

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 72/2021 OF 13TH MAY 2021

BETWEEN

LAVINGTON SECURITY LIMITEDAPPLICANT

AND

**CENTER FOR MATHEMATICS, SCIENCE AND TECHNOLOGY
EDUCATION IN AFRICA (CAMASTEAM)..... 1ST RESPONDENT**

THE ACCOUNTING OFFICER,

**CENTER FOR MATHEMATICS, SCIENCE AND TECHNOLOGY
EDUCATION IN AFRICA (CAMASTEAM) 2ND RESPONDENT**

CATCH SECURITY LINKS LIMITED..... INTERESTED PARTY

Review against the decision of Center for Mathematics, Science and Technology Education in Africa (CAMASTEAM) dated 13 May 2021 with respect to Tender No. CEMASTEAM/SE/001/2021-2022 for Provision of Security Services.

BOARD MEMBERS

- | | |
|------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Qs. Hussein Were | -Member |
| 3. Dr. Joseph Gitari | -Member |
| 4. Mr. Jackson Awele | -Member |
| 5. Mr. Nicholas Mruttu | -Member |

IN ATTENDANCE

1. Mr. Philip Okumu -Acting Board Secretary

BACKGROUND TO THE DECISION

The Bidding Process

Center for Mathematics, Science and Technology Education in Africa (CAMASTEIA) (hereinafter referred to as "the Procuring Entity") advertised Tender No. CEMASTEIA/SE/001/2021-2022 for Provision of Security Services (hereinafter referred to as "subject tender") in the MyGov Pullout Newspaper and the Procuring Entity's Website (www.cemasteia.ac.ke) on 16th March 2021 inviting eligible tenderers to bid for the same.

Bid submission Deadline and Opening of Bids

The Procuring Entity received nineteen (19) bids by the bid submission deadline of 30th March 2021. The same was opened shortly thereafter by a Tender Opening Committee and recorded as follows: -

| S/No | Bidder Name | Bid Amount | Bid Bond Amount(Kshs) | Provider Institution |
|-------------|------------------------------|-------------------|------------------------------|-----------------------------|
| 1 | Straight Security Services | 685,300.00 | 110,000.00 | Consolidated Bank |
| 2 | Robinson Investment Limited | 6,027,360.00 | 110,000.00 | Equity Bank |
| 3 | Alert Guard Services Limited | 669,624.00 | 110,000.00 | Rafiki Micro Finance Bank |
| 4 | Bob Morgan Services Limited | 1,155,840.00 | 110,000.00 | Victoria Commercial Bank |

| | | | | |
|----|---|-------------------------------------|------------|------------------------------------|
| 5 | Metropolitan Security Company Limited | 5,596,720.00 | 110,000.00 | Rafiki Micro Finance Bank |
| 6 | Lavington Security Limited | 5,796,000.00 | 110,000.00 | Kingdom Bank |
| 7 | Corprisk Africa Limited | 816,000.00 | 110,000.00 | Africa Merchants Assurance Company |
| 8 | Winguards Services Limited | 5,378,000.00 | 110,000.00 | Middle East Bank Kenya Limited |
| 9 | Regal Security Services Company Limited | 478,000.00 | 110,000.00 | Kenya Orient Insurance Limited |
| 10 | Vigilmax Security Services Limited | 8,454,720.00 | 110,000.00 | Co-operative Bank |
| 11 | Flashcom Security Limited | 6,189,400.00 | 110,000.00 | Africa Merchants Assurance Company |
| 12 | Secureman Services Limited | 479,200.00 | 110,000.00 | Africa Merchants Assurance Company |
| 13 | Marshall Guards Limited | 622,600.00 | 110,000.00 | Consolidated Bank |
| 14 | Pride King Services Limited | 7,842,000.00 | 110,000.00 | NCBA Bank |
| 15 | Catch Security Links Limited | 5,304,000.00 | 110,000.00 | The Monarch insurance |
| 16 | Anchor Security Links Limited | 4,673,088.00 | 110,000.00 | Rafiki Micro Finance Bank |
| 17 | Kenwatch Security Services Limited | Not indicated in the form of tender | 110,000.00 | KCB Bank Limited |
| 18 | Babs Security Services Limited | 6,828,000.00 | 110,000.00 | Family Bank |
| 19 | Total Security Surveillance Limited | 5,839,440.00 | 110,000.00 | KCB Bank |

Evaluation of Bids

Having appointed an Evaluation Committee, evaluation of bids submitted was conducted in the following three stages:-

- i.** Mandatory/Preliminary Evaluation;
- ii.** Technical Evaluation; and
- iii.** Financial Evaluation.

1. Mandatory/Preliminary Evaluation

At this stage, the Evaluation Committee applied the evaluation requirements as contained in Mandatory Requirements, Evaluation Criteria at Section II. Appendix to Instructions to Tenderers at page 16 of the Tender Document. At the end of evaluation at this stage, the Evaluation Committee found the following eleven (11) Bidders non- responsive;

Straight Security Services(001), Robinson Investment Ltd(002), Alert Guard Service Ltd(003), Bob Morgan Services Ltd(004), Metropolitan Security Co. Ltd(005), Corprisk Africa Ltd(007), Winguards Services Ltd(008), Marshall Guards Ltd(013), Anchor Security (016), Kenwatch Smart Security Solutions(017) and Babs Security Services(018).

Eight (8) Bidders found responsive at this stage proceeded to Technical Evaluation stage.

2. Technical Evaluation

At this stage, the Evaluation Committee applied the criteria outlined in Technical Evaluation criteria at Technical Evaluation in Section II. Appendix to Instructions to Tenderers at page 17 of the Tender Document on the eight (8) Bidders who made it to the Technical Evaluation stage. Bidders were required to attain a minimum technical score of 75 points to proceed to Financial Evaluation. At the end of this stage, six (6) Bidders attained the minimum technical score of 75 points therefore proceeded to the Financial Evaluation Stage.

The Following six bidders scored above 75 points out of a 100 and were found responsive thus proceeded to Financial Evaluation stage; Lavington Security Ltd (006), Regal Security Services Co. Ltd (009), Vigilmax Security Services Ltd (010), Secureman Services Ltd (012), Catch Security Links Ltd (015) and Total Security Surveillance Services (019).

3. Financial Evaluation

At the Financial Evaluation stage, the Evaluation Committee used the following formula to determine the financial score achieved by bidders:

$$FS = (100 \times FM/F;)$$

Where **FS = Financial Score;**

FM = lowest evaluated priced bidder

F = price of the bidder under consideration.

Recommendation

In determining the bidder to be recommended for award of the subject tender, the Evaluation Committee first combined the technical and financial scores achieved by a bidder using the following formula:

$$S=(TS*T\%)+(FS*P\%)$$

Bidders were ranked according to their combined Technical (TS) and Financial (FS) Scores using the weights (T=weight given to the Technical Proposal: P= the weight given to the Financial proposal;T+P=1) indicated

below. The combined Technical and Financial Score, S was calculated as follows:-

$$S=(TS*T\%)+(FS*P\%)$$

Weighting

$$T=0.70$$

$$P=0.30$$

FM- Lowest bidder=432,00

F-Bidder under evaluation

$$S=(1*0.7)+(01*0.3)$$

$$S=100\%$$

Subsequently, the Evaluation Committee recommended M/S Catch Security Links Limited for the award having attained the highest combined Technical and Financial score of 100 % of at a tender sum of Kenya Shillings Four Hundred and Thirty Two Thousand Shillings per Month (Kshs.432, 000.00).

Due Diligence

According to a Due Diligence Report dated 5th May 2021 (hereinafter the Due Diligence Report), the Evaluation Committee conducted a due diligence exercise on Bidder No. 15, M/S Catch Security Links Limited on 3rd May 2021.

The Due Diligence Report indicates Catch Security Links Limited's location as Jampark Plaza on Ngong Road, its work force/personnel to be sufficient and that the documents attached in its original bid were confirmed against the original documents e.g. the Business permit, Tax compliance certificate, C.R

12, WIBA for guards, Letter of compliance by the Labour Ministry, Valid certificate of good conduct for the guards and valid license from the Communication Authority of Kenya. Further it was observed that Catch Security Links Limited's guards were trained before being deployed.

It was the committee's conclusion that M/s Catch Security Links Limited had capacity to deliver Security Services efficiently.

Professional Opinion

In a Professional Opinion dated 6th May 2021, the Procuring Entity's Head, Supply Chain Manager recommended to the Accounting Officer of the Procuring Entity to approve of the recommendation of the Evaluation Committee to award Tender No. CEMASTE/SE/001/2021-2022 for Provision of Security Services to M/S Catch Security Links Limited at their tender sum of Kenya Shillings Four Hundred and Thirty Two Thousand per month (Kshs.432,000.00). The said professional opinion was approved by the Procuring Entity's Director, Ms. Jacinta Akatsa, and HSC on 6th May 2021.

Notification to Bidders

In letters dated 10th May 2021, the Procuring Entity's Director notified the successful tenderer and all other unsuccessful tenderers of the outcome of their bids.

THE REQUEST FOR REVIEW

M/s Lavington Security Limited (hereinafter referred to as "the Applicant") lodged a Request for Review dated 12th May 2021 and filed on 13th May 2021 together with a Statement in Support of the Request for Review sworn on 12th May 2021 and filed on 13th May 2021 through the firm of Chege & Sang Company Advocates, seeking the following orders: -

- i. An order declaring that the Procuring Entity breached the provisions of the Public Procurement and Asset Disposal Act, 2015 and Article 47 and 227 of the Constitution;***
- ii. An order cancelling and setting aside the letter of notification dated 10th May 2021 by the Procuring Entity's Accounting officer in respect of Tender Number CEMASTEА/SE/001/2021-2022 for Provision of Security Service;***
- iii. An order nullifying the award and the entire procurement proceedings in Tender Number CEMASTEА/SE/001/2021-2022 for the Provision of Security Services;***
- iv. An order directing the 1st and 2nd Respondent to re-admit the Applicants bid and carry out fresh evaluation of the bids submitted in accordance with the dictates of the Public Procurement and Assets Disposal Act and the Tender Document;***
- v. An order directing the costs of the Request for Review to be awarded to the Applicant.***

vi. An order granting any other relief that the Board deems fit to grant under the circumstances.

In response, the 1st and 2nd Respondents addressed a letter dated 20th May 2021 to the Chairman of the Public Procurement Administrative Review Board (i.e. a response to the Request for Review and forwarding confidential documents relating to the subject procurement process) through the Procuring Entity's Director.

In a letter dated 21st May 2021 addressed to the successful bidder, the Acting Board Secretary notified the successful bidder of the existence of the Request for Review lodged on 13th May 2021 and suspension of procurement proceedings in the subject tender pursuant to section 168 of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act"). The Board Secretary further directed the successful bidder to forward to the Board, any information and arguments about the tender within three days of the letter. The said letter was also sent to the Successful Bidder's email provided to the Board by the Procuring Entity. However, the Successful Bidder never responded to the instant Request for Review.

On 24th 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. Clause 1 at page 2 of the said

Circular further specified that pleadings and documents shall be deemed as properly filed if they bear the official stamp of the Board. However, parties did not file written submissions.

BOARD'S DECISION

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

- I. Whether the Procuring Entity evaluated bids in the subject tender within the statutory period of thirty (30) days specified in Section 80 (6) of the Act.**

- II. Whether the Procuring Entity evaluated the Applicant's bid at the Financial Evaluation stage in accordance with Section 80 (2) of the Act read together with Regulation 77 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020').**

- III. Whether the Procuring Entity issued letters of notification of unsuccessful bid dated 10th May 2021 in accordance with Section 87 (3) of the Act read together with Regulation 82 of Regulations 2020**

The Board now proceeds to address the above issues as follows: -

On the first issue for determination, the Applicant challenged the period taken by the Respondents in evaluating bids in the subject tender. At paragraph 3 of its Request for Review, the Applicant averred that the Respondents carried out evaluation of bids beyond the period specified in section 80 (6) of the Act. At paragraph 1 of their letter dated 20th May 2021 addressed to the Chairman of the Board, the Respondents stated that evaluation of the said tender started on 24th April 2021 and results were issued to bidders on 10th May 2021 and thus evaluation was within the mandatory period specified in section 80 (6) of the Act for evaluation of bids.

It is worth noting that, section 80 (6) of the Act specifies the period for evaluation of bids in open tender as follows: -

“The evaluation shall be carried out within a maximum period of thirty days”

In addressing this issue, the Board is mindful that on several occasions in the past, it has addressed the meaning of the word **“evaluation”** so as to make a determination on the date from which the period of 30 days under section 80 (6) of the Act ought to start running. Having considered provisions of Regulations 2020, the Board observes there is no express provision therein stating the date from which the 30 days for evaluation ought to start running.

The Black's Law Dictionary, 6th Edition defines "Bid Evaluation" as follows:-

"After the submission deadline, the process of examining, and evaluating bids to determine the bidders' responsiveness, and other factors associated with selection of a bid for recommendation for contract award."

Section 85 of the Act further states that:-

"Subject to prescribed thresholds all tenders shall be evaluated by the evaluation committee of the procuring entity for the purpose of making recommendations to the accounting officer through the head of procurement to inform the decision of the award of contract to the successful tenderers"

From the above provisions and having noted the ordinary meaning of bid evaluation, it is the Board's considered view that evaluation is conducted with a view of recommending a bidder for award of a tender.

Section 80 (4) of the Act is further instructive on the document that marks the end of evaluation. It states as follows:-

"The evaluation committee shall prepare an evaluation report containing a summary of the evaluation and comparison of tenders and shall submit the report to the person responsible for procurement for his or her review and recommendation"

An Evaluation Committee having conducted an evaluation of tenders is able to recommend a bidder for award of a tender. The recommendation

envisioned by the Head of Procurement function is only in respect of his/her professional opinion given pursuant to section 84 of the Act advising the Accounting Officer on the appropriate action to take. In essence, evaluation of bids ends once the Evaluation Committee prepares and signs an Evaluation Report containing a summary of evaluation and comparison of tenders and recommendation of award. It therefore follows that the evaluation of bids does not include all other processes after the conclusion of an evaluation process as contained in the Evaluation Report that is prepared and signed by the Evaluation Committee. It is worth noting that the period of evaluation of bids does not include a post qualification evaluation pursuant to section 83 of the Act, a professional opinion rendered by the Head of Procurement Function pursuant to section 84 of the Act and award of tenders by the Accounting Officer pursuant to section 87 of the Act.

In **PPARB Application No. 136 of 2020, Chania Cleaners Limited v. The Accounting Officer, National Social Security Fund & Another** (hereinafter referred to as the "Chania Cleaners Ltd Case"), the Board considered the meaning of "**tender evaluation**" provided in the Third Schedule of the Public Procurement and Asset Disposal Regulations 2020 (hereinafter referred to as "Regulations 2020") and held as follows: -

"Tender evaluation — is the process used to identify the most preferred bidder technically and financially. This process should not take more than 30 calendar days... Having established that evaluation is the process of identifying the

most preferred bidder technically and financially, it means that the period of 30 days for evaluation ought to be the number of days taken by an evaluation committee to identify the most preferred bidder that is technically and financially responsive. Therefore, the number of days between commencement of evaluation and signing of the evaluation report would constitute the period taken to determine the preferred bidder that is both technically and financially responsive”

In the Chania Cleaners Limited Case, the Board held that the period of 30 days for evaluation ought to be the number of days taken by an evaluation committee to identify the most preferred tenderer that is technically and financially responsive. In some instances, the Tender Document does not specify the date from which evaluation ought to start running. However, in the circumstances of the Chania Cleaners Limited Case, the Tender Document had stated that evaluation would commence from the date of tender opening.

The Board has also considered the circumstances in **PPARB Application No. 57 of 2020, Aprim Consultants v. The Accounting Officer, Parliamentary Joint Services-Parliamentary Service Commission & Another** where the Board considered the meaning of evaluation whilst making a finding on the roles of other persons in the procurement process. The Board held as follows:

"It is worth noting that the period of evaluation of bids does not include a post qualification evaluation pursuant to section 83 of the Act, a professional opinion rendered by the Head of Procurement Function pursuant to section 84 of the Act and award of tenders by the Accounting Officer pursuant to section 87 of the Act

The Board observes that the first evaluation process was conducted for a period of ten (10) days from Tuesday 24th March 2020 to Thursday 2nd April 2020. The Evaluation Committee then sought a professional opinion from the Procuring Entity's Principal Procurement Officer and then resumed and concluded evaluation on 23rd April 2020. From this narrative of events, it is evident that the total number of days the Procuring Entity evaluated proposals was eleven days, which include the first ten days with respect to the initial evaluation process and the one day for the subsequent evaluation process. 58 Notably, the Board has established that the period within which the evaluation committee sought an opinion with respect to the Applicant's financial proposal ought not to be included in the computation of time for evaluation of proposals"

In the Aprim Consultants Case, the Board found that evaluation does not include a post qualification evaluation pursuant to section 83 of the Act, a professional opinion rendered by the Head of Procurement Function pursuant to section 84 of the Act and award of tenders by the Accounting

Officer pursuant to section 87 of the Act. This supports the Board's position that evaluation ends when a signed Evaluation Report is provided by the Evaluation Committee.

Turning to the circumstances in the instant Request for Review, in determining the days taken for evaluation of bids in the subject tender, the Board notes that Clause ***2.22.5 of Section II. Instructions to Tenderers of the Tender Document provided that:***

"The tender evaluation committee shall evaluate the tender within 30 days from the date of opening the tender."

On the other hand, the Evaluation Committee report, the Evaluation Report dated 24th April 2021 shows evaluation commenced on 24th April 2021 and was completed on the same day. Further, the Respondent stated in her letter dated 20th May 2021 in response to the Request for Review that evaluation commenced on 24th April 2021.

The Board is mindful of section 57 (a) of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya which guides on the manner in which time ought to be computed for purposes of written law. The said provision states as follows: -

"In computing time for the purposes of a written law, unless the contrary intention appears—

(A) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done

The event of tender opening in the subject procurement process took place on 30th March 2021 and is therefore excluded in computing the time taken for evaluation of bids pursuant to section 80 (6) of the Act. Evaluation was concluded on 24th April 2021 going by the date on the Report by the Evaluation Committee. Therefore, if this provision is considered, then evaluation of bids in the subject tender took 25 days after 30th March 2021, which was within the 30 days specified in section 80 (6) of the Act.

On the other hand, if the date of 24th April 2021 is considered (being the date when the Evaluation Committee commenced evaluation), then evaluation of bid took 1 day because evaluation was completed on the same date of 24th April 2021. In both circumstances, evaluation was concluded within the period of 30 days provided in section 80 (6) of the Act.

It is worth pointing out that section 176 (1) (c) of the Act makes it an offence for any person to delay evaluation of tenders without any justifiable cause. It is therefore not expected that bids would be opened on 30th March 2021 and evaluation only begins on 24th April 2021. The Accounting Officer has an obligation of securing an Evaluation Committee so that evaluation commences immediately after tenders are opened. This will curb instances

where bids are opened and are susceptible to manipulation in a case where evaluation takes a long period before it commences. In the circumstances, the Tender Document already state evaluation would take place within 30 days from tender opening, thus the Accounting Officer ought to have taken this provision into consideration.

Having perused the documents furnished to it, the Board finds that the Procuring Entity evaluated bids in the subject tender within the maximum period of 30 days specified in section 80 (6) of the Act.

In addressing the second issue for determination, the Board carefully studied the provisions of the Tender Document, the Procuring Entity's Evaluation Report signed by all the evaluation committee members on 24th April 2021, the provisions of the Act, Regulations 2020 and Constitution to establish whether the Applicant's bid was evaluated in accordance with the provisions of the Tender Document, the Regulations, the Act and the Constitution at the Financial Evaluation stage.

At paragraph 12 of its Request for Review, the Applicant averred that the Procuring Entity failed to consider the award was to be made to a bidder whose tender had been determined to be substantially responsive and had been determined to be the lowest evaluated and qualified to perform the contract satisfactorily as provided in Clause 2.24.3 of the Tender Document.

It is the Applicant's contention that its bid met all the requirements of the Tender Document and the decision to declare its bid unsuccessful is unlawful, unfair and prejudicial.

Having considered the Applicant's pleadings and confidential documents availed to the Board by the Procuring Entity in accordance with section 67(3) (e) of the Act, the Board observes that the Applicant was found non responsive at the Financial Evaluation stage. In essence, the Applicant was responsive at the Preliminary Evaluation stage and the Technical evaluation stage but failed at the financial evaluation stage. At page 16 of the Evaluation Report, the Evaluation Committee noted the following:-

“4.0 FINANCIAL EVALUATION

i. The financial evaluation was of the formula: FS

$$***=(100 x FM/F;)***$$

Where FS = Financial Score;

FM = lowest evaluated priced bidder

F = price of the bidder under consideration.

The financial score was:

4.1.0 COMBINED TECHNICAL AND FINANCIAL SCORES

Basically, a Bidder whose combined technical and financial score is closer to 100% is the preferred one for award.

This was taken as:

$$S = (TS \times T \%) + (FS \times P \%)$$

Bidders were to be ranked according to their combined Technical (TS) and Financial (FS) Scores using the weights (T = the weight given to the Technical Proposal; P= the weight given to the Financial Proposal; T + P = 1) Indicated below. "

On the other hand, the criteria for evaluation at the Financial Evaluation Stage provided for in Clause 3 of Section II- Instructions to Tenderers Evaluation Criteria at page 18 of the Tender Document was follows:

"3. FINANCIAL EVALUATION

The evaluation committee will conduct a financial price comparison. "

The Board notes that the criteria for evaluation in the Tender Document provides that the evaluation committee will conduct a financial price comparison at Financial Evaluation stage. The Board also observes that an

award criteria was provided in Claus 2.24.3 of Section II. Instructions to Tenderers of the Tender Document as follows:-

"Award Criteria

2.24.3 Subject to paragraph 2.29 the Procuring entity will award the contract to the successful tenderer whose tender has been determined to be substantially responsive and has been determined to be the lowest evaluated tender, provided further that the tenderer is determined to be qualified to perform the contract satisfactorily."

Regulation 77 of Regulations 2020 deals with the manner in which Financial Evaluation is undertaken. In specific, Regulation 77 (3) of Regulations 2020 states as follows: -

"Tenders shall be ranked according to their evaluated price and the successful tender shall be in accordance with the provisions of section 86 of the Act"

It is clear that award to a successful tender is made in accordance with the award criterion applicable under section 86 (1) of the Act and as specified in the Tender Document. In this instance, Clause 2.24.3 of Section II. Instructions to Tenderers of the Tender Document provides for the Procuring Entity to award the contract to a successful tenderer whose tender has been determined to be substantially responsive and has been determined to be

the lowest evaluated tender, provided further that the tenderer is determined to be qualified to perform the contract satisfactorily.

The Board notes that this was an open tender where a Request for Proposal method of procurement was not used and thus section 86 (1) (a) of the Act was the applicable award criterion as specified in the Tender Document.

The Board studied the Evaluation Report dated 24th April 2021 and notes that at the Technical Evaluation Stage, bidders were awarded scores out of 100 points. Further, bidders were required to achieve an overall score of 75 points taken as 75% so as to proceed to the Financial Evaluation Stage.

At the Financial Evaluation, the Evaluation Committee used a scoring method that was not provided for in the Tender Document. The formula that was applied during financial evaluation was as follows:

The Financial evaluation was of the formula: $FS = (100 * FM / F)$

Where FS=Financial Score

FM=lowest Evaluated priced bidder

F=price of the bidder under consideration

The Evaluation Committee thereafter combined Technical and Financial scores and recommended award of the subject tender to Catch Security Links

Limited being the bidder who had the highest combined total score of 100 points taken as 100%.

The Board has established that this was an open tender where the Request for Proposal method was not used. Therefore, the applicable award criteria was that of lowest evaluated tenderer under section 86 (1) (a) of the Act and not the bidder with the highest combined technical and financial scores provided in section 86 (1) (b) of the Act.

Evidently, awarding scores at the Financial Evaluation Stage was not a criteria for evaluation. Combining the technical and financial evaluation scores to determine the bidder with the highest combined technical and financial evaluation scores was not an award criteria in the Tender Document. The applicable criteria required ranking of bidders according to their tender prices so as to recommend the lowest evaluated bidder for award of the subject tender. This is a clear demonstration that the Procuring Entity departed from the Financial Evaluation Criteria and award criterion applicable in the instant procurement proceedings.

Accordingly, the Board finds that the Procuring Entity did not award the subject tender in accordance with Clause 2.24.3 of Section II. Instructions to Tenderers of the Tender Document read together with Section 86 (1) (a) of the Act and Regulation 77 (3) of Regulations 2020.

Accordingly, the Board finds that the Procuring Entity failed to evaluate the Applicant's bid at the Financial Evaluation stage in accordance with Section 80 (2) of the Act read together with Regulation 77 of Regulations 2020.

On the third issue for determination, the Applicant avers that the Respondents breached the provisions of Regulation 82 (3) of Regulations 2020 by failing to disclose the price at which award was made to the successful bidder. Regulation 82 (3) provides as follows;

"The notification in this regulations shall include the name of the successful bidder, the tender price and the reasons why the bid was successful in accordance with section 86 (1) of the Act."

Further, in its Statement Supporting the Request for Review, the Applicant avers that contrary to this requirement, the regret letter dated 10th May 2021 stated that the Applicant's bid was responsive and went further to contradict itself by stating the winning bidder without its tender price.

Having considered the Applicants case, the Board notes that section 87 (3) of the Act provides that ***"when a person submitting the successful tender is notified under subsection (1), the accounting officer of the Respondent 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."***

On the other hand, Regulation 82 of Regulations 2020 provides as follows:-

"82(1) the notification to the unsuccessful bidder under section 87(3) of the Act, shall be in writing and shall be made at the same time the successful bidder is notified.

82(2) for greater certainty, the reason to be disclosed to the unsuccessful bidder shall only relate to their respective bids.

82(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. [Emphasis added]

In view of the provisions of section 87(3) and Regulation 82 of Regulations 2020 set out hereinbefore, the Board has severally held that, a notification must contain both the reason why the bidder's bid was found non-responsive as well as a disclosure of the winning bidder and the price at which award was made including the reason why a successful bidder was found to be successful in accordance with Section 86(1) of the Act. This is the ideal position in promotion of the principle of transparency envisaged under Article 227 (1) of the Constitution.

It is worth pointing out that the successful bidder's amount, at which an award is made, forms part of the ingredients of a letter of notification of unsuccessful bid.

In the instant scenario, the Applicant ought to have been informed of the name of the successful bidder, the tender price and reasons why the bid was successful. It is worth noting that the Applicant was not informed of the successful bidder's tender price.

The Applicant's letter of notification of unsuccessful bid dated 10th May 2021 was as follows:

RE: TENDER NO.CEMASTEА/SE/001/2021-2022 (PROVISION OF SECURITY SERVICES

This is to notify you that CEMASTEА has completed evaluating the bids for the above named work.

The bid was responsive, however,

- i. It was not the lowest evaluated bid.***

The successful bidder for the tender was Catch Security Link Ltd.

We thank you for participating in this tender and encourage you to participate in our future bids."

Evidently, the Procuring Entity did not disclose the amount at which award of the subject tender was made to the successful bidder in the Applicant's letter of notification.

Article 227 (1) of the Constitution provides that:

"When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective."

The Applicant's letter of notification of unsuccessful bid cannot be said to be transparent because the Accounting Officer of the Procuring Entity did not indicate the amount at which award of the subject tender was made to the successful bidder and thus did not act in a transparent manner.

Accordingly, the Applicant's letter of notification of unsuccessful bid dated 10th May 2021 fails to satisfy the principles of fairness and transparency under Article 227 (1) of the Constitution, Section 87 (3) of the Act and Regulation 82 of Regulations 2020 thus cannot be allowed to stand.

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

FINAL ORDERS

In exercise of the powers under section 173 of the Act, the Board makes the following orders:

- 1. The Procuring Entity's Accounting Officer's Letters of Notification dated 10th May 2021 with respect to Tender No. CEMASTEА/SE/001/2021-2022 for Provision of Security Services, to the Applicant and all other unsuccessful tenderers who participated in the subject procurement proceedings, be and are hereby cancelled and set aside.**

- 2. The Procuring Entity's Accounting Officer's Letter of Notification of Tender No. CEMASTEА/SE/001/2021-2022 for Provision of Security Services, dated 10th May 2021 addressed to the Successful Bidder, M/s Catch Security Links Ltd, be and is hereby cancelled and set aside.**

- 3. The Procuring Entity's Accounting Officer is hereby ordered to direct the Evaluation Committee to re-admit the Applicant's tender together with all tenders that made it to the Financial Evaluation stage, at the Financial Evaluation stage and to re-evaluate the tenders at the Financial Evaluation stage in accordance with the criterion provided in Clause 3. Financial Evaluation of Section II. Instructions to Tenderers of the Tender Document read together with Section 80 (2) and Regulation 77 of Regulations 2020, taking into consideration the Board's findings in this Review.**

4. Further to Order No. 3 above, the Accounting Officer of the Procuring Entity is hereby directed to proceed with the procurement proceedings in Tender No. CEMASTE/SE/001/2021-2022 for Provision of Security Services, including the making of an award to the lowest evaluated tenderer in accordance with Clause 2.24.3 of Section II. Instructions to Tenderers of the Tender Document read together with section 86 (1) (a) of the Act and to issue notification letters of the outcome of the evaluation of tenders to tenderers in accordance with section 87 of the Act read together with Regulation 82 of Regulations 2020 within fourteen (14) days from the date of this decision.

5. Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.

Dated at Nairobi this 2nd day of June 2021

CHAIRPERSON

PPARB

SECRETARY

PPARB