

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**REVIEW NO. 21/2015 OF 20<sup>TH</sup> APRIL, 2015**

**BETWEEN**

**THWAMA BUILDING SERVICES LTD ..... APPLICANT**

**AND**

**THARAKA NITHI COUNTY GOVERNMENT.....PROCURING  
ENTITY**

Review against the decision of the Tender Committee of the Tharaka Nithi County Government in the matter of Tender No tender No. TNC/01/2014-2015 for the construction of the Tharaka Nithi County Headquarters at Kathwana.

**BOARD MEMBERS PRESENT**

Paul Gicheru	Chairman
Josephine Mong'are	Member
Hussein Were	Member
Weche Okubo	Member
Nelson Orgut	Member

**IN ATTENDANCE**

Stanley Miheso	Secretariat
Shelmith Miano	Secretariat

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**~~APPLICANT-17-2015-THWAMA BUILDING SERVICES LTD~~**

Kamau Mbugwa	Advocate
B. G. Maina	Director

**PROCURING ENTITY-THARAKA NITHI COUNTY GOVERNMENT**

G. M. Nyaanga	Advocate,
S. M. Muriungi	Advocate
Duncan Wachira	Lawyer
Frank Njeru	Legal Advisor

**INTERESTED PARTIES**

Dennis Anyoka	Advocate for Terra Craft Ltd
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**THE BOARD'S DECISION**

This Request for Review was filed by the Applicant on 20<sup>th</sup> April, 2015 challenging the decision of the Procuring Entity awarding tender No. TNC/01/2014-2015 for the construction of the Tharaka Nithi County Headquarters at Kathwana to M/s Terra Craft (K) Limited.

During the hearing of this Request for Review, the Applicant was represented by Mr. Kamau Mbugua Advocate while the Procuring Entity

was represented by Mr. G. M. Nyaanga and Mr. S. M. Muriungi. Mr. Nyaanga however made the submissions on behalf of the Procuring Entity. The Interested M/s Terra Craft (K) Limited was on the other hand represented by Mr. Dennis Anyoka Advocate.

The Applicant's Request for Review was supported by the undated sworn Affidavit of one Barnabas Gicharu Maina together with the annexures thereto.

The Applicant's Request for Review was essentially based on three grounds but an issue arose as to whether there was a breach of the Provisions of Sections 44 and 45 of the Public Procurement and Disposal Act 2005. The following were therefore the issues that were before the Board:-

- (i) Whether the Procuring Entity failed to notify the Applicant of the outcome of its tender.
- (ii) Whether or not the Procuring Entity failed to supply the Applicant with a summary of the evaluation report.
- (iii) Whether or not the Applicant was the lowest evaluated bidder.
- (iv) Whether or not the Applicant breached the Provisions of Sections 44 and 45 of the Public Procurement and Disposal Act 2005.

It was the Applicant's case before the Board as contained in the documents filed and as submitted by Mr. Mbugua learned Counsel for the Applicant that the subject tender was advertised on 8<sup>th</sup> January, 2015 and that

pursuant to the said advertisement, the Applicant together with other bidders purchased the tender documents Counsel for the Applicant stated that the tenders were to be opened on 22<sup>nd</sup> January, 2015 at 10.00 a.m. but that the period for opening the tenders was extended by one week to 29<sup>th</sup> January, 2015 vide an addendum which was contained in the “Star Newspaper of 22<sup>nd</sup> January, 2015”.

The Applicant further stated that the tenders were opened at 10.00 a.m. on 29<sup>th</sup> January, 2015 at the Tharaka Nithi County Headquarters’ Boardroom at Kathwana where it emerged that the following tenderers had returned their tenders back as per “the tender opening schedule”.

NO.	TENDERER	TENDER SUM
1.	M/s Kabco Contractors Ltd	328,840,762.60
2.	M/s Mutahi Engineering Services Co. Ltd	332,961,366.76
3.	M/s Jasir Contractors Ltd	350,605,818.00
4.	M/s Thwama Building Services Ltd	354,344,063.20
5.	M/s Ernie Campbell & Co. Ltd	365,949,200.00
6.	M/s Terra Craft (K) Ltd	366,823,802.56
7.	M/s Kingstone Construction Co. Ltd	377,110,896.00
8.	M/s NGM Co. Ltd	382,388,015.44
9.	M/s Laton Engineering Ltd	392,050,913.00
10.	M/s Triospan Ltd	399,339,825.20
11.	M/s Farjano Construction Co. Ltd	560,685,686.57
12.	M/s Lalji Meghji Patel & Co. Ltd	598,420,510.00

13.	M/s Harricons (K) Ltd	NO TENDER
14.	OFFICIAL STATEMENT	358,943,451.00

On the first ground of Review Counsel for the Applicant argued based on paragraph 1.7 of the Request for Review and the averment at paragraph 8 of the Supporting Affidavit of Barnabas Gicharu Maina that the Applicant had reliably learnt that the Tender Evaluation Committee vide it's report dated 18<sup>th</sup> February, 2015 had adjudged the Applicant's tender and that of M/s Kabco contractors Ltd as responsive and had proceeded to subject them to a detailed technical evaluation.

The Applicant further stated in ground 1.9 of the Request for Review that it had reliably learnt that the Procuring Entity had awarded the tender to the interested party. The Applicant however stated that it had not been informed of the outcome of it's tender up to the date when this Request for Review was filed. The Applicant set out the same position in grounds 1.8, 1.13, 2.1, 2.3, 2.4, 2.5, 2.6 and 2.7 of the Request for Review and in paragraphs 9, 14 and 16 of the Supporting Affidavit of Barnabas Gicharu Maina and further contended that as a result of the Procuring Entity's failure to notify it of the outcome of its tender, it took the liberty to write to the Procuring Entity through its advocates on 14<sup>th</sup> April, 2015 asking to be supplied with the letter of notification among other documents.

The Applicant finally stated in paragraph 2.4 of the Request for Review that it visited the offices of the Procuring Entity on 15<sup>th</sup> April, 2015 where it

was informed that a letter of regret had been dispatched to its postal address. This averment is contained in paragraph 19 of the Supporting Affidavit of Barnabas Gicharu Maina.

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On the issue of notification, Counsel for the Applicant submitted that it was clear in the letter of notification contained in the Procuring Entity's response that the Procuring Entity had used the address 25507 – 00400 Nairobi in the letter of notification when the Applicant's correct address as per the tender document and from its letters was P. O. Box 22507-00400 Nairobi.

Based on all the above the Applicant urged the Board to find that the Applicant had not been notified of the outcome of its tender and therefore set aside and or nullify the decision of the Procuring Entity awarding the subject tender to the Interested Party.

On the second issue framed for determination, Counsel for the Applicant submitted that the Applicant had sought for a summary of the evaluation report from the Procuring Entity on several occasions. He submitted that the request for the summary of the evaluation report was first made to the Procuring Entity on 14<sup>th</sup> April 2014 and the same was renewed by a letter dated 7<sup>th</sup> May, 2015 which the Applicant produced and annexed to its reply to the Procuring Entity's response. Counsel for the Applicant however submitted that the Procuring Entity had refused to provide the Applicant with the said summary which he stated was in breach of the Provisions of

Section 45 of the Public Procurement and Disposal Act 2005. He further stated that this action and the Procuring Entity's failure to serve his client with a notification of the outcome of the tender was evidence of bias by the Procuring Entity against the Applicant.

On the third ground of Review and as the Board has already observed above, the Applicant stated that it had reliably learnt of the outcome of the tender evaluation committee process vide a letter dated 18<sup>th</sup> February, 2015.

Mr. Mbugua attributed this information to what he described as a "whistleblower" and that based on this source, whose name and particular's he failed to disclose, he submitted that the Applicant's tender and that of Kabco contractors Ltd had been adjudged as responsive. He also stated from the bar that the information of the outcome of the tender was in the public domain.

The Applicant further stated that it had also learnt from the alleged "whistleblower" that the tender was awarded to the Interested Party herein whose bid, according to the "whistleblower" was non-responsive as per the tender document contrary to the Provisions of Section 64 of the Public Procurement and Disposal Act 2005 specifically on the following grounds:-

- a) That the Bid validity period was insufficient.
- b) That no litigation history was provided.
- c) That no proof of similar works was provided.

d) That the bid was higher than the Applicant's.

On the issue of the Applicant being the lowest evaluated bidder, counsel for the Applicant stated that the only evidence that he had to support this allegation were the results announced at the tender opening which the Board has already set out page 4 of this decision but that he did not have any evidence of the outcome or the particulars of the evaluation.

Both Mr. Nyaanga and Mr. Anyoka who appeared on behalf of the Procuring Entity and Interested party opposed the Applicant's Request for Review. The Procuring Entity filed a statement of response dated 6<sup>th</sup> may, 2015 and a Replying Affidavit sworn by one Nicholas Gitonga on the same day while the Interested Party filed grounds of opposition dated 7<sup>th</sup> may, 2015 and a notice of Preliminary objection which the Board directed to be argued within the main Request for Review.

On the issue of notification, Mr. Nyaanga admitted that the address on the notification of the outcome of the tender was actually wrong and attributed this discrepancy to what he termed as a typographical error. He however submitted that the Applicant did not suffer any prejudice as it was able to file it's Request for Review on time. Counsel for the Procuring Entity further urged the Board to find that the Applicant was not taking any objection to the competence of the Applicant's Request for Review on the ground that it was filed out of time.



On the issue of confidentiality under the Provisions of Section 44 of the Public Procurement and Disposal Act, 2005, Counsel for the Procuring Entity and Mr. Anyoka for the Interested Party submitted that the Request for Review was based on confidential information and records of the Procuring Entity and/or of the evaluation obtained and/or retained illegally and or in contravention of the law.

Both Counsel for the Procuring Entity and Counsel for the Interested Party submitted that the Applicant had both in its Request for Review and in the Supporting Affidavit admitted that the Applicant was privy to the minutes of the Tender Evaluation Committee dated 18<sup>th</sup> February, 2015 including the outcome of the evaluation process and the eventual award. The Applicant also stated both in the Request for Review and the supporting affidavit that it was also aware of the contents of the successful bidder's bid/tender document.

The Procuring Entity and the Interested Party further submitted that this was contrary to the Provisions of Section 44 of the Public Procurement and Disposal Act, 2005 and urged the Board not to allow the Applicant to rely on an illegality in urging its case before the Board.

Turning to the issue of the summary of the evaluation report, Counsel for the Procuring Entity admitted that the Procuring Entity had received the Request from the Applicant's Counsel dated 14<sup>th</sup> April, 2015 and the request that followed thereafter. He however submitted that by the time

the Procuring Entity received the Request for a summary of the evaluation report, an award of the tender had not been made as this was done on 15<sup>th</sup> April, 2015. On the second request for the summary of evaluation report, made, Mr Nyaanga submitted that by the time the request dated 7<sup>th</sup> May, 2015 was made, the Procuring Entity had already forwarded all the tender documents including the evaluation reports to the Board and that the Applicant was not therefore able to comply with the second request.

On the issue of the Applicant being the lowest evaluated bidder, Counsel for the Procuring Entity and Counsel for the Interested Party submitted that the Applicant did not provide any evidence of this allegation which they stated was not therefore supported. Counsel for the Procuring Entity argued that in any event the Applicant was the second lowest evaluated bidder and could not rely on the results read out at the tender opening to support it's case since no evaluation of the tenders had been done at the tender opening.

The Procuring Entity and the Interested Party therefore urged the Board to dismiss the Applicant's Request for Review in it's entirety with costs.

The Board has considered the submissions made by the Advocates for the parties on the grounds that were put before the Board for determination. The Board has further perused the Request for Review and the Supporting Affidavit and all the responses thereto and finds that on the issue of notification, it was the Applicant's case that it had not been notified of the

outcome of its tender as at the date when it filed the Request for Review before the Board.

On the issue of service of the notification, the Board has perused the Applicant's original tender document and the notification sent to the Applicant which was produced as part of the bundle marked as annexure "NGI" to the Procuring Entity's response and finds that as rightly submitted by Counsel for the Applicant, the address used by the Applicant in the original tender document was P. O. Box 22507 – 00400 Nairobi but instead of using that address in dispatching the letter of notification, the Procuring Entity sent the notification to the Applicant vide the address P. O. Box 25507-00400 Nairobi which appears in the letter of notification annexed to the Procuring Entity's response.

Mr. Nyaanga readily conceded that the two addresses are different and attributed this to a typographical error on the part of the Procuring Entity.

The Board therefore finds on the basis of the above discrepancy and the admission by Counsel for the Procuring Entity that the Applicant was actually not notified of the outcome of its tender as required by the Provisions of Section 67 of the Public Procurement and Disposal Act 2005.

The Board however finds that despite this failure, the Applicant was able to file its Request for Review with the Board within the statutory period of

Seven (7) days provided for under the Provisions of Regulation 73(2)(c) of the Public Procurement and Disposal Regulations 2006 as amended in 2013.

As the Board has previously observed, the purpose of a letter of notification is to enable a bidder determine whether it will challenge the outcome of the tender within the stipulated time based on the contents of the notification and that where the notification is not given but later comes to the notice of the Applicant, the Applicant must demonstrate the prejudice it has suffered as a result of that failure. The Applicant in this case was not however able to demonstrate the prejudice it had suffered.

The Board therefore finds on the first issue that though the Applicant was not served with the letter of notification, the Applicant did not however suffer any prejudice since it was able to lodge its Request for Review within the stipulated period of seven (7) days.

The second issue which the Applicant argued before the Board was that it was not supplied with the summary of the evaluation report. The Applicant submitted that it wrote to the Procuring Entity for the first time on 14<sup>th</sup> April, 2015 requesting for the said document but contended that the same was not supplied to it. The Procuring Entity further contended in its reply to the Replying Affidavit by the Procuring Entity and the Interested Party's response dated 11<sup>th</sup> May, 2015 that it renewed the same request on 7<sup>th</sup> May, 2015 but stated that in spite of these letters, the Procuring Entity failed to comply with the said Request. The Applicant produced the letter

dated 7<sup>th</sup> May, 2015 and a response dated 8<sup>th</sup> May, 2015 from Advocates for the Applicant which it annexed to its said response as evidence of the fact that it had requested for the said document but that this request had not been complied with.

Counsel for the Procuring Entity in a short response to that submission however stated that the first request for a summary of the evaluation report was made by the Applicant prematurely before the Procuring Entity had made an award of the tender while the second request was made after the Procuring Entity had lodged all the tender documents and the evaluation reports with the Board.

The Board has considered the arguments made by the parties in support and in opposition to this ground of review. The Board finds as a matter of fact that it is indeed true that the Applicant requested for a summary of the evaluation report in this case on 14<sup>th</sup> April, 2015 and renewed the application through its advocates letter dated 7<sup>th</sup> May, 2015 addressed to the firm of M/s Sheikh & Company Advocates which was appearing on behalf of the Procuring Entity in this Request for Review.

The Board however finds that the decision to award this tender was made after 14<sup>th</sup> April, 2014 a fact which is reflected in the letters of notification dated 15<sup>th</sup> April, 2015 and which were annexed to the Procuring Entity's response dated 6<sup>th</sup> May, 2015 and produced as annexure "NG1". The Board therefore finds that the first request for a summary of the evaluation

report was made prematurely before the award of the tender had been made. Turning to the second Request for the summary of the evaluation report, the Board finds that the same was made on 7<sup>th</sup> May, 2015 after the Request for Review had been filed before the Board.

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The Board finds that in answer to the Applicant's submissions, the Procuring Entity stated in its Advocate's letter dated 8<sup>th</sup> May, 2015 that it had filed all the original documents relating to this tender including the summary of the evaluation report with the Board which explanation the Board finds to be reasonable.

The Board however finds that the Applicant was not entirely candid in its assertion that it had not been supplied with a summary of the evaluation report based on the contents of paragraph 10 of the Applicant's reply to the Procuring Entity's and the Interested Party's response dated 11<sup>th</sup> May, 2015 which it filed with the Board on the same day. The Applicant stated as follows in the said paragraph 10 of the response

*"10 That further, the information the Applicant relied on in its Request for Review was a summary of the evaluation report provided to it by a whistle blower who was an agent of the Procuring Entity and as such was not confidential information".*

The Board therefore finds, based on the above admission which is binding on the Applicant that at the time the Applicant made this Request for

Review, it had the summary of the evaluation report and the contents thereof which it admitted it had obtained from what it called as a "whistle blower".

The Board therefore has no other option but to dismiss this ground of review based on the Applicant's own admission.

On the third issue framed for determination, Mr Mbugua contended that the Applicant was the lowest evaluated bidder. He stated that the Applicant based its submissions on this issue on the tender sums which were read out during tender opening. He however stated that the Applicant did not have any evidence of the outcome of the evaluation.

Both Counsel for the Procuring Entity and the successful bidder opposed this ground of review and submitted that there was no evidence placed before the Board to demonstrate that the Applicant was the lowest evaluated bidder. Mr Nyaanga who appeared in this matter on behalf of the Procuring Entity contended that the Applicant was not in fact the lowest evaluated bidder but the second best evaluated bidder.

The Board has considered the arguments made by the parties on this issue and finds that there was no evidence which was placed before the Board by the Applicant to show that it was the lowest evaluated bidder. Mr Mbugua Advocate for the Applicant stated that the Applicant's case was solely based on the results read out at the tender opening. The Board however

respectfully finds that a successful bidder can only be determined upon the evaluation of tenders and an award made as provided for under the Provisions of Section 66(4) of the Act.

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The Board further notes that even based on the results read out at tender opening, which the Board has set out at page 4 of the Request for Review, the Applicant's price was the fourth lowest unevaluated tender price. The Board therefore has no other option but to dismiss this ground of the Applicant's Request for Review since the same was not supported.

On the fourth ground of review put forward to the Board for consideration, the Board has perused the Request for review and the Affidavit in Support of the Request for Review. The Applicant expressly admitted in ground 1.7 of the Request for Review and in paragraph 8 of the Supporting Affidavit respectively that it had knowledge of the contents of the Tender Evaluation Committees report dated 18<sup>th</sup> February, 2015 which it states adjudged the Applicant's tender and that of M/s Kabco Contractors Ltd as the most responsive bids. The Applicant further stated in ground 1.9 of the Request for Review and in paragraph 10 of the Supporting Affidavit of Mr Barnabas Gicharu Maina that it also had knowledge of the outcome and the contents of the Interested Party's tender document.

During the hearing of the Request for Review, Counsel for the Applicant however half-heartedly pursued this ground and failed to disclose the source of the said information including the particulars of the "whistle



blower” who had allegedly disclosed the information to the Applicant. Counsel for the Applicant also seemingly abandoned this ground of review and entirely left it to the Board to determine.

The Board has considered the arguments and the nature of the information set out in the Request for Review and the Supporting Affidavit and finds that the Applicant not only disclosed the date of the technical evaluation report but that it went to the extent of disclosing the contents of the Interested party’s bid to the specific detail of stating the date and the result of the evaluation process. It also set out the particulars of why the Interested Party’s bid had been declared as unsuccessful.

The Board finds that the Applicant stated with an apparent degree of certainty that the Tender Evaluation Committee’s report was dated 18<sup>th</sup> February, 2015 and that in the said report, the Procuring Entity had deemed the Applicant’s tender and that of M/s Kabco Contractors Ltd as responsive and that it had allegedly proceeded to subject them to technical evaluation.

The Applicant while referring to the same undisclosed source then proceeded to state in paragraph 1.9 of the Request for Review that the Interested Party had been awarded the tender despite the fact that as per the tender requirement it had not provided:-

- a) A bid validity period which was sufficient.
- b) Litigation history.

- c) Proof of similar works.
- d) The bid was higher than the Applicant's

The Board wishes to observe that whereas items (a) and (d) above could be established at the tender opening meeting, items (b) and (c) could only be established upon an access to the successful bidder's tender document. The Board is therefore unable to accept the Applicant's argument that there was no disclosure of confidential information and finds that contrary to the Applicant's submissions, there was in fact such a disclosure and reliance on what was clearly confidential information.

The question that therefore remains to be determined by the Board is whether a party can base its Request for Review on an action or actions that are contrary to the law.

As the Board has always stated, procurement proceedings are sacrosanct and are confidential in nature and that is why the law prohibits the disclosure of certain information under the Provisions of Section 44 of the Act. This is meant to enable parties in a tender process to have an equal playing field for the purposes of ensuring fairness and for the Procuring Entity to evaluate tenders without any interference.

Section 44 of the Act requires a Procuring Entity or an employee of a Procuring Entity not to disclose any confidential information save for the specific items of disclosure set out in the Act Section 44 (1) (c) and (d) of the

Act expressly bars the disclosure of information relating to evaluation, comparison or clarification of tenders, proposals or quotations or the contents of the tenders, proposals or quotations of any bidder.

Section 44 (4) of the Act further criminalizes such a disclosure and states that any person who contravenes the Provisions of Section 44 of the Act shall be guilty of an offence.

Under the Provisions of Section 137 of the Act, a person who is guilty of committing an offence under the Provisions of Section 44 of the Act shall, if convicted be liable to a fine not exceeding four Million Shillings or to imprisonment for a term not exceeding ten years or to both.

On the issue the "whistle blower", Section 44(1) and (2) of the Act sets out the prohibition and specifically names the persons to whom a disclosure may be made to under the Act. The said Section of the Act provides as follows:-

*"44(2) During or after procurement proceedings, no procuring Entity and or an employee or agent of the procuring entity or member of a board or committee of the Procuring Entity shall disclose the following:-*

- a) Information relating to procurement whose disclosure would impede law enforcement or whose disclosure would not be in the public interest;*

- b) *Information relating to procurement whose disclosure would prejudice legitimate commercial interest or inhibit fair competition.*
- c) *Information relating to the evaluation, comparison or clarification of tenders, proposals or quotations; or*

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- d) *The contents of tenders, proposals or quotations.*

*(2) This section does not prevent the disclosure of information if any of the following apply:-*

- a) *The disclosure is to an employee or agent of the procuring entity or a member of a Board or committee of the procuring entity involved in the procurement proceedings;*
- b) *The disclosure is for the purposes of law enforcement.*
- c) *The disclosure is for the purpose of a review under part VII or an investigation under part VIII or as required under Section 105:*
- d) *The disclosure is pursuant to a court order; or*
- e) *The disclosure is allowed under the regulations.*

It is clear from the above provisions that an unidentified "whistleblower" is not one of the people to whom a disclosure of confidential information can be made and also that a bidder is not a person entitled to receive such confidential information.

On the issue of illegality, it is now trite law that an action based on the contravention of a statute and the law generally is deemed to be against public policy and cannot aid a party's case.

In the case **Kenya Airways Limited –vs- Satwart Singh Flora** (Nai CA No. 54 of 2005) the Court of Appeal held that any action prohibited by a statute is against Public Policy and that a party who breaches the Provisions of the law cannot benefit from such a breach. The court also held that any contract or transaction arising from such a breach is illegal and is unenforceable.

It is therefore clear from the above Provisions of the Act and the above authority cited above that the issue of reliance on confidential information is a serious one and bears heavy consequences. The Applicant in this Request for Review and any other bidder are therefore warned that the Board will not in future allow reliance on confidential information as a basis for any Request for Review and will not hesitate to recommend sanctions against any bidder who breaches the Provisions of the Act on confidentiality.

### **FINAL ORDERS**

In view of the above findings and in the exercise of the powers conferred upon the Board by the Provisions of Section 98 of the Public Procurement

and Disposal Act 2005, the Board makes the following orders on this Request for Review:-

**a) That the Applicant's Request for Review filed on 20<sup>th</sup> April, 2015 be and is hereby dismissed.**

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**b) The Procuring Entity is therefore at liberty to proceed and conclude the Procurement process herein.**

**c) Each party shall bear its own costs of the Request for Review in view of the fact that the Applicant was partly successful in issue number No.1 framed for determination.**

**Dated at Nairobi this 15<sup>th</sup> May 2015.**

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**Chairman, PPARB**

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**Secretary, PPARB**