

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 16/2024 OF 4<sup>TH</sup> MARCH 2024**

**BETWEEN**

**TOTAL SECURITY SURVEILLANCE LIMITED.....APPLICANT**

**AND**

**THE ACCOUNTING OFFICER**

**KENYA POWER & LIGHTING CO. PLC.....1<sup>ST</sup>RESPONDENT**

**KENYA POWER & LIGHTING CO. PLC.....2<sup>ND</sup>RESPONDENT**

**BOB MORGAN SERVICES LIMITED.....1<sup>ST</sup> INTERESTED PARTY**

**HATARI SECURITY GUARDS LIMITED.....2<sup>ND</sup> INTERESTED PARTY**

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

**RILEY FALCON SECURITY**

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

**BASEIN SECURITY SERVICES LIMITED.....5<sup>TH</sup> INTERESTED PARTY**

**ROSE GUARDS SERVICES LIMITED.....6<sup>TH</sup> INTERESTED PARTY**

**MOCAM SECURITY SERVICES LIMITED.....7<sup>TH</sup> INTERESTED PARTY**

**PRIDE KINGS LIMITED.....8<sup>TH</sup> INTERESTED PARTY**

**PROTECTIVE CUSTODITY LIMITED.....9<sup>TH</sup> INTERESTED PARTY**

**SOLVIT SECURITY LIMITED.....10<sup>TH</sup>INTERESTED PARTY**

**SPYEAGLE SECURITY LIMITED.....11<sup>TH</sup> INTERESTED PARTY**

**VICKERS SECURITY SERVICES LIMITED.....12<sup>TH</sup> INTERESTED PARTY**

**BABS SECURITY SERVICES LIMITED.....13<sup>TH</sup> INTERESTED PARTY**

**DELTA GUARDS LIMITED.....14<sup>TH</sup> INTERESTED PARTY**

**GYTO SUCCESS COMPANY LIMITED.....15<sup>TH</sup> INTERESTED PARTY**

**ISMAX SECURITY LIMITED.....16<sup>TH</sup> INTERESTED PARTY**

**HOUNSLOW SECURITY LIMITED.....17<sup>TH</sup> INTERESTED PARTY**  
**SUPERIOR SECURITY LIMITED.....18<sup>TH</sup> INTERESTED PARTY**  
**KLEEN HOME SECURITY LIMITED.....19<sup>TH</sup> INTERESTED PARTY**

Review against the decision of the Accounting Officer, Kenya Power and Lighting Company Plc in relation to Tender No. KPI/9A.2/OT/043/SS/23-24 for Provision of Guarding Services Companywide.

**BOARD MEMBERS PRESENT**

1. Mr. Joshua Kiptoo - Panel Chairperson
2. Ms. Alice Oeri - Member
3. Ms. Jessica M'mbetsa - Member

**IN ATTENDANCE**

- Mr. James Kilaka - Ag. Board Secretary
- Mr. Philemon Kiprop - Secretariat
- Mr. Anthony Simiyu -Secretariat

**PRESENT BY INVITATION**

**APPLICANT**

**TOTAL SECURITY SURVEILLANCE LIMITED**

Mr. Kimutai Rotich -Advocate, Nyaanga & Mugisha Advocates

**RESPONDENTS**

**ACCOUNTING OFFICER, KENYA POWER &  
LIGHTING COMPANY PLC**

Ms. Ann Mulela

-Advocate, Kenya Power and Lighting Company  
Plc

**INTERESTED PARTIES**

**BOB MORGAN SERVICES LIMITED**  
**HATARI SECURITY GUARDS LIMITED**  
**LAVINGTON SECURITY LIMITED**  
**RILEY FALCON SECURITY SERVICES LTD**  
**BASEIN SECURITY SERVICES LIMITED**  
**ROSE GUARDS SERVICES LIMITED**  
**MOCAM SECURITY SERVICES LIMITED**  
**PRIDE KINGS LIMITED**  
**PROTECTIVE CUSTODITY LIMITED**  
**SOLVIT SECURITY LIMITED**  
**SPYEAGLE SECURITY LIMITED**  
**VICKERS SECURITY SERVICES LIMITED**  
**BABS SECURITY SERVICES LIMITED**  
**DELTA GUARDS LIMITED**  
**GYTO SUCCESS COMPANY LIMITED**  
**ISMAX SECURITY LIMITED**  
**HOUNSLOW SECURITY LIMITED**  
**SUPERIOR SECURITY LIMITED**  
**KLEEN HOME SECURITY LIMITED**

Mr. Ratemo

Advocate, ROM Law Advocates

**HARPCON SECURITY SERVICES LIMITED**

Mr Paul Muchiri

MM & Mabeya Advocates

**BACKGROUND OF THE DECISION**

## **The Tendering Process**

1. Kenya Power and Lighting Company Plc, the Procuring Entity together with the 1<sup>st</sup> Respondent herein, invited submission of electronic tenders in response to Tender No KPI/9A.2/OT/043/SS/23-24 for Provision of Guarding Services Companywide using an open tender method. The subject tender's submission deadline was Thursday, 4<sup>th</sup> January 2024 at 10:00 a.m.

## **Addenda**

2. The Procuring Entity issued multiple Addenda offering various clarifications in respect of the subject tender and also extending the tender submission deadline to 11<sup>th</sup> January 2024 at 10:00 a.m.

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

3. According to the signed Tender Opening Minutes for 16<sup>th</sup> January 2024, submitted under the Confidential File submitted by the Procuring Entity, the following 65 tenderers were recorded as having submitted their respective tenders in response to the subject tender by the tender submission deadline:

<b>No.</b>	<b>Name of Tenderer</b>
<b>1.</b>	<b>Access Security Services</b>
<b>2.</b>	<b>SGA Kenya Limited</b>
<b>3.</b>	<b>Anchor Security Services Limited</b>
<b>4.</b>	<b>Babs Security Services Limited</b>
<b>5.</b>	<b>Basein Security Services Limited</b>
<b>6.</b>	<b>Syosset Limited</b>
<b>7.</b>	<b>Bedrock Security Services Limited</b>
<b>8.</b>	<b>Bob Morgan Services Limited</b>
<b>9.</b>	<b>Brinks Security Services Limited</b>
<b>10.</b>	<b>Chakra Company Limited</b>

<b>11.</b>	<b>Delta Guards Limited</b>
<b>12.</b>	<b>Flashcom Security Limited</b>
<b>13.</b>	<b>G4S Security Services Kenya Limited</b>
<b>14.</b>	<b>Farsight Security Services Limited</b>
<b>15.</b>	<b>Gyto Success Company Limited</b>
<b>16.</b>	<b>Harpcn Security Services Limited</b>
<b>17.</b>	<b>Hatari Security Guards Limited</b>
<b>18.</b>	<b>Hounslow Security Limited</b>
<b>19.</b>	<b>Inter Security Services Limited</b>
<b>20.</b>	<b>Inter City Secure Homes Limited</b>
<b>21.</b>	<b>Ismax Security Limited</b>
<b>22.</b>	<b>Superior Security Limited</b>
<b>23.</b>	<b>Bulls Security Services Limited</b>
<b>24.</b>	<b>Catch Security Links Limited</b>
<b>25.</b>	<b>Kleen Homes Security Services Limited</b>
<b>26.</b>	<b>Gate Armour Security Services Limited</b>
<b>27.</b>	<b>Lavinggton Security Limited</b>
<b>28.</b>	<b>Rose Guards Services Limited</b>
<b>29.</b>	<b>Mocam Security Services Limited</b>
<b>30.</b>	<b>Cotec Security Group Limited</b>
<b>31.</b>	<b>Pivotstar Security Limited</b>
<b>32.</b>	<b>Pride Kings Services Limited</b>
<b>33.</b>	<b>Protective Custody Limited</b>
<b>34.</b>	<b>Race Guards Limited</b>
<b>35.</b>	<b>Canon Security Services Kenya Limited</b>
<b>36.</b>	<b>Riley Falcon Security Services Limited</b>
<b>37.</b>	<b>M4 Security Limited</b>
<b>38.</b>	<b>Santos Security Limited</b>
<b>39.</b>	<b>Solvit Security Solutions Limited</b>
<b>40.</b>	<b>Spyeagle Security Services Limited</b>
<b>41.</b>	<b>Pada Security and Alarm Systems</b>
<b>42.</b>	<b>Sumich Solutions Limited</b>
<b>43.</b>	<b>Tafada Security Services Limited</b>
<b>44.</b>	<b>Total Security Surveillance Limited</b>
<b>45.</b>	<b>Vickers Security Services Limited</b>
<b>46.</b>	<b>Vigilmax Security Services Limited</b>
<b>47.</b>	<b>Winguard Services Limited</b>
<b>48.</b>	<b>Protecht Security Services Limited</b>
<b>49.</b>	<b>Hewson Company Limited</b>
<b>50.</b>	<b>Superior Hands Security Limited</b>

<b>51.</b>	<b>Coalition Security Services Limited</b>
<b>52.</b>	<b>Diamond Trail Security Protection</b>
<b>53.</b>	<b>Taayo Security Limited</b>
<b>54.</b>	<b>Armytex International Security Service</b>
<b>55.</b>	<b>Kags Security Services Limited</b>
<b>56.</b>	<b>Dita Assured Security Company Limited</b>
<b>57.</b>	<b>Blueline Kennels Limited</b>
<b>58.</b>	<b>Rova Security Services Limited</b>
<b>59.</b>	<b>Skyfall Security Limited</b>
<b>60.</b>	<b>Action Rift Security Limited</b>
<b>61.</b>	<b>Papaton Security Services</b>
<b>62.</b>	<b>Silent Eye Securities Limited</b>
<b>63.</b>	<b>Joytime Security Company Limited</b>
<b>64.</b>	<b>Hava Security Group Limited</b>

### **Evaluation of Tenders**

4. The 1<sup>st</sup> Respondent constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") which was to undertake an evaluation of the received tenders in the following 3 stages as captured in the Tender Document
- i. Preliminary Evaluation
  - ii. Technical Evaluation
  - iii. Financial Evaluation

### **Preliminary Evaluation Stage**

5. At this stage of the evaluation, the submitted tenders were to be examined using the criteria set out as Preliminary examination-Determination of Responsiveness under Section III – EVALUATION AND QUALIFICATION CRITERIA on pages 40 to 42 of the Tender Document.

6. The evaluation was to be on a Yes/No basis and tenderers who failed to meet any criterion outlined at this Stage would be disqualified from further evaluation.
7. At the end of evaluation at this stage 34 tenders were found unresponsive with only 30 tenders qualifying for evaluation at the Technical Evaluation Stage.

### **Technical Evaluation Stage**

8. The Evaluation Committee was required at this stage to examine tenderers successful at the Preliminary Stage using the criteria set out as 3.2 Part 2- Technical Evaluation and Comparison of under Section III – EVALUATION AND QUALIFICATION CRITERIA on pages 42 to 45 of the Tender Document.
9. Evaluation at this Stage was to be carried out in two stages i.e. Preliminary Technical Evaluation and Technical Evaluation. Under Preliminary Technical Evaluation tenders were required to meet all the tender requirements at that stage before proceeding to the Technical Evaluation. At the Technical Evaluation stage, tenderers were to be evaluated on the basis of whether they had tendered for Class A or Class B assignments. For Class A Tenderers, tenderers had to garner 90 marks to qualify for further evaluation at the Financial Stage. However, for Class B Tenderers, they had to garner 80 marks to qualify for further evaluation at the Financial Stage.
10. At the end of the evaluation at this stage, the outcome was as follows:

- i. Under Class A assignments, 4 tenders were found responsive to the requirements at the Technical Evaluation Stage and thus qualified for further evaluation at the Financial Evaluation Stage.
- ii. Under Class B assignments, 15 tenderers were found responsive to the requirements at the Technical Evaluation Stage and thus qualified for further evaluation at the Financial Evaluation Stage.

### **Financial Evaluation Stage**

11. At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the Criteria set out as 3.3 Part III- Financial Evaluation Criteria under Section III– EVALUATION AND QUALIFICATION CRITERIA on page 45 of the Tender Document.
12. Tenders were to be examined by price comparison per class per zone and the prices were found favorable and within the acceptable market rates.
13. At the end of evaluation at this stage, the Evaluation Committee found all tenders evaluated at this stage to be responsive.

### **Due Diligence**

14. The Evaluation Report records that due diligence was conducted on the tenderers to ascertain their membership to professional security bodies, validity of submitted insurance policies and confirmation of the availability of key personnel and presence of office.

### **Evaluation Committee's Recommendation**

15. Accordingly, the Evaluation Committee recommended the award of the subject tender to the 1<sup>st</sup> to 19<sup>th</sup> Interested Parties at a total cost of **Kenya Shillings Eight Hundred and Ninety-Eight Million, Nine Hundred and Thirty-Four Thousand Eight Hundred and Forty-One (Kshs. 898,934,841.60)** per annum VAT exclusive for two years.

### **Professional Opinion**

16. In a signed Professional Opinion dated 12<sup>th</sup> February 2024 (hereinafter referred to as the "Professional Opinion"), the Procuring Entity's General Manager, Supply Chain & Logistics, Dr. John Ngeno reviewed the manner in which the subject procurement process was undertaken including the evaluation of tenders and agreed with the Evaluation Committee's recommendation under each of the Lots.
17. Thereafter on 16<sup>th</sup> February 2024, the Accounting Officer expressed his concurrence with the Professional Opinion.

### **Notification to Tenderers**

18. Accordingly, tenderers were notified of the outcome of the evaluation of the tenders in the subject tender vide letters dated 19<sup>th</sup> February 2024.

### **REQUEST FOR REVIEW**

19. On 4<sup>th</sup> March 2024, the Applicant through the firm of Nyaanga & Mugisha Advocates, filed a Request for Review dated 1<sup>st</sup> March 2024 supported by an Affidavit sworn on 1<sup>st</sup> March 2024 by Daniel Kipkorir, the Applicant's

General Manager, seeking the following orders from the Board in verbatim:

- 1. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents' decision contained in the letter of notification dated 19<sup>th</sup> February 2024 and received on 26<sup>th</sup> February 2024 disqualifying the Applicant's bid in relation to the tender for Provision of Guarding Services Companywide- Tender No. KPI/9A.2/OT/043/SS/23-24 be and is hereby nullified, cancelled and/or set aside;***
  - 2. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents' decision contained in the Letter of Notification dated 19<sup>th</sup> February 2024 and received on 26<sup>th</sup> February 2024 awarding the tender for Provision of Guarding Services Companywide- Tender No. KPI/9A.2/OT/043/SS/23-24 to the 1<sup>st</sup> to 19<sup>th</sup> Interested Parties herein be and is hereby nullified, cancelled and/or set aside.***
  - 3. An order be and is hereby issued directing the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to re-evaluate the Applicant's bid in relation to the tender for Provision of Guarding Services Companywide- Tender No. KPI/9A.2/OT/043/SS/23-24 and to award the tender to the lowest evaluated bidder as provided for in the tender document;***
  - 4. The Respondent be and is hereby ordered to pay the costs of and incidental to these proceedings; and***
  - 5. Such other or further relief or reliefs as this Board shall deem just and expedient.***
20. In a Notification of Appeal and a letter dated 4<sup>th</sup> March 2024, Mr. James Kilaka, the Acting Board Secretary of the Board notified the Respondents

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 24<sup>th</sup> March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondent was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 4<sup>th</sup> March 2024.

21. On 8<sup>th</sup> March 2024, the Respondents through Ann Mulela-Advocate filed a Notice of Appointment and a Memorandum of Response, both dated 8<sup>th</sup> March 2024. The Respondents also forwarded to the Board the confidential documents in the subject tender pursuant to Section 67(3)(e) of the Act.
22. Vide letters dated 11<sup>th</sup> March 2024, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the subject Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within 3 days from 11<sup>th</sup> March 2024.
23. On 12<sup>th</sup> March 2024, the Acting Board Secretary, sent out to the parties a Hearing Notice dated 12<sup>th</sup> March 2024 notifying parties and all tenderers in the subject tender that the hearing of the instant Request for Review would be by online hearing on 14<sup>th</sup> March 2024 at 2:40 p.m. through the link availed in the said Hearing Notice.

24. On 13<sup>th</sup> March 2024 the Applicant filed a Reply dated 12<sup>th</sup> March 2024 to the Respondents' Memorandum of Response and Written Submissions dated 13<sup>th</sup> March 2024.
25. On the same day, 13<sup>th</sup> March 2024, Harpcon Security Services Limited through the law firm of MM & Mabeya Advocates filed a Notice of Motion Application dated 13<sup>th</sup> March 2024.
26. On 14<sup>th</sup> March 2024, the the parties through their respective Advocates joined the scheduled online hearing session.
27. The Board read out to the parties the documents that had been filed in the Request for Review and sought for each party to confirm that each of the said documents had been served upon them. Parties' Advocates confirmed having filed and been served with each of the documents in the Request for Review.
28. However, before directions could be taken, Counsel for the Respondents, Ms. Mulela sought the recusal of Counsel for the Applicant, Mr. Rotich from acting for the Applicant. Counsel cited that Mr. Rotich's firm i.e. Nyaanga & Mugisha Advocates were on the 2<sup>nd</sup> Respondent's panel of external lawyers and thus were conflicted in representing the Applicant in the present Request for Review.
29. Counsel for the Applicant, Mr. Rotich opposed the recusal application indicating that the firm of Nyaanga & Mugisha stopped acting as the 2<sup>nd</sup> Respondent's external lawyers in 2020 and that all files in which they previously represented the 2<sup>nd</sup> Respondent were recalled with the exception of 2 employment claims that were pending judgment. Mr.

Rotich further highlighted that the firm of Nyaanga & Mugisha Advocates had not advised the 2<sup>nd</sup> Respondent on any procurement matter least of all the instant procurement proceedings and thus were not conflicted.

30. Counsel for Harpcon Security Services Limited, Mr. Muchiri, equally brought it to the attention of the Board Harpcon Security Services Limited had filed the Notice of Motion Application dated 13<sup>th</sup> March 2024 seeking to be made an Applicant or in the alternative an Interested Party in the present proceedings.
31. The Board retreated to consider 2 applications before it and returned with the following directions:
  - i. The Respondents' application for the recusal of Mr. Rotich in the matter was dismissed as there was no conflict in his representing the Applicant. There was no correlation between the employment matters the Applicant's Counsel's firm of Advocates was handling and the instant Request for Review.
  - ii. Harpcon Security Services Limited's application for joinder in the Request for Review as an Applicant was dismissed as they were outside the 14 days' statutory timeline to file a Request for Review. However, they were allowed to participate in the Request for Review as an Interested Party by virtue of their participation in the subject tender as tenderers.
32. The Board then gave hearing directions on the order of address being that the Applicant would go first, thereafter the Respondents and Interested Parties would offer submissions in response with the Applicant closing with a rejoinder on the Respondents' and Interested Parties' submissions.

## **PARTIES SUBMISSIONS**

### **Applicant's Submissions**

33. Counsel for the Applicant, Mr. Rotich, indicated that the Applicant would be relying on its filed documents i.e. the Request for Review dated 1<sup>st</sup> March 2024, Response to the Respondents' Memorandum of Response dated 12<sup>th</sup> March 2024 and Written Submissions and dated 13<sup>th</sup> March 2024.
34. Counsel argued that the Request for Review was challenging the decision contained in the Notification of intention to award the subject tender disqualifying the Applicant citing that the information in its Confidential Business Questionnaire did not conform to that in its CR-12.
35. Mr. Rotich argued that the disqualification of the Applicant was devoid of merit and could not be sustained. He argued that the Applicant provided a CR12 which showed that it had a share capital of 10 Million and that it had 2 directors who held 29% and 41 shares respectively but its 3<sup>rd</sup> shareholder was not a director in the company and thus his details were not required to be furnished in the Confidential Business Questionnaire.
36. Counsel argued that the Confidential Business Questionnaire required tenderers to provide details of the director's shareholding and not the entire shareholding of the tenderers.
37. It was the Applicant's position that if the Procuring Entity wanted tenderers to provide for their entire shareholding nothing would have been easier than to state as such in the Tender Document. Mr. Rotich therefore summed up that the Respondents disqualification of the

Applicant from the subject tender was in breach of the Act and thus the Request for Review was merited.

### **Respondents' Submissions**

38. Counsel for the Respondents, Ms. Mulela, indicated that the Respondents would be placing reliance on their filed documents i.e. the Memorandum of Response and the confidential documents submitted under section 67 of the Act.
39. Ms. Mulela argued that the Respondents conducted the subject procurement process in a fair and transparent manner giving an equal opportunity to all the participating tenderers. According to Counsel, the Applicant failed to demonstrate that they were unfairly disqualified from the subject tender.
40. She argued that under clause 3 of the Tender Document, tenderers were to provide details on both their directors and shareholders. It was argued that the details on the Confidential Business Questionnaire were to include details on both directors and shareholders as contained in the CR12.
41. Counsel indicated that the Applicant's tender was not compliant as it only gave details on its directors while omitting one of its shareholders. According to Counsel, if the Applicant was to be found responsive despite this omission, this would be unfair to the rest of the tenderers who had submitted compliant tenders.
42. Accordingly, Counsel urged the Board to dismiss the instant Request for Review.

### **1<sup>st</sup> to 19<sup>th</sup> Interested Parties' Submissions**

43. Counsel for the 1<sup>st</sup> to 19<sup>th</sup> Interested Parties, Mr. Ratemo, associated himself with the submissions made on behalf of the Respondents. He also indicated that the 1<sup>st</sup> to 19<sup>th</sup> Interested Parties were also relying on their filed Response to the Request for Review.
44. Mr. Ratemo pressed the argument that Clause 3 contained a mandatory requirement that the Confidential Business Questionnaire should contain details that correspond to the information in the CR12 and that the Interested Parties were compliant on this requirement. He argued that the tender proceedings were regularly conducted in compliance with the Act and Regulations 2020.
45. Counsel pointed out that there was no room for the Procuring Entity to exercise discretion to waive the Applicant's non-compliance with the mandatory requirement as Section 79 of the Act provides that responsive tenders are those that conform to requirements under the Tender Document.
46. Counsel contended that it was a general rule that a Procuring Entity should only consider conforming and compliant tenders. Further, that it would be unfair if non-compliant tenders were equally allowed to pass as qualified tenders.
47. He summed up that there was no evidence that the subject procurement proceedings were tainted with procedural impropriety and thus the Request for Review was for dismissal.

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

48. Counsel for the 20<sup>th</sup> Interested Party, Mr. Muchiri, associated himself with the submissions made on behalf of the Applicant. He equally added that the Tender Document was unclear on how a tenderer was to fill its tender where its preference did not fit any of the preferences provided for under the Tender Document
49. He maintained that the tender process was not competitive and equally not compliant with the Act. He therefore sought that the Request for Review be allowed.

### **Applicant's Rejoinder**

50. In a brief rejoinder, Counsel for the Applicant, Mr. Rotich, reiterated that the information to be included in the Confidential Business Questionnaire was for the shareholding of the directors and that this is exactly what the Applicant provided.
51. He equally maintained that the Applicant was not seeking to be excused for deviation from any non-compliance in respect of its tender. According to the Applicant, its tender complied with the requirements under the Tender Document.

### **CLARIFICATIONS**

52. The Board inquired from the Applicant on why it was seeking as part of its reliefs the re-evaluation of its tender when it maintained that it was compliant. Counsel for the Applicant, Mr. Rotich indicated that the Board

cannot award the subject tender to a compliant tenderer but can only make an order for re-evaluation.

53. The Board equally wanted clarity from the Respondents and 20<sup>th</sup> Interested Party on whether there was any clarification that was sought by the 20<sup>th</sup> Interested Party on any of the tender provisions. Counsel for the Respondents, Ms. Mulela pointed out that though the Tender Document made room for seeking clarifications, the 20<sup>th</sup> Interested Party never sought any such clarification. Counsel for the 20<sup>th</sup> Interested Party, Mr. Muchiri, equally admitted that the Interested Party did not seek any clarification.
54. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 1<sup>st</sup> March 2024 had to be determined by 25<sup>th</sup> March 2024. Therefore, the Board would communicate its decision on or before 25<sup>th</sup> March 2024 to all parties via email.

### **BOARD'S DECISION**

55. The Board has considered all documents, oral submissions and pleadings 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 Respondents properly disqualified the Applicant from the subject tender ?***
  - II. ***What orders should the Board issue in the circumstance?***

## **Whether the Respondents properly disqualified the Applicant from the subject tender?**

56. The Applicant brought the instant Request for Review taking issue with the Respondents' disqualifying it from the subject tender on account of what was stated that the information supplied on the Confidential Business Questionnaire did not conform to that in its CR12 supplied as part of its tender. Counsel for the Applicant, Mr. Rotich argued that the Applicant provided a CR12 which showed that it had 3 shareholders out of which only 2 of them were directors and that the Applicant supplied its directors' details in the Confidential Business Questionnaire.
57. Counsel argued that the Confidential Business Questionnaire required tenderers to provide details of the director's shareholding and not the entire shareholding of the tenderers. Accordingly, the Applicant took the view that its tender was irregularly disqualified.
58. Counsel for the 20<sup>th</sup> Interested Party, Mr. Muchiri, equally indicated that the Tender Document had portions of it that were unclear on what a tenderer would do in respect of its options where none of the options was applicable.
59. On the flip side, Counsel for the Respondents, Ms. Mulela, argued that the Respondents conducted the subject procurement process in a fair and transparent manner giving an equal opportunity to all the participating tenderers. According to Counsel, the Applicant failed to demonstrate that they were unfairly disqualified from the subject tender.

60. She argued that under clause 3 of the Tender Document, tenderers were to provide details on both their directors and shareholders. It was argued that the details on the Confidential Business Questionnaire were to include details on both directors and shareholders as contained in the CR12.
61. Counsel indicated that the Applicant's tender was not compliant as it only gave details on its directors while omitting one of its shareholders. According to Counsel, if the Applicant was to be found responsive despite this omission, this would be unfair to the rest of the tenderers who had submitted compliant tenders.
62. Equally, Counsel for the 1<sup>st</sup> to 19<sup>th</sup> Interested Parties, Mr. Ratemo, argued that Clause 3 contained a mandatory requirement that the Confidential Business Questionnaire should contain details that correspond to the information in the CR12 and that the Interested Parties were compliant on this requirement. He argued that the tender proceedings were regularly conducted in compliance with the Act and Regulations 2020.
63. Counsel pointed out that there was no room for the Procuring Entity to exercise discretion to waive the Applicant's non-compliance with the mandatory requirement as Section 79 of the Act provides that responsive tenders are those that conform to requirements under the Tender Document. He maintained that it would be unfair if the Applicant's non-compliant tender was allowed to pass as a qualified tender.
64. The Board is therefore at this stage invited to interrogate the Procuring Entity's Evaluation Committee's process that culminated in the disqualification of the Applicant's tender .

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

***"80. Evaluation of tenders***

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

***(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered."***

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

***"79. Responsiveness of tenders***

***(1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents.***

***(2) A responsive tender shall not be affected by—***

***a) minor deviations that do not materially depart from the requirements set out in the tender documents; or***

***b) errors or oversights that can be corrected without affecting the substance of the tender.***

***(3) A deviation described in subsection (2)(a) shall—***

***a) be quantified to the extent possible; and***

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

67. 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 – 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."**

See also ***Nairobi High Court Judicial Review Misc. Application No. 407 of 2018; Republic v Public Procurement Administrative Review Board; Arid Contractors & General Supplies (Interested***

***Party) Ex parte Meru University of Science & Technology [2019] eKLR.***

68. 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.
69. Turning to the Tender Document, Clause 3.1.5 of the Document provides as follows:

***Preliminary examination for Determination of Responsiveness- KPLC will start by examining all tenders to ensure they meet in all respects the eligibility criteria and other mandatory requirements in the ITT, and that the tender is complete in all aspects in meeting the requirements provided for in the preliminary evaluation criteria outlined below. The Standard Tender Evaluation Report Document for Goods and Works for evaluating Tenders provides very clear guide on how to deal with review of these requirements. Tenders that do not pass the Preliminary Examination will be considered non- responsive and will not be considered further.***

***3.1 Part 1 - Preliminary Evaluation under Paragraph 34.1 of the ITT. These are mandatory requirements. They shall include confirmation of the following: -***

**3.1.5 Submission and considering the Confidential Business Questionnaire: -**

**a) Is fully filled.**

**b) That details correspond to the related information in the bid.**

**c) That the Tenderer is not ineligible as per ITT 3.**

70. The Form of the Confidential Business Questionnaire is contained at pages 53 to 56 of the Tender Document:

**TENDERER'S ELIGIBILITY - CONFIDENTIAL BUSINESS QUESTIONNAIRE**

**a) Instructions to Tenderer**

**Tenderer is instructed to complete the particulars required in this Form, one form for each entity if Tenderer is a JV. Tenderer is further reminded that it is an offence to give false information on this Form. Tenderer's details**

	<b>ITEM</b>	<b>DESCRIPTION</b>
<b>1</b>	<b>Name of the Procuring Entity</b>	<b>KPLC</b>
<b>2</b>	<b>Name of Tenderer</b>	
<b>3</b>	<b>Full Address and Contact Details of the Tenderer</b>	<b>1.Country</b> ..... <b>2.City</b> ..... <b>3.Postal Address</b> .....

		<b>4.Email</b> ..... <b>5.Physical Location</b> ..... <b>Plot</b> <b>no.....</b> <b>Building</b> & <b>Floor.....</b> <b>6. Name and email of contact person</b> .....
<b>4</b>	<b>Reference Number of the Tender</b>	
<b>5</b>	<b>Maximum value of Business which the tenderer handles</b>	
<b>6</b>	<b>Bank &amp; Branch</b>	

**General and Specific Details**

**b) Sole Proprietor, provide the following details.**

**Name in full** \_\_\_\_\_ **Age** \_\_\_\_\_  
**Nationality** \_\_\_\_\_ **Country of Origin** \_\_\_\_\_  
**Citizenship** \_\_\_\_\_ **ID No. of Authorized Representative**

**c) Partnership, provide the following details.**

	<b>Name of Partners</b>	<b>Nationality</b>	<b>Citizenship</b>	<b>% Shares Owned</b>
<b>1</b>				

2				
3				

**d) Registered Company, provide the following details.**

**i) Private or public Company**

**ii) State the nominal and issued capital of the Company**

**Nominal Kenya Shillings**  
**(Equivalent).....**

**Issued Kenya Shillings**  
**(Equivalent).....**

**iii) Give details of Directors as follows. If director is a company is a company, give details of human directors until human directors are disclosed.**

	<u>Name of Director</u>	<u>Nationality</u>	<u>Citizenship</u>	<u>% Shares owned</u>
1				
2				
3				

**4. DISCLOSURE OF INTEREST- Interest of the Firm in KPLC**

**i) Are there any person/persons in.....? (Name of KPLC) who has an interest or relationship in this firm? Yes/No.....**

**If yes, provide details as follows.**

	<b>Name of Person</b>	<b>Designation in the KPLC</b>	<b>Interest or Relationship with Tenderer</b>
<b>1</b>			
<b>2</b>			
<b>3</b>			

**ii) Conflict of interest disclosure**

	<b>Type of Conflict</b>	<b>Disclosure (Yes or No)</b>	<b>If YES provide details of the relationship with tenderer</b>
<b>1</b>	<b>Tenderer is directly or indirectly controls, is controlled by or is under common control with another tenderer</b>		
<b>2</b>	<b>Tenderer receives or has received any direct or indirect subsidy from another tenderer</b>		
<b>3</b>	<b>Tenderer has the same legal representative as another tenderer</b>		
<b>4</b>	<b>Tender has a relationship with another, directly or</b>		

	<i>through common third parties, that puts it in a position to influence the tender of another tenderer, or influence the decisions of KPLC regarding this tendering process</i>		
<b>5</b>	<i>Any of the Tenderer's affiliates participated as a consultant in the preparation of the design or technical specifications of the works that are the subject of the tender</i>		
<b>6</b>	<i>Tenderer would be providing goods, works, non-consulting services or consulting services during implementation of the contract specified in this Tender Document</i>		
<b>7</b>	<i>Tenderer has a close business or family relationship with a</i>		

	<i>professional staff of KPLC who are directly or indirectly involved in the preparation of the Tender document or specifications of the Contract, and/or the Tender evaluation process of such contract.</i>		
	<i>Type of Conflict</i>	<i>Disclosure (Yes or No)</i>	<i>If YES provide details of the relationship with tenderer</i>
<b>8</b>	<i>Tenderer has a close business or family relationship with a professional staff of KPLC who would be involved in the implementation or supervision of the such Contract</i>		<i>Tenderer has a close business or family relationship with a professional staff of KPLC who would be involved in the implementation or supervision of the such Contract</i>

9	<p><i>Has the conflict stemming from such relationship stand in item 7 and 8 above been resolved in a manner acceptable to KPLC throughout the tendering process and execution of the contract</i></p>		<p><i>Has the conflict stemming from such relationship stand in item 7 and 8 above been resolved in a manner acceptable to KPLC throughout the tendering process and execution of the contract</i></p>
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***Certification***

***On behalf of the Tenderer, I certify that the information given above is correct.***

***Full Name*** \_\_\_\_\_

***Title or Designation*** \_\_\_\_\_

***(Signature)*** \_\_\_\_\_ ***(Date)*** \_\_\_\_\_

***\*NOTES TO THE TENDERERS ON THE QUESTIONNAIRE***

- 1. The address and contact person of the Tenderer provided above shall at all times be used for purposes of this tender.***
- 2. If a Kenyan citizen, please indicate under "Citizenship Details" whether by birth, naturalization or registration.***

***3. The details on this Form are essential and compulsory for all Tenderers. Failure to provide all the information requested shall lead to the Tenderer's disqualification.***

***4. For foreign Tenderers please give the details of nominal and issued share capital in the currency of the country of origin of the Tenderer.***

71. From the above, Clause 3.1.5 of the Tender Document made it a mandatory requirement for a tenderer participating in the subject tender to (i) ensure that the Confidential Business Questionnaire under the Tender Document is fully filled (ii) information included in the Confidential Business Questionnaire corresponds with the information in the rest of the tender and (iii) the tenderer was eligible under ITT 3, which provided that only locally registered security guarding companies were eligible. Accordingly, a tenderer for a tender to be responsive to Clause 3.1.5, they had to meet all the above 3 requirements. Conversely, failing to meet any of the above requirements would translate to a tender being found unresponsive and ripe for disqualification at the Preliminary Evaluation Stage.
72. Part (d) of the Confidential Business Questionnaire required a tenderer to outline details of its directorship and shareholding. The information on shareholding and directorship of a company is usually contained in a Company's CR12 Form, which Form was incidentally a mandatory requirement to be supplied in the subject tender under Clause 3.1.9 of the Tender Document.

73. Clause 3.1.5 above having made it mandatory that details supplied by tenderers in the Confidential Business Questionnaire must correspond to the rest of the documents in the tender, it would follow that the details on the directorship and shareholding of the Applicant as filled in the Confidential Business Questionnaire would mirror the details contained in the supplied CR12 Form.
74. The Board shall now interrogate the Applicant's compliance with this requirement under the Tender Document.
75. The Board has studied the Applicant's submitted tender and sighted its Confidential Business Questionnaire at pages 60 to 64. For purposes of the instant Request for Review page 62 which is relevant is hereinafter reproduced:

***iii) Give details of Directors as follows. If director is a company is a company, give details of human directors until human directors are disclosed.***

	<u>Name of Director</u>	<u>Nationality</u>	<u>Citizenship</u>	<u>% Shares owned</u>
<b>1</b>	<b>EVERTON E. TERIGIN</b>	<b>KENYAN</b>	<b>BY BIRTH</b>	<b>41%</b>
<b>2</b>	<b>TABITHA CHERUTO</b>	<b>KENYAN</b>	<b>BY BIRTH</b>	<b>29.5%</b>
<b>3</b>	<b>N/A</b>	<b>N/A</b>	<b>N/A</b>	<b>N/A</b>

76. The Board has equally sighted a copy of the Applicant's CR12 Form at page 191 of the Applicant's tender and the same contains the following information as held by the Companies Registry as at 27<sup>th</sup> November 2023:

<b>Name</b>	<b>Description</b>	<b>Address</b>	<b>Nationality</b>	<b>Shares</b>
<b>Kelley Registrars</b>	<b>Secretary</b>			<b>Ordinary: 0</b>
<b>Elvis Kiprono Terigin</b>	<b>Shareholder</b>			<b>Ordinary: 29500</b>
<b>Tabitha Cheruto Terigin</b>	<b>Director/Shareholder</b>	<b>P.O. Box 4243 Nyayo</b>	<b>Kenyan</b>	<b>Ordinary: 29500</b>
<b>Everton Ezekiel Terigin</b>	<b>Director/Shareholder</b>	<b>P.O. Box 2559 Eldoret</b>	<b>Kenyan</b>	<b>Ordinary: 41000</b>

77. When the Applicant's Confidential Business Questionnaire and CR12 are studied side by side the following is observed:

- i. Both documents capture Tabitha Cheruto Terigin and Everton Ezekiel Terigin as directors/shareholders.
- ii. The Confidential Business Questionnaire does not capture Elvis Kiprono Terigin as a shareholder in the Applicant. However, the CR12 Form indicates that he is a shareholder in the Applicant.

78. From the above, it would suffice that the information contained in Confidential Business Questionnaire does not correspond to the information in the CR12 Form. Understanding that Clause 3.1.5 of the Tender Document made it mandatory for information in the two

documents to mirror each other, we are unable to fault the Procuring Entity's disqualification of the Applicant on account of the information in the Confidential Business Questionnaire being at variance with that in its submitted CR12 Form.

79. The Board therefore finds that the Respondents properly disqualified the Applicant from the subject tender.

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

80. The Board has found that the Respondents properly disqualified the Applicant from the subject tender.
81. The upshot of our finding is that the Request for Review dated 1<sup>st</sup> March 2024 in respect of Tender No. KPI/9A.2/OT/043/SS/23-24 for Provision of Guarding Services Companywide fails in the following specific terms:

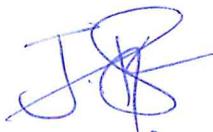
**FINAL ORDERS**

82. 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 1<sup>st</sup> March 2024:

- 1. The Request for Review dated 1<sup>st</sup> March 2024 with respect to Tender No. KPI/9A.2/OT/043/SS/23-24 for Provision of Guarding Services Companywide be and is hereby dismissed.**

**2. Given the subject procurement proceedings are not complete, each party shall bear its own costs in the Request for Review.**

**Dated at NAIROBI, this 25<sup>th</sup> Day of March 2024.**



.....

**PANEL CHAIRPERSON**

**PPARB**



.....

**SECRETARY**

**PPARB**