

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 20/2024 OF 7TH MARCH 2024

BETWEEN

INTERCITY SECURITY HOMES LIMITED.....APPLICANT

AND

THE ACCOUNTING OFFICER

KENYA POWER & LIGHTING CO. PLC.....1STRESPONDENT

KENYA POWER & LIGHTING CO. PLC.....2NDRESPONDENT

BOB MORGAN SERVICES LIMITED.....1ST INTERESTED PARTY

HATARI SECURITY GUARDS LIMITED.....2ND INTERESTED PARTY

LAVINGTON SECURITY LIMITED.....3RD INTERESTED PARTY

RILEY FALCON SECURITY

SERVICES LIMITED.....4TH INTERESTED PARTY

BASEIN SECURITY SERVICES LIMITED.....5TH INTERESTED PARTY

ROSE GUARDS SERVICES LIMITED.....6TH INTERESTED PARTY

MOCAM SECURITY SERVICES LIMITED.....7TH INTERESTED PARTY

PRIDE KINGS LIMITED.....8TH INTERESTED PARTY

PROTECTIVE CUSTODITY LIMITED.....9TH INTERESTED PARTY

SOLVIT SECURITY LIMITED.....10THINTERESTED PARTY

SPYEAGLE SECURITY LIMITED.....11TH INTERESTED PARTY

VICKERS SECURITY SERVICES LIMITED.....12TH INTERESTED PARTY

BABS SECURITY SERVICES LIMITED.....13TH INTERESTED PARTY

DELTA GUARDS LIMITED.....14TH INTERESTED PARTY

GYTO SUCCESS COMPANY LIMITED.....15TH INTERESTED PARTY

ISMAX SECURITY LIMITED.....16TH INTERESTED PARTY

HOUNSLOW SECURITY LIMITED.....17TH INTERESTED PARTY
SUPERIOR SECURITY LIMITED.....18TH INTERESTED PARTY
KLEEN HOME SECURITY LIMITED.....19TH 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

INTERCITY SECURITY HOMES LIMITED

Mr. Kamau Muturi -Advocate, G.K. Muturi & Company Advocates

RESPONDENTS

ACCOUNTING OFFICER

**KENYA POWER & LIGHTING COMPANY
PLC**

**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

BACKGROUND OF THE DECISION

The Tendering Process

1. Kenya Power and Lighting Company Plc, the Procuring Entity together with the 1st 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, 4th 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 11th January 2024 at 10:00 a.m.

Submission of Tenders and Tender Opening

3. According to the signed Tender Opening Minutes for 16th 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:

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

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

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

Evaluation of Tenders

4. The 1st 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 1st to 19th 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 12th 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 16th 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 19th February 2024.

REQUEST FOR REVIEW

19. On 7th March 2024, the Applicant through the firm of G.K. Muturi Advocates, filed a Request for Review dated 6th March 2024 supported by an Affidavit sworn on 6th March 2024 by Gladwell Mwiti, the Applicant's Business Development Manager, seeking the following orders from the Board in verbatim:

- a) The 1st and 2nd Respondents' decision awarding Tender No. KPI/9A.2/OT/043/SS/23-24 Procurement For Provision Of Guarding Services Companywide, to the Interested Parties be and is hereby set aside and nullified;***
- b) The Letter of Notification dated 19th February 2024 and received on 26th February 2024 issued to the Applicant in respect of Tender No. KPI/9A.2/OT/043/SS/23-24 Procurement For Provision Of Guarding Services Companywide be set aside;***
- c) The 1st and 2nd Respondent be ordered to re-admit the Applicant's tender and proceed to evaluate it in compliance with the tender documents, the Public Procurement and Asset Disposal Act and the Constitution;***
- d) In alternative to prayer (c) above, the Honourable Board be pleased to review all records relating to Tender No.: and KPI/9A.2/OT/043/SS/23-24 Procurement For Provision Of Guarding Services Companywide do substitute the decision of the 1st Respondent with an order for award of the Tender to the Applicant;***
- e) 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 7th 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 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 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 7th March 2024.

21. Vide letters dated 11th 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 24th March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within 3 days from 11th March 2024.
22. On 12th March 2024, the Interested Party's through ROM Law Advocates LLP filed a Notice of Appointment and a Memorandum of Response, both dated 12th March 2024.
23. On 13th March 2024, the Respondents through Ann Mulela-Advocate filed a Notice of Appointment and a Memorandum of Response, both dated 13th 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.
24. On 12th March 2024, the Acting Board Secretary, sent out to the parties a Hearing Notice dated 12th 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 14th March 2024 at 2:40 p.m. through the link availed in the said Hearing Notice.

25. On 20th March 2024 the Respondents filed Written Submissions dated 20th March 2024.
26. On 21st March 2024 the Interested Party filed its Bundle of Authorities dated "2th March 2024" (sic).
27. On 21st March 2024, the parties through their respective Advocates joined the scheduled online hearing session.
28. 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.
29. 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

30. Counsel for the Applicant, Mr. Muturi, referred the Board to the letter of notification annexed to the Request for Review as Annexure "GM-1" arguing that the reason for disqualification of the Applicant was that the percentage of shareholding declared in the Confidential Business Questionnaire did not correspond with the CR12 Form.

31. He argued that the above reason was different from the one indicated in the Respondent's Memorandum of Response where the reason was indicated as the Applicant omitted crucial information that was required to be submitted within the confidential business questionnaire.
32. Counsel referred the Board to the Applicant's Confidential Business Questionnaire which the Applicant had as their annexure marked "GM-3". Arguing that Applicant did not fail to fully disclose any information as alluded in the Respondents' response.
33. Mr. Muturi referred the Board to the CR12 Form which was attached to the Request for Review and marked "GM-2" indicating that the CR-12 captured that the Applicant had 1000 ordinary shares of Ksh. 100 each, there was only one shareholder whose name was Duncan Mwendwa Jackson, a Kenyan who owned 50% of the shares.
34. He concluded by stating that the details of the shareholding submitted in the Confidential Business Questionnaire were in compliance with the Tender document and corresponded with the details on the CR12 Form and therefore there was no reason for disqualification. He referred the Board to section 79 and 80(2) of the Act and Regulation 123(3) of the Regulations 2020 which outline what a responsive tender is and invited the Board to look at the case of **Republic v Public Procurement Administrative Review Board- Exparte Magic Contractors 2018** on responsiveness of a tender.

Respondents' Submission

35. Counsel for the Respondents, Ms. Mulela pointed out that the Respondents would rely on their submissions filed before the Board as

well as the confidential documents filed alongside their response to Request for Review.

36. She argued that the Tender Document required tenderers were to submit a CR12 Form. Further, that Clause 3.1.5(b) required tenderers to submit a duly filled, signed and stamped Confidential Business Questionnaire which also ought to include details that complied with information in their bid documents.
37. Ms. Mulela pointed out that the Applicant's Confidential Business Questionnaire Form only disclosed the information of one director whose percentage shareholding was 50 % of the total number of shares that had been indicated in the CR12 Form. She indicated that the Respondent's disqualified the Applicant on account of failing to offer a full disclosure on the ownership of the other 50% of the Applicant's shares.
38. Counsel indicated that the Applicant sought a debriefing as provided for in the Tender Document and the Respondents offered this on 4th March 2024 when the reason for disqualification of the Applicant was explained to its representatives.
39. Ms. Mulela contended that the Tender Document made room for clarification to tenderers on any unclear requirement under the Tender Document but none was received from the Applicant.
40. Counsel maintained that asserted that the Respondents duly constituted a Tender Evaluation Committee that carried out an evaluation process that was fair, equitable, transparent, competitive and cost effective and that they communicated the outcome of the evaluation to the tenderers..

1st to 19th Interested Parties' Submission

41. Counsel for the Interested Parties, Mr. Ratemo placed reliance on their response to the Request for Review and also associated the Interested Parties with the submissions made on behalf of the 1st and 2nd Respondents.
42. Mr. Ratemo submitted that the Applicant's Request for Review was not only misplaced as it was intended to delay the 1st to 19th Interested Parties the right to enjoy their successful bids.
43. Mr. Ratemo submitted that section 3.1.1 of the tender provided that all tenderers were mandatorily required to provide such documentary evidence of eligibility satisfactorily to the Procuring entity's request. He also relied on Section 79 of the Act. He stated that the tenderers were required to provide information in the Confidential Business Questionnaire that corresponded to the information in the CR 12 Form. He further stated that the information given by the Applicant only showed that there was 50 % shareholding of the shares and that the question as to the whereabouts of the remaining 50% rendered the Applicant's tender unresponsive on account of omission.
44. Counsel argued that the Applicant's omission was willful and negligent. He stated that the general rule is that a procuring entity can only consider conforming, compliant and responsive tenders and this was important for bidders to compete on an equal footing. He also stated that the Applicant did not seek any clarification as provided for in the Tender Document.
- 45.

46. Mr. Ratemo concluded by stating that the Respondents complied with Articles 10, 47(1), 201, 227(1) and 271 of the constitution and the principles laid out in the Act. He therefore urged the Board to find that the Evaluation committee decision to award the tender to the interested parties was lawful and that the review before the board was a misguided attempt by the applicant to obtain a means of reviving their chances of further evaluation of its bid and otherwise frustrate the business and operations of the Procuring Entity and the general public.

Applicant's Rejoinder

47. In a brief rejoinder, Counsel for the Respondent, Mr. Muturi emphasized that the Respondents failed to comply with the Act and Articles 10 and 227 of the Constitution of Kenya, 2010 as Applicant's bid was unfairly evaluated. He referred the board to the CR12 which indicated that there was only one shareholder who was also the director of the Applicant. He asserted that this information was also indicated in the CBQ. He further stated that the certificate of official search submitted to the procuring entity was within a year and it also indicated that there was only one Kenyan director and shareholder named Duncan Mwendwa Jackson who had 500 shares.
48. Mr. Muturi further stated that the nominal share capital was Kshs. 100,000 and each share was worth Kshs. 100. He also pointed out that there is a difference between nominal share capital and issued share capital. In this case, the issued shares were 500 which was 50% of the shareholding and the other 50% had not been allocated.

49. He concluded by stating that the Confidential Business Questionnaire and CR12 Form details corresponded with each other and the whole bid document complied with the eligibility criteria in the Tender Document. He further stated that the Applicant did not need any clarification as they found the requirements in the tender document clear and had complied with them accordingly.

CLARIFICATIONS

50. The Board sought clarity from the Applicant on why it did not indicate the nature of its unallotted shares in its Confidential Business Questionnaire. Counsel for the Applicant indicated the number of unallotted shares was not indicated on the CR12 Form and the two documents were meant to contain corresponding information.
51. Counsel for the Respondent Ms. Mulela told the Board that the Tender Document required tenderers to give a full disclosure on the percentage of their shareholding and the reason for the disqualification of the Applicant was that the percentage of shareholding declared in the Confidential Business Questionnaire does not correspond with what was in the CR12 Form. From the face of the CR12 Form, it is not clear for one to be able to tell that these are the shares that have been allotted and these are the shares that have not yet been allotted.
52. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 7th March 2024 had to be determined by 28th March 2024. Therefore, the Board would communicate its decision on or before 28th March 2024 to all parties via email.

BOARD'S DECISION

53. 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' Evaluation Committee 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?

54. 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 Form supplied as part of its tender.
55. Counsel for the Applicant, Mr. Muturi, argued that the details of the shareholding submitted in the Confidential Business Questionnaire were in compliance with the Tender Document and corresponded with the details on the CR12 Form and therefore there was no reason for its disqualification.
56. Counsel for the Applicant argued that the Applicant provided a CR12 Form which showed that it had 1 shareholder and that this was indicated in the Applicant's Confidential Business Questionnaire.

57. 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.
58. She argued that the Tender Document required tenderers to submit a CR12 Form. Further, that Clause 3.1.5(b) required tenderers to submit a duly filled, signed and stamped Confidential Business Questionnaire which also ought to include details that complied with information in their bid documents.
59. Ms. Mulela pointed out that the Applicant's Confidential Business Questionnaire Form only disclosed the information of one director whose percentage shareholding was 50 % of the total number of shares that had been indicated in the CR12 Form.
60. Counsel for the Interested Parties, Mr. Ratemo, submitted that the Applicant submitted a non-responsive tender. He stated that the tenderers were required to provide information in the Confidential Business Questionnaire that corresponded to the information in the CR 12 Form. He further stated that the information given by the Applicant only showed that there was 50 % shareholding of the shares and that the question as to the whereabouts of the remaining 50% rendered the Applicant's tender unresponsive on account of omission.

61. 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 .

62. 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."

63. 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.”*

64. 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.*

65. 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.
66. 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.

67. 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

	ITEM	DESCRIPTION
1	Name of the Procuring Entity	KPLC
2	Name of Tenderer	
3	Full Address and Contact Details of the Tenderer	1.Country

		2.City 3.Postal Address 4.Email 5.Physical Location Plot no..... Building & Floor..... 6. Name and email of contact person
4	Reference Number of the Tender	
5	Maximum value of Business which the tenderer handles	
6	Bank & Branch	

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.

	Name of Partners	Nationality	Citizenship	% Shares Owned
1				
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.

	Name of Director	Nationality	Citizenship	% Shares owned
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.

	Name of Person	Designation in the KPLC	Interest or Relationship with Tenderer
1			
2			
3			

ii) Conflict of interest disclosure

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

	<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>		
5	<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>		
6	<i>Tenderer would be providing goods, works, non-consulting services or consulting services during implementation of the contract specified in this Tender Document</i>		
7	<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>
<i>8</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>		<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.

68. 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.
69. 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.

70. 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. Accordingly, it would follow that the details on the directorship and shareholding of the Applicant as filled in the Confidential Business Questionnaire should mirror the details contained in the supplied CR12 Form.
71. The Board shall now interrogate the Applicant's compliance with this requirement under the Tender Document.
72. The Board has studied the Applicant's submitted tender and sighted its Confidential Business Questionnaire at pages 18 to 21. For purposes of the instant Request for Review page 19 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>
1	DUNCAN MWENDA JACKSON	KENYAN	KENYAN	50%
2				
3				

73. The Board has equally sighted a copy of the Applicant's CR12 Form at page 140 of the Applicant's tender and the same contains the following information as held by the Companies Registry as at 10th July 2023:

COMPANY	INTERCITY SECURE HOMES LIMITED
COMPANY NO.	C.135776
NOMINAL SHARE CAPITAL	
NUMBER AND TYPES OF SHARES (VALUE PER SHARE)	ORDINARY: 1000 (KES 100.00 EACH)
DATE OF REGISTRATION	22ND FEB, 2007
"	"

NAME	DESCRIPTION	ADDRESS	NATIONALITY	SHARES
DUNCAN MWENDA JACKSON	DIRECTOR/SHAREHOLDER		KENYAN	Ordinary 500
TOTAL				500

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

- i. Both documents capture Duncan Mwenda Jackson as the sole director/shareholder.
- ii. Both documents indicate that Duncan Mwenda Jackson held 500 shares.

75. From the above, it would suffice that the information contained in Confidential Business Questionnaire corresponds to the information in the CR12 Form. Accordingly, the Applicant satisfied the requirement under Clause 3.1.5 of the Tender Document in so far as the information on the shareholding in the two documents is concerned. We therefore find fault in the Procuring Entity's Evaluation Committee's disqualification of the Applicant on the allegation that the information in the Confidential Business Questionnaire did not correspond to that in the Applicant's submitted CR12 Form on the Applicant's shareholding.
76. The Board therefore finds that the Respondents' Evaluation Committee did not properly disqualify the Applicant from the subject tender .

What orders the Board should grant in the circumstances?

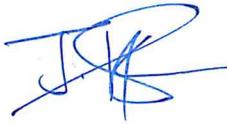
77. The Board has found that the Respondents did not properly disqualify the Applicant from the subject tender.
78. The upshot of our finding is that the Request for Review dated 6th March 2024 in respect of Tender No. KPI/9A.2/OT/043/SS/23-24 for Provision of Guarding Services Companywide succeeds in so far as in the following specific terms:

FINAL ORDERS

79. 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 6th March 2024:

- 1. The Letters of Notification dated 19th February 2024 addressed to the successful and unsuccessful tenderers in Tender No KPI/9A.2/OT/043/SS/23-24 for Provision of Guarding Services Companywide be and are hereby cancelled and set aside in respect of Class B assignments only.**
- 2. The Applicant's tender in Tender No KPI/9A.2/OT/043/SS/23-24 for Provision of Guarding Services Companywide in respect of Class B assignments be and are hereby re-admitted for evaluation at the Technical Evaluation Stage;**
- 3. The 1st Respondent be and is hereby directed to re-convene the Evaluation Committee for purposes of fresh re-evaluation of Applicant's bid together with all the tenders that made to the Technical Evaluation stage in Tender No KPI/9A.2/OT/043/SS/23-24 for Provision of Guarding Services Companywide in respect of Class B assignments only and complete the evaluation process in the tender within 14 days, having regard to the Board's findings in this Decision.**
- 4. The 1st Respondent be and is hereby directed to proceed with the Tender No KPI/9A.2/OT/043/SS/23-24 for Provision of Guarding Services Companywide to its logical conclusion as far as Class A Assignments are concerned.**
- 5. Given the subject procurement proceedings are not complete, each party shall bear its own costs in the Request for Review.**

Dated at NAIROBI, this 28th Day of March 2024.



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CHAIRPERSON

PPARB



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SECRETARY

PPARB