

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 101/2024 OF 11<sup>TH</sup> OCTOBER 2024**

**BETWEEN**

**CHAKRA COMPANY LIMITED ..... APPLICANT**

**AND**

**THE ACCOUNTING OFFICER,**

**MAWEGO NATIONAL POLYTECHNIC ..... 1<sup>ST</sup> RESPONDENT**

**VIGILMAX SECURITY ..... 2<sup>ND</sup> RESPONDENT**

Review against the decision of the Accounting Officer Mawego National Polytechnic in relation to Tender No. MTTI/T/1/2024-2025 for Provision of Security Services.

**BOARD MEMBERS PRESENT**

1. Mr. George Murugu, FCI Arb, I.P - Panel Chairperson
2. MS. Alice Oeri - Member
3. Mr. Daniel Langat - Member

**IN ATTENDANCE**

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



## **PRESENT BY INVITATION**

### **APPLICANT**

### **CHAKRA COMPANY LIMITED**

Mr. Omondi h/b for

Mr. Musa Aziz

- Advocate, Aziz & Associates

### **1<sup>ST</sup> RESPONDENT**

### **THE ACCOUNTING OFFICER, MAWEGO NATIONAL POLYTECHNIC**

1. Ms. Wafula Idelquin

- Council Member in Charge of Legal Affairs,  
Mawego National Polytechnic

2. Dr. John Abuto

- Accounting Officer, Mawego National  
Polytechnic

3. Ms. Loise Odengo

- Procurement Officer, Mawego National  
Polytechnic

### **2<sup>ND</sup> RESPONDENT**

### **VIGILMAX SECURITY**

Ms. Isdora Akinyi

- Director

## **BACKGROUND OF THE DECISION**

### **The Tendering Process**

1. Mawengo National Polytechnic, the Procuring Entity herein invited sealed bids in response to Tender No. MTTI/T/1/2024-2025 for Provision of Security Services (hereinafter referred to as the "subject tender"). Tendering was conducted under open competitive method (National) and the invitation was by way of an advertisement on 22<sup>nd</sup> May 2024 and



published on the Procuring Entity's website [www.mawegoinstitute.ac.ke](http://www.mawegoinstitute.ac.ke) and on the Public Procurement Information Portal (PIIP) website [www.tenders.go.ke](http://www.tenders.go.ke) where the blank tender document issued to tenderers (hereinafter referred to as the 'Tender Document') was available for download. The subject tender's submission deadline was on 6<sup>th</sup> June 2024 at 11.00 a.m.

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

2. According to the Tender Opening Minutes signed by members of the Tender Opening Committee on 6<sup>th</sup> June 2024 which form part of confidential documents furnished to the Public Procurement Administrative Review Board by the 1<sup>st</sup> Respondent pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), a total of nine (9) tenders were submitted in response to the tender. The tenders were opened in the presence of tenderers' representatives present, and were recorded as follows:

<b>Bidder No.</b>	<b>Name</b>
1.	Lindum Systems Limited
2.	Hounslow Security Limited
3.	Chakra Security
4.	Vigilmax Security
5.	Captain Ray Security Limited
6.	Raymond Wegner



7.	Spear Lights Security
8.	Piga works Enterprises Limited
9.	Captain Hawk Group

### **Evaluation of Tenders**

3. A Tender Evaluation Committee undertook evaluation of the nine (9) tenders as captured in the Minutes of Evaluation Meeting for the subject tender dated 25<sup>th</sup> June 2024. The evaluation was done in the following stages:

- i Preliminary Evaluation;
- ii Technical Evaluation; and
- iii Financial Evaluation

### **Preliminary Evaluation**

4. The Evaluation Committee carried out a Preliminary Evaluation and examined tenders for responsiveness against the Preliminary Evaluation Criteria set out at page 32 of the Tender Document. Tenderers were required to meet all the mandatory requirements at this stage to proceed to Technical Evaluation.

5. At the end of evaluation, six (6) tenders were determined non-responsive, while three (3) tenders, including the Applicant's and 2<sup>nd</sup> Respondent's tenders were determined responsive. The responsive tenders proceeded to Technical Evaluation.



## Technical Evaluation

6. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set under Technical Evaluation Criteria at page 33 to 34 of the Tender Document.
7. At the end of evaluation at this stage, all three (3) tenders were determined responsive and proceeded to Financial Evaluation.

## Financial Evaluation

8. At this stage of evaluation, the Evaluation Committee evaluated tenders that progressed to this stage as follows:

### *Financial Evaluation*

<b>REQUIREMENTS</b>	<b>HOUNSLOW</b>	<b>CHAKRA</b>	<b>VIGILMAX</b>
<i>Financial capacity as per books of accounts</i>	<i>The books of accounts provided tally with the rations work out and stated to be financially stable</i>	<i>The Audited financial statements appear from serial number 000422 to 000486. These pages contains the Audit reports for the years 2021,2022 and 2023</i>  <i>Form FIN-3.1 on financial Situation and Performance appearing under serial number 000071, the tenderer did</i>	<i>The presentation of books of accounts are found to prove stability and financial capable to handle the proposal effectively.</i>

		<p><i>financial analysis based on the financial years 2016 to 2020. Clearly, this analysis is done using financial statements not attached in the Tender Document and therefore its not possible to verify the correctness of the ratios provided on the page serialized 000071</i></p> <p><i>Because of the analysis done using financial data/Audit report not attached in the Tender document, the Value of Total Assets, Total Equity or Net worth, Current Assets, Current Liabilities, Working Capital, Total Revenue, Profits Before Taxes and Cash flow from operating activities could not be VERIFIED and hence the financial situation based on the data provided could not be ascertained.</i></p>	
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		<i>The tenderer ought to have analyzed ratios for the period 2021 to 2023</i>	
<i>Quoted cost per guard</i>	<i>16,000.00</i>		<i>14,384.00</i>
<i>Deviation from minimum wages 15,000/=</i>	<i>POSITIVE BY 1.07%</i>	<i>NEGATIVE BY %</i>	<i>NEGATIVE BY 0.96%</i>
<i>Payroll analysis</i>	<i>Not clearly</i>	<i>Clearly provided</i>	<i>Clearly provided</i>

*Based on the above table it was noted from the documents that Chakra Books of accounts were not authentic and couldn't be verified as per the criteria provided hence financial capability couldn't be determined, therefore the bidder was dropped at this level.*

*Two companies qualify for further evaluation on due diligence namely:*

- 1. Vigilmax Security*
- 2. Hounslow*

9. One (1) tender, being the Applicant's tender was disqualified, while two (2) tenders were found responsive and were recommended to progress for due diligence.

### **Due Diligence**

10. According to the Due Diligence Report, a due diligence exercise was conducted on the two (2) tenders that were determined responsive at the Financial Evaluation stage and the Evaluation Committee selected three (3) institutions to visit as part of the evaluation as can be discerned at page 10/27 to page 15/27 of the Due Diligence Report.

11. At the end of the due diligence exercise, the Evaluation Committee recommended an interview be conducted with the lowest evaluated tenderer to defend its proposal and other issues from the due diligence exercise.
  
12. The Evaluation Committee also recommended that prior to commitment, the bidder ought to have the following for smooth operations:
  - a) Full Uniformed Security guard
  - b) Laid down Work plan, Methodology and staff as stated on tender document
  - c) Relevant equipment for security (whistle, Rungu, Torch etc)
  - d) Radio calls for smooth operations
  - e) Metal detector for students and Vehicles

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

13. The Evaluation Committee recommended award of the tender to VIGILMAX SECURITY P.O. BOX 73714 NAIROBI at a rate of Kenya Shillings Fourteen Thousand Three Hundred and Eighty-Four (Kshs. 14,384.00) per guard being the lowest evaluated tender.

### **Professional Opinion**

14. In a Professional Opinion, dated 26<sup>th</sup> June 2024, the Procurement Officer, Ms. Rose Obengo reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and concurred

with the Evaluation Committee's recommendation to award the subject tender to Vigilmax Security, 2<sup>nd</sup> Respondent herein, at a rate of Kenya Shillings Fourteen Thousand Three Hundred and Eighty-Four (Kshs. 14,384.00) per guard being the lowest evaluated tender.

15. The Professional Opinion was approved by Dr. John Abuto, the 1<sup>st</sup> Respondent herein, on 26<sup>th</sup> June 2024.

### **Notification to Tenderers**

16. Tenderers were notified of the outcome of evaluation of the subject tender vide letters dated 27<sup>th</sup> September 2024.

### **REQUEST FOR REVIEW NO. 101 OF 2024**

17. On 11<sup>th</sup> October 2024, Chakra Company Limited, the Applicant herein, filed a Request for Review dated 9<sup>th</sup> October 2024 together with a Statement in Support of Review signed by Peter Omolo Osano, its Director on 9<sup>th</sup> October 2024 (hereinafter referred to as "the instant Request for Review") through Aziz & Associates seeking the following orders from the Board:

***a) A declaration that the procuring entity breached the provisions of the Public Procurement and Asset Disposal Act, 2015 and Articles 47 and 227 of the Constitution of Kenya.***



***b) The notification letter and subsequent regret letter dated 27th September 2024 be nullified and subsequently the entire process relating to the subject tender be annulled.***

***c) That subsequently, the 1st Respondent be ordered to re-evaluate the Applicant's bid in relation to the tender for the provision of security services and apply the criteria set out under the law as well as the tender documents and award the tender to a qualified bidder.***

***d) That in the alternative, the review board be pleased to award the subject tender to the Applicant as the lowest performing bidder.***

***e) The Applicant be awarded costs.***

18. In a Notification of Appeal and a letter dated 11<sup>th</sup> October 2024, Mr. James Kilaka, the Acting Secretary of the Board notified the Procuring Entity of the filing of the Request for Review and the suspension of the procurement proceedings of the subject tender, while forwarding to the said Procuring Entity 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 Procuring Entity was requested to submit a



response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 11<sup>th</sup> October 2024.

19. *Vide* a Hearing Notice dated 18<sup>th</sup> October 2024, the Acting Board Secretary, notified parties and all tenderers of an online hearing of the instant Request for Review slated for 24<sup>th</sup> October 2024 at 11:00 a.m. through the link availed in the said Hearing Notice.
20. On 22<sup>nd</sup> October 2024 the 1<sup>st</sup> Respondent filed a Memorandum of Response sworn by Dr. John Abuto on 18<sup>th</sup> October 2024 together with confidential documents submitted pursuant to Section 67(3)(e) of the Act.
21. *Vide* email dated 22<sup>nd</sup> October 2024, the Acting Board Secretary notified all tenderers in the subject tender, of the existence of the Request for Review while forwarding to them the Request for Review together with the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020. All tenderers were invited to submit to the Board any information and arguments concerning the tender within three (3) days.
22. At the hearing on 24<sup>th</sup> October 2024 at 11:00 a.m., the Board read out pleadings filed by parties in the instant Request for Review. Counsel for the Applicant, Mr. Omondi h/b for Mr. Aziz made an application to canvass the instant Request for Review by way of written submissions reason being that Mr. Aziz was indisposed. The Board also established that the 2<sup>nd</sup> Respondent having been notified of the instant Request for Review



on 22<sup>nd</sup> October 2024 did not have ample time to file their response. Subsequently, the Board directed (a) the 2<sup>nd</sup> Respondent be granted leave to file and serve its replying affidavit or any other rejoinder to the instant Request for Review by 4.00 p.m. on 24<sup>th</sup> October 2024, (b) the Applicant to file a further affidavit in response to the 2<sup>nd</sup> Respondent's response, if need be, together with its comprehensive submissions by 2.00 p.m. on 25<sup>th</sup> October 2024, (c) the 1<sup>st</sup> Respondent to file and serve a further affidavit in response to the 2<sup>nd</sup> Respondent's response, if need be, together with its comprehensive submissions by 2.00 p.m. on 25<sup>th</sup> October 2024, (d) the 2<sup>nd</sup> Respondent to file and serve its Written Submissions by 6.00 p.m. on 25<sup>th</sup> October 2024, (e) that the matter would be canvassed by way of written submissions. Parties were cautioned to adhere to the strict timelines as specified in the Board's directions and that any pleading filed outside the stipulated timelines would be struck out since the Board would rely strictly on the documentation filed before it in rendering its decision.

23. Parties were also informed that the instant Request for Review having been filed on 11<sup>th</sup> October 2024 was due to expire on 1<sup>st</sup> November 2024 and that the Board would communicate its decision on or before 1<sup>st</sup> November 2024 to all parties to the Request for Review via email.

24. On 24<sup>th</sup> October 2024, the 2<sup>nd</sup> Respondent filed through S.J Nyang & Co. Advocates a Notice of Appointment of Advocates and the 2<sup>nd</sup> Respondent's Response to the Applicant's Request for Review sworn by Isdora Akinyi on 24<sup>th</sup> October 2024.



25. On 25<sup>th</sup> October 2024, the Applicant filed Written Submissions dated 25<sup>th</sup> October 2024.

26. On 25<sup>th</sup> October 2024, the 1<sup>st</sup> Respondent filed Written Submissions dated 25<sup>th</sup> October 2024.

## **PARTIES' SUBMISSIONS**

### **Applicant's Submissions**

27. The Applicant submitted that the 1<sup>st</sup> Respondent's response to the instant Request for Review filed on 22<sup>nd</sup> October 2024 ought to be expunged from record having been filed outside the stipulated timelines of 5 days as provided under Regulation 205(3) of the Act in view of the fact that it was notified by the Ag. Board Secretary of existence of the review.

28. It further submitted that the 2<sup>nd</sup> Respondent's response is fatally defective and ought to be struck out for want of an authority in the form of a Board Resolution authorizing the deponent to depone or execute the response on behalf of the 2<sup>nd</sup> Respondent. The Applicant contends that the 2<sup>nd</sup> Respondent also failed to adduce authority authorizing its advocates on record to represent it in the instant Request for Review hence its response ought to be struck out.



29. It is the Applicant's case that it duly complied with the mandatory requirements as provided in the Tender Document in the subject tender but was notified vide letter dated 27<sup>th</sup> September 2024 of its disqualification in the subject tender yet from the contents of the said notification letter, it is clear that it was the lowest bidder at Kshs. 13,930/- yet the subject tender was awarded to the 2<sup>nd</sup> Respondent whose tender price of Kshs. 14,384/- was higher contrary to Section 79 of the Act read with Regulations 74(1) of Regulations 2020.
30. The Applicant submitted that the reasons for disqualification of its bid were not pegged on any of the mandatory or technical requirements provided in the Tender Document.
31. On the reasons for disqualification given by the 1<sup>st</sup> Respondent that that its financial statements appear from serial number 000422 to 000486 which pages contains the Audit reports for the years 2021,2022 and 2023, the Applicant submitted that this was the mandatory requirement as per the Tender Document since the period required was for 3 years and that this was the period which the Applicant prepared and presented the audit reports and was not a reason for disqualifying its bid.
32. On the reason for disqualification given by the 1<sup>st</sup> Respondent with regard to Form FIN-3.1 on financial situation and performance appearing under serial number 000071, it did financial analysis based on financial years 2016 to 2020 and that this analysis is done using financial statements not attached in the Tender Document and it was not possible



to verify the correctness of the ratios provided on the page serialized 000071, the Applicant submitted that this reason was not plausible and was contrary to the Act and Regulations 2020 noting that its audit reports for years 2021, 2022 and 2023 supported the financial data filled in Form FIN-3.1 and the 1<sup>st</sup> Respondent ought to have confirmed the closing balance as at 2020 as provided in Form FIN-3.1 and the audit report thereafter from 2021.

33. On the reason for disqualification given by the 1<sup>st</sup> Respondent that it ought to have analyzed ratios for the period 2021 to 2023 and that the Evaluation Committee could not make an objective decision resulting to its disqualification at the Financial Evaluation stage yet it had quoted the lowest, the Applicant submitted that it was not in contest that it had presented audited financial reports for the FY 2021 up to 2023 as a mandatory requirement and that these were sufficient evidence of its financial capacity warranting award of the subject tender.

34. The Applicant contends that the 1<sup>st</sup> Respondent at paragraphs (k) to (m) brought in new issues that were not part of the reasons indicated in the notification letter on why its bid was disqualified and that these are an afterthought and ought to be struck out. It further contends that the 1<sup>st</sup> Respondent did not act in a fair and equitable manner while evaluating the subject tender.

35. The Applicant prayed for the instant Request for Review to be allowed as prayed.



## **1<sup>st</sup> Respondent's submissions**

36. The 1<sup>st</sup> Respondent submitted that the instant Request for Review as filed is premature and ought to be dismissed with costs. In support of his argument, the 1<sup>st</sup> Respondent referred to the holding in *William Odhiambo Ramogi & 3 Others v Attorney General & 4 Others; Muslims for Human Rights & 2 Others (Interested Parties) (2020) eKLR* and *Martin Nyongesa Barasa v Traffic Commandant & 2 Others (2021) eKLR*. He contends that through annexure DJA-003, the Applicant was accorded 14 days within which it was required to lodge any application for review or appeal and on whose receipt, a committee would have been constituted to sit, deliberate and accord the Applicant relief if applicable and that it was only after the Applicant had exhausted the mechanisms put in place that it would have been justified in approaching the Board.

37. On whether the Request for Review as filed is merited, the 1<sup>st</sup> Respondent referred to the provisions of Section 79 of the Act and the holding in *Republic v Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk (2020) eKLR* and argued that as a general rule, procuring entities should only consider conforming, compliant or responsive bids.

38. It is the 1<sup>st</sup> Respondent's case that award of the subject tender is not based solely on the lowest bidder and the Applicant was required to meet



all the mandatory requirements at all the stages of the procurement process for it to be eligible for award of the subject tender.

39. He contends that one of the pre-requisites of the preliminary requirements was for the Applicant to provide historical financial information for the previous 3 years immediately preceding the tender financial year and this information was to be filled out on Form FIN-3.1 to be evaluated against the audited books of accounts as submitted during the tender evaluation process. That contrary to the mandatory requirements, the Applicant supplied financial information for 5 financial years 2016 to 2020 at tender opening whereas the required information was for 3 financial years 2021 to 2023.

40. He further contends that DJA 002 required the Applicant to supply the Statement of Financial position recorded in the Balance Sheet, Information from Income Statement, and Cash Flow information of the disclosed 3 financial years immediately preceding the tender financial year as denoted in line 13, 20, and 23 of DJA 002 for evaluation. That the insistence of the financial information for the 3 financial years immediately preceding the tender application was for the evaluation of the Applicant's financial ability to deliver the services tendered; which is a key pillar in tender evaluation.

41. The 1<sup>st</sup> Respondent contends that the Applicant further submitted audited reports for the financial years 2021, 2022, and 2023 and this information was meant to be evaluated against the information provided



in FORM FIN-3.1 (DJA 002), yet the information on the said form is at variance with the audited report. He pointed out that these reasons were clearly explained to the Applicant in its letter of Notification of Intention to Award the subject tender.

42. The 1<sup>st</sup> Respondent further contends that the Applicant failed to supply the Statement of Financial position recorded in the Balance Sheet, Information from Income Statement, and Cash Flow information of the disclosed 3 financial years immediately preceding the tender financial year as denoted in line 13, 20, and 23 of DJA 002 for evaluation.

43. That due to the foregoing, the 1<sup>st</sup> Respondent submitted that the Evaluation Committee was not able to determine the financial status of the Applicant and whether it was a going concern, in debt, bankrupt or any other position.

44. He referred the Board to the Applicant's Conflict of Interest Disclosure form and indicated that the Applicant declared that they would not provide the services in the subject tender. Further, he was not able to verify the authenticity of the mandatory documents supplied by the Applicant under the Insurance Covers Policy and he would at the earliest opportunity be calling on the services of the relevant state agency to investigate and avail a report concerning the same.

45. The 1<sup>st</sup> Respondent also submitted that under the Technical Evaluation Criteria, the Applicant was required to provide under paragraph iv the



salary scale according to the Employment Act but chose to attach the payroll contrary to the availed instructions.

46. He indicated that the alleged loss and damage that the Applicant purported to face is a fictional averment given that the requirements in the subject tender were clearly set out and non-compliance of the same at any stage would automatically lead to its disqualification.

47. He urged the Board to dismiss the instant Request for Review with costs.

### **2<sup>nd</sup> Respondent's submissions**

48. The 2<sup>nd</sup> Respondent averred that the subject tender was published on the Procuring Entity's website on 23<sup>rd</sup> May 2024 being a public notice and this was how it got to know about it. It further averred that the Applicant had not disclosed how it came to learn of the subject tender and that it was aligned to the submissions made by the 1<sup>st</sup> Respondent in the instant Request for Review.

49. The 2<sup>nd</sup> Respondent averred that it followed the due process and adhered to all the procedures and requirements set out in the Tender Document in the subject tender.

50. It further averred that evaluation of the subject tender was conducted as required by the law and that it was rightfully awarded the subject tender and accepted award of the same on 7<sup>th</sup> October 2024.

51. It is the 2<sup>nd</sup> Respondent's case that it is a total stranger to the allegations by the Applicant and that cancellation and review of the award will cause it irreparable loss and damage which can be avoided by upholding its award of the subject tender. It contends that the instant Request for Review ought to have proceeded by way of viva voce evidence and not written submissions as requested by counsel for the Applicant when parties were last before the Board given that the Applicant implies that it was corrupt in the procurement process of the subject tender.

52. The 2<sup>nd</sup> Respondent indicated that it was in the process of recruiting at least 30 guards and if the award was revised, it is bound to suffer irreparable loss and damage as it has purchased equipment and uniforms in preparation for deployment of the said guards.

### **BOARD'S DECISION**

53. The Board has considered each of the parties' submissions and documents placed before it and find the following issues call for determination.

#### **A. Whether the Board has jurisdiction to hear and determine the instant Request for Review;**

In determining the first issue, the Board shall make a determination on whether the allegation that the 1<sup>st</sup> Respondent breached Section 96 (2) & (3) of the Act by failing to publish the subject tender using the dedicated state portal or on the Procuring Entity's website was raised within the statutory period

of 14 days in accordance with Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020 as to invoke the jurisdiction of the Board.

**B. Whether the Procuring Entity's Evaluation Committee evaluated the Applicant's tender submitted in the subject tender in accordance with provisions of the Tender Document, the Act and Regulations 2020 as read with Article 227(1) of the Constitution.**

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

**A. Whether the Board has jurisdiction to hear and determine the instant Request for Review**

54. It is trite law that courts and decision-making bodies should only act in cases where they have jurisdiction and when a question of jurisdiction arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before doing anything concerning such a matter.

55. Black's Law Dictionary, *8th Edition*, defines jurisdiction as:

***"... the power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties ... the power of courts to inquire into facts, apply the law, make***



*decisions and declare judgment; The legal rights by which judges exercise their authority.”*

56. The celebrated Court of Appeal decision in **The Owners of Motor Vessel “Lilian S” v Caltex Oil Kenya Limited [1989] eKLR; Mombasa Court of Appeal Civil Appeal No. 50 of 1989** underscores the centrality of the principle of jurisdiction. In particular, Nyarangi JA, decreed:

***“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for continuation of proceedings pending evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction.”***

57. The Supreme Court added its voice on the source of jurisdiction of a court or other decision-making body in the case **Samuel Kamau Macharia and another v Kenya Commercial Bank Ltd and 2 others [2012] eKLR; Supreme Court Application No. 2 of 2011** when it decreed that;

***"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with Counsel for the first and second Respondent in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings."***

58. In the persuasive authority from the Supreme Court of Nigeria in the case of **State v Onagoruwa [1992] 2 NWLR 221 – 33 at 57 – 59** the Court held:

***"Jurisdiction is the determinant of the vires of a court to come into a matter before it. Conversely, where a court has no jurisdiction over a matter, it cannot validly exercise any judicial power thereon. It is now common place, indeed a well beaten legal track, that jurisdiction is the legal right by which courts exercise their authority. It is the power and authority to hear and determine judicial proceedings. A court with jurisdiction builds on a solid foundation because jurisdiction is the bedrock on which court proceedings are based."***



59. In the case of **Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others [2013] eKLR**, the Court of Appeal emphasized on the centrality of the issue of jurisdiction and held that:

*"...So central and determinative is the issue of jurisdiction that it is at once fundamental and overarching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain...."*

60. Such is the centrality of jurisdiction that the Court of Appeal has held in **Isaak Aliaza v Samuel Kisiavuki [2021] eKLR**, that:

*"whether it is raised either by parties themselves or the Court suo moto, it has to be addressed first before delving into the interrogation of the merits of issues that may be in controversy in a matter."*

61. The jurisdiction of a court, tribunal, quasi-judicial body or an adjudicating body can only flow from either the Constitution or a Statute (Act of Parliament) or both.



62. This Board is a creature of statute owing to the provisions of Section 27 (1) of the Act which provides:

**“(1) There shall be a central independent procurement appeals review board to be known as the Public Procurement Administrative Review Board as an unincorporated Board.”**

63. Further, Section 28 of the Act provides for the functions and powers of the Board as follows:

**(1) The functions of the Review Board shall be—**

**(a) reviewing, hearing and determining tendering and asset disposal disputes; and**

**(b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law.”**

64. The above provisions demonstrate that the Board is a specialized, central independent procurement appeals review board with its main function being reviewing, hearing and determining tendering and asset disposal disputes.

65. The jurisdiction of the Board is provided for under Part XV – Administrative Review of Procurement and Disposal Proceedings and



specific at Section 167 of the Act which provides for what can and cannot be subject to review of procurement proceedings before the Board and Section 172 and 173 of the Act which provides for the Powers of the Board as follows:

**PART XV — ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS**

**167. Request for a review**

**(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.**

**(2) .....**

**(3) .....**

**(4) The following matters shall not be subject to the review of procurement proceedings under subsection**

**(1)—**

**(a) the choice of a procurement method;**

**(b) a termination of a procurement or asset disposal proceedings in accordance with section 63 of this Act;**

**and**



***(c) where a contract is signed in accordance with section 135 of this Act. [Emphasis by the Board]***

***168. ....***

***169. ....***

***170. ....***

***171. ....***

***172. ....***

***172. Dismissal of frivolous appeals***

***Review Board may dismiss with costs a request if it is of the opinion that the request is frivolous or vexatious or was solely for the purpose of delaying the procurement proceedings or performance of a contract and the applicant shall forfeit the deposit paid.***

***173. Powers of Review Board***

***Upon completing a review, the Review Board may do any one or more of the following—***

***(a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;***

***(b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;***



***(c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;***

***(d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and***

***(e) order termination of the procurement process and commencement of a new procurement process.***

66. Given the forgoing provisions of the Act, the Board is a creature of the Act and the Board's jurisdiction flows from Section 167 (1) of the Act read with Section 172 and 173 of the Act which donates powers to the Board with respect to an administrative review of procurement proceedings before the Board.

67. It therefore follows, for one to invoke the jurisdiction of the Board, they need to approach the Board as provided under Section 167 (1) of the Act. Section 167(1) of the Act, requires any person invoking the jurisdiction of the board to satisfy the following (i) must either be a candidate or a tenderer (within the meaning of Section 2 of the Act) (ii) must claim to have suffered or to risk suffering, loss or damage due to breach of a duty imposed on a procuring entity by the Act or Regulations 2020 (iii) must seek administrative review by the Board within fourteen (14) days of notification of award or date of occurrence of alleged breach of duty imposed on a procuring entity by the Act and Regulations 2020 at any stage of the procurement process in a manner prescribed.



68. The manner in which an aggrieved candidate or tenderer seeks administrative review is prescribed under Part XV – Administrative Review of Procurement and Disposal Proceedings of Regulations 2020 and specific under Regulation 203 of Regulations 2020 as follows:

***PART XV – ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS***

***203. Request for a review***

***(1) A request for review under section 167(1) of the Act shall be made in the Form set out in the Fourteenth Schedule of these Regulations.***

***(2) The request referred to in paragraph (1) shall—***

***(a) state the reasons for the complaint, including any alleged breach of the Constitution, the Act or these Regulations;***

***(b) be accompanied by such statements as the applicant considers necessary in support of its request;***

***(c) be made within fourteen days of —***

***(i) the occurrence of the breach complained of, where the request is made before the making of an award;***

***(ii) the notification under section 87 of the Act; or***

***(iii) the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder.***

***(d) be accompanied by the fees set out in the Fifteenth Schedule of these Regulations, which shall not be refundable.***



***(3) Every request for review shall be filed with the Review Board Secretary upon payment of the requisite fees and refundable deposits.***

***(4) The Review Board Secretary shall acknowledge by stamping and signing the request filed for review immediately.***

69. Regulation 203 prescribes an administrative review sought by an aggrieved candidate or tenderer under Section 167(1) of the Act to be by way of (i) a request for review which is to be (ii) accompanied by such statements as the applicant considers necessary in support of its request. The request for review is to be in a form set out in the Fourteenth Schedule of Regulations 2020. The Fourteenth Schedule of Regulations 2020 provides for a form known as a Request for Review.

70. A reading of Section 167(1) of the Act read with Regulation 203(1), (2) & (3) of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 requires for one to invoke the jurisdiction of the Board, they must either be (i) a candidate or tenderer (within the meaning of Section 2 of the Act); (ii) must claim to have suffered or to risk suffering, loss or damage due to breach of a duty imposed on a procuring entity by the Act or Regulations 2020; (iii) must seek administrative review by the Board within fourteen (14) days of (a) occurrence of breach complained of, having taken place before an award is made, (b) notification under Section 87 of the Act; or (c) occurrence of breach complained of, having taken place after making of an award to the successful tenderer (iv) by



way of a request for review which is accompanied by (v) such statements as the applicant considers necessary in support of its request.

71. Section 87 of the Act referred to in Regulation 203(2)(c)(ii) of Regulations 2020 provides as follows:

***87. Notification of intention to enter into a contract***

***(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.***

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

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

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



72. It is therefore clear from a reading of Section 167(1) and 87 of the Act, Regulation 203(1), (2)(c) & (3) of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 requires for one to invoke the jurisdiction of the Board, they must either be (i) a candidate or tenderer (within the meaning of Section 2 of the Act); (ii) must claim to have suffered or to risk suffering, loss or damage due to breach of a duty imposed on a procuring entity by the Act or Regulations 2020; (iii) must seek administrative review by the Board within fourteen (14) days of (a) occurrence of breach complained of, having taken place before an award is made, (b) notification of intention to enter into a contract having been issued; or (c) occurrence of breach complained of, having taken place after making of an award to the successful tenderer (iv) by way of a request for review which is accompanied by (v) such statements as the applicant considers necessary in support of its request.

73. The option available for an aggrieved candidate or tenderer in the aforementioned three instances is determinant on when occurrence of breach complained of took place and should be within 14 days of such occurrence of breach. It was not the intention of the legislature that where an alleged breach occurs before notification to enter into a contract is issued, the same is only complained of after notification to enter into a contract has been issued. We say so because there would be no need to provide the three instances within which a Request for Review may be filed.



***Whether the allegation that the 1<sup>st</sup> Respondent breached Section 96 (2) & (3) of the Act by failing to publish the subject tender using the dedicated state portal or on the Procuring Entity's website was raised within the statutory period of 14 days in accordance with Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020 as to invoke the jurisdiction of the Board;***

74. The Applicant contends at ground 5 of the Request for Review that the 1<sup>st</sup> Respondent failed to comply with provisions of Section 96(2) & (3) of the Act by failing to publish the subject tender using the dedicated state portal or on the Procuring Entity's website. At paragraph 5 of its Statement In Support of Review, it states that this notwithstanding, it chose to participate in the subject tender by preparing its bid in accordance with the invitation to tender.

75. In response, the 1<sup>st</sup> Respondent contends at paragraph 4 of its Memorandum of Response that all tenders in relation to the financial year were advertised on <https://www.tenders.go.ke> on the 23<sup>rd</sup> May 2024 and that the said advertisement is still on the said website as at the date of filing its response in the instant Request for Review and this allegation by the Applicant is scandalous and vexatious meant to discredit the integrity of the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent attached a print out of the webpage in relation to the said advertisement marked as Exhibit DJA001.



76. On its part. The 2<sup>nd</sup> Respondent contends at paragraph 2 of the 2<sup>nd</sup> Respondent's Response to the Applicant's Request for Review that the subject tender was published on PPRA and the Procuring Entity's website on 23<sup>rd</sup> May 2024.

77. Having considered parties' pleadings and submissions, the issue that calls for determination by this Board is what were the circumstances in the instant case that determine the period when the Applicant ought to have approached the Board regarding its allegation concerning breach of Section 96 (2) & (3) of the Act.

78. We understand the Applicant's contention to be that the subject tender was not advertised on either the state portal or on the Procuring Entity's website by the 1<sup>st</sup> Respondent as prescribed under Section 96 (2) & (3) of the Act which provides as follows:

***"(2) Despite the provisions of subsection (1), if the estimated value of the goods, works or services being procured is equal to, or more than the prescribed threshold for county, national and international advertising, the procuring entity shall advertise in the dedicated Government tenders' portals or in its own website, or a notice in at least two daily newspapers of nationwide circulation or a notice in at least two free to air television stations and two radio stations of national reach***



***(3) In addition to subsection (2) a procuring entity shall— (a) use Kenya's dedicated tenders portal or any other electronic advertisements as prescribed; and (b) post advertisements at any conspicuous place reserved for this purpose in the premises of the procuring entity”***

79. We do however note that Section 96(1) of the Act states that:

***“(1) The accounting officer of a procuring entity shall take such steps as are reasonable to bring the invitation to tender to the attention of those who may wish to submit tenders.”***

80. The import of the above provisions is that a procuring entity shall advertise an invitation to tender in the dedicated government portal or in its own website or a notice in at least two daily newspapers of nationwide circulation or at least two free to air television stations and two radio stations in addition to dedicated tenders portals or any other electronic advertisements or posting the said advert at any conspicuous place reserved for such purposes in the premises of the procuring entity.

81. The Applicant does admit at paragraph 3 of its Statement in Support of Review that the subject tender was advertised by the procuring entity with a deadline of 6<sup>th</sup> June 2024 at 11.00 a.m. and annexed exhibit marked POO-2 being a copy of an assortment of pages of its tender document having chosen to participate in the subject tender. A perusal of the Applicant’s bid document submitted in the subject tender and



exhibit marked POO-2 reveals that the same was submitted by the Applicant on 30<sup>th</sup> May 2024.

82. It is our considered view that at the point of submitting its bid, the Applicant was cognizant of the allegation made that the 1<sup>st</sup> Respondent failed to comply with provisions of Section 96(2) & (3) of the Act by failing to publish the subject tender using the dedicated state portal or on the Procuring Entity's website. As such, it ought to have approached the Board with this allegation by virtue of Regulation 203(2)(c)(i) of Regulations 2020 in view of the fact that the alleged breach complained of occurred before an award was made in the subject tender and even before the tender submission deadline.

83. In computing time, the Board is guided by Section 57 of the IGPA which provides as follows:

***57. Computation of time***

***In computing time for the purposes of a written law, unless the contrary intention appears—***

***(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;***

***(b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the***



***period shall include the next following day, not being an excluded day;***

***(c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;***

***(d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.***

84. In computing time when the Applicant should have sought administrative review before the Board with respect to challenging failure by the 1<sup>st</sup> Respondent to publish the subject tender using the dedicated state portal or on the Procuring Entity's website in line with Section 96 (2) & (3) of the Act, the 22<sup>nd</sup> May 2024 is excluded being the date when the invitation to tender was issued by the Procuring Entity for awareness by bidders including the Applicant herein. This means, 14 days started running from 23<sup>rd</sup> May 2024 and lapsed on 5<sup>th</sup> June 2024. In essence, the Applicant had between 23<sup>rd</sup> May 2024 and 5<sup>th</sup> June 2024 to seek administrative review before the Board.

85. Assuming that the Applicant came to be aware of the alleged breach complained of on the 30<sup>th</sup> May 2024, time then started running on 31<sup>st</sup>



May 2024 and lapsed on 13<sup>th</sup> June 2024. In essence, the Applicant had between 31<sup>st</sup> May 2024 and 13<sup>th</sup> June 2024 to seek administrative review before the Board.

86. The Applicant filed the instant Request for Review on 11<sup>th</sup> October 2024 wherein it raised the allegation that the 1<sup>st</sup> Respondent breached Section 96 (2) & (3) of the Act by failing to publish the subject tender using the dedicated state portal or on the Procuring Entity's website outside the statutory period of fourteen (14) days prescribed under section 167(1) of the Act read with Regulation 203(2)(c)(i) of Regulations 2020 as to invoke the jurisdiction of the Board.

87. In the circumstance, the Board finds and holds that it is divested of jurisdiction **only** to the extent of hearing and determining the allegation raised in the instant Request for Review that the 1<sup>st</sup> Respondent breached Section 96 (2) & (3) of the Act by failing to publish the subject tender using the dedicated state portal or on the Procuring Entity's website.

**B. Whether the Procuring Entity's Evaluation Committee evaluated the Applicant's tender submitted in the subject tender in accordance with provisions of the Tender Document, the Act and Regulations 2020 as read with Article 227(1) of the Constitution.**

88. We understand the Applicant's case on this issue to be that the 1<sup>st</sup> Respondent in disqualifying its bid document as communicated in the letter of Notification of Intention to Award dated 27<sup>th</sup> September 2024



failed to adhere to the requirements of the Tender Document, the Act and the Constitution. The Applicant contends that its tender met all the eligibility and mandatory requirements and was the lowest responsive bid. It further contends that the Evaluation Committee was unfair in award of the subject tender and applied extraneous evaluation criteria in evaluating and disqualifying its tender.

89. On its part, the 1<sup>st</sup> Respondent contend that the Evaluation Committee adhered to the set out evaluation criteria in the Tender Document and complied with the provisions of the Constitution and the Act in evaluation of the subject tender.

90. The 2<sup>nd</sup> Respondent aligned its case with submissions made by the 1<sup>st</sup> Respondent on this issue.

91. Having considered parties' submissions herein, we note that objective of public procurement is to provide quality goods and services in a system that implements the principles specified in Article 227 of the Constitution which provides as follows:

***"227. Procurement of public goods and services***

***(1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.***



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

- a) .....**
- b) .....**
- c) ..... and**
- d) ....."**

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

**"80. Evaluation of tender**

- (1) .....**
- (2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, .....**
- (3) .....; and**
- (4) ....."**

93. Section 80(2) of the Act as indicated above requires the Evaluation Committee to evaluate and compare tenders in a system that is fair using



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

94. Further, Section 86(1)(a) of the Act provides:

***"(1) The successful tender shall be the one who meets any one of the following as specified in the tender document—***

***(a) the tender with the lowest evaluated price;***

***....."***

95. Turning to the circumstances in the instant Request for Review, we note that the Applicant was notified in a letter of Notification of Intention to Award dated 27<sup>th</sup> September 2024 that its tender was unsuccessful in the subject tender as follows:

***"....."***

- i The Audited financial statements appear from serial number 000422 to 000486. These pages contain the Audit reports for the years 2021, 2022, and 2023***
- ii Form FIN-3.1 on financial Situation and Performance appearing under serial number 000071, the tenderer***



***did financial analysis based on the financial years 2016 to 2020. Clearly, this analysis is done using financial statements not attached in the Tender Document and therefore its not possible to verify the correctness of the ratios provided on the page serialized 000071***

***iii Because of the analysis done using financial data/Audit report not attached in the Tender document, the Value of Total Assets, Total Equity or Net worth, Current Assets, Current Liabilities, Working Capital, Total Revenue, Profits Before Taxes and Cash flow from operating activities could not be VERIFIED and hence the financial situation based on the data provided could not be ascertained.***

***iv The tenderer ought to have analyzed ratios for the period 2021 to 2023. The committee could not make objective decision resulting to being disqualified at financial level though having quoted lowest."***

96. The Board notes the Tender Document provided under Clause 43 of Section I- Instructions To Tenderers for the Award Criteria at page 25 to 26 the award criteria as follows:

***"The Procuring Entity shall award the Contract to the successful tenderer whose tender has been determined to be the Lowest Evaluated Tender."***



97. Additionally, the Tender Document provided at Clause 39.1 of Section I- Instructions To Tenderers for the Award Criteria at page 25 the Qualification of the Tenderer as follows:

***"The Procuring Entity shall determine to its satisfaction whether the Tenderer that is selected as having submitted the lowest evaluated cost and substantially responsive Tender is eligible and meets the qualifying criteria specified in Section III, Evaluation and Qualification Criteria."***

98. The import of the above provisions is that award of the subject tender would be to the successful tenderer whose tender has been determined to be the lowest evaluated tender and the Procuring Entity would satisfy itself that the tenderer selected as having a substantially responsive tender with the lowest evaluated cost is eligible and meets the qualifying criteria under Section III – Evaluation and Qualification Criteria at pages 32 to 36 of the Tender Document.

99. We note that the bids submitted in the subject tender were to be evaluated in 3 stages being Preliminary Evaluation, Technical Evaluation and Financial Evaluation. Additionally, due diligence was conducted by the Evaluation Committee as envisioned under Section 83 of the Act as read with Regulation 80 of Regulations 2020.

100. The Preliminary Evaluation Criteria was provided under Clause 2 of Section III – Evaluation and Qualification Criteria at pages 32 of the Tender Document as follows:

**PRELIMINARY EVALUATION CRITERIA**

<b>NO.</b>	<b>REQUIREMENT</b>	<b>✓ OR X</b>
<b>1</b>	<b><i>valid trading license</i></b>	
<b>2</b>	<b><i>Certificate of registration, and</i></b>	
<b>3</b>	<b><i>Valid tax compliance certificate.</i></b>	
<b>4</b>	<b><i>VALID AGPO Certificate (where applicable).</i></b>	
<b>5</b>	<b><i>Valid Business permit</i></b>	
<b>6</b>	<b><i>Evidence of E-Tims accounts Registration</i></b>	
<b>7</b>	<b><i>Relevant Authority Licensed registration Private Security Regulatory Authority</i></b>	
<b>8</b>	<b><i>Complete attached forms to confirm eligibility and non-existence of a conflict of interest in relation to this procurement requirement by signing the attached Forms.</i></b>	

101. The Technical Evaluation Criteria was also provided under Clause 2 of Section III – Evaluation and Qualification Criteria at pages 32 of the Tender Document as follows:

**TECHNICAL EVALUATION CRITERIA**

*The Criteria, sub-criteria, and point system for the evaluation of the Technical Proposals:*

*[Note to Client: Allocation of points shall be within the range provided for each criteria and sub-criteria]*

<b>GENERAL QUALIFICATION</b>				
<b>NO.</b>	<b>DETAILS</b>	<b>SCORES</b>	<b>ACTUAL</b>	<b>REMARKS</b>
<b>i</b>	<b><i>Registration certificate</i></b>	<b><i>[0 -2]</i></b>		
<b>ii</b>	<b><i>Valid tax compliance</i></b>	<b><i>[0 -2]</i></b>		

<i>iii</i>	<i>Specific experience of the Tenderer, as a service provider relevant to the contract for last 5years (2 points per experience)</i>	<i>[0 -10]</i>		
<i>Iv</i>	<i>Attach salary scale according to employment Act</i>	<i>[0 -5]</i>		
<i>V</i>	<i>Provide certified copy of NHIF compliance</i>	<i>[0 -2]</i>		
<i>vi</i>	<i>Provide certified copy of NSSF compliance</i>	<i>[0 -2]</i>		
<i>vii</i>	<i>Provide evidence of Insurance by WIBA</i>	<i>[0 -2]</i>		
<i>viii</i>	<i>Adequacy and quality of the proposed methodology, and work plan in responding to the schedule of Requirements:</i>			
	<i>Technical approach and methodology</i>	<i>[0 -15]</i>		
	<i>Work plan</i>	<i>[0 -15]</i>		
	<i>Organization and staffing</i>	<i>[0 -15]</i>		
	<i>Notes to Tenderer: The Procuring Entity will assess whether the proposed methodology is clear, responds to the Services Requirements, work plan is realistic and implementable; overall team composition is balanced and has an appropriate skill mix; and the work plan has right input of Experts]</i>			
<i>ix</i>	<i>Key Experts' qualifications and competence for the Assignment:</i>			
	<i>a) Position K-1: [Team Leader]</i> <i>1) General qualifications (general education, training, and experience):[10 and 30%]</i> <i>2) Adequacy for the contract (relevant education, training, experience in the sector or similar assignments):[60 and 70%]</i> <i>3) Relevant experience in the Kenya (working level fluency in local language(s)/ knowledge of local culture or administrative system, government organization, etc.):[ 0 and 10%]</i> <i>Total weight: 100%</i>	<i>10</i>		
	<i>b) Position K-2: [Insert position title]</i>	<i>7.5</i>		

	<p><b>1) General qualifications (general education, training, and experience):[10 and 30%]</b></p> <p><b>2) Adequacy for the contract (relevant education, training, experience in the sector or similar assignments):[60 and 70%]</b></p> <p><b>3) Relevant experience in the Kenya (working level fluency in local language(s)/ knowledge of local culture or administrative system, government organization, etc.):[ 0 and 10%]</b></p> <p><b>Total weight: 100%</b></p>			
	<p><b>c) Position K-3:[Insert position title]</b></p> <p><b>1) General qualifications (general education, training, and experience):[10 and 30%]</b></p> <p><b>2) Adequacy for the contract (relevant education, training, experience in the sector or similar assignments):[60 and 70%]</b></p> <p><b>3) Relevant experience in the Kenya (working level fluency in local language(s)/ knowledge of local culture or administrative system, government organization, etc.):[ 0 and 10%]</b></p> <p><b>Total weight: 100%</b></p>	<b>7.5</b>		
<b>x)</b>	<b>Participation by Kenya citizens among proposed Key Experts</b>	<b>5</b>		
	<b>TOTAL</b>	<b>100%</b>		

102. The Financial Evaluation Criteria was also provided under Clause 3 of Section III – Evaluation and Qualification Criteria at pages 34 of the Tender Document as follows:

*"Price evaluation: in addition to the criteria listed in ITT 35.2 (a)–(d) the following criteria shall apply:*

i) *Alternative Completion Times, if permitted under ITT 15.2, will be evaluated as follows:*

.....

ii) *Alternative Technical Solutions for specified parts of the Works, if permitted under ITT 15.3, will be evaluated as follows:.....*

.....

iii) *Other Criteria; if permitted under ITT 35.2 (e):  
.....”*

103. We have carefully studied the Evaluation Report submitted to the Board as part of the confidential documents and note that the Applicant’s tender was disqualified at the Financial Evaluation stage as follows:

*Financial Evaluation*

<b>REQUIREMENTS</b>	<b>HOUNSLOW</b>	<b>CHAKRA</b>	<b>VIGILMAX</b>
<i>Financial capacity as per books of accounts</i>	<i>The books of accounts provided tally with the rations work out and stated to be financially stable</i>	<i>The Audited financial statements appear from serial number 000422 to 000486. These pages contains the Audit reports for the years 2021,2022 and 2023  Form FIN-3.1 on financial Situation and Performance appearing under serial number 000071, the tenderer did</i>	<i>The presentation of books of accounts are found to prove stability and financial capable to handle the proposal effectively.</i>



		<p><i>financial analysis based on the financial years 2016 to 2020. Clearly, this analysis is done using financial statements not attached in the Tender Document and therefore its not possible to verify the correctness of the ratios provided on the page serialized 000071</i></p> <p><i>Because of the analysis done using financial data/Audit report not attached in the Tender document, the Value of Total Assets, Total Equity or Net worth, Current Assets, Current Liabilities, Working Capital, Total Revenue, Profits Before Taxes and Cash flow from operating activities could not be VERIFIED and hence the financial situation based on the data provided could not be ascertained.</i></p>	
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		<i>The tenderer ought to have analyzed ratios for the period 2021 to 2023</i>	
<i>Quoted cost per guard</i>	<i>16,000.00</i>		<i>14,384.00</i>
<i>Deviation from minimum wages 15,000/=</i>	<i>POSITIVE BY 1.07%</i>	<i>NEGATIVE BY %</i>	<i>NEGATIVE BY 0.96%</i>
<i>Payroll analysis</i>	<i>Not clearly</i>	<i>Clearly provided</i>	<i>Clearly provided</i>

*Based on the above table it was noted from the documents that Chakra Books of accounts were not authentic and couldn't be verified as per the criteria provided hence financial capability couldn't be determined, therefore the bidder was dropped at this level.*

*Two companies qualify for further evaluation on due diligence namely:*

- 1. Vigilmax Security*
- 2. Hounslow*

104. Notably, according to the Tender Opening Minutes, the Applicant's tender price as read out was Kshs. 3,507,840/- per annum Kshs. 292,320/- per month for 21 guards at Kshs. 13,920/- while the 2<sup>nd</sup> Respondent's tender price as read out was Kshs. 172,608/- per month unit cost per guard Kshs. 14,384/-.

105. From the findings of the Evaluation Committee as recorded in the Evaluation report, we note that the criteria used by the Evaluation Committee in evaluating bids that had progressed to the Financial Evaluation stage was not provided for in the Tender Document. The Requirement of Financial capacity as per books of accounts used in comparing bids was not a criteria laid out under Section III – Evaluation



and Qualification Criteria at pages 32 to 36 of the Tender Document which was to be used in evaluation of bids at the Financial Evaluation stage.

106. Further, Form FIN-3.1 Financial Situation and Performance as provided at Page 50 of the Tender Document did not specifically stipulate the exact years that a bidder was required to fill in its historic information on its statement of financial analysis having provided as follows:

*Financial Data*

Type of Financial information in _____ (currency)	Historic information for previous _____ years,  (amount in currency, currency, exchange rate*, USD)				
	Year 1	Year 2	Year 3	Year 4	Year 5
<b>Statement of Financial Position (Information from Balance Sheet)</b>					
<b>Total Assets (TA)</b>					
<b>Total Liabilities (TL)</b>					
<b>Total Equity/Net Worth (NW)</b>					
<b>Current Assets (CA)</b>					
<b>Current Liabilities (CL)</b>					
<b>Working Capital (WC)</b>					
<b>Information from Income Statement</b>					
<b>Total Revenue (TR)</b>					

<b>Profits Before Taxes (PBT)</b>					
<b>Cash Flow Information</b>					
<b>Cash Flow from Operating Activities</b>					

*\*Refer to ITT 15 for the exchange rate*

107. It is the Board's considered finding that the Evaluation Committee applied extraneous criteria when evaluating the Applicant's tender at the Financial Evaluation stage contrary to Section 80(2) of the Act by introducing an evaluation criterion at this stage of evaluation based on its audited financial statements yet the Applicant has already been rendered responsive at both the Preliminary and Technical Evaluation stage and what was required to be done at the Financial Evaluation stage as per the provided criteria was for price comparison and ranking of bids in order of their tender prices so as to establish the lowest evaluated tender.

108. In so saying, we are guided by Regulation 77 of Regulations 2020 which provides:

***"(1) Upon completion of the technical evaluation under regulation 76 of these Regulations the evaluation committee shall conduct a financial evaluation and comparison to determine the evaluated price of each tender***

***(2) The evaluated price for each bid shall be determined by—***

***(a) taking the bid price in the tender form***

***(b) taking into account any minor deviation from the requirements accepted by a procuring entity under section 79 (2) (a) of the Act***

***(c) where applicable converting all tenders to the same currency using the Central Bank of Kenya exchange rate prevailing at the tender opening date***

***(d) applying any margin of preference indicated in the tender document”***

109. The Board is also guided by the holding in **Zachariah Wagunza & Another vs. Office of the Registrar Academic Kenyatta University & 2 Others [2013] eKLR** where the High Court held that:

***“Concerning irrelevant considerations, where a body takes account of irrelevant considerations, any decision arrived at becomes unlawful. Unlawful behavior might be constituted by (i) an outright refusal to consider the relevant matter; (ii) a misdirection on a point of law; (iii) taking into account some wholly irrelevant or extraneous consideration; and (iv) wholly omitting to take into account a relevant consideration.”***

110. In the circumstances, the Board finds that the Procuring Entity’s Evaluation Committee failed to evaluate the Applicant’s tender submitted in the subject tender in accordance with provisions of the Tender Document, the Act and Regulations 2020 as read with Article 227(1) of the Constitution.

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

111. We have found that the Board is divested of jurisdiction only to the extent of hearing and determining the allegation raised in the instant Request for Review that the 1<sup>st</sup> Respondent breached Section 96 (2) & (3) of the Act by failing to publish the subject tender using the dedicated state portal or on the Procuring Entity's website.

112. We have also found that the Applicant's tender was not evaluated in accordance with provisions of the Tender Document, the Act and Regulations 2020 as read with Article 227(1) of the Constitution.

113. The upshot of our finding is that the instant Request for Review succeeds with respect to the following specific orders:

**FINAL ORDERS**

114. 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 this Request for Review:

**A. The letter of Notification of Award dated 2<sup>nd</sup> October 2024 with respect Tender No. MTTI/T/1/2024-2025 for Provision of Security Services issued to the 2<sup>nd</sup> Respondent be and is hereby nullified and set aside.**



**B. The letters of Notification of Intention to Award dated 27<sup>th</sup> September 2024 with respect to Tender No. MTTI/T/1/2024-2025 for Provision of Security Services addressed to the Applicant and to all other unsuccessful tenderers be and are hereby nullified and set aside.**

**C. The 1<sup>st</sup> Respondent is hereby ordered to reconvene and direct the Evaluation Committee to re-admit the Applicant's tender at the Financial Evaluation stage and re-evaluate the Applicant's tender together with all tenders that made it to the Financial Evaluation stage and award the subject tender to the bidder with the lowest evaluated tender price taking into consideration the findings of the Board in this Request for Review, the provisions of the Tender Document, the Act and the Constitution within 21 days of the date of this decision.**

**D. Further to Order No. C, the 1<sup>st</sup> Respondent is hereby ordered to proceed with the procurement process of Tender No. MTTI/T/1/2024-2025 for Provision of Security Services to its lawful and logical conclusion taking into account the Board's findings herein.**



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

**Dated at NAIROBI this 31<sup>st</sup> Day of October 2024.**



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**CHAIRPERSON**

**PPARB**



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**SECRETARY**

**PPARB**



