

PETITION TO NAIROBI COUNTY GOVERNMENT UNDER ARTICLE 37 AND 227 OF THE CONSTITUTION 2010, PUBLIC PROCUREMENT ACT 2015, SECTION 88 (1) AND 89 OF THE COUNTY GOVERNMENT ACT 2012 AND SECTION 14, 15, 16, 17 AND 18 OF THE NAIROBI CITY COUNTY PUBLIC PARTICIPATION ACT 2015

To

Leboo Ole Morintant,
Ag. County Secretary,
Nairobi City County,
P. O. Box 30075 – 00100,
Nairobi



CC:

Head of Supply Chain Management,
City Hall Annex, 1st Floor,
Nairobi City County
P. O. Box 30075 – 00100,
Nairobi



Head of Compliance Department,
Public Procurement Oversight Authority,
National Bank Building,
10th Floor, Harambee Avenue,
Nairobi.

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I, the undersigned and humble petitioner, Wanjiru Gikonyo of P. O. Box 48353 – 00100, Nairobi, Kenya, and the National Coordinator of The Institute for Social Accountability,

DRAW the attention of the Nairobi County Government to the following:

1. **Article 1** of the **Constitution** which states that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the **Constitution**.
2. **Article 10** of the **Constitution**, which states that the national values and principles of governance bind all State Organs, State Officers and Public Officers whenever any of them apply or interpret the **Constitution**, and enacts, applies or interprets any laws and makes or implements public policy decisions.
3. **Article 37** of the **Constitution**, which states, every person has the right to present petitions to public authorities.
4. **Article 227(1)** of the **Constitution**, which states, “When a State organ or any other public entity contracts for goods or services it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost effective”.
5. The **Public Procurement and Assets Disposal Act 2015** provides for the procedures for efficient public procurement and assets disposal by public entities. **Section 3** states public procurement by State organs and public entities shall be guided by values and principles of the **Constitution** and relevant legislations. These include the **Constitution** national values and principles of governance (**Article 10**); equality and freedom from discrimination (**Article 27**); affirmative action programmes (**Articles 55, 56**); principles of public finance (**Article 201**); values and principles of public service (**Article 232**). In addition to this, are principles of integrity (**Leadership and Integrity Act, 2012**), principles governing procurement profession, international norms; maximization of value for money; promotion of local industry, sustainable development and protection of the environment; and promotion of citizen contractors.
6. The **County Government Act 2012 section 88(1)** provides that citizens have a right to petition the county government on any matter under the responsibility of the County Government, and **section (89)** which states that County government authorities, agencies and agents have a duty to respond expeditiously to petitions and challenges from citizens.
7. The **Nairobi City County Public Participation Act 2015 section 15(1)** allows members of the public to present a Petition to the County Secretary who shall forward the Petition to the relevant body for consideration (**section 16 (1)**) and make a decision and forward the decision to the County Secretary to notify the Petitioner **section 17(9)**.

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THAT,

1. On 26th January 2018, the Nairobi City County Acting County Secretary did cause to be published an invitation for:
 - 1.1 Expression of Interest for Street and other Open Spaces Sweeping, Litter Bin Emptying, Solid Waste Collection and Maintenance of Collection Points, and
 - 1.2 Tender Notice for Solid Waste Collection, Transportation and Disposal for 17 zones within Nairobi County. (Contracts NCC/EEW&NR/T/049 /050 /051 /052 /053 /054 /055 /056 /057 /058 /059 /060 /061 /062 /063 /064 /065), and
 - 1.3 Hire of Solid Waste Heavy Equipment and Machinery and Plants Contract NCC/EEW&NR/T/066.

The deadline for submission of tender documents was later extended from 9th February 2018 to 15th February 2018.

2. On 13th March 2018, the the Nairobi City County Acting County Secretary did cause to be published two (2) invitations for Expression of Interest for Energy from Waste Project and for Nairobi River Regeneration.
3. A review of the Bid Documents and the three Expression of Interest above mentioned (Paragraph 1.1, 1.2, 1.3 and 2) reveal that, Nairobi County Government is in breach of the Constitution and Public Procurement and Assets Disposal Act 2015 as follows:
 - 3.1 The Expression of Interest for Energy from Waste Project has not set out the eligibility and the qualifications necessary to be invited to submit a proposal in the notice contrary to (Section 119 (2)(c) of the Public Procurement and Disposal Act 2015.
 - 3.2 The Expression of Interest for Nairobi River Regeneration and Street and other Open Spaces Sweeping, Litter Bin Emptying, Solid Waste Collection and Maintenance of Collection Points are non - consultant services/ works to be rendered, therefore the appropriate procurement procedure would be to invite firms/ CBOs for prequalification. Thereafter, an invitation should be made to the shortlisted firms/ CBOs to submit tenders based on the scope of services for each ward.

4. Review of the Bid Documents

- 4.1 The Bidding Documents for Procurement of Solid Waste Collection, Transportation and Disposal Services for Kibra, Roysambu and Westlands Zones reveals the following issues captured in the matrix below.

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Review of the Bidding Documents for Procurement of Solid Waste Collection, Transportation and Disposal Services for Kibra, Roysambu and Westlands Zones				
#	Description	Section		Comments/ Recommendations
1.	General	Bidding document	The bid document is not in the standard format as required by section 70 of the Public Procurement and Assets Disposal Act 2015. It appears to be a hybrid of a Request for Proposal and non-consultant service document	The Procuring Entity should use the appropriate standard bid document for each procurement process.
2.	Definition of Terms	I.A.1.	<p>The definition of terms in the bid document assigns different meanings from the legal meaning in the Act to some terms as follows:</p> <p>a) The bid document defines the “Contractor” as “The party that will be awarded the tender” however, the Act defines a contractor as “a person who enters into a procurement contract with a procuring entity.”</p> <p>b) The bid document defines the Tenderer as “A party that offers a tender to serve the Zone Contract.” However, the Act defines a tenderer as “a person who submitted a tender pursuant to an invitation by a public entity.”</p> <p>c) The bid document defines the Pre-qualification as – “Initial evaluation of a party’s capacity to contest in the bid”. However, the Act defines it as “the procedure to identify and shortlist tenderers that are qualified prior to invitation for tenders”</p>	The Procuring Entity should use the legal definitions used in the Public Procurement and Asset Disposal Act, 2015. Failure to use legal meaning assigned to terms in the Public Procurement and Assets Disposal Act 2015 may lead to conflict, which may lead to legal challenges especially at contract award or contract management stage.
3.	Instructions to Tenderers	I.A.4. Number of bids per bidder	The bid document states that a Bidder can at most bid for three zones but can only be awarded in one zone (sister companies may bid in other zones provided they shall operate separate fleets and provide proof of ownership of the fleets).	This section is open to different interpretations because there is no definition of a “sister company” in the bid document. We propose the use of the proper legal terms as provided for in the Companies Act 2015, that is, parent company, subsidiary company and holding company.

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#	Description	Section		Comments/ Recommendations
		I.F.1 Procuring Entity's Right to Accept or Reject Any or All Bids	The bid document states that the Procuring Entity will award the contract to a maximum of Two (2) bidders whose bids have been determined to be substantially responsive to the bidding documents per zone.	This section contradicts the condition in section ITT I.A.4 of the Bid Document above.
	Special Conditions of Contract	IV.36 Bidders Limitation	The bid document states that no Bidder will be allowed to bid for more than one (1) Zone in the same Company name. The procuring entity will award to a bidder a maximum of one Zone.	This section places a different condition on the same issue further contradicting condition set in clause 1.A.4. The terms and conditions of a Bidding Document must be clear to the bidders and the evaluation committee who shall evaluate the bids.
4.	Instructions to Tenderers	I.E.13 Youths or Women Business Enterprises (YBE/WBE) Participation	The bid document requests Bidders to include in their proposals a narrative describing past accomplishments and intended actions to ensure Youth, and Women owned Business Enterprises (YBE/WBE) Participation. It further states that, if bidders are considering youths or women owned enterprises participation in their proposal, those firms, and their specific duties have to be identified in the proposal. If a bidder is considered for award, that bidder will be asked to meet with Nairobi County staff so that the intended YBE/WBE participation can be formalized and included in the subsequent contract.	An interpretation of this section reveals Nairobi County Government lack of commitment to include Youth and Women owned Enterprise in solid waste management procurement, and has left it to the discretion of the bidders. In case the bidders decide to include these groups then they are required to state in their proposal and thereafter meet NCC staff to formalize their inclusion in the contract. The County Government should live up to the mandate imposed under Section 33 (2)(f) of the Public Procurement and Assets Disposal Act, 2015 to promote preference and reservations schemes for small and micro enterprises and other disadvantaged groups, citizen contractors, women, youth, persons with disabilities, minorities and marginalized groups in public procurement at the county. The terms and conditions should be drafted to make it mandatory for the main bidder to subcontract/ work with

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				youth, women, PWD and/or CBOs in their respective zones. The evaluation criteria will then be prepared to allow fair, transparent and open evaluation.
1.		I.C.8. Duration of Services	The bid document states that the Contract shall run for a period of one (1) year effective from the date the award letter is issued and the contractor has accepted the award in writing. This award letter is a form of contract; however, it does not exempt any contractor from signing the contract agreement.	<p>This provision raises numerous concerns as follows:</p> <ol style="list-style-type: none"> 1. Solid waste management requires heavy investment in equipment and capital, therefore the contract duration of one year is short and bidders may not be willing to invest in appropriate vehicles. 2. The award letter does not constitute a contract as per Section 135 (3-4) Public Procurement and Assets Disposal Act, 2015. This should be corrected, because a contract is only effective upon signature by the parties. 3. The short duration will not allow the Nairobi County Government to monitor and learn from the contractors 4. The Nairobi County Government will start the procurement process approximately 6 months before the end of the contract and contractors will start lobbying/ bidding for the next contract, which may affect service delivery. 5. Determination of contract duration is a balancing act between the need for regular competition and allowance for capital cost recovery. Contracts of

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#	Description	Section		Comments/ Recommendations
				short duration may deter competition during the bidding process if companies realise that they may not recoup equipment investment costs.
2.	Terms of Reference	II.B.2 Waste Collection Time and Frequency	The Bid Document states that a Contractor shall inform the County Government of their collection schedule prior to the commencement of the operation. In addition, collection and transportation shall be conducted at least 6 days a week.	This clause lacks clarity and may be interpreted to mean the contractor will inform the County Government every time they set out to collect solid waste, or at the beginning of the contract. This needs to be clear as it may become an issue during the execution of the contract. The format is also not stated.
3.		II.B.4 Unit Contract Fee	The Bid Document states that for the purposes of this tender document, Unit Contract Fee will be determined as a predetermined rate dependent on a specific zone as indicated in Schedule 10 .	Section 82 Public Procurement and Assets Disposal Act, 2015 provides that the tender sum is absolute and is not subject to correction, adjustment or amendment in any way. Schedule 10 of the Bid Document requires the contractor to propose a provisional sum. This implies each contractor will propose different provisional sums hence become almost impossible to evaluate.
4.	Terms of Reference	II.B.5 License Fee	The Bid Document states that the Contractor shall pay the following license fees to the Procuring Entity at the commencement of the operation: <ul style="list-style-type: none"> (i) Security Bond (ii) Policy Document (iii) Single Business License (iv) Waste collection and transportation permit (v) Any other legal payment deemed necessary 	The Bid Document should clearly state the statutory fees payable and the amount to allow bidders to quote competitively. Imposition of any new fees during the contract may affect the bidder's position. Therefore, there is a need for clarity on the fees payable by the Contractor.
5.		II.B.7 Duration of	The Bid Document states that the duration of the	The Bid Document must clearly state the service level

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		the Contract	contract will be one (1) year; that is, it starts from and ends in..... If the Contractor does not perform well , the Procuring Entity has the right to terminate the Contract.	agreement/ performance indicators required not a vague statement, which may be misused to terminate the contract.
6.		II.B.8 Establishment of Complaint and Public Liaison Office	The Bid Document states that the Contractor shall establish and operate a complaint and public liaison office as stated in Clause IV.9, Special Conditions of Contract.	This is a good proposition, however, it is necessary for a Procuring Entity to establish its own complaint office to pick up unresolved issues and deal with them to the satisfaction of all parties.
7.		IV.9 Complaints	The Bid Document states that the Contractor shall receive and respond to all complaints regarding services provided under this Contract within 72 hours as contained in the Procuring Entity service charter. Any complaints received by the Procuring Entity will be directed to the Contractor's office. Should a complaint go unresolved for longer than two (2) days, the Procuring Entity will have the right to demand an explanation or resolution to its satisfaction?	
8.	Special Conditions of Contract	IV.2 Liquidated Damages	The Bid Document states that if the Bidder fails to deliver any or all the services within the period(s) specified in the Contract, the Procuring Entity shall, without prejudice to its other remedies under the Contract, demand from the Contract price liquidated damages sum equivalent to 0.5% of the delivered price of the delivered services per month up to a maximum	This condition is not clear. Usually liquidated damages are charged per day for non-performance. Use of this clause usually does not apply for services. Proposal of a Sample Clause: <i>(The Contractor shall pay liquidated damages to the Procuring Entity at the rate per day for each day that the Completion Date is later than the Intended Completion Date)</i>

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			deduction of 10% of the delivered services	
		IV.4 Supervisors / Drivers	The Bid Document states that all drivers must have a current driver's licence with minimum driving of 5 years. The Procuring Entity reserves the right to discontinue the use of any driver for failure to perform in a satisfactory manner.	This provision is not clear on how this condition will be measured keeping in mind that these are employees of the contractor! This condition implies that the Procuring Entity proposes to micro manage the contractor.
9.		IV.4 Supervisors / Drivers	The Procuring Entity reserves the right to reject the contractor's personnel who, in the Procuring Entity's judgment, are not adequately qualified to perform the work or for just cause	The Procuring Entity should set the minimum qualifications of the key staff to be provided by the contractor in the bidding document and the contractor will be evaluated based on the proposed staff. That clause is subjective and open to abuse.
10.		IV.5 Vehicles and Equipment	The Contractor's vehicles and equipment used for performing services shall be adequate and mechanically sound to perform the services required by the Contract as may be reasonably determined by the Procuring Entity from time to time.	The Procuring Entity should clearly indicate the number of vehicles/ equipment necessary to carry out the services during the bidding process. Use of vague terms such as adequate and mechanically sound is prone to abuse during contract performance. All commercial vehicles are subject to Inspection by National Transport Safety Authority to establish roadworthiness, and this should be the measure for compliance for vehicles.

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THAT,

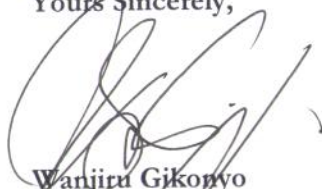
1. To the best of our knowledge, the issues in respect of which this petition is made are not pending before any court of law, or constitutional or legal body.

THEREFORE, your humble Petitioner PRAYS that the County Secretary:

1. Deals with this Petition immediately in view of the urgency of the matter and the seriousness of the issues presented herein.
2. Take necessary action to remedy the weaknesses, omissions and commissions in the procurement documents that may lead to non-compliance.
3. Cancel the Tender and Expression of Interest Notice above mentioned and advertise a fresh procurement process that is compliant with the law.
4. Give a written response on the matters raised in this petition within 14 days failure to which the applicants will be forced to seek legal redress.

AND your Petitioner will ever Pray

Yours Sincerely,



**Wanjira Gikonyo
National Coordinator
P.O. Box 48353 -00100 Nairobi
Tel: +254 20 4443676
www.tisa.or.ke**