

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 28/2014 of 26th JUNE, 2014

BETWEEN

ONEWAY CLEANING SERVICES LIMITED.....Applicant

AND

KENYA AIRPORTS AUTHORITY.....Procuring Entity

Review against the decision of Kenya Airports Authority in the Matter of Tender KAA/227/2013-2014 for Provision of Cleaning Services at Jomo Kenyatta International Airport, Terminal Four.

BOARD MEMBERS PRESENT

- | | |
|-----------------------------------|-------------------------|
| 1. Mrs. Josephine Wambua-Mong'are | - Member (In the Chair) |
| 2. Mrs. Rosemary K. Gituma | - Member |
| 3. Mr. Nelson Orgut | - Member |
| 4. Eng. Weche R. Okubo, OGW | - Member |
| 5. Mr. Peter Bitu Ondieki, MBS | - Member |

IN ATTENDANCE

- | | |
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| 1. Stanley C. Miheso | - Secretariat |
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PRESENT BY INVITATION

Applicant - One Way Cleaning Services Ltd.

1. Geoffrey. M. Nyaanga - Advocate
2. Andrew Kuria - Managing Director
3. V. Kemunto - Legal Assistant

Procuring Entity - Kenya Airports Authority

1. George Kamau - Legal Officer
2. Hobadia Orora - Ag. GM Procurement
3. Tabitha Gitau - Manager Corporate Services
4. Rachel Wambugu - House Keeping Officer
5. Antony Kamau - Procurement Officer
6. Bernard Bosire - Procurement Assistant

Interested Parties

1. Edwin Thiongo - Advocate, Mason Services
2. Stephen Njoroge - C. E. O, Mason Services
3. Onesmus Mutinda - Marketing Officer, Lupat Cleaning Services

BOARD'S DECISION

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

BACKGROUND OF AWARD

These tender has been necessitated by the new terminal at the Jomo Kenyatta International Airport- Terminal 4 . The proposed contract period under this tender is for three (3) years.

SCOPE OF WORK

The contractor was required to maintain the highest standards of cleanliness and decorum as is applicable to international airports. For this reason his obligation were to be the following against which standards would be measured; Floors, walls, pillars, stairs, glass walls, windows, doors, sign boards, counters, booths, desks refuse collection points-pavements, path-ways, waste bins, ash-trays, screening machines, lifts escalators, PBB, roof tops, V.I.P & Boarding lounges for general areas.

Terminal building toilets includes all the relevant toilets facilities, baby changing area and janitorial rooms- Toilet bowls, urinals, sanitary bins, toilet walls, floors, partitions, dust bins.

The Tenders were invited through the print media on 17th and 22nd April, 2014 and opened on 4th June 2014 at 11.00am. Twenty Tenderers (20) submitted their bids.

EVALUATION OF THE TENDERS

Tenders were evaluated based on the criteria set out in the bidding documents.

MANDATORY EVALUATION

The table below presents an analysis of the results of the bids based on the evaluation criteria.

MANDATORY EVALUATION TABLE

Eligible candidates are required to meet the following minimum requirements Criteria	Bidder Name and Number										
	1	2	3	4	5	6	7	8	9	10	11
	Precise pride cleaning	Nermal Enterprises Ltd	Dagiwa Investment	Super broom Service	Intelligent Logistic	Mason Services Ltd	Dekings traders	Bright Stars	Metro Cleaners	Parapet Cleaning Services	Spic 'N' Span
Copy of Certificate of Company Incorporation/Registration	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes
Tender surety of Ksh 200,000 validity 120 days from date of bid opening	yes	yes	No	yes	yes	yes	yes	No	yes	yes	yes
Duly filled Confidential Business Questionnaire Form	yes	yes	yes	No	yes	yes	yes	yes	No	yes	yes
Duly filled Declaration Form If NONE state NONE	yes	yes	No	yes	yes	yes	yes	yes	No	yes	yes
Duly filled Litigation History Form if NONE state NONE	yes	yes	No	yes	yes	yes	yes	No	No	yes	yes
Duly fill qualification information form	yes	yes	No	yes	yes	yes	yes	No	yes	yes	yes
Copy of Current KRA tax compliance certificate	yes	yes	No	yes	yes	yes	yes	yes	yes	yes	yes
Audited accounts for three years 2011, 2012 & 2013	No	No	yes	yes	yes	yes	yes	yes	yes	No	yes
Submission of one original and two copies of bid document	yes	yes	No	No	No	yes	yes	yes	yes	yes	yes
REMARKS(PASS & FAIL)	FAIL	FAIL	FAIL	FAIL	PASS	PASS	PASS	FAIL	FAIL	FAIL	PASS

Eligible candidates are required to meet the following minimum requirements:	Bidder Name and Number								
	12	13	14	15	16	17	18	19	20
Copy of Certificate of Company Incorporation/Registration	yes	No	yes	yes	yes	yes	yes	yes	yes
Tender surety of Ksh 200,000 validity 120 days from date of bid opening (1 st october,2014)	No	No	yes	yes	No	yes	No	No	yes
Duly filled Confidential Business Questionnaire Form	yes	yes	yes	yes	yes	yes	yes	yes	No
Duly filled Declaration Form If NONE state	No	yes	yes	yes	yes	yes	yes	yes	yes
Duly filled Litigation History Form If NONE state NONE	No	yes	yes	yes	yes	yes	yes	yes	yes
Duly filled qualification information form.	yes	yes	yes	yes	yes	yes	yes	yes	yes
Copy of Current KRA tax compliance certificate	No	No	yes	yes	yes	yes	yes	yes	yes
Audited accounts for three years 2011, 2012 & 2013	No	No	yes	No	yes	yes	yes	yes	yes
Submission of one original and two copies of bid document	No	yes	yes	yes	yes	yes	yes	yes	No
REMARKS(PASS OR FAIL)	FAIL	FAIL	PASS	FAIL	FAIL	PASS	FAIL	FAIL	FAIL

The following firms were RESPONSIVE to the Mandatory requirement and therefore proceeded to be evaluated further on technical requirements:-

- (i) Bidder No.5 Intelligent Logistic
- (ii) Bidder No. 6 Mason Services Ltd
- (iii) Bidder No. 7 Dekings traders Limited
- (iv) Bidder No. 11/17 Spic N' span cleaning services
- (v) Bidder No. 14 One Way Cleaning Services

TECHNICAL EVALUATION

The following were the technical requirements as per the tender document Requirements

LOT 1 CLEANING OF GENERAL AREAS - JKIA

(a) TECHNICAL EVALUATION REQUIREMENTS FOR LOT 1 GENERAL AREAS

The following were the technical requirements as per the tender Requirements for lot 1 General areas:-

NO.	CRITERIA
	Eligibility of Bidder and Qualification of Bidder
1	Proof of experience in similar works being undertaken since 2010 (3 NO) of value 6 million. Letters of award or contract agreement.
2	Qualification and technical experience of key personnel to administer and execute the contract.
3	Key minimum Equipment and Machinery to undertake works- owned, leased or hired.
4	Financial Capability, Average annual turnover of 5 m and above.
5	Means of Transport.
6	Operation and Work plan or work schedule

The firms that passed the Mandatory evaluation requirements for Lot 1 were subjected further to the technical requirements criteria and the results were as follows:-

Bidder No.	Bidder Name	Technical Evaluation (Total Score)
5	Intelligent Logistic	19%
6	Mason Services Ltd	90%
7	Dekings traders Limited	72%
11	Spic N' span cleaning services	77%
14	One Way Cleaning Services	86%

Based on the above evaluation, three bidders were responsive to the Technical requirements after scoring above 75% and will have their financial opened. It was therefore recommended that the Firms be invited for the opening of their financial bids. The bidders are as follows:-

- (i) Bidder No. 6 Mason Services Ltd
- (ii) Bidder No. 11 Spic N' span cleaning services
- (iii) Bidder No. 14 One Way Cleaning Services

LOT 2 CLEANING OF TOILETS

(b) TECHNICAL EVALUATION REQUIREMENTS FOR LOT 2 TOILETS

The following were the technical requirements as per the tender Requirements for lot 2 Toilets:-

NO.	CRITERIA
	Eligibility of Bidder and Qualification of Bidder
1	Proof of experience in similar works being undertaken since 2010 (3 NO) of value 6 million. Letters of award or contract agreement.
2	Qualification and technical experience of key personnel to administer and execute the contract.
3	Key minimum Equipment and Machinery to undertake works- owned, leased or hired.

4	Financial Capability, Average annual turnover of 5 m and above.
5	Means of Transport.
6	Operation and Work plan or work schedule

The firms that passed the Mandatory evaluation requirements for Lot 2 were subjected further to the technical requirements criteria and the results were as follows:-

Bidder No.	Bidder Name	Technical Evaluation (Total Score)
5	Intelligent Logistic	26%
6	Mason Services Ltd	91%
7	Dekings traders Limited	72%
17	Spic N' span cleaning services	79%
14	One Way Cleaning Services	84%

Based on the above evaluation, three bidders were responsive to the Technical requirements after scoring above 75% and proceeded to have their financial bids opened. It was therefore recommended that the Firms be invited for the opening of their financial bids. The bidders are as follows:-

- (i) Bidder No. 6 Mason Services Ltd
- (ii) Bidder No. 17 Spic N' span cleaning services
- (iii) Bidder No. 14 One Way Cleaning Services

Out of the Twenty bidders (20) that submitted their bids as indicated on the Technical Evaluation Report only Three (3) bidders were responsive and passed the Technical Evaluation Report and Proceeded to the Financial Evaluation Stage.

As per the Instructions to Tenderer's Clause 2.14.1, the financial proposals of the non-responsive bidders in the Technical proposal are to be returned

to the bidders unopened.

The Financial bids were opened on 17th June, 2014 and the Bid prices as read out are as follows:

Bidder No.	NAME OF TENDERER AND CONTACT ADDRESS	BID PRICE
6.	Mason Services Ltd P. O. Box 7044-00300 Nairobi, Tel: 020 3752142/3/5 E-mail: mansonervices@wanainchi.com Directors- Stephen Njoroge, Margaret Njeri	Lot 1 Ksh 139,751,905.65 Lot 2 Ksh 188,857,683.22
14	One Way Cleaning Services P. O. Box 10412-00400 Nairobi; Tel: 0705 277458, 0772 124637 E-mail: info@onewavcleanino.co.ke Directors- Anthony	Lot 1 Ksh 127,685,929.70 Lot 2 Ksh 238,324,389.67
11/17	Spic & Span Cleaning Services Ltd P. O. Box 1546-00100 Nairobi; Fax 2241806 Tel: 313055/2240425 E-mail: spicspan.cleaning@yahoo.com . Directors- Susan Mwenda, N. Mtwaruchiu	Lot 1 Ksh 110,193,216.00 Lot 2 Ksh 226,042,554.00

FINANCIAL EVALUATION OF TENDERS

Tenders were evaluated based on the criteria set out in the bidding documents. The criteria for evaluation were as below;

Criteria

As per the ITT clause 2.14.1 the financial proposal will include:

- (i) The filled Bills of Quantities and Grand Summary of Bills of Quantities.
- (ii) Tender form filled

Currency

The Currency Used by the bidders was: Kenyan Shilling (KES)

The Currency Used for Bid Evaluation was: Kenyan Shilling (KES)

Correction of Arithmetical Errors

It was observed that there was an Arithmetical error in one bid namely:-

Bidder no.17- Spic N' Span

Total per annum inclusive of VAT

	Submitted Bid	Corrected Amount
TABLE A	Kshs 54,234,000.00	Kshs 54,648,000.00
TABLE B	Kshs 317,131.00	Kshs 317,131.00
TABLE C	Kshs 10,350,000.00	Kshs 10,350,000.00
TABLE D	Kshs 53,626.00	Kshs 53,626.00
ADD VAT 16%	Kshs 10,392,610.00	Kshs 10,459,001.20
Total including VAT	Kshs 75,347,518.00	Kshs 75,827,758.20

Bidder no.8 was requested by letter to confirm acceptance of the corrected bid price. This was confirmed by letter on 19th June, 2014. The corrected sum is Kshs 75,827, 758.20 per year and for Three years the sum is Kshs 227,483,275.00

Summary of Financial Evaluation

Summary of price comparison against the three bidders namely:-

Bidders Name	Lot 1 (Kshs)	Lot 2 (Kshs)
Mason	139,751,905.65	188,857,688.22
SPIC N' Span	110,193,216.00	227,483,275.00
One Way	127,685,929.70	238,324,359.00

The lowest bidders are Spic Nil Span for LOT 1 and Mason for LOT 2

Summary Table for Technical score

The technical score is to be converted to 70%

Bidders Name	LOT 1	Converted Score	LOT 2	Converted Score
Mason Services Ltd	90%	63	91%	63.7
SPIC N' Span Cleaning	77%	53.9	79%	55.3
One Way Cleaning	86%	60.2	84%	58.8

Converted scores Financial 30%

Bidders Name	Lot 1 (out of 30)	Lot 2 (Out of 30)
Mason Services	23.7	30
SPIC N' Span cleaning	30.	24.9
One Way cleaning services	26.1	24

SUMMARY OF COMBINED SCORES Technical (70) Financial (30)

Bidders Name	Lot 1 GENERAL AREAS			Lot 2 toilets		
	technical	Financial	Total	technical	Financial	Total
Masons	63	23.7	86.7%	63.7	30	93.7%
SPIC N' Span	53.9	30	83.9%	55.3	24.9	80.2%
One Way	60.2	26.1	86.3%	58.8	24	82.8%

Price Comparison against Estimate

The estimated price for Terminal 4 (package 2A) exclusive of international arrivals was Kshs 68,000,000.00 including VAT for one year (Lot 2 estimates was Kshs 43,634,001.04 and Lot 1 was Kshs 17,532,456.32 however the remaining amount after deduction of lot 1 & 2 estimates Kshs 6,833,542.64 which can be utilized for lot 1 totalling to Kshs 24,365,998.96.

Bidder	Bid price for package 2A		Deviation from Estimate	
	LOT 1	LOT 2	LOT 1	LOT 2
SPIC N' Span	28,630,173.00	54,551,131.00	4,264,174.04	10,917,130.00
One Way	32,399,802.56	57,577,173.90	8,033,803.60	13,943,172.86
Mason Services	31,035,141.70	45,912,807.00	6,669,142.74	2,278,806.00

As per the above table in Lot 1 Spic N' span had the lowest deviation from the estimate of Kshs 4,264,174.04 and in Lot 2 Mason Services had the lowest deviation from the estimate of Kshs 2,278,806.00

RECOMMENDATION OF CONTRACT AWARD

Based on the tender submission evaluations, the evaluation committee recommends that the contract for the provision of cleaning services at JKIA terminal four (4) lot one (1) for cleaning of general areas & lot two (2) cleaning of toilets at Jomo Kenyatta International Airport, Tender reference no. KAA/227/2013-2014 be awarded to:

M/s Mason Services Ltd

P. O. Box 7044-00300 Nairobi,

Tel: 0203752142/3/5

E-mail: mansonservices@wanainchi.com . at the sum of Kshs 139,751,905.65 for Lot 1 and Kshs 188,857,688.22 for Lot 2 for three years contract inclusive of 160/0 VAT. (One Hundred and Thirty Nine Million, Seven Hundred and Fifty One Thousand, Nine Hundred and Five Shillings And Sixty Five Cents) LOT 1 and (One Hundred and Eighty Eight Million, Eight Hundred and Fifty Seven Thousand, Six Hundred and Eighty Eight Shillings and Twenty Two Cents) all inclusive of VAT , for being the highest scored bidder both in lot 1 and lot 2 as per the combined technical and financial scores.

TENDER COMMITTEE MEETING 324th HELD ON 19th JUNE, 2014 - RESOLUTION

The Tender committee adjudicated and approved the award as recommended by the evaluation committee.

REQUEST FOR REVIEW NO. 28/2014

The Request for Review was lodged by M/s Oneway Cleaning Services Limited on 26th June, 2014 in the matter of the Tender for provision of cleaning services at Jomo Kenyatta International Airport, Terminal Four.

The Applicant was represented by Mr. Geoffrey. M. Nyaanga, Advocate from the firm of M/s. Achach and Company Advocates while the Procuring Entity was represented by Mr. George Kamau, Legal Officer Kenya Airports Authority. The interested party M/S Mason Services who was the successful bidder was represented by Mr. Edwin Thiongo, Advocate from the firm of M/s. J Ngaii Gikonyo & Co. Advocates.

The Applicant filed its Request for Review before the Public Procurement Administrative Review Board (hereafter referred to as the Board) to have the decision of the Procuring Entity reviewed and sought for the following orders:

- 1. The Respondent's decision awarding both lots of Tender No. KAA/227/2013-2014 to the alleged successful bidder be and is hereby set aside and nullified.*
- 2. The Respondent's decision notifying the Applicant that it had not been successful in Tender No. KAA/227/2013-2014 purportedly by the letter dated 20th June 2014 be set aside and nullified.*
- 3. The Board be pleased to review all records of the procurement process (including the evaluation thereof) relating to Tender No. KAA/227/2013-2014 and do substitute the decision of the Review Board for the decision of the Respondent and award the Tender to the Applicant and/or one Lot thereof to the Applicant.*

4. *The Respondent be ordered to negotiate and sign a contract with the Applicant in accordance with the Tender and the decision of the Board.*
5. *Further and/or in the Alternative and without prejudice to any of the other prayers sought herein the Review Board do direct the Respondent to undertake fresh evaluation of all bids received in strict adherence to the Tender, the Act and the Regulations and award Tender No. 227 2013-2014 to the highest competitive bidder.*
6. *Further and in the alternative, the entire tender process be nullified and the Respondent be ordered to re-tender afresh.*
7. *The Respondent be and is hereby ordered to pay the costs of and incidental to these proceedings; and*
8. *Such other or further relief or reliefs as this board shall deem just and expedient.*

The Applicant raised eleven grounds of review. Several of the grounds set out in the Request for Review were factual. The factual grounds included grounds 1, 2, 3, 4 and 5 of the Request for Review. The Board will therefore consider these grounds while considering the substantive grounds for Review which are as follows:-

Grounds 6, 7, 8 and 9:- Breach of Section 66(2) of the Public Procurement and Disposal Act, 2005 (hereafter referred to as the "Act"), Appendix to Instructions to Tenderers and Special Conditions of Contract.

The Applicant averred that the Procuring Entity in violation of the mandatory conditions in the Tender Document (Appendix to Instructions to Tenderers and Special Conditions of Contract), that required that *"each LOT will be awarded independent of the others. And no Tenderer can be awarded*

more than one lot," awarded both LOT 1 and LOT 2 of Tender to one bidder, namely M/s Mason Services Ltd. The Applicant further stated that such an award runs contrary to the clear provisions of the conditions of the Tender Document and amounts to introduction of a new criteria in the evaluation process. The Applicant further stated that the Procuring Entity failed to use the Procedures and criteria set out in the tender documents contrary to the express provisions of Section 66(2) of the Act. The Applicant further submitted that the said conditions prohibited the Procuring Entity from awarding the entire tender to one person and the fact that the evaluation criteria was to evaluate each LOT separately clearly meant that these two LOTS were to be treated as two tenders and could not have been made to be performed by one person.

In its response the Procuring Entity stated that it issued a clarification to all bidders (including the Applicant) advising the bidders that both LOT 1 & 2 would be evaluated separately and awarded to the best evaluated bidder(s) with the highest combined score in both the technical and financial proposals. It went further to state that this clarification made it clear that the tender could be awarded to either one bidder for both LOTS or to two bidders in separate LOTS prior to their submission of the tenders and at closing.

The Procuring Entity further stated that it did not introduce a new evaluation criteria in the evaluation process as an amendment to the document was made through Addendum No. 3 where the Tender Document was amended to provide for independent evaluation criteria for the two lots and the formula to determine the successful Bidder clearly indicated. The bidder achieving the highest combined technical and financial score in each lot would be awarded the contract and the outcome of

preliminary, technical and financial evaluation of one lot did not have any bearing on the outcome of the other lot.

The Procuring Entity added that the Notification of Award to the successful bidder and the notification to the unsuccessful bidders were clearly stated with regard to the separate lots.

In determining the issue raised by the Applicant in the above stated grounds the Board has had regard to the provisions of Section 66(2) of the Act which state as follows;

Section 66:- *Evaluation of tenders.*

*"66.....
2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and no other criteria shall be used.
....."*

The Board has further looked at the provisions of the Appendix to Instructions to Tenderers which provided that:-

"The following information for procurement of services shall compliment or amend the provisions of the instructions to tenderers. Wherever there is a conflict between 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."

Similarly the Board's has also considered the provisions of the Special Conditions of Contract which provide as follows

"Each lot will be awarded independent of the others. And no tenderer can be awarded more than one lot

.....”
The Board's has also considered the Clarification issued by the Procuring Entity on 15th May, 2014 which states as follows:-

“3.2(ii) Lot 1 & 2 will be awarded to the best evaluated bidder(s) with the highest combined score.”

The Board has also noted the following:

- a). The Tender was advertised on 17th April, and 22nd April, 2014 to close/open on 6th May, 2014.
- b). The Procuring Entity issued a clarification and not an addendum to all bidders dated 15th May, 2014 clarifying amongst other things that Lot 1 & 2 will be awarded to the best evaluated bidder(s) with the highest combined score.
- c). The Tenders were opened on 4th June, 2014.
- d). The Preliminary and Technical evaluations of the Tenders were concluded on 16th June, 2014.
- e). Three bidders scored above 75% in both lots and were invited for Financial bid opening
- f). The Applicant scored the second highest combined score in each lot

From the foregoing, the Board finds that the Tender was evaluated using the criteria set out in the Tender Document. The Procuring Entity alleges to have used the evaluation criteria specified in the Addendum it purports to have issued to all bidders. The Board finds that the Procuring Entity may ~~issue an addendum and use it in its evaluation as this is in line with the~~ requirements of Section 53 of the Act but is persuaded that what was issued was a clarification pursuant to questions raised by bidders and not

an addendum as envisioned by section 53 of the Act which provides as follows:-

"53.(1) A procuring entity may amend the tender documents at any time before the deadline for submitting tenders by issuing an addendum.

(2) An amendment may be made on the procuring entity's own initiative or in response to an inquiry.

(3) The procuring entity shall promptly provide a copy of the addendum to each person to whom the procuring entity provided copies of the tender documents.

(4) The addendum shall be deemed to be part of the tender documents."

Overall, the Board is persuaded that although to a larger extent the procuring entity evaluated the tender using the criteria provided in the Tender Document and in compliance with Section 66 of the Act, in purporting to award the two LOTS to one bidder, the Procuring Entity went against its own tender document and especially in the General Conditions of Contract to be found in the said document. The effect of the said proviso was that the Procuring Entity could not enter into a contract for both LOTS with one person even if that person scored the highest combined score in both LOTS for technical and financial evaluation. The Board notes that the intended inclusion of the said clause in the body of the tender document meant that the same was part and parcel of the Tender document and could not be wished away. The Board therefore finds that this ground has merit and allows the same.

Grounds 9, 10, 11, and 12 - Breach of Sections 2 of the Act and Article 227 of the Constitution of Kenya, 2010.

The Applicant stated that it had met the mandatory and technical requirements for the Tender and was entitled to be awarded one of the lots since it finished second in both lots and that failure to do so was prejudicial and unfair as it believes that it submitted a competitive bid that was beneficial to the Procuring Entity, met the requirements set out in the Tender Document, attached all the documents that were required and it demonstrated its ability to perform the contract.

The Applicant also stated that the Procuring Entity's decision not to award it the Tender was in violation of Section 2 of the Act. By awarding both lots to one bidder the Procuring Entity did not promote competition nor did it ensure that competitors were treated fairly, it also did not maximize economy and resulted in unfair treatment of the Applicant who had a legitimate expectation to be awarded one of the lots. The Applicant avers that awarding both lots to one bidder was contrary to the Tender criteria, casts doubt on the integrity of the process and would result in loss of public confidence of the law contrary to Section 2(c), (d) and (e) of the Act.

The Applicant finally stated that the Procuring Entity breached Article 227 of the Constitution of Kenya, 2010 in that the award made was not fair, equitable, transparent or competitive.

In response to the above submissions, the Procuring Entity stated that the evaluation was done as per the evaluation criteria set out in the tender document. The formula for determining the winner was stated clearly in the tender document for the respective lots in the Tender Document where the firm achieving the highest combined technical and financial score would be

awarded the contract in each lot. The Applicant did not manage the highest combined score in any of the two lots.

The Board must seek to answer the question as to whether the Procuring Entity was in breach of the requirements of Sections 2 of the Act and Clause 227 of the Constitution.

Section 2 of the Act provides as follows;

Section 2:- *Purpose of the Act.*

"2. The purpose of this Act is to establish procedures for procurement and the disposal of unserviceable, obsolete or surplus stores and equipment by public entities to achieve the following objectives –

(a) to maximise economy and efficiency;

(b) to promote competition and ensure that competitors are treated fairly;

(c) to promote the integrity and fairness of those procedures;

(d) to increase transparency and accountability in those procedures; and

(e) to increase public confidence in those procedures.

(f) to facilitate the promotion of local industry and economic development."

While Article 227 of the Constitution of Kenya, 2010 provides as follows;

Clause 227:- *Procurement of public goods and services.*

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

The Board has perused a copy of the Tender Evaluation Report, the bidder's Tender documents, the Blank Tender Document and Clarifications and notes the following:

- a). The Applicant fulfilled the preliminary requirements of the Tender and qualified for Technical evaluation.
- b). The Applicant did not have the combined highest score for both lots but had the second highest score.
- c). The criteria used for evaluation was specified in the Tender Document and the Clarification to the Tenderers.

From the foregoing, the Board finds that the evaluation of the tender was as per the requirements of the Tender Document and the Clarification issued. The Board further finds that the requirement of complying with the specifications in the tender document lies with the individual bidders. The Board, however finds that in purporting to award the tender for both LOTS to one Tenderer irrespective of clear provisions of the Tender document the Procuring Entity did not adhere to the ideals of public procurement as found in Section 2 of the Public Procurement and Disposal Act, 2005 and Article 227 of the Constitution of Kenya 2010. Consequently the Board finds that these grounds have merit and allows the same.

Ground 13 - Breach of Section 67(2) of the Act.

The Applicant argued that the Procuring Entity acted illegally and ultra vires the provisions of Section 67(2) of the Act in failing to notify the Applicant of the outcome of the tendering process simultaneously and in the manner required by law.

In response, the Procuring Entity stated that it sent a letter dated 20th June, 2014 via email on 24th June 2014 and the hard copy was sent through the Post Office the same date of 24th June 2013 and the Applicant was not prejudiced by the actions of the Procuring Entity in any manner whatsoever.

The Board must seek to answer the question as to whether the Procuring Entity breached the Provisions of Section 67(1) and (2) of the Act on notification.

Section 67 of the Act provides as follows;

Section 67:- *Notification of award of contract.*

"67(1) Before the expiry of the period during which tenders must remain valid, the Procuring Entity shall notify the person submitting the successful tender that his tender has been accepted."

67(2) 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 has previously held that the main purpose of Notification as envisaged in the above provision of the law is to give an opportunity to a party whose bid was found to be unsuccessful an opportunity to complain before the Board and challenge the procurement process and the outcome before the procurement process is closed. In the instant case, the Board finds that the Applicant was able to file this Request for Review in time and finds that the Applicant suffered no prejudice arising from the failure to notify it at the same time with the Successful bidder. The Board finds no merit in this ground and will dismisses it.

BOARDS DECISION.

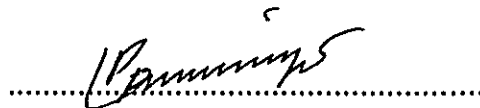
In conclusion therefore the Board makes the following orders;

1. That the Request for Review is hereby allowed and the decision of the Procuring Entity Awarding both LOTS of Tender No. KAA/227/2013-2014 to M/S Mason Services is hereby annulled and set aside.
2. Pursuant to Section 98 (b) of the Public Procurement and Disposal Act, 2005, the Board directs that the Procuring Entity does award the two LOTS separately by awarding one LOT to the Successful Bidder and the other LOT to the Applicant as the Applicant had the second highest combined Score.
3. That the Procuring Entity Proceeds and negotiates separate contracts for the two LOTS with the Successful Bidder M/S Mason Services and the Applicant M/S Oneway Cleaning Services Limited.
4. The Board makes no orders as to costs.

Dated at Nairobi on this 23rd day of July, 2014.



CHAIRMAN
PPARB



SECRETARY
PPARB

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