

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 4/2016 OF 4thFEBRUARY, 2016

SPIC & SPAN CLEANING SERVICES LTD.....APPLICANT
AND

GEOTHERMAL DEVELOPMENT COMPANY.....PROCURING ENTITY

Request for Review of the decision of the GDC of 28th January, 2016 in the matter of Tender No. GDC/PM/OT/001/2015 - 2016 Cleaning, Sanitation, Waste Collection, Transportation & Disposal Services.

Board members present

- | | |
|----------------------|------------|
| 1. Paul Gicheru | - Chairman |
| 2. Eng. Weche Okubo | - Member |
| 3. Peter Ondieki | - Member |
| 4. Josephine Mongare | - Member |

In attendance

- | | |
|-------------------|---------------|
| 1. PhilomenKiprop | - Secretariat |
| 2. Shelmith Miano | - Secretariat |

Present by invitation

Applicant - SPIC N SPAN CLEANING SERVICES

- | | |
|-------------------------|------------|
| 1. Nicholas M'twaruchiu | - Director |
| 2. Susan Mwenda | - Director |

Procuring Entity - GEOTHERMAL DEVELOPMENT COMPANY

1. Cyprian Wekesa - Advocate
2. Rose Kariuki - Advocate

3. Robert Ogutu - Legal Assistant
4. Leonard Munyonge - Legal
5. Samuel Bukania - Legal Intern
6. Justus Muhambi - SASC
7. Fridah Kinyua - SCO
8. Doris Kyale - Manager Supply Chain

Interested Parties

1. Phanice Kwegah - SMS Legal Assignment

2. Rono Mike - SMS Legal Assistant
3. Daniel Korir - OM, Top Image cleaning Services
4. Molly Sheila Migipe - Director, Clean shine Ltd
5. Faizah Abdiluhid - Salu Solution
6. Gocho Kimani - Advocate, Kleansly Hygiene Plus ltd
7. Matheri Kahiri John - Project Coordinator, Almat Co. Ltd
8. Diana Gakii - Senior, Supervisor Almat Co.ltd

THE BOARD'S DECISION

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

BACKGROUND OF AWARD

The GDC company outsources Cleaning and Sanitation Services for all its office sites therefore the company needed to outsource these services for the period 2015 to 2017 for all the sites that include; Kawi house in Nairobi, Lakeview Estate in Naivasha, the Go-Down, and Polo Centre in Nakuru and the Camp and Rig Site Offices in Menengai. This procurement was reserved for the Youth, Women and People with Disability under the Access to Government Procurement Opportunity (AGPO) in accordance with the Public Procurement and Disposal Preference and Reservations Amendment, Regulations, 2013. The advertisement for the Provision of Cleaning, Sanitation, Waste Collection and Disposal Services was published in the Standard Newspapers and Daily Nation on the 25th and 28th September 2015 respectively.

Closing /Opening of the Tender

The tender closed and opened on 16th October 2015 at 2:00pm. Twenty (20) bid documents were received and opened. The bid documents were as listed below;

NO.	BIDDER NAME
1.	Paco Investments Ltd
2.	Kalandini holdings

3.	Belcose Cleaning services
4.	Salu Solutions
5.	SosetShinners Services
6.	Aimat Company Ltd
7.	Top Image Cleaning company
8.	Cleanette management services ltd
9.	Cityscape trends services
10.	Pest Destruction Services
11.	Super Broom Services Ltd
12.	Cyka Man Power Services
13.	Sleep Inn limited
14.	Mungos Company Ltd
15.	Miss Clean Domestic & Office Sol. Ltd
16.	Cleanshine Limited
17.	Sender Services Co. Ltd
18.	Spic N' span Cleaning Services Ltd
19.	Kleansley Hygiene Plus
20.	Village Mastars Ltd

2.0 Tender Evaluation

The evaluation exercise was carried out in two stages starting with the evaluation of the mandatory requirements followed by the technical evaluation. The evaluation exercise was carried out by the tender processing committee of 5 members.

Preliminary Evaluation Results

Remarks

(a) The following fourteen (14) bidders were considered non responsive:

- **Paco Investment Limited:**
 - Had CR12 which had not been signed by the issuer
 - All directors were male yet WAGPO is for disadvantaged women group.
 - Did not provide proof of compliance with the prevailing labour laws
 - Did not indicate salary payment mode
 - NSSF membership card provided did not have a name
 - Did not provide evidence of remittance of NHIF
 - Did not provide certified declaration to comply with the minimum wage regulations
 - Did not provide valid NEMA Certification/ Licence
 - Did not provide respective County Certificate/licence

- **Kalandini Holdings**
 - Did not provide audited accounts/bank statements
 - Provided a site visit certificate for Nairobi only
 - Did not provide proof of compliance with prevailing labour laws

- Did not provide salary payment mode
- Did not provide evidence of remittance of NHIF
- Did not provide certified declaration to comply with minimum wage regulations
- Did not provide valid NEMA Certification/Licence
- Did not provide respective County Certificate/licence

- **Belcose Cleaning Services**

- Bid declaration form was not signed
- Did not provide proof of compliance with prevailing labour laws
- Referee letter provided does support salary payment mode
- Compliance certificate by NSSF provided was invalid
- Compliance certificate by NHIF provided was invalid
- Did not provide certified declaration to comply with minimum wage regulations
- Did not provide respective County Certificate/licence

- **Aimat Company Ltd**

- Did not provide a Nairobi County Certificate/Licence for garbage collection and disposal

- **CleanetteManagementServicesLtd**
 - Did not provide proof of compliance with prevailing labour laws
 - Did not provide certified declaration to comply with minimum wage regulations
 - Did not provide Nakuru County Certificate/Licence for garbage collection and disposal

- **Cityscape Trends Services**
 - Expired WAGPO certificate (Expired 14th October 2015)
 - Incomplete financial statements
 - Proof of compliance with prevailing labour laws provided expired (Expired on 26th July 2015)
 - Did not provide a certified declaration to comply with minimum wage regulations
 - Invalid NEMA Certification/Licence provided (Expired on 31st January 1015)
 - Did not provide County Certificate/Licence for garbage collection and disposal

- **Pest Destruction Services**
 - Expired WAGPO certificate (Expired 3rd October 2015)
 - Did not provide copies of CR12/ID Cards

- Referee letter provided does not support salary payment mode
 - Did not provide a certified declaration to comply with minimum wage regulations
 - Did not provide County Certificate/Licence for garbage collection and disposal
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- **Super Broom Services Ltd**

- Referee letter provided does not support salary payment mode
 - Did not provide certified declaration to comply with minimum wage regulations
 - Did not provide County Certificate/Licence for garbage collection and disposal
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- **Cyka Man Power Services**

- Referee letter provided does not support salary payment mode
- Did not provide County Certificate/Licence for garbage collection and disposal.

- **Sleep Inn Limited**
 - Referee letter provided does not support salary payment mode
 - Did not provide NEMA Certification/Licence
 - Did not provide County Certificate/Licence for garbage collection and disposal

- **Mungos Company Ltd**
 - Declaration not signed as a joint venture
 - Did not provide salary payment mode
 - Did not provide evidence of remittance to NHIF
 - Did not provide certified declaration to comply with minimum wage regulations
 - Did not provide County Certificate/Licence for garbage collection and disposal

- **Miss Clean Domestic & Office Sol. Ltd**
 - Did not provide a single business permit
 - Did not provide audited accounts
 - Did not provide proof of compliance with prevailing labour laws
 - Did not provide salary payment mode
 - Invalid NHIF certificate provided (Expired in October 2013)

- Did not provide certified declaration to comply with minimum wage regulations

- Did not provide NEMA Certification/Licence

- Did not provide County Certificate/Licence for garbage collection and disposal

- **Cleanshine Limited**

- Did not provide copies of CR12/ID Cards

- Did not provide a single business permit

- Did not provide a proof of compliance with prevailing labour laws

- Did not provide salary payment mode

- Did not provide evidence of remittance to NHIF

- Did not provide a certified declaration to comply with minimum wage regulations

- Did not provide NEMA Certification/Licence

- Did not provide County Certificate/Licence for garbage collection and disposal

- **Village Mastars Ltd**

- Provided financial statements of three months and not 1 year

- Referee letter provided does not support salary payment mode

- o Did not provide certified declaration to comply with minimum wage regulations
- o Did not provide County Certificate/Licence for garbage collection and disposal

(b)The following six (6) bidders met all the mandatory requirements and therefore qualified for technical evaluation:

1. Salu Solutions Limited.
2. SosetShinners Limited
3. Top Image Cleaning Company Ltd.
4. Senders Services Co. Ltd
5. Spic N' Span Cleaning Services Ltd.
6. Kleansley Hygiene Plus Ltd.

Technical Evaluation

At this stage bidders were to demonstrate capacity to manage the tender for provision of cleaning, sanitation, waste collection and disposal services. Bidders who scored a total of 80 marks out of 100 were considered to have passed the technical evaluation. The Summary of Technical evaluations is as below

	BIDDERS					
MAX SCORE	Salu Solutions	SosetShinners Limited	Top Image Cleaning	Senders Services	Spic N' Span	Kleansley Hygiene

MAX SCORE	BIDDERS					
	Salu Solutions	SosetShinners Limited	Top Image Cleaning	Senders Services	Spic N' Span	Kleansley Hygiene
100 Marks	78	65.5	92	71	91	86

Remarks

The following three bidders passed the technical evaluation by attaining the required 80% pass mark.

1. Top Image Cleaning Company Ltd.
2. Spic N' Span Cleaning Services Ltd.
3. KleansleyHygiene Plus Ltd.

3.0 Recommendations

The Evaluation committee recommended the financial bids for Top Image Cleaning Company Ltd, Spic N' Span Cleaning Services Ltd and Kleansley Hygiene Plus Limited to be opened.

FINANCIAL EVALUATION

Top Image Cleaning Company Ltd, Spic N' Span Cleanings Services Ltd and Kleansley Hygiene Plus Limited qualified at the technical stage with technical scores of 92%, 91%and 86%respectively and subsequently qualified for financial evaluation. The financial proposals were opened on 17thNovember 2015 at 2.00 pm at Kawi House South C off Mombasa Road Red Cross Road.

1. The bids for the three firms (Top Image, Spic N Span, Kleansley Hygiene) were analyzed to confirm that all items in the schedules were quoted for and the arithmetic computation was corrected. The price summary is as tabulated below:

No.	Description Item (Price Schedules)	Top Image Amount in KShs VAT inclusive (Annual Cost)	Spic N Span Amount in KShs VAT inclusive (Annual Cost)	KleansleyHygiene Amount in KShs VAT inclusive (Annual Cost)
1	A: CLEANING SERVICES COSTS	7,609,579.20	10,759,924.92	14,543,541.27
2	B: TRANSPORT COST	2,292,000.00	959,976.00	3,618,000.00
3	C: GARBAGE COLLECTION, TRANSPORTATION & DISPOSAL COSTS	1,008,000.00	432,000.00	1,440,000.00
4	D: FUMIGATION COSTS	144,000.00	480,000.00	716,400.00
5	E: SANITARY SERVICES	420,000.00	1,034,400.00	1,500,576.00
6	F: MAINTENANCE OF COMPOUND	1,704,000.00	360,000.00	1,289,206.32
7	G: BILL OF MATERIALS (NAIROBI - KAWI HOUSE)	2,859,856.00	Did not quote for all items	767,825.69

8	H: BILL OF MATERIALS (NAIVASHA OFFICE)	1,589,396.00	Did not quote for all items	Did not quote for all items
9	I: BILL OF MATERIALS (NAKURU: POLO CENTRE, GODOWN 1 & 2)	2,740,880.00	Did not quote for all items	1,047,067.37
10	J: BILL OF MATERIALS (MENENGAI)	2,977,590.00	Did not quote for all items	Did not quote for all items
	GRAND TOTAL:	23,345,301.20	Did not quote for all items in the schedules	Did not quote for all items in the schedules

(a) The following bidders **Spic N' Span Cleaning Services Ltd** and **Kleansley Hygien Plus Ltd** were disqualified in financial evaluation for not quoting for some items in some schedules (as highlighted above) as is required since the award was not as per schedule but on all schedules put together. Below are items not quoted for in the various schedules.

Spic N' Span Cleaning Services Ltd

- Schedule G: Did not quote for sanitary bins
- Schedule H: Did not quote for sanitary bins
- Schedule I: Did not quote for sanitary bins
- Schedule J: Did not quote for sanitary bins

Kleansley Hygiene Plus Ltd

- Schedule H: Quoted for Toilet balls in pieces (2 pieces) but not in cartons as requested. (2 pieces cannot be converted to cartons)
- Schedule J: Did not quote for floor polish.
- Schedule G-J: Quote for sanitary bins was combined in Section E. The supplier confirmed this upon clarification as per the attached letter.

The tender committee's decision

The procuring entity's Tender Committee in its meeting held on 25th January, 2016 approved the award to M/s Top Image Cleaning Services for Provision Of Cleaning, Sanitation, Waste Collection And Disposal Services at Kshs.23,345,301.20 per year.

THE REQUEST FOR REVIEW

The Applicant filed this Request for Review on 4th February, 2016 challenging the decision of the Procuring Entity M/s Geothermal Development Company Ltd (GDC) awarding the tender NO. GDC/PM/OT/001/2015 - 2016 for the Provision of outsourcing cleaning and sanitation services for all its office sites for the period 2015 to 2017 to the successful bidder.

During the hearing of the Request for Review the Applicant was represented by two of its Directors namely Mr. Nicholas M'twaruchiu and Mrs. Susan Mwenda while the Procuring Entity was represented by Mr. Cypria Wekesa and M/s Rose Kariuki Advocates. The successful bidder on the other hand was represented by M/s Phanice Kwegah advocate. Three other bidders who had participated in the tender namely M/s Clean Shine Ltd, M/s Salu Solutions Ltd, M/s Kileansly Hygiene Plus Ltd and M/s Almat Co. Ltd appeared at the hearing of the Request for Review.

The Applicant's case

Mr. Nicholas M'Twaruchiu who argued the Applicant's case started off his submissions by stating that the Applicant company had been in cleaning

business for the last 15 years and had a work force of over 700 workers. He further submitted that the Applicant had several clients amongst them the World Bank, Barclays Bank of Kenya Limited, the Kenya Commercial Bank Limited, Britam Insurance Corporation, the Kenya Re-insurance Corporation, ICDC and Kengen among others. Applicant stated that when the procuring entity advertised this tender it put in it's bid and that the Applicant was represented t the tender opening on 15th October, 2015 and upon the conclusion of technical evaluation, the Applicant stated that on 17th November, 2015 the procuring entity invited the bidders who had made it to the financial evaluation stage for the opening of the financial proposals.

Mr. M'Twaruchiu additionally submitted that during the opening of the financial proposals, the Applicant through it's representatives established that of all the three bidders who made it to the financial evaluation stage the Applicant had offered the lowest price, namely the sum of Kshs. 20,562,476 as opposed to the successful bidder M/s Top Image Cleaning Company Ltd which had offered a tender price of Kshs. 30,409,976.52. The Applicant further stated that during the opening of the financial proposals, the procuring entity read out the technical scores achieved by the respective bidders during technical evaluation and that the bidders attained the following technical scores respectively.

- i) The Applicant M/s SPIC N SPAN cleaning services Limited - 91%
- ii) M/s Top Image Cleaning Company Ltd the successful bidder herein....92%

iii)M/s Kleansley Hygiene plus Ltd.....86%

The Applicant therefore submitted that based on the above tender price and the technical score as read out during financial opening, the Applicant ought to have been declared as the successful bidder but contrary to it's expectation, the Applicant received a letter dated 28th January, 2016 from the Procuring Entity informing it that it's bid had been declared as unsuccessful on the ground that the Applicant had not quoted for sanitary bins in schedules G, H, I & J was allegedly required by the procuring entity.

The Applicant stated that the procuring entity's decision to disqualify the Applicant on the basis that it had not quoted prices for sanitary bins under schedules G, H, I & J was erroneous and stated that it had quoted for the said prices at page 57 of it's tender document which set out the quotations for Nairobi, Naivasha, Nakuru and Menengai.

The Applicant while relying on page 57 of it's tender document submitted that it had quoted prices for the Provision of sanitary services for Nairobi, Naivasha, Nakuru and Menengai where it had given the individual quotation for the price at which it would render the service leading to an aggregate cost of Kshs. 1,034,400 for the four regions. The Applicant however submitted that having provided price quotations for the sanitary services, it was therefore not tenable to quote for the same items and particularly to quote the price of bins since this would amount to a repetition and would also be inappropriate since the bins that were to be used by the Applicant and all the other bidders were to be owned by the

respective bidders but not by the Procuring Entity. The Applicant submitted that a ladder, a bucket and a bins among other sanitary items were a one off item and that bins, the people to change the bins and the chemicals that were to be used were to be provided by the Applicant and that there would therefore be no basis for quoting for the said items since this would have made the Applicant's quotation higher thereby resulting in a waste of public funds as the Procuring Entity would have to pay twice for the same services.

The Applicant additionally submitted that the same error was repeated on the items relating to automatic dispensing air freshener and the life guard learner for Nakuru and that is why the Applicant did not provide a quotation for the said items.

The Applicant finally submitted that the Procuring Entity had acted contrary to the Provisions of Regulations 49 and 50 of the Public Procurement and Disposal Regulations because having determined that the Applicant was successful at the technical evaluation stage it was not open for the Applicant to go back to aspects of technical evaluation at the financial evaluation stage and that the Applicant ought to have confined itself to the parameters of financial evaluation as set out under Regulation 50 of the Regulations and not bring in other extrinsic matters which were technical in nature.

The Applicant therefore prayed that it's Request for Review be allowed with costs.

The Procuring Entity's response

Mr. Cyprian Wekesa advocate for the procuring entity opposed the Applicant's Request for Review and while replying on the Procuring Entity's Memorandum of Response dated 12th February, 2016 and the written submissions dated 15th February, 2016 and several previous decisions made by the Board Mr. Wekesa submitted that the Applicant was rightly declared as having been non-responsive for the reasons set out in the procuring entity's letter dated 28th January, 2016. He submitted that the Applicant had failed to quote for sanitary bins under schedules G, H, I & J as required by the tender document which in the procuring entity's view was a mandatory condition.

Counsel for the Procuring Entity submitted that contrary to what the Applicant had asserted, the tender document required that a bidder gives price quotation under schedules G, H, I and J. Counsel for the Procuring Entity submitted that if a bidder did not desire to bid for an item, then it should have indicated Zero "0" instead of a dash "(-)" in its tender document. Counsel for the Procuring Entity stated that the Applicant may have confused services and items contrary to the Provisions of Section 2 of the Act that draws a distinction between goods and services.

Counsel for the Procuring Entity further submitted that by failing to quote for items G, H, I and J, the Applicant breached the Provisions of Clause 2.20.1 of the tender document on preliminary examination and responsiveness appearing at page 14 of the tender document and clause 2.22.1 of the appendix to instructions to tenderers which required the

Procuring Entity to check whether a bidder had costed all items, services and the payment terms at the financial evaluation stage.

Counsel for the Procuring Entity further submitted on the basis of the averment at paragraph 7 of the it's statement of response that the Procuring Entity evaluated the Applicant's tender based on the above criteria and the Applicant was found to be non-responsive as it did not cost for "sanitary bins to be changed once a week" but instead put a dash.

It was the Procuring Entity's case that whereas the Applicant had costed for "Sanitary Services" in E, it failed to cost for "Sanitary bins to be changed once a week under schedules" in G, H, I and J which in the procuring Entity's opinion constituted items as opposed to services. The procuring entity stated that a bidder such as the Applicant could not however be allowed to substitute its own interpretation of what constitutes items and services as the tender was self-explanatory.

The procuring entity stated that by not costing items G, H, I and J, the Applicant could not be the lowest evaluated bidder as those items had material financial implication on the financial bid as they affect the price.

Counsel for the Procuring Entity further submitted that the procuring entity complied with the Provisions of Regulation 50 of the regulations on the conduct of a financial evaluation and comparison to determine the evaluated price of each tender. This contention was restated in paragraph 19 of the Procuring Entity's Memorandum of Response.

During his submission before the Board, Counsel for the Procuring Entity however conceded that some items which the Applicant had tendered for had been repeated in the tender documents and that some items such as bins were the property of the bidders and that the Procuring Entity would not be entitled to retain the said items at the end of period during which the tender was to be executed.

Counsel for the Procuring Entity further conceded that the bidder Kleansley Hygiene Plus Ltd which was one of the bidder's in this tender had failed to quote for certain items and that by a letter dated 7th December, 2015, the Procuring sought clarification from the said bidder, a treatment that had not been extended to the Applicant and the other bidders.

Turning to the award criteria for determining the successful bidder, Counsel for the procuring entity submitted that the Procuring Entity had apportioned the marks assigned to the technical and the financial aspects of the tender and that the technical score assigned to the tender was 80 marks while 20 marks were assigned to the financial evaluation.

Counsel for the Procuring bidder stated that the successful bidder for the purposes of this tender was to be the bidder who had attained the highest combined aggregate technical and financial score. He stated that whereas the successful bidder had attained a combined score 93.3%, the procuring

entity had not ranked the other bidders who made it to the financial evaluation stage.

On the reasons why the Applicant's financial bid was not scored, Counsel for the Procuring Entity submitted that the Applicant's financial bid had not been evaluated or scored because of the alleged gaps in the price schedules. The procuring entity therefore prayed that the Applicant's Request for Review be dismissed with costs.

The successful bidder's response

M/s Phanice Kwegah who appeared before the Board on behalf of the successful bidder adopted and relied on the successful bidder's response dated 16th February, 2016. Counsel for the successful bidder submitted that the successful bidder tendered for the project and was notified that its tender was successful through the Procuring Entity's letter of notification dated 28th January, 2016 which is produced as annexure "TIC1".

Counsel for the successful bidder further submitted that the successful bidder offered a tender price of Kshs. 25,787,771 and that upon evaluation this figure was reduced to the sum of Kshs. 23,345,301 on account of correction of errors in the successful bidder's bid. She stated that it was clear from the Request for Review and the response thereto that the Applicant's bid was rightly rejected because the Applicant did not quote for sanitary bins in schedules G, H, I and J contrary to the Provisions of clause 2.22.1 of the tender document and Section 66 of the Public

Procurement and Disposal Act 2005 which required the procuring entity to evaluate tenders in accordance with the procedures and the criteria set out in the tender documents.

Counsel for the successful bidder however submitted that unlike the Applicant, the successful bidder had quoted for all the items but when challenged to explain why the successful bidder's financial proposal had been reduced from 25 Million to 23 Million, Counsel for the successful bidder through an explanation given to the Board by Mr. Daniel Korir the successful bidder's Operations Manager, the successful bidder conceded that this reduction was a result of errors other than the pricing of sanitary bins and that the error emanated from the quotation of the price on the item relating to buckets and air fresheners which were to be supplied. In as far as the automatic air freshener was concerned, the successful bidder conceded that it had quoted for this item twice and thereby necessitating the correction of the error as this would result in the same item being quoted twice. The successful bidder further conceded that the bins which were to be used in carrying out the cleaning services under the tender were its own property and would not revert to the Procuring Entity at the end of the exercise.

The successful bidder therefore prayed that the Applicant's Request for Review be dismissed with costs.

The Response by other interested parties

Though several other interested parties appeared at the hearing of this Request for Review, only M/s Clean Shine Ltd chose to participate in the proceedings. M/s Molly Sheila Migipe a Director of the said Company supported the Applicant's Request for Review and acknowledged that there were glaring irregularities in the manner in which the Procuring Entity had evaluated the subject tender. She further submitted that there were mistakes in the tender document which led to some items being quoted for twice while some documents were overlooked. She therefore prayed that the Request for Review be allowed as prayed by the Applicant.

The Applicant's response

In response to the submissions made by Counsel for the Procuring Entity and the successful bidder, the applicant reiterated its earlier submissions and stated that the successful bidder's contention that it had quoted wrongly for buckets had no basis since it was common knowledge to any bidder who had been in the cleaning industry that items like mopping buckets are not bought monthly but they are bought quarterly or after 5 months. The Applicant stated that the Procuring Entity was trying to assist the successful bidder make its figures lower and that what it had done could not lawfully amount to a correction of an error since what the Procuring Entity was supposed to do was only to correct the unit price if the total does not go with the unit price but not to guide a bidder on its quotation.

The Applicant reiterated that before tendering for the services in issue bidders were required to make site visits to bidders premises in order to familiarise themselves with the nature of the services to be rendered and the items that would be required to render the said services including bins. The Applicant stated that it was wrong for the procuring entity to disqualify it on the ground that it had not quoted for bins which were in any event to be the Applicant's property.

The Applicant therefore prayed that the Request for review be allowed.

The Board's decision

The Board has considered the Request for Review and the responses filed by the Procuring Entity, the successful bidder and the interested party M/s Clean Shine Limited and has also considered the oral and the written submissions made by the parties who opted to make submissions before it.

Upon considering the above documents and submissions, the Board finds that this Request for Review raised only one ground of review which can conveniently be summarised as follows:-

"Whether or not the Applicant's tender was rightly declared as being unsuccessful on the ground that the Applicant did not quote for sanitary bins in schedules G, H, I and J and whether by rejecting the Applicant's bid, the Procuring Entity breached the Provisions of Section 66(2) and 4 of the Act and Regulation 50 of the Public Procurement and Disposal Regulations 2006".

The Board is satisfied on the basis of the documents placed before it that the Applicant, the successful bidder and all the other interested parties who appeared before the Board participated in the tender the subject matter of this dispute and that the tender went through a preliminary, technical and financial evaluation. At the conclusion of the technical evaluation, three bidders namely the Applicant, the successful bidder and M/ Kleansley Hygiene plus Ltd were determined to have been technically responsive and were awarded technical scores of 91%, 92% and 86% out of the assigned technical score respectively.

The three bidders were therefore determined to have qualified to proceed for financial evaluation but when the Procuring Entity's tender evaluation committee embarked on the process of financial evaluation, it determined the Applicant's tender as being financially non-responsive because the Applicant did not quote for sanitary bins under schedules G, H, I and J.

The Board has however examined the Applicant's tender document and those of the other bidders and respectfully finds that the Procuring Entity's decision to declare the Applicant's bid as unsuccessful based on the above ground was erroneous for the reason that all the parties who appeared before the Board conceded that sanitary bins were not part of the goods that the Procuring Entity was to procure and purchase from the bidders for the purposes of rendering the services sought and that the said bins were and would remain the property of each individual bidder at the end of the tender period. It was therefore erroneous and a mistake by the procuring

entity to require bidders to provide quotations for sanitary bins under items G, H, I and J and ask bidders to assign unit prices for bins when it was clear that the bins were and would remain the property of the bidders and not that of the Procuring Entity.

By imposing the requirement that bidders quote for bins when the bins were to be owned by the individual bidders, the procuring entity placed unnecessary financial burden on the bidders and the public who would have to fund the price of bins which were and would remain private property.

The Board therefore holds that the Applicant cannot be faulted for having failed to indicate a price for the purchase of bins since this would have amounted to the applicant seeking economic benefit for goods that it would not eventually supply to the Procuring Entity.

Counsel for the Procuring Entity sought to fault the Applicant's bid by stating that if the Applicant did not desire to quote for any item under the tender, it should have indicated a figure "Zero" instead of indicating "Nil". The Board has considered the said argument and finds that the same lacks basis. An indication of **Zero** or **Nil** amounts to one and the same thing namely that there is no figure in terms of price assigned to the item under consideration and that this was not a sufficient ground upon which the Applicant or any other bidder for that matter ought to have been disqualified.

A perusal of the Applicant's entire tender document shows that the Applicant quoted for the components which ought to have enabled it tender for the services under consideration and upon giving the details of the said items it proceeded to give a summary of the sanitary services which it would render using its own bins in Nairobi, Naivasha, Nakuru (Polo and Go-down land 2) and Menengai under the following summary:-

SANITARY SERVICES

Sanitary services to change once a week	Monthly cost	Annual cost
Nairobi	16,000	192,000
Naivasha	11,000	132,000
Nakuru (Polo and Go-down 1 and 2)	36,800	441,600
Menengai	22,400	268,800
GRAND TOTAL	86,200	1,034,400

A perusal of pages 59, 60, 61, 62, 63, 64 and 65 of the Applicant's financial proposal shows that the Applicant quoted for all items under schedules G(Nairobi - Kawi House), H(Naivasha Office), I (Nakuru Polo centre, Go-down 1 &2) and J(Menengai). The only item which the Applicant did not quote for were sanitary bins which as the Board has already observed were and would remain the property of each individual bidder.

The Board therefore holds on the basis of the above findings that it was erroneous for the Procuring Entity to declare the Applicant's bid as having been unsuccessful on the ground that it did not quote for sanitary bins.

In view of the above findings the procuring entity ought to have subjected the Applicant's bid and those of the other two bidders who made it past the technical evaluation stage to financial evaluation for the simple reason that a price quotation for bins was not a requirement in this tender.

In any event, if the procuring entity was in doubt or needed clarification it ought to have sought clarification from the bidder on the reasons why it had not quoted for sanitary bins. The evidence placed before the Board shows that the Procuring Entity extended this privilege to one of the bidders namely M/s Kleansley Hygiene Plus Ltd on some missing items in its letter dated 7th December, 2015 and it is the Board's holding that a similar treatment ought to have been extended to all bidders including the Applicant where there was any doubt relating to any missing item.

A Request for clarification from one bidder on missing items to the exclusion of the other bidder's was in the Board's view discriminatory and cannot be allowed to stand.

The Board is further fortified in the above findings by both the procuring entity and the successful bidder's admission that the alleged mistake/error traversed both the Applicant and the successful bidder's bids. They both conceded that whereas the successful bidder had tendered for the sum of Kshs. 25,787,771 this figure contained errors occasioned by some over priced and or missing items such as buckets and automatic air freshener which was quoted twice. The Procuring Entity corrected the successful

bidder's financial bid and awarded the tender to it at the corrected tender sum of Kshs. 23,345,301.

In addition to all the foregoing and in view of the fact that the Procuring Entity evaluated and found the Applicant's tender as having been technically responsive, the Board finds that the Procuring Entity ought to have subjected the Applicant's bid to financial evaluation under the Provisions of Regulation 50 of the Regulations.

The said Regulation 50 of the Public Procurement and Disposal Regulations provides as follows:-

Regulation 50: Financial evaluation

"50. (1) Upon completion of the technical evaluation under Regulation 49 the evaluation committee shall conduct a financial evaluation and comparison to determine the evaluated price of each tender".

(2) The evaluated price for each bid shall be determined by-

- a) taking the bid price as read out the bid opening.***
- b) taking into account any corrections made by a procuring entity relating to arithmetic errors in a tender.***
- c) taking into account any minor deviation from the requirements accepted by a procuring entity under section 64(2) (a) of the act.***
- d) where applicable, converting all tenders to the same currency using a uniform exchange rate prevailing at the date indicated in the tender documents.***

e) Applying any discounts offered in the tender.

f) Applying any marging of preference indicated in the documents.

(3) Tenders shall be ranked according to their evaluation price and the successful tender shall be the tender with the lowest evaluated price in accordance with Section 66(4) of the Act.

The Board however finds that the procuring entity did not adhere to the above provisions of the regulations since it did not even purport to carry out any financial evaluation of the Applicants bid.

The Board held as follows in the case of **Auto express Ltd -vs- Kenya Ports Authority (KPA) PPRB Application no. 61 of 2006**) in as far as financial evaluation under Regulation 50 of the Regulations is concerned.

"It is clear from a reading of Regulation 50 that the procuring entity could not import technical requirements into financial evaluation when the tender document had expressly provided that any bidder who had attained a technical score of 75% was entitled to proceed to financial evaluation.

The Board finds and holds that just like in the above case, the procuring entity ought to have subjected all the tenders that had passed technical evaluation to financial evaluation and ranked them accordingly. The procuring entity however decided to mix up the two stages of evaluation contrary to the Provisions of the Regulations 49 and 50 of the Regulations.

The Board finally finds that under the award criteria set out in the tender document the procuring entity ought to have awarded the tender to the firm that had achieved the highest combined technical and financial score.

The Board however notes that the Procuring Entity did not evaluate, compare, rank and come up with a combined technical and financial score for all the three bidders who went past the technical evaluation stage.

In the above premises the Applicant's Request for Review is succeeds and is allowed.

FINAL ORDERS

Pursuant to the powers conferred upon it by the Provisions of the Act, the Board therefore makes the following orders on this Request for Review:-

- a) *The Applicant's Request for Review dated 3rd February, 2016 be and is hereby allowed.*
- b) *The award of the subject tender to the successful bidder M/s Top Image Cleaning Company Ltd as contained in the letter dated 28th January, 2016 be and is hereby annulled.*
- c) *The Procuring Entity is directed to carry out technical and financial evaluation of all the tenders that passed the preliminary evaluation stage in compliance with Provisions of Regulations 49 and 50 of the Public Procurement and Disposal Regulations and award the tender to the firm which shall have achieved the highest combined technical*

and financial score in terms of the award criteria set out in the tender document.

- d) The Procuring Entity shall complete the technical and financial re-evaluation of the bids as directed above within Fourteen (14) days from the date of this decision and shall provide evidence of compliance with the Board's order to the Board through it's secretary at the end of the said period of Fourteen (14) days.*
- e) The procuring entity shall take steps to extend the tender validity period and the bid bonds validity period for the affected bidders to enable it complete the re-evaluation exercise as directed above.*
- f) In view of the nature of the orders made above, the Board directs that each party shall bear it's own costs of this Request for Review.*

Dated at Nairobi this 24th day of February, 2016


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CHAIRMAN
PPARB


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SECRETARY
PPARB

