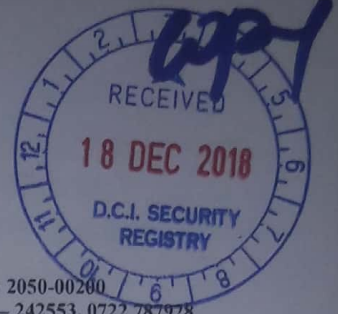


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Our Ref: MM/DM/18

Your Ref:

Date: 18th December 2018

**The Chairman
Public Procurement
Administrative Review Board
NAIROBI**



Dear Sirs,

**RE: PROCURING ENTITY : PARLIAMENTARY SERVICE COMMISSION - Ref:
PSC/PROC/4/VOL.11/(35)
SUCCESSFUL TENDERER : NIGHTINGALE ENTERPRISES**

We are retained by one "DM" who for fear of reprisals deems fit to use his acronym to safeguard his identity and in accordance with the Witness Protection Act that accords our said client such protection.

Our client is in common parlance a "whistleblower" and has instructed us to write to you in reference to the above subject pending for ruling not later than 19th December 2018 ("tomorrow").

As you are well aware, a tender for construction works was duly floated to the public by the Parliamentary Service Commission ("PSC") as the procuring entity and subsequent to which various bids were received by various companies and subjected to a tender evaluation committee for purposes of picking the successful bidder.

The successful bidder in the aforesaid exercise was NIGHTINGALE ENTERPRISES and one of the unsuccessful bidders has since challenged the prequalification of NIGHTINGALE ENTERPRISES through Mohammed and Muigai Advocate and the ruling of the application by the said party is scheduled for 20th December 2018 which is the last day within the mandatory 21 days prescribed period to enter such ruling.

When replying please quote our reference

The pendency of the ruling notwithstanding, our client's case is that the procurement process that led to the prequalification of NIGHTIGALE ENTERPRISES was undertaken without proper due diligence on the part of the Tender Evaluation Committee and was inter-alia riddled and rife with irregularities, illegalities, malpractices and manifest fraud.

Our client wishes to now draw your kind attention to the following pertinent issues that were deliberately overlooked while considering NIGHTIGALE ENTERPRISES for prequalification.

1. The companies/business names offered by NIGHTIGALE ENTERPRISES as referees are dubious and lack credibility for the reason that a search at e-citizen platform reveals that those companies share the same postal address as the NIGHTIGALE ENTERPRISES i.e. 63772 - 00619. The said companies are :

- I. BLISS PARK APARTMENTS LTD
- II. HAVEN PARK LTD
- III. LULU GARDENS LTD
- IV. GLEE HOTEL LTD

The unfortunate legal implication of this kind of scenario is that the said companies could not have been sufficiently and independently relied upon as "referee companies" as they appear to be related to NIGHTIGALE ENTERPRISES and therefore could not credibly verify the worthiness/integrity or otherwise of the said alleged successful bidder in so far as the pre-qualification exercise was concerned.

2. **OCTA ARCHITECTS LTD**

This is the architectural company purportedly cited by NIGHTIGALE ENTERPRISES in their prequalification documents and the ones to undertake the works in question.

A search at the BOARD OF REGISTRATION OF ARCHITECTS AND QUANTITY SURVEYORS (BORAQS) KENYA ("the board") clearly indicates that OCTA ARCHITECTS is not registered with the board and indeed it is unknown since there is no match in the search criteria.

The website of the board has a list of its duly registered members and OCTA ARCHITECTS is not one of them.

When replying please quote our reference

In accordance with Section 3 of the Architects and Quantity Surveyors Act, no one can use the name or title of an architect unless they are registered under the board accordingly.

Hence, NIGHTIGALE ENTERPRISES ought to have been disqualified on this score alone but unfortunately this was not the case as the tender committee further failed in their due diligence as further demonstrated hereinbelow.

3. FINANCIAL DUE DILIGENCE

One of the conditions for any successful bidder to satisfy is to provide authentic and financially sound bank statements from a reputable bank. Our client submits that this condition was neither met nor satisfied and indeed NIGHTIGALE ENTERPRISES supplied forged and unauthentic bank statements purportedly from EQUITY BANK. Vide letter dated 16th October 2018, EQUITY BANK wrote to the Parliamentary Service Commission (PSC) confirming the following fact(s) in relation to NIGHTIGALE ENTERPRISES's A/C No. 0010299129412:

- I. Inability (by the bank) to avail certified copies of the account statements as the copies availed did not originate from the bank.

In essence, therefore NIGHTIGALE ENTERPRISES never met the financial criteria and indeed NIGHTIGALE ENTERPRISES committed a Criminal Act under Section 345 and 347 of the Penal Code by forging and uttering false documents to the procuring entity which act alone extensively taints its credibility for prequalification or at all.

The other issues in relation to the lack of authenticity of the statements are as follows and in summary

- I. Page 73 - Contains a debit and credit on the same transaction.
- II. Page 73 - Figure increases without an entry in the credit column.
- III. Pages 78 & 79 - They are exactly the same.
- IV. Page 80 - Figure of Kshs. 163,000,000/- increases to Kshs. 168,000,000 without a credit when there is indeed even a debit of Kshs. 100,000/- in between and the same incredulously increases to Kshs. 168,000,000/-.

On this alone, NIGHTIGALE ENTERPRISES ought to have been disqualified outrightly so.

When replying please quote our reference

4. PREVIOUSLY UNDERTAKEN PROJECTS

Our client's position is that a search conducted online of the projects quoted by NIGHTIGALE ENTERPRISES reveal manifestly that NIGHTIGALE ENTERPRISES were never the contractors of such contracts. The following are the examples of their purported projects:

- a. Tarmac road in Wahir for 346km about 4.5 million per kilometer is on the list of project completed by KENHA (Kenya National Highways Authority) and not NIGHTIGALE ENTERPRISES.
- b. Purported project in the Zambia
NIGHTIGALE ENTERPRISES was never the contractor in the Zambian project and yet this was used as a reference project for the prequalification.

Had a proper and thorough due diligence been conducted then NIGHTIGALE ENTERPRISES ought to have been disqualified instantly upon receipt of their application.

THE LAW

The relevant law applicable and in support of my client's letter to you to immediately arrest/stay the pending ruling and take action is the following:

- a) Section 3(a) and (d) of the Public Procurement and Disposal Act.
- b) Sections 176(11(b) and (i) of the Public Procurement and Disposal Act.
- c) Articles 2(4), 3(1), 10(2)c, 227(1) and 258 of the Constitution of Kenya (2010).

A case in point and a precedent to guide you, is the case of MISTRY AMAR SINGH - VS- SERWANO WOFUNIRA KULUBA 1963 EA 408 from the judgement and order of the East African Court of Appeal and quoted with approval in case of MAPIS INVESTMENT (K) LTD -VS- KENYA RAILWAYS CORPORATION (2006)eKLR and the following passage wherein it was held inter-alia:

1. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract that is

When replying please quote our reference

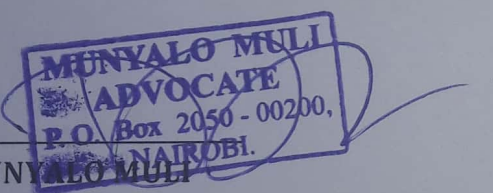
illegal; if the illegality is duly brought to the notice of the court (emphasis mine).

2. It is irrelevant the illegality is pleaded or not and the court ought to assist a party that proves the illegality.
3. A letter dated 20th November 2002 produced in court showing one Mr. Shompa and the appellant were not registered amounted to an admission of facts giving rise to an illegality and a contract to perform estate agency services was declared illegal as the same can only be entered into with a registered estate agent.

In view of the above, our client having demonstrated and proven illegality, then the Honourable Board has no option but to declare the contract between NIGHTIGALE ENTERPRISES and PARLIAMENTARY SERVICE COMMISSION illegal and terminate it forthwith.

Find enclosed the copies of relevant letters and documents mentioned above.

Yours faithfully,


MUNYALO MULI
ADVOCATE

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When replying please quote our reference