

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 51/2023 OF 21<sup>ST</sup> JULY 2023**

**BETWEEN**

**INTERCITY SECURE HOMES LIMITED.....APPLICANT**

**AND**

**ACCOUNTING OFFICER,**

**JOMO KENYATTA UNIVERSITY OF**

**AGRICULTURE AND TECHNOLOGY.....1<sup>ST</sup> RESPONDENT**

**JOMO KENYATTA UNIVERSITY OF**

**AGRICULTURE AND TECHNOLOGY.....2<sup>ND</sup> RESPONDENT**

Review against the decision of the Accounting Officer, Jomo Kenyatta University of Agriculture and Technology in relation to Tender No. JKUAT/13/2023-2025 – for Provision of Security Services.

**BOARD MEMBERS PRESENT**

- |                        |   |        |
|------------------------|---|--------|
| 1. Mr. George Murugu   | - | Chair  |
| 2. Eng. Lilian Ogombo  | - | Member |
| 3. Mr. Alexandar Musau | - | Member |
| 4. Mr. Joshua Kiptoo   | - | Member |
| 5. Mr. Daniel Langat   | - | Member |

**IN ATTENDANCE**

Mr. James Kilaka - Secretariat

**PRESENT BY INVITATION**

**APPLICANT - INTERCITY SECURE HOMES LIMITED**

Mr. Andrew Mwango -Advocate, Sisule & Associates LLP

**RESPONDENTS ACCOUNTING OFFICER,  
JOMO KENYATTA UNIVERSITY OF  
AGRICULTURE AND TECHNOLOGY  
JOMO KENYATTA UNIVERSITY OF  
AGRICULTURE AND TECHNOLOGY**

Mr. Edwin Momanyi -Advocate, Kassim and Nzula Advocates LLP

**1<sup>ST</sup> INTERESTED PARTY MAKINI SECURITY SERVICES LIMITED**

N/A - Makini Security Services Limited

**2<sup>ND</sup> INTERESTED PARTY LAVINGTON SECURITIES LIMITED**

N/A - N/A

**3<sup>RD</sup> INTERESTED PARTY BLUESHIELD SECURICOR LIMITED**

N/A - N/A

**4<sup>TH</sup> INTERESTED PARTY FLASHCOM SECURITY LIMITED**

Ms. Rahma Cheruiyot - Flashcom Security Limited

**5<sup>TH</sup> INTERESTED PARTY WINGUARDS SERVICES LIMITED**

Mr. Patrick Winguards Services Limited

**BACKGROUND OF THE DECISION**

**The Tendering Process**

1. Jomo Kenyatta University of Agriculture and Technology, the Procuring Entity together with the 1<sup>st</sup> Respondent herein, invited sealed tenders in response to Tender No. JKUAT/13/2023-2025 – for Provision of Security Services using the open tendering method. The subject tender submission deadline was Thursday, 6<sup>th</sup> July 2023 at 11:30 a.m.

**Submission of Tenders and Tender Opening**

2. According to the Tender Opening Minutes dated 6<sup>th</sup> July 2023 under the Confidential File submitted by the Procuring Entity, the following Twenty-Three (23) tenderers were recorded as having submitted their respective tenders in response to the subject tender by the tender submission deadline:

<b>No.</b>	<b>Name of Tenderer</b>
1.	Hewson Security
2.	Pivot Star Security
3.	Total Security Surveillance
4.	Canon Security Services Limited
5.	Lavington Security Limited
6.	Hava Security Group
7.	Ideal Security Services Limited
8.	Emirates Security Services Limited
9.	Babs Security Services
10.	Blue Shield Securicor
11.	Wing Guard Services Limited
12.	Intercity Secure Homes
13.	Sentinel Protection Services
14.	One on One Security Services Limited
15.	Vickers Security Limited
16.	Makini Security Services Limited
17.	Flashcom Security Limited
18.	Pelt Security Services Limited
19.	Magen Security Services Limited
20.	Kenwatch Security
21.	Lattice Security Group
22.	Santos Security Limited
23.	Anchor Security Services Limited

## **Evaluation of Tenders**

3. The 1<sup>st</sup> Respondent constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") to undertake an evaluation of the 23 tenders in the following 4 stages as captured in the Evaluation Report
  - i. Preliminary Stage (Sec 79 of the Public Procurement and Asset Disposal Act, 2015)
  - ii. Technical Stage (Sec 80 & 81 of the Public Procurement and Asset Disposal Act, 2015)
  - iii. Due Diligence Stage (Sec 83) of the Public Procurement and Asset Disposal Act, 2015
  - iv. Financial Stage

### **Preliminary Evaluation**

4. At this stage of the evaluation, the Evaluation Committee was required to examine the tenders using the criteria set out as Clause 2 Preliminary Examination for Determination of Responsiveness under Section III – EVALUATION AND QUALIFICATION CRITERIA of the Tender Document.
5. The evaluation was to be on Yes/No basis and tenderers who failed to meet any criteria in the Preliminary Evaluation would not proceed for further evaluation at the Technical Evaluation Stage.

6. At the end of the evaluation at this stage, 15 tenders, including that of the Applicant, were found unresponsive with only 8 tenders qualifying for further evaluation.

### **Past Performance**

7. The Evaluation Committee thereafter requested the user department to provide information on the following 4 tenderers who had previously offered security services to the Procuring Entity i.e. Lavington Security Limited, Babs Security Services, Flashcom Security Limited and Anchor Security Services Limited.
8. According to the Evaluation Report, all the 4 tenders were disqualified by the Evaluation Committee after it emerged that the tenderers failed to curb burglary at the Procuring Entity's premises as well as reported cases of misconduct and poor rapport with the Procuring Entity's students.

### **Due Diligence**

9. The Evaluation Committee conducted due diligence on 4 of the tenderers who were yet to be disqualified by visiting their physical premises. The Evaluation Report indicates that the 4 tenderers who included the 1<sup>st</sup> Interested Party were found responsive and thus qualified for further evaluation.

## **Technical Evaluation**

10. At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the Criteria set out as Part II: Technical Evaluation Criteria (Mandatory Requirements) under Section III – QUALIFICATION CRITERIA AND REQUIREMENTS of the Tender Document.
11. At the end of the evaluation at this stage, the 1<sup>st</sup> Interested Party was found as the most responsive tender having garnered the maximum score of 100 at this stage as can be gleaned from the Evaluation Report.

## **Evaluation Committee's Recommendation**

12. The Evaluation Committee determined the tender offered by the Interested Party as the lowest evaluated responsive tender who passed the due diligence test and recommended award of the subject tender to the Interested Party at the tender price of Kenya Shillings Six Forty-Six Million, Nine Hundred and Ninety-Nine Thousand, Nine Hundred and Ninety-Two only (Kshs. 46,999,992) inclusive of all taxes

## **Professional Opinion**

13. In a Professional Opinion dated 11<sup>th</sup> July 2023 (hereinafter referred to as the "Professional Opinion"), the Chief Procurement Officer, Ms. Kellen Njiru, reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and recommended the award of the subject tender to the Interested Party

as per the recommendations of the Evaluation Committee. According to page 3 of the Professional Opinion the approved budget in the subject tender was set at Kshs. 45 Million.

### **Notification to Tenderers**

14. According to the Respondents, tenderers were notified of the outcome of the evaluation of the subject tender vide letters dated and signed 12<sup>th</sup> July 2023 by the 1<sup>st</sup> Respondent.

### **REQUEST FOR REVIEW**

15. On 21<sup>st</sup> July 2023, the Applicant filed a Request for Review dated 21<sup>st</sup> July 2023 and a Supporting Affidavit deponed on 21<sup>st</sup> July 2023 by Gladwell Mwiti, seeking the following orders from the Board in verbatim:

**a) That the decisions of the Accounting Officer of the procuring entity in the procurement proceedings with respect to Tender No. JKUAT/13/2023-2025 TENDER FOR THE PROVISION OF SECURITY SERVICES AT JKUAT MAIN CAMPUS AND SATELLITE CAMPUSES, including the failure to issue the Notification to enter into a contract/ Notification of award of a contract and handover of site indicative of commencement of execution of the non-consulting services sought under the Tender are hereby declared unlawful and unprocedural.**

**b) That the decisions of the Accounting Officer of the procuring entity including the award if a contract with**



**respect to Tender No. JKUAT/13/2023-2025 TENDER FOR THE PROVISION OF SECURITY SERVICES AT JKUAT MAIN CAMPUS AND SATELLITE CAMPUSES, and the handover of site to an alleged successful tenderer, indicative of commencement of execution of non-consulting services and the referenced tender are forthwith vacated and annulled;**

**c) That the Accounting Officer of the procuring entity shall immediately issue the requisite Notification of Intention to Enter into a Contract/ Notification of award to all tenderers with respect to Tender No. JKUAT/13/2023-2025 TENDER FOR THE PROVISION OF SECURITY SERVICES AT JKUAT MAIN CAMPUS AND SATELLITE CAMPUSES, and in any case within seven days of issuance of this Order, and thereafter afford the required 14 days standstill period to enable interrogation of the evaluation of tenders by the Procuring Entity, and challenge of the intended award to any successful tenderer or candidate.**

**d) That in the alternative, where there is significant interference of collusion and preferential, unfair or corrupt practices in the proceedings (evaluation and award) of Tender No. JKUAT/13/2023-2025 TENDER FOR THE PROVISION OF SECURITY SERVICES AT JKUAT MAIN CAMPUS AND SATELLITE CAMPUSES, order and direct the termination of the procurement process and commencement of a new procurement process.**

16. In a Notification of Appeal and a letter dated 21<sup>st</sup> July 2023, Mr. James Kilaka, the Acting Board Secretary of the Board notified the 1<sup>st</sup> and 2<sup>nd</sup> Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 21<sup>st</sup> July 2023.
17. On 27<sup>th</sup> July 2023, in response to the Request for Review, the Respondents, through Kassim and Nzula Advocates, filed a Notice of Appointment of Advocates, Respondents' Memorandum of Response dated 26<sup>th</sup> July 2023 and a List of Documents dated 26<sup>th</sup> July 2023. The Respondents also submitted to the Board a confidential file containing confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.
18. Vide letters dated 26<sup>th</sup> July 2023, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the subject 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 24<sup>th</sup> 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 26<sup>th</sup> July 2023.

19. On 27<sup>th</sup> July 2023, the 4<sup>th</sup> Interested Party filed a Response in the form of a letter dated 26<sup>th</sup> July 2023. The 2<sup>nd</sup> Interested Party also filed its response in the form of a letter dated 27<sup>th</sup> July 2023.
20. On 28<sup>th</sup> July 2023, the 1<sup>st</sup> Interested Party filed a Memorandum of Response dated 27<sup>th</sup> July 2023.
21. Vide a Hearing Notice dated 21<sup>st</sup> July 2023, the Acting Board Secretary, notified parties and all tenderers in the subject tender that the hearing of the instant Request for Review would be by online hearing on 3<sup>rd</sup> August 2023 at 12.00 noon, through the link availed in the said Hearing Notice.
22. On 1<sup>st</sup> August 2023 the 1<sup>st</sup> Interested Party filed Written Submissions dated 1<sup>st</sup> 2023. Later on the same day the Respondents also filed Written Submissions dated 31<sup>st</sup> July 2023.
23. When the matter came up for hearing on 3<sup>rd</sup> August 2023 at 12.00 noon the Board gave hearing directions allocating the Applicant and Respondents 10 minutes each to highlight their case with each Interested Party getting 3 minutes. In terms of order of address, the Board directed that the Applicant would go first, thereafter the

Respondents and then the Interested Parties Thereafter, the Applicant would close the hearing with a rejoinder.

24. However, before the parties commenced their submissions, Counsel for the Applicant, Mr. Mwangi, made an application for leave to file 4 further affidavits in the matter, which were in their possession, citing that these affidavits would demonstrate that Makini Security Limited took up the Procuring Entity's premises before a notification of award in the subject tender had been made. He indicated that the deponents of the 4 affidavits were former employees of Makini Security Limited and also sought that the Board directs the Procuring Entity to furnish the CCTV surveillance footage in respect of its premises.
25. Counsel for the Respondents, Mr. Momanyi opposed the 2 requests by the Applicant citing that the application was brought too late in the day and by their very nature offended the right to privacy of persons who would be captured in the surveillance footage. He also pointed out that the application for a surveillance footage was too general in nature without any specifics.
26. Upon considering the parties' submissions on the Applicant's application, the Board returned a Ruling directing the Applicant to file their Further Affidavits within the next hour and granted leave to the Respondents to file any response thereto before close of business on the same day. The request for CCTV surveillance footage was denied

and the hearing of the Request for Review was adjourned to 4<sup>th</sup> August 2023 at 12.00 noon.

27. On the same day, the Applicant filed 5 Further Affidavits (1 sworn on 2<sup>nd</sup> August 2023 by Gladwell Mwiti and the rest sworn on 3<sup>rd</sup> August 2023, Daniel Mogaka, Daniel Wasike, Moses Mukundi and Evans Kiptum.
28. On 4<sup>th</sup> August 2023, the Respondents, filed a Replying Affidavit sworn on 3<sup>rd</sup> August 2023 by Kellen Karimi Njiru, the Procuring Entity's Chief Procurement Officer.
29. Also, on 4<sup>th</sup> August 2023, the 1<sup>st</sup> Interested Party, filed an Affidavit sworn on 3<sup>rd</sup> August 2023 by Simon Ngugi. The 4<sup>th</sup> Interested Party also filed an unsworn and undated Affidavit which was not included as part of the Board's record as it offended Section 5 of the Oaths and Statutory Declarations Act.
30. When the Request for Review came up for hearing on 4<sup>th</sup> August 2023 at midday, the Applicant, the Respondent and Flashcom Security Limited were represented by their various representatives. The Board directed that the hearing would proceed as per the hearing directions and order of address given on 3<sup>rd</sup> August 2023.

## **PARTIES SUBMISSIONS**

### **Applicant's Submissions**

31. During the online hearing, Counsel for the Applicant, Mwango, placed reliance on the Applicant's filed documents i.e. Request for Review dated 21<sup>st</sup> July 2023; Supporting Affidavit sworn on 21<sup>st</sup> July 2023 by Gladwell Mwiti, Further Affidavit sworn on 2<sup>nd</sup> August 2023 and 4 Further Affidavits sworn on 3<sup>rd</sup> August 2023 by Daniel Mogaka, Daniel Wasike, Moses Mukundi and Evans Kiptum.
32. Counsel submitted that the Applicant was a candidate in the subject tender and that as at 17<sup>th</sup> July 2023, Makini Security Limited, also a candidate in the tender, had taken over the manning of the Procuring Entity's grounds. He argued that this action infringed on the Applicant's rights as it was yet to receive a notification of the outcome of the subject tender and further was not afforded the 14 days stand still period expected in any public procurement process.
33. It was Counsel's contention that parties only realized that there was a successful tenderer when the 1<sup>st</sup> Respondent took up the responsibility of manning the Procuring Entity's grounds.
34. Mr. Mwango pressed on that the Applicant's tender was responsive and that the Respondents' assertion that the Applicant failed to provide a duly filled declaration form that the Applicant was not debarred as well as WIBA and contractual fidelity policy documents was incorrect.

35. Counsel argued that the Applicant had secured 4 former employees of the 1<sup>st</sup> Interested Party who had deponed that they had been deployed to man the Procuring Entity's grounds at its various campuses for 8 days starting on or about 17<sup>th</sup> July 2023.

### **Respondents' Submission**

36. Counsel for the Respondents, Mr. Momanyi, argued that the Procuring Entity was yet to handover its grounds to be manned by the 1<sup>st</sup> Interested Party. He submitted that the Respondents had sent letters of notification of the subject tender outcome to all participants identifying the 1<sup>st</sup> Interested Party as the successful tenderer. According to Counsel, the letters were sent to the participants on 12<sup>th</sup> July 2023 through the postal address supplied by the participants in their tender documents.
37. Mr. Momanyi pointed out that the Applicant was disqualified after it failed to supply a duly filled declaration form that it was not debarred as well as a valid insurance for WIBA and contractual fidelity policy documents. Counsel also argued that the documents supplied by the Applicant in the current proceedings were different from those actually submitted in their tender document. For this, he pointed out that the serialization on the documents was different.
38. It was Counsel's contention that the Applicant did not furnish evidence that the 1<sup>st</sup> Interested Party had taken over the manning of the

Procuring Entity's grounds at its various campuses. Further, that there was no evidence that the alleged deponents were employees of the Interested Party.

39. Counsel submitted that the Respondents had sent out notification of the outcome of the subject tender as per section 87 of the Act and that they had complied with the law. Accordingly, the Respondents sought the dismissal of the instant Request for Review.

#### **4<sup>th</sup> Interested Party's Submissions**

40. The 4<sup>th</sup> Interested Party's representative, Ms. Cheruiyot, indicated that the Interested Party supported the Request for Review and would be relying on the documents filed in the matter. The Interested Party filed a letter dated 27<sup>th</sup> July 2023 pointing out that they had been the Procuring Entity's immediate security service providers and had also submitted their tender in the subject tender. The letter notes that the Procuring Entity unfairly terminated the Interested Party's services despite their satisfactory performance. Accordingly, the Interested Party sought to be reinstated as the Procuring Entity's security service providers.

#### **Other Interested Parties' Submissions**

41. During the initial hearing date of 3<sup>rd</sup> August 2023, the 3<sup>rd</sup> and 5<sup>th</sup> Interested Parties were represented by their respective representatives while the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties were unrepresented. Nonetheless, all the Interested Parties were served with a fresh Hearing Notice inviting them to attend the online hearing session of 4<sup>th</sup>



August 2023. However, on 4<sup>th</sup> August 2023, only the 4<sup>th</sup> Interested Party attended the online hearing. For purposes of this Decision, the Board adopted each of the Interested Parties' Documents as their respective submissions in the Request for Review.

42. The 1<sup>st</sup> Interested Party filed a Memorandum of Response dated 27<sup>th</sup> July 2023 identifying itself as the successful tenderer in the subject tender. It affirmed that it complied with all the requirements in the Tender Document and confirmed that it received its notification letter dated 12<sup>th</sup> July 2023 through post. The Interested Party however denied having executed a contract with the Procuring Entity and sought the dismissal of the instant Request for Review.
43. The 2<sup>nd</sup> Interested Party filed a letter dated 27<sup>th</sup> July 2023 through which it highlighted that it was surprised to learn that the Procuring Entity had awarded the subject tender without issuing it with a notification on the outcome of the tender evaluation process.
44. The 3<sup>rd</sup> Interested Party filed a letter dated 27<sup>th</sup> July 2023 complaining that the 1<sup>st</sup> Interested Party was already executing the contract in the subject tender when in fact the Procuring Entity was yet to issue a notification on the outcome of the tender evaluation. The Interested Party pointed out that this effectively meant the Procuring Entity and the alleged successful tenderer did not observe the 14 days' standstill period provided for in law. It therefore sought for fresh evaluation of the tenders in the subject tender.

### **Applicant's Rejoinder**

45. Mr. Mwango in rejoinder submitted that the Applicant supplied all the documents that were required under the tender document.
46. He also referred the Board to Requirement No. 13 at page 34 of the Tender Document and submitted that the Respondents had conflated the requirement to supply a duly filled declaration form that one was not debarred to mean that the Applicant required to supply a form that was affirmed by the Public Procurement Regulatory Authority.
47. Mr. Mwango also referred the Board to the Respondents' documents, the receipt issued by the Post Office indicated that the Respondents sent the letters of notification on 21<sup>st</sup> July 2023, which was the same day the instant Request for Review was filed. He argued that surprisingly, as at 17<sup>th</sup> July 2023, days before the notification letters were sent the Procuring Entity had already handed over its grounds to the alleged successful tenderer, the 1<sup>st</sup> Interested Party.

### **CLARIFICATIONS**

48. The Board sought clarification from the Respondents as to when the letters of the notification of the outcome of the subject tender were sent, to which Mr. Momanyi affirmed that they were sent on 12<sup>th</sup> July 2023. Pressed on evidence of this dispatch, Mr. Momanyi relied on a receipt issued by the Post Office indicating that the dispatch date of 21<sup>st</sup> July 2023.

49. The Board also sought clarity as to whether the outcome of the subject tender was communicated to the participants through any other means other than post. Mr. Momanyi confirmed that the communication was only done through post.
50. The Board also inquired from the Respondents whether it was a requirement in the subject tender that candidates supply declaration forms affirmed by the Public Procurement Regulatory Authority that a candidate was not debarred. Mr. Momanyi submitted in the affirmative citing requirement No. 13 at page 33 of the Tender Document.
51. The Board inquired from the Respondents whether there was an evaluation criterion that required the examination of the past performance of a candidate in the subject tender. Mr. Momanyi confirmed that no such requirement existed in the Tender Document.
52. The Board also sought to understand how the Respondents awarded the subject tender to the 1<sup>st</sup> Interested Party at Kshs. 46,999,992.00 when in fact the approved budget for the subject tender was Kshs. 45 Million. Mr. Momanyi indicated that he was unaware of the budget allocation but attributed the excess amount to possible inclusion of taxes.
53. The Board sought clarification from the Applicant on the available evidence that the deponents of the Further Affidavits filed on 3<sup>rd</sup> August 2023 being former employees of the 1<sup>st</sup> Interested Party. Mr. Mwango indicated that the only available evidence were the photos of the

assembly parades and daybook attached as annexures to the said affidavits.

54. The Board also took the Applicant to task to explain why it had alluded to text messages sent to the 1<sup>st</sup> Interested Party's former employees on reporting at the Procuring Entity's grounds but failed to produce the said messages in evidence. Mr. Mwango responded that the recipients of the said messages had mobile phones that could not support the taking of screenshots.
55. At the conclusion of the hearing, the Board notified the parties that instant Request for Review having been filed on 21<sup>st</sup> July 2023 had to be determined by 11<sup>th</sup> August 2023 and that the Board would communicate its decision on or before 11<sup>th</sup> August 2023 to all parties via email.

### **BOARD'S DECISION**

56. The Board has considered all documents, pleadings, oral submissions, and authorities together with confidential documents submitted to it pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination:

- i. Whether the Procuring Entity issued a Notification of Intention To Award as envisioned under Section 87 of the Act and Regulation 82 of the Regulations 2020?**

- ii. Whether the Procuring Entity evaluated the Applicant's tender and the other tenders in the subject tender in accordance with Section 80 of the Act and the provisions of the Tender Document?**
- iii. What orders the Board should grant in the circumstances?**

**Whether the Procuring Entity issued a Notification of Intention To Award as envisioned under Section 87 of the Act and Regulation 82 of the Regulations 2020?**

57. During the hearing, the Applicant's Counsel, Mr. Mwangi took issue with the Procuring Entity's handing over the grounds at its various campuses to the 1<sup>st</sup> Interested Party as the alleged successful tenderer without issuing letters of notification of intention to award a contract in the subject tender. Counsel argued that this effectively denied the Applicant the right to seek administrative review before the Board. The Interested Parties other than the 1<sup>st</sup> Interested Party indicated that none of them had received a notification of intention to award a contract in the subject tender.
58. On the other end, Counsel for the Respondent, Mr. Momanyi admitted that the Procuring Entity had issued a letter dated 12<sup>th</sup> July 2023 to all the tenderers notifying them of their success or otherwise and confirming the 1<sup>st</sup> Interested Party as the successful tenderer in the subject tender. He was however quick to point out that this did not amount to a notification of intention to award a contract under Section

87 of the Act but was what he termed as a communication considering the 1<sup>st</sup> Interested Party as the successful tenderer. Counsel also denied the Applicant's assertion that the Procuring Entity had handed over its grounds to the 1<sup>st</sup> Interested Party.

59. The Board is therefore called upon to make a finding whether the Procuring Entity sent out a Notification of Intention to Award as per the provisions of Section 87 of the Act and Regulation 82 of the Regulations 2020.

60. Section 87 of the Act provides as follows:

**87. Notification of intention to enter into a contract**

**(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.**

**(2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.**

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

- (4) For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security.”**

61. Regulation 82 of the Regulations 2020 provides as follows:

**“82. Notification of intention to enter into a contract**

- (1) The notification to the unsuccessful bidder under section 87(3) of the Act, shall be in writing and shall be made at the same time the successful bidder is notified.**
- (2) For greater certainty, the reason to be disclosed to the unsuccessful bidder shall only relate to their respective bids.**
- (3) The notification in this regulation shall include the name of the successful bidder, the tender price and the reason why the bid was successful in accordance with section 86(1) of the Act.”**

62. From the above provisions of the Act and Regulations a notification of intention to award a contract in any tender should (i) be prepared in writing to the successful tenderer during the tender validity period; (ii) specify the period within which the successful tenderer should signify acceptance; (iii) the notification to the successful tenderer should be done at the same time to the unsuccessful tender; (iv) the notification

should disclose reasons why the successful tenderer was successful and (v) the notification to an unsuccessful tenderer should disclose reasons why the said tenderer was unsuccessful.

63. In the present case the Respondents produced as part of their documents under their List of Documents a letter dated 12<sup>th</sup> July 2023 which is hereinafter reproduced for ease of reference:

**12<sup>th</sup> July 2023**

**The Director**

**Intercity Secure Homes**

**Intercity Plaza, Northern Bypass, Nairobi**

**P.O. Box (Details withheld)**

**Tel: (Details withheld) Email: (Details withheld)**

**Dear Sir/Madam,**

**RE: TENDER NO. JKUA/13/2023-2025 PROVISION OF SECURITY SERVICES (ONE YEAR CONTRACT RENEWABLE SUBJECT TO EXCELLENT PERFORMANCE)**

**Reference is made to your above mentioned tender application.**

**We regret to inform you that the University evaluated and considered your bid to be unsuccessful for the reasons that:**

**1 Had attached duly filled, signed and stamped evaluated self-declaration form but not affirmed by PPRA.**



**2. Had not attached a valid insurance certificate (WIBA Fidelity and Contractual Liability)**

**The University after completion of the Tender evaluation process made the decision to award the tender to Makini Security Services Limited.**

**Makini Security Services Limited Bid was considered successful for the reason that their Bid**

**Was the tender with the highest technical score, where a tender is to be evaluated based on the procedures regulated by an Act of Parliament which provides guidelines for arriving at applicable professional charges also the bid price was the lowest and within the University budget.**

**Thank you.**

**Yours faithfully,**

**Signed**

**PROF. VICTORIA WAMBUI NGUMI, Ph.D., EBS**

**VICE CHANCELLOR**

**Copy to Deputy Vice Chancellor (Administration)**

**Chief Procurement Officer**

**Chief Legal Officer**

**Chief Finance Officer**

**Director, Security Services"**

64. From the contents of the letter, the Procuring Entity communicates the successful tenderer and the reasons for the success. The letter also discloses to the Applicant the reasons why its tender was not

successful, which characteristics are typical of notification of intention to award a contract in a tender under section 87 of the Act and Regulation 82 of the Regulations 2020. The Board, therefore, finds no hesitation to make a finding that the letter dated 12<sup>th</sup> July 2023 addressed to the Applicant was a notification of intention to award contract within the meaning of Section 87 of the Act and Regulation 82 of the Regulations 2020.

65. During the hearing, Counsel for the Applicant, Mr. Mwangi, argued that as at the time of the filing of the Request for Review, the letter dated 12<sup>th</sup> July 2023 addressed to it had not been issued. The position was supported by 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties who both affirmed that they too despite being tenderers in the subject tender had not received any communication on the outcome of the evaluation of their tenders.
66. On the other end, the Respondents argued that they communicated the outcome of the evaluation through letters dated 12<sup>th</sup> July 2023 and dispatched on the same day. However, the Respondents attached a postal receipt dated 21<sup>st</sup> July 2023 in their List of Documents as proof of dispatch of the letter dated 12<sup>th</sup> July 2023 to the Applicant. Taken to task to explain the variance on the date in the postal receipt and his assertion that the letter dated 12<sup>th</sup> July 2023 was dispatched on 12<sup>th</sup> July 2023, the Respondent's Counsel, Mr. Momanyi admitted that the notification of intention to award contract in the subject tender was dispatched on 21<sup>st</sup> July 2023.

67. The Board has perused the confidential file and noted that the Procuring Entity did prepare letters of notification to the other tenderers and that they are all dated 12<sup>th</sup> July 2023. However, it is not clear whether the said letters were ever dispatched as there was no proof of the same. Section 87 of the Act and Regulation 82 of the Regulations 2020 envisage that letters of notification of intention to award contract are shared with the successful tenderer at the same time communication is made to the unsuccessful tenderers.
68. In view of the above, under this issue, the Board finds that the Procuring Entity issued a Notification of Intention To Award as envisioned under Section 87 of the Act and Regulation 82 of the Regulations 2020 but it remains unclear whether the dispatch of the notification complied with the Act and Regulations 2020 given the contradictory nature of the Respondents pleadings, evidence and submissions made to certify dispatch of the subject notification highlighted above.

**Whether the Procuring Entity evaluated the Applicant's tender and the other tenders submitted in the subject tender in accordance with Section 80 of the Act and the provisions of the Tender Document?**

69. The Applicant through its Counsel, Mr. Mwango advanced the case that the Applicant's tender in the subject tender was not properly evaluated as per the provisions of the Tender Document and the law. Counsel indicated that the Respondents' response erroneously highlighted that

the Applicant failed to supply a declaration that it was not debarred as well as policy documents on WIBA and contractual fidelity, when in fact these documents were provided.

70. Counsel for the Respondents, Mr. Momanyi, submitted that the Applicant's tender was non-responsive and was disqualified at the Preliminary Stage after it failed to supply mandatory document as part of its tender. According to the Respondents, the Applicant did not supply a declaration affirmed by the Public Procurement Regulatory Authority that the Applicant was not debarred. Further, that the Applicant failed to supply policy documents on WIBA and contractual fidelity.

71. From the above arguments, this Board is invited to interrogate whether the Respondent's Evaluation Committee, justly disqualified the Applicant in the subject tender.

72. Section 80 of the Act provides as follows

**"80. Evaluation of tenders**

**(1) The evaluation committee appointed by the accounting officer pursuant to section 46 of this Act, shall evaluate and compare the responsive tenders other than tenders rejected.**

**(2) 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.”**

73. Section 79 on the other hand provides:

**“79. Responsiveness of tenders**

- (1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents.**
- (2) A responsive tender shall not be affected by—**
  - (a) minor deviations that do not materially depart from the requirements set out in the tender documents; or**
  - (b) errors or oversights that can be corrected without affecting the substance of the tender.**
- (3) A deviation described in subsection (2)(a) shall—**
  - (a) be quantified to the extent possible; and**
  - (b) be taken into account in the evaluation and comparison of tenders.”**

74. This Board is also guided by the dictum of the High Court in **Republic v Public Procurement Administrative Review Board & 2 others Exparte BABS Security Services Limited [2018] eKLR; Nairobi Miscellaneous Application No. 122 of 2018** where the

court while considering a judicial review application against a decision of this Board illuminated on the responsiveness of a tender under section 79 of the Act:

**"19. It is a universally accepted principle of public procurement that bids which do not meet the minimum requirements as stipulated in a bid document are to be regarded as non-responsive and rejected without further consideration.[9] Briefly, the requirement of responsiveness operates in the following manner:- a bid only qualifies as a responsive bid if it meets with all requirements as set out in the bid document. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements.[10] Bid formalities usually require timeous submission of formal bid documents such as tax clearance certificates, audited financial statements, accreditation with standard setting bodies, membership of professional bodies, proof of company registration, certified copies of identification documents and the like. Indeed, public procurement practically bristles with formalities which bidders often overlook at their peril.[11] Such formalities are usually listed in bid documents as mandatory requirements – in other words they are a sine qua non for further consideration in the evaluation process.[12] The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being**

**evaluated for compliance with other criteria, such as functionality, pricing or empowerment. Bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome.**

**20. 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.”**

75. Drawing from the above, the Tender Document is the key guide in the evaluation of tenders submitted in response to any tender invitation.

76. The Board shall now examine the various provisions on the tender document for which the Procuring Entity relied upon to disqualify the Applicant.

77. **Requirement No. 13** at **page 33 of 121** of the Tender Document made provision for the submission of a self-declaration form in the following terms:

**SECTION III- EVALUATION AND QUALIFICATION CRITERIA**

<b>S/No.</b>	<b>Item Description</b>
<b>12.</b>	...
<b>13.</b>	<b>Duly filled, signed and Stamped Self-Declaration Form that the Tenderer is Not Debarred by the Public Procurement Regulatory Authority</b>
<b>14.</b>	...

78. Page 31 of the Tender Document also outlined the template of the self-declaration as Form SD1. The said form is herein reproduced:

**FORM SD1**

**SELF DECLARATION THAT THE PERSON/TENDERER IS NOT DEBARRED IN THE MATTER OF PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT**

**I, ..... of Post Office Box ..... being a resident of ...in the Republic of ... do hereby make a statement as follows:**





1. **THAT I am the Company Secretary/Chief Executive/Managing Director, Principal Officer/Director of.....(insert name of the Company) who is a Bidder in respect of Tender No. .... for ..... (insert tender title/description) for..... (insert name of the Procuring entity) and duly authorized and competent to make this statement.**
2. **THAT the aforesaid Bidder, its Directors and subcontractors have not been debarred from participating in procurement proceedings under Part IV of the Act.**
3. **THAT what is deponed to herein above is true to the best of my knowledge, information and belief.**

.....  
**(Title)**

.....  
**(Signature)**

.....  
**(Date)**

79. From the above it is apparent that Requirement No. 13 at page 33 of the Tender Document made it a mandatory requirement for tenderers in the subject tender to supply a duly filled, signed and stamp declaration form that a tenderer was not debarred by the Public Procurement Regulatory Authority. The Board takes the view that this requirement would be fulfilled by any tenderer who filled up, signed and stamped the above Form SD1.



80. The Procuring Entity supplied the Board with the original tender documents as submitted by the various tenderers in the subject tender. The Board has keenly studied the Applicant's original tender document and notes that at page 93 the Applicant's Form SD1 was filled by its Business Development Manager, one Ms. Gladwell Mwiti; the form bears a signature and the Applicant's stamp. Effectively, the Applicant meets the Requirement under Requirement No. 13 at page 33 of 121 of the Tender Document. On this account alone, the Respondents' argument that it properly evaluated the Applicant's tender cannot stand.
81. **Requirement No. 23 and 24 at page 33 of 121** of the Tender Document made provision for the submission of contractual liability insurance policy cover and WIBA Fidelity and contractual liability cover in the following terms:

### **SECTION III- EVALUATION AND QUALIFICATION CRITERIA**

<b>S/No.</b>	<b>Item Description</b>
<b>12.</b>	...
<b>23.</b>	<b>Contractual liability insurance policy cover of not less than 20% of the bid price per year (Attach a valid copy of contractual liability policy document)</b>
<b>24.</b>	<b>Attach a valid insurance certificate (WIBA Fidelity and Contractual Liability)</b>

82. From the above it is apparent that it was a mandatory requirement for a tenderer to provide a valid copy of contractual liability policy document reflecting a cover of not less than 20% of a tenderer's bid. Further, the tender was also to submit a valid insurance certificate on WIBA Fidelity and Contractual Liability.

83. The Board has keenly studied the Applicant's original Tender Document as supplied by the Procuring Entity and notes that the Applicant at pages 122 to 127 of its tender document supplied various insurance policy documents:

- i. At page 123 is a Policy Schedule by AAR Insurance Kenya Limited insuring the Applicant from Contractual Liability for the period between 24.10.2022 and 23.10.2023.
- ii. At page 125 is a Policy Schedule by AAR Insurance Kenya Limited insuring the Applicant for Work Injury Benefits Insurance (WIBA) for the period between 2.11.2022 and 1.11.2023
- iii. At page 126 is a Policy Schedule by Aar Insurance Kenya Limited providing the Applicant with Fidelity Guarantee for the period between 19.09.2021 and 18.09.2023.

84. From the foregoing, it is clear that the Applicant met the requirements under Requirements 23 and 24 at page 33 of 121 of the Tender Document. Accordingly, it was erroneous for the Respondents to allege that they properly evaluated the Applicant's tender document.

85. Additionally, during the hearing, the Board sought clarity on whether there was any provision in the Tender Document that required the evaluation of the tenders in the subject tender on the basis of past performance with the Procuring Entity to which question the Respondents' Counsel, Mr. Momanyi answered in the negative. This question was elicited by the fact that the Evaluation Report records that 4 tenderers i.e. Lavington Security Limited, Babs Security Services, Flashcom Security Limited and Anchor Security Services Limited were disqualified on this non-existent criterion in the Tender Document.
86. Article 227 of the Constitution commands state organs and public entities to procure goods and services through a system that is fair, equitable, transparent, competitive and cost-effective. These principles can only be attained if tenders are objectively evaluated with the guidance of the Tender Document and procurement laws.
87. In the present case, the Respondents' own admission that the Tender Document did not provide the criterion for past performance of tenderers with the Procuring Entity, raises doubt as to whether the evaluation of the tenders in the subject tender was compliant with Article 227 of the Constitution.
88. Further, even though section 83 of the Act provides for the conduct of due diligence, the Procuring Entity's conduct of examining the past performance of the 4 tenderers immediately after the Preliminary

Evaluation and just before the Technical Evaluation casts more doubt on the appropriateness of the evaluation process.

89. Section 83 of the Act provides as follows:

**"83. Post-qualification**

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

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

90. From the above, it is apparent that any post-qualification exercise can only be conducted after evaluation is complete and not mid-way as was the case in the instant Request for Review.

91. The Board also noted that the Professional Opinion issued in the subject tender by one Ms. Kellen Njiru records that the approved budget for the subject tender was Kshs. 45 Million. Surprisingly, the subject tender was awarded to the 1<sup>st</sup> Interested Party at the sum of Kshs. 46,999,992, which amount is way above the approved budget.

The Respondents' Counsel Mr. Momanyi admitted that he was not aware of the budget allocation in the subject tender but explained that the amount is likely to have shoot beyond the budget to cater for the taxes.

92. This Board is aware of section 131 and 132 of the Act which gives room to the Accounting Officer and a tenderer to engage in competitive negotiations where the lowest evaluated price exceeds the available budget:

**131. Competitive Negotiations**

**An accounting officer of a procuring entity may conduct competitive negotiations as prescribed where—**

- (a) ...
- (b) ...
- (c) **the lowest evaluated price is in excess of available budget;**

**132. Procedure for Competitive Negotiations**

**(1) In the procedure for competitive negotiations, an accounting officer of a procuring entity shall—**

**(a) identify the tenderers affected by tie;**

**(b) identify the tenderers that quoted prices above available budget; or**

**(c) identify the known suppliers as prescribed.**

**(2) In the case of tenderers that quoted above the available budget, an accounting officer of a procuring entity shall—**

- (a) reveal its available budget to tenderers; and**
- (b) limit its invitation to tenderers whose evaluated prices are not more than twenty five percent above the available budget.**
- (3) An accounting officer of a procuring entity shall request the identified tenderers to revise their tenders by submitting their best and final offer within a period not exceeding seven days.**
- (4) The revised prices shall not compromise the quality specifications of the original tender.**
- (5) Tenders shall be evaluated by the evaluation committee appointed in the initial process.**

93. The procedure for the competitive negotiations is further outlined in Regulation 100 of the Regulations 2020:

**“100. Procedure for competitive negotiations**

- (1) In using competitive negotiations as provided for under section 131 of the Act and in applying the procedure set out in section 132 of the Act, an accounting officer of a procuring entity shall appoint an ad hoc evaluation committee pursuant to section to 46(4) of the Act to negotiate with the bidder on the recommendation of the head of the procurement function.**

- (2) Tenders shall be evaluated by the evaluation committee constituted in the initial phase of the proceedings.**
- (3) The accounting officer of a procuring entity shall request the identified vendors to revise their bids by submitting the best and final offer within a period not exceeding seven days.**
- (4) The revised prices shall not compromise the quality or specifications of the original tender.**
- (5) The members of the evaluation committee conducting the negotiation under paragraph (1) shall prepare a report of the negotiation and submit it to the head of procurement function for professional opinion and onward submission to the accounting officer for approval.**
- (6) The report prepared under paragraph (5) shall form part of the procurement records.**
- (7) A procuring entity shall, prior to applying the procedure referred to in this regulation, invite the concerned suppliers to submit their bids for competitive negotiations.**

94. In the instant case, there is no evidence of whether any competitive negotiations took place. Indeed, if the said negotiations took place, correspondence surrounding the said negotiations ought to have formed part of the confidential file submitted to the Board.



95. Absent any competitive negotiations envisioned under section 131 of the Act, the Procuring Entity could have terminated the subject tender under section 63(1)(b) of the Act which provides:

**“63. Termination or cancellation of procurement and asset disposal proceedings**

**(1) An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies—**

**(a) ...**

**(b) inadequate budgetary provision;”**

96. However, since the 1<sup>st</sup> Respondent elected to proceed with the subject tender, she ought to have complied with the provisions of Section 131 and 132 of the Act read with Regulation 100 of the Regulations 2020 on competitive negotiations where the lowest evaluated tender exceeds the available budget. In the present case there was no legal justification for the award of the subject tender to the 1<sup>st</sup> Respondent over and above the budget allocation and in contravention of the provisions of Sections 131 and 132 of the Act read with Regulations 100 of the Regulations 2020.

97. In light of the above discussion, the Board finds that the Procuring Entity did not evaluate the Applicant’s tender and the other tenders

submitted in the subject tender in accordance with Section 80 of the Act and the provisions of the Tender Document.

**What orders the Board should grant in the circumstances**

98. The Board has found that the Procuring Entity issued a Notification of Intention To Award as envisioned under Section 87 of the Act and Regulation 82 of the Regulations 2020 but it remains unclear whether the dispatch of the notification complied with the Act and Regulations 2020.
99. The Board has also found that the Procuring Entity Procuring Entity did not evaluate the Applicant's tender and the other tenders submitted in the subject tender in accordance with Section 80 of the Act and the provisions of the Tender Document and the said evaluation also failed to meet the requirements of Article 227(1) of the Constitution as it was not transparent, fair, equitable or cost effective..
100. The upshot of our finding is that the Request for Review dated 21<sup>st</sup> July 2023 in respect of Tender No. JKUAT/13/2023-2025 For Provision of Security Services succeeds in the following specific terms:

## **FINAL ORDERS**

101. 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 21<sup>st</sup> July 2023:

- 1. The Procuring Entity's letter of Notification of Award dated 12<sup>th</sup> July 2023 and addressed to the Applicant in respect of Tender No. JKUAT/13/2023-2025 For Provision of Security Services be and is hereby cancelled and set aside.**
- 2. The Procuring Entity's letters of Notification of Award dated 12<sup>th</sup> July 2023 and addressed to the other tenderers including the Interested Party, Makini Security Services Limited, in respect of Tender No. JKUAT/13/2023-2025 For Provision of Security Services be and are hereby cancelled and set aside.**
- 3. The 1<sup>st</sup> Respondent be and is hereby directed to reconvene the Procuring Entity's Evaluation Committee for purposes of conducting a fresh evaluation of the tenders submitted in respect of Tender No. JKUAT/13/2023-2025 For Provision of Security Services from the Preliminary Stage and that the evaluation should be concluded within the next 14 days from the date of this Decision taking note of the Board's findings herein.**
- 4. The 1<sup>st</sup> Respondent is directed to observe the provisions of section 131 and 132 together with Regulation 100 of the**

**Public Procurement and Asset Disposal Act,2015 and Regulations,2020 respectively in determining the award of the subject tender.**

**5. All tenders submitted in the subject tender are hereby re-admitted for fresh evaluation by the Evaluation Committee.**

**6. Given, the procurement process in the subject tender remains incomplete, each party shall bear its own costs.**

**Dated at NAIROBI, this 11<sup>th</sup> Day of August 2023.**



.....  
**CHAIRPERSON**

**PPARB**



.....  
**SECRETARY**

**PPARB**