

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**REVIEW NO. 19/ 2013 OF 9<sup>TH</sup> MAY, 2013**

**BETWEEN**

**SANITAM SERVICES (E.A.) LIMITED..... APPLICANT**

**AND**

**KENYATTA UNIVERSITY .....PROCURING ENTITY**

Review against the decision of the Tender Committee of Kenyatta University dated 24<sup>th</sup> April 2013 in the matter of Tender No. KU/TNDR/43/PSDBS/2013-2014 for Provision of Sanitary Disposal Bins Services.

**BOARD MEMBERS PRESENT**

Mr. P.M. Gachoka	- Chairman
Eng. Christine Ogut	- Member
Mr. Akich Okola	- Member
Mr. Joshua W. Wambua	- Member
Ms. Judith Guserwa	- Member

**IN ATTENDANCE**

Ms. Pauline O. Opiyo	- Ag. Secretary
Ms. Shelmith Miano	- Secretariat

## **PRESENT BY INVITATION**

### **Applicant – Sanitam Services (E.A.) Ltd**

Mr. Henry Kinyanjui - Advocate

Mr. Kamau Ng'ang'a - Director

### **Procuring Entity – Kenyatta University**

Mr. Guto Mogere - Advocate

Ms. G. Khaceke - Advocate

Ms. Edna Odhiambo - Pupil

Mr. Eliazar Ngarari - Ag. Procurement Manager

Mr. Joseph Gikandi - Officer

### **Interested Parties –**

Mr. Simon Ndege - Advocate, Pinpoint Hygiene Services

Mr. Robert Kamau - Manager, Pinpoint Hygiene 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**

Tender No. KU/TNDR/43/PSDBS/2013-2014 for Provision of Sanitary Disposal Bins Services was advertised in the Daily Nation of 22<sup>nd</sup> March 2013.

**Closing/Opening:**

Tender closing / opening was duly conducted on 12<sup>th</sup> April, 2013 at 10.00 a.m. in Mandela Boardroom, Kenyatta University. The following four (4) firms submitted their bids:

1. Roan Services
2. Pinpoint Hygiene Services Limited
3. One-way Cleaning Services Limited
4. Sanitam Services(E.A) Limited

The bids were recorded in the tender opening register as follows:

No.	Name of Firm	Opening No.	Remarks
1.	Roan Services	1	333,000/= No SAMPLE submitted
2.	Pinpoint Hygiene Services	2	73,320/= Two samples submitted
3.	Oneway Cleaning Services	3	909, 200/= One sample submitted
4.	Sanitam Services (E.A.) Ltd	4	206, 800/= One sample submitted

## EVALUATION OF BIDS

### EVALUATION OF TENDER NO. KU/TNDR/43/PSDBS/ 2012 -2013

Stage 1	Determination of Responsiveness	Response	Bidder 1 Roan Services	Bidder 2 Pinpoint Hygiene Services Ltd	Bidder 3 Oneway cleaning services Ltd	Bidder 4 Sanitam Services (E.A) Ltd
(A)	<b>PRELIMINARY EXAMINATION</b>	YES <input checked="" type="checkbox"/> NO <input type="checkbox"/>				
i.	Pin Number		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
ii.	Tax Compliance		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
iii.	Current Business Permit/Licence		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
iv.	Certificate of incorporation/Business registration		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
v.	Current incinerator license from a lawful regulatory body for waste management and /or Disposal		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
vi.	Physical location of business		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
vii.	Company/Business profile		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
viii.	Disclosure of Directors/Partners /Sole Proprietor		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
<b>DETERMINATION-( Q-QUALIFIED)</b>			<b>Q</b>	<b>Q</b>	<b>Q</b>	<b>Q</b>

#### REMARKS;

The four (4 no.) bidders met the mandatory requirements and hence qualified for technical evaluation.

**EVALUATION OF TENDER NO. KU/TNDR/43/PSDBS/ 2012 -2013**

<b>Stage 2</b>	<b>Technical Evaluation</b>	<b>Bidder 1 Roan Services</b>	<b>Bidder 2 Pinpoint Hygiene Services Ltd</b>	<b>Bidder 3 Oneway Cleaning Services Ltd</b>	<b>Bidder 4 Sanitam Services (EA) Ltd</b>
<b>(B)</b>	<b>GENERAL REQUIREMENTS 60%</b>	<b>BIDDERS SCORES</b>			
B1	Financial capability supported by audited accounts for the last three (3 ) current years 2009,2010 & 2011 ( <i>Max.20</i> )	10	20	10	0
B2	Indicate having undertaken similar assignments with atleast 4 firms(Attach Proof) ( <i>Max.20</i> )	0	20	20	20
B3	Maximum accumulated volume of business handled in a year for the last two years (2011,2012)	10	10	10	10
B4	Human Resources( <i>Max.10</i> )	10	10	10	10
	<b>SUB TOTAL OF SCORE ( GENERAL REQUIREMENTS)</b>	30	60	50	40
<b>C</b>	<b>TECHNICAL REQUIREMENT 40%</b>	<b>BIDDERS SCORES</b>			
C1.	Does your company have own transport (Attach evidence and capacity) ( <i>Max 20</i> ) If hired (Attach agreement) ( <i>Max. 10</i> )	0	20	20	10
C2.	For how long will prices hold? <ul style="list-style-type: none"> <li>• Will not change for the whole duration of the contract. (<i>Max.10</i>)</li> <li>• Prices will be subject to change with reason. (<i>Max.3</i>)</li> </ul>	0	0	0	10

Stage 2	Technical Evaluation	Bidder 1 Roan Services	Bidder 2 Pinpoint Hygiene Services Ltd	Bidder 3 Oneway Cleaning Services Ltd	Bidder 4 Sanitam Services (EA) Ltd
C3.	Provide sample of bin to be used if a patented bin or provide evidence of manufacturer's Authorization. (Max.5)	5	5	5	5
C4.	Document Conformity/Presented in a required format. (Max.5)	5	5	5	5
<b>SUB TOTAL OF SCORE ( TECHNICAL REQUIREMENTS)</b>		10	30	30	30
<b>AGGREGATE SCORE (MAX 100%)</b>		40	90	80	70

**REMARKS;**

**i. Ms. Roan Services :**

- a. **Criteria B2:** the bidder indicated only three past relevant assignments (against the requirement for a minimum of four) by way of copies of notifications of award. The recommendation letters provided from their current suppliers were on cleaning and fumigation services
- b. **Criteria C1:** The bidder did not indicated their means of transport
- c. **Criteria C2:** The bidder did not indicate the tenure validity of the quoted prices

## ii. Pinpoint Hygiene Services Ltd and Oneway cleaning services Ltd

- a. **Criteria C2:** The bidder did not indicate the tenure validity of the quoted prices
- b. **Criteria B1:** The balance for 2012 and 2011 bear the same financial but different dates of approval by the directors hence invalidating the accounts and a score of **zero** awarded.

## iii. Oneway cleaning services Ltd

- a. **Criteria C2:** The bidder failed to indicate the tenure validity of their quoted prices.
- b. **Criteria B1:** Audited Accounts for 2011 have the balance sheet missing; hence we could not calculate the financial ratios. Therefore a score of **Zero** awarded.

iv. **Criteria B1:** The Financial capability for each of the bidding firms was computed from the audited accounts of the **Most Recent Years** using the *Current ratio* and the *Quick ratio as follows:*

For each year, two ratios were calculated. Each ratio was worth five (5) marks if it met the thresholds as outlined below; Thus accounting for the 20 marks

### a. *Current ratio (CR)* : formula

- *should* CR be greater or equal to two(2) = 5 marks
- *should* CR be less than 2 = zero mark

### b. *Quick ratio (QR)*

- *should* QR be greater or equal to one (1) = 5 marks
- *should* CR be less than 1= zero mark

**PART 1: ANALYSIS OF BIN COLLECTION FREQUENCY AND NUMBER OF BINS**

**PRICE SCHEDULE**

Campus	No. of bins	Changes per week	Bidder 2: Pinpoint		Bidder 3: Oneway		Bidder 4 Sanitam	
			Unit Price	Total	Unit Price	Total	Unit Price	Total
Main Campus	738	2	78	115,128	100	147,600	220	324,720
Ruiru Campus	46	2	78	7,176	100	9,200	220	20,240
Parklands Campus	21	2	78	3,276	100	4,200	220	9,240
Mombasa Campus	No. 25	2	78	3,900	100	5,000	220	11,000
Kitui Campus	No. 53	2	78	8,268	100	53,000	220	23,320
Nyeri Campus	No. 8	1	78	624	100	800	220	1,760
Nakuru Campus	No. 15	1	78	1,170	100	1,500	220	3,300
City Campus	No. 26	2	78	4,056	100	5,200	220	11,440
North Coast Beach Hotel	No. 8	1	78	624	100	800	220	1,760
		COST PER WEEK		144,222		227,300		406,780
		COST PER YEAR		7,499,544		11,819,600		21,152,560

REMARKS: Pinpoint Hygiene Services Ltd has submitted the lowest price bid of KES Seven Million Four Hundred and ninety nine Thousand, Five Hundred and forty four.



## **RECOMMENDATION**

That the Tender Evaluation committee recommends awarding the tender for provision of sanitary disposal bins services to **M/s. Pin Point Hygiene Services Limited** at an annual tender sum of **KShs Seven million, four hundred and ninety-nine thousand, five hundred and forty-four (7,499,544.00).**

## **TENDER COMMITTEE'S DECISION**

The Tender Committee at its Meeting held on 24<sup>th</sup> April 2013 deliberated on Tender No. KU/TNDR/43/PSDBS/2013-2014 for Provision of Sanitary Disposal Bins Services and awarded the tender to M/s Pinpoint Hygiene Services at Kshs 78.00 per bin per change.

The outcome of the tender was communicated to all the bidders vide letters dated 24<sup>th</sup> April 2013.

## **THE REVIEW**

The Request for Review was lodged by M/s Sanitam Services (E.A) Ltd on 9<sup>th</sup> May, 2013 against the decision of the Tender Committee of Kenyatta University in the matter of Tender No. KU/TNDR/43/PSDBS/2013-2014 for Provision of Sanitary Disposal Bins Services.

The Applicant was represented by Mr. Henry Kinyanjui, Advocate while the Procuring Entity was represented by Mr. Guto Mogere, Advocate. The interested party present was M/s Pinpoint Hygiene Services Ltd represented by Mr. Simon Ndege, Advocate.

The Applicant requests the Board for the following orders:

- 1. That the Tender for provision of Sanitary Disposal Bin Services by the procuring Entity be awarded to the Applicant, M/S Sanitam Services (E.A.) Ltd.**
- 2. That any other purported award of such services be cancelled forthwith and the same be awarded to the Applicant, M/S Sanitam Services (E.A.) Ltd.**
- 3. That the costs herein be awarded to the Applicant, M/S Sanitam Services (E.A.) Ltd.**

The Applicant raised eleven (11) grounds of review which the Board deals with as follows:

**Grounds 1, 2, 3 and 4 – Breach of Sections 27 & 64(1) of the Public Procurement and Disposal Act, 2005 (hereinafter referred to as “the Act”) and Regulations 47 and 48 of the Regulations thereof herein referred to as “the Regulations”**

These grounds of review have been consolidated as they raise similar issues on the alleged failure by the Procuring Entity to declare the Successful Bidder non-responsive.

The Applicant submitted that the Procuring Entity failed to comply with the mandatory provisions of Section 27 of the Act, which provides that *“a Public Entity shall ensure that this Act, the regulations and any directions of the Authority are complied with respect to each of its procurements.”*

The Applicant stated that whereas Section 64 (1) of the Act imposes a mandatory obligation upon the Procuring Entity, in awarding this Tender, the Procuring Entity did not discharge this obligation. The Applicant submitted that the successful bidder’s tender should have been rejected for being non-responsive in terms of Section 64 of the Act and Regulation 48 thereof.

The Applicant stated that Regulation 47 of the Act stipulates the mandatory requirements / guidelines to be followed and complied with at the Preliminary Evaluation stage upon the opening of the Tenders. It argued that for a Tender to be deemed as being responsive it must comply with all the requirements. It submitted that, if any one item or ingredient is found to be missing or wanting, then pursuant to Section 64 of the Act, and Regulation 48 such tender(s) must be rejected for being non-responsive.

The Applicant averred that the Procuring Entity failed to discharge its duty on this provision and therefore breached the Law. It argued that Section 64

defines when a Tender shall be deemed to be responsive and Regulation 48 provides the prescription when a Tender is not responsive.

The Applicant submitted that the Procuring Entity didn't ensure strict compliance with these mandatory provisions of the law, and that therefore the awarding of this Tender was faulty, illegal and unlawful. It averred that Regulation 47(1)(f) which is in mandatory terms was **not** complied with by the Procuring Entity, thus rendering this Tender non-responsive.

The Applicant submitted that the winning tenderer did **not** provide all the required documents and information as was called for by the Procuring Entity and therefore the Procuring Entity should have rejected it.

The Applicant urged the Board to make a finding that, the Successful Bidder was awarded the tender unprocedurally and sought for nullification of the award and subsequent award of the said tender to the Applicant, having complied with all the tender requirements.

In response, the Procuring Entity submitted that, save where expressly admitted, it denied all the allegations leveled against it in the Request for Review for lack of merit.

The Procuring Entity averred that the Request for Review was framed in general terms and did not set out any specific breach of the Act or Regulations. It submitted that without prejudice to the foregoing, the Applicant's grounds 1, 2, 3 and 4 were general statements and did not disclose any breach of the Act or the Regulations. It stated that it processed the tender documents in line with the requirements of the Law and the Tender Document. It argued that the Successful Bidder met all the Tender requirements and then after being evaluated as the lowest priced bidder,

was awarded the Tender. It urged the Board to find no merit on the Applicant's argument, and allow the tender to proceed.

The Board has considered the presentations of the parties and perused the documents presented before it. The Board has perused a copy of the Tender Document that was issued by the Procuring Entity, the Evaluation Report as well as the bid documents of the four tenderers and notes the following:

- (1) That the Tender Document at page 17 provides the following in terms of mandatory requirements, general requirements and technical requirements that were to be considered during the evaluation:

*The criteria of evaluation and the points to be awarded on each criterion will be as follows:*

<b>A.</b>	<b>MANDATORY REQUIREMENTS</b>	<b>POINTS</b>
A1	<i>Pin Number</i>	<i>Yes/No</i>
A2	<i>Tax Compliance</i>	<i>Yes/No</i>
A3	<i>Current Business Permit/Licence</i>	<i>Yes/No</i>
A4	<i>Certificate of Incorporation/Business Registration</i>	<i>Yes/No</i>
A5	<i>Current Incinerator License from a Lawful regulatory body for Waste Management and/or Disposal</i>	<i>Yes/No</i>
A6	<i>Physical location of business premises (See business questionnaire)</i>	<i>Yes/No</i>
A7	<i>Company/Business Profile</i>	<i>Yes/No</i>
A8	<i>-Disclosure of Directors/ Partners /Sole Proprietor</i>	<i>Yes/No</i>
<b>B.</b>	<b>GENERAL REQUIREMENTS</b>	
B1.	<i>Financial Capability supported by Audited Accounts for the last three (3) current years 2009, 2010, 2011</i>	20
B2.	<i>Indicate having undertaken similar assignment with at least 4 firms (Attach Proof)</i>	20
B3.	<i>Maximum Accumulated Volume of Business handled in a year for the last two years (2011, 2012)</i> <ul style="list-style-type: none"> <li>- Above 5 Million (10)</li> <li>- 3 – 5 Million (7)</li> <li>- 1 – 2.9 Million (2)</li> <li>- Below 1 Million (0)</li> </ul>	10

B4.	<i>Human Resources:- Give Company Structure indicating clearly the contact person, rank and qualifications of Personnel to be handling the work.</i>	10
C	<b>TECHNICAL REQUIREMENT</b>	
C1	<i>Does your Company have own transport (Attach Evidence and Capacity) (20) If hired (Attach Agreement) (10)</i>	20
C2	<i>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)</i>	10
C3	<i>Provide sample of bin to be used if a patented bin or provide evidence of Manufacturer's Authorization</i>	5
C4	<i>Document Conformity/Presented in a required format</i>	5
	<b>GRAND TOTAL</b>	<b>100</b>

- (2) That the evaluation report prepared by the Procuring Entity shows that all the four tenderers were found on be responsive to the mandatory requirements shown above which were specified in the tender document.
- (3) That the bid documents submitted by all the four tenderers have copies of documents confirming that they met the mandatory requirements A1-A8
- (4) That in the Instant tender, the requirement for a sample is listed under part C of the table of Technical requirements and is therefore not applicable in the preliminary evaluation.

The Board is alive to Sections 27(1) and 64(1) of the Act and Regulations 47 and 48 which provide as follows;

Section 27(1):-

*"A Public Entity shall ensure that this Act, the regulations and any directions of the Authority are complied with respect to each of its procurements."*

Section 64(1)

*"A tender is responsive if it conforms to all the mandatory requirements in the tender documents."*

Regulations 47 and 48(1)

*47 (1) "Upon opening of the tenders under Section 60 of the Act, the evaluation committee shall first conduct a preliminary evaluation to determine whether:-*

*(a) The tender has been submitted in the required format*

*(b).....  
.....*

*(f) all required documents and information have been submitted;  
and*

*(g) any required samples have been submitted.*

*(2) The evaluation committee shall reject all tenders, which do not satisfy the requirements set out in paragraph (1). "*

*48(1) A procuring entity shall reject all tenders, which are not responsive in accordance with Section 64 of the Act."*

The Board notes that Section 64 and Regulations 47 and 48 are relevant in the preliminary evaluation stage of a tender where the responsiveness of each tender to the mandatory requirements is examined. The Board further notes that in conducting the preliminary evaluation, the Procuring Entity

only used the mandatory requirements / criteria as provided for in the Tender Document and considered all the four bidders as responsive to the mandatory requirements since all the bidders provided the documentary evidence showing that they indeed meet the mandatory requirements stated in the Tender Document.

From the foregoing, the Board finds that by declaring all the bidders as responsive to the mandatory requirements, the Procuring Entity complied with Section 64(1) of the Act and Regulation 47 and subsequently did not breach Regulation 48 considering that none of the tenders was found to be a candidate for rejection. To the above end, the Procuring Entity also complied with Section 27 (1) of the Act.

Accordingly, the Board finds no fault on the part of the Procuring Entity and therefore, these grounds of Appeal fail.

#### **Grounds 5, 6, 7 and 8 - Breach of Clauses 1.12, 2.14, 3.5 of the Tender Document and Regulation 49**

These grounds have been consolidated as they raise similar issues relating to specific requirements that the successful bidder allegedly failed to comply with.

The Applicant submitted that the successful bidder did not provide an appropriate and satisfactory Indemnity Certificate as required by the Procuring Entity. It stated that, the Tender submitted by the successful bidder should have therefore been rejected on the grounds of being non-responsive. The Applicant further submitted that the Procuring Entity, vide its letter dated 5<sup>th</sup> April 2013 Ref. No. KU/TNDR/PSDBS/2013/001, in



response to a clarification sought by the applicant pursuant to Clause 2.4 of the Tender Document, which for all intents and purposes and in law formed part and parcel of the Tender Document, stated and demanded that a Tenderer **shall** provide an acceptable form of Indemnity Certificate. It alleged that no such Certificate of Indemnity was provided to the Procuring Entity and therefore this was a glaring non-responsiveness that should have led to the disqualification of the Successful Bidder's Tender.

The Applicant averred that the Procuring Entity breached its own mandatory requirement on full description of Nature of Business, as required under Clause 1.12 of the Confidential Business Questionnaire, and thus the winning tender was not responsive and should have been disqualified.

The Applicant contended that the Procuring Entity was enjoined in law to ensure that Clause 1.12 on the Mandatory Confidential Business Questionnaire of the Tender Document was met by the participating tenderers, and of necessity as read *ejus dem generis* with the already given definitions of manufacturer, distributor etc. The Applicant stated that without the fear of contradiction, the tenderer awarded the tender was using a product that is patented and having failed to satisfy the aforesaid condition again, rejection hereof was the natural recourse to be taken by the Procuring Entity based on non-responsiveness.

The Applicant alleged that the Procuring Entity did not receive the mandatory requirements listed at item C3 of the Evaluation Criteria and hence the winning tender was not responsive and should have been rejected. It submitted that the Procuring Entity, in the part of the Tender Document dealing with Evaluation Criteria under item C3, provided that if the tenderer was using a patented bin then a sample of the bin to be used

was to be provided **OR** the Tenderer do provide evidence of Manufacturer's Authorization. It argued that this was a mandatory requirement and in the absence thereof, the Procuring Entity had no option but to reject this alleged winning tender on the grounds of not being responsive.

The Applicant submitted that the Procuring Entity failed to ensure that the Manufacturer's Authorization Form which was mandatory was strictly conformed to and complied with in form and substance and hence the winning tender was not responsive and ought to have been rejected in that;

- a. The Procuring Entity never received any indemnity in terms of Clause 3.5 of the Tender Document and therefore the winning Tender was not responsive and should have been rejected.
- b. The Manufacturer's Authorization Form as was proposed by the Procuring Entity and as now provided by the winning tenderer is a nullity and illegal in law, in the absence of a valid license issued to the said Manufacturer by the Patent Holder. Therefore the Tender should have been rejected for being non- responsive.
- c. The winning bidder did not conform to the mandatory requirements under item C3 – Technical Requirement, under the Evaluation Criteria and the Procurement Entity was obligated under Regulation 49 (1) and (2) to reject tenders which did not satisfy the Technical Requirements.

The Applicant submitted that the Procuring Entity, vide its Tender Document, demanded for a Manufacturer's Authorization and the form/format of the said Manufacturer's Authorization was provided. Further, it was also required that the said Manufacturer's Authorization be on the letter head of the Manufacturer.

The Applicant averred that, inter alia, the Procuring Entity mandatorily required that at the penultimate paragraph of the aforesaid Manufacturer's Authorization, it must be indicated that the Manufacturer was extending in full its guarantee and warranty as per the General Conditions of Contract for the goods offered for supply. It averred that a look at the General Conditions of Contract thereto revealed that the only item of relevance hereto, of all the listed items, is the item under Clause 3.5 and that is, **Patent Rights**. The Applicant contends that what this therefore meant was that such a Manufacturer was in essence giving a guarantee and warranty with respect and regard to the Patent Rights therein and thereto. In this regard therefore the Applicant submits that;

- (i) The Patent Rights having rightly so, been recognized by the Procuring Entity that the same must fundamentally be provided by the Tenderer, and the Tenderer having **not** provided for the same as fundamentally and mandatorily required, the Procuring Entity had no option but to reject this tender as being non – responsive.
- (ii) A Manufacturer is not a Patent Right Holder and the mere act of manufacturing does not bestow upon the Manufacturer any such right. The Patent-holder **MUST** donate such a right to the Manufacturer to legally and lawfully be able to manufacture the patented product. Since this was lacking, it therefore rendered the Manufacturer's Authorization a nullity, illegal and unlawful. It argued that the Manufacturer did **NOT** have the right or a valid license to manufacture this product which is a duly patented product. The Applicant cited that even the Public Procurement Oversight Authority in its own Tender Advertisement appearing in the **Daily Nation of 22<sup>nd</sup> December 2009**, was very categorical that a condition precedent to participating in the said tender was that a valid license

MUST be shown by the bidder or that the product was produced by the bidder. It argued that this was a tender involving Intellectual Property Rights just as in this case.

- (iii) That the Procuring Entity did not comply with the strict mandatory provisions of Regulation 49 (1) and (2) of the Act in that the Tender did not comply with the Mandatory Requirement on item C3 of the Evaluation Criteria in the requirements and hence the Tender ought to and should have been rejected as stated in the aforesaid law.

In response, the Procuring Entity submitted that the requirement of an indemnity certificate was not a mandatory requirement as per the Tender Documents and as such, the issue of non-responsiveness did not arise. It stated that, the provision of the indemnity certificate was not a criterion for evaluation. It further submitted that the Indemnity Certificate ought to be provided at the time of signing the Contract and not as one of the bid documents and therefore argued that the allegation was premature.

The Procuring Entity stated that the Successful Bidder provided a duly filled Mandatory Confidential Business Questionnaire as required by the Tender Documents. It averred that Part C of the Evaluation Criteria dealt with technical evaluation and that the requirements under Clause C3 were not mandatory as is evident from the Tender Documents. The Procuring Entity submits that Clause C3 of the Evaluation Criteria provided tenderers with two options namely to either provide a sample of the bin or to provide the Manufacturer's Authorization. It averred that the successful tenderer M/s Pinpoint Hygiene Services Limited provided samples and therefore met this requirement.

It added that this Board lacks jurisdiction to adjudicate on Intellectual Property disputes.

On its part, the Successful Bidder submitted that, its bid met all the requirements of the Tender Document. It argued that the Indemnity Certificate was not a pre-award requirement. It stated that it supplied a samples of the sanitary disposal bins as required under the tender, which did not infringe on the patent held by Sanitam Services E.A. Ltd as alleged by the Applicant. It argued that the Applicant who had been supplying the bins to the Procuring Entity was using a patent certificate which was irrelevant to this matter, to block competition and create monopoly for selfish ends. It urged the Board to find no merit on the arguments of the Applicant and to allow the procurement process to proceed.

The Board has considered the presentations of the parties and also perused the documents presented before it. The issues for the Board to determine are as follows:-

- i. Whether the provision of an Indemnity Certificate was a requirement in the evaluation of bidders in the instant tender.
- ii. Whether the Successful Bidder met the requirement under item C3 of the Evaluation Criteria.

The Board has perused a copy of the Tender Document that was issued by the Procuring Entity, the clarification letters / addenda issued to bidders, the original evaluation report, the tender opening register and minutes, the samples submitted by three of the four bidders as well as the bid document submitted by the Successful Bidder and notes the following:

1. That Clause 3.5 of the Tender Document stated as follows;  
***"PATENT RIGHTS***

*The tenderer shall indemnify Kenyatta University against all third party claims of infringement of patent, trademark, or industrial design rights arising from use of the services under the contract or any part thereof."*

2. That in a clarification letter Ref. No. KU/TNDR/PSDBS/2013/001 dated 5<sup>th</sup> April 2013, addressed to the Applicant and copied to four other bidders, the Procuring Entity responded as follows to queries raised by the Applicant;

<i>No.</i>	<i>Section / Title</i>	<i>Clarification</i>
<i>i</i>	<i>Section 3.5: Indemnity of Patent Rights</i>	<i>This Section is derived from the Standard Bid Documents issued by PPOA  It is therefore upon the prospective tenderer to provide an acceptable form of indemnity certificate to protect Kenyatta University against any claim(s) that may arise in regard to infringement of Property Rights.</i>
<i>ii &amp; iii</i>	<i>Table of Contents and Evaluation Criteria</i>	<i>Attached please find an addendum No.8</i>

3. That in a clarification letter Ref. No. KU/TNDR/PSDBS/2013/001 dated 5<sup>th</sup> April 2013, addressed to M/s Cawagi Agencies and copied to four other bidders including the Applicant, the Procuring Entity responded as follows to queries raised by M/s Cawagi Agencies ;

<i>No.</i>	<i>Section / Title</i>	<i>Clarification</i>
<i>i.</i>	<i>Section 5: Schedule of requirements – Particular and specific (what type / kind of Sanitary Bins to be supplied).</i>	<i>The tender in Question is for provision of Sanitary Disposal Bins Services and not Supply of Goods (Bins)  Kenyatta University is not Interested in the type of bins the successful bidder will use so long as they will offer satisfactory service.  In any case, prospective tenderers have been instructed to submit samples of the type they will use to deliver the</i>

		<i>service under section 2.22 in page 16"</i>
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4. That Clause 2.22 at page 16 of the Tender Document stated as follows;  
*"Tenderers shall submit sample bins with the tender document for the purpose of evaluations."*

5. That in the Original Tender Opening Register signed by the Tender Opening Committee members and two of the bidders' representatives, it is recorded that Pinpoint Hygiene Services provided two samples, Oneway Cleaning Services and Sanitam Services (E.A.) Ltd provided one sample each, while Roan Services provided no sample at all.

6. Item C3 of the Evaluation Criteria at page 17 of the Tender Document states as follows;  
*"Provide sample of bin to be used if a patented bin or provide evidence of Manufacturer's Authorization"*

7. That the Standard Manufacturer's Authorization Form at page 37 of the Tender Document in part states as follows:

".....  
*We hereby extend our full guarantee and warranty as per the General Conditions of Contract for the goods offered for supply by the above firm against this Invitation for Tenders.*

\_\_\_\_\_  
*[signature for and on behalf of manufacturer]*

*Note: This letter of authority should be on the letterhead of the Manufacturer and should be signed by a person competent."*

8. That M/s Pinpoint Hygiene Services, the Successful Bidder, has not included a Manufacturer's Authorization Form in its bid documents.
9. That Clause 1.12 of the Mandatory Confidential Business Questionnaire contained in the Tender Documents states as follows;
 

*"Nature of business: (Indicate whether Manufacturer, Distributor e.t.c)....."*
10. That in its bid document, at Clause 1.12 of the Mandatory Confidential Business Questionnaire on nature of business, M/s Pinpoint Hygiene Services has indicated that it is a *Service Provider*.
11. That all the four bidders were subjected to evaluation of General requirements and technical requirements upon which M/S Roan Services was disqualified for failing to meet the threshold score of 70%.
12. That three bidders, including the Applicant, qualified for financial Evaluation upon which M/s Pinpoint Hygiene Services was recommended for award of contract at its bid of Kshs 7,499,544 per year against the Applicants bid of Kshs 21, 152,560 and M/s Oneway Cleaning Services' bid of Kshs. 11, 819, 600.

With regard to the issue of the Indemnity Certificate, the Board notes that Clause 3.5 which is relied on by the Applicant is found in The General Conditions of Contract, which are applicable to a tenderer that has been awarded a contract and is not a factor in the evaluation process. The Board therefore makes the finding that the provision of Indemnity Certificate is not among the Technical Requirements in the Evaluation Criteria already cited herein, and therefore its presence or otherwise cannot be used to disqualify any bidder at the Technical Evaluation stage.



Consequently the Board finds that no bidder deserved to be disqualified for not submitting an Indemnity Certificate since such a certificate, where applicable, would only be required at the contracting stage, which is post-award of the Tender, a stage which is yet to come.

On the question whether the Successful Bidder met the requirement under item C3 of the Evaluation Criteria, the Board notes that Item C3 gave bidders the option to *provide sample of bin to be used if a patented bin or provide evidence of Manufacturer's Authorization*. As already noted herein, the Successful Bidder chose to provide samples and indeed provided two different samples of bins. The Board is therefore convinced that, the Successful Bidder complied with the requirement under item C3 of the Evaluation Criteria and was thus rightfully considered responsive to this requirement by the Procuring Entity. From the foregoing, the Board finds no merit in the Applicant's allegations that the Procuring Entity breached Regulation 49(2) which provides that "*the evaluation committee shall reject tenders which do not satisfy the technical requirements under paragraph (1).*"

### **Grounds 9 and 10 – Allegations of violation of Intellectual Property Rights**

These grounds have been consolidated as they raise similar issues relating to Violation of Intellectual Property Rights.

The Applicant submitted that it stood to suffer irreparable loss and damage due to the continued violation and breach of its Intellectual Property Rights by the unlawful and illegal continued use of its patented bin. It further submitted that, from all the foregoing, it could be seen and noted that

indeed Intellectual Property Rights were clearly, greatly and commendably fully observed, acknowledged and accepted in this tendering process. It added that this product was a duly patented product and the Applicant was the sole owner of the said Patent under Grant of Patent and Certified by ARIPO as Patent No. AP 773 as from 25<sup>th</sup> October 1999 to date and for its life. The Applicant stated that it has **not** donated its Rights in the said Patent in part or in whole to any other entity. The Applicant contended that all the aforesaid was clearly told and explained to the Procuring Entity vide the Applicant's Letter of Authority to Use, that sought to comply with mandatory requirement under Clause 3.5 of the Tender Documents. It stated that all the sanitary bins provided as samples by all the participating bidders were all foot operated, a patented product owned by the Applicant. The Applicant submitted that it stood to suffer irreparable loss and damage as a result of the violation and breach of its Intellectual Property Rights by this continued unlawful and illegal use of its patented product.

The Applicant stated that the Court of Appeal of Kenya, in Civil Appeal No. 228 of 2004, and the High Court of Kenya, in Civil Case No.702 of 2008, had confirmed the issue of its Patent and thwarted any attempts at re-modifying and remodeling of its Patent bin. It added that the Court of Appeal of Kenya in Civil Appeal No.228 of 2004 had dealt with the issue of the Applicants' patent and the High Court of Kenya in Civil Case No.702 of 2008 has re-affirmed that the Applicant was the owner of the Patent and that further any attempt disguised to re-modify and/ or remodel the bin is invalid and illegal.

The Applicant stated that the rulings in the above cited cases clearly showed that all persons purporting to present a re-modified and/ or remodeled bin,

by making cosmetic changes to the sanitary bin, were stopped and directed that if they felt compelled that that invention was different, then nothing could be easier than to present the same for registration to the relevant body. It added that indeed no party had made any such attempt as such attempts were bound to fail as the Applicant's patent was and is already duly registered.

The Applicant further submitted that it was important that the distinction in definitions of a Patent and Industrial Design be drawn. It stated that the former deals with mechanisms such as in the Applicants case and the latter, was based on Section 84 of the Industrial Property Act, 2001 and mainly deals with the form as opposed to mechanism.

The Applicant stated that it need not belabor the clear and express meaning and provisions of Article 40 (5) of the Constitution which clearly recognizes and protects Intellectual Property Rights. It averred that therefore this entire tendering process must of necessity fail.

In response the Procuring Entity submitted that ground 9 is a general statement which did not allege any breach of the Act or Regulations. It further averred that the Board lacks jurisdiction to adjudicate on ground 10 of the Request for Review since any dispute as to breach of patents should be adjudicated upon by the civil courts. It submitted that the tender was for the provision of a service and not goods and hence the issue of breach of intellectual property rights cannot arise. It prayed that the Request for Review as filed be dismissed with costs.

On the issues of intellectual Property Rights, this Board has had an occasion of dealing with a similar matter in Application No. 26/2008 (*Sanitam Services East Africa Ltd Vs Kenyatta University*).

The Board, in that earlier matter resolved as follows:

**'.....Therefore, if the Applicant has any claim that any of the bidders has infringed on its patent, it ought to lodge its claim with the right statutory body. The mandate of this Board is set in Section 93(1) of the Act. The said provision states as follows:**

*"Subject to the provisions of this part, any candidate who claims to have suffered or to risk to suffering loss or damage due to a breach of duty imposed on a procuring entity by this Act or the regulations may seek administrative review as in such manner as may be prescribed."*

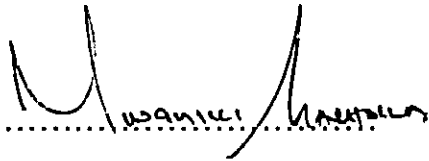
**It is clear from the above provision of the Act that, for any party to be properly before the Board, it has to demonstrate breach of duty imposed on the Procuring Entity by the Act or the Regulations. As can easily be determined from the grounds of Appeal, the Applicant is complaining of a breach of its patent rights by other bidders. Whether such a patent exists; whether such a patent has been breached by any other bidder is not an issue that can be dealt with by the Board. As submitted by the Procuring Entity and the Interested Candidate, such a claim should be lodged with the Industrial Property Tribunal.'**

The Board's position remains the same and therefore downs it's tool on these two grounds for lack of jurisdiction.

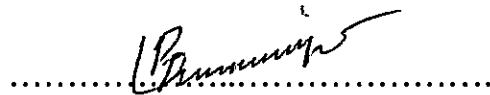
**Ground 11** is a mere statement of the Applicant's wish / opinion. The Board therefore need not make any finding on it.

Taking into account all the above, this Request of Review fails, and pursuant to Section 98 of the Act, the Board orders that the procurement process may proceed.

Dated at Nairobi on this 4<sup>th</sup> day of June, 2013.



CHAIRMAN  
PPARB



SECRETARY  
PPARB

