

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 55/2024 OF 21ST JUNE 2024

BETWEEN

LAKEPARM CLEANERS LIMITED.....APPLICANT

AND

CHIEF EXECUTIVE OFFICER, KENYATTA UNIVERSITY

TEACHING, REFERRAL & RESEARCH

HOSPITAL1ST RESPONDENT

KENYATTA UNIVERSITY

TEACHING, REFERRAL & RESEARCH

HOSPITAL..... 2ND RESPONDENT

Review against the decision of the Accounting Officer, Kenyatta University Teaching, Referral & Research Hospital in respect of Tender No. KUTRRH/TNDR/S/040/PCS-1/2023-2024 for Provision of Cleaning and Sanitary Services-Lot 2.

BOARD MEMBERS PRESENT

- | | | |
|------------------------|---|----------------------------------|
| 1. Ms. Alice Oeri | - | Vice-Chair and Panel Chairperson |
| 2. Dr. Susan Mambo | - | Member |
| 3. Eng. Lilian Ogombo | - | Member |
| 4. Mr. Daniel Langat | - | Member |
| 5. CPA Alexander Musau | - | Member |

IN ATTENDANCE

Mr. Philemon Kiprop - Secretariat

Mr. Anthony Simiyu - Secretariat

PRESENT BY INVITATION

APPLICANT

LUKEPARM CLEANERS LIMITED

Mr. George Odhiambo Advocate, Kamotho Njomo & Advocates

Mr. John Njomo Advocate, Kamotho Njomo & Advocates

RESPONDENT

CHIEF EXECUTIVE OFFICER, KENYATTA UNIVERSITY TEACHING, REFERRAL & RESEARCH HOSPITAL

KENYATTA UNIVERSITY TEACHING, REFERRAL & RESEARCH HOSPITAL

Ms. Susan Kihato Advocate, Kenyatta University Teaching and Referral Hospital

INTERESTED PARTY

BROOKLYN CEANING SERVICES LIMITED

N/A

N/A

BACKGROUND OF THE DECISION

The Tendering Process

1. Kenyatta University Teaching, Referral & Research Hospital, the Procuring Entity together with the 1st Respondent herein, invited submission of tenders in response to Tender No. KUTRRH/TNDR/S/040/PCS-1/2023-

2024 for Provision of Cleaning and Sanitary Services-Lot 2.The tender submission deadline was also set as Tuesday, 19th December 2023 at 10:00 a.m.

Submission of Tenders and Tender Opening

2. According to the signed Tender Opening Register dated 19th December 2023, submitted under the Confidential File submitted by the Procuring Entity, the following twenty (20) tenderers were recorded as having submitted in response to the subject tender by the tender submission deadline:

#	Name of Tenderer
1.	Easa Enterprise Limited
2.	Biceven East Africa Limited
3.	The Xenry Cleaning Services Limited
4.	Garbage hero Limited
5.	Candy and Candy Clean Services Limited
6.	Lakeparm Cleaners Limited
7.	Kamtix Cleaners Company Limited
8.	Remarc Cleaning Services Limited
9.	Linstar Venture Limited
10.	Cleanco Investment Limited
11.	Brooklyn Cleaning Services Limited
12.	Colnet Limited
13.	Cecilia Holdings Limited

14.	Ice Clean Care Group Co. Limited
15.	Hever The Company Limited
16.	Hamilton and Hmptons Limited
17.	Saham Cleaning Services Limited
18.	Rosey International Limited
19.	Roan Services Limited
20.	Shineways Cleaning Services Limited

Evaluation of Tenders

3. The 1st Respondent constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") to undertake an evaluation of the received tenders in the following 3 stages as captured in the Evaluation Report
- i. Preliminary Evaluation
 - ii. Technical Evaluation
 - iii. Financial Evaluation

Preliminary Evaluation

4. At this stage of the evaluation, the submitted tenders were to be examined using the criteria set out as Clause 2. Preliminary examination for Determination of Responsiveness under Section IIII-Evaluation and Qualification Criteria at pages 31 to 32 of the Tender Document.

5. The evaluation was to be on a Yes/No basis and tenders that failed to meet any criterion outlined at this Stage would be disqualified from further evaluation.
6. At the end of the evaluation at this stage, 13 tenders were found non-responsive, with only 7 tenders including those of the Applicant and Interested Party qualifying for further evaluation at the Technical Evaluation Stage.

Technical Evaluation

7. The Evaluation Committee was required at this stage to examine tenders successful at the Preliminary Stage using the criteria set out as Technical Evaluation under Section IIII-Evaluation and Qualification Criteria at pages 33 of the Tender Document.
8. The evaluation was on the basis of requirements bearing individual weighted scores. In order for a tender to qualify for further evaluation at the next evaluation stage, it had to garner a minimum score of 80 marks at this stage.
9. At the end of the evaluation at this stage, 4 tenders were found non-responsive, with only 3 tenders including those of the Applicant and Interested Party qualifying for further evaluation at the Financial Evaluation Stage.

Financial Evaluation

10. The Evaluation Committee was required at this stage to examine tenders successful at the Technical Evaluation Stage using the criteria set out as

Clause 6.4 under Section III Evaluation and Qualification Criteria at page 33 of the Tender Document.

11. The Evaluation Committee was to check on the financial aspects of the tenders through a comparison of the tender prices quoted in the respective tenders. The successful tender would be the one determined to be the lowest evaluated tender.
12. At the end of the evaluation at this stage, the tender price by Biceven East Africa Limited of Kshs. 8,832,000 per year was found to be the lowest tender price but the tenderer was disqualified under ITT 37.1 of the Tender Document as the quoted tender price was abnormally low.
13. The tender prices by the other 2 tenderers i.e. Lakeparm Cleaners Limited and Brooklyn Cleaning Services Limited were Kshs. 41,325,360 and 29,182,368 respectively.

Evaluation Committee's Recommendation

14. The Evaluation Report dated 4th March 2024 forming part of the Confidential File indicates that the Evaluation Committee recommended the award of the subject tender to the second lowest tenderer, the Interested Party, at its tendered price of Kshs. 29,182,368 per year and inclusive of taxes, with various reservations. The Evaluation Committee observed that at the tendered price, the tenderer may not adequately pay its staff the minimum wage as well as purchase the necessary cleaning equipment and supplies to service the tender.

Due Diligence

15. The Board has observed a Due Diligence Report dated 6th May 2024, which indicates that due diligence was done on the Interested Party including making a visit to its office as well as visits to sites of clients the tenderer had listed in its tender document.
16. It is reported that from the 4 out of 5 sites that the Evaluation Committee members visited, it was noted that the tenderer's deployed staff did not have adequate PPPE, lacked cleaning equipment and experienced delays in the delivery of cleaning supplies. Further that the sites needed extra scrubbing and maintenance.
17. The Due Diligence Report noted that though the Interested Party was experienced in cleaning offices they lacked experience in specialized cleaning in line with the requirements of the subject tender

Professional Opinion

18. In a Professional Opinion dated 17th May 2024 (hereinafter referred to as the "1st Professional Opinion") the Procuring Entity's Manager Supply Chain Management, Mr. Joseph Maina, reviewed the manner in which the subject procurement process was undertaken including the evaluation of tenders and recommended the award of the subject tender to the Applicant as the 3rd lowest evaluated tender.
19. Subsequently on the same day, 29th May 2024, the 1st Respondent rejected the recommendation by the Entity's Manager Supply Chain Management citing inconsistencies in the Due Diligence Report and the Evaluation Report. The 1st Respondent directed for re-evaluation of the tenders in the subject tender by a new Evaluation Committee .

20. The 1st Respondent proceeded to appoint the second Evaluation Committee through a memo dated 30th May 2024 (hereinafter referred to as the "2nd Evaluation Committee") referenced **KUTRRH/PD/TNDR COMM/Vol 2/G/(409)** members comprising of the following officers:-

S/No	Name	Department/Designation	Designation
1.	Mr. Ruth Irumbi	DA & CS	Chairperson
2.	Mr. Edward Maundu	Chief Finance Officer	Member
3.	Mr. Gerald Mutwiri	Housekeeping	Member
4.	Ms. Emily Sawe	Snr. Administrator	Member
5	Ms. Grace Gitau	Finance	Member
6.	Ms. Phoebe Nyamwaya	Procurement	Secretary

2nd Preliminary Evaluation

21. The newly constituted Evaluation Committee re-evaluated the tenders using the criteria set out as Clause 2. Preliminary examination for Determination of Responsiveness under Section IIII-Evaluation and Qualification Criteria at pages 31 to 32 of the Tender Document which was also the criteria used by the 1st Evaluation Committee .
22. According to the 2nd Evaluation Report dated 3rd June 2024, at the end of the evaluation at this stage, 15 tenders including that of the Applicant were found non-responsive, with only 5 tenders including that of the Interested Party qualifying for further evaluation at the Technical Evaluation Stage.

2nd Technical Evaluation

23. The newly constituted Evaluation Committee examined the tenders successful at the Preliminary Stage using the criteria set out as Technical Evaluation under Section IIII-Evaluation and Qualification Criteria at pages 33 of the Tender Document.
24. According to the 2nd Evaluation Report dated 3rd June 2024, at the end of the evaluation at this stage, 3 tenders were found non-responsive, with only 2 tenders including that of the Interested Party qualifying for further evaluation at the Financial Evaluation Stage.

2nd Financial Evaluation

25. The newly constituted Evaluation Committee examined tenders successful at the Technical Evaluation Stage using the criteria set out as Clause 6.4 under Section III Evaluation and Qualification Criteria at page 33 of the Tender Document.
26. According to the 2nd Evaluation Report dated 3rd June 2024, at the end of the evaluation at this stage the Interested Party's tender bearing the tender price of **Kshs. 29,182,368** was established as the lowest evaluated tender.

2nd Evaluation Committee's Recommendation

27. Accordingly, the Evaluation Committee recommended the award of the subject tender to the Interested Party, at its tendered price of **Kenya shillings Twenty-Nine Million, One Hundred and Eighty-Two Thousand, Three Hundred and Sixty-Eight Kshs. 29,182,368 per year and inclusive of taxes.**

2nd Professional Opinion

28. In a Professional Opinion dated 5th June 2024 (hereinafter referred to as the "Professional Opinion") the Procuring Entity's Manager Supply Chain Management, Mr. Joseph Maina, reviewed the manner in which the subject procurement process was undertaken including the evaluation of tenders and recommended the award of the subject tender to the Interested Party. Curiously though the 2nd Professional Opinion was signed for and on behalf of Mr. Joseph Maina who is the substantive position holder as per the submitted Practicing Licence .
29. Subsequently on 6th June 2024, the 1st Respondent approved concurred with the recommendation made in the 2nd Professional Opinion which was signed for and on behalf the Entity's Manager Supply Chain Management.

Notification to Tenderers

30. Accordingly, the tenderers was notified of the outcome of the evaluation of the tenders in the subject tender vide letters dated 10th June 2024.

REQUEST FOR REVIEW

31. On 21st June 2024, the Applicant through the firm of Kamotho Njomo & Company Advocates, filed a Request for Review dated 20th June 2024 supported by a Statement dated 20th June 2024 by Alice Wanjiku Kiai, the Applicant's Managing Director, seeking the following orders from the Board in verbatim:

a) The entire tender process with respect to Tender No. Lot 2-KUTRRH/TNDR/S/040/PCS-2/2023-2024 for Provision of Cleaning Services including the decision of the 1st Respondent as regards final award of Tenders

communicated vide letter dated 10th June 2024 herein be nullified and set aside;

b) In the alternative, the 1st Respondent be directed to award the Tender No. Lot 2- KUTRRH/TNDR/S/040/PCS-2/2023-2024 for Provision of Cleaning Services to the Applicant upon extension of its tender validity period.

c) The Public Procurement Administrative Review Board to make such and further orders as it may deem fit and appropriate in ensuring that the ends of justice are fully met in the circumstances of this Request for Review;

d) The Respondents be compelled to pay to the Applicant the costs arising from, and incidental to this Request for Review.

32. In a Notification of Appeal and a letter dated 21st June 2024, Mr. James Kilaka, the Acting Board Secretary of the Board notified the Respondents of the filing of the instant 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 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the said Respondents was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 21st June 2024.

33. On 24th June 2024, the Applicant filed an Amended Request for Review dated 24th June 2024 correcting the identity of the Applicant from Lukeparm Cleaners Limited to Lakeparm Cleaners Limited.

34. The Respondents had not filed their response as at 1st July 2024, which action prompted the Board Secretary to write to them a letter of even date reminding of their statutory obligation under Regulation 205 of the regulations 2020 and the consequence of non-compliance.
35. On 4th July 2024, the Respondents wrote a letter to the Board Secretary indicating that they received the Request for Review on 28th June 2024 and was in the circumstance requesting for more time to file the Respondents' Memorandum of Response. On the same day, 4th July 2024, the Respondents filed an undated Memorandum of Response.
36. Vide letters dated 4th July 2024, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the subject 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 24th March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within 3 days from 4th July 2024. However, none of the other tenderers filed a response.
37. On 5th July 2024, the Applicant filed a Further Statement of even date by Alice Wanjiku Kiai.
38. On the same day, 5th July 2024, the Acting Board Secretary, sent out to the parties a Hearing Notice notifying parties that the hearing of the instant Request for Review would be by online hearing on 8th July 2024 at 11:00 a.m. through the link availed in the said Hearing Notice.

39. On 8th July 2024, when the Board convened for the online hearing, all the parties were represented by their various Advocates. The Board read out to the parties the documents filed by the parties and requested them to confirm if the same had been served upon them of which all responded in the affirmative.
40. The Board gave hearing directions assigning each party 15 minutes to argue their case with the Applicant getting an extra 5 minutes to offer a rejoinder.

PARTIES SUBMISSIONS

Applicant's Submissions

41. Counsel for the Applicant, Mr. Odhiambo, indicated that the Applicant was placing reliance on its filed documents in the Request for Review. He argued that from the date of tender opening to the date of Notification of award, the Respondents spent 99% of tender validity period, something that made the Applicant suspect that the subject tender was being manipulated.
42. Mr. Odhiambo argued that the Respondents through paragraph 19 of their response confirmed that there was an appointment of a 2nd Evaluation Committee in the subject tender but no evidence was led with respect to the disbandment of the 1st Evaluation Committee as per the requirements of Section 46(4)(d) of the Act. According to Counsel, the 1st Respondent's purported constitution of the 2nd Evaluation Committee was done outside the provisions of the Act since the tenure of the 1st Evaluation Committee was still running.

43. He contended that Section 83 and 84 of the Act offer safeguards to the procurement process in the form of post qualification and the rendering of a Professional Opinion by the Head of the Procurement Function of a Procuring Entity. He submitted that Section 84(2) of the Act empowers the Head of the Procurement function to offer guidance to the Accounting Officer whereas Section 84(3) grants power to the Accounting Officer to make a decision on the award of a tender having regard to the Professional Opinion rendered to them by the Head of the Procurement Function. According to Counsel, if an Accounting Officer is unsatisfied with the conduct of the procurement process, the only avenue available to them is the termination of the tender in question under Section 63 of the Act. Therefore, the Accounting Officer erred in appointing a 2nd Evaluation Committee.
44. Mr. Odhiambo termed the speed at which the 2nd Evaluation Committee completed its evaluation, suspicious noting that it took 1 day to finalise the evaluation process when the 1st Evaluation Committee that took several weeks to finalise on the same process.
45. He also pointed out that the Respondents were not disclosing whether they carried out a 2nd Due Diligence exercise on the tenderers. Further, that though a 2nd Professional Opinion is indicated in the Respondents' response as having been prepared, it was not clear whether it was prepared by the same person who prepared the 1st Professional Opinion. Counsel argued if it was the same person, it was absurd for one person to take different positions on the successful tenderer in the subject tender. Conversely, if it was a separate person, this was unprocedural.

46. Counsel maintained that though the 2nd Evaluation Committee disqualified the Applicant on account what was termed as failing to submit a NEMA Waste Management Certificate, the same was provided as part of the Applicant's tender.

Respondent's Submissions

47. Counsel for the Respondent, Ms. Kihato, indicated that the Respondents were placing reliance on their filed documents. She argued that the delays in processing the subject tender was attributable to the festive break.
48. She argued that 1st Evaluation Committee recommended the subject tender to be awarded to the Interested Party but upon conducting due diligence on the tenderer it was found unsuitable for award. Further, that when the Accounting Officer reviewed the Professional Opinion and the Evaluation Report, they noted some inconsistencies which then informed the constitution of the 2nd Evaluation Committee.
49. Responding on the issue of disbanding of the 1st Evaluation Committee, Ms. Kihato submitted that the Procuring Entity's practice is not to issue disbandment letter but rather upon conclusion of evaluation, an Evaluation Committee is deemed disbanded.
50. She argued that it is during the evaluation process done by the 2nd Evaluation Committee that it was discovered that the Applicant's tender did not contain the NEMA Certificate and that the Certificate referred by the Applicant was only introduced in the present proceedings. Counsel maintained that upon the conclusion of the 2nd evaluation process, the Interested Party herein was found as the responsive tenderer.

51. She urged the Board to find the instant Request for Review as a frivolous one and debar the Applicant from participating in future public tenders.

Applicant's Rejoinder on its Request for Review

52. In his rejoinder, Counsel for the Applicant, Ms. Odhiambo, argued that there was nothing wrong in the Head of Procurement Function and Evaluation Committee taking different views on the procurement process.

53. He maintained that the 2nd Evaluation Committee was improperly constituted and thus all its processes amount to a nullity.

54. Counsel argued that the Respondents had not pleaded in their pleadings, anything on the debarment of the Applicant, and thus it was inappropriate to raise it during their response expecting the Applicant to offer a response during rejoinder.

CLARIFICATIONS

55. The Board asked the Applicant to confirm whether it submitted a valid NEMA Certificate as part of its tender to which Mr. Odhiambo answered in the affirmative.

56. The Board equally asked the Respondents to confirm whether the Procuring Entity which offers essential services, suspended its operations during the festivities. Counsel for the Respondents, Ms. Kihato indicated the Procuring Entity remained operational during the festivities with priority being given to procurement pharmaceutical supplies. She indicated that with respect to the services under the subject tender, the

Procuring Entity extended the term of the Applicant who were the current suppliers for the services under the subject tender.

57. The Board sought the Respondents to clarify on whether they satisfied the requirements under Section 46(4)(d) of the Act on disbandment of the 1st Evaluation Committee. Counsel for the Respondents, Ms. Kihato indicated that the 2nd Evaluation committee was necessary in light of the discrepancies that the Accounting officer noted in the Professional Opinion and the Evaluation Report.
58. The Board also wanted the Respondents to clarify on whether the Applicant was subjected to due diligence. Counsel for the Respondent, Ms. Kihato indicated the Applicant was not subjected to one since they were the current service providers for the service under the subject tender.
59. The Board equally wanted to confirm whether the 2nd Evaluation Committee took a single day to finish the evaluation process to which Counsel for the Respondent, Ms. Kihato responded in the negative indicating it took them 2 working days and a weekend.
60. The Board inquired from the Respondents whether the Professional Opinions in the subject tender were authored by the same person. The Procuring Entity's Manager Supply Chain Management, Mr. Maina confirmed that he authored the 2 opinions which variously recommended the award of the subject tender to Applicant and the Interested Party.

61. Th Board asked the Applicant to clarify on the nature of its amendments to the Request for Review. Counsel for the Applicant indicated that the amendments were restricted to clarifying on the name of the Applicant.
62. The Board inquired from the Respondents on the specific provision of the Act they applied in reconstituting the Evaluation Committee and Counsel for the Respondent, Ms. Kihato indicated she could not find any.
63. The Board inquired from the Respondents on whether the 2nd Evaluation Committee was constituted to disqualify the Applicant and Counsel for the Respondent, Ms. Kihato responded in the negative. She said there was no bad faith involved as the Applicant's current contract to offer the services under the subject tender was extended.
64. The Board equally asked the Respondents to confirm whether the 2nd Evaluation Committee completed its evaluation within the 30 days contemplated under the Act to which Counsel for the Respondent, Ms. Kihato responded in the negative.
65. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 21st June 2024 had to be determined by 12th July 2024. Therefore, the Board would communicate its decision on or before 12th July 2024 to all parties via email.

BOARD'S DECISION

66. The Board has considered all documents, submissions and pleadings together with confidential documents submitted to it pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination:

- I. ***Whether the Applicant's tender was properly disqualified from the subject tender in accordance with the provisions of the Act, Regulations 2020 and Tender Document?***
- II. ***Whether the Procuring Entity issued Notification Letters compliant with Section 87 of the Act and Regulation 82 of the Regulations 2020?***
- III. ***What orders should the Board issue in the circumstance?***

Whether the Applicant's tender was properly disqualified from the subject tender in accordance with the provisions of the Act, Regulations 2020 and Tender Document?

67. The Applicant brought the instant Request for Review taking issue with the manner in which the tender process leading to its disqualification from the subject tender was carried out. Counsel for the Applicant, Mr. Odhiambo argued the lengthy period the Respondents took to evaluate the tender coupled with the Respondents' revelation that there was a 2nd Evaluation Committee that was constituted to evaluate the tenders signaled manipulation in the process. He argued that the 2nd Evaluation Committee could not legally come into the existence without an official disbandment of the 1st Evaluation Committee under Section 46 of the Act. He nonetheless maintained that the Applicant submitted a valid copy of NEMA Certificate as part of its tender.
68. The Respondent affirmed that the Applicant's tender was properly disqualified at the Preliminary Evaluation Stage having failed to submit a valid NEMA Certificate. Counsel for the Respondent, Ms. Kihato argued that when the Accounting Officer received the Head of Procurement's Professional Opinion and the 1st Evaluation Committee's Evaluation

Report, he note some discrepancies which prompted the constitution of the 2nd Evaluation Committee. Further, that the Applicant's non-compliance with the requirement on the NEMA Certificate was unearthed by the 2nd Evaluation Committee.

69. The Board is therefore at this stage invited to interrogate the circumstances leading to the disqualification of the Applicant's tender .

70. Section 80 of the Act offers guidance on how an Evaluation Committee should proceed with the evaluation of tenders in the following terms:

"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.

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

71. Additionally, Section 79 of the Act offers clarity on the responsiveness of tenders in the following terms:

"79. Responsiveness of tenders

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

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

- a) minor deviations that do not materially depart from the requirements set out in the tender documents; or***
- b) errors or oversights that can be corrected without affecting the substance of the tender.***

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

- a) be quantified to the extent possible; and***
- b) be taken into account in the evaluation and comparison of tenders.”***

72. This Board is further guided by the dictum of the High Court in ***Republic v Public Procurement Administrative Review Board & 2 others Exparte BABS Security Services Limited [2018] eKLR; Nairobi Miscellaneous Application No. 122 of 2018*** where the court while considering a judicial review application against a decision of this Board illuminated on the responsiveness of a tender under section 79 of the Act:

“19. It is a universally accepted principle of public procurement that bids which do not meet the minimum requirements as stipulated in a bid document are to be regarded as non-responsive and rejected without further consideration.[9] Briefly, the requirement of responsiveness operates in the following manner:- a bid only qualifies as a responsive bid if it meets with all requirements as set out in the bid document. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements.[10] Bid formalities usually require timeous submission of formal bid documents such as tax clearance certificates, audited financial statements, accreditation with

standard setting bodies, membership of professional bodies, proof of company registration, certified copies of identification documents and the like. Indeed, public procurement practically bristles with formalities which bidders often overlook at their peril.[11] Such formalities are usually listed in bid documents as mandatory requirements – in other words they are a sine qua non for further consideration in the evaluation process.[12] The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing or empowerment. Bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome.

20. In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the

procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions.

See also ***Nairobi High Court Judicial Review Misc. Application No. 407 of 2018; Republic v Public Procurement Administrative Review Board; Arid Contractors & General Supplies (Interested Party) Ex parte Meru University of Science & Technology [2019] eKLR and PPARB Application No. 15 of 2024; Nash Eq Inc v Accounting Officer Sacco Societies Regulatory Authority & Ors***

73. Drawing from the above, the Tender Document is the key guide in the evaluation of tenders submitted in response to any tender invitation. Further, for a tender to be deemed responsive in respect of any requirement, it must comply with the specification of the actual requirement as set out in the Tender Document.
74. Equally, Section 46 of the Act speaks to an Accounting Officer constituting the Procuring Entity's Evaluation Committee in the following terms:

46. Evaluation Committee

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

(2) ...

(3) ...

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

(a) ...

(b) ...

(c) ...

(d) complete the procurement process for which it was appointed and no new committee shall be appointed on the same issue unless the one handling the issue has been procedurally disbanded;

(e) ...

75. From Section 46(4) above, it is apparent that an Evaluation Committee that is constituted by the Accounting Officer should complete the evaluation exercise for which it was constituted and that no new committee should be appointed in its place before it has been procedurally disbanded.

76. During the hearing, an argument was made on behalf of the Applicant that there was no evidence of the disbandment of the 1st Evaluation Committee such that at the time of disqualification of the Applicant there were in operation 2 separate Evaluation Committees with the Respondents' admitted constitution of the 2nd Evaluation Committee. The Respondents did not lead any evidence to contradict the Applicant's argument. Instead, an argument was made on behalf of the Respondents, that it was not in the practice of the Procuring Entity to formally disband Evaluation Committees upon conclusion of evaluation as it was presumed that the Evaluation Committee's role ended upon conclusion of the evaluation. Thus, Respondents argued that the tenure of the Evaluation

Committees were not concurrent as the 2nd Evaluation Committee replaced the 1st Evaluation Committee.

77. This Board finds great difficulty in following through with the argument made on behalf of the Respondents that the constitution of the 2nd Evaluation Committee effectively disbanded the 1st Evaluation Committee. We say so because Section 46(4)(d) of the Act is express that an Evaluation Committee once constituted should complete its evaluation exercise and can only be reconstituted through a procedural disbanding process. The argument made on behalf of the Respondents constituted a tacit admission on the part of the Respondents that there was no official disbandment of the 1st Evaluation Committee. Effectively, the tenures of the 1st and 2nd Evaluation Committees were running concurrently.
78. The Accounting Officer constituted the 1st Evaluation Committee through appointment letters which this Board has sighted as part of the documents submitted under the Confidential File under Section 67(4) of the Act. The Board has equally sighted appointment letters of the 2nd Evaluation Committee's members and made references herein before. However, there are no letters or other written communication on the disbandment of the 1st Evaluation Committee. The obtaining circumstances lead to this Board to find that the establishment of the 2nd Evaluation Committee was in breach of Section 46(4) of the Act and consequently all actions undertaken by the said 2nd Evaluation Committee in respect of the subject tender, including the disqualification of the Applicant amount to a nullity.
79. The Accounting Officer constituted the 2nd Evaluation Committee on what was argued to be inconsistencies in the contents of the 1st Evaluation

Committee's Evaluation Report, Due diligence report and the 1st Professional Opinion by the Head of the Procuring Entity. In the Board's view the proper course of action an Accounting Officer should take in the event they seek clarity on certain aspects of the tender process when they are called upon to make a decision on the award of a tender under Section 84(3) is to direct for the relevant information to be availed. In the present case it would have been appropriate for the Accounting Officer to direct the 1st Evaluation Committee to the specific issues that were of concern and for a report to be made to the Head of the Procurement Function on those issues of concern for purposes of the preparation of a subsequent Professional Opinion that would then be made available to the Accounting Officer. However, if the Accounting Officer's concerns are informed by sufficient evidence that impeaches the integrity of the tender process and or that of the Evaluation Committee members the Act avails to the Accounting Officer the avenue of correcting and even terminating the tender in question.

80. Notwithstanding the finding on the nullity of the actions of the 2nd Evaluation Committee in respect of the subject tender, the Board independently perused the Applicant's original tender as forwarded by the Respondents to verify if the Applicant supplied a NEMA Certificate. We have spotted at page 184 of the Applicant's tender, a NEMA Compliance Certificate for Cleaning Services dated 5th July 2023 bearing the Applicant's name and indicating on its face that it was valid for 12 months commencing 5th July 2023. The foregoing indicates that the 2nd Evaluation Committee's finding that the Applicant had not submitted the NEMA Certificate was equally without basis.

81. Despite the services being procured under the subject tender being sensitive as they concern sanitation at a Referral and Research hospital, there appears to be some casualness in the manner in which regard was made to the Due Diligence Report dated 6th May 2024 by the 2nd Evaluation Committee . Section 83 of the Act provides for due diligence so as to verify the qualifications of a tenderer so as to weed out any unqualified tenderer that was not spotted in the evaluation process.
82. The Board is alive to the provision of Section 83 of the Act on the process carrying out of a due diligence exercise. As noted herein, the Accounting officer made an observation that there existed a contradiction between Evaluation Committee's recommendation and the Professional Opinion. Further, that the findings of the Due Diligence Report contradicted the recommendation contained in the 1st Evaluation Report. Section 80 of the Act and Section 83 of the Act are clear that where evaluation has been carried out and a recommendation for award is made, the Procuring Entity may carry out due diligence /post qualification which will inform the overall decision to award or not to award. In some instance these post qualification exercises may have negative/positive affirmation to the recommendation made by the Evaluation Committee.
83. It would therefore follow that the negative affirmation of the Interested Party's technical capacity to offer the services under the subject tender required the Procuring Entity to consider awarding the subject tender to the next lowest evaluated tenderer whose tender made it to the Financial Evaluation Stage .

84. This Board 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 exercise the attention and care required to satisfy itself that the lowest evaluated responsive tenderer can execute a tender.
85. It is therefore surprising that the Procuring Entity went ahead to award the subject tender to the Interested Party as the 2nd lowest evaluated tender notwithstanding the adverse due diligence report that questioned its capacity to deliver on the services under the subject tender. The Procuring Entity callously awarded the tender without inquiring on the accuracy of the adverse entries on the Interested Party's capacity to deliver on the subject tender as noted in the Due diligence Report carried out by the properly constituted 1st Evaluation Committee . We find this to be reckless on the part of the Respondents.
86. In view of the foregoing the Applicant's tender was improperly disqualified from the subject tender in breached of Article 47 (1) and 227 (1) of the Constitution and Sections 79(1) , 80(2) and 86 of the Public Procurement and Asset Disposal Act,2015; Regulation 74(1) of the Public Procurement and Asset Disposal Regulations,2020 and Section III -evaluation and qualification criteria including the post qualification as set ought at pages 31 to 34 of the tender document by disqualifying the Applicant's Tender at the Preliminary stage. And further ignoring the Due diligence made by the 1st Evaluation Committee and 1st Professional Opinion by the Procuring Entity's Manager Supply Chain Management,

Whether the Procuring Entity issued Notification Letters compliant with Section 87 of the Act and Regulation 82 of the Regulations 2020?

87. The Applicant took issue with the Notification Letter issued to it in respect of the subject tender. It argued that the Notification Letters did not comply with Section 87 of the Act and Regulation 82 of the Regulations 2020. Counsel for the Applicant, Mr. Odhiambo argued that the Notification Letter issued to it failed to disclose to it the details on the successful tenderer and the reasons why the tenderer emerged successful.
88. The Respondents did not address the Board on the contents of the Notification Letters.
89. Section 87 of the Act prescribes the contents of the Notification of Intention of Award in the following terms:

87. Notification of intention to enter into a contract

(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.

(2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.

(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring

entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.

(4) For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security.

90. On its part Regulation 82 of the Regulations 2020 speaks to the procedure of notification in the following terms:

82. Notification of intention to enter into a contract

(1) The notification to the unsuccessful bidder under section 87(3) of the Act, shall be in writing and shall be made at the same time the successful bidder is notified.

(2) For greater certainty, the reason to be disclosed to the unsuccessful bidder shall only relate to their respective bids.

(3) The notification in this regulation shall include the name of the successful bidder, the tender price

91. In ***PPARB Application No. 12 of 2023; Royal Taste Kitchen v CEO, National Social Security Fund & Anor*** this Board pronounced itself on Section 87 of the Act and Regulation 82 as follows:

"In view of the provisions of Section 87 of the Act read with Regulation 82 of Regulations 2020, the Board observes an accounting officer of a procuring entity must notify, in writing, the tenderer who submitted the successful tender, that its tender was successful before the expiry of the tender validity period. Simultaneously while notifying the successful tenderer, an accounting officer of a procuring entity notifies

other unsuccessful tenderer of their unsuccessfulness, giving reasons why such tenderers are unsuccessful, disclosing who the successful tenderer is, why such a tenderer is successful in line with section 87(1) of the act and at what price the successful tenderer was awarded the tender. These reasons and disclosures are central to the principles of public procurement and public finance as they speak to transparency and accountability enshrined in Article 227 and 232 of the Constitution. This means all processes with a public procurement system, including notification to unsuccessful tenderers must be conducted in a transparent manner.”

92. From the above decision and provisions of the Act and Regulations, it is apparent that the law espouses as part of transparency and accountability for Procuring Entities to disclose in their Notifications to tenders as a bare minimum (i) the identity of the successful tenderer; (ii) the tender price at which the successful tenderer has been awarded the tender; (iii) reason why the successful tenderer’s tender emerged successful; (iv) specific reason why an unsuccessful tenderer was found unsuccessful.

93. The Board shall now interrogate the Notification Letter issued in the subject tender for purposes of confirming compliance.

94. Below is an excerpt of Notification Letter dated 10th June 2024:

M/s LAKEPARM CLEANERS LIMITED

(Address Details withheld)

Dear Sir/Madam,

RE: TENDER FOR PROVISION OF CLEANING AND SANITARY SERVICES LOT2

TENDER NO.: KUTRRH/TNDR/S/040/PCS-2/2023-2024

Further to our invitation for the above tender and your subsequent tender document for the same, we regret to inform you that your bid was Not Successful because:

Did not attach Valid National Environment Management Authority (NEMA) Certificate for Waste Management. Bidder instead attached a NEMA Certificate for a sub-contracted company, Pin Pont Hygiene Services, and attached a contract between the bidder (Lakeparm Cleaners Limited and Pin Point Hygiene Services). (A15). With reference to the Instructions to Tenderers 4.1. Maximum number of members in the joint venture shall be: N/A. Pursuant to Section 149(1)“If the tender documents do not prohibit subcontracting, the successful tenderer may subcontract part of the tender but only if the person to be subcontracted has not been debarred from procurement proceedings in accordance with this Act, or has participated in the procurement of Goods, works or services related to that contract.”

We wish to register our gratitude for your keen interest to do business with us and hope for your continued support.

Yours sincerely,

Signed

AHMED DAGANE, RN,BA, BSN, MBA-HCM

CHIED EXECUTIVE OFFICER

**KENYATTA UNIVERSITY TEACHING REFFERRAL AND
RESEARCH HOSPITAL...**

95. The above Notification Letter discloses that (i) the Applicant was unsuccessful in the subject tender and (ii) the reasons why the Applicant was unsuccessful.
96. However, the said letter fails to disclose the following details equally required under the Act and Regulations 2020 (i) the identity of the successful tenderer (ii) the tender price offered by the successful tenderer; and (iii) the reasons for the tenderer emerging successful.
97. From the foregoing the Notification Letter issued to the Applicant did not contain all the information contemplated under the Act and the Regulations. The Board has also noted from the Confidential File submitted to it under Section 67(4) of the Act that the notifications sent to the other unsuccessful tenderers take a similar format and are not complete in terms of the information contemplated in law. Accordingly, the Board finds that the Procuring Entity issued Notification Letters that were not compliant with Section 87 of the Act and Regulation 82 of the Regulations 2020.

What orders the Board should grant in the circumstances?

98. The Board has found that the Applicant's tender was not properly disqualified from the subject tender in accordance with the provisions of the Act, Regulations 2020 and Tender Document in so far as the 2nd Evaluation Committee is concerned which we have already held to be null

and void .The Board has equally affirmed that 1st Evaluation Report and the subsequent due diligence were carried out fairly.

99. The Board has also found that that the Procuring Entity issued Notification Letters that were not compliant with Section 87 of the Act and Regulation 82 of the Regulations 2020.

100. The upshot of our finding is that the Request for Review dated 21st June 2024 in respect of Tender No. KUTRRH/TNDR/S/040/PCS-1/2023-2024 for Provision of Cleaning and Sanitary Services-Lot 2 succeeds in the following specific terms:

FINAL ORDERS

101. 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 21st June 2024:

1. The Letters of Notification of Award dated 10th June 2024 issued to the Applicant and all the other unsuccessful tenders in respect of Tender No. KUTRRH/TNDR/S/040/PCS-1/2023-2024 for Provision of Cleaning and Sanitary Services-Lot 2 be and are hereby cancelled and set aside.

2. The Letter of Notification of Award dated 10th June 2024 issued to the Interested Party as the successful tenderer in respect of Tender No. KUTRRH/TNDR/S/040/PCS-1/2023-

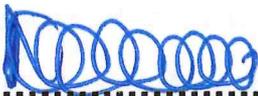
2024 for Provision of Cleaning and Sanitary Services-Lot 2 be and is hereby cancelled and set aside.

- 3. The Procuring Entity's Evaluation Report dated 3rd June 2024 with respect to Tender No. KUTRRH/TNDR/S/040/PCS-1/2023-2024 for Provision of Cleaning and Sanitary Services-Lot 2 be and is hereby cancelled and set aside.**
- 4. The Professional Opinion dated 5th June 2024 with respect to Tender No. KUTRRH/TNDR/S/040/PCS-1/2023-2024 for Provision of Cleaning and Sanitary Services-Lot 2 signed for and on behalf the Procuring Entity's Manager Supply Chain Management's be and is hereby cancelled and set aside.**
- 5. The Accounting Officer is hereby ordered to direct the 1st Evaluation Committee to prepare a conclusive Evaluation Report with a recommendation to award Tender No. KUTRRH/TNDR/S/040/PCS-1/2023-2024 for Provision of Cleaning and Sanitary Services-Lot 2 to lowest responsive evaluated bidder within 14 days taking into consideration the findings in the Due Diligence Report dated 6th June,2024 and the Board's findings herein.**
- 6. The tender validity period of Tender No. KUTRRH/TNDR/S/040/PCS-1/2023-2024 for Provision of**

Cleaning and Sanitary Services-Lot 2 be and is hereby extended for a further period of 45 days from the date of this decision.

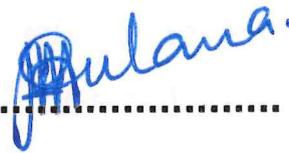
7. In view of the Board's findings and orders above, each party shall bear its own costs in the Request for Review.

Dated at NAIROBI, this 12th Day of July 2024.



PANEL CHAIRPERSON

PPARB



SECRETARY

PPARB