

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 105 OF 2022 OF 20TH DECEMBER 2022

BETWEEN

PELT SECURITY SERVICES LIMITED APPLICANT

AND

THE JUDICIARY 1ST RESPONDENT

THE CHIEF REGISTRAR OF THE JUDICIARY 2ND RESPONDENT

GYTO SUCCESS COMPANY LTD 1ST INTERESTED PARTY

CATCH SECURITY LINK LIMITED 2ND INTERESTED PARTY

TOFADA SECURITY SERVICES LTD 3RD INTERESTED PARTY

KLEEN HOMES SECURITY SERVICES LTD .. 4TH INTERESTED PARTY

Review against the decision of the Accounting Officer of the Judiciary in relation to Tender No. JUD/OT/15/2022-2023 for Provision of Security Services to the Judiciary (Re-tendering).

BOARD MEMBERS PRESENT

- | | |
|---------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Dr. Paul Jilani | -Member |
| 3. CPA Isabel Juma | -Member |

IN ATTENDANCE

Mr. Philemon Kiprop

-Holding brief for Ag. Board Secretary

BACKGROUND OF THE DECISION

The Tendering Process

The Judiciary, the Procuring Entity and the 1st Respondent herein, re-invited sealed tenders from interested and eligible candidates in response to Tender No. JUD/OT/15/2022-2023 for Provision of Security Services (re-advertisement) (hereinafter referred to as the 'subject tender') using an open tender method and by way of an advertisement in the Daily Nation newspaper and Standard Newspapers of Monday, 24th October 2022. Prospective tenderers were required to download the blank tender document issued to tenderers by the 1st Respondent (hereinafter referred to as the 'Tender Document') from the 1st Respondent's website www.judiciary.go.ke and in the Public Procurement Information Portal website www.tenders.go.ke. One addendum was issued dated 2nd November 2022.

Addendum

The 2nd Respondent issued Addendum No.1 dated which sought to clarify several provisions of the Tender Document.

Submission of Tender and Tender Opening

A total of twenty-nine (29) tenderers submitted their tenders in response to the subject tender within the tender submission deadline of 8th November

2022 at 2:00 p.m. The tenders were thereafter opened in the presence of tenderers' representatives virtually. The Tender Opening Committee then observed that there were three (3) tenders in the Tender Box that bore reference no. 'JUD/OT/004/2022-2023: Provision of Security Services to the Judiciary', being a reference to a tender that had earlier been terminated and therefore noted that these could not be processed. A clarification was sought from the Public Procurement Regulatory Authority (hereinafter referred to as the 'Authority') vide a letter dated 10th November 2022 and whose response was received by the Procuring Entity on 16th November 2022 with guidelines that the Tender Opening Committee should proceed to open the three tenders and subject them to evaluation alongside the other 29 tenders. The additional tenders were opened on 18th November 2022 in the presence of tenderers representatives following a letter dated 17th November 2022 having been issued to all participating tenderers inviting them for the opening of the additional tenders as guided by the Director General of PPRA. Vide a further memo dated 22nd November 2022 from the Tender Opening Committee to the Director, Supply Chain Management Services, the Tender Opening Committee noted that it opened four (4) tenders on 18th November 2022. The fourth tender had been marked as Bid No. 30 and the same had been submitted under the previously terminated tender and was by the same tenderer as the tender marked Bid No. 12 in the subject tender.

The tenderers who submitted tenders with respect to the subject tender were recorded as follows: -

1. Mosa Security and Investigative service.

2. Marshall Guards
3. BABS Security Services Ltd
4. Lavington Security Limited
5. Chakra Security
6. Mocam Security
7. Ismax Security Limited
8. Pride Kings Services Limited
9. Riley Falcon Security
10. Security twenty-four ltd
11. Flashcom Security Limited
12. *Alert Guard Service Co. Ltd*
13. Vickers Security
14. Pelt Security Services Limited
15. Glosec Services Limited
16. Radar Limited
17. ADT Security Kenya Limited
18. Hatari Security Guards Limited
19. Amazof Security Limited
20. Bedrock Security Services Limited

21. Intercity Secure Homes Limited
22. Real Race Security Services Limited
23. G4S Security Services
24. Hipora Security Solutions Ltd
25. Tofada Security Services Ltd
26. Catch Security Link
27. Stallion Group Africa Ltd
28. Cobra Security
29. Race Guards Limited
- 30. Alert Guard Services Co.Ltd*
31. Silent Eye Securities Ltd
32. Kleen Homes Security Services
33. Gyto Success Company Limited

Evaluation of Tenders

A Tender Evaluation Committee (hereinafter referred to as the 'Evaluation Committee') appointed by the 2nd Respondent undertook evaluation of the thirty-two (32) tenders in the following three stages and as captured in an Evaluation Report dated 5th December 2022 (hereinafter referred to as the 'Evaluation Report') submitted to the Public Procurement Administrative Review Board (hereinafter referred to as the Board) as part of confidential

documents pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'):

- i. Preliminary Evaluation;
- ii. Technical Evaluation; and
- iii. Financial Evaluation.

Preliminary Evaluation

At this stage of evaluation, tenders required to comply with all mandatory requirements outlined in the Preliminary Evaluation Criteria of Section III- Evaluation and Qualification Criteria at page 27 and 28 of the Tender Document. Tenders that were non-responsive in any of the mandatory requirements were to be eliminated from the entire evaluation process and would not be considered for Technical Evaluation.

At the end of evaluation at this stage, seventeen (17) tenders were determined to be non-responsive and were thus eliminated from further evaluation. Fifteen (15) tenders which included tenders submitted by the Applicant, 1st Interested Party, 2nd Interested Party and the 3rd Interested Party were determined responsive, thus proceeded for technical evaluation.

Technical Evaluation

At this stage of evaluation, tenders required to comply with the evaluation criteria outlined in the Technical Evaluation Criteria of Section III- Evaluation

and Qualification Criteria at page 29 to 33 of the Tender Document. Tenders required to attain a minimum of 80 out of 100 marks at this stage to qualify to proceed to the next stage of evaluation.

At the end of evaluation at this stage, ten (10) tenders which included the Applicant's tender, did not attain the cut off points of 80 marks and were therefore dropped from further evaluation. The 1st, 2nd and 3rd Interested Parties' tenders surpassed the cut off points of 80 mark, thus proceeded for financial evaluation.

The Applicant was found non-responsive for the following reasons:

1.	Pelt Security Services Limited	B14	Bidder Scored 76.78 out of 100 <ul style="list-style-type: none"> - CAK licenses provide for only 2 clusters (2&4) cluster 3 licenses missing - Appointed as an inspector on 9/9/2008 and resigned on 18/3/2014 (app 6yrs) - No indication of the of years as assistant superintendent. - Only two contracts met the requirement for guards
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Financial Evaluation

At this stage of evaluation, tenders required to comply with the evaluation criteria outlined in the Financial Evaluation of Section III- Evaluation and Qualification Criteria at page 37 to 38 of the Tender Document.

Evaluation Committee's Recommendation

The Evaluation Committee recommended the subject tender for award per cluster to following tenderers, subject to due diligence report:

- 1. Cluster 1: Tofada security services with a tender price of Ksh 34,688,640; thirty-four million, six hundred and eighty-eighty thousand six hundred forty for all the court stations in cluster one for a year.***
- 2. Cluster 2: Catch security services ltd with bid price Ksh 24,720,000; twenty-four million seven hundred and twenty thousand per year for all the court stations listed in cluster two for a year.***
- 3. Cluster 3,4 and 5: Gyto Success Company Limited, Cluster 3: Ksh 39,254,400; thirty-nine million two hundred fifty-four thousand four hundred for a year. Cluster 4: Ksh 29,553,600; twenty-nine million five hundred and fifty-three thousand six hundred for a year. Cluster 5: Ksh 47,598,000; forty-seven million five hundred and ninety-eight thousand for a year. Grand total: Ksh 116,406,000; one hundred and sixteen million four hundred and six thousand, for all the court stations under clusters 3,4 and 5 for a year.***

Due Diligence

The Evaluation Committee conducted due diligence and verified the qualifications of the tenderers who submitted the lowest evaluated responsive tenders per cluster to be awarded the subject tender.

Professional Opinion

In a Professional Opinion dated 7th December 2022 (hereinafter referred to as the 'Professional Opinion'), the Director, Supply Chain Management Services indicated that the prices quoted were within the estimated budget, the Evaluation Committee adhered to the criteria set forth in the Tender Document, the subject procurement was factored in the 1st Respondent's budget for Financial Year 2022/2023 and the 1st Respondent's Expenditure request form was attached. The Director of Supply Chain Management Services concurred with the recommendations of the Evaluation Committee and submitted the same for the consideration and approval by the 2nd Respondent.

Letters of Notification

Vide letters dated 8th December 2022, all tenders were notified of the outcome of evaluation and award of the subject tender.

REQUEST FOR REVIEW

On 20th December 2022, Pelt Security Services Limited, the Applicant herein, filed a Request for Review dated 19th December 2022 together with a

Statement in Support of the Request for Review thereof dated 19th December 2022 seeking the following orders:

- a) The 5 contracts attached meet the requirement as stipulated by technical evaluation criteria 4A and awarded 2 marks for each;***
- b) Review the evaluation of the bid document submitted by the applicant and ensure the allocation of marks is fair and as per the technical evaluation criteria;***
- c) If upon award of the marks Pelt Limited meets the pass mark of 80, Pelt Limited be evaluated in the financial evaluation. If Pelt Limited is compared with the companies that were awarded by the evaluation committee, they would score as per Table 3***

Table 3:Pelt Limited Price Comparison with other Firms Awarded					
COMP ANY	Cluster 1	Cluster 2	Cluster 3	Cluster 4	Cluster 5
Pelt		Bid amount Ksh. 25,548,268.44	Bid amount Ksh. 33,729,483.12	Bid amount Kshs. 24,759,758.88	
M/s Tofada Security Services	Evaluated tender sum of Kshs. 34,688,640.00				
M/s Catch		Evaluated tender sum			

Security Link		of Kshs. 24,720,000			
M/s Gyto Success Company			Evaluated tender sum of Kshs. 39,254,400	Evaluated tender sum of Kshs. 29,553,600	Evaluated tender sum of Kshs. 47,598,000
Remarks		Catchy Security Link Lowest Evaluated Bidder	Pelt Limited Lowest Bidder	Pelt Lowest Bidder	

- d) Award Pelt Limited Contract to provide security services to courts in cluster 3 at Kshs. 33,729,483.12 and cluster 4 at Kshs. 24,759,758.88.***
- e) Granting any other relief that the Review Board deems fit to grant under the circumstances.***

In a Notification of Appeal and letter dated 20th December 2022, the Acting Secretary of the Board, Mr. Jame Kilaka, notified the Respondents of the filing of the Request for Review and the suspension of procurement proceedings for the subject tender, while forwarding to the Respondents a copy of the Request for Review together with the Board's Circular No. 02/20 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondents were requested to submit a response to the Request for Review together with

confidential documents concerning the subject tender within five days from 20th December 2022.

On 30th December 2022, the Respondents entered appearance by filing Memorandum of Appearance dated 28th December 2022. On the same date, the Respondents filed a 1st and 2nd Respondents' Response to Request for Review dated 29th December 2022, a Replying Affidavit sworn by Jeremiah Nthusi, the Director of Supply Chain Management Services of the 1st Respondent, on 29th December 2022 together with the 1st and 2nd Respondents' List of Documents dated 29th December.

Vide letters dated 3rd January 2023 the Acting Board Secretary notified all tenderers in the subject tender, via email, of the existence of the instant Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within 3 days from 3rd January 2023.

Vide a letter dated 6th January 2023, Lavington Security Limited responded to the Acting Board Secretary's letter of 3rd January 2023. On 9th January 2023, the 4th Interested Party filed an Affidavit in Support sworn by Peter Maina, its General Manager, on 9th January 2023. On 10th December 2022,

the 1st Interested Party filed a Replying Affidavit sworn by Gladys Towett, its Managing Director, on 9th January 2023.

Pursuant to the Board's Circular No. 2/2020, physical hearings were dispensed with and directions given for all requests for review applications be canvassed by way of written submissions. The Board further cautioned all parties to adhere to the strict timelines as specified in its directive as the Board would strictly rely on the documentation filed before it within the timelines specified to render its decision within twenty-one days of filing of the request for review in accordance with Section 171 of the Act. Clause 1 on page 2 of the said Circular directed that pleadings and documents would be deemed properly filed if they bore the Board's official stamp.

On 3rd January 2023, the Applicant filed its Supplementary Affidavit sworn by Reuben Omondi Binayo on 3rd January 2023 and its undated and unsigned written submissions.

The 2nd and 3rd Interested Parties did not file any responses either in support or in opposition to the Request for Review.

APPLICANT'S CASE

The Applicant alleges that the Respondents failed to consider all the five contracts that the applicant attached as evidence of work experience as guarding services and thus denied them a maximum 10 points.

The Applicant avers that the Respondents failed to account for 23.22 marks being a difference of the maximum of 100 points and their score of 76.78 marks in the notification of intention to award the subject tender.

The Applicant avers that it feels the Evaluation Committee was unfair, opaque and alleges they were in breach of their duty imposed by Section 46(4) of the Act and Article 227 of the Constitution. The Applicant further avers that as result of the alleged breach it will suffer loss of future income that it was denied and a further cost incurred in submitting this review.

The Applicant further avers that the Respondents failed to evaluate and award the subject tender in a regular and transparent manner therefore denying the procurement process integrity, fairness, transparency and accountability and thus diminishing public confidence in the Respondents' procurement procedures.

The Applicant in the end avers that the instant Request for Review has merit and it is only fair and just that it be allowed with costs to the Applicant.

RESPONDENT'S RESPONSE

In response, the 1st Respondent contends that upon tender opening, the Respondents undertook an objective and quantifiable evaluation process in three stages in accordance with the criteria in the Tender Document and all procurement laws to arrive at the Best Evaluated Tender that met the qualification criteria and which tender had been determined both substantially responsive and with the lowest evaluated cost.

The Respondents contend that it was expressly stated in the Tender Document (pages 28 and 28) that only the tenderers who met the threshold in each stage would proceed to the next stage of evaluation. The Respondents contend that the Applicant passed the preliminary stage but its score at the Technical Evaluation Stage was below the threshold for proceeding to the Financial Evaluation stage.

The Respondents contend that upon evaluation of the tenders, the 1st, 2nd and 3rd Interested Parties emerged as the successful tenderers for different clusters, and all the tenderers were notified of the intention to award the subject tender to the successful tenderers via letters dated 8th December 2022.

The Respondents contend that the Evaluation Committee gave due consideration to the five contracts provided by the Applicant to demonstrate its experience. They contend that of the five contracts submitted only two (Chuka University and Meru University) met the criterion set out at page 32 of the Tender Document and due marks were awarded. The Respondents

contend that the other contracts did not satisfy this requirement for a number of reasons among them failure to indicate the years of the contracts or number of guards required.

The Respondents further contend in response to Ground 2 of the Request for Review that the Applicant was duly scored solely based on the evaluation criteria, and that the score awarded fairly, objectively and accurately reflects the Applicant's score against each of the parameters of the criteria as tabulated in their Replying Affidavit.

The Respondents contend that the procurement process for the subject tender was conducted strictly in accordance with all relevant provisions of the Act, the Public Procurement and Asset Regulations 2020 (hereinafter referred to as 'Regulations 2020', Article 227 of the Constitution and all other laws and regulations of the public. The Respondents contend that the Evaluation Committee acted in compliance with Section 46(4) of the Act and the Applicant has not provided any material to buttress the allegation of non-compliance with the provisions of the law.

The Respondents further contend that not only was the entire tender process conducted in accordance with the law, but also that there was no guarantee of awarding the contract to any particular tenderer other than the one who emerged as the lowest evaluated tenderer. Having not emerged the lowest evaluated tenderer, it is the Respondents contention that the Applicant has no basis upon which to claim an expectation for future income.

In conclusion the Respondents contend that the Applicant's tender was not the lowest evaluated tender as it did not go past the technical evaluation stage, having failed to score the minimum score for proceeding to the Financial Evaluation.

1ST INTERESTED PARTY'S CASE

The 1st Interested Party fully associates itself with the sentiments and averments set out in the Respondents' Affidavit sworn by Jeremiah Nthusi on 29th December, 2022 and the enclosures therein.

The 1st Respondent contends that the 1st Respondent established that only two contracts met the requirement for the guards and which position has not been denied by the Applicant in the Supplementary Affidavit.

The 1st Respondent contends that it is indicated that the Applicant provided CAK License for only two (2) customers and did not provide for Cluster 3 yet the Tender Document clearly stipulated that a tenderer should attach copies of valid licenses from CAK for all Clusters tendered for and this was a mandatory requirement.

According to the 1st Interested Party, the Applicant has dismally failed to demonstrate the manner in which the 1s Respondent did not use the

evaluation criteria and methodologies listed in instruction to tenders and Section 111 of the Tender Document, evaluation and qualification criteria and how the evaluation committee did not in any manner adhere to the requirements of Regulations 30, 31 and 32 of Regulations 2020.

The 1st Respondent contends that the Applicant has failed to demonstrate how the evaluation committee in evaluating the tenders used a criteria that is not objective or quantifiable or that which is not set out in the tender documents and any factual or legal basis that would necessitate the Board to annul the tender awards or to give directions to the 2nd Respondent with regard to anything to be done or redone or to substitute the 1st Respondent or to order the termination of the procurement process.

In conclusion, the 1st Interested Party prays that the request for review be dismissed with costs.

4TH INTERESTED PARTY'S CASE

The 4th Interested Party is aggrieved by the Respondents decision in determining its tender non responsive.

The 4th Interested Party alleges that the Respondents failed to consider that it provided contracts by Ministry of Health, Ministry of Housing, I-engineering

and Judiciary aside from NHIF, all of which satisfied the requirements of the Tender Document.

The 4th Interested Party alleges that the Respondents failed to consider certificate of dog handler that was attached in its tender under training of guards or training of trainers by reputable /accredited institution by National Industrial Training Authority (NITA) under evaluation criteria B (iii).

The 4th Interested Party alleges that the Respondents failed to consider the number of motor vehicle logbooks attached in its tender and which were 23 in number.

The 4th Interested Party alleges that the Respondents failed to account for the 14 marks which in addition to the awarded score of 76.8 out of 100, would have made it to qualify for the cut off points of the technical evaluation with a total of 90.8 marks against the required 80 marks.

According to the 4th Interested Party, it feels that the Evaluation Committee was unfair, opaque and in breach of their duty imposed by undermines Section 46 (4) of the Act and Article 227 of the Constitution and as a result of the breach, it will suffer loss of future income that it was denied.

It is for the foregoing reasons that the 4th Interested Party request a review of the 4 contracts, the dog handler certificate and the motor vehicles log books attached, and collaborate that they meet the requirements stipulated by the technical evaluation criteria 4A, B (iii) and A respectively and allocation of marks for the 4th Interested Party be reviewed against the evaluation criteria to ascertain it was fair. Further, if upon award of the marks, the 4th Interested Party meets the pass mark of 80, it be evaluated at the financial evaluation.

According to the 4th Interested Party, if it is compared to with the companies that were awarded by the evaluation committee, it will score 90.8 as per the table below:

KLEEN HOMES SECURITY SERVICES LTD COMPARISON WITH OTHER FIRMS AWARDED						
Company	Cluster 1		Cluster 3		Cluster 5	
Kleen Homes Security Services Ltd	Bid Ksh.	Amount 34,188,000	Bid Ksh.	Amount 37,584,000	Bid Ksh.	Amount 46,284,000
M/S Tofada Security Services	Evaluated Tender sum of Ksh. 34,688,640					
M/S Catch Security						

Link			
M/S Gyto Success Company		Evaluated Tender Sum of Ksh. 39,254,400	Evaluated Tender Sum of Ksh. 47,598,000
Remarks	Kleen Homes Security Services Ltd- Lowest Bidder	Kleen Homes Security Services Ltd- Lowest Bidder	Kleen Homes Security Services Ltd- Lowest Bidder

To this end, the 4th Interested Party prays to be awarded the subject tender with a score of 90.8 to courts in Cluster 1 at Ksh. 34,188,000 as compared to M/S Tofada Security Services of ksh 34,688,640, Cluster 3 at Ksh. 37,584,000 as compared to M/S Gyto Success Company of Ksh 39,254,400 and Cluster 5 at Ksh. 46,284,000 as compared to M/S Gyto Success Company of ksh 37,598,000.

In the alternative, the 4th Interested Party prays for the annulment of the process of procurement of the subject tender and for an order for a retender.

APPLICANT'S REJOINDER

In a rejoinder, the Applicant took issue with the marks awarded and the rationale arrived at to award those marks.

In particular, to the requirement in Section 1B(II) to provide copies of valid licenses from the Communications Authority of Kenya for all clusters tendered, the Applicant avers that it did provide 3 licenses, 2 of which were for the clusters tendered for and it is unfair that it should be awarded zero (0) marks thus, merited proportionate marks for the 2 licenses.

The Applicant avers that its contract for Egerton University had deployed 150 guards while that of Meru County Government had deployed 139 guards and the misreading of these two contracts by the Respondents cost it 4 marks.

The Applicant avers that it provided copies of payroll schedules certified by Co-operative Bank of Kenya which were forwarded to the bank for the purpose of making payments to respective Guards bank accounts.

The Applicants further avers that the Respondents made a mistake as to the months required by the tender evaluation criteria of May, June and July, 2022, the Applicant paid salaries to the guards on or before the last day of the month and thus should have been awarded 3 marks on this evaluation where, May salaries were paid on 28th May 2022, June salary was paid on 28th June 2022 and July salary was paid on 28th July 2022. Further that the

Applicant attached evidence of salaries paid to the guards on or before the last day of the month in the form of a certified copy of bank statement that the Respondents ignored thus leading to misevaluation of the Applicant.

Through the Applicant's Written Submissions filed on 3rd January 2023 the Applicant submitted that the Board has powers immense enough not only to annul anything the 2nd Respondent had done but it can also terminate the procurement proceedings altogether. In addition, it avers that its tender wasn't evaluated correctly as stated in the Applicant's Supplementary Affidavit thus leading to a score that was unfair thus losing out on qualifying for the subject tender.

BOARD'S DECISION

The Board has considered each of the parties' cases, documents, pleadings, authorities together with confidential documents submitted to it by the Respondents pursuant to Section 67(3)(e) of the Act and finds the issues that arise for determination are:

- 1. Whether the Applicant's tender satisfied the criteria set out at Technical Evaluation Criteria of Section III- Evaluation and Qualification Criteria of the Tender Document and more so Clause 1(B)(II), 3(B)I, 3(B)(Ii), 3F, 3G and 4(A) of**

Technical Evaluation Criteria to warrant it to qualify for evaluation at the Financial Evaluation stage.

2. What orders should the Board grant in the circumstances?

We wish to first dispense with a few preliminary issues before delving to the substantive issue framed for determination.

Lavington Security Limited, in response to the Board Secretary's letter of 3rd January 2023, vide its letter of 6th January 2023 addressed to the Board Secretary, indicated that the subject tender had two opening dates namely, 8th November 2022 at 2:00p.m. when 29 tenders were opened and 18th November 2022 at 12:00noon when another 4 tenders were opened. To this end, it invited the Board to look at the precedent being set, where a similar tender is opened on two different dates while an official opening date was communicated to all tenders in the tender Document. This letter by Lavington Security Limited was not copied to other parties to this Request for Review and was drawn by Lavington Security and received by the Board Secretary on 6th January 2023 way after the Applicant had filed its Supplementary Affidavit and written submissions on 3rd January 2023 and the Respondents had filed their responses on 30th December 2022 leaving no room for the Respondents to respond to any issues raised therein.

We note the said response by Lavington Security Limited essentially communicates its grievance with the manner in which tenders in the subject tender were opened. Basically, Lavington Security Limited is aggrieved by the subject tender being opened twice as opposed to once as is the norm. In essence, the breach complained of against the Respondents by Lavington Security Limited is the second opening of the subject tender which took place on 18th November 2022.

Section 167 (1) of the Act read with Regulation 203 of Regulations 2020 requires an aggrieved tenderer such as Lavington Security Limited to seek administrative review by way of filing a request for review within 14 days of occurrence of the breach complained of. However, Lavington Security Limited chose to make known its grievances by way of a letter dated 6th January 2023 and received by the Board Secretary on 6th January 2023 which was exactly 49 days from the date it became aware of the breach it is now complaining of. In essence, not only is the request to look into the opening of tenders on two different dates time barred but such request is also defective because it is not brought by way of a request for review as contemplated by Regulation 203 of Regulations 2020.

In the circumstances, we have no jurisdiction to hear and determine both the defective request and a request that is statutorily time barred. Accordingly, we shall not address the issues raised in Lavington Security Limited's letter dated 6th January 2023.

We have observed from the Affidavit in Support sworn by Peter Maina, the General Manager of the 4th Interested Party on 9th January 2023 that the 4th Interested Party is aggrieved by the manner in which its tender was evaluated. The 4th Interested Party has taken issue with the evaluation of its tender with respect to four of its past contracts, its certificate of dog handler, and its number of motor vehicle log books. In essence, the 4th Interested Party alleges that the Respondents breached provisions of the Act and Article 227 of the Constitution because the Evaluation Committee was unfair and opaque.

We understand the role of an Interested Party is limited to either supporting the instant Request for Review or opposing the Request for Review. In essence, the 4th Interested Party is limited to either supporting the Applicant or supporting the Respondents. An Interested Party cannot raise new issues in its Supporting or Replying Affidavit. The 4th Interested Party has raised new issues in its Affidavit in Support which issues are founded on how its tender was evaluated. In our view, the 4th Interested Party ought to have filed a request for review in line with Section 167(1) of the Act and Regulation 203 of Regulations 2020 to challenge the manner in which its tender was evaluated. What the 4th Interested Party has done is an attempt to file a request for review using a backdoor through what it calls an Affidavit in Support and more so without bearing the responsibility of paying the fees for such a request.

Just like in the case of Lavington Security Limited, we have no jurisdiction to hear and determine issues raised by the 4th Interested Party touching on evaluation of its tender for having not been properly filed before the Board in line with Section 167(1) of the Act and Regulation 203 of Regulations 2020. As such, we shall not address the issues raised by the 4th Interested Party in its Affidavit in Support.

We now proceed to address the substantive issue framed for determination.

Whether the Applicant's tender satisfied the criteria set out at Technical Evaluation Criteria of Section III- Evaluation and Qualification Criteria of the Tender Document and more so Clause 1(B)(II), 3(B)I, 3(B)(Ii), 3G and 4(A) of Technical Evaluation Criteria to warrant it to qualify for evaluation at the Financial Evaluation stage.

We understand the crux of the Applicant's request for review to be that, its tender satisfied the criteria at the technical evaluation stage more so clause 1(B)(II), 3(B)I, 3(B)(Ii), 3G and 4(A) of the Technical Evaluation Criteria of Section III- Evaluation and Qualification Criteria of the Tender Document. Accordingly, if the 1st Respondent's Evaluation Committee had properly considered the Applicant's tender, the Applicant's tender would have surpassed the cut off points of 80 out of 100 marks at the Technical Evaluation stage, qualified to proceed to Financial Evaluation stage and finally be awarded clusters 3 and 4 of the subject tender because its tender

price for cluster 3 and 4 is lower than the 1st Interested Party's who was awarded those two clusters.

On the other hand, the Respondents deny that the Applicant's tender was responsive at the Technical Evaluation stage and have given various reasons as hereinbefore captured, why the Applicant's tender was non-responsive at the Technical Evaluation stage especially because, according to the Respondents, the Applicant's tender did not attain the minimum score of 80 out of 100 marks required for a tender to proceed for financial evaluation.

The 1st Interested Party fully associates itself with the sentiments and averments set out by the Respondents.

Section 80(2) of the Act provides that: -

"The evaluation and comparison 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." [Emphasis by the Board]

Section 86 (1) (a) of the Act states that: -

"(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; [Emphasis by the Board]

Regulation 30 of the Regulations 2020 states as follows: -

"(30) In discharging the mandate provided for under the Act, members of the evaluation committee shall—

(a) conduct the technical and financial evaluation of the tenders or proposals availed in strict adherence to the compliance and evaluation criteria set out in the tender documents; [Emphasis by the Board]

(b) perform the evaluation or negotiation with due diligence;

(c) conduct the evaluation within the periods specified in the Act;

(d) not enter into direct communication with any of the tenderers participating in a tender or proposal that such evaluation committee is considering;

(e) seek any clarifications on tenders or proposals under consideration through the head of the procurement function; and

(f) prepare a report on the analysis of the tenders availed, and final ratings assigned to each tender and make recommendations and submit the report to the head of the procurement function”

In Republic v Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020] eKLR the Court stated:

"In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions."
[Emphasis ours].

Considering the above provisions of the Act, the Regulations 2020 and case law it is clear that evaluation of tenders is only carried out in accordance with the criteria and procedures set out in the Tender Document.

The Technical Evaluation Criteria in issue with respect to the Applicant's tender is outlined hereinafter and the Board proceeds to address each one of them against what the Applicant provided in its original tender which was submitted to the Board by the Respondents as part of the confidential documents pursuant to Section 67(3)(e) of the Act.

The Applicant challenged the award of zero (0) marks for the requirement to attach copies of valid licenses from CAK for all clusters tendered for. In its Supplementary Affidavit, the Applicant depones at paragraph 6 therein that it is unfair for it to have been awarded zero (0) marks for the two (2) licenses submitted for the clusters tendered for. Instead, it depones that it merited proportionate marks for the two (2) licenses provided. In essence, the Applicant admits that it did not provide CAK licenses for all the clusters tendered for.

Clause 1(II) of the Technical Evaluation Criteria of Section III- Evaluation and Qualification Criteria at page 29 of the Tender Document required tenderers to provide evidence that demonstrates ownership or capacity to provide or deploy, operate the following systems, tools or services;

	DESCRIPTION	REQUIREMENTS	TOTAL MARKS 100
II.	Ownership of Radio Communication and Alarm Response Systems to coordinate deployment, Rapid Response, evacuation, patrols etc.,	Attach copies of valid license from CAK for all clusters tendered for	2 MARKS

From the requirement above, it is our considered opinion that there was no option of prorating the marks scored based on the number of CAK licenses provided. In our considered opinion, what was required in no uncertain terms is for tenderers to provide CAK licenses for **all** clusters tendered for as proof of ability and permission from the regulatory authority to legally deploy and coordinate communication and alarm response systems in their possession.

We note the subject tender comprised of (5) clusters and the Tender Document required tenderers to tender for only three (3) clusters. Not more than 3 or less than 3 clusters. We also note that the Applicant has not demonstrated whether it sought clarification as to what '**all clusters tendered for**' meant.

It is our considered opinion that the Evaluation Committee adopted the correct approach to evaluation when it determined that a tenderer either submits CAK licenses for all the clusters tendered for or scores zero (0) marks. Accordingly, we find that the Applicant did not satisfy this criterion and was therefore not qualified for award of any or full marks with respect to this criterion. If the Respondents had intended to prorate the scores,

nothing would have been easier than indicating and detailing as such within the Tender Document as they did with the requirement for evidence from five institutions or organizations or companies under Clause 4(A) of the Technical Evaluation Criteria of Section III- Evaluation and Qualification Criteria at page 32 of the Tender Document.

Clause 3(B) and 3(B)(Ii) of the Technical Evaluation Criteria of Section III- Evaluation and Qualification Criteria at page 31 of the Tender Document required tenderers to provide evidence of qualification of General Manager (GM) Operations Manager.

	Description of Criteria	Requirements	Total Marks 100
I	General Manager (GM)		8
 (3 Marks)	Attach CV, valid certificate of good conduct, Copies of Certificates and letters of discharge	
 (2 Marks)		
	More than 10 years' experience above the rank of Chief Inspector of Police or Captain in the Armed Forces and honorably discharged (3marks) Less than 10 years' experience in equivalent positions (1marks)	As above	
Ii	Operations Manager		10
 (5 marks)	Attach CV, valid certificate of good conduct, Copies of
 (2 marks)		

	<p>More than 10 years' experience above the rank of Assistant Superintendent of Police or Major in the Armed Forces and honorably discharged (5marks)</p> <p>Less than 10 years' experience in equivalent positions (1 marks)</p>	<p>Certificates and letters of discharge</p>	
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The Oxford Dictionary defines the word 'above' to mean at **a higher level** or layer than... [Emphasis ours]. The same dictionary defines the word 'equivalent' to mean equal in value, amount, meaning, importance etc. from this definition we note and observe the provisions of requirements under Section B(I) and (Ii) of the Technical Evaluation Criteria of Section III- Evaluation and Qualification Criteria at page 31 of the Tender Document to be: -

- a. The personnel required for the position of General Manager should be one ranking higher than a Chief Inspector of Police.
- b. If the personnel referred to in (a) above, has more than 10 years' experience the marks awarded will be three (3).
- c. If the personnel referred to in (a) above, has less than 10 years' experience the mark awarded will be one (1).
- d. The personnel required for the position of Operations Manager should be one ranking higher than Assistant Superintendent of Police.
- e. If the personnel referred to in (d) above has more than 10 years' experience the marks awarded will be five (5) marks.
- f. If the personnel referred to in (d) above has less than 10 years' experience the mark awarded will be one (1).

With the conclusions drawn above, we make reference to the personnel provided by the Applicant in its original tender, the marks awarded by the Evaluation Committee and the observation by the Board.

Personnel Provided by the Applicant	Marks Awarded by the Evaluation Committee	Observation by the Board
<p>For the position of the General Manager the Applicant submitted:</p> <ul style="list-style-type: none"> At page 782 of the its original tender, an appointment letter of Reuben Omondi Binayo as an Inspector of Police dated 9th September 2008 At page 792 of its original tender, a CV of Reuben Binayo showing work experience at Kenya Police as Security Officer 2 Lake Turkana Wind Power Project from 2015 to 2017 	1	<ul style="list-style-type: none"> Personnel was not of a rank higher than a Chief Inspector of Police Never met the criterion and therefore ought to have scored zero (0) marks.
<p>For the position of the Operations Manager the Applicant submitted:</p> <ul style="list-style-type: none"> At page 808 a certificate of discharge of Joshua Mutembei Memeu as at Ass Superidentent of Kenya Police dated 23rd August 2014 	1	<ul style="list-style-type: none"> Personel was not of a rank higher than an Assistant Superitendent of Police The Cv did not provide proof that the Operations Manager had more than 10 years'

<ul style="list-style-type: none"> At page 812 and 813, the CV of Joshua Mutembei Memeu 		<p>experience above the rank of Assistant Superintendent of Police or Major in the Armed Forces and honorably discharged.</p> <ul style="list-style-type: none"> Never met the criterion and therefore ought to have scored zero (0) marks.
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From the foregoing, we are of the considered opinion that the Applicant ought not to have been awarded any mark with respect to the above criteria.

Clause 3(G) of the Technical Evaluation Criteria of Section III- Evaluation and Qualification Criteria at page 32 of the Tender Document required tenderers to provide evidence on dates by which salaries are paid to the guards;

	Description of Criteria	Requirements	Total Marks 100
G	Evidence on the dates by which salaries are paid to the guards		3
	Before last day of the month (3 Marks)		
	Last day of the month (2 marks)	Evidence or	
	1-5 days after end month (1 mark)	statement certified by the Bank [<i>Emphasis ours</i>]	

We note that the provisions of the Tender Document required evidence **OR** statement certified by the Bank. Oxford Dictionary defines the word 'OR' as disjunctive in that it is used to introduce another possibility. In essence the tenderers were free to choose between submitting statements certified by the Bank and submitting any other evidence provided it proved the date of payment of salaries to their guards.

The Tender Document allowed leeway to tenderers to supply whatever form of evidence and whatever choice of months indicating the date of salary payment. There were no specific months provided for in the Tender Document. At pages 1302-1303 of the Applicant's original tender, the Applicant provided a statement stamped and signed by Solution Sacco Limited. In the statement, there are highlighted four months being April 2022, May 2022, June 2022 and July 2022. In the month of April, the salaries to employees are indicated as having been released on 5th May 2022. In the month of May, the salaries to employees are indicated as having been released on 28th May 2022. In the month of June, the salaries to employees are indicated to have been released on 28th June 2022 and for July on 28th July 2022.

We note that in awarding 1 mark for this criterion, the Respondents must have considered only the month of April 2022. It is in the month of April 2022 that salaries were paid on the 5th day of May 2022. There is no rationale indicated either in the Evaluation Report or in the Notification of Intention to

Award the subject tender explaining the choice of the month of April vis-à-vis the other three months being May, June and July all of year 2022. In the absence of any such rationale, it is our considered view that this criterion was open for tenderers to provide proof of payments to guards irrespective of the month. Consequently, we find the Applicant was entitled to an award of three (3) marks as opposed to the one (1) mark awarded.

Clause 4(A) of the Technical Evaluation Criteria of Section III- Evaluation and Qualification Criteria at page 32 of the Tender Document required tenderers to provide evidence from 5 institutions or organizations or companies;

	Description of Criteria	Requirements	Total Marks 100
4	EXPERIENCE		10
A	Provide evidence from Five (5) institutions or organizations or companies that you are serving, or have provided security guarding services with not less than 100 permanent guards each, for the last 3 years (2019, 2020 and 2021)	Attach copies of signed contracts from five clients served. (Notification of award and award letters shall not be accepted)	Each contract 2 marks

The Applicant provided evidence of the following contracts in its original tender:

Institution Name Contracting with Pelt Security Services Ltd.	No. of Guards	Page on the Contract the No. of Guards is stated	Page on the Tender Bid the No. of Guards	Date the Contracts was signed/executed	Date the Contracts Commenced and Period of Contract

				is stated		
	County Government of Meru	139	11	409	22/06/2021	1 st July 2021-30 th June 2022
	<i>Nakuru Water & Sanitation Services Company Limited</i>	<i>116</i>	<i>2</i>	<i>1404</i>	<i>20/06/2022</i>	<i>1st July 2022-30th July 2024</i>
	<i>Egerton University</i>	<i>150</i>	<i>3</i>	<i>1382</i>	<i>28/01/2022</i>	<i>1st February 2022-2nd February 2025</i>
	Meru University of Science and Technology	126	6	381	30/07/2021	1 st July 2021-30 th July 2022
	<i>Chuka University</i>	<i>The maximum number of guards required is one hundred (100).</i>	<i>39</i>	<i>1360</i>	<i>28/12/2021</i>	<i>1st January 2021-31st December 2023</i>

Using the criteria set out in the Tender Document, the Evaluation Committee awarded the Applicant 4 marks and in the 1st and 2nd Respondents' Replying Affidavit at Paragraph 12 deponed that only two contracts met the set criteria. According to the Respondents the other three contracts did not satisfy this requirement for a number of reasons, such as failure to indicate the years of the contracts or number of guards.

For the avoidance of doubt, in our considered view, the contracts to be submitted as evidence of experience earned by a tenderer in the subject tender ought to have the following detail in no uncertain terms: -

- a. Indicate the number of guards, **being not less than 100** permanent guards.
- b. The contracts must have been for the last 3 years **being the years 2019, 2020 and 2021.**
- c. The tenderer **must submit signed contracts** from the five clients served.
- d. The contracts must be with clients that **the tenderer is serving** (in essence the contract may have commenced either in 2019, 2020 or 2021 and still continuing) or the **security services must have been provided either in 2019, 2020 and 2021.**

Using the above observations on the details that the five contracts ought to have entailed pursuant to the requirements in the Tender Document, the Board wishes to make the following findings: -

- a. All the provided contracts were executed between the Applicant and the various institutions they contracted with.
- b. The contract with the County Government of Meru was compliant with the requirements in the Tender Document.
- c. The contract with Meru University of Science and Technology was compliant with the requirements in the Tender Document.
- d. The contract with Chuka University DID NOT specify the number of guards provided thus making it impossible to ascertain if the number

of guards supplied were at least 100 permanent guards in number or less.

- e. The contract with Egerton University commenced on 1st February 2022 and therefore not falling within the years' 2019, 2020 and 2021 as specified in the Tender Document.
- f. The contract with Nakuru Water & Sanitation Services Company Limited commenced on 1st July 2022 and therefore not falling within the years' 2019, 2020 and 2021 as specified in the Tender Document.

It is therefore our considered opinion that the Applicant's tender did not fully satisfy this criterion to be awarded 10 marks. For avoidance of doubt, the Applicant, in our considered opinion was entitled to only 4 marks which is what it was awarded in this criterion.

We have established that the Applicant was awarded 2 marks with respect to evidence of a General Manager and Operations Manager yet it was not entitled to the same and that the Applicant was denied 2 marks with respect to evidence on the dates by which salaries are paid to the guards. If these marks are to be adjusted, the net effect is that the Applicant's tender still does not meet the minimum score of 80 out of 100 marks required to qualify for financial evaluation.

Bearing in mind the requirements in the Tender Document, the observations drawn above, it is our considered view that the Applicant's tender did not

satisfy the criteria set out at Technical Evaluation Criteria of Section III- Evaluation and Qualification Criteria of the Tender Document and more so Clause 1(B)(II), 3(B)I, 3(B)(Ii) and 4(A) of Technical Evaluation Criteria to warrant it to qualify for evaluation at the Financial Evaluation stage.

What orders should the Board grant in the circumstances?

Having found that the Applicant's tender would not attain the cut-off point of 80 out 100 marks even with the adjustments of marks as outlined hereinbefore, it is our considered view that this Request for Review fails for lacking in merit.

FINAL ORDERS

In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review dated 20th December 2022: -

- 1. The Applicant's Request for Review dated 20th December 2022 be and is hereby declared dismissed for lacking in merit.**
- 2. Given the findings herein, each party shall bear its own costs in the Request for Review.**

Dated at NAIROBI, this 10th Day of JANUARY, 2023.



.....
CHAIRPERSON

PPARB



.....
SECRETARY

PPARB

