the Applicant before Financial Evaluation. At paragraph 8 of its Supporting Affidavit, the Applicant challenged the reasons provided in its letter of notification. In the Applicant's view, the alleged failure to have signage at the entrance of its business is not true because the Applicant has been in business of providing cleaning services for a cumulative period of over 20 years with a fully operational and established office located at RentFord House Building along Muindi Mbingu Street in Nairobi with a clear signage that is visible to passersby and visitors.

The Applicant deponed at paragraph 9 of its Supporting Affidavit that the Procuring Entity's decision adjudging the Applicant's bid non-responsive because its business is for small scale traders, is irrational. According to the Applicant, the content and mode of its Business Permit does not in any way negate the nature of the company's business of providing cleaning services because the Applicant provided a valid Business Permit as required in the Tender Document. The Applicant also made reference to Reason No. 4, 5 and 6 of its letter of notification of unsuccessful bid to support its view that the said reasons were not part of the mandatory requirements in the Tender Document. Further, the Applicant deponed at paragraph 10 of its Supporting Affidavit that it provided the required documentation during the Procuring Entity's field visit and relevant grades were awarded. On the issue of providing evidence of similar work with relevant recommendation letters

and/or certificates of completion, the Applicant deponed at paragraph 11 of its Supporting Affidavit that the required documentation can be found at pages 167, 195, 200, 202, 385 and 388 of its original bid. In its Further Affidavit, the Applicant deponed at paragraphs 3 and 4 thereof that the marks awarded to it on the areas outlined in its letter of notification do not reflect fairness and openness in the subject procurement process. The Applicant further reiterates that all questions raised by the Evaluation Committee during the physical visit were adequately addressed. In the Applicant's view, the marks awarded to it during the Procuring Entity's physical visit do not reflect the Applicant's actual capacity of its bid.

In response, the Respondents deponed at paragraph 13 of their Replying Affidavit that the Applicant failed to point out instances where the Procuring Entity used evaluation criteria that was not provided in the Tender Document. While making reference to the reasons why the Applicant's bid was non-responsive, the Respondents deponed at paragraph 15 of their Replying Affidavit that the nature of business undertaken by a bidder should relate to the subject tender. In the Respondent's view, the Applicant did not satisfy this threshold because its Business Permit indicates that the Applicant is engaged in "small trader shop or retail services with up to 4 employees." The Respondents further depone that during the site visit for due diligence, the Evaluation Committee could not trace the appropriate office since there was no signage or any label of the Applicant's office. In conclusion, the Respondents aver that the Applicant's bid was considered in totality during evaluation and its outcome is captured in the Evaluation Report. In the Respondents' view, they complied with section 80 (2) and 83 of the Act without addressing itself to any new or foreign criteria.

The Interested Party did not make specific averments on the reasons why the Applicant's bid was found non-responsive. The Interested Party only urged the Board to dismiss the Request for Review because in the Interested Party's view, the Applicant failed to demonstrate how the subject procurement process violated provisions of the Tender Document and the law.

Having considered parties' rival positions, the Board deems it necessary to outline the contents of the Applicant's letter of notification of unsuccessful bid dated 5th May 2021. The same provides as follows:

"RE: PROVISION OF CLEANING SERVICES

Kisii University considered your application for provision of cleaning services TENDER NO. KSU/T/09/2020-2021.

The evaluation undertook due diligence in your company on 23/4/2021 having informed you in advance.

After comprehensive evaluation, we regret to communicate to you that your application was unsuccessful.

The decision was reached after the evaluation committee undertook due diligence and was unanimously satisfied that you did not meet the threshold set in the due diligence criteria in page 41 and 42 of the tender document thus you were not eligible to proceed to financial evaluation.

The company did not comply with the following:

- 1. Was not easily accessible neither did it have a signage outside nor at the entrance of the building for direction.***
- 2. The bidder's business is clearly indicated as for small traders and was not related to the subject tender.***

3. Evidence of similar works/projects done were three (3)

4. Did not provide supervisors files.

5. Did not provide evidence of resolving customer complaint in timely way only stating verbally that complaints were resolved on site.

6. Did not provide employees' payroll"

The Board studied the Tender Document to establish the criteria and procedures for evaluation applicable in the subject tender, thus proceeds to make the following findings:

Section A. Evaluation Criteria at page 38 of the Tender Document provided a list of 15 mandatory documents that would be considered during Preliminary Evaluation. According to the paragraph found on the foot of page 38 of the Tender Document, bidders were cautioned that:

"Failure to provide/attach any of the above documents/information [the 15 listed mandatory documents] would lead to Automatic Disqualification" [Emphasis by the Board

Further, Section B. Technical Evaluation at page 39 of the Tender Document provided 7 parameters of Technical Evaluation. According to page 40 of the Tender Document, bidders were instructed as follows:

"To qualify for financial evaluation stage, bidders are expected to score at least 50 marks out of maximum possible 70 marks at the technical evaluation stage."

On the same page 40 of the Tender Document, Stage 3. Financial Evaluation provides as follows:

"Lowest Bidder in price who meets all mandatory requirements and technical pass mark will be considered subject to due diligence"

Further, a Criteria on Site Visit is provided under Part B. Operational Assessment by Site Visit at page 41 to 42 of the Tender Document as follows:

"SITE VISIT

Part B. Operational Assessment by Site Visit

The Technical Evaluation Team will visit the physical premises of the Bidder to verify and award points accordingly, based on the following requirements:

Confirmation of Physical Business

Premises: (Name and Physical Address) YES NO

If the Bidder does not have a business premise, then he/she is automatically disqualified. If the bidder has a business premise, then he/she can proceed for further evaluation.

Site visit at the tenderer's premises

Criterion	Observations Made	Scores
Accessibility of the business		
• Easily accessible	2	
• Not easily accessible	1	
Nature of business in relation to the tender applied for		
i. Sole Business	8	
ii. Main Business	6	
iii. Minor Business	4	
iv. New Business	2	

Criterion	Observations Made	Scores
Existence of Original Registration documents <ul style="list-style-type: none"> • Single Business Permit • Certificate of Incorporation or Business Name 	4 2	
Existence of Original Project files of submitted projects Similar Projects <ul style="list-style-type: none"> • Above 7 projects • 7 projects • 6 projects • 5 projects • 4 projects • 3 projects 	14 12 10 8 6 4	
Neatness and availability of cleaning equipment Proof of ownership or physical verification <ul style="list-style-type: none"> • Floor scrubbing machine • Carpet cleaning machine Office neatness <ul style="list-style-type: none"> • Equipment/detergents store • Office cleanliness and orderliness 	2 2 2 2	
Existence of Supervisors' files <ul style="list-style-type: none"> • Name..... 	2	
Customer Services/After Sales services Proof of solving customers' complains in a timely way.	2	
Total Points	40	

- i. The above scheme will be applied to determine the authenticity of information supplied in Part B. The Evaluation Committee may not be limited to the above questionnaire***
- ii. Bidders who get a score of 30 points and above out of 40 will be considered responsive to the requirements of Part B and will proceed to Financial Analysis***

The Board observes that Clause 2.24 of Section II. Instructions to Tenderers of the Tender Document which deals with Award of Contract provides as follows:

"2.24 Award of Contract

a) Post qualification

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

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

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

b) Award Criteria

2.24.3 Subject to paragraph 2.25 the Procuring entity will award the contract to the successful tenderer whose tender has been determined to be substantially responsive and has been determined to be the lowest evaluated tender, provided further that the tenderer is determined to be qualified to perform the contract satisfactorily.

2.24.4 The procuring entity reserves the right to accept or reject any tender and to annul the tendering process and reject all tenders at any time prior to contract award, without thereby incurring any liability to the affected tenderer or tenderers or any obligation to inform the affected tenderer or tenderers of the grounds for the procuring entity's action. If the procuring entity determines that none of the tenderers is responsive; the procuring entity shall notify each tenderer who submitted a tender.

2.24.5 A tenderer who gives false information in the tender document about its qualification or who refuses to enter into a contract after notification of contract award shall be considered for debarment from participating in future public procurement'

The Board studied the Evaluation Report executed on 4th May 2021 and notes that the Evaluation Committee first conducted a Preliminary Evaluation of all

16 bids received by the Procuring Entity to determine whether or not bidders provided the 15 mandatory documents listed in Section A. Evaluation Criteria at page 38 of the Tender Document. Thereafter, the Evaluation Committee subjected 5 bids that were found responsive at the end of Preliminary Evaluation, to a Technical Evaluation based on the criteria outlined in Section B. Technical Evaluation at page 39 of the Tender Document. All the remaining five bidders were found responsive at the end of Technical Evaluation; thus their respective tender prices were recorded in an ascending order (from the lowest price to the highest price) as follows:

	Tenderer	Tender amount quoted per month
	M/s The Gardens & Weddings Center Limited	Kshs. 711,431/-
	M/s Hever the Company Limited	Kshs. 1,109,380/-
	M/s Vinstar Express Supplies Limited	Kshs. 1,104,500/-
	M/s Super-Broom Device Limited	Kshs. 1,548,734.42
	M/s Neat Hygiene Services Limited	Kshs. 1,092,500/-

Subsequently thereafter, the Evaluation Committee undertook what it referred to as "Due Diligence" at page 12 of the Evaluation Report. The criteria applied for the alleged "due diligence" is outlined at pages 13 to 19 of the Evaluation Report as follows:

No	Criterion
1.	<p>Accessibility of the business Easily accessible (2Mks) Not easily accessible (1Mks).</p> <p>Max Score: 2Mks</p>
2.	<p>Nature of business in relation to the tender applied for: i. Sole Business (8Mks) ii. Main business(6Mks) iii. Minor Business(4Mks) iv. New business(2Mks)</p> <p>Max Score: (8Mks)</p>
3.	<p>Existence of Original Registration documents.</p> <ul style="list-style-type: none"> • Single Business permit (4Mks) or

	<ul style="list-style-type: none"> • Certificate of Incorporation or Business name (2Mks) Max Score: (4Mks)
4.	Existence of Original project files of submitted projects. Similar projects Above 7 Projects 14 Mks 7Projects 12Mks 6Projects 10Mks 5Projects 8Mks 4Projects 6Mks 3 Projects 4mks Max Score: (14Mks)
5.	Neatness and availability of cleaning equipment Proof of ownership or physical verification <ul style="list-style-type: none"> • Floor scrubbing machine (2mks) • Carpet cleaning machine(2mks) Office neatness <ul style="list-style-type: none"> • Equipment / detergents store(2mks) • Office cleanliness and orderliness(2mks) Max Score: (8Mks)
6.	Existence of supervisors' files Max Score: (2Mks)
7.	Customer service / After sales service Proof of resolving customers' complaints in a timely way. (2 marks)
	Total Score

The Board observes that the Procuring Entity named the criteria outlined hereinbefore as "due diligence" even though the parameters outlined in the above table shows the criteria is for "Site Visit" found in Part B. Operational Assessment by Site Visit at page 41 to 42 of the Tender Document. This in the Board's view, was not a due diligence exercise but a Site Visit to be undertaken after Technical Evaluation and upon recording the prices quoted by bidders.

The Board is mindful of the criteria provided under Stage 3. Financial Evaluation of the Tender Document which stated that the "Lowest Bidder in price who meets all mandatory requirements and technical pass mark will be considered subject to due diligence." The Evaluation Committee did not determine the lowest evaluated bidder during Stage 3 but merely ranked

bidders in an ascending order according to their respective tender prices. Determination of the lowest evaluated bidder was carried out after conclusion of a Site Visit in a stage known as **"Financial Analysis."**

Since M/s Hever the Company Limited, M/s Vinstar Supplies Limited and the Applicant failed to achieve the average score of 30 marks after the Site Visit, their bids were not evaluated at the Financial Analysis Stage.

To support the Board's position that the Site Visit was not a due diligence exercise, we note that Clause 2.24 (a) of Section II. Instructions to Tenderers of the Tender Document which was outlined hereinbefore provided a procedure for a post-qualification exercise that would be carried out only on the lowest evaluated tenderer and not on several tenderers at the same time. This is in line with section 83 (1) of the Act which provides that:

"An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act"

It is the Board's considered view that the Procuring Entity's Site Visit undertaken pursuant to the criteria provided in Part B. Operational Assessment by Site Visit at page 41 to 42 of the Tender Document was not a due diligence exercise. The Procuring Entity misled the Applicant in the letter of notification dated 5th May 2021 by referring to the Site Visit as a **"due diligence criteria."**

In the circumstances, the Applicant's allegation that the Procuring Entity breached section 83 of the Act by carrying out a due diligence exercise before Financial Evaluation has not been substantiated.

Turning to the manner in which the Procuring Entity evaluated the Applicant's bid during the Site Visit exercise, the Board makes the following findings:

- **Accessibility of the Business**

According to Part B. Operational Assessment by Site Visit at page 41 to 42 of the Tender Document, the Evaluation Committee would determine whether a tenderer's premises is easily accessible or not during the site visit. If the premise is easily accessible, the Evaluation Committee would award two marks to such a bidder. However, an award of one mark would be given to a bidder's premises that is not easily accessible.

The Evaluation Committee noted in its Evaluation Report that the Applicant's office is located at Rentford, 2nd Floor, Nairobi but that the office has no signage at the entrance for direction and with no reserved parking, thus was not easily accessible. Consequently, the Applicant was awarded one mark.

In their Replying Affidavit, the Respondents attached a screenshot of a photograph of a door which has the number "5" indicated on the door without details of the name of the premises. The Board observes that the Applicant did not controvert the production of the said photograph as evidence but merely stated the marks awarded to it were unfair whilst confirming that its offices are located at Rentford House Building along Muindi Mbingu Street, Nairobi.

The Applicant did not provide any evidence to the Board demonstrating its offices have proper signage. The only confirmation from parties' pleadings and the EMS extract that was furnished to the Board is that the Applicant's office is located at Rentford House Building along Muindi Mbingu Street, Nairobi.

In the circumstances, the Board finds that the Applicant was fairly evaluated noting that the said bidder was awarded one mark because its business premises is located at Rentford House Building along Muindi Mbingu Street, Nairobi.

- **Nature of Business in relation to the tender**

According to Part B. Operational Assessment by Site Visit at page 41 to 42 of the Tender Document, the Evaluation Committee was required to establish the nature of business of a tenderer in relation to the subject tender during its site visit. Scores would be allocated as follows:

i. Sole Business (8Mks)

ii. Main business(6Mks)

iii. Minor Business(4Mks)

iv. New business(2Mks)

According to the Evaluation Report, the Evaluation Committee observed the following during their site visit at the Applicant's offices:

"It's a Small Business from observation, had two (2) staff sharing a small room which also acts as a store for some of the cleaning equipment.

The above observation is confirmed by the original business registration permit by the county government acquired by the

tenderer which clearly indicates it's for a small business meant for only 4 employees in a faraway location.

The Business permit is irrelevant to the tender applied for.

From the above observation compounded by the definition and classification in the county government business permit, the committee unanimously identifies the tenderer as a Minor Business with a permit irrelevant to the tender and scores them as follows:

Score 4 marks'

The Board observes that the Applicant opposed the reason provided in its notification letter by alleging that the nature of business stated in its Business Permit does not in any way negate the fact that the Applicant provides cleaning services.

The Board observes that the Evaluation Committee noted in its Evaluation Report that the Applicant provided a Single Business Permit during the site visit. The same is attached to the Procuring Entity's Response with the same details as the Business Permit found on page 92 of the Applicant's original bid. The Applicant's Business Permit was issued by Nairobi City County on 29th January 2021 for a duration of 12 months allowing the Applicant to engage in the business of **"Small trader shop or retail services"** with **"up to 4 employees/less than 50 square meters/faraway location."**

The Board observes that the subject tender is for Provision of Cleaning Services. Section 60 (1) of the Act requires an accounting officer of a procuring entity to:

"prepare specific requirements relating to the goods, works or services being procured that are clear, that give a correct and complete description of what is to be procured and that allow for fair and open competition among those who may wish to participate in the procurement proceedings."

The above provision gives the 1st Respondent an obligation of preparing specific requirements relating to the goods, works or services being procured. Such requirements must be clear, give a correct and complete description of what is to be procured and allow for fair and open competition among those who may wish to participate in the procurement proceedings. It therefore follows that a procuring entity is better placed to know its needs when advertising a tender and preparing a Tender Document.

Upon careful examination of the Tender Document, the Board observes that the scope of work in the subject tender is described in Section V. Schedule of Requirements of the Tender Document which provides a list of the areas to be cleaned in several locations and different activities to be undertaken by cleaners.

The Applicant did not provide any other documentation which might have been provided during the site visit to assist the Evaluation Committee in determining whether the Applicant's business fully satisfies the needs of the Procuring Entity. The Procuring Entity, is better placed to know its needs

thus classified the Applicant's business as a Minor Business owing to the description provided in the Applicant's Business Permit.

In essence, no documentation has been adduced to the Board to support the allegation that evaluation under this criterion was unfair noting further that the Applicant was awarded a score of 4 marks prescribed in the Tender Document if a bidder's business is classified as a minor business.

In the circumstances, the Board finds that the Applicant was fairly evaluated under this criterion.

- **Existence of Original Project files of submitted projects**

Part B. Operational Assessment by Site Visit at page 41 to 42 of the Tender Document required the Evaluation Committee to establish whether a bidder has the original project files of submitted projects. Further, scores would be awarded as follows:

"Similar projects

<i>Above 7 Projects</i>	<i>14 Mks</i>
<i>7Projects</i>	<i>12Mks</i>
<i>6Projects</i>	<i>10Mks</i>
<i>5Projects</i>	<i>8Mks</i>
<i>4Projects</i>	<i>6Mks</i>
<i>3 Projects</i>	<i>4mks'</i>

According to the Evaluation Report, the Evaluation Committee noted the following during their Site Visit:

"The Evaluation Committee was provided with Three (3) original project files. ie: IEBC, Ministry of foreign Affairs, Kenya Airports Authority."

The Board observes that the Applicant was awarded a score of 4 marks prescribed in the Tender Document if a bidder provides original project files for three projects, thus was fairly evaluated.

In the circumstances, the Board finds that the Applicant was fairly evaluated under this criterion.

- **Existence of Supervisors' files**

Part B. Operational Assessment by Site Visit at page 41 to 42 of the Tender Document required the Evaluation Committee to determine whether supervisors' files were available during the Site Visit. A maximum score of 2 marks would be awarded under this criterion. According to the Evaluation Report, the Evaluation Committee noted that the Applicant did not provide any supervisor's files thus achieved a score of zero. The Applicant did not controvert the allegation that it did not provide supervisor's files during the site visit.

In the circumstances, the Board finds that the Applicant was fairly evaluated under this criterion since it did not provide any supervisor's files during the site visit.

- **Customer Service/After sales Service**

Part B. Operational Assessment by Site Visit at page 41 to 42 of the Tender Document required the Evaluation Committee to determine whether the bidder had proof of resolving customers' complaints in a timely manner. A

maximum score of 2 marks would be awarded under this criterion. According to the Evaluation Report, the Evaluation Committee noted the following:

"Resolved on site

No documented evidence provided"

The Board observes that the Evaluation Committee awarded the Applicant a score of zero because the Applicant did not provide any documented evidence of resolving customers' complaints in a timely manner. According to the Applicant's letter of notification, the Applicant stated verbally that **"complaints were resolved on site"**. This position was not controverted by the Applicant.

In the circumstances, the Board finds that the Applicant was fairly evaluated under this criterion since it did not provide any documentation during the site visit thus failed to demonstrate that it resolves customers' complaints in a timely manner.

The Applicant alleged that the Procuring Entity introduced extraneous criteria during the Site Visit. The Board already noted that the criteria for Site Visit is provided in Part B. Operational Assessment by Site Visit at page 41 to 42 of the Tender Document comprising of 7 parameters outlined hereinbefore. From the Evaluation Report executed on 4th May 2021, these were the same parameters that were considered during the Site Visit. That notwithstanding, the Applicant was informed that it did not provide employees payroll, yet this criterion was not part of the Site Visit Criteria neither was it evaluated during the site visit. Furthermore, the criteria applied during Preliminary and Technical Evaluation do not include a criterion on providing employees

payroll, thus should not have formed part of the reasons why the Applicant's bid was found non-responsive.

It is worth pointing out that the Procuring Entity also evaluated the Applicant during the Site Visit on the two remaining criterion of Existence of Original Registration Documents and Neatness and availability of cleaning equipment as follows:

- **Existence of Original Registration Documents**

Part B. Operational Assessment by Site Visit at page 41 to 42 of the Tender Document required the Evaluation Committee to establish whether a bidder has the following original registration documents:

- Single Business Permit (4 Marks)
- Certificate of Incorporation or Business Name (2 Marks)

According to the Evaluation Report, the Evaluation Committee noted that the Applicant provided a Business Permit and a Certificate of Incorporation save that the Applicant's Business Permit was for small trader shop/retail service. The Board already established that the Applicant's business was classified by the Procuring Entity as a Minor Business owing to the description provided in the Applicant's Business Permit. Further, the Applicant was awarded some marks as opposed to a score of zero for providing a Business Permit and a Certificate of Incorporation save that the Applicant's Business Permit was for a small trader shop/retail service.

In the circumstances, the Board finds that the Applicant was fairly evaluated under this criterion.

- **Neatness and availability of cleaning equipment**

Part B. Operational Assessment by Site Visit at page 41 to 42 of the Tender Document required the Evaluation Committee to determine the level of neatness and availability of cleaning equipment at a bidder's premises. Further, scores would be awarded as follows:

Proof of ownership or physical verification

- ***Floor scrubbing machine (2mks)***
- ***Carpet cleaning machine(2mks)***

Office neatness

- ***Equipment / detergents store(2mks)***
- ***Office cleanliness and orderliness(2mks)***

The Evaluation Committee observed the following in their Evaluation Report:

"Receipts/Lease agreement provided. Office is untidy, acts as an office and a store for some of the equipment"

The Board observes that the Applicant was awarded a score of 8 marks for providing receipts and lease agreement. No evidence was furnished before the Board to demonstrate that evaluation under this criterion was unfair noting further that the Evaluation Committee found the Applicant's office to be untidy and acting as a store for some of the equipment.

In the circumstances, the Board finds that the Applicant was fairly evaluated under this criterion.

In totality of the third issue for determination, the Board finds that the Procuring Entity evaluated the Applicant's bid during the Site Visit in accordance with Part B. Operational Assessment by Site Visit at page 41 to 42 of the Tender Document read together with section 80 (2) of the Act. However, the Applicant was given a reason on failure to provide employees payroll which did not form part of the criteria for Site Visit and for evaluation during the Site Visit.

On the fourth issue for determination, the Applicant took the view that the Procuring Entity breached section 87 (3) of the Act read together with Regulation 82 (3) of Regulations 2020 by failing to notify the successful bidder of the outcome of its bid at the same time unsuccessful bidders were notified. In response, the Respondents depone at paragraph 10 of their Replying Affidavit that the Procuring Entity complied with section 87 (3) of the Act because they communicated the outcome of the Applicant's bid vide a letter referenced KSU/VC/PROC/1 (3) dated 5th May 2021. The Interested Party on the other hand did not state the date it received its letter of notification of award but deponed at paragraph 6 of its Replying Affidavit that it submitted its acceptance letter to the Procuring Entity committing themselves to offer the said services as per the bid documents and all the specifications therein.

The Board observes that section 87 (3) of the Act which was cited hereinbefore requires unsuccessful bidders to be notified the same time a successful bidder is notified. Regulation 82 of Regulations 2020 further provides that:

- "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 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."**

The Board already established that the Applicant was notified of the outcome of its bid on 12th May 2021. The Respondents did not provide evidence of the date when the Interested Party and all other unsuccessful bidders (apart from the Applicant) were notified of the outcome of their bids. Even though the Interested Party did not expressly state the date when it received its notification, it appears the Interested Party was notified on 5th May 2021 for it to assume the Applicant was also notified on 5th May 2021 and had up to 19th May 2021 to file a Request for Review. If indeed the Interested Party was notified on 5th May 2021, then the 1st Respondent failed to notify unsuccessful bidders such as the Applicant at the same time the successful bidder was notified of award of the subject tender.

Apart from the requirement of notifying bidders simultaneously, section 87 of the Act read together with Regulation 82 of Regulations 2020 requires a procuring entity to notify all bidders of the outcome of their bids in writing before the expiry of the tender validity period. These provisions further direct that a letter of 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 and the amount at which such award was made.

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.

The Applicant's letter of Notification dated 5th May 2021 only provided some of the reasons why the Applicant's bid was unsuccessful during the Site Visit. However, the said letter did not state the outcome of the Applicant's bid in two of the parameters considered during Site Visit (that is, Existence of Original Registration Documents & Neatness and Availability of Cleaning Equipment) and did not disclose the identity of the successful bidder, the reason why award was made to the successful bidder and the amount at

which such award was made. Further, the Applicant was informed of failure to provide employees payroll yet this was not part of the criteria to be considered during the Site Visit. Evidently, 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.

Accordingly, the Board 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 Procuring Entity did not state the outcome of the Applicant's bid in two of the parameters considered during Site Visit (that is, Existence of Original Registration Documents & Neatness and Availability of Cleaning Equipment) did not disclose the identity of the successful bidder, the reason why award was made to the successful bidder and the amount at which such award was made.

The Board observes that the Applicant prayed that the tender validity period be extended. Pursuant to Clause 2.13.1 of Section II. Instructions to Tenderers of the Tender Document, the tender validity period was 120 days from the date of tender opening which was 16th March 2021. By the time the Applicant filed its Request for Review on 25th March 2021, 59 days of the tender validity period had run. This period stopped running due to suspension of procurement proceedings pursuant to section 168 of the Act which includes the tender validity period. At paragraph 51 and 52 of the decision in **Judicial Review Application No. 540 of 2017, Republic v Public Procurement Administrative Review Board; Kenya Power & Lighting Company Limited (Interested Party) Ex parte Transcend**

Media Group Limited [2018] eKLR, the court addressed the import of section 168 of the Act and held as follows:

Firstly, section 168 of the Act provides that upon receiving a request for a review under section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed. The effect of a stay is to suspend whatever action is being stayed, including applicable time limits, as a stay prevents any further steps being taken that are required to be taken, and is therefore time –specific and time-bound.

53. Proceedings that are stayed will resume at the point they were, once the stay comes to an end, and time will continue to run from that point, at least for any deadlines defined by reference to a period of time, which in this case included the tender validity period. "

In the circumstances, 61 days of the tender validity period are still remaining thus the Board does not see the need of extending the tender validity period.

In totality, the Request for Review succeeds only in respect of 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 Interested Party's Preliminary Point of Law filed on 8th June 2021 and Grounds of Opposition filed on 8th June 2021, be and are hereby dismissed.**

- 2. The Accounting Officer of the Procuring Entity's Letters of Notification of Tender No. KSU/T/09/2020-2021 for Provision of Cleaning Services dated 5th May 2021 issued to all unsuccessful bidders, including the Applicant herein, be and are hereby cancelled and set aside.**

- 3. The Accounting Officer of the Procuring Entity's Letter of Notification of Tender No. KSU/T/09/2020-2021 for Provision of Cleaning Services dated 5th May 2021 issued to the Interested Party herein, be and is hereby cancelled and set aside.**

- 4. The Accounting Officer of the Procuring Entity is hereby directed to issue fresh letters of notification of the outcome of evaluation to all bidders in accordance with section 87 of the Act read together with 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.**

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

Dated at Nairobi this 14th day of June 2021

CHAIRPERSON

SECRETARY

PPARB

PPARB