

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION No. 73/2017 OF 10<sup>TH</sup>AUGUST, 2017**

**BETWEEN**

**KIVUKU AGENCIES.....APPLICANT**

**AND**

**KENYA AIRPORTS AUTHORITY .....PROCURING ENTITY**

Review against the decision of Kenya Airports Authority in the Matter of Tender Number KAA/338/2016-2017 for Provision of Cleaning Services for Washrooms at Moi International Airport.

**BOARD MEMBERS PRESENT**

1. Mrs. Josephine W. Mong'are - Member in the Chair
2. Mr. Hussein Were - Member
3. Mr. Peter B. Ondieki, MBS - Member
4. Mrs. Gilda Odera - Member

**IN ATTENDANCE**

1. Philip Okumu - Holding Brief for Secretary
2. Maureen Kinyundo - Secretariat



## **PRESENT BY INVITATION**

### **Applicant - Kivuku Agencies**

1. Gikandi Ngibuini - Advocate, Gikandi & Co. Advocates
2. Apolot Sarah - Advocate, Gikandi & Co. Advocates
3. Miriam Maina - Director
4. Velma Ngala - Director

### **Procuring Entity- Kenya Airports Authority**

1. Duncan Okatch - Advocate, Kithure Kindiki
2. Amany Valentino - Advocate, Kithure Kindiki
3. Yasmin Josephine - Advocate, Kithure Kindiki
4. Ettah A. Muango - Advocate, KAA
5. Lilian Okidi - Ag. Project Manager
6. Bernard Bosire - Procurement Records Officer
7. Kipngetich Nicholas - Clerk, Okatch & Partners

## **BOARD'S DECISION**

Upon hearing the representations of the parties and interested candidates and upon considering the information and all the documents before it, the Board decides as follows:



## BACKGROUND OF DECISION

### **Introduction**

The tender for Cleaning of Washrooms was necessitated by the termination of the contract by M/s Prolific Works and subsequent approval for a new tender. The proposed contract period under this tender was for three years renewable annually subject to performance.

### **Tender Invitation**

The Tender was advertised in the *Standard* Newspaper of 18<sup>th</sup> April 2017 and *Daily Nation* Newspaper of 18<sup>th</sup> April 2017. The tender eligibility was for duly registered enterprises owned by youth, women and persons with disabilities.

The tender was closed on 4<sup>th</sup> May, 2017 at 11.00 a.m. and opened immediately thereafter. Eighteen (18) tenderers submitted their bids by the closing date and time as listed below:-

BID No.	NAME OF BIDDER	AMOUNT (Ksh)
1.	City Scape Trends Services Ltd	23,010,199.20
2.	Soset Shidders Ltd	22,577,644.95
3.	Monyangih Investments	1,956,131.20
4.	Bryon Trustket investment Ltd	22,684,196.67
5.	Virgin Clean Ltd	20,079,948.00
6.	Oneway Cleaning Services Ltd	27,527,676.36
7.	Super Broom Services Ltd	20,103,252.72
8.	Jimmon Services	15,190,200.00
9.	SuperClean Shine Ent .Ltd	26,953,488.00
10.	GreenShine Cleaners& General Services	2,875,000.00 Per Month
11.	Monder International Limited	1,740,000.00



BID No.	NAME OF BIDDER	AMOUNT (Ksh)
		Per month
12.	Spic N Span Services	21,596,976.00
13.	Moriah Agencies Limited	33,839,520.00
14.	Vectorcon Pest Control and Supplies Limited	143,265,884.76
15.	The Gardens Wedding Centre Limited	21,333,417.60
16.	Sanjush Contractors and Suppliers Tender documents not availed as were said to have submitted documents for the wrong tender (Attached Minutes of Tender opening)	N/A
17.	Prolific Works Limited	21,152,386.56
18.	Kivuku Agencies	19,411,788.00

### **Tender Evaluation**

This was carried out in three stages of preliminary (mandatory), technical and financial evaluation.

#### **Preliminary Evaluation**

Bidders were assessed for compliance with mandatory requirements and failure to comply with any of the requirements led to automatic disqualification from further evaluation.

Ten tenderers complied fully with the mandatory requirements and therefore qualified for technical evaluation, while seven tenderers failed and were declared non-responsive. The Applicant herein was disqualified at this stage for failure to attach a certified copy of recent CR12 (not older than 2 months) duly issued by the Company registrar confirming directorship.



## Technical Evaluation

Bidders were evaluated for specific experience in relation to this assignment; adequacy of personnel; and possession of machinery, tools and equipment. The pass mark at the technical evaluation stage was 75%. Three bidders failed to attain the minimum score of 75% and were therefore disqualified from further evaluation. Seven bidders attained a minimum score of 75% and qualified for the financial evaluation stage.

## Financial Evaluation

The financial quotations of the seven qualified tenderers were verified and checked for arithmetical errors/omissions and completeness. Their prices were compared and ranked as shown below:

Bid No.	Bidder Name	Amount		Rank
		Per Month	Per Year	
02	Soset Shidders Ltd	1,881,470.41	22,577,644.95	4
06	Oneway Cleaning Services Ltd	2,293,973.04	27,527,676.48	6
09	SuperClean Shine Ent .Ltd	2,246,124.00	26,953,488.00	5
11	Monder International Limited	1,740,000.00	20,880,000.00	1
12	Spic N Span Services	1,799,748.12	21,596,977.44	3
13	Moriah Agencies Limited	2,819,960.02	33,839,520.14	7



15	The Wedding Limited	Gardens Centre	1,777,784.80	21,333,417.60	2
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### Recommendation

Based on the financial analyses above, the committee recommended that the tender for Provision of cleaning services for washrooms at Moi International Airport, be awarded to **M/s Monder International Limited** at their quoted price of Kenya Shillings **20,880,000** per year inclusive of all salaries, expenses, VAT, and all other taxes, being the lowest best evaluated bidder.

### PROFESSIONAL OPINION

The Professional Opinion was issued on 3<sup>rd</sup> July, 2017 by the Head of Procurement Unit (Acting General Manager, Procurement & Logistics) who opined that the procurement process was conducted as per the Public Procurement and Asset Disposal (PPAD) Act, 2015 and the award was recommended as per the evaluation report.

The Accounting Officer approved the recommendation on the same date, 3<sup>rd</sup> July, 2017.

Messrs Kivuku Agencies, the Applicant herein, was notified vide letter dated 26<sup>th</sup> July 2017 that its tender was unsuccessful, which decision it was aggrieved by and opted to file this request for review.

### REQUEST FOR REVIEW No. 73/2017

The Request for Review was lodged by M/s Kivuku Agencies (hereinafter "the Applicant") on 10<sup>th</sup> August, 2017 in the matter of the Tender Number KAA/338/2016-2017 for Provision of Cleaning Services for Washrooms at



Moi International Airport for Kenya Airports Authority (hereinafter "the Procuring Entity").

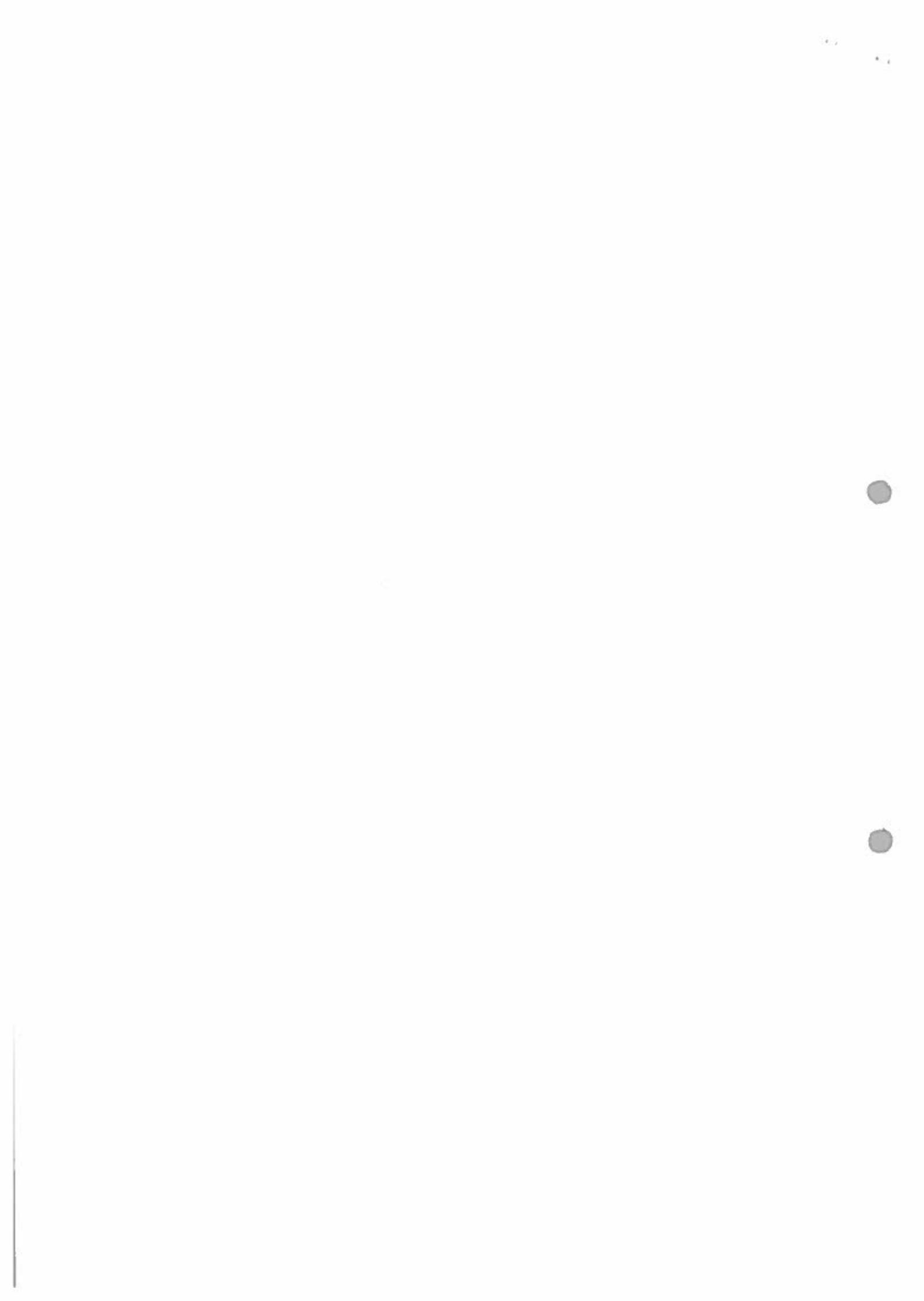
The Applicant sought the following orders of the Board:

1. *That the entire decision of the Respondent made on 26<sup>th</sup> July, 2017 in respect of Tender No. KAA/338/2016-2017 awarding the tender to M/s Monder International Limited at Kshs 20,880,000/= be annulled in its entirety.*
2. *That Tender No. KAA/338/2016-2017 be awarded to the Applicant herein, M/s Kivuku Agencies at Kshs. 19,411,788 being the lowest evaluated bidder.*
3. *Award of costs to the Applicant.*

The Applicant raised nine grounds in support of the Request for Review. It was represented by Mr. Gikandi Ngibuini, Advocate from the firm of Gikandi & Company Advocates. The Procuring Entity, represented by Mr. Duncan Okatch, Advocate from the firm of Kithure Kindiki & Co. Advocates opposed the Request for Review.

### APPLICANT'S CASE

The Applicant stated in its case that the Procuring Entity invited interested persons to bid for the subject tender and requested the bidders to indicate whether the bidder was a business name, sole proprietor, partnership or a registered company. It stated further that in compliance with the instructions to tenderers, it submitted its bid indicating that it was duly registered under the registration of business names. It also stated that, *vide* letter dated 26<sup>th</sup> July 2017, the Procuring Entity notified the Applicant that its tender was unsuccessful on account of the Applicant's failure to submit CR12.



The Applicant averred that as a business name the Applicant did not have a CR12 since the Applicant was not a company but a registered business name. In the Applicant's view the Procuring Entity's decision not to award the tender to the Applicant solely because the Applicant did not submit a CR12 was irrational and unreasonable. It averred further that CR12 was only issued to registered companies adding that had the Procuring Entity intended to lock out bidders other than registered companies then it had an obligation to disclose in the tender document that if a party was not a registered company, then such a party would be disqualified from being awarded the tender.

The Applicant termed as unlawful the action of the Procuring Entity to represent to tenderers that it would accept bids from registered business names, sole proprietorships, partnerships and registered companies then fail to award the tender to the Applicant who was the lowest evaluated bidder for the sole reason that the Applicant did not submit a CR12. It argued further that for the Procuring Entity to have used the very reason to knock off the Applicant from succeeding amounted to changing the conditions of the tender, post the floating of the same.

To the Applicant, the Procuring Entity violated the provisions of Clause 2.24.2 of the Tender Document at page 13, sub headed as "award of criteria" which stated, *"... the Kenya Airports Authority will award the contract to the successful tenderer whose tender has been determined to be the lowest evaluated tender, provided further that the tenderer is determined to be qualified to perform the contract satisfactorily"*.



The Applicant alleged that its bid was the lowest at the tender opening and that by accepting the second lowest evaluated bidder, M/s Monder International Limited, the Procuring Entity had unlawfully allowed public finance to be misused contrary to Articles 10, 47 and 201 of the Constitution of Kenya, 2010.

### PROCURING ENTITY'S RESPONSE

In Response to the Request for Review the Procuring Entity submitted that the procurement process was an open tender and that the evaluation of the tenders was carried out as per the evaluation criteria set out in the tender document. It submitted further that the Applicant was responsive to criterion 5 of the mandatory requirements which in part was to duly fill the Confidential Business Questionnaire and that this criterion was totally different from criteria 3 which required the bidder to provide certified copy of recent CR12 duly issued by company register confirming directorship. It also submitted that the CR12 requirement was a legal document issued by the Registrar of Companies and which provides details on the composition of directors adding that there was no evidence that the Applicant met this evaluation criterion.

The Procuring Entity averred that the Applicant was non-responsive at the preliminary evaluation stage and was therefore not evaluated at the technical level. It averred further that the tender opening process is not the evaluation process, therefore the Applicant could not have been the lowest best evaluated bidder as alleged as this was the preliminary stage. It was also averred that the Applicant was not evaluated the best lowest bidder as



claimed and could not therefore purport to be substantially responsive as provided under clause 2.24.2 of the tender document.

The Procuring Entity contended that at no time during the bidding process did the Applicant seek clarification as provided for under clause 2.4.1 of the tender document on its inability to obtain the CR 12. It contended further that the Applicant had not demonstrated the alleged lack of transparency, accountability and fairness in the tender process arguing that the tender was not only open to all eligible bidders but that the tender process was open, fair and not in violation of any Constitutional provisions or procurement laws.

The Procuring Entity stated that pages 52 and 53 of the tender document made reference to the Confidential Business Questionnaire which was a prescribed tender document that could not be altered by the Procuring Entity. Further, stated the Procuring Entity, inclusion of the form and the requirement thereof could not amount to variation of the terms of the tender document.

In conclusion, the Procuring Entity averred that the guiding principles as set out in the Public Procurement and Asset Disposal Act, 2015 were observed in the entire procurement process and that the tender was awarded fairly to the lowest evaluated bidder after examining the information provided by each bidder. The Procuring Entity urged the Board to dismiss the Request for Review with costs and find that the procurement procedure was duly followed and order the procurement process to be completed.



## APPLICANT'S REPLY

Mr. Ngibuini, in reply on behalf of the Applicant, submitted that the question of clarification did not arise because this having been an open tender and the applicant having submitted a certificate of registration issued under registration of business names Act then the Applicant was genuinely entitled to take it that the requirement for CR12 could not possibly apply to the Applicant. He argued that in the circumstances it was unfair for the Applicant to be knocked out purely on the basis of a condition that could possibly be realized.

## THE BOARD'S FINDINGS

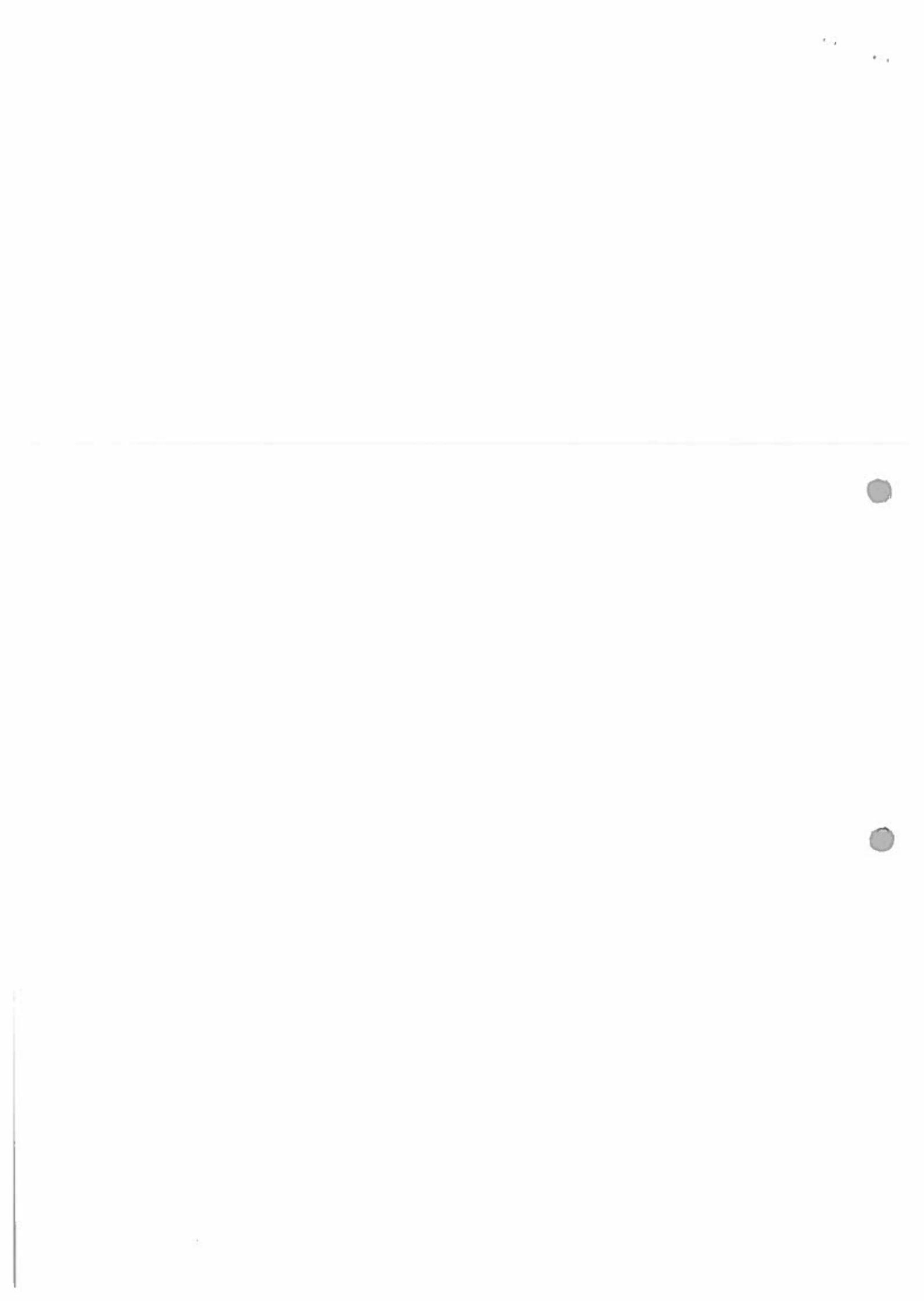
The Board has considered the submissions made by parties and has further examined all the documents that were submitted to it and has identified the following issue for determination in this Request for Review:

- 1. Whether the Procuring Entity unfairly disqualified the Applicant's tender purportedly on account of failure by the Applicant to provide a CR 12 in its bid document.*

The Board now proceeds to determine the issue framed for determination as follows:-

- 1. As to whether the Procuring Entity unfairly disqualified the Applicant's tender purportedly on account of failure by the Applicant to provide a CR 12 in its bid document**

The Board has considered the Applicant's Request for Review dated 5<sup>th</sup> August 2017 and filed on 10<sup>th</sup> August, 2017 together with the verifying affidavit sworn by Ms Miriam Maina Gathoni on 5<sup>th</sup> August 2017. The Board has also considered the Procuring Entity's Response dated 18<sup>th</sup> August, 2017



together with the submitted confidential documents and the oral submissions made by the parties to this Request for Review. It was common ground during the hearing of this Request for Review that the present dispute arose from the letter of notification dated 26<sup>th</sup> July 2017 to the Applicant which the Procuring Entity wrote thus,

*"This is to notify you that your tender for Provision of Cleaning Services for Washrooms at Moi International Airport was unsuccessful.*

*Kindly note that you did not submit the CR 12 as required.*

*The tender was awarded to the best evaluated firm, M/s Monder International Limited at Kshs 20,880,000.00 per year (inclusive of VAT)".*

It is common ground that the Procuring Entity advertised Tender Number KAA/338/2016-2017 for Provision of Cleaning Services for Washrooms at Moi International Airport on 18<sup>th</sup> April 2017. The tender eligibility was for duly registered enterprises owned by youth, women and persons with disabilities. The said tender was closed and opened on 4<sup>th</sup> May, 2017 with eighteen tenderers, including the Applicant, submitting bids.

Further, it is a fact not in dispute that the tender was evaluated in three stages of preliminary (mandatory), technical and financial evaluation. The Applicant was disqualified at the preliminary evaluation stage for failure to attach a certified copy of recent CR 12 (not older than 2 months) duly issued by the Company registrar confirming directorship.

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The issue for the Board to determine is whether the Applicant's bid was rightfully disqualified because of lack of submission of Form CR 12, which the Applicant contends is not issued by the Registrar of Companies to firms registered under Business Names, and therefore the Applicant ought not to have been disqualified.

To determine this issue the Board has looked at the tender document and in particular:

- i) Invitation for Tenderers found at Section I;
- ii) Eligible Tenderers found at Clause 2.1
- iii) Appendix to Instructions to Tenderers found at Section II
- iv) Preliminary evaluation criteria found at Section VI;
- v) Standard Forms found at Section VII

The Board notes the following provisions of the tender document:

#### **Section I - Invitation for Tenderers**

*...(Eligibility for duly registered Youth, Women & People Living with Disabilities) Kenya Airports Authority invites competent and eligible Cleaning Contractors/firms to submit sealed bids for the Provision of Cleaning Services for Washrooms at Moi International Airport.*

*...The tender shall be valid for a period of 90 days from the closing date of the tender and prices quoted should be net inclusive of all taxes..."*

#### **Clause 2.1.1-Eligible Tenderers**

*"This invitation to tender is open to all tenderers eligible as described in the instructions to tenderers. Successful tenderers shall provide the services for the stipulated duration from the date of commencement specified in the tender documents".*



## Section II –Appendix to Instructions to Tenderers

*“The following information shall complement or amend the provisions of the instructions to tenderers and the provisions of the appendix, the provisions of the appendix herein shall prevail over those of the instructions to tenderers.*

<i>Instruction to tender reference</i>	<i>Particulars of Appendix to Instruction to tenderers</i>
<i>2.1</i>	<i>Eligible tenderers shall be duly registered Kenyan firms/companies wholly owned and controlled by persons who are citizens of Kenya</i>
<i>2.2.2</i>	<i>The cost of the tender documents is N/A</i>
<i>2.11.1</i>	<i>The qualification requirements are as indicated in the evaluation criteria on Section VI</i>
<i>2.12.2</i>	<i>The amount of tender security is a duly filled and signed Tender Securing Declaration Form</i>
<i>2.13</i>	<i>The tender validity period is 90 days</i>
<i>2.14.1 &amp; 2.15.1</i>	<i>Tenderers must submit one original and one copy well bounded documents and enclosed in a plain outer envelope properly sealed, labelled and addressed as per instructions</i>
<i>2.16.3</i>	<i>Bulky tender documents shall be received in properly sealed envelopes as per instruction at the GM’s (Procurement &amp; Logistics) office on 2<sup>nd</sup> floor Kenya Airports Authority Headquarters at JKIA Nairobi</i>

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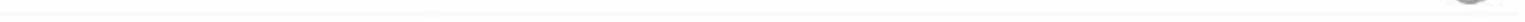
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2.18	<i>The tender closing and opening date is on 4<sup>th</sup> May, 2017 at 11.00 am</i>
2.18.1	<i>After 11.00 am local time on 4<sup>th</sup> May 2017</i>
2.20 & 2.22	<i>In addition, the evaluation criteria provided in Section H shall be taken into account and applied accordingly</i>
2.22.6	<i>Tenderers must comply</i>
2.27	<i>The performance security is ten (10%) of the contract price"</i>

#### **Section VI –Preliminary Evaluation Criteria**

*"Bidders shall submit the following mandatory requirements.*

1. *Copy of Certificate of Company Incorporation/Registration.*
2. *Copy of Current and valid KRA Tax Compliance Certificate*
3. *Certified copy of recent CR12 (not older than 2 months) duly issued by company register confirming directorship*
4. *Duly filled and signed tender securing declaration form*
5. *Duly filled Form of Tender, Confidential Business Questionnaire Form, Declaration Form, Self-Declaration Form, Litigation History Form, signed site visit certificate.*
6. *The tender validity period of 90 days*
7. *Submission of one original and two copies.*



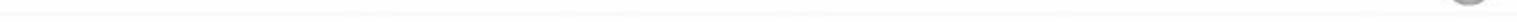
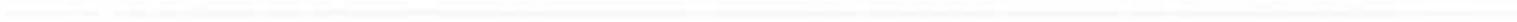
8. *Copy of YAGPO /AGPO certificate issued by the National Treasury – Youth, Women or Persons with disabilities”.*

After looking through the tender document and more particularly, the sections outlined above, the Board observes that the subject tender was an open tender reserved for the Youth, Women and Persons with Disabilities. Competent and eligible firms duly registered in Kenya were free to apply as stated in the invitation to tenderers and in the Appendix to Instructions to Tenderers. The Board further observes that the preliminary evaluation criteria at Section VI of the tender document provided for, among others, the requirement for:

*“Certified copy of recent CR12 (not older than 2 months) duly issued by company register confirming directorship”*

The Board observes that it was an undisputed fact that Form CR 12 is issued by the Registrar of Companies to firms only incorporated as limited liability companies and the same is therefore not available to firms registered under Business Names, such as sole proprietorships and partnerships. The Board further observes that the Applicant was a partnership with two partners namely, Velma Ngala and Miriam Gathoni, both Kenyan citizens by birth. That being so, the Applicant was not expected to have Form CR 12 and indeed did not submit Form CR 12 as part of its tender.

It is the observation of the Board that the requirement for a certified copy of CR 12 was a mandatory requirement in the preliminary evaluation criteria. The Board noted that this requirement is in conflict with the rest of the tender document on eligibility for the tender. It conflicts with the requirement that



this was an open tender and not reserved for any category of companies save for reservation under the defined target of Youth, Women and People with Disabilities.

The Board has arguments that CR 12 is a legal document provided by the Registrar of Companies and which provides details on the composition of directors. The Board holds the view that whereas that argument is correct, the same can be said of other documents such as certificate of registration. The Board finds that the mandatory requirement for a CR 12 is discriminatory against the Applicant contrary to the provisions of Section 3 of the Act which stipulates that:

*“Public Procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of the Constitution and relevant legislation –*

*a) ... ..*

*b) The equality and freedom from discrimination provided for under Article 27”*

The Board therefore upholds this ground of review and proceeds to allow it.

Before making the final orders in this matter the Board notes that the subject tender had a tender validity period of 90 days. The tender was opened on 4<sup>th</sup> May 2017 and barring extension of tender validity under Section 88 of the Act, the tender validity period expired on or before 4<sup>th</sup> August 2017. As previously held by the Board a procurement process dies a natural death when the tender validity period lapses before the award of the tender. To give effect to the orders the Board is about to make in this Request for Review, the Procuring Entity shall inquire into the issue of tender validity



period as directed herein and depending on the findings, comply with the orders as appropriate.

Based on the above findings and observations the Board makes the following orders in this Request for Review.

### **FINAL ORDERS**

In view of all the foregoing findings and in the exercise of the powers conferred upon it by the Provisions of Section 173 of the Public Procurement and Disposal Act, 2015 the Board makes the following orders on this Request for Review:-

1. The Request for Review dated 5<sup>th</sup> August, 2017 and which was filed by the Applicant with the Board on 10<sup>th</sup> August, 2017 in respect of Tender Number KAA/338/2016-2017 for Provision of Cleaning Services for Washrooms at Moi International be and is hereby allowed.
2. The award of subject tender to the successful tenderer be and is hereby annulled.
3. The Procuring Entity, having regard to the tender validity, is instructed to:
  - a) Reinstate the Applicant in the tender process and evaluate its tender alongside other tenders that made it past the preliminary evaluation stage and complete the process, including the making of an award, within fourteen days from the date of this decision, or,
  - b) If the evaluation committee of the Procuring Entity finds that the tender validity period of the subject tender lapsed and the same

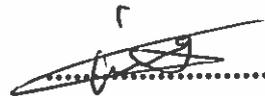


was not extended the Procuring Entity to start the procurement process afresh within fourteen days of this decision.

4. Since the Applicant will have another opportunity at the subject tender the Board orders that each party shall bear its own costs of this Request for Review.

Dated at Nairobi on this 31<sup>st</sup> day of August, 2017

  
.....  
**CHAIRMAN**  
**PPARB**

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

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