

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 123/2020 OF 31ST AUGUST 2020

BETWEEN

OURISE ENTERPRISES LIMITED.....APPLICANT

AND

THE ACCOUNTING OFFICER

KENYA PORTS AUTHORITY.....1ST RESPONDENT

Review against the decision of Kenya Ports Authority with respect to Tender No. KPA/170/2019-20/MO for Servicing, Inspection and Certification of Decompression Chamber and Diving Equipment

BOARD MEMBERS

- | | |
|----------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Ms. Rahab Chacha | -Member |
| 3. Mr. Ambrose Ngare | -Member |

IN ATTENDANCE

- | | |
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| 1. Mr. Philip Okumu | -Holding brief for Secretary |
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BACKGROUND TO THE DECISION

The Bidding Process

The Kenya Ports Authority (hereinafter referred to as “the Procuring Entity”) advertised Tender No. KPA/170/2019-20/MO for Servicing, Inspection and Certification of Decompression Chamber and Diving Equipment (hereinafter referred to as “the subject tender”), on its website www.kpa.co.ke and in My Gov Newspaper on 9th June 2020.

Bid Submission Deadline and Opening of bids

A total of four (4) firms/bidders submitted bids and the same were opened on 1st July 2020 in the presence of bidders and their representatives who chose to attend and which bids were recorded as follows:

Bidder No.	Bidder Name
1.	M/s Diko General Supplies
2.	M/s Hamonas Enterprises
3.	M/s Ourise Enterprises Limited
4.	M/s Vermillion Ventures

Evaluation of Bids

The Evaluation Committee conducted evaluation of bids in the following three stages: -

- Preliminary Evaluation;
- Financial Evaluation.

1. Preliminary Evaluation

At this stage of evaluation, bids were evaluated against the following mandatory requirements: -

Mandatory Requirements
1. Shall have a table of contents page clearly indicating Sections and Page Numbers (Mandatory) .
2. Shall have pages in the whole document numbered in the correct sequence including all appendixes and attachments (Mandatory) .
3. Shall be firmly bound and should not have any loose pages. Spiral binding and files (spring and box) are not acceptable (Mandatory) .
4. Shall be submitted in one original and two copies of the original (Mandatory) .
Note: Non-compliance with any MANDATORY requirement will automatically result in disqualification.
The submission shall contain the following documents; clearly marked and arranged in the following order: -
i. Particulars of Tendering Company including:
a. The Company background/profile (Mandatory) .
b. Telephone contact, Postal and physical address of the business (Mandatory) .
c. Email address (Mandatory) .
d. Certificate of Registration/Incorporation (Mandatory) .
e. Valid and Current Tax Compliance or Tax Exempt Certificate from Kenya Revenue Authority where the business operations of tenderer are domiciled (Mandatory) .
f. CR12 Letter from Registrar of Companies to show names of Directors of the tendering company (in case of a company), /Name of Proprietor (for Sole Proprietor and Business Name) and/or Names of Partners (for Partnerships) – as applicable (Mandatory) .
g. National ID Copies for owner (s)/Directors of the tendering company (Mandatory) .
ii. A valid and current County Business Permit (Mandatory) .
iii. Duly filled, signed and stamped Confidential Business Questionnaire (Mandatory) .
iv. Duly filled, signed and stamped Declaration Form (Mandatory) .
v. Original Tender Security amounting to Kenya Shillings Fifty thousand (Kshs.)

<p>100,000.00) in the form of a Banker’s guarantee or an Insurance Company Guarantee issued by an insurance firm approved by the Public Procurement Regulatory Authority (PPRA) letter of credit or guarantee by a deposit taking microfinance institution, Sacco society, the Youth Enterprise Development Fund or the Women Enterprise Fund valid for 180 days from the date of tender opening in the format provided in the tender document (Mandatory).</p>
<p>vi. Bidder must have a current and valid Certification by Classification Society, which is a member of International Association of Classification Societies (IACS) (Mandatory).</p>
<p>vii. Bidder must provide evidence of being an approved diving contractor of HSE (Mandatory).</p>
<p>viii. Bidder must be a current and valid member of International Marine Contractors Association of the Diving Division certified to provide Surface Supplied Diving Operations (Mandatory).</p>
<p>ix. CVs and qualifications of at least one management staff proposed for this contract (Mandatory).</p>
<p>x. Two letters of recommendation from at least two companies where the bidder has carried out similar works (Mandatory).</p>
<p>xi. At least 2 years’ experience of similar works – bidder will attach contract documents, service purchase orders from clients where similar works have been undertaken in the past 2 years (Mandatory).</p>
<p>xii. Form of tender (price quoted for the service).</p>
<p>xiii. Duly filled, signed and stamped Schedule of prices Prices quoted shall be inclusive of all taxes.</p> <p>Candidates will require to meet all the mandatory requirements to proceed to the next stage of evaluation i.e. financial evaluation.</p>

The Evaluation Committee observed as follows: -

A. M/s Diko General Supplies

- Certification documents of IACS provided were for M/s Tag Diving Services and not for M/s Diko General Supplies. There was no evidence of undertaking joint venture between M/s Diko & M/s Tag Diving Services.

- Did not provide evidence of being an approved diving contractor of HSE but instead provided one for OCS Marine Group. They did not show evidence of undertaking joint venture between M/s Diko General Supplies & M/s OCS Marine Group.
- Provided CVs for divers employed by OCS Marine Group and not M/s Diko General Supplies nor did they provide undertaking of joint venture.
- Letters of recommendation provided were from M/s Techno Dive recommending OCS Marine Group; and from Unik Group Diving and Life Support recommending M/s Tag Diving Services. There was no mention of M/s Diko General Supplies nor any undertaking of joint venture between them and the mentioned firms.
- Document providing evidence of similar works was for Transnet National Ports Authority and there was no evidence or mention of undertaking joint venture between Transnet National Ports Authority and M/s Diko General Supplies.

B. M/s Hamonas Enterprises Company limited

- The first page of the document was not numbered.
- The County Business Permit it provided expired on 12th February 2020.

C. M/s Vermillion Ventures

- Page Numbering did not start from the first page and the numbering was not sequential.

- Did not provide CR 12 or letter from the Registrar of Companies but instead provided a letter from its own company.

Upon conclusion of preliminary evaluation, three bidders were found non-responsive, that is: -

- 1)M/s Diko General Supplies;
- 2)M/s Hamonas Enterprises Company Limited;
- 3)M/s Vermillion Venture.

One (1) bidder, that is, M/s Ourise Enterprises Limited was found to be responsive and thus qualified for Financial Evaluation.

2. Financial Evaluation

Financial evaluation was done on M/s Ourise Enterprises Limited based on ITT Clause 2.4 of the Tender Document as follows: -

Works	Quantity	Unit Price (KSH) Incl. of VAT	Total Price (KSH) Incl. of VAT
Inspection, Servicing, repairing and Certification of Decompression Chamber	01	3,364,000.00	3,364,000.00
Inspection, Servicing, repairing and Certification of Kirby Morgan	02	110,200.00	220,400.00
Inspection, Servicing, repairing and Certification of Scuba Tanks	28	4,000.00	129,920.00
Inspection, Servicing, repairing and Certification of Divers Regulators	20	4,640.00	64,960.00
Inspection, Servicing, repairing and Certification of Air Banks	04	3,248.00	20,880.00

Inspection, Servicing, repairing and Certification of integrated Underwater Communication System	01	5,220.00	29,000.00
Inspection, Servicing, repairing and Certification of Electric Compressors	03	34,220.00	102,660.00
Inspection, Servicing, repairing and Certification of Hydraulic Driven Grinder	01	34,046.00	34,046.00
Inspection, Servicing, repairing and Certification of Hydraulic Power Pack	01	34,046.00	34,046.00
Total Price			3,999,912.00

Works	Quantity	Unit Price (KSH) Incl. of VAT	Total Price (KSH) Incl. of VAT
Cost of New Baurer Electric Compressor	01	649,600.00	649,600.00
Cost of New Hydraulic Driven Grinder	01	609,000.00	609,000.00
Cost of New Hydraulic Power Pack	01	1,015,000.00	1,015,000.00
Cost of New Integrated Underwater Communication System	01	507,000.00	507,000.00
Cost of New Kirby Morgan (KMB 18)	01	1,624,000.00	1,624,000.00
TOTAL			4,404,600.00

The Evaluation Committee's Recommendation

In view of the evaluation process, the Evaluation Committee recommended award of the subject tender to **M/s Ourise Enterprises Limited** at their **total quoted price of Kshs. 8,404,512.00** which comprised of **Kshs 3,999,912.00 for Servicing, Inspection and Certification** and **Kshs 4,404,600.00 for new Diving Equipment** as specified in the schedule of requirements and schedule of prices in the tender document on account of being the lowest evaluated bidder.

Professional Opinion

The Head of Procurement Function reviewed the Evaluation Report and concurred with the Evaluation Committee's recommendation of award, which was approved by the Procuring Entity's Acting Managing Director on 25th July 2020.

Cancellation of the Subject Tender

Prior to notification of bidders on the outcome of the tenders, the Acting Head of Procurement vide a memo dated 30th July 2020, informed the Acting Managing Director that a few days after he approved the Evaluation Committee's recommendation of award of the subject tender, the Acting Head of Procurement received a response to a letter they had written to the Public Procurement Regulatory Authority (hereinafter referred to as "PPRA") on other matters to do with tender processing, whereby PPRA informed the Procuring Entity that section 82 of the Public Procurement and Asset Disposals Act, No. 33 of 2015 provides that the tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be the subject of correction, adjustment or amendment in any way by any person or entity. Further, that the implication of this provision of the Act was that the Procuring Entity must award the subject tender at the price that was read out at tender opening without any correction and adjustment.

The Acting Head of Procurement further stated as follows in the said memo: -

".....In this case, the price that was read at tender opening was Kshs. 3,999,912.00. However, during evaluation, the committee discovered that the price in the Form of Tender was only a part of the bidders offer and that the tender document had two price schedules one for annual servicing, inspection and certification and the other for new diving equipment. The evaluation committee proceeded to evaluate the two schedules thereby recommending an award of Kshs. 8,404,512.00 inclusive of VAT which comprises of Kshs. 3,999,912.00 for annual servicing, inspection and certification and Kshs. 4,404,600.00 for new diving equipment.

It is on the basis of the recommendation in 2.3 above that Memo No. 007-2020-21 dated 23rd July, 2020 was forwarded to you for approval.

The recommendation by the evaluation committee to award the tender at a price higher than the price read out at tender opening contravened section 82 of the the Public Procurement and Asset Disposals Act, 2015 and makes any award arising from this process irregular.

.....Only one bidder was responsive technically and therefore no other bidder who participated in this tender may be considered for award. On account of the findings

herein all the bidders are therefore non responsive to the tender requirements.”

Following his sentiments as outlined hereinabove, the Acting Head of Procurement recommended as follows: -

- i. Terminate/Cancel Tender No. KPA/170/2019-20/MO: Contract for Servicing, Inspection and Certification of Decompression Chamber and Diving Equipment on the basis of section 63 (1) (f) of the Public Procurement & Asset Disposal Act, 2015 since all evaluated tenders are non-responsive***
- ii. Approve re-tendering.***

The Procuring Entity’s Acting Managing Director approved cancellation and re-tendering of the subject tender, subject to availability of funds.

Letters of Notification of Outcome of Bids and Termination of the Subject Tender were issued to all bidders dated 20th August 2020.

REQUEST FOR REVIEW NO. 123 OF 2020

M/s Ourise Enterprises Limited (hereinafter referred to as “the Applicant”), lodged a Request for Review dated and filed on 31st August 2020 together with Affidavit/Statement (hereinafter referred to as “the Applicant’s Statement”) dated and filed on even date, through the firm of Nyawira Milimu and Omotto Advocates.

In response, the Procuring Entity lodged a Memorandum of Response dated 7th September 2020 and filed on 9th September 2020 (hereinafter referred to as "the Procuring Entity's Response") through its Advocate, Ms. Addraya Dena.

The Applicant sought for the following orders in the Request for Review:

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- a. An order setting aside and nullifying the Respondent's decision to terminate the procurement proceedings in relation to Tender No. KPA/170/2019-20/MO;***
- b. An order setting aside and annulling the Respondent's decision to the effect that the Applicant's bid in Tender No. KPA/170/2019-20/MO was not responsive communicated via its letter dated 20th August 2020;***
- c. An order directing the Respondent to complete the tendering process, evaluate the Applicant's bid and award the tender to the lowest evaluated bidder as provided in the Tender Document, following the Board's review of all the records of the procurement process relating to Tender No. KPA/170/2019-20/MO***
- d. In the alternative to (b) above, an order directing the Respondent to award Tender No. KPA/170/2019-20/MO to the Applicant in case the Applicant was/is determined and/or found to be the lowest evaluated bidder;***

e. An order directing the Respondent to pay the costs of an incidental to these proceedings; and

f. Such other or further relief or reliefs at this Board shall deem just and expedient.

On 16th March 2020, the Board issued Circular No. 1/2020 and the same was published on the Public Procurement Regulatory Authority (hereinafter referred to as "the PPRA") website (www.ppra.go.ke) in recognition of the challenges posed by the COVID-19 pandemic and instituted certain measures to restrict the number of representatives of parties that may appear before the Board during administrative review proceedings in line with the presidential directives on containment and treatment protocols to mitigate against the potential risks of the virus.

On 24th March 2020, the Board issued Circular No. 2/2020 further detailing the Board's administrative and contingency management plan to mitigate the COVID-19 disease. Through this circular, the Board dispensed with physical hearings and directed that all request for review applications shall be canvassed by way of written submissions.

The Board further cautioned all parties to adhere to the strict timelines as specified in its directive as the Board would strictly rely on the documentation filed before it within the timelines specified to render its decision within twenty-one days of filing of the request for review in accordance with section 171 of the Public Procurement and Asset Disposal Act, No. 33 of 2015 (hereinafter referred to as "the Act").

The Applicant lodged Written Submissions dated 11th September 2020 on even date whereas the Procuring Entity filed Written Submissions dated 17th September 2020 on even date.

BOARD'S DECISION

The Board has considered each of the parties' cases, the documents filed before it, including confidential documents filed in accordance with section 67 (3) (e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") together with parties' submissions.

The main issue that calls for determination is: -

I. Whether the Procuring Entity terminated the subject procurement process in accordance with section 63 (1) (f) of the Act.

The Board now proceeds to address the above issue as follows: -

Termination of procurement and asset disposal proceedings is governed by section 63 of the Act. Further, if such termination meets the requirements of section 63 of the Act, the jurisdiction of this Board is ousted pursuant to section 167 (4) (b) of the Act which provides as follows: -

"The following matters shall not be subject to the review of procurement proceedings under subsection (1)—

(a);

(b) a termination of a procurement or asset disposal proceedings in accordance with section 62 of this Act" [i.e. section 63 of the Act] [Emphasis by the Board]

In **Miscellaneous Civil Application No. 1260 of 2007, Republic v. Public Procurement Administrative Review Board & Another Ex parte Selex Sistemi Integrati (2008) eKLR** (hereinafter referred to as "the Selex Sistemi Integrati Case"), the court while determining the legality of sections 36 (6) and 100 (4) of the repealed Public Procurement and Disposal Act, 2005 that dealt with termination of procurement proceedings held as follows: -

"I now wish to examine the issues for determination. The first issue is whether the Public Procurement and Disposal Act, 2005 (hereinafter referred to as "the Repealed Act"), section 100 (4) ousts the jurisdiction of the court in judicial review and to what extent the same ousts the jurisdiction of the Review Board. That question can be answered by a close scrutiny of section 36 (6) of the said Act which provides: -

"A termination under this section shall not be reviewed by the Review Board or a court."

In the literal sense, section 36 (6) quoted above purports to oust the jurisdiction of the court and the Review Board.

The Court has to look into the ouster clause as well as the challenged decision to ensure that justice is not defeated.

In our jurisdiction, the principle of proportionality is now part of our jurisprudence. In the case of Smith v. East Elloe Rural District Council [1965] AC 736 Lord Viscount Simonds stated as follows: -

"Anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal."

It is a well settled principle of law that statutory provisions tending to oust the jurisdiction of the Court should be construed strictly and narrowly... The court must look at the intention of Parliament in section 2 of the said Act which is inter alia, to promote the integrity and fairness as well as to increase transparency and accountability in Public Procurement Procedures.

To illustrate the point, the failure by the 2nd Respondent [i.e. the Procuring Entity] to render reasons for the decision to terminate the Applicant's tender makes the decision amenable to review by the Court since the giving of reasons is one of the fundamental tenets of the principle of natural justice. Secondly, the Review Board ought to have addressed its mind to the question whether

the termination met the threshold under the Act, before finding that it lacks jurisdiction to entertain the case before it on the basis of a mere letter of termination furnished before it.

The court in the Selex Sistemi Integrati Case held that this Board (as was constituted then) had the duty to question whether a decision by a procuring entity terminating a tender met the threshold of section 100 (4) of the repealed Act, and that the Board's jurisdiction was not ousted by mere existence of a letter of termination furnished before it.

Further, in **Judicial Review Miscellaneous Application No. 142 of 2018, Republic v. Public Procurement and Administrative Review Board & Another ex parte Kenya Veterinary Vaccines Production Institute (2018) eKLR** (hereinafter referred to as "JR No. 142 of 2018") it was held as follows: -

"The main question to be answered is whether the Respondent [Review Board] erred in finding it had jurisdiction to entertain the Interested Party's Request for Review of the Applicant's decision to terminate the subject procurement..."

A plain reading of section 167 (4) (b) is to the effect that a termination that is in accordance with section 63 of the Act is not subject to review. Therefore, there is a statutory pre-condition that first needs to be satisfied in the said

sub-section namely that the termination proceedings are conducted in accordance with the provisions of section 63 of the Act, and that the circumstances set out in section 63 were satisfied, before the jurisdiction of the Respondent can be ousted.

As has previously been held by this Court in Republic v Kenya National Highways Authority Ex Parte Adopt –A-Light Ltd [2018] eKLR and Republic v. Secretary of the Firearms Licensing Board & 2 others Ex parte Senator Johnson Muthama [2018] eKLR, it is for the public body which is the primary decision maker, [in this instance the Applicant as the procuring entity] to determine if the statutory pre-conditions and circumstances in section 63 exists before a procurement is to be terminated...

However, the Respondent [Review Board] and this Court as review courts have jurisdiction where there is a challenge as to whether or not the statutory precondition was satisfied, and/or that there was a wrong finding made by the Applicant in this regard...

The Respondent [Review Board] was therefore within its jurisdiction and review powers, and was not in error, to interrogate the Applicant's Accounting Officer's conclusion as to the existence or otherwise of the conditions set out

in section 63 of the Act, and particularly the reason given that there was no budgetary allocation for the procurement. This was also the holding by this Court (Mativo J.) in R v Public Procurement Administrative Review Board & 2 Others Ex-parte Selex Sistemi Integrati which detailed the evidence that the Respondent would be required to consider while determining the propriety of a termination of a procurement process under the provisions of section 63 of the Act.”

The Court in JR No. 142 of 2018 affirmed the decision of the Court in the *Selex Sistemi Integrati Case* that this Board has the obligation to first determine whether the conditions outlined under section 63 of the Act have been satisfied to warrant termination of a procurement process, in order to make a determination whether the Board’s jurisdiction is ousted by section 167 (4) (b) of the Act.

It is therefore important for this Board to determine whether the Procuring Entity terminated the subject tender in accordance with the provisions of section 63 of the Act, which determination can only be made by interrogating the reasons cited for termination by the Procuring Entity.

Section 63 (1) (f) of the Act states as follows: -

“(1) An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate

or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies—

- (a)***
- (b)***
- (c)***
- (d)***
- (e)***
- (f) all evaluated tenders are non-responsive;***
- (g)***
- (h)***
- (i)***
- (2)***
- (3)***
- (4)***

The Procuring Entity cited section 63 (1) (f) of the Act as the reason for termination of the subject tender, because in its view all evaluated tenders were non-responsive.

However, the Applicant contended that it submitted a responsive tender that met all the mandatory and technical requirements of the subject tender.

According to the Procuring Entity's Letter of Cancellation of Tender dated 20th August 2020, the Procuring Entity notified the Applicant that the subject tender had been cancelled pursuant to section 63 (1) (f) of the Act and would be re-advertised because all evaluated tenders were non-responsive, and specified the reasons why the Applicant's bid was found non-responsive as follows: -

"You were non-responsive because at financial evaluation we noted that your read out price at tender opening was Kshs. 3,999,912.00 yet your evaluated price was Kshs 8,404,512.00. We were therefore unable to award this tender as such as an action would contravene section 82 of the Act which provides that the tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be subject of correction, adjustment or amendment in any way by any person or entity."

The Applicant contended that it did not alter, adjust or amend its tender sum as read out during the tender opening and was therefore a stranger to the alleged figure of Kshs. 8,404,512.00/- as indicated in the Procuring Entity's letter dated 20th August 2020. According to the Applicant, it provided for the cost of new equipment in its schedule of prices out of an abundance of caution but clearly stipulated that the cost of service of equipment would amount to Kshs. 3,999,912.00/- and not Kshs 8,404,512.00/-. The Applicant contended that it made a clear distinction in its tender document that the amount for provision of services as required under the subject tender was Kshs. 3,999,912.00

which figure was clearly announced at the Procuring Entity's opening of tenders on 1st July 2020.

On its part, the Procuring Entity submitted that the price indicated by the Applicant on its form of tender as read out during the opening of tenders was Kshs. 3,999,912.00/-. However, the Applicant's total evaluated price was Kshs 8,404,512.00/- which comprised of Kshs. 3,999,912.00/- for Servicing, Inspection and Certification and Kshs. 4,404,600.00/- for new diving equipment.

In the Procuring Entity's view, every bidder was required to not only provide the cost of servicing the equipment but also the cost of providing new equipment in the event any of the equipment breaks down and requires replacement. It was therefore the Procuring Entity's submission that the sum indicated by the Applicant in its form of tender was neither complete nor a reflection of the information required by the Procuring Entity as stipulated in the provisions of the Tender Document.

The Procuring Entity argued that in view of section 82 of the Act, it was not at liberty to alter the Applicant's tender sum as quoted in its form of tender and thus the Applicant's bid was found non-responsive at the Financial Evaluation Stage. The Procuring Entity therefore had no other recourse but to terminate the subject tender pursuant to section 63 (1) (f) of the Act since no tenders submitted in response to the subject tender were found responsive.

Having considered all parties' submissions, the Board shall first address the question what is a 'tender sum' or the 'amount indicated in a form of tender'?

The Act defines a "tender" under section 2 in the following terms: -

"tender" means an offer in writing by a candidate to supply goods, services or works at a price; or to acquire or dispose stores, equipment or other assets at a price, pursuant to an invitation to tender, request for quotation or proposal by a procuring entity.

Further, section 82 of the Act states that: -

"The tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be the subject of correction, adjustment or amendment in any way by any person or entity"

Having compared the above provisions, the Board notes, in a procurement process, bidders submit a tender, that is, ***an offer in writing to supply goods, services or works at a price pursuant to an invitation to tender, request for quotation or proposal by a procuring entity.***

In that offer, bidders quote a tender sum, i.e. the price at which they undertake to execute or implement the tender if found successful. Pursuant to section 82 of the Act, this tender sum, that is quoted in a bidder's Form of Tender is absolute and final and is not subject to any correction, adjustment or amendment.

The question that now arises is what amounts to a correction, adjustment or amendment by a procuring entity?

Once a bidder has submitted its bid including its financial proposal to a procuring entity, it may contain arithmetic errors or discrepancies that may be identified by a procuring entity during financial evaluation. As explained hereinbefore, section 82 of the Act expressly prohibits any alterations or corrections to the tender sum which remains absolute and final and is not subject to any correction, adjustment or amendment.

Accordingly, any corrections made by a procuring entity to a bidder's tender sum would therefore serve no purpose because the procuring entity cannot use such corrections to rank the bidders or amend the tender sum in the form of tender, which remains absolute and final in accordance with section 82 of the Act.

It is worth noting, that the Board has consistently held in its previous decisions that the tender sum is absolute and cannot be changed. In **PPARB Application No. 42 of 2017, Surestep Systems and**

Solutions Limited vs. Industrial and Commercial Development Corporation, concurred with its decision in **PPARB Application No. 38 of 2019, Alfatech Contractors Limited vs. Kenya National Highways Authority**, where the Board stated the importance and the primacy of the form of tender in any tender process in the following words: -

"The Board holds that the form of tender is the document which the offer is communicated to specified employer. It is the offer that the procuring entity would consider and either accept or reject. The Board finds that the form of tender is a very vital document which communicates every essential information based on which a contract is created.

The provision of section 82 of the Act, is couched in mandatory terms and leaves no room for any other interpretation. The tender sum for the successful bidder as read out and as recorded at the tender opening was Kshs. 34,166,398.13/- and was not subject to any variation whatsoever pursuant to the prohibition contained in section 82 of the Act."

Turning to the circumstances of the case, the Board examined the Procuring Entity's Tender Document and observes that the subject tender was for the '*Servicing, Inspection and Certification of Decompression Chamber and Diving Equipment*'.

Further, Clause 2.1.1 of Section II Instructions to Tenderers on page 9 of the Tender Document provides as follows: -

"This Invitation to tender is open to all tenderers eligible as described in the instructions to tenderers. Successful tenderers shall provide the services for the stipulated duration from the date of commencement (hereinafter referred to as the term) specified in the tender documents."

Accordingly, the Procuring Entity sought to procure services under the subject tender for the servicing, inspection and certification of the decompression chamber diving equipment.

Mandatory Requirement XII of the subject tender as outlined under Clause 2.15.1 of the Appendix to Instructions to Tenderers on page 21 of the Tender Document stipulated that bidders were required to submit the following: -

"Form of tender (price quoted for the service)"

Accordingly, bidders were required to submit a form of tender within which they were required to provide a quote therein for the service sought to be procured under the subject tender.

Clause 2.8 Form of Tender of Section II Instructions to Tenderers on page 11 of the Tender Document provides as follows: -

"The tenderers shall complete the Form of Tender and the appropriate Price Schedule furnished in the tender documents, indicating the services to be performed."

Further, Clause 2.9.1 and 2.9.2 Tender Prices of Section II Instructions to Tenderers on page 11 of the Tender Document reads as follows: -

"2.9.1 The tenderer shall indicate on the Price schedule the unit prices where applicable and total tender prices of the services it proposes to provide under the contract.

2.9.2 Prices indicated on the Price Schedule shall be the cost of the services quoted including all customs duties and VAT and other taxes payable."

From the foregoing clauses, the Board observes that bidders were required to indicate in their respective Forms of Tender their total tender price for the services to be provided under the subject tender.

Further, the Procuring Entity required bidders to provide in their respective Price Schedules the unit prices and the total tender prices of the services to be provided under the subject tender.

The Board then studied the sample form of tender under Section VIII Standard Forms on page 36 of the Tender Document which reads as follows: -

"Having examined the tender documents including Addenda Nos. [insert numbers], the receipt of which is hereby duly acknowledged, we, the undersigned, offer to provide. [description of services] in conformity with the said tender documents for the sum of [total tender amount in words and figures] or such other sums as may be ascertained in accordance with the Schedule of Prices attached herewith and made part of this Tender. "

From the above excerpt, the Board observes that a bidder was required to indicate in its form of tender, the total tender amount this being the total cost for the services to be provided under the subject tender.

The Board also examined the Schedule of Prices Section VII on page 32 of the Tender Document which outlined as follows: -

Works	Quantity	Unit Price (KSH) Incl. of VAT	Total Price (KSH) Incl. of VAT
Inspection, Servicing, repairing and Certification of Decompression Chamber	01		
Inspection, Servicing, repairing and Certification of Kirby Morgan	02		
Inspection, Servicing, repairing and Certification of Scuba Tanks	28		
Inspection, Servicing, repairing and Certification of Divers Regulators	20		
Inspection, Servicing, repairing and Certification of Air Banks	04		
Inspection, Servicing, repairing and Certification of integrated Underwater Communication System	01		
Inspection, Servicing, repairing and Certification of Electric Compressors	03		
Inspection, Servicing, repairing and	01		

Certification of Hydraulic Driven Grinder			
Inspection, Servicing, repairing and Certification of Hydraulic Power Pack	01		
Cost of New Baurer Electric Compressor	01		
Cost of New Hydraulic Driven Grinder	01		
Cost of New Hydraulic Power Pack	01		
Cost of New Integrated Underwater Communication System	01		
Cost of New Kirby Morgan (KMB 18)	01		
Total Price			

Notably, the Schedule of Prices outlined the specific items that bidders were required to submit prices for and their quantities.

The Procuring Entity furnished the Board with the original bids of all the four (4) bidders who participated in the subject tender, which forms part of the Procuring Entity's confidential file.

The Board examined the Applicant's original bid and observes from the Applicant's Form of Tender dated 26th June 2020 on page 75 therein that the Applicant indicated as follows: -

"Having examined the tender documents including Addenda Nos. N/A that of which is hereby duly acknowledged, we, the undersigned, offer to provide. SERVICING, INSPECTION AND CERTIFICATION OF DECOMPRESSION CHAMBER AND DIVING EQUIPMENT in conformity with the said tender documents for the sum of [Amount in words] KSH THREE MILLION, NINE HUNDRED AND NINETY-NINE, NINE HUNDRED AND TWELVE (Amount in figures) KSHS. 3,999,912 or such other sums as may be

ascertained in accordance with the Schedule of Prices attached herewith and made part of this Tender. "

Accordingly, the Applicant quoted in its form of tender a total tender sum/amount of Kshs Three Million, Nine Hundred and Ninety-Nine, Nine Hundred and Twelve (KSHS. 3,999,912).

The Board then examined the Applicant's Schedule of Prices on page 80 and 81 of the Applicant's original bid which was outlined as follows: -

<i>Works</i>	<i>Quantity</i>	<i>Unit Price (KSH) Incl. of VAT</i>	<i>Total Price (KSH) Incl. of VAT</i>
<i>Inspection, Servicing, repairing and Certification of Decompression Chamber</i>	<i>01</i>	<i>3,364,000.00</i>	<i>3,364,000.00</i>
<i>Inspection, Servicing, repairing and Certification of Kirby Morgan</i>	<i>02</i>	<i>110,200.00</i>	<i>220,400.00</i>
<i>Inspection, Servicing, repairing and Certification of Scuba Tanks</i>	<i>28</i>	<i>4,000.00</i>	<i>129,920.00</i>
<i>Inspection, Servicing, repairing and Certification of Divers Regulators</i>	<i>20</i>	<i>4,640.00</i>	<i>64,960.00</i>
<i>Inspection, Servicing, repairing and Certification of Air Banks</i>	<i>04</i>	<i>3,248.00</i>	<i>20,880.00</i>
<i>Inspection, Servicing, repairing and Certification of integrated Underwater Communication System</i>	<i>01</i>	<i>5,220.00</i>	<i>29,000.00</i>
<i>Inspection, Servicing, repairing and Certification of Electric Compressors</i>	<i>03</i>	<i>34,220.00</i>	<i>102,660.00</i>
<i>Inspection, Servicing, repairing and Certification of Hydraulic Driven Grinder</i>	<i>01</i>	<i>34,046.00</i>	<i>34,046.00</i>
<i>Inspection, Servicing, repairing and Certification of Hydraulic Power Pack</i>	<i>01</i>	<i>34,046.00</i>	<i>34,046.00</i>
<i>Total Price</i>			<i>3,999,912.00</i>

Works	Quantity	Unit Price (KSH) Incl. of VAT	Total Price (KSH) Incl. of VAT
Cost of New Baurer Electric Compressor	01	649,600.00	649,600.00
Cost of New Hydraulic Driven Grinder	01	609,000.00	609,000.00
Cost of New Hydraulic Power Pack	01	1,015,000.00	1,015,000.00
Cost of New Integrated Underwater Communication System	01	507,000.00	507,000.00
Cost of New Kirby Morgan (KMB 18)	01	1,624,000.00	1,624,000.00
TOTAL			4,404,600.00

Annual Total Price Inclusive of Taxes

Service Amount in Figures: Kshs 3,999,912

Cost of New Machines in Figures: Kshs 4,404,600

The Board observes that the Applicant in its Schedule of Prices outlined the unit prices and the total price for services to be provided under the subject tender, that is, Kshs 3,999,912.00. Further, the Applicant provided the unit cost and the total cost of new machines, that is, Kshs 4,404,600.00.

The Board considered the Procuring Entity's submission that it was necessary for any prospective bidder to not only quote the cost of servicing the equipment but also the cost of providing new equipment in its Form of Tender. In this regard therefore, it was the Procuring Entity's submission that the sum indicated by the Applicant in its form of tender

was incomplete and not a reflection of the information required by the Procuring Entity.

It is important to note that a tender document should be interpreted holistically taking into consideration all the provisions therein.

As established hereinbefore, the subject tender was for the provision of services, that is, for the servicing, inspection and certification of the decompression chamber and diving equipment.

This Board notes under Section VI Description of Services on page 29, 30 and 31 that services to be provided under the subject tender *inter alia* include 'replacement of parts as and when necessary'. This means that as part of the services to be provided under the subject tender was replacement of parts as and when necessary.

Further, Clause 2.22.2 Evaluation and Comparison of Tenders of Section II Instructions to Tenderers on page 15 of the Tender Document provides as follows: -

"The comparison shall be of the price including all costs as well as duties and taxes payable on all the materials to be used in the provision of the services."

According to the above clause, the evaluation process shall include the comparison of the price including all costs as well as duties and taxes payable on all the materials to be used in the provision of the services.

In view of the foregoing provisions of the Tender Document, it is safe to state that, the subject tender was essentially for the provision of services (which includes replacement of parts as and when necessary), that is, the servicing, inspection and certification of the decompression chamber and diving equipment and not for provision of goods (which would entail provision of new equipment). Any materials to be used in the provision of the said services was in essence included in the Tender Document's description of the subject services.

In this regard therefore, the total sum that a bidder was required to indicate in its Form of Tender was the total cost for the subject services (which includes replacement of parts as and when necessary) under the subject tender, that is, servicing, inspection and certification of decompression chamber and diving equipment.

As mentioned hereinbefore, the tender sum, which is quoted in a Form of Tender is absolute and final, and is not subject to any correction, adjustment or amendment, pursuant to section 82 of the Act. It therefore follows that the tender sum as quoted in a bidder's Form of Tender should comprise the total cost of services to be provided under the subject tender, that is, the total cost for servicing, inspection and certification of decompression chamber and diving equipment.

However, from a comparison of the Applicant's Form of Tender and its Schedule of Prices, the Board notes, the Applicant in its Form of Tender

indicated a total tender sum of Kshs 3,999,912.00 whereas in its Schedule of Prices, it indicated a total service amount of Kshs 3,999,912.00 and a total cost of new machines of Kshs 4,404,600.00.

The question that the Board must now answer is what recourse is available to a Procuring Entity where there is a discrepancy between the amount indicated in a bidder's Form of Tender and its Schedule of Prices.

Section 81 of the Act states that: -

"(1) A procuring entity may, in writing request a clarification of a tender from a tenderer to assist in the evaluation and comparison of tenders.

(2) A clarification shall not change the terms of the tender" [Emphasis by the Board]

According to the above provision, a Procuring Entity may seek clarifications from a tenderer to assist in the evaluation and comparison of tenders, but such a clarification should not change the terms of the tender.

Furthermore, this clarification from a procuring entity should be made in writing and the response from the tenderer received by the procuring entity in writing. This is in line with section 64 (1) of the Act which provides that: -

"All communications and enquiries between parties on procurement and asset disposal proceedings shall be in writing" [Emphasis by the Board]

The Board observes Clause 2.19 Clarification of Tenders under Section II Instructions to Tenderers on page 14 of the Tender Document which reads as follows: -

"2.19.1 To assist in the examination, evaluation and comparison of tenders the procuring entity may at its discretion, ask the tenderer for a clarification of its tender. The request for clarification and the response shall be in writing, and no change in the prices or substance shall be sought, offered, or permitted.

2.19.2 Any effort by the tenderer to influence the procuring entity in the procuring entity's tender evaluation, tender comparison or contract award decisions may result in the rejection of the tenderers tender.

Comparison or contract award decisions may result in the rejection of the tenderers' tender."

The Board finds, a clarification was needed in this instance in order for the Procuring Entity to clearly establish whether the Applicant would be bound by the total amount indicated in its Form of Tender, that is, Kshs Three Million, Nine Hundred and Ninety-Nine, Nine Hundred and Twelve (KSHS. 3,999,912). for the provision of the services (which includes replacement of parts as and when necessary) that the Procuring Entity

sought to procure under the subject tender which would be considered to be inclusive of the materials that would be required to provide the said service.

This clarification would be sought by the Procuring Entity with the understanding that the Applicant would not be offered an opportunity to change the amount as quoted in its Form of Tender and thus the Applicant would be bound by the tender sum as is.

If the Applicant agrees to be bound by the amount as indicated in its Form of Tender, the Procuring Entity would proceed with Financial Evaluation of the Applicant's bid in accordance with Clause 2.22.2 Evaluation and Comparison of Tenders of Section II Instructions to Tenderers on page 15 of the Tender Document as cited hereinbefore.

If the Applicant is found to be the lowest evaluated bidder, based on the Applicant's evaluated price, an award of the subject tender would be made to it at the amount quoted in the Form of Tender, that is, Kshs Three Million, Nine Hundred and Ninety-Nine, Nine Hundred and Twelve (KSHS. 3,999,912.00) as the total cost for servicing, inspection and certification of decompression chamber and diving equipment.

If the Applicant does not agree to be bound by the total amount as indicated in its Form of Tender, the Procuring Entity shall proceed to consider the next lowest evaluated bidder and follow the procedure for

financial evaluation as outlined hereinabove until a successful bidder is found.

Upon conclusion of financial evaluation, the Procuring Entity ought to make an award, subject to a due diligence exercise as provided under Clause 2.24 of Section II Instructions to Tenderers on page 16 and 17 of the Tender Document which reads as follows: -

"2.24.1 In the absence of pre-qualification, the Procuring entity will determine to its satisfaction whether the tenderer that is selected as having submitted the lowest evaluated responsive tender is qualified to perform the contract satisfactorily.

2.24.2 The determination will take into account the tenderer's financial and technical capabilities. It will be based upon an examination of the documentary evidence of the tenderers qualifications submitted by the tenderer, pursuant to paragraph 2.1.2, as well as such other information as the Procuring entity deems necessary and appropriate.

2.24.3 An affirmative determination will be a prerequisite for award of the contract to the tenderer. A negative determination will result in rejection of the Tenderer's tender, in which event the Procuring entity will proceed to the next lowest evaluated tender to make a similar determination of that Tenderer's capabilities to perform satisfactorily.

Accordingly, the Procuring Entity is required to conduct a due diligence on the tenderer identified as the lowest evaluated responsive bidder, in order to determine to its satisfaction that the said bidder is qualified to perform the contract satisfactorily. This due diligence or post-qualification exercise shall involve an examination of the documentary evidence of the tenderer's qualifications submitted by the tenderer, as well as such other information as the Procuring Entity may deem necessary and appropriate.

In this instance, the Board observes from the Procuring Entity's evaluation report dated 8th July 2020 that the Applicant was the only bidder that was found to be responsive at the Mandatory Evaluation Stage and thus the only bidder that qualified for the Financial Evaluation Stage. In this regard therefore, if the Applicant does not agree to be bound by the total amount in its Form of Tender, the only recourse available to the Procuring Entity would be to terminate the subject tender, pursuant to section 63 (1) (f) of the Act as cited hereinbefore.

In view of the foregoing, the Board finds that the Procuring Entity unfairly disqualified the Applicant's bid at Financial Evaluation, noting that the Procuring Entity failed to seek clarification with respect to the total sum indicated in the Applicant's Form of Tender and the total sums indicated in its Schedule of Prices in accordance with Clause 2.24 of Section II Instructions to Tenderers on page 16 and 17 of the Tender Document.

Accordingly, the Board finds that the Procuring Entity failed to terminate the subject procurement process in accordance with section 63 (1) (f) of the Act rendering the said termination null and void.

In determining the appropriate orders to issue in the circumstances, the Board has established that the Procuring Entity failed to terminate the subject procurement process in accordance with section 63 (1) (f) of the Act rendering the said termination null and void. Moreover, the Board has established that the Procuring Entity unfairly disqualified the Applicant's bid at Financial Evaluation noting that the Procuring Entity failed to seek clarification with respect to the total sum indicated in the Applicant's Form of Tender and the total sums indicated in its Schedule of Prices.

Section 173 of the Act gives this Board powers to undertake the following: -

"Upon completing a review, the Review Board may do any one or more of the following—

(a)

(b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings"

Accordingly, the Board deems it fit to direct the Procuring Entity to re-admit the Applicant's bid at the Financial Evaluation Stage and conduct a

re-evaluation of the Applicant's bid at the Financial Evaluation Stage taking into consideration the findings of this Board and in accordance with the provisions of the Tender Document, the Act and the Constitution.

In totality, the Request for Review succeeds with respect to the following specific orders: -

FINAL ORDERS

In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review: -

- 1. The Procuring Entity's Letters of Cancellation of Tender addressed to all tenderers dated 20th August 2020 with respect to Tender No. KPA/170/2019-20/MO for Servicing, Inspection and Certification of Decompression Chamber and Diving Equipment, be and are hereby nullified and set aside.**

- 2. The Procuring Entity is hereby directed to re-admit the Applicant's tender at the Financial Evaluation Stage, and conduct a re-evaluation of the Applicant's tender only at the Financial Evaluation Stage.**

3. Further to Order No. 2 above, the Procuring Entity is hereby directed to proceed with the procurement process to its logical conclusion within fourteen (14) days from the date of this decision, taking into consideration the Board's findings in this case.

4. Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.

Dated at Nairobi, this 21st Day of September 2020

CHAIRPERSON

SECRETARY

PPARB

PPARB