

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 19/2011 and 20/2011 OF 20<sup>th</sup> MAY, 2011

BETWEEN

PESTLAB LTD & SANITAM SERVICES E.A LTD.....APPLICANTS

AND

KENYATTA UNIVERSITY.....PROCURING ENTITY

Review against the decision of the Tender Committee of the Kenyatta University dated 6<sup>th</sup> May, 2011 in the matter of Tender No. KU/TNDR/S/14/SDB/2011-2012 for Provision of Sanitary Disposal Bins Services 2011-2012.

BOARD MEMBERS PRESENT

Ms. J. A. Guserwa	-	Member, in the Chair
Ms. Loise Ruhiu	-	Member
Ms. Natasha Mutai	-	Member
Amb. C. M. Amira	-	Member

## **IN ATTENDANCE**

Mr. C. R. Amoth - Secretary  
Ms. Maurine Namadi - Secretariat  
Ms. Shelmith Miano - Secretariat

## **PRESENT BY INVITATION**

### **1<sup>st</sup> Applicant, Pestlab Ltd**

Mr. S. M. Mutisya - Advocate, Mutisya Bosire Advocates  
Mr. E. M. Otuoma - Advocate, Mutisya Bosire Advocates  
Mr. Stephen M. Kilonzo - Director  
Mr. Hannington - Director

### **2<sup>nd</sup> Applicant, Sanitam Services Ltd**

Mr. W. Nyamu - Nyamu & Nyamu Advocates  
Mr. Wainaina Ng'ang'a - Director

### **Procuring Entity, Kenyatta University**

Mr. Guto Mogere - Advocate, Mohammed Muigai Advocates  
Mr. Emmanuel Wetangula - Advocate, Mohammed Muigai Advocates  
Ms. Jane Macharia - Procurement Manager  
Mr. Joseph Gitahi - Finance Officer

### **Interested Candidates**

Mr Justus Mwendwa - Pestlab Cleaning Services

## **BOARD'S DECISION**

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

### **BACKGROUND**

#### Advertisement

The Procuring Entity advertised the tender for provision of sanitary disposal bins services in the daily Nation Newspaper of 15<sup>th</sup> March, 2011.

#### **Closing/Opening:**

The tender closed and opened on 5<sup>th</sup> April, 2011 where the following six tenderers submitted their bids:

1. Pestlab Cleaning Services.
2. Rentokill Initial (k) ltd
3. Sanitam services (EA) Ltd
4. Pestlab Services Ltd
5. Roan Services
6. Pin point Hygiene Services Ltd.

### **EVALUATION**

The received tenders were subjected to three stages of evaluation namely; Responsiveness, Technical and Financial evaluations. Responsiveness and Technical evaluation was based on the following criteria:

<b>A</b>	<b>Mandatory Requirements</b>	<b>Points</b>
A1	Pin Number	Yes/No
A2	Tax Compliance	Yes/No
A3	Current business permit/licence	Yes/No
A4	Certificate of Incorporation/Business Registration	Yes/No
A5	Physical location of business (See business questionnaire)	Yes/No
A6	Audited accounts for the last three (3) years	Yes/No
A7	Disclosure of Directors/Partners/Sole proprietor/Business profile	Yes/No
A8	30 Days credit period	Yes/No
<b>B</b>	<b>General Requirements</b>	
B1	Financial Capability (As supported by Audited Accounts for the last three (3) years) 2007, 2008, 2009.	20
B2	Indicate having undertaken similar assignment with at least 4 firms (Attach Proof.)	20
B3	<b><u>Maximum Accumulated Volume of Business handled in a year for the last two years 2008, 2009</u></b> -Above 5 Million (10) -3 to 5 Million (7) -1 to 2.9 Million (2) -Below 1 million (0)	10
B4	<b><u>Human Resources:-</u></b> Give Company Structure indicating clearly the rank and qualifications of the key personnel to be handling this work.	10
<b>C</b>	<b>Technical Requirements</b>	
C1	Does your company have own means of transport (Attach evidence and capacity) (20) If hired (Attach agreement) (10)	20
C2	For how long will prices hold -Will not change for the whole duration of the contract (10) -Prices will be subject to change with reason (3)	10
C3	Provision of bin sample if patented bin, provide evidence of Manufacturer's Authorization	5
C4	Document Conformity/Presented in a required format	5
	<b>Grand Total</b>	<b>100</b>

## A. PRELIMINARY EVALUATION ON RESPONSIVENESS

Table 1 below summarizes the results of the Preliminary Evaluation on mandatory requirements

Notes;

A.	MANDATORY REQUIREMENTS	BIDDERS NUMBERS											
		B-N1		B-N2		B-N3		B-N4		B-N5		B-N 6	
		PESTLAB		RENTOKIL		SANITAM		PESTLAB		ROAN		PINPOINT	
		YES	NO	YES	NO	YES	NO	YES	NO	YES	NO	YES	NO
	Pin Number	√	□	√	□	√	□	√	□	√	□	√	□
A2	Tax Compliance	√		√		√		√		√		√	
A3	Current business permit/licence	√		√		√		√		X		√	
A4	Certificate of Incorporation/ Business Registration	√		√		√		√		√		√	
A5	Physical location of business (See business questionnaire)	√		√		√		√		√		√	
A6	Audited accounts for the last three (3) years	√		X		√		√		X		√	
	Disclosure of Directors/Partners/Sole proprietor/ Business profile	√		√		√		√		√		√	
A8	30 Days credit period	√		√		√		√		√		√	
	Responsiveness	Q		NQ		Q		Q		NQ		Q	

√ - Means the bidder was responsive on the requirement

X - means the bidder was not responsive on the requirement

Q - The bidder qualified by meeting all mandatory requirements

NQ -Bidder not qualified

B.	<u>GENERAL REQUIREMENTS</u>	MAXIMUM SCORE	PESTLAB CLEANING SERVICES (BN 01)	SANITAM SERVICES (BN 03)	PESTLAB SERVICES (BN 04)	PIN POINT (BN 06)
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From the initial 6 bidders, only 4 bidders namely; Pestlab Cleaning Services, Sanitam (EA) Services, Pestlab Services and Pinpoint Hygiene Services Ltd met the mandatory requirements thus qualifying for the technical evaluation. Bidder No.2, M/s Rentokil Initial (K) Ltd failed to submit audited accounts and current business permit while bidder No.5, M/s Roan Services failed to submit audited accounts.

#### **A. TECHNICAL EVALUATION**

The four bidders were subjected to technical evaluation and awarded scores as summarized in table 2 below. To proceed to financial evaluation, a bidder was required to score 70% and above.

B1.	Financial Capability (As supported by Audited Accounts for the last three (3) years) 2007, 2008, 2009.	20	9	15	17	17
B2.	Indicate having undertaken similar assignment with at least 4 firms (Attach Proof.	20	15	4	5	4
B3.	Maximum Accumulated Volume of Business handled in a year for the last two years 2008, 2009 -Above 5 Million (10) -3 to 5 Million (7) -1 to 2.9 Million (2) -Below 1 million (0)	10	10	10	10	10
B4.	Human Resources:- Give Company Structure indicating clearly the rank and qualifications of the key personnel to be handling this work.	10	10	7	7	10
C	<b>TECHNICAL REQUIREMENTS</b>					
C1.	Does your company have own means of transport	20	20	10	14	12
C2.	For how long will prices hold	10	10	10	10	10
C3.	Provision of sample & Manufacturer's Authorization	5	0	5	5	0
C4.	Document Conformity/ Presented in a required format	5	4	4	5	4
	<b>GRAND TOTAL</b>	<b>100</b>	<b>78</b>	<b>65</b>	<b>73</b>	<b>67</b>

Two bidders namely; M/s Pestlab Cleaning Services and M/s Pestlab Services qualified at Technical Evaluation stage for scoring above 70%. Bidder Nos. 3, M/s Sanitam (EA) Services and 6, M/s Pin Point Hygiene Services Ltd were disqualified at this stage for scoring below the required pass mark.

#### A. FINANCIAL EVALUATION

Inconsistencies in calculating the tender sum were observed across all the bidders. There were differences amongst the bidders in the interpretation of the bin collection schedule to the extent that the final sums arrived at by the bidders were different from those obtained after arithmetic corrections were done by the TEC.

Pursuant to the above this was considered as a minor deviation which did not merit the exclusion of any bidders from further participation in the evaluation exercise. Subsequently, the TEC resolved that:

1. The UNIT PRICE quoted per bin per change shall prevail as the quoted price.
2. The tender sum will be determined by the number of bin change per time.

**Table 3: Price Bid Evaluation Ranked by order from the Lowest Quoted Price**

<u>B.N</u>	<u>Name of the firm</u>	<u>Unit Price</u>	<u>Campus</u>
<u>1</u>	Pestlab Cleaning Services	Ksh.145.00	All Campuses
<u>4</u>	Pestlab Services Ltd	Ksh.660.00	Main, Ruiru, Parklands, Mombasa & City Campus
<u>4</u>	Pestlab Services Ltd	Ksh. 1100	Kitui, Nyeri & Nakuru Campus

### **RECOMMENDATION**

The Tender Evaluation Committee recommends that the tender for provision of sanitary bin services be awarded to PESTLAB CLEANING SERVICES at Ksh 145.00 (VAT inclusive) per bin per change, being the lowest evaluated.

### **THE TENDER COMMITTEE DECISION**

The Tender Committee at its meeting held on 6<sup>th</sup> May 2011 approved award of the tender for provision of sanitary disposal bins services to Pestlab Cleaning Services at Ksh.145.00 (VAT inclusive) per bin per change being the lowest evaluated bid.



## THE REVIEW

The two Requests for Review were lodged on 20<sup>th</sup> May, 2011 against the decision of the Kenyatta University dated 6<sup>th</sup> May, 2011 in the matter of the Tender No. KU/TNDR/S/14/SDBS/2011/2010 of 5<sup>th</sup> April, 2011.

### REVIEW NO. 19/2011

The Applicant, Pestlab Ltd was represented by Mr. Mutisya, Advocate. The Procuring Entity was represented by Mr. Guto Mogere while the Interested Candidates Pestlab Clearing Services was represented by Mr. Stephen Kilonzo, Director. The Applicant requests for the following orders.

1. *"The board to stop any further process of the contract until it determines our case.*
2. *The board to examine our tender responsiveness and conformity to all the mandatory requirements guided by the set criteria in the tender document and determine fairness of award or lack of it.*
3. *The board to re examine integrity and fairness of the procedure during technical evaluation by the evaluation committee and determine if the action may have been influenced through corruption or fraudulent means.*
4. *The board to direct the Procuring Entity to rectify the contravention, cancels the award notification already issued, and unconditionally awards the contract to us."*

The Board deals with the six grounds of review raised by the Applicant as follows:-

**Grounds 1, 4, 5 and 6 - alleged failure to award the tender to the lowest bidder.**

The Applicant stated that although its bid was the lowest as it was the most economical and advantageous compared to the other bids, it was not awarded the tender. It argued that its bid was the most responsive as it met all the requirements in the I.T.T. It stated that the discrepancies in the bid prices affected only the monthly totals and not the unit prices. It added that such minor discrepancies could be seen in the price quoted for Parklands Campus which had a discrepancy of only Kshs. 20 out of the whole quotation. It averred that the Procuring Entity's failure to consider the discrepancies as minor led to the breach of section 64 (1) of the Act.

In response, the Procuring Entity stated that the Applicant's bid did not have the lowest evaluated tender price as alleged and that there were discrepancies in the Applicant's bid price which when compared to that of the successful bidder was much higher. It made reference to the Applicant's tender rates of Kshs. 660/= per unit for Main, Ruiru, Parklands, City and Mombasa Campus and Kshs 1100 for Kitui, Nyeri and Nakuru Campuses as compared to the successful bidders tender rate of Kshs. 145/= per unit for all the campuses. It stated that the bids which advanced to the financial evaluation stage including that of the Applicant had discrepancies between the quoted unit price and the quoted total prices. The Procuring Entity stated that it relied on Section 2.20.2 of its tender document to deal with the discrepancies as the quoted Unit prices prevailed over the totals.

It referred the Board to the evaluation data that set out the following information:-

B.N	Name of the firm	Unit Price	Campus
1	Pestlab Cleaning Services	Ksh.145.00	All Campuses
4	Pestlab Services Ltd	Ksh.660.00	Main, Ruiru, Parklands, Mombasa & City Campus
4	Pestlab Services Ltd	Ksh. 1100	Kitui, Nyeri & Nakuru Campus

It submitted that the Applicant's bid was not the lowest evaluated bid as required by Section 66 (4) of the Public Procurement & Disposal Act.

The Board has carefully examined the documents presented before it and the parties submissions. The Board notes that Clause 2.20.2 of the Tender document provided as follows:-

*"Arithmetical errors will be rectified on the following basis. If there is a discrepancy between the unit price and the total price that is obtained by multiplying the unit price and quantity, the unit price shall prevail, and the total price shall be corrected. If the candidate does not accept the correction of the errors, its tender will be rejected, and its tender security may be forfeited. If there is a discrepancy between words and figures, the amount in words will prevail."*

The Board has examined the Applicant's bid which indeed has some discrepancies in the monthly totals and has noted that it's quoted Unit prices that were evaluated in comparison with the tender rates/unit price of the other bidders were not the lowest evaluated rates.

The Board therefore finds that the Applicant's bid was properly evaluated and it did not qualify at the financial evaluation stage and therefore was not considered as the lowest evaluated bid.

Accordingly, these grounds of appeal fail.

**GROUND 2 AND 3 - Breach of Section 39(1) of the Act**

The Applicant alleged that the Procuring Entity treated it with negative bias leading to its discrimination and breach of Section 39(1) of the Act. It argued that the bias was exhibited through the notification letter to the Applicant which was dated 6<sup>th</sup> of May, 2011 and posted to it on the 12<sup>th</sup> of May, 2011 after 6 days of delay. It stated that this late notification was unreasonable as there was no advance notification by a quicker method like the use of email or fax as provided for in Clause of 3.1.8 of the Instruction to Tenderers.

In response, the Procuring Entity stated that it delayed the postage of the Applicants notification letters which were dated 6<sup>th</sup> of May, 2011 and posted to all the bidders on the 12<sup>th</sup> of May, 2011 which was caused by the absence of the signatories on the said date. It further stated that no prejudice was suffered by the Applicant who was able to file the Appeal within time. It added that all the bidders were notified of the outcome of the tender on the same date. The Procuring Entity also submitted that the Applicant's evaluation was not done unfairly nor in any discriminatory manner as the evaluation was done in strict accordance with the criteria set out in the tender document.

The Board has examined the notification letters to the Applicant and all the other bidders and noted that all the letters were dated 6<sup>th</sup> of May, 2011 and posted on 12<sup>th</sup> May, 2011. The letters were posted simultaneously as required by Section 67 (2) of the Act which states as follows:

*"At the same time as the person submitting the successful tender is notified, the Procuring Entity shall notify all other persons submitting tenders that their tenders were not successful"*

The Board finds that the Applicant was duly notified of the award as required by the above Section of Act and the Procuring Entity did not therefore breach the said Section. Further the Board finds that the Applicant's bid was evaluated on the same criteria as the other bidders and no bias/discrimination has been established in line with Section 39 (1) of the Act.

Accordingly, these grounds of Review fail and Application No. 19/2011 is therefore hereby dismissed.

#### **REVIEW NO. 20/2011**

The Applicant Sanitam Services E.A. Ltd was represented by Mr. W. Nyamu Esq. Advocate. The Procuring Entity was represented by Mr. Emmanuel Wetangula while Mr. Justus Mwendwa appeared for Pestlab Cleaning Services. The Applicant requests the Board for the following orders:-

- 1. That the Board do annul the decision of the Procuring Entity in respect of the tender of provision of Sanitary Disposal Bin Service.*
- 2. That the Review Board do substitute Tender of Provision of Sanitary Disposal Bin services by the Procuring Entity be awarded to Sanitam Service Limited.*
- 3. That any other award of such services be cancelled forthwith and the same be awarded to Sanitam Services Limited.*
- 4. That costs thereof be awarded to Sanitam Services Limited.*

The Board deals with the seven grounds of review as follows:-

**GROUND NO. 1 & 4 - Breach of Sec. 64(1)**

The Applicant stated that the Procuring Entity failed to observe the mandatory requirements of the tender process as set out in its tender document. It argued that not all the bidders met the mandatory requirements of the tender. It further stated that the Mandatory Requirements of A5 of the I.T.T. with regard to the NEMA Licence was not complied with by any other bidder except the Applicant.

In response, the Procuring Entity stated that it complied with the tendering process as provided for in the instructions to the bidders. It further stated that it complied with all the statutory requirements for open tendering procedure as provided for in Part V of the Act. It submitted that the Applicant had scored below 70% at the technical evaluation stage because it failed to meet certain conditions relating to having its own transport and also not being able to give adequate information from four clients with whom it had carried out similar assignments. It added that it was not enough to give the letters of recommendation but also the actual LPOs where the contractual terms were set out for evaluation. It concluded its submissions under this ground by stating that the Applicant was fairly evaluated within the criteria set by the Procuring Entity and its bid was properly rejected.

The Board has considered the documents placed before it together with the submissions by the parties and makes the following findings:-

The Procuring Entity's evaluation criteria was set out at Clause 2.22 of the Appendix to the I.T.T. (refer to page 3 and 4 herein above).

The Board finds that the Applicant complied with the mandatory requirements of the tender as set out in the foregoing paragraph but the Procuring Entity introduced other evaluation parameters at the Preliminary and technical evaluation stage. The Board notes that from the evaluation report it shows that the bidders were evaluated on eight (8) mandatory parameters instead of nine (9) as set out in the I.T.T. The Board also notes that the parameter relating to the NEMA licence parameter was not evaluated. It is further noted that the Applicant had a Nema Licence while the Successful bidder had none. The Board notes that the requirement by the Procuring Entity for Local Purchase Order's (LPO) from the bidders was not a requirement in the evaluation criteria and as such the Procuring Entity introduced new parameters of evaluation which were not known to the bidders and hence prejudicial to them. This was in breach of Section 66(2) of the Act and therefore this ground of review succeeds as the Applicant bid conformed with section 64 (1) of the Act.

**GROUND NO. 2 & 6 - Alleged failure to give reasons for the unsuccessful bid**

The Applicant stated that upon being notified of the Award of the tender, it sought to get the reasons for its bid's rejection. It argued that the reasons which were finally given to it were vague and unsatisfactory. It stated that its bid was most responsive and it ought to have scored over 80% as it provided all the required documents and had complied with the evaluation criteria.

In response, the Procuring Entity stated that this ground of review lacks any factual basis, is frivolous, made in bad faith and ought to be dismissed by the Board in exercise of its powers under Section 93 and 95 of the Act. It

submitted that the Applicant had failed to meet the technical evaluation threshold of 70% as it had scored 64% and hence its disqualification at that stage.

The Board has carefully considered the submissions by both parties and makes the following findings.

The Procuring Entity notified the Applicant and the other bidders of the award of tender vide its letters of 6<sup>th</sup> May, 2011. The Procuring Entity also gave the Applicant the reasons for the rejection of its bid. The Act imposes a duty of notification on the Procuring Entity vide the Provisions of Section 67(1) of the Act which the Procuring Entity discharged. However, the Board notes that whereas the Applicant requested for the reasons of the rejection of its bid, it did not request for a summary of the Evaluation report in terms of Section 44(2) (c) & (3) which would have enabled it to establish the extent of its evaluation parameters.

In the said circumstances, the Board finds that the Procuring Entity did not breach Sections 67(1) of the Act as it provided the Applicant with the reasons for its unsuccessful bid and therefore this ground of review fails.

### **GROUND NO. 3**

The Applicant stated that its bid was the only one that complied with the mandatory condition C3 of the I.T.T. for the evaluation requirement. It added that it had not allowed any other party the use of its patent by way of giving a licence, permission or authority to use which would have in turn enabled such a party to give any guarantees or indemnities as sought. It asserted that it was



the only one that provided a sample and patent certificate while the other bidders who participated in the tender did not.

In response, the Procuring Entity stated that the requirements under Clause C3 were not mandatory as alleged by the Applicant but rather a technical requirement for which the Applicant was evaluated and scored. It added that the Applicant actually scored five (5) full marks under this requirement.

On its part, the interested candidate informed the Board that the evaluation criteria for C3 was discretionary and in the alternative the bidders were either to provide a sample of the bin (if a patented bin) or provide evidence of the manufacturers authorization and it provided the later. It also argued that there was no basis for it or any other candidate to seek the permission or licence of the Applicant which would have completely defeated the purpose and intention of the entire tender process and breached the spirit and provisions of the Act. It further stated that the evaluation criteria and Clause C3 attracted minimal points and could not occasion the annulment of the tender nor make the Applicant the winner.

The Board has considered the parties submissions under this ground of review and notes that the Applicant complied with the requirement of the technical Clause C3 of the tender and was properly evaluated and scored as follows:-

*“Provide sample of bin to be used if a patented bin, provide evidence of manufacturer’s Authorisation ----- 5 points”*

In the premises, the Procuring Entity did not commit any breach of the Act under this ground of review and as such this ground of appeal fails.

**GROUND NO. 5 - Breach of Sections 62(1), 73 & 74 of the Act.**

The Applicant stated that the Procuring Entity should have invoked Sections 62(1), 73 and 74 of the Act. The Applicant prayed for the Procuring Entity's failure to apply the foregoing provisions to be treated as a breach of the said provisions by the Board so as to lead to the nullification of the award of tender.

In response, the Procuring Entity stated that no circumstances existed that could allow invocation of the cited Sections. It further argued that the Applicant was at liberty to request for a clarification of the tender in order to assist in preparation of its bid for evaluation pursuant to Section 62(1) of the Act.

The Board has considered the parties arguments under this ground and finds that this ground of review is a mere statement and does not have any backup evidential material for consideration. The Board also finds that the cited sections 62 (1), 73 and 74 are not applicable in the instant matter as they are irrelevant.

The same is found to be baseless and therefore the ground fails.

**GROUND NO. 6 & 7**

The Applicant stated in general terms that it shall raise other further grounds if necessary once it receives the reason for its disqualification which grounds it has argued under ground two above.

Ground 7 is also a general statement touching on the entire process.

In response, the Procuring Entity stated that both grounds 6 and 7 of the Request for Review did not amount to sustainable grounds of review as they were frivolous and vexatious and ought to be dismissed.

The Board has considered the two grounds set up above together with the parties submissions and is in agreement with the Procuring Entity that the two grounds are general statements that are not backed by any material evidence nor breach of any sections of the Act. The same lack merit, fail and are hereby dismissed.

Taking all the foregoing matters into consideration, the Board finds that the tender evaluation process was flawed and the Request for Review No.20/2011 succeeds.

In conclusion, the Board has thoroughly perused the documents placed before it and the arguments advanced by the parties who appeared before it during the hearing of these two appeals and makes the following observations and findings-

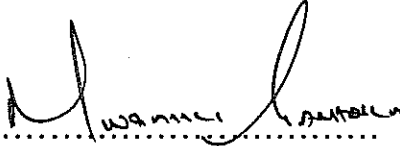
- 1) The Procuring Entity seems to have changed the evaluation criteria at the preliminary evaluation stage by considering 8 parameters instead of the nine (9) as set out at Clause 2.22 of the Appendix to the I.T.T. It also introduced new criteria of LPO's in addition to client reference letters.
- 2) The Procuring Entity implemented the provisions of Clause 2.20.2 with regard to the Unit price in the bids prevailing over the monthly

totals where discrepancies were noted without notifying the bidders for concurrence pursuant to Section 63 (2) of the Act .

- 3) The Successful Bidder being the Interested Party herein attached documents to its bid relating to the Applicant in Application 19/2011 well knowing that it was a different bidder from the said Applicant. These documents included reference letters from Central Bank of Kenya and Pwani University College, Certificate of incorporation dated 9<sup>th</sup> February, 2004, and V.A.T. Certificate amongst others. This amounted to misrepresentations of facts contrary to Section 41 of the Act.
- 4) The Procuring Entity evaluated the successful bidder on documents that were neither theirs nor met the requirements of its specifications and also documents that did not belong to it as aforesaid, thereby acting unfairly to the Applicant in Request for Review No. 19/2011.

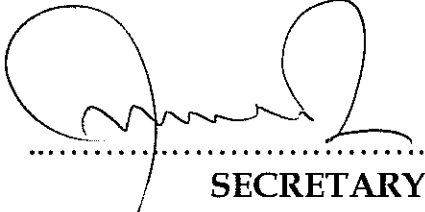
Consequently, the Board orders pursuant to Section 98 of the Act that the award to the successful Bidder M/S. Pestlab Cleaning Services is hereby nullified and the Procuring Entity is hereby ordered to re-evaluate the tender in strict compliance with the Provisions of Instructions to Tenderers as well as Section 66(2) of the Act. There will be no order as to costs.

**Dated at Nairobi on this 20<sup>th</sup> day of June, 2011**



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**CHAIRMAN  
PPARB**



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**SECRETARY  
PPARB**