

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 47/2025 OF 17<sup>TH</sup> APRIL 2025**

**BETWEEN**

**COUNTY GUARDS LIMITED ..... APPLICANT**

**AND**

**ACCOUNTING OFFICER,**

**MULTIMEDIA UNIVERSITY OF KENYA ..... 1<sup>ST</sup> RESPONDENT**

**MULTIMEDIA UNIVERSITY OF KENYA ..... 2<sup>ND</sup> RESPONDENT**

**CANON SECURITY SERVICES KENYA LIMITED . INTERESTED PARTY**

Review against the decision of the Accounting Officer, Multimedia University of Kenya in relation to Tender No. MMU/OT/SS/08/2024-2025 for Provision of Security Guard Services

**BOARD MEMBERS PRESENT**

- |                              |   |             |
|------------------------------|---|-------------|
| 1. Mr. George Murugu FCI Arb | - | Chairperson |
| 2. Mr. Stanslaus Kimani      | - | Member      |
| 3. Mr. Joshua Kiptoo         | - | Member      |

**IN ATTENDANCE**

- |                      |   |                                       |
|----------------------|---|---------------------------------------|
| 1. Ms. Dokatu Godana | - | Holding Brief for the Board Secretary |
| 2. Ms. Evelyn Weru   | - | Secretariat                           |



## **PRESENT BY INVITATION**

### **APPLICANT**

### **COUNTY GUARDS LIMITED**

Ms. Mutua

- Advocate, Mutua Eboso And company  
Advocates

### **RESPONDENTS**

### **ACCOUNTING OFFICER, MULTIMEDIA UNIVERSITY OF KENYA & MULTIMEDIA UNIVERSITY OF KENYA**

Mr. Kagwe

- Advocate, Legal Department

### **INTERESTED PARTY**

### **CANON SECURITY SERVICES KENYA LIMITED**

Ms. Maina h/b for

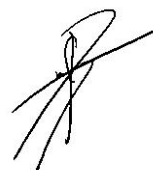
Ms. Nungo

- Advocate, NOW Advocates LLP

## **BACKGROUND OF THE DECISION**

### **The Tendering Process**

1. The Multimedia University of Kenya, the Procuring Entity and the 2<sup>nd</sup> Respondent herein invited qualified and interested tenderers to submit sealed tenders in response to Tender No. MMU/OT/SS/08/2024-2025 for Provision of Security Guard Services (hereinafter referred to as the



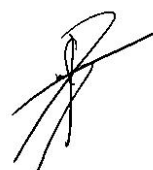
"subject tender") by use of open competitive method (National). The invitation was by way of an advertisement on 21<sup>st</sup> January 2025 in My Gov Publication, on the 2<sup>nd</sup> Respondent's website [www.mmu.ac.ke](http://www.mmu.ac.ke) and the Public Procurement Information Portal [www.tenders.go.ke](http://www.tenders.go.ke) where the blank tender document for the subject tender issued to tenderers (hereinafter referred to as the 'Tender Document') was available for download. The tender submission deadline of the subject tender was scheduled on 4<sup>th</sup> February 2025 at 11.00 a.m.

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

2. According to the Minutes of the subject tender's opening held on 4<sup>th</sup> February 2025 signed by members of the Tender Opening Committee on 5<sup>th</sup> February 2025 (hereinafter referred to as the 'Tender Opening Minutes') and which Tender Opening Minutes were part of confidential documents furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') by the 1<sup>st</sup> Respondent pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), a total of twenty-two (22) tenders were submitted in response to the subject tender. The said twenty-two (22) tenders were opened in the presence of tenderers' representatives present at the tender opening session, and were recorded as follows:



<b>Bidder No.</b>	<b>Name</b>
1.	Mulika Security Services
2.	County Guards Limited
3.	Lindum Security Limited
4.	Young Force Services (K) Ltd
5.	Canon Security Services Kenya Ltd
6.	Catch Security Links Limited
7.	Blue Shield Securicor
8.	Lavington Security Limited
9.	Lelo Security Service Ltd
10.	Pelt Security Services Ltd
11.	Flashcom Security Limited
12.	Delta Guards Limited
13.	Babs Security Services Limited
14.	One On One Security Services Ltd
15.	Papaton Security Services Ltd
16.	Pivot Star Security Limited
17.	Rose Guards Services Ltd
18.	Mofa Security Service Ltd
19.	Keyforce Security Group Ltd
20.	Marco Security Limited
21.	Coalition Security Services Ltd
22.	Konex Security Services Limited



## **Evaluation of Tenders**

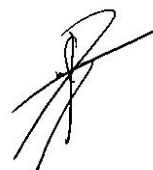
3. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1<sup>st</sup> Respondent undertook evaluation of the twenty-two (22) tenders as captured in an Evaluation Report for the subject tender in the following stages:
- i Preliminary Evaluation;
  - ii Technical Evaluation; and
  - iii Financial Evaluation.

### **Preliminary Evaluation**

4. The Evaluation Committee was required to carry out a Preliminary Evaluation and examine tenders for responsiveness using the criteria provided under Preliminary Evaluation of Section III- Evaluation and Qualification Criteria at page 33 of 107 to 34 of 107 of the Tender Document. Tenderers were required to meet all the mandatory requirements at this stage to proceed for Technical Evaluation.
5. At the end of evaluation at this stage, sixteen (16) tenders were determined non-responsive, while six (6) tenders, including the Applicant's and Interested Party's tender, were determined responsive and proceeded to Technical Evaluation.

### **Technical Evaluation**

6. The Evaluation Committee was required to carry out a Technical Evaluation using the criteria provided under Technical Evaluation of



Section III- Evaluation and Qualification Criteria at page 35 of 107 to 37 of 107 of the Tender Document. Tenderers were required to attain a pass mark of 80 marks so as to progress for further evaluation.

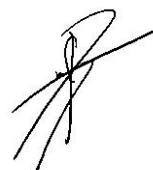
7. At the end of evaluation at this stage, the two (2) tenders were determined non-responsive while four (4) tenders were determined responsive, including the Applicant's and Interested Party's tenders, and proceeded to Financial Evaluation.

### **Financial Evaluation**

8. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria provided under Price Evaluation of Section III – Evaluation and Qualification Criteria at page 38 of 107 of the Tender Document.
9. At the end of evaluation at this stage, the Evaluation Committee ranked the responsive bids as follows:

***Table VI Tender Bid Prices***

<b><i>No.</i></b>	<b><i>Firm Name of Firms</i></b>	<b><i>Total Bid per Month Kshs</i></b>	<b><i>Total Bid per Annum Bid Kshs</i></b>	<b><i>Two year Bid</i></b>	<b><i>Overall Ranking</i></b>
<b><i>F2</i></b>	<b><i>M/s. County Guards Limited</i></b>	<b><i>791,700.00</i></b>	<b><i>9,500,400.00</i></b>	<b><i>19,000,800.00</i></b>	<b><i>1</i></b>
<b><i>F3</i></b>	<b><i>M/s. Lindum Security Limited</i></b>	<b><i>791,800.00</i></b>	<b><i>9,501,600.00</i></b>	<b><i>19,003,200.00</i></b>	<b><i>2</i></b>



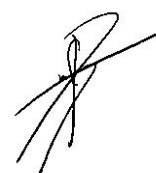
<b>F5</b>	<b><i>M/s. Canon Security Services</i></b>	<b><i>866,800.00</i></b>	<b><i>10,401,600.00</i></b>	<b><i>20,803,200.00</i></b>	<b><i>4</i></b>
<b>F7</b>	<b><i>M/s. Blue Shield Securicor Limited</i></b>	<b><i>792,200.00</i></b>	<b><i>9,506,400.00</i></b>	<b><i>19,012,800.00</i></b>	<b><i>3</i></b>

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

10. The Evaluation Committee recommended award of the subject tender to M/s County Guards Limited being the lowest evaluated bidder, at a total cost of Kenya Shillings Nine Million Five Hundred Thousand Four Hundred (Kshs.9,500,400.00) Only, annually, inclusive of all applicable taxes subject to the procurement in the subject tender being within the approved budget of the Procuring Entity.

### **Professional Opinion**

11. In a Professional Opinion dated 5<sup>th</sup> March 2025 (hereinafter referred to as "the Professional Opinion"), the Ag. Chief Procurement Officer, Mr. Anthony Gitau reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender to M/s County Guards Limited being the lowest evaluated bidder, at a total cost of Kenya Shillings Nine Million Five Hundred Thousand Four Hundred (Kshs.9,500,400.00) per year.



12. The Professional Opinion was approved by the 1<sup>st</sup> Respondent on 14<sup>th</sup> March 2025.

### **Notification to Tenderers**

13. Tenderers were notified of the outcome of evaluation of the subject tender vide letters dated 17<sup>th</sup> March 2025.

### **REQUEST FOR REVIEW NO. 47 OF 2025**

14. On 17<sup>th</sup> April 2025, County Guards Limited, the Applicant herein, filed a Request for Review dated 17<sup>th</sup> April 2025 together with an Applicant's Supporting Affidavit sworn on 17<sup>th</sup> April 2025 by Wilson Diego its Director (hereinafter referred to as the 'instant Request for Review') through Mutua Eboso & Company Advocates seeking the following orders from the Board in verbatim:

***a) That the Review Board quash/annul the entire decision of the Procuring Entity dated 28<sup>th</sup> March 2025 purporting to revisit any pre-award stage of the procurement proceeding.***

***b) That the Review Board quash/annul any communication done outside of the statutory process between the Procuring Entity and any one tenderer which was done at the exclusion of other tenderers or candidates and invalidate any decision arising therefrom.***





***c) A declaration be made that a Procuring Entity cannot by law perform any act that effectively changes the status of the procuring process during the standstill period contemplated by the Act.***

***d) That the Review Board direct the Accounting Officer of the Procuring Entity to immediately begin the process of contracting, there being no formal request for review impeaching any stage of the process of award.***

***e) That the Review Board directs the Accounting Officer of the Procuring Entity to extend the tender validity time by thirty days to give time for negotiation of the contract in light of the time spent in the correspondences leading to this request for review.***

***f) That costs of this review be awarded to the applicant.***

15. In a Notification of Appeal and a letter dated 17<sup>th</sup> April 2025, Mr. James Kilaka, the Acting Board Secretary of the Board notified the 1<sup>st</sup> and 2<sup>nd</sup> Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020, detailing administrative and contingency measures to mitigate




the spread of COVID-19. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 17<sup>th</sup> April 2025.

16. On 24<sup>th</sup> April 2025, the Respondents jointly filed through Prof. Geoffrey Kihara Rurimo, PhD, the 1<sup>st</sup> Respondent herein, a Response to the instant Request for Review dated 24<sup>th</sup> April 2025 together with a file containing confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

17. *Vide* letter dated 28<sup>th</sup> April 2025, the Acting Board Secretary notified all tenderers in the subject tenders via email, of the existence of the Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the tender within three (3) days.

18. *Vide* a Hearing Notice dated 28<sup>th</sup> April 2025, the Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the Request for Review slated for 30<sup>th</sup> April 2025 at 2.00 p.m., through the link availed in the said Hearing Notice.

19. On 29<sup>th</sup> April 2025, the Interested Party filed through NOW Advocates LLP a Notice of Appointment of Advocates dated 28<sup>th</sup> April 2025.

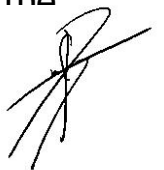
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20. Vide email dated 30<sup>th</sup> April 2025, the Interested Party requested for the hearing slated on 30<sup>th</sup> April 2025 at 2.00 p.m. to be adjourned to enable it file its substantive response to the instant Request for Review on the basis that it had 3 days to file its response from the date of notification.

21. When the matter first came up for hearing on 30<sup>th</sup> April 2025 at 2.00 p.m., the Applicant was represented by Ms. Mutua, while the Interested Party was represented by Ms. Maina h/brief for Ms. Nungo. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents were not represented despite having been notified of the hearing.

22. The Board read out pleading filed by parties in the matter and requested the Secretariat to reach out to the Respondents to join the proceedings. It also sought for parties to address it on the application by the Interested Party to adjourn the hearing to enable it file its response to the instant Request for Review. Ms. Maina for the Interested Party submitted that having been notified on 28<sup>th</sup> April 2025, the Interested Party had three (3) days to file its response and the same would lapse on 1<sup>st</sup> May 2025, which fell on a public holiday. She sought for the hearing to be adjourned to 5<sup>th</sup> May 2025 to enable her file her responses noting that no prejudice would be occasioned on parties in the matter.

23. In response, Ms. Mutua for the Applicant indicated that though she was ready to proceed with the hearing, she was not opposed to the

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Interested Party's application and sought for corresponding leave to file a supplementary response.

24. Having considered parties' submissions, the Board allowed the adjournment and directed as follows:

- i The Interested Party be granted leave to file and serve its replying affidavit, written submissions and list of authorities by 5.00 p.m. on 2<sup>nd</sup> May 2025.
- ii The Applicant and Respondents be granted leave to file and serve their rejoinders to the Interested Party's response together with written submissions and list of authorities by 12.00 noon on 5<sup>th</sup> May 2025.
- iii Hearing of the matter to proceed on 5<sup>th</sup> May 2025 at 4.00 p.m.
- iv Parties were cautioned to adhere to the strict timelines as directed.

25. On 2<sup>nd</sup> May 2025, the Interested Party filed an Interested Party's Replying Affidavit sworn on 2<sup>nd</sup> May 2025 by Peter Irungu, its General Manager, Written Submissions dated 2<sup>nd</sup> May 2025 and a List and Bundle of Authorities dated 2<sup>nd</sup> May 2025.

26. Vide email dated 2<sup>nd</sup> May 2025, the Respondents through Mr. Wilson Kagwe indicated that their legal team was indisposed and they were not in a position to file their submissions by 5.00 p.m. as directed.



27. On 5<sup>th</sup> May 2025, the Interested Party filed a Supplementary List and Bundle of Authorities dated 5<sup>th</sup> May 2025.
28. On 5<sup>th</sup> May 2025, the Applicant filed Written Submissions dated 5<sup>th</sup> May 2025 together with a List of Authorities dated 2<sup>nd</sup> May 2025.
29. On 5<sup>th</sup> May 2025, the Respondents filed through Mr. Wilson Kagwe a Replying Affidavit sworn on 2<sup>nd</sup> May 2025 by Kagwe Wilson, Written Submissions dated 2<sup>nd</sup> May 2025 and List of Authorities dated 2<sup>nd</sup> May 2025.
30. At the hearing of the instant Request for Review on 5<sup>th</sup> May 2025 at 4.00 p.m., the Applicant was represented by Ms. Mutua, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were represented by Mr. Kagwe while the Interested Party was represented by Ms. Maina h/brief for Ms. Nungo.
31. The Board read out the pleadings filed by parties in the matter. Ms. Mutua informed the Board that she had filed Written Submissions on behalf of the Applicant. She further informed the Board that she had not been served with the Respondent's Replying Affidavit and Written Submissions filed on 5<sup>th</sup> May 2025 and sought for time to respond to issues raised therein. In response, Mr. Kagwe confirmed that Ms. Mutua had not been served with the Respondent's Replying Affidavit and Written Submissions. On her part, Ms. Maina indicated that she had not been served with the Applicant's Written Submissions and List of Authorities.



32. The Board made an observation that parties had not exchanged pleadings as directed on 30<sup>th</sup> April 2025 and issued the following directions in the instant Request for Review:

- i The Applicant be and is hereby granted leave to file and serve its rejoinder to the Respondents' Replying Affidavit sworn by Mr. Kagwe Wilson on 2<sup>nd</sup> May 2025.
- ii Hearing of the matter to proceed on 6<sup>th</sup> May 2025 at 2.00 p.m.
- iii Parties to ensure that they have exchanged their respective pleadings filed in the matter.


33. On 6<sup>th</sup> May 2025, the Applicant filed a Further Affidavit sworn on 6<sup>th</sup> May 2025 by Wilson Diego and a Notice of Objection dated 6<sup>th</sup> May 2025.

34. At the hearing on 6<sup>th</sup> May 2025, the Board once again read out pleadings filed by parties in the matter and having confirmed compliance by parties of its directions issued on 5<sup>th</sup> May 2025, allocated time to parties to highlight their respective cases. Thus the Request for Review proceeded for virtual hearing as scheduled.

## **PARTIES' SUBMISSIONS**

### **Applicant's case**

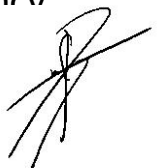
35. In her submissions, Ms. Mutua for the Applicant placed reliance on the Applicant's pleadings filed before the Board.



36. With regard to the Applicant's Notice of Objection, it submitted that the Interested Party has no standing before the Board and sought to strike out the Interested Party's Replying Affidavit sworn and filed on 2<sup>nd</sup> May 2025 on the ground that it violates the principles established by the Supreme Court in *Francis Kariuki Muruatetu & Another Vs. Republic & 5 Others as consolidated with 16 of 2013; [2016] eKLR* on the participation of interested parties in a dispute before any judicial or quasi-judicial tribunal. The Applicant held the position that the Interested Party's Replying Affidavit sought to plead new issues which were outside the jurisdiction of the Board and pointed out that any issue sought through review ought to have been filed within 14 days of occurrence of the alleged breach. It argued that the Interested Party has no individual legal rights at stake in the matter and its participation cannot be justified by any special knowledge.

37. The Applicant also sought to strike out the Replying Affidavit sworn by the Respondents on 2<sup>nd</sup> May 2025 and filed on 5<sup>th</sup> May 2025 for having been filed outside stipulated statutory timelines and without leave, contrary to the directions of the Board and being in response to the instant Request for Review instead of the responding to the Interested Party's pleadings.

38. On the substantive issues raised in the instant Request for Review, the Applicant submitted that it was aggrieved by the actions of the 1<sup>st</sup> Respondent with regard to the subject tender which were in violation of Articles 10 and 227(1) of the Constitution for lacking transparency.



Section 47 of the Fair Administrative Actions Act for denying the Applicant natural justice, Section 79, 85, 87 and 135 of the Act by purporting to re-evaluate the subject tender and failing to enter into a contract with the successful bidder, and the principles of natural justice particularly *audi alteram partem* (hear the other side.)

39. By way of background, the Applicant submitted that on 17<sup>th</sup> March 2025, it was issued with a Notification of Award of the subject tender which triggered the 14 days' standstill period under Section 87 of the Act. Subsequently, it accepted the award on 4<sup>th</sup> April 2025 vide letter of even date but on the same day, the Respondents notified bidders of a decision directing the Evaluation Committee to review a complaint and re-evaluate the subject tender which led it to seek an explanation for this action.

40. The Applicant submitted that vide letter dated 7<sup>th</sup> April 2025 received on 9<sup>th</sup> April 2025, it received an explanation from the Respondents for its decision to the effect that (a) the Respondents had received a complaint from one of the unsuccessful tenderers on 20<sup>th</sup> March 2025 regarding the Applicant's registration status at NITA, (b) the complainant questioned the evaluation criteria that led to award of the subject tender, (c) relying solely on the complaint the Procuring Entity proceeded to carry out correspondence with NITA which were not shared with other bidders inquiring on the authenticity and validity of registration certificates submitted by all bidders, (d) vide response dated 26<sup>th</sup> march 2025, NITA confirmed that the Applicant was not a





registered training provided with the Authority, and (e) on this basis, the 1<sup>st</sup> Respondent proceeded to direct the Evaluation Committee to re-evaluate bids.

41. The Applicant submitted that the Procuring Entity engaged in communications with the Interested Party with the exception of other bidders in regard to their registration status contrary to Article 227 of the Constitution and in violation of fair administrative action and procedural justice.

42. The Applicant further submitted that pursuant to the Fair Administrative Actions Act, it ought to have been afforded an opportunity to address concerns raised as to its registration before taking adverse administrative action. It argued that the Respondents were precluded from taking any steps to change the status of the procurement proceedings during the standstill period following notification of award. It further argued that the Procuring Entity can only direct for re-evaluation of the subject tender before a decision to award has been made and that the 1<sup>st</sup> Respondent having already awarded the subject tender was *functus officio*.

43. It is the Applicant's case that the 1<sup>st</sup> Respondent cannot purport to conduct due diligence at this late stage noting that due diligence is only carried out of the successful bidder prior to award of tender. The Applicant submitted that the only recourse available to a party after award of tender is filing a review application before the Board and



where none is filed, the 1<sup>st</sup> Respondent is obligated to enter into a contract with the successful bidder.

44. In support of her case, counsel made reference to the holding in *PPARB Application No. 48 of 2020 Xtranet Communications Limited vs Accounting Officer, Agricultural and Food Authority and Jenetworks Ventures Limited* ; *PPARB Application No. 30 of 2025 Peesam Limited v Tharaka Nithi University* ; *PPARB Application No. 16 of 2020, Papaton Security Services Limited v. The Accounting Officer, Kakamega County Water and Sanitation Company & Another*; *Msagha vs. Chief Justice & 7 Others Nairobi HCMCA no. 1062 of 2004 (Lessit, Wendo & Emukule, JJ on 3/11/06) (HCK) [2006] 2 KLR 553*; *Republic v. Public Procurement Administrative Review Board ex parte Nairobi City & Sewerage Company and Another (2019) eKLR*

45. The Applicant urged the Board to allow the instant Request for Review as prayed.

### **Respondents' case**

46. In his submissions, Mr. Kagwe for the Respondents placed reliance on the Respondent's pleadings and confidential documents submitted to the Board.

47. By way of background, the Respondents submitted that following evaluation of the subject tender, the Applicant emerged as the



successful bidder but it was later discovered that it had submitted in its bid document a forged/fake letter of registration with NITA. Further, the Respondents indicated that they had not issued a letter of award and as such, could not proceed to execute a contract with the Applicant. They indicated that they resulted to seek for an advisory from the Director General, Public Procurement Regulatory Authority vide letter dated 7<sup>th</sup> April 2025.

48. Mr. Kagwe pointed the Board to Mandatory Requirement No. 19 of the Tender Document which required bidders to submit a valid copy of registration certificate as a training provided with the National Industrial Training Authority (NITA) approving trainers to train security courses. He submitted that in response to this requirement, the Applicant provided in its bid document a forged/fake Registration Certificate and this was picked up during the standstill period before a letter of award was issued. Counsel argued that in such instances, a remedy was available to the Respondents noting that there is no contractual relationship and/or obligation between parties at this stage.

49. He submitted that the Applicant had not raised any point of law that the Respondents had infringed and that the Act does not prohibit the Procuring Entity from revisiting any decision before the pre-award stage especially after new evidence is brought to its knowledge.

50. While making reference to the equity doctrine of 'he who comes to equity must come with clean hands', counsel submitted that



Applicant's hands were dirty since it had submitted an invalid NITA certificate that it knew to be inauthentic and cannot be allowed to benefit from its misdeeds. Counsel further submitted that compelling the Respondents to award the subject tender to the Applicant would be unlawful.

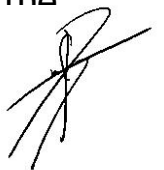
51. In support of his argument, he referred the Board to the holding in *Republic v Public Procurement Administrative Review Board & 2 Others Ex parte Numerical Machining Complex Ltd.*

52. Mr. Kagwe urged the Board to dismiss the instant Request for Review with costs for lacking in merit.

### **Interested Party's case**

53. In her submissions, Ms. Maina for the Interested Party placed reliance on the Interested Party's pleadings submitted to the Board and aligned herself with averments in the Respondent's Response dated 24<sup>th</sup> April 2025.

54. In response to the objection by the Applicant, Ms. Maina while making reference to Section 170 of the Act submitted that the Interested Party was a bidder in the subject tender and stands to be affected by the outcome of the proceedings in the instant Request for Review hence ought to be allowed to participate as an interested party. Counsel referred to the holdings in *PPARB Application No. 34 of 2020*; and *PPARB Application No. 56 of 2021* and argued that bidders such as the

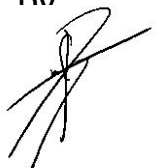


Interested Party herein who participated in a procurement process have an identifiable stake in the legal proceedings related to a procurement process since they may be directly affected by the outcome of the request for review lodged before the Board. She further argued that no prejudice would be occasioned to the Applicant by joining the Interested Party to the proceedings and its participation would be beneficial in assisting the Board reach a comprehensive just determination of the issues at hand.

55. Counsel pointed out that no new issues had been raised by the Interested Party in its replying affidavit and that it was merely supporting the averments and decision of the Respondents.

56. On the substantive issues raised in the instant Request for Review, the Interested Party submitted that vide letter dated 17<sup>th</sup> March 2025, it was notified that the subject tender had been awarded to the Applicant and that aggrieved with this decision, it lodged a procurement - related complaint dated 20<sup>th</sup> March 2025 with the Respondents within the 14 days stand still period pursuant to paragraph 4 of the Notification of Intention to Award and Clause 43, 44 and 50 of Section I – Instruction to Tenderers read with ITT 50.1 of Section II – Tender Data Sheet of the Tender Document challenging the decision to award the Applicant the subject tender.

57. The Interested Party further submitted that after the complaint was lodged, the Respondents acknowledge having taken action hv

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conducting investigations into bids submitted in the subject tender and the results of the said investigations was a confirmation made by the issuing authority i.e. NITA concerning the Applicant's NITA registration status to the effect that the Applicant was not a registered training provider leading to the rightful conclusion that its bid was non-responsive.

58. The Interested Party acknowledged having received a letter from the Respondents dated 4<sup>th</sup> April 2025 informing all bidders that owing to the issues raised in its complaint, the Evaluation Committee had been instructed to review the complaint and re-evaluate the tenders.

59. As to whether the Applicant submitted a responsive bid in compliance with the mandatory requirements of the Tender Document, Ms. Maina referred the Board to Section 55(5) and 79(1) of the Act and submitted that the Applicant did not submit a complaint and responsive bid for failure to satisfy Mandatory Requirement No. 19 of the Tender Document. Counsel pointed out that it was only upon subsequent verification by the 2<sup>nd</sup> Respondent with NITA vide letter dated 25<sup>th</sup> march 2025 that the Respondents received confirmation from NITA that the Applicant was not a registered training provider.

60. It is the Interested Party's case that the confirmation by NITA meant that (a) that as at the time of submitting its bid, the Applicant did not submit a valid NITA registration certificate in compliance with MR 19 and (b) the letter submitted by the Applicant supposedly from NITA as

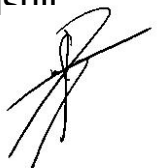


proof of being a registered training provider with NITA supposedly valid up to 31<sup>st</sup> December 2025 and allegedly certified by Nkatha Muriuki Advocates was a forged/falsified document.

61. Counsel pointed the Board to annexure PI-4 to the Interested Party's Replying Affidavit being a list of valid training providers as at the tender submission deadline on 4<sup>th</sup> February 2025 which confirms the non-compliant and non-responsive state of the Applicant's bid to the extent that the Applicant's name was not part of the list and is not a registered training provider hence the document submitted in response to Mandatory Requirement 19 as proof of registration was invalid, inauthentic and forged in nature. She submitted that the Applicant was ineligible to contract under the subject tender for submitting false information concerning its NITA registration qualifications.

62. In support of her argument, counsel referred to the holding in *Republic v Public Procurement Administrative Review Board & 2 others Ex parte BABS Security Services Limited [2018] eKLR*; *Republic v Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex parte Tuv Austria Turk [2020] eKLR*; and *Republic v Public Procurement Administrative Review Board Ex parte Giant Forex Bureau De Change Limited & 2 Others (2017) KEHC6030eKLR*.

63. As to whether the Respondents acted lawfully and within their mandate in ordering for a re-evaluation of bids during the standstill



period, the Interested Party submitted that the Respondents actions after issuance of the award were lawful and justified as per Section 44(1)(2)(g) and 66(3)(a) of the Act.

64. Counsel submitted that the Respondents in ordering for re-evaluation of bids submitted in the subject tender were fulfilling their statutory obligations to prevent an illegal and irregular award noting that the complaint by the Interested Party triggered a legitimate procurement concern regarding authenticity of the Applicant's NITA certification which concern had the potential of disqualifying the Applicant from entering into a contract with the Procuring Entity per Section 135 of the Act.
65. Counsel further submitted that in light of Section 66(3)(a) and (b) of the Act, it doesn't matter at what stage a Procuring Entity receives an adverse report regarding a successful tenderer and that it may cancel an award at any stage and proceed to award the 2<sup>nd</sup> most responsive tenderer and thereafter notify the other tenderers of the second award. She referred the Board to the holding in *PPARB Application No. 6 of 2023* and *Misc. Civil Application No. 388 of 2016, Republic v Kenya Airports Authority Ex part Seo & Sons Limited (2018) eKLR*.
66. Counsel submitted that the successful bidder in the subject tender was the Interested Party having satisfied all the mandatory requirements in the subject tender.





67. She urged the Board to dismiss the instant Request for Review with costs.

### **APPLICANT'S REJOINDER**

68. In a rejoinder, Ms. Mutua submitted that the issues raised by the Interested Party was an attempt to reintroduce a request for review clothed as participation as an Interested Party in the instant proceedings. She pointed out that the question before the Board did not touch on the merits or demerits of what the Procuring Entity did in arriving at the successful bidder but issues regarding a fairness in the procurement process in the subject tender.

### **CLARIFICATIONS**

69. The Board sought confirmation from the Applicant on whether it was registered with NITA as deponed at paragraph 19 of its Further Affidavit sworn on 6<sup>th</sup> May 2025. In response, Ms. Mutua confirmed that as at 26<sup>th</sup> March 2025 when the said correspondence between NITA and the Respondents was purportedly made, it was duly registered under registration number NITA/LEVY/CDWR/23357.

70. Asked if the Applicant provided documentation in support of this averment in the instant Request for Review, Ms. Mutua indicated that the deposition made supported this fact and submitted that the Applicant's cause of action is in regard to failure to be supplied with documentation concerning the alleged investigations carried out concerning its certificate submitted in response to MR19 which is being



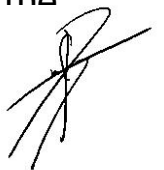
faulted for being a forgery and as such, having not cited any documentation, it was constrained to respond substantively to these allegations.

71. The Board sought to know if the subsequent verification exercise carried out post award by the Respondents made reference to previous verification carried out as captured in the Professional Opinion as to authenticity of the Applicant's documents. In response, Mr. Kagwe submitted that in the instant matter, certain new issues came to the attention of the Procuring Entity prior to signing a contract that may have been previously omitted during the evaluation process and such new evidence ought to be considered.

72. Asked if the ensuing process carried out by the Respondents post notification amounted to due diligence, Mr. Kagwe submitted that no due diligence was carried out noting that the complaint arose from an unsatisfied bidder during the standstill period.

73. Asked to expound on statutory implications underpinning the actions taken by the Respondents post notification of award, Mr. Kagwe submitted that pursuant to Section 66 of the Act, the Respondents can act on any anomaly brought to its attention irrespective of the stage information is brought to its attention.

74. The Board while making reference to paragraph 4 of the Procuring Entity's Notification of Intention to Award sought to know when the

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Procuring Entity transformed itself to a dispute resolution body capable of collecting fees on behalf of the Board and the Public Procurement Regulatory Authority ("the Authority").

75. In response, Mr. Kagwe submitted that the Respondents have never received any fees on behalf of the Board or Authority and that the fee referred to therein is in regard to complaints lodged with the Board.

76. Asked to clarify what provision of the Act clothes the Procuring Entity with jurisdiction to entertain complaints of this nature, Mr. Kagwe referred the Board to Section 66 of the Act and submitted that this provision allows the Procuring Entity pick on anomalies brought to its attention so as to safeguard itself.

77. As to whether the Respondents consulted the Applicant while exercising its authority under Section 66 of the Act, Mr. Kagwe submitted that there was no consultation done with the Applicant.

78. When asked to expound on her understanding of the provisions under paragraph 4 of the Procuring Entity's Notification of Intention to Award, Ms. Maina submitted that bidders had an opportunity to make enquiries or complaints to the Procuring Entity and these could be brought even before the Board.


79. The Board sought to know how it could establish the authenticity of the Applicant's certificate submitted in response to Mandate

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Requirement No. 19 of the Tender Document in view of averments made by the Applicant in its affidavits filed in the instant Request for Review which were also joined by the Respondents and Interested Party in their submissions.

80. In response, Ms. Mutua urged the Board to note that the Applicant was never informed of the complaint made by the Interested Party which is a clear depiction of the fact that it was never afforded a fair administrative action. She further urged the Board to be persuaded that the Applicant submitted a valid certificate and is validly registered with NITA as deponed at paragraph 19 of its Further Affidavit and was in its best interest to put such weighty allegations to rest through the appropriate legal process. She submitted that the 1<sup>st</sup> Respondent has no residual legal authority to direct a re-evaluation of a tender once the decision to award the subject tender was made and communicated in line with Section 86 and 87 of the Act.

81. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 17<sup>th</sup> April 2025 was due to expire on 8<sup>th</sup> May 2025 and that the Board would communicate its decision on or before 8<sup>th</sup> May 2025 to all parties to the Request for Review via email.



## **BOARD'S DECISION**

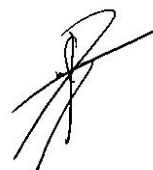
82. The Board has considered each of the parties' cases, documents, pleadings, oral and written submissions, list and bundle of authorities together with confidential documents submitted to the Board by the Respondents pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination.

**A. Whether the Interested Party has *locus standi* before the Board.**

**B. Whether the complaints mechanism as provided to bidders in the subject tender is misleading when read against provisions of the Act.**

**C. Whether the Procuring Entity acted unfairly and in breach of the provisions of the Act and Article 227 of the Constitution by disqualifying the Applicant's tender post notification of intention to award the subject tender.**

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

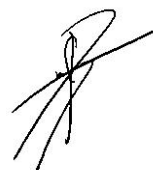


### **Whether the Interested Party has *locus standi* before the Board.**

83. The Applicant at ground 1 and 2 of its Notice of Objection dated 6<sup>th</sup> May 2025 sought to strike out the Replying Affidavit sworn and filed by the Interested Party on 2<sup>nd</sup> May 2025 on the basis that (a) it sought to plead new issues which were outside the temporal jurisdiction of the Board and (b) it lacked standing before the Board.

84. The Applicant submitted that the Interested Party was neither an aggrieved person within the meaning of Section 167 of the Act nor an agent of the Procuring Entity as to have any substantive pleadings or requests before the Board. It further submitted that the Interested Party's participation in the instant proceedings cannot be justified by any special knowledge and has no individual legal rights at stake.

85. In response, Ms. Maina for the Interested Party made reference to Section 170 of the Act and submitted that the Interested Party was a bidder in the subject tender and has an identifiable stake in the legal proceedings before the Board related to the procurement process in the subject tender since it may be directly affected by the outcome of the instant request for review lodged before the Board. Counsel pointed out that no new issues had been raised by the Interested Party in its replying affidavit and that it was merely supporting the averments and decision of the Respondents in the subject tender.



86. We note that the High Court in **Alfred Njau and Others v City Council of Nairobi (1982) KAR 229** described *locus standi* as:

***"the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings."***

87. Further, in **Law Society of Kenya v Commissioner of Lands & Others Nakuru High Court Civil Case No. 464 of 2000**, the High Court held that:

***"Locus Standi signifies a right to be heard, a person must have sufficiency of interest to sustain his standing to sue in a court of law".***

88. The import of the above holdings is that *locus standi* is the right to appear and be heard in Court or other proceedings and literally means 'a place of standing.' As such, if a party is found to have no *locus standi*, it then means that it cannot be heard whether or not it has a case worth listening to.

89. Section 170 of the Act provides for persons who must be parties to an administrative review lodged with the Board pursuant to Section 167 (1) of the Act as follows:

***"170. The parties to a review shall be.***

***(a) the person who requested the review;***



- (b) the accounting officer of a Procuring Entity;***  
***(c) the tenderer notified as successful by the Procuring Entity; and***  
***(d) such other persons as the Review Board may determine."***

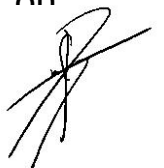
90. In essence, provisions under Section 170 of the Act are set in mandatory terms and provide that an administrative review must comprise of (a) the candidate or tenderer requesting the review, (b) the accounting officer of a Procuring Entity, (c) the successful tenderer, and (d) such other persons as the Review Board may determine.

91. According to Section 170(d) of the Act, the Board has the judicial discretion to determine whether a party can participate in an administrative review before it.

92. Black's Law Dictionary (Tenth Edition) defines judicial discretion as:

***"The exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not act when a litigant is not entitled to demand the act as a matter of right."***

93. In essence, determination of which other person participates in an administrative review other than the applicant, the accounting officer of a procuring entity and the successful tender ought to be based on






what is fair under the circumstances and should be guided by the rules and principles of law.

94. Regulation 205 of the Public Procurement and Asset Disposal Regulations 2020 (hereinafter referred to as "Regulations 2020") mandates the Board Secretary to immediately notify all other parties who participated in the procurement proceedings upon receipt of such documents from a procuring entity.

95. Having carefully studied the Board's file in the instant Request for Review, we do note that Mr. Kilaka, the Acting Board Secretary notified all tenderers in the subject tender of the filing of the instant Request for Review upon receipt of the confidential documents submitted by the Procuring Entity pursuant to Section 67(3)(c) of the Act vide a notification dated 28<sup>th</sup> April 2025. From this notification, tenderers who participated in the subject tender were notified and invited to respond to the instant Request for Review.

96. The Interested Party, being a tenderer in the subject tender and one of the parties notified of existence of the instant Request for Review proceeded to file on 29<sup>th</sup> April 2025 a Notice of Appointment of Advocates dated 28<sup>th</sup> April 2025 and pursuant to leave granted by the Board on 30<sup>th</sup> April 2025, filed its rejoinders to the instant Request for Review.

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97. This Board in **PPARB Application No. 67 of 2021 Resolution Insurance Company Limited v The Accounting Officer, County Government of Bomet & Another** addressed itself on the role of an interested party in request for review proceedings and observed as follows:

***"...the Board observes that bidders who participate in a procurement process have an identifiable stake in the legal proceedings relating to a procurement process because they might be directly affected by the outcome of a request for review, hence are normally joined as interested parties to a request for review.***

***Such bidders do not advance their own grievances by framing their own fresh issues or introducing new issues for determination. Further, such bidders do not advance their own grievances in terms of challenging the outcome of their respective bids since their role is limited to supporting an applicant's case or the respondent's (i.e. the accounting officer of a procuring entity's) case.  
....."***

98. The Interested Party herein has categorically stated that it has not framed its own fresh issues nor introduced new issues for determination and that its case is pegged solely in support of the Respondents' case.



99. In view of the foregoing, we find the participation of the Interested Party in the instant Request for Review to be just and fair and that it has requisite *locus standi* before the Board noting that (a) it has not framed its own fresh issues for determination, and (b) the findings of the Board in these proceedings will have an impact on all bidders who participated in the subject tender including the Interested Party.

100. In the circumstances, the Interested Party has *locus standi* before the Board.

**Whether the complaints mechanism as provided to bidders in the subject tender is misleading when read against provisions of the Act.**

101. The Board notes that the Tender Document at page 68 of 107 to 70 of 107 provided for the Notification of Intention to Award that was to be sent to each bidder who submitted its tender in the subject tender. The Notification of Intention to Award provided bidders with *inter alia* how to make a procurement related complaint as follows:

".....

***iv. How to make a complaint***

***Period: Procurement-related Complaint challenging the decision to award shall be submitted by [insert date and time].***



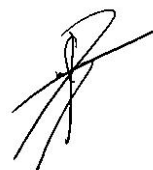
***Provide the contract name, reference number, name of the Tenderer, contact details; and address the Procurement-related Complaint as follows:***

***Attention: .....[insert full name of person, if applicable] Title/position: ..... [insert title/position]***

***Agency: ..... [insert Multimedia University of Kenya] Email address: ..... [insert email address]***

***At this point in the procurement process, you may submit a Procurement-related Complaint challenging the decision to award the contract. You do not need to have requested, or received, a debriefing before making this complaint. Your complaint must be submitted within the Stand still Period and received by us before the Stand still Period ends. In summary, there are four essential requirements:***

- 1. You must be an 'interested party'. In this case, that means a Tenderer who submitted a Tender in this tendering process, and is the recipient of a Notification of Intention to Award.***
- 2. The complaint can only challenge the decision to award the contract.***
- 3. You must submit the complaint within the period stated above.***
- 4. You must include, in your complaint, all of the information required to support the complaint.***



***5. The application must be accompanied by the fees set out in the Procurement Regulations, which shall not be refundable (information available from the Public Procurement Authority at [info@ppra.go.ke](mailto:info@ppra.go.ke) or [complaints@ppra.go.ke](mailto:complaints@ppra.go.ke)***

.....

102. We note that having concluded the evaluation process, the Procuring Entity issued bidders in the subject tender with a Notification of Intention to Award dated 17<sup>th</sup> March 2025 which availed an avenue at Paragraph 4 for bidders to make procurement related complaints challenging the decision to award the subject tender.

103. Paragraph 4 of the Notification of Intention to Award dated 17<sup>th</sup> March 2025 reads as follows:

***"4. How to make a complaint***

***Period: Procurement-related Complaint challenging the decision to award shall be submitted by midnight of 31<sup>st</sup> March, 2025 (local time).***

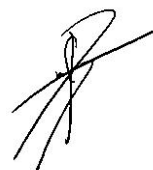
***Provide the contract name, reference number, name of the Tenderer, contact details; and address the Procurement-related Complaint as follows:-***

***Attention : Prof. Rosebella O. Maranga, PHD, MBS***

***Title/position : Vice Chancellor***

***Agency : Multimedia University of Kenya***

***Email address: [vc@mmu.ac.ke](mailto:vc@mmu.ac.ke)***



***At this point in the procurement process, you may submit a Procurement-related Complaint challenging the decision to award the contract. You do not need to have requested, or received, a debriefing before making this complaint. Your complaint must be submitted within the standstill period and received by us before the Standstill period ends.***

***In summary, there are four essential requirements:***

- 1. You must be an 'interested party'. In this case, that means a Tenderer who submitted a Tender in this tendering process, and is the recipient of a Notification of Intention to Award.***
- 2. The complaint can only challenge the decision to award the contract.***
- 3. You must submit the complaint within the period stated above.***
- 4. You must include, in your complaint, all of the information required to support the complaint.***
- 5. The application must be accompanied by the fees set out in the Procurement Regulations, which shall not be refundable (information available from the Public Procurement Authority at [info@ppra.go.ke](mailto:info@ppra.go.ke) or [complaints@ppra.go.ke](mailto:complaints@ppra.go.ke)***

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



104. From the above, bidders were informed that they could make procurement related complaints to the Procuring Entity by addressing the same to the 1<sup>st</sup> Respondent and such complaint was required to be submitted within the standstill period by midnight of 31<sup>st</sup> March 2025. Four essential requirements were set out as pertains the procurement complaint amongst them being that the application ought to be accompanied by fees set out under Regulations 2020 which shall not be refundable.

105. It is imperative to note that the Act is the governing law on matters public procurement and asset disposal and prescribes how public procurement and asset disposal disputes are to be handled. This Board is a creature of statute owing to the provisions of Section 27 (1) of the Act which provides:

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

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

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

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



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

107. Section 167(1) of the Act also provides that:

***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.***

108. The manner in which an aggrieved candidate or tenderer seeks administrative review is prescribed under Part XV – Administrative Review of Procurement and Disposal Proceedings of Regulations 2020 and specific under Regulation 203 of Regulations 2020 which prescribes that an administrative review sought by an aggrieved candidate or tenderer under Section 167(1) of the Act ought to be by way of (i) a request for review which is to be (ii) accompanied by such statements as the applicant considers necessary in support of its request.





109. The request for review is to be in a form set out in the Fourteenth Schedule of Regulations 2020. The Fourteenth Schedule of Regulations 2020 provides for a form known as a Request for Review while the Fifteenth Schedule of Regulations 2020 provides for the fee payable in filing a request for review. Such fee is strictly payable to the Board and a Procuring Entity can therefore not purport to collect any fees for procurement related complaints submitted to it as this has no backing in law.

110. The aforementioned provisions of the Act and Regulations 2020 demonstrate that this Board is a specialized, central independent procurement appeals review board with its main function being reviewing, hearing and determining tendering and asset disposal disputes.

111. In essence, procurement disputes are to be handled by the Board as per the reading of Section 28(1)(a), 167(1) of the Act and Regulation 203 read with the Fourteenth Schedule of Regulations 2020 and whenever there is a conflict, these override any provisions on complaints mechanism as provided in the Notification of Intention to Award and in the Tender Document in the subject tender.

112. It is the Board's considered view that the Procuring Entity ought to have categorically indicated in the Tender Document and the Notification of Intention to Award in the subject tender that while bidders were free to seek internal mechanisms by lodging a

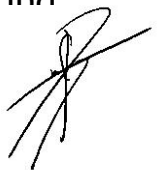
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procurement related complaint with it during the standstill period, aggrieved bidders were at liberty to seek administrative review by the Board as prescribed under the Act noting that the Board is the only specialized statutory tribunal established to deal with all complaints of breach of duty by a procuring entity and is the only body charged with collecting fees for such tendering disputes.

113. In the circumstances, we find that the complaints mechanism as provided to bidders in the subject tender is misleading and illegal when read against provisions of the Act.

**Whether the Procuring Entity acted unfairly and in breach of the provisions of the Act and Article 227 of the Constitution by disqualifying the Applicant's tender post notification of intention to award the subject tender.**

114. The Applicant faulted the Respondents for engaging in communications with the Interested Party to its exclusion with regard to its registration status with NITA and authenticity of its registration certificate submitted in response to Mandatory Requirement No. 19 of the Tender Document. The Applicant contends that the 1<sup>st</sup> Respondent had no discretionary power to direct the Evaluation Committee to re-evaluate the subject tender having already issued it with a notification of intention to award the subject tender. Further, the Applicant contends that the 1<sup>st</sup> Respondent is not allowed to take any action affecting or likely to alter the status of procurement proceedings during



the 14 days' standstill period following notification of award of the subject tender.

115. It is the Applicant's case that it is aggrieved by the actions of the 1<sup>st</sup> Respondent with regard to the subject tender which it argues to be in violation of Articles 10 and 227(1) of the Constitution for lacking transparency, Section 47 of the Fair Administrative Actions Act for denying it natural justice particularly *audi alteram partem* (hear the other side), and Section 79, 85, 87 and 135 of the Act by purporting to re-evaluate the subject tender and failing to enter into a contract.

116. In response, the Respondents submitted that subsequent to issuance of the Notification of Intention to award the subject tender dated 17<sup>th</sup> March 2025 to bidders communicating that the successful bidder was the Applicant, they received a complaint from the Interested Party claiming that the Applicant did not meet Mandatory Requirement No. 19 of the Tender Document requiring it to be registered with NITA as a training provider. They further submitted that this led them to request for confirmation as to the authenticity and validity of the registration certificates of bidders found responsive at the Preliminary Evaluation stage. That NITA in its response confirmed that only the Interested Party was registered as a training provider and based on this development, the 1<sup>st</sup> Respondent directed the Evaluation Committee to evaluate the said bids.



117. The Respondents averred that bidders were informed of the decision to re-evaluate the tenders vide letter dated 28<sup>th</sup> March 2025 and they intended to communicate the outcome of the re-evaluation exercise. However, that the Applicant vide letter dated 4<sup>th</sup> April 2025 demanded that the Procuring Entity ought to commence the process of signing a contract with respect to the subject tender. Subsequently, the Respondents resulted to seek for an advisory from the Director General, Public Procurement Regulatory Authority vide letter dated 7<sup>th</sup> April 2025.

118. On its part, the Interested Party submitted that the Respondents acted lawfully and within their mandate in ordering for a re-evaluation of bids in the subject tender during the standstill period in view of Section 44 (1), (2)(g), and 66 (3)(a) of the Act. It further submitted that upon notification of the outcome of evaluation of the subject tender, it lodged a complaint through its advocates contesting award of the subject tender to the Applicant. The Interested Party pointed out that the Respondents acted on its complaint and conducted investigations into bids submitted in the subject tender leading to a discovery that the Applicant was not a registered training provider hence non-responsive in the subject tender.

119. The Interested Party contends that at the time of submitting its bid, the Applicant did not submit a valid NITA registration certificate in compliance with MR 19 and that the letter submitted by the Applicant supposedly from NITA as proof of being a registered training provider



supposedly valid up to 31<sup>st</sup> December 2025 was a forged/falsified document.


120. In a rejoinder, the Applicant submitted that it is a registered training provider with NITA and that even as at 26<sup>th</sup> March 2025 when the alleged correspondence was made between the Respondents and NITA, it was duly registered under registration number NITA/LEVY/CDWR/23357.

121. Having considered parties' submissions, pleadings and the confidential documents submitted by the 1<sup>st</sup> Respondent, the Board is invited to make a determination on whether the actions of the Respondents leading to disqualification of the Applicant's tender post notification of intention to award were irregular and unfair.

122. The Board is alive to the objective of public procurement which is to provide quality goods and services in a system that implements the principles stated in Article 227 of the Constitution which provides as follows:

Article 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)”**

123. The legislation contemplated in Article 227(2) of the Constitution is the Act. Section 80 of the Act is instructive on how evaluation and comparison of tenders should be conducted by a procuring entity, as follows:


Section 80 - Evaluation of tender:

**(1) "....."**

**(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, .....**

**(3) .....;”**

124. 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.



125. The Board has carefully studied the Tender Document and notes that the criteria for evaluation of the subject tender was set out in Section III-Evaluation and Qualification Criteria at page 32 of 107 to page 39 of 107. Evaluation of bids would be carried out in three stages being Preliminary Evaluation, Technical Evaluation, and Financial Evaluation.

126. The Board has perused (a) the Evaluation Report dated 28<sup>th</sup> February 2025 and (b) the Professional Opinion dated 5<sup>th</sup> March 2025 submitted to the Board pursuant to Section 67(3)(e) of the Act and observes that:

- i Sixteen (16) tenders were rendered non-responsive at the Preliminary Evaluation stage while four (4) tenders, including that of the Applicant and Interested party, were found responsive and progressed to the Technical Evaluation stage.
- ii The four (4) tenders were found responsive at the Technical Evaluation stage and progressed to the Financial Evaluation stage.
- iii Following ranking at the Financial Evaluation stage, the Applicant was determined to be the lowest evaluated bidder and recommended for award of the subject tender.
- iv According to the Professional Opinion prepared by the Ag. Chief Procurement Officer, Mr. Anthony Gitau, and presented to the 1<sup>st</sup> Respondent, he indicated that due diligence was conducted on

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the Applicant which entailed verification and authentication of documents. Mr. Gitau indicated as follows in the Professional Opinion:

***"5. Verification and Authentication of Documents***

***The Committee verified that copies of documents that were submitted by County Guards in their tender documents had corresponding original documents. These include CR12, Business Permit, KSIA, NSSF, CAK License, WIBA Policy, NHIF/SHA, NITA, PSRA, Contractual Liability Insurance & Tax Compliance Certificate."***

***Conclusion***

***The Evaluation Committee was satisfied with the evidence of performance that was provided County Guards Limited's references. The Committee also verified the authenticity of documents submitted by County Guards Limiter in their tender.(sic)***

127. Mr. Gitau concurred with the recommendation of the Evaluation Committee to award the subject tender to the Applicant, and the 1<sup>st</sup> Respondent subsequently approved the award and issued letters of Notification of Intention to Award dated 17<sup>th</sup> March 2025 to the Applicant and other unsuccessful bidders.

128. Observation is made that vide letter dated 20<sup>th</sup> March 2025, the Interested Party through its advocates NOW Advocates LLP lodge





complaint with the 1<sup>st</sup> Respondent challenging award of the subject tender to the Applicant where it stated under paragraph B (III to VI) of its letter as follows:

".....

***III. In our efforts to verify the compliance of all bidders listed in the Notification of Intention to Award, we accessed the NITA website ([www.nita.go.ke](http://www.nita.go.ke)) and downloaded a list of registered Training Providers. A copy of this list is enclosed herein and marked CSS-3 for your ease of reference.***

***IV. It is evident from the list that County Guards Limited, the alleged successful bidder in the subject tender, is not registered as a Training Provider by NITA. Consequently, its bid could not have met the mandatory requirement 19 and should have been disqualified at the mandatory requirement evaluation stage. As such, County Guards Limited should not have been awarded the subject tender.***

***V. Additionally, all the bidders enumerated in the Notification of Intention to Award whose evaluated process were lower than that of the Complainant are equally not registered as Training Providers by NITA as evidenced in the enclosure marked CSS-3 herein.***




***VI. The Notification of Intention to Award the subject tender to County Guard Limited is in breach of MR19 of the Tender Document read with Article 227(1) of the Constitution and Sections 3, 79, 80 and 86 of the Procurement Act....."***

129. The Procuring Entity subsequently resulted to write to NITA vide letter dated 25<sup>th</sup> March 2025 as follows:

***.....***  
***SUBJECT: DUE DILIGENCE TO CONFIRM AUTHENTICITY AND VALIDITY OF REGISTRATION AS TRAINING PROVIDERS WITH THE NATIONAL INDUSTRIAL TRAINING AUTHORITY***

***The Multimedia University of Kenya is in the process of concluding tender evaluation for provision of Security Guard Services. One of the mandatory requirements in the tender document was the submission of a valid "copy of registration certificate as a training provider with the National Industrial Training Authority (NITA) approving the Trainers to train security course."***

***Pursuant to the provisions of Section 83 of the Public Procurement and Disposal Act (2015) with regard to due diligence, we wish to seek confirmation of the authenticity and validity of registration certificates as training providers for the following four (4) firms:***



- 1. County Guards Limited**
- 2. Lindum Security Limited**
- 3. Blue Shield Security Limited**
- 4. Canon Security Services Kenya Limited.**

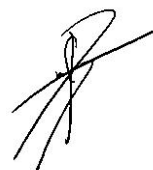
.....”

130. From the contents of the above letter dated 25<sup>th</sup> March 2025, the Board observes that the Procuring Entity indicated from the subject of its letter that it was conducting due diligence pursuant to Section 83 of the Act so as to confirm authenticity and validity of registration as training providers and that it was in the process of conducting evaluation of the subject tender. This is despite having already completed the evaluation process and awarded the subject tender to the Applicant.

131. Section 83 of the Act is instructive on conduct of due diligence and provides 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.”***

132. 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—***

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

*(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."*

133. Black's Law Dictionary, Ninth Edition at page 523 defines "due diligence" as

*"the diligence reasonably expected from, and ordinarily exercised by a person who seeks to satisfy a legal requirement or discharge an obligation"* with the term diligence meaning *"the attention and care required from a person in a given situation"*

134. This Board in **PPARB Application No. 158/ 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.



135. The Board notes that an evaluation committee of a procuring entity has the discretion to conduct or not to conduct post-qualification evaluation or a due diligence exercise to confirm and verify the qualifications of a tenderer who submitted the lowest evaluated responsive tender to be awarded a contract. This is so stated because a reading of Section 83 of the Act makes reference to the word 'may' which implies discretion as opposed to the word 'shall' that would otherwise make conduct of the exercise an obligation. In our considered view where a tender document has not provided for post qualification evaluation or due diligence exercise, then a procuring entity is not under an obligation to conduct a due diligence exercise or a post qualification evaluation.

136. Turning to the instant Request for Review, the Board observes that the Tender Document provided for Due Diligence at page 37 of 107 as follows:

***"Multimedia University may carry out a DUE DILIGENCE exercise to verify the information provided in bidder's tender document."***

137. Noting that the Procuring Entity had a discretion to carry out a due diligence exercise to verify information provided in a bidder's tender, this provision of the Tender Document when read together with Section 83 of the Act as read with Regulation 80 of Regulations 2020 dictates



that due diligence can only be conducted prior by the Evaluation Committee prior to award of tender.

138. It is evident that the information sought by the Procuring Entity from NITA in letter dated 25<sup>th</sup> March 2025 under the guise of due diligence was an anomaly and improper since the same was conducted eight (8) days post issuance of letters of notification of award of the subject tender dated 17<sup>th</sup> March 2025. Section 83 is clear on due diligence being carried out before the award of the tender. The post-qualification exercise carried out on 25<sup>th</sup> March 2025 cannot be said to be due diligence within the meaning of the provisions of Section 83.

139. The Board has heard the argument that the Respondents are at liberty to rectify any anomaly discovered during the procurement process and communicate the same to bidders. The Board has also heard the argument that the Respondents acted within their mandate by not entering into a contract with the Applicant for the reason that it was ineligible to contract having submitted false information concerning its NITA qualifications pursuant to Section 55(5) and 66(3)(a) of the Act.

140. Section 55 of the Act provides for eligibility to bid and subsection (5) provides that:

***"State organ or public entity shall consider as ineligible a person for submitting false, inaccurate or incomplete information about his or her qualifications."***



141. Further Section 66 of the Act cautions bidders against being involved in any corrupt, coercive, obstructive, collusive or fraudulent practice; or conflicts of interest in any procurement or asset disposal proceeding and reads in part:

***"(1) A person to whom this Act applies shall not be involved in any corrupt, coercive, obstructive, collusive or fraudulent practice; or conflicts of interest in any procurement or asset disposal proceeding. (2) A person referred to under subsection (1) who contravenes the provisions of that sub-section commits an offence. (3) Without limiting the generality of the subsection (1) and (2), the person shall be —***  
***(a) disqualified from entering into a contract for a procurement or asset disposal proceeding; or***  
***(b) if a contract has already been entered into with the person, the contract shall be voidable."***

142. In essence, a person involved in any corrupt, coercive, obstructive, collusive or fraudulent practice; or conflicts of interest in any procurement or asset disposal proceeding commits an offence and shall be disqualified from entering into a contract for a procurement or asset disposal proceeding and if a contract has already been entered into with such person, it shall be voidable.





143. Justice Odunga in **Miscellaneous Civil Application No. 338 of 2016, Republic v Kenya Airports Authority Ex-Parte Seo & Sons Limited [2018] eKLR** when considering the import of section 66 of the Act held as follows:

***"In this case it is clear that vide a letter dated 20<sup>th</sup> July, 2016, the Respondent herein terminated the award of the subject tender while expressing itself inter alia as hereunder:***

***Upon receipt of a report on further due diligence, a decision has been made to terminate the award based on misrepresentation in respect of your qualification for the award of tender; constituting an offence under section 66 (2), (3) and 83 of the Public Procurement and Asset Disposal Act.***

***Kindly note that the aforementioned Award is hereby terminated.***

***For avoidance of doubt the legal provisions that were relied upon provide as hereunder:***

***66 (1) ....***

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

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

***As regards section 66, it is clear that the same can only be invoked where it is found that a person to whom an award of a tender is given is involved in any corru***



***coercive, obstructive, collusive or fraudulent practice; or conflicts of interest in any procurement or asset disposal proceeding.”***

144. From the above holding, Section 66 of the Act can only be invoked where it is found that a person whom an award of a tender is given is involved in any corrupt, coercive, obstructive, collusive or fraudulent practice; or conflicts of interest in any procurement or asset disposal proceeding.

145. Turning to the instant Request for Review, we note that NITA responded to the Procuring Entity vide letter dated 26<sup>th</sup> March 2025 and indicated as follows:

***“.....***

***RE: DUE DILIGENCE TO CONFIRM AUTHENTICITY AND VALIDITY OF REGISTRATION AS TRAINING PROVIDERS WITH THE NATIONAL INDUSTRIAL TRAINING AUTHORITY.***

***.....***

***Therefore, the Authority wishes to state as follows in respect to registration of the 4 companies as detailed in your letter as training providers:***

***1. County Guards Limited***

***The company County Guards Limited is not registered by NITA as a training provider.***

***.....”***



146. It was on receipt of the above communication that the Respondents resulted to notify bidders in the subject tender vide letter dated 28<sup>th</sup> March 2025 that they had received a complaint from one of the bidders during the stand still period and subsequently instructed the Evaluation Committee to review the complaint and re-evaluate the subject tender.

147. It is therefore clear from the sequence of events herein that the Respondents in resulting to instruct the Evaluation Committee to review the complaint received by the Interested Party and to re-evaluate the subject tender failed to adhere to Section 83 of the Act. This in our considered view means that the Respondents cannot invoke Section 66 (3)(a) of the Act having purported to carry out due diligence on bidders who progressed to the Financial Evaluation stage in the subject tender post award of the tender.

148. Interestingly, the letters of notification of intention to award dated 17<sup>th</sup> March 2025 issued to the Applicant and unsuccessful bidders in the subject tender were still alive at the point of issuance by the Respondents of the letter to bidders dated 28<sup>th</sup> March 2025 informing them that they had instructed the Evaluation Committee to review the complaint and re-evaluate the subject tender.

149. It should also be noted that contrary to the response by NITA, the Applicant deponed at paragraph 19 of its Further Affidavit sworn on 6<sup>th</sup> May 2025 as follows:

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***"19. I however state as a matter of fact that the Applicant herein is registered under the Authority, and even on 26<sup>th</sup> March 2025, when the said correspondence between the Authority and the respondent herein is purported to have been made, the Applicant was duly registered under registration number NITA/LEVY/CDWR/23357."***

150. The allegation that the Applicant submitted a forged/falsified NITA certificate is a grave allegation akin to fraud and the standard of proof for fraud is quite high. The Court of Appeal in **Ratilal Gordhanbhai Patel v Lalji Makanji [1957] EA 314, 317** held that:

***"There is one preliminary observation which we must take on the learned judge's treatment of this evidence: he does not anywhere... expressly direct himself on the burden of proof or on the standard of proof required. Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required. There is no specific indication that the learned judge had this in mind: there are some indications which suggest he had not."***

151. Further, the Court of Appeal in the case of **Kinyanjui Kamau vs George Kamau [2015] eKLR** expressed itself as follows:



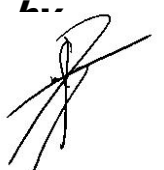
***"...It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo vs Ndolo (2008) 1 KLR (G & F) 742 wherein the Court stated that: "...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts."***

152. In essence, the onus of proving fraud rests on a party who seeks to rely on an allegation of fraud by another party and the standard of proof required is more than a balance of probability.

153. In addition, the party accused of committing fraud ought to be granted an opportunity to make representation on the allegations raised against it. This in view of provisions under Article 47 of the Constitution which provides that:

***"(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***

***(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected ...***



***administrative action, the person has the right to be given written reasons for the action”***

154. Further Section 4 (3) and (4) and 5 (1) (b) and (c) of the Fair Administrative Actions Act 2015 which provides:

***“(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision***

***(a) prior and adequate notice of the nature and reasons for the proposed administrative action;***

***(b) an opportunity to be heard and to make representations in that regard;***

***(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;***

***(d) a statement of reasons pursuant to section 6;***

***(e) notice of the right to legal representation, where applicable;***

***(f) notice of the right to cross-examine or where applicable; or***

***(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.***

***(4) The administrator shall accord the person against whom administrative action is taken an opportunity to***



***(a) attend proceedings, in person or in the company of an expert of his choice;***

***(b) be heard;***

***(c) cross-examine persons who give adverse evidence against him; and***

***(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing....***

***(5)(1) In any case where any proposed administrative action is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public, an administrator shall***

***(a) issue a public notice of the proposed administrative action inviting public views in that regard;***

***(b) consider all views submitted in relation to the matter before taking the administrative action;***

***(c) consider all relevant and materials facts; and***

***.....”***

155. From the record, it is clear that the Applicant was never accorded a right to be heard by the Respondents in regard to the complaint by the Interested Party and subsequent correspondences with NITA prior to the decision by the 1<sup>st</sup> Respondent directing the Evaluation Committee to re-evaluate the subject tender which led to its disqualification from entering into a contract in the subject tender.



156. In the circumstances, the Board finds that the Procuring Entity acted unfairly and in breach of the provisions of the Act and Article 227 of the Constitution by disqualifying the Applicant's tender post notification of intention to award the subject tender.

**As to what orders the Board should issue in the circumstances**

157. The Board has established that that the Interested Party has *locus standi* before it.

158. The Board has found that the complaints mechanism as provided to bidders in the subject tender is misleading and illegal when read against provisions of the Act.

159. It is the Board's further finding that the Procuring Entity acted unfairly and in breach of the provisions of the Act and Article 227 of the Constitution by disqualifying the Applicant's tender post notification of intention to award the subject tender.

160. In determining the appropriate orders to grant in the circumstances, the Board observes that Section 173(b) of the Act gives the Board a discretionary power to "*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.*"





161. Noting the contentious issue of whether the Applicant's NITA certificate submitted in response to Mandatory Requirement No. 19 of the Tender Document is genuine, the Board deems it fair and just to nullify and set aside the letters of Notification of Intention to Award the subject tender dated 17<sup>th</sup> March 2025 issued to the successful tenderer and the unsuccessful tenderers and direct the Procuring Entity to carry out fresh due diligence on the successful bidder, being the Applicant herein, and all other Bidders qualifying in the financial evaluation stage in line with provisions under Section 83 of the Act read with Regulation 80 of Regulations 2020 given that the primary Evaluation and professional opinion done indeed found the applicant to have qualified in respect of MR19 .

162. The upshot of our decision is that the Request for Review dated 17<sup>th</sup> April and filed on even date succeeds with respect to the following specific orders:

### **FINAL ORDERS**

163. In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the instant Request for Review:

#### **A. The complaints mechanism as provided to bidders by the Respondents in the subject tender and Notification of**



**Intention to Award dated 17<sup>th</sup> March 2025 is misleading and illegal when read against provisions of the Act.**

**B. The Letters of Notification of Intention to Award dated 17<sup>th</sup> March 2025 issued to the Applicant and other unsuccessful tenderers with respect to Tender No. MMU/OT/SS/08/2024-2025 for Provision of Security Guard Services be and are hereby nullified and set aside.**

**C. The 1<sup>st</sup> Respondent is hereby ordered to direct the 2<sup>nd</sup> Respondent's Evaluation Committee to conduct due diligence to confirm and verify the qualifications of the Applicant and all other Bidders qualifying in the financial evaluation stage in line with provisions of the Tender Document, Section 83 of the Act, Regulations 2020, Article 227 of the Constitution while taking into consideration the Board's findings in this Request for Review.**

**D. Further to order C above, the 1<sup>st</sup> Respondent is directed to complete the procurement process of the subject tender within 30 days of this decision while taking into consideration the provisions of the Tender Document, the Constitution, the Act and Regulations 2020.**




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

**Dated at NAIROBI this 8<sup>th</sup> Day of May 2025.**



.....

**CHAIRPERSON**  
**PPARB**



.....

**SECRETARY**  
**PPARB**

