

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 25/2015 OF 5<sup>TH</sup> JUNE, 2015**

**BETWEEN**

**MBARAK PIT CONTRACTORS... .....Applicant**

**AND**

**KENYA PORTS AUTHORITY ... .....Procuring Entity**

Review against the decision of Kenya Ports Authority in the Matter of Tender No. KPA/097/2014-15/MO for Provision of Public Outdoor Toilet Cleaning Services

**BOARD MEMBERS PRESENT**

- |                           |                |
|---------------------------|----------------|
| 1. Mr. Hussein Were       | - In the Chair |
| 2. Mr. Peter Ondieki, MBS | - Member       |
| 3. Mr. Nelson Orgut       | - Member       |
| 4. Mrs. Rosemary Gituma   | - Member       |

**IN ATTENDANCE**

- |                       |               |
|-----------------------|---------------|
| 1. Mr. Stanley Miheso | - Secretariat |
|-----------------------|---------------|

## **PRESENT BY INVITATION**

### **Applicant – Mbarak Pit Contractors**

- 
- |                   |                     |
|-------------------|---------------------|
| 1. Ali Mbarak Ali | - Managing Director |
|-------------------|---------------------|

### **Procuring Entity – Kenya Ports Authority (K.P.A)**

- |                     |                              |
|---------------------|------------------------------|
| 1. Paul Munyao      | - Advocate                   |
| 2. George Kashindi  | - Advocate                   |
| 3. Johnson Gachanja | - PPO (CTC & Tenders)        |
| 4. Eveline Shigoli  | - Senior Procurement Officer |

### **Interested Parties**

None

## **BOARD'S DECISION**

Upon hearing representations of 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**

The Head of Marine Operations of Kenya Ports Authority requested for the provision of public outdoor toilet cleaning services for various zones within the Authority, procured under Tender No. KPA/097/2014-15/MO. This was an open tender advertised in the *Daily Nation* Newspaper on 6<sup>th</sup> February, 2015. Fifty bids were submitted and opened on the date of tender opening on 26<sup>th</sup> February, 2015 at 1000 hours.

## TENDER EVALUATION

The Tender Processing Committee carried out the evaluation of the submitted tenders in three stages of preliminary evaluation, technical evaluation and financial evaluation.

### Preliminary Evaluation

The preliminary evaluation was to determine proof of the following:-

- a) Site visit and pre-bid conference
- b) Particulars of tendering company to include company background, organization structure, taxpayer registration certificate and current/valid tax compliance certificate.
- c) Tender security of Kshs, 100,000.00 valid for 120 days from the date of tender opening.
- d) Duly filled, signed and stamped Confidential Business Questionnaire.
- e) Duly filled, signed and stamped Declaration Form.
- f) Duly filled, signed and stamped Integrity Declaration and Anti-Corruption Declaration Commitment pledge.
- g) Certificate of Good Conduct for each of the Directors of the firm.
- h) Workman's Compensation and Group Personal Accident Insurance, Third Party of Public Liability insurance.
- i) Letter of Compliance issued by Ministry of Labour and showing compliance to labour requirements and in particular compliance to payment of minimum wage.

Bids for thirty eight firms were found to be non-responsive at the preliminary evaluation as in the table below:

No	Bidder Name	a	b	c	d	e	f	g	h	i
1	Corporate Green Services (K)	√	X	√	√	√	√	√	√	√
2	Maeji Kaiho International Ltd	X		√				X	√	√
3	ZamZam Constructions Ltd	√	Indicated prices in technical bid							
4	Msenya Elvis Qdhiambo /Rimba Ventures	X	Indicated prices in technical bid							
5	Chania Cleaners Ltd	√	√	√	X	√	√	√	√	√
6	Flavy Cleaning Services & General Supplies	X		X						
7	Mbarak Pit Contractors	√	X	√	X	√	√	√	√	√
8	Winley Kleener Ltd	√	√	√	X	√	√	√	√	√
9	El-Roba Enterprises Ltd	√	X	√	√	√	√	√	√	√
10	Amijikenda Enterprise	√	√	√	X	√	√	X	√	√
11	Strong Impact Ltd	√	√	X	√	√	√	X	√	√
12	Kamtix Cleaners Co. Ltd	√	√	√	√	√	√	X	√	√
13	Namjimco Professional Services			X						
14	Tamia Ltd	√	√	√	√	√	√	X	√	√
15	Mogho Enterprises	√	√	√	X	√	√	√	√	√
16	Mwana Mulai Enterprises	X								
17	Graham Investment Co	√	X	√	X	√	√	√	√	√

18	Byron Trustkett Investment	√	√	√	√	√	√	X	√	√
19	Somakim Const. & Service Trading Ltd	√	√	√	√	√	√	X	√	√
20	Suldanka Harti Ltd	√	X	√	X	√	√	X	X	√
21	Azoki Enterprises	√	X	√	X	√	√	√	√	√
22	Chriedal Enterprises	√	√	√	X	X	√	√	√	√
23	Norgen Enterprises	√	X	√	√	√	√	X	√	√
24	Keen Kleeners Ltd	√	X	√	X	√	√	√	√	√
25	Angie General Supplies			X						
26	Smarties Cleaning Services	X								
27	Blue Sea Services	√	√	√	√	√	√	X	√	√
28	Ricotech Kenya	√	√	√	√	√	√	√	X	√
29	Frizel Investment Ltd	X								
30	Sea -Tech Ltd	√	√	√	X	√	√	X	√	√
31	Bidu General Agencies	√	√	√	X	√	√	X	√	√
32	Pendavy Enterprises	√	√	√	X	√	√	√	√	√
33	Standard Technical Services	√	√	√	√	√	√	X	√	√
34	Jenga Ideal Ltd	√	X	√	X	X	X	√	√	√
35	Sky Dove Group Ltd			X						
36	Ndamboi Agencies	√	√	√	X	√	√	√	√	√
37	Sender Services Co. Ltd	√	√	√	√	√	√	X	√	√

38	Roan Services	√	√	√	X	√	√	X	√	√
----	---------------	---	---	---	---	---	---	---	---	---

Twelve bidders met the mandatory requirements of preliminary evaluation and proceeded to the next stage of technical evaluation.

### Technical Evaluation

The bidders were evaluated on the basis of their responsiveness to the following criteria:

	Criteria	Marks
a)	<b>Financial Strength:</b> Certified copies of audited financial report for the last two years, pegged on liquidity ratio, gearing ratio, return on capital employed and cash flow.	10 marks
b)	<b>Company's experience</b> (attach extract copies of contracts) as follows: <ul style="list-style-type: none"> <li>i. Works of a similar nature and size for each of the last three years <b>(10 marks)</b></li> <li>ii. Details of work underway or contractually committed with documentary proof for each of the last three years <b>(5 marks)</b></li> <li>iii. Names and addresses of clients who may be contacted for further information on these contracts <b>(3 marks)</b></li> <li>iv. 2 reference letters <b>(2 marks)</b></li> </ul>	20 marks

c)	<p><b>Personnel Capability</b></p> <p>List of personnel including qualifications and experience of one (1) management personnel (Public Health or Environment Maintenance) and technical personnel proposed for the Contract and an undertaking that they shall be available for the contract (attach detailed CVs and copies of certification).</p> <ul style="list-style-type: none"> <li>• Qualification for management (degree) and 2 technical (diploma)</li> <li>• Experience of management and technical staff (at least 5 years each)</li> <li>• List of technical personnel proposed for the contract.</li> </ul>	15 marks
d)	<p><b>Method of Work Statement:</b> Should include but not limited to:</p> <ul style="list-style-type: none"> <li>• Schedule of Work</li> <li>• Methodology</li> <li>• Health &amp; Safety Precautions (attach Health, Safety &amp; Environment Policy)</li> </ul>	30 marks
e)	<p><b>List of Equipment</b> proposed to execute the contract, their location and proof of ownership. All equipment facilities and transport vehicles must have been inspected for conformity by all relevant authorities (certified copies of current inspection certificates to be</p>	25 marks

	provided as proof)	
--	--------------------	--

Based on the above requirements, the Tender Processing Committee ranked the bidders in terms of score as follows:-

No.	Name of Bidder	Average Points	Remarks
1	Geeg Investment	20%	Fail
2	Betoyo Contractors	43%	Fail
3	Nakaj Services	69%	Fail
4	Parapet Cleaning Services	70%	Fail
5	Green Shine Cleaners & General	73%	Fail
6	Subisa Communications Ltd	75%	Pass
7	Simca Agencies Ltd	76%	Pass
8	Virgin Clean Ltd	77%	Pass
9	Harp General Merchants	77%	Pass
10	Jona Pestcon	79%	Pass
11	Keys Cleaning & Garbage Services	90%	Pass
12	Burj Arab Const & General Supplies Ltd	91%	Pass



The minimum technical score for a bid to proceed to the next stage was 75 points. Seven bidders met the threshold and were thus recommended to proceed to financial proposals opening.

### Financial Evaluation

The financial bids for the seven firms which attained the minimum pass mark of 75% in the technical evaluation were opened on 7<sup>th</sup> April, 2015.

The Committee arrived at the estimated total cost per zone for the three zones by taking into consideration the following criteria:

- a) Labour force cost @ Kshs. 9,780.00 minimum wage for the cleaners and Kshs. 20,000.00 for supervisor
- b) Estimated cost of cleaning materials and equipment
- c) Personal protective equipment
- d) Port pass charges
- e) 10% profit margin
- f) 16% Value Added Tax (VAT)

The monthly costs quoted by the firms were as follows:

No.	Name of Bidder	Zone 1	Zone 2	Zone 3
1.	Subisa Communications Ltd	401,626.80	218,892.00	431,473.60
2.	Simca Agencies Ltd	339,595.80	243,344.35	408,630.50
3.	Virgin Clean Ltd	255,385.60	116,199.52	209,264.00
4.	Harp General Merchants	348,000.00	327,120.00	336,400.00
5.	Jona Pestcon	252,880.00	139,200.00	237,800.00

6.	Keys Cleaning & Garbage Serv.	330,600.00	261,000.00	339,880.00
7.	Burj Arab Const & General Supplies Ltd	738,383.00	Nil	712,936.00
<b>Estimated Cost per Zone</b>		<b>266,695.50</b>	<b>169,292.00</b>	<b>207,072.50</b>

From the estimated costs, the committee recommended award of the tender for the three zones to two firms which quoted nearest to the estimated cost as indicated below.

<b>Zone</b>	<b>Firm Recommended</b>	<b>Price Per Month Kshs. VAT Inc.</b>
Zone 1	Virgin Clean Ltd	255,385.60
Zone 2	Jona Pestcon	139,200.00
Zone 3	Virgin Clean Ltd	209,264.00

### **TENDER COMMITTEE DECISION**

The Tender Committee, at its meeting number 017/2014-15 held on 18<sup>th</sup> May, 2015 approved the recommendation of the Tender Processing Committee and awarded tender No. KPA/097/2014-15/MO for Provision of Public Outdoor Toilet Cleaning Services as follows:

Zone	Firm Awarded	Amount per month In Kshs (VAT inclusive)
Zone 1	Virgin Clean Ltd	255,385.60
Zone 2	Jona Pestcon	139,200.00
Zone 3	Virgin Clean Ltd	209,264.00

### REQUEST FOR REVIEW

The Request for Review was lodged on 5<sup>th</sup> June, 2015 by M/s Mbarak Pit Contractors (hereinafter referred to as “the Applicant”) of P. O. Box 83303 - 80100, Gatundu Road, Lohana Building, Mombasa, against the decision of Kenya Ports Authority (hereinafter referred to as the “Procuring Entity”) in the matter of Tender No KPA/097/2014-15/MO for the Provision of Public Outdoor Toilet Cleaning Services.

The Applicant sought for the following orders:

- 1. The Applicant’s tender documents were responsive in all aspects and that the Procuring Entity’s letter REF: PSM/CTC/1/01/ (097) VOL of 25<sup>th</sup> May, 2015 rejecting the Applicant’s bid be declared null and void.*

2. *The successful Tenderers awarded this contract be declared unresponsive for having failed to comply with the mandatory requirements.*

---

3. *The Procuring Entity's decision to award the contract to ineligible and unresponsive contractors be annulled.*
4. *The Procuring Entity's "Technical Committee" be disqualified and barred from acting in similar committees in future for being unjust, discriminatory and acting in unethical behaviour thereby depriving "deserving contractors" the opportunity to do business in a fair competitive process.*
5. *Being the only qualified contractor as per "Tender Documents", the Board to order the Procuring Entity to award the Applicant the whole contract accordingly.*
6. *The Board to order the Procuring Entity to pay the Applicant costs of these proceedings and any other reliefs deemed necessary.*

The Applicant raised five grounds in support of the request for review as namely:-

1. Ground 1:- Breach of Sections 31(1) and (4) of the Public Procurement and Disposal Act, 2005 (hereafter referred to as “the Act”).
2. Ground 2:- Breach of Section 2(b)-(e) of the Act.
3. Ground 3:- Breach of Section 39(1) of the Act.
4. Ground 4:- Breach of Section 64(1) of the Act.
5. Ground 5:- Breach of Sections 59(3), 64(1) and (2) (a) and (b) and 66(2) and (5) of the Act.

During the hearing of the Request for Review, the Applicant was represented by Mr. Ali Mbarak Ali its Managing Director while the Procuring Entity was represented by Paul Munyao advocate and Mr. George Kashindi Advocate.

#### PRELIMINARY ISSUE

The Procuring Entity in its Response to the Request for Review raised a preliminary issue challenging the jurisdiction of the Board to hear the matter by dint of the provisions of Regulation 73(2)(c) of the Public Procurement & Disposal Regulations, 2006. The Procuring Entity contended that the Request for Review was filed outside the mandatory period allowed by the law and the rules and accordingly prayed that the Request for Review be dismissed with costs.

The Procuring Entity, in its submissions in support of the preliminary objection relied on its response filed on 11<sup>th</sup> June 2015 and particularly to paragraph 7 of the response. It averred that all parties are bound by the law that requires that the request for review must be filed within 7 days. It argued that in order for the Applicant to cloth the Board with jurisdiction, the Applicant needed to come to the Board within 7 days. It added that ignorance of the law is not a defense. The Procuring Entity pointed out that the Applicant had admitted being aware of the relevant provisions of the law but instead chose to rely on extraneous documents such as the tender document and argued that the tender document cannot operate to amend the law. It prayed that the request for review be dismissed.

In response to the preliminary objection by the Procuring Entity, the Applicant submitted that although the letter of notification was dated 25<sup>th</sup> May, 2015, the Applicant received the said letter on 28<sup>th</sup> May, 2015. It further submitted that it lodged the application on 5<sup>th</sup> June 2015, nine days from the date of service because it was moved by the Procuring Entity's tender document at Clause 46 of the Instructions to Tenderers which stated that *the tenderer shall submit an application for review in*

*the number of copies and pay fees as prescribed in the regulations within 14 days of the tenderer becoming aware of the circumstances giving rise to the complaint or dispute.* The Applicant also submitted that it was aware of the regulation on timelines for filing the request for review but it opted to comply with the instructions in the tender document. The Applicant termed the preliminary objection as an attempt by the Procuring Entity to disown its own tender document and therefore requested the Board to declare the whole tender document annulity in law for failing to comply with the Provisions of Act and the Regulations.

On the issue of the validity of the Preliminary Objection the averred further stated that the request for review was filed on 5<sup>th</sup> June 2015 and the preliminary objection was filed on 11<sup>th</sup> June 2015, which was more than five days allowed by the regulations for the filing of a preliminary objection. The Applicant submitted that the fifth day fell on 10<sup>th</sup> June, 2015 and not 11<sup>th</sup> June, 2015 the date the preliminary objection was filed. The Applicant therefore urged the Board to dismiss the preliminary objection and find that the Request for Review was properly before the Board.

The Board has heard the submissions made by the parties and has additionally read the documents filed by the parties in support of and in opposition to this Request for Review. The only issue that flows from the Preliminary Objection is one namely:-

---

*“Whether the Preliminary Objection by the Procuring Entity is properly before the Board and whether the Board lacks Jurisdiction to hear the Request for Review having been filed outside the mandatory 7 day period from the date of the occurrence of the breach complained of”.*

The Board notes the following;

1. That the Applicant participated in Tender No. KPA/097/2014-15/MO advertised by the Procuring Entity on 6<sup>th</sup> February, 2015.
2. That Fifty bids were submitted and opened on the date of tender opening on 26<sup>th</sup> February, 2015.
3. That the Procuring Entity evaluated the submitted tenders for preliminary, technical and financial responsiveness.
4. That the tender for the Applicant was disqualified at the preliminary evaluation stage



5. That the Procuring Entity notified the Applicant in a letter dated 25<sup>th</sup> May, 2015 and received by the Applicant on 28<sup>th</sup> May, 2015 that the Applicant's tender was unsuccessful.
6. That the Applicant filed this request for review on 5<sup>th</sup> June, 2015 against the decision of the Procuring Entity to disqualify the Applicant's tender at preliminary evaluation stage.
7. That the secretariat of the Public Procurement Administrative Review Board notified the Procuring Entity on 5<sup>th</sup> June, 2015 that this request for review had been filed.
8. That the Procuring Entity filed a response to the request for review and a preliminary objection to the request for review on 11<sup>th</sup> June, 2015.

In the case of **Owners of the Motor Vessel "Lillan S" v. Caltex Oil (Kenya) Ltd (1989) KLR C.A1** pg.1 at 14.15 the Court of Appeal stated that an issue of jurisdiction ought to be raised and determined at the earliest possible opportunity and that where a Court or other body finds that it has no jurisdiction then it has to down its tools and cannot proceed to hear the merits of the case.

Before proceeding to determine whether this Request for Review was filed within time, the Board will however first determine the issue of whether the preliminary objection is properly before the Board since that issue must in the natural order of things be determined first. The operative section of the law allegedly breached is Regulation 77 of the Act which state as follows:

*Section 77 (1) A party notified under Regulation 74 may file a preliminary objection to the hearing of the request for review to the Secretary of the Review Board within five days from the date of notification.*

(2) ... ..

*(6) The fees chargeable for filing a preliminary objection shall be as set out in the Part II of the Fourth Schedule.*

The Board finds that the Procuring Entity filed it's response and the preliminary objection to the Request for Review filed by the Applicant on 11<sup>th</sup> June, 2015. The Board further finds that the Procuring Entity was promptly notified of the filing of the Request for Review on the same day the Request for Review was filed namely on 5<sup>th</sup> June, 2015. The Board therefore finds that the period of five days for the filing of a preliminary objection lapsed on 10<sup>th</sup> June, 2015. In this instance, the Procuring Entity finds itself in a position where it has to defend itself

against an allegation of breach of a regulation in the same way that the Procuring Entity is accusing the Applicant of having breached the Regulations. It was therefore also incumbent upon the Procuring Entity to approach the Board in accordance with the Regulations. The Board finds that the Procuring Entity filed the Preliminary Objection on the sixth day from the date it was notified that a Request for Review had been filed. The Board consequently finds and holds that the Procuring Entity breached the provisions of regulation 77 (1) of the Regulations and that the Preliminary Objection filed by the Procuring Entity is incompetent and is hereby disallowed. The Board will on that account proceed to consider and determine the Request for Review on its merits.

#### THE APPLICANT'S CASE

Mr. Ali Mbarak Ali, appearing in person, argued the Applicant's case. He submitted that the Procuring entity breached the General Procurement Rules contained in the Public Procurement and Disposal Regulations, 2006 as the "successful" tenderers were not qualified to perform the services and that they were not licensed by NEMA, Mombasa County Government and Mombasa Water and Sewage Company as required by the County by-laws.

The Applicant submitted that the Procuring Entity breached Section 31(1)(a) of the Act that states that a person is qualified to be awarded a contract only if the person has the necessary qualifications, capabilities, experience, resources, equipment and facilities to provide what is being procured. He submitted further that all the successful tenderers did not have local authority and NEMA licenses in sewage services and were therefore ineligible to be awarded the tender. He also stated that the Procuring Entity breached Section 31(4) of the Act that requires the Procuring Entity to determine whether a person is qualified and that determination should be done using the criteria and the requirements set out in the tender document.

The Applicant averred that the Procuring Entity breached the Provisions of Section 2(b) of the Act by failing to promote competition and ensure that competitors were treated fairly; Section 2(c) of the Act for failing to promote the integrity and fairness of those procedures; Section 2(d) of the Act for failing to increase transparency and accountability in those procedures; and Section 2(e) of the Act for failing to increase public confidence in those procedures. It claimed that the actions of the Procuring Entity were in breach of Section 39(1) of the Act that requires candidates to participate in procurement proceedings without

discrimination except where participation is limited in accordance with the Act and the regulations and further claimed that the Procuring Entity favoured some bidders at the expense of the Applicant.

The Applicant argued that the Procuring Entity's decision breached the provisions of Section 64(1) of the Act that states that a tender is responsive if it conforms to all the mandatory requirements in the tender documents. It also argued that the Procuring Entity breached Sections 59(3); 64(1); 64(2) (a) & (b) and 66(2) & (5) of the Act.

Turning to the letter of notification dated 25<sup>th</sup> May, 2015 which contains the reasons the Procuring Entity gave for disqualifying the Applicant's tender, the Applicant stated that it had attached all the mandatory documents and cited its tender not having been declared non-responsive at the tender opening stage as proof that the tender was responsive. He further stated that the Applicant had provided the organizational structure in the form of a company profile in its tender. It also stated that it had attached a Confidential Business Questionnaire in its tender.

In conclusion the Applicant submitted that its bid was responsive in all aspects and urged the Board to grant its prayers.

## THE PROCURING ENTITY'S RESPONSE

In response, Mr. Paul Munyao for the Procuring Entity stated that the averments contained in the Application were general and a mere repetition of the provisions of the General Procurement Rules contained in the Public Procurement and Disposal Regulations, 2006 ("The Principal Regulations"). He averred that the tender document was very clear as regards the mandatory requirements as well as the other requirements of the Tender. The issues of NEMA licenses, Mombasa County Government licenses and Mombasa Water and Sewerage licenses, he argued, were not part of the mandatory tender requirements and that the Applicant therefore not correct in the position taken by him.

The Procuring Entity submitted that the Applicant had a separate previous tender awarded to it by the Procuring Entity, for emptying of soak-pits and de-sludging and that the licenses the Applicant erroneously thought were mandatory therein may have been relevant in that previous tender but not in the tender the subject matter of this request for review. It added that the Applicant was proceeding under the impression that the subject tender was for sewage services which required NEMA licensing. This tender, it added was basically for cleaning services for toilets and

that it was not about emptying and cleaning of sewage pits for which the Procuring Entity would have required NEMA licenses and bid from the Mombasa Sewerage Company licensed contractors.

The Procuring Entity further stated that it fully complied with the provisions of the law, promoted competition and treated all bidders fairly. It further submitted that it made public announcements through the press and its website and that was how the Applicant took part in the process adding that fairness was observed.

The Procuring Entity averred that the Applicant was eliminated at the preliminary stage of evaluation because its tender did not meet some of the mandatory requirements including failure to provide the organizational structure, and the Confidential Business Questionnaire provided under section IX of the tender document was only partially filled. It stated that the Applicant filled only one out of the 3 pages of the Questionnaire, yet it was a mandatory requirement that all be filled. It added that the Applicant omitted crucial details that required to be filled to complete the form such as client's references, key personnel for administration and execution of the contract, declaration form, litigation history and qualification and experience of the key personnel.

The Procuring Entity denied that it breached the cited provisions of the Act as alleged or at all. It reiterated that the Applicant's tender was disqualified at the preliminary evaluation stage for being non-responsive and added that the grounds in the request for review were bad in law for lack of particulars. In conclusion the Procuring Entity therefore urged the Board to dismiss the Applicant's Request for Review and award it the costs of the Request for Review.

---

#### **THE APPLICANT'S REPLY**

In a short reply, the Applicant stated that the parameters the Procuring Entity applied on the Applicant's tender were not the same parameters the Procuring Entity had applied to the successful tenderers and urged the Board to uphold the request for review.

#### **THE BOARD'S FINDINGS**

The Board has carefully considered the oral and the submissions made by the parties and has examined all the documents that were submitted to it and has identified the issues for determination in this Request for Review as follows: -



- (i) *Whether the evaluation of the Applicant's tender was flawed and not done in accordance with the criteria for determination of responsiveness set out in the tender document contrary to the provisions of Section 64 (1) of the Act.*
- (ii) *Whether the Procuring Entity breached the provisions of the Sections 31 (1), 31 (4), 2 (b) (c) (d) (e), 39 (1) (b) and 59 (3).*

1. As to whether the evaluation of the Applicant's tender was flawed and not done in accordance with the criteria for determination of responsiveness set out in the tender document contrary to the provisions of Section 64 (1) of the Act:

The Board has established the following facts from the documents and the submissions presented before it:

- a) The Applicant participated in Tender No. KPA/097/2014-15/MO advertised by the Procuring Entity on 6<sup>th</sup> February, 2015.
- b) Fifty bids were submitted and opened on the date of tender opening on 26<sup>th</sup> February, 2015.
- c) The bids were evaluated by the Procuring Entity's Tender Processing Committee in three stages namely the preliminary evaluation, technical evaluation and financial evaluation.

- d) Thirty eight (38) firms were found to have been non-responsive and were therefore disqualified at the preliminary evaluation stage.
- 
- e) The Applicant was among the 38 firms disqualified at the preliminary evaluation stage.
- f) Twelve bidders were evaluated for technical responsiveness and bidders who scored above the minimum 75 points proceeded to the financial evaluation stage.
- g) Seven bidders who scored above the minimum 75 points at the technical evaluation stage were invited to the opening of financial proposal which took place on 7<sup>th</sup> April 2015.
- h) Seven bids were subjected to Financial Evaluation.
- i) The Procuring Entity's tender evaluation committee recommended the award of the tender for Zones 1, 2 and 3 to Messrs Virgin Clean Limited, Messrs Jona Pestcon and Messrs Virgin Clean Limited respectively at their quoted prices of Kshs 255,385.60, Kshs 139,200.00 and Kshs 209,264.00.
- j) On 14<sup>th</sup> April 2015 the Procuring Entity's Tender Committee approved the recommendation of the evaluation committee and awarded the tenders.

- k) The Procuring Entity notified the successful bidders vide letter dated 25<sup>th</sup> May, 2015 that its bid was successful.
- l) The Procuring Entity at the same time notified unsuccessful bidders, including the Applicant, vide letter dated 25<sup>th</sup> May 2015, that their bids were not successful and gave reasons.
- m) The Applicant filed this request for review on 5<sup>th</sup> June 2015 against the decision of the Procuring Entity to disqualify the Applicant's tender at the preliminary evaluation stage.

In determining this issue the Board is guided by the provisions of Sections 64 and 66 of Act which governs the evaluation of tenders.

The said Sections state as follows:-

- (i) Section 64(1) *"A tender is responsive if it conforms to all the mandatory requirements in the tender document. "*
- (ii) Section 66(1) *"The Procuring Entity shall evaluate and compare the responsive tenders other than the tenders rejected under Section 63(3). "*
- (ii) Section 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 finds that the requirements of NEMA licences, Mombasa County Government licences and the Mombasa Water and Sewage Company licences were not listed as requirements under Section III of the tender document and were therefore not used in the evaluation. The Board therefore finds that the use of these criteria would have amounted to the introduction of a new evaluation criteria and would have been contrary to the Provisions of Section 66(2) of the Act.

The Board further finds that the Applicant's bid was found to be non-responsive because the firm's organizational structure was not provided and the Confidential Business Questionnaire was not dully filled by providing clients references, items of equipment, key personnel for administration and execution of the contract and litigation history. The Board has confirmed from the tender document that the Applicant indeed submitted a Confidential Business Questionnaire in its bid. The Questionnaire submitted by the Applicant was however different in its form and content from the one provided in the blank tender document and was not complete as required in the tender document. The Board finds on this aspect of the ground of the Request for Review that the evaluation conformed to the Provisions of Section 64(1) of the Act.

The Board notes that the tender for the three zones was awarded to two firms - Messrs Virgin Clean Limited and Messrs Jona Pestcon. Nothing in the submissions and the documents presented to the Board by the Applicant proves the allegation that the successful bidders tenders were not responsive or that the bidders were not qualified as alleged by the Applicant.

From the foregoing, the Board finds that the preliminary evaluation criteria and the requirements were set out in the document. The Board further finds that the Procuring Entity evaluated the Applicant's tender using the preliminary evaluation criteria set out in Section III of the tender document. Accordingly, the Board finds and holds that the evaluation of the Applicant's tender was done in accordance with the criteria set out in the tender document and in accordance with Section 64(1) of the Act. The Board is therefore satisfied that this ground of the request for review lacks merit and is therefore dismissed.

2. As to whether the Procuring Entity breached several provisions of Sections 31 (1), 31 (4), 2 (b) (c) (d) (e), 39 (1) (b) and 59 (3):

The Board finds that the Applicant was not clear on what aspects of the Procuring Entity's decision, the tender evaluation criteria and the award of the tender offends the express and the implied provisions of Section 2 of the Act.

---

With regard to the alleged breach of Section 39(1) of the Act, the Board observes that the Procuring Entity advertised the tender in the *Daily Nation* and the *People Daily* newspapers of 6<sup>th</sup> February, 2015. The advertisement also allowed tenderers or potential bidders to download a complete tender document in the Procuring Entity's website. The tender document clearly stated the requirements and the evaluation criteria therein with provisions for clarifications where required. The Applicant has not proved the claim of discrimination in the participation in the procurement proceedings by eligible bidders.

The Board observes that the Applicant merely reproduced the provisions of the Act which were allegedly breached but made no effort in providing proof of the alleged breaches. The Board finds itself in a situation where it cannot uphold the allegations of breach set out in this ground for lack of particulars and evidence to support the alleged breaches.

This ground of the Request for Review therefore also lacks merit and is disallowed.

### DECISION OF THE BOARD

In exercise of the powers conferred upon the Board by Section 98 of the Act, the Board therefore makes the follows orders: -

1. The Request for Review filed by the Applicant on 5<sup>th</sup> June 2015 in respect of Tender No. KPA/097/2014-15/MO is hereby dismissed.
2. The Procuring Entity is at liberty to proceed with procurement process to its logical conclusion.
3. Since the Applicant was successful in resisting the Procuring Entity's Preliminary Objection and was therefore partly successful in this matter to the said extent, the Board orders that each party shall bear it's own costs of the Request for Review.

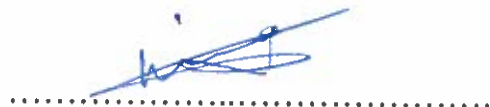
Dated at Nairobi on this 2<sup>nd</sup> July, 2015



.....

**CHAIRMAN**

**PPARB**



.....

**SECRETARY**

**PPARB**

