

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 68/2024 OF 19<sup>TH</sup> JULY 2024**

**BETWEEN**

**COLNET LIMITED.....APPLICANT**

**AND**

**THE ACCOUNTING OFFICER,**

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

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

Review against the decision of the Accounting Officer, Kenya Revenue Authority in respect of Tender No. KRA/HQS/NCB-034/2023 for Provision of Cleaning and Garbage Collection for KRA Offices and Residential Houses Countrywide for a period of Two (2) Years.

**BOARD MEMBERS PRESENT**

1. Mr. George Murugu, FCI Arb, I.P - Chairperson
2. QS. Hussein Were - Member
3. Mr. Jackson Awele - Member

**IN ATTENDANCE**

- Ms. Sarah Ayoo - Secretariat
- Mr. Anthony Simiyu - Secretariat



## **PRESENT BY INVITATION**

### **APPLICANT**

**COLNET LIMITED**

Mr. Mbugua

Advocate, Karugu Mbugua & Co. Advocates

### **RESPONDENTS**

**THE ACCOUNTING OFFICER, KENYA  
REVENUE AUTHORITY**

**KENYA REVENUE AUTHORITY**

Ms. Almadi

Advocate, Kenya Revenue Authority

Mr. Nyaga

Advocate, Kenya Revenue Authority

## **BACKGROUND OF THE DECISION**

### **The Tendering Process**

1. Kenya Revenue Authority, the Procuring Entity together with the 1<sup>st</sup> Respondent herein, vide an advert in the MyGov Publication, PPIP Portal ([www.tenders.go.ke](http://www.tenders.go.ke)) and Kenya Revenue Authority website ([www.kra.go.ke](http://www.kra.go.ke)) , invited interested suppliers to electronically submit their tenders in response to Tender No. KRA/HQS/NCB-034/2023 for Provision of Cleaning and Garbage Collection for KRA Offices and Residential Houses Countrywide for a period of Two (2) Years (herein "the subject tender") through the through the KRA E-Procurement Portal . The tender was reserved for all AGPO Categories (Women, Youth and Persons with Disabilities) and had a tender closing date of Friday, 16<sup>th</sup> February 2024 at 11:00 a.m.



## **Addendum**

2. Subsequently, the Procuring Entity issued two addenda offering clarifications in response to various inquiries that were made by different suppliers who had expressed interest in participating in the tender. However, in both Addenda the tender closing date was retained as Friday, 16<sup>th</sup> February 2024 at 11:00 a.m.

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

3. According to the signed Tender Opening Minutes dated 16<sup>th</sup> February 2024, submitted under the Confidential File submitted by the Procuring Entity, the following Forty-Six (46) tenderers were recorded as having submitted in response to the subject tender by the tender submission deadline:

<b>#</b>	<b>Name of Tenderer</b>
1.	Zuzumz Limited
2.	Kamtix Cleaners Limited
3.	Cleanmark Limited
4.	Kotaa East Africa Limited
5.	Hannaneli Suppliers Limited
6.	Shineways Cleaning Services Limited
7.	Village Mastas Limited
8.	Outlander Express Service Limited
9.	Haver The Company Limited
10.	Biceven East Africa Limited
11.	Kleansley Hygiene Plus Limited
12.	Dechrip East Africa Limited



13.	Sifteagleam Enterprises
14.	Joymax Enterprises
15.	Petals Hygiene & Sanitation Services
16.	Liga Holdings Limited
17.	Rosey International Limited
18.	Ice Clean Care Group Limited
19.	All and Sundry Services
20.	Peesam Limited
21.	Binsmart Enterprises Limited
22.	Nadiah Investments Limited
23.	Neru (K) Limited
24.	Colnet Limited
25.	Aimat Company Limited
26.	Saham Cleaning Services Limited
27.	Paramax Cleaning Services Limited
28.	Ximtak Investment Limited
29.	Maice Enterprises
30.	Oneway Facilities Management Limited
31.	Allreggy Investments Limited
32.	Helicon Kenya Limited
33.	Cleanco Investments Limited
34.	Cityscape Trends Services Limited
35.	Smart Outsource Limited
36.	The Brick Chick Limited
37.	The Waste Company Limited
38.	Trueland Construction Limited
39.	Stepover Services

40.	Easa Enterprises Limited
41.	Sixonet Construction
42.	Zenla Merchants
43.	Remarc Cleaning Services
44.	Brooklyn Cleaning service
45.	Zendai Express Limited
46.	Saafi Cleaning Company Limited

### **Evaluation of Tenders**

4. The 1<sup>st</sup> Respondent constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") to undertake an evaluation of the received tenders in the following 4 stages as captured in the Evaluation Report
- i. Preliminary Evaluation
  - ii. Vendor Evaluation
  - iii. Financial Evaluation
  - iv. Due Diligence

### **Preliminary Evaluation**

5. At this stage of the evaluation, the submitted tenders were to be examined using the criteria set out as Preliminary/Mandatory Evaluation Criteria under Section III-Evaluation and Qualification Criteria at pages 33 to 35 of 379 of the Tender Document.

6. The evaluation was to be on a Pass/Fail basis and tenders that failed to meet any criterion outlined at this Stage would be disqualified from further evaluation.
7. At the end of the evaluation at this stage, 10 tenders were found non-responsive, with only 36 tenders including that of the Applicant qualifying for further evaluation at the Technical Compliance Evaluation Stage.

### **Vendor Evaluation**

8. The Evaluation Committee was required at this stage to examine tenders successful at the Preliminary Stage using the criteria set out as Clause 2 Vendor Evaluation Criteria under Section III-Evaluation and Qualification Criteria at pages 36 to 37 of the Tender Document.
9. The evaluation was to be on the basis of a weighted criteria, with each criterion carrying a weighted score. In order for one to qualify for further evaluation at the Financial Stage, they had to garner at least 60 out of 75 marks or 80% of the marks at this Stage.
10. At the end of the evaluation at this stage, all the tenders evaluated at this stage including the Applicant's tender met the 60 out of 75 marks threshold and thus qualified for further evaluation at the Financial Evaluation Stage.

### **Financial Evaluation**

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

Price Evaluation under Section III-Evaluation and Qualification Criteria at page 30 of 379 of the Tender Document.

12. The Evaluation Committee was to compare the tender prices indicated in the tenders according to the specific Lots under the subject tender. The successful tender would be that established to bear the lowest tender price under each Lot.
13. At the end of the evaluation at this stage it was established that the following tenderers were established to bear the lowest tender prices under the respective lots:

<b>Lot</b>	<b>Lowest Evaluated Tenderer</b>	<b>Tender Price (Kshs)</b>
Lot 1	Easa Enterprise Limited	59,613,792.00
Lot 2	Ximtak Investment Limited	142,387,527.00
Lot 3	Nadiah Investments Limited	96,976,752.00
Lot 4	Kamtix Cleaners Limited	26,693,684.95
Lot 5	Nadiah Investments Limited	52,931,688.00
Lot 6	Kamtix Cleaners Limited	24,389,831.70
Lot 7	Peesam Limited	74,744,485.59
Lot 8	Peesam Limited	115,445,055.44

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

14. The Evaluation Committee through an Evaluation Report dated 15<sup>th</sup> March 2024 forming part of the Confidential File, recommended the award of the above 8 Lots to the various tenderers above established to bear the lowest tender prices at their respective prices, subject to due diligence being undertaken on the tenderers.



## Due Diligence

15. The Evaluation Committee vide a Due Diligence Report dated 22<sup>nd</sup> April 2024 (herein "the Due Diligence Report") records that it validated the AGPO, NEMA and Tax Compliance Certificates submitted by the tenderers established to be have submitted the lowest evaluated tenders under each Lot and sought information on the tenderers' performance with their past clients that had been indicated in the tenderers' tenders.
16. The Due Diligence Report bears the following findings on the lowest evaluated tenderers:

<b>Tenderer</b>	<b>Observation by the Evaluation Committee</b>
Kamtix Cleaners Limited (Lots 4 & 6)	AGPO Certificate authentic All NEMA Certificates authentic Tax Compliance Certificate authentic
Ximtak Investments Limited (Lot 2)	AGPO Certificate not authentic All NEMA Certificates not authentic Tax Compliance Certificate authentic
Nadiah Investments (Lots 3 & 5)	Letter of No Objection was authentic License to transport waste was authentic NEMA Certificate was authentic but was for a licence to own/operate an incinerator plant and not the required for handling of plastics
Peesam Limited (Lots 7 & 8)	AGPO Certificate authentic All NEMA Certificates authentic Tax Compliance Certificate authentic
EASA Enterprise (Lot 1)	AGPO Certificate authentic

	NEMA Certificate for transportation not authentic Tax Compliance Certificate authentic
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17. Page 2 of 6 of the Due Diligence Report details that EASA Enterprise Limited (Lot 1) , Nadiah Investments Limited (Lots 3 & 4) and Ximtak Investments Limited (Lot 2) were found non-responsive flowing from the discovery that some of their submitted Certificates were not authentic. The Evaluation Committee therefore recommended that tenderers that had submitted the next Lowest evaluated tenders under all the 8 Lots be equally subjected to a validation exercise on their submitted AGPO, NEMA and Tax Compliance Certificates. The Due Diligence Report indicates that the Evaluation Committee validated the authenticity of the AGPO, NEMA and Tax Compliance Certificates submitted by Kotaa East Africa Limited, Sixone4 Construction Limited, Biceven East Africa Limited, Cleanmark Limited, Colnet Limited, Dechrip East Africa Limited, Ice Clean Care Group Limited and Saafi Cleaning Company Limited and the findings were as follows:

<b>Tenderer</b>	<b>Observation by the Evaluation Committee</b>
Kotaa East Africa Limited	AGPO Certificate authentic NEMA Certificates not authentic Tax Compliance Certificate authentic
Sixone4 Construction Limited	AGPO Certificate authentic NEMA Certificates not authentic Tax Compliance Certificate authentic
Biceven East Africa Limited	AGPO Certificate authentic NEMA Certificates not authentic Tax Compliance Certificate authentic

Cleanmark Limited	AGPO Certificate authentic NEMA Certificates not authentic Tax Compliance Certificate authentic
Colnet Limited	AGPO Certificate authentic NEMA Certificates authentic Tax Compliance Certificate authentic
Dechrip East Africa Limited	AGPO Certificate authentic NEMA Certificates not authentic Tax Compliance Certificate authentic
Ice Clean Care Group Limited	AGPO Certificate authentic NEMA Certificates not authentic Tax Compliance Certificate authentic
Saafi Cleaning Company Limited	AGPO Certificate authentic NEMA Certificates authentic Tax Compliance Certificate authentic

18. Page 4 of 6 of the Due Diligence Report bears out that each of the past Clients of Kamtix Cleaners, Peesam Limited, Colnet Limited and Saafi Cleaning Company Limited gave positive reviews of the tenderers' past performance with them. Accordingly, the Evaluation Committee recommended the award of the 8 Lots under the subject tender as follows:

<b>Lot</b>	<b>Lowest Evaluated Tenderer</b>	<b>Tender Price (Kshs)</b>
Lot 1	Kamtix Cleaners Limited	72,978,000.72
Lot 2	Saafi Cleaning Company Limited	169,518,792.00
Lot 3	Colnet Limited	99,372,312.00
Lot 4	Kamtix Cleaners Limited	26,693,684.95

Lot 5	Colnet Limited	55,289,696.64
Lot 6	Kamtix Cleaners Limited	24,389,831.70
Lot 7	Peesam Limited	74,744,485.59
Lot 8	Peesam Limited	115,445,055.44

### **Professional Opinion**

19. From the Confidential Documents it would appear that when the Evaluation Committee presented its 1<sup>st</sup> Evaluation Report to the Procuring Entity's Acting Deputy Commissioner-Supply Chain Management, Mr. Benson Kiruja, he reviewed the manner in which the subject procurement process was undertaken asked the Evaluation Committee to re-evaluate the tenders at the Preliminary Evaluation Stage on Requirements No. 10 and 22. These requirements were on NSSF Returns for the last 3 months with remittance payrolls and Certified Letters from Tenderer's Bank on access to a Line of Credit of at least Kshs. 2 Million.
  
20. The Confidential File contains a Professional Opinion dated 13<sup>th</sup> June 2024 (hereinafter "the Professional Opinion") by Mr. Kiruja which details that the Evaluation Committee re-evaluated the tenders with the result that:
  - i. The Applicant's tender was found non-responsive with respect to Requirement no. 10 on NSSF Returns for the last 3 months with remittance payrolls.
  - ii. All the tenderers under Lot 7 were found non-responsive as none of them made it to the Financial Evaluation Stage
  - iii. Kamtix Cleaners Limited was found as the lowest evaluated tenderer for Lots 1,4 and 6



21. Page 9 of 11 of the Professional Opinion records that the Evaluation Committee carried out a cost analysis of the lowest evaluated tenderers and the current cost of cleaning and garbage collection services and noted significant discrepancy between the budgeted sum of Kshs. 231,289,563.36 for Lots 2,3, 5 and 7 and the total tender price of 619,895,770.32
22. Accordingly, the Acting Deputy Commissioner-Supply Chain Management, recommended the award of Lots 1,4 and 6 to Kamtix Cleaners Limited, the termination and re-advertisement of Lots 2,3,5,7 and 8 of the subject tender.
23. Subsequently on 14<sup>th</sup> June 2024, Dr. Lillian Nyawada on behalf of the 1<sup>st</sup> Respondent, concurred with the Professional Opinion.

#### **Notification to Tenderers**

24. Accordingly, the tenderers were notified of the termination of Lots 2,3,5,7 and 8 of the subject tender vide letters dated 2<sup>nd</sup> July 2024.

#### **REQUEST FOR REVIEW**

25. On 19<sup>th</sup> July 2024, the Applicant filed a Request for Review dated 19<sup>th</sup> July 2024 supported by an affidavit sworn on 19<sup>th</sup> July 2024 Harriet Wahome, a Director at the Applicant, seeking the following orders from the Board in verbatim:

***a) The Letter of termination of the Procurement proceedings addressed to the Applicant and all other bidders with respect to the tender for Provision of Cleaning and Garbage Collection Services for KRA Offices and***



***Residential Houses for a period of Two (2) years Tender No. KRA/HQS/NCB-034/2023-2024 (hereinafter the "tender") by the First respondent be annulled in its entirety;***

***b) The Procurement be directed to readmit the applicant's bid for further evaluation and bring the procurement process to its logical conclusion awarding the tender to the lowest evaluated bidder;***

***c) That the Respondents do bear the costs of this Request for Review; and***

***d) Any other orders that the Honourable Board may deem just and fit in the circumstances***

26. In a Notification of Appeal and a letter dated 19<sup>th</sup> July 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 24<sup>th</sup> March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the said Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 19<sup>th</sup> July 2024.

27. On 26<sup>th</sup> July 2024, the Respondents through Pius Nyaga-Advocate filed a Memorandum of Response of even date and equally forwarded the Confidential Documents under Section 67(3) of the Act

28. Vide letters dated 26<sup>th</sup> 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 24<sup>th</sup> 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 26<sup>th</sup> July 2024.
29. On 29<sup>th</sup> 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 1<sup>st</sup> August 2024 at 11:00 a.m. through the link availed in the said Hearing Notice.
30. On 31<sup>st</sup> July 2024, the Applicant filed a Further Affidavit sworn on 31<sup>st</sup> July 2024 by Harriet Wahome.
31. On 1<sup>st</sup> August 2024 at 11:00 a.m., when the Board convened for the online hearing, all the parties were represented by their various Advocates.
32. However, before the Board could give hearing directions, Counsel for the Respondents, Mr. Nyaga indicated that his colleague who had conduct of the matter on behalf of the Respondents, Ms. Almadi, was requesting for the matter to be stood over until 11:30 a.m. as he was appearing before the High Court in a separate matter. Counsel for the Applicant, Mr. Mbugua, indicated he was not opposed to this request for adjournment until 11:30 a.m. Accordingly, the Board adjourned the hearing session to 11:30 a.m.

33. When the Board reconvened at 11:30 a.m. Ms. Almadi was now present and so was Counsel for the Applicant, Mr. Mbugua. The Board proceeded to 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.
34. The Board then gave hearing directions and the order of address directing that each party would have 10 minutes to address it with the Applicant getting a right to offer a rejoinder to the address by the Respondents.

### **PARTIES SUBMISSIONS**

#### **Applicant's Submissions**

35. Counsel for the Applicant, Mr. Mbugua, argued that there appeared to be a general admission by the Respondents at paragraphs 4 to 9 of the Memorandum of Response that the evaluation process was complete and was only re-opened by the Evaluation Committee at the instance of directions from the Head of the Procurement Function. Mr. Mbugua argued that the Head of Procurement appears to have directed the Evaluation Committee to relook in to certain aspects of the Tender when in reality the law requires him to forward a Professional Opinion to the Accounting Officer for decision on the award of the subject tender.
36. Counsel contended that the Head of Procurement could only seek clarifications from the Evaluation Committee but not direct the evaluation process, as was the case in the subject tender. He maintained that the Evaluation Committee should conduct the evaluation process independently. He equally argued that though he was not aware of the Professional Opinion that was forwarded to the Accounting Officer for a



decision on the award of the subject tender, in the event such Professional Opinion emanated from the fresh re-evaluation as directed by the Head of Procurement, the procurement process was flawed.

37. Mr. Mbugua argued that there was a general admission that the Applicant qualified all the way to the Due Diligence Stage and thus all the documents forming part of its tender were scrutinized and found valid under Section 83 of the Act. Further, he argued that Section 79(2)(a)(b) exempted minor deviations from making a substantially responsive tender otherwise unresponsive. For this reliance was placed on ***Misc. Application No. 16 of 2020***. Counsel maintained that the Procuring Entity had a chance to seek clarification from the Applicant on its submitted documents and for the curing any of the deficiencies which the Applicant deemed minor deviations. He argued that the essence of having certified documents is to verify the authenticity of documents in issue and that even if a new Due Diligence exercise was to be carried out on the Applicant's documents, it would still establish that the Applicant's documents were authentic. Accordingly, he asked the Board to allow the Request for Review.

### **Respondents' Submissions**

38. Counsel for the Respondents, Ms. Almadi, indicated that she was relying on the Respondents' Memorandum of Response.
39. Counsel contended that it was an undisputed fact that the Applicant failed to meet Mandatory Requirements No. 10 and 22 under the Preliminary Evaluation Stage in the subject tender. Further that non-compliance with

the mandatory requirements cannot constitute minor deviations as was being suggested by the Applicant.

40. Ms. Almadi argued that the Head of the Procurement Function was within his mandate when he directed the Evaluation Committee to re-evaluate the tenders. Further, that when the Applicant's tender was found unresponsive to mandatory requirements under the subject tender they were disqualified at that stage. She argued that contrary to the Applicant's suggestion that they ought to have been given room to clarify on their documents, taking that route would mean the Procuring Entity would allow all tenderer's submitting unresponsive tenders to clarify on their unresponsive tenders, which situation was not contemplated under the Act.
41. Relying on ***PPARB Application No. 55 of 2024; LakeParm Cleaners Limited v Chief Executive Officer, Kenyatta University Teaching, Referral and Research Hospital***, Counsel argued that tenders that do not meet mandatory requirements should be rejected as non-responsive.
42. Ms. Almadi contended that the Procurement Entity followed due process in the subject tender and that its termination was lawful. She argued that invalidating the termination would be unconstitutional as it would perpetuate discrimination being that the Applicant would stand exempted from complying with the mandatory requirements.

### **Applicant's Rejoinder**

43. In his brief rejoinder, Counsel for the Applicant, Mr. Mbugua argued that the Head of Procurement had no power to direct the re-evaluation of the

tenders received in the subject tender and there was no basis for the 2<sup>nd</sup> evaluation.

44. Further that if there was any deficiency in the Applicant's tender with respect to Mandatory Requirements No. 10 and 22, the same were curable under Section 79(2) of the Act.

### **CLARIFICATIONS**

45. The Board inquired from the Applicant how it got the information that the Head of the Procurement Function directed the Evaluation Committee to re-evaluate the tenders in the subject tender, which communication was by its very nature confidential under Section 67 of the Act. Counsel for the Applicant, Mr. Mbugua argued that this was disclosed by the Respondents at paragraph 11 of the Memorandum of Response.
46. The Board equally required the Applicant to confirm whether its submitted documents conformed to the Requirements No. 10 and 22 under the Preliminary Evaluation Stage in the Tender Document. Counsel for the Applicant, Mr. Mbugua responded in the affirmative citing submission of NSSF Compliance Certificate, payroll, bank payment reports and that its remittance payrolls were not certified because they were computer-generated. Further, that the letter from the Bank was supplied in its original form.
47. The Board asked the Applicant to confirm whether it sought any clarification from the Procuring Entity prior to tender closing on whether the format in which it intended to submit its documents satisfied Mandatory Requirements No. 10 and 22. Counsel for the Applicant, Mr.



Mbugua, answered in the negative but added that the Applicant submitted as part of its tender a general letter indicating to the Procuring Entity could seek clarity on any of the documents submitted towards compliance with the various requirements under the Tender Document.

48. The Board inquired from the Respondents the provision of the Act that informed the Head of Procurement Function to direct the Evaluation Committee to re-evaluate the tenders submitted in the subject tender. Counsel for the Respondents, Ms. Almasi referred to Regulation 78(3) of the Regulations 2020.
49. The Board asked the Respondents to clarify on the assigned budget in the subject tender noting that the tender was terminated on account of inadequate budgetary allocation. Counsel for the Respondents, Ms. Almadi indicated that the budget for all the 8 Lots under the subject tender was set at Kshs. 200 Million.
50. The Board asked the Respondents to confirm what was the budget assigned to each of the Lots of the subject tender that were terminated. Counsel for the Respondents, Ms. Almadi indicated there was no specific amount set aside for an individual Lot and that all that was there was a total sum of Kshs. 200 Million for all the 8 Lots.
51. The Board followed up by asking the Respondents to clarify on why they decided to terminate certain Lots and issue awards in others when they were of the view that there was inadequate budgetary allocation in the subject tender. Counsel for the Respondents, Ms. Almadi argued that Lots 1, 4 and 6 were not terminated since the lowest evaluated tenders were

responsive to the mandatory requirements while the rest of the Lots were terminated for the twin reasons (i) the lowest evaluated tenderers under the Lots were unresponsive and (ii) the next lowest evaluated tenders had tender prices that were above the budgeted amount.

52. The Board asked the Respondents whether they had complied with the requirement under Section 63 of the Act of sending a report to the Director General of the Public Procurement Regulatory Authority on the tender termination. Counsel for the Respondents, Ms. Almadi responded in the negative indicating that they were yet to do so for the reason that the Applicant had filed the Request for Review.
53. The Board equally asked the Respondents to clarify on the essence of certified documents being required of the tenderer. Counsel for the Respondents, Ms. Almadi indicated that this was for purposes of authenticating the documents in question.
54. The Board equally asked the Respondents on why they found it necessary to disclose to the Applicant through the Notification Letter that it was non-responsive and at the same time terminate the tender for the specific Lots the Applicant participated in. Counsel for the Respondents, Ms. Almadi, contended that the Letter of Notification disclosed that the Applicant's tender was unresponsive and that they could seek for a debrief which they did and were informed of the reasons for their disqualification.
55. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 19<sup>th</sup> July 2024 the same had to be determined by 9<sup>th</sup> August 2024. Therefore, the Board would

communicate its decision on or before 9<sup>th</sup> August 2024 to all parties via email.

### **BOARD'S DECISION**

56. 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 Procuring Entity's termination of the tender process in respect of Lots 3 & 5 under the subject tender was in accordance with Section 63 of the Act?***
  - II. ***Whether Procuring Entity's Head of Procurement Function was within his mandate under the Act when he directed the re-evaluation of tenders submitted in response to the subject tender?***
  - III. ***What orders should the Board issue in the circumstance?***

**Whether the Procuring Entity's termination of the tender process in respect of Lots 3 & 5 under the subject tender was in accordance with Section 63 of the Act?**

57. During the parties address to the Board it became apparent that the tender process in respect Lots 3 and 5 of the subject tender, in respect of which Lots the Applicant was also challenging its disqualification had actually been terminated by the Procuring Entity. Termination of a tender is a matter that calls to question the jurisdiction of the Board over a Request for Review in view of the provision of Section 167(4) of the Act.
58. This Board acknowledges the established legal principle that courts and decision-making bodies can only preside over cases where they have jurisdiction and when a question on jurisdiction arises, a Court or tribunal

seized of a matter must as a matter of prudence enquire into it before doing anything concerning such a matter in respect of which it is raised.

59. Black's Law Dictionary, 8th Edition, defines jurisdiction as:

***"... the power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties ... the power of courts to inquire into facts, apply the law, make decisions and declare judgment; The legal rights by which judges exercise their authority."***

60. On its part, Halsbury's Laws of England (4<sup>th</sup> Ed.) Vol. 9 defines jurisdiction as:

***"...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision."***

61. The locus classicus case on the question of jurisdiction is the celebrated case of ***The Owners of the Motor Vessel "Lillian S" -v- Caltex Oil Kenya Ltd (1989) KLR 1*** where Nyarangi J.A. made the oft-cited dictum:

***"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for continuation of proceedings pending other evidence."***

***A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction."***

62. In the case of ***Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others [2013] eKLR***, the Court of Appeal emphasized the centrality of the issue of jurisdiction and held that:

***"...So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain...."***

63. This Board is a creature of statute owing to its establishment as provided for under Section 27(1) of the Act which provides that:

***"(1) There shall be a central independent procurement appeals review board to be known as the Public Procurement Administrative Review Board as an unincorporated Board."***

64. Further, Section 28 of the Act provides for the functions of the Board as:

***The functions of the Review Board shall be—  
reviewing, hearing and determining tendering and asset disposal disputes; and to perform any other function conferred to the Review Board by this Act, Regulations or any other written law."***

65. The Board shall now interrogate the termination of the subject tender.
66. The jurisdiction of the Board is provided for under Part XV – Administrative Review of Procurement and Disposal Proceedings and specific at Section 167 of the Act which provides for what can and cannot be subject to review of procurement proceedings before the Board and Section 172 and 173 of the Act which provides for the powers the Board can exercise upon completing a review as follows:

***PART XV – ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS***

***167. Request for a review***

***(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.***

***(2) .....***

***(3) .....***

***(4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)—***

***(a) the choice of a procurement method;***

***(b) a termination of a procurement or asset disposal proceedings in accordance with section 63 of this Act; and***

***(c) where a contract is signed in accordance with section 135 of this Act. [Emphasis by the Board]***

**168. ....**

**169. ....**

**170. ....**

**171. ....**

**172. ....**

**172. Dismissal of frivolous appeals**

***Review Board may dismiss with costs a request if it is of the opinion that the request is frivolous or vexatious or was solely for the purpose of delaying the procurement proceedings or performance of a contract and the applicant shall forfeit the deposit paid.***

**173. Powers of Review Board**

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

***(a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;***

***(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;***

***(c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;***

***(d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and***



***(e) order termination of the procurement process and commencement of a new procurement process.***

67. Section 167 of the Act above, extends an opportunity to candidates and tenderers disgruntled with a public tender process to approach the Board for redress. However, subsection (4) of the Section divests the Board jurisdiction on a myriad of subject matters including the termination of a procurement process. Termination of public procurement proceedings is governed by Section 63 of the Act.

68. Superior Courts of this country have on numerous occasions offered guidance on the interpretation of Section 167(4) of the Act and the ousting of the Board's jurisdiction on account of the subject matter relating to termination of tenders:

69. In ***Nairobi High Court Judicial Review Misc. Application No. 390 of 2018; R v Public Procurement Administrative Review Board & Ors Ex parte Kenya Revenue Authority***, the High Court considered a judicial review application challenging the decision of this Board. The Board had dismissed a preliminary objection that had cited that it lacked jurisdiction to hear a Request for Review before it on account of the fact that it related to the termination of a proposal process under section 63 of the Act. In dismissing the judicial review application, the Court affirmed that the Board has jurisdiction to first establish whether the preconditions for termination under section 63 of the Act have been met before downing its tools:

***"33. A plain reading of Section 167(4) (b) of the Act is to the effect that a termination that is in accordance with section 63***

**of the Act is not subject to review. Therefore, there is a statutory pre-condition that first needs to be satisfied in the said sub-section namely that the termination proceedings are conducted in accordance with the provisions of section 63 of the Act, and that the circumstances set out in section 63 were satisfied, before the jurisdiction of the Respondent can be ousted...**

***See also Nairobi High Court Judicial Review Misc. Application No. 117 of 2020; Parliamentary Service Commission v Public Procurement Administrative Review Board & Ors v Aprim Consultants***

70. The above judicial pronouncements mirror the position of this Board in its previous decisions in ***PPARB Application No. 14 of 2024; Emkay Construction Limited v Managing Director, Kenya reinsurance Corporation Limited; PPARB Application No. 29 of 2023; Craft Silicon Limited v Accounting Officer Kilifi County Government & anor; and PPARB Application No. 9 of 2022; and PPARB Application No. 5 of 2021; Daniel Outlet Limited v Accounting Officer Numeric Machines Complex Limited; PPARB Application No. 18 of 2024; Infinity Pool Limited v The Accounting Officer, Kenya Wildlife Services; PPARB Application No. 40 of 2024 Marl Mart Enterprises Limited v The Accounting Officer Independent and Electoral Boundaries Commission & Ors***

71. Drawing from the above judicial pronouncements, this Board will first interrogate the termination of the subject tender to establish whether the

termination of the subject tender was in accordance with the requirements under Section 63 of the Act. It is only upon satisfying itself that the said requirements have been met that the Board can down its tools in the matter. However, where any requirement has not been met, the Board will exercise its jurisdiction, hear, and determine the Request for Review.

72. Section 63 of the Act, on termination of tenders provides as follows:

***"63. Termination or cancellation of procurement and asset disposal Proceedings***

***(1) An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies—***

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

***(b) inadequate budgetary provision;***

***(c) ...***

***(d) ...***

***(e) ...***

***(f) ...***

***(g) ...***

***(h) ...***

***(i) ...***

***(2) An accounting officer who terminates procurement or asset disposal proceedings shall give the Authority a written report on the termination within fourteen days.***

**(3) A report under subsection (2) shall include the reasons for the termination.**

**(4) An accounting officer shall notify all persons who submitted tenders of the termination within fourteen days of termination and such notice shall contain the reason for termination.**

73. From the foregoing, for an Accounting Officer of a Procuring Entity to validly terminate a procurement or asset disposal proceedings (i) the termination must be based on any of the grounds under section 63(1) (a) to (f) of the Act; (ii) the Accounting Officer should give a Written Report to the Public Procurement Regulatory Authority within 14 days of termination giving reasons for the termination; and (iii) the Accounting Officer should within 14 days of termination give a Written notice to the tenderers in the subject tender communicating the reasons for the termination.
74. Effectively, an Accounting Officer is under a duty to provide sufficient reasons and evidence to justify and support the ground of termination of the procurement process under challenge. The Accounting Officer must also demonstrate that they have complied with the substantive and procedural requirements set out under the provisions of section 63 of the Act.
75. On the one hand, the substantive requirements relate to a Procuring Entity outlining the specific ground under section 63(1) of the Act as to

why a tender has been terminated and the facts that support such termination.

76. On the other hand, the procedural requirements include the requirements under Section 63(2), (3), and (4) of the Act i.e. (i) the submission of a Written Report to the Authority on the termination of a tender within 14 days of such termination and (ii) the issuance of notices of termination of tender to tenderers who participated in the said tender outlining the reasons for termination within 14 days of such termination.
77. The Board shall now interrogate the circumstances under which the subject tender was terminated:
78. The Board has sighted the Procuring Entity's letter dated 2<sup>nd</sup> July 2024 addressed to the Applicant and the same bears reproducing for ease of reference:

***KRA/HQS/NCB-034/2023-2024***

***2<sup>nd</sup> July 2024***

***The Managing Director,***

***Colnet Limited***

***P.O. Box (details withheld)***

***Nairobi***

***RE: TERMINATION OF PROCUREMENT PROCEEDINGS  
FOR THE PROVISION OF CLEANING AND GARBAGE  
COLLECTION FOR KRA OFFICES AND RESIDENTIAL***

**HOUSES COUNTRYWIDE FOR A PERIOD OF TWO (2)  
YEARS (LOT 3 & 5)**

**Reference is made to you (sic) submitted bid in regard to  
the above procurement.**

**The Authority has terminated the Procurement  
Proceeding for the above tender due to inadequate  
budgetary provisions. Specifically, the bid submitted  
failed at the mandatory evaluation stage because the  
submitted NSSF remittance payrolls were not certified by  
NSSF and the Bank Letter was not certified by the Bank  
This termination is pursuant to Section 63(1)(b) of the  
Public Procurement and Asset Disposal Act 2015, states  
that "An Accounting Officer of a procuring entity, may, at  
any time, prior to notification of tender award, terminate  
or cancel procurement or asset disposal proceedings  
without entering into a contract where (b) there is  
inadequate budgetary provision"**

**How to request for debriefing**

**...**

**Yours faithfully,**

**Signed**

**HUMPHREY WATTANGA**

**COMMISSIONER GENERAL**

79. From the letter dated 2<sup>nd</sup> July 2024 above reproduced, the Procuring Entity communicated that the subject tender was terminated on account of inadequate budgetary provision. Further that the Applicant's tender was found unresponsive at the Preliminary Evaluation Stage for



submitting NSSF remittance payrolls that were not certified by NSSF and a Bank Letter was not certified by the Bank.

80. Section 63(1)(b) of the Act recognizes inadequate budgetary provision as one of the grounds under which an Accounting Officer can invoke for the termination of procurement and asset disposal proceedings. However, as this Board has always held, for one to satisfy the substantive requirement under Section 63, they must go beyond a mere restating of the statutory language on the grounds for termination, they must demonstrate by way of evidence that the circumstances embodying the ground relied upon actually exist. In the present case, the Respondents shouldered the burden of leading evidence demonstrating the inadequate budgetary provision.
81. During the hearing, specifically, at the clarifications stage, the Board asked the Respondents to confirm the actual budget the Procuring Entity set aside for the subject tender to which Counsel for the Respondents, Ms. Almadi indicated a sum of Kshs. 200 Million for all the 8 Lots under the subject tender and that none of the 8 Lots had been assigned a specific amount from the total amount.
82. Further, when the Board inquired from the Respondents on why they chose to continue with some of the Lots and terminate others under the same tender, they were of the view that the tender did not have adequate budgetary provision, Counsel for the Respondents, Ms. Almadi stated that the Lots in which an award was made, the lowest evaluated tenderer's were responsive to the mandatory requirements under the Tender Document. She equally indicated that for those that were terminated, the



previously established lowest evaluated tenderers were non-responsive to the mandatory requirements and that the next lowest evaluated tenderers had tender prices that exceeded the budgetary provision for the subject tender.

83. The Board has independently studied the Documents submitted to it by the Respondents under the Confidential File and made the following observations:

- i. The Head of the Procurement Function's 2<sup>nd</sup> Professional Opinion dated 13<sup>th</sup> June 2024 bears out that the budget of the subject tender was Kshs. 212 Million per year and Kshs. 424 Million for the 2 Years.
- ii. Lot 1 of the subject tender was awarded to Kamtix Cleaners Limited at Kshs. 72,978,000.72.
- iii. Lot 4 of the subject tender was awarded to Kamtix Cleaners Limited at Kshs. 26,693,684.95
- iv. Lot 6 of the subject tender was awarded to Kamtix Cleaners Limited at Kshs. 24,389,831.70
- v. Lots 1,4 and 6 of the subject tender were awarded to Kamtix Cleaners Limited at a total tender price of Kshs. 124,061,517.37.
- vi. The lowest evaluated tenderers for Lots 2,3,5 and 7 of the subject had a combined tender sum of Kshs. 619,895,770.32
- vii. All the tenders in Lot 8 of the subject tender were established as non-responsive.

84. From the above information, it is apparent that the cumulative sum of the tender prices quoted by the lowest evaluated tenderers in 7 of the 8 Lots

alone, was way above the budgetary allocation. Whereas the Procuring Entity set aside Kshs. 424 Million, the combined sum of the lowest tender prices for Lots 1 to 7 alone is Kshs. 743,957,287.69.

85. It may well be that the sum tender prices quoted by the lowest evaluated tenders under the 7 Lots surpassed the budget of Kshs. 200 Million but the Board found great difficulty in following through the Procuring Entity's decision to issue award letters in respect of Lots 1, 4 and 6 of the subject tender when the said Lots were also part of the subject tender which evidently had inadequate budgetary provision. The Board was not persuaded by Counsel for the Respondents' attempt at explaining that issuing the award for Lots 1, 4 and 6 was because the lowest evaluated tenderers in those Lots were responsive to the mandatory requirements under the subject tender for at least 3 reasons:

- i. There was no suggestion that the lowest evaluated tenderers in the rest of the Lots were not responsive to the mandatory requirements. One would therefore question why an award was not made to the lowest tenderer in any of the Lots 2,3,5 and 7.
- ii. Counsel for the Respondents, Ms. Almadi confirmed that there was no specific distribution of the budgeted sum of Kshs. 200 Million among the 8 Lots. It was therefore inexplicable for the Procuring Entity to handpick the Lots 1,4 and 6 to issue an award while terminating others, when all Lots had a unified budget which turns out was inadequate.
- iii. The awarded Lots (Lot 1, 4 and 6 of the subject tender) were all made to a single tenderer, Kamtix Cleaners Limited, while the rest of the Lots (2,3,5,7 and 8) terminated. It may well be that the tenderer submitted responsive tenders in all the different

Lots but the award of tenders only in Lots that this single supplier was the successful tenderer while ignoring the rest is of itself questionable.

- iv. No budget or procurement plan was shared with the Board or put in evidence by the Respondents to affirm lack of sufficient budgetary allocation and therefore the Board could not verify this assertion.

From the above it clear that the Respondents did not satisfy the substantive requirement for the termination of the procurement process in Lots 3 and 5 of the subject tender.

86. Turning to the procedural requirement i.e. on sending notifications on termination to the tenderers and preparation of a Written Report to the Authority, the Board has sighted letter dated 2<sup>nd</sup> July 2024 communicating to the Applicant the termination of the procurement proceedings under Lots 3 and 5 of the subject tender. Absent any evidence that the letter was sent outside the 14 days timeframe under Section 63 of the Act, the Board presumes that it was regularly sent. However, when it came to the preparation of a report on the termination to the Director General of the Public Procurement Regulatory Authority, Counsel for the Respondents made an admission that this was yet to be fulfilled following the filing of the instant Request for Review. The Board notes that the letter terminating the various Lots under the tender is dated 2<sup>nd</sup> July 2024 and the Request for Review was filed on 19<sup>th</sup> July 2024 which is more than 14 days later, meaning the 14 days contemplated under Section 63 of the Act for the presenting of a report to the Authority had already lapsed. In totality, the Respondents did not satisfy the procedural requirement under Section 63 of the Act.

87. In view of the foregoing, the Respondents failed to satisfy both the substantive and procedural requirements under Section 63 of the Act. Accordingly, this Board is clothed with jurisdiction over the instant request for Review as the Procuring Entity's termination of the tender process in respect of Lots 3 & 5 under the subject tender was not in accordance with Section 63 of the Act.

**Whether Procuring Entity's Head of Procurement Function was within his mandate under the Act when he directed the re-evaluation of tenders submitted in response to the subject tender?**

88. The Applicant instituted the instant Request for Review challenging the Procuring Entity's decision to terminate procurement proceedings in respect of Lots 3 and 5 under the subject tender and disqualifying it at the Preliminary Evaluation Stage for failing to satisfy the requirements under Mandatory Requirements No. 10 and 22 under the Tender Document.

89. Counsel for the Applicant Mr. Mbugua submitted that there was a general admission by the Respondents that an initial evaluation was conducted and concluded before a re-evaluation of the tenders was done by the Evaluation Committee at the instance of the Head of the Procurement Function. He argued that this was irregular since under the law he was required to prepare a Professional Opinion for the Accounting Officer and even though he could seek clarification from the Evaluation Committee this did not include directing the Evaluation Committee to re-evaluate the tenders.

90. The Respondents on their part contended that the procurement process in respect of the subject tender was carried out in accordance with the Act and thus regular.
91. Counsel for the Respondents, Ms. Almadi, argued that the Applicant's tender failed to satisfy mandatory requirements for which the Tender Document called for disqualification as the same could not be deemed as minor deviation as contemplated under Section 79(2) of the Act. According to Counsel, the Head of the Procurement Function was within his mandate under Regulation 78(3) when he directed the Evaluation Committee to re-evaluate the tenders, which eventually led to the discovery that the Applicant and other tenderers had not satisfied mandatory requirements under the Tender Document.
92. Flowing from the above, it is not in dispute that there were 2 separate evaluation processes. Further, it is apparent that the disqualification of the Applicant's tender is traceable to the 2<sup>nd</sup> evaluation process that the Evaluation Committee undertook at the instance of the Head of the Procurement Function. The Board is therefore invited to interrogate whether the Head of Procurement was within his mandate when he directed the re-evaluation of the tenders in the subject tender with respect of Mandatory Requirements No.10 and 22 at the Preliminary Evaluation Stage.
93. Section 84 of the Act speaks to the role of the Head of Procurement Function in the preparation of the Professional Opinion in the following terms :

***84. Professional opinion***

***(1) The head of procurement function of a procuring entity shall, alongside the report to the evaluation committee as secretariat comments, review the tender evaluation report and provide a signed professional opinion to the accounting officer on the procurement or asset disposal proceedings.***

***(2) The professional opinion under sub-section (1) may provide guidance on the procurement proceeding in the event of dissenting opinions between tender evaluation and award recommendations.***

***(3) In making a decision to award a tender, the accounting officer shall take into account the views of the head of procurement in the signed professional opinion referred to in subsection (1).***

94. From Section 84 of the Act above, the following is apparent:

- i. The head of Procurement Function prepares a professional opinion for the Accounting Officer from a review of the Evaluation Report by the Evaluation Committee.
- ii. The Professional Opinion may provide guidance to the Accounting Officer in the event of dissenting opinions between tender evaluation and award.
- iii. The Accounting Officer takes into account the view of the Head of Procurement as expressed in the Professional Opinion.

95. On its part, Regulation 78(3) of the Regulations 2020 allows for the Head of the Procurement Function to seek clarifications from the Evaluation Committee in the following terms:

***"(2) The evaluation report under paragraph (1), shall be reviewed by the head of the procurement function and forwarded to the accounting officer together with the professional opinion referred to in section 84 of the Act within a day upon receipt of the evaluation report.***

***(3) The head of the procurement function may seek for clarification from the evaluation committee before making a professional opinion."***

96. From the above it is clear that the Head of Procurement is at liberty to seek clarification from the Evaluation Committee. However, the Regulations 2020 does not offer a definition on the word "Clarification" as used under Regulation 78. Recourse is therefore made to external sources for an understanding of what the term "clarification" entails.
97. The Online Oxford Learner's Dictionary defines clarification as *"the act or process of making something clearer or easier to understand."*
98. It would therefore follow that Regulation 78(3) of the Regulations contemplates that any information that the Head of Procurement seeks from the Evaluation Committee should be one that seeks to make the contents of the Evaluation Report clearer or easier to understand.
99. Turning to the instant case, the Board has seen a Memo dated 28<sup>th</sup> May 2024 from the Head of the Procurement Function to the Evaluation Committee Secretary and the same bears reproducing for ease of reference:

**From:** *Ag. Deputy Commissioner-Supply Chain Management*

**To:** *Evaluation Committee Secretary*

**CC:** *Chairman Tender Evaluation Committee  
Tender Evaluation Committee Members*

**Ref:** *KRA/HQS/NCB-034/2023-2024*

**Date:** *28<sup>th</sup> May, 2024*

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***REQUEST FOR CLARIFICATION FOR TENDER FOR PROVISION OF CLEANING AND GARBAGE COLLECTION FOR KRA OFFICES AND RESIDENTIAL HOUSES COUNTRYWIDE FOR A PERIOD OF TWO (2) YEARS***

***Reference is made to the above subject tender***

***I have further reviewed the evaluation report for the subject tender and noted the following;***

- a) Under mandatory evaluation criteria No. 10, some of the bidders submitted uncertified copies of NSSF returns and payrolls, in other bids, only one of the subject documents were certified contrary to the criteria requirement.***
- b) Under mandatory evaluation criteria No. 22, some bidders submitted bank reference letters that had not been certified.***
- c) Bidder No. 46's NHIF compliance certificate expires on 31/01/2024.***

***Pursuant to Regulations 78(3) of the Public Procurement and Asset Disposal Regulations, 2020 that reads 3) "the head of***



***the procurement function may seek for clarification from the evaluation committee before making a professional opinion,”  
the committee is required to reconfirm the bids submitted and clarify on the issues listed above.***

***Kindly provide a response and resubmit the procurement file by 4<sup>th</sup> June 2024.***

***Signed***

***Benson Kiruja***

100. This Memo is illustrative of the Head of the Procurement Function's observations on tenderer's compliance with Mandatory Requirements No. 10 and 22 as well as Bidder No. 46's submission of an expired NHIF Compliance Certificate. The Memo equally requires the Evaluation Committee to reconfirm the Head of the Procurement Functions observation and clarify on the issues.

101. The Board has struggled to identify the information that the Head of the Procurement Function was seeking to be made clearer through the said Memo. This is because the Memo did not contain a specific question but only gave his observations which the Evaluation Committee as is apparent, treated as a direction to conduct a fresh re-evaluation of the tenders to confirm his observations. In the Board's view, the Head of the Procurement Function did not seek any clarification through the above Memo, which was in fact a direction to the Evaluation Committee to re-evaluate the tenders submitted in the subject tender.

102. Drawing from Section 84 of the Act and Regulation 78 of the Regulations 2020, the Head of Procurement Function is required to

prepare his Professional Opinion from the Evaluation Committee's Evaluation Report for onward forwarding to the Accounting Officer. The Accounting Officer then approves or rejects the award of a particular tender through the guidance of the Professional Opinion. The Head of the Procurement Function is at liberty to seek clarification from the Evaluation Committee but this should be geared towards a better understanding of the Evaluation Committee's Report and not a call for a fresh evaluation process and the preparation of a new Evaluation Report.

103. Turning to the subject tender, it would appear that the Head of the Procurement Function directed the re-evaluation of the tenders in the subject tender, something that is outside his mandate. The correct procedure the Head of the Procurement Function should adopt in instances where they detect an anomaly in the evaluation of tenders is to indicate this observation in their Professional Opinion and to recommend to the Accounting Officer to direct the re-evaluation of tenders. The Head of the Procurement Function cannot of his own motion direct the Evaluation Committee to re-evaluate the tenders.

104. The Board therefore finds fault in the Head of Procurement function's direction for the re-evaluation of the tenders in the subject tender that subsequently culminated in the disqualification of the Applicant.

105. In view of the foregoing analysis, the Board finds that the Procuring Entity's Head of the Procurement Function went outside his mandate under the Act when he directed the re-evaluation of tenders submitted in response to the subject tender.

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

106. The Board has found that as the Procuring Entity's termination of the tender process in respect of Lots 3 & 5 under the subject tender was not in accordance with Section 63 of the Act.
107. The Board has equally found that the Procuring Entity's Head of the Procurement Function went outside his mandate under the Act when he directed the re-evaluation of tenders submitted in response to the subject tender.
108. The upshot of our finding is that the Request for Review dated 19<sup>th</sup> July 2024 in respect of Tender No. KRA/HQS/NCB-034/2023 for Provision of Cleaning and Garbage Collection for KRA Offices and Residential Houses Countrywide for a period of Two (2) Years succeeds in the following specific terms:

**FINAL ORDERS**

109. 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 19<sup>th</sup> July 2024:

- 1. The Letters of Notification issued to the Applicant and all the unsuccessful tenderers in respect of Lots 1 to 8 of Tender No. KRA/HQS/NCB-034/2023 for Provision of Cleaning and Garbage Collection for KRA Offices and Residential Houses Countrywide for a period of Two (2) Years be and are hereby cancelled and set aside.**

- 2. The Letters of Notification issued to the successful tenderers in Lots 1, 4 and 6 under Tender No. KRA/HQS/NCB-034/2023 for Provision of Cleaning and Garbage Collection for KRA Offices and Residential Houses Countrywide for a period of Two (2) Years be and are hereby cancelled and set aside.**
- 3. The Evaluation Report dated 11<sup>th</sup> June 2024 in respect of Tender No. KRA/HQS/NCB-034/2023 for Provision of Cleaning and Garbage Collection for KRA Offices and Residential Houses Countrywide for a period of Two (2) Years be and is hereby cancelled and set aside.**
- 4. The Professional Opinion dated 13<sup>th</sup> June 2024 in respect of Tender No. KRA/HQS/NCB-034/2023 for Provision of Cleaning and Garbage Collection for KRA Offices and Residential Houses Countrywide for a period of Two (2) Years be and is hereby cancelled and set aside.**
- 5. The 1<sup>st</sup> Respondent be and is hereby directed to reconvene the Evaluation Committee for purposes of forwarding the Evaluation Report dated 15<sup>th</sup> March 2024 in respect of Tender No. KRA/HQS/NCB-034/2023 for Provision of Cleaning and Garbage Collection for KRA Offices and**




**Residential Houses Countrywide for a period of Two (2) Years to the Head of the Procurement Function for preparation of a Professional Opinion having regard to the Board's findings in this Decision.**

**6. Further to order 5 above, Tender No. KRA/HQS/NCB-034/2023 for Provision of Cleaning and Garbage Collection for KRA Offices and Residential Houses Countrywide for a period of Two (2) Years be allowed to proceed to its lawful and logical conclusion having regard to the Board's finding in this Decision.**

**7. Each party shall bear its own costs in the Request for Review.**

**Dated at NAIROBI, this 9<sup>th</sup> Day of August 2024.**

  
.....  
**CHAIRPERSON**  
**PPARB**

  
.....  
**SECRETARY**  
**PPARB**



