

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 76/2023 OF 11<sup>TH</sup> OCTOBER 2023**

**BETWEEN**

**GYTO SUCCESS COMPANY LIMITED.....APPLICANT**

**AND**

**PRINCIPAL SECRETARY,**

**STATE DEPARTMENT OF ROADS,**

**MINISTRY OF TRANSPORT.....1<sup>ST</sup> RESPONDENT**

**STATE DEPARTMENT OF ROADS,**

**MINISTRY OF TRANSPORT.....2<sup>ND</sup> RESPONDENT**

**AND**

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

**ACTION RIFT SECURITY LIMITED.....2<sup>ND</sup> INTERESTED PARTY**

**FLASHCOM SECURITY SERVICES LIMITED.....3<sup>RD</sup> INTERESTED PARTY**

**PAPATON SECURITY SERVICES LIMITED.....4<sup>TH</sup> INTERESTED PARTY**

Review against the decision of the Accounting Officer, State Department of Roads, Ministry of Transport in relation to Tender No. MOR&T (SDoR)/01/2023-2025 for the Provision of Security Services.

**BOARD MEMBERS PRESENT**

1. Mr. George Murugu FCI Arb - Chairperson
2. Ms. Alice Oeri - Member

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|------------------------|---|--------|
| 3. Mr. Daniel Langat   | - | Member |
| 4. Eng. Lilian Ogombo  | - | Member |
| 5. CPA Alexandar Musau |   | Member |

**IN ATTENDANCE**

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|--------------------|---|-------------|
| Ms. Sarah Ayoo     | - | Secretariat |
| Mr. Anthony Simiyu | - | Secretariat |

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**PRESENT BY INVITATION**

**APPLICANT - GYTO SUCCESS COMPANY LIMITED**

Ms. Desma Nungo - Advocate, NOW Advocates LLP

**RESPONDENTS                      PRINCIPAL SECRETARY,  
STATE DEPARTMENT OF ROADS,  
MINISTRY OF TRANSPORT  
STATE DEPARTMENT OF ROADS,  
MINISTRY OF TRANSPORT**

Mr. David Ngugi - Advocate, Ministry of Transport

**1<sup>ST</sup> INTERESTED PARTY    ANCHOR SECURTY SERVICES LIMITED**

Mr. Morris Kimuli - M.M. Kimuli & Co Advocates

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<b>2<sup>ND</sup> INTERESTED PARTY</b>	<b>ACTION RIFT SECURITY LIMITED</b>
Mr. Davis Korrir	-Advocates SMS Advocates LLP
<b>3<sup>RD</sup> INTERESTED PARTY</b>	<b>FLASHCOM SECURITY SERVICES LIMITED</b>
N/A	N/A
<b>4<sup>TH</sup> INTERESTED PARTY</b>	<b>PAPATONSECURITY SERVICES LIMITED</b>
N/A	N/A

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## **BACKGROUND OF THE DECISION**

### **The Tendering Process**

1. The State Department of Roads, Ministry of Transport, the Procuring Entity together with the 1<sup>st</sup> Respondent herein, invited sealed tenders in response to Tender No. MOR&T (SDoR) for the Provision of Security Services using an open national competitive tender method restricted to suppliers registered with the National Treasury under the Access to Government Procurement Opportunities (AGPO) program. The subject tender submission deadline was Thursday, 10<sup>th</sup> August 2023 at 10:00 a.m.

### **Submission of Tenders and Tender Opening**

2. According to the Tender Opening Minutes dated and signed on 10<sup>th</sup> August 2023 under the Confidential File submitted by the Procuring Entity, the following 8 tenderers were recorded as having submitted their respective tenders in response to the subject tender by the tender submission deadline:

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No.	Name of Tenderer
1.	Action Rift Security Limited
2.	Papaton Security Services Limited
3.	Gyto Success Company Limited
4.	Dango Five Security Services Limited
5.	Hounslow Security Services Limited
6.	Anchor Security Services Limited
7.	Flashcom Security Services Limited
8.	Catch Security Links 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 8 tenders in the following 4 stages as captured in the Evaluation Report

- i. Preliminary Stage
- ii. Technical Stage
- iii. Financial Stage
- iv. Due Diligence

### **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 at pages of the Tender Document marked "xx".

5. The evaluation was to be on a Responsive/Nonresponsive basis and tenderers who failed to meet any criteria in the Preliminary Evaluation Stage would not proceed for further evaluation at the Technical Evaluation Stage.
  6. At the end of the evaluation at this stage, only 1 tender was found unresponsive with the other 7 tenders including that of the Applicant and the Interested Parties qualifying for further evaluation.
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### **Technical Evaluation**

7. At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the Criteria set out as Clause B: Technical Evaluation under Section III – QUALIFICATION CRITERIA AND REQUIREMENTS on pages of the Tender Document marked as "xx".
8. The evaluation was to be on a Responsive/Non Responsive basis and on a Lot by Lot basis. Tenderers who failed to meet any criteria in the Technical Evaluation Stage would not proceed for further evaluation at the Financial Evaluation Stage in respect of the specific Lot.
9. At the end of the evaluation at this stage, under Lot 1, 1 tender was found unresponsive with the other 6 tenders including that of the Applicant and the Interested Parties qualifying for further evaluation at the Financial Stage.

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10. Under Lot 2, only 1 tender was found unresponsive with the other 6 tenders including that of the Applicant and the Interested Parties qualifying for further evaluation at the Financial Stage.
11. Under Lot 3, only 1 tender was found unresponsive with the other 6 tenders including that of the Applicant and the Interested Parties qualifying for further evaluation at the Financial Stage.
12. Under Lot 4, 3 tenders were found unresponsive with the other 3 tenders including that of the Applicant and the Interested Parties qualifying for further evaluation at the Financial Stage.
13. Under Lot 5, only 1 tender were found unresponsive with the other 6 tenders including that of the Applicant and the Interested Parties qualifying for further evaluation at the Financial Stage.

### **Financial Evaluation**

14. At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the Criteria set out as Financial Evaluation under Section III– QUALIFICATION CRITERIA AND REQUIREMENTS on a page of the Tender Document marked “xx”
15. The Evaluation Committee was to verify the tenderer’s financials, checking for arithmetic errors, omissions and price comparison among the qualified tenderers. The tenderer determined to have the Lowest Evaluated Tender price would be selected for award of the subject tender.

16. The Evaluation Committee determined that Hounslow Security Service Limited's tender sum of Kshs. 1,444,000.00 was the lowest evaluated tender under Lot 1. Accordingly, the Evaluation Committee recommended the award of the subject tender to it for a period of two years at its quoted tender sum of **Kenya Shillings One Million, Four Hundred and Forty-Four Thousand (Kshs. 1,444,000.00) inclusive of taxes per month** subject to the tenderer being subjected to due diligence.
17. The Evaluation Committee determined that the 2<sup>nd</sup> Interested Party's tender sum of Kshs. 880,440.00 was the lowest evaluated tender under Lot 2. Accordingly, the Evaluation Committee recommended the award of the subject tender to the 2<sup>nd</sup> Interested Party for a period of two years at its quoted tender sum of **Kenya Shillings Eight Hundred and Eighty Thousand Four Hundred and Forty (Kshs. 880,440.00) inclusive of taxes** per month subject to the tenderer being subjected to due diligence.
18. The Evaluation Committee determined that 1<sup>st</sup> Interested Party's tender sum of Kshs. 1,059,660 was the lowest evaluated tender under Lot 3. Accordingly, the Evaluation Committee recommended the award of the subject tender to it for a period of two years at its quoted tender sum of **Kenya Shillings One Million, Fifty-Nine Thousand, Six Hundred and Sixty (Kshs. 1,059,660.00) inclusive of taxes** per month subject to the tenderer being subjected to due diligence.
19. The Evaluation Committee determined that Hounslow Security Service Limited's tender sum of Kshs. 1,060,500.00 was the lowest evaluated tender under Lot 4. Accordingly, the Evaluation Committee recommended the award of the subject tender to it for a period of two years at its quoted



tender sum of **Kenya Shillings One Million, Sixty Thousand and Five Hundred (Kshs. 1,060,500.00) inclusive of taxes** per month subject to the tenderer being subjected to due diligence.

20. The Evaluation Committee determined that the 4<sup>th</sup> Interested Party's tender sum of Kshs. 840,000.00 was the lowest evaluated tender under Lot 5. Accordingly, the Evaluation Committee recommended the award of the subject tender to it for a period of two years at its quoted tender sum of **Kenya Shillings Eight Hundred and Forty Thousand (Kshs. 840,000.00) inclusive of taxes** per month subject to the tenderer being subjected to due diligence.
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### **Evaluation Committee's Recommendation**

21. The Evaluation Committee recommended award of the subject tender to the tenderers it determined their tenders to be the lowest evaluated responsive tenders under each of the 5 Lots subject to the tenderers being subjected to due diligence.

### **Due Diligence**

22. According to an undated but signed Due Diligence Report submitted to the Board as part of the Confidential Documents, the Evaluation Committee made physical visits to the offices of tenderers whose tenders had been determined as the lowest evaluated tenders under each of the 5 lots. At the tenderer's offices, the Evaluation Committee verified the tenderer's statutory documents as well as CAK Licenses authorizing the tenderers to establish radio communication stations.

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23. The results of the due diligence were positive for each of the tenderers determined to be the lowest evaluated tenders under each of the 5 lots save for Hounslow Security Services Limited which had previously been found as the lowest evaluated tender under Lots 1 and 4.
24. During due diligence, Hounslow Security Services Limited was unable to demonstrate that they had working radio communication gadgets. Accordingly, the Committee recommended the award of the tender for Lot 1 to the 1<sup>st</sup> Interested Party at its tender price of **Kenya Shillings One Million, Four Hundred and Ninety-Two Thousand, Three Hundred and Forty (Kshs. 1,492,340.00)** per month upon conducting due diligence on the 1<sup>st</sup> Interested Party. The Committee also recommended the award of the tender for Lot 4 to the 3<sup>rd</sup> Interested Party at its tendered price of **Kenya Shillings One Million, Two Hundred and Twenty-One Thousand (1,221,000.00)** per month upon conducting due diligence on the 3<sup>rd</sup> Interested Party.

### **Professional Opinion**

25. In a Professional Opinion dated 8<sup>th</sup> September 2023 (hereinafter referred to as the "Professional Opinion"), the Assistant Director, Mr. David Ngugi, reviewed the manner in which the subject procurement process was undertaken including the evaluation of tenders, and recommended the award of the subject tender to the tenderers as proposed by the Evaluation Committee. The 1<sup>st</sup> Respondent concurred with said Professional Opinion.

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## **Notification to Tenderers**

26. Tenderers were notified of the outcome of the evaluation of the subject tender vide letters dated 20<sup>th</sup> September 2023, which were sent through email on 26<sup>th</sup> September 2023.

## **REQUEST FOR REVIEW**

27. On 11<sup>th</sup> October 2023, the Applicant filed a Request for Review dated 9<sup>th</sup> October 2023 supported by a Statement made on 9<sup>th</sup> October 2023 by Ms. Gladys Towett, a Director at the Applicant, seeking the following orders from the Board in verbatim:

- a) The 1<sup>st</sup> Respondent furnishes the Applicant with a summary of the proceedings of the opening of bids, evaluation and comparison of the bids including the evaluation criteria used in evaluating bids in Tender No. MOR&T (SDoR)/01/2023-2025 for Provision of Security Services forthwith in accordance with Section 67(4) of the Act read with Section 68(2)(d)(iii) of the Act;*
- b) The 1<sup>st</sup> Respondent's decision awarding Region/Lot 1 and 3 of Tender No. MOR&T (SDoR)/01/2023-2025 for Provision of Security Services to the 1<sup>st</sup> Interested Party be annulled and set aside;*
- c) The 1<sup>st</sup> Respondent's decision awarding Region/Lot 2 of Tender No. MOR&T (SDoR)/01/2023-2025 for Provision of Security Services to the 2<sup>nd</sup> Interested Party be annulled and set aside;*
- d) The 1<sup>st</sup> Respondent's decision awarding Region/Lot 4 of Tender No. MOR&T (SDoR)/01/2023-2025 for Provision of*

- Security Services to the 3<sup>rd</sup> Interested Party be annulled and set aside;*
- e) The 1<sup>st</sup> Respondent's decision awarding Region/Lot 5 of Tender No. MOR&T (SDoR)/01/2023-2025 for Provision of Security Services to the 4<sup>th</sup> Interested Party be annulled and set aside;*
- f) The 1<sup>st</sup> Respondent's letter dated 20<sup>th</sup> September 2023 notifying the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Interested Party of their successfulness in the various 5 Regions/Lots of Tender No. MOR&T (SDoR)/01/2023-2025 for Provision of Security Services (if any) be annulled and set aside;*
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- g) The 1<sup>st</sup> Respondent's letter dated 20<sup>th</sup> September 2023 notifying the Applicant that it had not been successful in the various 5 Regions/lots of Tender No. MOR&T (SDoR)/01/2023-2025 for Provision of Security Services be annulled and set aside;*
- h) Any procurement contract with respect to any of the 5 Regions/Lots of Tender No. MOR&T (SDoR)/01/2023-2025 for Provision of Security Services that the Respondents may have entered in to with the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Interested Party in breach of Section 135(3) of the Act read with Sections 167(1) and 168 of the Act and Regulation 203(c) of Regulations 2020 be nullified and set aside;*
- i) The Respondents be directed to award the 5 Regions/Lots of Tender No. MOR&T (SDoR)/01/2023-2025 for Provision of Security Services to the Applicant as the bidder who submitted the bid with the lowest evaluated price;*

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***j) In the alternative, the Public Procurement Administrative Review Board be pleased to review all records of the procurement proceedings relating to Tender No. MOR&T (SDoR)/01/2023-2025 for Provision of Security Services and in exercise of its secretion, to direct the Respondents to redo or correct anything within the entire procurement proceedings found not to have been done in compliance with the law;***

***k) The Respondents be compelled to pay the Applicant the costs arising from and incidental to, this Request for Review; and***

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***l) The Public Procurement Administrative Review Board to make such and further orders as it may deem fit and appropriate in ensuring that the ends of justice are fully met in the circumstances of this Request for Review.***

28. In a Notification of Appeal and a letter dated 11<sup>th</sup> October 2023, Mr. James Kilaka, the Acting Board Secretary of the Board notified the Respondent of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondent 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 Respondent was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 11<sup>th</sup> October 2023.

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29. On 18<sup>th</sup> October 2023, the Respondents filed a Memorandum of Response and a Notice of Preliminary Objection, both dated 16<sup>th</sup> October 2023. The Respondents also submitted the confidential documents in the subject tender pursuant to Section 67(3)(e) of the Act.
30. Vide letters dated 19<sup>th</sup> October 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 19<sup>th</sup> October 2023.
31. On the same day of 19<sup>th</sup> October 2023, the Acting Board Secretary, sent out to the parties a Hearing Notice dated 19<sup>th</sup> October 2023, notifying parties and all tenderers in the subject tender that the hearing of the instant Request for Review would be by online hearing on 25<sup>th</sup> October 2023 at 2:00 p.m. through the link availed in the said Hearing Notice.
32. On 24<sup>th</sup> October 2023, the 2<sup>nd</sup> Interested Party through the law firm of SMS Advocates LLP filed a Notice of Appointment of Advocates, a Notice of Preliminary Objection and Memorandum of Response, all dated 19<sup>th</sup> October 2023.
33. Later that day, the Applicant filed a Further Statement by Gladys Towett dated 24<sup>th</sup> October 2023.

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34. Still on the 24<sup>th</sup> October 2023, the 1<sup>st</sup> Interested Party through the law firm of M.M. Kimuli & Co. Advocates filed a Notice of Appointment of Advocates.
35. During the online hearing on 25<sup>th</sup> October 2023 at 2:00 p.m., the Applicant, Respondents and the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties were represented by their respective Advocates. The Board noted that since the Respondents and 2<sup>nd</sup> Interested Party had filed Notices of Preliminary Objection; these would be heard as part of the substantive Request for Review. This was in line with Regulation 209(4) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020') which grants the Board the discretion to hear preliminary objections as part of the substantive request for review and render one decision.
36. Accordingly, the Board gave directions on the order of address of the Board as follows: The parties would each submit their respective cases in 10 minutes with the Applicant starting followed by the Respondents and 2<sup>nd</sup> Interested Party thereafter the Applicant would offer a rejoinder in 3 minutes. Since only the 2<sup>nd</sup> Interested Party had filed a response, they would be the only Interested Party submitting before the Board. The rest of the Interested Parties would only communicate their position as to whether they were in support or opposition to the Request for Review.
37. The Applicant and Respondents through their Counsel made oral submissions. However, when it was the turn for the Interested Parties to make their submissions, Counsel for the 1<sup>st</sup> Respondent, Mr. Kimuli indicated that he was served with the Applicant's Further Statement on 24<sup>th</sup> October 2023 at 7.30 p.m. which was late and thus he sought that

the Statement be struck out or in the alternative he be allowed to make oral comments on the document. He also indicated that if granted leave he was ready to file his response by 26<sup>th</sup> October 2023.

38. Mr. Nungo in response submitted that the Further Statement was not filed late as the Applicant had 3 days within which to file the Statement and that the same was filed on the last day of the 3 days. Counsel reiterated that at the beginning of the hearing when the Board sought parties' confirmation of their readiness to proceed to which Mr. Kimuli indicated that he was ready.

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39. Mr. Ngugi submitted that the Further Statement by the Applicant had a lot of facts and made further Requests and thus warranted parties to be accorded time to file their responses.

40. The Board considered the sentiments by Counsel and returned a Ruling directing (i) the 1<sup>st</sup> Interested Party to file a Written response to the Request for Review and Submissions by 11.00 a.m. on 26<sup>th</sup> October 2023; (ii) the Applicant was granted leave to file its rejoinder together with its Written Submissions by 5.00 p.m. on 26<sup>th</sup> October 2023; the Respondents and the Interested Parties were granted leave to file their Written Submissions by 11:00 a.m. on 27<sup>th</sup> October 2023; the 1<sup>st</sup> Interested Party was directed to pay statutory adjournment fees in the sum of Kshs. 15,000 by 11:00 a.m. on 26<sup>th</sup> October 2023; and that the Request for Review would now be canvassed by way of the Board considering all the documents filed in the Request for Review.

41. On 26<sup>th</sup> October 2023, the Respondents filed a Further Memorandum of Response dated 25<sup>th</sup> October 2023.

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42. On 26<sup>th</sup> October 2023, the 1<sup>st</sup> Interested Party filed an Affidavit sworn on 26<sup>th</sup> October 2023 by Michael Kavate, the 1<sup>st</sup> Interested Party's Managing Director.
43. On 26<sup>th</sup> October 2023, the 2<sup>nd</sup> Interested Party filed a Further Response dated 25<sup>th</sup> October 2023. On the same day, the Applicant filed Written Submissions dated 26<sup>th</sup> October 2023.
44. On 27<sup>th</sup> October 2023, both the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties filed their individual Written Submissions of even date. In addition, the 2<sup>nd</sup> Respondent filed a List of Authorities of even date.
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45. A brief of each party's case as can be discerned from the filed documents is as summarized below:

### **PARTIES SUBMISSIONS**

#### **Applicant's Case**

46. The Applicant's Case is that it received a letter of regret that its tender was unsuccessful for not being the lowest evaluated tender under each of the 5 Lots under the subject tender.
47. According to the Applicant, the Respondents' and 2<sup>nd</sup> Interested Party's Notices of Preliminary Objection filed in the Request for Review were defective. It was argued that both objections made reference to a decision dated 11<sup>th</sup> October 2023 which according to the parties was challenged by a Request for Review filed on 11<sup>th</sup> September 2023. The Applicant denied having referred to a decision dated 11<sup>th</sup> October 2023 and insisted that it filed the instant Request for Review on 11<sup>th</sup> October 2023 and not 11<sup>th</sup> September 2023 as portrayed in the Notices of Preliminary Objection.

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Thus, it was the Applicant's case that the Respondents' and 2<sup>nd</sup> Interested Party's Notices of Preliminary Objection were defective as there was a clear dispute as to facts.

48. The Applicants also argued that the instant Request for Review was filed on 11<sup>th</sup> October 2023 and within the 14-day statutory timeline under Section 167 of the Act. It was argued that the Applicant was challenging the decision contained in the notification of award in the subject tender which decision it only became aware of upon receipt of a letter of regret it received on its email on 26<sup>th</sup> September 2023.

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49. According to the Applicant's computation, the 14 days contemplated under the Act lapsed on 10<sup>th</sup> October 2023, which date was a public holiday under the Public Holidays Act and thus under Section 57(b) 10<sup>th</sup> October 2023 was excluded from the computation of time with the result that the deadline for filing the Request for Review was moved to 11<sup>th</sup> October 2023. Having filed the instant Request for Review on 11<sup>th</sup> October 2023, the Applicant maintained that the same was filed within the statutory timelines.

50. The Applicant further pressed that though Article 227 of the Constitution emphasizes fairness in the public procurement processes, the Evaluation Committee did not promote principles of fairness and competition in the subject tender. The Applicant decried that though its tender price of Kshs. 812,620 was much lower than the 4<sup>th</sup> Interested Party's tender price of Kshs. 840,000.00, it is the Interested Party's tender price that was selected as the lowest evaluated tender under Lot 5.

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51. Further, it was argued that the 4<sup>th</sup> Interested Party's tender was unresponsive to the eligibility and mandatory requirements under paragraphs 3 and 4 of the Tender Document.
52. It was also contended that the 1<sup>st</sup> Interested Party just like the 4<sup>th</sup> Interested Party did not have an AGPO Certificate which was a mandatory requirement No. 4 under Section III of the Tender Document.
53. The Applicant also faulted the finding of the 2<sup>nd</sup> Interested Party's tender as responsive when it did not meet the mandatory requirement of 3 years' experience as per mandatory requirement No. 15.
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54. The Applicant insisted that the 1<sup>st</sup> and 4<sup>th</sup> Interested Party did not have valid AGPO Certificates as of the tender submission deadline. It was argued that an official search at the Business Registration Services yielded that the 1<sup>st</sup> Interested Party's Directors as Michael Kimanzi and Gabriel Kavate were aged 46 and 75 years respectively within the knowledge of the Applicant's Director, Ms. Gladys Towett. This made it questionable that the 1<sup>st</sup> Interested Party held a valid AGPO Certificate when the said 2 shareholders were well beyond 34 years and thus ineligible to qualify under the youth scheme for AGPO.
55. The Applicant invited the Board to review the 4<sup>th</sup> Interested Party's tender arguing that the 4<sup>th</sup> Interested Party did not have a valid Tax Compliance Certificate as per Mandatory Requirement No. 4 of the Tender Document.
56. It was also argued that the Tender Document required responsive tenders to be from tenderers with a at least 3 years of experience and to provide 3 recommendation letters on contracts between January 2021 to January

2023 but the 2<sup>nd</sup> Interested Party was only registered on 2<sup>nd</sup> December 2023 according to an official search conducted on 2<sup>nd</sup> December 2023. This differed from the 30<sup>th</sup> May 2017 date mentioned at paragraph 2 of the Respondents' Memorandum of Response.

57. The Applicant's questioned why the 2<sup>nd</sup> Interested Party failed to produce evidence of a CR12 or a Certificate of Incorporation showing that it was incorporated more than 3 years before the tender submission deadline.
58. The Applicant also questioned why the Respondents awarded the 3<sup>rd</sup> Interested Party Lot 4 of the subject tender at a tender price that left out certain areas like Turkana, West Pokot, Kericho and Bomet.
59. Equally, the Applicant questioned why the Respondents awarded the 4<sup>th</sup> Interested Party Lot 5 of the subject tender at a tender price that included certain areas like Turkana, West Pokot, Kericho and Bomet which ought to be under Lot 4 and not Lot 5.
60. The Applicant also contended that the 3<sup>rd</sup> Interested Party's tender was not compliant with tax, employment and labour laws as its price schedule did not fully accommodate tax laws pursuant to the Income Tax Act, VAT together with 15% statutory allowance under section 31 of the Employment Act. The Applicant argued that the 3<sup>rd</sup> Interested Party's computation would fall below the minimum wage.
61. The Applicant invited the Board to review the 4<sup>th</sup> Interested Party's tender to establish whether it submitted a list showing the position of backup systems and ability to respond timeous in respect of Lot 5.

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## **Respondents' Case**

62. The Respondents did not file Written Submissions in respect of the Request for Review. However, the Respondents' case as can be discerned from the documents on record is as follows:
63. It was contended that the Respondents conducted the procurement proceedings in respect of the subject tender in strict adherence to the Constitution, Act, Regulations 2020. According to the Respondents they evaluated the submitted tenders under the Preliminary Evaluation Stage, Technical Evaluation Stage and Financial Evaluation Stage. Further ~~tenderers who passed the financial stage were subjected to due diligence before the awards for the separate lots were made.~~
64. The Respondents disputed the Applicant's allegation that the 1<sup>st</sup> and 4<sup>th</sup> Interested Parties did not have valid and current AGPO certificates. The Respondents invited the Board to review the Evaluation Report and copies of the 1<sup>st</sup> and 4<sup>th</sup> Interested Parties' AGPO Certificates at 9 and 103 respectively of their submitted tenders. It was argued that the submitted AGPO certificates were verified on AGPO's verification portal: <https://agpo.go.ke>.
65. The Respondents further disputed the Applicant's allegation that the 2<sup>nd</sup> Interested Party was registered on 2<sup>nd</sup> December 2021 and thus it was impossible for them to have had 3 years of experience. It was argued that the 2<sup>nd</sup> Interested Party provided a Certificate of Incorporation certified by a Commissioner for Oaths at page 107 of its submitted tender together with audited annual accounts for 3 years and a sworn affidavit as proof that they were registered on 30<sup>th</sup> May 2017.



66. The Respondents further disputed the Applicant's allegations that the 3<sup>rd</sup> Interested Party's tender price was not compliant with Tax, Employment and Labour Laws. They argued that the tenderer provided a certificate of compliance with labour laws issued by the labour office at page 85 of its tender. Further at page 80 of their tender, the tenderer attached letters of commitment to abide by labour laws.
67. It was submitted that the quoted rates by the 3<sup>rd</sup> Interested Party were within the minimum wage and that it was difficult in the circumstance to establish how the tenderer would organize its payroll and work schedule for its guards.
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68. The Respondents also disputed the Applicant's contention that Lot 5 was awarded to the 4<sup>th</sup> Interested Party, a tenderer who had a higher tender price compared to the Applicant. It was argued that the Applicant provided 2 tables under this lot i.e. one for Kshs. 812,620 and the other 376,580. Accordingly, the Applicant's total tender sum was Kshs. 1,189,200 compared to the 4<sup>th</sup> Interested Party's Kshs. 840,000.
69. The Respondents also affirmed that tenderers that could not provide back-up services under their respective lots were disqualified and not allowed to proceed to the next stage of evaluation.

### **1<sup>st</sup> Interested Party's Case**

70. The 1<sup>st</sup> Interested Party took the view that the instant Request for Review was time-barred. It argued that the 14 days' timeline within which the Request for Review ought to have been filed lapsed on 10<sup>th</sup> October 2023. It was contended that procurement matters carry strict timelines that are

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not subject to the computation of time under the Interpretation and General Provisions Act.

71. It was also contended that Section 57 of the Interpretation and General Provisions Act provides that excluded days are reckoned in the computation of time where the timelines in question exceed 6 days.
72. The 1<sup>st</sup> Interested Party also insisted that it submitted a valid and current AGPO certificate as part of its tender. It was submitted that it was not within the remit of this Board to audit the issuance of AGPO Certification and therefore urged the Board to decline the invitation to audit government processes and systems.
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### **2<sup>nd</sup> Interested Party's Case**

73. The 2<sup>nd</sup> Interested Party argued that the Applicant having received the letter of Notification of Intention to award on 26<sup>th</sup> September 2023 ought to have brought the instant Request for Review on or before 9<sup>th</sup> October 2023. It was argued that the Request for Review having been filed on 11<sup>th</sup> October 2023 was therefore time-barred.
74. It was contended that the entire evaluation process was conducted in accordance with the evaluation criteria set out in the Tender Document.
75. It was further argued that he who alleges must prove and that in the present Request for Review, the Applicant failed to prove any breach of the law.

## **BOARD'S DECISION**

76. 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 instant Request for Review is time-barred under Section 167(1) of the Act as well as Regulation 203(2)(c) and thus the Board is divested of jurisdiction to hear and determine it?***

*Depending on the determination of the first issue;*

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***II. Whether the Procuring Entity's Evaluation Committee properly evaluated the submitted tender documents in compliance with the provisions of Section 80 of the Act and the Tender Document?***

***III. What orders should the Board issue in the circumstance?***

**Whether the instant Request for Review is time-barred under Section 167(1) of the Act as well Regulation 203(2)(c) and thus the Board is divested of jurisdiction to hear and determine it?**

77. Subsequent to the filing of the instant Request for Review, the Respondents and the 2<sup>nd</sup> Interested Party filed Notices of Preliminary Objection dated 16<sup>th</sup> October 2023 and 19<sup>th</sup> October 2023 indicating that the instant Request for Review was time-barred under Section 167 of the Act. This position was also shared by the 1<sup>st</sup> Interested Party who at paragraph 4 of the Affidavit sworn on 26<sup>th</sup> October 2023 by Michael Kavate took a similar view that the Request for Review was filed outside the 14 days' statutory timeline prescribed under Section 167(1) of the Act.

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78. According to the Respondents and the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties, the Applicant having received the letter of notification of Intention to Award in respect of the subject tender on 26<sup>th</sup> September 2023, ought to have filed the instant request for Review by 10<sup>th</sup> October 2023. The 1<sup>st</sup> Interested Party went on to suggest the provisions of the Interpretation and General Provision Act were in applicable as procurement matters had strict timelines. It was also argued in the alternative that 10<sup>th</sup> October 2023 being the last day for filing the Request for Review and a public holiday ought not to be excluded in the computation of the 14-day statutory timeline since the Applicant had in excess of 6days to bring the Request for Review.

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79. On the flip side, the Applicant mounted 2 challenges with respect to the Notices of Objection. First, the Applicant argued that the Notices of Objection as filed were not true Preliminary Objections as they referred to a decision dated 11<sup>th</sup> October 2023 when in fact the Request for Review related to a decision dated 20<sup>th</sup> September 2023. The Applicant therefore argued that this introduced a different set of facts that called for the interrogation of evidence when Preliminary Objections should be based on pure points of law.

80. Secondly, the Applicant also indicated that the suggestion that the instant Request for Review was time-barred under Section 167(1) of the Act was mistaken since the 14 days contemplated under the Act lapsed on 10<sup>th</sup> October 2023 which was a public holiday. The Applicant argued section 57 of the Interpretation and General Provisions Act excluded public holidays from the computation of timelines provided for under statute and

thus, the Applicant had until 11<sup>th</sup> October 2023 to bring the instant Request for Review.

81. This Board is therefore called upon in the first place to interrogate whether the Notices of Preliminary Objection as filed raise pure points of law.
82. The Board has keenly studied the Respondents' and 2<sup>nd</sup> Interested Party's Notices of Preliminary Objection and noted that the 2 objections have been similarly worded almost word for word. Both Notices of Preliminary Objection's paragraph 3 cite that the Applicant had pleaded that the decision under challenge in the present proceedings is dated 11<sup>th</sup> October 2023 and that it received the Notification of Intention to Award on the 26<sup>th</sup> September, 2023. Therefore, the Notification of Intention to Award was issued on 26<sup>th</sup> September 2023 and the Request for Review ought to have been filed by 9<sup>th</sup> September 2023.
83. The date of the decision under challenge as per the Notices of Preliminary Objection is erroneous. A look at the face of the Request for Review reveals that the decision forming the subject of the instant proceedings was dated 20<sup>th</sup> September 2023 and in this regard, it is plausible to presume that the Respondents and 2<sup>nd</sup> Interested Party were proceeding from a different set of facts from those of the Applicant. Whereas the Applicant was challenging a decision dated 20<sup>th</sup> September 2023, the Respondents and 2<sup>nd</sup> Interested Party were making reference to a non-existent decision of 11<sup>th</sup> October 2023.
84. In spite of the foregoing, the 1<sup>st</sup> Interested Party equally raised a Preliminary Objection whose set of facts correspond to that of the

Applicant. Paragraph 4(d) of the Affidavit sworn on 26<sup>th</sup> October 2023 of Miacheal Kavate correctly refers to the decision dated 26<sup>th</sup> September 2023 which is the decision forming the subject of the instant Request for Review. Accordingly, whereas, the Respondents and 2<sup>nd</sup> Interested Party may not have raised Preliminary Objections based on pure points of law, the 1<sup>st</sup> Interested Party has done so.

85. The Board shall now interrogate the merit of the Preliminary Objection as raised. The Preliminary Objection as pleaded by the 1<sup>st</sup> Interested Party challenges the jurisdiction of the Board over the instant Request for Review.

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86. It is trite 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.

87. 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."***

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88. Jurisdiction is defined in Halsbury's Laws of England (4 th Ed.) Vol. 9 as:

***"...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision."***

89. 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 draws tools in respect of the matter before it the moment it holds that it is without jurisdiction."***

90. In the case of ***Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others [2013] eKLR***, the Court of Appeal emphasized 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...."*

91. 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."***

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

***The functions of the Review Board shall be—  
reviewing, hearing and determining tendering and asset disposal disputes; and to perform any other function conferred to the Review Board by this Act, Regulations or any other written law."***

93. A reading of section 167 of the Act denotes that the jurisdiction of the Board should be invoked within a specified timeline of 14 days:

***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.***

94. Regulation 203(2) (c) of the Regulations 2020 equally affirms the 14-days timeline in the following terms:

***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) state the reasons for the complaint, including any alleged breach of the Constitution, the Act or these Regulations;***

***b) be accompanied by such statements as the applicant considers necessary in support of its request;***

***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***

95. Our interpretation of the above provisions is that an Applicant seeking the intervention of this Board in any procurement proceedings must file their request within the 14-day statutory timeline. Accordingly, Requests for

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Review made outside the 14 days would be time-barred and this Board would be divested of the jurisdiction to hear the same.

96. It is therefore clear from a reading of section 167(1) of the Act , Regulation 203(1)(2)(c) & 3 of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 that an aggrieved candidate or tenderer invokes the jurisdiction of the Board by filing a Request for Review with the Board Secretary within 14 days of (i) occurrence of breach complained of, having taken place before an award is made (ii) notification of intention to enter in to a contract having been issued or (iii) occurrence of breach complained of, having taken place after making of an award to the successful tenderer. Simply put, an aggrieved candidate or tenderer can invoke the jurisdiction of the Board in three (3) instances namely (i) before notification of intention to enter in to a contract is made (ii) when notification of intention to enter into a contract has been made and (iii) after notification to enter into a contract has been made. The option available to an aggrieved candidate or tenderer in the aforementioned instances is determinant on when occurrence of breach complained took place and should be within 14 days of such breach. It was not the intention of the legislature that where an alleged breach occurs before notification to enter in to contract is issued, the same is only complained after the notification to enter into a contract has been issued. We say so because there would be no need to provide 3 instances within which such Request for Review may be filed.

97. Section 167 of the Act and Regulation 203 of the 2020 Regulations identifies the benchmark events for the running of time to be the date of

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notification of the award or date of occurrence of the breach complained of.

98. The gravamen of the Applicant's Request for Review is that its tender was found unresponsive as it was not the lowest evaluated tender in the 5 lots in the subject tender and this fact was communicated through the letter dated 20<sup>th</sup> September 2023 and sent to the Applicant on 26<sup>th</sup> September 2023. We are of the considered view that 26<sup>th</sup> September February 2023 being the date when the Applicant learnt of its disqualification, this is the date that forms the benchmarks for the 14-days statutory window.

99. In computing the 14 days contemplated under the Act, we take guidance from section 57 of the Interpretation and General Provisions Act:

***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***

100. When computing time when the Applicant ought to have sought administrative review before the Board, 26<sup>th</sup> September 2023 is excluded as per section 57(a) of the IGPA being the day that the Applicant learnt of the occurrence of the alleged breach. This means time started to run on 27<sup>th</sup> September 2023 and lapsed on 10<sup>th</sup> October 2023. However, since 10<sup>th</sup> October 2023 was a Public Holiday, under Section 57(b) this date is excluded in the computation such that the statutory period would now be taken as having lapsed on 11<sup>th</sup> October 2023. In essence the Applicant had between 26<sup>th</sup> October 2023 and 11<sup>th</sup> October 2023 to seek administrative review before the Board. The instant Request for Review was filed on 11<sup>th</sup> October 2023 which was the 14<sup>th</sup> day from the date of receipt of the notification of intention to award and therefore within the statutory timelines.

101. The Board therefore finds that the instant Request for Review is not time-barred under Section 167(1) of the Act as well Regulation 203(2)(c) and that the Board is vested with jurisdiction to hear and determine it.

**Whether the Procuring Entity's Evaluation Committee properly evaluated the Interested Party's submitted tender at the**

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**Preliminary and Financial Evaluation Stages in compliance with the provisions of Section 80 of the Act and the Tender Document?**

102. The Applicant took issue with the manner in which the Evaluation Committee undertook an evaluation process which culminated in the 1<sup>st</sup> to 4<sup>th</sup> Interested Parties being identified as the successful tenderers in the subject tender.
103. The Applicant questioned how the 1<sup>st</sup> Interested Party was determined ~~the successful tenderer under Lots 1 and 3 of the subject tender when in~~ fact the 1<sup>st</sup> Interested Party did not have a valid AGPO Certificate as per Mandatory Requirement No. 4 of the Tender Document. The Applicant argued that the 1<sup>st</sup> Interested Party's shareholders were aged 46 and 76 years old and thus could not purport to hold a valid AGPO Certification under the youth scheme.
104. The Applicant equally questioned how the 2<sup>nd</sup> Interested Party was determined as the successful tenderer under Lot 2 of the subject tender when in fact the 2<sup>nd</sup> Interested Party lacked 3 years of experience as per Mandatory Requirement No. 15 of the Tender Document. It was argued that the 2<sup>nd</sup> Interested Party was incorporated on 2<sup>nd</sup> December 2021 and thus could not have been 3 years in existence as at the tender closing date of 10<sup>th</sup> August 2023.
105. Additionally, the Applicant assailed the evaluation exercise that determined the 3<sup>rd</sup> Interested Party as the lowest evaluated tender under Lot 4 of the subject tender. This was because the 3<sup>rd</sup> Interested Party was

awarded the tender at a tender price of Kshs. 1,221,000 per month which amount did not cover areas such as Turkana, West Pokot, Kericho and Bomet which areas were meant to be under Lot 4.

106. For Lot 5 the Applicant questioned how the 4<sup>th</sup> Interested Party was determined as the lowest evaluated tender, when the Applicant's tender price was much lower. It also maintained that the 4<sup>th</sup> Interested Party failed to submit valid AGPO Certificates as per Mandatory Requirement No. 4 of the Tender Document. The Applicant equally wondered why the 4<sup>th</sup> Interested Party was awarded a tender to provide security services to areas such as Turkana West Pokot, Kericho and Bomet under Lot 5 when the said areas were to be under Lot 4.

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107. The Respondents argued that the Evaluation process leading to the award of the subject tender was above board and in compliance with the law.

108. This Board is therefore being invited to interrogate whether the Evaluation Committee properly evaluated the tenders submitted in the subject tender.

109. Section 80 of the Act offers guidance on how an Evaluation Committee should proceed with the evaluation of tenders in the following terms:

***"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."***

110. Regulation 74 of the Regulations 2020 provides guidance on how the Preliminary Evaluation should be undertaken:

***"74. Preliminary evaluation of open tender***

***(1) Pursuant to section 80 of the Act and upon opening of tenders, the evaluation committee shall first conduct a preliminary evaluation to determine whether—***

- (a) a tenderer complies with all the eligibility requirements provided for under section 55 of the Act;***
- (b) the tender has been submitted in the required format and serialized in accordance with section 74(1)(i) of the Act;***
- (c) any tender security submitted is in the required form, amount and validity period, where applicable;***
- (d) the tender has been duly signed by the person lawfully authorised to do so through the power of attorney;***
- (e) the required number of copies of the tender have been submitted;***
- (f) the tender is valid for the period required;***
- (g) any required samples have been submitted; and***
- (h) all required documents and information have been submitted."***

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111. Regulation 77 makes the following provision on financial evaluation:

***77. Financial evaluation***

***(1) Upon completion of the technical evaluation under regulation 76 of these Regulations, the evaluation committee shall conduct a financial evaluation and comparison to determine the evaluated price of each tender.***

***(2) The evaluated price for each bid shall be determined by***

***(a) taking the bid price in the tender form;***

***(b) taking into account any minor deviation from the requirements accepted by a procuring entity under section 79(2)(a) of the Act;***

***(c) where applicable, converting all tenders to the same currency, using the Central Bank of Kenya exchange rate prevailing at the tender opening date;***

***(d) applying any margin of preference indicated in the tender document.***

***(3) Tenders shall be ranked according to their evaluated price and the successful tender shall be in accordance with the provisions of section 86 of the Act.***

112. Additionally, Section 79 of the Act offers clarity on the responsiveness of tenders in the following terms:

***"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.”*

113. This Board is further guided by the dictum of the High Court in *Republic v Public Procurement Administrative Review Board & 2 others Ex parte 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*

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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.

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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."*

114. Drawing from the above, the Tender Document is the key guide in the evaluation of tenders submitted in response to any tender invitation. Further, for a tender to be deemed responsive in respect of any requirement, it must comply with the specification of the actual requirement as set out in the Tender Document.

115. Mandatory Requirement No. 3 and 15 of the Tender Document provides as follows:

***2.Preliminary examination for Determination of Responsiveness***

***The Procuring Entity will start by examining all tenders to ensure they meet in all respects the eligibility criteria and other mandatory requirements in the ITT, and that the tender is complete in all aspects in meeting the requirements provided below.***

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***A. Preliminary evaluation criteria***

<b><i>NO.</i></b>	<b><i>MANDATORY REQUIREMENTS</i></b>	<b><i>RESPONSIVE OR NON RESPONSIVE</i></b>
<b><i>1</i></b>	<b><i>...</i></b>	
<b><i>2.</i></b>	<b><i>...</i></b>	
<b><i>3.</i></b>	<b><i>Valid and current AGPO registration certificate</i></b>	
<b><i>..</i></b>		
<b><i>15.</i></b>	<b><i>At least a minimum of 3 years' experience (attach evidence) Must submit 3 letters of recommendation based on contracts that you have serviced in the last two years (January 2021-January 2023). In the letter the contracting manager/organization must give a comment on whether satisfactory or not based on your performance.</i></b>	

116. A tender responsive to Mandatory Requirement No.3 above, was required to among others contain a current valid and current AGPO registration certificate.

117. The Board has keenly perused the 1<sup>st</sup> and 4<sup>th</sup> Interested Party's original tender documents with the view of establishing whether the said tenderers submitted valid AGPO certificates as part of their tender documents.

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118. From the 1<sup>st</sup> Interested Party's tender, the Board has traced the tenderer's AGPO Certificate which bears on its face that it was issued on 1<sup>st</sup> October 2021 and valid for 2 years from that date. The 1<sup>st</sup> Interested Party's AGPO Certificate was therefore valid until 30<sup>th</sup> September 2023.

119. From the 4<sup>th</sup> Interested Party's tender the Board has traced the tenderer's AGPO Certificate which bears on its face that it was issued on 30<sup>th</sup> September 2021 and valid for 2 years from the said date. The 4<sup>th</sup> Interested Party's AGPO Certificate was therefore valid until 29<sup>th</sup> September 2023.

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120. In view of the foregoing, it is apparent that both the 1<sup>st</sup> and 4<sup>th</sup> Interested Parties held valid and current AGPO Certificates as at the tender submission deadline of 10<sup>th</sup> August 2023.

121. Also a tender responsive to Mandatory Requirement No. 15 above ought to have a minimum of 3 years of experience supported by evidence. It was a must for the tenderer to submit 3 letters of recommendation based on contracts serviced between January 2021 and January 2023. Additionally, the contracting manager or organization had to include in the letter of recommendation whether the services offered by the specified tenderer were satisfactory.

122. In the subject tender the 2<sup>nd</sup> Interested Party submitted a tender which this Board has had the opportunity to peruse through. The 2<sup>nd</sup> Interested Party's original tender has a Certificate of Incorporation dated 30<sup>th</sup> May 2017 indicating that the tenderer was registered in 2017. It also had 3 recommendation letters from Lake Victoria Water Development, CDF-Kipkelion Constituency and Kipsigis Secondary School, all of which gave

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positive feedback on the performance of the 2<sup>nd</sup> Interested Party in the offering of security services.

123. The Tender Document was clear as to the fate of tenders that were unresponsive on any of the requirements under the Preliminary Evaluation Stage: The tender was to be disqualified from any further evaluation.

124. The Applicant took issue with the Evaluation process that led to the 4<sup>th</sup> Interested Party being awarded Lot 5 of the subject tender as the lowest evaluated tender when in fact the Applicant had submitted a lower tender sum.

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125. The Board has keenly studied the Procuring Entity's Evaluation Report and notes that both the Applicant and the 4<sup>th</sup> Interested Party qualified for evaluation at the Financial Evaluation Stage for Lot 5. Upon comparison of the tender sum indicated in the Applicant's and 4<sup>th</sup> Interested Party's price schedule the tender sum were Kshs. 812,620.00 per month and 840,000.00 per month respectively.

126. Section 86 of the Act identifies the submission of the lowest evaluated tender price as one of the ways of identifying a successful tender:

***86. Successful tender***

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

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

***(b) the responsive proposal with the highest score determined by the procuring entity by combining, for each proposal, in accordance with the procedures and criteria set out in the***

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***request for proposals, the scores assigned to the technical and financial proposals where Request for Proposals method is used;***

***(c) the tender with the lowest evaluated total cost of ownership; or***

***(d) the tender with the highest technical score, where a tender is to be evaluated based on procedures regulated by an Act of Parliament which provides guidelines for arriving at applicable professional charges:***

127. The Financial Evaluation Stage in the subject tender had a criterion that an award would made to the lowest evaluated tender. The Evaluation Committee therefore fell in error when it proceeded to award the subject tender in respect of Lot 5 to the 4<sup>th</sup> Interested Party when in fact the Applicant's tender sum was much lower.

128. The Applicant faulted the evaluation process leading to the award of Lot 3 of the subject tender to the 1<sup>st</sup> Interested Party alleging that the tenderer's price was non-compliant with the taxation, employment and labour laws. According to the Applicant the 1<sup>st</sup> Interested Party was in violation of labour laws in respect of minimum wages.

129. The Board has keenly perused the 1<sup>st</sup> Interested Party's original tender document and observed that the 1<sup>st</sup> Interested Party has supplied proof of compliance with the minimum wage requirements under the country's labour laws. The tenderer has supplied a letter from the labour office confirming that the Interested Party has been compliant with the minimum wage requirement.

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130. Accordingly, it would be erroneous on the part of the Board to question the tenderer's compliance with labour laws without basis.

131. Lastly, the Board made an allegation that it was the lowest evaluated tenderer in all the 5 Lots under the subject tender. The Board has keenly perused the Applicant's tender prices alongside each of the tenderers who were found successful under their respective lots and found that it is only under Lot 5 that the Applicant's tender price was lower than the rest of the tenderers the Evaluation Committee considered as the successful tenderers:

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- i. Under Lot 1, the Applicant submitted a tender for Kshs. 1,973,740.00 per month against the 1<sup>st</sup> Interested Party's Kshs. 1,492,340.00 per month.
  - ii. Under Lot 2, the Applicant submitted a tender for 971,180.00 per month against the 2<sup>nd</sup> Interested Party's Kshs. 880,440.00 per month.
  - iii. Under Lot 3, the Applicant submitted a tender for Kshs. 1,284,300.00 per month against the 1<sup>st</sup> Interested Party's Kshs. 1,059,660.00 per month.
  - iv. Under Lot 4, the Applicant submitted a tender for Kshs. 1,308,120.00 per month against the 1<sup>st</sup> Interested Party's Kshs. 1,221,000.00 per month.

132. The Board therefore finds that the Procuring Entity's Evaluation Committee properly evaluated tenders submitted in the subject tender in compliance with the provisions of Section 80 of the Act and the Tender Document save for tenders in respect of Lot 5.

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

133. The Board has found that the instant Request for Review is not time-barred under Section 167(1) of the Act. This Board is therefore vested with the jurisdiction to hear and determine the Request for Review.

134. The Board has also found that the Procuring Entity's Evaluation Committee properly evaluated tenders submitted in the subject tender in compliance with the provisions of Section 80 of the Act and the Tender Document save for tenders in respect of Lot 5.

135. The upshot of our finding is that the Request for Review dated 9<sup>th</sup> October 2023 in respect of Tender No. MOR&T (SDoR)/01/2023-2025 for the Provision of Security Services partially succeeds in the following specific terms:

### **FINAL ORDERS**

136. 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 9<sup>th</sup> October 2023:

**1. The Respondents' and 2<sup>nd</sup> Interested Party's Notices of Preliminary Objection dated 16<sup>th</sup> October 2023 and 19<sup>th</sup> October 2023 respectively as well as the Preliminary Objection raised**

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through the 1<sup>st</sup> Interested Party's Affidavit be and are hereby dismissed.

2. The Letters of Notification of Intention to Award dated 22<sup>nd</sup> September 2023 in respect of Tender No. MOR&T (SDoR)/01/2023-2025 for the Provision of Security Services under Lots 1,2,3 and 4 addressed to the tenderers herein be and are hereby upheld.
3. The Letters of Notification of Intention to Award dated 22<sup>nd</sup> September 2023 in respect of Tender No. MOR&T (SDoR)/01/2023-2025 for the Provision of Security Services under Lot 5 addressed to the parties herein be and are hereby cancelled.
4. The Letters of Notification of Intention to Award dated 22<sup>nd</sup> September 2023 in respect of Tender No. MOR&T (SDoR)/01/2023-2025 for the Provision of Security Services in respect of Lot No. 5 and addressed to the Applicant and all the other unsuccessful tenderers be and are hereby cancelled.
5. The 1<sup>st</sup> Respondent is hereby directed to reconvene the Procuring Entity's Evaluation Committee to re-evaluate tenders that qualify for evaluation at the Financial Evaluation Stage in respect of Tender No. MOR&T (SDoR)/01/2023-2025 for the Provision of Security Services under Lot 5 and issue an award to the lowest evaluated tenderer within 7 days of this Decision


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while taking into consideration the Board's finding in this Request for Review.

6. Given the Board's finding above, each party shall bear its own costs.

Dated at NAIROBI, this 1<sup>st</sup> Day of November 2023.

  
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**CHAIRPERSON**  
**PPARB**

  
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**SECRETARY**  
**PPARB**

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