

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 114/2021**

**BETWEEN**

**COBRA SECURITY COMPANY LIMITED.....APPLICANT**

**VERSUS**

**THE ACCOUNTING OFFICER, NATIONAL  
CEREALS AND PRODUCE BOARD.....RESPONDENT**

**AND**

**BULLS SECURITY COMPANY LIMITED.....1<sup>ST</sup> INTERESTED PARTY**  
**LAVINGTON SECURITY COMPANY LIMITED....2<sup>ND</sup> INTERESTED PARTY**  
**PRIDE KINGS SERVICES LIMITED.....3<sup>RD</sup> INTERESTED PARTY**  
**PELT SECURITY COMPANY LIMITED.....4<sup>TH</sup> INTERESTED PARTY**

Request for review against the decision of the Accounting Officer, National Cereals and Produce Board in relation to Tender No: NCPB/SEC/03/2021-2023 for provision of guarding services and alarm systems for a period of 3 years.

**BOARD MEMBERS**

- |                        |  |
|------------------------|--|
| 1. Ms. Njeri Onyango   | -Vice Chairperson ( <b>Panel Chair</b> ) |
| 2. Mrs. Irene Kashindi | -Member                                  |
| 3. Eng. Mbiu Kimani    | -Member                                  |
| 4. Jackson Awele       | -Member                                  |

**IN ATTENDANCE**

- |                       |                         |
|-----------------------|-------------------------|
| 1. Mr. Stanley Miheso | -Acting Board Secretary |
|-----------------------|-------------------------|

## **BACKGROUND**

National Cereals and Produce Board (hereinafter referred to as "the Procuring Entity") invited interested and eligible bidders to submit bids in response to Tender No: NCPB/SEC/03/2021-2023 for provision of guarding services and alarm systems for a period of 3 years in two separate envelopes for the technical and financial bids.

### **Tender opening**

Based on the confidential documents availed to the Board, the tender closed and was opened on 27<sup>th</sup> July 2021. According to the minutes of the tender opening dated 27<sup>th</sup> July 2021 twenty-four companies participated in the tender process as tabulated below:-

| <b>No.</b> | <b>Name of Firm</b>           |
|------------|-------------------------------|
| 1          | Santos Security Ltd           |
| 2          | Pelt Security Services        |
| 3          | Masterfound                   |
| 4          | Total Security Surveillance   |
| 5          | Chakra Company Ltd            |
| 6          | Buckram                       |
| 7          | Pride Kings                   |
| 8          | Lavington Security            |
| 9          | Cobra Security                |
| 10         | Bulls Security                |
| 11         | Gyto Success Company          |
| 12         | Metropolitan Security Company |
| 13         | Pivot Star                    |
| 14         | Clean Homes Security          |
| 15         | Ismark                        |
| 16         | Intercity                     |

| <b>No.</b> | <b>Name of Firm</b>          |
|------------|------------------------------|
| 17         | Alert Security Services      |
| 18         | Vickers                      |
| 19         | Wing guard Security Services |
| 20         | Race Guards                  |
| 21         | Bedrock Holdings             |
| 22         | Hatari Security              |
| 23         | Babs                         |
| 24         | Safeways Alert               |

### **Evaluation and Evaluation criteria**

According to the tender documents, the evaluation criteria was as follows;

- **Mandatory requirements** – A bidder must comply with all the mandatory requirements listed in the tender document.
- **Technical evaluation** – A bidder must attain **80%** and above to be considered for financial evaluation under Nairobi and Environs cluster whereas **75%** for the other remaining clusters outlined in the tender document.

Failure to meet any one of the listed mandatory requirements would lead to the disqualification of bidder. Upon evaluating the tenders for compliance with mandatory requirements, 13 firms were disqualified for failing to comply with various mandatory requirements. The said firms are not parties to these proceedings and no issue has arisen concerning their disqualification. It will therefore not be necessary to parse out the said reasons in this decision

The remaining tenders proceeded to technical evaluation on the basis of the following technical evaluation criteria:-

| No | Item of Evaluation   | Score |
|----|--|-------|
|    | <b>Technical Evaluation</b>  |       |
| 1. | <b>Track record and references</b><br>Evidence of five current guarding contracts to a company or organization, with each contract not less than Kshs. 3 million per month (Attach copies of signed contracts and reference letters from the five clients to be provided) completion certificates.<br><b>(Each reference=6 marks)</b>  | 30    |
| 2. | Average volume of business handled in years: 2018, 2019 and 2020 <ol style="list-style-type: none"> <li>Over Kshs. 100 million <b>(20 marks)</b></li> <li>Over Kshs. 70 million and below 100 million <b>(15 marks)</b></li> <li>Over 40million and below 70 million <b>(10marks)</b></li> <li>Over 10 million and below 40 million <b>(5 marks)</b></li> <li>Below 10million <b>(2marks)</b></li> </ol>                                   | 20    |
| 3. | Experience -years of cumulative experience in provision of security services <ol style="list-style-type: none"> <li>Above 10 years (10 marks)</li> <li>Over 5 years and below 10 years (5marks)</li> <li>Below 5 years (2marks)</li> </ol>   | 10    |
| 4  | Qualification of supervisors to be deployed indicating minimum academic qualification and experience.<br>Attach at least five CVs with certificates of the supervisors and evidence of minimum qualification; <ul style="list-style-type: none"> <li>0 level certificate</li> <li>Training on security management (Diploma or higher)</li> <li>5 years' experience in security operations</li> </ul> Each CV and above certificates (2mks) | 10    |
| 5  | Evidence that service provider is ISO certified<br>Attach ISO certificate  | 10    |
|    | <b>Financial Health Evaluation</b>   |       |
| 6  | <i>To be calculated from the submitted audited accounts.</i><br><b>Liquidity Ratio (10 mks)</b> <ol style="list-style-type: none"> <li>1 : 2 &amp; above = 10 marks</li> <li>1 :1.99 =5marks</li> </ol>  | 20    |



| No            | Item of Evaluation   | Score        |
|---------------|--|--------------|
|               | iii) $1 : 0.5 - 0.99 = (3 \text{ marks})$<br>iv) $1 : < 0.5 = 2 \text{ marks}$<br><b>Profitability ratio (10mks)</b><br>i) 20% and above = 10 marks<br>ii) 15% - 19% = 5 marks<br>iii) 10% - 14% = 3 marks<br>iv) 1% - 9% = 2 marks<br>v) LOSS = 0 |              |
| <b>Totals</b> |  | <b>100 %</b> |

All the remaining 11 firms met the pass rate for consideration of their financial bids under Nairobi and Environs and the other remaining clusters outlined in the tender document.

At page 8 of the tender document, the Procuring Entity reserved the right to authenticate all documents submitted to it as part of the mandatory requirements in the following terms;

***"Please note that the authenticity of the above may be verified with relevant authority and any forgery or false presentation in any one of the above will lead to automatic disqualification and render the tenderers bid non -responsive."***

The Evaluation committee carried out verification of the authenticity of statutory documents with various regulatory bodies including Protective Security Industry Association, Kenya Security Industry Association and Private Security Regulatory Authority.

Vide an Email dated 12<sup>th</sup> August 2021, the Procuring Entity requested the Protective Security Industry Association (PSIA) to confirm authenticity of registration certificates submitted by: -

- Pride Kings Security Services Ltd
- Pelt Security Services Ltd
- Kleen Homes Security Services Ltd
- Pivot Star Security Ltd
- Race Guards Ltd

PSIA replied vide an email confirmation dated 13<sup>th</sup> August 2021 confirming the companies were confirmed as fully paid-up members except Pivot Star Security Services Ltd whose certificate they could not authenticate because it was not its fully paid up member.

The committee sent out a further email dated 13<sup>th</sup> August 2021 to Kenya Security Industry Association (KSIA) requesting them to confirm authenticity of registration certificates submitted by: -

- Cobra security Company Ltd
- Lavington Security Ltd
- Bulls Security Ltd
- Hatari Security Guards Ltd
- Babs security Ltd
- Ismax security Ltd

The registration body did not respond to the email and hence the committee did not pursue the matter further.

Vide another email of even date, the committee wrote to Private Security Regulatory Authority (PSRA) requesting for information on authenticity of

the PSRA certificate issued by the eleven technically qualified firms. PSRA responded vide letter ref: PSRA/MSS/NCPB/19 dated 16<sup>th</sup> August 2021 with a list of the security companies in possession of both a valid registration certificate and a valid security training certificate issued by the PSRA as follows: -

- M/S Pelt Security Services Ltd
- M/S Kleen Homes Security Services Ltd
- M/S Pride Kings Services Ltd
- M/S Lavington Security Ltd
- M/S Race Guards Ltd
- M/S Ismax Security Ltd
- M/S Hatari Security Guards Ltd
- M/S Cobra Security Company Ltd

In its letter, PSRA stated that M/S **Babs Security Services Ltd** had no valid certificate of security training as required by the the Private Security Regulation Act 2016 and that M/S Pivot Star Security Ltd and M/S Bulls Security Ltd had no valid certificate of registration nor a valid certificate of security training as required by the Private Security Regulation Act 2016.

In the circumstances, M/S Babs Security Services, Pivot Star and Bulls Security Ltd could not be considered for further evaluation and the evaluation committee recommended financial opening of bids from the 8 remaining firms. The said firms were invited to attend financial bid opening through email addresses provided in their respective technical bids.

The financial Bids were opened on 23<sup>rd</sup> August 2021 and Financial evaluation of the same commenced and finalized on 25<sup>th</sup> August 2021. The evaluation was essentially for the comparison of bid prices offered by bidders.

Based on the results of the bid opening and the individual clusters quoted by technically qualified bidders, the committee recommended that the tender for provision of guarding and alarm system services be awarded to the firms tabulated below:-

**A. M/S Pelt Security Services Ltd**

| Cluster | Location                     | No. Guards/ Alarms | Unit Cost Per Guard/ Alarm | Total Per Month  | Total Per Year    |
|---------|------------------------------|--------------------|----------------------------|------------------|-------------------|
| 1       | EASTERN (A)                  | 31                 | 17,300                     | 536,300          | 6,435,600         |
|         | EASTERN (B)                  | 40                 | 17,300                     | 692,000          | 8,304,000         |
|         | Alarm Sagana Milling Complex | 1                  | 7,000                      | 7,000            | 84,000            |
|         |                              | <b>72</b>          |                            | <b>1,235,300</b> | <b>14,823,600</b> |

**B. M/S Pride Kings Services Ltd**

| Cluster | Location                           | No. Guards/ Alarms | Unit Cost Per Guard/ Alarm | Total Per Month  | Total Per Year    |
|---------|------------------------------------|--------------------|----------------------------|------------------|-------------------|
| 05      | SOUTH RIFT (A)                     | 78                 | 15,000                     | 1,170,000        | 14,040,000        |
|         | Alarm Nakuru                       | 1                  | 7,500                      | 7,500            | 90,000            |
|         | SOUTH RIFT (B)                     | 33                 | 15,000                     | 495,000          | 5,940,000         |
|         | LAKE WESTERN                       | 83                 | 14,000                     | 1,162,000        | 13,944,000        |
|         | Alarm for Bungoma and Kisumu Silos | 2                  | 7,500                      | 15,000           | 180,000           |
|         |                                    | <b>197</b>         |                            | <b>2,849,500</b> | <b>34,194,000</b> |

**C. M/S Lavington Security Ltd**

| Cluster | Location | No. Guards/ Alarms | Unit Cost Per Guard/ Alarm | Total Per Month | Total Per Year |
|---------|----------|--------------------|----------------------------|-----------------|----------------|
|---------|----------|--------------------|----------------------------|-----------------|----------------|



|    |   |            |        |                  |                   |
|----|---|------------|--------|------------------|-------------------|
| 02 | NAIROBI & ENVIRONS                            | 41         | 19,800 | 811,800          | 9,741,600         |
|    | Alarms for Head office, GCP and Nairobi Silos | 4          | 7,500  | 30,000           | 360,000           |
|    | Dog Handler                                   | 1          | 48,000 | 48,000           | 576,000           |
| 03 | COAST   | 34         | 17,300 | 588,200          | 7,058,400         |
|    | Alarms for Shimanzi and Changamwe             | 2          | 7,500  | 15,000           | 180,000           |
| 04 | NORTH RIFT (A)                                | 50         | 17,300 | 865,000          | 10,380,000        |
|    | Alarms for Eldoret                            | 2          | 7,500  | 15,000           | 180,000           |
|    | NORTH RIFT (B)                                | 53         | 17,300 | 916,900          | 11,002,800        |
|    | Alarms for Moisbridge and Kitale              | 2          | 7,500  | 15,000           | 180,000           |
| 07 | NORTH EASTERN                                 | 30         | 14,450 | 433,500          | 5,202,000         |
|    |   | <b>219</b> |        | <b>3,738,400</b> | <b>44,860,800</b> |

On 26<sup>th</sup> August, 2021 the Respondent's head of procurement function issued a professional opinion to the effect that the subject procurement satisfied the constitutional requirements of Article 227(1) and statutory requirements of the Public Procurement and Asset Disposal Act, 2015 and Public Procurement Regulations, 2020 and accordingly sought the authority of the Accounting officer to award the tenders as above.

However, on the same date, i.e. 26<sup>th</sup> August 2021, PSRA wrote to the Procuring entity vide a letter ref: PSRA/MSS/NCPB/20 clearing M/S Bulls Security Services Ltd from its earlier disqualification communicated vide letter ref: PSRA/MSS/NCPB/19 dated 16<sup>th</sup> August 2021 - which essentially stated that the firm failed to satisfy the requirements of the law as it lacked a valid certificate of registration and a valid certificate of security training.

The Procuring Entity's Managing Director on his annotations on the professional opinion dated 30<sup>th</sup> August 2021 accordingly guided the

evaluation committee to re-evaluate the financial bid offers of all technically qualified bidders taking into consideration the Private Security Regulatory Authority's (PSRA) letter ref: PSRA/MSS/NCPB/20 dated 26<sup>th</sup> August 2021. The evaluation committee met again on 30<sup>th</sup> August 2021 to deliberate on the new developments from PSRA and to agree on the way forward whereupon it agreed that the bid offer by M/s Bulls would be considered alongside those of the technically qualified firms cleared by PSRA.

Upon further analysis of all financial offers, M/s Bulls Security Ltd was not considered for comparison under the North Rift Cluster. The firm had computational errors in the said cluster. In the event, the tender evaluation committee recommended that the tender for provision of guarding and alarm system services be awarded to the firms tabulated below:-

**A. M/S Pelt Security Services Ltd**

| Cluster | Location                                    | No. Guards/<br>Alarms | Unit Cost<br>Per Guard/<br>Alarm | Total Per<br>Month | Total Per<br>Year |
|---------|---|-----------------------|----------------------------------|--------------------|-------------------|
| 1       | Eastern (A)                                 | 31                    | 17,300                           | 536,300            | 6,435,600         |
|         | Eastern (B)                                 | 40                    | 17,300                           | 692,000            | 8,304,000         |
|         | <b>Alarm Sagana<br/>Milling<br/>Complex</b> | 1                     | 7,000                            | 7,000              | 84,000            |
|         |   | <b>72</b>             |                                  | <b>1,235,300</b>   | <b>14,823,600</b> |

**B. M/S Pride Kings Services Ltd**

| Cluster | Location            | No. Guards/<br>Alarms | Unit Cost<br>Per Guard/<br>Alarm | Total Per<br>Month | Total Per<br>Year |
|---------|---------------------|-----------------------|----------------------------------|--------------------|-------------------|
| 05      | South Rift (A)      | 78                    | 15,000                           | 1,170,000          | 14,040,000        |
|         | <b>Alarm Nakuru</b> | 1                     | 7,500                            | 7,500              | 90,000            |
|         | South Rift (B)      | 33                    | 15,000                           | 495,000            | 5,940,000         |

| Cluster | Location | No. Guards/<br>Alarms | Unit Cost<br>Per Guard/<br>Alarm | Total Per<br>Month | Total Per<br>Year |
|---------|----------|-----------------------|----------------------------------|--------------------|-------------------|
|         |          | <b>112</b>            |                                  | <b>1,672,500</b>   | <b>20,070,000</b> |

#### C. M/S Lavington Security Ltd

| Cluster | Location   | No. Guards/<br>Alarms | Unit Cost Per<br>Guard/Alarm | Total Per<br>Month | Total Per<br>Year |
|---------|--|-----------------------|------------------------------|--------------------|-------------------|
| 02      | Nairobi & Environs   | 41                    | 19,800                       | 811,800            | 9,741,600         |
|         | <b>Alarms For Head<br/>Office, Gcp And<br/>Nairobi Silos</b> | 4                     | 7,500                        | 30,000             | 360,000           |
|         | <b>Dog Handler</b>   | 1                     | 48,000                       | 48,000             | 576,000           |
| 03      | Coast  | 34                    | 17,300                       | 588,200            | 7,058,400         |
|         | <b>Alarms For<br/>Shimanzi And<br/>Changamwe</b>             | 2                     | 7,500                        | 15,000             | 180,000           |
| 04      | North Rift (A)   | 50                    | 17,300                       | 865,000            | 10,380,000        |
|         | <b>Alarms For<br/>Eldoret</b>                                | 2                     | 7,500                        | 15,000             | 180,000           |
|         | North Rift (B)   | 53                    | 17,300                       | 916,900            | 11,002,800        |
|         | <b>Alarms For<br/>Moisbridge And<br/>Kitale</b>              | 2                     | 7,500                        | 15,000             | 180,000           |
| 07      | North Eastern  | 30                    | 14,450                       | 433,500            | 5,202,000         |
|         |  | <b>219</b>            |                              | <b>3,738,400</b>   | <b>44,860,800</b> |

#### D. Bulls Security Services Ltd

| Cluster | Location  | No. Guards/<br>Alarms | Unit Cost<br>Per Guard/<br>Alarm | Total Per<br>Month | Total Per<br>Year |
|---------|---|-----------------------|----------------------------------|--------------------|-------------------|
| 06      | Lake Western                                      | 83                    | 13,700                           | 1,137,100          | 13,645,200        |
|         | <b>Alarm For<br/>Bungoma And<br/>Kisumu Silos</b> | 2                     | 10,000                           | 20,000             | 240,000           |
|         |   |                       |                                  | <b>1,157,100</b>   | <b>13,885,200</b> |



On 30<sup>th</sup> August 2021 the Respondent's head of procurement function issued a professional opinion to the effect that the aforesaid recommendations satisfied the constitutional requirements of Article 227(1) and statutory requirements of the Public Procurement and Asset Disposal Act, 2015 and Public Procurement Regulations, 2020 and thereby sought the Accounting officer's authority to award the tenders in clusters to the four firms as above.

### **REQUEST FOR REVIEW NO. 109/2021**

The Request for Review was lodged by M/s Cobra Security Company Limited, on 14<sup>th</sup> September 2021 seeking the following orders:

***1) That the award of the to M/s Bulls Security Limited, Lavington Security Limited, Pride King Services Limited and Pelt Security Services Limited and the entire procurement process be vitiated for;***

***a) Failing to award the Tender to Kleen Homes Security Services Limited which presented the lowest financial bid of Kshs 38,832,000.00.***

***b) Purporting to award the Tender to M/s Pelt Security Services Limited which tendered a bid of Kshs 110,165,400.00 and Lavington Security Limited which bid Kshs 97,156,200.00 against lower bids of M/s Race Guards Limited (Kshs 93,753,840.00) and Kleen Homes Security Services Limited (Kshs 38,832,000.00).***



***c) Purporting to award the Tender to M/s Bull Security Limited which was confirmed by the Private Security Regulatory Authority as not being a registered member of the Authority and as not being in possession of both a registration certificate and a valid training security certificate issued by PSRA, contrary to the mandatory requirement numbers 23 and 24 of the Tender Document and the law.***

***d) Purporting to award the Tender to M/s Bull Security Limited which set the minimum wage paid to the security guards at Kshs. 13,700.00 inclusive of taxes as against the statutory minimum wage Kshs. 15,141.95 in the cluster awarded contrary to requirement number 21 of the Tender Document and the prevailing labour laws being the Regulation of Wages (General Amendment) Order 2018 as read with the Regulation of Wages (Agricultural Industry) (Amendment) Order 2018.***

***e) Purporting to award the Tender to M/s Pelt Security Services Limited at Kshs. 97,156,200/= as against the Company's bid of Kshs. 110,165,400/= read at the opening of the financial bids contrary to law.***

***f) Purporting to award the Tender to M/s Bulls Security Limited, Lavington Security Limited, Pride King Services***

***Limited and Pelt Security Services Limited absent proof of ISO Certification contrary to mandatory requirement number 22 of the Tender Document and the law.***

***2) The Review Board be pleased to direct the Accounting Officer of the, National Cereals And Produce Board to re-advertise and commence anew the procurement process afresh.***

***3) costs of and incidental to these proceedings; and***

***4) Such other relief or reliefs as the board shall deem just and expedient.***

This Request for Review is supported by the statement of Mr. James A. Ngwalla, the Applicant's head of operations dated 13<sup>th</sup> September 2021, a supplementary affidavit dated 23<sup>rd</sup> September 2021 and written submissions dated 27<sup>th</sup> September 2021.

The Request for Review is opposed by a memorandum of response dated 20<sup>th</sup> September 2021 and written submissions dated 29<sup>th</sup> September 2021.

The Board observes that none of the interested parties filed a response to the Request for review.

Pursuant to the Board's Circular No. 2/2020 dated 24<sup>th</sup> March 2020 detailing the Board's administrative and contingency management plan to mitigate the effects of Covid-19 pandemic, the Board dispensed with physical hearings and directed that all request for review applications would be canvassed by way of written submissions. Clause 1 at page 2 of the said Circular further specifies that pleadings and documents would be deemed as properly filed if they bear the official stamp of the Board.

### **BOARD'S DECISION**

After a careful consideration of all the pleadings and documents filed in support of and in opposition to the Request for review, the Board frames the following as the issues falling for determination in this matter;

- a) Whether the Board has jurisdiction to hear and determine the Request for review.
- b) Whether the Applicant disclosed confidential information in the procurement process and/or engaged in unlawful conduct.
- c) Whether the Procurement process was carried out and the awards made in compliance with the tender documents and the applicable law.
- d) Whether notifications to tenderers were lawfully issued.

**a) Whether the Board has jurisdiction to hear and determine the Request for review.**

The Respondent has raised a jurisdictional objection to the Request for Review on two main grounds to wit;

- i) That the Request for review was filed out of time contrary to section 167(1) of the Public Procurement and Asset Disposal Act ('The Act'); and
- ii) that in any event, it had already executed contracts with the successful tenderers thereby ousting the jurisdiction of this court by dint of section 167(4)(c) of the Act.

The Respondent avers inter-alia that the notification of award of tender was done to all bidders through a letter dated 31<sup>st</sup> August 2021 and therefore that the 14<sup>th</sup> day for purposes of execution of the contract with successful bidders under section 135 (3) of the Act lapsed on 13 September 2021. It avers that it received the Notification of the instant Request for review from the Board on 15 September 2021 with instructions to suspend the procurement process and not to sign any contract with any tenderer prior to the completion of the appeal but by which time it had already executed contracts with the successful bidders. It accordingly asserts that by 15 September 2021, when it was notified of the appeal, the procurement process had concluded and the remedies under section 167 of the Act were no longer available to the tenderers.



The Applicant opposes the objection and avers that the Respondent delivered the notification of its unsuccessful bid by postage registered on 8<sup>th</sup> September 2021 but which it received on 17<sup>th</sup> September, 2021. It submits accordingly that pursuant to Regulation 203 (2) (c) (ii) of the Regulations the time for filing the Request for Review herein began on 8<sup>th</sup> September 2021 when the Respondent posted the Letter of Notification of award and not 31<sup>st</sup> August, 2021 when the same was dated. In the circumstances, it avers that the Request for Review was filed within time.

The Applicant further avers that going by Regulation 203 (2) (c) (ii) of the Regulations as read with Section 87 of the Act which requires that notifications of award or rejection be delivered simultaneously to both successful and unsuccessful bidders, the assumption is that all notification were issued on 8<sup>th</sup> September, 2021 thereby precluding the signing of contracts before 22<sup>nd</sup> September, 2021 being the day after the lapse of the 14 day period stipulated under Section 135(3) of the Act. It submits that the Request for Review herein was lodged with the Review Board Secretary and the requisite fees duly paid therefor on 14<sup>th</sup> September, 2021 in accordance with Regulation 203 (3) of the Public Procurement and Asset Disposal Regulations. The Applicant thus asserts that the Review Board has jurisdiction to hear and determine the matter before it.

The Board has considered the rival submissions and the supporting documents supplied by parties together with the confidential documents supplied by the Procuring Entity pursuant to section 67 (3) (e) of the Act and observes that it is a peremptory rule of evidence codified by section 107(1) of the Evidence Act that whoever desires any court to give

judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. In the instant case, the burden of proving when the notification letters were posted and therefore the date time begun running for purposes of determining the 14 day deadline for the filing of requests for review and execution of contracts with successful bidders squarely lay with the respondent. In this regard the Board notes that no certificate of postage has been tendered in evidence by the Respondent and that the best evidence available as to when the notifications were sent out to bidders is that of the Applicant showing that its notification letter though dated 31<sup>st</sup> August, 2021 was **posted** on 8<sup>th</sup> September, 2021. Logically, though dated 31<sup>st</sup> August, 2021, the Applicant and indeed any other party cannot be presumed to have received the same on the same date.

It is settled law that there cannot be a presumption that a letter sent by ordinary post would reach the addressee. Such a presumption arises only in the case of a letter sent by **registered post** as prescribed in section 3(5) of the Interpretation and General Provisions Act, (cap 2). See the Court of Appeal decision in **Shah vs. Padamshi [1982] eKLR.** In the circumstances absent a certificate of registered post or a copy of the notification duly signed by the Applicant as received or an email read receipt, there is no plausible way of ascertaining that the notification letters were sent out by the Respondent or more importantly that they were received by the Applicant on the 31<sup>st</sup> of August as asserted by the Respondent.

In the premises, the Applicant's evidence that the notification letters were in fact posted on 8<sup>th</sup> September remains the best evidence of postage of

the notification letter available to the Board. Even then the Applicant asserts that it only received the notification letters on 7<sup>th</sup> September, 2021 when it decided to physically collect the same. This has not been denied by the Respondent. Nonetheless, even assuming the Applicant was notified of the award on 8<sup>th</sup> September 2021 when the notification letters were posted, the deadline for the filing of the Request for review lapsed on 22<sup>nd</sup> September, 2021 well after the Applicant had filed the instant request for review. For purposes of determining the 14-day deadline for the filing of requests for review and execution of contracts with successful bidders, the Board finds that time started running at the earliest on 8<sup>th</sup> September 2021. Pursuant to section 135(3) of the Act therefore, the Respondent was precluded from executing contracts with the successful bidders before 23<sup>rd</sup> September 2021. The contracts executed between the Respondent and the successful bidders are in the circumstances invalid, null and void and are thereby vitiated by operation of law. The upshot of the foregoing is that the Request for review was filed within time and that the Board has jurisdiction to hear and determine the matter.

**b) Whether the Applicant disclosed confidential information in the procurement process and/or engaged in unlawful conduct.**

At paragraphs 9-13 of its memorandum of response, the Respondent objects to the reliance placed by the Applicant on confidential information about the procurement process that ought not to be in its possession. The Respondent avers that the nature of information that the Applicant has produced could not have been obtained otherwise than in contravention section 66 and 67 of the Act. The Applicant thus urges the Board to



expunge any confidential information relied on by the Applicant including inter-alia the partial copy of the letter dated 16 August 2021 addressed to the Procuring Entity which the Applicant has annexed to its affidavit in support of the Request for Review as exhibit *JAN -5* and information on the sums allegedly awarded to successful bidders as contained at paragraph 7 of the Request for Review. It further prays that if the Board, finds that the documents presented by the Applicant were improperly obtained then the paragraphs in the Request for Review and the affidavit of James Ngwalla premised on the same be similarly expunged from these proceedings.

The Applicant avers in Response that it obtained the contested documents and information from the Respondent and that it was Constitutionally entitled to the same.

Upon a careful consideration of the parties' rival positions and submissions, the Board observes that the authentication exercise of documents submitted by bidders was a confidential exercise between the procuring entity and the relevant authorities with which it communicated. The said documents were integral in the evaluation of tenders and were accordingly confidential within the meaning of section 67(1)(c) of the Act. Similarly, upon a review of the financial bids opening register, it is clear that the bids publicly read out to parties were global sums and not individual bids **per guard or per service**. Any information concerning the pricing of bids other than that which was disclosed at bid opening in the presence of all bidders is accordingly confidential information relating to the evaluation, comparison or clarification of tenders within the meaning of section 67(1)(c) of the Act and which the procuring entity, its



employee or its agents were precluded from disclosing. On the strength of the Applicant's own admission therefore, the Board finds that the information relating to the letter dated 16<sup>th</sup> August 2021 and the unit pricings annexed as exhibit JAN 6 was unlawfully obtained by the Applicant and hereby expunges the same from the record of these proceedings. It is settled that no legal remedy or benefit can flow from an illegal act. **In Kenya Pipeline Company Limited v Glencore Energy (U.K.) Limited [2015] eKLR**, the Court of Appeal while citing its decision **Standard Chartered Bank Vs. Intercom Services LTD & 4 Others** held inter-alia

*'...that once an issue of a breach of a statute is brought to the attention of the Court in the course of proceedings, then in the interest of justice the Court must investigate it because the court's fundamental role is to uphold the law. The court upheld and endorsed the old English case of **HOLMAN Vs. JOHNSON** (1775-1802) All ER 98 where Chief Justice Mansfield stated;*

***"The principle of public policy is this:***

***Ex dolo malo no ovitur actio . No court will lend its aid to a man who found his cause of action on an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says that he has no right to be assisted. It is on that ground the court goes, not***

***for the sake of the defendant, but because they will not lend their aid to such a plaintiff.”***

In the circumstances, the said letter marked as exhibit JAN 5 and the table of financial bids marked as exhibit JAN 6, and the Applicant's assertions founded on the same cannot be countenanced by this Board. The same are hereby expunged from and disregarded in these proceedings. In order to uphold the integrity of procurement processes and to ascertain the circumstances under which the said letter was obtained by the Applicant, the Board directs that this decision be transmitted to the Public Procurement Regulatory Authority for investigations and further action as it may deem fit.

As regards information relating to the sums allegedly awarded to successful bidders as contained at paragraph 7 of the Request for Review, the Board is of a contrary opinion as under regulation 82(3) of the Public Procurement and Asset Disposal Regulations (the regulations), the tender price at which an award is made must be disclosed in any event.

**c) Whether the Procurement process was carried out and the awards made in compliance with the tender documents and the applicable law.**

On this issue, the Applicant avers that the successful bidders were awarded tenders in violation of the evaluation criteria set out in the tender document and in contravention of the applicable law for the following reasons;

- a) Failing to award the Tender to Kleen Homes Security Services Limited which presented the lowest financial bid of Kshs 38,832,000.00.***
- b) Purporting to award the Tender to M/s Pelt Security Services Limited which tendered a bid of Kshs 110,165,400.00 and Lavington Security Limited which bid Kshs 97,156,200.00 against lower bids of M/s Race Guards Limited (Kshs 93,753,840.00) and Kleen Homes Security Services Limited (Kshs 38,832,000.00).***
- c) Purporting to award the Tender to M/s Bull Security Limited which was confirmed by the Private Security Regulatory Authority as not being a registered member of the Authority and as not being in possession of both a registration certificate and a valid training security certificate issued by PSRA, contrary to the mandatory requirement numbers 23 and 24 of the Tender Document and the law.***
- d) Purporting to award the Tender to M/s Bull Security Limited which set the minimum wage paid to the security guards at Kshs. 13,700.00 inclusive of taxes as against the statutory minimum wage Kshs. 15,141.95 in the cluster awarded contrary to requirement number 21 of***



***the Tender Document and the prevailing labour laws being the Regulation of Wages (General Amendment) Order 2018 as read with the Regulation of Wages (Agricultural Industry) (Amendment) Order 2018.***

***e) Purporting to award the Tender to M/s Pelt Security Services Limited at Kshs. 97,156,200/= as against the Company's bid of Kshs. 110,165,400/= read at the opening of the financial bids contrary to law.***

***f) Purporting to award the Tender to M/s Bulls Security Limited, Lavington Security Limited, Pride King Services Limited and Pelt Security Services Limited absent proof of ISO Certification contrary to mandatory requirement number 22 of the Tender Document and the law.***

The Respondent avers that in accordance with clause 2.11 of the Tender document, the Procuring Entity informed the bidders of the evaluation criteria, stages and requirements and at clause 2.12.0 of the tender document, all bidders were informed that the Procuring Entity would select the lowest responsive tender and consider whether that tender met the due diligence thresholds and the set financial and technical requirements. It asserts that the award of tender was to be to the successful tender who was determined to be substantially responsive and determined to be the lowest evaluated tenderer with demonstrated ability to perform the contract satisfactorily in accordance with clause 2.13.0 on the Award Criteria.



The Board observes that clause 2.2.2 of the tender document provided as follows;

***The Board encourages bidders to bid for the entire package of seven (7) classes of clusters in the NCPB Network. But where the bidder cannot bid for all the clusters, the bidder has the option to place a bid for less, provided that the bid he places is for all the locations in that cluster i.e. if one chooses to bid for Nyanza cluster only, he/she MUST bid for all the locations in Nyanza cluster.***

At clause, 2.13.2 the tender document provided;

***At its discretion and in managing risks, NCPB may award the tender to more than one firm provided that the firm is technically qualified and willing to match the lowest evaluated price offers.***

In essence, bidders were under no obligation to submit bids for all clusters or locations. The corollary to this was that evaluation was to be conducted not on the basis of the global sums quoted but by comparison of technically qualified bids for individual/similar clusters as was indeed the case as per the confidential documents submitted to the Board. In the event, the Applicant's assertions that the Tender to M/s Pelt Security Services Limited at Kshs. 97,156,200/= as against the Company's bid of Kshs. 110,165,400/= read at the opening of the financial bids was contrary to law and that the Respondent awarded the tender to M/s Pelt Security Services Limited which tendered a bid of Kshs 110,165,400.00 and Lavington Security Limited which bid Kshs 97,156,200.00 against

lower bids of M/s Race Guards Limited (Kshs 93,753,840.00) and Kleen Homes Security Services Limited (Kshs 38,832,000.00), is with respect a misapprehension of the evaluation and award criteria set out in the tender document.

In this regards, the Board observes that the tender was awarded by clusters and successful bidders were deemed to be the lowest evaluated in that cluster. The total figure at opening was therefore not the basis for award and had no direct correlation with the award as it is a total for all the clusters bid but not necessary for awarded.

Secondly, the Board observes from the confidential documents and the financial bid opening minutes that contrary to the Applicant's assertions, M/s Kleen Homes Security Services, bid as follows for the following clusters: -

|                                   |          |          |
|-----------------------------------|----------|----------|
| Cluster 02 – Nairobi and Environs | - Guards | - 25,000 |
|                                   | - Alarm  | - 7,500  |
| Cluster 03 – Coast                | - Guards | - 18,000 |
|                                   | - Alarm  | - 7,500  |
| Cluster 06 – Lake, Western        | - Guards | - 18,000 |
|                                   | - Alarm  | - 7,500  |
| Dog Handler                       |          | - 45,000 |

The winning bidders in each of the above clusters quoted as follows:-

|                                     |          |          |
|-------------------------------------|----------|----------|
| Cluster 02 – M/s Lavington Security | - Guards | - 19,800 |
|                                     | - Alarm  | - 7,500  |
| Cluster 03 – M/s Lavington Security | - Guards | - 17,300 |

|  |          |          |
|--|----------|----------|
|  | - Alarm  | - 7,500  |
| Cluster 06 – M/s Bulls Security Services | - Guards | - 13,700 |
|  | - Alarm  | - 10,500 |
| Dog Handler - M/s Lavington Security     | -        | 48,000   |

From the foregoing, it is evident that M/s Kleen Homes Security Services was not the lowest evaluated in the clusters it had bid for. Though its cost for radio services was comparable with most winning bidders its guard services were comparatively higher. The Board accordingly finds that this ground of appeal lacks merit.

Thirdly, on the issue of M/s Bull Security Limited having been disqualified by PSRA, the Board observes this is information that only the procuring entity ought to have been privy to. It is not clear how the Applicant founded its allegations on the same. Nonetheless, the Board observes that though PSRA vide its letter of 16<sup>th</sup> August, 2021 notified the Respondent that the firm did not have a valid certificate of registration and a valid certificate of security training, it is the very PSRA that followed up its letter with another dated 26<sup>th</sup> August, 2021 clarifying that M/s Bull Security Limited was in possession of both a registration certificate and a valid security training certificate. Bearing in mind that but for the adverse letter from PSRA the Applicant was technically qualified to provide the services for which it bid for, the accounting officer acted well within his powers and in accordance with the principle of fairness in public procurement by advising the evaluation committee to reconsider financial bids of all technically qualified bidders. Indeed, the Board cannot fathom any greater prejudice to the procurement process than leaving out a



technically qualified bidder from financial evaluation on the strength of an erroneous letter whose author has clarified before notification of awards.

Finally on the allegation that the tender was awarded to bidders lacking ISO certification, the Board observes that from the confidential documents supplied to it, all successful bidders provided their ISO certifications and that these were considered during evaluation. This ground of the Appeal similarly fails.

For the avoidance of doubt, the issue as to whether the M/s Bull security limited was awarded the tender based on price quotations below statutory minimum wage, the Board notes that the said allegation is premised on the alleged price quotations per guard annexed to the Applicant's Request for review as exhibit JAN-6 and which we have found was illegally obtained confidential information. In the event the said information and all averments hinged thereon stand expunged from these proceedings.

The upshot of the foregoing is that this ground of appeal lacks merit and is accordingly dismissed. That in any event the procuring entity has stated and shown that the Procuring entity required all bidders as a mandatory requirement to provide clearance from the Ministry of Labour and Social Security that it meets the ministry's directives on minimum wage under Kenyan Labour Laws and that such clearance was provided by Bulls Security Services thereby meeting the mandatory requirement. The Board has taken note from the confidential documents provided by PE of the presence of a certified letter from the Ministry of Labour on this account.

**d) Whether notifications to tenderers were lawfully issued.**

On this issue, the Applicant alleges that its bid was rejected without reasons. The Board observes that Section 87(3) of the Act provides as follows with regard to notification of awards;

***When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.***

Regulation 82(3) of the Regulations further states;

***(3) The notification in this regulation shall include the name of the successful bidder, the tender price and the reason why the bid was successful in accordance with section 86(1) of the Act.***

A cursory look of the notification letters sent to the Applicant shows that the same contained the reason why the Applicant was unsuccessful in accordance with regulation 82(2) of the Regulations which mandates the Respondent to confine itself to the reason why the unsuccessful bidder it is notifying was unsuccessful. The Respondent was however duty bound to inform all unsuccessful bidders the name of the successful bidder(s), the tender price and the reason why the bid was successful. In this regard, the Board observes that the notification letters *ex facie* show that the Respondent failed to disclose the tender price and the reason why the bid was successful. The Board accordingly determines that the notification letters were issued in contravention of section 87(3) of the Act as read with regulation 82(3) of the Regulations and are accordingly for cancellation.

In conclusion the request for review partly succeeds to the limited extent that the procuring entity failed to disclose the tender price and the reason why the bid was successful in the notification letter sent to bidders as by law required.

### **FINAL ORDERS**

Pursuant to the powers granted to the Board under section 173 of the Act, the Board makes the following final orders;


- i) THAT the notification letters issued to bidders in relation to Tender No: NCPB/SEC/03/2021-2023 for provision of guarding services and alarm systems for a period of 3 years is hereby cancelled and set aside.**
- ii) THAT the procuring entity is hereby directed to re-issue notification letters to all bidders who participated in Tender No: NCPB/SEC/03/2021-2023 for provision of guarding services and alarm systems for a period of 3 years in accordance with section 87(3) of the Act as read with regulation 82(3) of the Regulations within seven (7) days from the date hereof.**
- iii) THAT the Procuring Entity is directed to transmit this decision to the Public Procurement Regulatory Authority to investigate the circumstances in which the Applicant**



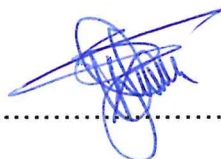
obtained confidential information relating to these proceedings and for further action as the Authority may deem fit.

- iv) THAT save as hereinabove ordered, the request for review is dismissed.
- v) Each Party shall bear its own costs.

Dated at Nairobi on this 4<sup>th</sup> day October 2021



.....  
Vice Chairperson (**Panel Chair**)



.....  
Ag. Board Secretary

