REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 89/2023 OF 7TH NOVEMBER 2023

BETWEEN

RIVATEX EAST AFRICA LIMITED ..... APPLICANT

AND

THE INSPECTOR GENERAL,

NATIONAL POLICE SERVICE ..... 1ST RESPONDENT

NATIONAL POLICE SERVICE .....2ND RESPONDENT

Review against the decision of the Inspector General, National Police Service in relation to Tender No. MINA/NPS/KPS/015/2023-2025 for Supply and Delivery of Uniform Materials to Kenya Police Service (KPS), Administration Police Service (APS) and General Service Unit (GSU) from Local Textile Manufacturers and Authorised Agents Only for a period of two (2 No.) years after fourteen (14 No.) days from the date of notification of award.

BOARD MEMBERS PRESENT

1. Mr. George Murugu - Chairperson
2. Dr. Susan Mambo - Member
3. CPA Alexander Musau - Member

IN ATTENDANCE

1. Mr. James Kilaka	-Acting Board Secretary
2. Ms. Evelyn Weru	- Secretariat

PRESENT BY INVITATION

APPLICANT	**RIVATEX EAST AFRICA LIMITED**
Ms. Michira	-Advocate, h/b for Joseline Cheruiyot Advocate
RESPONDENTS	**THE INSPECTOR GENERAL, NATIONAL POLICE SERVICE & NATIONAL POLICE SERVICE**
Mr. Joel Ngolekong	-Head, Supply Chain Management Services

BACKGROUND OF THE DECISION

The Tendering Process

1. The National Police Service, the Procuring Entity and the 2nd Respondent herein, invited sealed tenders from eligible, qualified and interested tenderers in response to Tender No. MINA/NPS/KPS/015/2023-2025 for Supply and Delivery of Uniform Materials to Kenya Police Service (KPS), Administration Police Service (APS) and General Service Unit (GSU) from Local Textile Manufacturers and Authorised Agents Only for

a period of two (2 No.) years after fourteen (14 No.) days from the date of notification of award (hereinafter referred to as the "subject tender") on as and when need arises basis by use of the open tendering method. The invitation was by way of an advertisement on 18th May 2023 on the 2nd Respondent's website www.nationalpolice.go.ke and on the Public Procurement Information Portal (PPIP) (www.tenders.go.ke) where the blank tender document for the subject tender issued to tenderers by the 2nd Respondent (hereinafter referred to as the 'Tender Document') was available for download. Tendering was open to local textile manufacturers and authorized agents only and tenders would be awarded to multiple bidders on the basis of framework agreements. The subject tender comprised of three (3) lots.

Submission of Tenders and Tender Opening

2. According to the Minutes of the subject tender's opening held on 13th June 2023 signed by members of the Tender Opening Committee (hereinafter referred to as the 'Tender Opening Minutes') and which Tender Opening Minutes were part of confidential documents furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') by the 1st Respondent pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'),a total of forty-eight (48) tenders were submitted in response to the subject tender. The said forty-eight (48) tenders were opened in the presence of tenderers' representatives present at the tender opening session, and were recorded as follows:

No.	Name of Tenderer
1.	Thika Cloth Mill Limited
2.	Ramasco Trading Limited
3.	Movers and Shakers Trading Company Limited
4.	Multisrorey Standards Limited
5.	Murinchamba Investment Limited
6.	Ghashamwa Enterprises
7.	Airim General Contractors
8.	Domain Suppliers Enterprises
9.	Jitegemee Kenya Limited
10.	Joedreams Limited
11.	Liance International Company
12.	Margid General Supplier
13.	Eros Company Limited
14.	Uniform Emporium Limited
15.	Windcom Solutions Limited
16.	Samco Agencies Limited
17.	Rene Enterprises Limited
18.	Magman Manufacturers Limited
19.	Proforce Contractors Limited
20.	Original Outfitters Limited
21.	Rivertex East Africa Limited

22.	Joleca Traders Limited
23.	Lauram General Merchants
24.	Korai Company Limited
25.	Weaver Bird German Manufacturers
26.	Wescorp Enterprises
27.	Phynom Investment Limited
28.	Fabric Pro Limited
29.	Purma Holdings Limited
30.	Bedi Investment Limited
31.	House of Procurement Limited
32.	Charma Holdings Limited
33.	Greenberg Holdings Limited
34.	Rock and Pure Limited
35.	Narella Holdings Limited
36.	Cetbon Solution Limited
37.	Eriken Manufacturing Industries Limited
38.	Orsims Investments Limited
39.	Izmir Enterprises Limited
40.	Sayari Kenya Company Limited
41.	Blaze Investment Limited
42.	All-Round Business Works Limited
43.	Creatives Images Limited
44.	Teamwork East Africa Limited
45.	Allaken General Merchants
46.	Ruter General Contractors Limited

47.	Evertec General Trading Company Limited
48.	Antoren Investments

Evaluation of Tenders

3. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1st Respondent undertook evaluation of the forty-eight (48) tenders as captured in a Tender Evaluation Report for the subject tender signed by members of the Evaluation Committee on 31st July 2023 (hereinafter referred to as the "Evaluation Report") in the following stages:
   - i Preliminary Evaluation;
   - ii Technical Evaluation – Visual Inspection;
   - iii Site Visit;
   - iv Financial Evaluation;
   - v Negotiation

Preliminary Evaluation

4. The Evaluation Committee was required to carry out a Preliminary Evaluation and examined tenders for responsiveness using the criteria provided under Clause 1.4 Evaluation of Tenders, Stage one: Preliminary Evaluation of Section III- Evaluation and Qualification Criteria at page 27 to page 28 of the Tender Document. Tenderers were required to meet all the mandatory requirements at this stage to proceed to the Technical Evaluation stage.

5. At the end of evaluation at this stage, nineteen (19) tenders were determined non-responsive while twenty-nine (29) tenders, including the Applicant's tender, were determined responsive and proceeded to Technical Evaluation.

Technical Evaluation – Visual Inspection

6. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Clause 1.4 Evaluation of Tenders, Stage two: Technical Evaluation of Section III- Evaluation and Qualification Criteria at page 27 and Clause 2.2.1 of Section III- Evaluation and Qualification Criteria at page 29 of the Tender Document.

7. Samples submitted by bidders were subjected to visual analysis as can be discerned from page 28 to 71 of the Evaluation Report on all the three lots. The Applicant was amongst the twenty-nine tenderers who were responsive at this stage.

Site Visit

8. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Clause 1.4 Evaluation of Tenders, Stage three: KEBS Analysis of Section III- Evaluation and Qualification Criteria at page 27 of the Tender Document.

9. The Evaluation Committee visited the premises of the bidders who were responsive in the Technical Evaluation – Visual Inspection stage to

verify if they were local manufacturers, verify the authenticity of the statutory documents submitted; ascertain the accuracy of the information given in the Tender Documents; confirm the financial capacity and capability of the firm (the personnel & machinery); confirm the premises/physical location; confirm previous similar performance and to carry out due diligence to verify if the manufacturer authorized the tenderers for the subject tender.

10. At the end of evaluation at this stage, nine (9) tenders were found non-responsive while twenty (20) tenders including the Applicant's tender were found responsive and proceeded to the Financial Evaluation stage.

Financial Evaluation

11. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Clause 1.4 Evaluation of Tenders, Stage four: Financial Evaluation of Section III- Evaluation and Qualification Criteria at page 27 of the Tender Document and Clause 2.2.1 Evaluation of Commercial Terms and Conditions of the Tender (ITT 33.1(a)) of Section III- Evaluation and Qualification Criteria at page 29 of the Tender Document.

12. The Evaluation Committee noted that the framework agreement would be awarded to multiple tenderers based on a range of prices and tenderers bidding prices above the lowest evaluated tender price were required to match the price of the lowest evaluated price (based on the

prevailing market price) within a certain range set by the Evaluation Committee and in order to ensure quality of the items procured, it recommended that tenderers who did not fall within the recommended price range be disqualified.

13. The Evaluation Committee proceeded to conduct a price comparison as can be discerned at page 93 to 100 of the Evaluation Report.

Negotiations

14. At this stage of evaluation, the Evaluation Committee was required to examine tenders using Clause 1.4 Evaluation of Tenders, Stage five: Negotiation of Section III- Evaluation and Qualification Criteria at page 27 of the Tender Document. The Evaluation Committee was required to carry out negotiations with the bidders whose prices have been matched with the lowest evaluated bidder. After negotiations, bidders who will not have agreed to match their prices with the lowest evaluated bidder would be disqualified.

15. According to the Evaluation report as can be discerned at page 101, the Evaluation Committee carried out negotiations with bidders who had been rendered responsive at the Financial Evaluation stage and according to the Minutes for Negotiation Meetings held on 25th July 2023 with the various responsive tenderers at this stage as can be discerned at pages 101 to 186 of the Evaluation Report, the Evaluation Committee proceeded to match tenderers prices with the lowest

evaluated price provided in the award range set out in the Price Comparison Schedule.

16. After negotiations, bidders who did not agree to match their prices with the lowest evaluated price set out in the award range were not considered for award of that specific item.

17. During negotiations, Rivatex East Africa Ltd indicated that they had underquoted in their bid as prices have since gone up and requested for a 30% price increase for each item quoted for. The Evaluation Committee declined this request on the grounds that the Tender Document provided under ITT 13.6 that prices quoted by a tenderer were to remain valid for a period of 24 months.

Evaluation Committee's Recommendation

18. The Evaluation Committee recommended the following tenderers for award as can be discerned at page 187 to 195 of the Evaluation Report as follows:

LOT 1: SUPPLY AND DELIVERY OF UNIFORM MATERIALS TO KENYA POLICE SERVICE

S/NO	ITEM DESCRIPTION	UNIT OF ISSUE	QUANTITY	AWARD PRICE PER METER (KSHS.)	BIDDER NUMBER	BIDDER NAME	ADDRESS	PHONE NUMBER

1.	Light Blue Cloth Material 60" Wide	Meter	AWR	**695**	B1	M/S Thika Cloth Mills Limited	41896-00100 Nairobi	0733410400
					B24	M/S Korai Company Limited	2081-00502 Nairobi	0718796398
					B29	M/S Purma Holdings Limited	63772-00619 Nairobi	0722209844
					B30	M/S Bedi Investment Limited	230-20100 Nakuru	0722202909
					B32	M/S Charma Holdings Limited	20658-00100 Nairobi	0722841889
					B34	M/S Rock and Pure Limited	15973-00100 Nairobi	0712280003
					B35	M/S Narella Holdings Limited	2845-00606 Nairobi	0718660803
					B36	M/S Cetbon Solutions Limited	467-00200 Nairobi	0722740251
					B46	M/S Ruter General Contractors Limited	78343-00507 Nairobi	0722518434
					B47	M/S Evertec General Trading Company Limited	32989-00600 Nairobi	0722284420
2.	Dark Navy Blue Cloth Material 60" Wide	Meter	AWR	**750**	B1	M/S Thika Cloth Mills Limited	41896-00100 Nairobi	0733410400

					B9	M/S Jitegemee Kenya Limited	35110-00100 Nairobi	0712678731
					B19	M/S Proforce Contractors Limited	458-70100 Garissa	0723056560
					B24	M/S Korai Company Limited	2081-00502 Nairobi	0718796398
					B29	M/S Purma Holdings Limited	63772-00619 Nairobi	0722209844
					B30	M/S Bedi Investment Limited	230-20100 Nakuru	0722202909
					B32	M/S Charma Holdings Limited	20658-00100 Nairobi	0722841889
					B34	M/S Rock and Pure Limited	15973-00100 Nairobi	0712280003
					B35	M/S Narella Holdings Limited	2845-00606 Nairobi	0718660803
					B36	M/S Cetbon Solutions Limited	467-00200 Nairobi	0722740251
					B46	M/S Ruter General Contractors Limited	78343-00507 Nairobi	0722518434
					B47	M/S Evertec General Trading Company Limited	32989-00600 Nairobi	0722284420

3.	Mid-Night Blue Cloth Material 60" Wide	Meter	AWR	**1,220**	B30	M/S Bedi Investment Limited	230-20100 Nakuru	0722202909
4.	Olive Jungle Green Cloth Material 60" Wide	Meter	AWR	**660**	B1	M/S Thika Cloth Mills Limited	41896-00100 Nairobi	0733410400
					B9	M/S Jitegemee Kenya Limited	35110-00100 Nairobi	0712678731
					B14	M/S Uniform Emporium Limited	804-00100 Nairobi	0758434450
					B19	M/S Proforce Contractors Limited	458-70100 Garissa	0723056560
					B24	M/S Korai Company Limited	2081-00502 Nairobi	0718796398
					B28	M/S Fabric Pro Limited	86860-80100 Nairobi	0722826073
					B29	M/S Purma Holdings Limited	63772-00619 Nairobi	0722209844
					B30	M/S Bedi Investment Limited	230-20100 Nakuru	0722202909
					B32	M/S Charma Holdings Limited	20658-00100 Nairobi	0722841889
					B34	M/S Rock and Pure Limited	15973-00100 Nairobi	0712280003
					B35	M/S Narella	2845-00606 Nairobi	0718660803

						Holdings Limited		
					B36	M/S Cetbon Solutions Limited	467-00200 Nairobi	0722740251
					B47	M/S Evertec General Trading Company Limited	32989-00600 Nairobi	0722284420
5.	Shirt OR Cloth Material 60" Wide	Meter	AWR	**760**	B28	M/S Fabric Pro Limited	86860-80100 Nairobi	0722826073
					B29	M/S Purma Holdings Limited	63772-00619 Nairobi	0722209844
					B30	M/S Bedi Investment Limited	230-20100 Nakuru	0722202909
					B32	M/S Charma Holdings Limited	20658-00100 Nairobi	0722841889
					B34	M/S Rock and Pure Limited	15973-00100 Nairobi	0712280003
					B35	M/S Narella Holdings Limited	2845-00606 Nairobi	0718660803
					B44	M/S Teamwork East Africa Limited	38799-00100 Nairobi	0772855814
					B46	M/S Ruter General Contractors Limited	78343-00507 Nairobi	0722518434
					B47	M/S Evertec General	32989-00600 Nairobi	0722284420

						Trading Company Limited		
6.	Shirting Officers Cloth Material 60" Wide	Meter	AWR	**760**	B29	M/S Purma Holdings Limited	63772-00619 Nairobi	0722209844
					B30	M/S Bedi Investment Limited	230-20100 Nakuru	0722202909
					B32	M/S Charma Holdings Limited	20658-00100 Nairobi	0722841889
					B35	M/S Narella Holdings Limited	2845-00606 Nairobi	0718660803
					B47	M/S Evertec General Trading Company Limited	32989-00600 Nairobi	0722284420
7.	Digital Camouflage Cloth Material 60" Wide	Meter	AWR	**1,127**	B1	M/S Thika Cloth Mills Limited	41896-00100 Nairobi	0733410400
					B9	M/S Jitegemee Kenya Limited	35110-00100 Nairobi	0712678731
					B14	M/S Uniform Emporium Limited	804-00100 Nairobi	0758434450
					B19	M/S Proforce Contractors Limited	458-70100 Garissa	0723056560
					B24	M/S Korai Company Limited	2081-00502 Nairobi	0718796398

					B29	M/S Purma Holdings Limited	63772 -00619 Nairobi	0722209 844
					B32	M/S Charma Holdings Limited	20658-00100 Nairobi	0722841 889
					B35	M/S Narella Holdings Limited	2845-00606 Nairobi	0718660 803
					B47	M/S Evertec General Trading Company Limited	32989-00600 Nairobi	0722284 420
8.	Bedford Cloth Material 60" Wide	Met er	AWR	**1,145**	B29	M/S Purma Holdings Limited	63772 -00619 Nairobi	0722209 844
					B32	M/S Charma Holdings Limited	20658-00100 Nairobi	0722841 889
					B35	M/S Narella Holdings Limited	2845-00606 Nairobi	0718660 803
					B44	M/S Teamwor k East Africa Limited	38799-00100 Nairobi	0772855 814
					B47	M/S Evertec General Trading Company Limited	32989-00600 Nairobi	0722284 420
9.	Red Gabardine Cloth Material 60" Wide	Met er	AWR	**1,465**	B30	M/S Bedi Investmen t Limited	230-20100 Nakuru	0722202 909
					B32	M/S Charma	20658-00100 Nairobi	0722841 889

						Holdings Limited		
					B35	M/S Narella Holdings Limited	2845-00606 Nairobi	0718660803
					B37	M/S Eriken Manufacturing Industries Limited	10785-00400 Nairobi	0722129077
					B44	M/S Teamwork East Africa Limited	38799-00100 Nairobi	0772855814
					B46	M/S Ruter General Contractors Limited	78343-00507 Nairobi	0722518434
					B47	M/S Evertec General Trading Company Limited	32989-00600 Nairobi	0722284420
10.	Blue Gabardine Cloth Material 60" Wide	Meter	AWR	**1,465**	B30	M/S Bedi Investment Limited	230-20100 Nakuru	0722202909
					B32	M/S Charma Holdings Limited	20658-00100 Nairobi	0722841889
					B35	M/S Narella Holdings Limited	2845-00606 Nairobi	0718660803
					B37	M/S Eriken Manufacturing Industries Limited	10785-00400 Nairobi	0722129077

					B44	M/S Teamwork East Africa Limited	38799-00100 Nairobi	0772855814
					B46	M/S Ruter General Contractors Limited	78343-00507 Nairobi	0722518434
					B47	M/S Evertec General Trading Company Limited	32989-00600 Nairobi	0722284420

LOT 2: SUPPLY AND DELIVERY OF UNIFORM MATERIALS TO ADMINISTRATION POLICE SERVICE

S/NO	ITEM DESCRIPTION	UNIT OF ISSUE	QUANTITY	AWARD PRICE PER METER (KSHS.)	BIDDER NUMBER	BIDDER NAME	ADDRESS	PHONE NUMBER
1.	Grey Material 60" wide as per approved APS stock sample	Meter	AWR	**695**	B29	M/S Purma Holdings Limited	63772 - 00619 Nairobi	0722209844
					B30	M/S Bedi Investment Limited	230-20100 Nakuru	0722202909
					B32	M/S Charma Holdings Limited	20658-00100 Nairobi	0722841889
					B35	M/S Narella Holding	2845-00606 Nairobi	0718660803

						s Limited		
					B47	M/S Evertec General Trading Company Limited	32989-00600 Nairobi	0722284420
2.	Jungle Green Material 60" wide as per approved APS stock sample	Meter	AWR	**660**	B1	M/S Thika Cloth Mills Limited	41896-00100 Nairobi	0733410400
					B9	M/S Jitegemee Kenya Limited	35110-00100 Nairobi	0712678731
					B14	M/S Uniform Emporium Limited	804-00100 Nairobi	0758434450
					B19	M/S Proforce Contractors Limited	458-70100 Garissa	0723056560
					B24	M/S Korai Company Limited	2081-00502 Nairobi	0718796398
					B28	M/S Fabric Pro Limited	86860-80100 Nairobi	0722826073
					B29	M/S Purma Holdings Limited	63772 - 00619 Nairobi	0722209844
					B30	M/S Bedi Investment Limited	230-20100 Nakuru	0722202909

					B32	M/S Charma Holdings Limited	20658-00100 Nairobi	0722841889
					B35	M/S Narella Holdings Limited	2845-00606 Nairobi	0718660803
					B47	M/S Evertec General Trading Company Limited	32989-00600 Nairobi	0722284420
3.	Jungle Shirting Material (Angola) 60" wide as per approved APS stock sample	Meter	AWR	**760**	B1	M/S Thika Cloth Mills Limited	41896-00100 Nairobi	0733410400
					B9	M/S Jitegemee Kenya Limited	35110-00100 Nairobi	0712678731
					B14	M/S Uniform Emporium Limited	804-00100 Nairobi	0758434450
					B19	M/S Proforce Contractors Limited	458-70100 Garissa	0723056560
					B28	M/S Fabric Pro Limited	86860-80100 Nairobi	0722826073
					B30	M/S Bedi Investment Limited	230-20100 Nakuru	0722202909

					B34	M/S Rock and Pure Limited	15973-00100 Nairobi	0712280003
					B35	M/S Narella Holdings Limited	2845-00606 Nairobi	0718660803
4.	Camouflage Material 60" wide as per approved APS stock sample	Meter	AWR	**1,127**	B1	M/S Thika Cloth Mills Limited	41896-00100 Nairobi	0733410400
					B9	M/S Jitegemee Kenya Limited	35110-00100 Nairobi	0712678731
					B14	M/S Uniform Emporium Limited	804-00100 Nairobi	0758434450
					B19	M/S Proforce Contractors Limited	458-70100 Garissa	0723056560
					B24	M/S Korai Company Limited	2081-00502 Nairobi	0718796398
					B28	M/S Fabric Pro Limited	86860-80100 Nairobi	0722826073
					B29	M/S Purma Holdings Limited	63772 - 00619 Nairobi	0722209844
					B32	M/S Charma Holdings Limited	20658-00100 Nairobi	0722841889

					B35	M/S Narella Holdings Limited	2845-00606 Nairobi	0718660803
					B47	M/S Evertec General Trading Company Limited	32989-00600 Nairobi	0722284420
5.	Gabardine Material 60" wide as per approved APS stock sample	Meter	AWR	**1,220**	B29	M/S Purma Holdings Limited	63772 - 00619 Nairobi	0722209844
					B30	M/S Bedi Investment Limited	230-20100 Nakuru	0722202909
					B32	M/S Charma Holdings Limited	20658-00100 Nairobi	0722841889
					B33	M/S Greenberg Holdings Limited	34100-00100 Nairobi	0721200370
					B34	M/S Rock and Pure Limited	15973-00100 Nairobi	0712280003
					B35	M/S Narella Holdings Limited	2845-00606 Nairobi	0718660803
					B47	M/S Evertec General Trading Compan	32989-00600 Nairobi	0722284420

						y Limited		
6.	Maroon Material 60" wide as per approved APS stock sample	Meter	AWR	**713**	B1	M/S Thika Cloth Mills Limited	41896-00100 Nairobi	0733410400
					B29	M/S Purma Holdings Limited	63772 - 00619 Nairobi	0722209844
					B32	M/S Charma Holdings Limited	20658-00100 Nairobi	0722841889
					B35	M/S Narella Holdings Limited	2845-00606 Nairobi	0718660803
7.	Checked Material 60" Wide	Meter	AWR	**660**	B1	M/S Thika Cloth Mills Limited	41896-00100 Nairobi	0733410400
					B24	M/S Korai Company Limited	2081-00502 Nairobi	0718796398
					B29	M/S Purma Holdings Limited	63772 - 00619 Nairobi	0722209844
					B30	M/S Bedi Investment Limited	230-20100 Nakuru	0722202909
					B32	M/S Charma Holdings Limited	20658-00100 Nairobi	0722841889

					B35	M/S Narella Holdings Limited	2845-00606 Nairobi	0718660803
					B47	M/S Evertec General Trading Company Limited	32989-00600 Nairobi	0722284420
8.	Multicam TDU camouflage Material as per approved APS stock sample	Meter	AWR	**1,080**	B1	M/S Thika Cloth Mills Limited	41896-00100 Nairobi	0733410400
					B30	M/S Bedi Investment Limited	230-20100 Nakuru	0722202909
					B32	M/S Charma Holdings Limited	20658-00100 Nairobi	0722841889
					B35	M/S Narella Holdings Limited	2845-00606 Nairobi	0718660803
					B47	M/S Evertec General Trading Company Limited	32989-00600 Nairobi	0722284420
9.	Jungle Green lining materials as per approved APS Stock sample	Meter	AWR	**250**	B1	M/S Thika Cloth Mills Limited	41896-00100 Nairobi	0733410400
					B29	M/S Purma Holding	63772 - 00619 Nairobi	0722209844

						s Limited		
					B30	M/S Bedi Investment Limited	230-20100 Nakuru	0722202909
					B32	M/S Charma Holdings Limited	20658-00100 Nairobi	0722841889
					B35	M/S Narella Holdings Limited	2845-00606 Nairobi	0718660803
					B47	M/S Evertec General Trading Company Limited	32989-00600 Nairobi	0722284420
10	Grey lining materials as per approved APS Stock sample	Meter	AWR	**250**	B29	M/S Purma Holdings Limited	63772 - 00619 Nairobi	0722209844
					B30	M/S Bedi Investment Limited	230-20100 Nakuru	0722202909
					B32	M/S Charma Holdings Limited	20658-00100 Nairobi	0722841889
					B35	M/S Narella Holdings Limited	2845-00606 Nairobi	0718660803
					B47	M/S Evertec General	32989-00600 Nairobi	0722284420

						Trading Company Limited		

LOT 3: SUPPLY AND DELIVERY OF UNIFORM MATERIALS TO GENERAL SERVICE UNIT

S/NO	ITEM DESCRIPTION	UNIT OF ISSUE	QUANTITY	AWARD PRICE PER METER (KSHS.)	BIDDER NUMBER	BIDDER NAME	ADDRESS	PHONE NUMBER
1.	Olive Jungle Cloth Material 60" Wide	Meter	AWR	**660**	B1	M/S Thika Cloth Mills Limited	41896-00100 Nairobi	0733410400
					B14	M/S Uniform Emporium Limited	804-00100 Nairobi	0758434450
					B19	M/S Proforce Contractors Limited	458-70100 Garissa	0723056560
					B24	M/S Korai Company Limited	2081-00502 Nairobi	0718796398
					B28	M/S Fabric Pro Limited	86860-80100 Nairobi	0722826073
					B29	M/S Purma Holdings Limited	63772 - 00619 Nairobi	0722209844

					B30	M/S Bedi Investment Limited	230-20100 Nakuru	0722202909
					B32	M/S Charma Holdings Limited	20658-00100 Nairobi	0722841889
					B34	M/S Rock and Pure Limited	15973-00100 Nairobi	0712280003
					B35	M/S Narella Holdings Limited	2845-00606 Nairobi	0718660803
					B41	M/S Blaze Investment Limited	5868-30100 Eldoret	0723711382
					B47	M/S Evertec General Trading Company Limited	32989-00600 Nairobi	0722284420
2.	Shirting O.R Cloth Material 60" Wide	Meter	AWR	**760**	B29	M/S Purma Holdings Limited	63772 - 00619 Nairobi	0722209844
					B30	M/S Bedi Investment Limited	230-20100 Nakuru	0722202909
					B32	M/S Charma Holdings Limited	20658-00100 Nairobi	0722841889

					B33	M/S Greenberg Holdings Limited	34100-00100 Nairobi	0721200370
					B34	M/S Rock and Pure Limited	15973-00100 Nairobi	0712280003
					B35	M/S Narella Holdings Limited	2845-00606 Nairobi	0718660803
					B41	M/S Blaze Investment Limited	5868-30100 Eldoret	0723711382
					B44	M/S Teamwork East Africa Limited	38799-00100 Nairobi	0772855814
					B46	M/S Ruter General Contractors Limited	78343-00507 Nairobi	0722518434
					B47	M/S Evertec General Trading Company Limited	32989-00600 Nairobi	0722284420
3.	Digital Camouflage Cloth Material 60" Wide	Meter	AWR	**1,127**	B1	M/S Thika Cloth Mills Limited	41896-00100 Nairobi	0733410400
					B9	M/S Jitegemee Kenya Limited	35110-00100 Nairobi	0712678731

					B14	M/S Uniform Emporium Limited	804-00100 Nairobi	0758434450
					B19	M/S Proforce Contractors Limited	458-70100 Garissa	0723056560
					B24	M/S Korai Company Limited	2081-00502 Nairobi	0718796398
					B28	M/S Fabric Pro Limited	86860-80100 Nairobi	0722826073
					B29	M/S Purma Holdings Limited	63772 - 00619 Nairobi	0722209844
					B32	M/S Charma Holdings Limited	20658-00100 Nairobi	0722841889
					B35	M/S Narella Holdings Limited	2845-00606 Nairobi	0718660803
					B41	M/S Blaze Investment Limited	5868-30100 Eldoret	0723711382
					B47	M/S Evertec General Trading Company Limited	32989-00600 Nairobi	0722284420

4.	Dress Ceremonial Cloth Material 60" Wide	Meter	AWR	**1,220**	B29	M/S Purma Holdings Limited	63772 - 00619 Nairobi	0722209844
					B30	M/S Bedi Investment Limited	230-20100 Nakuru	0722202909
					B32	M/S Charma Holdings Limited	20658-00100 Nairobi	0722841889
					B34	M/S Rock and Pure Limited	15973-00100 Nairobi	0712280003
					B35	M/S Narella Holdings Limited	2845-00606 Nairobi	0718660803
					B47	M/S Evertec General Trading Company Limited	32989-00600 Nairobi	0722284420
5.	Shirting Officer Cloth Material 60" Wide	Meter	AWR	**760**	B29	M/S Purma Holdings Limited	63772 - 00619 Nairobi	0722209844
					B30	M/S Bedi Investment Limited	230-20100 Nakuru	0722202909
					B32	M/S Charma Holdings Limited	20658-00100 Nairobi	0722841889

					B33	M/S Greenberg Holdings Limited	34100-00100 Nairobi	0721200370
					B34	M/S Rock and Pure Limited	15973-00100 Nairobi	0712280003
					B35	M/S Narella Holdings Limited	2845-00606 Nairobi	0718660803
					B41	M/S Blaze Investment Limited	5868-30100 Eldoret	0723711382
					B46	M/S Ruter General Contractors Limited	78343-00507 Nairobi	0722518434
					B47	M/S Evertec General Trading Company Limited	32989-00600 Nairobi	0722284420
6.	Shirting Ceremonial Material 60" Wide	Meter	AWR	**760**	B29	M/S Purma Holdings Limited	63772 - 00619 Nairobi	0722209844
					B30	M/S Bedi Investment Limited	230-20100 Nakuru	0722202909
					B32	M/S Charma Holding	20658-00100 Nairobi	0722841889

						s Limited		
					B34	M/S Rock and Pure Limited	15973-00100 Nairobi	0712280003
					B35	M/S Narella Holdings Limited	2845-00606 Nairobi	0718660803
					B41	M/S Blaze Investment Limited	5868-30100 Eldoret	0723711382
					B44	M/S Teamwork East Africa Limited	38799-00100 Nairobi	0772855814
7.	White Dust Coat Cloth Material 60" Wide	Meter	AWR	**475**	B1	M/S Thika Cloth Mills Limited	41896-00100 Nairobi	0733410400
					B9	M/S Jitegemee Kenya Limited	35110-00100 Nairobi	0712678731
					B14	M/S Uniform Emporium Limited	804-00100 Nairobi	0758434450
					B19	M/S Proforce Contractors Limited	458-70100 Garissa	0723056560
					B24	M/S Korai Company Limited	2081-00502 Nairobi	0718796398

					B28	M/S Fabric Pro Limited	86860-80100 Nairobi	0722826073
					B29	M/S Purma Holdings Limited	63772 - 00619 Nairobi	0722209844
					B30	M/S Bedi Investment Limited	230-20100 Nakuru	0722202909
					B34	M/S Rock and Pure Limited	15973-00100 Nairobi	0712280003
					B35	M/S Narella Holdings Limited	2845-00606 Nairobi	0718660803
					B41	M/S Blaze Investment Limited	5868-30100 Eldoret	0723711382
					B47	M/S Evertec General Trading Company Limited	32989-00600 Nairobi	0722284420
8.	Blue Dust Coat Cloth Material 60" Wide	Meter	AWR	**475**	B1	M/S Thika Cloth Mills Limited	41896-00100 Nairobi	0733410400
					B9	M/S Jitegemee Kenya Limited	35110-00100 Nairobi	0712678731
					B14	M/S Uniform Emporiu	804-00100 Nairobi	0758434450

						m Limited		
					B19	M/S Proforce Contractors Limited	458-70100 Garissa	0723056560
					B24	M/S Korai Company Limited	2081-00502 Nairobi	0718796398
					B28	M/S Fabric Pro Limited	86860-80100 Nairobi	0722826073
					B29	M/S Purma Holdings Limited	63772 - 00619 Nairobi	0722209844
					B30	M/S Bedi Investment Limited	230-20100 Nakuru	0722202909
					B32	M/S Charma Holdings Limited	20658-00100 Nairobi	0722841889
					B34	M/S Rock and Pure Limited	15973-00100 Nairobi	0712280003
					B46	M/S Ruter General Contractors Limited	78343-00507 Nairobi	0722518434
					B47	M/S Evertec General Trading Compan	32989-00600 Nairobi	0722284420

						y Limited		

Professional Opinion

19. In a Professional Opinion dated 9th October 2023 (hereinafter referred to as the "Professional Opinion"), the Head, Supply Chain Management Services, Mr. Joel K. Ngolekong, reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders, due diligence, price comparison and negotiations and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender.

20. Thereafter, the 1st Respondent herein, approved the Professional Opinion on 16th October 2023.

Notification to Tenderers

21. Tenderers were notified of the outcome of evaluation of the subject tender vide letters dated 17th October 2023.

REQUEST FOR REVIEW NO. 89 OF 2023

22. On 7th November 2023, Rivatex East Africa Limited, the Applicant herein, filed a Request for Review dated 7th November 2023 together with an Affidavit in Support of the Request for Review sworn on 7th November 2023 by Prof. Thomas Kipkurgat, its Managing Director

(hereinafter referred to as the 'Request for Review') and an Applicant's List and Bundle of Documents dated 7th November 2023 through Joseline Cheruiyot Advocate seeking the following orders from the Board in verbatim:

a) A declaration do issue that the Respondent's letter dated 17th October, 2023 and received by the Applicant on 31st October, 2023 is void and the same be cancelled and/or set aside.

b) The Respondent be ordered to declare the Applicant as the successful bidder and be awarded the tender No. MINA/NPS/KPS/015/2023-2025.

c) The Applicant be awarded costs.

d) Any other relief the Public Procurement Administrative Review Board may deem fit to grant.

23. In a Notification of Appeal and a letter dated 7th November 2023, Mr. James Kilaka, the Acting Board Secretary of the Board notified the 1st and 2nd Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondents were requested to submit a response to the Request for Review together with confidential

documents concerning the subject tender within five (5) days from 7th November 2023.

24. *Vide* a letter dated 15th November 2023, the Acting Board Secretary notified the 1st and 2nd Respondent that the five (5) days within which they were required to submit a response in the matter lapsed on or about 14th November 2023 and urged them to comply with the Notification of Appeal served upon them on 7th November 2023 in view Regulation 205 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020').

25. *Vide* a Hearing Notice dated 20th November 2023, the Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the Request for Review slated for Wednesday 22nd November 2023 at 2:00 PM, through the link availed in the said Hearing Notice.

26. On 21st November 2023, the Acting Board Secretary notified the 1st and 2nd Respondents that the matter was slated to be heard on 22nd November 2023 and urged them to file their response.

27. The Respondents filed on 21st November 2023 a letter dated 20th November 2023 forwarding the confidential documents in the subject tender and apologized for the delay in submitting the same and their failure to submit the required response.

28. On 22nd November 2023, the Acting Board Secretary informed parties that due to unavoidable circumstances, the hearing of the matter would not proceed as scheduled and that the same was now slated to be heard on 23rd November 2023 at 12.30 p.m. and attached a Hearing Notice dated 22nd November 2023 to this effect.

29. When the matter came up for hearing on 23rd November 2023 at 12.30 p.m., the Respondents had not joined the proceedings despite being notified and counsel for the Applicant, Ms. Michira, informed the Board that she had not received any response filed by the Respondents in the matter. The Board having satisfied itself that the Respondents were aware of the instant Request for Review proceeded to allocate the Applicant 10 minutes to highlight its case. At the point that counsel for the Applicant concluded with highlighting her case, Mr. Joel Ngolekong joined the proceedings and upon enquiry by the Board on whether the Respondents had filed any response in the matter, he submitted that he had filed on 21st November 2023 a letter dated 17th November 2023 setting out the procurement proceedings in the subject tender together with the confidential documents and sought for the same to be admitted and for more time to link with the Respondents' legal team in substantively responding to the instant Request for Review.

30. In a rejoinder, Ms. Michira opposed the application for admission of the Respondent's letter in response to the instant Request for Review dated 17th November 2023 citing that (a) it had not been filed in the proper form, (b) the same would be an ambush as the Applicant had

not been served with the said letter, (c) the Respondent was in breach of the timelines set out in Regulations 2020 of filing of its documents and (d) the Respondents were taking the proceedings in the instant Request for Review casually.

31. Having considered parties' submissions, the Board directed that due to the limited time within which it was required to issue its decision, the instant Request for Review would be canvassed by way of written submissions and further directed (a) the Respondents to serve the Applicant and file with the Board the complete letter dated 17th November 2023 within one (1) hour of conclusion of the hearing of the instant Request for Review, (b) the Applicant to file and serve a rejoinder to the Respondents' letter dated 17th November 2023 and its written submissions by 11.00 a.m. on 24th November 2023, (c) the Respondents to file and serve its written submissions by 3.00 p.m. on 24th November 2023 and (d) the Applicant to file and serve its rejoinder to the Respondents' submissions limited to points of law, if any, by 6.00 p.m. on 24th November 2023.

32. On 24th November 2023, the Applicant filed a Further Affidavit sworn on 24th November 2023 by Prof. Thomas Kipkurgat and Written Submissions dated 24th November 2023 together with the Authorities relied upon.

33. On 24th November 2023, the Respondents filed Written Submissions dated 24th November 2023.

PARTIES' SUBMISSIONS

Applicant's case

34. It is the Applicant's case that it submitted a bid in the subject tender as per the duly filled tender documents and received on 31st October 2023 a letter dated 17th October 2023 which informed it that its bid was not successful due to the reason, *'Declined your quoted price and requested for a 30% price increment for each item.'*

35. The Applicant avers that the reason given for its disqualification in the subject tender is unlawful, opaque, not objective and lacks quantifiable reason since (a) the wording and the entire sentence is not clear, precise, and articulate, (b) the reasons do not state which prices were rejected *vis-a-vis* what was quoted, who the successful bidders were, at what prices they were awarded the subject tender, whether the said prices were above the market price or so low as to compromise the quality amongst other reasons contrary to Section 87(3) of the Act.

36. The Applicant points out that the Tender Document at ITT 33.2 provides that *price evaluation will be done for suppliers who satisfy both preliminary and technical criteria only*. Further that additional evaluation factors provided in the Tender Document stated that *award will be per line item to multiple bidders whose prices fall within a range set by evaluation committee guided by prevailing market rates. All responsive bidders quoting within range will be required to match the lowest price.*

37. According to the Applicant, the successful tenderer was required to (a) be substantially responsive to the tender documents and (b) offer prices that fall within market range. As such, the Applicant contends that there was a quantifiable reason in terms of the pricing for the bidders which was that the prices were to fall within the prevailing market rates and the successful bidder would be one with the lowest quote within the market range.

38. The Applicant further contends that the Respondents did not apply the evaluation criteria provide for in the Tender Document in terms of pricing in disqualifying the Applicant's bid.

39. The Applicant pressed on that the set quantifiable aspect in the subject tender was the lowest bidder quoting its price within the prevailing market prices and this was not expressly given as the reason for the disqualification of the Applicant's bid since there is no indication of the prices of the bids received *vis-a-vis* the prevailing market prices.

40. The Applicant contends that the Respondent did not formally request it and other identified tenderers to revise their tenders by submitting their best and final offer within a period of seven days and it did not therefore submit a revised tender as it was not requested, in fulfilment of the required evaluation procedure. The Applicant further contends that it was not informed if there was a tie in the quoted prices and if

any of the tenderers submitted similar prices compared to what it had quoted.

41. The Applicant avers that on 25th July 2023, it was invited for a meeting by the Respondents where the Respondents proposed a price reduction for various items under the three (3) lots. The Applicant further avers that the purported negotiations were unfair as the Respondents failed to afford the Applicant ample opportunity to provide its official revised prices if any within a period of not less than seven days as stipulated under the Act and hence failed to follow the procedure for competitive negotiations set out under Section 132 of the Act.

42. The Applicant contends that the Respondents declined any purported increment of its prices citing ITT 13.6 of the Tender Document which provides that prices quoted are inclusive of delivery charges, tax and handling charges per item and must be valid for 24 months hence its prices as submitted remain binding upon it.

43. The Applicant avers that its tender was responsive in all parameters and it submitted the lowest bid within the market range and it has worked with the Procuring Entity before. The Applicant further avers that a review of the award prices *vis a vis* its prices indicates that it was the lowest evaluated bidder and the most competitive in all lots on the various items noting that its quoted price fell below the award range stipulated by the Respondents.

44. The Applicant contends that the Respondents applied different values of the award range upon it *vis a vis* the rest of the tenderers which is a clear indication of unfairness, bias and discrimination against it. Further, that even if the Respondent was to apply the purported 30% increment of the tender prices, it would still remain materially responsive as against the award range and given that the Respondents invited parties to negotiations, it is illogical that the Respondents went on to dismiss the Applicant's quoted prices which were inherently lower than the award range.

45. The Applicant further contends that it had a legitimate expectation of an objective tender evaluation process and the Respondents acted ultra vires and lacked objectivity, rationale and quantifiable reason in disqualifying its bid in the subject tender.

46. The Applicant avers that the Respondents actions were in breach of the principles of public procurement and Article 201 (d) and 207(1) of the Constitution.

Respondents case

47. According to the Respondents, evaluation of the subject tender was carried out as per stages provided in the evaluation and qualification criteria set out in Section III at pages 27, 28, and 29 of the Tender Document.

48. The Respondents contend that the Applicant being the lowest evaluated bidder in its quoted prices declined to stand by its quoted prices and instead requested for a 30% price increase for each item. Consequently, the Evaluation Committee declined their request since a tenderer cannot vary prices upwardly during the evaluation process but can only negotiate downwards.

49. The Respondents submit that the Evaluation Committee negotiated with the second lowest tenderer in each item and matched the prices for those who agreed to match in line with Clause 22.1 Evaluation of Commercial Terms and Conditions of the Tender (ITT 33.1 (a) of Section III- Evaluation and Qualification Criteria of the Tender Document.

50. The Respondents submit that the regret letter indicating that the Applicant declined quoted prices and requested for 30% price increment for each item is basis for non - responsiveness further noting that the subject tender is a framework agreement on as and when required (AWR) basis.

51. The Respondents contend that the Applicant attended and participated in the negotiation meeting where minutes were taken and the agenda for negotiation was applicable to all responsive tenderers as provided in the tender document.

52. The Respondents concede that the Applicant was the lowest in its quoted prices and could have formed the basis of matching the prices of other responsive bidders in order to achieve multiple awards but instead declined to stand with their quoted prices.

53. The Respondents urge the Board to find that the evaluation process was transparent as per the set criteria and to dismiss the instant Request for Review. Further, that since the Applicant is a government manufacturing entity, there is still room for engaging government entities on government to government arrangements and Buy Kenya Build Kenya Initiative.

BOARD'S DECISION

54. The Board has considered each of the parties' cases, documents, pleadings, oral and written submissions, list and bundle of authorities together with confidential documents submitted to the Board by the Respondents pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination.

i ***Whether the Procuring Entity's Letter of Notification dated 17th October 2023 issued to the Applicant meets the threshold of Section 87(3) of the Act.***

ii ***Whether the Procuring Entity complied with the requirements of the Tender Document, the Act and the Constitution in evaluating the Applicant's tender and other tenders rendered responsive at the Financial Evaluating stage and in awarding the subject tender.***

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

As to whether the Procuring Entity's Letter of Notification dated 17th October 2023 issued to the Applicant meets the threshold of Section 87(3) of the Act.

55. It is the Applicant's case that the Respondents breached the provisions of Section 87 of the Act in failing to (a) issue it with a clear, precise, and articulate reason on why it was unsuccessful in the subject tender, and (b) notify it which of its prices were rejected and the outcome of the successful bidders with their respective prices.

56. Section 87 of the Act is instructive on how notification of the outcome of evaluation of the successful and unsuccessful tenderers should be conducted by a procuring entity and provides as follows:

> "***87. Notification of intention to enter into a contract***
> ***(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person***

submitting the successful tender that his tender has been accepted.

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

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

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

57. Section 87 of the Act recognizes that notification of the outcome of evaluation of a tender is made in writing by an accounting officer of a procuring entity. Further, the notification of the outcome of evaluation ought to be done simultaneously to the successful tenderer(s) and the unsuccessful tenderer(s). A disclosure of who is evaluated as the successful tenderer is made to the unsuccessful tenderer with reasons thereof in the same notification of the outcome of evaluation.

58. The procedure for notification under Section 87(3) of the Act is explained by Regulation 82 of Regulations 2020 which provides as follows:

"82. Notification of intention to enter into a contract

(1) The notification to the unsuccessful bidder under Section 87(3) of the Act, shall be in writing and shall be made at the same time the successful bidder is notified.

(2) For greater certainty, the reason to be disclosed to the unsuccessful bidder shall only relate to their respective bids.

(3) The notification in this regulation shall include the name of the successful bidder, the tender price and the reason why the bid was successful in accordance with Section 86(1) of the Act."

59. In view of the provisions of Section 87 of the Act read with Regulation 82 of Regulations 2020, the Board observes an accounting officer of a procuring entity must notify, in writing, the tenderer who submitted the successful tender, that its tender was successful before the expiry of the tender validity period.

60. Simultaneously, while notifying the successful tenderer, an accounting officer of a procuring entity notifies other unsuccessful tenderers of their unsuccessfulness, giving reasons why such tenderers are unsuccessful, disclosing who the successful tenderer is, why such a tenderer is successful in line with Section 86(1) of the Act and at what price is the successful tenderer awarded the tender. These reasons and

disclosures are central to the principles of public procurement and public finance of transparency and accountability enshrined in Article 227 and 232 of the Constitution. This means all processes within a public procurement system, including notification to unsuccessful tenderers must be conducted in a transparent manner.

61. In **Judicial Review Miscellaneous Application No. 531 of 2015, Republic v Public Procurement Administrative Review Board & 2 others ExParte Akamai Creative Limited** (hereinafter referred to as "the Akamai Case") the High Court held as follows:

> ***"In my view, Article 47 of the Constitution requires that parties to an administrative proceeding be furnished with the decision and the reasons therefor within a reasonable time in order to enable them decide on the next course of action. It is not merely sufficient to render a decision but to also furnish the reasons for the same. Accordingly, where an administrative body unreasonably delays in furnishing the parties with the decision and the reasons therefor when requested to do so, that action or inaction may well be contrary to the spirit of Article 47 aforesaid."***

62. From the above case, the Board observes that the High Court was basically expounding on one of the rules of natural justice as provided for in Article 47 (2) of the Constitution which provides:

"If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action."

63. In essence, the rules of natural justice as provided for in Article 47 of the Constitution require that a procuring entity promptly notifies tenderers of the outcome of evaluation to afford an unsuccessful tenderer the opportunity to challenge such reasons if need be. Further, the Act does not require that an unsuccessful tenderer seeks clarification in order for the accounting officer to provide it with the outcome of evaluation or reasons leading to its disqualification in a tendering process.

64. Turning to the circumstances in the instant Request for Review, we note that the letter of notification dated 17th October 2023 reads in part as follows:

> ***".....***
>
> ***Reference is made to Tender No. MINA/NPS/KPS/015/2023-2025 in which you participated.***
>
> ***This is to notify you that your bid for the tender was not successful due to the following reason:***
>
> - ***Declined your quoted price and requested for a 30% price increment for each item.***

Thank you for showing interest of working with us and we wish you well in your future endeavors.

....."

65. From the contents of the above letter, it is clear that the Respondents failed to precisely state the reasons as to why the Applicant's tender was rendered unsuccessful as one cannot decipher who declined the quoted price, where and why and where the 30% price increment for each item was requested. Further, we have established from the confidential documents submitted to the Board pursuant to Section 67(3)(e) of the Act that the Respondents failed to notify the Applicant and other unsuccessful tenderers of the names of the successful bidders in the subject tender, their tender prices and the reason why their bids were successful.

66. In the circumstances, we find that the letter of notification of award dated 17th October 2023 issued to the Applicant **did not** meet the threshold required in Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020.

As to whether the Procuring Entity complied with the requirements of the Tender Document, the Act and the Constitution in evaluating the Applicant's tender and other tenders rendered responsive at the Financial Evaluating stage and in awarding the subject tender.

67. Central to the Request for Review filed on 7th November 2023 is the manner in which the Respondents evaluated and awarded the subject tender. The Applicant contends that the procurement proceedings in the subject tender were unfair and in breach of the provisions of the Tender Document, the Act and the Constitution since the Applicant was the lowest evaluated bidder, the most competitive in all lots of the subject tender, and that its quoted prices fell below the award range stipulated by the Respondents hence it was unfairly disqualified from the subject tender.

68. On the other hand, the Respondents concede that the Applicant was the lowest evaluated tenderer and could have formed the basis of matching the prices of other tenderers in order to achieve multiple awards had it not been for its refusal during the negotiation meeting held on 25th July 2023 to stand by its quoted prices as submitted in its bid and its request for a 30% price increase for each item quoted for in its bid.

69. The Board notes that the objective of public procurement is to provide quality goods and services in a system that implements the principles specified in Article 227 of the Constitution which provides as follows:

"227. Procurement of public goods and services

(1) When a State organ or any other public entity contracts for goods or services, <u>it shall do so in</u>

accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

(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) ..... and

d) ....."

70. Justice Mativo (as he then was) in **Nairobi High Court Misc. Application No. 60 of 2020; Republic v The Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020] eKLR** (hereinafter referred to as "Misc. Application No. 60 of 2020") spoke to the principles under Article 227 of the Constitution as follows:

> ***"45. Article 227 of the Constitution provides that when procuring entities contract for goods or services they must comply with the principles of fairness, equity, transparency, competitiveness and cost-effectiveness. For there to be fairness in the public procurement process, all bids should be considered on the basis of***

their compliance with the terms of the solicitation documents, and a bid should not be rejected for reasons other than those specifically stipulated in the solicitation document.

46. However, there is a need to appreciate the difference between formal shortcomings, which go to the heart of the process, and the elevation of matters of subsidiary importance to a level, which determines the fate of the tender. The Evaluation Committee has a duty to act fairly. However, fairness must be decided on the circumstances of each case..."

71. The national values and principles of governance under Article 10 of the Constitution apply to State organs and public entities contracting for goods and services. Article 10 provides as follows:

"(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(a) applies or interprets this Constitution;

(b) <u>enacts, applies or interprets any law</u>; or

(c) makes or implements public policy decisions.

(2) The national values and principles of governance include—

(a) .....;

(b) .....;

(c) <u>good governance, integrity, transparency and accountability</u>".

72. Efficient good governance in public procurement proceedings provides tenderers with an assurance that public procurement and asset disposal processes are operating effectively and efficiently. Such processes are also underpinned by broader principles such as the rule of law, integrity, transparency and accountability amongst others.

73. The Board observes that the legislation contemplated in Article 227(2) of the Constitution is the Act. Section 3 of the Act underpin good governance, integrity, transparency and accountability as key pillars in public procurement and asset disposal proceedings and provides as follows:

> ***"Public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of the Constitution and relevant legislation—***
>
> ***(a) the national values and principles provided for under Article 10;***
>
> ***(b) the equality and freedom from discrimination provided for under Article 27;***

(c) affirmative action programmes provided for under Articles 55 and 56;

(d) principles of integrity under the Leadership and Integrity Act, 2012 (No. 19 of 2012);

(e) the principles of public finance under Article 201;

(f) the values and principles of public service as provided for under Article 232;

(g) principles governing the procurement profession, international norms;

(h) maximisation of value for money;

(i) promotion of local industry, sustainable development and protection of the environment; and

(j) promotion of citizen contractors."

74. Section 58 of the Act requires a procuring entity to use a standard tender document which contains sufficient information and provides as follows:

"(1) An accounting officer of a procuring entity shall use a standard procurement and asset disposal documents issued by the Authority in all procurement and asset disposal proceedings.

(2) The tender documents used by a procuring entity under subsection (1) shall contain sufficient information to allow fairness, equitability, transparency, cost-effectiveness and competition among those who may wish to submit their applications."

75. Further Section 60 provides as follows:

"(1) An accounting officer of a procuring entity shall prepare specific requirements relating to the goods, works or services being procured that are clear, that give a correct and complete description of what is to be procured and that allow for fair and open competition among those who may wish to participate in the procurement proceedings.

(2) The specific requirements shall include all the procuring entity's technical requirements with respect to the goods, works or services being procured.

(3) .....

(4) ....."

76. In the same vein, section 70 of the Act requires a procuring entity to use a standard tender document which contains sufficient information to allow for fair competition among tenderers. Section 70(3) reads as follows:

"(3) The tender documents used by a procuring entity pursuant to subsection (2) shall contain sufficient information to allow fair competition among those who may wish to submit tenders."

77. Regulation 68 of Regulations 2020 also provides for use of standard tender documents and formats. Regulation 68(4) of Regulations 2020 provides:

"(4) Pursuant to section 70(4) of the Act, <u>the accounting officer of a procuring entity shall prepare the tender document clearly indicating the technical and financial evaluation criteria to be applied which shall be quantifiable, measurable and objective in line with the provisions of section 80(3) of the Act in consultation with the user department and other relevant departments."</u>

78. Section 80 of the Act is instructive on how evaluation and comparison of tenders should be conducted by a procuring entity as follows:

"80. Evaluation of tender

(1) The evaluation committee appointed by the accounting officer pursuant to Section 46 of the 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.

(3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)-

(a) the criteria shall, to the extent possible, be objective and quantifiable;

(b) each criterion shall be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality, time and service for the purpose of evaluation; and

(4) .....”

79. Section 80(2) of the Act as indicated above requires the Evaluation Committee to evaluate and compare tenders in a system that is fair using the procedures and criteria set out in the Tender Document. A system that is fair is one that considers equal treatment of all tenders against a criteria of evaluation known by all tenderers since such criteria is well laid out for in a tender document issued to tenderers by a procuring entity. Section 80(3) of the Act requires for such evaluation criteria to be as objective and quantifiable to the extent possible and to be applied in accordance with the procedures provided in a tender document.

80. Turning to the circumstances in the instant Request for Review, the Tender Document provided for Financial Evaluation as follows:

81. ITT 33.2 of Section I: Instructions to Tenderers at page 18 of the Tender Document provides:

> ***"Price evaluation will be done for Items or Lots (contracts), as specified in the TDS; and the Tender Price as quoted in accordance with ITT 14.To evaluate a Tender, the Procuring Entity shall consider the following:***
>
> ***a) Price adjustment due to unconditional discounts offered in accordance with ITT 13.4;***
>
> ***b) Converting the amount resulting from applying (a) and (b) above, if relevant, to a single currency in accordance with ITT 31;***

c) Price adjustment due to quantifiable nonmaterial non-conformities in accordance with ITT 29.3; and

d) Any additional evaluation factors specified in the TDS and Section III, Evaluation and Qualification Criteria."

82. ITT 33.2 of Section II- Tender Data Sheet (TDS)at page 26 of the Tender Document provides:

"Price evaluation will be done for Suppliers who satisfy both Preliminary and Technical evaluation criteria only."

83. ITT 33.2(d) of Section II- Tender Data Sheet (TDS)at page 26 of the Tender Document provides:

"Additional evaluation factors are:

Award will be per line item to multiple bidders whose prices fall within a range set by evaluation committee guided by the prevailing market rates. All responsive bidders quoting within the range will be required to match the lowest price." [Emphasis Board]

84. Clause 1.4 Evaluation of Tenders of Section III- Evaluation and Qualification Criteria at page 27 of the Tender Document provides:

".....

4. Stage Four: Financial Evaluation: To qualify for financial evaluation the firm MUST have a sample which meets the parameters of the approved stock sample at the technical evaluation stage

This stage involves comparison of quoted prices. Bidders quoting above the lowest Evaluated Tender Price within a certain range set by the evaluation committee (based on the prevailing Market Price) shall be required to match the price of the lowest evaluated price.

5. Stage Five: Negotiation: The evaluation committee shall carry out negotiations with the bidders whose prices have been matched with the lowest evaluated bidder. After negotiations, bidders who will not have agreed to match their prices with the lowest evaluated bidder shall be disqualified." [Emphasis Board]

85. Clause 2.2.1 Evaluation of Commercial Terms and Conditions of the Tender (ITT 33.1(a)) of Section III- Evaluation and Qualification Criteria at page 29 of the Tender Document provides:

"This is a framework agreement, where goods shall be ordered on a call off approach, as and when required, therefore the framework agreement shall be awarded to multiple bidders based on a range of prices. Bidders bidding above the lowest evaluated Tender Price shall be required to match the lowest evaluated price (Based on the prevailing Market Price) within a certain range set by the Evaluation Committee.

The Evaluation Committee shall carry out negotiations with the bidders whose prices have been matched with

the lowest evaluated bidder. After negotiations, bidders who will not have agreed to match their prices with the lowest evaluated bidder shall be disqualified." [Emphasis Board].

86. The import of the above provisions is that (a) award of the subject tender, being a framework agreement, would be to multiple bidders whose prices were within a range set by the Evaluation Committee; (b) the Evaluation Committee would conduct a price comparison to determine the lowest evaluated price in the subject tender, (c) all bidders determined responsive having quoted within the range set by the Evaluation Committee were required to match their prices with the lowest evaluated bidder, and (d) following negotiations, responsive bidders who do not agree to match their prices with the lowest evaluated bidder would be disqualified.

87. According to the Evaluation Report submitted to the Board by the 1st Respondent pursuant to Section 67(3)(e) of the Act we note that a detailed price comparison and recommended price ranges was provided at page 93 to 100 of the Evaluation Report as follows:

PRICE COMPARISON SCHEDULE

LOT1: SUPPLY AND DELIVERY OF UNIFORM MATERIALS TO KENYA POLICE SERVICE										
S/NO	ItemDescription	Unit ofIssue	Quantity	UnitPrice (Kshs.) (Per Meter)						
				Award Range	B1	B9	B14	B19	B21	B24
	Light Blue Cloth	Meter	AWR	695-	784	-	-	-	520	870

	Material 60" wide as per approved KPS stock sample			1,186						
	Dark Navy Blue Cloth Material 60" wide as per approved KPS stock sample	Meter	AWR	750-1,186	784	1,000	720	1,110	560	870
	Mid-Night Blue Cloth Material 60" wide as per approved KPS stock sample	Meter	AWR	1,220	-	-	-	-	600	870
	Olive Jungle Green Cloth Material 60" wide as per approved KPS stock sample	Meter	AWR	760-1,100	784	1,100	1,300	975	560	870
	Shirting OR Cloth Material 60" wide as per approved KPS stock sample	Meter	AWR	760-1,940	-	-	-	-	520	-
	Shirting Officers Cloth Material 60" wide as per approved KPS stock sample	Meter	AWR	760-1,842	-	-	-	-	520	-
	Digital Camouflage Cloth Material 60" wide as per approved KPS stock sample	Meter	AWR	1,127-1,530	1,127	1,450	1,530	1,400	810	1,240
	Bedford Cloth Material 60" wide as per approved KPS stock sample	Meter	AWR	1,145-1,200	-	-	-	-	600	-
	Red Gabardine Cloth Material 60" wide as per approved KPS stock sample	Meter	AWR	1,465-1,600	-	-	-	-	-	-
	Blue Gabardine Cloth Material 60" wide as per approved KPS stock sample	Meter	AWR	1,465-1,550	-	-	-	-	-	-

LOT1: SUPPLY AND DELIVERY OF UNIFORM MATERIALS TO KENYA POLICE SERVICE				
S/NO	**ItemDescription**	**Unit ofIssue**	**Quantity**	**UnitPrice (Kshs.) (Per Meter)**

				Award Range	B28	B29	B30	B32	B33	B34
	Light Blue Cloth Material 60" wide as per approved KPS stock sample	Meter	AWR	695-1,186	650	784	695	800	638	1,186
	Dark Navy Blue Cloth Material 60" wide as per approved KPS stock sample	Meter	AWR	750-1,186	650	784	750	795	682	1,186
	Mid-Night Blue Cloth Material 60" wide as per approved KPS stock sample	Meter	AWR	1,220	-	784	1,220	780	-	1,186
	Olive Jungle Green Cloth Material 60" wide as per approved KPS stock sample	Meter	AWR	760-1,100	999	784	695	798	627	752
	Shirting OR Cloth Material 60" wide as per approved KPS stock sample	Meter	AWR	760-1,940	950	1,939	875	950	-	893
	Shirting Officers Cloth Material 60" wide as per approved KPS stock sample	Meter	AWR	760-1,842	-	1,842	875	950	-	-
	Digital Camouflage Cloth Material 60" wide as per approved KPS stock sample	Meter	AWR	1,127-1,530	-	1,128	-	1,150	902	892
	Bedford Cloth Material 60" wide as per approved KPS stock sample	Meter	AWR	1,145-1,200	-	1,145	-	1,200	-	-
	Red Gabardine Cloth Material 60" wide as per approved KPS stock sample	Meter	AWR	1,465-1,600	-	1,145	1,480	1,465	-	-
	Blue Gabardine Cloth Material 60" wide as per approved KPS stock sample	Meter	AWR	1,465-1,550	-	1,145	1,480	1,465	-	-

LOT1: SUPPLY AND DELIVERY OF UNIFORM MATERIALS TO KENYA POLICE SERVICE				
S/NO	ItemDescription		Quantity	UnitPrice (KShs.)(Per Meter)

		Unit ofIssue		Award Range	B35	B36	B37	B44	B46	B47
	Light Blue Cloth Material 60" wide as per approved KPS stock sample	Meter	AWR	695-1,186	810	930	727	720	750	790
	Dark Navy Blue Cloth Material 60" wide as per approved KPS stock sample	Meter	AWR	750-1,186	805	930	827	827	830	780
	Mid-Night Blue Cloth Material 60" wide as per approved KPS stock sample	Meter	AWR	1,220	810	-	900	980	985	790
	Olive Jungle Green Cloth Material 60" wide as per approved KPS stock sample	Meter	AWR	760-1,100	780	950	869	850	-	800
	Shirting OR Cloth Material 60" wide as per approved KPS stock sample	Meter	AWR	760-1,940	980	-	820	800	827	1,940
	Shirting Officers Cloth Material 60" wide as per approved KPS stock sample	Meter	AWR	760-1,842	990	-	-	-	-	1,840
	Digital Camouflage Cloth Material 60" wide as per approved KPS stock sample	Meter	AWR	1,127-1,530	1,300	-	1,180	1,100	-	1,200
	Bedford Cloth Material 60" wide as per approved KPS stock sample	Meter	AWR	1,145-1,200	1,180	-	-	1,200	-	1,190
	Red Gabardine Cloth Material 60" wide as per approved KPS stock sample	Meter	AWR	1,465-1,600	1,470	-	1,580	1,550	1,600	1,480
	Blue Gabardine Cloth Material 60" wide as per approved KPS stock sample	Meter	AWR	1,465-1,550	1,470	-	1,530	1,500	1,550	1,480

LOT 2: SUPPLY AND DELIVERY OF UNIFORM MATERIALS TO ADMINISTRATION POLICE SERVICE										
S/NO	ItemDescription	Unit ofIssue	Quantity	UnitPrice (Kshs.) (Per Meter)						
				Award Range	B1	B9	B14	B19	B21	B24
	Grey Material 60" wide as per approved APS stock sample	Meter	AWR	695-900	-	-	-	-	520	-
	Jungle Green Material 60" wide as per approved APS stock sample	Meter	AWR	660-1,980	784	1,146	1,980	1,280	560	870
	Jungle Shirting Material (Angola) 60" wide as per approved APS stock sample	Meter	AWR	760-1,035	784	1,035	960	925	-	-
	Camouflage Material 60" wide as per approved APS stock sample	Meter	AWR	1,127-1,55	1,127	1,400	1,555	1,355	-	1,240
	Gabardine Material 60" wide as per approved APS stock sample	Meter	AWR	1,220-3,209	-	-	-	-	-	-
	Maroon Material 60" wide as per approved APS stock sample	Meter	AWR	713-850	713	-	-	-	-	-
	Checked Material 60'' Wide as per approved APS stock sample	Meter	AWR	660-910	831	-	-	-	419	910
	Multicam TDU camouflage 60" wide as per approved APS stock sample	Meter	AWR	1,080-1,650	1,650	-	-	-	810	-
	Jungle Green Lining Materials 60" wide as per approved APS stock sample	Meter	AWR	250-400	400	-	-	-	-	-
	Grey Lining Materials 60" wide as per approved APS stock sample	Meter	AWR	250-390	-	-	-	-	150	-

LOT 2: SUPPLY AND DELIVERY OF UNIFORM MATERIALS TO ADMINISTRATION POLICE SERVICE										
S/NO	Item Description	Unit of Issue	Quantity	Unit Price (Kshs.) (Per Meter)						
				Award Range	B28	B29	B30	B32	B33	B34
	Grey Material 60" wide as per approved APS stock sample	Meter	AWR	695-900	-	810	695	795	-	-
	Jungle Green Material 60" wide as per approved APS stock sample	Meter	AWR	660-1,980	990	784	665	800	630	-
	Jungle Shirting Material (Angola) 60" wide as per approved APS stock sample	Meter	AWR	760-1,035	904	713	760	750	578	772
	Camouflage Material 60" wide as per approved APS stock sample	Meter	AWR	1,127-1,55	1,378	1,128	-	1,200	902	892
	Gabardine Material 60" wide as per approved APS stock sample	Meter	AWR	1,220-3,209	-	3,209	1,220	1,465	1,610	1,976
	Maroon Material 60" wide as per approved APS stock sample	Meter	AWR	713-850	-	713	-	750	-	-
	Checked Material 60'' Wide as per approved APS stock sample	Meter	AWR	660-910	-	831	660	900	-	-
	Multicam TDU camouflage 60" wide as per approved APS stock sample	Meter	AWR	1,080-1,650	-	-	1,080	1,230	902	-
	Jungle Green Lining Materials 60" wide as per approved APS stock sample	Meter	AWR	250-400	-	362	250	370	-	-
	Grey Lining Materials 60" wide as per approved APS stock sample	Meter	AWR	250-390	-	362	250	370	-	-

LOT 2: SUPPLY AND DELIVERY OF UNIFORM MATERIALS TO ADMINISTRATION POLICE SERVICE				
S/NO	Item Description	Unit of	Quantity	Unit Price (KShs.) (Per Meter)

		Issue		Award Range	B35	B36	B37	B44	B46	B47
1	Grey Material 60" wide as per approved APS stock sample	Meter	AWR	695-900	850	-	-	-	-	900
2	Jungle Green Material 60" wide as per approved APS stock sample	Meter	AWR	660-1,980	810	-	-	850	-	790
3	Jungle Shirting Material (Angola) 60" wide as per approved APS stock sample	Meter	AWR	760-1,035	850	-	-	860	-	710
4	Camouflage Material 60" wide as per approved APS stock sample	Meter	AWR	1,127-1,55	1,190	-	-	1,200	-	1,300
5	Gabardine Material 60" wide as per approved APS stock sample	Meter	AWR	1,220-3,209	1,470	-	-	-	-	3,100
6	Maroon Material 60" wide as per approved APS stock sample	Meter	AWR	713-850	850	-	-	-	-	710
7	Checked Material 60'' Wide as per approved APS stock sample	Meter	AWR	660-910	850	-	-	-	-	825
8	Multicam TDU camouflage 60" wide as per approved APS stock sample	Meter	AWR	1,080-1,650	1,260	-	-	-	-	1,290
9	Jungle Green Lining Materials 60" wide as per approved APS stock sample	Meter	AWR	250-400	390	-	-	-	-	380
1	Grey Lining Materials 60" wide as per approved APS stock sample	Meter	AWR	250-390	390	-	-	-	-	380

LOT3: SUPPLY AND DELIVERY OF UNIFORM MATERIALS TO GENERAL SERVICE UNIT

S/NO	ItemDescription	Unit ofIssue	Quantity	UnitPrice (Kshs.) (Per Meter)							
				Award range	B1	B8	B9	B14	B19	B21	B24
	Olive Jungle Cloth Material 60" Wide	Meter	AWR	660-950	784	-	-	950	1,000	560	870
	Shirting O.R Cloth	Meter	AWR	760-	-	-	-	-	-	-	

	Material 60" Wide			1,980							
	Digital Camouflage Cloth Material 60" Wide	Meter	AWR	1,127-1,550	1,127	-	1,350	1,345	1,600	810	1,240
	Dress Ceremonial Cloth Material 60" Wide	Meter	AWR	1,220-2,090	-	-	-	-	-	-	-
	Shirting Officer Cloth Material 60" Wide	Meter	AWR	760-1,842	-	-	-	-	-	520	-
	Shirting Ceremonial Cloth Material 60"	Meter	AWR	760-1,052	-	-	-	-	-	-	-
	White Dust Coat Cloth Material 60" Wide	Meter	AWR	475-1,000	475	900	700	1,000	830	500	530
	Blue Dust Coat Cloth Material 60" Wide	Meter	AWR	475-1,000	475	900	700	1,000	830	600	530

LOT 3: SUPPLY AND DELIVERY OF UNIFORM MATERIALS TO GENERAL SERVICE UNIT

S/NO	Item Description	Unit of Issue	Quantity	Unit Price (Kshs.) (Per Meter)							
				Award Range	B28	B29	B30	B32	B33	B34	B35
	Olive Jungle Cloth Material 60" Wide	Meter	AWR	660-950	985	784	660	792	627	772	812
	Shirting O.R Cloth Material 60" Wide	Meter	AWR	760-1,980	-	1,939	865	950	871	801	990
	Digital Camouflage Cloth Material 60" Wide	Meter	AWR	1,127-1,550	1,450	1,128	-	1,160	902	1,096	1,135
	Dress Ceremonial Cloth Material 60" Wide	Meter	AWR	1,220-2,090	-	2,078	1,220	1,430		1,242	1,490
	Shirting Officer Cloth Material 60" Wide	Meter	AWR	760-1,842	-	1,842	875	950	792	876	990
	Shirting Ceremonial Cloth Material 60"	Meter	AWR	760-1,052	-	960	875	950		876	990
	White Dust Coat Cloth Material 60" Wide	Meter	AWR	475-1,000	650	475	660	470	395	520	500
	Blue Dust Coat Cloth Material 60" Wide	Meter	AWR	475-1,000	650	475	660	485	395	520	470

LOT 3: SUPPLY AND DELIVERY OF UNIFORM MATERIALS TO GENERAL SERVICE UNIT									
S/NO	Item Description	Unit of Issue	Quantity	Unit Price (Kshs.) (Per Meter)					
				Award Range	B37	B41	B44	B46	B47
	Olive Jungle Cloth Material 60" Wide	Meter	AWR	660-950	-	820	850	-	800
	Shirting O.R Cloth Material 60" Wide	Meter	AWR	760-1,980	830	1,151	800	830	1,980
	Digital Camouflage Cloth Material 60" Wide	Meter	AWR	1,127-1,550	-	1,186	1,000	-	1,150
	Dress Ceremonial Cloth Material 60" Wide	Meter	AWR	1,220-2,090	675	950	650	675	2,090
	Shirting Officer Cloth Material 60" Wide	Meter	AWR	760-1,842	860	876	850	860	1,830
	Shirting Ceremonial Cloth Material 60"	Meter	AWR	760-1,052	745	1,052	780	745	-
	White Dust Coat Cloth Material 60" Wide	Meter	AWR	475-1,000	500	802	520	-	490
	Blue Dust Coat Cloth Material 60" Wide	Meter	AWR	475-1,000	500	-	520	500	500

88. From the above Price Comparison Schedule, we note that the Evaluation Committee set out an award range with the intention of evaluating and disqualifying bids which did not fall within the set price range. We fault the Procuring Entity for having failed to avail the said price range in the Tender Document since bidders were left to their own devices in predicting the prevailing market rates while quoting for the various items in the subject tender. We also note that the Evaluation Committee in its price comparison failed to capture prices of some items quoted for by the Applicant herein such as (a) Items 9 and 10 under Lot 1; (b) Items 3,4,5, 6, and 9 under Lot 2; and (c) Items 2 under Lot 3.

89. We have perused the Applicant's tender and note that the Applicant quoted at pages 58 and 59 of its tender as follows:

"PRICE SCHEDULE FORMS FOR GOODS MANUFACTURED IN KENYA

TENDER NAME: Supply and Delivery of Uniform Materials to Kenya Police Service (KPS), Administration Police Service (APS), and General Service Unit (GSU)

TENDER NO. MINA/NPS/KPS/015/2023-2025

S/NO	*Item Description*	*Unit of Issue*	*Unit Price Per Meter (KShs.)*
1.	*Light Blue Cloth Material 60" wide as per approved KPS stock sample*	*Meter*	*520*
2.	*Dark Navy Blue Cloth Material 60" wide as per approved KPS stock sample*	*Meter*	*560*
3.	*Mid-Night Blue Cloth Material 60" wide as per approved KPS stock sample*	*Meter*	*600*
4.	*Olive Jungle Green Cloth Material 60" wide as per approved KPS stock sample*	*Meter*	*560*
5.	*Shirting OR Cloth Material 60" wide as per approved KPS stock sample*	*Meter*	*520*
6.	*Shirting Officers Cloth Material 60" wide as per approved KPS stock sample*	*Meter*	*520*
7.	*Digital Camouflage Cloth Material 60" wide as per approved KPS stock sample*	*Meter*	*810*
8.	*Bedford Cloth Material 60" wide as per approved KPS stock sample*	*Meter*	*600*
9.	*Red Gabardine Cloth Material 60" wide as per approved KPS stock sample*	*Meter*	*520*
10.	*Blue Gabardine Cloth Material 60" wide as per approved KPS stock sample*	*Meter*	*550*

S/NO	Item Description	Unit of Issue	Unit Price Per Meter (KShs.)
1.	Grey Material 60" wide as per approved APS stock sample	Meter	520
2.	Jungle Green Material 60" wide as per approved APS stock sample	Meter	560
3.	Jungle Shirting Material (Angola) 60" wide as per approved APS stock sample	Meter	520
4.	Camouflage Material 60" wide as per approved APS stock sample	Meter	810
5.	Gabardine Material 60" wide as per approved APS stock sample	Meter	520
6.	Maroon Material 60" wide as per approved APS stock sample	Meter	520
7.	Checked Material 60'' Wide as per approved APS stock sample	Meter	419
8.	Multicam TDU camouflage 60" wide as per approved APS stock sample	Meter	810
9.	Jungle Green Lining Materials 60" wide as per approved APS stock sample	Meter	150
10.	Grey Lining Materials 60" wide as per approved APS stock sample	Meter	150

S/NO	Item Description	Unit of Issue	Unit Price Per Meter (Kshs.)
1.	Olive Jungle Cloth Material 60" Wide	Meter	560
2.	Shirting O.R Cloth Material 60" Wide	Meter	520
3.	Digital Camouflage Cloth Material 60" Wide	Meter	810
4.	Dress Ceremonial Cloth Material 60" Wide	Meter	-
5.	Shirting Officer Cloth Material 60" Wide	Meter	520
6.	Shirting Ceremonial Cloth Material 60"	Meter	-
7.	White Dust Coat Cloth Material 60" Wide	Meter	500
8.	Blue Dust Coat Cloth Material 60" Wide	Meter	600

Notes

i ***The price quoted should be inclusive of all applicable taxes***

ii ***The rates shall apply for a period of two (2No.) years***

Name of tenderer: .....PROF. THOMAS KIPKURGAT.....

Signature of tenderer:.....(Signed).....

Date: .....25/05/2023.....

Official Stamp: (Stamped)"

90. It is not in contest that the Applicant was the lowest evaluated tenderer in the items quoted in its bid in the subject tender as seen from the price comparison indicated in the Evaluation Report. As such, all responsive tenderers at the Financial Evaluation Stage who were within the range determined by the Evaluation Committee were therefore required to proceed to the Negotiation stage and negotiate with the Procuring Entity in order for them to agree to match their prices with the Applicant's bid prices, being the lowest evaluated tender price.

91. We note that the Respondents submitted in the confidential documents Minutes for Negotiation Meeting for the subject tender held on 25th July 2023 with various responsive tenderers where tenderers were informed that the purpose of the negotiation meeting was to negotiate with the responsive bidder on price reduction, delivery schedule, quality of uniform materials, pre-delivery inspection and terms of payment.

92. According to the Respondents, and as captured in the *Minutes for Negotiation Meeting for Tender No. MINA/NPS/KPS/015/2023-2025 for Supply and Delivery of Uniform Materials to Kenya Police Service (KPS), Administration Police Service (APS) and General Service Unit (GSU) held on 25/07/2023 at Vigilance House Annex, First Floor Boardroom Between National Police Service and M/S Rivatex East Africa Ltd (Bidder 21) of P.O. BOX 4744-30100 Eldoret,* ("hereinafter referred to as the Negotiation Minutes") it was during the negotiation meeting that the Applicant declined the award price for items tendered for in the subject tender on the basis that it had underquoted since prices have since gone up and requested for 30% price increase for each item of its bid to which the Evaluation Committee rejected.

93. The Negotiation Minutes read in part as follows:

"*MINUTE/B21/1/2023: CHAIRMAN OPENING REMARKS*

The Chairman called the meeting to order at 10.00 a.m. and started by a word of prayer by Ms. Mercy Waigwa. The Chairman requested members and the bidder to do self-introduction. He informed the members the purpose for the meeting was to negotiate with the bidder on; Price reduction, Delivery schedule, Quality of Uniform Materials, Pre-delivery inspection and Terms of payment as per the agenda.

MINUTE/B21/2/2023: PRICE NEGOTIATION

The Chairman informed the members that the bidder had quoted the prices as per the schedule below and requested the bidder to consider reducing the price to match with the lowest evaluated price in the specific items as quoted in the tender documents as per the instructions in the tender data sheet. The negotiations for the items were discussed as below;

TABLE A: NEGOTIATED PRICE TABLE

LOT1: SUPPLY AND DELIVERY OF UNIFORM MATERIALS TO KENYA POLICE SERVICE				
ITEM	*Item Description*	*Unit*	*Quantity*	*Unit Price (Kshs.) (Per Meter)*

NO.		ofIssue		Lowest evaluated price (Kshs)	B21 Quoted Price (Kshs)	Negotiated price (Kshs)
	Light Blue Cloth Material 60" wide as per approved KPS stock sample	Meter	AWR	520	520	Declined
	Dark Navy Blue Cloth Material 60" wide as per approved KPS stock sample	Meter	AWR	560	560	Declined
	Mid-Night Blue Cloth Material 60" wide as per approved KPS stock sample	Meter	AWR	600	600	Declined
	Olive Jungle Green Cloth Material 60" wide as per approved KPS stock sample	Meter	AWR	560	560	Declined
	Shirting OR Cloth Material 60" wide as per approved KPS stock sample	Meter	AWR	520	520	Declined
	Shirting Officers Cloth Material 60" wide as per approved KPS stock sample	Meter	AWR	520	520	Declined
	Digital Camouflage Cloth Material 60" wide as per approved KPS stock sample	Meter	AWR	810	810	Declined
	Bedford Cloth Material 60" wide as per approved KPS stock sample	Meter	AWR	600	600	Declined

OBSERVATIONS:

After the deliberations the bidder/bidder's representatives declined the award price for items No. 1, 2, 3, 4, 5, 6, 7 & 8 citing that they underquoted and the prices have since gone up. They requested for a 30% price increase for each item of which the committee declined since in the Tender Document Instructions to Tenderer ITT 13.6 indicated that the prices quoted by the tenderer were to remain valid for 24 Months.

LOT2: SUPPLY AND DELIVERY OF UNIFORM MATERIALS TO ADMINISTRATION POLICE SERVICE						
ITEM NO.	*Item Description*	*Unit of Issue*	*Quantity*	*Unit Price (Kshs.) (Per Meter)*		
				Lowest evaluated price (Kshs)	*B21 Quoted Price (Kshs)*	*Negotiated price (Kshs)*
1.	*Grey Material 60" wide as per approved APS stock sample*	*Meter*	*AWR*	*520*	*520*	*Declined*
2.	*Jungle Green Material 60" wide as per approved APS stock sample*	*Meter*	*AWR*	*560*	*560*	*Declined*
7.	*Checked Material 60'' Wide as per approved APS stock sample*	*Meter*	*AWR*	*419*	*419*	*Declined*
8.	*Multicam TDU camouflage 60" wide as per approved APS stock sample*	*Meter*	*AWR*	*810*	*810*	*Declined*
10.	*Grey Lining Materials 60" wide as per approved APS stock sample*	*Meter*	*AWR*	*150*	*150*	*Declined*

OBSERVATIONS:

After the deliberations the bidder/bidder's representatives declined the award price for items No. 1, 2, 7, 8 & 10 citing they underquoted and the prices have since gone up. They requested for a 30% price increase for each item of which the committee declined since in the Tender Document Instructions to Tenderer ITT 13.6 indicated that the prices quoted by the tenderer were to remain valid for 24 Months."

94. In our considered view, the Evaluation Committee had every right to reject the request by the Applicant for a 30% increase for each item quoted in the subject tender in view of the fact that (a) all other responsive tenderers at the Financial Evaluation stage and the Negotiation stage were required to match their prices with the Applicant's price being the lowest evaluated tender price as provided

for in the Tender Document, (b) the purpose of negotiation as provided for under the Tender Document was for bidders to match their prices with the lowest evaluated bidder, and (c) the aim of the Negotiation stage as provided in the Tender Document was for the responsive tenderers to reduce their bid prices to match the lowest evaluated tender price and not to increase their submitted bid price.

95. Subsequently, the fact that the Applicant requested for an increment of its submitted bid price under the subject tender, which request was declined at the negotiation meeting, does not change the fact that it was still the lowest evaluated tenderer in the subject tender. The Evaluation Committee was therefore under an obligation to proceed with its negotiations held on 25th July 2023 with all other responsive tenderers with the aim of having the said bidders match their bid prices with the Applicant's price and to disqualify any bidder who did not agree to match its bid price with the Applicant's bid price in the subject tender.

96. There is no doubt that the purpose of the negotiation stage as provided for in the Tender Document was for other responsive tenders other than the lowest evaluated tenderer, to negotiate with the Evaluation Committee with the aim of lowering their bid prices to match the lowest evaluated tenderer.

97. In the circumstances, the Board finds that the Procuring Entity **failed to comply** with the requirements of the Tender Document, the Act and the Constitution in evaluating the Applicant's tender and other tenders rendered responsive at the Financial Evaluating stage and in awarding the subject tender.

What orders should the Board grant in the circumstances?

98. We have established that the letter of Notification dated 17th October 2023 issued to the Applicant failed to meet the threshold required in Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020. We therefore find it just and fair to nullify the letters of Notification dated 17th October 2023 issued to all successful and unsuccessful tenderers in the subject tender.

99. We have found that the Procuring Entity failed to comply with the requirements of the Tender Document, the Act and the Constitution in evaluating the Applicant's tender and other tenders rendered responsive at the Financial Evaluating stage and in awarding the subject tender.

100. Accordingly, we deem it fit and just to order the 1st Respondent to direct the Evaluation Committee to re-instate the Applicant's tender back into the procurement process and to conduct a re-evaluation of all responsive tenders at the Financial Evaluation Stage in accordance with provisions of the Tender Document noting to comply with ITT

33.2(d) of Section II- Tender Data Sheet (TDS) of the Tender Document and taking into consideration the findings of the Board in this decision, the provisions of the Act, the Constitution and the Tender Document.

101. In totality, the instant Request for Review succeeds with respect to the following specific orders:

FINAL ORDERS

102. 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 7th November 2023 and filed on even date:

A. The letters of notification of award dated 17th October 2023 issued by the 1st Respondent with respect to Tender No. MINA/NPS/KPS/015/2023-2025 for Supply and Delivery of Uniform Materials to Kenya Police Service (KPS), Administration Police Service (APS) and General Service Unit (GSU) from Local Textile Manufacturers and Authorised Agents Only and addressed to the successful tenderers, be and are hereby nullified and set aside.

B. The letters of notification dated 17th October 2023 issued by the 1st Respondent with respect to Tender No. MINA/NPS/KPS/015/2023-2025 for Supply and Delivery of Uniform Materials to Kenya Police Service (KPS), Administration Police Service (APS) and General Service Unit (GSU) from Local Textile Manufacturers and Authorised Agents Only addressed to all the unsuccessful tenderers including the Applicant, be and are hereby nullified and set aside.

C. The 1st Respondent is hereby ordered to reconvene and direct the Evaluation Committee to re-admit the Applicant's tender at the Financial Evaluation stage and re-evaluate the Applicant's tender together with all tenders that made it to the Financial Evaluation stage taking into consideration the findings of the Board in this Request for Review, the provisions of the Tender Document, the Act and the Constitution within 14 days of the date of this decision.

D. Further to Order No. 3 above, the Respondents are hereby ordered to ensure the procurement proceedings of Tender No. MINA/NPS/KPS/015/2023-2025 for Supply and Delivery of Uniform Materials to Kenya Police Service (KPS), Administration Police Service (APS) and General Service Unit

(GSU) from Local Textile Manufacturers and Authorised Agents Only proceed to its lawful and logical conclusion taking into account the Boards findings herein.

E. Given that the procurement process for the subject tender is not complete each party shall bear its own costs in the Request for Review.

Dated at NAIROBI this 28th Day of November 2023.

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CHAIRPERSON	**SECRETARY**
PPARB	**PPARB**