

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 109/2024 OF 28TH OCTOBER 2024

BETWEEN

CANON SECURITY SERVICES KENYA LIMITED APPLICANT

AND

ACCOUNTING OFFICER,

THE TECHNICAL UNIVERSITY OF KENYA 1ST RESPONDENT

THE TECHNICAL UNIVERSITY OF KENYA 2ND RESPONDENT

KLEEN HOMES SECURITY SERVICES LIMITED ... INTERESTED PARTY

Review against the decision of the Accounting Officer, The Technical University of Kenya in relation to Tender No. TUK/T/08/2024/2025 for Provision of Security Guarding Services.

BOARD MEMBERS PRESENT

- | | |
|----------------------|---------------------|
| 1. QS Hussein Were | - Panel Chairperson |
| 2. Mr. Daniel Langat | - Member |
| 3. Dr. Susan Mambo | - Member |

IN ATTENDANCE

- | | |
|-------------------|--|
| 1. Ms. Sarah Ayoo | - Holding Brief for the Acting Board Secretary |
| 2. Evelyn Weru | - Secretariat |



PRESENT BY INVITATION

APPLICANT

CANON SECURITY SERVICES KENYA LIMITED

1. Ms. Desma Nungo - Advocate, NOW Advocates LLP
2. Ms. Maina - Advocate, NOW Advocates LLP

1ST& 2ND RESPONDENT

ACCOUNTING OFFICER, THE TECHNICAL UNIVERSITY OF KENYA & THE TECHNICAL UNIVERSITY OF KENYA

1. Mr. Mwangi Mugo h/b for
Mr. Gichuru - Advocate, Gichuru & Gichuru Advocates
2. Mrs. Ruth Kirwa - Advocate, The Technical University of Kenya
3. Dr. Judith Wasike - Ag. Director Procurement

INTERESTED PARTY

KLEEN HOMES SECURITY SERVICES LIMITED

- Mr. Daniel Omutanyi - Tender Officer

BACKGROUND OF THE DECISION

The Tendering Process

1. The Technical University of Kenya, the Procuring Entity and 2nd Respondent herein, invited sealed tenders in response to Tender No. TUK/T/08/2024/2025 for Provision of Security Guarding Services at the main campus, Men's Hostel and Women Hostel for a period of one year (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 13th September 2024 and published



on the Procuring Entity's website www.tukenya.ac.ke and on the Public Procurement Information Portal (PIIP) website www.tenders.go.ke where the blank tender document issued to tenderers (hereinafter referred to as the 'Tender Document') was available for download. The tender's submission deadline was 26th September 2024 at 10.00 a.m.

Submission of Tenders and Tender Opening

2. According to the Tender Opening Minutes signed by members of the Tender Opening Committee which form part of confidential documents furnished to the Public Procurement Administrative Review Board by the 1st Respondent pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), a total of fifteen (15) tenders were submitted in response to the tender. The tenders were opened in the presence of tenderers' representatives present, and were recorded as follows:

Bidder No.	<u>Name</u>
1	Sentinel Protection Services Ltd
2	Tamca Security Services Ltd
3	Mocam Security Service Ltd
4	Complex Matrix Security Service Ltd
5	Superior Security Ltd
6	Lagarda Security Services Limited
7	Dorda Security Services Ltd
8	Wellings Security Services Limited
9	Pivot Star Security Limited



10	Rova Security Service Ltd
11	Keyforce Security Group (KSG) Ltd
12	Sumich Solutions Limited
13	Chakra Company Limited
14	Kleen Homes Security Services Ltd
15	Canon Security Services Kenya Limited

Evaluation of Tenders

3. A Tender Evaluation Committee undertook evaluation of the tenders in the following stages:

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

Preliminary Evaluation

4. The Evaluation Committee was required to examine tenders for responsiveness against the criteria set out under Table 2: Mandatory Evaluation Criteria of Section III-Evaluation and Qualification Criteria at page 27 to 28 of the Tender Document. Tenderers were required to meet all the mandatory requirements at this stage.

5. At the end of evaluation, two (2) tenderers, being the Applicant and Interested Party, were determined responsive proceeded to Technical Evaluation. Thirteen (13) tenders were determined non-responsive and dropped from further evaluation.



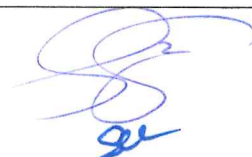
Technical Evaluation

6. The Evaluation Committee was required to examine tenders at this stage using the criteria set under Technical Evaluation of Section III-Evaluation and Qualification Criteria at page 29 to 31 of the Tender Document. Bidders were required to score 80 out of 100 to proceed to Financial Evaluation.
7. At the end of evaluation at this stage, two tenders, being the Applicant's and Interested Party's, were found responsive and proceeded for financial evaluation.

Financial Evaluation

8. At this stage of evaluation, the Evaluation Committee was required to evaluate tenders using the criteria set out under Price Evaluation of Section III-Evaluation and Qualification Criteria at page 31 of the Tender Document. The Procuring Entity would award the tender to the tenderer determined to be the lowest evaluated subject to pre-qualification.
9. At the end of evaluation at this stage, the Evaluation Committee found as follows:

<i>B/No</i>	<i>Company Name</i>	<i>Tender Sum Amount (Ksh) per annum</i>
<i>14.</i>	<i>M/S Kleen Homes Security Services Ltd</i>	<i>(Kshs. 7,380,000.00)</i>
<i>15.</i>	<i>M/S Canon Security Services Kenya Limited</i>	<i>(Kshs. 7,905,600.00)</i>



RECOMMENDATION

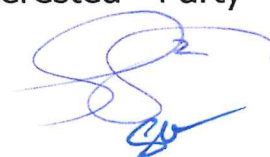
Based on the financial evaluation and comparison with other bidders, the Evaluation Committee finds that the financial proposal of Bidder 14- M/S Kleen Homes Security Services Ltd is compliant, competitive and provides the best value for money. Pursuant to section 86 (1) (c) of the Public Procurement and Asset Disposal Act 2015, a successful tender is one with the lowest evaluated total cost of ownership.

The Tender Evaluation Committee recommends that Bidder 14- M/S Kleen Homes Security Services Ltd be awarded for the procurement of Provision of Security Services at a total cost of Kshs. 7,380,000.00 (Seven Million three hundred and eighty thousand Kenya Shillings Only), VAT Incl per annum.

Due Diligence

10. The Evaluation Committee was required to carry out Post-Qualification/Due Diligence on the lowest evaluated tenderer as provided under the criteria set out under Post-qualification and Contract award (ITT 39) of Section III-Evaluation and Qualification Criteria at page 31 of the Tender Document.

11. According to the Due Diligence Report as can be discerned at pages 21 to 24 of the Evaluation Report, a due diligence exercise was conducted on M/s Kleen Homes Security Services Ltd, the Interested Party herein, and the Evaluation Committee found the Interested Party as satisfactory.



Evaluation Committee's Recommendation

12. The Evaluation Committee recommended award of the tender to M/s Kleen Homes Security Services Ltd at a total cost of Kenya Shillings Seven Million Three Hundred and Eighty Thousand only (Kshs. 7,380,000.00), VAT Inclusive per annum.

Professional Opinion

13. In a Professional Opinion, dated 11th October 2024, the Ag. Director, Procurement & Supply Chain, Dr. Judith Wasike, reviewed the manner in which the procurement process was undertaken and concurred with the Evaluation Committee's recommendation to award the tender to M/s Kleen Homes Security Services Ltd at a total cost of Kenya Shillings Seven Million Three Hundred and Eighty Thousand only (Kshs. 7,380,000.00) VAT Inclusive per annum.

14. The Professional Opinion was approved by the 1st Respondent on 14th October 2024.

Notification to Tenderers

15. Tenderers were notified of the outcome of the evaluation *vide* letters dated 14th October 2024.



REQUEST FOR REVIEW NO. 109 OF 2024

16. Canon Security Services Kenya Limited, (hereinafter, "the Applicant"), filed a Request for Review on 28th October 2024 dated the same day together with an Applicant's Statement in Support signed by Peter Irungu, its General Manager (hereinafter, "the instant Request for Review") through NOW Advocates LLP, seeking the following orders of the Board:

- a) The 1st Respondent furnishes the Applicant with a summary of the proceedings of the opening of bids, evaluation and comparison of the bids, due diligence report (if any) including the evaluation criteria used in evaluating bids in Tender No. TUK/T/08/2024/2025 for Provision of Security Guarding Services forthwith in accordance with Section 67(4) of the Public Procurement and Asset Disposal Act, 2015 read with Section 68(2)(d)(iii) of the Public Procurement and Asset Disposal Act, 2015;***

- b) The 1st Respondent's decision awarding the subject tender to the Interested Party be annulled and set aside;***

- c) The 1st Respondent's letter dated 14th October 2024 notifying the Interested Party of its successfulness in the subject tender, if any, be annulled and set aside;***



- d) The 1st Respondent's letter of Notification of Regret dated 14th October 2024 notifying the Applicant that it had not been successful in the subject tender be annulled and set aside;***
- e) Any procurement contract with respect to the subject tender that the Respondents may have entered into with the Interested Party in breach of Section 135(3) of the Public Procurement and Asset Disposal Act, 2015 read with Sections 167(1) and 168 of the Public Procurement and Asset Disposal Act, 2015 and Regulation 203(2)(c)(ii) of the Public Procurement and Asset Disposal Regulations, 2020 be nullified and set aside;***
- f) The Respondents be directed to award the subject tender to the Applicant as the bidder who submitted the bid with the lowest evaluated price;***
- g) In the alternative, the Public Procurement Administrative Review Board be pleased to review all records of the procurement proceedings relating to the subject tender and in exercise of its discretion, to direct the Respondents to redo or correct anything within the entire procurement proceedings found not to have been done in compliance with the law, including conducting post-qualification evaluation/due diligence on the Interested Party to confirm the authenticity of the documents provided by the***



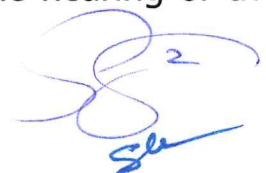
Interested Party in its bid in response to the subject tender;

h) The Respondents be compelled to pay to the Applicant the costs arising from, and incidental to, this Request for Review; and

i) The Public Procurement Administrative Review Board to make such and further orders as it may deem fit and appropriate in ensuring that the ends of justice are fully met in the circumstances of this Request for Review.

17. In a Notification of Appeal and a letter dated 28th 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 24th 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 28th October 2024.

18. *Vide* a Hearing Notice dated 5th November 2024, the Acting Board Secretary, notified parties and all tenderers of an online hearing of the



instant Request for Review slated for 12th November 2024 at 11:00 a.m. through the link availed in the said Hearing Notice.

19. On 7th November 2024, the Applicant filed through its advocates an Affidavit of Service sworn by David Manyonge Saratuki on 7th November 2024.
20. On 12th November 2024 the 1 & 2nd Respondents filed through Gichuru & Gichuru Advocates a Notice of Appointment of Advocates dated 11th November 2024, a Replying Affidavit sworn by Dr. Judith Nelima Wasike, the Ag. Director Procurement of the Procuring Entity, on 11th November 2024 together with confidential documents submitted pursuant to Section 67(3)(e) of the Act.
21. *Vide* email dated 12th November 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 24th March 2020. All tenderers were invited to submit to the Board any information and arguments concerning the tender within three (3) days.
22. Through email, the Acting Board Secretary, notified parties and all tenderers that the online hearing of the instant Request for Review slated for 12th November 2024 at 11:00 a.m. had been postponed to 14th November 2024 at 11.00 a.m.




23. On 13th November 2024, the Applicant filed an Applicant's Further Statement in Support of the Request for Review signed by Peter Irungu, its General Manager on 13th November 2024
24. On 14th November 2024, the Applicant filed an Applicant's List and Bundle of Authorities dated 13th November 2024.
25. At the hearing of the Request for Review on 14th November 2024 at 11.00 a.m. the Board read out pleadings filed by parties in the matter and allocated time for parties to highlight their respective cases. Thus the instant Request for Review proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

Applicant's Submissions

26. In her submissions, Ms. Desma Nungo Counsel for the Applicant, relied on the Request for Review dated 28th October 2024, the Applicant's Statement in Support of the Request for Review signed by Peter Irungu, its General Manager on 28th October 2024, the Applicant's Further Statement in Support of the Request for Review signed by Peter Irungu, its General Manager on 13th November 2024 and Applicant's List and Bundle of Authorities dated 13th November 2024 filed before the Board.
27. The Applicant, in its submission, invited the Board to review whether the Respondents evaluated the Interested Party's bid in conformity with the procedures set out in the Tender Document and in accordance with Section 79(1), 80 (1) & (2), and 86(1)(a) of the Act as read with



Regulation 74(1), 75(1), 76 and 77 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020').

28. While referring to Clause 1 of the Invitation to Tender (ITT) at page 2 of the Tender Document read with Section V – Activity Schedule of Part II – Procuring Entity's Requirements at page 74 of the Tender Document, the Applicant pointed out that the subject tender was for provision of 30 security guards at the Procuring Entity's main campus at the men's and women's hostel for a period of one (1) year and for which the Applicant was the service provider prior to the subject tender.
29. It submitted that the Tender Document at MR 19 of Table 2: Mandatory Evaluation Criteria of Section III- Evaluation and Qualification Criteria at page 28 required bidders to provide an undertaking to comply with labour laws and to provide a written declaration that the bidder shall comply with all labour laws and the minimum wage guidelines during the entire period of the contract in the subject tender as provided in the Labour Institutions Act No. 12 of 2007 and the Regulation of Wages (Amendment) Order, 202 inclusive of House Allowance and all statutory obligations.
30. It pointed out that MR19 set out the monthly wages for 30 day and night security guards and a house allowance at 15% of the basic monthly wage, the total wage payable, inclusive of house allowance, being Kshs. 17,481.80 for the day guard and Kshs. 19,502.85 for the night guard. It argued that these amounts were not inclusive of VAT



and that as such, in the light of the requirement to comply with the statutory obligation of VAT, the total wage payable ought to have been plus 16% VAT.

31. The Applicant averred that MR19 had two components being (a) the requirement for provision of a written declaration and (b) the requirement for provision of a compliant bid price. In flagging out the requirement for VAT, it made reference to Clause 16.6 of Section I-Instructions to Tenderers at page 12 of the Tender Document and indicated that this provision was to the effect that a bidder's prices would include all duties, taxes and other levies payable under the subject tender.
32. The Applicant averred further that in computing the total basic minimum wage against the requirements of MR19, the amount quoted for a day guard and a night guard would be Kshs. 20,279.00 and Kshs. 22,623.31, respectively, and that the annual minimum wages, inclusive of 15% housing allowance and 16% VAT, for 15 day-guards and 15 night-guards in Nairobi with respect to the subject tender ought to be Kshs. 7,722,415.80.
33. The Applicant went on to aver that the Interested Party, whose bid price was read out at the tender opening as Kshs. 7,380,000.00 per annum, provided a bid price that was below the minimum monthly wages inclusive of 15% housing allowance and 16% VAT compared to the Applicant's bid price of Kshs. 7,905,600.00 per annum, all inclusive.



34. It opined that the Interested Party ought to have been disqualified at the Financial Evaluation stage for non-compliance with MR19 and added that compliance with labour laws with respect to conforming to minimum wage guidelines was a serious issue that had been taken up by several institutions including the Commissioner of Labour and the Director General of Public Procurement Regulatory Authority as evidenced by the Applicant's annexures marked "PI-7" and "PI-8".

35. In support of its case, the Applicant relied on the holding in the case of *Grain Pro Kenya Inc. Ltd v Andrew Waithaka Kiragu (2019) eKLR ; Arasa & another v Benori Agencies and Services Limited (Cause 242 of 2017) (2022) KEELRC 116 (KLR) (Employment and Labour) (17 May 2022) (Judgment) ; PPARB Application No. 10 of 2017 Questa Care v Kenya Medical Supplies Authority & Another; Republic v Public Procurement Administrative Review Board Nairobi City Water & Sewerage Company Limited & Machiri Limited (Interested Parties) Ex parte Fourway Construction Company Limited (2019) KEHC 8471 (KLR); and Republic v Public Procurement Administrative Review Board Accounting Officer Kenya Rural Roads Authority China Railway No. 10 engineering Group Co. Ltd, S.S. Mehta & Sons Ltd Ex parte Roben Aberdare (K) Ltd.*

36. On whether the Respondents breached Section 83 of the Act, the Applicant posited that the Tender Document provided for due diligence at page 31 to confirm, amongst others, the authenticity of documents provided by a bidder. It posited further that the authenticity of a document can only be confirmed by the Evaluation Committee if it



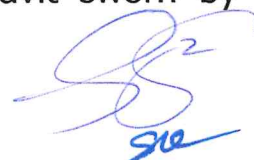
writes to the 3rd party who issued the said document and invited the Board to study the Due Diligence Report and confirm that due diligence was conducted on the Interested Party which entailed authenticating its documents. It relied on the holding in *Republic v Public Procurement Administrative Review Board & Palona Enterprises General Supplies Limited Ex parte University of Eldoret (2017) KEHC 4209 (KLR)*.

37. On whether the Respondents breached Section 87(3) of the Act read with Regulation 82 of Regulations 2020, the Applicant submitted that the notification letter issued to the Applicant by the Respondents did not specify who the successful bidder was and at what price it was awarded the subject tender. It referred to the holding in *PPARB Application No. 28 of 2023 Trident Insurance Company Limited v Secretary to Independent Electoral and Boundaries Commission & Another*.

38. The Applicant also submitted that the Procuring Entity had signed a contract with the Interested Party during the pendency of the instant Request for Review as evidenced at paragraph 15 of the Applicant's Further Statement where the Applicant annexed photographs taken as at 2nd November 2024 indicating a breach of Section 168 of the Act. It pointed out that the Interested Party's guards were on site following the expiration of the Applicant's contract with the Procuring Entity.

First and Second Respondents submissions

39. In his submissions counsel for the 1st and 2nd Respondents, Mr. Mwangi, relied on the Respondents' Replying Affidavit sworn by Dr.



Judith Nelima Wasike on 11th November 2024 together with the confidential documents submitted to the Board pursuant to Section 67(3)(e) of the Act.

40. The Respondents submitted that they complied with the Act and the provisions of the Tender Document in the evaluation of bids submitted in the subject tender. They indicated that both the Applicant's and the Interested Party's tenders were found to be responsive to the mandatory requirements in the Tender Document.
41. They averred that MR19 required a bidder to provide a written declaration that it would comply with the labour laws and the minimum wage guidelines during the entire period of the contract and that both the Applicant and the Interested Party complied with this requirement by attaching valid labour compliance certificates to their tenders.
42. They averred further that the Tender Document provided that the Procuring Entity reserved the right to conduct due diligence so as to confirm authenticity of the documents submitted a requirement which the Respondents complied with as could be discerned from the Due Diligence Report that was provided alongside the evaluation report.
43. Referring to ITT 32.1 of Section I – Instructions to Tenderers (ITT) at page 19 of the Tender Document the Respondents pointed out that the tender sum as submitted and read out during the tender opening was absolute and final and not subject to correction, adjustment or



amendment in any way by any person or entity. The Applicant, having attended the tender opening where the bid prices were read out, must have known the Interested Party's bid price which was not subject to any alteration. According to the Respondents, the notification letter issued by the Respondents complied with the Act and Regulations 2020 noting the reason given as to why the Applicant was disqualified was that it did not emerge as the lowest evaluated bidder.

44. Explaining their filing of response to the instant Request for Review beyond the stipulated timelines notified by the Board Secretary and as provided under Regulation 205(3) of Regulations 2020, the Respondents pointed out that they came on record a bit late noting that 1st November 2024 was declared a public holiday and due to the bulkiness of the documents in the subject tender, they required time to compile the same and to acquaint themselves with the matter. They also referred the Board to the provisions under Article 50 and 169 of the Constitution and submitted that the Applicant having had an opportunity to view the Respondents' response and to respond to it was not prejudiced.

45. At this juncture, Ms. Kirwa indicated that it took time for the Procuring Entity to compile the documents relating to the subject tender noting that public universities are experiencing industrial action and the Procuring Entity was working on balancing these issues and sought for the Board's indulgence.



Interested Party's submissions

46. In his submissions, Mr. Omutanyi, on behalf of the Interested Party, stated it was aligned to the submissions made by the Respondents.

Applicant's Rejoinder

47. In a rejoinder, Ms. Desma Nungo submitted that it was clear that the Respondents did not deny the requirements set out under MR19 on compliance with the labour laws, housing allowance and tax and that the only issue was that the Respondents had misconstrued the two components under MR19.

48. Counsel stated that the unique nature of MR19 was that a bidder would progress for further evaluation having shown that it had submitted the written declaration at the Preliminary Evaluation stage but would be subjected to further evaluation at the Financial Evaluation stage so as to confirm compliance with the law in terms of the prices quoted. She indicated that the Procuring Entity was conspicuously silent on this critical issue on the amounts quoted by the Interested Party vis a vis MR19.

49. She averred that there was no denial that the authenticity of the documents submitted by the Interested Party was not confirmed during post qualification contrary to the express provisions of the Tender Document noting that there was need for extra processes to be undertaken other than the site visit.



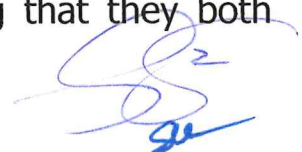
50. Counsel reiterated that the the fact that the Applicant became aware of the Interested Party's bid price at tender opening does not cure the legal requirement of stating it in the notification letter. She argued that since the Interested Party's tender price was absolute, it could not offer the services within the requirements of the Tender Document in terms of compliance with MR19 and it ought to have been disqualified.

CLARIFICATIONS

51. When asked to clarify on the notification letter dated 14th October 2024 issued to the Applicant Mr. Mwangi reiterated that the said letter complied with Section 87(3) of the Act to the extent that it disclosed the successful bidder and the reason it was successful. Ms. Wasike added that bid prices were read out loud during tender opening and the Applicant having been present was aware of the Interested Party's bid price, and as such, the notification letter issued to the Applicant did not specify the amount of the successful bidder but informed it that the Interested Party's price was the lowest evaluated price.

52. On whether the Applicant's bid complied with the requirements set out under MR19, Ms. Nungo stated that the Applicant complied indicating that although the Applicant's bid price was slightly higher than that of the Interested Party, the Interested Party's performance of a contract in the subject tender would be sanctioning a breach of the law.

53. On the same question Mr. Mwangi submitted that both the Applicant and the Interested Party complied with MR 19 noting that they both



presented the written declarations that they would comply with the labour laws and minimum wage guidelines in addition to submission of the labour compliance certificate. He further submitted that the Procuring Entity carried out due diligence on the Interested Party confirming compliance with the mandatory requirements under the Tender Document.

54. Mr. Mwangi referred the Board to the Due Diligence Report furnished to the Board under Part 5 of the Evaluation Report which provided all the details pertaining to the due diligence exercise. He indicated that no contract had been signed with regard to the subject tender and that the expiration of the Applicant's contract on 31st October 2024 necessitated deployment of the security guards by the Interested Party on reliance of the letter of notification of award of the subject tender.

55. As to why the contract between the Applicant and the Procuring entity could not be extended pending a contract being signed with regard to the subject tender, Ms. Kirwa submitted that the Procuring Entity had noted that the Applicant's personnel were aware of the impending transition and it could not risk to be left unguarded noting security concerns.

56. Ms. Kirwa further stated that based on the award letter to the Interested Party, an oral or implied contract was sufficient in the circumstances.



57. On whether the Procuring Entity visited the Interested Party for purposes of conducting due diligence and what exercise was carried out, Mr. Omutanyi stated that the Procuring Entity visited the Interested Party's premises on a due diligence to confirm its existence, physical location, and documentation.
58. Mr. Omutanyi, in response to an inquiry, submitted that the Interested Party had not signed a contract with respect to the subject tender but had deployed its security guards on the night of 31st October 2024 and are currently on site. He indicated that the Interested Party's bid price of Kshs. 7,380,000/- was inclusive of VAT and covered 30 guards.
59. When asked to clarify how the Applicant came to learn of the Interested Party's bid price, Ms. Nungo submitted that the Applicant's representative attended the tender opening where it came to learn of the Interested Party's bid price that was read out loud. She confirmed to the Board that the Applicant had a contract with the Procuring Entity which expired on 31st October 2024.
60. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 28th October 2024 was due to expire on 18th November 2024 and that the Board would communicate its decision on or before 18th November 2024 to all parties via email.



BOARD'S DECISION

61. 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 Procuring Entity failed to evaluate the Interested Party's tender with regard to Mandatory Requirement No. 19 in accordance with the evaluation criteria in the Tender Document thereby offending the provisions of Section 80(2) of the Act.*
- b. Whether the Procuring Entity failed to conduct due diligence on the Interested Party in accordance with the Tender Document in breach of the provisions of Section 83 of the Act.*
- c. Whether the Procuring Entity' violated the provisions of Section 168 of the Act by deploying the Interested Party's security guards to its premises during the pendency of this Request for Review.*
- d. Whether the Procuring Entity's Letter of Notification dated 14th October 2024 issued to the Applicant failed to meet the threshold required under Section 87(3) of the Act.*
- e. What orders should the Board grant in the circumstances?*

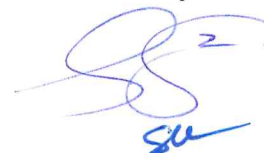


As to whether the Procuring Entity failed to evaluate the Interested Party's tender with regard to Mandatory Requirement No. 19 in accordance with the evaluation criteria in the Tender Document thereby offending Section 80(2) the Act.

62. It was the Applicant's case that the Interested Party tender failed to comply with MR19 since its bid price as read out loud at the tender opening as Kshs. 7,380,000.00 per annum was below the basic minimum monthly wages inclusive of 15% housing allowance and 16% VAT and as such, it ought to have been disqualified at the Financial Evaluation stage specifically for failure to meet the requirement on a bid price that complies with statutory obligations and all labour laws and minimum wage guidelines during the entire period of the contract.

63. The Respondents countered that the Evaluation Committee complied with provisions of the Constitution, the Act, Regulations 2020 and the Tender Document in evaluation of the subject tender and that in regard to MR19, both the Applicant and the Interested Party's tenders were found compliant having submitted their respective declarations indicating that they would comply with labour laws and the minimum wage guidelines during the entire period of the contract in the subject tender.

64. The Respondents submitted that both the Applicant and the Interested Party's tenders were found to be compliant to the tax requirements and the employment and labour laws and that the Interested Party's all-



inclusive bid price of Kshs. 7,380,000/= was competitively priced compared to the Applicant's bid price of Kshs. 7,905,600/= and hence the lowest evaluated.

65. The issue that has arisen for the determination of the Board is whether the Procuring Entity's evaluation committee evaluated the Interested Party's tender in respect of mandatory requirement MR 19 in accordance with the evaluation criteria of the tender document.

66. To determine this issue the Board takes cognisance of the objective of public procurement which 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)d)"



67. Further to the stipulations of the Constitution, the Board takes note of the various provisions of the Act and the Regulations. Section 80 of the Act is instructive on how evaluation and comparison of tenders should be conducted by a procuring entity as follows:

"80. Evaluation of tender

- (1) The evaluation committee appointed by the accounting officer pursuant to Section 46 of the Act, shall evaluate and compare the responsive tenders other than tenders rejected.**
- (2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and,**
- (3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)-**
 - (a) The criteria shall, to the extent possible, be objective and quantifiable;**
 - (b) each criterion shall be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality, time and service for the purpose of evaluation; and**
- (4)"**



68. Section 80(2) of the Act is clear on the requirement for 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. The Board's interpretation of a system that is fair is one that considers equal treatment of all tenders against criteria of evaluation known by all tenderers having been well laid out in the tender document issued by the 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 the tender document.

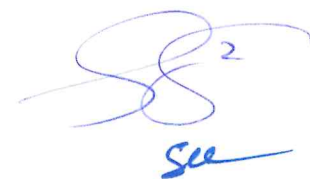
69. Section 86 of the Act provides for the successful tender as follows:

"(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;

(b) the responsive proposal with the highest score determined by the procuring entity by combining, for each proposal, in accordance with the procedures and criteria set out in the request for proposals, the scores assigned to the technical and financial proposals where Request for Proposals method is used;

(c) the tender with the lowest evaluated total cost of ownership; or



(d) the tender with the highest technical score, where a tender is to be evaluated based on procedures regulated by an Act of Parliament which provides guidelines for arriving at applicable professional charges:

Provided that the provisions of this subsection shall not apply to section 141 of this Act.

(2)

70. Regulation 77 of Regulations 2020 provides for Financial Evaluation as follows:

"77. Financial evaluation

(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.

(3) Tenders shall be ranked according to their evaluated price and the successful tender shall be in accordance with the provisions of section 86 of the Act.”

71. Having carefully studied the Tender Document, the Board notes that MR19 was provided at Table 2: Mandatory Evaluation Criteria of Section III-Evaluation and Qualification Criteria at page 28 of the Tender Document as follows:

	MANDATORY
MR19	<p><i>A Written declaration that the Service Provider shall comply with all labour laws and the minimum wage guidelines during the entire period of the contract as provided for in the Labour Institution Act No.12 of 2007 and the Regulation of wages (Amendment) Order, 2022 inclusive of House Allowance and all the statutory obligations as follows:</i></p> <p><i>(a)Monthly Wages for Nairobi, Mombasa and Kisumu</i> <i>Kshs. 15,201.65 (day guard)</i> <i>Kshs. 16,959 (night guard)</i></p> <p><i>(b)House Allowance (15%) of the basic minimum monthly wage for each above</i></p> <p><i>Total Wage Payable incl. of house allowance</i> <i>Kshs. 17,481.8(day guard)</i> <i>Kshs. 19,502.85 (night guard)</i></p> <p><i>NB Failure to meet this requirement shall lead to automatic disqualification at the financial stage. Also Attach a Copy of Valid Labour Compliance Certificate</i></p>



72. Further, at the Financial Evaluation stage a tender would be evaluated using the criteria set out under Price Evaluation of Section III-Evaluation and Qualification Criteria at page 31 of the Tender Document as follows:

"Price evaluation

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

73. In essence, MR19 required a bidder to submit a written declaration that it would comply with all labour laws and the minimum wage guidelines during the entire period of the contract as provided for in the Labour Institution Act No. 12 of 2007 and the Regulations of Wages (Amendment) Order 2022, inclusive of house allowance and all statutory obligations whereby the total wage payable inclusive of house allowance for Nairobi, Mombasa, and Kisumu was Kshs. 17,481.8 for the day guard and Kshs. 19,502.85 for the night guard.

74. Bidders were also required to submit a copy of a valid labour compliance certificate. It is imperative to note that failure to comply with MR19 would lead to disqualification of a bidder at the Financial Evaluation stage which provided that award of the subject tender would be to the lowest evaluated bidder.

75. A perusal of the Evaluation Report shows that both the Applicant and the Interested Party were determined responsive to MR19 and both having passed the Preliminary and Technical Evaluation stages



progressed for evaluation at the financial stage where a review of their bid prices was carried out including checking for compliance with labour laws as stipulated under MR 19. The Evaluation Committee found as follows:

Table 4 Financial Bids

<i>B/No</i>	<i>Company Name</i>	<i>Tender Sum Amount (ksh) per annum</i>
<i>14.</i>	<i>M/S Kleen Homes Security Services Ltd</i>	<i>(Kshs. 7,380,000.00)</i>
<i>15.</i>	<i>M/S Canon Security Services Kenya Limited</i>	<i>(Kshs. 7,905,600.00)</i>

Financial Proposal Analysis

- i. Compliance with labour laws. (Mandatory requirement 19):
Compliance with labour laws was reviewed for both Bidder 14 and Bidder 15 and found to be reasonable. The requirement of providing a total wage payable inclusive of house allowance for both day and night guards was met.*
- ii. Competitive pricing compared to other bidders
The total quoted price of Kshs. 7,380,000.00 (Seven Million three hundred and eighty thousand Kenya Shillings Only), VAT Incl per annum for bidder 14 was competitive when compared to bidder 15 quoting a total of Kshs. 7,905,600.00 (Seven Million, Nine hundred and five thousand six hundred), VAT Incl per annum.*
- iii. Value for money.
Considering the technical score of 91.5 out of 100 and the financial proposal, Bidder 14 offers the best value for money.*

76. It is clear from the reading of MR19 that the key requirements were (i) written declaration that the service provider shall comply with all labour laws and the minimum wage guidelines inclusive of house allowance and all statutory obligations and (ii) attach a copy of valid labour



compliance certificate. Further, it is not in dispute that both the Applicant and the Interested Party provided written declarations and attached valid labour compliance certificates in their bids.

77. What is in contention however, as stated by the Applicant, is the presumed inability of the Interested Party to comply with the minimum wage guidelines, inclusive of house allowance and all statutory obligations, during the entire contract. The presumed inability is borne out of the Interested Party's tender price that the Applicant argues will lead to breach of minimum wage guidelines under the Labour Institution Act No. 12 of 2007.

78. It is the Board's view that a keen reading of MR19 reveals that a bidder was not required to tabulate the figures totaling its bid price. Whereas the amounts stipulated for the Total Wage Payable Inclusive of House Allowance was Kshs. 17,481.8 for the day guard and Kshs. 19,502.85 for the night guard, it was up to a bidder to quote a price that was not only compliant with the labour laws and the minimum wage guidelines during the contract period inclusive of house allowance but to also ensure that its bid price was inclusive of all its statutory obligations.

79. It is the Board's further view that the total wage payable, inclusive of house allowance, of Kshs. 17,481.80 for the day guard and Kshs. 19,502.85 for the night guard, was inclusive of all duties, taxes and other levies, collectively referred to as statutory obligations, as clearly stated under Clause 16.6 of Section I-Instructions to Tenderers at page



12 of the Tender Document. In any case, it is the Board's view that no employer is exempt from the said statutory obligations unless expressly stated under the relevant statute.

80. It is not in the place of this Board to decide for a bidder how to price its bid. The minimum monthly wage inserted in the Tender Document served as a useful piece of information to guide a bidder on what costs to expect should his bid become successful but was not binding upon a bidder otherwise the essence of competition would have been lost if even bidder was to quote the minimum wage in their bids. Any bidder was free to price its bid below or above the minimum wage but will have to live with the choice they make, if successful, since the successful bidder will be required to abide by the minimum wage guidelines during the entire period of the contract.

81. To this end, the Board finds and holds that the Procuring Entity confined itself to the procedures and criteria set out in the Tender Document when evaluating bids at the financial evaluation stage and is therefore left with the inevitable conclusion that the Procuring Entity evaluated the Interested Party's tender with regard to Mandatory Requirement No. 19 in compliance with the provisions of the Tender Document, the Act and the Constitution. Accordingly, this ground of review fails and is disallowed.



As to whether the Procuring Entity failed to conduct due diligence on the Interested Party in accordance with the Tender Document in breach of the provisions of Section 83 of the Act.

82. The Applicant contended that the Respondents misconstrued and misapplied the post-qualification criteria of Section III- Evaluation and Qualification Criteria at page 31 of the Tender Document having failed to confirm the authenticity of the Interested Party's documents that were issued by third parties. The Applicant submitted that authenticity of a document can only be confirmed by the maker and/or issuer of such a document and that in carrying out the due diligence, the Respondents breached Section 83 of the Act.

83. On the flip side, the Respondents submitted that the Evaluation Committee conducted due diligence on the Interested Party in accordance with the provisions of the Tender Document and Section 83 of the Act and that the Interested Party was found to be compliant and was thus recommended for award of the subject tender. It was the Respondents' case that Section 83 of the Act gave the Evaluation Committee discretion in regard to how to conduct due diligence including obtaining references from persons whom a bidder had prior engagement and did not place any mandatory requirement on a procuring entity to confidentially write and obtain responses from third parties including statutory bodies who issued various certificates.



84. To address this issue the Board makes reference to the Tender Document at page 31 which states as follows:

"Post-qualification and Contract award (ITT 39), more specifically,

This tender will be subject to post-qualification, the contract shall be awarded to the lowest evaluated tenderer, subject to confirmation of pre-qualification data, if so required.

The University will carry out due diligence on the lowest Tenderer's who are technically responsive by visiting their premises. The criteria will be to:

- Confirm the financial capacity and capability of the firm (the personnel & equipment).***
- Confirm the authenticity of the documents provided***
- Confirm the premises/physical location.***
- Confirm previous performance.***
- Other relevant statutory documents***
- Demonstration that workers are employed as per labour laws (Appointment letters for at least 20 employees)***

The Tenderer will automatically be disqualified where false or fraudulent information is established to have been given.



Prior to the signing of the contract the successful tenderer will be required to submit/agree with the procuring entity on the following: -

a. Police Clearance Certificates for all staff that will be deployed to work at all premises of the University.”

85. The question which arises for the determination of the Board is whether the due diligence exercise was conducted in accordance with the provisions of the Tender Document as read with Section 83 of the Act.

86. Section 83 of the Act is instructive on conduct of due diligence and states as follows:

"83. Post-qualification

(1) An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act.

(2) The conduct of due diligence under subsection (1) may include obtaining confidential references from persons with whom the tenderer has had prior engagement.



(3) To acknowledge that the report is a true reflection of the proceedings held, each member who was part of the due diligence by the evaluation committee shall—
(a) initial each page of the report; and
(b) append his or her signature as well as their full name and designation.”

87. Further, Regulation 80 of the 2020 Regulations provides as follows:

"80. Post-qualification

(1) Pursuant to section 83 of the Act, a procuring entity may, prior to the award of the tender, confirm the qualifications of the tenderer who submitted the bid recommended by the evaluation committee, in order to determine whether the tenderer is qualified to be awarded the contract in accordance with sections 55 and 86 of the Act.

(2) If the bidder determined under paragraph (1) is not qualified after due diligence in accordance with the Act, the tender shall be rejected and a similar confirmation of qualifications conducted on the tenderer—

(a) who submitted the next responsive bid for goods, works or services as recommended by the evaluation committee; or

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(b) who emerges as the lowest evaluated bidder after re-computing financial and combined score for consultancy services under the Quality Cost Based Selection method.”

88. This Board in **PPARB Application No. 158 of 2020 On the Mark Security Limited V The Accounting Officer, Kenya Revenue Authority and Another** established that a due diligence exercise is a fundamental element of a procurement process that assists a procuring entity to exercise the attention and care required to satisfy itself that the lowest evaluated responsive tenderer can execute a tender.

89. The Board notes that a Due Diligence Report was included as part of the Evaluation Report submitted to the Board by the 1st Respondent pursuant to Section 67(3)(e) of the Act at pages 21 of 25 to 24 of 25 and an attendance register confirming attendance of members of the Evaluation Committee and representatives of the Interested Party signed on 8th October 2024. The Due Diligence Report states as follows:

5. DUE DILIGENCE REPORT

This Due Diligence Report provides a detailed account of the investigations conducted to verify the qualifications, performance, and capacity of Bidder 14 M/S Kleen Homes Security Services Ltd for the provision of Security Services. The due diligence process was undertaken in accordance with Section 83 of the Public Procurement and Asset Disposal Act, 2015.

5.1 Company Representatives and Evaluation committee members present

The attendance register of the Company Representatives and The Technical University members of the evaluation committee is here- in attached and referred to as Appendix VI.

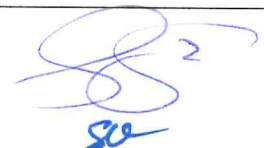
5.2 Areas of Due Diligence

The due diligence exercise covered the following key areas:



Table 5: Due Diligence Criteria

No.	CRITERIA
1	<i>Confirmation of Physical location & premise according to Tenderer Eligibility Details Form.</i>
2	<i>Confirmation of company 's Valid Certificate of Registration/Incorporation</i>
3	<i>Confirmation of an Original Current ISO certification in Security Management and or Quality Management system from a relevant body.</i>
4	<i>Confirmation of current CR 12 certificate not older than three months from the date of tender opening and copy National IDs for the Directors.</i>
5	<i>Confirmation of a valid registration certificate for corporate Private Security Service Provider from Private Security Regulatory Authority and Certificate of Training for Persons holding management positions from PSRA</i>
6	<i>Confirmation of a valid certificate confirming membership with Kenya Security Industry Association (KSIA), Protective Security Industry Association (PSIA), Protective & Safety Association of Kenya (PROSAK) or any other recognized security Association.</i>
7	<i>Confirmation of a Valid Dosh Certificate from Directorate of Occupational Health and Safety</i>
8	<i>Confirmation of valid Radio and Alarms frequency licenses from Communication Authority of Kenya. (Payment Receipts shall Not be Allowed).</i>
9	<p><i>Confirmation of the framework for:</i></p> <ul style="list-style-type: none"> <i>a) Guards' duty Rostering Methodology</i> <i>b) Selection, recruitment, and vetting policies</i> <i>c) Training Schedules</i>
10	<p><i>Confirmation of the Written declaration that the Service Provider shall comply with all labour laws and the minimum wage guidelines during the entire period of the contract as provided for in the Labour Institution Act No.12 of 2007 and the Regulation of wages (Amendment) Order, 2022 inclusive of House Allowance and all the statutory obligations as follows; - (a)Monthly Wages for Nairobi, Mombasa and Kisumu Kshs. 15,201.65(day guard) Kshs. 16,959 (night guard) (b)House Allowance (15%) of the basic minimum monthly wage for each above Total Wage Payable incl. of house allowance Kshs. 17,481.8(day guard) Kshs. 19,502.85 (night guard) NB Failure to meet this requirement shall lead to automatic disqualification at the financial stage.</i></p> <p><i>Confirmation of an original certificate of Valid Labour Compliance.</i></p>



11	<i>Confirmation of availability of training, the attached M.O.U with a training school accredited by Private Security Regulatory Authority and its Certificate of Accreditation as a Private Security Training Institution from PSRA. The Attach Training Certificate of at least 15 Guards issued by PSRA-accredited training Institution and a List of at least 15 Guard Force Numbers issued by PSRA</i>
12	<p>OPERATIONAL TOOLS AND EQUIPMENTS</p> <p><i>Tools and Equipment</i></p> <p><i>a) Confirmation of 8 Handheld metal scanners and Proof of ownership</i></p> <p><i>b) Confirmation of 4 Under-Search Mirror and Proof of ownership</i></p> <p><i>c) Confirmation of emergency response 2 vehicles and Logbooks in the tenderer name</i></p>

Table 5.1 Findings and Observations

No.	CRITERIA	YES/NO(✓/✗)	B14
1	<i>Confirmation of Physical location & premise according to Tenderer Eligibility Details Form.</i>	YES/NO(✓/✗)	✓
2	<i>Confirmation of company 's Valid Certificate of Registration/Incorporation</i>	YES/NO(✓/✗)	✓
3	<i>Confirmation of an Original Current ISO certification in Security Management and or Quality Management system from a relevant body.</i>	YES/NO(✓/✗)	✓
4	<i>Confirmation of current CR 12 certificate not older than three months from the date of tender opening and copy National IDs for the Directors.</i>	YES/NO(✓/✗)	✓
5	<i>Confirmation of a valid registration certificate for corporate Private Security Service Provider from Private Security Regulatory Authority and Certificate of Training for Persons holding management positions from PSRA</i>	YES/NO(✓/✗)	✓
6	<i>Confirmation of a valid certificate confirming membership with Kenya Security Industry Association (KSIA), Protective Security Industry Association (PSIA), Protective & Safety Association of Kenya (PROSAK) or any other recognized security Association.</i>	YES/NO(✓/✗)	✓
7	<i>Confirmation of a Valid Dosh Certificate from Directorate of Occupational Health and Safety</i>	YES/NO(✓/✗)	✓

8	Confirmation of valid Radio and Alarms frequency licenses from Communication Authority of Kenya. (Payment Receipts shall Not be Allowed).	YES/NO(✓/✗)	✓
9	Confirmation of the framework for a) Guards' duty Rostering Methodology b) Selection, recruitment, and vetting policies c) Training Schedules	YES/NO(✓/✗)	✓
10	Confirmation of the Written declaration that the Service Provider shall comply with all labour laws and the minimum wage guidelines during the entire period of the contract as provided for in the Labour Institution Act No.12 of 2007 and the Regulation of wages (Amendment) Order, 2022 inclusive of House Allowance and all the statutory obligations as follows; - (a)Monthly Wages for Nairobi, Mombasa and Kisumu Kshs. 15,201.65(day guard) Kshs. 16,959 (night guard) (b)House Allowance (15%) of the basic minimum monthly wage for each above Total Wage Payable incl. of house allowance Kshs. 17,481.8(day guard) Kshs. 19,502.85 (night guard) NB Failure to meet this requirement shall lead to automatic disqualification at the financial stage. Confirmation of an original certificate of Valid Labour Compliance.	YES/NO(✓/✗)	✓
11	Confirmation of availability of training, the attached M.O.U with a training school accredited by Private Security Regulatory Authority and its Certificate of Accreditation as a Private Security Training Institution from PSRA. The Attach Training Certificate of at least 15 Guards issued by PSRA-accredited training Institution and a List of at least 15 Guard Force Numbers issued by PSRA	YES/NO(✓/✗)	✓
12	OPERATIONAL TOOLS AND EQUIPMENTS Tools and Equipment a) Confirmation of 8 Handheld metal scanners and Proof of ownership b) Confirmation of 4 Under-Search Mirror and Proof of ownership c) Confirmation of emergency response 2 vehicles and Logbooks in the tenderer name	YES/NO(✓/✗)	✓

- *Technical capacity has been verified through successful past performance and the availability of qualified personnel and necessary equipment.*
- *The bidder has demonstrated sound financial health with adequate liquidity to handle the contract.*
- *The bidder is fully compliant with legal requirements, including valid registration, current CR 12 Certificate, compliance with security associations.*

6. RECOMMENDATION

Based on the due diligence findings, the Evaluation Committee recommends awarding the contract for the procurement of provision of Security Services to Bidder 14-M/S Kleen Homes Security Services Ltd.

90. From the above, the Board notes that the due diligence exercise carried out by the Evaluation Committee confirmed various documents submitted by the Interested Party as provided under the Tender Document. It is also noted that neither the Tender Document nor the Act required the Procuring Entity to write to third parties to confirm the authenticity of documents issued by third parties. In the Board's considered view the Applicant the notion that the authenticity of a document can only be confirmed by the issuer of the document is erroneous. It is perfectly possible to authenticate a document without referring to the author of the document as was done in the post-tender evaluation of the subject tender.

91. In the circumstances, the Board finds that the Procuring Entity conducted due diligence on the Interested Party in accordance with the provisions of the Tender Document and in compliance with the provisions of Section 83 of the Act read with Regulation 80 of Regulations 2020. Accordingly, this ground of review fails and is disallowed.



As to whether the Procuring Entity' violated the provisions of Section 168 of the Act by deploying the Interested Party's security guards to its premises during the pendency of this Request for Review.

92. At paragraph 15 of the Applicant's Further Statement in Support of the Request for Review, the Applicant averred that the Respondents engaged the Interested Party to offer security guarding services upon expiry of its contract with the Procuring Entity on 31st October 2024 and during the pendency of the instant Request for Review contrary to Section 168 of the Act.

93. During the hearing, both the Respondents and the Interested Party confirmed that indeed security guards had been deployed to the Procuring Entity's premises on the night of 31st October 2024 following expiration of the previous contract held by the Applicant and that although no contract had been signed, this was done in order to avoid a vacuum and was based on the letter of notification of intention to award issued to the Interested Party.

94. The Board notes that pursuant to Section 168 of the Act, the procurement proceedings in the subject tender were suspended following receipt by the Board Secretary of the instant Request for Review filed on 28th October 2024. Section 168 provides that:

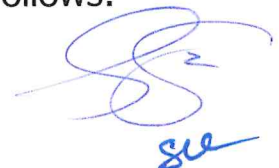


"Upon receiving a request for a review under section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed."

95. In **PPARB Application No. 13 of 2021 Five Blocks Enterprises Limited v Managing Director KEBS & Another** the Board held that:

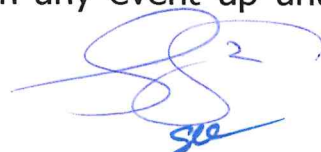
"...upon filing of a request for review application, an automatic stay of proceedings takes effect which suspends all procurement proceedings and prevents any further steps from being taken in the tender in question. Further, procurement proceedings shall resume at the point they were, when the stay comes to an end, once the request for review has been heard and determined by the Board."

96. In essence, once a request for review application is lodged with the Board Secretary, procurement proceedings are immediately suspended and any action taken by the Respondents in furtherance of the procurement proceedings during the pendency of the request for review is null and void. This position was explained by Justice Nyameya, as she then was, in **Judicial Review Application 540 of 2017 Republic v Public Procurement Administrative Review Board; Kenya Power & Lighting Company Limited (Interested Party) Exparte Transcend Media Group Limited [2018] eKLR** as follows:



"...Section 168 of the Act provides that upon receiving a request for a review under section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed. The effect of a stay is to suspend whatever action is being stayed, including applicable time limits, as a stay prevents any further steps being taken that are required to be taken, and is therefore time –specific and time-bound. 53. Proceedings that are stayed will resume at the point they were, once the stay comes to an end, and time will continue to run from that point"

97. Picking from the foregoing precedence, the Board notes that the procurement proceedings in the subject tender were suspended on 28th October 2024 upon the filing of the Instant Request for Review. The act of the Procuring Entity allowing the Interested Party to deploy guards at the Respondents' premises on the night of 31st October 2024 was irregular and a contravention of Section 168 of the Act. This is so because, the procurement proceedings having been suspended on 28th October, 2028 meant that the *status quo* remained such that the Applicant being the current service provider of the security guard services ought to have continued giving this service until the instant Request for Review is determined to finality and in any event up until



the procurement dispute has been resolved with finality. In the Board's considered view, proper procurement planning on the part of the Procuring Entity would have avoided a situation such as the present one in transitioning from one service provider to another. Caught in this situation the right thing to do in the circumstances would have been for the Procuring Entity to extend the existing contract with the Applicant pending hearing and determination of the instant Request for Review.

98. It is imperative to note that Section 135 of the Act provides for creation of procurement contracts and oral or implied contracts are not envisaged under the Act. Section 135(4) of the Act clearly stipulates that:

"No contract is formed between the person submitting the successful tender and the accounting officer of a procuring entity until the written contract is signed by the parties."

99. In this regard therefore, the Board finds that the deployment of the Interested Party's security guards by the Procuring Entity on its premises on 31st October 2024 was done in breach of the provisions of Section 168 of the Act.

100. Accordingly, this ground of review succeeds and is allowed.



As to whether the Procuring Entity's Letter of Notification dated 14th October 2024 issued to the Applicant failed to meet the threshold required under Section 87(3) of the Act.

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

"(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."



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

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

"82. Notification of intention to enter into a contract

- (1) The notification to the unsuccessful bidder under Section 87(3) of the Act, shall be in writing and shall be made at the same time the successful bidder is notified.***
- (2) For greater certainty, the reason to be disclosed to the unsuccessful bidder shall only relate to their respective bids.***
- (3) The notification in this regulation shall include the name of the successful bidder, the tender price and the reason why the bid was successful in accordance with Section 86(1) of the Act."***



104. In view of the provisions of Section 87 of the Act read with Regulation 82 of Regulations 2020, the Board observes that an accounting officer of a procuring entity must notify, in writing, the tenderer who submitted the successful tender, that its tender was successful before the expiry of the tender validity period. Simultaneously, while notifying the successful tenderer, an accounting officer of a procuring entity notifies other unsuccessful tenderers of their unsuccessfulness, giving reasons why such tenderers are unsuccessful, disclosing who the successful tenderer is, why such a tenderer is successful in line with Section 86(1) of the Act and at what price is the successful tenderer awarded the tender. These reasons and disclosures are central to the principles of public procurement and public finance of transparency and accountability enshrined in Article 227 and 232 of the Constitution. This means all processes within a public procurement system, including notification to unsuccessful tenderers must be conducted in a transparent manner.

105. Having carefully studied the Applicant's letter of Notification of Regret dated 14th October 2024, the Board observes that the Interested Party was indicated as the successful bidder as follows:

".....
The selection was made based on the criteria outlined in the tender documents. After thorough review, the contract was awarded to M/S Kleen Homes Security Services Ltd whose bid met all the Mandatory, Technical and Financial Requirements.
....."



106. From the above, there is no indication of the price that the Interested Party, being the successful bidder, was awarded the subject tender. More concerning is that during the hearing, the Respondents submitted that the Applicant was already aware of the Interested Party's bid price having attended the tender opening of the subject tender where bid prices were read out loud.

107. It is therefore quite clear to the Board that the Respondents Letter of Notification dated 14th October 2024 issued to the Applicant failed to meet the threshold required in Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020 for not including the tender price at which the Interested Party was awarded the subject tender.

108. Accordingly, this ground of review succeeds and is allowed.

As to what orders the Board should grant in the circumstances

109. The Board has found that the Procuring Entity evaluated the Interested Party's tender with regard to Mandatory Requirement No. 19 in compliance with the provisions of the Tender Document.

110. The Board has further found that the Procuring Entity conducted due diligence on the Interested Party in accordance with the provisions of the Tender Document, Section 83 of the Act read with Regulation 80 of Regulations 2020.



111. The Board has also established that the deployment of the Interested Party's security guards to the Procuring Entity's premises on 31st October 2024 was in breach of the provisions of Section 168 of the Act. As such, the Board deems it just and fair to order the Respondents to comply with Section 168 as read with Section 135 of the Act and engage with the Interested Party's security guards only once a procurement contract has been signed with regard to the subject tender.

112. It is the Board's further finding that the Respondents Letter of Notification of Regret dated 14th October 2024 issued to the Applicant failed to meet the threshold required in Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020 as it failed to include the tender price at which the Interested Party was awarded the subject tender. Consequently, the Board deems it fit to nullify the letters of Notification of Award and the regret letters dated 14th October 2024 issued to both the successful and unsuccessful bidders to enable all tenderers be notified of the outcome of evaluation of the subject tender including the tender price of the successful bidder in accordance with Section 87 of the Act read with Regulation 82 of Regulations 2020.

113. The upshot of all of the foregoing findings is that the instant Request for Review succeeds in terms of 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 Letters of Notification of Award and Regret addressed to the Interested Party and the unsuccessful tenderers, including the Applicant, dated 14th October 2024 with respect to Tender No. TUK/T/08/2024/2025 for Provision of Security Guarding Services be and are hereby nullified and set aside.**
- B. The 1st Respondent is hereby directed to issue fresh letters of Notification of Award and Regret, as appropriate, in the subject tender in accordance with the law within seven (7) days from the date of this decision taking into account the Board's findings herein.**
- C. Given the success and failure of the grounds of review herein, each party shall bear its own costs in the Request for Review.**

Dated at NAIROBI this 18th Day of November 2024.



**PANEL CHAIRPERSON
PPARB**



**SECRETARY
PPARB**