

bids in response to Tender No. KEFRI/ONT/006/2024-2025 for Provision of Security, Guarding and Reception Services. It was an open (national) tender and the tender submission deadline was set as Tuesday, 31st December 2024 at 11:30 a.m.

Submission of Bids and Tender Opening

2. According to the Tender Opening Minutes dated 31st December 2024 under the Confidential File submitted by the Procuring Entity, the following seventeen (17) bidders were recorded as having submitted their bids in response to the subject tender by the tender submission deadline.

#	Bidder
1.	Dango Five Security Limited
2.	Ismax Security Limited
3.	Superior Security Limited
4.	Babs Security Limited
5.	Lelo Security Services Limited
6.	Asap Security Services
7.	Canon Security Services Limited
8.	Flashcom Security Limited
9.	Blueshield Securicor Limited
10.	Pada Private Investigators Limited
11.	Gate Armor Security Service Limited
12.	Bracel Limited



13.	Armytex Security Services Limited
14.	Papaton Security Services Limited
15.	Chakra Security
16.	Hounslow Security Limited
17.	Trimtone Security Limited

Evaluation of Bids

3. The 1st Respondent constituted a Tender Evaluation Committee to undertake an evaluation of the submitted bids in the following 3 stages.
 - i. Preliminary Evaluation
 - ii. Technical Evaluation
 - iii. Financial Evaluation

Preliminary Evaluation

4. At this stage of the evaluation, all the submitted bids were to be examined using the criteria set out as Clause 2. Preliminary examination for Determination of Responsiveness under Section III- Evaluation and Qualification Criteria at pages 34 to 36 of the blank Tender Document.
5. Nine of the submitted bids were found unresponsive to the mandatory requirements and thus disqualified from further evaluation. Eight bids, which included that of the Applicant and the Interested Party were



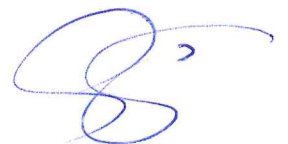
found responsive to the mandatory requirements and thus qualified for further evaluation.

Technical Evaluation

6. At this stage of the evaluation, the bids successful at the Preliminary Evaluation Stage were to be examined using the criteria set out as Clause 2. Vendor Evaluation Criteria under Section III- Evaluation and Qualification Criteria at pages 37 to 39 of the blank Tender Document.
7. One of the bids evaluated at this stage was found unresponsive after it failed to muster the 80 marks threshold and was thus disqualified from further evaluation. Seven bids, which included that of the Applicant and the Interested Party met the 80 marks threshold and thus qualified for further evaluation.

Financial Evaluation

8. At this stage of the evaluation, the bids successful at the Technical Evaluation Stage were to be examined using the criteria set out as Clause 2. Financial Evaluation at page 40 of the blank Tender Document.
9. Bids were to be evaluated through a comparison of their tender prices. The successful bid would be that offering the lowest tender price among the bids that qualified for evaluation at the Financial Evaluation Stage in addition to making provision for payment of minimum wages.



10. At the end of the evaluation at this stage, the Interested Party's bid was established as the bid offering the lowest tender price at Kenya Shillings Forty-Nine Million, Seven Hundred and Ninety, six Hundred and Sixty-Two and Thirty-Four Cents (Kshs. 49,790,662.34) inclusive of all taxes. The Evaluation Report captures that the tender price could only cover the minimum wages and for this reason clarification was sought and obtained from the bidder.

Evaluation Committee's Recommendation

11. The Evaluation Committee vide its Evaluation Report recommended the award of the subject tender to the Interested Party at its tendered price of Kenya Shillings Forty-Nine Million, Seven Hundred and Ninety, Six Hundred and Sixty-Two and Thirty-Four Cents (Kshs. 49,790,662.34) inclusive of all taxes.

Professional Opinion

12. In a Professional Opinion dated 13th December 2024 the Procuring Entity's Manager, Supply Chain Management, Dr. Paul Nyathore, reviewed the manner in which the subject procurement process was undertaken and recommended that the Evaluation Committee to consider the bid of the next responsive bid after that of the Interested Party. According to the Professional Opinion, the Interested Party was determined to have submitted an invalid Tax Compliance Certificate and further that the approved annual budget for the financial year



2024/2025 of Kshs 25,000,000 would be inadequate to sufficiently cover the subject tender.

13. On 20th January 2025, Dr. Jane W. Njuguna, rejected the Professional Opinion and directed the re-advertisement of the subject tender noting that there was no sufficient budget to cover the next lowest bid's tender price of Kshs. 63,369,600.

Notification to the bidders

14. Accordingly, the bidders were notified of the termination of the subject tender vide letters dated 22nd January 2025.

REQUEST FOR REVIEW

15. On 4th February 2025, the Applicant herein, through the firm P.O. Odira & Company Advocates, filed a Request for Review dated 4th February 2025 supported by an affidavit sworn on even date by Peter Gichu, the Applicant's General Manager, seeking the following orders:

a) The Applicant has suffered and risks further loss or damage as it submitted a bid that satisfied all eligibility, mandatory requirements, and qualification criteria, conformed to the technical specifications outlined in the Tender Document, and provided a competitive bid price aligned with section 131 and 132 of the Public Procurement and Disposal Act (sic) (PPDA) 2015, labour laws and minimum wage guidelines. Therefore, it should have

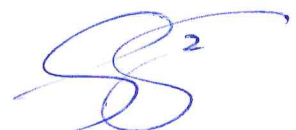


- been deemed the lowest responsive bidder and anticipated to be awarded the tender;*
- b) The Applicant risks losing income from the subject tender award and is being unfairly denied the opportunity to negotiate and thus engage in the procurement contract;*
 - c) The Applicant faces significant loss and damage due to being unjustly denied the economic opportunities presented by the tender if the termination persists;*
 - d) The Respondent's decision to terminate the procurement proceedings should be cancelled and set aside;*
 - e) The Applicant be awarded the subject tender as a rightful and proper determination of its bid;*
 - f) The Notification of Termination be cancelled and set aside;*
 - g) A summary of the proceedings regarding the opening, evaluation, and comparison of the subject tender, including the evaluation criteria, should be provided;*
 - h) A Notification of Intention to Contract should be issued in favour of the Applicant, followed by the signing of a procurement contract subject to negotiations between the Respondent and the Applicant;*
 - i) The Respondent must refrain from advancing to the next stage of the procurement process, including re-advertisement of the subject tender, pending the resolution of this matter;*
 - j) The Respondent be compelled to pay the costs to the Applicant arising from and incidental to this application;*



k) The Board to make such and further orders as it may deem fit and appropriate in ensuring that the ends of justice are fully met.

16. In a Notification of Appeal and a letter dated 4th February 2025, Mr. James Kilaka, the Ag. Board Secretary of the Board notified the Respondents of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the said Respondent was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 4th February 2025.
17. On 10th February 2025, the Respondents through Philip M. Kichana, filed Grounds of Opposition dated 10th February 2025 and supported by an affidavit sworn on 10th February 2025 by Philip M. Kichana, the Corporate Secretary and Principal Legal Officer of the 2nd Respondent. The Respondents equally forwarded to the Board the Confidential Documents under Section 67(3) the Act.
18. Vide letters dated 14th February 2025, the Acting Board Secretary notified all bidders in the subject tender via email, of the existence of the subject Request for Review while forwarding to all tenderers a copy



of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. All bidders in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within 3 days from 14th February 2025.

19. On the same day, 14th February 2025, the Ag. Board Secretary, sent out to the parties a Hearing Notice notifying parties that the hearing of the instant Request for Review would be by online hearing on 19th February 2025 at 11:00 a.m. through the link availed in the said Hearing Notice.
20. On 17th February 2025, the Applicant filed a Further Affidavit sworn on even date by Peter Irungu Gichu.
21. On 18th February 2025, the Interested Party, through the firm of Ivy Maria Kerre Advocates, filed a Memorandum of Appearance of even date as well as a Replying Affidavit sworn on 18th February 2025 by Nancy Khasoha Kamusienyi.
22. On the morning of 19th February 2025, the Respondents filed an undated Statement in response to the Interested Party's Memorandum of Response.
23. When the Board convened for hearing on 19th February 2025 at 11:00 a.m. Counsel for the Applicant, Mr. Odira, raised an objection to the



participation of the Interested Party in the present proceedings citing that he had just learnt that there was an Interested Party in the matter.

24. The Respondents associated themselves with the submissions made the Applicant arguing that the Interested Party's response in the matter was an afterthought. According to Applicant, the Interested Party had 14 days from the date of receipt of its Notification Letter to move the Board through a Request for Review but having failed to do so could not seek to participate in the present proceedings.
25. Counsel for the Interested Party, Ms. Kerre, argued that the proceedings before the Board were in respect of the subject tender, a tender in which the Interested Party had submitted its bid and thus held a legitimate interest in the outcome of the proceedings before this Board.
26. The Board retreated and returned with directions that in line with Section 170(d) of the Act, the Interested Party would be allowed to participate in the present proceedings. The Board observed that the Interested Party submitted its bid in the subject tender forming the basis of the present Request for Review. Further, that on 14th February 2025, the Board's Secretary notified the Interested Party of the present Request for Review and invited it to submit its representation in the matter. However, the Board cautioned the Interested Party, that since it had not filed its own Request for Review, it could not through its response purport to introduce any new arguments in the present



proceedings beyond those raised in the documents by the Applicant and the Respondents.

PARTIES SUBMISSIONS

Applicant' Submissions

27. Counsel for the Applicant, Mr. Odira, submitted that the Respondents had breached Sections 131 and 132 of the Act as they failed to engage the Applicant in a competitive negotiation despite its tender price being above the approved budget within a margin of 25%. He contended that the Applicant's tender price of Kshs. 63,369,600 was within the 25% margin contemplated under Sections 131 and 132 since the approved budget in the subject tender was Kshs. 50,000,000.
28. According to Counsel, the Applicant ought to have been invited for a competitive negotiation and only if that failed, could there be a valid termination of the tender. He contended that the Respondents' reason for termination of the subject tender on account of inadequate budgetary allocation was unjustified as the Applicant was never invited to participate in any competitive negotiations.
29. Mr. Odira argued that the Applicant ought to have factored in the applicable minimum wages in their approved budget. He further relied on ***PPARB Application No. 51 of 2017; South Consulting Africa Limited v Ministry of Devolution & Planning*** for the proposition



that the Board should allow the Request for Review and that the Respondents should be compelled to engage the Applicant in a competitive negotiation exercise.

Respondents' Submissions

30. Counsel for the Respondents, Mr. Kichana, highlighted that whereas the Request for Review was founded on an alleged breach of Section 131 of the Act, the Applicant during the hearing was focused on Section 132 of the Act.
31. According to Counsel, Section 132 of the Act only comes into effect when the Accounting Officer is of the view that negotiations are possible and if undertaken the same could lead to an agreement with engaged bidders on a contract price that is within a Procuring Entity's approved budget.
32. Mr. Kichana pointed out that that the approved annual budget for security services for the financial year 2024/2025 was Kshs. 25 million and that the Procuring Entity was keen on carrying forward this amount to the subsequent financial year 2025/2026. Therefore, the approved budget for the 2 years which is the contractual period in the subject tender was Kshs. 50 million.
33. Commenting on Section 132 of the Act, Counsel was of the view that the competitive negotiations contemplated under the said section were not mandatory. He contended that negotiations were up to the



Accounting Officer to determine whether it was appropriate in the circumstance to hold any such negotiations.

34. Mr. Kichana contended that Article 227 of the Constitution of Kenya, 2010 requires prudent use of public resources and that in the procurement proceedings of the subject tender, the Accounting Officer acted in accordance with the various guidelines issued by the National Treasury and the Public Procurement Regulatory Authority. He concluded by pointing out that the Procuring Entity still required security services and therefore asked the Board to dismiss the Request for Review and allow them to retender.

Interested Party's Submissions

35. Counsel for the Interested Party, Ms. Kerre, indicated that the Interested Party had abandoned the Replying Affidavit previously filed by it in the present proceedings. She confirmed that the Interested Party associated itself with the submissions made on behalf of the Respondents.

Rejoinder

36. Counsel for the Applicant, Mr. Odira, rejected any suggestion by the Respondents that competitive negotiations can only happen after the Board issues directions for the same. According to the Counsel, Section 132 of the Act was clear that competitive negotiations should happen



with respect to all bids whose tender prices do not exceed the approved budget by a margin of 25%.

CLARIFICATIONS

37. The Board called on the Respondents to point out the documents in the matter that confirmed that the approved budget for the subject tender was Kshs. 50 million. Counsel for the Respondents, Mr. Kichana indicated that they had submitted the minutes of the Procuring Entity's Board approving the budget as well as the approved procurement plan showing the Kshs. 25 million annual budget for the financial year 2024/2025. He added that this annual approved amount would be carried over to the next financial year, 2025/2026.
38. Responding to the same question, Counsel for the Applicant, Mr. Odira, asserted that the Applicant had, subsequent to receiving the notification of termination of the subject tender on account of inadequate budgetary allocation, inquired from the Respondents the actual approved budget to which the Respondents disclosed as being Kshs. 50 million.
39. Asked whether they were keen on re-advertising or withdrawing the tender altogether, Mr. Kichana indicated that the Procuring Entity would have to convene its management to determine the way forward, noting that they still needed to procure the security services for its installations.



40. Asked if competitive negotiations with the Applicant would be appropriate in underscoring the principle of cost-effectiveness the Respondents agreed that competitive negotiations could be held with the Applicant but not through compulsion.
41. Asked how it knew that it was the lowest evaluated bidder in the subject tender, Counsel for the Applicant, Mr. Odira indicated that there was a document that confirmed this only that the same had not been filed with the Board.
42. The Board asked the Respondents to confirm the recommendation of the Evaluation Committee as expressed through the Evaluation Report vis-a-vis the Notification of termination. Counsel for the Respondents Mr. Kichana stated that, according to the Evaluation Report, the Evaluation Committee recommended the award of the subject tender to the Interested Party at a tender price of **Kshs. 49,790,662.34**. Further, that the Accounting Officer subsequently terminated the subject tender having been satisfied that the Interested Party had not submitted a valid Tax Compliance Certificate as its status on KRA's itax Portal was reading "withdrawn" as at the time of the recommendation. Additionally, that the Second lowest bid, that is, the bid of the Applicant was above the approved budget.
43. The Board inquired from the Respondents on whether they carried out a due diligence exercise, and if so to provide the details of the persons



who participated and the time when the same was done. Counsel for the Respondents, Mr. Kichana indicated that no due diligence was undertaken as the Evaluation Report captures that due diligence was waived for all the bidders.

44. On the termination Mr. Kichana stated that the Respondents complied with Section 63 of the Act having notified the bidders of the termination through letters dated 22nd January 2025 and also forwarded a report on the termination to the Public Procurement Regulatory Authority.
45. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 4th February 2025 had to be determined by 25th February 2025. Therefore, the Board would communicate its decision on or before 25th February 2025 to all parties via email.

BOARD'S DECISION

46. The Board has considered all documents, submissions and pleadings together with confidential documents submitted to it pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination:
 - i) *Whether the Board has jurisdiction over the present Request for Review pursuant to Section 167(4)(b) of the Act on account of the termination of the subject tender;*



Depending on the finding on the first issue:

- ii) Whether competitive negotiation was available to the Applicant under Sections 131 and 132 of the Act for having emerged the lowest evaluated bidder.*
- iii) Whether the Respondents, in terminating the subject tender failed to comply with the provisions of Section 63 of the Act;*
- iv) What orders the Board should issue in the circumstance*

As to whether the Board has jurisdiction over the present Request for Review pursuant to Section 167(4)(b) of the Act on account of the termination of the subject tender

47. Though not pleaded by any party, this Board must as a matter of prudence satisfy itself that it is clothed with the requisite jurisdiction to determine the present Request for Review. This is because termination of a procurement process divests the Board of jurisdiction to entertain the subject matter under Section 167(4)(b) of the Act.
48. The foregoing is in line with the established legal principle that courts and decision-making bodies can only preside over cases where they have jurisdiction and when a question on jurisdiction arises, a Court or tribunal seized of a matter must as a matter of good judgment enquire into it before doing anything concerning such a matter in respect of which it is raised. It is only upon satisfying itself to have the requisite



jurisdiction will the Board proceed to pronounce itself on the merits of the Request for Review.

49. 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."

50. The locus classicus case on the question of jurisdiction is the celebrated case of ***The Owners of the Motor Vessel "Lillian S" -v- Caltex Oil Kenya Ltd (1989) KLR 1*** where Nyarangi J.A. made the oft-cited dictum:

"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 other evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction."



51. This Board is a creature of statute owing to its establishment as provided for under Section 27(1) of the Act, which provides that:

"(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."

52. Section 28 of the Act provides for the functions of the Board as:

***The functions of the Review Board shall be—
reviewing, hearing and determining tendering and asset disposal disputes; and to perform any other function conferred to the Review Board by this Act, Regulations or any other written law."***

53. The jurisdiction of the Board is provided for under Section 167 of the Act which provides for what can and cannot be subject to review of procurement proceedings before the Board and Sections 172 and 173 of the Act which provides for the powers the Board can exercise upon completing a review as follows:

Section 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.

...

169 ... – 171 ...

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.

54. Section 167 of the Act extends an opportunity to candidates and bidders disgruntled with a public tender process to approach the Board for redress. However, subsection (4) of the Section divests the Board of jurisdiction on a myriad of subject matters including the termination of a procurement process. Termination of public procurement proceedings is governed by Section 63 of the Act.
55. Superior Courts have on numerous occasions offered guidance on the interpretation of Section 167(4)(b) of the Act and the ousting of the Board's jurisdiction on account of termination of tenders.



56. In ***Nairobi High Court Judicial Review Misc. Application No. 390 of 2018; R v Public Procurement Administrative Review Board & Ors Ex parte Kenya Revenue Authority***, the High Court affirmed that the Board has jurisdiction to first establish whether the preconditions for termination under section 63 of the Act have been met before downing its tools:

"33. A plain reading of Section 167(4) (b) of the Act is to the effect that a termination that is in accordance with section 63 of the Act is not subject to review. Therefore, there is a statutory pre-condition that first needs to be satisfied in the said sub-section namely that the termination proceedings are conducted in accordance with the provisions of section 63 of the Act, and that the circumstances set out in section 63 were satisfied, before the jurisdiction of the Respondent can be ousted..."

See also ***Nairobi High Court Judicial Review Misc. Application No. 117 of 2020; Parliamentary Service Commission v Public Procurement Administrative Review Board & Ors v Aprim Consultants***

57. Drawing from the above judicial pronouncements, this Board is clothed with jurisdiction to first interrogate whether the preconditions for termination of a tender under Section 63 have been satisfied. It is only



upon satisfying itself that the said preconditions have been met that the Board can down its tools in the matter. Where any precondition has not been met, the Board will exercise its jurisdiction to hear and determine the Request for Review.

58. Section 63 of the Act speaks to termination of public procurement and asset disposal proceedings in the following terms:

"63. Termination or cancellation of procurement and asset disposal Proceedings

(1) An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies—

(a) ...

(b) inadequate budgetary provision;

(c) ... (i) ...

(2) An accounting officer who terminates procurement or asset disposal proceedings shall give the Authority a written report on the termination within fourteen days.

(3) A report under subsection (2) shall include the reasons for the termination.

(4) An accounting officer shall notify all persons who submitted tenders of the termination within fourteen days of



termination and such notice shall contain the reason for termination.

59. From the foregoing, for an Accounting Officer of a Procuring Entity to validly terminate a procurement or asset disposal proceedings:
- i. The termination must be based on any of the grounds under section 63(1) (a) to (f) of the Act;
 - ii. The Accounting Officer must give a Written Report to the PPRA within 14 days of termination giving reasons for the termination; and
 - iii. The Accounting Officer must, within 14 days of termination, give a written notice to the tenderers in the subject tender communicating the reasons for the termination.
60. Effectively, an Accounting Officer is under a duty to provide sufficient reasons and evidence to justify and support the ground of termination of the procurement process under challenge. The Accounting Officer must also demonstrate that they have complied with the substantive and procedural requirements set out under the provisions of Section 63 of the Act.
61. The substantive requirements relate to a Procuring Entity outlining the specific ground under section 63(1) of the Act as to why a tender has been terminated and the facts that support such termination.



62. The procedural requirements include the requirements under Section 63(2), (3), and (4) of the Act i.e. (i) the submission of a Written Report to the PPRA on the termination of a tender within 14 days of such termination and (ii) the issuance of notices of termination of tender to tenderers who participated in the said tender outlining the reasons for termination within 14 days of such termination.
63. The Board shall now interrogate whether the Respondents satisfied the substantive and procedural requirements under Section 63 of the Act when terminating the procurement proceedings in the subject tender:
64. The Board has sighted the Procuring Entity's letter dated 22nd January 2025 addressed to the Applicant, reproduced hereunder:

Managing Director,

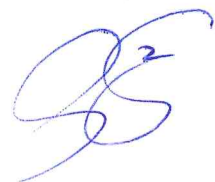
Canon Security Services (K) Ltd

(Address details withheld)

Dear Sir/Madam,

***TERMINATION OF TENDER NUMBERR KEFRI-ONT-006-
20024-2025-PROVISION OF SECURITY GAURDINGG AND
RECEPTION SERVICES***

***Reference is made to the above procurement proceedings
that you participated.***



The institute notifies you of the termination of the above Tender due to inadequate budgetary provision, pursuant to section 63(1)(b) of the PPADA, 2015.

If you have any questions regarding this termination, please do not hesitate to contact us.

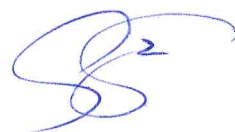
We thank you for participating in our tenders.

Signed

Jane Njuguna (PhD)

Director-KEFRI

65. From the letter dated 22nd January 2025, the Procuring Entity communicated to the Applicant that the subject tender was terminated on account of inadequate budgetary provision.
66. Section 63(1)(b) of the Act recognizes inadequate budgetary provision as one of the grounds under which an Accounting Officer can invoke for the termination of procurement and asset disposal proceedings. However, for one to satisfy the substantive requirement under Section 63, they must go beyond a mere restating of the statutory language on the grounds for termination, they must demonstrate by way of evidence that the circumstances embodying the ground relied upon actually exist.
67. The Board has keenly studied the Respondents' Affidavit sworn on 10th February 2025 by Philip Kichina, the Procuring Entity's Corporate Secretary and Principal Legal Officer and spotted paragraph 7 which reads:



...

7. That the averments in Paragraph 13 are scandalous. There is no one who can tell what bidders will ask for in an Open National Tender, which was the case when the Respondent's (sic) issued the Tender in question. At all material times the budget for provision of security services was KES 25,000,000.

68. The Respondents equally attached its approved Procurement Plan for the financial year 2024/2025. Under the services to be procured during the said financial period, the amount assigned for the subject tender is Kshs. 25,000,000.
69. Counsel for the Applicant during the clarification session clarified further that since the subject tender was running for 2 years, the approved annual budget amount of Kshs. 25,000,000 for the financial year 2024/2025 was to be carried to the financial year 2025/2026, with the result that the total budget for the subject tender was Kshs. 50 million.
70. The Board takes note that the Applicant contended that its tender price exceeded the approved budget by 21.1 %. The Applicant argued that its tender price of Kshs. 63,369,600 did not exceed the approved budget of Kshs. 50,000,000 by a margin of 25%. According to the Applicant the difference of Kshs. 13,369,600 represented a margin of 21.1 %. However, this is not the case as shall become apparent:



$$\text{A bidder's Margin \%} = \frac{\text{Difference between tender price of the bidder and the approved budget}}{\text{Procuring Entity's Approved Budget}} \times 100$$

$$\text{A bidder's Margin \%} = \frac{13,369,600}{50,000,000} \times 100$$

$$= 26.74\%$$

71. From the Form of Tender forming part of the Applicant's bid, the Board notes that the Applicant quoted a tender sum of Kshs. 63,369,600 for the 2-year period that the tender was to be carried out. Therefore, it is apparent that the Applicant's tender sum exceeded the approved budget by Kshs. 13,369,000.
72. The Board is cognizant of Sections 131 to 133 of the Act that make provisions for competitive negotiations in instances where the tender price of the lowest evaluated bid exceeds the available budget and state as follows:

131. Competitive Negotiations

An accounting officer of a procuring entity may conduct competitive negotiations as prescribed where—

(a)

(b)

(c) the lowest evaluated price is in excess of available budget; or

(d)

132. Procedure for Competitive Negotiations

(1) In the procedure for competitive negotiations, an accounting officer of a procuring entity shall—

(a) ...

(b) ...

(c) ...

(2) In the case of tenderers that quoted above the available budget, an accounting officer of a procuring entity shall—

(a) reveal its available budget to tenderers; and

(b) limit its invitation to tenderers whose evaluated prices are not more than twenty five percent above the available budget.

(3) ... (4) ... (5) ...


73. Under Section 131(c) above, it is apparent that the Procuring Entity can enter into competitive negotiations where the lowest evaluated bid price exceeds the approved budget. Sections 132 and 133 are instructive that:
- i. The Procuring Entity should disclose to the bidders the approved budget for the tender in question;



- ii. The Act limits the participation in the competitive negotiations to bidders whose tender prices do not exceed the approved budget by 25%;
- iii. ...

74. As already observed herein the Applicant encountered a computation challenge when it set out to compute the percentage of the margin by which its tender price exceeded the approved budget, with the result that the Applicant erred in its contention that its tender price fell within the 25% margin contemplated under Section 132(2)(c) of the Act. The Board observes that the Applicant arrived at the erroneous 21.1% margin after computing the difference between its bid price and the approved budget against its own bid sum in place of the approved budget. This is because, the erroneous computation yields the margin as 21.0978134626% which approximates to 21.1%.

75. The Applicant's tender sum of Kshs. 63,369,600 exceeds the Procuring Entity's approved budget of Kshs. 50,000,000 by Kshs. 13,369,600. Basically, the Applicant's tender price exceeds the approved budget by a margin of 26.74%, which is above the 25% margin contemplated under Section 132(2)(b) of the Act. Accordingly, the Applicant did not qualify to participate in any competitive negotiations in respect of the subject tender.



76. Having established that the Applicant's bid was above the approved budget and further that it did not qualify to participate in any competitive negotiations, the Board finds that the Respondents sufficiently demonstrated that there was inadequate budgetary allocation, if the Applicant's tender price was the lowest evaluated bid.
77. Turning to the procedural requirement under Section 63(4) of the Act, the Board has sighted from the Confidential File the termination letters dated 22nd January 2025 addressed to the different bidders in the subject tender, including the Applicant. In the absent of evidence to the contrary, the Board is convinced that the Respondents notified bidders in the subject tender of the termination of the tender within 14 days.
78. Turning to the other procedural requirement under Section 63(2) of the Act for the Procuring Entity to furnish the Public Procurement Regulatory Authority with a Written Report within 14 days of the termination, the Board has verified this on the PPIP Portal (Public Procurement Information Portal) accessible at www.tenders.go.ke. The Board observes that the subject tender is listed in the PPIP Portal, which is a platform managed by the Public Procurement Regulatory Authority thereby satisfying the requirement to report the termination of the tender to the Public Procurement Regulatory Authority.
79. It would appear from the above that the Respondents satisfied the substantive and procedural requirements set out under Section 63 for



termination of the subject tender. A finding that the subject tender was properly terminated will automatically strip the Board of jurisdiction to inquire into the merits of the Request for Review and the Board will have no option but to down its tools and strike out the Request for Review. This is however not the case in the instant Request for Review.

80. It is not lost on the Board that during the question-and-answer session of the hearing, Counsel for the Respondents admitted that the Applicant was not the lowest evaluated bidder in the subject tender. Counsel restated the position of the Evaluation Committee which had recommended the award of the subject tender to the Interested Party at a tender price of **Kshs. 49,790,662.34.**

81. The Board has perused the tender evaluation report submitted to it under confidential cover and notes that the report, at page 11, states as follows:

*“Recommendations by the Evaluation Committee,
The Tender Evaluation Committee recommended the award of Tender No. KEFRI/ONT/OO6/2024-2025- Provision of Security, Guarding and Reception Services to M/s Papaton Security Services Ltd of P.O Box 336-50100 Kakamega at a total cost of Kenya Shillings Forty Nine Million, Seven Hundred and Ninety Thousand, Six Hundred and Sixty Two and Thirty Four Cents (Kshs 49,790,662.34) inclusive of all*



levies for a period of two years starting from 5th February, 2025 up to and including 4th February, 2027"

82. It is clear from the evaluation report that the Applicant herein was not the lowest evaluated bidder. The evaluation committee determined the lowest evaluated bidder to be Messrs Papaton Security Services Ltd, the Interested Party herein, whom it recommended for the award of the tender at a total cost of Kenya Shillings Forty-Nine Million, Seven Hundred and Ninety Thousand, Six Hundred and Sixty Two and Thirty Four Cents (Kshs 49,790,662.34). The evaluation committee, further confirmed availability of funds for the tender.
83. The Board takes note of a Professional Opinion dated 13th January, 2025, by the Manager, Supply Chain Management, Dr. Paul Nyathore, which stated as follows:

1. Financial Evaluation

As observed by the evaluation committee, the figures quoted by the recommended bidder, M/s Papaton Security Services Ltd, only covered gazetted minimum wages. The figures quoted did not cover applicable levies, taxes and profit margins (if any). The clarification offered did not explain how their pricing met minimum wages. The tender document provided that financial evaluation would entail among other things determining if the Tenderer had provided for payment of minimum wages. Abnormally low bids that did not provide for payment of minimum wages were to be taken as evidence of inability to perform the Contract for the offered Tender Price, KEFRI was to reject such bids.

2. It was a mandatory requirement for bidders to submit a current and valid Tax



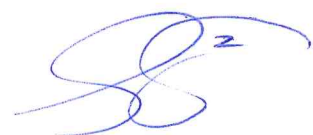
Compliance Certificate issued by the Kenya Revenue Authority. By the time of making this opinion, post qualification results on M/s Papaton Security Services Ltd's tax compliance certificate was negative. The status was 'withdrawn'.

- 3. Requirements for Garissa, Wajir, Tiva, Hola, Meru and Londiani Seed Centre were inadvertently not captured in the price schedule. In addition, the exact number of night guards for Marigat was not indicated.*
- 4. The financial year 2024/2025 budget for Provision of Security, Guarding and Reception Services is Ksh. 25,000,000. With the requirement for payment of minimum wages and expanded scope of services, it is expected that there will be a budget deficit for five months (February 2025 to June 2025).*

Recommendations

- 1. The evaluation committee to conduct similar confirmation of qualifications on the tenderer who submitted the next responsive bid for this tender as per their recommendation.*
- 2. Use per unit rate quoted for the cluster/similar towns to cover the missing requirements for Garissa, Wajir, Tiva, Hola, Meru, Marigat and Londiani Seed Centre. The missing requirements had been covered in the scope/terms of reference"*

84. From the Professional Opinion of the Head of Procurement function and the recommendation of the evaluation committee, the budgetary allocation for the tender was Kshs 50,000,000. The lowest evaluated bidder having submitted a bid of Kshs 49,790,662.34 was below the budget by Kshs 209,337.66. Further, by the Respondent's own admission during the hearing, no post-qualification evaluation was conducted on any bidder. This therefore begs the question, who



determined and when, that the Interested Party's Tax Compliance Certificate had been withdrawn by the Kenya Revenue Authority?

85. The Board has perused the tender evaluation report and does not find anything in the report that countermands the evaluation committee's recommendation to award the subject tender to the Interested Party.
86. In view of the foregoing, the Board finds that the Accounting Officer terminated the subject tender based on a wrong tender amount of Kshs 63,369,600 submitted by the Applicant and which was not the lowest evaluated bid as determined by the Tender Evaluation Committee. In the circumstances the Board holds that the Respondents failed to satisfy the substantive requirement set out under Section 63 for terminating the subject tender. In the Board's finding, a satisfactory reason for the termination of the tender was not provided by the Accounting Officer. Accordingly, this ground of challenge to the Board's jurisdiction fails and is disallowed. The Board now proceeds to inquire into the merits of the Request for Review.

As to whether competitive negotiation was available to the Applicant under Sections 131 and 132 of the Act for having emerged the lowest evaluated bidder.

87. The Board heard the Applicant in its pleadings variously contend that its tender price exceeded the approved budget by 21.1 %. For instance, at



paragraph 7 of the Request for Review the Applicant suggests the margin as 21.1%:

"7. The respondent did not invite the applicant being the lowest bidder for negotiations on their budget thus they did not have proper justification to terminate the applicant as being above the budget. Sections 131 and 132 of the PPDA 2015 were breached since the evaluated price for the applicant was well within the threshold of the 25% of the respondent's budget as stipulated. More specifically: the approved budgeted (sic) budget of the Respondents was kshs; 50,000,000/= whereas the applicant's evaluated price bid was Kshs. 63,369,6006/=, the difference is kshs. 13,369,600/= (21.1%)"

88. At paragraph 12 of the affidavit sworn on 4th February 2025 by Peter Gichu, the Applicant's General Manager:

"12. THAT it is not true that the Respondent has inadequate budgetary provision for the subject tender since the PPDA 2025 gives it room to negotiate with the successful bidder who is within the parameters of the 25% difference. The approved budget of the Respondents was Ksh; 50,000,000/= whereas the applicant's evaluated price bid was kshs. 63,369,600/=, the difference is Kshs. 13,369,600/= (21.1%). To this end, the respondents should have invited the applicants for negotiations on the budget instead of



terminating the tender process in accordance with sections 132 of the Public Procurement and Disposal (sic) Act (PPDA) 2015.”

89. From the above, the Applicant contended that its tender price of Kshs. 63,369,600 did not exceed the approved budget of Kshs. 50,000,000 by a margin of 25%. According to the Applicant the difference of Kshs. 13,369,600 represented a margin of 21.1 %. However, this is not the case as shall become apparent:

$$\begin{array}{l}
 \text{A bidder's} \\
 \text{Margin}
 \end{array}
 \quad
 \% = \frac{\text{Difference between tender price of the bidder and the approved budget}}{\text{Procuring Entity's Approved Budget}} \times 100$$

$$\begin{array}{l}
 \text{A bidder's} \\
 \text{Margin}
 \end{array}
 \quad
 \% = \frac{13,369,600}{50,000,000} \times 100$$

$$= 26.74\%$$

90. From the Form of Tender forming part of the Applicant’s bid, the Board notes that the Applicant quoted a tender sum of Kshs. 63,369,600 for the 2-year period that the tender was to be carried out. Therefore, it is clear that the Applicant’s tender sum exceeded the approved budget of Ksh 50,000,000 by Kshs. 13,369,000.

91. The Board notes that Sections 131 to 133 of the Act make provisions for competitive negotiations in instances where the tender price of the lowest evaluated bid exceeds the available budget. They state as follows:

131. Competitive Negotiations

An accounting officer of a procuring entity may conduct competitive negotiations as prescribed where—

(a) there is a tie in the lowest evaluated price by two or more tenderers;

(b) there is a tie in highest combined score points;

(c) the lowest evaluated price is in excess of available budget; or

(d) there is an urgent need that can be met by several known suppliers.

132. Procedure for Competitive Negotiations

(1) In the procedure for competitive negotiations, an accounting officer of a procuring entity shall—


(a) identify the tenderers affected by tie;

(b) identify the tenderers that quoted prices above available budget; or

(c) identify the known suppliers as prescribed.

(2) In the case of tenderers that quoted above the available budget, an accounting officer of a procuring entity shall—

(a) reveal its available budget to tenderers; and



(b) limit its invitation to tenderers whose evaluated prices are not more than twenty five percent above the available budget.

(3) An accounting officer of a procuring entity shall request the identified tenderers to revise their tenders by submitting their best and final offer within a period not exceeding seven days.

(4) The revised prices shall not compromise the quality specifications of the original tender.

(5) Tenders shall be evaluated by the evaluation committee appointed in the initial process.


133. Successful best and final offer

(1) The successful best and final offer shall be the best rated tender using evaluation criteria set forth in the tender documents.

(2) Cabinet Secretary may develop further guidelines on the powers and thresholds for tender awards.

92. Under Section 131(c), the Procuring Entity can enter into competitive negotiations where the lowest evaluated bid price exceeds the approved budget.


93. In terms of the procedure of carrying out the competitive negotiations in the case where the lowest evaluated bid bears a tender sum that exceeds the budget, Sections 132 and 133 provide that:



- iv. The Procuring Entity should disclose to the bidders the approved budget for the tender in question;
- v. The Act limits the participation in the competitive negotiations to bidders whose tender prices do not exceed the approved budget by 25%;
- vi. The Act requires the Procuring Entity to allow the identified bidders at least 7 days within which the bidders can revise their tender prices and submit their best and final offers.
- vii. The Procuring Entity's Evaluation Committee would then determine the successful bid in the tender in question using the award criteria set out in the Tender Document.

94. It is apparent that the Applicant encountered a computation challenge when it set out to compute the percentage of the margin by which its tender price exceeded the approved budget, with the result that the Applicant erred in its contention that its tender price fell within the 25% margin contemplated under Section 132(2)(c) of the Act. The Board observes that the Applicant arrived at the erroneous 21.1% margin after computing the difference between its bid price and the approved budget against its own bid sum in place of the approved budget. This is because, the erroneous computation yields the margin as 21.0978134626% which approximates to 21.1%.

95. The Board notes that the Applicant's tender sum of Kshs. 63,369,600 exceeded the Procuring Entity's approved budget of Kshs. 50,000,000



by Kshs. 13,369,600. In essence, the Applicant's tender price exceeded the approved budget by a margin of 26.74%, which is above the 25% contemplated under Section 132(2)(b) of the Act. Accordingly, the Board finds that the Applicant did not qualify to participate in any competitive negotiations in respect of the subject tender. This ground of the Request for Review therefore fails and is disallowed.

As to whether the Respondents, in terminating the subject tender failed to comply with the provisions of Section 63 of the Act.

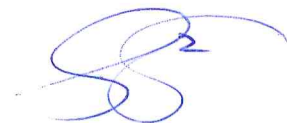
96. The Board has heard the Respondent's arguments that it terminated the tender subject of this Request for Review on account of inadequate budgetary provision. It was their submission that the lowest evaluated tenderer submitted a tender of Kshs 63,369,600 against the Procuring Entity's budget of Kshs 50,000,000. This position was supported by the Interested Party.
97. The Applicant, on its part, submitted that the Respondents breached the provisions of Sections 131 and 132 of the Act for failing to engage the Applicant in competitive negotiation despite its tender price being within a margin of 25% above the approved budget.
98. On the issue of competitive negotiation pursuant to Sections 131 and 132 of the Act the Board has already determined elsewhere in this



decision that the Applicant's assertion that its tender price of Kshs. 63,369,600 did not exceed the approved budget of Kshs. 50,000,000 by a margin of 25% is erroneous. According to the Applicant the difference of Kshs. 13,369,600 represented a margin of 21.1 %. This is however not the case as the actual difference is 26.74%. In the circumstances, the Applicant did not qualify for competitive negotiation in line with the provisions of Sections 131 and 132 of the Act.

99. Apart from the failure to meet the qualification for competitive negotiations under Sections 131 and 132 of the Act on account of the difference between the Applicant's tender and the budget exceeding the 25% threshold, the Applicant's tender was not the lowest evaluated tender.
100. The question that arises for determination of the Board is, which bidder was the lowest evaluated bidder? The Board has perused the tender evaluation report submitted to it under confidential cover and notes that the report, at page 11, states as follows:

*“Recommendations by the Evaluation Committee,
The Tender Evaluation Committee recommended the award of Tender No. KEFRI/ONT/OO6/2024-2025- Provision of Security, Guarding and Reception Services to M/s Papaton Security Services Ltd of P.O Box 336-50100 Kakamega at a total cost of Kenya Shillings Forty Nine Million, Seven Hundred and Ninety Thousand, Six Hundred and*



Sixty Two and Thirty Four Cents (Kshs 49,790,662.34) inclusive of all levies for a period of two years starting from 5th February, 2025 up to and including 4th February, 2027"

101. The Board further takes note of a Professional Opinion by the Manager, Supply Chain Management, Dr. Paul Nyathore, dated 13th January, 2025 which states as follows:

1. *Financial Evaluation*

As observed by the evaluation committee, the figures quoted by the recommended bidder, M/s Papaton Security Services Ltd, only covered gazetted minimum wages. The figures quoted did not cover applicable levies, taxes and profit margins (if any). The clarification offered did not explain how their pricing met minimum wages. The tender document provided that financial evaluation would entail among other things determining if the Tenderer had provided for payment of minimum wages. Abnormally low bids that did not provide for payment of minimum wages were to be taken as evidence of inability to perform the Contract for the offered Tender Price, KEFRI was to reject such bids.

2. *It was a mandatory requirement for bidders to submit a current and valid Tax Compliance Certificate issued by the Kenya Revenue Authority. By the time of making this opinion, post qualification results on M/s Papaton Security Services Ltd's tax compliance certificate was negative. The status was 'withdrawn'.*

3. *Requirements for Garissa, Wajir, Tiva, Hola, Meru and Londiani Seed Centre were inadvertently not captured in the price schedule. In addition, the exact number of night guards for Marigat was not indicated.*

4. *The financial year 2024/2025 budget for Provision of Security, Guarding and Reception Services is Ksh. 25,000,000. With the requirement for*



payment of minimum wages and expanded scope of services, it is expected that there will be a budget deficit for five months (February 2025 to June 2025).

Recommendations

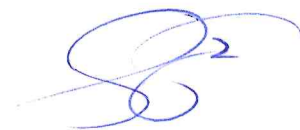
3. *The evaluation committee to conduct similar confirmation of qualifications on the tenderer who submitted the next responsive bid for this tender as per their recommendation.*
4. *Use per unit rate quoted for the cluster/similar towns to cover the missing requirements for Garissa, Wajir, Tiva, Hola, Meru, Marigat and Londiani Seed Centre. The missing requirements had been covered in the scope/terms of reference”*

102. The Accounting Officer considered the professional opinion and made the following remarks:

103. The Accounting Officer considered the professional opinion and made the following remarks:

1. No budget to cover the tender sum for next bidder (63,369,600 vs 50,000,000) KES
2. Re-advertise the tender and consider prioritizing centres of high risk within the budget
3. Renegotiate with current provider to extend services for another three months as the procurement process continues

As a result, the subject tender was terminated.



104. From the above the Board observes that each segregated function had a different approach from the other in the handling of the subject tender. Whereas the evaluation committee made recommendations for award and confirmed availability of funds, the head of supply chain on the other hand carried out “post qualifications” and made own recommendation that the second lowest bidder be considered. The Accounting Officer, on the other hand, took a different trajectory and instructed that the tender be readvertised since there was no budget to meet the second lowest bid price.
105. The Board notes Section 46 of the Act provides for establishment of an ad hoc Evaluation Committee:

“(4) An evaluation committee established under subsection (1), shall—

(a) deal with the technical and financial aspects of a procurement as well as the negotiation of the process including evaluation of bids, proposals for prequalification, registration lists, Expression of Interest and any other roles assigned to it;

(b) consist of between three and five members appointed on a rotational basis comprising heads of user department and two other departments or their representatives and where necessary, procured consultants or professionals, who shall



advise on the evaluation of the tender documents and give a recommendation on the same to the committee within a reasonable time;

(c) have as its secretary, the person in charge of the procurement function or an officer from the procurement function appointed, in writing, by the head of procurement function;

(d) complete the procurement process for which it was appointed and no new committee shall be appointed on the same issue unless the one handling the issue has been procedurally disbanded;

(e) adopt a process that shall ensure the evaluation process utilized adheres to Articles 201(d) and 227(1) of the Constitution."

106. Attention of the Board is further drawn to the functions of the head of procurement function. Section 84 of the Act provides for provision of a professional opinion by the head of procurement function to the accounting officer as follows:



"(1) The head of procurement function of a procuring entity shall, alongside the report to the evaluation committee as secretariat comments, review the tender evaluation report and provide a signed professional opinion to the accounting officer on the procurement or asset disposal proceedings.

(2) The professional opinion under sub-section (1) may provide guidance on the procurement proceeding in the event of dissenting opinions between tender evaluation and award recommendations.

(3) In making a decision to award a tender, the accounting officer shall take into account the views of the head of procurement in the signed professional opinion referred to in subsection (1)."

107. The import of the foregoing is that the evaluation committee is charged with the carrying out of evaluation of the tenders and the procurement function is represented as secretary. The opinion of the head of procurement comes in case there is dissenting opinion during evaluation among the committee members. In the subject tender it is apparent that there was dissent among members of the evaluation committee to warrant the head of procurement to carry out exercises outside its mandate leading to misleading opinion to the Accounting Officer.



108. The Board has perused the tender evaluation report and has not found anything in the report rescinding the recommendation to award the subject tender to the Interested Party.
109. It is the Board's considered view the action of the Head of Procurement in the subject tender did not have the backing of the tender document, and, more importantly, has no basis in the Act. The Board finds that the Head of Procurement acted outside his mandate when he purported to overturn the recommendation of the evaluation committee and proceed to carry out post-qualification evaluation on the successful bidder resulting in a flawed professional opinion to the Accounting Officer.
110. The Board further notes that the action to terminate the subject tender arose from a flawed professional opinion and cannot therefore stand.
111. The upshot of the foregoing is that the termination of the subject tender was irregular, the same having been based on a flawed process. The Board finds that Section 63 of the Act cannot be said to have been complied with since the process leading up to the termination was not proper. Accordingly, this ground of review succeeds and is allowed.

As to what orders the Board should grant in the circumstances

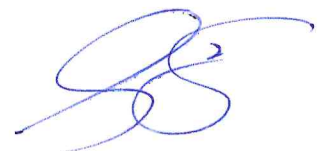


112. The Board has found it has jurisdiction to hear and determine the present Request for Review.
113. It is the Board's further finding that competitive negotiation was not available to the Applicant under Sections 131 and 132 of the Act since the Applicant was not the lowest evaluated bidder and the margin of difference between its tender and the approved budget exceeded 25%.
114. The Board has also established that, in terminating the subject tender, the Procuring Entity failed to comply with the provisions of Section 63 of the Act in that the process leading up to the termination was not proper.
115. The upshot of these findings is that the instant Request for Review succeeds in the following terms:

FINAL ORDERS

116. 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 Notification Letters dated 22nd January 2025 addressed to the Applicant, the Interested Party and other unsuccessful bidders with respect to Tender No. KEFRI/ONT/006/2024-2025 for Provision of Security, Guarding and Reception



Services for Kenya Forestry Research Institute be and are hereby cancelled and set aside.

B. The Respondent is hereby ordered to direct the Head of Procurement function of the Procuring Entity to forward his professional opinion on the tender evaluation report dated 13th January, 2025 in line with Section 84 of the Act taking into consideration the Board's findings in this Request for Review.

C. Further to Order B above, the Respondent is directed to proceed with the procurement process of the subject tender to its logical conclusion within 21 days from the date of this decision.


D. In view of the fact that the procurement process is not complete, each party shall bear its own costs in the Request for Review.

Dated at NAIROBI this 25th Day of February 2025.


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PANEL CHAIRPERSON

PPARB


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SECRETARY

PPARB

21/1/16