REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 82/2022 OF 14th SEPTEMBER 2022

BETWEEN

SWIFTMAX SERVICES LTD..... APPLICANT

AND

THE ACCOUNTING OFFICER,

COUNTY GOVERNMENT OF KERICHO-DEPARTMENT OF HEALTH SERVICES..... 1ST RESPONDENT

COUNTY GOVERNMENT OF KERICHO-DEPARTMENT OF HEALTH SERVICES..... 2ND RESPONDENT

Review against the decision of the Accounting Officer of theCounty Government of Kericho- Department of Health Servicesin relation to Tender No. CGK/T/H/006/2022-2024for Provision of Cleaning Services, Gardening, and Environmental Management.

BOARD MEMBERS PRESENT

1. Ms. Faith Waigwa -Chairperson
2. Dr. Joseph Gitari -Member
3. Ms. Isabel Juma (CPA) -Member
4. Ms. Phyllis Chepkemboi -Member
5. Mr. Steven Oundo, OGW -Member

IN ATTENDANCE

1. Mr. James Kilaka - AG.Board Secretary
2. Ms. Sarah Ayoo - Secretariat
3. Philemon Kiprop - Secretariat

BACKGROUND OF THE DECISION

The Tendering Process

The County Government of Kericho- Department of Health Services, the Procuring Entity and the 2nd Respondent herein, invited eligible tenderers to submit tendersin response to Tender No. CGK/T/H/006/2022-2024 for Provision of Cleaning Services, Gardening, and Environmental Management (hereinafter referred to as the "subject tender") using an open national method of tendering and by way of an advertisement placed on the Standard Newspaper on 25th July 2022 and also on the 2nd Respondent's website www.kericho.go.ke and on the Public Procurement Information Portal at https://tenders.go.ke with a submission deadline of 2nd August 2022 on or before 10.00 a.m. The subject tender was reserved for women category.

Submission of Tender and Tender Opening

A total of seven (7) tenderers submitted their tenders in response to the subject tender within the tender submission deadline as indicated in the Tender Opening Minutes dated 2nd August 2022 being:

No	Firm
1.	Grashah Investment
2.	Swiftmax Services
3.	Modason Cleaners
4.	Lydover Enterprises
5.	Fagidron cleaners
6.	Jotrovin Enterprise
7.	Gloshedy Cleaners services

Evaluation of Tenders

A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1st Respondent undertook evaluation of the seven (7) tendersin the following three stages and as captured in an Evaluation Report dated 19th August 2022 (hereinafter referred to as the "Evaluation Report"):

i. Preliminary Evaluation;
ii. TechnicalEvaluation; and
iii. Financial Evaluation.

Preliminary Evaluation

At this stage of evaluation, the Evaluation Committee was required to examine all submitted tenders and ensure that they met the eligibility criteria and other mandatory requirements in the Information To Tenderers(hereinafter referred to as "ITT")and that the tender was complete in all aspects in meeting the requirements provided for in the preliminary evaluation criteria outlined in the Tender Document. Tenders that did not pass the Preliminary Examination would be considered non-responsive and would not be considered further.

At the end of evaluation at this stage,three (3) tenders were found to be non-responsive and the other four (4) tenders, which included the Applicant'stender, were found responsive. The tenders that were found responsive proceeded to the Technical Evaluation stage.

Technical Evaluation

At this stage of evaluation, the Evaluation Committee was required to apply the criteria outlined under Section III clause 2 Stage 2 Technical Evaluation on Capacity to Deliver the Contractof the Tender Document. Bidders must demonstrate conformance to all the technical specifications and requirements as per section V of the Tender Document.

At the end of evaluation at this stage, one (1) tenderer was found non-responsive while three (3) tenderers were found to be responsive including

the Applicant's tender having achieved the set pass mark of 70 marks. The tenders that were found responsive proceeded to the Financial Evaluation stage.

Financial evaluation

At this stage of evaluation, the Evaluation Committee was required to compare the responsive bidder's prices and recommend the lowest evaluated bid for award. Comparison of the lowest evaluated bid against the market rates would also be undertaken to confirm that the recommended price was within the indicative market price. The successful bidder would be the tenderer with the lowest evaluated tender price subject to the appointed ad hoc evaluation committee right to exercise due diligence relating to confirmation of information submitted by the bidder before the award of the tender in pursuant to Section 83 of the Public Procurement and Asset Disposal Act 2015 (hereinafter referred to as "the Act").

The tender sums quoted by the responsive bidders at this stage were as follows:

Kericho County Referral Hospital

S/NO	Bidder	TENDER SUM PER MONTH
1.	B2	559,073
2.	B3	656,850
3.	B6	833,000

Kapkatet Hospital

S/NO	Bidder	TENDER SUM PER MONTH
1.	B2	306,350
2.	B3	404,000
3.	B6	450,660

Sigowet Hospital

S/NO	Bidder	TENDER SUM PER MONTH
1.	B2	135,256
2.	B3	133,200
3.	B6	191,400

Evaluation Committee's Recommendations

According to the Evaluation Report dated 19th August 2022, the Evaluation Committee recommended the Applicant herein for the award of contract for **Provision of Cleaning Services, Gardening and Environmental Management at Kericho County Referral Hospital** at a cost**of Kenya Shillings Five Hundred Fifty-Nine Thousand Seventy-Three only (Kshs 559,073/=**) per month being the most responsive subject to due diligence on the possible areas of previous works done as provided by the tenderer.

Additionally, the Applicant was also recommended for award of contract for**Provision of Cleaning Services, Gardening and Environmental Management at Kapkatet Hospital** at a cost **of Kenya Shillings Three Hundred and Six Thousand Three Hundred and Fifty only (Kshs 306,350/=**).

The Evaluation Committee recommended Modason Cleaners of P.O. Box 1802-2000 Nakuru, tenderer B3, for the award of contract for **Provision of Cleaning Services, Gardening and Environmental Management atSigowet Hospital at a cost of Kenya Shillings One Hundred and Thirty Three Thousand Two Hundred Only (Kshs. 133,200/=).**

Due Diligence

The Evaluation Committee resolved to obtain confidential references from firms with whom the Applicant had prior engagement. On 22nd August 2022, the Procuring Entity's Chief Officer Health Services, Mr. David Ekuwam together with the Procuring Entity's Supply Chain Management Officer Ms. Beatrice Koech wrote to the Medical Superintendents at Kapkatet Hospital and Kericho County Referral Hospital requesting to visit the said hospitals on 22nd August 2022 to have a look at the services provided by the Applicant. They also requested for information regarding the Applicant on performance of the services provided at the said hospitals.

Kericho County Referral Hospital confirmed that the Applicant was offering services at the facility albeit with challenges. Various concerns were cited and the facility gave various misgivings and cited underperformance by the service provider which was said to have led to poor health service delivery hence an increase in morbidity at the facility. The committee also noted that the price quoted of Kshs. 559,073/= for Kericho County Referral Hospital was below the current expenditure of Kshs. 582,853/= with the same establishment of 85 staff.

Consequently, the evaluation committee recommended that the next lowest bidder **Modason Cleaners** of P.O. Box 1802-2000 Nakuru be awarded the contract for Provision of Cleaning Services, Gardening, and Environmental Management at **Kericho County Referral Hospital at a cost of Kshs. 656,850/= per month.**

Kapkatet Hospital confirmed that the Applicant was currently offering services without any challenges. The Evaluation Committee consequently recommended that the Applicant, being the lowest bidder whose performance had been found to be satisfactory be awarded the contract for Provision of Cleaning Services, Gardening, and Environmental Management at **Kapkatet Hospital at a cost of Kshs. 306,350/= per month.**

Professional Opinion

Ina Professional Opinion dated 26th August 2022 (hereinafter referred to as the 'Professional Opinion'), the Senior Supply Chain Management Officer of the 2nd Respondent, Ms. Lily Koech,noted that a requisition had been made on 21st July 2022 by the Medical Superintendent Kericho County Referral Hospital, Kapkatet Hospital and Sigowet hospital and was approved for procurement on 22nd July 2022. She confirmed that the subject tender was budgeted for and funds available, that the evaluation process was carried out as per the provisions of the law, and that the recommended price was within the indicative market price.

The recommendation made was that the Accounting Officer may consider approval of award of the subject tender as per the recommendation of the evaluation report as follows:

1. Provision of Cleaning Services, Gardening and Environmental Management at **Kericho County Referral Hospital** to **Modason Cleaners** of P.O. Box**1802 – 20200 Kericho** being the most responsive evaluated bidder at a cost of **Kshs.656,850/= per month.**
2. Provision of Cleaning Services, Gardening and Environmental Management at **Kapkatet Hospital** to **Swiftmax services** of P.O Box **18721-20100 Nakuru** being the most responsive evaluated bidderat a costof **Kshs 306,350/=per month.**
3. Provision of Cleaning Services, Gardening and Environmental Management at **Sigowet Hospital** to **Modason Cleaners** of P.O. Box**1802 – 20200 Kericho** being the most responsive evaluated bidder at a cost of **Kshs.133,200/= per month.**

The Accounting Officer approved the recommendation of awarding the subject tender on the even date.

<u>Letters of Notification</u>

By letters dated 26th August 2022, the Respondent notified the tenderers of the outcome of the subject tender. Text messages were sent on 29th

August 2022 advising them to collect their notification of award/regret letters.

REQUEST FOR REVIEW

The Request for Review regarding the subject tender was lodged by M/s Swiftmax Services Ltd, the Applicant herein, together with a Supporting Affidavit sworn by Cherotich Beatrice, its director, on 14th September, 2022 through the firm of Karugu Mbugua & Co. Advocates, seeking the following orders:

a) The letter of award arising from the tender for provision of cleaning services, gardening and environmental management Tender No. CGK/T/H/006/2022-2024 (hereinafter the "tender") for Kericho County Referral Hospital facility reserved for Women Only issued by the 1st respondent to Modason Cleaners be annulled;

b) The alleged due diligence findings against the applicant be declared a nullity and be struck off;

c) The procuring Entity be directed to admit the applicant's financial bid and award the tender to the lowest bidder;

d) Costs of this application be awarded to the applicant; and

e) Any other orders that the Honorable Board may deem just and fit.

In a Notification of Appeal and letter dated 14th September 2022, the Acting Board Secretary of the Public Procurement Administrative Review Board (hereinafter referred to as the "Board") notified the Respondents of the filing 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. 02/20 dated 24th 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 from14th September,2022.

The 1st and 2nd Respondents failed to comply and submit the requested documents within five days from 14th September 2022 prompting the Acting Board Secretary to send a reminder on 20th September 2022 advising the 1st and 2nd Respondents on the consequences of failing to comply with the Notification of Appeal as provided under Section 176(1)(m) and (2) of the Act and Regulation 205 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "the Regulations,2020").

In opposition of the Request for Review, the Respondents filed their Response to the Applicant's Request for Review dated 19th September 2022 and filed on 22nd September 2022.

On 16th March 2020, the Board issued Circular No. 1/2020 and the same was published on the Public Procurement Regulatory Authority (hereinafter referred to as "the PPRA") website (www.ppra.go.ke) in recognition of the challenges posed by the COVID-19 pandemic and instituted certain measures to restrict the number of representatives of parties that may appear before the Board during administrative review proceedings in line with the presidential directives on containment and treatment protocols to mitigate against the potential risks of the virus.

On 24th March 2020, the Board issued Circular No. 2/2020 further detailing the Board's administrative and contingency management plan to mitigate the COVID-19 disease. Through this circular, the Board dispensed with physical hearings and directed that all requests for review applications shall be canvassed by way of written submissions. The Board further cautioned all parties to adhere to the strict timelines as specified in its directive as the Board would strictly rely on the documentation filed before it within the timelines specified to render its decision within twenty-one days of filing of the request for review in accordance with section 171 of the Act. Clause 1 on page 2 of the said Circular directed that pleadings and documents would be deemed properly filed if they bore the Board's official stamp.

Vide letters and notifications of appeal dated 21st September 2022, the Acting Board Secretary notified the rest of the Tenderers via email, of the existence of the subject Request for Review while forwarding to the interested parties a copy of the Request for Review together with the Board's circular No. 02/2020 dated 24th March 2020. The tenderers were

invited to submit to the Board any information and arguments about the subject tender within 3 days from 21st September 2022.

None of the parties filed their written submissions.

APPLICANT'S CASE

The Applicant avers that it participated in the subject tender as a tenderer by submitting its tender in response to a tender invitation by the Procuring Entity.

The Applicant states that on 1st September 2022, the Procuring Entity issued it with a letter of regret regarding the subject tender dated 26th August 2022 for the Kericho County Referral Hospital and in the same letter awarded it the subject tender for Kapkatet Hospital, a facility run by the Procuring Entity.

The Applicant avers that it is prequalified by the County Government of Kericho Department of Health Services since 2016 for Provision of Cleaning Services, Gardening, and Environmental Management.

The Applicant states that the Procuring Entity is in breach of Section 3 of the Act for allegedly stating that the Applicant had performed unsatisfactorily in a previous contract and yet it was awarded a contract of similar nature at the Procuring Entity's facility – Kapkatet Sub-County Hospital vide letter of notification of award dated 26th August 2022.

The Applicants further states that the Procuring Entitybreached Section 3 of the Act byallegedly stating that the Applicant had performed unsatisfactorily in a previous contract yet no conduct of performance review of the said previous contract or communication had ever been made to the Applicant.

The Applicant avers that the Procuring Entity breached Section 83 of the Act by introducing a criteria and/or parameter for due diligence that was not included in the tender document.

The Applicant claims that the Procuring Entity breached Section 83 of the Act as read with Section 64 (1) of the Act by failing to communicate to the Applicant the issue of unsatisfactory performance of the previous contract during the impugned procurement process or during the previous procurement process.

Consequently, the Applicant prays that the Board grants the orders sought in itsRequest for Review.

RESPONDENTS CASE

The Respondents contends that on 25th July 2022, the Procuring Entity placed an advert on a daily newspaper and on the Procuring Entity's website pursuant to Section 96(2) of the Act inviting tenderers in the category of Women for the subject tender. On 1st August 2022 the 1st Respondent appointed a tender opening committee and later appointed an evaluation committee on 5th August 2022.

The Respondents states that on 22nd August, 2022, pursuant to Section 83 of the Act the Evaluation Committee conducted due diligence on the Applicant pertaining previous similar works at Kericho County Referral Hospital and Kapkatet Hospital Respectively. Confidential reports from the two facilities were submitted to the Board pursuant to Section 67 of the Act.

The Respondents contends that according to Section 83 of the Act, due diligence is done after tender evaluation and not prior to award of tender. Therefore, this means that it does not form part of the evaluation criteria as stated by the bidder and this was clearly stated in the tender document.

BOARD'S DECISION

The Board has consideredeach of the parties' cases, documents, pleadings, written submissions, authorities together with confidential documents submitted to the it by the Respondents pursuant to Section 67(3)(e) of the Act and finds the issuethat arise for determination is:

1. **Whether the Procuring Entity conducted due diligence in the subject tender in accordance with stage 4 of Section III: Evaluation and Qualification Criteriaof the Tender Document and Article 227(1) of the Constitution as read with Section 83 of the Acttogether with Regulation 82 of the Regulations,2020.**

The Board will now proceed to address the issue framed for determination as follows:

Whether the Procuring Entity conducted due diligence in the subject tender in accordance with stage 4 of Section III: Evaluation and Qualification Criteria of the Tender Document and Articles 47 and 227(1) of the Constitution as read with Section 83 of the Act together with Regulation 82 of the Regulations,2020.

The Applicant contends that the Procuring Entity is in breach of Section 3 of the Act for allegedly stating that the Applicant performed unsatisfactorily in a previous contract with the Procuring Entity's facility, Kericho County Referral Hospital, yet no conduct of performance review of the said previous contract or communication had ever been made to the Applicant.

Further the Applicant argues that the Procuring Entity breached Section 3 of the Act by awarding the Applicant a contract of similar nature at the Procuring Entity's facility, Kapkatet Sub County Hospital, while alleging that the Applicant had performed unsatisfactorily in a previous contract at Kericho County Referral Hospital.

The Applicant contends that it was never notified of the alleged unsatisfactory performance of the contract during the impugned procurement process or during the previous procurement process contrary to Section 83 as read with Section 64(1) of the Act. The Applicant further contends that the Procuring Entity introduced a criteria or parameter for

due diligence that was not included in the tender document hence breached Section 83 of the Act.

In response, the Respondents state that pursuant to Section 83 of the Act, the Evaluation Committee conducted due diligence on the Applicant pertaining to the Applicant's previous works at Kericho County Referral Hospital and Kapkatet Hospital. According to the Respondents, due diligence is done after tender evaluation but prior to award of tender which therefore means that it does not form part of the evaluation criteria.

The Board has carefully studied the Blank Tender Document submitted as part of the confidential documents pursuant to Section 67(3)(e) of the Act by the Procuring Entity and notes that Section III of the Tender document sets out the evaluation and qualification criteria to be used to evaluate and qualify tenderers.

Clause 1.3 of the Tender Document states that:

> ***"The Procuring Entity shall use the criteria and methodologies listed in this section to evaluate tenders and arrive at the Lowest Evaluated Tender. The tender that (i) meets the qualification criteria, (ii) has been determined to be substantially responsive to the Tender Documents, and (iii) is determined to have the Lowest Evaluated Tender Price shall be selected for award of contract."***

The Board notes that the subject tender was to be evaluated through a three (3) stage evaluation process as follows:

1. Preliminary Evaluation
2. Technical Evaluation
3. Financial Evaluation.

Section III – Evaluation and Qualification Criteria of the Tender Document further provides stage 4 as Recommendation for Award and states that:

> ***"The successful bidder shall be the tenderer with the lowest evaluated tender price subject to the appointed ad hoc evaluation committee right to exercise due diligence relating to confirmation of information submitted by the bidder before the award of the tender in pursuant to Section 83 of the Public Procurement and Asset Disposal Act 2015."***

The Board notes that a due diligence exercise was conducted by the Procuring Entity and observes that on 22nd August 2022 the Supply Chain Management officer/Secretary to Evaluation Committee, Ms. Beatrice Koech, wrote to the Medical Superintendent, Kericho County Referral Hospital as follows:

> ***"...***
>
> ***The county Government of Kericho, Department of Health services tendered for provision of cleaning services among***

other tenders. The evaluation committee wishes to seek clarification on the above named company in terms of their performance on service provision.

Thank you.

Yours faithfully,

..."

Additionally, the Chief Officer, Health Services, Dr. David Ekuwam, on 22nd August 2022 also wrote to the Medical Superintendent, Kericho County Referral Hospital as follows:

"...

The county government of Kericho, Department of Health Services wishes to outsource cleaning services. Various bidders have been enlisted through the tendering process and they were able to give institutions where they offer or have offered services in the country.

The Department thus feels that due diligence has to be done so that these services can be acquired from the most reliable and efficient bidder. The following officers wish to visit institution on 22nd August 2022 to have a look at the services provided by one of the bidders.

1. .....

2. .....

3. .....

4. .....

5. .....

6. .....

7. .....

Any information accorded to them will be dealt with great confidentiality and will only be used for evaluation purposes.

Thank you.

Yours faithfully,

....."

Similar letters were also sent out by both the Supply Chain Management officer/Secretary to Evaluation Committee, Ms. Beatrice Koech, and the Chief Officer, Health Services, Dr. David Ekuwam to the Medical Superintendent Kapkatet Hospital requesting for information regarding the Applicant's services at Kapkatet Hospital.

The Board has carefully studied the confidential report dated 22nd August 2022 regarding the Applicant from the Deputy Medical Superintendent Kericho County Referral Hospital addressed to the Procuring Entity in response to the due diligence exercise which stated:

"...

This is to certify and confirm that the above referenced company has been offering cleaning services at our facility since 1st October 2021 and expires on 30th September 2022.

However, as a hospital we have encountered challenges with the said service provider leading to poor health service delivery. Attached are reports from IPC and Hospital Quality Improvement Team.

Yours faithfully,

..."

A due diligence report was prepared and signed by all the members of the Evaluation committee where it was noted as follows:

"...

KERICHO COUNTY REFERRAL

Kericho County Referral Hospital – the committee confirmed that they are currently offering services albeit with challenges.

Attached are IPC reports dated 23/05/2022 and 26/05/2022 and a confidential report from the Hospital Quality Improvement Team Ref: QIT/2022/REP/01 dated 4/08/2022 on the current service provider. The team cited various areas of concern as per attached reports. They gave various misgivings and under-performance by the service provider and this has led to poor health service delivery hence increase in morbidity at the facility.

The committee noted that the price quoted (Kshs. 559,073) for Kericho CRH is below the current expenditure of Kshs. 582,853 with the same staff establishment of 85 staff.

As per the above, the team recommends that the next lowest bidder Modason Cleaners of P.O. Box 1802-2000 Nakuru be awarded the contract for provision of cleaning services, gardening and environmental management at Kericho County Referral Hospital at a cost of Kshs. 656,850.00 per month.

KAPKATET HOSPITAL

Kapkatet Hospital the committee confirmed that they are currently offering services without any challenges.

The committee having verified and confirmed, the team recommends that the lowest bidder whose performance have been found to be satisfactory be awarded the contract for provision of cleaning services, gardening and environmental management at Kapkatet Hospital M/S Swiftmax services of P.O. Box 18721-20100 Nakuru at a cost of Kshs. 306,350.

..."

The Board observes that the Senior Supply Chain Management Officer relied on the due diligence report in preparing the Professional Opinion dated 26th August 2022 recommending award of the subject tender at Kericho County Referral Hospital to the next lowest evaluated bidder, Modason Cleaners, being the most responsive evaluated bidder at a cost of

Kshs. 656,850 per month. Thereafter, vide notification of regret letter dated 26th August 2022, the Board observes that the Procuring Entity notified the Applicant that its tender was not successful for award of the subject tender at Kericho County Referral Hospitaland stated that:

> "...
>
> ***Reference is made to the above tender. The evaluation of bids has been concluded; we wish to notify you that your tender was not successful because of the reasons specified below:***
>
> 1. ***Due Diligence conducted on the bidder for Provision of Cleaning Services, Gardening, and Environmental Management at KCRH indicated that the bidder performed unsatisfactorily in the previous contract and therefore could not be recommended for award. Therefore, the Next Lowest Bidder was awarded.***
>
> ***M/S Modason Cleaners P.O. Box 1802-20200 Kericho was awarded the contract for provision of cleaning services, gardening and environmental management at Kericho County Referral Hospital at the contract sum of Kenya Shillings Six Hundred Fifty-Six Thousand Eight Hundred Fifty Only (Kshs. 656,850) and Sigowet Hospital Kenya Shillings One Hundred Thirty Three Thousand Two Hundred Only (Kshs. 133,200)***

M/S SWIFTMAX SERVICES of P.O. Box 18721-20100 Nakuru was awarded the contract for provision of cleaning services, gardening and environmental management at Kapkatet Hospital at the contract sum of Kenya Shillings Three Hundred Six Thousand Three Hundred Fifty-Six Only (Kshs. 306,356).

However, we sincerely appreciate your participation in this tender and encourage you to participate in future tenders as county may advertise from time to time...."

As captured in the Due Diligence Report, the Board notes that the Procuring Entity contacted two references provided by the Applicant being Kericho County Referral Hospital and Kapkatet Hospital. Both hospitals are facilities managed by the Procuring Entity. Kapkatet Hospital gave a satisfactory reference whereas Kericho County Referral Hospital did not provide a satisfactory response. The Evaluation Committee proceeded to rely on the response from Kericho County Referral Hospital which expressed dissatisfaction with the Applicant's performance of a previous contract having termed it unsatisfactory and thus did not recommend the Applicant for award of the subject tender.

The Board has carefully studied the report dated 4th August 2022 compiled by the Hospital Quality Improvement Team Kericho County Referral Hospital and addressed to the Chief Officer Health Services together with

the IPC Assessment Report dated 26th May 2022 furnished to the Board pursuant to Section 67(3)(e) of the Act and notes that from the Procuring Entity's confidential file and documentation, there is no indication that any of these reports/or the outcome of such assessments were copied or communicated to the Applicant herein.

The Board has also studied the Applicant's submitted tender document which forms part of the confidential documents and observes that at page 103 of the Applicant's tender, it provided a clients' reference list in compliance with the criteria set out under the Technical Evaluation Stage requiring tenderers to provide evidence of having done at least three (3) similar assignments by providing copies of Local Service Orders (LSOs) and contract Agreement from current major clients as follows:

No.	Name of Client	Summary of Services	...
1	Kericho County Referral Hospital	Provision of Hospital Cleaning Services	...
2	Kenya Power Lighting Company	Provision of Cleaning-Electricity House Nakuru	...
3	Kenya Electricity Generating Company (KENGEN)	Provision of Cleaning, Gardening, and Garbage collection	...
4	Kapkatet Sub-County Hospital	Provision of Hospital Cleaning Services	...

The Procuring Entity conducted due diligence on the Applicant from only two of the Applicant's references being Kericho County Referral Hospital and Kapkatet Sub-County Hospital. References from Kenya Power Lighting Company and Kenya Electricity Generating Company (KENGEN) were not obtained.

It is also evident from the Procuring Entity's confidential file that due diligence was only conducted on the Applicant and not on the next lowest evaluated bidder, M/S Modason Cleaners, who was awarded the subject tender for Kericho County Referral Hospital upon disqualification of the Applicant by the Procuring Entity.

We note that the reports from the Applicant's references form part of the Procuring Entity's confidential file, access to which the Applicant is not entitled to pursuant to Section 67(1)(c) of the Act. This notwithstanding, the Board notes that the Applicant is entitled to specific reasons why its bid was found non-responsive at the post qualification stage, in accordance with Section 87(3) of the Act, which reasons must be specific and not general, to enable a bidder who may be dissatisfied with the decision of the Procuring Entity to challenge the same, if need be. Providing a bidder with reasons why its bid was found unsuccessful is an issue that goes to the root of the rules of natural justice, one of them being "the right to a fair hearing" as espoused under Article 50 (1) of the Constitution. A bidder cannot adequately exercise this right when specific reasons are not afforded to it by a Procuring Entity. Further, there is no evidence that the

respondents had communicated their dissatisfaction with the applicant's work as part of feedback to a supplier.

In **Judicial Service Commission vs. Gladys Boss Shollei & Another [2014] eKLR** the court held that:

> ***"Apart from the need for independence and impartiality, the right to a fair hearing under Article 50(1) of the Constitution encompasses several aspects. These include, the individual being informed of the case against her/him; the individual being given an opportunity to present her/his side of the story or challenge the case against her/him; and the individual having the benefit of a public hearing before a court or other independent and impartial body."***

For the Procuring Entity to rely only on reports from two of the Applicant's referees and disregard conducting due diligence on the Applicant's remaining two referees demonstrates lack of objectivity and fairness on the part of the Procuring Entity contrary to Article 47 and 227(1) of the Constitution as read with Section 82 and 83 of the Act.

Article 227 (1) of the Constitution of Kenya requires procurement of goods and services to be undertaken in a system that is fair, equitable, transparent, competitive and cost-effective and provides as follows:

"227. Procurement of public goods and services

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

Article 47 of the Constitution of Kenya states that:

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

2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action"

Administrative action has been defined under Section 2 of the Fair Administrative Action Act,2015 to include any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.

Section 4(3) of the Fair Administrative Action Act, 2015 provides that:

"(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action."

It follows that there was a constitutional and statutory obligation placed on the Procuring Entity to give the Applicant prior and adequate notice of the reports issued by Kericho County Referral Hospital and an opportunity to be heard and to make representations regarding the issues raised in the reports with regard to performance of the previous contract procured at Kericho County Referral Hospital with the Procuring Entity.

The Board is guided by the case of **Geothermal Development Company Limited vs. Attorney General & 3 Others [2013] eKLR** where the court held that:

> ***"20. Article 47 enshrines the right of every person to fair administrative action.....***
>
> ***28. As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it. Elementary justice and the law demands that a person be given full information on the case against him and given reasonable opportunity to present a response. This right is not limited only in cases of a hearing as in the case of a court or before a tribunal, but when taking administrative actions as well. (See Donoghue v South Eastern Health Board [2005] 4 IR 217). Hilary Delany in his book, Judicial Review of Administrative Action, Thomson Reuters 2nd edition, at page 272, notes that, "Even where no actual hearing is to held in relation to the making of an administrative or quasi-judicial decision, an individual may be entitled to be informed that a decision which will have adverse consequences for him may be taken and to notification of the possible consequences of the decision.***

30. In many jurisdictions around the world, it has long been established that <u>notice is a matter of procedural fairness and an important component of natural justice</u>. As such, <u>information provided in relation to administrative proceedings must be sufficiently precise to put the individual on notice of exactly what the focus of any forthcoming inquiry or action will be</u>. (See Charkaoui v Canada [2007] SCC 9, Alberta Workers' Compensation Board v Alberta Appeals Commission (2005) 258 DLR (4th), 29, 55 and Sinkovich v Strathroy Commissioners of Police (1988) 51 DLR (4th) 750)." [Emphasis provided]."

Similarly, in **<u>Gathigia vs. Kenyatta University Nairobi HCMA No. 1029 of 2007 [2008] KLR 587</u>** the Court held that:

> ***"...4.The person accused must know the nature of the accusation made; 5. A fair opportunity must be given to those who are parties to the controversy to correct or contradict any statement prejudicial to their view and to make any statement they may decide to bring forward;..."***

In the subject tender, the Board has established that the successful bidder would be the tenderer with the lowest evaluated tender price subject to the appointed ad hoc evaluation committee's right to exercise due diligence

relating to confirmation of information submitted by the bidder before the award of the subject tender.

The Board notes that Section 83 of the Act provides for a due diligence exercise on recommended tenderers as follows:

> ***"83. Post-qualification***
>
> ***(1) 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.***
>
> ***(2) The conduct of due diligence under subsection (1) may include obtaining confidential references from persons with whom the tenderer has had prior engagement.***
>
> ***(3) .....***

Additionally, Regulation 80 of Regulations 2020 provides:

> ***"80. Post-qualification***
>
> ***(1) Pursuant to section 83 of the Act, a procuring entity may, prior to the award of the tender, confirm the qualifications of the tenderer who submitted the bid recommended by the evaluation committee, in order to***

determine whether the tenderer is qualified to be awarded the contract in accordance with sections 55 and 86 of the Act.

(2) If the bidder determined under paragraph (1) is not qualified after due diligence in accordance with the Act, the tender shall be rejected <u>and a similar confirmation of qualifications conducted on the tenderer</u>—

(a) who submitted the next responsive bid for goods, works or services as recommended by the evaluation committee; or

(b) who emerges as the lowest evaluated bidder after re-computing financial and combined score for consultancy services under the Quality Cost Based Selection method."

This Board's in **PPARB Application No. 158/ 2020 On the Mark Security Limited v The Accounting Officer, Kenya Revenue Authority and Another** established that a due diligence exercise is a fundamental element of a procurement process that assists a procuring entity to exercisethe attention and care required to satisfy itself that the lowest evaluated responsive tenderer can execute a tender.

Black's Law Dictionary, Ninth Edition at page 523 defines "due diligence" as

"the diligence reasonably expected from, and ordinarily exercised by a person who seeks to satisfy a legal requirement or discharge an obligation" with the term diligence meaning ***"the attention and care required from a person in a given situation"***

Accordingly, a procuring entity may elect to conduct a due diligence exercise to satisfy itself of the qualifications of the tenderer determined by the evaluation committee to be the lowest evaluated responsive tenderer. When a procuring entity advertises a tender, bidders submit their tender documents attaching evidence of their qualifications. In arriving at the responsive tenderer therefore, the procuring entity considers documents that support the eligibility and mandatory requirements specified in the procuring entity's tender document.

In this regard therefore, a procuring entity conducts a due diligence exercise to verify and confirm the qualifications of the lowest evaluated responsive tenderer, which exercise would be based on documents and qualifications considered during evaluation that met the minimum eligibility and mandatory requirements of the Tender Document.

If the qualifications of the lowest evaluated tenderer are satisfactory, the due diligence report is submitted to the Head of Procurement function for his/her professional opinion and onward transmission to the Accounting Officer who will consider whether or not to award the tender to that lowest evaluated tenderer.

If the lowest evaluated tenderer is disqualified after due diligence, this fact must be noted in the Due Diligence Report with reasons. In view of the findings of this report that the lowest evaluated tenderer be disqualified after due diligence, the Evaluation Committee then recommends award to the next lowest evaluated tenderer, subject to a similar due diligence process conducted on such tenderer, as outlined hereinbefore. [*Emphasis*]

This procedure is applied until the successful tenderer for award of the tender is determined.

In Miscellaneous Civil Application 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 High Court stated as follows:

> ***"In order to give meaning to section 83 of the Act, the Regulations and the Tender documents, regard must be had***

to their wording, read in context, and having regard to the purpose of the entire Act and the dictates of Article 227 of the Constitution. Read against this backdrop, the plain wording of the relevant provisions and the scheme of section 83 of the Act make it clear that the provisions are meant to ensure a fair, equitable, transparent, competitive procurement process which is consistent with the provisions of Article 227 of the Constitution."

Accordingly, due diligence ought to be conducted by a procuring entity in a manner consistent to the public procurement principles as espoused in Article 227 (1) of the Constitution, that is, a due diligence exercise ought to *interalia* be fair, and transparent.

We have established that there is no documentation before this Board demonstrating that all the issues raised by the Procuring Entity's facility, Kericho County Referral Hospital, as captured in the due diligence report were raised with the Applicant during the pendency of its previous contract or when the said issues continued to persist. We have also established that the Procuring Entity did not conduct any due diligence on the next lowest evaluated tenderer.

The Board is of the considered view that the Procuring Entity ought to have directly raised all issues it may have had with the Applicant's execution of

the previous contract at Kericho County Referral Hospital during the pendency of the said contract and granted the Applicant an opportunity to respond and address the issues raised. If indeed the performance of the Applicant during its last contract was way below par, it is expected that the Procuring Entity may have taken some steps to demand the Applicant to remedy the situation or terminated the said contract in its entirety.

It is therefore the finding of this Board that the Procuring Entity was neither objective nor fair in its conduct of the due diligence exercise on the Applicant, in so far as only part of the Applicant's references were used in conducting due diligence on the Applicant's past performances and such reports were never communicated to the Applicant for their response.

In this regard therefore, the Board hereby expunges the report from Kericho County Referral Hospital from the Post Qualification/ Due Diligence Report. For avoidance of Doubt the report from Kapkatet Hospital is still valid. The Procuring Entity ought to conduct due diligence on the Applicant's remaining references and obtain recommendations for its consideration. Additionally, the Procuring Entity ought to conduct due diligence on any subsequent tenderer considered for award of the subject tender in compliance with provisions of Article 227(1) and 47 of the Constitution as read with Sections 82 and 83 of the Act.

Accordingly, the Board holds that the Request for Review succeeds in terms of the following specific orders:

FINAL ORDERS

In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review dated 14th September 2022:

1. **The Accounting Officer of the Procuring Entity's Letter of Notification of award of Tender No. CGK/T/H/006/2022-2024 for Provision of Cleaning Services, Gardening and Environmental Management at Kericho County Referral Hospital dated 26th August 2022, addressed to M/s Swiftmax Services Ltd, be and are hereby nullified and set aside.**
2. **The Accounting Officer of the Procuring Entity's Letters of Notification of Regret for Tender No. CGK/T/H/006/2022-2024 for Provision of Cleaning Services, Gardening and Environmental Management at Kericho County Referral Hospital dated 26th August 2022, to the Applicant and to all other unsuccessful bidders, be and are hereby nullified and set aside.**
3. **The Accounting Officer of the Procuring Entity is hereby ordered to direct the Evaluation Committee to conduct due diligence on the remaining two references provided by the Applicant being Kenya Power Lighting Company**

and Kenya Electricity Generating Company (KENGEN) within seven (7) days from the date of this decision.

4. Further to order (3) above the Accounting Officer of the Procuring Entity is hereby directed to proceed with the procurement process of Tender No. CGK/T/H/006/2022-2024 for Provision of Cleaning Services, Gardening and Environmental Management to its logical conclusion including the making of an award within 21 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 5th Day of October 2022.

.....	.....
CHAIRPERSON	SECRETARY
PPARB	PPARB