

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 22/2024 OF 8<sup>TH</sup> MARCH 2024**

**BETWEEN**

**TOFADA SECURITY SERVICES 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**

**TOFADA SECURITY SERVICES LIMITED**

Ms. Auma -Advocate, Ochieng 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

*Se*

## **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>



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

*Se*

<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:

*gu*



- 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.

*su*



### **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 8<sup>th</sup> March 2024, the Applicant through the firm of Ochieng Advocates, filed a Request for Review dated 8<sup>th</sup> March 2024 supported by an Affidavit sworn on 8<sup>th</sup> March 2024 by Washington Wasiama, a Director at the Applicant, seeking the following orders from the Board in verbatim:

*See*

- a) A Declaration be issued that the Letter of Notification dated 19/02/2024 pertaining to Tender for provision of Guarding Services Companywide Tender No. KPI/9A.2/OT/043/SS/23-24 issued to the Applicant disqualifying the Applicant's bid be cancelled and/or nullified;***
- b) A declaration be issued that the Letter of Notification dated 19/02/2024 pertaining to Tender for provision of Guarding Services Companywide Tender No. KPI/9A.2/OT/043/SS/23-24 issued to the Applicant awarding the said tender to the 1<sup>st</sup> to 19<sup>th</sup> Interested Parties be cancelled and/or nullified;***
- c) An order directing the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to re-evaluate the Applicants bid in relation to the tender for Provision of Guarding Services Companywide Tender No. KPI/9A.2/OT/043/SS/23-24, apply the criteria set out under the law as well as the tender documents and award the tender to the lowest bidder as provided for in the tender document;***
- d) An Order directing the Respondents to pay the Applicant's costs for these proceedings.***

20. In a Notification of Appeal and a letter dated 8<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 Respondents 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 8<sup>th</sup> March 2024.

21. 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.
22. On 12<sup>th</sup> March 2024, the Interested Parties through ROM Law Advocates LLP filed a Notice of Appointment and a Memorandum of Response, both dated 12<sup>th</sup> March 2024.
23. On 12<sup>th</sup> March 2024, the Respondents through Ann Mulela-Advocate filed a Notice of Appointment of Advocates and a Memorandum of Response, both dated 12<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.
24. On 20<sup>th</sup> March 2024, the Acting Board Secretary, sent out to the parties a Hearing Notice dated 20<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 26<sup>th</sup> March 2024 at 11:00 a.m. through the link availed in the said Hearing Notice.

*Se*



25. On 25<sup>th</sup> March 2024 the Respondents filed Written Submissions dated 25<sup>th</sup> March 2024.
26. On 26<sup>th</sup> March 2024 at 11:00 a.m., 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. 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**

29. Counsel for the Applicant, Ms. Auma, argued that the Applicant's tender was responsive as it duly complied with the Tender Document. According to her, the information in the Applicant's Confidential Business Questionnaire corresponded to that in its CR12 Form.
30. She submitted that Clause 3.1.9 of the Tender Document required tenderers to submit a Confidential Business Questionnaire showing the directorship and respective shareholding. Further, the Applicant had only





2 shareholders who owned 40% shareholding each in the company and that this information was filled in the Confidential Business Questionnaire.

31. Counsel argued that the Tender Document did not specify that the tenderers were to disclose their entire shareholding. Clause 3.1.9 was categorical that the shareholding to be disclosed was that of the directors and this exactly what the Applicant supplied.
32. She argued that Article 227(1) of the Constitution of Kenya, 2010 commands a public procurement process that is fair, equitable, transparent, competitive and cost effective. Further, that Section 73 of the Act obligates a Procuring Entity to ensure that the Tender Document contains sufficient information to allow for competition from among those who wish to submit tenders. Accordingly, the Respondents' claim that they requires details on the entire shareholding of tenderers post the fact was in violation of Section 79(1) and 73 of the Act.
33. Counsel contended that the Respondent formulated the requirement in a manner that only tenderers who had issued their entire shareholding would be eligible when it was in fact legal under the Companies Act, 2015 for a company to reserve its shares.
34. Ms. Auma argued that the Applicant had been placed in a precarious situation since it previously had a contract for Kshs. 4 Million with the Procuring Entity. Further, that its workforce of 195 security personnel faced imminent job losses and that the Applicant equally faced possible law suits stemming from these job losses.

*Su*

35. She further indicated that the Preliminary Objection raised by the Interested Parties was not based on pure points of law and thus was for dismissal.

### **Respondents' Submission**

36. Counsel for the Respondents, Ms. Mulela indicated that the Respondents would be placing reliance on their filed documents i.e. Memorandum of Response, Written Submissions and the Confidential Documents.
37. She argued that the Procuring Entity was guided by the Act in evaluating the tenders received in response to the invitation under the subject tender.
38. Ms. Mulela argued that the Applicant did not submit a tender responsive to the mandatory requirements under the subject tender. She argued that under the Tender Document, tenderers were required to submit their CR12-Form and therefore it was misleading for the Applicant to argue that only details on a tenderer's directorship were required.
39. Counsel indicated that Clause 3.1.5 provided for submission of a duly filled Confidential Business Questionnaire with details corresponding to that in the tender. She argued that the Applicant submitted as part of its bid a CR12 Form showing it had a nominal share capital of 100,000 and only 80,000 had been allotted. Further, its Confidential Business Questionnaire disclosed a shareholding of 80% leaving a balance of 20% unaccounted shares.
40. She argued that Clause 8 of the Tender Document gave room for clarification of unclear provisions in the document but the Applicant only

sought this clarification post award of the subject tender when it sought debriefing. According to Counsel, the Applicant ought to have disclosed in their Confidential Business Questionnaire that the unallotted 20% shares had been reserved for future investors. Therefore, the Applicant was unresponsive and properly disqualified from the subject tender.

41. Counsel relied on this Board's Decision in ***Application No. 28 of 2023; Trident Insurance Company Ltd v Secretary Independent Electoral and Boundaries Commissions & Anor*** for the proposition that an acceptable tender is one that complies with the requirements under the Tender Document.
42. She equally argued that the Applicant could not harbor a legitimate expectation to have its non-responsive tender proceed to the next evaluation stage in breach of the Act.

### **Interested Parties Submissions**

43. Counsel for the Interested Parties, Mr. Ratemo indicated that the Interested Parties would be relying on their filed Memorandum of Response. Further, that they would be associating themselves with the submissions made on behalf of the Respondents.
44. Mr. Ratemo argued that Clause 3.1.9 provides for submission of a current CR12 Form as part of the tender documents and that the intention of the drafters of the impugned clause of the Tender Document could only be established through the precise words used, documentary and factual context and their aim and purpose.

*su*



45. He argued that under Clause 3.1.1. the Procuring Entity is at liberty to request for documents to its satisfaction. Further, under Clause 3.1.9 in the event of an ambiguity, this was cured by Clause 8 which allowed tenderers to seek clarifications before the close of tender. According to Counsel, the Applicant ought to have sought clarification before the close of the tender.
46. Mr. Ratemo maintained that the Procuring Entity in awarding the subject tender to the Interested Parties herein complied with the Act and the requirements under the Tender Document.

### **Applicant's Rejoinder**

47. In a brief rejoinder, Counsel for the Applicant, Ms. Auma reiterated that it was not illegal for a company to reserve its shares and thus the argument that the Applicant ought to have disclosed its 20% shareholding was unmerited.
48. She maintained that the Applicant submitted a responsive tender whose Confidential Business Questionnaire had information corresponding with the CR12 Form.

### **CLARIFICATIONS**

49. The Board sought clarity from the Applicant on the prejudice it would suffer if it included in its Confidential Business Questionnaire that 20% of its shares were reserved. Ms. Auma indicated no prejudice would be suffered but the CR12 Form only captured the 80% of the allotted shares and not the 20% unallotted shares.





50. The Board also sought the Applicant to clarify if the information contained in its Confidential Business Questionnaire mirrored that in its CR12 Form to which Counsel for the Applicant, Ms. Auma responded to in the affirmative.
51. The Board asked the Respondents to clarify on how exactly, the information in the Applicant's Confidential Business Questionnaire did not correspond to its CR12 Form. Counsel for the Respondents, Ms. Mulela indicated that the Applicant did not account of 100% of its shareholding through its Confidential Business Questionnaire.
52. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 8<sup>th</sup> March 2024, the 21<sup>st</sup> day from this date would be 29<sup>th</sup> March, 2024, a public holiday being Good Friday, the Request for Review had to be determined by 2<sup>nd</sup> April 2024. Therefore, the Board would communicate its decision on or before 2<sup>nd</sup> April 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?***

*su*

**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, Ms. Auma, 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, Ms. Auma, argued that the Applicant's tender was responsive as it duly complied with the Tender Document. According to her, the information in the Applicant's Confidential Business Questionnaire corresponded to that in its CR12 Form.
57. She argued that the Applicant had 2 shareholders that held 40 % each in the company, leaving 20% shares reserved for future investors. Further, the Applicant disclosed the shareholding of its 2 shareholders in the Confidential Business Questionnaire.
58. On their part, the respondents took the position that the Applicant's tender was non-responsive to the requirements under the Tender Document. Counsel for the Respondents, Ms. Mulela argued that the Applicant failed to provide an account for 20 of its shareholding and thus

its Confidential Business Questionnaire's details did not correspond with details corresponding those in the CR12.

59. She argued that Clause 8 of the Tender Document gave room for clarification of unclear provisions in the document but the Applicant only sought this clarification post award of the subject tender when it sought debriefing.
60. The Interested Parties sided with the Respondents and argued that the Applicant ought to have sought clarity on any unclear provisions in the Tender Document.
61. Mr. Ratemo maintained that the Procuring Entity in awarding the subject tender to the Interested Parties herein complied with the Act and the requirements under the Tender Document.
62. The Board is therefore at this stage invited to interrogate the Procuring Entity's Evaluation Committee's evaluation process that culminated in the disqualification of the Applicant's tender .
63. 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***

*see*



***relevant professional associations regarding regulation of fees chargeable for services rendered."***

64. 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."***

65. 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

*gu*

**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.***

66. 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.

*Su*



67. 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.***

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

*SN*



## **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> .....

*Sh*

<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>				
<b>2</b>				
<b>3</b>				

**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).....**

*se*

**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.**

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

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

**ii) Conflict of interest disclosure**

	<b><u>Type of Conflict</u></b>	<b><u>Disclosure (Yes or No)</u></b>	<b><u>If YES provide details of the relationship with tenderer</u></b>

*su*



<b>1</b>	<b><i>Tenderer is directly or indirectly controls, is controlled by or is under common control with another tenderer</i></b>		
<b>2</b>	<b><i>Tenderer receives or has received any direct or indirect subsidy from another tenderer</i></b>		
<b>3</b>	<b><i>Tenderer has the same legal representative as another tenderer</i></b>		
<b>4</b>	<b><i>Tender has a relationship with another, directly or 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>		
<b>5</b>	<b><i>Any of the Tenderer's affiliates participated as a consultant in the preparation of the</i></b>		

*ser*

	<i>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 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>		
	<b>Type of Conflict</b>	<b>Disclosure (Yes or No)</b>	<b>If YES provide details of the</b>

*SL*

			<i>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>
<b>9</b>	<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>		<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</i>

*sh*



			<i>process and execution of the contract</i>
--	--	--	--

### ***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.***

69. 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.

70. 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.
71. 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.
72. The Board shall now interrogate the Applicant's compliance with this requirement under the Tender Document.
73. The Board has studied the Applicant's submitted tender and sighted its Confidential Business Questionnaire at pages 13 to 15. For purposes of the instant Request for Review page 14 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.**

	<b><u>Name of Director</u></b>	<b><u>Nationality</u></b>	<b><u>Citizenship</u></b>	<b><u>% Shares owned</u></b>
<b>1</b>	<b>WASHINGTON WASIAMA</b>	<b>KENYAN</b>	<b>BY BIRTH</b>	<b>40</b>
<b>2</b>	<b>GEORGE KANYAMKUR</b>	<b>KENYAN</b>	<b>BY BIRTH</b>	<b>40</b>
<b>3</b>				

74. The Board has equally sighted a copy of the Applicant's CR12 Form at page 96 of the Applicant's tender and the same contains the following information as held by the Companies Registry as at 20<sup>th</sup> April 2023:

<b>COMPANY</b>	<b>TOFADA SECURITY SERVICES LIMITED</b>
<b>COMPANY NO.</b>	<b>CPR/2013/104924</b>
<b>NOMINAL SHARE CAPITAL</b>	<b>100,000.00</b>
<b>NUMBER AND TYPES OF SHARES (VALUE PER SHARE)</b>	<b>ORDINARY: 1000 (KES 100.00 EACH)</b>
<b>DATE OF REGISTRATION</b>	<b>9<sup>TH</sup> SEP, 2013</b>
<b>..</b>	<b>...</b>

<b>NAME</b>	<b>DESCRIPTION</b>	<b>ADDRESS</b>	<b>NATIONALITY</b>	<b>SHARES</b>
-------------	--------------------	----------------	--------------------	---------------

*CU*



<b>GEORGE OLAYO KANYAMKUR</b>	<b>DIRECTOR/SHAREHOLDER</b>	<b>(Details Withheld)</b>	<b>KENYAN</b>	<b>Ordinary 400</b>
<b>C.K. MUTHUSI</b>	<b>SECRETARY</b>		<b>N/A</b>	<b>ORDINA 0</b>
<b>WASHINGTON ERICK O WASIMA</b>	<b>DIRECTOR/SHAREHOLDER</b>	<b>(Details Withheld)</b>	<b>KENYAN</b>	<b>ORDINA 400</b>
<b>TOTAL</b>				<b>800</b>

75. When the Applicant's Confidential Business Questionnaire and CR12 Form are studied side by side the following is observed:
- Both documents capture Washington Wasima and George Kanyamkur as the only directors/shareholders.
  - Both documents indicate that Washington Wasima and George Kanyamkur held 400 shares each.
76. 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.

*su*

77. The Applicant's CR12 Form does not on its face provide any explanation on its unallotted 200 shares and therefore it could not be expected of the Applicant to offer this explanation in its filled Confidential Business Questionnaire.
78. 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?**

79. The Board has found that the Respondents did not properly disqualify the Applicant from the subject tender.
80. The upshot of our finding is that the Request for Review dated 8<sup>th</sup> 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**

81. In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review dated 8<sup>th</sup> March 2024:

- 1. The Letters of Notification dated 19<sup>th</sup> 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.**

*She*

2. The Applicant's tender and all other tenders received 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 1<sup>st</sup> Respondent be and is hereby directed to re-convene the Evaluation Committee for purposes of fresh re-evaluation of the Applicant's tender with all the tenders that qualified for evaluation at 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 1<sup>st</sup> 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.

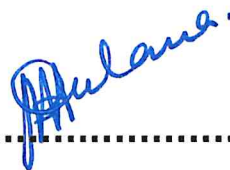
Dated at NAIROBI, this 2<sup>nd</sup> Day of April 2024.



.....

**PANEL CHAIRPERSON**

**PPARB**



.....

**SECRETARY**

**PPARB**



