

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 73/2025 OF 27<sup>TH</sup> JUNE 2025**

**BETWEEN**

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

**AND**

**THE ACCOUNTING OFFICER,**

**GEOHERMAL DEVELOPMENT COMPANY LTD ..... 1<sup>ST</sup> RESPONDENT**

**GEOHERMAL DEVELOPMENT COMPANY LTD ... 2<sup>ND</sup> RESPONDENT**

**CLEANMARK LIMITED ..... INTERESTED PARTY**

Review against the decision of the Accounting Officer, Geothermal Development Company Ltd in relation to Tender No. GDC/ADMIN/OT/045/2024-2025 for Provision of Cleaning, Sanitation & Waste Collection & Disposal Services for a Period of Two (2) Years.

**BOARD MEMBERS PRESENT**

- |                         |                     |
|-------------------------|---------------------|
| 1. Mr. Jackson Awele    | - Panel Chairperson |
| 2. Mr. Stanslaus Kimani | - Member            |
| 3. Mr. Joshua Kiptoo    | - Member            |

**IN ATTENDANCE**

- |                      |                                     |
|----------------------|-------------------------------------|
| 1. Ms. Sarah Ayoo    | - Holding brief for Board Secretary |
| 2. Ms. Godana Dokatu | - Secretariat                       |

3. Ms. Evelyn Weru

- Secretariat

## **PRESENT BY INVITATION**

### **APPLICANT**

### **COLNET LIMITED**

Mr. Karugu Mbugua

Advocate, Karugu Mbugua & Co. Advocates

### **1<sup>st</sup> & 2<sup>nd</sup> RESPONDENTS THE ACCOUNTING OFFICER, GEOTHERMAL DEVELOPMENT COMPANY LTD & GEOTHERMAL DEVELOPMENT COMPANY LTD**

Mr. Phillip Chemngorem

h/brief for Ms. Agnes Muthengi      Advocate, Geothermal Development  
Company Ltd

### **INTERESTED PARTY**

### **CLEANMARK LIMITED**

Ms. Elizabeth Karanja

h/brief for Mr. Edwin Mukele      Advocate, Mukele Moni and Company  
Advocates

## **BACKGROUND OF THE DECISION**

### **The Tendering Process**

1. The Geothermal Development Company Ltd, the Procuring Entity and 2<sup>nd</sup> Respondent herein invited sealed tenders in response to Tender No. GDC/ADMIN/OT/045/2024-2025 for Provision of Cleaning, Sanitation &

Waste Collection & Disposal Services for a Period of Two (2) Years (hereinafter referred to as the "subject tender") by way of an advertisement on My Gov Publication on 4<sup>th</sup> February 2025, and on the Procuring Entity's website [www.gdc.co.ke](http://www.gdc.co.ke) and the Public Procurement Information Portal [www.tenders.go.ke](http://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. Tendering would be conducted under open competitive tendering method and was reserved for the special group (Youth, Women & PWDs).

2. The Procuring Entity issued various addendums in response to requests for clarification and while the subject tender's initial submission deadline was on 28<sup>th</sup> February 2025 at 11.00 a.m., it was later extended to 10<sup>th</sup> March 2025 at 11.00 a.m.

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

3. According to the Tender Opening Minutes which were part of confidential documents furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') by the 1<sup>st</sup> Respondent pursuant to Section 67(3)(e) of the Act, a total of twenty-four (24) tenders were submitted in response to the subject tender. The twenty-four (24) tenders were opened in the presence of tenderers' representatives present at the tender opening session, and were recorded as follows:

| <b>Bidder No.</b> | <b>Name</b>                          |
|-------------------|--------------------------------------|
| 1                 | Hever the Company Ltd                |
| 2                 | Kamtix Company Ltd                   |
| 3                 | Remarc Facility Management Ltd       |
| 4                 | Aimat Company Ltd                    |
| 5                 | Cleanmark Ltd                        |
| 6                 | Liga Holdings Ltd                    |
| 7                 | Sender Services Ltd                  |
| 8                 | Got Nyang Ltd                        |
| 9                 | Superior Smart Security Company      |
| 10                | Brooklyn Cleaning Services Ltd       |
| 11                | Dana Clean Care Services             |
| 12                | Peesam Ltd                           |
| 13                | Twomoc Holdings Ltd                  |
| 14                | Takumma Smart Ltd                    |
| 15                | Liminic Company Ltd                  |
| 16                | Quicksafeties Company Ltd            |
| 17                | Dechrip East Africa Ltd              |
| 18                | One Facilities Management Africa Ltd |
| 19                | Carrorel Cleaning Services Ltd       |
| 20                | Zahryn Kenya Ltd                     |
| 21                | Babs Facilities Ltd                  |
| 22                | Colnet Ltd                           |
| 23                | Nairobi Brightwork Cleaners Ltd      |

|    |            |
|----|------------|
| 24 | Zuzumz Ltd |
|----|------------|

## **Evaluation of Tenders**

4. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1<sup>st</sup> Respondent undertook evaluation of the twenty-four (24) tenders as captured in the Tender Evaluation Report for the subject tender signed on 20<sup>th</sup> May 2025 in the following stages:
  - i Preliminary Evaluation;
  - ii Technical Evaluation; and
  - iii Financial Evaluation.

## **Preliminary Evaluation**

5. The Evaluation Committee was required to carry out a Preliminary Evaluation and examine tenders for responsiveness using the criteria provided under Clause 2.1 Mandatory Evaluation Criteria/Requirements of Section III- Evaluation and Qualification Criteria at page 28 to 29 of the Tender Document. Tenderers were required to meet all the mandatory requirements at this stage to proceed for Technical Evaluation.
6. At the end of evaluation at this stage, seventeen (17) tenders were declare non-responsive while seven (7) were determined responsive and proceeded to Technical Evaluation.

## **Technical Evaluation**

7. The Evaluation Committee was required to carry out a Technical Evaluation using the criteria provided under Technical Evaluation Requirements of Section III- Evaluation and Qualification Criteria at page 30 to 31 of the Tender Document. Tenderers were required to meet the cut-off score of 80 marks at this stage to proceed for Financial Evaluation.
8. At the end of evaluation at this stage, all the seven (7) tenders met the cut-off score of 80 marks and proceeded to Financial Evaluation.

## **Financial Evaluation**

9. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria provided under Clause 2.3 Financial Evaluation Stage of Section III – Evaluation and Qualification Criteria at page 31 of the Tender Document. The successful tenderer would be the one with the lowest evaluated bid.
10. At the end of evaluation at this stage, the Evaluation Committee found as follows:

### **Financial Analysis One (1): CONFIRMATION OF ARITHMETIC ERRORS**

***This was guided by Section 82 of the PPADA 2015 that reads 'the tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be the subject of correction, adjustment or amendment in any way by any person or entity' and Regulation 74 (2) that reads 'Subject to section 79(2)(b) of the Act, 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. The below total calculated tender sums tabulated based on the unit prices indicated in the respective price schedules and compared to the tender sums read out during the tender opening were as summarized below;***

| <b>No.</b> | <b>Bidder Number</b> | <b>Bidder Name</b>                            | <b>Amount as per form of tender and Read Out During Tender Opening (Kshs. Incl. 16% VAT)</b> | <b>Total Amount As per Price Schedule (Kshs. Incl. 16% VAT)</b> | <b>Variance (Kshs)</b> |
|------------|----------------------|---|--|---|------------------------|
|            |                      |   |  |   |                        |
| <b>1</b>   | <b>3</b>             | <b>M/s Remarc Facility Management Ltd.</b>    | <b>72,717,132.49</b>   | <b>72,860,846.98</b>  | <b>- 143,714.49</b>    |
| <b>2</b>   | <b>5</b>             | <b>M/s Cleanmark Limited</b>                  | <b>80,029,131.84</b>   | <b>80,029,131.84</b>  | <b>0.00</b>            |
| <b>3</b>   | <b>6</b>             | <b>M/Liga Holdings Limited.</b>               | <b>113,062,712.80</b>  | <b>113,116,726.76</b>   | <b>-54,013.96</b>      |
| <b>4</b>   | <b>10</b>            | <b>M/s Brooklyn Cleaning Services Limited</b> | <b>97,213,312.00</b>   | <b>97,239,192.76</b>  | <b>-25,880.76</b>      |
| <b>5</b>   | <b>17</b>            | <b>M/s Dechrip East Africa Limited</b>        | <b>112,120,478.56</b>  | <b>112,115,826.00</b>   | <b>4,652.56</b>        |
| <b>6</b>   | <b>22</b>            | <b>M/s Colnet Limited</b>                     | <b>93,951,701.41</b>   | <b>93,951,689.90</b>  | <b>11.51</b>           |
| <b>7</b>   | <b>24</b>            | <b>M/s ZuZumz Limited</b>                     | <b>92,551,375.27</b>   | <b>92,551,375.27</b>  | <b>0.00</b>            |

**Remarks:**

***M/s Remarc Facility Management Ltd, M/Liga Holdings Limited, Brooklyn Cleaning Services Limited, M/s Dechrip East Africa Limited & M/s Colnet Limited were disqualified since tender sums as read out during tender opening were different from the totals calculated using the unit prices on the price schedules as tabulated on above.***

***Remarks: Bidder : M/s Cleanmark Limited is the lowest evaluated bidder.***

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

11. The Evaluation Committee recommended award of the subject tender to M/s Cleanmark Limited being the lowest evaluated bidder at a grand total cost of Kenya Shillings Eighty Million Twenty Nine Thousand One Hundred and Thirty One and Eighty Four Cents Only (Kshs. 80,029,131.84)

### **First Professional Opinion**

12. In a Professional Opinion dated 21<sup>st</sup> May 2025 (hereinafter referred to as "the First Professional Opinion"), the Ag. Manager, Supply Chain Management, Mr. Patrick Kapto reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and recommended award of the subject tender to M/s Cleanmark Limited being the lowest evaluated bidder at a grand total cost of Kenya Shillings Eighty Million Twenty Nine Thousand One Hundred and Thirty One and Eighty Four Cents Only (Kshs. 80,029,131.84).



13. The 1<sup>st</sup> Respondent sought to know if all the firms that had qualified for Financial Evaluation met the minimum wage.

14. Vide Secretarial Comments Ref: GDC/MSD/005/24-25/pk dated 28<sup>th</sup> May 2025, the Ag. Manager, Supply Chain Management, Mr. Patrick Kapto addressed to the Evaluation Committee indicated that the Evaluation Report had been reviewed and that the 1<sup>st</sup> Respondent sought to know whether the all firms that had qualified for Financial Evaluation met the minimum wage. Mr. Kapto directed the Evaluation Committee to review the Evaluation Report in line with the aforementioned observations and to submit a duly and corrected Evaluation Report by 30<sup>th</sup> May 2024 (*meant to read 2025*).

## **Second Evaluation of Tenders**

15. Vide an Evaluation Report dated 3<sup>rd</sup> June 2024 (*meant to read 2025*) and signed by the members of the Evaluation Committee on 3<sup>rd</sup> June 2025, the Evaluation Committee reiterated its findings at the Financial Evaluation stage and made observations on the minimum wage requirement as follows:

" .....

***The following were the observations of the committee on minimum wage requirement;***

***To ascertain, the applicable rates on minimum wages for different areas, the committee made reference from the Kenya subsidiary legislation, 2024 legal notice no. 164 (attached) on the minimum wage payable.***

***Out of the Seven (7) bidders who made it to the financial stage, one (1) bidder m/s Remarc Facility management Ltd was found non-responsive on the minimum wage requirement for Kawi and Polo Centre. The other five (5) bidders were found responsive on the minimum wage requirement. Attached is a comparison of minimum wage against the quoted figures by the bidders.”***

## **Second Professional Opinion**

16. In a Professional Opinion dated 4<sup>th</sup> June 2025 (hereinafter referred to as “the Second Professional Opinion”), the Ag. Manager, Supply Chain Management, Mr. Patrick Kapto reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and recommended award of the subject tender to M/s Cleanmark Limited being the lowest evaluated bidder at a grand total cost of Kenya Shillings Eighty Million Twenty Nine Thousand One Hundred and Thirty One and Eighty Four Cents Only (Kshs. 80,029,131.84).

17. The Second Professional Opinion was thereafter approved on 4<sup>th</sup> June 2025 by the 1<sup>st</sup> Respondent.

## **Notification to Tenderers**

18. Tenderers were notified of the outcome of evaluation of the subject tender vide letters dated 13<sup>th</sup> June 2025.

## **REQUEST FOR REVIEW NO. 73 OF 2025**

19. On 27<sup>th</sup> June 2025, Colnet Limited, the Applicant herein, filed a Request for Review dated 27<sup>th</sup> June 2025 together with a Supporting Affidavit sworn by Harriet Wahome, its Director on 27<sup>th</sup> June 2025 (hereinafter referred to as the 'instant Request for Review') through the firm of Karugu Mbugua & Co. Advocates seeking the following orders from the Board:

- a) A declaration that the Procurement Entity breached the requirements of the Tender Evaluation 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 13<sup>th</sup> June 2025 to award the tender to the Interested Party be annulled and set aside forthwith.***
- e) The Applicant be declared the Lowest Evaluated Bidder for the subject tender and be awarded to the Applicant; and***
- f) Any other orders that the Honorable Board may deem just and fit in the circumstances.***

20. In a Notification of Appeal and a letter dated 27<sup>th</sup> June 2025, Mr. James Kilaka, the Review Board Secretary notified the 1<sup>st</sup> and 2<sup>nd</sup> Respondents of the filing of the Request for Review and the suspension of the procurement proceedings, while forwarding to the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the matter within five (5) days from 27<sup>th</sup> June 2025.

21. On 2<sup>nd</sup> July 2025, Mr. Justus Muhambi, the Principal Assistant SCM of the Procuring Entity submitted to the Board the confidential documents concerning the subject matter pursuant to Section 67(3)(e) of the Act.

22. *Vide* a Hearing Notice dated 3<sup>rd</sup> July 2025, the Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the Request for Review slated for 10<sup>th</sup> July 2025 at 02.00 p.m., through the link availed in the said Hearing Notice.

23. *Vide* a letter dated 3<sup>rd</sup> July 2025, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the instant Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the tender within three (3) days.

24. On 8<sup>th</sup> July 2025, the Respondents jointly filed through Agnes Muthengi Advocate a Notice of Appointment dated 8<sup>th</sup> July 2025, a Memorandum of Response dated 8<sup>th</sup> July 2025, a 1<sup>st</sup> and 2<sup>nd</sup> Respondent's Affidavit in Support of Memorandum of Response sworn by Patrick Kapro on 8<sup>th</sup> July 2025, and a Certificate dated 8<sup>th</sup> July 2025.

25. On 8<sup>th</sup> July 2025, the Interested Party filed through Mukele Moni and Company Advocates a Notice of Appointment of Advocates dated 8<sup>th</sup> July 2025.

26. On 9<sup>th</sup> July 2025, the Respondents filed Written Submissions dated 9<sup>th</sup> July 2025.

27. On 10<sup>th</sup> July 2025, the Interested Party filed an Interested Party's Memorandum of Response dated 10<sup>th</sup> July 2025 and Written Submissions dated 10<sup>th</sup> July 2025.

28. When the matter came up for hearing on 10<sup>th</sup> July 2025 at 2.00 p.m., the Board proceeded to read out respective pleading filed by parties in the matter. Mr. Mbugua brought to the attention of the Board that he had just been served with the Interested Party's response and written submissions and as such, he was constrained to proceed with the hearing as he needed to peruse the same and file a further response and comprehensive submissions. On her part, Ms. Karanja acknowledged the late filing and service and attributed this to late of

issuance of instructions by the Interested Party. She indicated that she was not opposed to the application for adjournment. Similarly, Mr. Chemngorem indicated that he was not opposed to the adjournment.

29. Having considered parties submissions on the application for adjournment, the Board proceeded to allow the same and directed parties to file their respective responses and submissions by 5.00 p.m. on Friday, 11<sup>th</sup> July 2025. Hearing of the matter was slated for Monday, 14<sup>th</sup> July 2025 at 2.00 p.m.

30. Vide email dated 10<sup>th</sup> July 2025, the Board Secretary notified parties of the Directions of the Board as issued during the hearing session while forwarding the link for parties to join the hearing on Monday, 14<sup>th</sup> July 2025 at 2.00 p.m.

31. On 11<sup>th</sup> July 2025, the Applicant filed Written Submissions dated 11<sup>th</sup> July 2025.

32. At the hearing of the instant Request for Review on 14<sup>th</sup> July 2025 at 2.00 p.m., the Board read out respective pleading filed by parties in the matter and having confirmed parties' compliance with its earlier directions, allocated time to parties to highlight their respective cases. Thus, the instant Request for Review proceeded for virtual hearing as scheduled.

## **PARTIES' SUBMISSIONS**

## **Applicant's case**

33. In its submissions, the Applicant placed reliance on its pleadings filed before the Board.

34. The Applicant submitted that the instant request for review arises out of the Procuring Entity's decision contained in the letter received on 13<sup>th</sup> June 2025 where it was notified that its tender in the subject tender was unsuccessful for the reason that it had an arithmetic error on the total cost having quoted Kshs. 93,751,701.41 yet the evaluated amount was Kshs. 93,951,681.90 thus a difference of Kshs. 11.51.

35. As to whether the reason given for the Applicant's disqualification was lawful, the Applicant contends that the Respondents acted contrary to the provisions of the Act and referred the Board to Section 80(2) of the Act which provides for evaluation of tenders in strict compliance with the requirements stipulated in the Tender Document.

36. Mr. Mbugua submitted that Clause 2.3 (i) of the Tender Document provided for the Financial Evaluation Criteria which stipulated that the tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be subject of correction, adjustment or in any way by any person or entity. He further submitted that this was reiterated under Section 82(1) of the Act and argued that the alterations made by the Procuring Entity which form the basis for disqualifying the Applicant's tender are null and void since the amount as read out at the tender opening is what should be considered and

there is no room for the Procuring Entity to correct, adjust, or omit that particular amount in any manner.

37. While making reference to Regulation 77 of the Public Procurement and Asset Disposal Regulations 2020 (hereinafter referred to as "Regulations 2020"), counsel submitted that it is trite law that minor deviations ought not to be taken into account and relied on the holding in *PPARB Application No. 152 of 2020 Top Choice Surveillance Limited & Vaghjiyani Enterprises Limited v The Accounting Officer Ministry of Transport, Infrastructure, Housing & Urban Development*. He indicated that disqualifying the Applicant's bid on the basis of the recalculated sums is a contravention of Section 82 of the Act and urged the Board to set aside the notification letter issued to the Applicant.

38. Mr. Mbugua submitted that the Tender Document provided a price schedule/scope of work and detailed requirements in form of labour, materials/consumables, equipment required of the bidders and specifically, on the number of workers for specific sites in addition to the requirement to comply with the labour laws.

39. Counsel argued that the successful bidder's tender price cannot sustain the scope of work bearing in mind that apart from the overhead costs, there exists contractor margins and various heads of taxes and statutory deductions. He further argued that the Procuring Entity was under an obligation to ensure that all bidders comply with the tender requirements so as to ensure fairness in the process and a level



playground for all. He urged the Board to direct the Evaluation Committee to evaluate all bids including the Interested Party's bid and ensure compliance with the provided scope including the wages paid to the workers at the respective stations depending on the locality of the site. In support of his argument, he relied on the holding in *Republic Versus Public Procurement Administrative Review Board, Accounting Officer Kenya Electricity Generating Company PLC & 5 others (Judicial Review E283 OF 2024)* and *Republic v Public Procurement Administrative Review Board; Rhombus Construction Company Limited (Interested Party) Exparte Applicant; Kenya Ports Authority & Accounting Officer-Kenya Ports Authority (Judicial Review E002 of 2021)[2021] KEHC 8109 (KLR)(5 March 2021) upheld by the Court of Appeal in Kenya Ports Authority & another v Rhombus Construction Company Limited & 2 others [2021] eKLR.*

40. The Applicant urged the Board to allow the instant Request for Review as prayed.

### **Respondents' case**

41. In their submissions, the Respondents placed reliance on the pleadings and confidential documents submitted to the Board.

42. Mr. Chemngorem in giving a brief background of the procurement process in the subject tender submitted that the Financial Evaluation was guided by the evaluation criteria provided in the Tender Document that stipulated that no correction of arithmetic errors would be

permitted and that the lowest evaluated bidder would be recommended for award. He further submitted that only the Interested party, M/s Cleanmark Limited and M/s Zuzumz Limited had matching totals between the read out tender sums and the computed totals which were subjected to further comparison to determine the lowest evaluated bidder.

43. As to whether disqualification of the Applicant's tender was lawful for reason that it had an arithmetic error in its tender sum as quoted, counsel submitted that there was a discrepancy of Kshs. 11.51 between the read out tender sum and the total of the unit prices. He indicated that Section 82(1) of the Act affirms the principle of finality in tender pricing by provision that the tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be subject of correction, adjustment or amendment in any way by any person or entity.

44. Counsel submitted that every bidder is strictly bound by the tender sum indicated in the Form of Tender, which constitutes the total amount at which the bidder offers to execute the contract. He referred the Board to Regulation 74(2) of Regulations 2020 and pointed that arithmetic errors in a tender arising from discrepancies between unit prices, quantities, subtotals, and the total bid price are considered as major deviations which affect the substance of the tender and must lead to disqualification.

45. Counsel argued that a mismatch between the total tender sum and the aggregated component prices is not a trivial informality as it constitutes a material deviation that undermines the integrity and reliability of the bid. He indicated that the Respondents were precluded by law from attempting to reconcile or adjust the Applicant's figures and that any such action would have contravened Section 82 of the Act and that conversely disregarding the discrepancy would have violated Regulation 74(2) of Regulations 2020 and the disclosed financial evaluation criteria thereby compromising the principles of fairness towards other compliant bids. He reiterated that disqualification of the Applicant was lawful and a necessary consequence in view of the fact that the arithmetic error constituted a fatal flaw under Section 82 of the Act and Regulation 74(2) of Regulations 2020.

46. Mr. Chemngorem submitted that evaluation in the subject tender was strictly in accordance with the evaluation criteria set out in the Tender Document and pursuant to Section 80(2) of the Act which prohibits introduction of any new or undisclosed evaluation criteria and ensures that all bidders are assessed based on the same predetermined standards. He pointed out that the Tender Document explicitly required bidders to ensure arithmetic consistency in the financial proposal and warned that the tender sum must correspond with the sum of the itemized prices.

47. Counsel indicated that the principles of fairness and transparency as provided under Article 227 of the Constitution were adhered to urged

the Board to dismiss the instant Request for Review and award of the subject tender to the Interested Party be upheld. He further pointed out that the tender validity period was due to lapse on 9<sup>th</sup> July 2025 and that the statutory standstill period took effect on 27<sup>th</sup> June 2025 pursuant to Section 168 of the Act thereby preserving 13 days of tender validity from the date of the Board's decision and prayed for the Board to direct the Respondents to extend the tender validity period by an additional 90 days from the date of the decision in the instant Request for Review to enable implementation of the said decision.

### **Interested Party's case**

48. In its submissions, the Interested Party placed reliance on the pleadings filed before the Board.

49. As to whether the Applicant's bid was responsive to the Financial Evaluation Criteria as stipulated in the Tender Document, Ms. Karanja submitted that tenders ought to comply with all aspects of the invitation to tender and meet any other requirements laid down by the Procuring Entity in the Tender Document. She referred the Board to Clause 31.2 of Section I – Instructions to Tenderers and pointed out that the Procuring Entity's determination of a tender's responsiveness is to be based on the contents of the tender without material deviation, reservation, or omission as defined in the Tender Document.

50. Counsel argued that the assertion by the Applicant that the Procuring Entity was in breach of Section 79 of the Act in disqualifying its tender

from the procurement process on a minor error that should have been corrected without affecting the substance of the tender constitutes an attempt at misleading the Board.

51. She indicated that the Evaluation Committee was under an obligation to ensure that the Applicant's tender adhered to the provisions under Clause 2.1 of Section III – Evaluation and Qualification Criteria of the Tender Document and Clause 32 of Section I – Instructions to Tenderers and as such, the Applicant's tender as submitted was final and could not be subject of any correction, adjustment or amendment and was rightfully disqualified. Counsel further indicated that the Applicant had not disputed the arithmetic error identified in its tender document.

52. She reiterated that the Procuring Entity being bound by the provisions of the Tender Document, Article 227 of the Constitution and Section 79 of the Act could not allow the Applicant's arithmetic error as doing so would occasion prejudice to other bidders in the subject tender. She submitted that non-compliance by the Applicant cannot provide an anchor for the doctrine of legitimate expectation.

53. Counsel submitted that the Interested Party complied fully with the financial evaluation criteria and the price schedule outlined in the Tender Document and pointed out that the Evaluation Committee reaffirmed vide memo dated 3<sup>rd</sup> June 2025 that the financial evaluation was conducted in accordance with the criteria set out in the Tender

Document and that it was established that six (6) out of seven (7) bidders complied with the minimum wage requirements including the Interested Party.

54. Counsel submitted that the assertion by the Applicant that the Interested Party was below the threshold for financial evaluation per the evaluation criteria set out in the Tender Document constitutes an attempt at evaluating the Interested Party's tender against a criteria other than that provided in the subject tender contrary to Section 80(2) of the Act and usurpation of the mandate of the Evaluation Committee.

55. Ms. Karanja submitted that the Applicant has failed to provide any proof to substantiate its allegation that the Interested Party's bid was below the threshold for financial evaluation per the evaluation criteria set out in the Tender Document and referred the Board to the holding in *PPARB Application No. 153 of 2020 Space Contractors & Suppliers Investment Limited v The Accounting Officer, Kenya Maritime Authority and Others* and *PPARB Application No. 120 of 2024 Peesam Limited v Kenya Electricity Generating Company Plc*.

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

## **APPLICATIONS REJOINDER**

57. In a rejoinder, Mr. Mbugua submitted that the Procuring Entity went out of its way and corrected the Applicant's tender sum as submitted

in its tender. He further submitted that the Applicant's tender failed at the Financial Evaluation stage. Counsel indicated that all bidders were subject to the scope of works and that the Applicant's assertions were not in any way an attempt at usurping the powers of the Evaluation Committee. He further indicated that the Applicant was not privy to what had been submitted by the Interested Party and the role of review was a purview of the Board.

58. He urged the Board to allow the instant Request for Review as prayed.

59. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 27<sup>th</sup> June 2025 was due to expire on 18<sup>th</sup> July 2025 and that the Board would communicate its decision to all parties to the Request for Review via email.

### **BOARD'S DECISION**

60. 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:

#### **A. Whether the Procuring Entity lawfully disqualified the Applicant's tender at the Financial Evaluation stage in**

**accordance with the provisions of the Tender Document the Act and the Constitution.**

**B. Whether the Procuring Entity improperly evaluated the Interested Party's tender contrary to the provisions of the Tender Document.**

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

**Whether the Procuring Entity lawfully disqualified the Applicant's tender at the Financial Evaluation stage in accordance with the provisions of the Tender Document the Act and the Constitution.**

61. We have heard the Applicant submit that its tender was disqualified at the Financial Evaluation stage contrary to Section 79 of the Act on account of an arithmetic error that ought to have been corrected without affecting the substance of its tender.

62. The Applicant argued that the alterations made by the Procuring Entity on its tender sum which form the basis for its disqualification are null and void since the price as read out at the tender opening is what should be considered during evaluation and there is no room for correction, adjustment, or omission of that particular price by the Procuring Entity.



63. In response, the Respondents denied breaching Section 79 of the Act and submitted that evaluation of the subject tender was conducted in strict adherence with the provisions of the evaluation criterion set out in the Tender Document as read with Section 82 of the Act and Regulation 74(2) of Regulations 2020 which expressly prohibit the correction of arithmetic errors.

64. The Respondents submitted that the Applicant's tender was disqualified due to discrepancies between the tender sum as read out at the tender opening and the computed totals from its price schedule. They argued that this error constituted a material deviation and affected the substance of the Applicant's tender.

65. On its part, the Interested Party aligned itself with the Respondents' submissions and submitted that disqualification of the Applicant's tender by the Evaluation Committee due to the identified arithmetic error was in line with the set-out evaluation criterion as read with Article 227 (1) of the Constitution, Section 79 and 80(2) of the Act.

66. We note that 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)”**

67. The High Court in **Nairobi High Court Misc. Application No. 60 of 2020; Republic v The Public Procurement Administrative Review Board & Ors v Ex-parte Tuv Austria Turk** spoke to the principles under Article 227 of the Constitution and held as follows:

***45. Article 227 of the Constitution provides that when procuring entities contract for goods or services they must comply with the principles of fairness, equity, transparency, competitiveness and cost-effectiveness. For there to be fairness in the public procurement process, all bids should be considered on the basis of their compliance with the terms of the solicitation documents, and a bid should not be rejected for reasons other than those specifically stipulated in the solicitation document.***

***46. However, there is a need to appreciate the difference between formal shortcomings, which go to the heart of the process, and the elevation of matters of subsidiary importance to a level, which determines the fate of the tender. The***

***Evaluation Committee has a duty to act fairly. However, fairness must be decided on the circumstances of each case."***

68. The Act was established, *inter alia*, to give effect to Article 227 of the Constitution. 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) .....***

69. 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.

70. Section 79(1) of the Act provides for responsiveness of tenders as follows:

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

71. From the above provision, a tender only qualifies as a responsive tender if it meets all eligibility and mandatory requirements set out in the tender documents. In the case of **Nairobi High Court Misc. Application No. 112 of 2018; Republic v Public Procurement Administrative Review Board Ex-parte BABS Security Services [2018]eKLR** the

High Court affirmed that as a general rule, procuring entities ought to only consider and award responsive tenders and held that:

***“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.”***

72. The Applicant in the instant Request for Review is aggrieved by the notification letter dated 13<sup>th</sup> June 2024 which reads in part as follows:

***" .....***

***a) The successful tenderer***

| <b>No.</b> | <b>Name of successful Tenderer</b> | <b>Address of the successful Tender</b> | <b>Contract price of the successful Tender</b>   |
|------------|------------------------------------|---|--|
|            | <b>M/s Cleanmark Limited</b>       | <b>P.o Box 2169-00200, Nairobi</b>      | <b>Kshs. 80,029,131.84 inclusive of 16% VAT and PPCB Levy being the lowest evaluated bidder.</b> |

***d) Other Tenderers***

| <b>No.</b>  | <b>Name of Tenderer</b>   | <b>One Reason Why Not Evaluated</b>             |
|-------------|---------------------------|---|
| <b>....</b> | <b>.....</b>              | <b>.....</b>                                    |
| <b>22</b>   | <b>M/s Colnet Limited</b> | <b>Failed at the Financial evaluation Stage</b> |
| <b>....</b> | <b>.....</b>              | <b>.....</b>                                    |

***Reason for Disqualification of your bid;***

***a. You had an arithmetic error on the total cost. Your quoted amount was Ksh. 93,951,701.41 and the evaluated amount was Ksh.93,951,689.90 thus a difference of Kshs. 11.51***

.....”

73. According to the above notification letter, the Applicant’s tender was disqualified at the Financial Evaluation stage due to an arithmetic error on the total quoted price having quoted Kshs. 93,951,701.41 yet upon evaluation, the amount totaled to Kshs. 93,951,689.90 hence a difference of Kshs. 11.51.

74. Turning to the instant Request for Review, the Board notes that the Tender Document provided the procedures and criteria for evaluation of tenders at Section III – Evaluation and Qualification Criteria. Clause 2.3 of Section III – Evaluation and Qualification Criteria provided for the Financial Evaluation as follows:

***2.3 Financial Evaluation Stage***

***No correction of arithmetic errors – The tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be the subject of correction, adjustment, or amendment in any way by any person or entity.***

***The tenderer with the lowest evaluated bid will be recommended for award.***

***NB: Bidders must quote for all the schedules with completeness to be considered responsive.***

75. In essence:

- i. Bidders were required to quote for all the schedules with completeness so as to be considered responsive.
- ii. The tender sum as submitted and read out at the tender opening was final, absolute, and not subject to correction, adjustment, or amendment in any way by any person or entity.
- iii. The bidder with the lowest evaluated bid would be recommended for award of the subject tender.

76. According to the Evaluation Report submitted by the 1<sup>st</sup> Respondent pursuant to Section 67(3)(e) of the Act, we note that the Evaluation Committee having carried out a financial analysis at the Financial Evaluation stage and confirmed arithmetic errors found as follows as discerned at page 55 of the Evaluation Report:

**Financial Analysis One (1): CONFIRMATION OF ARITHMETIC ERRORS**

*This was guided by Section 82 of the PPADA 2015 that reads 'the tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be the subject of correction, adjustment or amendment in any way by any person or entity' and Regulation 74 (2) that reads 'Subject to section 79(2)(b) of the Act, 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. The below total calculated tender sums tabulated based on the unit prices indicated in the respective price schedules and compared to the tender sums read out during the tender opening were as summarized below;*



| <b>No.</b> | <b>Bidder Number</b> | <b>Bidder Name</b>                     | <b>Amount as per form of tender and Read Out During Tender Opening (Kshs. Incl. 16% VAT)</b> | <b>Total Amount As per Price Schedule (Kshs. Incl. 16% VAT)</b> | <b>Variance (Kshs)</b> |
|------------|----------------------|--|--|---|------------------------|
|            |                      |  |  |   |                        |
| <b>No.</b> | <b>Bidder Number</b> | <b>Bidder Name</b>                     |  |   |                        |
| 1          | 3                    | M/s Remarc Facility Management Ltd.    | 72,717,132.49  | 72,860,846.98   | -<br>143,714.49        |
| 2          | 5                    | M/s Cleanmark Limited                  | 80,029,131.84  | 80,029,131.84   | 0.00                   |
| 3          | 6                    | M/Liga Holdings Limited.               | 113,062,712.80   | 113,116,726.76  | -54,013.96             |
| 4          | 10                   | M/s Brooklyn Cleaning Services Limited | 97,213,312.00  | 97,239,192.76   | -25,880.76             |
| 5          | 17                   | M/s Dechrip East Africa Limited        | 112,120,478.56   | 112,115,826.00  | 4,652.56               |

|   |    |                    |               |               |       |
|---|----|--------------------|---------------|---------------|-------|
| 6 | 22 | M/s Colnet Limited | 93,951,701.41 | 93,951,689.90 | 11.51 |
| 7 | 24 | M/s ZuZumz Limited | 92,551,375.27 | 92,551,375.27 | 0.00  |

**Remarks:**

***M/s Remarc Facility Management Ltd, M/Liga Holdings Limited, Brooklyn Cleaning Services Limited, M/s Dechrip East Africa Limited & M/s Colnet Limited were disqualified since tender sums as read out during tender opening were different from the totals calculated using the unit prices on the price schedules as tabulated on above.***

***Remarks: Bidder : M/s Cleanmark Limited is the lowest evaluated bidder.***

77. From the above, it is clear that the Evaluation Committee disqualified the Applicant's tender, including other tenders, upon confirmation of arithmetic errors on account of there being a variance between the tender price indicated in the Form of Tender and as read out at the Tender Opening and their submitted total price as calculated using the unit prices indicated on the price schedules.

78. In support of the above decision, the Respondents during the hearing referred the Board to the provisions under Section 82 of the Act and Regulation 74(2) of regulations 2020 arguing that the said provisions expressly prohibit the correction of arithmetic errors.

79. The Board notes that Section 86(1)(a) of the Act 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) .....;***

***(c) .....; or***

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

80. Further, 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."***

81. From the aforementioned provisions, an evaluation committee while evaluating tenders at the financial evaluation stage is required *inter alia* to determine the evaluated price for each tender by taking into account any minor deviation from the requirements accepted by a procuring entity under section 79(2)(a) of the Act and 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.

82. We note that Section 79 (2) and (3) of the Act provides as follows with respect to minor deviations:

***"(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 document; 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."***

83. The import of the above provision is that a responsive tender shall not be affected by (a) any minor deviations that do not materially depart from the requirements set out in the Tender Document and (b) errors or oversights that can be corrected without affecting the substance of the tender.

84. Notably, Regulation 74(2) of Regulations 2020 cited by the Respondents provides for errors touching on the tender price as follows:

***"Subject to section 79(2)(b) of the Act, 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."***

85. In essence, Regulation 74(2) of Regulations 2020 dictates that any error from a miscalculation of unit price quantity subtotal and total bid price ought to be considered as a major deviation that affects the substance of the tender thus leading to its disqualification for being non-responsive.

86. Further, Section 82 of the Act provides for the tender sum as follows:

***"The tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be the subject of correction, adjustment or amendment in any way by any person or entity."***

87. Section 82 of the Act expressly prohibits any alterations or corrections to the tender sum which remains absolute and final and is not subject to correction, adjustment or amendment.

88. This Board has in numerous decisions considered the import of the above provisions under Regulation 74(2) of Regulations 2020 vis-à-vis Section 79(2)(b) and 82 of the Act. In **PPARB Application No. 144 of 2020 County Builders Limited v The Accounting Officer, Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works, State Department of Housing and Urban Development & Another** held as follows:

".....

*In considering the provisions cited herein, the Board observes that Regulation 74 (2) of Regulations 2020 is subject to the provision of section 79 (2) (b) of the Act. In the article on "Solicitors at Risk" published on November 2013, Andrew Nickels explains the meaning of the phrase "subject to" in legal agreements and legislation as follows: -*

*"Subject to" looks ahead to the exception. It is used in a clause that is secondary to the clause it is expressed to be "subject to". It tells the reader which clause takes priority where there is an overlap".*

***In its "Guide to Legislative Processes in Kenya" published in 2015, the Kenya Law Reform Commission explains the relationship between subsidiary legislation and a primary legislation (i.e. the parent Act/Statute) as follows:***

***"In other words, subsidiary legislation must conform to the primary legislation in all respects"***

***Thus, the Board deduces the meaning of "subject to" as applied in Regulation 74 (2) of Regulations 2020 to mean that Regulation 74 (2) of Regulations 2020 must conform in all respects with section 79 (2) (b) of the Act because the primary legislation being the Act, takes priority over Regulations 2020.***

***Furthermore, section 31 (b) of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya provides that:***

***"Where an Act confers power on an authority to make subsidiary legislation, the following provisions shall, unless a contrary intention appears, have effect with reference to the making of the subsidiary legislation—***

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

***(b) no subsidiary legislation shall be inconsistent with the provisions of an Act"***

***Section 24 (2) of the Statutory Instruments Act No. 23 of 2013 further provides that: -***

***"statutory instrument (i.e. subsidiary legislation) shall not be inconsistent with the provisions of the enabling legislation, or of any Act, and the statutory instrument shall be void to the extent of the inconsistency" [Emphasis by the Board]***

***The Court in Petition No. 20 of 2019, Victor Juma v Kenya School of Law & Council of Legal Education (Interested Party) [2020] eKLR also addressed the legal relationship between a primary/parent legislation and a subsidiary legislation while comparing provisions of the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 and the Kenya School of Law Act, 2016 when it held as follows: -***

***"I see no reason why the provisions of a subsidiary legislation should override the express provisions of an Act of Parliament. It is therefore my finding that the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 are not applicable in this case, and the relevant legislative instrument to be applied is the KSL Act. This means that the Petitioner cannot benefit from the vertical progression recognized in the Legal Education (Accreditation and Quality Assurance) Regulations, 2016."***

***Given that subsidiary legislation should not be inconsistent with provisions of an Act, when such an inconsistency arises, provisions of the Act supersede. In this instance, Regulation***



***74 (2) of Regulations 2020 states that any errors should lead to disqualification of a tender yet, the said Regulations should only apply to the extent of section 79 (2) (b) of the Act which allows errors or oversights can be corrected without affecting the substance of a tender to be declared responsive. There is therefore an inconsistency, and thus section 79 (2) (b) of the Act must prevail.***

***The Board is also mindful of section 82 of the Act which states that: -***

***"The tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be the subject of correction, adjustment or amendment in any way by any person or entity"***

***The Board has established certain errors or oversights can be corrected without affecting the substance of a tender. That notwithstanding, the tender sum remains the same and cannot be corrected even if errors or oversights (which are not necessarily arithmetic errors in a tender) may be identified or corrected pursuant to section 79 (2) (b) of the Act. This explains why a tenderer is bound by its tender sum hence ought to be prepared to implement a tender at its tender sum because award is made based on that tender sum. These provisions support the Board's view that the Procuring Entity did not have leeway to apply Regulation 74 of Regulations***

***2020 without considering provisions of section 79 (2) (b) and 82 of the Act.***

***Accordingly, the Board finds that Regulation 74 (2) of Regulations 2020 does not vest an automatic action for the Procuring Entity to find tenderers non-responsive as a result of arithmetic errors found in their bids during Financial Evaluation because the said provision is subject to section 79 (2) (b) of the Act whilst taking into account how a tender sum ought to be treated pursuant to section 82 of the Act.”***

89. Fundamentally:

- i. Section 79 (2) (b) of the Act prevails over Regulation 74(2) of Regulations 2020.
- ii. Pursuant to Section 82 of the Act, the tender sum as submitted in a tenderer’s Form of Tender and read out at the tender opening is absolute and final thus cannot be corrected, adjusted or amended in any way by any person or entity.
- iii. Pursuant to Section 79 (2) (b) of the Act, a responsive tender is not affected by errors or oversights that can be corrected without affecting the substance of a tender. This notwithstanding, the tender sum remains the same and cannot be corrected even if errors or oversights (which are not necessarily arithmetic errors in a tender) may be identified or corrected pursuant to section 79 (2) (b) of the Act.

iv. A tenderer is bound by its tender sum as submitted in the form of tender and the same cannot be corrected even if errors or oversights are identified or corrected. Hence, it ought to be prepared to implement a tender at its tender sum as indicated in its form of tender because award is made based on that tender sum indicated in the form of tender and as read out at the tender opening.

90. In the circumstances, a procuring entity does not have the leeway of applying the provisions of Regulations 74 of Regulations 2020 to disqualify a tenderer without considering provisions of Section 79(2)(b) and Section 82 of the Act. In this regard, the Board finds that there is no room for the Procuring Entity to correct arithmetic errors in tenderers bids and cannot apply Regulation 74(2) of Regulations 2020 while conducting Financial Evaluation as the price indicated in the Form of Tender and read out at the tender opening is supreme.

91. Similar holdings of the Board reflecting this position have been upheld in **PPARB Application No. 152 of 2020 Top Choice Surveillance Limited & Vaghjiyani Enterprises Limited v The Accounting Officer, Ministry of Transport, Infrastructure, Housing, Urban Development & Public Works, State Department for Housing & Urban Development & Another; PPARB Application No. 64 of 2022 Com Twenty One Limited v The Director General Communication Authority of Kenya; PPARB Application No. 104 of 2022 Dignity Traders Limited v Accounting Officer, Kenya**

**Maritime Authority & Another; and PPARB Application No. 14 of 2023 Shaanxi Investment Limited v Accounting Officer, Kenya National Highways Authority & Another.**

92. In view of the foregoing analysis, this Board is left with the inevitable conclusion that the Procuring Entity unlawfully disqualified the Applicant's tender at the Financial Evaluation stage contrary to the provisions of the Tender Document, the Act, and the Constitution.

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

**Whether the Procuring Entity improperly evaluated the Interested Party's tender contrary to the provisions of the Tender Document.**

94. The Applicant contends that the Procuring Entity improperly evaluated and awarded the Interested Party the subject tender yet its bid was below the threshold for financial evaluation as per the criterion set out in the Tender Document. It is the Applicant's case that upon further interrogation of the Interested Party's tender price, the same cannot be the subject of award as it barely met the overheads including the minimum wage for workers required in the different sites, statutory deductions for the workers, taxes, materials required for the tasks at hand and the contractor's margins including profits.

95. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that the Evaluation Committee, in response to comments made by the 1<sup>st</sup> Respondent in the First Professional Opinion as to whether all the bidders that had progressed to the financial evaluation stage had complied with the minimum wage requirement, carried out further interrogations and relied on Legal Notice No. 164 of 2024 The Regulation of Wages (General)(Amendment) Order, 2024 and found that six (6) out of the seven (7) bidders who had progressed to financial evaluation stage, including the Interested Party, were compliant.

96. On its part, the Interested Party aligned itself with the submissions made by the 1<sup>st</sup> & 2<sup>nd</sup> Respondent and submitted that its bid was responsive to the requirements set out under the Tender Document and all statutory requirements for purposes of undertaking the subject tender. It argued that the Applicant had failed to substantiate its claim that its tender was below the stipulated threshold for evaluation at the financial stage as per the requirements of the Tender Document

97. In view of parties' arguments, the issue that comes up for determination is whether award of the subject tender to the Interested Party was proper and in line with the requirements set out in the Tender Document in terms of its tender price bearing in mind its compliance with the statutory requirement on payment of the minimum wage as set in law and the threshold for financial evaluation.

98. Having carefully studied the Tender Document, we note that Mandatory Requirement No. 18 and 19 of Clause 2.1 Mandatory Evaluation Criteria/ Requirements under Section III – Evaluation and Qualification Criteria at page 28 of the Tender Document (hereinafter referred to as MR 18 & 19 of the Tender Document) provides as follows:

***2.1 Mandatory Evaluation Criteria/ Requirements:***

| <b><i>Preliminary/ Mandatory Evaluation Requirements/ Criteria</i></b> |  |
|--|--|
| <b><i>.....</i></b>  | <b><i>.....</i></b>  |
| <b><i>18</i></b>   | <b><i>Written undertaking in the company's letterhead duly signed and stamped stating that the tenderer will comply with payment of minimum wage approved by the Ministry of Labour.</i></b>   |
| <b><i>19</i></b>   | <b><i>Proof of compliance with prevailing Labour laws including the statutory annual increments on minimum wage as follows:</i></b><br><b><i>a) Attach latest certified payroll duly stamped by the company and an advocate for the last three (3) Months i.e., December 2024, November 2024 &amp; October 2024).</i></b><br><b><i>b) Attach a valid letter from the labour office, duly certified by an advocate, stating that the firm complies with all labour laws and minimum wage.</i></b> |
| <b><i>.....</i></b>  | <b><i>.....</i></b>  |

99. In essence, for a bidder to be considered as compliant to MR 18 & 19 of the Tender Document, it had to

- i. Submit in its tender a written undertaking on its letterhead duly signed and stamped stating that it will comply with payment of minimum wage approved by the Ministry of Labour.
- ii. Submit proof of compliance with prevailing labour laws including statutory annual increments on minimum wage comprising of (a) latest certified payroll duly stamped by the company and an advocate for the last 3 months of 2024 being December, November, and October; and (b) a valid letter from the labour office, duly certified by an advocate stating that it complies with all labour laws and minimum wage.

100. We have scrutinized the Evaluation Report submitted to the Board by the 1<sup>st</sup> Respondent pursuant to Section 67(3)(e) of the Act and note that the Evaluation Committee found the Interested Party to have complied with MR 18 & 19 of the Tender Document. Subsequently, it was progressed to the Technical Evaluation stage and later on to the Financial Evaluation stage where it was recommended for award of the subject tender.

101. From the First Professional Opinion, we note that the 1<sup>st</sup> Respondent sought to know if all the firms that had qualified for Financial Evaluation met the minimum wage. Thereafter, the Ag, Manager Supply Chain Management, Mr. Patrick Kapto vide Secretarial Comments Ref:

GDC/MSC/005/24-25/pk dated 28<sup>th</sup> May 2025, addressed to the Evaluation Committee indicated that the Evaluation Report had been reviewed and that the 1<sup>st</sup> Respondent sought to know whether all firms that had qualified for Financial Evaluation met the minimum wage. Mr. Kapto directed the Evaluation Committee to review the Evaluation Report in line with the aforementioned observations and to submit a duly and corrected Evaluation Report.

102. We note that the Evaluation Committee vide an Internal Memo Ref: GDC/ADMIN/OT/045/2024-2025 dated 3<sup>rd</sup> June 2025 indicated that it had reviewed the comments of the 1<sup>st</sup> Respondent on whether the bidders who had made it to the financial evaluation met the minimum wage requirement and responded as follows:

".....

***The following were the observation of the committee on minimum wage requirements;***

***To ascertain, the applicable rates on minimum wages for different areas, the committee made reference from the Kenya subsidiary legislation, 2024 legal notice no. 164 (attached) on minimum wage payable.***

***Out of the seven (7) bidders who made it to financial stage, one (1) bidder M/s Remarc Facility Management Ltd was found non-responsive on the minimum wage requirement for Kawi and Polo Centre. The other five (5) bidders were found responsive on the minimum wage***



***requirement. Attached is a comparison of minimum wage against the quoted figures by the bidders.***

103. From the attached Comparison of Price Cost per area with Minimum Wage Form accompanying the Internal Memo Ref: GDC/ADMIN/OT/045/2024-2025 dated 3<sup>rd</sup> June 2025 , we note that the Evaluation Committee found the Interested Party's tender to be responsive and compliant with the set out minimum wage requirements as per the Regulation of Wages (General)(Amendment) Order, 2024.

104. It is not in dispute that the Interested Party in compliance with MR18 and 19 of the Tender Document provided a written undertaking to comply with the payment of the minimum wage approved by the Ministry of Labour and proof of compliance with prevailing labour laws as required in its tender. What seems to be the Applicant's contention is the presumed inability of the Interested Party to comply with the minimum wage regulations for the different sites including statutory deductions for its workers, taxes, materials required for the task at hand and also the contractor's margins including profits. This presumption is borne out of the Interested Party's tender price that the Applicant contends has interrogated and is of the belief that the same will lead to a breach of the minimum wage guidelines and the labour laws.

105. When faced with a similar issue as raised in the instant Request for Review by the Applicant, this Board in **PPARB Application No. 109 of 2024 Canon Security Services Kenya Limited v Accounting Officer, The Technical University of Kenya & Another** held as follows:

***" 78. It is the Board's view that a keen reading of MR 19 reveals that a bidder was not required to tabulate the figures totaling its bid price. Whereas the amounts stipulated in the Total Wage payable Inclusive of House Allowance was Kshs. 17,481.8 for the day guard and Kshs. 19,502.85 for the night guard, it was up to a bidder to quote a price that was not only compliant with the labour laws and the minimum wage guidelines during the contract period inclusive of house allowance but also ensure that its bid price was inclusive of all its statutory obligations.***

.....

***80. It is not in the place of this Board to decide for a bidder how to price its bid. The minimum monthly wage inserted in the Tender Document serves as a useful piece of information to guide a bidder on what costs to expect should his bid become successful but was not binding upon a bidder otherwise the essence of competition would have been lost if even bidder was to quote the minimum wage in their bids. Any bidder was free to price***

***its bid below or above the minimum wage but will have to live with the choice they make, if successful since the successful bidder will be required to abide by the minimum wage guidelines during the entire period of the contract...”***

106. In **PPARB Application No. 116 of 2024 Peesam Limited v The Accounting Officer, Kenya Electricity Generating Company Plc & Others**, the Board similarly found as follows:

***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.***

107. In view of the foregoing, the Board finds no compelling reason to depart from the above holdings. As rightly stated, any breach by the Interested Party of the statutory minimum wage requirement in light of its written undertakings to comply with payment of the minimum wage approved by the Ministry of Labour, which in any event, is bound to change if the Regulation of Wages (General)(Amendment) Order,

2024 is amended at any point in time during pendency of the subject tender, is a matter of a future claim.

108. We are of the considered view that the Evaluation Committee is under a duty to confine itself to the procedures and criteria set out in the Tender Document when evaluating bids as read with provisions of the Act, Regulations 2020 and the Constitution. The integrity of public procurement demands strict adherence to published criteria and this Board is tasked with affirming the primacy of the Tender Document and upholding procurement fairness and legality. This was the holding of Justice Aburili in **Judicial Review E092 of 2025 Minet Kenya Insurance Brokers Limited v The Public Procurement Administrative Review Board & Others** where the High Court cautioned the Board against introduction of unstated evaluation criterion in the Tender Document and held as follows:

***"139. In light of the foregoing analysis, this Court finds that the 1<sup>st</sup> Respondent's interpretation of the term "valid registration" to include a current practicing license was not only inconsistent with the plain and ordinary meaning of the term "valid registration" as used in the tender documents, but also amounted to the unlawful introduction of an unstated evaluation criterion.***

***140. Further, the duty to draft clear, unambiguous and comprehensive tender documents lies with the Procuring Entity, and where the procuring entity fails to expressly stipulate specific requirements, bidders are entitled to rely on the document as framed. To hold otherwise would be to sanction retrospective and subjective interpretations that undermine the principles of fairness, transparency and accountability in public procurement processes.***

***141. Accordingly, I find and hold that the decision to fail to award to the Applicant the required marks during technical evaluation on the basis of an unstated requirement namely, a current practicing license was unlawful, irrational and ultra vires. It offended the principles of legality, procedural fairness and legitimate expectation and violated the Applicant's right to fair administrative action under Article 47 of the Constitution under Article 47 of the Constitution and the statutory safeguards under the Public Procurement and Asset Disposal Act.***

***142. I hasten to add that the integrity of public procurement demands strict adherence to published criteria. The Review Board's expansion of the term "valid registration" undermines this principle and should be corrected, the interpretation having been a post facto interpretation by the tender procuring entity. This case demonstrates the absolute need***

***for the Review Board to always affirm the primacy of the tender document and uphold procurement fairness and legality...”***

109. In the circumstances, the Board finds that the Procuring Entity's Evaluation Committee properly evaluated the Interested Party's tender in compliance with MR 18 and 19 of the Tender Document as regards compliance with the minimum wage requirement. Accordingly, this ground of review fails and is disallowed.

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

110. The Board has found that the Procuring Entity unlawfully disqualified the Applicant's tender at the Financial Evaluation stage contrary to the provisions of the Tender Document, the Act, and the Constitution.

111. The Board has further found that the Procuring Entity's Evaluation Committee properly evaluated the Interested Party's tender in compliance with MR 18 and 19 of the Tender Document as regards compliance with the minimum wage requirement.

112. 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 1<sup>st</sup> 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 within 30 days 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.

113. Bearing in mind the importance of compliance with stipulated statutory minimum wage requirements, we also deem it necessary to direct whichever bidder will be found successful for award of the subject tender be supervised on this aspect by the Public Procurement Regulatory Authority (PPRA) and the Ministry of Labour and Social Protection so as to ensure compliance and in the event of breach, legal action be taken against the said bidder.

114. We note that the Respondents had sought at prayer c) of their Memorandum of Response dated 8<sup>th</sup> July 2025 for extension of the Tender Validity period for an additional ninety (90) days from the date of the Board's decision to enable them implement the decision of the Board. In seeking this prayer, the Respondents indicated that the validity period was due to expire on 9<sup>th</sup> July 2025 but time came to a standstill upon filing of the instant Request for Review on 27<sup>th</sup> June 2025 pursuant to Section 168 of the Act thereby preserving 13 days tender validity period from the date of the Board's decision.

115. Section 88 of the Act provides for extension of the tender validity period as follows:

***"88. Extension of tender validity period***

***(1) Before the expiry of the period during which tenders shall remain valid the accounting officer of a procuring entity may extend that period.***

***(2) The accounting officer of a procuring entity shall give in writing notice of an extension under subsection (1) to each person who submitted a tender.***

***(3) An extension under subsection (1) shall be restricted to not more than thirty days and may only be done once.***

***(4) For greater certainty, tender security shall be forfeited if a tender is withdrawn after a bidder has accepted the extension of bidding period under subsection (1).***

116. In essence, the accounting officer of a procuring entity (a) may extend the tender validity period before expiry of such period; (b) give a written notice to tenderers of the extension of the tender validity period; (c) is restricted to extending the tender validity period for not more than thirty (30) days; and (d) is restricted to only extending the tender validity period once.

117. Noting that the subject tender's validity period is valid for a period of 13 days and that the 1<sup>st</sup> Respondent is yet to apply the provisions under Section 88 of the Act by extending the tender validity period for a period of 30 days, the Board's deems it just to direct the 1<sup>st</sup> Respondent to extend the validity period as envisioned under Section 88 of the Act. This in effect means that the Respondents will have adequate time to implement the Board's orders.

118. The upshot of our finding is that the instant Request for Review succeeds with respect to the following final orders, subject to the right of any party aggrieved with this decision to seek judicial review by the High Court within fourteen days, pursuant to Section 175 of the Act.

### **FINAL ORDERS**

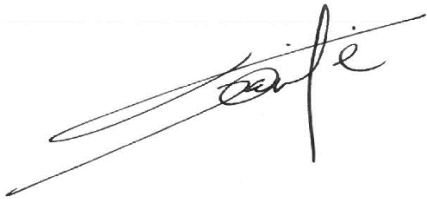
119. In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the instant Request for Review:

**A. The letter of Notification of Intention to Award dated 13<sup>th</sup> June 2025 issued by the 1<sup>st</sup> Respondent to the successful bidder with respect to Tender No. GDC/ADMIN/OT/045/2024-2025 for Provision of Cleaning, Sanitation & Waste Collection & Disposal Services for a Period of Two (2) Years be and is hereby cancelled and set aside.**

- B. The letters of Notification of Intention to Award dated 13<sup>th</sup> June 2025 issued by the 1<sup>st</sup> Respondent to the Applicant and to all other unsuccessful tenderers with respect to Tender No. GDC/ADMIN/OT/045/2024-2025 for Provision of Cleaning, Sanitation & Waste Collection & Disposal Services for a Period of Two (2) Years be and are hereby cancelled and set aside.**
- C. The 1<sup>st</sup> Respondent is hereby ordered to extend the subject tender's validity period by 30 days pursuant to Section 88 of the Act.**
- D. The 1<sup>st</sup> 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.**
- E. For certainty, the re-evaluation ordered at D 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.**

**F. Considering that the procurement process is not complete,  
each party shall bear its own costs in the Request for Review.**

**Dated at NAIROBI this 18<sup>th</sup> Day of July 2025.**



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**PANEL CHAIRPERSON**

**PPARB**



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**SECRETARY**

**PPARB**