

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 54/2022 OF 23<sup>RD</sup> JUNE 2022**

**BETWEEN**

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

**AND**

**DIRECTOR GENERAL,  
ENERGY AND PETROLEUM REGULATORY**

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

**ENERGY AND PETROLEUM REGULATORY**

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

**HEVER THE COMPANY LIMITED..... INTERESTED PARTY**

Review against the decision of the Energy and Petroleum Regulatory Authority with respect to Tender Number EPRA/SCM/4/3/21-22/069 for Provision of Cleaning & Tea Making Services.

**BOARD MEMBERS PRESENT**

- |                           |              |
|---------------------------|--------------|
| 1. Ms.Faith Waigwa        | -Chairperson |
| 2. EngMbiu Kimani OGW HSC | -Member      |
| 3. Mrs Irene Kashindi     | -Member      |
| 4. Qs Hussein Were        | -Member      |
| 5. Dr Joseph Gitari       | -Member      |

**IN ATTENDANCE**

Mr.Philemon Kiprop -holding brief for Acting Board Secretary

## **BACKGROUND OF THE AWARD**

The tender was advertised on 8<sup>th</sup> March, 2022 vide an advertisement in the local daily newspapers inviting interested tenderers for Tender No. EPRA/SCM/4/3/21-22/069 for Provision of Cleaning & Tea Making Services (Reserved for Women Only) (hereinafter referred to as the 'subject tender').

A Tender Opening Committee was appointed by the 1<sup>st</sup> Respondent and subsequently opened the submitted tenders on 24<sup>th</sup> March, 2022. A total of twenty-five (25) tenders were submitted and the required Tender Opening register and minutes prepared.

## **Tender Evaluation and Award**

The Tender Evaluation exercise was carried out by the Respondent. The evaluation stages undertaken were as follows:

- a. Preliminary/ Mandatory Requirements Evaluation Criteria;
- b. Technical Evaluation Criteria; and
- c. Financial Evaluation.

A Tender Evaluation Committee was appointed by the 1<sup>st</sup> Respondent who subsequently undertook the Tender Evaluation of the submitted bids and an Evaluation Report dated 22<sup>nd</sup> April, 2022 was prepared and issued to the

1<sup>st</sup> Respondent recommending award to Hever The Company Limited the Interested Party herein.

### **Professional opinion**

Pursuant to Section 84 (1) of the Act, the Acting Deputy Director Supply Chain Management prepared the Professional Opinion dated 5<sup>th</sup> May, 2022 recommending to the 1<sup>st</sup> Respondent, the award to Hever The Company Limited. On 25<sup>th</sup> May, 2022 the 1<sup>st</sup> Respondent approved the recommendation of award to HeverThe Company Limited.

### **Notification**

Vide letters dated 31<sup>st</sup> May 2022 the Respondents notified tenderers of the outcome of evaluation of their tenders.

The Applicant herein has lodged this Request for Review seeking annulment of the tender award on the grounds set out in the application which the Respondents has opposed.

### **REQUEST FOR REVIEW NO. 54/2022**

The Request for Review was lodged by M/s The Gardens And Weddings Centre Limited, the Applicant herein, on 23<sup>rd</sup> June, 2022. The Applicant, through the firm of Messrs CK Advocates of P.O. Box 10475-00400, Nairobi, sought for the following orders:-

***(a) The 1<sup>st</sup> Respondent's decision as communicated to the Applicant in the letter dated 31<sup>st</sup> May, 2022 be annulled.***

***(b) Any letter of award of tender arising from the Tender for Provision of Cleaning & Tea Making Services (Reserved for Women Only) Tender No.EPRA/SCM/4/3/21-22/069 (hereinafter the "Tender") issued by the 1<sup>st</sup> Respondent to HEVER THE COMPANY LIMITED be declared null and void.***

***(c) The procurement and proceedings leading to the decision by the 1st Respondent to award the Tender for Provision of Cleaning & Tea Making Services (Reserved for Women Only) Tender No.EPRA/SCM/4/3/21-22/069 (hereinafter the "Tender") to M/S Hever The Company Limited be reviewed and the Board be pleased to direct the 1st Respondent to re-admit the Applicant's bid for, Technical and Financial evaluation and proceed to make an award in a manner that complies with the provisions of the law.***

***(d) In the alternative but without prejudice to the above request in prayer (c) hereinabove, the entire tender process be and is hereby annulled in its entirety and the 1st Respondent compelled to commence a fresh procurement with respect to the Tender for Provision of Cleaning & Tea Making Services (Reserved for Women Only) Tender No.EPRA/SCM/4/3/21-22/069 (hereinafter the "Tender") which procurement process shall accord with the established law and procedures.***

***(e) The Respondents be ordered to pay the costs of and incidental to these proceedings.***

***(f) Any other relief that the Honourable Board deems fit to grant, having regard to the circumstances of this case in order to give effect to the Board's orders.***

By a Notification of Appeal and letter dated 23<sup>rd</sup> June 2022, the Acting Board Secretary of the Public Procurement Administrative Review Board (hereinafter referred to as the "Board") notified the Respondents of the existence of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five days of 23<sup>rd</sup> June 2022.

The Respondents filed a Response on 29<sup>th</sup> June, 2022, signed by Leah Jadidah Jara, Counsel of the 2<sup>nd</sup> Respondent.

Vide letters dated 30<sup>th</sup> June 2022, the Acting Board Secretary notified all the tenderers in the subject tender, via their respective postal and email addresses as provided by the Respondents, of the existence of the Request for Review while forwarding to the tenderers a copy of the Request for

Review together with the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020. Further, all tenderers were invited to submit to the Board any information and arguments about the subject tender within three days of 30<sup>th</sup> June 2022.

The Interested Party filed on 4<sup>th</sup> July, 2022 a Replying Affidavit dated on an even date sworn by **CAROLINE KAMUTU**, Director of Hever The Company Limited, the Interested Party herein.

Pursuant to the Board's Circular No. 20/2020 dated 24<sup>th</sup> March 2020, detailing an administrative and contingency management plan to mitigate the effects of 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 specifies that pleadings and documents shall be deemed as properly filed if they bear the official stamp of the Board.

In its response to the Request for Review the Procuring Entity submits that the Application violates Section 167 (1) of the Act and regulation 203 (2) (c) (i) – (iii) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "Regulations 2020") as the Application has been brought before the Board after the lapse of fourteen (14) days of notification of intention to award, therefore the Respondents raise a

preliminary objection that the Board lacks jurisdiction to hear and determine this Request for Review.

### **BOARD'S DECISION**

The Board has considered the parties' cases, pleadings, submissions together with the documentation filed before it, including confidential documents submitted to it pursuant to Section 67 (3) (e) of the Act.

### **PARTIES' CASES**

#### **Applicant's case**

The Applicant averred that the Procuring Entity was in breach of the Constitution, the Act, Regulations 2020 and the Fair Administrative Action Act by failing to promote fair competition and ensure all tenderers get treated fairly and equally to promote the integrity and fairness of the procedures of the public procurement by failing to declare the Applicant's tender substantially responsive and the lowest evaluated tender, thus denying the Applicant reasonable expectation to secure an award of the tender. As a result the Applicant risks suffering loss and damage as a result of the Respondents' breach of the Act and the Regulations.

The Applicant averred that it submitted a copy of a single business permit to the Procuring Entity at page 59 of its bid document in the form of a receipted invoice with an affixed system generated stamp acknowledgment by a Nairobi City County officer, a Mr Kirui and with a unique system

identifier Business ID: 1431709 and therefore it complied with criteria for evaluation.

The Applicant avered that if the Procuring Entity doubts validity of the Applicant's copy of a single business permit submitted to the Procuring Entity at page 59 of the Applicant's bid document that would have been dispelled by visiting the Nairobi City County offices and presenting the said copy of the document for verification and authentication in compliance with Section 81 of the Act.

The Applicant argued that the Procuring Entity declared the Applicant's tender as unsuccessful despite having complied with the above mandatory requirements in a manner contrary to law and in complete disregard of the provisions of the law. As such the 1<sup>st</sup> Respondent acted in breach of Section 80 of the Act to the detriment of the Applicant in contravention of Section 3 of the Act, as well as the principles set out in Articles 10, 35, 27 and 227 of the Constitution of Kenya, 2010.

The Applicant further argued that the Procuring Entity evaluated the tenders in a manner contrary to the objectives and intent of the law by adopting a procedure and criterion contrary to the express requirements of the law and criteria provided in the tender document thus in the process unfairly eliminating the Applicant's bid from further evaluation; consequently awarding the tender to the Interested Party.

The Applicant stated that the Procuring Entity was also in breach of the Act for failing to comply with the provisions of the Act and in particular to ensure compliance with the responsibilities assigned by the Act.

The Applicant further stated that the notification letter dated 31<sup>st</sup> May, 2022 offends the Act since it failed to disclose the tender sum the successful tenderer quoted so as to be declared the lowest evaluated price.

The Applicant submitted that the notification letter dated the 31st May, 2022 further offends the Act which mandates ONLY the Accounting Officer as the one duly authorized to notify bidders of the outcome of the Tender proceedings. It submitted further that it had established that one Cyprian Nyakundi who issued and signed the Notification Letter dated the 31st May, 2022 is not the Accounting officer of the Procuring Entity.

The Applicant also submitted that the Procuring Entity was in breach of Section 55 of the Act for failing to ensure compliance with the responsibilities assigned by the Act as required under section 55 (1) (a), (f), 4 and 5 of the Act.

### **Procuring Entity's Response**

In response the Procuring Entity denied breach of the Act, Regulations and the Fair Administrative Action Act, 2015 and Articles 10, 227 and 232 of the Constitution of Kenya 2010. It stated that it carried out the Evaluation of the subject tender properly and as guided by the law. All steps taken ensured fairness and fidelity to the law and the Applicant's bid was properly evaluated.

The Procuring Entity averred that the Applicant submitted a receipted invoice instead of a copy of a single business permit and hence failed to

meet the requirements of Preliminary/Mandatory Evaluation Criteria. The Applicant's tender was therefore properly rejected in accordance with clause 2 of the Tender Document and the law. The evaluation of its tender could not proceed to the technical and financial evaluation stages.

On the successful bidder, the Procuring Entity submitted that it met the minimum preliminary, technical and financial requirements in the Tender Document and as such the Applicant's tender was fairly evaluated by the 2nd Respondent's Evaluation Committee and the need for submission of a copy of valid Business premises/permit license from the respective County Government where the tenderer is domiciled applied to all tenders duly received by the 2nd Respondent.

It submitted further that the Applicant was fully aware of the evaluation criteria set out in the Tender Document and was fully aware that a copy of valid Business premises/permit license from the respective County Government where the tenderer is domiciled was mandatory and was to be submitted.

The Procuring Entity stated that the Act and the Regulations both envisage that the authority of the Accounting Officer may be delegated provided it is done in writing. The 1st Respondent delegated his authority as the Accounting Officer to Mr. Cyprian Nyakundi in writing. The 2nd Respondent's Human Resource Policy and Procedures Manual, 2021 supports the same and therefore stated that in delegating the authority of

the Accounting Officer to Mr. Cyprian Nyakundi, he acted within the provisions of the Act, Regulations 2020 and 2nd Respondent's Human Resource Policy and Procedures 2021.

On the issue of notification, the Procuring Entity argued that Section 87 (3) of the Act, 2015 and Regulation 82 (2) of Regulations 2020 do not require the 2nd Respondent to disclose the tender sum quoted by the successful bidder in the notification to the unsuccessful bidder. It went on to argue that Regulation 82 (2) of Regulations, 2020 is clear that the information to be disclosed in the notification to the unsuccessful bidder shall only relate to their respective bids.

The Respondent in conclusions affirmed that the evaluation process was fair, transparent and competitive. That the Applicant was subjected to the stated evaluation process as provided in the Tender Document. Its bid failed. In accordance with the law, it was not considered for any award of the Tender.

### **Interested Party's Response**

In response to the Request for Review the interested party opposed the application in its entirety and made no admission to allegations of breach of the Constitution, the Act, Regulations 2020. The Interested Party further averred that the application for review by the Applicant was fatally defective, bad in law, frivolous, vexatious and devoid of any merit for the below reasons.

The Interested Party averred that it was not the only bidder and that all the tenders upon being opened were subjected to scrutiny for compliance by the tender evaluation committee and upon approval by the evaluation committee recommendation, by the 1<sup>st</sup> respondent, the procuring entity in accordance with the provision of the law issued the Interested Party with a notice of intention to award vide a letter dated 31<sup>st</sup> May 2022. The Interested Party stated that they duly accepted the notice of intention to award vide its letter dated 16th June 2022.

The Interested Party stated that it had heavily invested and expended in terms of procuring all the required equipment, materials and personnel necessary for the execution of the contract and the work and the purported review by the Applicant will make it suffer irreparable losses and damages.

From the foregoing the Interested Party argued that the Applicant's application for review was filed late and the same was without merit and ought to be dismissed with costs.

### **THE BOARD'S FINDINGS**

Upon considering each of the parties' cases the Board has framed the following issues for determination are as follows: -

- I. Whether the Applicant filed its Request for Review outside the statutory period provided for in section 167 (1) of the Act, thus ousting the jurisdiction of the Board;***

Depending on the determination of Issue No. (I) above:-

- II. Whether the letter of notification issued to the Applicant by the Procuring Entity meets the threshold of section 87 (1) and (3) of the Act*
- III. Whether an Accounting Officer can delegate his Authority in a Procurement process*
- IV. Whether the Procuring Entity rightfully found the Applicant's bid non-responsive in accordance with Section 79 (1) and 80 (2) of the Act.*
- V. Whether the subject procurement was in breach of Section 55 (1) (a), (f), 4 of the Act*

The Board will now proceed to consider each of the above issues.

**ISSUE I: As to whether the Applicant filed its Request for Review outside the statutory period provided for in section 167 (1) of the Act, thus ousting the jurisdiction of the Board.**

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.

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** pronounced itself regarding where the jurisdiction of a court or any other decision making body flows from. It 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 decision of the Supreme Court in *Samuel Kamau Macharia Case* is very critical in determining where the jurisdiction of this Board flows from. The Board's attention is drawn to section 167 (1) of the Act which states 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." [Emphasis by the Board]***

In the instant Request for Review the Respondent raised a Preliminary Objection on the ground that the Request for Review violates Section 167 (1) of the Public Procurement & Asset Disposal Act, 2015 and regulation 203 (2) (c) (i) – (iii) of Public Procurement and Asset Disposal Regulations, 2020 (the "PPAD Regulations, 2020") in that the application was brought before the Board after the lapse of fourteen (14) days of notification of intention to award. The Respondents therefore argued that the the Board lacked jurisdiction to hear and determine this Request for Review.

The Procuring Entity submitted in support of the preliminary objection that it sent out the Notification to unsuccessful bidders and the Notification of Intention to Award to the successful bidder, all dated 31st May 2022, on 7<sup>th</sup> June 2022. It submitted further that it sent the Applicant a Notification to the unsuccessful bidders via email and also dispatched the hard copy

Notification via the Applicant's postal address provided by the Applicant in their Confidential Business Questionnaire.

The Applicant opposed the preliminary objection and averred that on or about 14<sup>th</sup> June, 2022 it received a notification letter dated 31st May, 2022 through a registered post mail.

The Board has perused the documents submitted to it and notes that the Applicant in its Request for Review has annexed a copy of the envelope showing a postal stamp of a registered mail dated 10th June, 2022 and which the Applicant averred that it received on 14<sup>th</sup> June, 2022.

The Procuring Entity, on the other hand, annexed copy of the email correspondence with an attached Notification to the Applicant which was sent on 7<sup>th</sup> June, 2022 at 10.55am from email of Irene Ahhubi<> to [info@gardens-weddingcentre.co.ke](mailto:info@gardens-weddingcentre.co.ke) cc to; [procurementGrp@epra.go.ke](mailto:procurementGrp@epra.go.ke). The Board notes that that the sender email is not in the format of a valid email it has no **DOMAIN** as it should. Rather, it has only registration name Irene Ahhubi<>. In the circumstance and the Board will therefore only rely on the copy that was posted or dispatched via the Applicant's postal address provided in the confidential business questionnaire of its tender.

Counting from 11<sup>th</sup> June 2022 the day they presented the letter to courier, fourteen days lapsed on 25<sup>th</sup> June 2022. The instant Request for Review having been filed on 23<sup>rd</sup> June 2022 was filed within the fourteen day

period allowed under Section 167 (1) of the Act. Accordingly, the Board finds that it has jurisdiction to entertain the Request for Review.

The Board will now proceed to address the issues raised in the substantive Request for Review.

**ISSUE II: as to whether the letter of notification issued to the Applicant by the Procuring Entity meets the threshold of section 87 (1) and (3) of the Act.**

The Applicant submitted that the notification letter dated 31st May, 2022 offends Section 87 (3) of the Act since it fails to disclose the tender sum the successful tenderer quoted so as to be declared the lowest evaluated price. It further submitted that the same notification letter offends Section 87(1) of the Act which mandates ONLY the Accounting Officer as the one duly authorized to notify bidders of the outcome of the tender proceedings.

In response the Procuring Entity averred that Section 87 (3) of the Act and Regulation 82 (2) of the Regulations do not require the Respondent to disclose in the notification to the unsuccessful bidder the tender sum quoted by the successful bidder arguing that the information to be disclosed in the notification to the unsuccessful bidder shall only relate to their respective bids.

To resolve this issue the Board has studied the letter of notification issued to the Applicant. The letter states as follows in part: -

***"The authority has completed the evaluation process and your tender was not successful; because you failed to attach a copy of valid business premises /permit license from the respective County Government where the tenderer is domiciled.***

***The Successful bidder was M/s HeverThe Company Ltd.***

***We thank you for showing interest in doing business with the Energy & Petroleum Regulatory Authority and wish you success in our future tenders.***

***Yours***

***Cyprian Nyakundi***

***For: Director General"***

The Board takes cognizance of the relevant acts and regulations in this matter.

Section 87 (3) of the Act provides that,

***"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."***

Regulation 82 (1) and (2) of the PPAD Regulations, 2020 provides that;

- 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 regulations shall included the name of the successful bidder ,the bidder price and the reason why the bid was successful in accordance with Section 86(1) of the Act"*

The Board has on several of its decisions enumerated that the letter of notification of tender outcome serves a number of functions:-

- i. It guarantees and protects the successful and unsuccessful bidder's right to be informed of the outcome of their bids;
- ii. It allows the successful bidder to promptly signify its acceptance of the award but subject to the fourteen (14) day standstill period under section 167 (1) of the Act;
- iii. It allows an unsuccessful bidder aggrieved by a procuring entity's decision on its bid to exercise the right to administrative review under section 167 (1) of the Act;

- iv. It marks the beginning of the fourteen (14) day standstill period within which a procuring entity and a successful bidder are precluded from entering into a written contract pursuant to the right to an administrative review afforded to an aggrieved candidate or tenderer under section 167 (1) of the Act; and
- v. It informs the parties that the contract must be entered into within the tender validity period.

A cursory look at the letter of notification to the Applicant shows that the letter does not indicate the prices at which the Interested Party herein was awarded. The Board notes that that Regulation 82(3) of the regulations is couched in mandatory terms. The Board finds that Procuring Entity was obligated to disclose the sum at which it awarded the tender to the Interested Party.

It follows that the letter of notification dated 31<sup>st</sup> May2022 and issued to the Applicant by the Procuring Entity fails to meet the threshold of Regulation 82 (3) of the Regulation .This ground of review therefore succeeds.

**ISSUE III:       wheter an Accounting Officer can delegate his Authority in a Procurement process.**

The Board notes from the notification letter dated 31<sup>st</sup> May 2022 that it was signed for and on behalf of Director General of the Procuring Entity by one Mr. Cyprian Nyakundi.

The Act confers the accounting officer of a public entity the primary responsibility for ensuring that its institution complies with the Act. In the tender subject of the instant Request for Review the Procuring Entity's Accounting Officer is the Director-General. The question that the Board will address is whether the Director General can delegate his Authority to issue a letter of award or regret to other officers. Section 69 (4) of the Act provides that,

***"No procurement approval shall be made by a person exercising delegated authority as an accounting officer or head of the procurement function unless such delegation has been approved in writing by the accounting officer or the head of the procurement unit, respectively".***

The above provision therefore provides that the Accounting Officer may delegate his Authority to carry out his function depending on certain circumstances. The Board has perused a copy of the letter dated 27th May, 2022 from the 1st Respondent to the PS Ministry of Energy which the Procuring Entity Annexed and marked LJ-2;

The letter provides as follows in part:-

**"RE:AWAY FROM OFFICE TO ATTEND THE SENIOR EXECUTIVE FELLOW PROGRAMME,USA**

***Folowing the approval and clearance to travel to attend the senior executive fellow programme, I wish to inform you that I will be away fom office beginning Tuesday 31<sup>st</sup> May-Friday 1<sup>st</sup> July2022.***

***During my absence,MrCoprianNyakundi, director Public Education, Advoacy& Consumer Protection will look after affairs ofthe Authority.....***

***Signed***  
***Director General"***

The Procuring Entity supplied the Board with Human Resource Policy and Procedures Manual, 2021, which provides, at Section 16:OFFICIAL COMMUNICATION paragraph 16.2.7 and 16.2.12 that,

***"all external communication touching on matters EPPRA shall be through the DG' 'and "All out going external communication shall be as per delegated authority in writing, no employee should sign any correspondence for the DG unless delegated to in writing."***

The Board notes that the Director General in the above quoted letter delegated his authority as the Accounting Officer to one Mr. Cyprian Nyakundi in writing. Further it is clear to the Board that the Director General in the circumstance of being away from office was obligated to delegate his Authority to Cyprian Nyakundi which he rightfully did in writing and was properly guided by the above quoted organizational policy.

The Board therefore finds and holds that the letter of regret to the Applicant was properly authorized for issue and did not violate the provisions of Section 87(1) of the Act. Accordingly, the Board now proceeds to disallow this ground of review.

**ISSUE IV:            whether the Procuring Entity rightfully found the Applicant's bid non-responsive in accordance with Section 79 (1) and 80 (2) of the Act.**

The Board notes that the tender document at page 29 of the blank tender document provided as follows:

***Section III evaluation and qualification criteria, Paragraph 2 under Stage 1 of Preliminary/ Mandatory Requirements/Evaluation Criteria of the tender document***

*Note: bidders complying with all the above requirements will proceed to the second stage of technical evaluations. Bidders who do not qualify at this stage will **NOT** proceed to the next stage of evaluation.*

Section 80(2) of the Act provides as follows:

***"The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered."***

Considering the provisions of section 79 and 80(2) of the Act, the Board considers the task before it is to establish if the Procuring Entity evaluated the Applicant's tender in accordance with the criteria set out in the Tender Document.

From the evaluation report provided by the Procuring Entity, the the Board observes that the Applicant herein was disqualified at the preliminary evaluation stage after failing to satisfy the provisions of Sections 79 and 80 (2) of the Act on account of failure to meet the evaluation criteria which was provided in the Tender document.

The subject tender No. EPRA/SCM/4/3/21-22/069 for Provision of Cleaning & Tea Making Services, was Reserved for Women Only. Section III evaluation and qualification criteria, Paragraph 2 under Stage 1 is Preliminary/ Mandatory Requirements/Evaluation Criteria of the tender document at pages 28 and 30 of the blank tender document is the evaluation criteria one of the mandatory requirement was for bidders to provide:

<b>3</b>	<b><i>Copy of valid Business premises/permit license from the respective County Government where the tenderer is domiciled</i></b>
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The Applicant provided at page 59 of its original tender document a **Single Business Permit Bill for the year 2022** by a Nairobi City County. A cursory look at the Applicant's above Single Business Permit Bill for the year 2022 shows Single Business Permit Bill No. BP22-1459616. It was generated on 18<sup>th</sup> February, 2022 with instruction "***that the SINGLE BUSINESS PERMIT payment is due at the CASH OFFICE of the council by 31-March-2022'***" bill total amount being 5,000.

The Board observes that the tender requirement as per criteria 3 above was for bidders to submit a **valid Business premises/permit license** from the respective County Government where the tenderer is domiciled and not to provide a receipted invoice/Bill.

The Applicant has acknowledged and conceded in its Request for Review at paragraph 5 that the above document is a receipted invoice but argued that it is a copy of a single business permit. The Applicant went on to argue that it was open for the evaluation committee to seek clarification from the issuer of the bill to establish the validity.

The Board observes that the cardinal principle is for the document to speak to its purpose. In the instant case the Applicant has conceded that it submitted in its bid document **Business premises/permit license** in the form of a receipted invoice and which the Board finds and holds that it is not a valid Business premises/permit license to support the requirement of the above criteria. The Board further finds that the Applicant has not demonstrated through evidence of receipt that it paid for what it was invoiced or billed by the Nairobi City County on 18<sup>th</sup> February, 2022 to even warrant seeking clarification.

A look at the other bidders document who were positively affirmed to this criteria shows that they paid for the licence and were issued with valid business premises/permit licences. A case in point is that of the Interested Party who at page 000133 submitted in its bid, Nairobi City County Single Business Permit effective 1<sup>st</sup> January, 2022 for a period of 12 months.

**In Miscellaneous Civil Application No. 85 of 2018, Republic v Public Procurement Administrative Review Board *Ex-parte* Meru**

**University of Science & Technology; M/s AAKI Consultants Architects and Urban Designers (Interested Party) [2019] eKLR,**  
the court held that:-

***"Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions.***

Accordingly, the Board finds and holds that the Applicant's bid was properly evaluated and that the Procuring Entity rightfully found the Applicant's bid non-responsive in accordance with Sections 79 (1) and 80 (2) of the Act. This ground of review also fails.

**ISSUE V: As to whether the subject procurement was in breach of Section 55 (1) (a), (f), 4 of the Act.**

The Applicant at ground 1(d) argued that there was Breach of Section 55 (1) (a), (f), 4 of the Act, by the respondent. The Section touches on eligibility. The Board notes that the Applicant has not demonstrated who among the tenderers was ineligible or has no legal capacity to enter into a contract, or which person has not fulfilled tax obligations or which bidder has submitted false, inaccurate or incomplete information about his or her qualifications in subject tender for the Board to make any determination.

**What are appropriate orders to grant**

In totality of the foregoing, the Request for Review succeeds only in so far as the letter of notification issued to the Applicant is concerned, having established that it failed to meet the threshold of Regulations 82 (3) of the Regulations as regarding failure to indicate the sum at which the tender was awarded and the Board proceeds to make the following specific orders:-

**FINAL ORDERS**

In exercise of the powers conferred upon it by section 173 of the Public Procurement and Asset Disposal Act, 2015, the Board makes the following orders in the Request for Review:-

1. The letter of notification issued to the Applicant dated 31<sup>st</sup> May, 2022 be and is hereby annulled.

2. The Procuring Entity is directed to issue a letter of notification to the Applicant in accordance with Regulations 82 (3) of the Act read together with Article 47 of the Constitution in particular to include the tender sum of the award to the Interested Party within seven (7) days, taking into consideration the Board's findings in this case.

3. Further to Order No. 2 above, the Procuring Entity is at liberty to proceed with the procurement process to its logical conclusion.

4. Given the outcome of the Request for Review on the issues framed for determination, each party shall bear its own costs in the Request for Review.

Dated at Nairobi, this 13<sup>th</sup> day of July 2022



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**CHAIRPERSON**  
**PPARB**



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**SECRETARY**  
**PPARB**

