

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 69/2024 OF 19<sup>TH</sup> JULY 2024**

**BETWEEN**

**PEESAM 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 relation to Tender No. KRA/HQS/NCB-034/2023-2024 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, FCIArb, I.P - Chairperson
2. QS Hussein Were - Member
3. Mr. Jackson Awele - Member

**IN ATTENDANCE**

1. Ms. Sarah Ayoo -Holding brief for Acting Board Secretary
2. Mr. Philemon Kiprop -Secretariat



3. Mr. Anthony Simiyu - Secretariat  
4. Ms. Evelyn Weru - Secretariat

## **PRESENT BY INVITATION**

### **APPLICANT**

**PEESAM LIMITED**

Mr. Mbugua

- Advocate, Karugu Mbugua & Co. Advocates

### **RESPONDENTS**

**THE ACCOUNTING OFFICER, KENYA  
REVENUE AUTHORITY & KENYA  
REVENUE AUTHORITY**

Ms. Almadi h/b for Mr. Nyaga and

Mr. Nyapara

- Advocate, Kenya Revenue Authority

## **BACKGROUND OF THE DECISION**

### **The Tendering Process**

1. Kenya Revenue Authority and 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 for a period of Two (2) Years (herein "the subject tender") 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:

#	Name of Tenderer
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.	Nadiyah 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 services
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 as follows:

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

### **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 (hereinafter referred to as "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><i>Tenderer</i></b>	<b><i>Observation by the Evaluation Committee</i></b>
<b><i>Kamtix Cleaners Limited (Lots 4 &amp; 6)</i></b>	<b><i>AGPO Certificate authentic All NEMA Certificates authentic Tax Compliance Certificate authentic</i></b>
<b><i>Ximtak Investments Limited (Lot 2)</i></b>	<b><i>AGPO Certificate not authentic All NEMA Certificates not authentic Tax Compliance Certificate authentic</i></b>
<b><i>Nadiah Investments (Lots 3 &amp; 5)</i></b>	<b><i>Letter of No Objection 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</i></b>

<b><i>Peesam Limited (Lots 7 &amp; 8)</i></b>	<b><i>AGPO Certificate authentic All NEMA Certificates authentic Tax Compliance Certificate authentic</i></b>
<b><i>EASA Enterprise (Lot 1)</i></b>	<b><i>AGPO Certificate authentic NEMA Certificate for transportation not authentic Tax Compliance Certificate authentic</i></b>

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 2<sup>nd</sup> 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><i>Tenderer</i></b>	<b><i>Observation by the Evaluation Committee</i></b>
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<b><i>Kotaa East Africa Limited</i></b>	<b><i>AGPO Certificate authentic NEMA Certificates not authentic Tax Compliance Certificate authentic</i></b>
<b><i>Sixone4 Construction Limited</i></b>	<b><i>AGPO Certificate authentic NEMA Certificates not authentic Tax Compliance Certificate authentic</i></b>
<b><i>Biceven East Africa Limited</i></b>	<b><i>AGPO Certificate authentic NEMA Certificates not authentic Tax Compliance Certificate authentic</i></b>
<b><i>Cleanmark Limited</i></b>	<b><i>AGPO Certificate authentic NEMA Certificates not authentic Tax Compliance Certificate authentic</i></b>
<b><i>Colnet Limited</i></b>	<b><i>AGPO Certificate authentic NEMA Certificates authentic Tax Compliance Certificate authentic</i></b>
<b><i>Dechrip East Africa Limited</i></b>	<b><i>AGPO Certificate authentic NEMA Certificates not authentic Tax Compliance Certificate authentic</i></b>
<b><i>Ice Clean Care Group Limited</i></b>	<b><i>AGPO Certificate authentic NEMA Certificates not authentic Tax Compliance Certificate authentic</i></b>
<b><i>Saafi Cleaning Company Limited</i></b>	<b><i>AGPO Certificate authentic NEMA Certificates authentic Tax Compliance Certificate authentic</i></b>

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><i>Lot</i></b>	<b><i>Lowest Evaluated Tenderer</i></b>	<b><i>Tender Price (Kshs)</i></b>
<b><i>Lot 1</i></b>	<b><i>Kamtix Cleaners Limited</i></b>	<b><i>72,978,000.72</i></b>
<b><i>Lot 2</i></b>	<b><i>Saafi Cleaning Company Limited</i></b>	<b><i>169,518,792.00</i></b>
<b><i>Lot 3</i></b>	<b><i>Colnet Limited</i></b>	<b><i>99,372,312.00</i></b>
<b><i>Lot 4</i></b>	<b><i>Kamtix Cleaners Limited</i></b>	<b><i>26,693,684.95</i></b>
<b><i>Lot 5</i></b>	<b><i>Colnet Limited</i></b>	<b><i>55,289,696.64</i></b>
<b><i>Lot 6</i></b>	<b><i>Kamtix Cleaners Limited</i></b>	<b><i>24,389,831.70</i></b>
<b><i>Lot 7</i></b>	<b><i>Peesam Limited</i></b>	<b><i>74,744,485.59</i></b>
<b><i>Lot 8</i></b>	<b><i>Peesam Limited</i></b>	<b><i>115,445,055.44</i></b>

### **Professional Opinion**

19. In a Professional Opinion dated 13<sup>th</sup> June 2024 (hereinafter referred to as the "Professional Opinion") the Procuring Entity's Acting Deputy Commissioner-Supply Chain Management, Mr. Benson Kiruja, reviewed



the manner in which the subject procurement process was undertaken and sought clarification from the Evaluation Committee, mainly on the mandatory evaluation requirements No. 10 and 22 pertaining to (a) NSSF Returns for the last three consecutive months with remittance payrolls (August, September & October 2023 or October, November & December 2023) certified by NSSF, and (b) Certified letter from the bidders banker indicating that the firm is currently operating an account and can access line of credit of at least Kshs. 2,000,000.00 at any given time (not older than six months from the tender closing date).

20. The Professional Opinion details that the Evaluation Committee re-evaluated the tenders with the result that the Applicant's tender was found non-responsive with respect to Requirement no. 10 having failed to meet the mandatory requirement as neither its payrolls nor NSSF remittance receipts were certified.
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 (a) a 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 Kshs. 619,895,770.32, (b) all bidders who bided for Lot VIII were found to be non-responsive as none made it to the financial evaluation stage, and (c) bidder No. 2 was found to be the lowest evaluated bidder for lot 1, 4 & 6.



22. The Professional Opinion proceeds to indicate that after the re-evaluation, the Evaluation Committee recommended (a) award of the subject tender for Lot 1, 4, and 6 to M/s Kamtix Cleaners Limited at its evaluated prices, (b) termination of procurement proceedings for Lots 2, 3, 5, 7 and 8 and re-advertisement of the five (5) lots pursuant to Section 63(1)(b) & (f).
23. With regard to adequacy of funds, it was stated in the Professional Opinion that the procurement was planned for in the Annual Procurement Plan for the FY 2023/2024 under line item 538 and that the approximate value of the procurement per year is Kshs. 200,000.000.00.
24. 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.
25. 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**

26. 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 NO. 69 OF 2024**

27. On 19<sup>th</sup> July 2024, Peesam Limited, the Applicant herein, filed a Request for Review dated 19<sup>th</sup> July 2024 together with a Supporting Affidavit sworn on 19<sup>th</sup> July 2024 by Samuel Mburu Nganga, its Director



(hereinafter referred to as the 'instant Request for Review') through Karugu Mbugua & Co. Advocates seeking the following orders from the Board:

- 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 by 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 Honorable Board may deem just and fit in the circumstances.***

28. In a Notification of Appeal and a letter dated 19<sup>th</sup> July 2024, Mr. James Kilaka, the Acting Secretary of the Board notified the 1<sup>st</sup> and 2<sup>nd</sup> Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender and forwarded 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. Further, the Respondents were requested to submit a response to the Request for



Review together with confidential documents concerning the subject tender within five (5) days from 19<sup>th</sup> July 2024.

29. On 26<sup>th</sup> July 2024, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed through E. Nyapara/ Pius Nyaga Advocate a Respondent's Written Memorandum of Response dated 25<sup>th</sup> July 2024 together with confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

30. 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 three (3) days.

31. Vide a Hearing Notice dated 26<sup>th</sup> July 2024, the Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the Request for Review slated for 1<sup>st</sup> August 2024 at 2.00 p.m., through the link availed in the said Hearing Notice.

32. On 31<sup>st</sup> July 2024, the Applicant filed through its advocates a Further Affidavit sworn by Samuel Mburu Nganga on 31<sup>st</sup> July 2024.

33. At the hearing, the Board read out the pleadings filed by parties in the matter and allocated time for each party to proceed and highlight its case. Thus, the matter proceeded for virtual hearing as scheduled.



## **PARTIES' SUBMISSIONS**

### **Applicant's submissions**

34. In his submissions, counsel for the Applicant, Mr. Mbugua relied on the Applicant's documents filed in the instant Request for Review before the Board.
35. Mr. Mbugua referred the Board to paragraphs 4 to 9 of the Respondent's Written Memorandum of Response and submitted that the procurement process had initially been completed and that the Evaluation Committee rendered its report together with a Due Diligence report to the Head of Procurement who instead of cascading it to the Accounting Officer of the Procuring Entity submitted it back to the Evaluation Committee which came up with a new Evaluation Report as indicated in the Respondent's Memorandum of Response and cited issues which led to the issuance of the regret letter received by the Applicant.
36. Counsel submitted that the Professional Opinion is a basic opinion that is not binding on the Evaluation Committee and should be cascaded to the Accounting Officer and as such, the resultant findings were a nullity since the powers conferred on the Head of Procurement cannot order or direct the Evaluation Committee on what it ought to do in the procurement process.
37. He indicated that the regret letter addressed to the Applicant raised one issue on the question of failure by the Applicant to submit National Social Security Fund (NSSF) remittance rolls certified by NSSF yet it had submitted a valid NSSF Compliance Certificate and evidence of payments



of NSSF deductions as required in the Tender Document. Counsel submitted that the NSSF roll is a system generated document which enables one to go to the bank and make payment and remit it back to NSSF which then issues an NSSF Compliance Certificate as and when requested.

38. Mr. Mbugua submitted that the Applicant complied with the NSSF requirement and that a Due Diligence report was prepared though the Applicant was not privy to it, which looked at the issue of NSSF and verified that the Applicant's documents were fully compliant. Counsel indicated that it made no sense for NSSF to issue the Applicant with a compliance certificate if it had not made the initial remittances since this is a process which starts with the submission of the remittance rolls followed by payment and issuance of the compliance certificate.

39. Counsel argued that the Tender Document as floated by the Procuring Entity is not cast in stone and the Board has the power to review a criteria contained in the said Tender Document in the interest of the whole procurement process and being guided by the principles of public procurement as envisioned under Section 3 of the Act.

40. He submitted that Section 79(2)(a)&(b) of the Act that the Applicant's bid document is substantially responsive notwithstanding the fact that there was no certification of the NSSF remittance which he reiterated was system generated and that there was no known procedure at NSSF for requesting for certification of a system generated document. Counsel further submitted that the Applicant was advised that certification cannot

be made on the NSSF remittance being a system generated document which bore contact details for anyone who would want to make a query on the same.

41. In support of his argument, Mr. Mbugua referred the Board to the holding in *Judicial Review Misc. Application No. 60 of 2020 R v Public Procurement Administrative Review Board and Kenya Bureau of Standards* on substantive responsiveness at paragraphs 37 to 42 and the definition of minor deviations. He pointed out that the particular deviation in the Applicant's bid document was a minor deviation which had no effect on the price and delivery of the services being acquired in the subject tender nor prejudice any of the bidders and was curable. He indicated that this was addressed at the debriefing meeting attended by the Applicant following issuance of its regret letter. He urged the Board to look into whether other bidders had complied with this requirement. Counsel further pointed out that the Applicant's bid is within the budgetary limits for the subject tender.
42. Mr. Mbugua submitted that the Applicant submitted a certified letter from KCB Bank Limited indicating that he had a credit rating exceeding Kshs. 2M and that the said letter indicated that the Applicant can be financed up to 60% of any contract amount and as such, the issue of banking does not arise in this particular instance.
43. He urged the Board to allow the Request for Review with costs as prayed.



## **Respondents' submissions**

44. In her submissions, Ms. Almadi, counsel for the Respondents relied on the 1<sup>st</sup> and 2<sup>nd</sup> Respondents documents filed in the instant Request for Review including confidential documents submitted to the Board pursuant to Section 67(3)(e) of the Act.
45. Ms. Almadi submitted that the Applicant failed to meet the mandatory requirements as provided for in the Tender Document. She indicated that as part of the mandatory requirements, bidders were required to provide certified copies of NSSF remittance roll and returns and the letters relied on from the bank had to be certified by the said bank.
46. Counsel further submitted that failure by the Applicant to meet the mandatory requirements culminated in the issuance of the regret letter dated 2<sup>nd</sup> July 2024 where the Applicant was informed that (a) the Procuring Entity had terminated the procurement proceedings due to inadequate budgetary provision, (b) there was unresponsiveness with respect to lot 8, and (c) it had failed at the mandatory evaluation stage because it submitted NSSF remittance payrolls that were not certified by NSSF.
47. Ms. Almadi argued that once a bidder fails to meet mandatory requirements, then such bidder becomes unresponsive and it is not correct for the Applicant to allege that its bid was responsive because it failed to meet mandatory requirements. In support of her argument, counsel referred to the holding in ***PPARB Application No. 55 of 2024 Lakeparm Cleaners Limited v Chief Executive Officer, Kenyatta***



***University Teaching Referral & Research Hospital & others and Judicial Review Misc. Application No. 122 of 2018 R v Public Procurement Administrative Review Board & 2 others Ex parte BABS Security Services Limited*** which held that 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 from further consideration.

48. On the issue raised by the Applicant that the procurement process had been initially completed and evaluation and due diligence reports prepared, counsel submitted that the Head of Procurement upon looking at the Evaluation Committee's report referred the matter back to the Evaluation Committee pursuant to Regulation 78 of the Public Procurement and Asset Disposal Regulations 2020 (hereinafter referred to as "Regulations 2020") so as to ensure that all the bids in lots 7 and 8 that are subject to the instant Request for Review had complied and the Evaluation Report prepared was able to confirm that the Applicant had not complied with mandatory requirements and as such, even if there were issues of due diligence, the same conclusion would have been arrived at.

49. On the issue submitted by the Applicant that the NSSF remittance roll was system generated and contained contacts in case of raising a query, counsel submitted that the Applicant was shifting the burden of proof which is not correct in the circumstances, since if a mandatory requirement dictates compliance, it ought to have complied and it was not up to the Procuring Entity to go further and examine documents



provided by the Applicant in a bid of assisting it in the procurement process.

50. She further submitted that there was a reason as to why the Act provides that both bidders and procuring entities are required to follow the set out procedure and relied on the holding in ***PPARB Application No. 48 of 2021*** where the Board noted the rising number of bidders abusing the options set out under Section 167 of the Act by noting an alleged breach of duty during the early stages of a procurement process and only waiting for the outcome of evaluation of its bid to raise an issue where such outcome is not favorable.

51. Counsel submitted that the NSSF remittance roll does not appear to be system generated and there is a reason why such documents are certified and a requirement set for certification by the issuing institution so as to confirm originality and authenticity. She indicated that it is not up to the Respondent, having required the said documents to be certified, to then be the one calling the issuer of the said document so as to confirm its authenticity.

52. She urged the Board to dismiss the Request for Review with costs

### **Applicant's Rejoinder**

53. In a rejoinder, Mr. Mbugua submitted that the whole procurement process right from the time of floating the subject tender is an administrative process that is amenable to the available mechanisms starting from

review by the Board to judicial review at the High Court and the Court of Appeal.

54. Counsel further submitted that paragraphs 4 to 9 of the Respondent's Memorandum of Response was relevant and is an indication that there were two parallel evaluation processes which were carried out on the subject tender and which was illegal.
55. Counsel reiterated that the NSSF remittance rolls were system generated and that the Board is able to make its own finding bearing in mind that there were contact details provided both as a mobile telephone number and email address. He pointed to the Applicant's NSSF Compliance Certificate and argued that the Procuring Entity ought to have carried out due diligence on the same. He indicated that the Applicant learnt of the outcome of evaluation of its bid document vide the letter of 2<sup>nd</sup> July 2024 and could not approach the Board at an earlier date as argued by counsel for the Respondent.

### **CLARIFICATIONS**

56. When asked by the Board to explain whether the NSSF remittance roll when submitted contains the names and details of the people for which those contributions were made, Mr. Mbugua submitted that the Applicant submitted in its bid document an NSSF Compliance Certificate stamped on 24<sup>th</sup> November 2023 and that the remittance roll was for the months of August, September and October 2023 and annexed to it was the bank payment made. He indicated that for the required months, the Applicant



availed in its bid document banking details by KCB Bank Limited for the required 3 months. Counsel further indicated that a payroll had been attached to the Applicant's bid showing the number of staff paid for but he was yet to get clarification on whether one submits at NSSF the actual number of people the remittance are for or a global figure is indicated since the remittance order from the bank is indicative of the amount payable and if its towards tier 1 or tier 2.

57. When asked by the Board to further explain how the Applicant came to learn that the evaluation in the subject tender had to be done afresh, Mr. Mbugua submitted that the Applicant learnt of the fresh evaluation once it was served with the Respondents Memorandum of Response as detailed at paragraphs 4 to 9 therein and that the details pertaining the second evaluation are as averred at paragraphs 10 to 15 therein. He reiterated that this second evaluation of the subject tender was illegal.

58. When asked to expound on what was contained in the NSSF remittance roll submitted by the Applicant, Mr. Mbugua submitted that one uploads the payroll with the names to the system and is asked to approve following which it generates a payment order which was attached to the instant Request for Review. He indicated that the system automatically computes the amount payable depending on the tiers.

59. On whether a particular criterion is of essence or fair, counsel submitted that this depends on case to case basis since what may be considered fair in one instance may not be fair in another. He indicated that in the current circumstances, the Applicant submitted an NSSF Compliance Certificate



that was part of the Applicant's tender documents and stamped by NSSF having been issued by the branch manager which was an indication that the Applicant was compliant.

60. In response, Ms. Almadi confirmed that the NSSF Compliance certificate was stamped by NSSF and it would have been as well easy for the Applicant to comply with Mandatory requirement no. 10 of the Tender Document. Counsel indicated that for system generated certificates, they have a rider at the bottom indicating that it is a system generated document which does not require a signature or certification and in this instance the compliance certificate was on the Applicant's letterhead having copy pasted it and in view of what a system generated certificate is, this wasn't one and in so far as the Respondents were concerned this wasn't a system generated document that it could rely on.

61. As a rejoinder, Mr. Karugu indicated that it was possible to scan a document on top of a document and that the Compliance Certificate was not system generated though the payment order was system generated.

62. When asked to expound on what were the issues that led the Head of Procurement to remit the first Evaluation Report back to the Evaluation Committee and what its recommendation was in the first Evaluation Report and if the provisions of Section 63 of termination of procurement proceedings was complied with, Ms. Almadi submitted that the provisions under Regulation 78(3) of Regulations 2020 guided the Head of Procurement in communicating to the Evaluation Committee and seeking clarification on compliance of the mandatory requirements. She pointed

to mandatory requirements no. 9 and 10 of the Tender Document and submitted that the whole essence of certification of the documents therein was to confirm originality and authenticity so that the Procuring Entity can confirm that these were the very same documents submitted to NSSF. She pointed out that from the Compliance Certificate submitted by the Applicant, it indicated that it was issued based on the information availed to the fund at the time of inspection and does not preclude or prevent the fund from inspecting the said information and previous records or demand payment of skipped or understated contributions or any outstanding dues to the fund. She further pointed out that it did not mention the issue of the payment rolls or what was contained in the remittance rolls by the Applicant.

63. Ms. Almadi submitted that the Procuring Entity issued its decision pertaining the subject tender to the Applicant on 2<sup>nd</sup> July 2024 and pointed out that this was 1 tender consisting of 8 lots. She indicated that before the Procuring Entity could issue the report to the Director General, Public Procurement Regulatory Authority, it received a notification from the Board informing it that all proceedings in the subject tender had been suspended and that no contract would be signed between the Procuring Entity and the successful bidder being the reason it was yet to issue the said report.

64. Counsel indicated that vide letter dated 28<sup>th</sup> May 2024 the Head of Procurement sought clarification from the Procuring Entity with regard to compliance of mandatory requirement no. 10 of the Tender Document in view of the fact that some bidders had satisfied the requirement while



others had not complied and therefore he deemed it necessary to raise these issues with the Evaluation Committee.

65. When asked to clarify if the Tender Document provided an express provision on how certification was supposed to be done and if a particular standard had been provided for the compliance certificates to be held against the said standard, Ms. Almadi pointed to page 33 of 379 of the Tender Document providing for mandatory requirement no. 10 under the Preliminary/Mandatory Evaluation Criteria and submitted that it was clearly stipulated that the NSSF Returns for the last three consecutive months with remittance payrolls (August, September & October 2023 or October, November & December 2023) were required to be certified by NSSF. As to the mode of certification counsel indicated that the normal way of doing this and per common law would be either a seal or stamp signed by the authorized signatories from the institution and even though there was no express specification on the mode of certification, there ought to be an indication on the document presented showing that it was from the bank or NSSF and that it had actually conformed the same.

66. She indicated that the payroll remittance could easily have been an excel spreadsheet that was extracted either form NSSF or the bank which was the actual need for certification so as to show that for the period in question, the bidder was dealing with a certain number of people and NSSF had confirmed receipt of the remittance in relation to the specified number of people in question.



67. When asked whether the Respondents had provided the budget relevant to Lot 7 in the subject tender, counsel indicated that she had not availed the budget for the specific lots because the budget was wholesome at Kshs. 200,000,000 for all the eight lots and there was no breakdown.
68. When asked to expound on what the extent of the Due Diligence carried out by the evaluation Committee and if a report was prepared, counsel submitted that the Due Diligence was part of the Confidential file submitted to the Board. She indicated that the due diligence exercise was to authenticate all the documents submitted by bidders in the subject tender.
69. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 19<sup>th</sup> July 2024 was due to expire on 9<sup>th</sup> August 2024 and that the Board would communicate its decision on or before 9<sup>th</sup> August 2024 to all parties to the Request for Review via email.

### **BOARD'S DECISION**

70. The Board has considered each of the parties' cases, documents, pleadings, oral and written submissions, list and bundle of authorities together with confidential documents submitted to the Board by the Respondents pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination.



- I. *Whether the Procuring Entity's termination of the tender process in respect of Lots 7 & 8 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 7 & 8 under the subject tender was in accordance with Section 63 of the Act?**

71. During the parties address to the Board it became apparent that the tender process in respect Lots 7 and 8 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.
72. 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.
73. 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."**

74. 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."**

75. 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 drops tools in respect of the matter before it the moment it holds that it is without jurisdiction."**

76. 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...."***

77. 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."***

78. 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."***

79. The Board shall now interrogate the termination of the subject tender.
80. 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.***

81. 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.
82. 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:
83. 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***

84. 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***

85. 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.

86. 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) all evaluated tenders are non-responsive;*

*(g) ...*

*(f) all evaluated tenders are non-responsive; (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.**

87. 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.

88. 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.

89. 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.
90. 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.
91. The Board shall now interrogate the circumstances under which the subject tender was terminated:
92. 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,***



***Peesam 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 7 & 8)***

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***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***

93. From the letter dated 2<sup>nd</sup> July 2024, 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 were not certified by NSSF and a Bank Letter was not certified by the Bank.
94. 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.
95. 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.

96. 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 when they were of the view that the tender did not have adequate budgetary provision, Counsel for the Respondents, Ms. Almadi stated that the Lots that 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.
97. 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.

98. 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 purported 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.

99. 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 illogical 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. Neither the annual procurement plan nor the budget relevant to this procurement was furnished upon the Board nor submitted by the Respondents in evidence before it, therefore it was impossible to verify the lack of adequate budgetary allocation as assured by the Respondent.
100. From the above it clear that the Respondents did not satisfy the substantive requirement for the termination of the procurement process in Lots 7 and 8 of the subject tender.
101. 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 7 and 8 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.

102. 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 7 & 8 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?**

103. The Applicant instituted the instant Request for Review challenging the Procuring Entity's decision to terminate procurement proceedings in respect of Lots 7 and 8 under the subject tender and disqualifying it at the Preliminary Evaluation Stage for failing to satisfy the requirements under Mandatory Requirements No. 10 under the Tender Document.
104. 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.
105. 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.
106. 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.

107. 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.

108. 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).***

109. 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.

110. 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."***

111. 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.
112. The Online Oxford Learner's Dictionary defines clarification as *"the act or process of making something clearer or easier to understand."*
113. 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.
114. 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**



**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**



115. This Memo illustrates 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.
116. 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.
117. 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..

118. 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.
119. 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.
120. 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?**

121. The Board has found that as the Procuring Entity's termination of the tender process in respect of Lots 7 & 8 under the subject tender was not in accordance with Section 63 of the Act.

122. 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.
123. 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**

124. 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 are 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 are 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)**



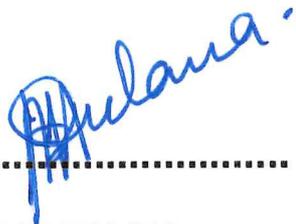
**Years to the Head of the Procurement Function for preparation of a Professional Opinion having regard to the Board's findings in this Decision.**

**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**

