

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 117/2020 OF 17<sup>TH</sup> AUGUST 2020**

**BETWEEN**

**GUARDFORCE GROUP LIMITED.....APPLICANT**

**AND**

**THE ACCOUNTING OFFICER,**

**PWANI UNIVERSITY.....1<sup>ST</sup> RESPONDENT**

**PWANI UNIVERSITY.....2<sup>ND</sup> RESPONDENT**

**CATCH SECURITY LINKS LIMITED.....INTERESTED PARTY**

Review against the decision of Pwani University with respect to Tender No. PU/OT/04/2020/2021 for Provision of Security Services.

**BOARD MEMBERS**

- |                         |              |
|-------------------------|--------------|
| 1. Ms. Faith Waigwa     | -Chairperson |
| 2. Mr. Nicholas Mruttu  | -Member      |
| 3. Mr. Alfred Keriolale | -Member      |

**IN ATTENDANCE**

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

## **BACKGROUND TO THE DECISION**

### **The Bidding Process**

Pwani University (hereinafter referred to as "the Procuring Entity") advertised Tender No. PU/OT/04/2020/2021 for Provision of Security Services (hereinafter referred to as "the subject tender"), in the Public Procurement Information Portal (PIIP) [www.tenders.go.ke](http://www.tenders.go.ke) and the Procuring Entity's website [www.pu.ac.ke](http://www.pu.ac.ke).

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

A total of fifteen (15) firms/bidders submitted bid documents in response to the subject tender and the same were opened on 20<sup>th</sup> July 2020 in the presence of bidders and their representatives who chose to attend. The following firms/bidders submitted their bid documents in response to the subject tender: -

1. M/s Cobra Security Co. Ltd
2. M/s Lamu Security Guards
3. M/s KK Security Services Ltd
4. M/s Armytex Intl. Security Services Ltd
5. M/s Catch Security Links Ltd
6. M/s Superior Security Ltd
7. M/s Bulls Security Services Ltd
8. M/s Ismax Security Ltd
9. M/s Babs Security Ltd
10. M/s Total Security Surveillance Ltd

11. M/s County Guards Ltd
12. M/s Hatari Security Guards
13. M/s Guardforce Group Ltd
14. M/s Pride Kings Services Ltd
15. M/s Solvit Security Solutions Ltd

## **Evaluation of Bids**

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

- Preliminary Evaluation Stage;
- Technical Evaluation Stage;
- Financial Evaluation Stage.

### **1. Preliminary Evaluation Stage**

This stage of evaluation involved determination of compliance with respect to the mandatory requirements set out in the tender document. Tenderers who did not meet all the mandatory requirements were considered non-responsive and eliminated from further evaluation.

The mandatory requirements were as follows: -

- MR1 Must submit a copy of certificate of registration/incorporation
- MR2 Must submit a copy of PIN certificate

MR3 Must submit copy of membership certificate with either Kenya Security Industry Association (KSIA) or Protective Security Industry Association (PSIA)

MR4 Must submit copy of NSSF compliance certificate

MR5 Must submit copy of current NHIF compliance certificate

MR6 Must submit a copy of valid tax compliance certificate

MR7 (a) Must submit a duly filled, signed and stamped Tender Securing declaration form for AGPO together with a valid AGPO certificate or

(b) Must Submit tender security of 2% of total tender sum in the format provided valid for 120 days from closing date for Non-AGPO

MR8 Must submit CR12/CR13 certificate

MR9 Must fill the Price Schedule in the format provided

MR10 Must submit a duly filled, signed and stamped Form of Tender in the format provided valid for 120 days from closing date

MR11 Must submit copy of valid contractual liability cover of over 30 million from a reputable insurance provider

MR12 Must submit a certified copy of valid WIBA insurance

MR13 Must submit a copy of certified copy of valid Public liability insurance cover

MR14 Must submit a copy of certified group personal accident cover

MR15 Must submit a duly filled, signed and stamped self-declaration form in the format provided

MR16 Must submit a duly filled, signed and stamped Confidential Business Questionnaire in the format provided

MR17 Must submit copy of labour compliance certificate

MR18 Document should be serialized to entirety

MR19 Must submit evidence of having applied for vetting by Private Security Regulatory Authority

Upon completion of preliminary evaluation, ten (10) bidders were found non-responsive and disqualified from further evaluation.

Five bidders, that is, M/s Cobra Security Co. Ltd, M/s Catch Security Links Ltd, M/s Ismax Security Ltd, M/s Total Security Surveillance Ltd and M/s Solvit Security Solutions Ltd were found responsive and qualified for the Technical Evaluation Stage having met all the mandatory requirements.

## **2. Technical Evaluation**

At this stage of evaluation, the five (5) bids that were found responsive at the Preliminary/Mandatory Evaluation Stage were evaluated against the technical criteria as outlined hereinbelow: -

| <b>No.</b> | <b>Evaluation Attribute</b>  | <b>Weighting Score</b>  | <b>Max Score</b> |
|------------|--|---|------------------|
| TS1        | Number of years in the business of providing private guarding services | 5 years and above (5 Marks)<br>Below 5 years prorated<br>No. of years x 5/5 | 5                |

| No. | Evaluation Attribute  | Weighting Score  | Max Score |
|-----|---|--|-----------|
| TS2 | Provide list of 5 corporate clients 3 of whom should be with institutions of higher learning you are currently serving. Show proof with e.g. contracts and award letter                         | 3 or more clients with evidence (15 Marks)<br>Below 3 evidences prorated at No. of clients x 15/3  | 15        |
| TS3 | Key personnel competency profiles (Operations manager, Technical and supervisory staff)   | Qualification of operations manager (served in police/military) for 10 years and above, good discharge certificates and have a minimum of a degree in the relevant field. Attach CV and relevant certificates as evidence. (max 5 Marks) | 10        |
|     |   | Qualification of technical personnel in security (police/military) sector with or 5 years' experience and above in private security industry. Attach CV and relevant certificates as evidence (max. 3 Marks)                             |           |
|     |   | Qualification of supervisory personnel in security sector 5 years' experience and above. Attach CV and relevant certificates as evidence (max. 2 Marks)  |           |
| TS4 | Qualification of Guards   | State your policy on qualification of guards to be deployed indicating the minimum academic qualification and experience.<br>Recruitment vetting process (5 Marks)<br>Daily operation instruction procedure (5 Marks)                    | 10        |
| TS5 | Relevant infrastructure for provision of guarding services such as motor vehicles, motor cycle (attach copies of logbooks), 24 hr. guard control, communication apparatus, back up arrangements | No. of vehicles: 5 vehicles and above (5 Marks)  | 15        |
|     |   | No. of motor cycle: 5 motor cycle and above (5 Marks)  |           |
|     |   | Radio communication: attach CAK radio license/certificate as evidence (5 Marks)  |           |
| TS6 | Guarding uniforms & buttons   | Attach images of guards uniform and uniform guard dressed in full gear   | 4         |
| TS7 | Security dogs   | Evidence that dogs are vaccinated and evidence of certified(trained) dog   | 1         |

| No.  | Evaluation Attribute                          | Weighting Score   | Max Score  |
|--|---|---|------------|
|  |   | handler   |            |
| TS8  | General training schedule                     | A) Attach evidence of guards training school:<br>1) training curriculum areas like: -<br>2) Training program<br>3) Antiterrorism training manual<br>4) Photos of trainers in session<br>B) Attach evidence of training in the following field:<br>a) Fire fighting<br>b) First aid<br>c) Customer care and public relations<br>d) Use of security equipment's<br>e) Physical security and treat identification<br>(1 Mark for each) | 5          |
| TS9  | Sound financial stability                     | Attach audited accounts for the last 3 years  | 6          |
| TS10   | References                                    | Evidence of favorable past performance in similar organization of higher learning (e.g. University). Attach copies of letters of award and recommendation letters (4 Marks each)  | 12         |
| TS11   | Documents conformity                          | The documents should be properly bound, logically arranged, neat and give ample evidence in terms of content  | 2          |
| TS12   | ISO 18788: 2015                               | Provide copy of ISO 18788: 2015 certificate as evidence   | 5          |
| TS13   | Evidence of physical location in Kilifi       | Provide copy of lease agreement or title deed as evidence   | 5          |
| TS14   | Mode of supervision:<br>Real time supervision | Sample digital reports as evidence (5 marks)  | 5          |
|  | Manual supervision reporting                  | Sample manual reports as evidence (2 marks)   |            |
|  | <b>Total</b>                                  |   | <b>100</b> |
| <b>Only bidders who score 70% and above will be subjected to financial evaluation. Those who score below 70% will be eliminated at this stage from the entire evaluation process and will not be considered further.</b> |   |   |            |

The results were as follows: -

| <b>No.</b>  | <b>Evaluation Attribute</b>  | <b>COBRA SEC. CO. LTD</b> | <b>CATCH SEC. LINKS LTD</b> | <b>ISMAX SEC. LTD</b> | <b>TOTAL SEC. SURV.</b> | <b>SOLVIT SEC. SOLNS</b> |
|-------------|--|---------------------------|-----------------------------|-----------------------|-------------------------|--------------------------|
| <b>TS1</b>  | Number of years in business  | 5                         | 5                           | 5                     | 5                       | 5                        |
| <b>TS2</b>  | Three (3) clients from institution of higher learning                                      | 15                        | 15                          | 15                    | 0                       | 3                        |
| <b>TS3</b>  | Key personnel competency profiles (Operations manager; Technical staff; Supervisory staff) | 10                        | 10                          | 10                    | 6                       | 5                        |
| <b>TS4</b>  | Qualification of guards  | 10                        | 10                          | 8                     | 4                       | 10                       |
| <b>TS5</b>  | Relevant infrastructure for guarding services  | 15                        | 15                          | 10                    | 14                      | 15                       |
| <b>TS6</b>  | Guarding uniforms & buttons  | 4                         | 4                           | 4                     | 2                       | 4                        |
| <b>TS7</b>  | Security dogs  | 1                         | 1                           | 0                     | 0                       | 1                        |
| <b>TS8</b>  | General training schedule  | 0                         | 4                           | 5                     | 4                       | 0                        |
| <b>TS9</b>  | Financial stability  | 6                         | 6                           | 6                     | 6                       | 6                        |
| <b>TS10</b> | References   | 12                        | 12                          | 12                    | 6                       | 4                        |
| <b>TS11</b> | Documents conformity   | 2                         | 2                           | 2                     | 2                       | 2                        |
| <b>TS12</b> | ISO 18788: 2015  | 0                         | 0                           | 0                     | 0                       | 0                        |
| <b>TS13</b> | Evidence of physical   | 5                         | 5                           | 5                     | 0                       | 0                        |



| <b>No.</b>   | <b>Evaluation Attribute</b>  | <b>COBRA SEC. CO. LTD</b> | <b>CATCH SEC. LINKS LTD</b> | <b>ISMAX SEC. LTD</b> | <b>TOTAL SEC. SURV.</b> | <b>SOLVIT SEC. SOLNS</b> |
|--------------|--|---------------------------|-----------------------------|-----------------------|-------------------------|--------------------------|
|              | location in Kilifi   |                           |                             |                       |                         |                          |
| <b>TS1 4</b> | Mode of supervision<br>Real time supervision<br>Manual supervision reporting | 2                         | 5                           | 5                     | 2                       | 5                        |
|              | <b>Total</b>   | <b>87</b>                 | <b>94</b>                   | <b>87</b>             | <b>51</b>               | <b>60</b>                |
|              | <b>Result</b>  | <b>Qualified</b>          | <b>Qualified</b>            | <b>Qualified</b>      | <b>Eliminated</b>       | <b>Eliminated</b>        |

The minimum requisite pass mark to qualify for financial evaluation is 70 points.

Upon conclusion of evaluation, three (3) bidders, M/s Cobra Security Co. Ltd, M/s Catch Security Links Ltd, M/s Ismax Security Ltd qualified for financial evaluation having scored above the minimum requisite pass mark for qualifying into the Financial Evaluation Stage as shown in the table above.

Two (2) bidders, that is, M/s Total Security Surveillance Ltd and M/s Solvit Security Solutions Ltd scored below 70 points and were therefore eliminated from further evaluation.

### **3. Financial Evaluation**

At this stage of evaluation, the Evaluation Committee examined the wage rate of each tenderer to ascertain compliance with minimum

government wage and confirmed that their rates conform to Legal Notice No. 2 of Labor Institutions Act - The Regulation of Wages (General)(Amendment) Order, 2018.

| <b>No.</b> | <b>Bidder</b>                   | <b>Tender Sum Incl. of Vat (Kes)</b> | <b>Monthly wage rate Incl. VAT</b> | <b>Monthly wage rate Excl. VAT</b> | <b>Govt. Monthly minimum Wage Rate</b> | <b>Variance (-/+)</b> |
|------------|---------------------------------|--------------------------------------|------------------------------------|------------------------------------|--|-----------------------|
| <b>1.</b>  | <b>Cobra Security Co. Ltd</b>   | <b>14,938,560</b>                    | <b>15960</b>                       | <b>14000</b>                       | <b>14401.11</b>                        | <b>-401.11</b>        |
| <b>2.</b>  | <b>Ismax Security Ltd</b>       | <b>15,200,640</b>                    | <b>16240</b>                       | <b>14245</b>                       | <b>14401.11</b>                        | <b>-156</b>           |
| <b>3.</b>  | <b>Catch Security Links Ltd</b> | <b>16,286,400</b>                    | <b>17400</b>                       | <b>15263</b>                       | <b>14401.11</b>                        | <b>+861.89</b>        |

Upon conclusion of Financial Evaluation, the Evaluation Committee observed that the monthly wage rate exclusive of VAT for M/s Cobra Security and M/s Ismax Security were below the current government minimum wage rate as computed in the table above.

### **Post Qualification/Due diligence**

Due diligence was conducted as per section 83 of the Public Procurement and Disposal Act 2015 to confirm technical competence, past performance and information as submitted by the tenderers on the following bidders: - M/s Cobra Security Co. Ltd, M/s Catch Security Links Ltd, M/s Ismax Security Ltd on 23<sup>rd</sup> July 2020.

Results of the exercise gave an affirmative determination on M/s Catch Security Links Ltd and a negative determination on M/s Cobra Security Co. Ltd and M/s Ismax Security Ltd.

### **The Evaluation Committee's Recommendation**

In view of the evaluation process, the Evaluation Committee recommended award of the subject tender to **M/s Catch Security Links Ltd of P.O. Box 3360-80100, Mombasa** at the total price of **Kenya Shillings Sixteen Million Two Hundred Eighty-Six Thousand Four Hundred Only (Kshs 16,286,400) Inclusive of VAT.**

### **Professional Opinion**

The Procuring Entity's Procurement Officer concurred with the recommendation made by the Evaluation Committee which was duly approved by the Accounting Officer on 3<sup>rd</sup> August 2020.

### **REQUEST FOR REVIEW NO. 117 OF 2020**

M/s Guardforce Group Limited (hereinafter referred to as "the Applicant"), lodged a Request for Review dated 14<sup>th</sup> August 2020 and filed on 17<sup>th</sup> August 2020 (hereinafter referred to as "the Request for Review") together with an Affidavit in Support of the Request dated 14<sup>th</sup> August 2020 and filed on 17<sup>th</sup> August 2020 (hereinafter referred to as "the Applicant's Affidavit") through the firm of Njuguna & Partners Advocates.

In response, the Procuring Entity, acting in person, lodged a Response to the Grounds for Review dated 21<sup>st</sup> August 2020 and filed on 26<sup>th</sup> August 2020 (hereinafter referred to as "the Procuring Entity's Response").

M/s Catch Security Links Limited (hereinafter referred to as "the 1<sup>st</sup> Interested Party"), lodged a Memorandum of Response dated 27<sup>th</sup> August 2020 and filed on 28<sup>th</sup> August 2020 together with an Affidavit in Response to the Applicant's Affidavit in Support of the Review dated 27<sup>th</sup> August 2020 and filed on 28<sup>th</sup> August 2020 through the firm of Gicheru & Company Advocates.

M/s Hatari Security Guards Limited (hereinafter referred to as "the 2<sup>nd</sup> Interested Party"), acting in person, lodged a Response to the Request for Review in form of a letter dated 26<sup>th</sup> August 2020 and filed on 27<sup>th</sup> August 2020

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

-

- i. An order setting aside the Procuring Entity's award;***
- ii. An order declaring that the Applicant's bid has satisfied all the mandatory requirements and should fully be evaluated;***

- iii. An order directing the Procuring Entity to re-evaluate the Applicant's tender together with other tenders which passed the mandatory evaluation stage and make an award in accordance with the law;***
- iv. Any further orders or directions as the Board may deem appropriate in the circumstances.***
- v. An order awarding costs of the proceedings to the Applicant.***

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 (hereinafter referred to as "the PPRA") website ([www.ppra.go.ke](http://www.ppra.go.ke)) in recognition of the challenges posed by the COVID-19 pandemic and instituted certain measures to restrict the number of representatives of parties that may appear before the Board during administrative review proceedings in line with the presidential directives on containment and treatment protocols to mitigate against the potential risks of the virus.

On 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 COVID-19 pandemic. Through this circular, the Board dispensed with physical hearings and directed that all request for review applications shall be canvassed by way of written submissions.

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

The Applicant filed written submissions dated 27<sup>th</sup> August 2020 and filed on 28<sup>th</sup> August 2020 whereas the Procuring Entity filed written submissions dated 31<sup>st</sup> August 2020 and filed on 3<sup>rd</sup> September 2020. The 1<sup>st</sup> Interested Party filed written submissions dated 27<sup>th</sup> August 2020 and filed on 28<sup>th</sup> August 2020. The 2<sup>nd</sup> Interested Party did not file any written submissions.

### **BOARD'S DECISION**

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

The main issue that arises for determination is: -

- I. Whether the Procuring Entity evaluated the Applicant's bid at Preliminary Evaluation Stage in accordance with section 80 (2) of the Act read together with Article 227**

**(1) of the Constitution with respect to the following mandatory criteria: -**

- a) MR 5: Must submit copy of current NHIF Compliance Certificate

Before the Board puts its mind to the issue framed for determination, the Board would like to make the following observation: -

The 2<sup>nd</sup> Interested Party lodged a Response to the Request for Review in form of a letter dated 26<sup>th</sup> August 2020 and filed on 27<sup>th</sup> August 2020 seeking the following orders as captured on page 5 therein: -

***"We request the Board orders that:***

***a) The Procuring Entity annuls the award***

***b) A declaration that our bid has satisfied all the mandatory requirements and should full be evaluated;***

***c) The Procuring Entity be ordered to re-evaluate our tender together with other tenders which passed the mandatory evaluation stage and make an award in accordance with the law...."***

From the foregoing excerpt, the Board observes that the 2<sup>nd</sup> Interested Party is seeking orders that not only touch on the present Request for Review Application but also orders that are specific to its bid document which bid document it submitted in response to the subject tender.

The Black's Law Dictionary (Ninth Edition) defines an 'interested party' as follows: -

***"A party who has a recognizable stake (and therefore standing) in the matter"***

Further, Order 10 Rule 2 of the Civil Procedure Rules (2010) further states that an Interested Party is one: -

***".... whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit...."***

Accordingly, an interested party is a party who has a recognizable stake or interest in a matter, whose presence may be necessary to enable a court or any adjudicating body to effectually and completely settle all questions raised therein.

The role of an Interested Party in legal proceedings was explained by the Supreme Court in **Petition 12 of 2013 Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others [2014] eKLR** where it opined as follows: -

***".....an interested party has a 'stake/interest' directly in the case....an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way."***

An Interested Party is therefore a person who is closely connected to the subject matter of a suit and who's role in the proceedings is limited in



that they cannot claim any rights with respect to the matter under review or determination.

In this regard therefore, an interested party in administrative review and disposal proceedings is a tenderer who participated in a procurement process that is the subject of administrative review and disposal proceedings before the Board but did not file or lodge the said proceedings.

It is important to note that once the Applicant filed the Request for Review, all tenderers who participated in the subject tender were notified of the existence of the request for review application by the Board Secretary and were invited to submit any information with respect to the request for review application within three (3) days from the date of notification, failure to which the review proceedings would proceed in their absence.

Such information may be presented before the Board in the form of pleadings which will be served to all parties who choose to participate in the request for review proceedings.

The Board notes, the 2<sup>nd</sup> Interested Party filed a letter and not pleadings before the Board in support of the Request for Review application.

Further, from an examination of the letter filed by the 2<sup>nd</sup> Interested Party, the Board notes, the prayers sought therein are separate and

distinct from the Applicant's Request for Review application as they touch on an interest specific to the 2<sup>nd</sup> Interested Party.

In this regard therefore, it is the Board's considered view that the orders sought by the 2<sup>nd</sup> Interested Party are ordinarily sought through a request for review application but in this instance have been sought through the 'back door' as an Interested Party.

In doing so, the 2<sup>nd</sup> Interested Party has advanced its case without filing a request for review application and intentionally or not, avoided the responsibility of filing a request for review application and paying the requisite filing fees which would be incurred in this respect.

The Board notes, the 2<sup>nd</sup> Interested Party was at liberty to file a request for review application and approach this Board as an applicant pursuant to section 167 (1) of the Act. If the 2<sup>nd</sup> Interested Party had moved the Board as an applicant, the Board would have exercised its discretion to consolidate its request for review application with that of the Applicant in this case as provided under Regulation 211 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "the 2020 Regulations") which provides as follows: -

***"Where two or more requests for review are instituted arising from the same tender or procurement proceeding, the Review Board may consolidate the requests and hear them as if they were one request for review."***

Accordingly, the Board finds that the orders sought by the 2<sup>nd</sup> Interested Party are not properly sought before this Board.

The Board will now address the first issue framed for determination as follows: -

Vide a letter dated 3<sup>rd</sup> August 2020 and received by the Applicant on 5<sup>th</sup> August 2020 as submitted in paragraph 2 of its Request for Review Application, the Applicant was notified by the Procuring Entity of the outcome of its bid submitted in response to the subject tender which letter read as follows: -

***"Pwani University is grateful that you expressed interest to do business with us.***

***This is to inform you that your tender submission was non-responsive as it did not meet:***

| <b><i>No</i></b>  | <b><i>Requirements</i></b>  | <b><i>Page on tender document</i></b> |
|-------------------|---|---------------------------------------|
| <b><i>MR5</i></b> | <b><i>Must submit copy of current NHIF compliance certificate</i></b> | <b><i>20</i></b>                      |

***The successful bidder is M/s Catch Security Links Ltd.***

***We appreciate your support in this tender and look forward to working with you should the opportunity arise.”***

Aggrieved by the decision of the Procuring Entity, the Applicant moved the Board through the Request for Review.

The Applicant contended that it duly furnished the Procuring Entity with a current NHIF Compliance Certificate on page 36 of its bid document in full compliance with Mandatory Requirement No. 5 in the Tender Document. The Applicant submitted that since the subject tender closed on 20<sup>th</sup> July 2020, the current NHIF Compliance Certificate required in this regard would be for the period up to June 2020, noting that July 2020 NHIF remittances would be payable by 9<sup>th</sup> August 2020 which was after the tender submission deadline. The Applicant further contended that bidders who progressed to the technical and financial evaluation stages submitted similar NHIF Compliance Certificates to that of the Applicant and thus in its view, the evaluation criteria was subjectively applied to the Applicant's detriment.

The Applicant argued that the Procuring Entity did not attempt to seek a clarification as provided for under section 81 (1) of the Act from NHIF, the institution that issued its NHIF Compliance Certificate and further, the Procuring Entity did not give the Applicant an opportunity to comply with any new criterion for the compliance certificate. If the Procuring Entity had issues with the Applicant's NHIF Compliance Certificate, it was

the Applicant's submission that the Procuring Entity should have verified the said certificate at the due diligence stage.

In response, the Procuring Entity submitted that the Applicant did not provide a current, that is, an up to date NHIF Compliance Certificate, noting that the Applicant submitted an NHIF Compliance Certificate for the period up to and including June 2020 yet the subject tender was advertised on 6<sup>th</sup> July 2020 and closed on 20<sup>th</sup> July 2020. It was therefore the Procuring Entity's submission that the Applicant's NHIF Compliance Certificate did not comply with the mandatory requirement in the Tender Document and thus the Applicant's bid was rightfully found non-responsive at the Mandatory Evaluation Stage and disqualified from further evaluation.

The Procuring Entity submitted that there was no reason to seek clarification from NHIF, the institution that issued the Applicant's NHIF Compliance Certificate, since the information on the said certificate was clear and well understood. It was therefore the Procuring Entity's contention that it evaluated all bids under the subject tender objectively and in accordance with the provisions of the Tender Document and the Act.

The 1<sup>st</sup> Interested Party was of the view that the Applicant's NHIF Compliance Certificate was neither current nor compliant with the requirements of the Tender Document and thus invalid for the purposes of the subject tender. In this regard therefore, the 1<sup>st</sup> Interested Party

submitted that the Procuring Entity could therefore not seek clarification from the Applicant with respect to a document that was prima facie invalid.

The 1<sup>st</sup> Interested Party further contended that there was no evidence that other tenderers who participated in the subject tender submitted expired NHIF Compliance Certificates in their respective bids as alleged by the Applicant. It was therefore the 1<sup>st</sup> Interested Party's submission that the Applicant had failed to demonstrate any breaches of law or procedure to warrant the Board to interfere with the Procuring Entity's award of the subject tender.

In its determination of the first issue, the Board studied the Procuring Entity's Tender Document and observes Mandatory Requirement No. 5 of Clause 2.24 Evaluation Criteria on page 20 of the Tender Document which reads as follows: -

***"Must submit copy of current NHIF Compliance Certificate...***

***...At this stage, tenderer's submission will either be responsive in all the mandatory requirements above or non-responsive. Non-responsive submissions will be eliminated from the entire evaluation process and will not be considered further."***

According to the above provision, bidders were required to provide a copy of a current NHIF Compliance Certificate. Further, failure by a

bidder to comply with all the mandatory requirements would result in their elimination from the evaluation process.

The question that the Board must now address is what is a current NHIF Compliance Certificate.

The Board studied the National Hospital Insurance Fund Act, No. 9 of 1998 (hereinafter referred to as "the NHIF Act") and observes section 3 (1) therein which provides as follows: -

***"(1) There shall be established a Fund, to be known as the National Hospital Insurance Fund which shall vest in and be operated and managed by the Board.***

***(2) There shall be paid—***

***(a) into the Fund, all contributions and other payments required by this Act to be paid into the Fund; and***

***(b) out of the Fund, all benefits and other payments required by this Act to be paid out of the Fund"***

The Board observes that the National Hospital Insurance Fund (hereinafter referred to as "the Fund") is established by the NHIF Act and is operated and managed by the National Hospital Insurance Fund Management Board (hereinafter referred to as "the NHIF Board"). Further, all contributions and payments required by the Act shall be paid into the Fund and out of this Fund shall be paid all the benefits and other payments required by the Act.

The Board observes that a 'contributor' to the fund is defined in the interpretation section of the NHIF Act as follows: -

***"a person liable to contribute to the Fund under section 15"***

Further, section 15 of the NHIF Act provides as follows: -

***"(1) Subject to this Act, any person—***

***(a) who is ordinarily resident in Kenya; and***

***(b) who has attained the age of 18 years; and***

***(c) whose total income, whether derived from salaried or self-employment, in the immediately preceding month, was not less than such amount as the Board, in consultation with the Minister, may prescribe,***

***shall be liable as a contributor to the Fund.***

***(2) A person liable as a contributor under this section shall pay to the Board—***

***(a) in the case of a person whose income is derived from salaried employment, a standard contribution; or***

***(b) in the case of a person whose income is derived from self-employment, a special contribution,***

***in accordance with this section.***

***(3) .....***



**(4) A person to whom this section applies shall pay the contribution to the Board on the first day of each month or on such later date as the Board, in consultation with the Minister, may prescribe.**

**(5) .....**"

Accordingly, a person liable to contribute to the fund is any person ordinarily resident in Kenya, who has attained 18 years and whose total income whether from salaried employment or self-employment in the immediately preceding month, was not less than the amount prescribed by the NHIF Board, in consultation with the Minister for Health. Further, such a person shall pay the contribution to the Board on the first day of each month or on such later date as the NHIF Board, in consultation with the Minister of Health, may prescribe.

The Board observes that contributions to the fund in the event a person is in salaried employment, which are referred to as standard contributions as per section 15 (2) (a) of the NHIF Act are payable as a deduction from the person's salary or other remuneration by the employer as provided for under section 16 (1) of the NHIF Act which reads as follows: -

***"A person liable to pay a standard contribution under section 15 shall pay such contribution through monthly deductions from his salary or other remuneration and the employer of such person shall be liable to deduct and to pay the contribution to the Board on behalf of and to the exclusion of that person."***

Further, the Board examined the National Hospital Insurance Fund (Standard and Special Contributions) Regulations, 2003 (hereinafter referred to as "the NHIF 2003 Regulations") and observes therein Regulation 5 which stipulates at what point a contributor shall make standard contributions to the fund as follows: -

***(1) A standard contributor shall, through his or her employer submit to the Fund, on the first day of the month following the one in which the deduction was made, his or her prescribed contribution.***

***(2) An employer shall deduct the prescribed contribution from each employee and submit it to the Fund on the first day of the month following the one deduction is made.***

***(3) The contribution referred to in this regulation shall be remitted in such a manner as the Board may, from time to time, notify the employer.***

Accordingly, a standard contributor shall through his/her employer submit his/her contribution to the fund its prescribed contribution on the first day of the month following the one in which the deduction was made. Further, this contribution shall be remitted in the manner as the Board may from time to time notify the employer.

With this in mind, the Board examined the NHIF website [www.nhif.or.ke](http://www.nhif.or.ke) and observes that NHIF is a State Parastatal that was established in 1966 as a department under the Ministry of Health. Further that the

Fund's core mandate is to provide medical insurance cover to all its members and their declared dependants (spouse and children).

The Board further observes from the NHIF website that NHIF membership is open to all Kenyans who have attained the age of 18 years and have a monthly income of more than Kshs 1000/-.

From the NHIF website, under the heading 'Public Notices', the Board observes a document titled 'NHIF Payment Reminder' dated 27<sup>th</sup> February 2019 which read as follows: -

***"NHIF wishes to remind members that the DUE DATE for paying monthly NHIF contributions is before the 9<sup>th</sup> of every month. Pay BEFORE the 9<sup>th</sup> to ensure uninterrupted services and to avoid penalties..."***

Accordingly, the due date for paying monthly contributions is before the 9<sup>th</sup> of every month to ensure uninterrupted services and to avoid penalties.

The Board observes from the NHIF Act and its attendant regulations that there is no definition therein for a current NHIF Compliance Certificate.

However, on the NHIF website it is stated that a current NHIF Compliance Certificate indicates that an employer is up-to-date with the remittance of its employees' NHIF contributions.

The NHIF website further indicates the steps an Employer should take to obtain an NHIF Compliance Certificate as follows: -

***"1. Write an official letter to the C.E.O through the Branch***

***2. Ensure your payments are up to date. That you have got no penalties and no late payments.***

***3. Visit the nearest NHIF Branch and collect your Compliance Certificate.***

***Note: You can get a certificate valid for 6 or 3 months. If you are a new employer kindly note that you will get a certificate valid for 1 month."***

In order to obtain an NHIF Compliance Certificate, an employer should *interalia* ensure its payments are up to date. Further, an employer can get a compliance certificate valid for three (3) or six (6) months while new employers can get a certificate valid for one (1) month.

Turning to the instant case, the Board examined the Applicant's original bid which forms part of the confidential file that was submitted to the Board in accordance with section 67 (3) (e) of the Act and observes on page 36 therein that the Applicant submitted an NHIF Compliance Certificate with the following information therein: -

***"Serial No. 13468***

***NHIF Compliance Certificate***

***This is to certify that Guardforce Group Limited***

***Is compliant in respect to the provisions of the NHIF Act No. 9 of***

***1998***

***For the period up to and including June 2020***

***This certificate is property of NHIF***

***Signed (For Chief Executive) Date: 2<sup>nd</sup> July 2020”***

From the above excerpt, the Board observes that the NHIF Compliance Certificate on page 36 of the Applicant’s original bid is dated 2<sup>nd</sup> July 2020, for the period up to and including June 2020.

The Board notes that the subject tender was floated by the Procuring Entity on 6<sup>th</sup> July 2020 and subsequently closed on 20<sup>th</sup> July 2020.

In this regard therefore, it is safe to state that bidders were required to submit a current NHIF Compliance Certificate in accordance with Mandatory Requirement No. 5 in the Tender Document, for the period up to and including the month of July 2020, noting that according to the NHIF website, an employer can obtain an NHIF Compliance Certificate valid for three (3) or six (6) months so long as they do not have any pending penalties or payments.

The Board considered the Applicant’s submission that other bidders who qualified for technical and financial evaluation provided similar NHIF Compliance Certificates and that it was not possible to obtain an NHIF

Compliance Certificate for the period up to and including July 2020 prior to the tender submission deadline.

The Board examined the 1<sup>st</sup> Interested Party's original bid, the successful bidder in the subject tender, and observes that it provided the following NHIF Compliance Certificate on page 6 of its bid: -

***"Serial No. 39087***

***NHIF Compliance Certificate***

***This is to certify that Catch Security Links Ltd***

***Code No. 55657***

***Is compliant in respect to the provisions of the NHIF Act No. 9 of 1998***

***For the period up to and including July 2020***

***This certificate is property of NHIF***

***Signed (For Chief Executive) Date: 6<sup>th</sup> July 2020"***

The Board observes that the NHIF Compliance Certificate on page 6 of the 1<sup>st</sup> Interested Party's original bid is dated 6<sup>th</sup> July 2020 valid for the period up to and including July 2020.

It is therefore the Board's considered view that the Applicant's NHIF Compliance Certificate was not current or up to date as required under Mandatory Requirement No. 5 of the Tender Document, noting that it was possible to obtain an NHIF Compliance Certificate for the period up to and including the month of July 2020.

The Board further considered the Applicant's submission that the Procuring Entity ought to have sought clarification from NHIF with respect to the Applicant's NHIF Compliance Certificate in accordance with section 81 (1) of the Act.

The Board studied section 81 of the Act which states as follows: -

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

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

According to the above provision, a procuring entity may seek clarification from a tenderer to assist in the evaluation and comparison of tenders which clarification shall not change the terms of the tender.

This was further explained by the Honourable Justice Odunga in **Miscellaneous Application 402 & 405 of 2016 (Consolidated) Republic v Public Procurement Administrative Review Board & another Ex parte: Athi Water Service Board & another [2017] eKLR** where he stated as follows: -

***"...a procuring entity may seek a clarification of the tender which clarification may assist in the evaluation and comparison of the tenders. Such clarification is however not a passport for the tenderer to change the terms of the***

***tender. In my view a clarification cannot be equated to a confirmation of the procuring entity's view of the tenderer's bid. Where the procurement entity can ascertain the bid, there would be no need for the procuring entity to seek a clarification. However, the mere fact that the procuring entity seeks a clarification and a response is given does not bind the procuring entity to the purported clarification if the so-called clarification in fact amounted to change the terms of the tender."***

The Board observes that according to the High Court, a procuring entity in seeking clarification from a tenderer is not an opportunity for a tenderer to change the terms of its tender. More importantly, where a procuring entity can ascertain a tender, there would be no need for the procuring entity to seek a clarification.

Notably, contrary to the Applicant's submission, clarification is sought from a tenderer that submitted a bid document pursuant to section 81 of the Act and not from the institution that issued a document that is being sought clarification on.

Turning to the instant case, the Board is of the considered view that there was no need for the Procuring Entity to seek clarification from the Applicant with respect to its NHIF Compliance Certificate, noting that the said certificate was for the period up to and including June 2020, thus clearly not a current NHIF Compliance Certificate as required under Mandatory Requirement No. 5 of the Tender Document.



It was also the Applicant's submission that if the Procuring Entity had issues with the Applicant's NHIF Compliance Certificate, it ought to have verified the said certificate at the due diligence stage.

Due diligence is provided for under section 83 of the Act which provides as follows: -

***"(1) An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act***

***(2) The conduct of due diligence under subsection (1) may include obtaining confidential references from persons with whom the tenderer has had prior engagement.***

***(3) To acknowledge that the report is a true reflection of the proceedings held, each member who was part of the due diligence by the evaluation committee shall—***

***(a) initial each page of the report; and***

***(b) append his or her signature as well as their full name and designation."***

Accordingly, a procuring entity may elect to conduct a due diligence exercise to satisfy itself of the qualifications of the tenderer determined by the evaluation committee to be the lowest evaluated responsive

tenderer. The lowest evaluated responsive tenderer is one whose bid has been found to be responsive at the Preliminary, Technical and Financial evaluation.

In this regard therefore, a procuring entity conducts a due diligence exercise to verify and confirm the qualifications of the lowest evaluated responsive tenderer, which exercise would be based on documents and qualifications considered during evaluation that met the minimum eligibility and mandatory requirements of the Tender Document.

Firstly, due diligence is conducted on the lowest evaluated responsive tenderer to verify and confirm the qualifications in its bid document. Secondly, as established hereinbefore, the Applicant's NHIF Compliance Certificate was for the period up to and including June 2020, not a current NHIF Compliance Certificate as required under Mandatory Requirement No. 5 of the Tender Document and thus there was no need to conduct due diligence on the Applicant with respect to a document which did not meet the said mandatory requirement.

The Applicant was therefore rightfully and fairly found non-responsive at the Preliminary Evaluation Stage for failure to comply with a mandatory requirement.

In view of the foregoing, it is the finding of this Board that the Procuring Entity evaluated the Applicant's bid in accordance with section 80 (2) of

the Act read together with Article 227 (1) of the Constitution with respect to Mandatory Requirement No. 5 of Clause 2.24 Evaluation Criteria on page 20 of the Tender Document.

In totality of the foregoing, the Board holds that the Request for Review lacks merit and the same is hereby dismissed.

### **FINAL ORDERS**

In exercise of the powers conferred upon it by section 173 of the Public Procurement and Asset Disposal Act, 2015, the Board makes the following orders in the Request for Review: -

- 1. The Request for Review filed on 17<sup>th</sup> August 2020 with respect to Tender No. PU/OT/04/2020/2021 for Provision of Security Services be and is hereby dismissed.**
- 2. Each party shall bear its own costs in the Request for Review.**

**Dated at Nairobi, this 7<sup>th</sup> Day of September 2020**

**CHAIRPERSON**

**SECRETARY**

**PPARB**

**PPARB**