

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 58/2023 OF 11th AUGUST 2023

BETWEEN

M/S GAP TECH SOLUTIONS LIMITED APPLICANT

AND

PRINCIPAL SECRETARY,

THE NATIONAL TREASURY..... 1ST RESPONDENT

THE NATIONAL TREASURY2ND RESPONDENT

M/S CORPRISK AFRICA LIMITED INTERESTED PARTY

Review against the decision of the Principal Secretary, The National Treasury in relation to Tender No. TNT/007/2022-2023 for Provision of Fleet Management Solution for Motor Vehicle Leasing Programme Phase VII

BOARD MEMBERS PRESENT

- | | | |
|-----------------------|---|-------------|
| 1. Mr. George Murugu | - | Chairperson |
| 2. QS. Hussein Were | - | Member |
| 3. Eng. Lilian Ogombo | - | Member |
| 4. Dr. Paul Jilani | - | Member |
| 5. Mr. Joshua Kiptoo | - | Member |

IN ATTENDANCE

1. Mr. James Kilaka -Acting Board Secretary
2. Ms. Sarah Ayoo - Secretariat

PRESENT BY INVITATION

APPLICANT

M/S GAP TECH SOLUTIONS LIMITED

Mrs. Bukachi

-Owino Bukachi & Company Advocates

RESPONDENTS

PRINCIPAL SECRETARY, THE NATIONAL TREASURY & THE NATIONAL TREASURY

1. Mr. Caleb Ogot -Head, Supply Chain Management Services
2. Mr. Donnie Muyera - AD Supply Chain Management Services
3. Mr. Oloo Benard - Supply Management Services
4. Kenneth Korir - Senior Supply Chain Management Officer

INTERESTED PARTY

M/S CORPRISK AFRICA LIMITED

1. Mr. Wanjohi -Advocate, Wanjohi & Wawuda Advocates
2. Mr. Muturi -Advocate, Wanjohi & Wawuda Advocates
3. Mr. Githae -Advocate, Wanjohi & Wawuda Advocates



BACKGROUND OF THE DECISION

The Tendering Process

1. The National Treasury, the Procuring Entity, invited tenders from interested tenderers in response to Tender No. TNT/007/2022-2023 for Provision of Fleet Management Solution for Motor Vehicle Leasing Programme Phase VII (hereinafter referred to as the "subject tender"). The invitation was by way of advertisement in *MyGov* Newspaper on 22nd November 2022, the Treasury website, www.treasury.go.ke and the PPIP portal, www.tenders.go.ke. The tender's submission deadline was initially scheduled for 16th December 2022 at 11.00 a.m.

Addenda

2. The Procuring Entity issued three addenda dated 5th December 2022, 14th December 2022 and 5th January 2023 which extended the tender submission deadline to 19th January 2023 at 11.00 a.m.

Submission of Tenders and Tender Opening

3. According to the minutes of the tender opening held on 19th January 2023 a total of eleven (11) tenders were submitted in response to the tender invitation. The said eleven (11) tenders were opened in the presence of tenderers' representatives present and were recorded as follows:



Bidder No.	Name of Tenderer
1.	Safetrac Limited
2.	Track and Trace Limited
3.	Medici Secure Services
4.	Pis International Limited
5.	Eezy Track Limited
6.	Corprisk Africa Limited
7.	Kingsway Autowatch Limited
8.	Telematics Africa Limited
9.	Babs Security Services Limited
10.	Tracking Hub Limited
11.	Gap Tech Solutions Limited

Evaluation of Tenders

4. The Procuring Entity's Tender Evaluation Committee evaluated the tenders in three following stages:
- i Preliminary Examination;
 - ii Technical Evaluation; and
 - iii Financial Evaluation.

Preliminary Examination

5. The Evaluation Committee examined tenders for responsiveness using the criteria provided under Clause a. Mandatory Requirements of Section III- Evaluation and Qualification Criteria at page 28 of 120 to

page 29 of 120 of the blank tender document (hereinafter referred to as the 'Tender Document'). Tenderers were required to meet all the mandatory requirements at this stage to proceed to the Technical Evaluation stage.

6. At the end of evaluation at this stage, nine (9) tenders were determined as non-responsive while two tenders, **B6** and **B11**, were determined to be responsive. The responsive tenders proceeded to Technical Evaluation stage.

Technical Evaluation

7. At this stage of evaluation, the Evaluation Committee examined tenders using the criteria set out under Clause 3 Detailed Tender Evaluation of Section III- Evaluation and Qualification Criteria at page 29 of 120 to 31 of 120 of the Tender Document. Tenders were required to attain a pass mark of 75% to proceed to Financial Evaluation stage.
8. At the end of evaluation at this stage, both tenders **B6** and **B11** met the minimum pass mark and proceeded for Financial Evaluation.

Financial Evaluation

9. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Clause 4 Price Evaluation of Section III- Evaluation and Qualification Criteria at page 31 of 120 of the Tender Document. The award was to be made on the

basis of the lowest technically evaluated tenderer. The two tenderers quoted as follows:

S/No.	Item Description	B6	B11
1	Total tender prices as read out (Kshs)	179,091,050.00	242,651,000.00

10. Based on the above, **Bidder No. 6 Messrs Corprisk Africa Limited**, the Interested Party herein, was found to be the lowest evaluated responsive tenderer at Kenya Shillings One Hundred and Seventy-Nine Million, Ninety-One Thousand and Fifty only (Kshs. 179,091,050.00) and was recommended for award subject to due diligence being undertaken.

Due Diligence

11. *Vide* an Internal Memo dated 21st February 2023 the Head Supply Chain Management Services sought approval from the 1st Respondent to undertake due diligence which request was approved on 28th February 2023.
12. The Evaluation Committee was required to conduct due diligence and address concerns during the contract implementation period, *inter alia*, on how the successful bidder would address empowerment and job creation, technological skills and knowledge transfer, local content, innovation and continuous improvement, service networks, work/past experience, and capacity.



13. The Evaluation Committee was taken through a live demonstration of the various parameters of the proposed system as well as other administrative aspects of the Interested Party as can be discerned from page 3 of 12 to page 10 of 12 of the Due Diligence Report signed by members of the Evaluation Committee on 24th May 2023.
14. At the end of the due diligence exercise, the Evaluation Committee recommended award of the subject tender to the Interested Party at a total cost of Kenya Shillings One Hundred and Seventy-Nine Million, Ninety-One Thousand and Fifty only (Kshs. 179,091,050.00) for a period of four (4) years.

Evaluation Committee's Recommendation

15. The Evaluation Committee determined the tender submitted by the Interested Party was the lowest evaluated responsive tender having passed the due diligence test and recommended award of the tender to the Interested Party at a total cost of Kenya Shillings One Hundred and Seventy-Nine Million, Ninety-One Thousand and Fifty only (Kshs. 179,091,050.00) for a period of four (4) years.

Professional Opinion

16. In a Professional Opinion dated 20th June 2023, the Head, Supply Chain Management Services, Mr. Calleb Ogot, reviewed the, manner in which the subject procurement process was undertaken and concurred with

the recommendations of the Evaluation Committee with respect to award of the subject tender. Thereafter, the Principal Secretary of the National Treasury, the 1st Respondent herein, approved the Professional Opinion on 21st June 2023.

Notification to Tenderers

17. Tenderers were notified of the outcome of evaluation of the subject tender *vide* letters of Notification of Intention to Award dated 12th July 2023 signed by the 1st Respondent.

REQUEST FOR REVIEW NO 58 OF 2023

18. Messrs Gap Tech Solutions Limited (hereinafter referred to as 'the Applicant') approached the Board by way of Request for Review dated and filed on 11th August 2023 together with a Supporting Affidavit sworn on even date by Gilbert Odadi, its Managing Director through the firm of Owino Bukachi & Company Advocates. The Applicant sought the following orders from the Board:

a) THAT the Board makes a declaration that the notification of the intention to award the tender to M/s Corprisk Africa Limited goes against the provision of the law.

b) THAT the Board herein annuls the decision of the 1st and 2nd Respondents being Accounting Officer and the procuring entity to award the tender to M/s Corprisk Africa Limited.



c) THAT the Board orders the 1st and 2nd Respondents being Accounting Officer and the procuring entity to re-award the tender to the applicant.

d) THAT the Board Orders the 1st and 2nd Respondents being Accounting Officer and the procuring entity to initiate debarment proceedings with the Public Procurement Regulatory Authority (PPRA) against M/s Corprisk Africa Limited for providing misleading information about their qualifications pursuant to the provisions of Section 41(1)(d) of the Act.

e) Any other or further relief or reliefs that the Board shall deem just and expedient.

f) THAT The costs of this Review be awarded to the Applicant.

19. In a Notification of Appeal and a letter dated 11th August 2023, Mr. James Kilaka, the Acting Board Secretary of the Board notified the 1st and 2nd 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 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 (5) days.

20. The Respondents, through Calleb O. Ogot, filed a 1st and 2nd Respondents Statement of Response all dated 16th August 2023 and filed on 17th August 2023, together with confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act (hereinafter referred to as 'the Act').
21. *Vide* letters dated 18th August 2023, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the 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 were invited to submit to the Board any information and arguments concerning the tender within three (3) days.
22. On 18th August 2023, the Applicant filed a Replying Affidavit to the Preliminary Objection and Further Affidavit to the 1st and 2nd Respondents' Response sworn on 18th August 2023 by Gilbert Odadi.
23. *Vide* a Hearing Notice dated 18th August 2023, the Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the Request for Review slated for 24th August 2023 at 3:00 PM, through the link availed in the said Hearing Notice.



24. On 21st August 2023, the Interested Party filed through Wanjohi & Wawuda Advocates a Notice of Appointment of Advocates, a Memorandum of Response and a Replying Affidavit by David Kimani Kiriro, its Managing Director, all dated and sworn on 19th August 2023.
25. On 22nd August 2023 the Applicant filed a Further Affidavit to the Interested Party's Memorandum of Response sworn on 22nd August 2023 by Gilbert Odadi.
26. The Interested Party filed Written Submissions together with a List and Bundle of Authorities, all dated and filed on 23rd August 2023.
27. On 24th August 2023, the Interested Party filed a Supplementary List of Authorities dated 24th August 2023.
28. At the hearing, the Board directed that the hearing of the preliminary objections would be heard as part of the substantive Request for Review. This was in accordance with Regulation 209(4) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020') which allows the Board to deliver one decision having considered the preliminary objections as part of the substantive Request for Review.

PARTIES' SUBMISSIONS

Respondents' submissions on their Preliminary Objection

29. Mr. Ogot, for the Respondents, submitted that the preliminary objection was premised on Section 167(1) of the Act which prescribes



timelines within which an administrative review ought to be filed. He pointed out that the letters of intention to award the subject tender were signed on 12th July 2023 and tenderers were informed on 13th July 2023. Mr. Ogot further pointed out that the Interested Party collected its letter on 13th July 2023 while the Applicant collected its letter on 31st July 2023.

30. He argued that in computing time from when the Interested Party collected its letter of notification, the standstill period lapsed on 27th July 2023 from 13th July 2023. He further argued that the Applicant collected its letter 15 days after it had been called to collect its letter and when the standstill period had expired.
31. Mr. Ogot contended that the Applicant lodged the instant Request for Review after the timeline prescribed under the Act had expired and as such the instant Request for Review was time barred and ought to be dismissed with costs.

Applicant's Response to the Preliminary Objection and Submissions on the Request for Review

32. Ms. Bukachi submitted that the Applicant collected the letter of notification to award the subject tender on 31st July 2023 as confirmed by the Respondents. She submitted further that the Respondents had not availed any evidence of call logs made to the Applicant and as such no call was ever made to the Applicant.



33. Counsel argued that Section 87(3) of the Act on notification of intention to award ought to be in writing and done simultaneously to all tenderers. She referred the Board to Exhibit 6B of the Applicant's Request for Review where paragraph 2 stipulated the mode of communication which was required to be in written form and evidenced by receipt.
34. The Applicant stated that it received notification of intention to award on 31st July 2023 and time started running on 1st August 2023 hence the instant Request for Review was filed with the statutory period stipulated under Section 167 of the Act. Counsel further stated that the Board's jurisdiction cannot be ousted by an allegation of oral correspondence as submitted by Mr. Ogot.
35. Ms. Bukachi referred the Board to the list evidencing various dates when tenderers received their letters of notification of award and pointed out that there was no simultaneous communication of the outcome of evaluation of the tender contrary to Section 87(3) of the Act.
36. Turning to the substantive Request for Review, Ms. Bukachi for the Applicant averred that the Applicant was seeking a declaration of the Board annulling the Respondent's decision and award of the tender be made to the Applicant for the reason that the Interested Party had no capacity which arose out of discovery noting the scope of the subject tender. She further averred that the Interested Party had not produced any document or certificate evidencing that it qualified to cover the



scope of the subject tender to counter the letter from the Director of the Private Security Regulatory Authority which letter was annexed to the Request for Review.

37. The Applicant referred the Board to Section 15 of the Private Security Regulation Act under the first schedule Form PSR8 which provides for Application for Registration or Renewal Corporate Private Security Providers and Part 6 on categories of Private Security Services and requests parties making applications to tick the applicable portion, giving a gamut of provisions. It submitted that the Private Security Regulation Act envisaged licensing whereby a party would choose the scope and category within which it was to be licensed. The Applicant indicated that Regulation 14(2) provides for fees for particular sought and submitted that the Interested Party having failed to annex their application form evidences that they have no qualification as stipulated by the Director.
38. It took issue with the Respondents act of ignoring information rendered by the Director, Private Security Regulatory Authority and urged the Board to find that the Interested Party ought not to have been awarded the subject tender and that the Respondent were mandated to seek specialized service providers' failure to which would lead to jeopardizing the national security.
39. The Applicant referred to page 217 of the Interested Party's Bundle at paragraph 1 of its Background which was in tandem with the Private Security Regulatory Authority letter dated 3rd August 2023.



Respondents' rejoinder to its Preliminary Objection and Submissions on the Request for Review

40. Mr. Ogot, on behalf of the Respondents, submitted that bidders were notified in writing pursuant to Section 87 of the Act and calling tenderers to collect letters of notification was not prohibited. He stated that the argument by the Applicant on the standstill period meant that it each tenderer would have their own standstill period.
41. On the substantive issues raised in the instant Request for Review, Mr. Ogot submitted that the law on procuring security related services was clear. He referred to Section 90 of the Act on classified items and procedure to be undertaken and argued that the current service is not a classified procurement which requires vetting of firms.
42. Mr. Ogot submitted that the certificate which the Applicant submitted was the same in format and content as that of the Interested Party and that as such, it was strange that the Applicant was alleging that the Interested Party did not have capacity. Mr. Ogot further submitted that it was the obligation of the Procuring Entity to set out the award criteria and that a participant could not purport to evaluate a competitor.
43. He averred that the Applicant quoted a higher price than the Interested Party when a point of departure arose during financial evaluation.



44. Mr. Ogot averred further that the Respondents did not ask nor write asking for due diligence from the Private Security Regulatory Authority and that there was no point of doing so since it checked on the said Authority's website and conducted due diligence as per its Due Diligence Report confirming that the Interested Party was duly registered. He further clarified that the certificate submitted by the Applicant in the subject tender in response to mandatory requirement 19 was the same in content and form as the one submitted by the Interested Party.

Interested Party's Submissions on the Request for Review and on the Respondents Preliminary Objection

45. In his submission, counsel for the Interested Party, Mr. Wanjohi, associated himself with the submissions by Mr. Ogot on the Preliminary Objection and submitted that there cannot be a moving target when it comes to the standstill period. He pointed out that some tenderers were yet to collect their letters of notification of award and that the challenge by the Applicant was an issue of evaluation and yet it did not reveal when it became aware of the breach complained of being that the registration of the Interested Party was not sufficient.
46. Counsel submitted that discovery of the breach complained of would inform the question of timelines and that the matter ought to have been raised at the preliminary stages and that the Applicant waived its right adding that the instant Request for Review was an abuse of the



Board's process. He urged the Board to uphold the Respondents' Preliminary Objection.

47. On the substantive issues raised, the Interested Party submitted that the mandatory requirement under Item 19 at page 28 of the Tender Document was a certified copy of valid registration by Private Security Regulatory Authority. It further submitted that there was no requirement for classification of licences and that the Interested Party complied with this requirement as seen at page 201 of its tender.
48. The Interested Party averred that the Applicant had not demonstrated that there were special classes or categories of licenses sought by the Procuring Entity other than the registration certificate. It pointed out that the Applicant had not produced the special license referred to.
49. It averred further that Section 80(2) of the Act required evaluation to be conducted on the basis of the Tender Document and that a Procuring Entity should not deviate from the Tender Document's provisions.
50. The Interested Party submitted that it met all the mandatory requirements set out in the Tender Document and argued that the letter dated 3rd August 2023 appearing at page 12 of the Applicant's Further Affidavit sworn on 18th August by Gilbert Odadi was issued after the intention to award had been issued. It also argued that the said letter dated 3rd August 2023 was addressed to the 1st Respondent and not the Applicant and did not lay any context under which it was



issued and neither did the Applicant lay any basis on how it was obtained.

51. It was the Interested Party's submission that the Applicant appeared to have confidential information contrary to Section 67 of the Act which required information to be kept confidential so as to promote equity and fairness. It was the Interested Party's further submission that the said letter ought to have been brought to its attention for it to comment or to counter the contents therein. To buttress its arguments, it referred to the case of *Republic v Public Procurement Administrative Review Board & 2 Others Ex Parte Hyosung Ebara Company Limited* and urged the Board to expunge the said letter dated 3rd August 2023 from record.
52. The Interested Party submitted that the issue of capacity of the Interested Party was for the 2nd Respondent to determine based on the criteria set out in the Tender Document adding that on the requirement of tenderers to have provided similar services, the Interested Party provided at least seven similar contracts at pages 404-524 of its tender.
53. In conclusion, the Interested Party contended that it had been properly evaluated and urged the Board to dismiss the Request for Review with costs.



Applicant's Rejoinder

54. In a rejoinder, Counsel for the Applicant, Mrs. Bukachi submitted that Section 83 of the Act provides for conduct of due diligence which the Respondent sought from the Private Security Regulation Authority but failed to rely on as evidenced at page 11, 12, 13, 14 on post qualification.
55. She averred that validity of a certificate was a question of law and the Tender Document required parties to supply certified copies of valid registration by Private Security Regulatory Authority meaning that questions of validity can only be determined within the scope of the law.
56. Mrs. Bukachi argued that Section 87 of the Act cures the question of moving targets as raised by the Respondent and pointed out that had the Respondent adhered to the provisions under Section 87 of the Act in its communication, there would be no moving target.
57. Regarding the circumstances under which the letter dated 3rd August 2023 was obtained, Mrs. Bukachi submitted that the communication was clearly provided for as evidenced by correspondences in the Request for Review.
58. Mrs. Bukachi urged the Board to uphold the Request for Review and dismiss the preliminary objection by the Respondents with costs.



59. Upon enquiry by the Board on whether there was any difference between the certificate submitted by the Applicant and the one submitted by the Interested Party, Mrs. Bukachi stated that they differed with regard to the scope and that the directorate had clarified on the same.
60. Upon further enquiry by the Board on when the Applicant discovered the issue that the Interested Party's certificate was not valid, Mrs. Bukachi responded that upon receipt of the letter of notification and based on discussions in the market, the Applicant sought to know entities which were licensed from the directorate.
61. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 11th August 2023 was due to expire on 1st September 2023 and that the Board would communicate by email its decision on or before 1st September 2023 to all parties to the Request for Review via email.

BOARD'S DECISION

62. The Board has considered all the parties' 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 Board has jurisdiction to hear and determine the Request for Review;*



In determining this issue, the Board will make a determination on whether the Request for Review was filed within the statutory period of 14 days of notification of award or occurrence of breach in accordance with Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020.

Depending on the determination of Issue (i):

- (ii) *Whether the Procuring Entity improperly evaluated the Interested Party's tender on account of the requirement of valid registration by Private Security Regulatory Authority, in breach of the provisions of Section 80 of the Act.*
- (iii) *Whether the Procuring Entity failed to properly conduct due diligence to confirm and verify the qualifications of the Interested Party in breach of Section 83 of the Act.*
- (iv) *What orders should the Board grant in the circumstances?*

As to whether the Board has jurisdiction to hear and determine the Request for Review.

63. It is trite law that courts and decision-making bodies can only act in cases where they have jurisdiction and when a question on jurisdiction arises, a Court or tribunal seized of a matter must as a matter of



prudence enquire into it before doing anything concerning such a matter in respect of which it is raised.

64. Black's Law Dictionary, *8th Edition*, defines jurisdiction as:

"... the power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties ... the power of courts to inquire into facts, apply the law, make decisions and declare judgment; The legal rights by which judges exercise their authority."

65. The *locus classicus* case on the question of jurisdiction is the celebrated case of **The Owners of the Motor Vessel "Lillian S" –v - Caltex Oil Kenya Ltd (1989) KLR 1** where Nyarangi J.A. held:

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction."

66. In the case of **Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others [2013] eKLR**, the Court of Appeal emphasized on the centrality of the issue of jurisdiction and held that:

"...So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain...."

67. Such is the centrality of jurisdiction that the Court of Appeal has held in **Isaak Aliaza v Samuel Kisiavuki [2021] eKLR**, that:

"whether it is raised either by parties themselves or the Court suo moto, it has to be addressed first before delving into the interrogation of the merits of issues that may be in controversy in a matter."

68. The Supreme Court in the case of **Samuel Kamau Macharia and Another v Kenya Commercial Bank Ltd and 2 Others [2012]**

eKLR pronounced itself regarding the source of jurisdiction of a court or any other decision making body as follows:

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with Counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings."

69. The jurisdiction of a court, tribunal, quasi-judicial body or adjudicating body can only flow from either the Constitution or a Statute or both.

70. This Board is a creature of statute owing to its establishment as provided for under Section 27(1) of the Act which provides that:

"(1) There shall be a central independent procurement appeals review board to be known as the Public Procurement Administrative Review Board as an unincorporated Board."



71. Further, Section 28 of the Act provides for the functions of the Board as:

"(1) The functions of the Review Board shall be—

(a) reviewing, hearing and determining tendering and asset disposal disputes; and

(b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law."

72. The above provisions demonstrate that the Board is a specialized, central independent procurement appeals review board with its main function being reviewing, hearing and determining tendering and asset disposal disputes

73. The jurisdiction of the Board is provided for under Part XV – Administrative Review of Procurement and Disposal Proceedings and specific at Section 167 of the Act which provides for what can and cannot be subject to review of procurement proceedings before the Board and Section 172 and 173 of the Act which provides for the powers the Board can exercise upon completing a review. Section specifically 167 provides as follows:

Section 167 - Request for a review

"(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or



the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.

74. Given the forgoing provisions of the Act, the Board is a creature of the Act and the Board's jurisdiction flows from Section 167 (1) of the Act read with Sections 172 and 173 of the Act which donate powers to the Board with respect to an administrative review of procurement proceedings before the Board.
75. It therefore follows that for one to invoke the jurisdiction of the Board one must approach the Board in the manner prescribed under Section 167 (1) of the Act. Further, Section 167(1) of the Act requires any person invoking the jurisdiction of the board to satisfy three conditions:
- i) must either be a candidate or a tenderer (within the meaning of Section 2 of the Act);
 - ii) must claim to have suffered or to risk suffering, loss or damage due to breach of a duty imposed on a procuring entity by the Act or Regulations 2020;
 - iii) must seek administrative review by the Board within fourteen (14) days of notification of award or date of occurrence of alleged breach of duty imposed on a procuring entity by the Act and Regulations 2020 at any stage of the procurement process in a manner prescribed.



76. Part XV – Administrative Review of Procurement and Disposal Proceedings of Regulations 2020 and specifically under Regulation 203 of Regulations 2020 provides as follows:

Regulation 203 - Request for a review

"(1) A request for review under section 167(1) of the Act shall be made in the Form set out in the Fourteenth Schedule of these Regulations.

(2) The request referred to in paragraph (1) shall—

(a)

(b)

(c) be made within fourteen days of —

(i) the occurrence of the breach complained of, where the request is made before the making of an award;

(ii) the notification under section 87 of the Act; or

(iii) the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder.

(d)"



77. Section 87 of the Act referred to in Regulation 203(2)(c)(ii) of Regulations 2020 provides as follows:

Section 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."

78. It is therefore clear from a reading of Section 167(1) and 87 of the Act, Regulation 203(1), (2)(c) & (3) of Regulations 2020 and the Fourteenth



Schedule of Regulations 2020 requires for one to invoke the jurisdiction of the Board, they must either be (i) a candidate or tenderer (within the meaning of Section 2 of the Act); (ii) must claim to have suffered or to risk suffering, loss or damage due to breach of a duty imposed on a procuring entity by the Act or Regulations 2020; (iii) must seek administrative review by the Board within fourteen (14) days of (a) occurrence of breach complained of, having taken place before an award is made, (b) notification of intention to enter into a contract having been issued; or (c) occurrence of breach complained of, having taken place after making of an award to the successful tenderer (iv) by way of a request for review which is accompanied by (v) such statements as the applicant considers necessary in support of its request.

79. The issue that has arisen is whether the instant Request for Review was filed within the 14 days' statutory period provided for under section 167(1) of the Act as read with Regulation 203 of the Regulations 2020.
80. In this Request for Review the Respondents objected to the hearing and determination of the Review on the ground that the same was time-barred contending that tenderers were invited via telephone call to collect their letters of notification on 13th July 2023 and that therefore the 14 days' standstill period started running on that day and lapsed on 27th July 2023.



81. The Interested Party, on its part, associated itself with the views of the Respondents and further submitted that the Applicant had failed to disclose when it became aware of the breach complained of.
82. The Applicant however maintained that it filed the Request for Review within the statutory period of 14 days from 31st July 2023, being the date it received the letter of notification of award and faulted the Respondents for failing to simultaneously notify tenderers of the outcome of evaluation as required under Section 87 of the Act.
83. The Board, having considered the parties' submissions and confidential documents submitted to it, has formed the view that it is being called upon to determine which between the two dates, 13th July 2023 and 31st July 2023 is the date that Applicant was notified of the outcome of evaluation of the tender subject of this Request for Review and, consequently, whether the Request for Review as filed on 11th August 2023 is out of time.
84. The Board notes that it is not in contention that the Applicant received its letter of notification of award the subject tender on 31st July 2023. It is also not in contention that the Applicant, upon receiving the letter and learning from it that it was unsuccessful, chose to inquire from the Director-General Private Security Regulatory Authority on the list of companies registered and licensed to offer vehicle and asset tracking services as at 19th January 2023. It is further not in contention that the Director General of Private Security Regulatory Authority, responded to the Applicant's inquiry vide latter dated 11th August 2023 in which



he enclosed another letter dated 3rd August 2023 addressed to the Respondents. The effect of the letters of the Regulatory Authority was to communicate information that the Interested Party was not security vetted and therefore not licensed to undertake the asset tracking services.

85. The Board has severally held that procurement proceedings are time bound and a candidate or a tenderer who wishes to challenge a decision of a procuring entity with respect to a tender must come before the Board at the earliest, by using the earliest option available under Regulation 203(2)(c) of Regulations 2020 so as not to be accused of laches.
86. The Board is further guided by the holding in **Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Kemotrade Investment Limited [2018] eKLR** where the High Court at paragraphs 65, 66 and 67 noted that to determine when time starts to run, such determination can only be made upon an examination of the alleged breach and when the aggrieved tenderer had knowledge of the said breach and held:

66. The answer then to the question when time started to run in the present application can only be reached upon an examination of the breach that was alleged by the 2nd Interested Party in its Request for Review, and when the 2nd Interested Party had knowledge of the said breach. The said Request for Review was annexed as

"Annexure CO4" to the 2nd Interested Party's replying affidavit. Paragraphs 2 to 4 of the said Request address the first breach that the 2nd Interested Party's representative, one Charles Obon'go noted and notified the Chairman of the tender opening committee about at the tender opening, namely that the Applicant had not supplied the sample of 3m of the sleeve and mill certificate and had not been issue with a delivery note, and that the said Applicant sought to introduce the sample after the commencement of the tender opening.

67. It is not in dispute that the tender opening was on 10th November 2017 at 10.00am, which all the parties attest to in their various affidavits. It is therefore evident that for this particular breach the 2nd Interested Party had knowledge of the same and admits to notifying the 1st Interested Party's tender opening committee of the same on 10th November 2017. Therefore, time for filing a review against this particular alleged breach started to run on 10th November 2017, and the Respondent had no jurisdiction to consider the alleged breach when it was included in the Request for Review filed on 21st February 2017, as the statutory period of filing for review of 14 days had long lapsed. Any decisions by the Respondent on the alleged breach were therefore ultra vires and null and void.



87. The Board heard the Respondents' argument that tenderers were notified on 13th July 2023 to collect their notification letters. The Board however notes that the Respondents did not proffer any evidence in form of call logs or otherwise to back this assertion that it made calls to tenderers on 13th July 2023 asking them to collect letters of notification.
88. In the absence of evidence to the contrary it is reasonable to conclude that the Applicant was notified on 31st July 2023 when it received its letter of notification of intention to award the subject tender.
89. In computing time, the Board is guided by Section 57 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya (hereinafter the IGPA) which provides as follows:

Section 57 - Computation of time

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

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

(b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the



period shall include the next following day, not being an excluded day;

(c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;

(d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time."

90. In computing time when the Applicant should have sought administrative review before the Board 31st July 2023 is excluded pursuant to Section 57(a) of IGPA. This means that 14 days started running from 1st August 2023 and lapsed on 14th August 2023. The Applicant having filed the instant Request for Review on 11th August 2023 was within the statutory period prescribed under Section 167(1) of the Act.

91. Accordingly, this ground of Preliminary Objection fails. Consequently, the Board finds that it has jurisdiction to hear and determine the instant Request for Review and now proceeds to address the substantive issues framed for determination.



As to whether the Procuring Entity improperly evaluated the Interested Party's tender on account of the requirement of valid registration by Private Security Regulatory Authority, in breach of the provisions of Section 80 of the Act.

92. The circumstances of this case are that the Applicant and Interested Party submitted bids in Tender No. TNT/007/2022-2023 for Provision of Fleet Management Solution for Motor Vehicle Leasing Programme Phase VII for the National Treasury in response to an advertisement on 22nd November, 2022.
93. Eleven tenders were received and opened on 19th January 2023 and thereafter evaluated by the Procuring Entity's Tender Evaluation Committee through three stages of Preliminary Examination, Technical Evaluation and Financial Evaluation.
94. At the end of the evaluation the Interested Party was recommended for award of the tender at a sum of Kenya Shillings One Hundred and Seventy-Nine Million, Ninety-One Thousand and Fifty only (Kshs. 179,091,050.00) being the lowest evaluated responsive tenderer subject to due diligence being undertaken.
95. Tenderers were notified of the outcome of evaluation of the subject tender *vide* letters of Notification of Intention to Award dated 20th June 2023 signed by the 1st Respondent.



96. It has been determined herein that the Applicant received its letter of notification on 31st July 2023 informing it that it was unsuccessful. The Applicant, feeling aggrieved by the decision of the Procuring Entity, filed this Request for Review on 11th August, 2023.
97. Central to the Request for Review filed on 11th August 2023 is the manner in which the Respondents evaluated the subject tender and conducted due diligence on the Interested Party. The Applicant contended that the procurement proceedings in the subject tender were unfair since the Respondents awarded the subject tender to the Interested Party despite its failure to comply with MR19 under Clause a Mandatory Requirements of Section III- Evaluation and Qualification Criteria at page 28 of 120 of the Tender Document.
98. During the hearing of the Request for Review the Applicant argued that the Interested Party had no capacity which arose out of discovery noting the scope of the subject tender in that the Interested Party had not produced any document or certificate evidencing that it qualified to cover the scope of the subject tender to counter the letter from the Director of the Private Security Organization.
99. The Respondents on their part argued that that the certificate which the Applicant submitted was the same in format and content as that of the Interested Party and that as such, it was strange that the Applicant was alleging that the Interested Party did not have capacity adding that it was the obligation of the Procuring Entity to set out the



award criteria and that a participant could not purport to evaluate a competitor.

100. The Interested Party's position was that the mandatory requirement under Item 19 at page 28 of the Tender Document was a certified copy of valid registration by Private Security Regulatory Authority and that there was no requirement for classification of licences.

101. The question that has arisen that begs an answer is whether the Interested Party met Mandatory Requirement No. 19 under the Preliminary Evaluation Criteria. To answer this question, the Board heeds the guidance of Section 80 of the Act, which is the guiding provision on evaluation of tenders. The said Act states as follows: -

Section 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 ..."

In terms of establishing whether a tender is responsive to the requirements of the Tender Document, Section 79 of the Act provides as follows:



Section 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.

102. Turning to the Tender Document, the requirement for the supply of a valid registration by Private Security Regulatory Authority was provided for under Criterion No. 19 of the Tender Document. The said Evaluation Criteria was couched in the following words:



Part I: Preliminary Examination (Mandatory Requirements)

No.	Requirement	Compliance
1.
2.
...
<u>19.</u>	<u>Certified Copy of valid registration by Private Security Regulation Authority.</u>	<u>Must meet</u>

From the above, it is clear that Mandatory Requirement No. 19 on the provision of certified copy of valid registration by Private Security Regulation Authority was a mandatory requirement. Further, failure to meet this requirement or any of the 22 requirements would lead to the automatic disqualification of a tenderer.

103. The Applicant, in its submission, did not fault the Interested Party's tender in terms of adherence to mandatory requirement No. 19 on the provision of certified copy of valid registration by Private Security Regulatory Authority.

104. The complaint by the Applicant appears to revolve around the capacity of the Interested Party to undertake car tracking services which apparently it is not licensed to do by the Director of the Private Security Regulatory Authority.



105. The question that arises is whether registration for tracking services was a mandatory requirement of the tender document.
106. The Board has keenly studied the Tender Document and discerns that under mandatory requirements evaluation criteria there are 22 items. Item No. 19 is specific on the provision of certified copy of valid registration by Private Security Regulation Authority. It is not stated under this criteria on any other criteria of the tender document that bidders were required to be registered or vetted to provide car tracking services.
107. The Procuring Entity, the Board notes, did not customize and specify the appropriate requirement in the tender document to meet the requirement of the provisions of car satellite tracking services.
108. The Board observes in this case that it is not reasonable to expect of a bidder more than that which the tender document of a procuring entity prescribes.
109. It is the Board's finding that the Interested Party fulfilled the requirement of registration with the Private Security Regulatory Authority and holds that this ground of review fails.



As to whether the Procuring Entity failed to properly conduct due diligence to confirm and verify the qualifications of the Interested Party in breach of Section 83 of the Act

110. It is a fact of this case that the Interested Party's tender was found to be the lowest evaluated tender at Kenya Shillings One Hundred and Seventy-Nine Million, Ninety-One Thousand and Fifty only (Kshs. 179,091,050.00) and was recommended for award subject to due diligence being undertaken.
111. It is a further fact of the case that, *vide* an Internal Memo dated 21st February 2023, the Head Supply Chain Management Services sought approval from the 1st Respondent to undertake due diligence which request was approved on 28th February 2023.
112. It is also a fact that the Evaluation Committee was required to conduct due diligence and address concerns during the contract implementation period, *inter alia*, on how the successful bidder would address empowerment and job creation, technological skills and knowledge transfer, local content, innovation and continuous improvement, service networks, work/past experience, and capacity.
113. The Evaluation Committee was taken through a live demonstration of the various parameters of the proposed system as well as other administrative aspects of the Interested Party as shown in the Due Diligence Report signed by members of the Evaluation Committee on 24th May 2023.



114. The question which has arisen is whether the Interested Party has capacity to undertake the tender arising out of the due diligence exercise and the information contained in the letter from the Director of the Private Security Regulatory Authority.
115. To answer this question the Board take cognizance of the provisions of the tender document and the applicable law. Section 83 of the Act states as follows:

Section 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.

(3) To acknowledge that the report is a true reflection of the proceedings held, each member who was part of the due diligence by the evaluation committee shall—

(a) initial each page of the report; and



(b) append his or her signature as well as their full name and designation.”

116. Further Regulation 80 of the 2020 Regulations provides as follows:

Regulation 80 - Post-qualification:

“(1) Pursuant to section 83 of the Act, a procuring entity may, prior to the award of the tender, confirm the qualifications of the tenderer who submitted the bid recommended by the evaluation committee, in order to determine whether the tenderer is qualified to be awarded the contract in accordance with sections 55 and 86 of the Act.

(2) If the bidder determined under paragraph (1) is not qualified after due diligence in accordance with the Act, the tender shall be rejected and a similar confirmation of qualifications conducted on the tenderer—

(a) who submitted the next responsive bid for goods, works or services as recommended by the evaluation committee; or

(b) who emerges as the lowest evaluated bidder after re-computing financial and combined score for consultancy services under the Quality Cost Based Selection method.”

117. This Board in **PPARB Application No. 158/ 2020 On the Mark Security Limited V The Accounting Officer, Kenya Revenue Authority and Another** established that a due diligence exercise is a fundamental element of a procurement process that assists a procuring entity to exercise the attention and care required to satisfy itself that the lowest evaluated responsive tenderer can execute a tender.

118. In the instant Request for Review, it was the Applicant's case that the Evaluation Committee of the Procuring Entity failed to conduct due diligence to establish the validity of the registration certificate provided by the Interested Party in response to Mandatory Requirement No. 19 (MR19).

119. The Applicant stated that due to its industry knowledge and extensive research it sought to establish the list of companies licensed to offer vehicle/asset tracking services from the Director, Private Security Regulatory Authority as provided under the Private Securities Regulation Act No. 13 of 2016 and that it came to learn from the response it got that the Interested Party has no capacity to provide car tracking, satellite tracking and or undertake distribution and installation of any other electronic monitoring device or surveillance equipment by dint of lack of a mandatory license, a clear indication that its scope was limited to provide Private Security Guarding Services only.



120. The Board has heard the Applicant state that on 10th August 2023, the Applicant wrote to the Director General Private Security Regulatory Authority requesting for a list of companies registered and licensed to offer GPS tracking services as at 19th January 2023.

121. One Clinton Ingalula for the Director General/ Chief Executive Officer Private Security Regulatory Authority wrote to the Applicant's Managing Director vide letter dated 11th August 2023 and confirmed that the said Authority was in receipt of a similar inquiry relating to the subject tender and had addressed the same with the 2nd Respondent and enclosed the said response in the said letter. This letter reads in part:

".....
We are in receipt of your letter on the above subject. The Authority is in receipt of a similar enquiry relating to the aforementioned tender and already addressed the same with The National Treasury as per copy of the attached letter
....."

122. We note that the response referred to above is the letter dated 3rd August 2023 addressed to the 2nd Respondent by one Kevin Ngarari for Chief Executive Officer/Director General Private Security Regulatory Authority which reads in part:

".....
The Authority wishes to advice that M/s Corprisk Africa Limited has been licensed to ONLY provide private



security guarding services. FOR CLARITY AND AVOIDANCE OF DOUBT, M/s Corprisk Africa Limited has NOT been security vetted and licensed to provide car tracking, satellite tracking and/or to undertake the distribution and installation of any other electronic monitoring device or surveillance equipment including fleet management solutions.

Further, private security services include but are not limited to; electronic, car tracking, satellite tracking, provision of a reactive/response service, distribution or installation of an electronic monitoring device, or any other surveillance equipment.

KINDLY TAKE NOTE any company providing the aforementioned services without being in possession of the mandatory registration certificate and license issued by the Authority in accordance with Sections 21, 23, 28, 29 & 31 of the Act; COMMITS AN OFFENCE.

.....

In view of the foregoing and in compliance with the provisions of the law, the Authority hereby advises The National Treasury to carry out due diligence and ensure that it only procures private security services from private security firms that are duly registered and licensed in accordance with the law.

.....”



123. The Respondents, in counter to the Applicant, argued that evaluation of tenders was done in accordance with the provisions of the Tender Document, the Act and the Constitution. It added that MR 19 required tenderers to submit a certified copy of a valid registration by Private Security Authority and that the Interested Party submitted a certified copy of registration certificate by the Private Security Regulatory Authority Registration No. PSRA/CAL/19/98 issued on 21/06/2022.
124. The Respondent was heard to contend that the Interested Party, having emerged as the lowest responsive evaluated tenderer, was recommended for award subject to a due diligence exercise which was undertaken from 23rd March 2023 when a verification of the authenticity of the Interested Party's certificate of registration by Private Security Authority was conducted through the Security Company Checker on the said authority's website.
125. The Interested Party agreed with the Respondents' submissions and argued that it was duly licensed pursuant to section 2 of the Private Security Regulation Act No. 13 of 2016. It argued further that there were no sub-categories of licenses issued by the Private Security Regulatory Authority and urged the Board to expunge the letter dated 3rd August 2023 for having been obtained illegally and yet it was a confidential document as provided under Section 67 of the Act.
126. The question that we are now called upon to answer is whether the 2nd Respondent's Evaluation Committee conducted due diligence in the



subject tender in accordance with Section 83 of the Act read with Regulation 80 of Regulations 2020.

127. The Respondents in the instant Request for Review have confirmed that recommendation was made to award the subject tender subject to a due diligence exercise being conducted to verify the qualifications of the Interested Party, being the lowest responsive tenderer in the subject tender.
128. The Board is cognizant of the fact that the responsibility of conducting due diligence on tenderers solely lies with the Evaluation Committee of the Procuring Entity. Neither this Board nor a participating tenderer can purport to convert themselves into a member of the Evaluation Committee for purposes of carrying due diligence.
129. The Board however is faced with a unique situation in which the Respondents state that they conducted due diligence on the Interested Party and yet there appears to exist a letter dated 3rd August 2023 addressed to the Respondents by one Kevin Ngarari on behalf of the Chief Executive Officer/Director General, Private Security Regulatory Authority marked as Applicant's Exhibit 14 annexed to the Supporting Affidavit of Gilbert Odadi, the Applicant's Managing Director which does not form part of the confidential file.
130. A closer scrutiny of the said letter shows it was received by the Principal Secretary on 4th August 2023 because of the receipt stamp on the letter. The Respondents however do not make any reference to the



said letter in the Due Diligence Report comprising of the confidential documents submitted to the Board.

131. The Respondents have submitted that part of the scope of due diligence entailed authentication of the Applicant's certified copy of valid registration by Private Security Regulatory Authority which was conducted vide an online verification from the website of Private Security Regulatory Authority. From the foregoing it begs the question of whether the due diligence exercise conducted by the Respondents sufficiently verified the qualifications of the Interested Party to undertake the subject tender.

132. It is our considered view that the online verification carried out by the Respondents in in the due diligence exercise on the qualifications of the Interested Party was not sufficient in light of the contents of the aforementioned letter dated 3rd August 2023. This Board is cognizant of its **Decision in PPARB No. 9 of 2023 Asal Frontiers Limited v The Accounting Officer, Kenya National Highways Authority & Another** where it held that fairness would dictate that a procuring entity in being diligent while conducting due diligence would check further with the issuing authority to ascertain the qualifications of a tenderer recommended for award. The Board held at Page 90 of the said case as follows:

"Having the above in mind, the principle of fairness envisioned under Article 227(1) of the Constitution,



would dictate that the 2nd Respondent's Evaluation Committee in being diligent while conducting the due diligence exercise would check further with Kenya Revenue Authority on when the Applicant's Tax Compliance Certificate was withdrawn because this information was not revealed on the website when a verification was conducted. Had Kenya Revenue Authority refuted issuing the Applicant with a valid Tax Compliance Certificate dated 8th November 2022 and valid for 12 months upto 7th November 2023, then it would have been correct to say that the Applicant's tender was non-responsive since it had submitted an invalid or a falsified Tax Compliance Certificate as at 12th January 2023."

133. From the foregoing, we find that the 2nd Respondent's Evaluation Committee failed to conduct due diligence in the subject tender in accordance with the provisions of Section 83 of the Act as read with Regulation 80 of the Regulations 2020 and the Tender Document. Accordingly this ground of review succeeds and is allowed.

What orders should the Board grant in the circumstances?

We have found that the Board has jurisdiction to hear and determine the instant Request for Review. Accordingly, the preliminary objection raised by the Respondents is dismissed.



We have also found that the 2nd Respondent did not carry out due diligence on the Applicant in accordance with Section 83 of the Act read with Regulation 80 of Regulations 2020. Having found that due diligence conducted on the Applicant's tender was not proper.

The upshot of our findings is that the instant Request for Review succeeds with respect to the following specific orders:

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 this Request for Review:

- 1. The Request for Review dated and filed on 11th August 2023 in respect of Tender No. TNT/007/2022-2023 for Provision of Fleet Management Solution for Motor Vehicle Leasing Programme Phase VII for The National Treasury, be and is hereby allowed.**
- 2. The Letters of Notification of Intention to Award, dated 12th July 2023 issued by the 1st Respondent in respect of the subject tender and addressed to the Interested Party and to**



the unsuccessful tenderers, including the Applicant, be and are hereby cancelled and set aside.

3. The 1st Respondent is hereby ordered to direct the Evaluation Committee of the Procuring Entity to conduct due diligence in accordance with the Tender Document and the law to confirm and verify the qualifications of the Interested Party taking into consideration the Board's findings in this Request for Review, which due diligence shall be conducted within 14 days from the date of this decision.
4. Further to Order No. 3 above, the Respondents are directed to proceed with the procurement process to its logical conclusion.
5. Considering that the procurement process is not complete each party shall bear its own costs of the Request for Review.

Dated at NAIROBI this 1st Day of September 2023.


.....
CHAIRPERSON
PPARB


.....
SECRETARY
PPARB

