

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 72/2023 OF 06<sup>TH</sup> OCTOBER 2023**

**BETWEEN**

**JANAM FUNERAL SERVICES LIMITED ..... APPLICANT**

**AND**

**ACCOUNTING OFFICER,**

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

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

**MUSA BY CHOICE SERVICES ..... INTERESTED PARTY**

Review against the decision of the Accounting Officer, Kenya Ports Authority in relation to Tender No. KPA/184/2022-23/ADM for Provision of Transport for Welfare Services.

**BOARD MEMBERS PRESENT**

- |                                    |                |
|------------------------------------|----------------|
| 1. QS Hussein Were                 | Panel Chairman |
| 2. Mrs. Njeri OnyangoFCI Arb       | Member         |
| 3. Eng. Mbiu Kimani OGW, HSC, FIEK | Member         |
| 4. Mr. Jackson Awele               | Member         |

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## **IN ATTENDANCE**

Mr. James Kilaka

- Acting Board Secretary

## **PRESENT BY INVITATION**

### **APPLICANT**

### **JANAM FUNERAL SERVICES LIMITED**

- |                      |                                  |           |
|----------------------|----------------------------------|-----------|
| 1. Mr. Justus Omollo | Advocate, Sigano & Omollo LLP    | Advocates |
| 2. David Ongoro      | Director, Janam Funeral Services | Limited   |

### **RESPONDENTS**

### **ACCOUNTING OFFICER, KENYA PORTS AUTHORITY & KENYA PORTS AUTHORITY**

- |                       |                                 |
|-----------------------|---------------------------------|
| 1. Mr. Robert Muge    | Advocate, Kenya Ports Authority |
| 2. Mr. Amos Cheruiyot | Advocate, Kenya Ports Authority |

### **INTERESTED PARTY**

### **MUSA BY CHOICE SERVICES**

N/A

## **BACKGROUND OF THE DECISION**

### **The Tendering Process**



1. Kenya Ports Authority, the Procuring Entity and the 2<sup>nd</sup> Respondent herein, invited tenders in response to Tender No. KPA/184/2022-23/ADM for Provision of Transport for Welfare Services (hereinafter referred to as the "subject tender"). The invitation was placed in *MyGov* Newspaper on 30<sup>th</sup> May 2023 and on the 2<sup>nd</sup> Respondent's website [www.kpa.co.ke](http://www.kpa.co.ke). The tender's submission deadline was scheduled for Monday, 24<sup>th</sup> July 2023 at 10.00a.m.

### **Submission of Tenders and Tender Opening**

2. According to the Minutes of the tender opening held on 24<sup>th</sup> July 2023 a total of five (5) tenders were submitted in response to the subject tender. The said five (5) tenders were opened in the presence of tenderers' representatives present at the tender opening session, and were recorded as follows:

<b>Bidder No.</b>	<b>Name of Tenderer</b>
1.	M/s Royal Hisham Ltd
2.	M/s Janam Funeral Services
3.	M/s Musa By Choice Services
4.	M/s Spero Africa
5.	M/s Kenatco Taxis Ltd

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### **Evaluation of Tenders**

3. The Procuring Entity's Tender Evaluation Committee evaluated the tenders in three following stages:
  - i Preliminary Examination;
  - ii Technical Evaluation; and
  - iii Financial Evaluation.

### **Preliminary Evaluation**

4. The Evaluation Committee, at the Preliminary Evaluation stage examined tenders for responsiveness to mandatory requirements in order to proceed to the Technical Evaluation stage. Tenderers were required to meet all the mandatory requirements provided under Part I: Preliminary Evaluation Criteria (Mandatory Requirements) of Section III- Evaluation and Qualification Criteria at page 33 to page 34 of the Tender Document.
5. At the end of evaluation at this stage, two (2) tenders were determined non-responsive while two tenders, **B2** and **B3**, were determined responsive and proceeded to Technical Evaluation stage.

### **Technical Evaluation**

6. Tenders were required to meet all the requirements at this stage to proceed for Financial Evaluation. The requirements were set out under Part II: Technical Evaluation Criteria (Mandatory Requirements) of Section III- Evaluation and Qualification Criteria at page 34 to 35 of the Tender Document. Sh

7. At the end of evaluation at this stage, both tenders **B2** and **B3** met all the technical requirements and proceeded to Financial Evaluation stage.

### Financial Evaluation

8. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Clause 3 Tender Evaluation (ITT 35) of Section III- Evaluation and Qualification Criteria at page 35 of the Tender Document. The award was to be based on the lowest evaluated tender. Tenderers **B2** and **B3** quoted as follows:

<b>Bidder</b>	<b>County</b>	<b>Rate Per KM (Kshs.) VAT Inclusive</b>	<b>Rate Per KM for Hearse (Kshs.) VAT Inclusive</b>	<b>Indicate the Incidentals service offered, and the prices charged. (Kshs.) VAT Inclusive</b>
<b>B2</b>	<b>47</b>	<b>155</b>	<b>Forty three (43) counties quoted Kshs. 145.00</b>  <b>Four (4) counties quoted Kshs. 100.00 (Taita-Taveta, Garissa, Mandera and Marsabit)</b>	<b>55,000.00</b>
<b>B3</b>	<b>47</b>	<b>190</b>	<b>110</b>	<b>50,000.00</b>

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9. The Committee observed that Tender **B2** submitted by the Applicant herein quoted rate per Kilometer for the Hearse at Kshs. 145.00 in forty-three (43) counties and Kshs. 100.00 in four (4) counties.

### **Evaluation Committee's Recommendation**

10. The Evaluation Committee determined Tender **B3** submitted by the Interested Party herein as the most responsive lowest evaluated bidder at its quoted price of Bus Rate Per Kilometer of Kshs. 190.00, Hearse Rate per Kilometer Kshs. 110.00 and Incidentals for service offered at Kshs. 50,000.00 (all VAT inclusive.)

### **Professional Opinion**

11. In a Professional Opinion dated 18<sup>th</sup> September 2023, the General Manager, Ms. Eveline I. Shigoli, reviewed the manner in which the procurement process was undertaken and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender. The same was approved by the 1<sup>st</sup> Respondent hereinon 18<sup>th</sup> September 2023.

### **Notification to Tenderers**

12. Tenderers were notified of the outcome of evaluation of the subject tender *vide* letters of Notification dated 25<sup>th</sup> September 2023 signed by the 1<sup>st</sup> Respondent. Su

## **REQUEST FOR REVIEW NO 72 OF 2023**

13. Messrs Janam Funeral Services Limited (hereinafter referred to as 'The Applicant'), on 6<sup>th</sup> October 2023 filed a Request for Review dated 4<sup>th</sup> October 2023 together with a Supporting Affidavit sworn on 4<sup>th</sup> October 2023 by David Ongoro, its Director through the firm of Sigano & Omollo LLP Advocates seeking the following orders from the Board:

- a) The intended award of the subject tender number KPA/184/2023-24/ADM for Provision of Transport for Welfare Services to MUSA BY CHOICE SERVICES as communicated through the notification dated 25<sup>th</sup> September 2023 be and is hereby annulled and set aside.***
- b) The Respondents' decision to disqualify the Applicant's bid in the tender number KPA/184/2023-24/ADM for Provision of Transport for Welfare Services as contained in the notification dated 25<sup>th</sup> September 2023 and addressed to the Applicant be annulled and set aside.***
- c) A declaration be and is hereby issued that the Applicant (JANAM FUNERAL SERVICES LIMITED) was the successful bidder in the subject tender number KPA/184/2023-24/ADM for Provision of Transport for Welfare Services having duly satisfied the award criteria set forth in ITT Clause 41 of the tender document.***

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***d) The Accounting officer of the procuring entity be and is hereby directed to award the subject tender number KPA/184/2023-24/ADM Provision of Transport for Welfare Services to the Applicant (JANAM FUNERAL SERVICES LIMITED).***

***e) Any other relief that the Board may deem fit and just to grant pursuant to section 11(1) of the Fair Administrative Action Act.***

***f) Costs of the Review***

14. In a Notification of Appeal and a letter dated 6<sup>th</sup> October 2023, Mr. James Kilaka, the Acting Board Secretary of the Public Procurement Administrative Review Board (hereinafter, 'The Board') notified the 1<sup>st</sup> and 2<sup>nd</sup> Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said 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 (5) days.

15. On 13<sup>th</sup> October 2023, the Respondents filed through Turasha J. Kinyanjui Respondents' Notice of Appointment of Advocate dated 11<sup>th</sup> October 2023, Respondents' Memorandum of Response, an Affidavit

in Support of the Respondents' Memorandum of Response sworn on 11<sup>th</sup> October 2023 by Daniel Amuyunzu together with confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act (hereinafter referred to as 'The Act').

16. *Vide* letters dated 13<sup>th</sup> October 2023, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020. All tenderers were invited to submit to the Board any information and arguments concerning the tender within three (3) days.
17. *Vide* a Hearing Notice dated 18<sup>th</sup> October 2023, the Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the Request for Review slated for 23<sup>rd</sup> October 2023 at 11:00 a.m., through the link availed in the said Hearing Notice.
18. At the hearing of the Request for Review, the Board issued hearing directions allocating the Applicant and Respondent Party 10 minutes each to highlight their respective cases with the Applicant being granted a right of rejoinder on matters of law only. The Interested Party did not enter an appearance despite having been notified. The Request for Review proceeded for virtual hearing as scheduled.

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## **PARTIES' SUBMISSIONS**

### **Applicant's Submission**

19. In his submissions on behalf of the Applicant, Mr. Omollo relied on the Applicant's Request for Review dated 4<sup>th</sup> October 2023 and Supporting Affidavit sworn on 4<sup>th</sup> October 2023 by David Ongoro.
20. The Applicant submitted that the reason for disqualification of its tender was on the purported basis that it was not the lowest evaluated bidder. It further submitted that from the face of the letter of notification, it was indicated that the successful bidder was the Interested Party herein at the rates provided in the table therein. The Applicant further submitted that the rates provided in the table in the letter of notification was a clear departure from the form provided at page 75 of the Tender Document being the Specifications and Priced Activity Schedules (Mandatory) Appendix B which indicated the rate of payment per kilometer and incidentals.
21. The Applicant pressed on that the particular information disclosed in the letter of notification suggested that the Interested Party did not disclose the incidental services offered and merely stated a price. It submitted that Appendix B provided a sequential way of indicating the 47 counties that were subject to the subject tender.
22. The Applicant drew the Board's attention to page 91 of its bundle of documents which indicated the county code, county name and county capital and submitted that it appears that the only particulars

which the Interested Party indicated in its tender was No. 47 which is the county code for Nairobi City suggesting that the Interested Party only quoted for Nairobi City. It averred that there was no indication that the Interested Party quoted for each of the counties as enumerated with their county codes in the Tender Document and only gave figure No. 47 which identifies Nairobi City County.

23. It went on to aver that the Applicant on its part, sequentially quoted for each of the counties enumerating number 1 and county and the rate for bus, rate for the hearse and indicated the incidental services and prices charged.
24. It was the Applicant's submission that the incidental services to be offered were missing in the Interested Party's bid and that the quoted amount of Kshs. 50,000/- did not reflect anything and was silent on what it covered.
25. It was the Applicant's further submission that in comparing the quoted prices, some of the components of the Applicant's bid were cheaper and that as such, the Procuring Entity failed to comply with the Evaluation Criteria in the Tender Document.
26. The Applicant stated that its tender was the only one that quoted for all the 47 counties and ought to have been declared successful as its prices for the Bus and for the Hearse were cheaper compared to those of the Interested Party arguing its price per kilometer in Taita-

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Taveta, Garissa, Mandera and Marsabit was Kshs 100.00 while the Interested Party quoted Kshs. 110.00 for all the counties.

27. It argued that the Interested Party's tender was non-responsive and ought to have been disqualified since it failed to comply with the mandatory requirements of Appendix B at page 75 of the Tender Document and urged the Board to grant the prayers sought in the Request for Review.

### **Respondents' Submissions**

28. Submitting on behalf of the Respondent, Mr. Muge relied on the Respondents' Memorandum of Response, Affidavit in Support of the Respondents' Memorandum of Response sworn on 11<sup>th</sup> October 2023 by Daniel Amuyunzu together with confidential documents submitted to the Board.
29. The Respondents averred that the subject tender went through the Preliminary, Technical and Financial Evaluation and that according to the provisions of ITT 41 of the Tender Document, the Interested Party was awarded for being the lowest evaluated tenderer.
30. It invited the Board to look into the confidential documents and note that all parties quoted for the 47 counties. It submitted further that the Interested Party was cumulatively found to be the lowest tenderer and awarded the tender. 

31. It argued that the provisions of the Constitution and the Act were observed in the entire procurement process and that the subject tender awarded fairly based on the information provided and urged the Board to dismiss the Request for Review.
32. Upon enquiry by the Board on whether the subject tender would be awarded to different tenderers for the various categories, Counsel for the Respondents submitted that the tender was to be awarded as one unit and was not meant to be split. When asked to further expound on how the Procuring Entity would determine which tender was cheaper for purposes of award, counsel submitted that when looking at the distance to be covered, the Interested Party's rates for the Bus cumulatively were lower than the rates provided by the Applicant and that this was clear from the Evaluation Report.

### **Applicant's Rejoinder**

33. In a rejoinder, Counsel for the Applicant, Mr. Omollo submitted that the Respondent did not controvert the Applicant's position that its bid was cheaper having tabulated sequentially all the counties required to be quoted for.
34. The Applicant pointed out that it would be absurd that the Respondents would disclose in the letter of notification a paltry no. 47 which does not indicate what it means yet there is part of the Tender Document showing 47 was the county code for Nairobi City

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and as such for the rest of the counties, the Applicant was the only responsive tenderer.

35. It submitted that there was no indication on the Tender Document that there would be a cumulative summation of the quoted items to get the lowest bidder.
36. Upon enquiry by the Board on the requirement for sequential provisions of counties in the Tender Document, the Applicant referred to page 76 of the Tender Document and Appendix B (rate of payment per kilometre and Incidentals) and page 91 of the Tender Document providing for the Counties.
37. When asked to clarify on whether the Tender Document had any provision for the splitting of counties or whether the tender was to be awarded as one unit, the Applicant stated that the Tender Document was vague on this aspect.
38. At the conclusion of the hearing, the Board informed parties that it would communicate its decision to all parties via email before the expiry of the Request for Review, on or before 27<sup>th</sup> October 2023

### **BOARD'S DECISION**

39. The Board has considered each of the parties' cases, documents, pleadings, oral and written submissions, list and bundle of authorities together with confidential documents submitted to the Board by the

Respondents pursuant to Section 67(3)(e) of the Act and has identified issues for determination being the following.

- (i) *Whether the Procuring Entity failed to evaluate and compare the Applicant's and the Interested Party's tenders in accordance with the Tender Document, in breach of the provisions of Section 80(2) of the Act.*
- (ii) *What orders the Board should grant in the circumstances.*

**As to whether the Procuring Entity failed to evaluate and compare the Applicant's and the Interested Party's tenders in accordance with the Tender Document, in breach of the provisions of Section 80(2) of the Act.**

- 40. The circumstances of this case are that the Applicant and Interested Party submitted bids in Tender No. KPA/184/2022-23/ADM for Provision of Transport for Welfare Services for Kenya Airports Authority in response to an advertisement on 30<sup>th</sup> May 2023.
- 41. Five tenders were received and opened on 24<sup>th</sup> July 2023 and thereafter evaluated by the Procuring Entity's Tender Evaluation Committee through three stages of Preliminary Examination, Technical Evaluation and Financial Evaluation.

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42. At the end of the evaluation the Interested Party was recommended for award of the tender at its quoted price of Bus Rate Per Kilometre of Kshs. 190.00, Hearse Rate per Kilometre Kshs. 110.00 and Incidentals for service offered at Kshs. 50,000.00 (all VAT inclusive.) being the lowest evaluated responsive tenderer.
43. Tenderers were notified of the outcome of evaluation of the subject tender *vide* letters of Notification dated 25<sup>th</sup> September 2023 signed by the 1<sup>st</sup> Respondent.
44. The Applicant, feeling aggrieved by the decision of the Procuring Entity, that it was unsuccessful, filed this Request for Review on 6<sup>th</sup> October 2023.
45. Central to the Request for Review filed on 6<sup>th</sup> October 2023 is the manner in which the Respondents evaluated the subject tender. The Applicant contended that the procurement proceedings in the subject tender were unfair since the Respondents awarded the tender to the Interested Party despite its failure to meet the award criteria set out under ITT Clause 41 of the Tender Document. The Applicant also contended that its tender was unfairly disqualified on the ground that it was not the lowest evaluated tenderer whereas its bid was lower than that of the Interested Party.
46. During the hearing of the Request for Review the Applicant argued that the rates provided in the letter of notification awarding the Interested Party was a clear departure from the Specifications and

Priced Activity Schedules (Mandatory) Appendix B (rate of payment per kilometre and Incidentals) provided at page 75 of the Tender Document and that the particular information disclosed in the notification suggested that the Interested Party did not disclose the incidental services offered and merely stated a price. It argued further that Appendix B provided a sequential way of indicating the 47 counties that were subject to the tender and that the only particulars which the Interested Party indicated in its tender was No. 47 which is the county code for Nairobi City which suggested that the Interested Party only quoted for Nairobi City only.

47. The Respondents on their part argued that the evaluation of the tender was done in accordance with the provisions of the Tender Document, the Act and the Constitution and that the subject tender was awarded to the lowest evaluated tenderer. During the hearing, Mr. Muge, Counsel for the Respondents, submitted that cumulatively, the Applicant's rates were higher compared to those of the Interested Party and as such the Interested Party's tender was the lowest evaluated tender.
48. The question that has arisen that begs an answer is whether the Interested Party met Specifications and Priced Activity Schedules (Mandatory) Appendix B (rate of payment per kilometre and Incidentals) provided at page 75 of the Tender Document and further, whether the Interested Party was indeed the lowest evaluated bidder. *See*

49. To answer this question, the Board relies on the guidance provided by the enabling law. Article 227 of the Constitution 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 fair, equitable, transparent, competitive and cost-effective.**

**(2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following: .....**

50. The Board observes that the legislation contemplated in Article 227(2) of the Constitution is the Act. Section 80 of the Act is instructive on how evaluation and comparison of tenders should be conducted by a procuring entity, as follows:

Section 80 - Evaluation of tenders:

**"(1) The evaluation committee appointed by the accounting officer pursuant to section 46 of this Act, shall evaluate and compare the responsive tenders other than tenders rejected.**

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**(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents ..."**

51. The Board is also cognizant of the provisions of Article 47(1) of the Constitution on procedural fairness which provides:

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

52. Further, Section 7(2)(n) of the Fair Administrative Action Act provides:

***"(2) A court or tribunal under subsection (1) may review an administrative action or decision, if –***

***.....  
(n) the administrative action or decision is unfair;  
....."***

In essence, procedural fairness is a constitutional requirement in administrative action and goes beyond the traditional meaning of the duty to afford one an opportunity of being heard.

53. In the instant Request for Review, the Board notes that Clause 3 (c) Tender Evaluation (ITT 35) of Section III- Evaluation and Qualification Criteria at page 35 of the Tender Document provided for Price Evaluation as follows: *Su*

***"(c) Other Criteria; if permitted under ITT 35.2 (e): The award will be based on the lowest evaluated bidder."***

54. ITT 41 Award Criteria of Section I – Instructions to Tenderers at page 27 of the Tender Document provided that:

***"The Procuring Entity shall award the Contract to the successful tenderer whose tender has been determined to be the Lowest Evaluated Tender."***

55. In essence, award of the subject tender was to be made to the lowest evaluated tenderer which is in line with the provisions of Section 86(1)(a) of the Act that read:

***"(1) The successful tender shall be the one who meets any one of the following as specified in the tender document –***

***(a) the tender with the lowest evaluated price;***

***(b) .....***

56. Regulation 77 of Regulations 2020 provides for Financial Evaluation as follows:

***"(1) Upon completion of the technical evaluation under regulation 76 of these Regulations, the evaluation committee shall conduct a financial evaluation and comparison to determine the evaluated price of each tender.***

***(2) The evaluated price for each bid shall be determined by—***

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- (a) taking the bid price in the tender form;*
- (b) taking into account any minor deviation from the requirements accepted by a procuring entity under section 79(2)(a) of the Act;*
- (c) where applicable, converting all tenders to the same currency, using the Central Bank of Kenya exchange rate prevailing at the tender opening date;*
- (d) applying any margin of preference indicated in the tender document.*

***(3) Tenders shall be ranked according to their evaluated price and the successful tender shall be in accordance with the provisions of section 86 of the Act."***

57. The Board has carefully studied the Tender Document and notes that:

58. ITT 13 of Section I- Instruction to Tenderers at page 16 of the Tender Document provided for documents comprising the tender as follows:

***"13.1 The Tender shall comprise the following:***

***(a) Form of Tender prepared in accordance with ITT 14;***

***(b) Schedules: priced Activity Schedule completed in accordance with ITT 14 and ITT 16;***

***(c) Tender Security or Tender- Securing Declaration in accordance with ITT 21.1;***

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***(d) Alternative Tender: if permissible in accordance with ITT 15;***

***(e) Authorization: written confirmation authorizing the signatory of the Tender to commit the Tenderer, in accordance with ITT 22.3;***

***(f) Qualifications: documentary evidence in accordance with ITT 19 establishing the Tenderer's qualifications to perform the Contract if its Tender is accepted;***

***(g) Tenderer's Eligibility: documentary evidence in accordance with ITT 19 establishing the Tenderer's eligibility to Tender;***

***(h) Conformity: documentary evidence in accordance with ITT 18, that the Services conform to the tendering document; and***

***(i) Any other document required in the TDS."***

59. ITT 14 of Section I- Instruction to Tenderers at page 16 of the Tender Document provided for the Form of Tender and Activity Schedule as follows:

***"14.1 The Form of Tender and priced Activity Schedule shall be prepared using the relevant forms furnished in Section IV, Tendering Forms. The forms must be completed without any alterations to the text, and no substitutes shall be accepted except as provided under ITT 22.3. All blank spaces shall be filled with the information requested.***

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***14.2 The Tenderer shall furnish in the Form of Tender information on commissions and gratuities, if any, paid or to be paid to agents or any other party relating to this Tender."***

60. ITT 16 of Section I- Instruction to Tenderers at page 17 of the Tender Document provided for the Tender Prices and Discounts as follows:

***"16.1 The prices and discounts (including any price reduction) quoted by the Tenderer in the Form of Tender and in the Activity Schedule(s) shall conform to the requirements specified below.***

***16.2 All lots (contracts) and items must be listed and priced separately in the Activity Schedules(s).***

***16.3 The Contract shall be for the Services, as described in Appendix A to the Contract and in the Specifications (or Terms of Reference), based on the priced Activity Schedule, submitted by the Tenderer.***

***16.4 The Tenderer shall quote any discounts and indicate the methodology for their application on the Form of Tender in accordance with ITT 16.1***

***16.5 The Tenderer shall fill in rates and prices for all the items of the Services described in the Specifications (or Terms of Reference), and listed in the Activity Schedule in Section VII, Procuring Entity's Requirements. Items for which no rate or price is entered by the Tenderer***

*will not be paid for by the Procuring Entity when executed and shall be deemed covered by the other rates and prices in the Activity Schedule.*

*16.6 All duties, taxes, and other levies payable by the Service Provider under the Contract, or for any other cause, as of the date 30 days prior to the deadline for submission of Tenders, shall be included in the total Tender price submitted by the Tenderer.*

*.....”*

61. ITT 13.1 (i) of Section II – Tender Data Sheet (TDS) at page 30 of the Tender Document provided that:

*"The Tenderer shall submit the following additional documents in its Tender: all duly completed and signed mandatory tendering forms under section IV."*

62. The Specifications and Priced Activity Schedules – Mandatory of Section IV – Tendering Forms at page 75 of the Tender Document provided as follows:

***Appendix B (rate of payment per kilometer and Incidentals)***

<b><i>1</i></b>	<b><i>2</i></b>	<b><i>3</i></b>	<b><i>4</i></b>	<b><i>5</i></b>
<b><i>No.</i></b>	<b><i>County</i></b>	<b><i>Rate per kilometer for Bus (Kshs.)</i></b>	<b><i>Rate per kilometer for Hearse (Kshs.)</i></b>	<b><i>Indicate the Incidentals services offered, and the prices charged. (Kshs.)</i></b>
<b><i>1.</i></b>				
<b><i>2.</i></b>				

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***Prices shall be inclusive of all applicable taxes.***

***2. Method Statement***

***As per Section V – Activity Schedule***

***3. Work Plan***

***As per Section V – Activity Schedule***

***4. Other Time Schedule***

***(to be used by Tenderer when alternative Time for Completion is invited in ITT 14.2)***

63. Section V – Activity Schedule at pages 89 to 93 of the Tender Document provided for the Work Schedule, a brief description of the Scope of Work, the scope of coverage, guidelines on the chargeable rates for the transport services inclusive of applicable taxes for the Bus and Hearse, the Service Provider's obligations, the Procuring Entity's obligations and a Vehicle Mileage/Odometer Reading Form. The Coverage Areas listed all the 47 county Codes, Counties and Capital of the said Counties. We note that under the scope of works, the services were to comprise of (i) Provision of hearse to the point of burial/ last rights, (ii) Provision of lowering gear and equipment, and (iii) Provision of casket tent during the burial ceremony.

64. Further, Activity Schedule C – Transport Services Rates of Section V Activity Schedule at page 91 of the Tender Document provided as follows:

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***"The chargeable rates for the transport service, inclusive of applicable taxes, shall be guided by the following;***

***Bus:***

***a. the distance covered in kilometers from the point of departure/start journey to the destination and vice-versa, inclusive of any authorized movement.***

***b. Any overnight stay by the bus shall be limited to two (2) nights. The service provider is expected to quote a cost for the same.***

***Hearse:***

***a. the distance covered in kilometers from the point of departure/start of journey to the destination and vice-versa, inclusive of any authorized movement.***

***b. The service provider is expected to quote a cost for provision of lowering gear and equipment.***

***c. Any overnight stay by the hearse shall be limited to two (2) nights. The service provider is expected to quote a cost for the same.***

65. The aforementioned provisions are clear in terms of interpretation that:

- a) a tender was to be comprised of a Tender Form and Activity Schedule prepared and filled with the required information without any alterations to the text of the said forms,
- b) it was mandatory for items to be listed and priced separately in the Activity Schedules,

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- c) the scope of work comprised of provision of hearse to the point of burial/last rights, lowering gear & equipment, and casket tent during the burial ceremony and this is what was required to guide a tenderer in quoting for the incidental services to be offered,
- d) the scope of coverage areas was all the 47 Counties, and
- e) a tenderer was expected to quote for the chargeable rates inclusive of taxes being guided by the distance covered in kilometers and to also quote for any overnight stay.

66. An examination of the Evaluation Report submitted to the Board as part of the confidential documents reveals that the price quoted by the two firms was tabulated under Table V at page 21 of 22 of the Evaluation Report as follows:

<b><i>Firm</i></b>	<b><i>County</i></b>	<b><i>Rate per kilometer for Bus (Kshs.)</i></b>	<b><i>Rate per kilometer for Hearse (Kshs.)</i></b>	<b><i>Indicate the Incidentals services offered, and the prices charged. (Kshs.)</i></b>
<b><i>Janam Funeral Service</i></b>	<b><i>47</i></b>	<b><i>155</i></b>	<b><i>Forty-three (43) counties quoted Kshs. 145.00</i></b> <b><i>Four (4) counties quoted Kshs. 100.00 (Taita-Taveta,</i></b>	<b><i>55,000.00</i></b>

			<b>Garissa, Mandera, and Marsabit)</b>	
<b>Musa By Choice Services</b>	<b>47</b>	<b>190</b>	<b>110</b>	<b>50,000.00</b>

67. The Board has also examined the Applicant's tender submitted to the Board as part of the confidential documents pursuant to Section 67(3)(e) of the Act and notes that the Applicant submitted the Specifications and Priced Activity Schedules – Mandatory at pages 8 to 11 of its tender, as follows:

<b>1</b>	<b>2</b>	<b>3</b>	<b>4</b>	<b>5</b>
<b>No.</b>	<b>County</b>	<b>Rate Per kilometer for Bus (Kshs.) VAT Inclusive</b>	<b>Rate Per kilometer for Hearse (Kshs.) VAT Inclusive</b>	<b>Indicate the Incidentals service offered, and the prices charged. (Kshs.)</b>
<b>County Code</b>	<b>County</b>			
<b>1.</b>	<b>Mombasa</b>	<b>155.00</b>	<b>145.00</b>	<b>Lowering Gear @ 25,00.00 once &amp; Allowance @ 30,000.00= per day</b>
<b>2.</b>	<b>Kwale</b>	<b>155.00</b>	<b>145.00</b>	<b>Lowering Gear @ 25,00.00 once &amp; Allowance @ 30,000.00= per day</b>
<b>3.</b>	<b>Kilifi</b>	<b>155.00</b>	<b>145.00</b>	<b>Lowering Gear @ 25,00.00 once &amp; Allowance @ 30,000.00= per day</b>

4.	<i>Tana River</i>	<i>155.00</i>	<i>145.00</i>	<i>Lowering Gear @ 25,00.00 once &amp; Allowance @ 30,000.00= per day</i>
5.	<i>Lamu</i>	<i>155.00</i>	<i>145.00</i>	<i>Lowering Gear @ 25,00.00 once &amp; Allowance @ 30,000.00= per day</i>
6.	<i>Taita-Taveta</i>	<i>155.00</i>	<i>100.00</i>	<i>Lowering Gear @ 25,00.00 once &amp; Allowance @ 30,000.00= per day</i>
7.	<i>Garissa</i>	<i>155.00</i>	<i>100.00</i>	<i>Lowering Gear @ 25,00.00 once &amp; Allowance @ 30,000.00= per day</i>
8.	<i>Wajir</i>	<i>155.00</i>	<i>145.00</i>	<i>Lowering Gear @ 25,00.00 once &amp; Allowance @ 30,000.00= per day</i>
9.	<i>Mandera</i>	<i>155.00</i>	<i>100.00</i>	<i>Lowering Gear @ 25,00.00 once &amp; Allowance @ 30,000.00= per day</i>
10.	<i>Marsabit</i>	<i>155.00</i>	<i>100.00</i>	<i>Lowering Gear @ 25,00.00 once &amp; Allowance @ 30,000.00= per day</i>
11.	<i>Isiolo</i>	<i>155.00</i>	<i>145.00</i>	<i>Lowering Gear @ 25,00.00 once &amp; Allowance @ 30,000.00= per day</i>
12.	<i>Meru</i>	<i>155.00</i>	<i>145.00</i>	<i>Lowering Gear @ 25,00.00 once &amp; Allowance @ 30,000.00= per day</i>
13.	<i>Tharaka-Nithi</i>	<i>155.00</i>	<i>145.00</i>	<i>Lowering Gear @ 25,00.00 once &amp; Allowance @ 30,000.00= per day</i>
14.	<i>Embu</i>	<i>155.00</i>	<i>145.00</i>	<i>Lowering Gear @ 25,00.00 once &amp; Allowance @ 30,000.00= per day</i>
15.	<i>Kitui</i>	<i>155.00</i>	<i>145.00</i>	<i>Lowering Gear @ 25,00.00 once &amp; Allowance @ 30,000.00= per day</i>
16.	<i>Machakos</i>	<i>155.00</i>	<i>145.00</i>	<i>Lowering Gear @ 25,00.00 once &amp; Allowance @</i>

				<b>30,000.00= per day</b>
<b>17.</b>	<b>Makueni</b>	<b>155.00</b>	<b>145.00</b>	<b>Lowering Gear @ 25,00.00 once &amp; Allowance @ 30,000.00= per day</b>
<b>18.</b>	<b>Nyandarua</b>	<b>155.00</b>	<b>145.00</b>	<b>Lowering Gear @ 25,00.00 once &amp; Allowance @ 30,000.00= per day</b>
<b>19.</b>	<b>Nyeri</b>	<b>155.00</b>	<b>145.00</b>	<b>Lowering Gear @ 25,00.00 once &amp; Allowance @ 30,000.00= per day</b>
<b>20.</b>	<b>Kirinyaga</b>	<b>155.00</b>	<b>145.00</b>	<b>Lowering Gear @ 25,00.00 once &amp; Allowance @ 30,000.00= per day</b>
<b>21.</b>	<b>Murang'a</b>	<b>155.00</b>	<b>145.00</b>	<b>Lowering Gear @ 25,00.00 once &amp; Allowance @ 30,000.00= per day</b>
<b>22.</b>	<b>Kiambu</b>	<b>155.00</b>	<b>145.00</b>	<b>Lowering Gear @ 25,00.00 once &amp; Allowance @ 30,000.00= per day</b>
<b>23.</b>	<b>Turkana</b>	<b>155.00</b>	<b>145.00</b>	<b>Lowering Gear @ 25,00.00 once &amp; Allowance @ 30,000.00= per day</b>
<b>24.</b>	<b>West Pokot</b>	<b>155.00</b>	<b>145.00</b>	<b>Lowering Gear @ 25,00.00 once &amp; Allowance @ 30,000.00= per day</b>
<b>25.</b>	<b>Samburu</b>	<b>155.00</b>	<b>145.00</b>	<b>Lowering Gear @ 25,00.00 once &amp; Allowance @ 30,000.00= per day</b>
<b>27.</b>	<b>Trans- Nzoia</b>	<b>155.00</b>	<b>145.00</b>	<b>Lowering Gear @ 25,00.00 once &amp; Allowance @ 30,000.00= per day</b>
<b>26.</b>	<b>Uasin Gishu</b>	<b>155.00</b>	<b>145.00</b>	<b>Lowering Gear @ 25,00.00 once &amp; Allowance @ 30,000.00= per day</b>
<b>28.</b>	<b>Elgeyo- Marakwet</b>	<b>155.00</b>	<b>145.00</b>	<b>Lowering Gear @ 25,00.00 once &amp; Allowance @ 30,000.00= per day</b>

<b>29.</b>	<b>Nandi</b>	<b>155.00</b>	<b>145.00</b>	<b>Lowering Gear @ 25,00.00 once &amp; Allowance @ 30,000.00= per day</b>
<b>30.</b>	<b>Baringo</b>	<b>155.00</b>	<b>145.00</b>	<b>Lowering Gear @ 25,00.00 once &amp; Allowance @ 30,000.00= per day</b>
<b>31.</b>	<b>Laikipia</b>	<b>155.00</b>	<b>145.00</b>	<b>Lowering Gear @ 25,00.00 once &amp; Allowance @ 30,000.00= per day</b>
<b>32.</b>	<b>Nakuru</b>	<b>155.00</b>	<b>145.00</b>	<b>Lowering Gear @ 25,00.00 once &amp; Allowance @ 30,000.00= per day</b>
<b>33.</b>	<b>Narok</b>	<b>155.00</b>	<b>145.00</b>	<b>Lowering Gear @ 25,00.00 once &amp; Allowance @ 30,000.00= per day</b>
<b>34.</b>	<b>Kajiado</b>	<b>155.00</b>	<b>145.00</b>	<b>Lowering Gear @ 25,00.00 once &amp; Allowance @ 30,000.00= per day</b>
<b>35.</b>	<b>Kericho</b>	<b>155.00</b>	<b>145.00</b>	<b>Lowering Gear @ 25,00.00 once &amp; Allowance @ 30,000.00= per day</b>
<b>36.</b>	<b>Bomet</b>	<b>155.00</b>	<b>145.00</b>	<b>Lowering Gear @ 25,00.00 once &amp; Allowance @ 30,000.00= per day</b>
<b>37.</b>	<b>Kakamega</b>	<b>155.00</b>	<b>145.00</b>	<b>Lowering Gear @ 25,00.00 once &amp; Allowance @ 30,000.00= per day</b>
<b>38.</b>	<b>Vihiga</b>	<b>155.00</b>	<b>145.00</b>	<b>Lowering Gear @ 25,00.00 once &amp; Allowance @ 30,000.00= per day</b>
<b>39.</b>	<b>Bungoma</b>	<b>155.00</b>	<b>145.00</b>	<b>Lowering Gear @ 25,00.00 once &amp; Allowance @ 30,000.00= per day</b>
<b>40.</b>	<b>Busia</b>	<b>155.00</b>	<b>145.00</b>	<b>Lowering Gear @ 25,00.00 once &amp; Allowance @ 30,000.00= per day</b>
<b>41.</b>	<b>Siaya</b>	<b>155.00</b>	<b>145.00</b>	<b>Lowering Gear @ 25,00.00 once &amp; Allowance @</b>

				<b>30,000.00= per day</b>
<b>42.</b>	<b>Kisumu</b>	<b>155.00</b>	<b>145.00</b>	<b>Lowering Gear @ 25,00.00 once &amp; Allowance @ 30,000.00= per day</b>
<b>43.</b>	<b>Homa Bay</b>	<b>155.00</b>	<b>145.00</b>	<b>Lowering Gear @ 25,00.00 once &amp; Allowance @ 30,000.00= per day</b>
<b>44.</b>	<b>Migori</b>	<b>155.00</b>	<b>145.00</b>	<b>Lowering Gear @ 25,00.00 once &amp; Allowance @ 30,000.00= per day</b>
<b>45.</b>	<b>Kisii</b>	<b>155.00</b>	<b>145.00</b>	<b>Lowering Gear @ 25,00.00 once &amp; Allowance @ 30,000.00= per day</b>
<b>46.</b>	<b>Nyamira</b>	<b>155.00</b>	<b>145.00</b>	<b>Lowering Gear @ 25,00.00 once &amp; Allowance @ 30,000.00= per day</b>
<b>47.</b>	<b>Nairobi (County)</b>	<b>155.00</b>	<b>145.00</b>	<b>Lowering Gear @ 25,00.00 once &amp; Allowance @ 30,000.00= per day</b>

68. In essence the Applicant:

- a) Submitted the Specifications and Priced Activity Schedules – Mandatory at pages 8 to 11 of its tender wherein it listed in Appendix B (rate of payment per kilometer and Incidentals) (i) under column 1 the County Code and under column 2 the names of all the 47 Counties, (ii) the rate per kilometer for Bus in the 47 Counties listed at Kshs. 155.00, (iii) the rate per kilometer for Hearse in 43 Counties listed at Kshs. 145.00, (iv) the rate per kilometer for Hearse in 4 Counties listed at Kshs. 100.00, (v) incidental services of lowering gear at Kshs. 25,000/= once and Allowance at Kshs. 30,000/= per day in all the 47 Counties listed.

*su*

b) Did not provide an express quote for any overnight stay in the Specifications and Priced Activity Schedules – Mandatory

c) Submitted its Form of Tender dated 24<sup>th</sup> July 2023 at pages 13 to 15 of its tender wherein the Tender Price was not indicated/filled in.

69. A similar perusal of the Interested Party's tender reveals that the Interested Party submitted the Specifications and Priced Activity Schedules – Mandatory at pages 114 of its tender as follows:

<b>1</b>	<b>2</b>	<b>3</b>	<b>4</b>	<b>5</b>
<b>No.</b>	<b>County</b>	<b>Rate Per kilometer for Bus (Kshs.) VAT Inclusive</b>	<b>Rate Per kilometer for Hearse (Kesh's.) VAT Inclusive</b>	<b>Indicate the Incidentals service offered, and the prices charged. (Kshs.) VAT Inclusive</b>
<b>1</b>	<b>All Counties</b>	<b>190</b>	<b>110</b>	<b>Lowering Gear and allowance at 50,000</b>

70. In essence the Interested Party:

a) Submitted the Specifications and Priced Activity Schedules – Mandatory Appendix B (rate of payment per kilometer and Incidentals at pages 114 of its tender wherein (i) under the requirement for name of County at column 2 it submitted a general indication of "All Counties", (ii) the rate per kilometer for Bus at Kshs. 190.00, (iii) the rate per kilometer for Hearse at Kshs.

*Su*

110.00, and under the last column on incidental services offered at Kshs. 50,000/=.

- b) Did not provide an express quote for any overnight stay in the Specifications and Priced Activity Schedules – Mandatory.
- c) Submitted its Form of Tender dated 24<sup>th</sup> July 2023 at pages 110 to 113 of its tender wherein the Tender Price was indicated as *"300.00 Three Hundred Shillings Per Kilometer 50,000 Fifty Thousand for Incidentals."*

71. The Board has observed elsewhere in this decision that it was a mandatory requirement for tenderers to list all the 47 Counties when filling in their rates under the Specifications and Priced Activity Schedules – Mandatory. Appendix B (rate of payment per kilometer and Incidentals) Form. In simple terms, it was mandatory for the Counties to be listed and priced separately in the Activity Schedules.

72. Also observed was a tenderer's obligation to quote for the incidental services offered and prices charged under the format provided in the Specifications and Priced Activity Schedules – Mandatory. Appendix B (rate of payment per kilometer and Incidentals) Form without any alterations to the text of the said form. In clear terms a tenderer was obligated to list and indicate the specific incidental service and at what cost having in mind the scope of services as provided for in the Tender Document. su

73. In view of the foregoing, the Board notes that the Interested Party failed to:

- a) List all the 47 Counties when filling in their rates under the Specifications and Priced Activity Schedules – Mandatory. Appendix B (rate of payment per kilometer and Incidentals) Form,
- b) list the specific incidental service and at what price charged, and
- c) Expressly quote for any overnight stay in the Specifications and Priced Activity Schedules – Mandatory Appendix B (rate of payment per kilometer and Incidentals) Form.

74. The Board further notes that the Applicant, on its part, failed to:

- a) Expressly quote for any overnight stay in the Specifications and Priced Activity Schedules – Mandatory. Appendix B (rate of payment per kilometer and Incidentals) Form, and
- b) Fill in its Tender Price in the Form of Tender.

75. It is the observation of this Board that the Procuring Entity having prepared the tender document of the subject tender and, further, having set the mandatory requirements to be met by the bidders cannot be heard to turn its back on its own tender document by failing to enforce the requirements therein save for provision on minor deviations. The Board in such circumstances cannot look any other way but to demand compliance of the Procuring Entity with the requirements it set out in its own tender document in keeping with the provisions of the Act. Se

76. In view of all of the foregoing, the Board finds and holds that the Procuring Entity's Evaluation Committee failed to evaluate and compare the Applicant's and the Interested Party's tenders in accordance with the Tender Document and hence is in breach of the provisions Section 80(2) of the Act. Accordingly, this ground of review succeeds.

**What orders the Board should grant in the circumstances**

77. The Board has found that the 2<sup>nd</sup> Respondent's Evaluation Committee failed to evaluate and compare the tenders of the Applicant and the Interested Party in accordance with the provisions of the Tender Document and thereby offended the provisions of Section 80(2) of the Act read with Article 227(1) of the Constitution.

78. In determining the appropriate orders to grant in the circumstances, the Board is cognizant of section 173 (b) of the Act, which states that:

***"Upon completing a review, the Review Board may do any one or more of the following-***

***(a).....;***

***(b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings***

***....."***

*GV*

79. The Board therefore finds it just and fair to nullify the Notification of award and Regret communicated to the bidders *vide* letters dated 25<sup>th</sup> September 2023. In view of the findings herein, it is also deemed just and fit to order a re-evaluation of the Applicant's and the Interested Party's tenders at the Financial Evaluation stage taking into consideration the findings of this Board, the provisions of the Tender Document, the Act and the Constitution.
80. The upshot of the Board's findings is that the instant Request for Review succeeds in terms of the following specific orders:

### **FINAL ORDERS**

81. 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 this Request for Review:

- 1. The Letter of Notification dated 25<sup>th</sup> September 2023 issued by the 1<sup>st</sup> Respondent with respect to Tender No. KPA/184/2022-23/ADM for Provision of Transport for Welfare Services, and addressed to the Interested Party, be and is hereby nullified and set aside.**
  
- 2. The Letters of Notification dated 25<sup>th</sup> September 2023 issued by the 1<sup>st</sup> Respondent in respect of the subject**

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tender and addressed to the unsuccessful tenderers, be and are hereby nullified and set aside.

3. The 1<sup>st</sup> Respondent is hereby ordered to direct the 2<sup>nd</sup> Respondent's Evaluation Committee to conduct a re-evaluation of the Applicant's and the Interested Party's tenders at the Financial Evaluation stage taking into consideration the findings of the Board herein.
4. Further to Order No. 3 above, the Respondents are hereby directed to proceed with the procurement process to its logical conclusion within fourteen (14) days of this decision in accordance with the law.
5. Given that the procurement process for the subject tender is not complete each party shall bear its own costs in the Request for Review.

Dated at NAIROBI this 26<sup>th</sup> Day of October 2023.



**PANEL CHAIRMAN**

**PPARB**



**SECRETARY**

**PPARB**