

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 99 & 101 OF 2020 (CONSOLIDATED)**

**BETWEEN**

**MAGAL SECURITY SYSTEMS LTD ISRAEL (BMMM JV Lead Partner)**

**On behalf of BLUE SKIES WORLD LIMITED,**

**MAGAL SECURITY SYSTEMS LIMITED &**

**MASTER POWER SYSTEMS LIMITED.....1<sup>ST</sup>  
APPLICANT**

**AND**

**GLOSEC SOLUTIONS LIMITED/**

**ORAD LIMITED (JV).....2<sup>ND</sup> APPLICANT**

**AND**

**THE ACCOUNTING OFFICER,**

**PARLIAMENTARY JOINT SERVICES,**

**PARLIAMENTARY SERVICE COMMISSION.....RESPONDENT**

**AND**

**TOP SKY LINE ENGINEERING SYSTEM LIMITED (JV Lead Partner)**

**On behalf of TANDU TECHNOLOGIES & SECURITY SYSTEMS LTD &**

**NJUCA CONSOLIDATED COMPANY LIMITED.....INTERESTED  
PARTY**

Review against the decision of the Parliamentary Service Commission in relation to Tender No. PJS/002/2019-2020 for the Supply, Installation, Configuration, Testing, Training, Commissioning and Maintenance of

Integrated Security Management System & Infrastructure for the Parliamentary Service Commission.

### **BOARD MEMBERS**

1. Ms. Faith Waigwa -Chairperson
2. Arch. Steven Oundo, OGW -Member
3. Mr. Alfred Keriolale -Member

### **IN ATTENDANCE**

1. Mr. Philemon Kiprop -Holding brief for the Secretary

### **BACKGROUND TO THE DECISION**

#### **The Bidding Process**

Parliamentary Joint Services, Parliamentary Service Commission (hereinafter referred to as "the Procuring Entity"), through the restricted method of tendering, invited sealed bids for Tender No. PJS/002/2019-2020 for the Supply, Installation, Configuration, Testing, Training, Commissioning and Maintenance of Integrated Security Management System & Infrastructure for the Parliamentary Service Commission (hereinafter referred to as "the subject tender") on 29<sup>th</sup> January 2020. The Procuring Entity held a Pre-Bid meeting on 10<sup>th</sup> February 2020 at the Mini-Chamber, County Hall located at Parliament Building.

Having received various requests for clarifications from prospective bidders concerning the Document for Supply, Installation, Configuration, Testing,

Training, Commissioning and Maintenance of Integrated Security Management System & Infrastructure for the Parliamentary Service Commission (hereinafter referred to as "the Tender Document"), the Procuring Entity issued Addenda clarifying on the provisions of the Tender Document and subsequently extended the bid submission deadline from 16<sup>th</sup> March 2020 to 18<sup>th</sup> May 2020.

### **Bid Submission Deadline and Opening of Bids**

The Procuring Entity received a total of five bids by the bid submission deadline of 18<sup>th</sup> May 2020. The same were opened by a Tender Opening Committee on the same date and recorded as follows: -

<b>Bidder No.</b>	<b>Bidder Name</b>
1	M/s Glosec Solutions Ltd & M/s Orad Ltd (JV)
2	M/s Magal Security Systems Ltd, M/s Blue Skies World Limited , M/s Magal Security Systems Ltd & M/s Master Power Systems Ltd (JV)
3	M/s Megason Electronics & Control & M/s H. Young & Company (East Africa) Limited (JV)
4	M/s Top Sky Line Engineering System Ltd, M/s Tandu Technologies & Security Systems Ltd& M/s Njuca Consolidated Company Limited (JV)
5	M/s Spire Security Solutions Limited, M/s Nightingale Enterprises Limited, M/s Micronet Power Systems Limited & M/s Octopus Systems Limited

### **Evaluation of Bids**

Having appointed an Evaluation Committee, evaluation of bids in the subject tender was carried out in the following three stages: -

- i. Determination of Responsiveness (Mandatory Requirements);
- ii. Detailed Technical Evaluation; and
- iii. Financial Evaluation.

### **1. Mandatory Requirements Evaluation**

At this stage, the Evaluation Committee applied the criterion under Stage 1. Determination of Responsiveness-Tender Evaluation Criteria in the Appendix to Instructions to Tenderers of the Tender Document. Having subjected the 5 bidders to evaluation, the Evaluation Committee found the following four bidders non-responsive: -

- *Bidder No. 1, M/s Glosec Solutions Ltd & M/s Orad Ltd (JV);*
- *Bidder No. 2, M/s Magal Security Systems Ltd, M/s Blue Skies World Limited, M/s Magal Security Systems Ltd & M/s Master Power Systems Ltd (JV);*
- *Bidder No. 3, M/s Megason Electronics &Control & M/s H. Young & Company (East Africa) Limited (JV); and*
- *Bidder No. 4, M/s Top Sky Line Engineering System Ltd, M/s Tandu Technologies & Security Systems Ltd & M/s Njuca Consolidated Company Limited (JV).*

Bidder No. 5, M/s Spire Security Solutions Limited, M/s Nightingale Enterprises Limited, M/s Micronet Power Systems Limited & M/s Octopus Systems Limited was found responsive, therefore proceeded to the Detailed Technical Evaluation Stage.

## **2. Detailed Technical Evaluation**

At this stage, the Evaluation Committee applied the criteria outlined in Stage 2. Technical Evaluation-Tender Evaluation Criteria in the Appendix to Instructions to Tenderers of the Tender Document, which required bidders to achieve a minimum technical score of 80% in order to proceed to Financial Evaluation. The Evaluation Committee subjected Bidder No. 5 (M/s Spire Security Solutions Limited, M/s Nightingale Enterprises Limited, M/s Micronet Power Systems Limited & M/s Octopus Systems Limited) to Technical Evaluation and noted that the said bidder achieved an overall technical score of 92.11% and was therefore eligible to proceed to Financial Evaluation.

## **3. Financial Evaluation**

At this stage, the Evaluation Committee applied the criterion under Stage 3. Financial Evaluation-Tender Evaluation Criteria in the Appendix to Instructions to Tenderers of the Tender Document. Clause 6.1 of Section II. Instructions to Tenderers of the Tender Document further specified that award of the subject tender would be made to the bidder who submitted the lowest evaluated tender price. The Evaluation Committee noted that

Bidder No. 5 (M/s Spire Security Solutions Limited, M/s Nightingale Enterprises Limited, M/s Micronet Power Systems Limited & M/s Octopus Systems Limited) submitted a tender price of Kshs. 3,471,493,479.00. At the end of Financial Evaluation, the Evaluation Committee declared the said bidder to be the lowest evaluated bidder.

### **Recommendation**

In line with Clause 6.1 of Section II. Instructions to Tenderers of the Tender Document, the Evaluation Committee recommended award of the subject tender to Bidder No. 5 (M/s Spire Security Solutions Limited, M/s Nightingale Enterprises Limited, M/s Micronet Power Systems Limited & M/s Octopus Systems Limited) at its tender price of Kshs. 3,471,493,479.00 inclusive of all taxes.

### **First Professional Opinion**

In a Professional Opinion dated 27<sup>th</sup> May 2020, the Procuring Entity's Principal Procurement Officer outlined the procedure applied in the subject procurement process and further reviewed the Evaluation Report dated 24<sup>th</sup> May 2020 whilst making the following observations: -

- *That the Evaluation Committee adhered to the evaluation criteria in evaluation of the proposals;*
- *That the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") and its attendant Regulations*

*were complied with, therefore the award recommendation by the Evaluation Committee was sound;*

- *That the subject tender was advertised through an open tender, therefore the market prices have been determined by the open market; and*
- *He recommended that the Evaluation Committee conducts a due diligence exercise.*

## **Due Diligence**

The Evaluation Committee carried out a due diligence exercise on Bidder No. 5 by verifying the projects undertaken by the said bidder that were similar to the project to be undertaken under the subject tender. The clients of Bidder No. 5, confirmed the following: -

- *Ministry of Defence of Israel confirmed that only 2 out of 7 components of work undertaken by M/s Octopus Systems (Joint Venture partner of Bidder No. 5) was completed;*
- *JTC 1 North, Singapore Project (Prosecur Singapore PTE Ltd) confirmed that the project was undertaken by M/s Octopus Systems who overstated the works done on the project. Further, it was stated that the completion certificates referred to by the Procuring Entity in the due diligence process were not issued by M/s Prosecur Singapore PTE Ltd. The Evaluation Committee further noted that M/s Octopus Systems was a subcontractor and not the main contractor of this project;*

- *Socar AQS Limited, Azerbaijan, Turkey stated that it has no relations with M/s Octopus Systems and could not authoritatively state that M/s Octopus Systems undertook the works cited by the Procuring Entity during the due diligence exercise. Later, the Procuring Entity received a letter dated 16<sup>th</sup> June 2020 from the Director of a company known as M/s Avandsis Group, Azerbaijan, Turkey. The Technical Director of the said company stated that M/s Octopus Systems was selected by M/s Avandsis Group in February 2018 to provide its Integrated Command and Control System for the security project of SOCAR Oil and Gas in Petkim Port, Turkey and that the system was commissioned successfully in February 2019. The Technical Director further confirmed that the system is working to the satisfaction of M/s Avandsis Group, but when asked to provide details of a contact person from M/s SOCAR AQS Limited, he declined the request stating that the contact details were confidential.*

## **Second Professional Opinion**

In a second Professional Opinion dated 24<sup>th</sup> June 2020, the Chief Procurement Officer of the Procuring Entity reviewed the evaluation process and the due diligence exercise. He further noted the approved budget of the Procuring Entity for the year 2019/2020 and 2020/2021 and found that the amount budgeted for the project in the subject tender is Kshs. 2,450,000,000.00 whereas the bidder recommended for award



submitted a bid price of Kshs. 3,471,493,479.00. The Chief Procurement Officer also observed that Bidder No. 5 was found non-responsive at the end of the due diligence exercise. In view of the foregoing, he advised the Procuring Entity's Director-General to approve termination of the subject tender pursuant to section 63 (1) (b) and (f) of the Act due to inadequate budgetary provision and that all tenders were non-responsive, respectively. The said professional opinion was approved by the Director-General on 25<sup>th</sup> June 2020.

### **Notification to Bidders**

In letters dated 26<sup>th</sup> June 2020, the Director General of the Procuring Entity notified all bidders of the reasons why their respective bids were found non-responsive and further informed bidders that the subject tender was terminated pursuant to section 63 (1) (b) and (f) of the Act.

### **REQUEST FOR REVIEW NO. 99/2020**

M/s Magal Security Systems Ltd Israel (BMMM JV Lead Partner) on behalf of Blue Skies World Limited, Magal Security Systems Limited & Master Power Systems Limited lodged a Request for Review dated 8<sup>th</sup> July 2020 and filed on 9<sup>th</sup> July 2020 together with a Statement in Support of the Request for Review sworn and filed on even date and a Further Statement in Response to the Interested Party's Affidavit, through the firm of Mwaniki Gachoka & Co. Advocates, seeking the following orders: -

- a) An order annulling and setting aside the Respondent's decision notifying the Applicant that it had not been successful in Tender No. PJS/002/2019-2020 for the Supply, Installation, Configuration, Testing, Training, Commissioning and Maintenance of Integrated Security Management System & Infrastructure for the Parliamentary Service Commission, by way of a letter dated 26<sup>th</sup> June 2020;***
- b) An order annulling and setting aside the Respondent's decision terminating Tender No. PJS/002/2019-2020 for the Supply, Installation, Configuration, Testing, Training, Commissioning and Maintenance of Integrated Security Management System & Infrastructure for the Parliamentary Service Commission under section 63 (1) (b) and (f) of the Act communicated in the letter dated 26<sup>th</sup> June 2020;***
- c) An order declaring that the Respondent failed to evaluate the Applicant's bid at the preliminary/mandatory stage in accordance with the Tender Document, the Act and the Regulations;***
- d) Consequent to (c) above, the Board be pleased to review all records of the procurement process relating to Tender No. PJS/002/2019-2020 for the Supply, Installation, Configuration, Testing, Training, Commissioning and Maintenance of Integrated Security Management System & Infrastructure for the Parliamentary Service Commission and to direct the Respondent to re-admit the Applicant back to***

***the tender process and evaluate its technical proposal and conclude the procurement process to its logical conclusion in accordance with the Tender Document, the Act and Regulations;***

***e) An order directing the Respondent to pay the costs of and incidental to these proceedings; and***

***f) Such other or further relief/reliefs as the Board shall deem just and expedient.***

In response, the Respondent lodged a Response to Review No. 99/2020, which Response is dated 10<sup>th</sup> July 2020 and filed on 13<sup>th</sup> July 2020, through Susan Mukindia Advocate while the Interested Party lodged a Replying Affidavit sworn on 22<sup>nd</sup> July 2020 and filed on even date through the firm of Gerivia Advocates LLP.

### **REQUEST FOR REVIEW NO. 101/2020**

M/s Glosec Solutions Limited/Orad Limited (JV) lodged a Request for Review dated 9<sup>th</sup> July 2020 and filed on 10<sup>th</sup> July 2020 together with a Supporting Affidavit sworn and filed on even date, through the firm of Wandabwa Advocates, seeking the following orders: -

***a) An order annulling the decision of the Respondent/Procuring Entity contained in the letter dated 26<sup>th</sup> June 2020, to declare the Applicant responsive and allow the Applicant to proceed to Financial Evaluation;***

- b) An order setting aside the Procuring Entity's decision terminating the subject procurement process;***
- c) An order directing the Procuring Entity to competitively negotiate with the responsive bidders as provided for in section 131 and 132 of the Public Procurement and Asset Disposal Act No. 33 of 2015; and***
- d) An order awarding costs to the Applicant.***

In response, the Respondent lodged a Response to Review No. 101/2020, which Response is dated 10<sup>th</sup> July 2020 and filed on 13<sup>th</sup> July 2020, through Susan Mukindia Advocate while the Interested Party lodged a Replying Affidavit sworn on 22<sup>nd</sup> July 2020 and filed on even date through the firm of Gerivia Advocates LLP.

On 16<sup>th</sup> March 2020, the Board issued Circular No. 1/2020 and the same was published on the Public Procurement Regulatory Authority's website ([www.ppra.go.ke](http://www.ppra.go.ke)) in recognition of the challenges posed by the COVID-19 pandemic. Through the said Circular, the Board 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 24<sup>th</sup> 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. Clause 1 at page 2 of the said Circular further specified that pleadings and documents shall be deemed as properly filed if they bear the official stamp of the Board.

In so far as Request for Review No. 99/2020 is concerned, M/s Magal Security Systems Ltd Israel (BMMM JV Lead Partner) on behalf of Blue Skies World Limited, Magal Security Systems Limited & Master Power Systems Limited lodged Written Submissions dated and filed on 17<sup>th</sup> July 2020, the Respondent lodged Written Submissions dated and filed on 22<sup>nd</sup> July 2020 while the Interested Party lodged Written Submissions dated and filed on 22<sup>nd</sup> July 2020. With respect to Request for Review No. 101/2020, M/s Glosec Solutions Limited/Orad Limited (JV) lodged Written Submissions dated and filed on 27<sup>th</sup> July 2020, the Respondent lodged Written Submissions dated and filed on 27<sup>th</sup> July 2020 while the Interested Party lodged Written Submissions dated and filed on 24<sup>th</sup> July 2020.

### **CONSOLIDATION OF THE TWO REQUEST FOR REVIEW APPLICATIONS**

When Request for Review No. 99/2020 and Request for Review No. 101/2020 came up for deliberation, the Board noted that they both relate

to the same tender advertised by the same Procuring Entity. The Board further noted that where two Request for Review applications are filed relating to the same tender, it has discretion to consolidate the request for review applications under Regulation 211 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "Regulations 2020").

Accordingly, the Board consolidated the two Request for Review applications, bearing in mind that any orders issued by the Board upon completing review of either of the two applications must be taken up by the same Accounting Officer in both applications and this would affect both all parties to the two request for review applications since the tender under review before this Board is the same in both applications.

Pursuant to the said consolidation, the parties to the Request for Review shall be identified as follows: -

- M/s Magal Security Systems Ltd Israel (BMMM JV Lead Partner) on behalf of Blue Skies World Limited, Magal Security Systems Limited & Master Power Systems Limited.....1<sup>st</sup> Applicant;
- M/s Glosec Solutions Limited/Orad Limited (JV).....2<sup>nd</sup> Applicant;
- The Accounting Officer, Parliamentary Joint Services, Parliamentary Services Commission.....Respondent;
- M/s Top Sky Line Engineering System Limited (JV Lead Partner) on behalf of Tandu Technologies & Security Systems Ltd & Njuca

Consolidated Company Limited.....Interested  
Party

**BOARD’S DECISION**

The Board has considered all the pleadings and written submissions filed before it, including the confidential documents submitted to it pursuant to section 67 (3) (e) of the Act and finds that the following issue calls for determination: -

**Whether the Procuring Entity terminated the subject procurement process in accordance with section 63 of the Act, thus ousting the jurisdiction of the Board.**

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 2<sup>nd</sup> 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 precondition that first needs to be satisfied in the said subsection 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 statutory pre-conditions of 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 provisions of section 63 of the Act, which determination can only be made by interrogating the reasons cited for termination by the Procuring Entity and whether or not the Procuring Entity satisfied the statutory pre-conditions for termination outlined in section 63 of the Act.

Section 63 (1) (b) & (f), 2, 3 and 4 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) inadequate budgetary provision;***

***(c) .....***

***(d) .....***

***(e) .....***

***(f) all evaluated tenders are non-responsive;***

***(g) .....***

***(h) .....***

***(i) .....***

- (2) An accounting officer who terminates procurement or asset disposal proceedings shall give the Authority a written report on the termination within fourteen days.***
- (3) A report under subsection (2) shall include the reasons for the termination.***
- (4) An accounting officer shall notify all persons who submitted tenders of the termination within fourteen days of termination and such notice shall contain the reason for termination.***

The Procuring Entity cited section 63 (1) (b) and (f) of the Act as the two reasons for termination of the subject tender. Having considered parties' pleadings and written submissions, the Board now proceeds to address the same as follows: -

**a) All evaluated tenders are non-responsive**

The Procuring Entity cited section 63 (1) (f) of the Act to support its view that all evaluated tenders were non-responsive therefore leading to termination of the subject tender.

In addressing the question whether the Procuring Entity's second reason meets the threshold of section 63 (1) (f) of the Act, the Board notes that according to the Evaluation Report dated 24<sup>th</sup> May 2020, it is only M/s Spire

Security Solutions Limited in Joint Venture with M/s Micronet Power Systems Limited and M/s Octopus Systems who proceeded to Financial Evaluation and was found to be the lowest evaluated tenderer. According to the Due Diligence Report dated 23<sup>rd</sup> June 2020, the Procuring Entity was not satisfied by the responses it received from third parties contacted when confirming and verifying the qualifications of M/s Spire Security Solutions Limited in Joint Venture with M/s Micronet Power Systems Limited and M/s Octopus Systems. Accordingly, the said bidder was found non-responsive.

The Board would like to make an observation that when a procuring entity receives negative responses after a due diligence exercise conducted on the lowest evaluated tenderer, the procuring entity ought to recommend the next lowest evaluated tenderer for award of the tender, subject to a similar due diligence exercise conducted on that next lowest evaluated tenderer in accordance with the procedure outlined in section 83 (1) of the Act, before making a decision whether or not the procurement proceedings should be terminated pursuant to section 63 (1) (f) of the Act. However, the circumstances of the instant Request for Review are different, in that M/s Spire Security Solutions Limited in Joint Venture with M/s Micronet Power Systems Limited and M/s Octopus Systems was the only bidder who proceeded to Financial Evaluation. As a result, the Procuring Entity did not have other bidders at the Financial Evaluation Stage, for it to determine the next lowest evaluated bidder to be recommended for award of the subject tender subject to a due diligence exercise.

Given that the 1<sup>st</sup> Applicant and the 2<sup>nd</sup> Applicant have challenged the reasons why their respective bids were found non-responsive, the Board must determine whether the 1<sup>st</sup> Applicant and the 2<sup>nd</sup> Applicant were rightfully found non-responsive in order for the Procuring Entity to cite the reason under section 63 (1) (f) of the Act in terminating the subject tender. Accordingly, the Board proceeds to make the following findings: -

- **1<sup>st</sup> Applicant**

The 1<sup>st</sup> Applicant received a letter of notification of unsuccessful bid dated 26<sup>th</sup> June 2020 with the following details: -

***"The above caption tender refers***

***Following the conclusion of the procurement process, we regret to inform you that your tender was not successful due to the reason cited below***

- ***One of your joint venture partners, M/s Blue Skies World Limited, a foreign/international company did not specify that they would source at least 40% of their supplies and labour from citizen contractors in Kenya as required in the Tender Document..."***



It is worth noting that Clause (ii) of Stage 1. Determination of Responsiveness-Tender Evaluation Criteria of the Appendix to Instructions to Tenderers of the Tender Document provided as follows: -

***"Foreign and international bidders shall provide a declaration that they source at least 40% of their supplies and labour from citizen contractors"***

In procurement practice a bidder is also referred to as a tenderer just like a bid document would be referred to as a tender document. In essence, the term "bidder" and "tenderer" are used interchangeably and have the same meaning.

The Board studied the Tender Document to establish who the Procuring Entity considered to be eligible tenderers and notes that the Appendix to Instructions to Tenderers, (which refers to Clause 1.4 and 1.9 of Section II. Instructions to Tenderers) of the Tender Document provides as follows: -

Instructions to Tenderers Reference	Particulars of Appendix to Instructions to Tenderers
1.4	Eligible tenderers are the pre-qualified firms
1.9	Joint Venture or individual tenderers only

Clause 1.4 and Clause 1.9 of Section II. Instructions to Tenderers, referenced in the Appendix to Instructions to Tenderers of the Tender Document provide as follows: -

***"1.4. In the event that pre-qualification of potential tenderers has been undertaken, only tenders from pre-qualified tenderers will be considered for award of contract. These tenderers would submit with their tenders any information updating their original pre-qualification applications or, alternatively, confirm in their tenders that the originally submitted pre-qualification information remains essentially correct as of the date of tender submission***

***1.9. Each tenderer shall submit only one tender, either individually or as a partner in a joint venture. A tenderer who submits or participates in more than one tender (other than as a sub-contractor or in cases of alternatives that have been permitted or requested) will cause all the proposals with the tenderer's participation to be disqualified"***

Further to this, Section I. Invitation to Tender of the Tender Document states as follows: -

***"The Parliamentary Service Commission invites pre-qualified firms to submit sealed bids for the supply, installation, configuration, testing, training, maintenance and commissioning of Integrated Security Management System Infrastructure"***

Having considered the foregoing provisions, the Board observes that according to the Tender Document, the Procuring Entity considered eligible tenderers to be tenderers who have been prequalified and are either a Joint Venture or Individual Tenderers. Such prequalified tenderers would submit only one tender as an individual or as a partner in a joint venture. The Board studied the Procuring Entity's confidential file and notes that the Procuring Entity pre-qualified five tenderers who were subsequently invited to submit bids in response to the subject tender through letters dated 29<sup>th</sup> January 2020, which states as follows: -

***"The Parliamentary Service Commission invites you to submit sealed bids for the supply, installation, configuration, testing, training, maintenance and commissioning of Integrated Security Management System Infrastructure***

***You may obtain further information from the procurement office on 2<sup>nd</sup> floor, Protection House, Nairobi..."***

Further to this, Clause 1.6 of Section II. Instructions to Tenderers of the Tender Document specified the requirements for joint ventures as follows:

-

***"Tenders submitted by a joint venture of two or more firms as partners shall comply with the following requirements, unless otherwise stated:***

***(a) .....***;

- (b) .....
- (c) **all partners shall be jointly and severally liable for the execution of the Contract in accordance with the contract terms;**
- (d) **one of the partners will be nominated as being in charge, authorized to incur liabilities, and receive instructions for and on behalf of all partners of the joint venture; and**
- (e) **the execution of the entire contract, including payment shall be done exclusively with the partner in charge”**

From the foregoing, it is evident that the Procuring Entity considered joint ventures to be eligible tenderers and that one of the partners in the joint venture would be nominated as being in charge and authorized to incur liabilities, and receive instructions for and on behalf of all partners of the joint venture. Furthermore, execution of the entire contract including payment would be done exclusively with the partner in charge.

At Page C-2015 of the **Indian Trade Journal (Volume 419, Issues 10-13)**, the Indian Department of Commercial Intelligence and Statistics, explains the role of a Lead Partner in a Joint Venture as follows: -

***"The lead partner is responsible for successful performance of the contract. The bid is submitted by the lead partner for***

***the entire work and the co-opted partner/s shall enter into a joint venture agreement”***

Having established that the Tender Document allowed tenderers bidding as joint ventures to nominate a lead partner authorized to incur liabilities, and receive instructions for and on behalf of all partners of the joint venture, it is the Board’s considered view that in a Joint Venture where a lead partner has been nominated as being responsible for the successful implementation of the project in a tender, a procuring entity ought to consider the documentation provided by the lead partner and as approved and/or authorized by the joint venture partners, unless otherwise provided in the tender document.

In determining the documentation provided by the Applicant in response to the criterion under consideration, the Board studied the 1<sup>st</sup> Applicant’s original bid and notes that it provided the following: -

- At page 0002 of its original bid, a document titled **‘JV Introduction’** which gives an overview of the 1<sup>st</sup> Applicant’s Joint Venture company as follows: -

***“Magal Security Systems Ltd, in cooperation with Blue Skies World, Magal Security Systems Limited (Magal Kenya) and Master Power Systems Limited has established a Joint Venture (the “BMMM JV”) for implementing the ISMS project as required in Tender No. PJS/002/2019-2020 (refer to the following diagram)***



.....

***1.5. The BMMM JV is a joint venture established between Magal Israel, Blue Skies World, Magal Kenya and Master Power Systems, with Magal Security Systems Ltd (Magal Israel) serving as the Lead Contractor...for purposes of implementing the ISMS as required in Tender No. PJS/002/2019-2020”***

- At pages 0012 to 0016 of its original bid, the 1<sup>st</sup> Applicant attached a Joint Venture Agreement dated 10<sup>th</sup> April 2020 between Magal Security Systems Ltd (MAGAL Israel), Blue Skies World Limited, Magal Security Systems Limited (MAGAL Kenya) and Master Power Systems Limited. According to the recital clause of the said joint venture agreement, the joint venture partners assert as follows: -

***"WHEREAS***

- A. Parliamentary Service Commission of Kenya (the Customer) has invited bidders to participate in Tender No. PJS/002/2019-2020 for the Supply, Installation, Configuration, Testing, Training, Commissioning and Maintenance of Integrated Security Management System & Infrastructure for the Parliamentary Service Commission***
- B. MAGAL ISRAEL, BSW, MAGAL KENYA and MPSL are interested in collaboration for the execution of the Project, in the framework of a Joint Venture in the following manner:***

- ✓ **MAGAL ISRAEL will act as the Group Leader of the Joint Venture and shall have the authority to represent and bind the Joint Venture for the purposes set in the RFQ**
- ✓ **The Parties will be jointly and severally responsible for the performance of the Project vis-à-vis the Customer... ”**

- At page 0130 of its original bid, the 1<sup>st</sup> Applicant attached a Power of Attorney which contains the following details: -

***"We the undersigned, authorized representatives of Magal Security Systems Ltd ("Magal Israel"), Magal Security System Limited, Master Power Systems Limited and Blue Skies World Limited have formed a joint venture (together, "the Joint Venture") and appointed Magal Israel as lead partner of the Joint Venture.***

***We hereby authorize Magal Israel through its authorized representatives, to submit and sign on behalf of the Joint Venture, on any proposal, document and form connected to Tender No. PJS/002/2019-2020 for the Supply, Installation, Configuration, Testing, Training, Commissioning and Maintenance of Integrated Security Management System & Infrastructure for the Parliamentary Service Commission (the: "Tender") and to bind the Joint Venture and any party thereof in relation to the above-mentioned Tender.***

***Respectfully,***

***[signature affixed]***

***[signature affixed]***

.....

.....

***Magal Security Systems Ltd***

***Magal Security Systems Limited***

**Name: Arnon Bram**  
**Title: General Manager**  
**Date: 5/4/2020**

**Name: Guy Amsellem**  
**Title: General Manager**  
**Date: 2/4/2020**

*[signature affixed]*

.....

**Name: Tsakash Modoshiya**  
**Title: Director**  
**Date: 07/04/2020**

*[signature affixed]*

.....

**Name: Evan Romano**  
**Title: Director**  
**Date: 10/4/2020**

- At page 0129 of its original bid, the 1<sup>st</sup> Applicant attached another Power of Attorney with the following details: -

***"We the undersigned, Arnon Bram, General Manager of Magal Israel-Magal Security Systems Ltd (the Company)... hereby authorize the persons listed herein under, to submit and sign on behalf of the Company and/or on behalf of the Joint Venture of Blue Skies World Limited, Magal Security Systems Ltd, Magal Security Systems Limited and Master Power Systems Limited (together: "the Joint Venture") on any proposal, document, declaration and form connected to Tender No. PJS/002/2019-2020 for the Supply, Installation, Configuration, Testing, Training, Commissioning and Maintenance of Integrated Security Management System & Infrastructure for the Parliamentary Service Commission (the: "Tender") and to bind the Joint Venture and any party thereof (including the Company) in relation to the above-mentioned Tender:...***



- ✓ ***Mr. Benny (Bunim) Brimer bearer of Israeli Passport No. 39027065;***
- ✓ ***Mr. Grisha Ziman bearer of Israeli Passport No. 30083184;***
- ✓ ***Mr. Guy Amsellem bearer of Israeli Passport No. 23951414;***
- ✓ ***Mr. Ronald Kiprono Kirui bearer of Kenyan Passport No. A1564637.”***

Having studied the documents listed hereinbefore, the Board observes that the 1<sup>st</sup> Applicant explained the composition of its joint venture partnership comprising of four companies known as Magal Security Systems Ltd (Magal Israel), Magal Security Systems Limited (Magal Kenya), Master Power Systems Limited and Blue Skies World Limited in the document titled **Joint Venture Introduction**.

The 1<sup>st</sup> Applicant further specified that Magal Israel would be the Lead Partner in the Joint Venture, with authority to represent and bind the Joint Venture (i.e. BMMM JV). In addition to this, the partners in the joint venture will be jointly and severally responsible for the performance of the Project. The Board further notes that the Power of Attorney found at page 0130 of the 1<sup>st</sup> Applicant's original bid confirms that all the joint venture partner's representatives confirmed the appointment of Magal Israel as the Lead partner to submit and sign any proposal, document and form in connection to the subject tender on behalf of the Joint Venture, through Magal Israel's authorized representative. Given that Magal Israel was appointed as the Lead partner in the 1<sup>st</sup> Applicant's Joint venture

partnership, Magal Israel's authorized representative, i.e. Mr. Arnon Bram subsequently authorized the officers of Magal Israel (i.e. one of the being Mr. Grisha Ziman) to submit and sign any proposal, document, declaration and form in connection to the subject tender on behalf of Magal Israel.

This explains why at page 0127 of the 1<sup>st</sup> Applicant's original bid, Magal Israel attached a Citizen Contractors Declaration issued and signed by Mr. Grisha Ziman (i.e. one of the authorized officers of Magal Israel listed in the Power of Attorney issued by Mr. Arnon Bram, General Manager of Magal Israel) and bearing Magal Israel's stamp with the address 17 Adtalef St, Yahud 56100, Israel P.O.X70, which declaration contains the following details: -

***"Dear Sir,***

***I, the undersigned, Mr. Grisha Ziman, the authorized signatory on behalf of BMMM JV (the joint venture of blue skies world limited, Magal Security Systems Limited, Magal Security Systems Limited), hereby confirms that the joint venture will source at least 40% of its supplies and labor for Tender No. PJS/002/2019-2020 for the Supply, Installation, Configuration, Testing, Training, Commissioning and Maintenance of Integrated Security Management System &***

***Infrastructure for the Parliamentary Service Commission  
from Kenyan citizen contractors”***

The Board has established that Joint Ventures were eligible tenderers pursuant to Clause 1.9 of the Appendix to Instruction to Tenderers of the Tender Document and that the 1<sup>st</sup> Applicant provided sufficient evidence of the manner in which the joint venture partnership would operate in implementation of the subject tender. It is the Board’s considered view that the Citizen Contractors Declaration found at page 0127 of the 1<sup>st</sup> Applicant’s original bid demonstrates that the joint venture comprising of Magal Security Systems Limited (Magal Israel) as the Lead Partner, Magal Security Systems Limited (Magal Kenya), Master Power Systems Limited and Blue Skies World Limited would source at least 40% of its supplies and labor for the subject tender from Kenyan citizen contractors. Furthermore, the Tender Document did not require each individual partner in a joint venture to provide a Citizen Contractors Declaration, but required a foreign or international tenderer to provide a citizen contractors declaration and in this case, the joint venture as the tenderer (i.e BMMM JV) has provided a citizen contractors declaration. This means that the 1<sup>st</sup> Applicant satisfied the requirement of Clause (ii) of Stage 1. Determination of Responsiveness-Tender Evaluation Criteria of the Appendix to Instructions to Tenderers of the Tender Document.

Accordingly, the Board finds that the Procuring Entity ought to have found the 1<sup>st</sup> Applicant's bid responsive at the Preliminary Evaluation Stage since the 1<sup>st</sup> Applicant satisfied the requirement of Clause (ii) of Stage 1. Determination of Responsiveness-Tender Evaluation Criteria of the Appendix to Instructions to Tenderers of the Tender Document and was therefore eligible to proceed to Technical Evaluation noting that this was the only criterion under which the 1<sup>st</sup> Applicant was wrongfully and/or unfairly found non-responsive.

- **2<sup>nd</sup> Applicant**

The 2<sup>nd</sup> Applicant received a letter of notification of unsuccessful bid dated 26<sup>th</sup> June 2020 which contains the following details: -

***"The above captioned tender refers***

***Following the conclusion of the procurement process, we regret to inform you that your tender was not successful due to the following reasons cited below***

- ✓ ***You attached a confidential business questionnaire which was not duly filled***
- ✓ ***Your partner, M/s Orad Ltd did not provide details of the directors in the confidential business questionnaire form"***

It is worth noting that Clause (ix) of Stage I. Determination of Responsiveness-Tender Evaluation Criteria of the Appendix to Instructions

to Tenderers of the Tender Document required bidders to submit **“Duly completed confidential business questionnaire form”**.

The Board considered parties’ submissions on the question whether the 2<sup>nd</sup> Applicant satisfied the above provision and notes that it is not contested that the 2<sup>nd</sup> Applicant provided a Confidential Business Questionnaire Form for its Joint Venture Partner, that is, M/s Orad Ltd. However, according to the Procuring Entity, the confidential business questionnaire form provided by the 2<sup>nd</sup> Applicant did not specify the directors of M/s Orad Ltd.

The Board studied the 2<sup>nd</sup> Applicant’s original bid and notes that: -

- ✓ At pages 714 to 715 of its original bid, the 2<sup>nd</sup> Applicant provided a Confidential Business Questionnaire Form. Page 714 which bore the first part of the Confidential Business Questionnaire Form was duly completed by the 2<sup>nd</sup> Applicant. However, on page 715 of its original bid, which is the second and last part of the Confidential Business Questionnaire Form, the 2<sup>nd</sup> Applicant with respect to details of all directors completed the Confidential Business Questionnaire Form as follows with the following details: -

***“Give details of all directors as follows:***

<b><i>Name in full</i></b>	<b><i>Nationality</i></b>	<b><i>Citizenship</i></b>	<b><i>Shares</i></b>
----------------------------	---------------------------	---------------------------	----------------------

- 1. A public company, see following document (equivalent to Kenya CR 12)***

2. ....;
3. ....;
4. ....”

Further, on page 715 of its original bid, the Confidential Business Questionnaire Form was signed by Rami Zarchi, CTO and stamped with a stamp bearing the name Orad Ltd and telephone number Tel +972-3-5576666.

The Board observes that the 2<sup>nd</sup> Applicant submitted a confidential business questionnaire for its Joint Venture Partner, M/s Orad Ltd duly completed in terms of the information applicable to it. With respect to details of its directors, the Procuring Entity was referred to a document, considered to be an equivalent to Kenya’s CR 12. This prompted the Board to study the following pages of the 2<sup>nd</sup> Applicant’s original bid that appear immediately after page 715 and which contain the following: -

- ✓ At page 716 of its original bid, the 2<sup>nd</sup> Applicant attached a Certificate of Translation certifying that one Mr. Alfredo Berkowitz, a notary at Tel Aviv Israel is well acquainted with the Hebrew and English Language and that the document attached is a correct complete translation prepared by the said Mr. Alfredo Berkowitz;
- ✓ At page 717 to 723 of its original bid, the 2<sup>nd</sup> Applicant attached a document titled **“Immediate Report of the Roster of Officials in High-Ranking Positions and the substitute directors in the**

**Corporation (i.e. Orad Ltd)”,** with several details including the following: -

<b>No</b>	<b>Name</b>	<b>Position</b>
1	Nir Peleg	Chairman of the Board of Directors
2	Ammon Adoram	Ordinary Director
3	Ariel Adoram	CEO
4	Yitzhak Sultan	Ordinary Director
5	Ilan Benguigui	Ordinary Director
6	Avraham Nachmias	External Director
7	Gideon Altman	External Director
8	Iris Arkin Raviv	Independent Director
9	Izak Asher	Other .....
10	Einat Vinograd	Accountant
11	Ilanit Grossman	Other Legal Counsel, Secretary of the Company and Compliance Officer
12	Yossi Gofer	Other VP for Marketing and Sales
13	Daniel Spira	Internal Auditor

The Board further studied the 2<sup>nd</sup> Applicant’s original bid to establish whether the 2<sup>nd</sup> Applicant provided information regarding the shares held in M/s Orad Ltd and notes that at page 98 of its original bid, the 2<sup>nd</sup> Applicant attached an **“Association Memorandum”** for M/s Orad Ltd, which shows that the number of shares taken were as follows: -

**Names of the undersigned**

**and their ID number**

**Number of shares**

***Amnon Adoram***

***95***

***Ariel Adoram***

***5***

***Total of shares distributed***

***100 regular shares***

Having noted that the 2<sup>nd</sup> Applicant referred the Procuring Entity to a document considered to be an equivalent to a Kenyan CR 12, the Board studied the 2<sup>nd</sup> Applicant's bid and notes that the 2<sup>nd</sup> Applicant attached a **Certificate of Incorporation & Registration of Private Company issued to M/s Orad Ltd** at page 97 of its original bid, which certificate shows that the said company is a private company registered in Israel. This explains why the 2<sup>nd</sup> Applicant could not provide a Kenyan CR 12 for M/s Orad Ltd because the said company is not registered in Kenya, but is a foreign company whose CR 12 equivalent does not take the same format as the ones issued to companies registered in Kenya. The document referenced in the confidential business questionnaire form for M/s Orad Ltd lists 1 Chairman of the Board of Directors and 6 Directors. Two of the said directors, i.e. Amnon Adoram and Ariel Adoram hold shares in M/s Orad Ltd.

M/s Orad Ltd, being a foreign company registered in Israel, provided a document which it specified was an equivalent of a CR 12 extract. Upon



perusal of the referenced document, details of the directors of M/s Orad Ltd are provided. Therefore, the 2<sup>nd</sup> Applicant cannot be faulted for referring the Procuring Entity to a document appearing immediately after the Confidential Business Questionnaire form for M/s Orad Ltd, wherein details of its directors can be found.

It is the Board's considered view that the Evaluation Committee ought to have taken the document titled "**Immediate Report of the Roster of Officials in High-Ranking Positions and the substitute directors in the Corporation (i.e. Orad Ltd)**" appearing at pages 717 to 723 into consideration since the details therein coincide with the details required in the Confidential Business Questionnaire Form for M/s Orad Ltd. If there was doubt as to the directorship or shareholding of M/s Orad Ltd, the Procuring Entity was at liberty to conduct due diligence on M/s Orad Ltd in the event the 2<sup>nd</sup> Applicant was found to be the lowest evaluated tenderer in accordance with section 83 of the Act to confirm and verify the directorship and shareholding of M/s Orad Ltd.

The Board finds that the 2<sup>nd</sup> Applicant satisfied the requirement of Clause (ix) of Stage 1. Determination of Responsiveness-Tender Evaluation Criteria of the Appendix to Instructions to Tenderers of the Tender Document and was therefore eligible to proceed to Technical Evaluation.

Accordingly, the Board finds that the Procuring Entity ought to have found the 2<sup>nd</sup> Applicant's bid responsive at the Preliminary Evaluation Stage since the 2<sup>nd</sup> Applicant satisfied the requirement of Clause (ix) of Stage 1. Determination of Responsiveness-Tender Evaluation Criteria of the Appendix to Instructions to Tenderers of the Tender Document and was therefore eligible to proceed to Technical Evaluation noting that this was the only criterion under which the 2<sup>nd</sup> Applicant was wrongfully and/or unfairly found non-responsive.

Having found that the 1<sup>st</sup> Applicant and the 2<sup>nd</sup> Applicant satisfied the requirements at the Preliminary Evaluation Stage, the Board finds, the Procuring Entity's reason for terminating the subject tender in that all evaluated tenders were non-responsive pursuant to section 63 (1) (f) of the Act was not available to the Procuring Entity in the circumstances.

Accordingly, the Board finds that termination of the procurement proceedings of the subject tender on grounds that all evaluated tenders were non-responsive under section 63 (1) (f) of the Act was unlawful for the reason that the Board has found the 1<sup>st</sup> and 2<sup>nd</sup> Applicants' respective tenders were wrongfully and/or unfairly found non-responsive.

## **b) Inadequate budgetary provision**

The Procuring Entity received a total of 5 bids in response to the letters of invitation dated 29<sup>th</sup> January 2020. Since this was a one-enveloped tender, the Procuring Entity read out the prices submitted by bidders by the tender opening date of 18<sup>th</sup> May 2020 as can be seen from the Tender Opening Minutes dated 18<sup>th</sup> May 2020 as follows: -

***"Min. No. 03/PJS/RFP/002/2019-2020 OPENING PROCESS***

***The Chair requested all present to introduce themselves and thereafter, ordered the opening of the bids one at a time. A total of five (05) were opened and the names, the Bid Bonds and the Total amounts were read out loudly and recorded as shown below: -***

<b>No</b>	<b>Firms Names</b>	<b>Security Bond (Kshs)</b>	<b>Insurance/Bank Company</b>	<b>Total Amount</b>	<b>Technical Documents</b>	<b>Total Bid Amount</b>
1	Glosec and Orad (JV)	Yes, 180 days	Corporate Insurance Ltd	10,000,000.00	5 original 5 copies 1 soft copy	2,849,991,867.00
2	Magal Security Systems/Master Power Solutions/Blue Skies World/Registered Electrical Solutions	Yes, 180 days	The Monarch Insurance	10,000,000.00	8 Original 8 copies 1 soft copy	2,494,551,308.00

3	Megason Electra and H. Young East Africa Ltd	Yes, 180 days	Kenya Commercial Bank	10,000,000.00	6 original 6 copies 1 soft copy	2,759,753,938.00
4	Top Skyline Engineering Systems	Yes, 180 days	Sidian Bank	10,000,000.00	4 original 4 copies 1 soft copy	2,740,369,982.00
5	Micronet Power Systems/Octopus Control and Command spire Security Solutions/Nightingale Enterprises Ltd	Yes, 180 days	Credit Bank	10,000,000.00	5 original 5 copies 1 soft copy	3,471,493,479.00

Subsequently thereafter and with full knowledge of the prices quoted by bidders, the Procuring Entity proceeded to conduct an evaluation exercise at the Preliminary, Detailed Technical and Financial Evaluation stages and even subjected a bidder determined to have submitted the lowest evaluated price to a due diligence exercise.

It is worth noting that section 44 (2) of the Act states that: -

**"44 (1) .....**

**(2) In the performance of the responsibility under subsection (1), an accounting officer shall—**

***(a) ensure that procurements of goods, works and services of the public entity are within approved budget of that entity"***

On the other hand, section 45 (3) of the Act provides as follows: -

***"45. Corporate decisions and segregation of responsibilities***

***(1) .....***

***(2) .....***

***(3) All procurement processes shall be—***

***(a) within the approved budget of the procuring entity and shall be planned by the procuring entity concerned through an annual procurement plan***

Further, section 53 (2) of the Act requires an accounting officer of a procuring entity to undertake the following: -

***"(1) .....***

***(2) An accounting officer shall prepare an annual procurement plan which is realistic in a format set out in the Regulations within the approved budget prior to commencement of each financial year as part of the annual budget preparation process."***

The above provisions demonstrate that the accounting officer of a procuring entity must prepare an annual procurement plan within the approved budget prior to commencement of each financial year. This means, in making a decision whether or not to initiate a procurement process, the accounting officer must ensure that there is adequate budgetary allocation from the procurement plan that he or she prepared before the commencement of a financial year.

In determining whether the Procuring Entity lawfully terminated the subject tender pursuant to section 63 (1) (b) of the Act, the Board observes that at paragraph 31 of its Written Submissions, the Procuring Entity referred to a document titled **“Estimates of Recurrent and Development Expenditure of the Parliamentary Service Commission for the year Ending 30<sup>th</sup> June 2021 and Projections for 2021/2022-2023”**. According to the Procuring Entity, the amounts quoted by the lowest evaluated bidder was over and above its project cost estimate as follows: -

**“Year ending 30<sup>th</sup> June 2018 and projections for 2019/2020-2021:  
Illustration 1**

Head Code	Unit	Item	Item Description	Approved Estimates FY 2017/18	Draft Estimates FY 2018/19	Proposed Budget Estimates FY2019/20	Proposed Budget Estimates FY 2020/21
1003	1	3111108	Installation	<b>500,000,000</b>	<b>800,000,000</b>	<b>750,000,000</b>	<b>400,000,000</b>

			of Integrated Security System - Purchase of Police and Security Equipment				
--	--	--	--	--	--	--	--

**Year ending 30<sup>th</sup> June 2021 and projections for 2019/2020-2021:Illustration II**

Head Code	Unit	Item	Item Description	Approved Estimates FY 2019/20	Draft Estimates FY 2020/21	Proposed Budget Estimates FY2021/2022	Proposed Budget Estimates FY 2022/2023
1003	1	311 110 8	Installation of Integrated Security System- Purchase of Police and Security Equipment	<b>700,000,000</b>	<b>265,550,000</b>	<b>500,000,000</b>	<b>1,000,000,000</b>

The Procuring Entity further states as follows at paragraphs 32 to 36 of its Written Submissions: -

***"32. Since government projects may take several years to implement, they are usually budgeted for in advance through projections. In this instance when the Parliamentary Service***

***Commission resolved to initiate the project, it was estimated that it would take four years to complete. As can be observed from the illustration I above, the total amount that was allocated towards the project during the FY 2017/18 was Kshs 500,000,000/-. This was done with the projection that the project would kick start within the financial year 2017/2018, and end in financial year 2020/2021. Thus, the total amount that was projected for the project in 2017/18 is as follows; assuming the project started according to plan;***

***Kshs 500,000,000 (allocation for 2017/18)***

***+Kshs 800,000,000 (projection for 2018/19)***

***+Kshs 750,000,000 (projection for 2019/20)***

***+Kshs 400,000,000 (projection for 2020/21)***

***Kshs 2,450,000,000/= (Total Cost for project)***

***33. However, the project did not start within that period as anticipated and thus the monies allocated towards the project in the financial year 2017/18 automatically lapse every financial year since no monies were expended towards the project.***

***34. The procurement process that is the subject of this application was initiated in Financial Year 2019/2020, the projections were revised as seen in the preceding financial projections as seen in the illustration II;***



***Kshs 700,000,000 (allocation for 2019/20)***

***+Kshs 265,550,000 (projection for 2020/21)***

***+Kshs 500,000,000 (projection for 2021/22)***

***+Kshs 1,000,000,000 (projection for 2022/23)***

***Kshs 2,465,550,000/= (Total Cost for project)***

***35. This projection, even though it is projected to be revised upwards in the budget, the amount quoted by the lowest evaluated bidder exceeded the total budget allocated by Parliament to the project.***

***36. As such, the Respondent's hands were tied that it had to terminate the subject procurement on account of insufficient budgetary allocation vis-a-vis the amount quoted by the bidders."***

The Board considered the foregoing submissions and further studied the Procuring Entity's "**Estimates of Recurrent and Development Expenditure of the Parliamentary Service Commission for the year Ending 30<sup>th</sup> June 2021 and Projections for 2021/2022-2023**", which forms part of the confidential file submitted pursuant to section 67 (3) (e) of the Act and proceeds to make the following findings: -

According to the Procuring Entity it previously had a total budgetary allocation of **Kshs. 2,450,000,000/-** for the financial year ending 2017/2018, 2018/2019, 2019/2020, 2020/2021 and had assumed that the project in the subject tender would commence in the financial year 2017/2018 and end in the financial year 2020/2021. However, according to the Procuring Entity, the project in the subject tender commenced in the financial year 2019/2020 and expected to be completed in the financial year 2022/2023 with the budgetary allocation having been revised slightly upwards to a total of Kshs. **2,465,550,000/-** (i.e. financial years 2019/2020, 2020/2021, 2021/2022, 2022/2023).

The Board observes that the Procuring Entity argued at paragraph 28 of its Written Submissions that the Accounting Officer was satisfied at the commencement of the procurement process that there was an approved budget for the tender and that the only bidder who proceeded to financial evaluation submitted a tender price which was above the Procuring Entity's approved budget. The foregoing submissions notwithstanding and as earlier noted, the Procuring Entity's Evaluation Committee proceeded with evaluation of tenders in the subject tender, recommended award of the subject tender to the tenderer determined to have submitted the lowest evaluated tender price (i.e. M/s Spire Security Solutions Limited in Joint Venture with M/s Micronet Power Systems Limited and M/s Octopus Systems Limited at the tender price of **Kshs. 3,472,493,479.00**).

Secondly, according to a Professional Opinion dated 27<sup>th</sup> May 2020 (first professional opinion), the Procuring Entity's Principal Procurement Officer stated as follows: -

***"(d) Whether the recommended price for standard goods, services and works are within the indicative market prices***

***This was an open tender for Procurement of Works (Building and Associated Civil Engineering Works) and therefore the market prices are determined by market forces***

***I therefore make a finding that the market prices were determined by the open market and the budget set by the Commission for the tender and therefore the recommended price is within the indicative market prices***

***(e) availability of funds***

***Funds are available for the assignment"***

It is evident that the Procuring Entity's Principal Procurement Officer advised the Accounting Officer that the recommended lowest evaluated tender price (i.e. the tender sum of Kshs. 3,472,493,479.00 at which the Evaluation Committee recommended award of the subject tender to M/s Spire Security Solutions Limited in Joint Venture with M/s Micronet Power Systems Limited and M/s Octopus Systems) was within market prices. Further to this, the Principal Procurement Officer of the Procuring Entity

asserted that there was adequate funds for implementation of the subject tender. The Procuring Entity's allegation that monies allocated towards the subject tender in the financial year 2017/2018 automatically lapsed after the financial year since no monies were expended towards the subject tender, has not been substantiated to the satisfaction of the Board and it is not clear whether such monies were remitted back to the National Treasury or retained by the Procuring Entity.

In essence, even if the Board were to consider the previous budgetary projections of **Kshs. 2,450,000,000/-** or the subsequent revised budgetary projections of **Kshs. 2,465,550,000/-** alluded to by the Procuring Entity, the Board observes that the Principal Procurement Officer of the Procuring Entity in the first professional opinion approved the Evaluation Committee's recommendation for an award of the subject tender to M/s Spire Security Solutions Limited in Joint Venture with M/s Micronet Power Systems Limited and M/s Octopus Systems despite its tender sum being above the Procuring Entity's budgetary projection. In addition to this, the Procuring Entity's Procurement Officer confirmed that the amount at which recommendation for award of the subject tender was made, was within indicative market prices and that funds were available for implementation of the subject tender. The Principal Procurement Officer further advised the Procuring Entity's Accounting Officer to approve commencement of a due diligence exercise on the lowest evaluated tenderer prior to awarding the subject tender.

On 28<sup>th</sup> May 2020, the Accounting Officer approved commencement of a due diligence exercise noting that funds were available to implement the subject tender. However, it is only after receiving negative responses on the due diligence exercise conducted on the lowest evaluated tenderer, the Procuring Entity remembered the lowest evaluated tenderer's price was above its budgetary provision and opted to terminate the subject tender on the basis of inadequate budgetary provision under section 63 (1) (b) of the Act.

It is the Board's considered view that, at all material times, the Procuring Entity conducted the subject tender with full knowledge of the total amount of funds available for the financial years mentioned hereinbefore. From its own conduct a recommendation for award was made, a first professional opinion was issued confirming the availability of funds and the recommendation for a due diligence exercise to be conducted on the lowest evaluated tenderer. The first professional opinion was subsequently approved by the Accounting Officer. This in the Board's view is sufficient evidence that the Procuring Entity was willing to proceed with the subject procurement process despite having noted the lowest evaluated price was above its budgetary provision and only got an excuse to terminate the subject tender after a due diligence exercise conducted on the lowest evaluated tenderer had a negative outcome.

The Board observes that at paragraph 15 (h) of its Statement in Support of the Request for Review, the 1<sup>st</sup> Applicant took the view that section 131 of the Act gives the Procuring Entity an opportunity to negotiate with the lowest evaluated tenderer whose price is not more than 25% above the available budget. In support of its submission, the 1<sup>st</sup> Applicant states that it quoted a tender price of **Kshs. 2,494,551,308/-**, and that the Procuring Entity disclosed its budgetary allocation for the subject tender to be **Kshs. 2,450,000,000/-**. According to the 1<sup>st</sup> Applicant, its tender price is within the 25% margin above the available budget and thus subject to competitive negotiations contemplated by section 131 and 132 of the Act.

According to paragraph 36 of its Response to the Request for Review, the Procuring Entity states that section 131 of the Act relied upon by the 1<sup>st</sup> Applicant to claim that the Procuring Entity may engage in competitive negotiations is not applicable in respect of tenders. According to the Procuring Entity, the provision is only applicable to request for proposals. The Procuring Entity further states that competitive negotiation is a procurement method and that the choice of a procurement method is a prerogative of the accounting officer and ought not to be the subject of a review as stated in section 167 (4) of the Act.

Having considered parties' submissions on the question whether the Procuring Entity could undertake a negotiation with the lowest evaluated

bidder, the Board studied the provisions of section 131 and 132 of the Act, which provide as follows: -

**"131. Competitive Negotiations**

***An accounting officer of a procuring entity may conduct competitive negotiations as prescribed where—***

- (a) there is a tie in the lowest evaluated price by two or more tenderers;***
- (b) there is a tie in highest combined score points;***
- (c) the lowest evaluated price is in excess of available budget; or***
- (d) there is an urgent need that can be met by several known suppliers.***

**132. Procedure for Competitive Negotiations**

***(1) In the procedure for competitive negotiations, an accounting officer of a procuring entity shall—***

- (a) identify the tenderers affected by tie;***
  - (b) identify the tenderers that quoted prices above available budget; or***
  - (c) identify the known suppliers as prescribed.***
- (2) In the case of tenderers that quoted above the available budget, an accounting officer of a procuring entity shall—***

- (a) reveal its available budget to tenderers; and**
- (b) limit its invitation to tenderers whose evaluated prices are not more than twenty-five percent above the available budget.**
- (3) An accounting officer of a procuring entity shall request the identified tenderers to revise their tenders by submitting their best and final offer within a period not exceeding seven days.**
- (4) The revised prices shall not compromise the quality specifications of the original tender.**
- (5) Tenders shall be evaluated by the evaluation committee appointed in the initial process.**

The Board would like to make an observation that the 1<sup>st</sup> Applicant is not challenging the method of procurement that was used by the Procuring Entity. It is also worth noting that the circumstances listed under section 131 of the Act where a procuring entity may conduct competitive negotiations include an open tender (i.e. section 131 (a) and (c) of the Act) because a successful tenderer in an open tender under section 86 (1) (a) of the Act is one whose tender has the lowest evaluated price; Request for Proposal (i.e. section 131 (b) of the Act) because a successful tenderer in a Request for Proposal is one whose tender has the highest score determined by combining the technical and financial proposal in accordance with section 86 (1) (b) of the Act; and restricted method of



tendering (i.e. section 131 (d) of the Act) because the restricted method of tendering under section 102 (1) (b) & (c) of the Act, the time and costs required to examine and evaluate tenders would be disproportionate to the value of what is being procured and there are only a few known suppliers in the market. This in the Board's view demonstrates that competitive negotiation is not only used in a Request for Proposal method of procurement and is not a stand-alone method of procurement, but the same is applied after other methods of procurement have been used up to the Financial Evaluation Stage but; (a) there is a tie in the lowest evaluated price by two or more tenderers; (b) there is a tie in highest combined score points; (c) the lowest evaluated price is in excess of available budget; or (d) there is an urgent need that can be met by several known suppliers.

The lowest evaluated price is used as an award criterion in open tenders where the Request for Proposal is not used in accordance with section 86 (1) (a) of the Act, which states as follows: -

***(1) The successful tender shall be the one who meets any one of the following as specified in the tender document—***

***(a) the tender with the lowest evaluated price***

This was the award criterion to be applied by the Procuring Entity in the subject tender noting that the Procuring Entity knew the prices quoted by tenderers at tender opening and upon conclusion of evaluation, the

Evaluation Committee recommended award of the subject tender to the tenderer determined to have submitted the lowest evaluated price as the said award criterion was specified in Clause 6.1 of Section II. Instructions to Tenderers of the Tender Document.

Noting that the Board has found the Procuring Entity unfairly evaluated the 1<sup>st</sup> and 2<sup>nd</sup> Applicants' respective tenders at the Preliminary Evaluation Stage, it is the Board's considered view that the Procuring Entity has an option to apply competitive negotiations pursuant to section 131 (c) of the Act using the procedure outlined in section 132 of the Act in the event the Procuring Entity finds itself with tenderers whose tender sums are in excess of the available budget at the Financial Evaluation Stage and the lowest evaluated price at the Financial Evaluation Stage is in excess of available budget.

This Board is cognizant that the Procuring Entity initiated the subject procurement process through a pre-qualification exercise undertaken in the year 2019. Through letters dated 15<sup>th</sup> November 2019, the Procuring Entity notified the 5 bidders who participated in the subject tender that their respective applications for pre-qualification for the proposed Integrated Security Management System was successful, therefore paving way for the invitation to submit bids through letters of invitation dated 29<sup>th</sup> January 2020. The Procuring Entity further submitted that it first received a budgetary allocation for the subject tender in the financial year 2017/2018,

therefore demonstrating that plans for implementation of the subject tender were already underway even before the pre-qualification exercise undertaken in the year 2019. The Procuring Entity had previously projected completion of the project in the subject tender by the financial year 2020/2021. However, according to the Procuring Entity, it will complete the project in the subject tender in the financial year 2022/2023. The Board observes that the project in the subject tender includes Supply, Installation, Configuration, Testing, Training, Commissioning and Maintenance of Integrated Security Management System & Infrastructure for the Procuring Entity in the following buildings listed in Section IV. Appendix to Conditions of Contract of the Tender Document: -

***"Main Parliament Site and all Office Buildings in the Parliamentary Square owned or occupied by the Commission and surrounding (This includes Juvenile Court Building, Red Cross Building, Imani House, County House, Protection House, Ukulima House, Harambee House, Continental House, The New Office Block and County Hall). The Integrated Security Management System shall be scalable to include all buildings within the Parliamentary Square and such other properties that the employer [Parliamentary Service Commission] may acquire in future. The works also includes associated Electrical, Mechanical installations and Civil works such as Construction of gate houses, Wall and Partitioning, Ramps and steps, Grille works, command***

***rooms, receptions and making good of the affected areas of the properties”***

Having noted the magnitude of the project in the subject tender, the Board finds that it is not in the public interest for the subject tender to be delayed any further, especially in this instance where the Procuring Entity has an option for competitive negotiations under section 131 (c) of the Act. Article 201 (d) of the Constitution requires the Procuring Entity to use public money in a prudent and responsible way and this in the Board’s view means that the project in the subject tender should not be delayed any further as this would lead to wastage of public resources that were already allocated to the said project as early as the Procuring Entity’s financial year 2017/2018 and that the Procuring Entity used public resources for pre-qualification, invitation in the restricted tendering, evaluation of tenders, a due diligence exercise, so far conducted by the Procuring Entity.

Accordingly, the Board’s finds that the Procuring Entity has not provided sufficient reasons to support termination of the subject tender pursuant to section 63 (1) (b) of the Act noting that the Procuring Entity has not exhausted all the options available to it such as competitive negotiations, if need be, and therefore the termination does not meet the threshold of section 63 (1) (b) of the Act. Furthermore, has already found that the 1<sup>st</sup> and 2<sup>nd</sup> Applicants’ respective tenders were wrongfully and/or unfairly

found non-responsive and this would warrant a re-evaluation at the Technical Evaluation Stage.

The Board observes that in addition to citing any of the reasons listed in section 63 (1) of the Act, a procuring entity must also comply with the statutory pre-conditions for termination of a tender specified in section 63 (2), (3) and (4) of the Act.

**In Republic v. Public Procurement Administrative Review Board & another ex parte Kenya Veterinary Vaccines Production Institute (2018) eKLR**, the court held that: -

***"In a nutshell therefore, the procuring entity is under duty to place sufficient reasons and evidence to justify and support the ground of termination of the procurement process under challenge. The Procuring Entity must in addition to providing sufficient evidence also demonstrate that it has complied with the substantive and procedural requirements set out under the provisions of section 63 of the Public Procurement and Asset Disposal Act, 2015"***

Section 63 (2) and (3) of the Act provide that a procuring entity must provide a written report to the Public Procurement Regulatory Authority (hereinafter referred to as "the Authority") within fourteen (14) days from

the date of the termination including reasons for the termination. All bidders who participated in the procurement process must also be notified within fourteen (14) days from the date of the termination, citing the specific reason why the tender was terminated pursuant to section 63 (4) of the Act.

The Board was only furnished with letters of notification dated 26<sup>th</sup> June 2020 issued to all bidders who participated in the subject tender. From the Procuring Entity's confidential file, the Accounting Officer approved termination of the subject tender on 25<sup>th</sup> June 2020 and letters of notification were subsequently prepared on 26<sup>th</sup> June 2020. The Board was not furnished with a report submitted to the Authority within fourteen days after 25<sup>th</sup> June 2020, which days lapsed on 9<sup>th</sup> July 2020 citing the two reasons by the Procuring Entity for terminating the subject tender.

In essence, whereas the Procuring Entity cited two reasons for termination of the subject tender, which reasons we have established were not justified in law, it did not comply with the requirements of section 63 (2) and (3) of the Act given that there is no documentation before the Board regarding a written report submitted to the Authority, containing specific reasons for the said termination.

Accordingly, the Board finds that the Procuring Entity failed to terminate the subject procurement process in accordance with section 63 of the Act.

In determining the appropriate orders to issue in the circumstances, the Board observes that since the Procuring Entity failed to meet the statutory pre-conditions of section 63 of the Act, the said termination is null and void. In addition to this, the Board has established that the 1<sup>st</sup> Applicant and the 2<sup>nd</sup> Applicant ought to have proceeded to Technical Evaluation since they satisfied the requirements at the Preliminary Evaluation Stage.

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 Respondent herein to admit the 1<sup>st</sup> Applicant's bid and the 2<sup>nd</sup> Applicant's bid together with M/s Spire Security Solutions Limited in Joint Venture with M/s Micronet Power Systems Limited and M/s Octopus Systems who was the only tenderer that made it to Technical Evaluation, at the Technical Evaluation Stage, and conduct a re-evaluation at the Technical Evaluation Stage, taking into consideration the Board's findings in this case.

In totality, the Request for Review succeeds in terms of the following specific orders: -

## **FINAL ORDERS**

In exercise of the powers conferred upon it by section 173 of the Act, the Board makes the following orders in the Request for Review: -

- 1. The Letters of Termination Notice addressed to all tenderers dated 26<sup>th</sup> June 2020 with respect to Tender No. PJS/002/2019-2020 for the Supply, Installation, Configuration, Testing, Training, Commissioning and Maintenance of Integrated Security Management System & Infrastructure for the Parliamentary Service Commission, be and are hereby nullified and set aside.**
- 2. The Procuring Entity is hereby directed to admit the 1<sup>st</sup> Applicant's tender and the 2<sup>nd</sup> Applicant's tender at the Technical Evaluation Stage, and conduct a re-evaluation at the Technical Evaluation Stage of the 1<sup>st</sup> Applicant's tender and the 2<sup>nd</sup> Applicant's tender together with all other tenders that qualified to proceed for evaluation at the Technical 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 30<sup>th</sup> day of July 2020**

**CHAIRPERSON**

**SECRETARY**

**PPARB**

**PPARB**