

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 80/2023 OF 16TH OCTOBER 2023

BETWEEN

ARMYTEX INTERNATIONAL

SECURITY SERVICES LIMITED.....APPLICANT

AND

AG. DIRECTOR GENERAL

KENYA MARITIME AUTHORITY.....1ST RESPONDENT

KENYA MARITIME AUTHORITY.....2ND RESPONDENT

Review against the decision of the Accounting Officer, Kenya Maritime Authority in relation to Tender No. KMA/ONT/03/2023-2024 for the Provision of Security Services at KMA Offices.

BOARD MEMBERS PRESENT

1. Mr. George Murugu, FCI Arb - Chairperson
2. QS. Hussein Were - Member
3. CPA Isabel Juma - Member
4. Eng. Lilian Ogombo - Member
5. Mrs. Irene Kashindi, FCI Arb - Member

SW

[Signature]

IN ATTENDANCE

Ms. Sarah Ayoo - Secretariat
Mr. Philemon Kiprop - Secretariat
Mr. Anthony Simiyu - Secretariat

PRESENT BY INVITATION

APPLICANT **ARMYTEX INTERNATIONAL SECURITY SERVICES LIMITED**

Mr. Njoroge -Advocate, S. Ruwa & Company Advocates

RESPONDENTS **AG. DIRECTOR GENERAL, KENYA MARITIME AUTHORITY**
KENYA MARITIME AUTHORITY

Ms. Kibet -Advocate, Kenya Maritime Authority

BACKGROUND OF THE DECISION

The Tendering Process

1. Kenya Maritime Authority, the Procuring Entity together with the 1st Respondent herein, invited sealed tenders in response to Tender No. KMA/ONT/03/2023-2024 for the Provision of Security Services to KMA Offices using an open national competitive tender method. The subject tender submission deadline was Thursday, 5th September 2023 at 10:00 a.m.



Addendum

2. The Procuring Entity subsequently issued an Addendum amending Mandatory Requirement No.10 under the Preliminary Evaluation Stage. The amendment offered a clarification that tenderers were required to show proof of registration with a recognized Security Association.

Submission of Tenders and Tender Opening

3. According to the Tender Opening Minutes dated and signed on 5th September 2023 under the Confidential File submitted by the Procuring Entity, the following 16 tenderers were recorded as having submitted their respective tenders in response to the subject tender by the tender submission deadline:

No.	Name of Tenderer
1.	Magen Security Services Limited
2.	Access Security Services Limited
3.	Intercity Secure Homes Limited
4.	Sentinel Protection Services Limited
5.	Texas Alarms (K) Limited
6.	Canon Security Services Kenya Limited
7.	Solvit Security Solutions Limited
8.	Security Twenty Four Limited
9.	Babs Security Services Limited
10.	Corprisk Africa Limited
11.	Reliance Consortium Limited
12.	Ismax Security Limited
13.	Patriotic Group of Co. Limited

SU

[Signature]

14.	Vickers Security Services Limited
15.	Armytex International Security Services Limited
16.	Blueshield Securico Limited

Evaluation of Tenders

4. The 1st Respondent constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") to undertake an evaluation of the 16 tenders in the following 3 stages as captured in the Evaluation Report
- i. Preliminary Stage
 - ii. Technical Stage
 - iii. Financial Stage

Preliminary Evaluation

5. 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 24 to 25 of the Tender Document.
6. The evaluation was to be on a Yes/No basis and tenderers who failed to meet any criteria at the Preliminary Evaluation Stage would not proceed for further evaluation at the Technical Evaluation Stage.



7. At the end of the evaluation at this stage, 14 tenders were found unresponsive with only 2 tenders including that of the Applicant and Access Security Services Limited (hereinafter “the successful tenderer”) qualifying for further evaluation at the Technical Evaluation Stage.

Technical Evaluation

8. At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the Criteria set out as Stage II: - Technical Evaluation Criteria under Section III – QUALIFICATION CRITERIA AND REQUIREMENTS at pages 26 to 27 of the Tender Document.
9. The evaluation was to be on a weighted criterion with each requirement under the Technical Evaluation carrying assigned marks. In order to qualify for further evaluation at the Financial Evaluation Stage, tenderers were required to garner a minimum of 70 marks against the technical requirements.
10. At the end of the evaluation at this stage, both the Applicant’s and successful tenderer’s tenders surpassed the 70-mark pass mark and thus qualified for further evaluation at the Financial Evaluation Stage.

Financial Evaluation

11. At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the Criteria set out as Stage III: - Financial Evaluation under Section III– QUALIFICATION CRITERIA AND REQUIREMENTS.
12. The tenderers were required to complete the Price Schedule in the Tender Document as required indicating the services to be performed and the

costing. The Evaluation Committee would then compare the prices quoted by the tenderers and establish the lowest evaluated tender.

13. Following the conclusion of the evaluation at this stage, the Evaluation Committee determined the successful tenderer's tender price of **Kshs. 11,952,000.00** as the lowest evaluated tender price in the subject tender. The Applicant's tender price was **Kshs. 20,337,120.00**.

Evaluation Committee's Recommendation

14. Accordingly, the Evaluation Committee recommended the award of the subject tender to the successful tenderer at its annual tender price of **Kshs. 11, 952,000.00 (Kenya Shillings Eleven Million, Nine Hundred and Fifty-Two Thousand only.) inclusive of taxes.**

Professional Opinion

15. In a Professional Opinion dated 19th September 2023 (hereinafter referred to as the "Professional Opinion"), the Procuring Entity's Assistant Director, Supply Chain Management, Ms. Bevaline Lundu, 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 successful tenderer as proposed by the Evaluation Committee. The 1st Respondent concurred with the said Professional Opinion.

Notification to Tenderers

16. Tenderers were notified of the outcome of the evaluation of the subject tender vide letters dated 3rd October 2023.



REQUEST FOR REVIEW

17. On 16th October 2023, the Applicant filed a Request for Review dated 16th October 2023 supported by a Supporting Affidavit sworn on 16th October 2023 by Tobias Odhiambo Omom, the Managing Director at the Applicant, seeking the following orders from the Board in verbatim:
- i. That the notice of the decision by the Procuring Entity for the tender number KMA/ONT/03/2023-2024 be set aside.*
 - ii. That the Public Procurement Review Board reviews the score and criteria entered by the Procurement Entity, the tender documents and awards the tender to the Applicant. In the alternative, this Honourable Review Board directs the Procuring Entity to evaluate the Applicant's bid at the Technical Stage and Award the appropriate marks to the Applicant who are in full compliance with the law on minimum wages 2022 guidelines.*
 - iii. The Honourable Review Board substitute the decision by the Procurement Entity made on 3/10/2023 with a decision awarding the tender herein to the Applicant.*
 - iv. The Public Procurement Administrative Review Board directs the Procurement entity to pay exemplary costs to the Applicant.*
 - v. Any other relief that this Honourable Review Board may deem fit to grant.*
18. In a Notification of Appeal and a letter dated 16th October 2023, Mr. James Kilaka, the Acting Board Secretary of the Board notified the Respondent of the filing of the instant 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 24th 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 16th October 2023.

19. On 23rd October 2023, the Respondents filed a Memorandum of Response dated 19th October 2023 supported by an affidavit sworn on 19th October 2023 by John Odira Oming'o, the 1st Respondent herein. The Respondents also submitted the confidential documents in the subject tender pursuant to Section 67(3)(e) of the Act.
20. Vide letters dated 24th 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 24th March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within 3 days from 24th October 2023.
21. None of the tenderers in the subject tender filed any response to the Request for Review.
22. On 27th October 2023, the Acting Board Secretary, sent out to the parties a Hearing Notice dated 27th 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 1st November 2023 at 2:00 p.m. through the link availed in the said Hearing Notice.



23. On 1st November 2023, the Applicant filed its Written Submissions of even date.
24. During the online hearing on 1st November 2023 at 2:00 p.m., the Applicant and Respondents were represented by their respective Advocates.
25. The Board read out to the parties the documents that had been filed in the Request for Review and sought for parties' confirmation that those were the documents that had been filed and served upon them.
26. Counsel for the Applicant, Ms. Kibet, indicated that they had not been served upon with the Applicant's Written Submissions filed on 1st November 2023. She pointed out that the Respondents were also keen on filing their Written Submissions in response to the Applicant's filed Written Submissions.
27. On his part, Counsel for the Applicant, Mr. Njoroge maintained that the Applicant's Written Submissions had been served on the Respondents through email.
28. The Board requested Mr. Kibet to forward to the Secretariat the email through which the Written Submissions had been served upon the Respondents. The Board adjourned the hearing for 5 minutes to confirm service of the Applicant's Written Submissions as well as the Respondents' request to equally file their Written Submissions.
29. The Board confirmed that the Applicant's Written Submissions had been filed on the morning of the hearing and wanted to know from the parties

if they were agreeable to leave being granted to the Respondents to file their Written Submissions and thereafter the Board determines the Request for Review on the basis of filed documents and without holding a subsequent online hearing. This was because the Board's 21-day statutory timeline for hearing and determining the Request for Review was scheduled to lapse on 6th November 2023.

30. Counsel for the Applicant, Mr. Njoroge and Counsel for the Respondents, Ms. Kibet were both agreeable to the Request for Review being canvassed by way of filed documents and without the necessity of a subsequent hearing. Accordingly, the Board directed as follows:

- i. The Applicant would serve their already filed Written Submissions upon the Respondents within an hour.
- ii. The Respondents would file and serve their Written Submissions by Close of Business on 1st November 2023.
- iii. The Applicant would file and serve any Written Submissions in rejoinder and limited to points of law raised in the Respondents' Written Submissions.
- iv. The Board would consider the documents filed in the Request for Review and deliver a Decision on or before 6th November 2023.
- v. Parties were also cautioned to adhere to the set timelines.

31. On 2nd November 2023, the Respondents filed their Written Submissions and List of Authorities, both dated 1st November 2023.

32. Later on the same day, on 2nd November 2023, the Applicant filed their Further Written Submissions dated 1st November 2023 together with Authorities in support thereof.



33. A brief of each party's case as can be discerned from the filed documents is as summarized below:

PARTIES SUBMISSIONS

Applicant's Case

34. The Applicant's Case is that it received a Notification of Intention To Award in respect of the subject tender indicating that its tender was unsuccessful for the reason that its submitted tender was not the lowest evaluated tender.
35. The Applicant argued that whereas it submitted a tender that was compliant with the laws of Kenya and the requirements under the Tender Document, the successful tenderer's tender was not compliant with the laws of Kenya. In particular, it was submitted that the successful tenderer's tender prices fell short of the standards stipulated in the Minimum Wages Regulation of 2022. It was therefore argued that the successful tenderer would be unable to service the tender and still comply with the minimum wages prescribed in law.
36. It was argued on behalf of the Applicant that Article 227(2)(d) of the Constitution of Kenya, 2010 and Section 55 of the Act provide that persons who are guilty of serious violations of labour laws should have sanctions imposed on them. Further, a proper construction of Section 79(1) of the Act would yield that a bid only qualifies as responsive if it meets all the requirements set out in the Tender Document and that bid requirements relate to compliance with regulatory prescripts, bid formalities, or functionality, technical, pricing and empowerment requirements.

37. Relying on the case of ***Republic v PPARB & Another; Premier Verification Quality Services (PVQS) Limited***, the Applicant made the argument that tenders should comply with tender requirements and that this should be on an equal footing with no tenderer being extended an unfair advantage over the others.
38. The Applicant indicated that Section 48 of the Labour Institutions Act creates an offence on the part of any employer who fails to pay at least the minimum wage to their employee. Therefore, the Respondents were faulted for finding Access Security Services Limited as the successful tenderer without verifying that the said tenderer would be compliant with the minimum wage law in performing the contract.
39. Relying on the case of ***Republic v PPARB & anor Ex parte University of Eldoret [2017] eKLR*** it was argued that due diligence is an implied criterion in every tender document and the Procuring Entity is under an obligation to carry out due diligence.
40. Accordingly, the Applicant sought the Request for Review to be allowed as prayed.

Respondents' Case

41. The Respondents argued that the Applicant's tender was responsive to the requirements of the Tender Document but its tender was not the lowest evaluated tender.
42. It was argued on behalf of the Respondents that the successful tenderer's contract in respect of the subject tender would become renewable subject to satisfactory performance on the part of the tenderer.



43. It was contended that Section 80(2) of the Act provides that evaluation and comparison of tenders shall be done using procedures and criteria set out in the tender document. It was therefore Respondents' submission that the evaluation process in the subject tender was done as per the requirements spelt out in the Tender Document.
44. It was argued that the Procuring Entity's was concerned with awarding cost-effective tenders and not the margin of profits that participating tenderers stood to make on their submitted tender prices.
45. Reliance was placed on the case of ***Republic v PPARB Ex parte Kenya Power & Lighting Company Limited; Energy Sectors Contractors Association & anor [2020]eKLR., R v PPARB Ex parte Kotaa East African Limited ; Kenya Ports Authority & 2 others (Interested Parties) [2021]eKLR*** and this Board's decision in ***Application No. 31 of 2017; Muturi Maina Contractors v KAA*** for the proposition that failing to award the lowest evaluated tender offends the spirit of Section 3 and Article 227 of the Constitution on cost-effectiveness.
46. The Respondents argued that Section 79 of the Act provides that a tender is responsive if it conforms to all the eligibility and mandatory requirements in the tender document. In the subject tender, the Evaluation Committee considered the letter issued by the Ministry of Labour to ascertain compliance with Mandatory Requirement No. 5 of the Tender Document.
47. Reliance was placed on this Board's Decision in ***Application No. 75 of 2022; Teknohub Limited v State Department of Housing & Urban***

Su



Development, Ministry of Transport, Infrastructure, Housing and Urban Development for the proposition that all bids should be considered on the basis of their compliance with the terms of the solicitation documents and that a bid should not be rejected for reasons other than those stipulated in the tender document.

48. It was also argued that the Applicant had not led any evidence on how the successful tenderer would be tied up in litigation for non-compliance with the minimum wage laws. The Respondents therefore sought for the Request for Review to be dismissed.

BOARD'S DECISION

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

I. Whether the Procuring Entity's Evaluation Committee properly evaluated the tenders submitted in response to the subject tender in compliance with the provisions of Section 80 of the Act and the Tender Document?

II. What orders should the Board issue in the circumstance?

Whether the Procuring Entity's Evaluation Committee properly evaluated the tenders submitted in response to the subject tender in compliance with the provisions of Section 80 of the Act and the Tender Document?

50. Central to the instant Request for Review is the Applicant's grievance that the Procuring Entity's Evaluation Committee awarded the subject tender

Su

to Access Security Services Limited when the said tenderer's tender price fell afoul of the Regulation of Wages (General) (Amendment) Order 2022.

51. According to the Applicant, the minimum wage for a watchman under the minimum wage law was **Kshs. 15,201.65** per month. It therefore, followed that since pages 58 to 50 of the tender document required 60 persons, the minimum wages payable to the said persons would be **Kshs. 11,953,897.50**. The Applicant made the argument that this amount was more than the successful tenderer's tender price of **Kshs. 11,952,000.00** and thus the successful tenderer runs the risk of defaulting on the minimum wage law if awarded the subject tender.
52. On their part, the Respondents affirmed that they had properly conducted the evaluation exercise and that the successful tenderer had the lowest evaluated tender. It was argued on their behalf that the Respondents were not concerned with the profit margins that the tenderers would make on their tendered prices but were concerned about the cost-effectiveness and responsiveness of the submitted tenders. Further, the renewal of the contract in the subject tender was subject to the successful tenderer's performance.
53. The Respondents also affirmed that the successful tenderer complied with Mandatory Requirements No. 5 and 6 at Stage 1 of the Tender Document on compliance with the minimum wage requirement.
54. This Board is therefore invited to look into the Evaluation process leading to the award of the subject tender to Access Security Services Limited and ascertain whether it was carried out in compliance with the law and the requirements under the Tender Document.

Su

[Signature]

55. Article 227(2)(d) of the Constitution of Kenya 2010 appreciated the need for suppliers participating in public tenders to adhere to other laws including employment laws. In particular, the provision required Parliament to pass a law carrying sanctions against suppliers who violated labour laws among others.

227. Procurement of public goods and services

(2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following—

(a) ...

(b) ...

(c) ...

(d) sanctions against persons who have defaulted on their tax obligations, or have been guilty of corrupt practices or serious violations of fair employment laws and practices.

56. Section 41 of the Act enumerates serious violation of fair employment laws and practices as a ground for a supplier being debarred by the Public Procurement Regulatory Authority Board from participating in any public procurement of disposal proceedings:

41. Debarment

(1) The Board shall debar a person from participating in procurement or asset disposal proceedings on the ground that the person—

(a) ...

(b) ...

su

JK

(c) ...

(i) is guilty of a serious violation of fair employment laws and practices; or

(j) ...

57. Section 55 of the Act equally provides that suppliers who are guilty of violating fair employment laws and practices are ineligible to participate in public tenders.

55. Eligibility to bid

(1) A person is eligible to bid for a contract in procurement or an asset being disposed, only if the person satisfies the following criteria—

(a) the person has the legal capacity to enter into a contract for procurement or asset disposal;

(b) the person is not insolvent, in receivership, bankrupt or in the process of being wound up;

(c) the person, if a member of a regulated profession, has satisfied all the professional requirements;

(d) the procuring entity is not precluded from entering into the contract with the person under section 38 of this Act;

(e) the person and his or her sub-contractor, if any, is not debarred from participating in procurement proceedings under Part IV of this Act;

(f) the person has fulfilled tax obligations;

(g) the person has not been convicted of corrupt or fraudulent practices; and

(h) is not guilty of any serious violation of fair employment laws and practices.

58. In terms of how an Evaluation Committee should approach the evaluation process, Section 80 of the Act is instructive that the Committee should follow the criteria set out in the Tender Document:

"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."

59. On its part, 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

cu

8

b) be taken into account in the evaluation and comparison of tenders."

60. This Board is further guided by the dictum of the High Court in ***Republic v Public Procurement Administrative Review Board & 2 others Exparte BABS Security Services Limited [2018] eKLR; Nairobi Miscellaneous Application No. 122 of 2018*** where the court while considering a judicial review application against a decision of this Board illuminated on the responsiveness of a tender under section 79 of the Act:

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

su

8

in other words they are a sine qua non for further consideration in the evaluation process.[12] The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing or empowerment. Bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome.

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

su

61. 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.
62. Turning to the instant Request for Review, the Applicant alleges that the successful tenderer shall be unable to carry out the contract and make a profit while being compliant with the minimum wage law at its tender price.
63. Appreciating that the Tender Document is the primary document that should guide the evaluation process, the Board has keenly studied the Tender Document to understand the evaluation criteria prescribed therein in respect of minimum wage.
64. The Board has observed that Mandatory Requirements No.5 and 6 under Clause 2 of Section III- EVALUATION AND QUALIFICATION CRITERIA on page 24 of the Tender Document spelt out the evaluation criteria that tenderers participating in the subject tender had to comply with respect to the minimum wage. The said Mandatory Requirements are hereinafter reproduced for ease of reference:

Stage 1: Mandatory Requirements

<i>No.</i>	<i>MANDATORY REQUIREMENT</i>	<i>YES/NO</i>
<i>MR 1</i>	<i>....</i>	
<i>"</i>	<i>...</i>	

Su



MR 5	<i>Attach a letter issued by Ministry of labour showing compliance to labour requirements and in particular compliance to payment of minimum wage (Not more than 6 months)]</i>	
MR 6	<i>Attach a written undertaking that the tenderer shall comply with all labor laws and payment of minimum wage as approved by the Ministry of Labor during the entire contract period. Failure to meet this requirement during the contract period will be a ground for cancellation of the contract. The indicators for these are the payment of salaries in time to avoid complaints on delayed salaries.</i>	
...	...	

NB: Tenderers that do not meet any of the above mandatory requirements shall be considered non-responsive and will be disqualified at this stage.

65. From the above, it is apparent that the Tender Document made it a mandatory requirement for tenderers participating in the subject tender to observe the country's minimum wage laws.

66. In particular Mandatory Requirement No. 5 required tenderers to attach a letter from the Ministry of Labour showing compliance with the payment of minimum wage. The letter had to be not more than 6 months.

Su

67. On its part, Mandatory Requirement No. 6 required tenderers to submit a written undertaking that the tenderer would comply with all labour laws and not pay below the minimum wage as approved by the Ministry of Labour during the entire contract period. Further, that breach of this requirement during the contract period would be a ground for cancellation of the contract.
68. Our interpretation of the above tender provisions is that any tenderer who would submit a letter from the Ministry of Labour bearing a date not more than 6 months before the tender submission deadline and indicating that the tenderer was compliant with the payment of the minimum wage would be responsive to the requirement No. 5.
69. We also take the view that any tenderer who had submitted as part of their tender document a written undertaking to comply with all labour laws and not pay wages that are below minimum wages as approved by the Ministry of Labour during the contract period, would be in that regard responsive to Mandatory Requirement No. 6.
70. The Board has keenly perused the tender submitted by Access Security Services Limited with a view of establishing whether the said tenderer submitted as part of its tender the aforesaid letter from the Ministry of Labour as well as an undertaking to comply with the labour laws.
71. The Board has noted that at page 29 of its submitted tender, Access Security Services Limited attached a letter dated 25th August 2023 from the Ministry of Labour. In the said letter, the Ministry of Labour confirms that Access Security Services Limited has been compliant with the law in terms of payment of minimum wage. The letter also bears the 25th August

2023 date which was 11 days to the tender submission deadline and thus within the 6-month period required under the Tender Document. Therefore, the successful tenderer's letter of 25th August 2023 complied with Mandatory Requirement No. 5 of the Tender Document.

72. The Board has also noted that Access Security Services Limited attached at page 31 of its tender, a written undertaking to comply with all labour laws and pay the minimum wage. Mandatory Requirement No. 6 under the Tender Document required tenderers to provide a written undertaking to comply with labour laws and pay the minimum wage and this is exactly what the successful tenderer did. The successful tenderers tender was therefore equally responsive to Mandatory Requirement No. 6.
73. The Board has also reviewed the Evaluation Report dated 15th September 2023 and observes that the Evaluation Committee found the Access Security Services Limited responsive in respect of Mandatory Requirements 5 and 6. We find no fault on the part of the Evaluation Committee for making the said findings as the tenderer was in fact responsive to Mandatory requirements no. 5 and 6. The Tender Document which is the primary evaluation guide required a tenderer to submit a letter from the Ministry of Labour and an undertaking by the tenderer to comply with the labour law and the successful tenderer complied with these 2 requirements.
74. The Board therefore declines the Applicant's invitation that the Board finds that the successful tenderer ought to have been disqualified on account of non-compliance with the minimum wage. The Tender Document outlined the requirements that a tenderer ought to have supplied to demonstrate compliance with the minimum wage



requirements and the successful tenderer supplied the said requirements as part of its submitted tender. Expecting the Evaluation Committee to evaluate the successful tenderer against a requirement beyond that stipulated in the Tender Document would be tantamount to the introduction of a new evaluation criteria and offensive to the spirit of Article 227 of the Constitution which calls for transparency and competitiveness in public tenders.

75. The above findings are in line with this Board's finding in its Decision in ***Application No. 75 of 2022; Teknohub Limited v State Department of Housing and Urban Development, Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works*** that tenders should not be disqualified on the basis of requirements not contained in the tender document.

"Section 79(1) of the Act has the import of commanding a Procuring Entity that a responsive bid is one that meets ALL the eligibility and mandatory requirements in the Tender Document and therefore the Evaluation Committee is bound to follow the procedure and criteria that is set out in the Tender Document."

76. The Board acknowledges that the Applicant attempted to lead computation which according to it were the correct computations on the minimum wage to be paid to security guards to implement the contract in the subject tender. However, it is not in the place of the Board to interrogate the computations in the face of clear requirements under Mandatory Requirements 5 and 6 of the Tender Document on compliance with the minimum wage. There exist enforcement agencies such as the

Su

R

Ministry of Labour who have access to employment records of employers to verify compliance with the minimum wage.

77. Furthermore, Mandatory Requirement No. 6 makes non-compliance with the minimum wage constitutes a ground for termination of the contract in respect of the subject tender. The Board is therefore satisfied that there are adequate checks in place to ensure that the successful tenderer complies with the minimum wage requirements. In as far as the Tender Document is concerned, the successful tenderer complied with Mandatory Requirement No. 5 and 6.
78. In view of the foregoing, the Board finds that the Procuring Entity's Evaluation Committee properly evaluated the tenders submitted in response to the subject tender in compliance with the provisions of Section 80 of the Act and the Tender Document.

What orders the Board should grant in the circumstances?

79. The Board has found that the Procuring Entity's Evaluation Committee properly evaluated the tenders submitted in response to the subject tender in compliance with the provisions of Section 80 of the Act and the Tender Document.
80. The upshot of our finding is that the Request for Review dated 16th October 2023 in respect of Tender No. KMA/ONT/03/2023-2024 for the Provision of Security Services fails in the following specific terms:



FINAL ORDERS

81. 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 16th October 2023:

- 1. The Request for Review dated 16th October 2023 be and is hereby dismissed.**
- 2. Given the Board's finding above, each party shall bear its own costs.**

Dated at NAIROBI, this 6th Day of November 2023.


.....
CHAIRPERSON
PPARB


.....
SECRETARY
PPARB

