

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 116/2024 OF 22ND NOVEMBER 2024

BETWEEN

PEESAM LIMITED APPLICANT

AND

THE ACCOUNTING OFFICER,

KENYA ELECTRICITY GENERATING

COMPANY PLC 1ST RESPONDENT

KENYA ELECTRICITY GENERATING

COMPANY PLC 2ND RESPONDENT

BROOKLYN CLEANING 1ST INTERESTED

PARTY

CLEANMARK LIMITED 2ND INTERESTED

PARTY

ZUZUMZ LIMITED 3RD INTERSTED

PARTY

DIAMOND SPARKLE LIMITED 4TH INTERSTED

PARTY

JOYMACX ENTERPRISES 5TH INTERSTED

PARTY

Review against the decision of the Accounting Officer Kenya Electricity Generating Company PLC in relation to Tender No. KGN-ADM-007-2024 for

Provision of Cleaning, Garbage Management and Gardening Services for Kengen Premises for the Year 2024-2026 (Re-tender).

BOARD MEMBERS PRESENT

1. Ms. Alice Oeri - Panel Chairperson
2. Dr. Susan Mambo - Member
3. QS Hussein Were - Member

IN ATTENDANCE

1. Mr. Philemon Kiprop - Holding brief for Acting Board Secretary
2. Ms. Evelyn Weru - Secretariat

PRESENT BY INVITATION

APPLICANT

Ms. Munyu

PEESAM LIMITED

- Advocate, Chepkuto Advocates

1ST & 2ND RESPONDENT

Mr. Mogaka

THE ACCOUNTING OFFICER, KENYA ELECTRICITY GENERATING COMPANY PLC & KENYA ELECTRICITY GENERATING COMPANY PLC

- Advocate, Mogaka Omwenga & Mabeya Advocates

Mr. Abiud Ambehi -Advocate, Mogaka .Omwenga & Mabeya
Advocates

1ST INTERESTED PARTY BROOKLYN CLEANING

N/A

2ND INTERESTED PARTY CLEANMARK LIMITED

N/A

3RD INTERSTED PARTY ZUZUMZ LIMITED

N/A

4TH INTERSTED PARTY DIAMOND SPARKLE LIMITED

N/A

5TH INTERSTED PARTY JOYMACX ENTERPRISES

Mr. Amondi - Advocate, Amondi & Co. Advocates

BACKGROUND OF THE DECISION

The Tendering Process

1. Kenya Electricity Generating Company PLC, the Procuring Entity and 2nd Respondent herein invited sealed tenders in response to Tender No. KGN-ADM-007-2024 for Provision of Cleaning, Garbage Management and Gardening Services for Kengen Premises for the Year 2024-2026 (Re-tender). (hereinafter referred to as "the subject tender"). The

invitation was by way of an advertisement on 18th June 2024 published on My Gov Newspaper, the Procuring Entity's website www.kengen.co.ke and the Public Procurement Information Portal www.tenders.go.ke where the blank tender document for the subject tender issued to tenderers by the Procuring Entity (hereinafter referred to as the Tender Document') was available for download. The initial subject tender's submission deadline was scheduled on 29th September 2024 East Africa Time. The Procuring Entity issued several clarifications and addendums while extending the tender submission deadline to 13th August 2024.

Submission of Tenders and Tender Opening

2. According to the Tender Opening Minutes signed by members of the Tender Opening Committee and which Tender Opening Minutes were part of confidential documents furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') by the 1st Respondent pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act') thirty-eight (38) bidders submitted bids in the subject tender as follows:

DOC NO.	NAME OF FIRM	AMOUNT (KShs. Inclusive of VAT)	REMARKS
1.	VINSTAR EXPRESS SERVICES LTD	KSHS.339,091.00	
2.	OLLREGGY INVESTMENT	KSHS.115,201,920.00	

3.	KAMTIX CLEANERS CO NLTD	KSHS.96,655,860.00	
4.	GLACIER EAST AFRICA LTD	KSHS.40,559,998.32	
5.	LAXCOM HOLDINGS LIMITED	KSHS.24,179,040.00	
6.	PEESAM LIMITED	KSHS.124,584,000.00	
7.	REMARC CLEANING SERVICES LTD	KSHS.176,054,681.92	
8.	ZEINA VENTURES (EA) LIMITED	KSHS.933,129,088.64	
9.	GARBAGE HERO LIMITED	KSHS.22,064,743.00	
10	BUTTERFLY FACILITIES LTD	KSHS.140,160,000.00	NO BID SUBMITTED IN THE SRM PORTAL
11	HURRICANE GLOBAL FM KENYA	KSHS.83,965,440.00	
12	KISIMA CLEANING SERVICES LIMITED	KSHS.56,403,415.00	
13	DANLEY COMPANY LTD	KSHS.6,546,072.00	
14	IBSOIS ENTERPRISES	KSHS.21,882,474.00	
15	SPACE HYGIENE STYSEMS LIMITED	KSHS.180,418,512.00	
16	DILYWALAH ORIENT LIMITED	KSHS.15,109,100.00	
17	SMART HOME DESIGNS	KSHS.102,789,177.60	
18	SHAKE INDUSTRIES LTD	KSHS.79,221,504.00	
19	ASEFAH LIMITED	KSHS.21,575,781.60	

20	ONEWAY FACILITIES MANAGEMENT LIMITED	KSHS.69,147,600.00	
21	KOTAA EAST AFRICA LIMITED	KSHS.191,368,868.00	NO BID SUBMITTED IN THE SRM PORTAL
22	CLEANCO INVESTMENTS LIMITED	KSHS.83,254,142.00	NO BID SUBMITTED IN THE SRM PORTAL
23	PARAMAX CLEANING SERVICES LIMITED	KSHS.93,450,960.00	NO BID SUBMITTED IN THE SRM PORTAL
24	DAVIMORE LIMITED	KSHS.92,066,880.00	NO BID SUBMITTED IN THE SRM PORTAL
25	DECHRIP EAST AFRICA LIMITED	KSHS.35,792,106.00	
26	NADIAH INVESTMENTS LIMITED	KSHS.54,875,640.00	
27	CLEANMARK LIMITED	KSHS.121,772,160.00	
28	HANNANELI SUPPLIERS LIMITED	KSHS.139,048,188.00	
29	REEHO LIMITED	KSHS.121,830,527.96	
30	OPTIVEIL ENTERPRISES LIMITED	KSHS.95,663,336.80	
31	IN HOUSE KENYA	KSHS.116,846,798.20	NO BID

	SOLUTIONS LIMITED		SUBMITTED IN THE SRM PORTAL
32	VANECO ENTERPRISES	KSHS.81,487,680.00	
33	VILLAGE MASTARS LIMITED	KSHS.43,012,729.00	
34	IFOR CLEANING SERVICES LIMITED	KSHS.62,436,200.00	
35	DIAMOND SPARKLE LIMITED	KSHS.152,664,581.28	
36	YIEWSLEY VENTURES LIMITED	KSHS.129,567,360.00	
37	ZUZUMZ LIMITED	KSHS.124,639,680.00	
38	OUTLAND EXPRESS SERVICES LIMITED	KSHS.10.00	NO BID SUBMITTED IN THE SRM PORTAL
39	JOYMACX ENTERPRISES	KSHS.155,740,634.00	
40	BICEVEN EAST AFRICA LIMITED	KSHS.17,047,517.00	
41	SENDER SERVICES COMPANY LIMITED	KSHS.116,649,600.00	
42	DILYWALAH ORIENT LIMITED	KSHS.64,528,334.72	BID DOCUMENTS IN THE SRM PORTAL BUT NOT INDICATED IN THE TENDER

			OPENING REGISTER
43	BROOKLYN CLEANING SERVICES LIMITED	KSHS.105,243,120.48	BID DOCUMENTS IN THE SRM PORTAL BUT NOT INDICATED IN THE TENDER OPENING REGISTER
44	DASONET CLEANING COMPANY LIMITED	KSHS.	BID DOCUMENTS IN THE SRM PORTAL BUT NOT INDICATED IN THE TENDER OPENING REGISTER
45	KISIMA CLEANING SERVICES LIMITED	FORM OF TENDER NOT ATTACHED	BID DOCUMENTS IN THE SRM PORTAL BUT NOT INDICATED IN THE TENDER OPENING REGISTER

Evaluation of Tenders

3. A Tender Evaluation Committee appointed by the Respondent undertook evaluation of the submitted bids as captured in a Tender Evaluation Report for the subject tender in the following stages:
 - i Preliminary Evaluation
 - ii Technical Evaluation
 - iii Financial Evaluation

Preliminary Evaluation

4. The Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Mandatory Requirements of Section III- Evaluation and Qualification Criteria at page 35 to 36 of the Tender Document. Tenderers were required to meet all the mandatory requirements at this stage to proceed for Technical Evaluation.
5. At the end of evaluation at this stage, seventeen (17) tenders were determined non-responsive, while twenty-one (21) tenders were determined responsive and proceeded to Technical Evaluation.

Technical Evaluation

6. The Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Stage 2: Technical Evaluation on Capacity to Deliver the Contract of Section III- Evaluation and Qualification Criteria at page 37 to 38 of the Tender Document.

Tenderers were required to meet all the requirements at this stage to proceed for Financial Evaluation.

7. At the end of evaluation at this stage nine (9) tenders were determined non-responsive, while twelve (12) tenders were determined responsive and proceeded to Financial Evaluation.

Financial Evaluation

8. The Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Stage 3. Financial Evaluation Criteria of Section III- Evaluation and Qualification Criteria at page 39 of the Tender Document. Following evaluation of tenders against the set out criteria, a comparative analysis was carried out on each bidder's bid price against the total minimum wages and consumable costs in each cluster and a bidder whose tender price was below the statutory minimum wage for each cluster was not considered for award of the subject tender.

9. At the end of evaluation, the following bidders were recommended for award:

SUMMARY OF THE FIRMS RECOMMENDED FOR AWARD

CLUSTERS	REGIONS	AGPO CATEGORY	FIRM RECOMMENDED FOR AWARD	AMOUNT 2 YEARS, VAT INCLUSIVE (KSHS)

1	Garissa & Ngong Power Station-Compound bush clearing,	Youth	Brooklyn Cleaning Services Limited	4,123,104.00
2	Kipevu-Cleaning of offices, power	Women	Cleanmark Limited	14,365,440.00
3	Kipevu-Compounds Bush	Women	Zuzumz Limited	9,048,000.00
4	Turkwel-Compounds Bush	Women	Diamond Sparkle Limited	11,530,757.31
5	Gitaru. Kiambere, Kindaruma & Ndula-Compounds Bush	Women	Diamond Sparkle Limited	30,717,378.24
6	Gogo, Sondu, Sangoro, Muhoroni, Sosiani-Cleaning of offices	PWD	Joymacx Enterprises	47,578,560.00

Due Diligence

10. The Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Stage 4. Due Diligence of Section III- Evaluation and Qualification Criteria at page 39 of the Tender Document. Prior to award of the subject tender, the Procuring Entity was required to carry out due diligence through site visit(s) to bidder(s)' office(s) and/or areas where bidder(s)' are currently offering similar service(s) and contacting bidder(s)' references/referees so as to determine to its satisfaction whether the selected bidder(s) would qualify to perform the contract satisfactorily.

11. Following the due diligence exercise, the Evaluation Committee found as follows:

DESCRIPTION	S			ZUZUMU	CLEANMARK	BROOKLYN
				LIMITED	LIMITED	CLEANING SERVICES LIMITED
A Office Location Details						
Physical Business Address	✓	✓	✓	✓	✓	✓
Valid Single Business Permit	✓	✓	✓	✓	✓	✓
Valid Lease Agreement	✓	✓	✓	✓	✓	✓
B Legal requirements						
CR12 (where applicable)	✓	✓	✓	✓	✓	✓
Valid Registration Certificate /Certificate of Incorporation	✓	✓	✓	✓	✓	✓
Valid Tax compliance certificate	✓	✓	✓	✓	✓	✓
Valid & current AGPO certificate for the relevant group (Women Enterprise/Youth/PWD)	✓	✓	✓	✓	✓	✓
National Council of persons with Disabilities (NCPWD) disability card (applicable to PWD)	✓	✓	✓	✓	✓	✓
PIN Certificate	✓	✓	✓	✓	✓	✓
Valid Compliance Certificate from the National Social Security Fund (NSSF)	✓	✓	✓	✓	✓	✓
Valid Compliance Certificate from the National/Social Health Insurance Fund (NISHIF)	✓	✓	✓	✓	✓	✓
OSHA Certificate	✓	✓	✓	✓	✓	✓
Valid NEMA License (waste management)	✓	✓	✓	✓	✓	✓
Valid County Permit /License (waste management)	✓	✓	✓	✓	✓	✓
Logbook/s- Garbage transport vehicle	✓	✓	✓	✓	✓	✓
Logbook/s- staff transport vehicle	✓	✓	✓	✓	✓	✓
C Technical requirements						
Cleaning Machines & equipment	✓	✓	✓	✓	✓	✓
Capacity for delivery (original letter for financing commitment from financial institution)	✓	✓	✓	✓	✓	✓
D Staffing Skills						
Availability of Key staff i.e Supervisor	✓	✓	✓	✓	✓	✓
E Work Experience/ Similar Projects Undertaken/ Similar Contracts in place						
	✓	✓	✓	✓	✓	✓

DESCRIPTION				ZUZUMZ LIMITED	CLEANMARK LIMITED	BROOKLYN CLEANING SERVICES LIMITED
REMARKS	PASS	PASS	PASS	PASS	PASS	PASS
GENERAL REMARKS						
ALL THE RECOMMENDED FIRMS HAVE THE CAPACITY TO SATISFACTORILY DELIVER THE CONTRACT AND WERE THEREFORE DEEMED SUITABLE FOR AWARD.						

Evaluation Committee's Recommendation

12. The Evaluation Committee recommended award of the subject tender as follows:

CLUSTERS	REGIONS	AGPO CATEGORY	FIRM RECOMMENDED FOR AWARD	AMOUNT 2 YEARS, VAT INCLUSIVE (KSH)
1	Garissa & Ngong Power Station-Compound bush clearing,	Youth	Brooklyn Cleaning Services Limited	4,123,104.00
2	Kipevu-Cleaning of offices, power	Women	Cleanmark Limited	14,365,440.00
3	Kipevu-Compounds Bush	Women	Zuzumz Limited	9,048,000.00
4	Turkwel-Compounds Bush	Women	Diamond Sparkle Limited	11,530,757.31
5	Gitaru, Kiambere, Kindaruma & Ndula-Compounds Bush	Women	Diamond Sparkle Limited	30,717,378.24
6	Gogo, Sondu, Sangoro, Muhoroni, Sosiani-Cleaning of offices	PWD	Joymax Enterprises	47,578,560.00

Professional Opinion

13. In a Professional Opinion dated 12th November 2024, the Ag. General Manager – Supply Chain, Mr. Vincent Mamboleo reviewed the manner in which the procurement process in the subject tender was undertaken including evaluation of tenders and concurred with the Evaluation Committee’s recommendation of award of the subject tender as set out in the Evaluation Report.

14. The Professional Opinion was approved as recommended by the 1st Respondent, Eng. Peter Njenga, on 12th November 2024.

Notification to Tenderers

15. Tenderers were notified of the outcome of evaluation of the subject tender vide letters dated 13th November 2024.

REQUEST FOR REVIEW NO. 116 OF 2024

16. On 22nd November 2024, Peesam Limited, the Applicant herein, filed a Request for Review dated 21st November 2024 together with a Supporting Affidavit sworn by Samuel Mburu on 21st November 2024 (hereinafter referred to as “the instant Request for Review”) through Chepkuto Advocates seeking the following orders from the Board:

a) A declaration that the Procurement Entity breached the requirements under the Tender Document.

- b) A declaration that the Procurement Entity breached the provisions of the Public Procurement and Asset Disposal Act, 2015:***
- c) A declaration that the Procurement Entity breached Article 227(1) of the Constitution, 2010.***
- d) The decision of the Procuring entity dated 13th November 2024 to award the tender to the Interested Party be annulled and set aside forthwith.***
- e) The Applicant be declared the Lowest Evaluated Bidder in clusters 1,3, 4, 5 and 6, and the Tender FOR PROVISION OF CLEANING, GARBAGE MANAGEMENT AND GARDENING SERVICES FOR KENGEN PREMISES FOR THE YEAR 2024-2026 (RE-TENDER) NO. KGN-ADM-007-2024 be awarded to the Applicant.***
- f) An order do issue terminating any contract entered into by the Procuring Entity until the logical conclusion of this matter***
- g) The costs of this application be awarded to the Applicant in any event.***

17. In a Notification of Appeal and a letter dated 22nd November 2024, Mr. James Kilaka, the Acting Secretary of the Board notified the 1st and 2nd

Respondents of the filing of the Request for Review and the suspension of the procurement proceedings of the subject tender, while forwarding to the said Procuring Entity 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 Procuring Entity was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 22nd November 2024.

18. On 26th November 2024, the 1st and 2nd Respondents filed through Mogaka Omwenga & Mabeya Advocates a Notice of Appointment of Advocates dated 26th November 2024, a 1st and 2nd Respondents Memorandum of Response to the Request for Review dated 26th November 2024, Replying Affidavit sworn on 26th November 2024 by Vincent Nyamweya Mamboleo together with confidential documents submitted pursuant to Section 67(3)(e) of the Act.

19. *Vide* letters dated 27th November 2024, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the tender within three (3) days.

20. *Vide* a Hearing Notice dated 29th November 2024, the Acting Board Secretary, notified parties and all tenderers of an online hearing of the instant Request for Review slated for 4th December 2024 at 11:00 a.m. through the link availed in the said Hearing Notice.
21. On 29th November 2024, the 5th Interested Party filed through Amondi & Co. Advocates a Notice of Appointment dated 25th November 2024, an Affidavit of the 5th Interested Party in Opposition to the Request for Review sworn by Joyce Moraa Oyaro on 29th November 2024, Written Submissions dated 29th November 2024 and a List of Authorities dated 29th November 2024.
22. On 4th December 2024, the Applicant filed through its advocates a Further Affidavit sworn by Samuel Nganga on 3rd December 2024 and Written Submissions dated 3rd December 2024.
23. On 4th December 2024, the 1st and 2nd Respondents filed through their advocates Written Submissions dated 4th December 2024.
24. The 1st, 2nd, 3rd, and 4th Interested Parties did not file any pleadings in the instant Request for Review.
25. At the hearing on 4th December 2024, the Board read out the pleadings filed by parties in the matter and allocated time for parties to highlight their respective cases. Thus the instant Request for Review proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

Applicant's submissions

26. In her submissions, counsel for the Applicant, Ms. Munyu relied on the documents filed by the Applicant before the Board in the instant Request for Review.
27. Counsel submitted that sometime in November 2023, the Procuring Entity invited sealed bids in response to Tender No. KGN-ADM-014-2023 for Provision of Cleaning, Garbage Management and Gardening Services for Kengen Premises for the Year 2024-2026 (hereinafter referred to as "the 1st tender") and being interested, the Applicant submitted its bid in response. However, that on 25th April 2024, the Applicant received a regret letter informing it that its bid was unsuccessful and that all the lots reserved for people with disability were awarded to the 5th Interested Party while those reserved for the youth were terminated and retendered, open for all AGPO groups.
28. Counsel submitted that a further reading of the regret letter dated 25th April 2024 revealed that the 5th Interested Party was awarded the 1st tender despite quoting under cluster/lot 6 a tender price of Kshs. 17,888.70 per staff which was abnormally low and could not cover wages.
29. Ms. Munyu indicated that following the retendering of the 1st tender, the Applicant submitted its bid in the subject tender in all clusters at a total price of Kshs. 124,584,000 and that as per the Tender Opening

Minutes dated 13th August 2024 issued to the Applicant by the Procuring Entity, the Applicant noted that different bidders had submitted their respective bids and quotations for cluster 6.

30. Counsel submitted that the Applicant once again received a regret letter on 13th November 2024 informing it that its bid was unsuccessful for the reason that its bid in cluster 1, 2, 3, and 5 was not the lowest evaluated and that its total bid price in cluster 6 was below the statutory minimum wage as per the Labour Institutions Act No. 12 of 2007 and the Regulation of Wages (Agricultural Industry) (Amendment) Order, 2022 and minimum consumable items cost.
31. She further submitted that the Applicant learnt that the 5th Interested Party was awarded cluster 6 of the subject tender at a price of Kshs. 47,578,560 and Kshs. 155,740,640 and that in the 1st tender and the subject tender, the 5th Interested Party won irregardless of having either quoted an extremely low or high price which is a clear indication that the tender was reserved for some bidders only and other bidders were nothing but intruders.
32. As to whether the Procuring Entity evaluated the Applicant's tender using the comparison procedures set out in the Tender Document, counsel referred the Board to provisions under Article 227(1) of the Constitution and the holding in *Republic v Public Procurement Administrative Review Board & another, Premier Verification Quality Services (PVQS) 2020* and argued that the Procuring Entity failed to

promote fairness and integrity in its procedures in evaluating the subject tender.

33. She further argued that the reason given for disqualification of the Applicant's bid in the subject tender was a means of covering up its malicious actions and discrimination against the Applicant and other bidders in the subject tender. Counsel pointed out that the Applicant's bid price in cluster 6 of Kshs. 29,386.67 per staff was within the prescribed minimum wage as per the Labour Institutions Act No. 12 of 2007 and the Regulation of Wages (Agricultural Industry) (Amendment) Order, 2022 and minimum consumable items cost.

34. Ms. Munyu pressed on that in the Procuring Entity's calculations, not all labour related costs were included and that the aspect of the employer deductions that must be matched with those deducted from the staff and remitted to various Government entities, such as NSSF at 6%, Affordable Housing Levy at 1.5%, and NITA at Kshs. 50 per staff, were ignored in an effort to mislead the Board.

35. It is the Applicant's case that that Procuring Entity did not factor in VAT at 16% though column G implies that the prices include VAT. Further, the Applicant avers that the Procuring Entity is misleading the Board in alleging that there are no consumables for cluster 1, 3, 4 and 5 yet in its Addendum 3, it listed tools, machines and equipment to be provided whose cost was to be on the contractor's side and must therefore make a reasonable margin for their own equipment.

36. The Applicant contends that the Procuring Entity awarded bidders under cluster 1 at a price of Kshs. 21,474.50 per staff; cluster 3 at Kshs. 19,842.11 per staff; cluster 4 at Kshs. 21,838.56 per staff; and cluster 5 at Kshs. 21,331.51 per staff being abnormally low prices which cannot meet the minimum wage as per the Labour Institutions Act No. 12 of 2007 and the Regulation of Wages (Agricultural Industry) (Amendment) Order, 2022 and minimum consumable items cost.
37. Counsel submitted that it was illogical and absurd that the Procuring Entity failed to award the Applicant cluster 6 of the subject tender for the reason that its bid price was below the statutory minimum wage while proceeding to award bidders in cluster 1, 3, 4, and 5 yet their prices were below the statutory minimum wage as stipulated in the Labour Institutions Act No. 12 of 2007 and the Regulation of Wages (Agricultural Industry) (Amendment) Order, 2022 and minimum consumable items cost.
38. She referred the Board to Section 80(2) and 86(1)(a) of the Act and argued that the Evaluation Committee failed to evaluate bids submitted in the subject tender in accordance with the evaluation criteria set out in the Tender Document and that had the same been done, the Applicant's bid would have emerged as the lowest evaluated and successful tender.
39. As to whether the 5th Interested Party's bid was responsive, counsel referred the Board to ITT 14.1 of the Tender Document, Section 82 of

the Act and Regulation 77(2)(a) of Regulations 2020 and submitted that the 5th Interested Party failed to quote its price on the tender form as per the instructions to tenderers and ought to have been deemed unresponsive at the preliminary evaluation stage. In support of her argument, counsel referred the Board to Section 79(1) of the Act.

40. While referring to Article 227(1) of the Constitution, counsel pointed out that whilst the Procuring Entity forwarded the Tender Opening Minutes to bidders, it stated in its response that the opening minutes exhibited by the Applicant were prepared erroneously and did not capture all the information yet it chose not to correct the said errors. Further, that the 5th Respondent following receipt of the erroneous minutes raised no objection to the same and as such, in the absence of any evidence to the contrary, the 5th Interested Party did not fully fill its tender and that the Procuring entity was trying to cover up the same.

41. Mr. Munyu urged the Board to allow the instant Request for Review as prayed.

1st and 2nd Respondents' submissions

42. In his submissions, counsel for the Respondents, Mr. Mogaka relied on the documents filed by the Respondents before the Board in the instant Request for Review.

43. Counsel gave a brief background of the procurement proceedings in the subject tender and submitted that the procurement process was

conducted in accordance with the Tender Document, the Act, Regulations 2020 and the Constitution. He indicated that the Applicant had annexed correspondence in its Supporting Affidavit and Further Affidavit making reference to the 1st Tender and that there was no challenge by way of a review filed within 14 days as stipulated under Section 167(1) of the Act and as such, any reference thereon is ousted from the jurisdiction of the Board due to time limitations.

44. He pointed out that it is the Procuring Entity and not tenderers that stipulate the terms of the tender and that in the subject tender, the Financial Evaluation stage as provided in the Tender Document made an inclusion of consumable as per Appendix 8 of the Tender Document and the Applicant was required to adhere to this stipulation.
45. With regard to evaluation of the subject tender, counsel invited the Board to analyze the background to the Evaluation Report as filed before the Board the submitted confidential documents and submitted that evaluation was done in line with Section 80 of the Act as read with Clause 35 at page 23 of the Tender Document.
46. While referring to the Financial Evaluation criteria provided at page 39 of the Tender Document, counsel submitted that the financial evaluation and award would be to the lowest evaluated bidder per cluster and confirmation of compliance with the statutory minimum wage as set out in Appendix 8 of the Tender document and confirmation that the bidders made provision for consumable items as per the tender

requirement .He indicated that the consumable items were applicable in cluster 2 and 6 of the subject tender which were for cleaning services.

47. It is the Respondents case that at the Financial Evaluation stage, the Evaluation Committee calculated the applicable minimum wage per the Regulation of Wages (Agricultural Industry) (Amendment) Order 2022 and the minimum cost of consumables for each cluster and that these values were multiplied by the number of employees to find the cost per month then multiplied by 12 to find the cost per year, then multiplied by 2 for the tender period, and added to the monthly consumables for two years (only applicable for cluster 2 and 6) to get the Total cost of Minimum Wage and Monthly consumables per cluster. Further that the Evaluation Committee compared these values to the tenderers' bids to determine the lowest evaluated responsive bidder and that simple formulae was that any bid that was below the minimum cost as set out was deemed unresponsive while any bid that was above the minimum cost was deemed responsive subject to evaluation to determine the lowest bidder.

48. Counsel submitted that a comparison done at this stage found that the Applicant's tender was unresponsive since it was not the lowest evaluated responsive bidder in cluster 1,2,3,4,5 and 6 of the subject tender.

49. He further submitted that the Applicant's allegations that the 5th Interested Party did not bid for cluster 3, 4, 5, and 6 is incorrect and

pointed the Board to the 5th Interested Party's Form of Tender which clearly indicated that the six (6) clusters were quoted for in compliance with the requirements in the Tender Document.

50. While referring to the holding in *Republic v Public Procurement Administrative Review Board & 2 others Ex Parte Kenya Power & Lighting Company Limited [2019] eKLR*, counsel submitted that the role of the Tender Opening Committee as provided under the Act is to open and record bids received while evaluation is a role of the Evaluation Committee.

51. As to whether the Applicant was the lowest evaluated bidder in cluster 1,2, 3, 4, 5 and 6 of the subject tender, counsel submitted that the Applicant was not the lowest evaluated bidder and that the tabulations and values provided by the Applicant are incorrect and not in line with the evaluation criteria provided in the Tender Document.

52. He further submitted that the total monthly consumables were determined by the Evaluation Committee who conducted a market survey of prices of items and consumables listed under Appendix 8 of the Tender Document. Counsel indicated that the monthly consumables for two [2] years was set at Kshs. 4,467,120/= and Kshs. 25,463,520/= for Cluster 2 and 6 respectively, hence the bids submitted by tenderers had to include the consumables for these two [2] Clusters.

53. Further that from the confidential documents submitted to the Board, it is clear that in cluster 2 the Applicant's bid of Kshs. 14,755,200/= was not the lowest evaluated Bidder as the 2nd Interested Party's bid of Kshs.14, 365,440/= was the lowest evaluated and was therefore rightfully awarded the same.

54. With regard to cluster 6, counsel submitted that the Applicant's bid of Kshs. 38,307,840/=, when compared to the total minimum wage and consumables of Kshs. 46,366,678.08/=, clearly shows that its bid was below the minimum value set. He indicated that by subtracting the value of the monthly consumables for two [2] years from the Applicant's bid in Cluster 6, the total minimum wage cost for two [2] years would be Kshs. 12,844,320/= and when divided by 2 (the tender period), then by 12 (the number of months in a year), and then by 54 (the number of staff for the cluster), the total wage for each staff member amounted to Kshs. 9,910.74 per month which was below the minimum wage rate set by the Procuring Entity and the applicable minimum wage under the Regulation of Wages (Agricultural Industry) (Amendment) Order 2022 hence it was justifiably deemed unresponsive in Cluster 6 due to non-compliance with the minimum wage requirements.

55. He urged the Board to dismiss the instant Request for Review with costs.

5th Interested Party's submissions

56. In his submissions, counsel for the 5TH Interested Party, Mr. Amondi relied on the documents filed by the Respondents before the Board in the instant Request for Review.
57. Mr. Amondi submitted that it was a mandatory requirement in the Tender Document that bids submitted in response to the subject tender comply with the minimum wage as per Section 48 of the Labor Institutions Act No.12 of 2007. He further submitted that the Applicant's bid failed to comply with this requirement and was rightfully disqualified as affirmed by the High Court in *Nairobi Hcc Misc App 60/2020-R-V-Public Procurement Administrative Review Board, Accounting Officer Kenya Bureau Of Standards & Premium Verification Quality Services Ltd.*
58. He pointed out that the bid price submitted by a bidder in the subject tender was inclusive of amongst others the monthly salary, house allowance, transport, provision for equipment/machinery, provision for cleaning materials, uniforms, boots, taxes and profits hence at a minimum monthly wage of Kshs. 15,201.65 exclusive of house allowance as per the Regulation of Wages (Agricultural Industry (Amendment) Order,2022 meant that the price analysis of various components and cost allocations in respect of the Applicant's bid price of Kshs. 29,386.67 demonstrates that the same would not suffice and in any case the same would lead to stifling the employee's standard of living contrary to Economic and Social Rights envisaged under Article 43 of the Constitution.

59. He argued that experienced service providers such as the Applicant ought to be aware that the Procuring Entity is under a duty to ensure that its Service Providers meet their standards and expectation in terms of employee remuneration which translate to high standards that are envisaged in the industry and not the bear minimum hence the 5th Interested Party's bid price of Kshs. 36,711.85 promises an extra Kshs. 7325.18 to the employees which is a better offer and more reasonable.

60. In support of his argument, he referred the Board to the holding by Justice Mativo in *Constitutional Petition No.86/2017 Kenya Human Rights Commission-V-Communication Authority of Kenya & 4 Others* .

61. On whether the Applicant had demonstrated that the 5th Interested Party was in breach of Section 82(1) of the Act as read with Section 77(2)(a) of Regulations 2020, counsel submitted that this allegation had not been substantiated in view of the fact that the 5th Interested Party's bid complied with all the schedules wherein the prices for all the five clusters were clearly captured as Kshs. 7,854,554 for Cluster 1, Kshs. 19,882,080 for Cluster 2, Kshs. 14,087,040 for Cluster 3, Kshs. 21,910,080 for Cluster 4, Kshs. 44, 488,320 for Cluster 5 and Kshs. 47,578,560 for Cluster 6 and when tabulated amount to the total price of Kshs. 155,740,634 which figure was well captured in the Tender Opening Minutes.

62. He argued that evaluation of the subject tender complied with Section 86(1)(a) of the Act and the criteria set out in the Tender Document as read with the relevant provisions of the Constitution.

63. Mr. Amondi urged the Board to dismiss the instant Request for Review with costs.

Applicant's Rejoinder

64. In a rejoinder, Ms. Munyu submitted that the Applicant was not relying on the 1st tender which had lapsed but on the subject tender. She further submitted that information pertaining to the 1st tender was brought out to show the poor judgement of the Procuring Entity in the instant procurement proceedings.

65. He submitted that pursuant to Section 107 of the Evidence Act, he who alleges must prove and that in the instant Request for Review, the Procuring Entity had not proved that the Applicant did not submit the sum of Kshs. 29,386.67 under cluster 6 and had only alleged that it had submitted an amount below the minimum monthly wage.

66. With regard to the alleged errors in the Tender Opening Minutes, counsel submitted that nothing prevented the Procuring Entity from submitting to bidders the correct minutes as required under the Act noting that the Applicant was pegging its case on the minutes supplied to it by the Procuring Entity.

67. She submitted that the Applicant had been discriminated against in the procurement proceedings of the subject tender and urged the Board to allow the instant Request for Review as prayed.

CLARIFICATIONS

68. When asked to substantiate the allegation of discrimination and that the subject tender was reserved for certain bidders to the exception of others, Ms. Munyu pointed to paragraph 17 and 18 of the Applicant's Supporting Affidavit and submitted that the Applicant had shown the disparity in award of the various clusters irrespective of whether a bidder had quoted an extremely low price or an extremely high price both in the 1st tender and the subject tender.

69. She reiterated that the Applicant was the lowest evaluated bidder under cluster 6 of the subject tender and its price was within the minimum monthly wage contrary to the allegations of the Procuring Entity that it had not met the same.

70. When asked to clarify whether the Applicant was the lowest evaluated bidder, Mr. Abiud submitted the 5th Interested Party was the lowest evaluated bidder under cluster 6 and indicated that the evaluation criteria provided at page 35 of the Tender Document stipulated that the Applicant's bid ought to have included the monthly consumables for two years of the tender period and that the Procuring Entity did a market survey of the monthly consumables attached at Appendix 8 of the Tender Document and found that the cost of the monthly consumables

for the two years for cluster 6 was Kshs. 25,463,520 and when this figure was put across all the bids submitted in cluster 6, the total value divided by the number of staff revealed that the Applicant's bid failed to meet the minimum wage set for this cluster which amounted to Kshs. 16,128 and when applied to the 54 staff multiplied by 12 and 2 years and added to the monthly consumables it added up to Kshs. 46,366,678.08. He reiterated that the Applicant's bid was unresponsive based on these findings.

71. On whether the excel sheet alleged to have an error constitute a minor deviation to the Tender Opening Minutes and how the Applicant came to be in possession of the same, counsel submitted that her argument was that the Respondents had indicated that the Tender Opening Minutes annexed to their response were erroneous and knowing that they had shared erroneous information, they ought to have corrected the said information in the excel sheet and shared the correct minutes with bidders as shared before via email.
72. On his part, Mr. Amondi submitted that the figures that ought to be considered and captured in the Tender Opening Minutes would be the amounts indicated in the Form of Tender which was not in contest and that any error as alleged does not alter the figures indicated in the Form of Tender.
73. Mr. Abiud submitted that the Tender Opening Minutes were prepared in accordance with the provisions of the Act and captured the bid prices as

submitted and as such, the excel sheet had errors that ought not to be considered noting that the opening minutes were signed by the members of the opening committee as a true record and by bidder's representatives who were present at the tender opening.

74. As to whether the tender price submitted by the Applicant under cluster 6 of the subject tender was inclusive of taxes and complied with the statutory minimum wage guidelines and made provision for consumables, Ms. Munyu confirmed that the price was all inclusive and was in compliance with the law and the tender requirements as averred in the Applicant's Further Affidavit.

75. On whether the Applicant was aware of any contracts signed with regard to the subject tender, Ms. Munyu submitted that she was not aware of any contract that was signed and only raised this argument as a precaution. On his part, Mr. Abiud also confirmed that no contract had been signed with regard to the subject tender.

76. With regard to whether a bidder understood that its quote in the subject tender ought to be based on the minimum wage and if it deviated from the same, it would be deemed to have gone against the requirements set out in the subject tender, Ms. Abiud referred the Board to ITT 16.6 of the Tender Document and the evaluation criteria set out at page 39 of the Tender Document and submitted that these provisions were set out clearly and prices were required to be inclusive of all applicable taxes and provide for consumables.

77. When asked to clarify if the allegation by the Applicant that some bidders who submitted abnormally low bids were awarded the subject tender yet the Applicant was disqualified under cluster 6 for submitting a low bid price and if this was the case what the rationale was in awarding a bidder who had submitted a tender price that was below the minimum wage in other clusters, Mr. Abiud referred the Board to the Evaluation Report and the Background of the Tender Evaluation Report and pointed out that the Applicant was not the lowest evaluated bidder in all clusters and it was only in cluster 6 where its bid was found non-responsive because it failed to meet the minimum wage set out in law.

78. On whether a minor deviation can apply to a mandatory requirement provided in the Tender Document, Mr. Abiud submitted it was the expectation of the Procuring Entity that a bidder would submit an all-inclusive bid price and it was provided under the Tender Document that the minimum wage would be governed by the Regulation of Wages (Agricultural Industry) (Amendment) Order 2022. He confirmed that the actual figures were not provided in the Tender Document. He pointed the Board to the tabulations at paragraphs 7 of the Respondents Replying Affidavit which guided the Evaluation Committee in determining if a bidder was responsive or not at the Financial Evaluation stage.

79. He confirmed that these tabulations were not availed to bidders during the tendering process.

80. When asked to clarify whether a bidder would be deemed as non-responsive having signed Appendix 4 confirming that it would comply with the minimum wage and render the service but quoted a price lower than that stipulated under the Regulation of Wages (Agricultural Industry) (Amendment) Order 2022, Mr. Abiud submitted that the Procuring Entity is guided by the provisions set out under the Regulation of Wages (Agricultural Industry) (Amendment) Order 2022 and Circular No. 07/2023 issued by the Public Procurement Regulatory Authority on compliance with Fair Employment Laws and Practices and Eligibility of Bidders under Section 55 of the Act.

81. As to whether the Respondents were raising a preliminary objection with regard to reference made in the instant Request for Review by the Applicant regarding the 1st tender, counsel left this issue to the discretion of the Board to determine if it amounts to a preliminary objection and if it has jurisdiction to hear and determine the same.

82. On his part, Mr. Amondi submitted that since this issue had been raised by parties in their responses and not per se in a formal notice of preliminary objection, the Board ought to address the same as a preliminary issue noting that the Applicant's arguments form the substance of the review in demonstrating that the procurement process was unfair.

83. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 22nd November 2024 was due to expire on 13th December 2024 and that the Board would communicate its decision on or before 13th December 2024 to all parties to the Request for Review via email.

BOARD'S DECISION

84. The Board has considered each of the parties' submissions and documents placed before it and find the following issues call for determination.

- A. Whether reference made by the Applicant with regard to findings by the Procuring Entity in the 1st tender is time barred having been raised outside the statutory period of 14 days stipulated under Section 167(1) of the Act.**
- B. Whether the Procuring Entity evaluated the Applicant's bid at the Financial Evaluation stage in strict compliance with the provisions of the Tender Document, the Act and the Constitution.**
- C. Whether the 5th Interested Party indicated its tender price in its Form of Tender with regard to clusters 3 to 6 of the Tender Document.**
- D. What orders should the Board grant in the circumstances?**

Whether reference made by the Applicant with regard to findings by the Procuring Entity in the 1st tender is time barred having been raised outside the statutory period of 14 days stipulated under Section 167(1) of the Act.

85. It is trite law that courts and decision making bodies can only act in cases where they have jurisdiction and when a question 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.

86. During the hearing, the Board sought to know whether the Respondents were raising a preliminary objection to reference made by the Applicant with regard to findings by the Procuring Entity in the 1st tender in view of averments made by Mr. Vincent Nyamweya Mamboleo at paragraph 6 of the Respondents Replying Affidavit where he depones that:

"6. THAT I aver in response to paragraph 6 and 7 of Mr. Samuel Mburu's Supporting Affidavit that, the Applicant is referring to issues from tender KGN-ADM-014-2023, which is different from the current tender, KGN-ADM-007-2024. The tender he is referring to was awarded on 25th April 2024 without any challenge or objections within the 14-day period stipulated by Section 167(1) of the Public Procurement and Asset Disposal Act (PPADA). Therefore,

matters touching on the said awarded tender are ousted from the jurisdiction of the Honourable review Board due to lapse of time.

87. Mr. Amondi submitted that as much as no formal preliminary objection had been raised, the Board ought to address this as a preliminary issue as it forms the substance of the Applicant's grounds of review in the instant Request for Review and reference to the 1st tender has been used to demonstrate the aspect of lack of fairness in the procurement process in question.
88. On her part, Ms. Munyu submitted that the Applicant was not relying on the 1st tender which had lapsed but on the subject tender under review and that the information pertaining to the 1st tender was brought out to show the poor judgement of the Procuring Entity in the instant procurement process.
89. The Board's jurisdiction flows from Section 167(1) of the Act which provides:

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.

90. In essence, Section 167(1) of the Act allows an aggrieved candidate or tenderer to seek administrative review within 14 days of (i) notification of award or (ii) date of occurrence of alleged breach of duty imposed on a procuring entity by the Act and Regulations 2020 at any stage of the procurement process.
91. Further, a reading of Regulation 203(1), (2)(c) & (3) of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 confirms that an aggrieved candidate or tenderer invokes the jurisdiction of the Board by filing a request for review with the Board Secretary within 14 days of (i) occurrence of breach complained of, having taken place before an award is made, (ii) notification under Section 87 of the Act; or (iii) occurrence of breach complained of, having taken place after making of an award to the successful tenderer.
92. Having considered parties' pleadings, submissions, and the confidential documents contained in the confidential file submitted by the Respondents to the Board pursuant to section 67(3)(e) of the Act, we note that the Applicant at paragraph 6 and 7 of its Supporting Affidavit confirms having received on the 25th April 2024 a notification letter informing it that it was unsuccessful in the 1st tender while notifying it of successful bidders therein and termination of certain clusters in the

1st tender. As such, there is no contest that as at 25th April 2024, the Applicant was well aware of the outcome of evaluation of the 1st tender. In our considered view, any challenge to the procurement process or allegations of unfairness in the 1st tender ought to have been raised within 14 days from the 25th April 2024.

93. This Board has in a plethora of cases held that procurement proceedings are time bound and a candidate or a tenderer who wishes to challenge a decision of a procuring entity with respect to a tender must come before the Board at the earliest, by using the earliest option available under Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020 so as not to be accused of laches.

94. In the circumstances, there is no doubt that any reference made by the Applicant regarding the findings by the Procuring Entity in the 1st tender is time barred having been raised outside the statutory period of 14 days stipulated under Section 167(1) of the Act thus ousting the jurisdiction of the Board to hear and determine the same.

Whether the Procuring Entity evaluated the Applicant's bid at the Financial Evaluation stage in strict compliance with the provisions of the Tender Document, the Act and the Constitution.

95. The Applicant contends that it was the lowest evaluated bidder in cluster 1,2,3,5,and 6 of the subject tender and that the Procuring Entity breached the provisions of Section 80(2) and 86(1)(a) of the Act,

Regulation 77(3) of Regulations 2020 as read with Article 227(1) of the Constitution by failing to adhere to the evaluation criteria set out in the Tender Document and in disqualifying its tender at the Financial Evaluation stage. The Applicant invited the Board to interrogate its original tender submitted in the subject tender and confirm that its tender was compliant with the requirements of the Tender Document

96. In response, the Respondents contend that they adhered to the set out evaluation criteria in the Tender Document which was objective and quantifiable and complied with provisions of the Act and Constitution. It is the Respondent's case that the Applicant was not the lowest evaluated bidder in cluster 1,2,3, and 5 of the subject tender as alleged and that its price under cluster 6 was below the statutory minimum wage as per the Labour Institution Act No.12 of 2007 and the Regulation of Wages (Agricultural Industry) (Amendment) Order, 2022 and minimum consumable costs.

97. On its part, the Interested Party associated itself with the Respondents submissions and submitted that the reasons for disqualification of the Applicant's tender were substantiated and the requirements set out in the Tender Document were clear and unambiguous and fault cannot be apportioned to the Respondents for the Applicant's failure to meet the stipulated mandatory requirements in the Tender Document.

98. The objective of public procurement is to provide quality goods and services in a system that implements the principles specified in Article 227 of the Constitution which provides as follows:

"227. Procurement of public goods and services

(1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

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

a)d)"

99. Section 80 of the Act is instructive on how evaluation and comparison of tenders should be conducted by a procuring entity as follows:

"80. Evaluation of tender

(1) The evaluation committee appointed by the accounting officer pursuant to Section 46 of the 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,**
- (3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)-**
- (a) The criteria shall, to the extent possible, be objective and quantifiable;**
- (b) each criterion shall be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality, time and service for the purpose of evaluation; and**
- (4)**

100. Section 80(2) of the Act is clear on the requirement for the Evaluation Committee to evaluate and compare tenders in a system that is fair using the procedures and criteria set out in the Tender Document. The Board's interpretation of a system that is fair is one that considers equal treatment of all tenders against criteria of evaluation known by all tenderers having been well laid out in the tender document issued by the procuring entity. Section 80(3) of the Act requires for such evaluation criteria to be as objective and quantifiable to the extent possible and to be applied in accordance with the procedures provided in the tender document.

101. The Applicant in the instant Request for Review is aggrieved by the regret letter dated 13th November 2024 which reads in part as follows:

".....

We refer to the above tender, reference KGN-ADM-007-2024, opened on 13th August 2024 and wish to advice that your firm was not successful due to the following reason(s):

a) Your firm was not the lowest evaluated bidder for cluster 1,2,3,5.

b) The total bid price for Cluster 6 was below the statutory minimum wage as per Labour Institutions Act No. 12 of 2007 and the Regulation of wages (Agricultural Industry) (Amendment) Order, 2022 and minimum consumable items cost.

....."

102. From the above notification letter, it is clear that the Applicant's tender was disqualified at the Financial Evaluation stage.

103. The Board takes note of Section 86 of the Act that provides for the successful tender as follows:

"(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."

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

"77. Financial evaluation

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

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

(a) taking the bid price in the tender form;

(b) taking into account any minor deviation from the requirements accepted by a procuring entity under section 79(2)(a) of the Act;

(c) where applicable, converting all tenders to the same currency, using the Central Bank of Kenya exchange rate prevailing at the tender opening date;

(d) applying any margin of preference indicated in the tender document.

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

105. From the aforementioned provisions, an evaluation committee while evaluating tenders at the financial evaluation stage is required *inter alia* to rank tenders according to their evaluated bid price and the successful tender shall be determined in accordance with the provisions of Section 86 of the Act.

106. The question that the Board is now called to determine is whether evaluation and comparison of tenders in the subject tender, including the Applicant's was carried out using the evaluation criteria provided in the Tender Document in awarding the successful bidders therein.

107. Section 58 of the Act requires a procuring entity to use a standard tender document which contains sufficient information and provides as follows:

"(1) An accounting officer of a procuring entity shall use a standard procurement and asset disposal documents issued by the Authority in all procurement and asset disposal proceedings.

"(2) The tender documents used by a procuring entity under subsection (1) shall contain sufficient information to allow fairness, equitability, transparency, cost-effectiveness and competition among those who may wish to submit their applications."

108. Further Section 60(1) provides as follows:

"(1) An accounting officer of a procuring entity shall prepare specific requirements relating to the goods, works or services being procured that are clear, that

give a correct and complete description of what is to be procured and that allow for fair and open competition among those who may wish to participate in the procurement proceedings.”

109. In the same vein, Section 70 of the Act requires a procuring entity to use a standard tender document which contains sufficient information to allow for fair competition among tenderers. Section 70(3) reads as follows:

“(3) The tender documents used by a procuring entity pursuant to subsection (2) shall contain sufficient information to allow fair competition among those who may wish to submit tenders.”

110. Having carefully studied the Tender Document, we note that the evaluation procedure and criteria for the tender subject of this Request for Review is set out at Section III- Evaluation and Qualification Criteria of the Tender Document.

111. Financial Evaluation was provided for at page 39 of the Tender Document as follows:

STAGE 3. FINANCIAL EVALUATION

Financial evaluation shall involve checking completeness of financial bids.

- Financial evaluation and award shall be to the lowest evaluated responsive bidder per cluster/schedule
- Bidders shall bid for all items in the respective SCHEDULE (S) that they are participating in.
- A bidder that OMTS ANY PRICING ITEM/S in a SCHEDULE(S) bid for shall be declared non-responsive
- Any errors in the submitted tender arising from a miscalculation of unit price, quantity, subtotal and total bid price shall be considered as a major deviation that affects the substance of the tender and shall lead to disqualification of the tender as non-responsive (ref Section 74(2) of Public Procurement and Asset Disposal Regulations 2020)
- All prices must be inclusive of all the applicable taxes
- Confirmation of compliance with statutory minimum wage as set out and Appendix 4 (user requirement-number of staff required) of the tender document
- Confirmation that the bidders made a provision for consumable items as per the tender requirements (Appendix 8 of the tender document).
- Bidders will be expected to comply with the Labour Institutions Act No.12 of 2007 and the Regulation of wages (Agricultural Industry) (Amendment) Order, 2022. Any firm that bids below the statutory minimum wage for each cluster will not be considered for award

and only compliant bidders will be considered for award of the same.

112. From the above it is apparent that the financial evaluation involved checking for completeness of financial bids which entailed, *inter alia*,
- i award to the lowest evaluated responsive bidder per cluster/schedule;
 - ii ensuring that all prices were inclusive of all the applicable taxes;
 - iii confirming compliance with the statutory minimum wage as set out and Appendix 4 (user requirement- number of staff required) of the Tender Document; and
 - iv confirming that bidders made a provision for consumable items as per Appendix 8 of the Tender document.
 - v An expectation that bidders would comply with the Labour Institutions Act No.12 of 2007 and the Regulation of wages (Agricultural Industry) (Amendment) Order, 2022.

113. We note that Appendix 4 User Requirements – No. of Staff Required per Cluster, Station and Category was provided at page 202 to 203 of the Tender Document while a Revised Appendix 8 Summary of Estimate Quantities of Detergents, Chemicals and Consumables Required per month was provided under Addendum No. 3 dated 2nd August 2024. In both Appendix 4 and 8, nowhere were any approximate costs/prices provided as a baseline to guide bidders as to the evaluation of bids in the subject tender.

114. According to the Evaluation Report submitted to the Board as part of the confidential documents by the 1st Respondent, the Evaluation Committee noted as follows during its evaluation of bids at the Financial Evaluation stage:

"....."

Pursuant to the pre-bid conference held on 17th July, 2024 and the issued Appendix VI of the tender document, it was clarified that bidders will be expected to comply with the Labour Institutions Act No.12 of 2007 and the Regulation of wages (Agricultural Industry) (Amendment) Order, 2022. Any firm that bid below the statutory minimum wage for each cluster will not be considered for award and only compliant bidders will be considered for award of the same. Below is a tabulation of the expected minimum wage payment for each cluster.

Table 4: Summary of statutory minimum wage analysis as per Labour Institutions Act No.12 of 2007 and the Regulation of wages (Agricultural Industry) (Amendment) Order, 2022 and minimum consumable items for each cluster;

	A	B	C	D	E	F	G (E+F)
CLUSTERS	NO OF STAFF	MIINIMUM WAGE RATES PER CLUSTER	MIINIMUM WAGE COST FOR ONE MONTH (KSHS.) (A*B)	MIINIMUM WAGE COST FOR TWELVE MONTHS (KSHS.) (C*12)	MIINIMUM WAGE COST FOR TWO YEARS (KSHS.) (D*2)	MONTHLY CONSUMABLES PER CLUSTER FOR 2 YEARS	TOTAL COST FOR MIINIMUM WAGE & MONTHLY CONSUMABLES PER CLUSTER KSHS, VAT INCLUSIVE
I.	8	16,128.98- Garissa 17,128.90-	137,149.36	1,645,792.32	3,291,584.64	N/A	3,291,584.64

		Ngong					
2.	20	17,481.90	349,638.00	4,195,656.00	8,391,312.00	4,467,120.00	12,858,432.00
3.	19	17,481.90	332,156.10	3,985,873.20	7,971,746.40	N/A	7,971,746.40
4.	22	16,128.98	354,837.56	4,258,050.72	8,516,101.44	N/A	8,516,101.44
5.	60	16,128.98	967,738.80	11,612,865.60	23,225,731.20	N/A	23,225,731.20
6.	54	16,128.98	870,964.92	10,451,579.04	20,903,158.08	25,463,520.00	46,366,678.08

Twelve (12) firms that met the technical requirements were considered for financial evaluation. Tabulated below are the reasons for rejection of the bids at the financial analysis:

NO	FIRM	COMMENTS					
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		1	2	3	4	5	6
		Garissa & Ngong Power Station	Kipevu	Kipevu	Turkwel	Gitaru, Kiambere, Kindaruma & Ndula	Gogo, Sondu, Sangoro, Muhoroni, Sosiani
		Compound bush clearing,	Cleaning of offices, power	Compounds Bush	Compounds Bush	Compounds Bush	Cleaning of offices
1	BROOKLYN CLEANING SERVICES LIMITED	4,123,104.00	11,630,591.32	10,124,294.40	12,778,782.72	32,193,897.60	34,392,450.20
2	ONEWAY FACILITIES MANAGEMENT LIMITED		19,307,040.00	12,166,080.00		37,674,480.00	
3	SHAKE INDUSTRIES LIMITED	5,729,472.00	17,672,832.00	12,784,128.00		43,035,072.00	
4	PEESAM LIMITED	5,568,000.00	14,755,200.00	13,168,320.00	14,699,520.00	38,307,840.00	38,085,120.00
5	SPACE HYGIENE SYSTEMS LIMITED	25,015,632.00	21,353,280.00			60,412,800.00	73,636,800.00
6	BIZMART ENTERPRISES LIMITED		29,969,760.00	15,892,000.00			
7	ZUZUMZ LIMITED	5,345,280.00	18,096,000.00	9,048,000.00	14,198,400.00	35,607,360.00	42,344,640.00
8	BICEVEN EAST AFRICA LIMITED	5,098,896.00	17,047,517.76	11,954,496.00	13,462,310.40	35,905,248.00	54,371,659.20
9	CLEANMARK LIMITED	5,512,320.00	14,365,440.00	12,528,000.00	14,755,200.00	40,479,360.00	34,131,840.00
10	JOYMACX ENTERPRISES	7,854,554.00	19,822,080.00	14,087,040.00	21,910,080.00	44,488,320.00	47,578,560.00
11	HANNANELI SUPPLIERS LIMITED	6,975,228.00	16,035,840.00	12,695,040.00	21,019,200.00	39,282,240.00	43,040,640.00
12	DIAMOND SPARKLE LIMITED	4,375,167.36	31,833,432.58	10,116,692.22	11,530,757.31	30,717,378.24	64,091,153.56
	Minimum Wage Cost	3,291,584.64	8,391,312.00	7,971,746.40	8,516,101.44	23,225,731.20	20,903,158.08
	Consumables Cost	N/A	4,467,120.00	N/A	N/A	N/A	25,463,520.00
	TOTAL MINIMUM & CONSUMABLES COST	3,291,584.64	12,858,432.00	7,971,746.40	8,516,101.44	23,225,731.20	46,366,678.08

1.	SHAKE INDUSTRIES LIMITED	1. Not the lowest evaluated responsive bidder for clusters 1,2,3 and 5
2.	PEESAM LIMITED	1. Not the lowest evaluated responsive bidder for clusters 1,2,3 and 5 2. The total bid price for Cluster 6 is below the statutory minimum wage as per Labour Institutions Act No.12 of 2007 and the Regulation of wages (Agricultural Industry) (Amendment) Order, 2022 and minimum consumable items
3.	SPACE HYGIENE SYSTEMS LIMITED	1. Not the lowest evaluated responsive bidder for clusters 1, 2,5 and 6
4.	ZUZUMZ LIMITED	1. Not the lowest evaluated responsive bidder for clusters 1,2,4 and 5
5.	BICEVEN EAST AFRICA LIMITED	1. Not the lowest evaluated responsive bidder for clusters 1,2,3,4 and 5
6.	CLEANMARK LIMITED	1. Not the lowest evaluated responsive bidder for clusters 1,3,4 and 5 2. The total bid price for Cluster 6 is below the statutory minimum wage as per Labour Institutions Act No.12 of 2007 and the Regulation of wages (Agricultural Industry) (Amendment) Order, 2022 and minimum consumable items
7.	JOYMACX ENTERPRISES	1. Not the lowest evaluated responsive bidder for clusters 1,2,3,4 and 5
8.	HANNANELI SUPPLIERS LIMITED	1. Not the lowest evaluated responsive bidder for clusters 1, 2,3,4 and 5 2. The total bid price for Cluster 6 is below the statutory minimum wage as per Labour Institutions Act No.12 of 2007 and the Regulation of wages (Agricultural Industry) (Amendment) Order, 2022 and minimum consumable items
9.	DIAMOND SPARKLE LIMITED	1. Not the lowest evaluated responsive bidder for clusters 1,2,3 and 6
10.	BROOKLYN CLEANING SERVICES LIMITED	1. The total bid price for Cluster 2 is below the statutory minimum wage as per Labour Institutions Act No.12 of 2007 and the Regulation of wages (Agricultural Industry)

		<p>(Amendment) Order, 2022 and minimum consumable items</p> <p>2. Not the lowest evaluated responsive bidder for clusters 3,4 and 5</p> <p>3. The total bid price for Cluster 6 is below the statutory minimum wage as per Labour Institutions Act No.12 of 2007 and the Regulation of wages (Agricultural Industry) (Amendment) Order, 2022 and minimum consumable items</p>
11.	ONEWAY FACILITIES MANAGEMENT LIMITED	1. Not the lowest evaluated responsive bidder for clusters 2, 3 and 5
12.	BIZMART ENTERPRISES LIMITED	1. Not the lowest evaluated responsive bidder for clusters 2 and 3

SUMMARY OF THE FIRMS RECOMMENDED FOR AWARD

CLUSTERS	REGIONS	AGPO CATEGOR	FIRM RECOMMENDED FOR AWARD	AMOUNT 2 YEARS, VAT INCLUSIVE (KSHS)
1	Garissa & Ngong Power Station- Compound bush clearing,	Youth	Brooklyn Cleaning Services Limited	4,123,104.00
2	Kipevu- Cleaning of offices, power	Women	Cleanmark Limited	14,365,440.00
3	Kipevu- Compounds Bush	Women	Zuzumz Limited	9,048,000.00
4	Turkwel- Compounds Bush	Women	Diamond Spark Limited	11,530,757.31
5	Gitaru, Kiambere, Kindaruma & Ndula- Compounds Bush	Women	Diamond Spark Limited	30,717,378.24
6	Gogo, Sondu, Sangoro, Muhoroni, Sosiani- Cleaning of offices	PWD	Joymax Enterprises	47,578,560.00

115. The 1st Respondent also submitted to the Board as part of the confidential documents tabulations used by the Evaluation Committee under Appendix 8 Summary of Estimate Quantities of Detergents, Chemicals and Consumables of the Tender Document in computing the monthly consumables for 2 years per cluster 2 and 6 of the Tender Document which included a price list.

116. From the contents of the Evaluation Report at the Financial Evaluation stage and the tabulations by the Procuring Entity under Appendix 8 – Summary of Estimate Quantities of Detergents, Chemicals and Consumables and Price List, the Board observes that the Evaluation Committee proceeded to compute:

- i the expected minimum wage payment for each cluster in the subject tender; and
- ii a projection of the minimum consumable items for cluster 2 and 6 of the subject tender.

117. In support of the findings by the Evaluation Committee Mr. Vincent Myamweya Mamboleo deponed at paragraphs 8 and 9 of the Respondent's Replying Affidavit that the monthly consumables prices for cluster 2 and 6 listed under Appendix 8 of the Tender Document were based on a market survey conducted earlier by the Procuring entity and that the tabulations on the minimum wage were correct contrary to the Applicant's allegations. He depones as follows:

"8. THAT I aver that the aforementioned Monthly Consumables prices for Cluster 2 and 6 listed under Appendix 8 of the Tender Document were based on a Market Survey conducted earlier by the Procuring Entity. We refer to the SUMMARY OF ESTIMATE QUANTITIES OF DETERGENTS, CHEMICALS AND CONSUMABLES detailing the price quotes that informed the total value of the amounts for Clusters 2 and 6 submitted in the bundle of confidential documents.

9. THAT I aver in response to paragraphs 13, 14, 15 and 16 of Mr. Samuel Mburu's Supporting Affidavit that the tabulations are incorrect and do not align with the Evaluation Criteria stipulated in the Tender Document. The cost of staff can only be determined by taking into account the total number of staff per cluster and multiplying it by the applicable minimum wages for the cluster....."

118. On its part, the Applicant opposed the computations fronted by the Respondents as seen at paragraphs 13, 14, 15, 16, and 17 where Mr. Samuel Nganga depones as follows:

"....."

13. In its Response at paragraph 9 the Procuring Entity is misleading the Board as the aspect of the employer deductions that must be matched with those deducted from the staff and remitted to various Government entities has been ignored. These deductions include NSSF at 6%,

affordable Housing Levy (AHL) at 1.5% and NITA at Kshs. 50.00 per staff. The Respondent also ignored factoring VAT of 16% and yet in their column G it implies that the prices include VAT.

14. Further, the Procuring Entity is misleading the Board that there are no consumables for cluster 1, 3, 4 and 5 yet addendum 3 has a list of tools, machines and equipment to be provided. These machines include grass cutters that consume fuel whose costs are to be on contractor's side. The staff are also to be provided with uniforms and protective clothing. This being an AGPO tender, the contractor must also make reasonable margin for their own empowerment.

15. The summary table attached herein demonstrates the true minimum costs of the labour aspect and the balance after labor that should cater for materials and contractors margins. Cluster 1 and 3 are in THE NEGATIVE after labor charges and it is thus ridiculous that the Procuring Entity can make such awards. Cluster 4 and 5 the balance left after labor charges is BELOW 10% of the total quoted costs and is supposed to cater for the grass cutting machines, fuels, gardening tools as well as male a margin for the contractor.

.....

16. The Applicant avers that the only logical award made was for cluster 2 where the balance after labor costs of 27% and can cater for materials and leave a reasonable margin

for the contractor. Column K shows costs per head of staff and the variation is extremely big.

17. Going by the calculations of the Procuring Entity Cluster 6 has more than 50% of the price left after labor charges, however, as per the calculations of the Applicant 45.1% is left after the labor charges. It is therefore clear that the same is extremely overpriced and this being a service contract, the cost of consumables cannot exceed the labor charges.

.....”

119. From the foregoing, the Board notes that the Applicant differs with the Procuring Entity in terms of tabulations under Appendix 4 User Requirements – No. of Staff Required per cluster, station and category as provided at page 202 to 203 of the Tender Document and the tabulations under the Revised Appendix 8 Summary of Estimate Quantities of Detergents, Chemicals and Consumables Required per month as provided under Addendum No. 3 dated 2nd August 2024.

120. During the hearing when the Board sought to know whether bidders in the subject tender were aware of the actual figures relied upon by the Evaluation Committee in terms of tabulations/computations under Appendix 4 and 8 of the Tender Document, Mr. Abiud informed the Board that these tabulations were not availed to bidders during the tendering process.

121. This therefore means that bidders were not aware of the above criteria used in computing the sums relied upon in determining if a tender was responsive or not at the Financial Evaluation stage under Appendix 4 and 8 of the Tender Document. The Board having studied both the blank Tender Document and the Evaluation Report observes that the criterion used in tabulations of tender prices and evaluation of bids at the Financial Evaluation stage with regard to Appendix 4 and 8 of the Tender Document was not provided for in the Tender Document.

122. In our considered view, the evaluation by the Evaluation Committee at the Financial Evaluation stage was derived from extraneous criteria that did not form part of the procedures and criteria in the Tender Document. Further, no compelling reason was provided as to why the alleged market survey that is said to have been carried out earlier by the Procuring Entity and to have guided the pricing of the monthly consumable prices for cluster 2 and 6 listed under Appendix 8 of the Tender Document was not made available to bidders during the tendering process and prior to close of the subject tender. This market survey was not part of the evaluation criteria provided in the Tender Document.

123. Notably, at the Preliminary Evaluation stage, bidders were evaluated and checked for compliance with Mandatory Requirement No. 9 at page 36 of the Tender Document which provides as follows:

MR 9 Duly filled, signed and stamped Letter of Undertaking that the service provider shall comply with labour laws and

***wage regulation guidelines. for the cluster(s)/schedule(s)
bid for (Refer to Appendix 1)***

124. In essence, bidders who progressed from the Preliminary Evaluation stage up to the Financial Evaluation stage were found to be responsive having complied with Mandatory Requirement No. 9 at page 36 of the Tender Document which required bidders to submit in a duly filled, signed and stamped Letter of Undertaking that they would comply with labour laws and wage regulation guidelines for the cluster(s) they bid for.

125. We note that the Respondents made reference to PPRA Circular No. 07/2023 dated 27th October 2023 as reference point in their evaluation of bids in the subject tender which is commendable. However, we find great difficulty in its translation by the Procuring Entity in the subject tender for the following reasons:

- i At the Preliminary Evaluation stage, Mandatory Requirement No. 9 at page 36 of the Tender Document requires a bidder to submit an undertaking to comply with the statutory minimum wage yet evaluation at the Financial Evaluation stage involves confirmation of compliance by a bidder with statutory minimum wage and provision for consumable items while not providing any values, amounts, or bands and the Evaluation Committee resulting to introduce with specificity a threshold amount during financial evaluation. This to us amounts to introducing a new and specific evaluation criteria to the disadvantage of bidders since such

derivation of specific figures and amounts ought to have been provided for in the Tender Document as a threshold and in any event the basic minimum wage are bound to change if the Regulation of Wages (General)(Amendment) Order, 2022 is amended at any point in time during pendency of the subject tender.

- ii The breach or otherwise on compliance with the statutory minimum wage requirement in light of Mandatory Requirement No. 9 at page 36 of the Tender Document and Clause 4 at page 3 of 4 of the PPRA Circular No. 07/2023 dated 27th October 2023 renders it a matter for a future claim in the event a successful tenderer fails to abide by the set out statutory minimum wage. In saying so we note that Clause 1.8 of Section VIII – General Conditions of Contract at page 174 of the Tender Document provides for Taxes and Duties whereby the service provider, subcontractors and their personnel shall pay such taxes, duties, fees and other impositions as may be levied under the applicable law, the amount of which is deemed to have been included in the contract price.

126. The Evaluation Committee is under a duty to confine itself to the procedures and criteria set out in the Tender Document when evaluating bids. Award of the subject tender was to be to the lowest evaluated responsive bidder per cluster taking into consideration that (a) prices tendered were inclusive of the applicable taxes, (b) a bidder

had made provision for consumable items under Appendix 8 and (c) the bidder had confirmed in its tender its compliance with the statutory minimum wage as set out and Appendix 4 of the Tender Document.

127. In view of the foregoing analysis, this Board is left with the inevitable conclusion that the Evaluation Committee introduced extraneous criteria at the Financial Evaluation stage and therefore the Procuring Entity failed to evaluate the Applicant's bid at the Financial Evaluation stage in accordance with the procedures and criteria set out in the Tender Document as read with Section 86(1)(a) of the Act and Regulation 77(3) of Regulations 2020.

128. In the circumstances, the Board finds that the Procuring Entity's Evaluation Committee went outside the evaluation criteria contained in its own Tender Document in the evaluation of the Applicant's tender at the Financial Evaluation stage and holds the Procuring Entity in breach of the provisions of Article 227(1) of the Constitution, Section 80(2), 86(1)(a) of the Act as read with Regulation 77(3) of Regulations 2020.

129. Accordingly, this ground of review succeeds and is allowed.

Whether the 5th Interested Party indicated its tender price in its Form of Tender with regard to clusters 3 to 6 of the Tender Document.

130. The Applicant contends that the 5th Interested Party's bid ought to have been deemed non-responsive for failure to indicate its price for

clusters 3 to 6 in its Form of Tender contrary to Section 82(1) of the Act as read with Regulation 77(2)(a) of Regulations 2020. In support of its argument, the Applicant made reference to omissions in an Excel Data Sheet shared by the Procuring Entity with bidders that contained bidders' prices as read out at the Tender Opening.

131. In response, the 5th Interested Party submitted that its Form of Tender as submitted in the subject tender was duly filled and complied with the requirements of the Tender Document and as such, its tender was rightfully found responsive in the subject tender.

132. On its part, the Respondents contends that the document at page 5-6 of the Opening Minutes as exhibited by the Applicant was a manually entered Excel sheet prepared by the Tender Opening Committee in which erroneously, they failed to capture all the information that is contained in the Tender Opening Details of pages 1-4 of the Opening Minutes and as such, the Excel Sheet is not conclusive and does not invalidate the accurate information recorded by the Tender Opening Committee in the Tender Opening Minutes.

133. The Respondents referred the Board to the Form of Tender filled by the 5th Interested Party which was submitted by the 1st Respondent as part of the confidential bundle of documents pursuant to Section 67(3)(e) of the Act. Having had a chance to study the same, the Board notes that the 5th Interested Party submitted its Form of Tender at pages 43 to 46 of its bid document where it indicated (a) its tender

prices both in figures and word for each of the 6 clusters in the Tender Document and (b) its total tender price for all the 6 clusters both in figures and word.

134. The omission by the Procuring Entity in its Excel Data sheet has been acknowledged to have been an error and it is clear to the Board that this did not have any impact on the 5th Interested Party's tender price as read out at the Tender Opening and as recorded by the Tender Opening Committee in the Tender Opening Minutes pursuant to Section 78 of the Act.

135. In the circumstances, the Board finds that the Applicant has not substantiated its allegations and that the 5th Interested Party indicated its tender price in its Form of Tender with regard to clusters 3 to 6 of the Tender Document. Accordingly, this ground of review fails.

What orders the Board should grant in the circumstances?

136. The Board has established that any reference made by the Applicant regarding the findings by the Procuring Entity in the 1st tender is time barred having been raised outside the statutory period of 14 days stipulated under Section 167(1) of the Act thus ousting the jurisdiction of the Board to hear and determine the same.

137. The Board has found that the 5th Interested Party indicated its tender price in its Form of Tender with regard to clusters 3 to 6 of the Tender Document.

138. The Board has also found that the Procuring Entity failed to evaluate the Applicant's bid at the Financial Evaluation stage in accordance with the procedures and criteria set out in the Tender Document as read with Section 86(1)(a) of the Act and Regulation 77(3) of Regulations 2020.

139. Section 173(b) of the Act gives the Board a discretionary power to *"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."* The Board deems it just and fair to order the 1st Respondent to direct the Evaluation Committee to re-admit the Applicant's tender and all other bidders' tenders which progressed to the Financial Evaluation stage back into the procurement process for re-evaluation at the Financial Evaluation stage and to proceed with the procurement process to its logical conclusion while taking into consideration the findings of the Board in this decision, the provisions of the Tender Document, the Constitution, the Act and Regulations 2020.

140. It is not lost to us the importance of compliance with stipulated statutory minimum wage requirements and in view of our observations and analysis hereinabove, it becomes necessary to direct that whichever tenderer(s) is found to be ultimately successful for award of the subject tender premised on declarations submitted per Mandatory Requirement 9 at page 36 of the Tender Document be supervised on this aspect by the Public Procurement Regulatory Authority (PPRA) and the Ministry of Labour and Social Protection to ensure compliance and in the event of

breach, apt legal consequences to be brought to bear upon such offending tenderer(s).

141. The upshot of our finding is that the instant Request for Review succeeds with respect to the following specific orders:

FINAL ORDERS

142. 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:

A. The letters of Notification of Intent to Award dated 13th November 2024 issued by the 1st Respondent to successful bidders with respect to Tender No. KGN-ADM-007-2024 for Provision of Cleaning, Garbage Management and Gardening Services for Kengen Premises for the Year 2024-2026 (Re-tender) be and are hereby cancelled and set aside.

B. The letters of Notification of Intent to Award dated 13th November 2024 issued by the 1st Respondent to the Applicant and to all other unsuccessful tenderers with respect to Tender No. KGN-ADM-007-2024 for Provision of Cleaning, Garbage Management and Gardening Services for Kengen Premises for the Year 2024-2026 (Re-tender) be and are hereby cancelled and set aside.

- C. The 1st Respondent is hereby ordered to direct the Evaluation Committee of the Procuring Entity to admit the Applicant and all other bidders who progressed to the Financial Evaluation stage back into the procurement process and re-evaluate their tenders at the Financial Evaluation stage and proceed with the procurement process to its logical conclusion in accordance with the law while taking into account the findings of the Board in this decision.**
- D. For certainty, the re-evaluation ordered at C above shall be carried out and completed within 30 days from the date of this decision while taking note of the provisions of Section 175 of the Act.**
- E. Considering that the procurement process is not complete, each party shall bear its own costs in the Request for Review.**

Dated at NAIROBI this 13th Day of December 2024.



PANEL CHAIRPERSON

PPARB



SECRETARY

PPARB