

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 104/2024 OF 14TH OCTOBER 2024

BETWEEN

BROOKLYN CLEANING SERVICES LIMITED.....APPLICANT

AND

THE DIRECTOR GENERAL,

NATIONAL INDUSTRIAL TRAINING AUTHORITY...1ST RESPONDENT

NATIONAL INDUSTRIAL TRAINING AUTHORITY...2ND RESPONDENT

ICE CLEAN CARE GROUP COMPANY LIMITED.....INTERESTED PARTY

Review against the decision of the Accounting Officer, National Industrial Training Authority in respect of Tender No. NITA/01/2024-2025 for Provision of Cleaning/ Fumigation/ Sanitary and Garbage Disposal Services in NITA Headquarters, NITA Athi River, NITA Kisumu and NITA Mombasa.

BOARD MEMBERS PRESENT

- | | | |
|------------------------|---|-------------|
| 1. QS Hussein Were | - | Panel Chair |
| 2. CPA Alexander Musau | - | Member |
| 3. Mr. Daniel Langat | - | Member |

IN ATTENDANCE

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




PRESENT BY INVITATION

APPLICANT	BROOKLYN CLEANING SERVICES LIMITED
Mr. Anthony Kiprono	Advocate, A.E. Kiprono & Associates Advocates
RESPONDENTS	ACCOUNTING OFFICER, NATIONAL INDUSTRIAL TRAINING AUTHORITY NATIONAL INDUSTRIAL TRAINING AUTHORITY
Mr. Fredrick Otieno	Advocate, National Industrial Training Authority
Mr. Odumo	Evaluation Committee Chairperson
Ms. Mary Mbithe	Procurement Department Representative
INTERESTED PARTY	ICE CLEAN CARE GROUP COMPANY LTD
N/A	N/A

BACKGROUND OF THE DECISION

The Tendering Process

1. National Industrial Training Authority, the Procuring Entity, together with the 1st Respondent herein, *vide* an advert in the *MyGov* Publication and the PPIP Portal (www.tenders.go.ke) invited interested suppliers to submit bids in response to Tender No. NITA/01/2024-2025 for Provision of Cleaning/ Fumigation/ Sanitary and Garbage Disposal Services in



NITA Headquarters, NITA Athi River, NITA Kisumu and NITA Mombasa through an Open Tender method. Participation in the tender was restricted to suppliers registered under the Youth, Women and Persons with Disabilities (AGPO Categories) and the tender submission deadline was set as 29th July 2024 at 10:00 a.m.

Submission of Bids and Tender Opening

2. According to the signed Tender Opening Minutes dated 29th July 2024 submitted by the Procuring Entity under the Confidential File, thirty-four (34) bidders submitted bids as follows:

S/NO	FIRM NAME	TENDER SUM	No. of Pages
1.	FALHAD CLEANING SERVICES LTD	1,130,100 P.M	405
2.	KIMBERLEY LOGISTICS LIMITED	2,248,252 PM	430
3.	KAMTIX CLEANERS LTD	589,712 PM	559
4.	NADIAH INVESTMENT LTD	2,287,882 PM	341
5.	NODEN INVESTMENT LTD	1,662,941.57 PM	363
6.	RIZENN HOMES SERVICES	23,631,143 P. A	983
7.	DECHRIP EAST AFRICA LIMITED	368,850 PM	404
8.	MUTSONS CLEANING SERVICES LTD	1,330,484.18 PM	175
9.	ALEXAN AGENCIES LTD	NITA HQ 380,000 PM KISUMU 190,350 PM MOMBASA 187,500 PM ATHI RIVER 319,500 PM	238
10.	OLLREGGY INVESTMENT LTD	1,380,958.10	300
11.	ICE CLEAN CARE GROUP COMPANY LTD	943,597 PM	919



12.	DIAMOND SPARKLE LTD	1,320,538.49 PM	284
13.	PEESAM LIMITED	12,912,348 PA	435
14.	JEPCO SERVICES AND RENOVATORS LTD	1,163,289.30 PM	505
15.	EASYBREEZ CLEANING SERVICES	20,923,200 PA	252
16.	HEVER THE COMPANY LTD	1,202,682.64 PM	355
17.	VINSTAR EXPRESS SERVICES	15,523,535.40 PA	
18.	CLEANCO INVESTMENT LTD	13,497,367.68 PA	227
19.	KISIMA CLEANING SERVICES	6,720,000 PM	294
20.	MASTERS TOUCH SRVICES	26,994,980.40 PA	257
21.	TOPKLINE CLEANING SERVICES	12,213,600 PA	206
22.	COLNET LIMITED	14,164,593.72 PA	455
23.	CLEANMARK LIMITED	775,500 PM	377
24.	BROOKLYN CLEANING SERVICES	10,944,351.60 PA	673
25.	SMARTER CLEANING SERVICES	9,798,959.28 PA	458
26.	BABS FACILITIES LTD	1,596,000 PM	677
27.	OLDCRAFT VENTURES LTD	41,154,651.20 PA	278
28.	RIFNO CLEANING SERVICES LTD	1,832,667 PM	280
29.	PARAMAX CLEANING SERVICES LIMITED	1,112,184.50 PM	446
30.	KENMA HOMECARE SERVICES	1,398,600.48 PM	650
31.	SAHAM CLEANING SERVICES LTD	13,917,240.96 PA	402
32.	OPTVEIL ENTERPRISES LTD	1,830,567.06 PM	598
33.	GARBAGE HERO LIMITED	835,579.35 PM	335
34.	GO CLEANERS	NITA HQ 307,700 PM ATHI RIVER 554,516.50 PM KISUMU 188,432PM MOMBASA 104,965 PM	485



Evaluation of Tenders


3. The received bids were evaluated in the following 3 stages as captured in the Evaluation Report
 - i. Preliminary Evaluation
 - ii. Technical Evaluation
 - iii. Financial Evaluation

Preliminary Evaluation

4. The bids were to be examined using the criteria set out as Stage One: Mandatory Requirements under Section III-Evaluation and Qualification Criteria at the pages 24 to 25 of the Tender Document on a Yes/No basis.
5. 13 bids were disqualified at this stage. 21 bids, including that of the Applicant and the Interested Party, qualified for evaluation at the next stage.

Technical Evaluation

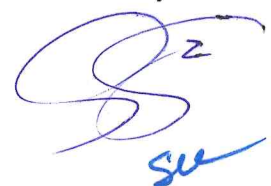
6. The Evaluation Committee was required to examine bids using the criteria set out as Stage Two-Technical Evaluation under Section III Evaluation and Qualification Criteria at pages 25 to 26 of the Tender Document. In order for a bid to qualify for further evaluation it had to garner at least 70 marks at this stage.



7. All the 21 bids evaluated at this stage met the 70 marks threshold and thus qualified for further evaluation at the Financial Evaluation Stage.

Financial Evaluation

8. The Evaluation Committee was required at this stage to examine bids using the criteria set out as Stage 3- Financial Evaluation under Section III-Evaluation and Qualification Criteria at page 27 of the Tender Document. The tender prices indicated in the bids would be compared and the successful bid would be the one bearing the lowest price.
9. From page 24 of the Evaluation Report dated 29th August 2024, it appears that the Evaluation Committee conducted a market survey and established that it would cost about **Kshs. 15,130,216.00** to deliver the services in the subject tender. In arriving at this cost consideration was made to various elements including minimum wages under the Labour Institutions Act, rates offered by the Procuring Entity's current service providers, cost of consumables, fumigation and garbage collection costs. The Evaluation Report indicates that the Evaluation Committee decided to award the subject tender to a bidder with a quote between Kshs. 11 million and 12 million
10. At the end of the evaluation at this stage, Messrs Ice Clean Care Group Company Limited's (the Interested Party's) tender was established as the lowest evaluated tender at a price of **Kenya Shillings Eleven Million Three Hundred and Twenty-Three Thousand, One**



Hundred and Sixty-Four (Kshs.11,323,164.00), inclusive of taxes, per annum.

Evaluation Committee's Recommendation

11. The Evaluation Committee recommended the award of the subject tender to Messrs Ice Clean Care Group Company Limited, the Interested Party, at its tendered price of **Kenya Shillings Eleven Million, Three Hundred and Twenty-Three Thousand, One Hundred and Sixty-Four (Kshs.11,323,164.00), inclusive of taxes, per annum.**

Professional Opinion

12. In a Professional Opinion dated 2nd September 2024, the Procuring Entity's Manager Supply Chain Management, CPSP Elvina Osodo reviewed the manner in which the subject procurement process was undertaken including the evaluation of bids and recommended the award of the subject tender to the Interested Party as proposed by the Evaluation Committee.
13. the Accounting Officer, Ms. Theresa K. Wasike, concurred with the Professional Opinion on 6th September 2024.

Notification to Bidders

14. Bidders were notified of the outcome of the evaluation of the tender *vide* letters dated 13th September 2024.

REQUEST FOR REVIEW

15. On 14th October 2024, Messrs Brooklyn Cleaning Services (hereinafter, "the Applicant"), through the firm of A.E. Kiprono & Associates filed a Request for Review dated 11th October 2024 supported by an affidavit sworn by Abdikadir Dahir, its sole Director seeking the following orders from the Board:

- a) An order annulling and setting aside the Respondent's letter to the Applicant dated 13th September 2024;***
- b) An order annulling and setting aside the award of the Tender to the Interested Party***
- c) A declaration that the Applicant's tender sum of Kshs. 10,944,351.60 is the lowest evaluated price;***
- d) Costs of the Request for Review be granted to the Applicant;***
- e) Any other relief that the Review Board deems fit to grant under the circumstances.***

16. In a Notification of Appeal and a letter dated 14th October 2024, Mr. James Kilaka, the Ag. Board Secretary of the Board notified the Respondents of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the said Respondents were requested to submit a response to the Request for Review together with confidential

documents concerning the tender within five (5) days from 14th October 2024.

17. On 25th October 2024, the Ag. 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 30th October 2024 at 11:00 a.m. through the link availed in the said Hearing Notice.
18. On 28th October 2024, the Respondents, through its representative, Japheth Kemei, filed a Memorandum of Response dated 25th October 2024. The said Respondents equally forwarded to the Board the Confidential Documents under Section 67(3) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter, "the Act").
19. On 29th October 2024, the Applicant filed Written Submissions of even date.
20. On 30th October 2024 at 11:00 a.m., when the Board convened for the online hearing, all parties were present and represented by their respective Advocates. The Board read through a list of the documents filed in the matter and asked parties to confirm having filed and been served the said documents, to which Counsel responded in the affirmative. However before the Board could issue hearing directions, Counsel for the Respondents, Mr. Odhiambo sought leave to file Written Submissions citing that he had sight of the Applicant's Written Submissions on the morning of 30th October 2024.

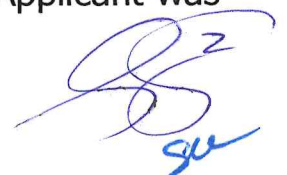


21. The Board briefly retreated and returned with the following directions:
- I. The plenary hearing had been adjourned to 31st October 2024 at 4:00 p.m.;
 - II. The Respondents had leave to file their Written Submissions by 31st October 2024 at 2:00 p.m.
 - III. Each party would have 5 minutes to highlight their Written Submissions.
22. On 31st October 2024 the Respondents filed Written Submissions of even date.
23. On 31st October 2024 at 4:00 p.m., when the Board convened for the online hearing, all parties were present and represented by their respective Advocates. Parties equally confirmed their readiness for the hearing.
24. Below is a summary of the parties cases as urged by their respective Counsel.

PARTIES SUBMISSIONS

Applicant's Submissions

25. Counsel for the Applicant, Mr. Anthony Kiprono argued that the Applicant submitted a bid bearing the tender price of Kshs. 10,944,351.60 only to receive a Notification Letter that its bid was unsuccessful upon Financial Evaluation and that the subject tender had been awarded to the Interested Party at a tender price of Kshs. 11,323,164. He indicated that upon seeking a debrief the Applicant was



informed that its tender price was abnormally low. According to Counsel the reason for the disqualification of the Applicant was a moving target since the Respondents, subsequently through their Memorandum of Response, indicated that the Applicant's tender price was below the price identified through a market survey.

26. The Applicant submitted that under Section 52 and 54(2A) of the Act a market survey is carried out before tender proceedings are initiated. It contended that the market survey applied in the evaluation of bids in the subject tender offended the Tender Document since:
- i. The Applicant having met Mandatory Requirements 12 and 13 on minimum wages under the Tender Document could be said to have offered a tender price that did not support the minimum wage.
 - ii. The cost of garbage collection, fumigation and cleaning could not be uniform across all bidders as the cost to each bidder depended upon a bidder's efficiency.
 - iii. Fumigation and garbage collection were in Lots and not in square feet and tonnage, respectively, as indicated in the market survey.
27. Accordingly, the Applicant invited the Board to reject the market survey report applied by the Procuring Entity for introducing foreign parameters to the subject tender.
28. Reliance was placed on Section 80 of the Act and the decisions in ***PPARB No. 30 of 2022; Pawa IT Solutions Ltd –vs- ICT Authority & Another and Public Procurement Administrative***



Review Board; Arid Contractors & General Supplies; Ex parte Meru University of Science & Technology; 2019 eKLR; for the proposition that evaluation should be based on the Tender Document.

29. The Applicant argued that the Respondents, in disqualifying the Applicant, adopted a criterion that was not provided for under the Tender Document. Further that it was absurd on the part of the Respondents to establish through the market survey that the cost to deliver the tender was Kshs. 13,962,008 but go ahead to award the same to the Interested Party at a tender price lower than this.
30. It argued further that whereas Clause 37.2 of the Tender Document outlined that for a tender to be determined as abnormally low, the Respondents had to seek written clarifications to a bidder, the Applicant never received any request for clarification on its tender price. It therefore contended that the Respondents never complied with this provision before disqualifying the Applicant's bid as abnormally low.
31. In sum, the Applicant contended that the Respondents breached the Constitution, the Act and Regulations 2020 as well as the Tender Document and therefore sought that the Request for Review be allowed.

Respondents' Submissions

32. Counsel for the Respondents, Mr. Fredrick Odhiambo submitted that from the 21 bids evaluated at the Financial Evaluation Stage, the Applicant was not the lowest evaluated bidder. He indicated that the tender prices of the 21 bids were as below:



S/NO	Firm name	Tender sum per month	Tender sum per year
1.	Kamtix Cleaners Ltd	589,712.00	7,076,544.00
2.	Nadiah Investment Ltd	2,287,882.00	27,454,584.00
3.	Noden Investment Ltd	1,662,941.57	19,955,298.80
4.	Rizenn Homes Services	1,969,261.92	23,631,143.00
5.	Ice Clean Care Group Co. Ltd	943,597.00	11,323,164.00
6.	Diamond Sparkle Ltd	1,320,538.49	15,846,461.90
7.	Jepco Services and Renovators Ltd	1,163,289.30	13,959,471.60
8.	Vinstar Express Services	1,293,627.87	15,523,535.40
9.	Cleanco Investments Ltd	1,124,780.63	13,497,367.68
10.	Kisima Cleaning Services Ltd	6,720,000.00	80,640,000.00
11.	Topkline Cleaning Services	1,017,800.00	12,213,600.00
12.	Colnet Ltd	1,180,382.81	14,164,593.72
13.	Cleanmark Ltd	775,500.00	9,306,000.00
14.	Brooklyn Cleaning Services	912,029.30	10,944,351.60
15.	Babs Facilities Ltd	1,596,000.00	19,152,000.00
16.	Oldcraft Ventures Ltd	3,429,554.27	41,154,651.20
17.	Rifno Cleaning Services Ltd	1,832,667.00	21,992,004.00
18.	Kenma Homecare Services	1,398,6000.48	16,783,205.80
19.	Saham Cleaning Services	1,159,770.08	13,917,240.96
20.	Optveil Enterprises Ltd	1,830,567.06	21,966,804.70
21.	Garbage Hero Ltd	835,579.35	10,026,952.20



33. The Respondents submitted that they were guided by Clause 35.1 of the Tender Document in identifying the substantially responsive bid that was also the lowest evaluated bid.
34. They argued that under Section 54(2) of the Act, standard goods, services and works with known prices should be procured at prevailing market prices. They further argued that under Section 80(3)(b) each criterion shall be expressed so that it is applied in accordance with procedures taking to account consideration prices, quality, time service and purpose of evaluation.
35. Relying on ***Somwet Ltd vs Ministry of interior and co-ordination, PPRAB No 67 and 68 of 2017*** it was argued that price should be given consideration so as to avert a scenario where a tender is awarded to a bidder offering an abnormally low or abnormally high tender price.
36. According to the Respondent, the Applicant's bid was disqualified at the Financial Evaluation Stage because its tender price was lower than the cost identified through a market survey conducted by the Procuring Entity's Head of Procurement.
37. The Respondent stated that the Applicant had been providing cleaning services to the Respondents at a cost of Kshs. 5,270,496 but cleaning services had since doubled with the introduction of new NITA Centers and thus it was not feasible for the Applicant to provide services at its quoted tender price.



38. It reiterated that the Applicant's bid was not the lowest evaluated bid and thus sought the dismissal of the Request for Review.

Applicant's Rejoinder

39. Counsel for the Applicant, Mr. Kiprono waived the Applicant's right to a rejoinder observing that no new issues had emerged.

CLARIFICATIONS

40. The Board sought clarity from the Respondents on what informed their decision to label the Applicant's tender price as abnormally low. The Evaluation Committee Chair, Mr. Odumo indicated that the Applicant who was the current service provider for cleaning services at three centers was offering the service at a cost Kshs. 5.2 million per year. He posited that with an increase in NITA centers to five and an addition of fumigation and garbage collection services, the Applicant would struggle to offer the services at its tender price.

41. It inquired from the Respondents on why the successful bidder was awarded the subject tender at a tender price of Kshs, 11 million, which amount was below the cost established through the market survey. The Evaluation Committee Chair, Mr. Odumo indicated that several bids ranging from Kshs. 7 million to 29 million were evaluated at the Financial Stage and that based on the market survey and the available budget, the Respondents settled on Kshs. 11 million.



42. As what exactly the Respondents considered noting that the difference between the Applicant and Interested Party's tender price was about Kshs. 300,000, Mr. Odumo stated that the market survey yielded a figure of Kshs. 15 million and the Procurement Department advised that a deviation of 25%, plus or minus), was permissible and this was about 11 million.
43. Asked whether the Respondent sought clarification from the Applicant on whether it could deliver at its quoted price, Mr. Odumo confirmed that the Applicant was not contacted with respect to its tender price.
44. The Board inquired from the Applicant where it got the information that its bid was the lowest evaluated tender and whether this information was factual. Counsel for the Applicant, Mr. Kiprono indicated that from the Notification Letter it received, it was apparent that the Applicant made it to the Financial Evaluation Stage and that the Interested Party's tender price was higher than the Applicant. Counsel further indicated that he was not aware that there were other multiple bidders whose bids made it to the Financial Evaluation Stage.
45. The Applicant, in response to an inquiry, also confirmed that it was the current service provider but counsel did not have full information on the cost at which the Applicant was offering the services.
46. Asked to confirm when the market survey was done, by whom and whether a market survey report was prepared and forwarded to the Board, Counsel for the Respondents, Mr. Odhiambo indicated that the



market survey was done by the Head of Procurement prior to evaluation and that though there was a report, the same was not made available to the Board. Ms. Mbithe, a representative from the Procurement Department however indicated that whereas a market survey was conducted there was no market survey report.

47. Asked about the percentage deviation the Respondents were willing to allow beyond the Respondent's stated market survey figure of about Kshs. 15 million for the cost of the services, Ms. Mbithe indicated 25%.
48. The Board probed further and inquired on what was special about the 25% deviation. The Evaluation Committee Chair, Mr. Odumo indicated that is the percentage allowed in works.
49. The Board asked whether there was a specific document that guided on the 25% deviation. The Evaluation Committee Chair, Mr. Odumo confirmed that there was none.
50. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 14th October 2024 had to be determined by 4th November 2024. Therefore, the Board would communicate its decision on or before 4th November 2024 to all parties via email.



BOARD'S DECISION

51. 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 improperly disqualified the Applicant's tender at the financial evaluation stage in breach of the provisions of Section 80(2) of the Act.*
- ii. What orders the Board should issue in the circumstance.*

As to whether the Procuring entity improperly disqualified the Applicant's tender at the financial evaluation stage in breach of the provisions of Section 80(2) of the Act

52. The Applicant challenged the disqualification of its bid by the Procuring Entity upon financial evaluation on what was termed as being abnormally low. According to the Applicant it submitted a lower tender price compared to the Interested Party and yet it was disqualified at the financial evaluation stage in preference to the Interested Party's bid.

53. The Applicant stated that the Respondents adopted criteria that were not provided for under the Tender Document in disqualifying its tender. Further, that it was absurd on the part of the Respondents to establish through the market survey that the cost to deliver the services of the



tender was Kshs. 13,962,008 only for it to award the tender to the Interested Party at a tender price lower than this.

54. The Applicant also stated that it never received any request for clarification on its tender price as provided for under Clause 37.2 of the Tender Document for a tender to be determine as abnormally low and therefore contended that the Respondents did not comply with this provision before disqualifying the Applicant's bid.
55. On the flip side, the Respondents argued that from the 21 bids evaluated at the Financial Evaluation Stage, the Applicant's bid was not the lowest evaluated bid. According to the Respondents, the Applicant's bid was disqualified at the Financial Evaluation Stage because its tender price was lower than the cost identified through a market survey conducted by the Procuring Entity's Head of Procurement.
56. The Respondents argued that under Section 54(2) of the Act standard goods, services and works with known prices should be procured at prevailing market prices. Further that under Section 80(3)(b) of the Act each criterion shall be expressed so that it is applied in accordance with procedures taking into account consideration prices, quality, time service and purpose of evaluation. Additionally, that price should be given consideration so as to avert a scenario where a tender is awarded to a bidder offering an abnormally low or abnormally high tender price.
57. The Respondents argued further that the Applicant has been providing cleaning services to the Respondents at a cost of Kshs. 5,270,496 but



that cleaning services have since doubled with the introduction of new NITA Centers and thus it was not feasible for the Applicant to provide services at its quoted tender price.

58. The question that arises from the foregoing rival positions is whether the Procuring properly evaluated the Applicant's tender resulting in its disqualification at the financial evaluation stage.
59. To answer this question the Board has reviewed the notification letter dated 13th September 2024 that the Respondents sent to the Applicant, which reads:

"...

Reference is made to the above-mentioned tender in which you participated.

This is to notify you that the offer in relation to the above named tender has been determined to be unsuccessful upon Financial evaluation.

We therefore wish to inform you that the successful bidder that was awarded the tender is M/S Ice Clean Care Group Company Limited at a total cost of Kenya Shillings Eleven Million, Three Hundred and Twenty Three Thousand, One Hundred and Sixty Four (Kshs. 11,323,164.00) only per year.

...

Yours faithfully,

Signed

Theresa K Wasike (Ms.)



60. From the above letter it is apparent that the Applicant’s bid evaluated at the Financial Evaluation Stage, which was the last stage of the evaluation.

61. The Board takes cognizance of the provisions of the Act that guide the evaluation process and selection of winning bidder. Section 86 reads as follows:

Section 86 - Successful tender:

“(1) The successful tender shall be the one who meets any one of the following as specified in the tender document—

(a) the tender with the lowest evaluated price;

(b) the responsive proposal with the highest score determined by the procuring entity by combining, for each proposal, in accordance with the procedures and criteria set out in the request for proposals, the scores assigned to the technical and financial proposals where Request for Proposals method is used;

(c) the tender with the lowest evaluated total cost of ownership; or

(d) the tender with the highest technical score, where a tender is to be evaluated based on procedures regulated by an Act of Parliament which provides guidelines for arriving at applicable professional charges: Provided that the provisions of this subsection shall not apply to section 141 of this Act.



(2) For the avoidance of doubt, citizen contractors, or those entities in which Kenyan citizens own at least fifty-one per cent shares, shall be entitled to twenty percent of their total score in the evaluation, provided the entities or contractors have attained the minimum technical score."

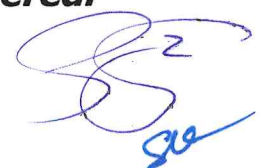
62. From the foregoing, it follows that the successful bid in the subject tender is the one that is established as offering the lowest tender price from bids evaluated at the Financial Evaluation Stage. It is also goes without saying that for a bid to get to the Financial Evaluation Stage, it has to have met the requirements prescribed at the Preliminary and Technical Evaluation Stages.

63. On its part Section 80 of the Act is instructive on the Procuring Entity's Evaluation Committee approaching the evaluation process in adherence to the criteria set out in the Tender Document:

Section 80 - Evaluation of tenders,

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

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



64. On the other hand, Section 79 of the Act offers clarity on the responsiveness of tenders in the following terms:

Section 79 - Responsiveness of tenders,

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

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

a) minor deviations that do not materially depart from the requirements set out in the tender documents; or

b) errors or oversights that can be corrected without affecting the substance of the tender.

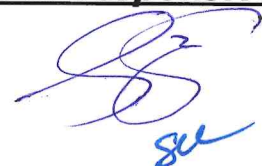
(3) A deviation described in subsection (2)(a) shall—

a) be quantified to the extent possible; and

b) be taken into account in the evaluation and comparison of tenders."

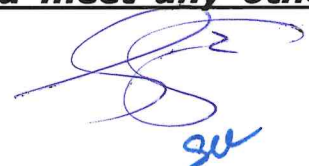
65. The dictum of the High Court in ***Republic v Public Procurement Administrative Review Board & 2 others Ex parte BABS Security Services Limited [2018] eKLR; Nairobi Miscellaneous Application No. 122 of 2018*** further illuminates on what constitutes responsiveness of a bid under Section 79 of the Act. In the case, the court while considering a judicial review application against a decision of this Board pronounced itself thus:

"19. It is a universally accepted principle of public procurement that bids which do not meet the minimum requirements as stipulated in a bid document are to be regarded as non-responsive and rejected without further consideration.[9] Briefly, the requirement of responsiveness



operates in the following manner:- a bid only qualifies as a responsive bid if it meets with all requirements as set out in the bid document. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements.[10] Bid formalities usually require timeous submission of formal bid documents such as tax clearance certificates, audited financial statements, accreditation with standard setting bodies, membership of professional bodies, proof of company registration, certified copies of identification documents and the like. Indeed, public procurement practically bristles with formalities which bidders often overlook at their peril.[11] Such formalities are usually listed in bid documents as mandatory requirements – in other words they are a sine qua non for further consideration in the evaluation process.[12] The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing or empowerment. Bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome.

20. In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other



requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions."

See also ***Nairobi High Court Judicial Review Misc. Application No. 407 of 2018; Republic v Public Procurement Administrative Review Board; Arid Contractors & General Supplies (Interested Party) Ex parte Meru University of Science & Technology [2019] eKLR***

66. Drawing from the above, the Tender Document is the key guide in the evaluation of tenders submitted in response to any tender invitation. Further, for a tender to be deemed responsive in respect of any requirement, it must comply with the specification of the actual requirement as set out in the Tender Document.



67. The Board has keenly studied the Tender Document and observed that it bears multiple provisions that offer guidance on identifying the successful bidder:

68. Clause 35 under Section I-Instructions To Tenders at page 17 of the Tender Document states:

"35 Evaluation of Tenders

35.1 The Procuring Entity shall use the criteria and methodologies listed in this ITT and Section III, Evaluation and Qualification Criteria. No other evaluation criteria or methodologies shall be permitted. By applying the criteria and methodologies, the Procuring Entity shall determine the Best Evaluated Tender. This is the Tender of the Tenderer that meets the qualification criteria and whose Tender has been determined to be:

- a)Substantially responsive to the tendering document; and***
- b)the lowest evaluated cost***

35.2 In evaluating the Tenders, the Procuring Entity will determine for each Tender the evaluated Tender cost adjusting the Tender price as follows:

- a)Price adjustments due to discounts offered in accordance with ITT 16.4***
- b)Price adjustment due to quantifiable non material non-conformities in accordance with ITT 31.3;***



c)Converting the amount resulting from applying (a) and (b) above, if relevant to a single currency in accordance with ITT 33; and

d) any additional evaluation factors specified in the TDS and Section III, Evaluation and Qualification Criteria”

69. Clause 36 under Section I-Instructions To Tenders at page 17 of the Tender Document specifically offers clarity on the comparison of bids to identify the successful bidder:

"36.1 The Procuring Entity shall compare the evaluated costs of all substantially responsive Tenders established in accordance with ITT 35.2 to determine the Tender that has the lowest evaluated cost”.

70. Clause 37 under Section I-Instructions to Tenderers at page 17 of the Tender Document provides for Abnormally Low and High Tenders. Specifically on Abnormally Low Tenders, it provides as follows:

37.1 An Abnormally Low Tender is one where the Tender price, in combination with other elements of the Tender, appears so low that it raises material concerns as to the capability of the Tenderer in regards to the Tenderer’s ability to perform the Contract for the offered Tendered Price.

37.2 In the event of identification of a potentially Abnormally Low Tender, the Procuring Entity shall seek written clarifications from the Tenderer, including detailed price analyses of its Tender price in relation to the subject matter of the contract, scope, proposed methodology, schedule,

allocation of risks and responsibilities and any other requirements of the Tender document.

37.3 After evaluation of the price analyses, in the event that the Procuring Entity determines that the Tenderer has failed to demonstrate its capability to perform the Contract for the offered Tender Price, the Procuring Entity shall reject the Tender.

71. Under Section III- Evaluation and Qualification Criteria, at page 27 of the Tender Document, the evaluation criteria to be used at the Financial Evaluation Stage is set out as follows:

Stage 3 - Financial Evaluation,

"The responsive bidder(s) will be considered for Financial Evaluation. At this stage, bidders who have passed Technical Evaluation I&II will be checked against:

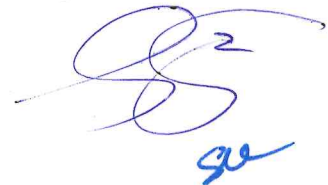
a)Arithmetical Errors: A bidder whose bid will have arithmetical errors shall be quantified and treated as stipulated in the Public Procurement and Asset Disposal Act.

b)Tender Security: Tenderers must attach tender securing declaration.

c)Price schedule: Must be fully filled, signed and stamped as indicated in the instructions to tenderers.

d)Form of tender: Must be correctly filled, signed and stamped with total contract sum both in figures and words by the Tenderer"

i.Due diligence/post-qualification



National Industrial Training Authority may conduct due diligence on the lowest evaluated bidder prior to the Award as per the Public Procurement and Asset Disposal Act, 2015. The Authority shall verify and determine to its satisfaction whether the tenderer that is selected as having submitted the lowest evaluated bid is responsive and qualified to perform the contract satisfactorily.

v) AWARD CRITERIA

National Industrial Training Authority will award the contract to the successful tenderer whose tender has been determined to be substantially responsive and has been determined to be the lowest evaluated tender.

72. From the above provisions of the Tender Document, it is apparent with regard to the subject tender that:
- i. Evaluation of bids was to be based on the evaluation criteria set out in the Tender Document.
 - ii. No other evaluation criteria outside the Tender Document was permitted.
 - iii. The successful bid was that which was substantially responsive and offering the lowest evaluated price.
 - iv. The lowest evaluated price was to be determined from a comparison of the evaluated cost of all substantially responsive bids.
 - v. An abnormally low tender is one where the tender price, in combination with other elements of the tender, appears so low as



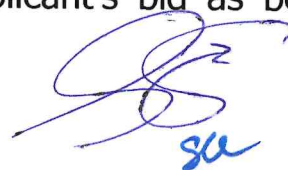
to raise concerns over a bidder's ability to deliver on a tender at its tender price.

- vi. The Tender Document required that where the Procuring Entity spotted a potentially abnormally low tender, it would seek a written clarification from the concerned bidder and a decision as to whether or not to reject its bid as abnormally low would be made after considering the bidder's clarification.

73. Turning to the case at hand, the Board notes that the 21 bids evaluated at the Financial Evaluation Stage were determined to be substantially responsive at the preliminary and technical stages of the evaluation. From the Tender Document, the successful bid would be established as the one offering the lowest tender price at the Financial Evaluation Stage.
74. The Board notes that the Procuring Entity's Evaluation Committee carried out a market survey that yielded Kshs. 15 million as the cost of the service being procured under the subject tender. The market survey cost was then adjusted by a 25% deviation to form the basis upon which the evaluation at the financial stage was done.
75. The Board has perused the Tender Document and notes that nowhere in the Tender Document was it provided that a market survey would be carried out and the resultant cost adjusted through a deviation of 25% to determine the benchmark cost for the evaluation of the tender prices submitted by the bidders.



76. Assuming, for a moment, that the notion of a market survey was the way to go in establishing the benchmark cost upon which the winning bidder would be determined, this was not carried through. Despite finding that the cost of delivering the tender was Kshs. 15 million, the Evaluation Committee of the Procuring Entity chose to determine that the successful bid would be the one priced between Kshs. 11 million and 12 million on the basis of a 25% deviation of the market survey cost. No reason whatsoever was provided for this specific percentage of deviation as the same was unsupported by any document as admitted by the Respondents. In the absence of documentary support or cogent proof, the choice of a percentage of deviation 25% from the market survey cost as an acceptable limit of tender price can, not only be termed as arbitrary and unjustified, but a breach of Section 80(3) of the Act which requires an evaluation criterion to be objective and quantifiable.
77. Further, whereas the Respondents indicated that the Applicant's bid was disqualified for being abnormally low, The Evaluation Committee's Chair, Mr. Odumo admitted that the procedure of determining abnormally low bids found at clause 37 under Section I-Instructions to Tenders of the Tender Document was not followed. Clause 37 required a Procuring Entity to seek written clarification from a bidder submitting a potentially abnormally low bid on its capacity to deliver on the tender at its quoted price. No such clarification was sought from the Applicant. In the absence of a written clarification there was no basis upon which the Respondents could objectively determine the Applicant's bid as being abnormally low.



78. Summing up all of the foregoing, the Board notes that the Applicant's tender was found responsive at the preliminary and technical evaluations but disqualified at financial evaluation stage for being abnormally too low. Further, the Procuring Entity applied a Kshs 15 million cost of the tender derived from a market survey with a 25% deviation on cost as a basis of evaluation at the financial stage; the market survey conducted by the Procuring Entity was not part of the evaluation criteria provided for in the Tender Document; no report was availed to the Board to back up claims by the Procuring Entity that it carried out a market survey that established the cost of the tender of Ksh 15 million; Clarification for abnormally low tenders was not sought by the Procuring Entity from the Applicant on its capacity to deliver on the subject tender at its tender price.
79. Based on the foregoing analysis of evidence, the Board is satisfied that the Respondents did not apply the evaluation criteria set out in the Tender Document in the evaluation of the Applicant's tender at the Financial Evaluation Stage. The Respondents' Evaluation Committee applied an evaluation criterion that was alien to its own Tender Document for financial evaluation of the tender. This Board will not protect a Procuring Entity that chooses to set aside its own tender document when it comes to evaluation of bids that have been submitted in accordance with the requirements laid out in the tender document. A criterion introduced in the currency of the tender process will, in all probability, be struck out when brought to the attention of this Board.

80. Considering the foregoing, the Board finds that the Procuring Entity (Respondents herein) departed from the evaluation criteria set out in the Tender Document in the evaluation of the Applicant's tender at the financial evaluation stage and therefore acted in breach of the provisions of Section 80 (2) of the Act as read with Article 227(1) of the Constitution in disqualifying the Applicant's tender. Accordingly, this ground of review succeeds and is allowed.

As to what orders the Board should grant in the circumstances


81. The Board has found that the that Respondents did not properly evaluate the Applicant's bid in the subject tender in line with the provisions of the Constitution of Kenya, 2010, the Act, the Regulations 2020 and the Tender Document.

82. The upshot of the Board's finding is that the Request for Review dated 11th October 2024 in respect of Tender No. NITA/01/2024-2025 for Provision of Cleaning/ Fumigation/ Sanitary and Garbage Disposal Services in NITA Headquarters, NITA Athi River, NITA Kisumu and NITA Mombasa succeeds in the following specific terms:

FINAL ORDERS

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

1. The Procuring Entity's Letters of Notification dated 13th September 2024 and addressed to the Interested Party, the Applicant and all unsuccessful bidders in respect of



Tender No. NITA/01/2024-2025 for Provision of Cleaning/ Fumigation/ Sanitary and Garbage Disposal Services in NITA Headquarters, NITA Athi River, NITA Kisumu and NITA Mombasa be and are hereby cancelled and set aside.


- 2. The 1st Respondent be and is hereby directed to re-admit the Applicant back into the tender process and re-evaluate its tender at the Financial Evaluation Stage, alongside other bids that were responsive at the Technical Evaluation Stage in respect of the subject tender, and complete the evaluation process, including the making of an award, within 15 days from the date of this Decision.**
- 3. For avoidance of doubt, the 1st Respondent shall reconvene the Procuring Entity's Evaluation Committee for purposes of the re-evaluation ordered in 2 above.**
- 4. Given that the procurement process is not complete each party shall bear its own costs in the Request for Review.**

Dated at NAIROBI, this 4th Day of November 2024.



PANEL CHAIRMAN

PPARB



SECRETARY

PPARB