

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 73/2021 OF 21ST MAY 2021

BETWEEN

PRIDE KINGS SERVICES LIMITEDAPPLICANT

AND

THE ACCOUNTING OFFICER,

SIBO WATER & SANITATION

COMPANY LIMITED.....1ST RESPONDENT

SIBO WATER & SANITATION

COMPANY LIMITED.....2ND RESPONDENT

INTER SECURITY SERVICES LIMITED INTERESTED PARTY

Review against the decision of the Accounting Officer of Sibo Water & Sanitation Company Limited with respect to Tender No. SIBO/TEND/15/2020-22, for Provision of Security Services.

BOARD MEMBERS

- | | |
|----------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Arch. Steven Oundo, OGW | -Member |
| 3. Eng. Mbiu Kimani, OGW | -Member |
| 4. Mr. Jackson Awele | -Member |
| 5. Mr. Ambrose Ogetto | -Member |

IN ATTENDANCE

1. Mr. Stanley Miheso -Holding brief for the Acting Board Secretary.

BACKGROUND TO THE DECISION

The Bidding Process

Sibo Water & Sanitation Company Limited (hereinafter referred to as "the Procuring Entity") advertised Tender No. SIBO/TEND/15/2020-2022 for Provision of Security Services (hereinafter referred to as "subject tender") in the Standard Newspaper and the Procuring Entity's Website (www.sibowasco.co.ke) on 19th April 2021 inviting eligible tenderers to bid for the same.

Bid submission Deadline and Opening of Bids

The Procuring Entity received five (5) bids by the bid submission deadline of 28th April 2021. The same were opened shortly thereafter by a Tender Opening Committee and recorded as follows: -

S/No	Bidder Name	Documents Received	Tender Sum	Tender Security
1	Inter Security Services	2	5,529,600	60,480
2	Guard Force Group Limited	2	8,519,040	60,480
3	Pride Kings Services	2	5,616,000	60,480
4	Anchor Security	2	5,527,440	60,480
5	Chakra Security	2	5,529,600	60,480

Evaluation of Bids

Having appointed an Evaluation Committee, evaluation of bids 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 evaluated bids against eleven (11) mandatory requirements listed in Section VII. Provision of Security Services of the Tender Document. At the end of evaluation at this stage, the Evaluation Committee found the three (3) bidders, that is, M/s Guard Force Group Limited, M/s Anchor Security and M/s Chakra Security non-responsive. The remaining two (2) bidders, M/s Pride Kings Services and M/s Inter Security Services were found responsive and eligible to proceed to the Technical Evaluation stage.

2. Technical Evaluation

At this stage, the Evaluation Committee applied the Technical Evaluation criteria outlined in Section VII. Provision of Security Services of the Tender Document. Bidders were required to attain a minimum technical score of 70% to proceed to Financial Evaluation. At the end of this stage, the two (2) Bidders attained the minimum technical score of 70% therefore proceeded to the Financial Evaluation Stage.

3. Financial Evaluation

At this stage, the Evaluation Committee applied the Financial Evaluation criteria outlined in Section VII. Provision of Security Services of the Tender Document. The lowest evaluated tender was to be considered for award of the subject tender. The prices quoted by the remaining two bidders was recorded as follows:

Tenderer	Tender Sum
1. Inter Security Services Limited	Kshs. 5,529,600.00
2. Pride Kings Services Limited	Kshs. 5,616,000.00

The Evaluation Committee observed that M/s Inter Security Services Limited submitted the lowest evaluated tender price of **Kshs. 5,529,600.00 (Kenya Shillings Five Million, Five Hundred and Twenty-Nine Thousand Six Hundred only) inclusive of 16% VAT.**

Recommendation

The Evaluation Committee recommended award of the subject tender to M/s Inter Security Services Limited at their tender price of **Kshs. 5,529,600.00 (Kenya Shillings Five Million, Five Hundred and Twenty-Nine Thousand Six Hundred only) inclusive of 16% VAT** having determined the said bidder submitted the lowest evaluated tender price.

Due Diligence

According to a Due Diligence Report executed on 7th May 2021, the Evaluation Committee undertook a due diligence exercise at the offices of

M/s Inter Security Services Ltd located in Kisumu and made the following findings: -

No.	Requirements	Findings
1.	Original Tax Compliance Certificate	Kept in head office - Nairobi
2.	CR 12 Forms	Kept in head office - Nairobi
3.	Original KISA or PSIA membership Certificate	Kept in head office - Nairobi
4.	Original Company Registration Certificate	Kept in head office - Nairobi
5.	Copy of work plan and supervisory reports	Kept in head office - Nairobi
6.	Evidence of the following: - - Functional VHL Radio set - Operating Vehicles - Metal Detectors	Available and working
7.	Original Certified Valid Communications Authority (CA) licenses	Kept in head office - Nairobi
8.	Availability of an operating office	Available

Professional Opinion

In a Professional Opinion dated 6th May 2021, the Procuring Entity's Acting Procurement Officer reviewed the Evaluation Report executed on 4th May 2021 and the Due Diligence Report executed on 7th May 2021. He concurred with the Evaluation Committee's recommendation on award of the subject tender thus advised the Procuring Entity's Managing Director to award the subject tender to M/s Inter Security Services Limited at their tender sum of **Kenya Shillings Five Million, Five Hundred and Twenty-Nine Thousand Six Hundred only inclusive of 16% VAT (Kshs. 5,529,600.00)** The said professional opinion was approved by the Procuring Entity's Managing Director on 6th May 2021.

Notification to Bidders

In letters dated 7th May 2021, the Procuring Entity's Managing Director notified the successful tenderer and all other unsuccessful tenderers of the outcome of their bids.

THE REQUEST FOR REVIEW

M/s Pride Kings Services Limited (hereinafter referred to as "the Applicant") lodged a Request for Review dated 20th May 2021 and filed on 21st May 2021 together with a Statement in Support of the Request for Review sworn on 20th May 2021 and filed on 21st May 2021 through the firm of Bruce Odeny & Company Advocates, seeking the following orders: -

- i. An order annulling, cancelling and setting aside the award of tender to the Interested Party;*
- ii. An order directing the Respondents to award the tender to the Applicant and to execute a contract in line with the decision of the Review Board;*
- iii. An order directing the Respondents to avail all records of the procurement process particularly the tender evaluation proceedings relating to the subject tender for the Board to review and if not according to the law, annul the said proceedings and make appropriate orders as mandated by law;*
- iv. An order awarding the costs of and incidental to these proceedings to the Applicant; and*

v. Any other or alternative relief that the Board deems just and expedient to grant.

In response, the 1st and 2nd Respondents lodged a Memorandum of Response dated 27th May 2021 and filed on 28th May 2021 together with a Relying Affidavit sworn on 27th May 2021 and filed on 28th May 2021 through the firm of Mugoye & Associates Advocates. The Interested Party lodged a Memorandum of Response to the Request for Review dated 2nd June 2021 filed on 4th June 2021 together with a Supporting Affidavit sworn on 2nd June 2021 and filed on 4th June 2021 through the firm of Okulo & Company Advocates.

Pursuant to Circular No. 2/2020 dated 24th March 2020, detailing an administrative and contingency plan to mitigate against Covid-19 pandemic, 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, none of the parties filed written submissions.

BOARD'S DECISION

The Board has considered the Applicant's Request for Review, its Statement in support thereof, the 1st and 2nd Respondent's Memorandum of Response and Affidavit in Support thereof, the Interested Party's Memorandum of

Response and Supporting Affidavit thereof and all attachments provided by parties in their respective pleadings including the confidential documents submitted to it pursuant to section 67 (3) (e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act"). The Board finds that the following issues call for determination: -

- I. Whether the Applicant can rely on and benefit from confidential information contained in the Interested Party's original bid;**
- II. Whether the Procuring Entity evaluated the Interested Party's bid at the Mandatory Requirements Evaluation stage in accordance with section 79 (1) and 80 (2) of the Act in respect of the following criterion:**
 - Clause 6. Mandatory Requirements of Section VII. Provision of Security Services Preliminary Evaluation of the Tender Document on providing evidence of existence of an operating office (s) within the County where the services are provided/undertaken.**

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

On the first issue for determination, the Applicant alleged at paragraph 4 of its Request for Review that the 1st Respondent unfairly evaluated the Applicant's tender despite the fact that it's tender was responsive and had successfully passed all evaluation stages in compliance of with sections 79

(1) and 86 (1) of the Act. The Applicant further stated that award of the subject tender to the Interested Party despite its failure to satisfy mandatory requirements, was contrary to the provisions of section 79 of the Act and the Public Procurement and Asset Disposal Regulations 2020. The Applicant further averred at paragraphs 4 (a), (b) and (c) of its Request for Review and paragraphs 11 (a), (b) and (c) of the Statement in Support of the Request for Review that; the Interested Party has no operational offices within Siaya County, lacks an Alarm Communication License and does not have evidence of an assignment of a similar nature yet these were mandatory requirements in the Tender Document.

At paragraph 12 of their Memorandum of Response, the Respondents state that in a letter dated 15th May 2021, the Applicant notified the Respondents of the intention to challenge the outcome of its (Applicant's) bid whilst confessing and/or admitting that through one Francis Odhiambo, the Applicant was in communication with the Evaluation Committee members before the tendering process was concluded in violation of section 65 (2) of the Act.

At paragraph 6 of its Supporting Affidavit, the Interested Party depones that the allegations made by the Applicant are false, malicious and designed to tarnish its reputation

Having considered parties' rival cases, the Board notes that section 67 (1), (3), and (4) of the Act states as follows:

1) During or after procurement proceedings and subject to subsection (3), no procuring entity and no employee or

agent of the procuring entity or member of a board, commission or committee of the procuring entity shall disclose the following;

- a) Information relating to a procurement whose disclosure would impede law enforcement or whose disclosure would not be in the public interest;***
- b) Information relating to a procurement whose disclosure would prejudice legitimate commercial interests, intellectual property rights or inhibit fair competition;***
- c) Information relating to the evaluation, comparison or clarification of tenders, proposals or quotations; or***
- d) The contents of tenders, proposals or quotations.***

2);

3) This section does not prevent the disclosure of information if any of the following apply—

- (a) The disclosure is to an authorized employee or agent of the procuring entity or a member of a board or committee of the procuring entity involved in the procurement proceedings;***
- (b) The disclosure is for the purpose of law enforcement;***
- (c) The disclosure is for the purpose of a review under Part XV or requirements under Part IV of this Act;***

- (d) The disclosure is pursuant to a court order; or*
- (e) The disclosure is made to the Authority or Review Board under this Act.*
- (4) Notwithstanding the provisions of subsection (3), the disclosure to an applicant seeking a review under Part XV shall constitute only the summary referred to in section 67 (2)(d)(iii) [that is, section 68 (2) (d) (iii) of the Act] [Emphasis by the Board].*

Section 68 (2) (d) (iii) of the Act provides as follows:

"68 (1).....;

(2) The records for a procurement shall include-

(a).....;

(b).....;

(c).....;

(d) For each tender, proposal or quotation that was submitted-

(i).....;

(ii);

(iii) A summary of the proceedings of the opening of tenders, evaluation and comparison of the

tenders, proposals or quotations, including the evaluation criteria used as prescribed.”

Section 67 (1) of the Act provides for confidential information that should not be disclosed by a procuring entity, employee or agent of the procuring entity or member of the board, commission or committee of the procuring entity. However, disclosure of confidential information is allowed if any of the circumstances listed in section 67 (3) of the Act apply. Further, an applicant seeking a review is entitled to a summary of the proceedings of the opening of tenders, evaluation and comparison of tenders, proposal or quotations, including the evaluation criteria used pursuant to section 68(2) (d) (iii) of the Act. This means that the Applicant is not entitled to a disclosure of the contents of another bidder's bid because such disclosure would prejudice legitimate commercial interests, intellectual property rights or inhibit fair competition.

The Board studied the Applicant's Request for Review and the Statement in Support of the Request for Review and notes that at paragraphs 4 (b) and (c) of the Request for Review and paragraph 11 (b) and (c) of its Statement in Support of the Request for Review, the Applicant avers that:

“The Respondent unfairly found the Applicant's tender was unresponsive despite the fact that the Applicant's tender being responsive and had successfully passed all the stages of the Preliminary stages and was in compliance of both section 79 (1) and 86(1) of the Act. By awarding the tender to the Interested Party who did not meet the Mandatory

requirements of the tender contrary to the provisions of section 79 of the Act and regulations made there under and the Interested Party's tender was hence unresponsive. Among the Mandatory requirements that were breached are;

a)

b) The Interested Party lacked an Alarm Communication License yet it was a requirement in the tender.

c) The Interested Party does not have an assignment of a similar nature which was also a mandatory requirement in the tender.

d)....."

Clause 7. Mandatory Requirements of Section VII. Provision of Security Services Preliminary Evaluation of the Tender Document required bidders to provide:

"Certified Valid Communications Authority (CA) Licenses for both Radio and Alarm communications"

Further Clause 2. Technical Evaluation of Section VII. Provision of Security Services of the Tender Document required bidders to provide:

"Evidence of similar works. Provide copies of contracts, LPO/LSO/Award letters from at least (3) organizations with at least Kshs. 500,000 monthly invoice value being served currently."

Therefore, evidence of a Certified Valid Communications Authority License for Alarm Communications and evidence of similar works through contracts, LPOs, LSOs and Award Letters are to be found in the original bid submitted by a bidder in response to the two criteria outlined hereinbefore. The Applicant did not explain to this Board how it got information regarding; the Alarm Communication License of the Interested Party and the assignments undertaken by the Interested Party.

Section 67 (5) of the Act provides that any person who contravenes the provisions of section 67 in general commits an offence as stipulated in section 176 (1) (f) and shall be debarred and prohibited to work for a government entity or where the government holds shares, for a period of ten years. Section 176 (1) (f) of the Act provides that a person shall not divulge confidential information under section 67 of the Act. In essence, divulging confidential information in a manner that is not permitted by section 67 (3), 67 (4) and 68 (2) (d) (ii) of the Act is prohibited. If the Applicant obtained such information and is now relying on the same as evidence in its Request for Review, such information amounts to illegally obtained evidence.

Courts are categorical on the effect of a party relying on illegally obtained evidence. In **Petition No. 58 of 2014, Okiya Omtatah Okiiti & 2 others v. Attorney General & 3 others [2014] eKLR**, the Honourable Justice Lenaola held at paragraph 84 to 89 of his judgment as follows:

"the point made in the context of the matter before me is that if litigants choose to use clandestine means to procure

information such would heavily compromise the need for Article 35 of the Constitution and would obviously violate the other parties' fundamental right of privacy under Article 31 of the Constitution. Had the petitioners followed lawful channels and procedures available in law in obtaining the information, then the question of violation of the Respondents' rights to privacy as alleged in the Cross-Petition would not have arisen.

It is obvious that the documents purportedly relied upon by the petitioners do not meet the criteria [provided in law] and are therefore not admissible....

I also say so because Article 50(4) of the Constitution states as follows;

"Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair or would otherwise be detrimental to the administration of justice".

At paragraph 82 to 84 of the Court of Appeal decision **in Civil Appeal No. 13 of 2015, Okiya Omtatah Okiiti & 2 Others V Attorney General & 4 Others [2020] eKLR**, the court upheld the finding of Honourable Justice Lenaola in the foregoing case regarding illegally obtained evidence, when it (Court of Appeal) held as follows:

"82. It is clear that by dint of Article 50 (4) of the Constitution, the adage, "it matters not how you get it if you steal it even, it would be admissible in evidence" is not representative of whether the dispute is of a criminal or civil nature.

83. We reiterate that the appellants claimed to have been supplied with the contentious documents by "conscientious citizens" and "whistleblowers". Based on the foregoing, the appellants ought to have requested the concerned Government Departments to supply them with the information they required, and to which they were entitled to receive in accordance with Article 35 of the Constitution. It was not necessary for the Appellants to resort to unorthodox or undisclosed means to obtain public documents. If they deemed the documents were relevant (as indeed they were) then they ought to have invoked the laid down procedure of production of documents.

84. We therefore agree with the learned Judge that it would be detrimental to the administration of justice and against the principle underlying Article 50 (4) of the Constitution to in effect countenance illicit actions by admission of irregularly obtained documents. However well intentioned "conscientious citizens" or "whistleblowers" might be in checking public officers, there can be no justification, as pointed out by the Supreme Court, for not following proper procedures in the procurement of evidence. We do not have

any basis for interfering with the decision of the High Court to expunge the documents in question.”

The Board observes that Article 50 (4) of the Constitution states as follows;

(4) Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.

Article 50 (4) of the Constitution precludes a decision making body from admitting illegally obtained evidence because admission of such evidence would render a decision making process unfair and detrimental to administration of justice. Furthermore, reliance on illegally obtained evidence would prejudice the Interested Party's legitimate commercial interest, intellectual property rights and inhibit fair competition.

Having found information in the Interested Party's original bid is confidential, a party that obtains such information using illegal means renders such information inadmissible because section 67 (1) (d) of the Act categorizes the contents of a tender as confidential information which would not be disclosed to the Applicant.

In the circumstances, paragraph 4 (b) and (c) of the Request for Review and paragraph 11 (b) and (c) of the Applicant's Statement in support of the Request for Review are hereby expunged from the record of these

proceedings because the Applicant cannot rely on and benefit from information provided in the Interested Party's original bid obtained in blatant breach of section 67 (1) (d) of the Act.

The second limb of the issue under consideration relates to the Applicant's allegation that it received communication from the Evaluation Committee **"based on their professional opinion that the Applicant was awarded the tender and have been shortchanged in the process."**

The Applicant was notified of the outcome of its bid in a letter of notification of tender dated 7th May 2021 as follows:

"RE: NOTIFICATION OF TENDER FOR PROVISION OF SECURITY SERVICES: TENDER NO. SIBO/TEND/15/2020-22

The above subject matter refers.

Pursuant to Section 87 (3) of the Public Procurement and Asset Disposal Act, 2015, you are hereby notified that your submitted tender was non responsive. The Tender was not successful due to;

The firm's quoted Tender Sum of Kshs. 5,616,000.00 (Kenya Shillings Five Million, Six Hundred and Sixteen Thousand Only) was not the lowest evaluated price.

The successful tenderer was Ms. Inter Security Services Limited, having been considered as the lowest evaluated

tender at a bid price of Kshs. 5,529,600.00 (Kenya Shillings Five Million, Five Hundred and Twenty-Nine Thousand, And Six Hundred Only)

We thank you for showing interest to transact business with the company and wish you luck in the subsequent tenders."

In a letter dated 15th May 2021 addressed to the Procuring Entity, the Applicant stated as follows:

"RE: INTENTION TO APPEAL

We make reference to your letter dated 7th May 2021 notifying us of being unsuccessful in the recently concluded tender for Provision of Security Services Tender Number SIBO/TEND/15/2020/2022

We write to object the award of tender to M/S Inter Security Services Limited based on the following grounds;

- 1. The awarded firm has no operational office within Siaya County which was one of the Mandatory requirement number 6 i.e. Evidence of existence of an operating office(s) within the County where the services are provided/ undertaken (titles/ leases agreement and/or Single Business permit. This was also confirmed during the due diligence by the evaluation team***
- 2. The awarded firm attached Certified Valid Communications Authority (CA) Licenses Radio communication and not for***

Alarm communications yet it was a requirement that you ought to attach both radio and alarm.

3. The awarded firm currently does not have an assignment of similar nature, reference letters from at least three (3) similar organizations served in the last 3 years.

We have information from the evaluation committee based on their professional opinion that we were awarded the tender and have been shortchanged in the process and therefore intend to appeal to the Public Procurement Regulatory Authority."

The Board notes the Applicant alleged in the last paragraph of its letter dated 15th May 2021 that based on the Evaluation Committee's professional opinion, the Applicant was awarded the subject tender but had been short changed in the process.

Section 65 (1) and (2) of the Act states that:

"(1) after the deadline for the submission of tenders, proposals or quotations—

(a) A person who submitted a tender shall not make any unsolicited communications to the procuring entity or any person involved in the procurement proceedings that might reasonably be construed as an attempt to influence the evaluation and comparison of tenders; and

(b) A person shall not attempt, in any way, to influence that evaluation and comparison.

(2) A person who contravenes the provisions of subsection (1) commits an offence and shall lead to the tenderer being disqualified and the public officer facing disciplinary action in addition to any other action under this Act."

Further, section 176 (1) (g), (2) and (3) of the Act states as follows:

"(1) a person shall not—

- (a);***
- (b);***
- (c);***
- (d);***
- (e);***
- (f);***
- (g) Inappropriately influence tender evaluations;***
- (h);***
- (i);***
- (j);***
- (k);***
- (l);***
- (m)***

(2) A person who contravenes the provisions of subsection (1) of this section, commits an offence and shall be liable upon conviction—

(a) if the person is a natural person, to a fine not exceeding four million shillings or to imprisonment for a term not exceeding ten years, or to both;

(b) If the person is a body corporate, to a fine not exceeding ten million shillings.

(3) In addition to the penalty under subsection (2), a state or public officer involved shall be subject to internal disciplinary action while any other person who is not a state or public officer shall be debarred.”

Section 65 (1) and (2) of the Act precludes a tenderer from making any unsolicited communications to the procuring entity or any person involved in the procurement proceedings that might reasonably be construed as an attempt to influence the evaluation and comparison of tenders, after the deadline of submission of tenders. Further, a person who contravenes the provisions of subsection (1) commits an offence and this leads to the tenderer being disqualified and the public officer facing disciplinary action in addition to any other action under the Act. Section 176 (1) (g) of the Act makes it an offence to influence evaluation of tenders. A person who commits this offence is liable to the penalties provided in section 176 (2) and (3) of the Act.

The Board was not furnished with any evidence as to the truthfulness of the Applicant's allegation. That notwithstanding, if indeed the Applicant had information from the Evaluation Committee that it was awarded the tender but was shortchanged in the subject procurement process, then the Applicant would be in breach of section 65 (1) of the Act for making unsolicited communication with the Evaluation Committee after the deadline of submission of tenders. Further, if the Evaluation Committee colluded with the Applicant to influence evaluation of the Applicant's tender, the Evaluation Committee members would be in breach of section 176 (1) (g) of the Act and thus liable to the penalties provided in section 176 (2) and (3) of the Act.

On the second issue for determination the Applicant challenged the Procuring Entity's evaluation of the Interested Party's bid at the Mandatory Requirements Evaluation stage in accordance with section 80 (2) of the Act in respect of Clause 6 of Section VII. Provision of Security Services Preliminary Evaluation of the Tender Document.

At paragraph 1 of its Request for Review, the Applicant avers that the Respondents violated the provisions of Section 80 (2) of the Act by failing to evaluate the tenders using the procedures and criteria set out in the Tender Document. According to paragraph 3 of the Applicant's Request for Review, the 1st Respondent breached the provisions of section 80 (1) and 79 (1) of the Act by purporting to evaluate a non-responsive tender submitted by the

Interested Party thus ought not to have passed the preliminary stage or even proceeded to technical evaluation.

In response, the Respondents aver at paragraph 7 of their Memorandum of Response that the tenders were evaluated strictly and in compliance with the criteria set out in the Tender Document. The Respondents further state that the Interested Party was responsive to all mandatory requirements and the technical evaluation criteria and finally submitted the lowest evaluated financial bid. According to the Respondents, this being an open tender, the Procuring Entity invited eligible and interested bidders to participate in the subject tender but did not restrict the tender to bidders located in Siaya County. In the Respondents' view, tenderers were only required to provide evidence of an operational office (s) within any County where they are currently providing services.

At paragraph 2 (a) of its Memorandum of Response to the Request for Review the Interested Party states that it has an operational office within Siaya County on L.R No. 1/453 Siaya, Ndere Road and a satellite office in Sinaga Gem along Siaya Road Plot no. 1120.

Having considered parties' cases, the Board notes that Clause 6 of Section VII. Provision of Security Services Preliminary Evaluation of the Tender Document required bidders to provide the following:

"Evidence of Existence of an operating office(s) within the county where the services are provided/undertaken (Titles/Lease agreement and /or Single Business permit)"The Applicant's

interpretation of the above mentioned Clause was that the successful tenderer must have a physical and operational office in Siaya County. The Respondents' on the other hand, interpreted the clause to mean that the subject tender being an open tender, the invitation to eligible and interested bidders to participate was not restricted to bidders located in Siaya County. In the Respondents' view, tenderers were only required to provide evidence of an operational office within any County where the tenderers are currently providing Security Services.

The issue under consideration relates to the location of a bidder's premises. This issue is not part of confidential information whose disclosure would be barred by section 67 (1) of the Act. We say so because, it is very likely that service providers undertaking the same type of business would know each other including the location of a competitor's office.

In addressing the issue under consideration, the Board notes that this was an open tender advertised in the Standard Daily Newspaper and the Respondents' website on 19th April 2021. Section 96 (1), (3) and (4) of the Act deals with requirements of an open tender and provides as follows;

(1) The accounting officer of a procuring entity shall take such steps as are reasonable to bring the invitation to tender to the attention of those who may wish to submit tenders.

(2)

(3) In addition to subsection (2) a procuring entity shall—

- (a) Use Kenya's dedicated tenders' portal or any other electronic advertisements as prescribed; and*
 - (b) Post advertisements at any conspicuous place reserved for this purpose in the premises of the procuring entity.*
- (4) In regard to county-specific procurements pursuant to section 33, the procuring entity shall advertise the notice inviting expressions of interest in the dedicated Government tenders portal; in its own website, or in at least one daily newspaper of county-wide circulation.*

Section 33 of the Act reference hereinbefore states that:

"(1) A County Treasury shall be the organ responsible for the implementation of public procurement and asset disposal policy in the county.

(2) Without prejudice to the general provisions of sub-section (1), the County Treasury shall establish a procurement function which shall—

(a) Implement public procurement and asset disposal procedures;

(b) Coordinate administration of procurement and asset disposal Contracts;

- (c) Coordinate consultations with county stakeholders of the public procurement and asset disposal system in liaison with the National Treasury and the Authority;*
 - (d) Advise the accounting officers of county government entities on public procurement and asset disposal matters;*
 - (e) Co-ordinate county government monitoring and evaluation of the supply chain function of county government entities including ensuring compliance;*
 - (f) promote preference and reservations schemes for small and micro enterprises and other disadvantaged groups, citizen contractors, women, youth, persons with disabilities, minorities and marginalized groups in public procurement at the county;*
 - (g) Promote preference and reservation schemes for residents of the county to ensure a minimum of twenty percent in public procurement at the county;*
 - (h) Administer the scheme of service for county government procurement and supply chain management officers and capacity building;*
- (3) The County Treasury may prescribe an institutional framework to provide for the procurement, administration and management of common user items for the county government."*

The Board observes that Clause 2.1.1 of the Appendix to Instructions to Tenderers of the Tender Document states that;

"The tender is open to eligible bidders/tenderers."

This means that the tender was open to all eligible members of the public without limiting the location of a company's premises.

On careful studying of the Procuring Entity's Tender Notice dated 19th April 2021, the Board observes that the Procuring Entity did not publish an expression of interest in relation to a County specific procurement pursuant to Section 96 (4) read together with section 33 of the Act. This supports the Board's position that the subject tender was not restricted to bidders whose premises are located in Siaya County.

Having noted this was an open tender, open to all irrespective of the location of a bidder's premises then it means the Procuring Entity required evidence of existence of an operating office (s) within the County where a bidder provides or undertakes its services. This does not necessarily mean a bidder's office should be located where the services (in the subject tender) will be provided or undertaken.

Section VI. Schedule of Requirements at page 24 of the Tender Document provides that:

"SECTION VI - SCHEDULE OF REQUIREMENTS

6.1 General

SIBOWASCO requires security and safety services to protect its premises within Siaya County as determined from time to time. Details of the required services are provided in the table below.

<i>S/No</i>	<i>Station</i>	<i>Day Guard</i>	<i>Night Guard</i>
<i>1</i>	<i>Mauna Treatment Plant</i>	<i>1</i>	<i>1</i>
<i>2</i>	<i>Sibo Old Office</i>	<i>1</i>	<i>2</i>
<i>3</i>	<i>Sibo New Office</i>	<i>1</i>	<i>2</i>
<i>4</i>	<i>Siaya Sewerage</i>	<i>1</i>	<i>2</i>
<i>5</i>	<i>Sigana Tank</i>	<i>1</i>	<i>1</i>
<i>6</i>	<i>Siaya Treatment</i>		<i>1</i>
<i>7</i>	<i>Abura Dam</i>	<i>1</i>	<i>2</i>
<i>8</i>	<i>Nyamninia Tank</i>	<i>1</i>	<i>1</i>
<i>9</i>	<i>Ndanu Falls</i>	<i>1</i>	<i>2</i>
<i>10</i>	<i>Bondo T. Works</i>	<i>1</i>	<i>2</i>
<i>11</i>	<i>Bondo Sewerage</i>	<i>1</i>	<i>2</i>
<i>12</i>	<i>Asembo Ndori T. Works</i>	<i>1</i>	<i>1</i>
<i>13</i>	<i>Ulumbi Pump House</i>	<i>1</i>	<i>2</i>
<i>14</i>	<i>Bondo Office</i>		<i>2</i>
<i>15</i>	<i>South Sakwa treatment plant</i>		<i>1</i>
	<i>Total</i>	<i>12</i>	<i>24</i>

Note: The number of guards indicated is the actual numbers to be deployed and payments will be based on these numbers subject to job cards as filled.

The Security firm or firms may also be required to lease on "as and when required basis" intruder alarm equipment to the Company fitted with motion detectors, alarm sound errand linkage of the same/existing system to local police station

and/or guarding firm at SIBOWASCO Stations as tabulated in the clause by clause requirements in the description of services.”

From the foregoing, it is evident that the Procuring Entity specified that the security and safety services will be executed within Siaya County. However, as already established by the Board, this was an open tender open to all irrespective of the location of a bidder's premises. This does not necessarily mean a bidder's office should be located where the services (in the subject tender) will be provided or undertaken. In the Board's view, a bidder can be located in any other county provided that such a bidder is prepared to execute security and safety services by deploying its security guards in the stations listed herein before within Siaya County.

Having studied the Interested Party's original bid, the Board notes that at page 49 thereof, the Interested Party attached a Single Business Permit issued by Nairobi City County on 19th January 2021, Business Identification Number 1092430 valid for 12 months from 1st January 2021 to 31st December 2021. The location of the business is indicated to be along Masaba Road on Plot Number 37/373. At page 98 to 99 of its original bid, the Interested Party attached a duly completed Confidential Business Questionnaire Form, showing the Interested Party's office is located along Masaba Road, off Bunyala road within Nairobi City County.

At page 50 of its original bid, the Board notes that the Interested Party attached a lease agreement dated 22nd May 2007 between Kenya Industrial Estate Ltd, Kisumu and Inter Security Services Limited (the Interested Party

herein) for Office Room Number 7. The lease agreement is certified as a true copy of the original. The Board also notes that the Evaluation Committee in their Due Diligence Report dated 7th May 2021 stated they visited the Interested Party's Kisumu office on 7th May 2021 to carry out due diligence on the Interested Party.

The Board already found that the criterion under consideration did not limit the location of a bidder's premises to Siaya County.

Section 79 (1) of the Act describes a responsive tender as a tender that conforms to all the eligibility and other mandatory requirements in the tender document.

Further, section 80 (2) of the Act provides that:

"(2) The evaluation and comparison of tenders shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered."

The Evaluation Committee had an obligation of confining itself to the criteria set out in the Tender Document when evaluating the Interested Party's bid as required by sec 80 (2) of the Act so as to determine whether the

Interested Party submitted a responsive tender within the meaning of section 79 (1) of the Act. In this instance, the Tender document did not limit the location of a bidder's premises, thus the Interested satisfied the criterion under Clause 6 of Section VII. Provision of Security Services Preliminary Evaluation of the Tender Document.

Having established the Interested Party satisfied the criterion under consideration, the Board finds that the Procuring Entity evaluated the Interested Party's bid at the Mandatory Requirements Evaluation stage in accordance with the criterion provided in Clause 6 of Section VII. Provision of Security Services Preliminary Evaluation of the Tender Document read together with section 79 (1) and 80 (2) of the Act.

The Board would like to make an observation, the Applicant alleged that the Procuring Entity awarded the subject tender to a bidder who did not satisfy the mandatory requirements in the Tender Document and was not the lowest evaluated tender. According to prayer 2 of the Request for Review, the Applicant urged the Board to direct the Respondents to award the subject tender to the Applicant and to sign a contract in respect of such an award.

The Board already found that the Applicant could not rely on and benefit from information provided in the Interested Party's original bid obtained in blatant breach of section 67 (1) (d) of the Act regarding the Interested Party's Alarm Communication License and any Contracts, LPOs, LSOs or Award Letters provided in the Interested Party's original bid. Further, the

Board has established the Interested Party satisfied the criterion under consideration and that the Procuring Entity evaluated the Interested Party's bid at the Mandatory Requirements Evaluation stage in accordance with the criterion provided in Clause 6 of Section VII. Provision of Security Services Preliminary Evaluation of the Tender Document.

Having found this was an open tender where the Request for Proposal method was not used, the appropriate award criteria is provided in section 86 (1) (a) of the Act as follows;

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

(a) the tender with the lowest evaluated price;"

Clause 2.2.7.4 of Section II. Instructions to Tenderers of the Tender Document provides for the Award Criteria applicable in the subject tender as follows;

"2.27.4 The Procuring entity will award the contract to the successful tenderer(s) 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."

An evaluation committee first determines bidders' responsiveness to eligibility and mandatory requirements (including technical specifications) before a consideration of price is undertaken at the Financial Evaluation stage so as to arrive at the lowest evaluated tender. This therefore means, award of a tender in an open tender is not made to a bidder who submitted the lowest price at tender opening but to a bidder who is substantially responsive to eligibility and mandatory requirements (including technical specifications) and is found to have submitted the lowest evaluated price at the end of Financial Evaluation.

Section 86 (1) (a) of the Act describes a successful tender in an open tender as a tender with the lowest evaluated price. The principle of cost-effectiveness cited in Article 227 (1) of the Constitution is not the only principle applicable to procurement of goods and services because, state organs and public entities are required to procure for goods and services in a system that is fair, equitable, transparent, competitive and cost-effective. This explains why evaluation of bids is done in stages, so that bidders compete for award of a tender by first demonstrating their responsiveness to eligibility and mandatory requirements (including technical specifications) before a consideration of price is made at the Financial Evaluation Stage.

Even though the Applicant's bid advanced to the Financial Evaluation Stage, the same was not the lowest evaluated bid, thus the Applicant could not be recommended for award of the subject tender. As a result, the Applicant's

prayer for the Board to direct the Respondents to award the subject tender to the Applicant and sign a contract with the Applicant is not merited.

The Board further notes that at prayer (e) of their Memorandum of Response, the Respondents sought an order directing that the Applicant be barred from participating in future procurement process of a similar nature as the subject tender having made unfounded allegations with the sole aim of delaying the subject procurement process so as to benefit from extension of its existing contract with the Procuring Entity which was due to expire on 31st May 2021.

Section 41 of the Act gives the Public Procurement Regulatory Board (hereinafter referred to as "the Regulatory Board") powers to debar a person from participating in procurement and asset disposal proceedings in accordance with the procedure outlined in Regulation 22 of Regulations 2020. One of the persons who can initiate a request for debarment is an accounting officer of a procuring entity as stated in Regulation 22 (1) (a) of Regulations, 2020.

On the other hand, the powers of this Board are outlined in section 173 of the Act as follows;

"Upon completing a review, the Review Board may do any one or more of the following—

- "(A) Annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;***
- (b) Give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;***
- (c) Substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;***
- (d) Order the payment of costs as between parties to the review in accordance with the scale as prescribed; and***
- (e) Order termination of the procurement process and commencement of a new procurement process."***

It is evident from the foregoing that this Board does not have powers to debar a person from participating in public procurement and asset disposal proceedings. That notwithstanding, Section 41 of the Act and Regulation 22 of Regulations 2020 gives the 1st Respondent the option of initiating a request for debarment if he wishes to do so.

In totality, the Board dismisses the Request for Review and proceeds to issue the following orders:

FINAL ORDERS

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

- 1. The Request for Review filed by the Applicant on 21st May 2021 in respect of Tender No. SIBO/TEND/15/2020-22 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 10th day of June 2021


.....
CHAIRPERSON

PPARB


.....
SECRETARY

PPARB

