

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 80/2025 OF 9TH JULY 2025

BETWEEN

BABS SECURITY SERVICES LIMITED APPLICANT

AND

THE ACCOUNTING OFFICER,

MURANG'A UNIVERSITY OF TECHNOLOGY 1ST RESPONDENT

MURANG'A UNIVERSITY OF TECHNOLOGY 2ND RESPONDENT

SKYWAYS SECURITY SERVICES LIMITED INTERESTED PARTY

Review against the decision of the Accounting Officer, Murang'a University of Technology in relation to Tender No. MUT/T 01/SECURITY/2025-2026 for Provision of Security Services.

BOARD MEMBERS PRESENT

- | | |
|------------------------|--|
| 1. Ms. Alice Oeri | - Vice-Chairperson & Panel Chairperson |
| 2. Mr. Jackson Awele | - Member |
| 3. Mr. Robert Chelagat | - Member |

IN ATTENDANCE

- | | |
|---------------------|-------------------------------------|
| 1. Mr. Abdalla Issa | - Holding brief for Board Secretary |
| 2. Ms. Evelyn Weru | - Secretariat |

PRESENT BY INVITATION

APPLICANT

Mr. Odhiambo Daniel

BABS SECURITY SERVICES LIMITED

Advocate, Karugu Mbugua & Co. Advocates

1st & 2nd RESPONDENTS

THE ACCOUNTING OFFICER,

MURANG'A UNIVERSITY OF

TECHNOLOGY & MURANG'A UNIVERSITY OF TECHNOLOGY

1. Victor Gichuki

Head of Procurement

2. Mr. Caleb

Legal Department

3. Ms. Evelyn Munuve

Procurement Department

INTERESTED PARTY

SKYWAYS SECURITY SERVICES LIMITED

N/A

BACKGROUND OF THE DECISION

The Tendering Process

1. Murang'a University of Technology, the Procuring Entity and 2nd Respondent herein invited sealed tenders in response to Tender No. MUT/T 01/SECURITY/2025-2026 for Provision of Security Services (hereinafter referred to as the "subject tender") by way of an advertisement on The Daily Nation on 17th April 2025, and on the Procuring Entity's website www.mut.ac.ke and the Public Procurement Information Portal www.tenders.go.ke where the blank tender document for the subject tender issued to tenderers by the Procuring

Entity (hereinafter referred to as 'the Tender Document') was available for download. Tendering would be conducted under open competitive tendering method and the subject tender's submission deadline was on 9th May 2025 at 11.00 a.m.

Submission of Tenders and Tender Opening

2. According to the Tender Opening Minutes which were part of confidential documents furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') by the 1st Respondent pursuant to Section 67(3)(e) of the Act, a total of ten (10) tenders were submitted in response to the subject tender. The ten (10) tenders were opened in the presence of tenderers' representatives present at the tender opening session, and were recorded as follows:

Bidder No.	Name
1	Hounslow Security Ltd
2	Superior Security Ltd
3	Papaton Security Services Ltd
4	Babs Security Services Ltd
5	Skyways Security Services
6	Roseguards Security Ltd
7	One on One Security S. Ltd
8	Glosec Services Ltd

9	FK Guards Services Ltd
10	Canon Security Services

Evaluation of Tenders

3. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1st Respondent undertook evaluation of the ten (10) tenders as captured in the Tender Evaluation Report for the subject tender signed on 30th May 2025 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 Clause A. Preliminary and Mandatory Requirements of Section III- Evaluation and Qualification Criteria at page 36 to 38 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, eight (8) tenders were determined to be non-responsive including the Applicant's tender while two (2) were determined to be responsive, being the Interested Party's

tender and that of Canon Security Services which 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 Criteria of Section III- Evaluation and Qualification Criteria at page 39 to 40 of the Tender Document. Tenderers were required to meet the pass mark score of 70% at this stage so as to proceed for Financial Evaluation.
7. At the end of evaluation at this stage, the two (2) tenders at this stage were determined to have met the pass mark score and were progressed for further evaluation.

Due Diligence

8. According to the Evaluation Report, due diligence was carried out on Bidder No. 5 being the Interested Party so as to ascertain that what was presented in its tender was factual and that the bidder was capable of undertaking the tendered services. However, the Evaluation Committee deemed it not necessary to repeat a due diligence exercise on Bidder No. 10 being Canon Security Services since it was the current service provider for provision of security services and a similar physical due diligence had been carried out when contracting the said service provider.

9. At the end of the due diligence exercise, the Evaluation Committee found the Interested Party's tender to be responsive and progressed to the Financial Evaluation stage.

Financial Evaluation

10. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria provided under Financial Evaluation of Section III – Evaluation and Qualification Criteria at page 41 of the Tender Document. Financial Evaluation would be based on the Least Cost Method.

11. At the end of evaluation at this stage, the Evaluation Committee found as follows:

NO	Description	Required guards	Bidder 10 M/s Canon Security Services Ltd			Bidder 5 M/s Skyways Security			Previous Contracted Rates (2024-2025)
			Monthly Rates Per Guard (Ksh)	Total Monthly Rate	Annual Rate (Ksh)	Monthly Rates Per Guard (Ksh)	Total Monthly Rate	Annual Rate (Ksh)	Monthly Rates (Ksh)
1.	Number of Guards per month	66 Guards	19,845.00	1,309,770.00	15,717,240.00	19,728.00	1,302,048.00	15,624,576.00	1,313,400.00
2.	Hand Held Metal Detector	10 pcs	FREE	FREE	FREE	FREE	FREE	FREE	-
3.	One Security Patrol Car/Alarm Rapid Response	1 pc	FREE	FREE	FREE	FREE	FREE	FREE	-
4.	Underbelly vehicle search mirror	3 pcs	FREE	FREE	FREE	FREE	FREE	FREE	-

<i>Best Lowest Evaluated Bid</i>					<i>1,302,048.0 0</i>	<i>15,624,57 6.00</i>	
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Evaluation Committee’s Recommendation

12. The Evaluation Committee recommended award of the subject tender to M/S Skyways Security Services Limited of P.O Box 2125 - 10100, Nyeri, at its tender sum of Kenya Shillings One Million Three Hundred and Two Thousand and Forty-Eight Only (Kshs. 1,302,048.00) monthly.

Professional Opinion

13. In a Professional Opinion dated 3rd June 2025 (hereinafter referred to as “the Professional Opinion”), the Head of Procurement, Mr. Victor Gichuki reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders, concurred with the recommendations of the Evaluation Committee and recommended award of the subject tender to M/S Skyways Security Services Limited as detailed therein.

14. Thereafter, the Professional Opinion was approved on 18th June 2025 by the 1st Respondent.

Notification to Tenderers

15. Tenderers were notified of the outcome of evaluation of the subject tender vide letters dated 25th June 2025.

REQUEST FOR REVIEW NO. 80 OF 2025

16. On 9th July 2025, Babs Security Services Limited, the Applicant herein, filed a Request for Review dated 8th July 2025 together with a Supporting Affidavit sworn by Isaac Macharia, its Director on 8th July 2025 (hereinafter referred to as the 'instant Request for Review') through the firm of Kwaje & Associates seeking the following orders from the Board that:

- a) The 1st Respondent's decision awarding Tender Number MUT/T01/SECURITY/2025-2026 for Provision of Security Services at Murang'a University of Technology to the Interested Party be annulled and set aside.***
- b) The 1st Respondent's letter dated 25th June 20215 notifying the Applicant that it had not been successful in Tender Number MUT/T01/SECURITY/2025-2026 for Provision of Security Services at Murang'a University of Technology be annulled and set aside.***
- c) A declaration that the 2nd Respondent failed to evaluate the Applicant's bid at the preliminary evaluation stage following the criteria and procedures under the Tender Document and the provisions of the Act at Sections 79, 80, and 86 and the provisions of Regulations 74, 75 of the Regulations.***
- d) The 2nd Respondent be directed to re-admit the Applicant at the preliminary evaluation stage and to carry out a re-***

evaluation of the tender noting to observe and apply the criteria in the Tender Document as required by the Act at Section 80 and to carry out the re-evaluation in compliance with Section 79 80,86 of the Act and Regulation 74 and 75 of the Regulations;

e) The Board in the exercise of its discretion, to give directions to the Respondents to redo or correct anything within the entire procurement process found to not have been done in compliance with the law.

f) 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 in the circumstances of this Request for Review.

17. In a Notification of Appeal and a letter dated 9th July 2025, Mr. James Kilaka, the Review Board Secretary notified the 1st and 2nd Respondents of the filing of the Request for Review and the suspension of the procurement proceedings, 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. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the matter within five (5) days from 9th July 2025.

18. On 16th July 2025, the 1st and 2nd Respondents filed their response to the Request for Review through Mr. Victor Gichuki, Head of

Procurement together with the confidential documents concerning the subject matter pursuant to Section 67(3)(e) of the Act.

19. *Vide* a Hearing Notice dated 17th July 2025, the Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the Request for Review slated for 23rd July 2025 at 11.00 a.m., through the link availed in the said Hearing Notice.
20. *Vide* a letter dated 17th July 2025, the Board Secretary notified all tenderers in the subject tender via email, of the existence of the instant 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 tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the tender within three (3) days.
21. On 22nd July 2025, the Applicant filed a Further Affidavit sworn on 21st July 2025 by Isaac Macharia, its director.
22. *Vide* email of 23rd July 2025 at 10.36 a.m., the 1st and 2nd Respondents filed an NSSF Due Diligence Report concerning the Applicant citing it to be an additional reason for its non-responsiveness.
23. When the matter came up for hearing on 23rd July 2025 at 11.00 a.m., the Board proceeded to read out respective pleading filed by parties in

the matter and confirmed that all bidders were notified of existence of the instant Request for Review and served with the Hearing Notice.

24. The Board brought to the attention of the Applicant's counsel the contents of the Respondents' email sent on the same day at 10.36 a.m concerning the NSSF Due Diligence Report. Subsequently, Mr. Odhiambo sought for time to consult and get instructions from the Applicant with regard to the NSSF Due Diligence Report. The Board indulged him and granted him 10 minutes to consult with his client and thereafter allocated time to parties to highlight their respective cases. Thus, the instant Request for Review proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

Applicant's case

25. In its submissions, the Applicant placed reliance on its pleadings filed before the Board.

26. The Applicant indicated that it submitted a competitive bid in the subject tender which met all eligibility and mandatory requirements in the Tender Document comprising a tender price of Kshs. 1,267,200/-. It further submitted that it received a notification letter on 25th June 2025 notifying it that its tender had been disqualified on the grounds that it had not attached a copy of the WIBA policy cover duly certified by the underwriter and that the subject tender had been awarded to the Interested Party at a bid price of Kshs. 1,302,048/-.

27. The Applicant indicated that it requested for a debrief vide email dated 26th June 2025 and subsequently, the Respondents on 27th June 2025 notified it of the result of the debrief through an email which introduced further grounds for disqualification that were not in the regret letter dated 25th June 2025.
28. The Applicant contends that the decision of the Respondents to disqualify its tender is unlawful, unfair, prejudicial and in breach of Article 227(1) of the Constitution as read with Section 3, 79, 80 and 86 of the Act and Regulation 74 and 75 of Regulations 2020. It argued that failure to disclose all information pertaining to disqualification of its tender vide notification letter dated 25th June 2025 shows a lack of transparency and fairness in how the evaluation process was carried out and a breach of Section 87 of the Act.
29. The Applicant further argued that the Respondents erroneously interpreted the Tender Document in reaching the conclusion that it had provided a copy of the Indemnity and WIBA Policy documents that were not certified thereby applying an extraneous evaluation criterion not provided for under the Tender Document.
30. In urging this position, Mr. Odhiambo pointed out that the indication in the debrief letter that the Applicant ought to have provided the insurance covers for indemnity and WIBA policies certified by a general stamp and thereafter a certification stamp was not stipulated in the Tender Document.

31. He submitted that Mandatory Requirement No. 8 indicated that a bidder was required to provide certified proof of valid insurance cover including: Indemnity against risk & Workman Injuries Benefit Cover (WIBA) Certified by the Underwriter and that the Applicant at page 371 and 374 of its tender provided certified copies of the said policy covers signed by Adam Nganga, the Branch Manager, stamped and certified as true copy with the initials (C.T.C) in accordance with the clear wordings of the Tender Document.

32. As regards the reason for disqualification indicating that the Applicant had submitted a copy of staff payrolls for the months of January, February & March 2025 that were certified but undated, counsel submitted that Mandatory Requirement No. 7 indicated that a bidder was required to provide copies of staff payrolls for the months of January, February & March 2025 duly certified by your bank confirming salaries were remitted through the bank. He pointed out that the Applicant at page 245 – 285 of its tender provided certified copies of the said staff payrolls duly, stamped and dated 4th April 2025 and certified as true copy in accordance with the clear wordings of the Tender Document. He further pointed out that the Tender Document did not explicitly provide that the certification stamp would be defective for not being dated and thus the Respondents' response in the debrief amounted to introducing extraneous criteria for preliminary evaluation.

33. With regard to the reason for disqualification indicating that the Applicant provided a copy of valid NHIF Compliance Certificate and

certified returns for the last three consecutive months with Payrolls (January, February & March 2025) documents which were certified by NHIF instead of SHA , counsel submitted that Mandatory Requirement No. 10 indicated that a bidder was required to provide a valid NHIF Compliance Certificate and certified returns for the last three consecutive months with Payrolls (January, February & March 2025) Certified by NHIF. He further submitted that the Applicant at page 547 – 630 of its tender provided certified copies of the said NHIF Compliance Certificate and certified returns duly stamped and signed and certified as true copy in accordance with the clear wordings of the Tender Document. Counsel submitted that the Tender Document categorically required a duly certified NHIF Compliance Certificate and the Respondents use of the phrase SHA Compliance Certificate is an attempt at misleading the Board.

34. Mr. Odhiambo submitted that after filing of the instant Request for Review, the Respondents started conducting due diligence on the Applicant in respect of the grounds raised in their response. He indicated that the Applicant was notified on 16th July 2025 that the Respondents wrote an email to Sanlam Insurance seeking clarification on whether the WIBA Policy Cover was authentic and a response issued confirming its authenticity. He indicated that the Applicant's bank relationship managers were still contacting the Applicant to inform it that they had received applications for due diligence from the Respondents with regard to the subject tender.

35. The Applicant submitted that arising from the unfair evaluation process by the Respondents, it has suffered loss and damage. Mr. Odhiambo further submitted that due diligence carried out by the Respondents was illegal and in breach of Section 83 of the Act and that this is evidenced by the letter from NSSF indicating that due diligence was being conducted way after the review application had been filed.

36. Counsel urged the Board to allow the instant Request for Review as prayed.

Respondents' case

37. In their submissions, the Respondents placed reliance on the pleadings and confidential documents submitted to the Board.

38. Mr. Gichuki submitted that the letter of notification of intention to award the subject tender dated 25th June 2025 complied with the provisions of Section 87 of the Act as read with Regulation 82 of Regulations 2020. He pointed out that bidders were informed of the successful bidder and reasons for disqualification of the unsuccessful bidders.

39. He acknowledged that the Respondents responded to Applicant's email of 26th June 2025 requesting for a debrief whereby all the reasons as to why the Applicant's tender was determined non-responsive in the subject tender were issued.

40. The Respondents submitted that the Applicant was required to provide copies of staff staff payrolls for the months of January, February & March 2025 that were to be duly certified by the bank. He indicated that the Evaluation Committee took note of the said payrolls in the Applicant's tender at pages 246 to 369 but the certification stamp from the bank had a slot for the date and the same was not dated as required rendering the tender non-responsive to the stipulated requirement.

41. Mr. Gichuki further submitted that the Applicant was required to provide certified proof of insurance covers for indemnity and WIBA certified by the underwriter and that the Applicant attached at page 371 to 374 of its tender insurance covers for indemnity and WIBA policies which were not certified by the underwriter as required. He pointed out that the stamp by the underwriter is just a general stamp and the engraved initials C.T.C are not in way justifiable to be a commitment from the underwriter as true copies since the underwriter ought to have stamped with the general stamp and a certification stamp just like what the bank had done on the payroll. He indicated that it was not possible to verify who had certified the said documents.

42. He submitted that another reason as to why the Applicant was determined non-responsive is that it was required to provide a valid NHIF Compliance Certificate and certified returns for the last three consecutive months with Payrolls (January, February & March 2025) Certified by NHIF. He pointed out that indication of NHIF was a typo and that all bidders were required to engage and avail documents from

SHA and as such, the Applicant at pages 547 to 630 of its tender attached SHA compliance certificate and payroll as required but these were not certified as true copies by SHA and instead, the returns were purportedly certified by NHIF which had transitioned to SHA as from 1st October 2024 and that the payment slips provided were not readable.

43. Mr. Gichuki made further reference to due diligence report received from NSSF and submitted that a bidder was required to submit a valid NSSF Compliance Certificate and certified returns by NSSF for the last three consecutive months with payrolls for January, February and March. He further submitted that the Applicant submitted at page 401 of its tender the said documents however, that the certification was done inside the stamp with initials CTC yet the stamp details are for a receiving stamp and this could not be considered as proper certification.

44. He pointed out that the Applicant had provided a Unique Payment Number (UPN) whereby the only month that had a payment slip was in March and no receipts or proof of payment was provided for January and February which indicated that it had expired on 28th February 2025 before it was issued on 1st March 2025. He further pointed out that the Evaluation Committee having noted the lack of coherence proceeded to conduct due diligence on the Applicant whose results were shared with the Board. He urged the Board to take note of the comments made by NSSF with regard to the Applicant's UPN and compliance certificates.

45. Mr. Gichuki maintained that the Respondents adhered to provisions of the Act in evaluation of the subject tender and urged the Board to dismiss the instant Request for Review with costs.

APPLICATIONS REJOINDER

46. In a rejoinder, Mr. Odhiambo referred the Board to Section 87 of the Act and reiterated that the Respondents acted contrary to the provisions therein with regard to notification of the reasons for disqualification of the Applicant's tender.

47. He submitted that from the Respondents' response, it was clear that they applied extraneous evaluation criterion in evaluation of the Applicant's tender contrary to Section 79 and 80(2) of the Act and Article 50 of the Constitution on the right to fair hearing and fair administrative action. Mr. Odhiambo urged the Board to disregard the submissions made concerning the NSSF report and claimed that the same was inadmissible having only been raised contrary to Section 83 of the Act and during the hearing and not as part of the memorandum of response so as to afford the Applicant an opportunity to respond to the same.

48. He further submitted that the Respondents ought to have sought clarification from the Applicant pursuant to Section 81 of the Act and urged the Board to allow the instant Request for Review as prayed.

CLARIFICATIONS

49. The Board sought clarification on the ripple effect of NHIF signing the returns per Mandatory Requirement 10 instead of SHA yet the Tender Document indicated NHIF. In response, Mr. Gichuki submitted that the Procuring Entity was cautious to ensure that whoever was engaged in the subject tender adhered to the labour laws and provisions of the Tender Document. He indicated that it was wrong for a bidder to purport to have certification of its returns done by NHIF yet it ceased to operate on 1st October 2024.

50. Asked to explain why all the reasons for disqualification of the Applicant were not indicated in the notification letter of 25th June 2025, Mr. Gichuki submitted that the template used for debriefing was obtained from PPRA and adhered to.

51. As to why due diligence was conducted on the Applicant yet it was disqualified at the preliminary evaluation stage, Mr. Gichuki submitted that there was a need for the Respondents to present all their issues in a factual manner and prove that the evaluation process was objective without any breach of the law. He confirmed that due diligence was not conducted on all bidders who failed at the Preliminary Evaluation stage and that the due diligence on the Applicant was carried out after review application had been lodged.

52. The Board sought to know why the initials CTC were used in certifying the WIBA insurance cover, Mr. Odhiambo indicated that the said document did not originate from the Applicant and that the person

certifying signed the same and name indicated while also indicating the initials CTC. He indicated that the Applicant cannot dictate how another entity certifies its documents.

53. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 9th July 2025 was due to expire on 30th July 2025 and that the Board would communicate its decision to all parties to the Request for Review via email.

BOARD'S DECISION

54. 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:

A. Whether the Letter of Notification of Intention to Award the subject tender dated 25th June 2025 issued to the Applicant in the subject tender met the threshold required in Section 87(3) of the Act read with Regulation 82 of Regulations 2020.

B. Whether the Procuring Entity carried out due diligence in the subject tender in accordance with the provisions of Section 83 of the Act.

C. Whether the Respondents lawfully disqualified the Applicant's tender at the Preliminary Evaluation stage in accordance with the provisions of the Tender Document the Act and the Constitution.

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

Whether the Letter of Notification of Intention to Award the subject tender dated 25th June 2025 issued to the Applicant in the subject tender met the threshold required in Section 87(3) of the Act read with Regulation 82 of Regulations 2020.

55. We have heard the Applicant submit that it was notified of the outcome of evaluation of its tender submitted in the subject tender vide a letter of Notification of Intention to award dated 25th June 2025 and learnt that its tender was unsuccessful. The Applicant further submitted that it requested for a debrief vide an email dated 26th June 2025 and that in return, the Respondents responded vide email of 27th June 2025 and proceeded to introduce further grounds for disqualification of the Applicant's tender that were not indicated in the initial notification letter. It is the Applicant's case that failure to notify it with all the reasons for disqualification of its tender is a breach of Section 87 of the Act as read with Regulation 82 of Regulations 2020.

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

“87. Notification of intention to enter into a contract

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

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

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

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

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

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

"82. Notification of intention to enter into a contract

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

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

60. In **Judicial Review Miscellaneous Application No. 531 of 2015, Republic v Public Procurement Administrative Review Board & 2 others ExParte Akamai Creative Limited** (hereinafter referred to as “the Akamai Case”) the High Court held as follows:

"In my view, Article 47 of the Constitution requires that parties to an administrative proceeding be furnished with the decision and the reasons thereof within a reasonable time in order to enable them decide on the next course of action. It is not merely sufficient to render

a decision but to also furnish the reasons for the same. Accordingly, where an administrative body unreasonably delays in furnishing the parties with the decision and the reasons therefor when requested to do so, that action or inaction may well be contrary to the spirit of Article 47 aforesaid”

61. From the above case, the Board observes that the High Court was basically expounding on one of the rules of natural justice as provided for in Article 47 (2) of the Constitution which provides:

“If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action”

62. In essence, the rules of natural justice as provided for in Article 47 of the Constitution require that a procuring entity promptly notifies tenderers of the outcome of evaluation to afford an unsuccessful tenderer the opportunity to challenge such reasons if need be. Further, the Act does not require that an unsuccessful tenderer to seek clarification in order for the accounting officer to provide it with the outcome of evaluation or reasons leading to its disqualification in a tendering process.

63. We note that the Applicant was issued with a letter of Notification of Intention to Award the subject tender dated 25th June 2025 whereby it

was informed that its tender was non-responsive at the Preliminary Evaluation stage for the reason that:

"The attached copy of WIBA Insurance policy documents were not certified by the Underwriter as required."

64. The Applicant proceeded to seek for a debrief vide email dated 26th June 2025 and the Respondents confirm in their response to the instant Request for Review that they responded to the Applicant vide email dated 27th June 2025 as follows:

Dear Sally Kogei,

Good Afternoon, we trust your are doing well too,

We are in receipt of your email in regard to the Notification of Intention to Award the Security Services, please note that the letter only indicates one reason for being as categorized as Non-Responsive and thus with your email above, we will be providing all the reasons why you did not proceed to the technical evaluation stage;

- ***Attached staff payrolls (January, February & March 2025) were not duly certified by the bank (Certification stamp signed but not dated as required) from page 246 to 369.***
- ***Attached copy of Insurance covers for indemnity and WIBA policies were not certified by the underwriter as required (the stamp by the***

Underwriter is just a general stamp and the Initials C.T.C are not in way justifiable to be a commitment from the Underwriter as true copies, the Underwriter ought to have stamped with the general stamp and a certification stamp (just like what you bank has done on the payroll) but then should be duly executed (where dates and signatures are required) Page 371 to 374L

- ***Attached SHA compliance certificate and payroll as required, but not certified as true copies required by SHA (Social Health Authority), however the returns and payroll were purported certified by NHIF (National Hospital Insurance Fund) which transited to SHA from the 1 October, 2024. pages 547 to 630.***

Thank you for your enquiry and do not hesitate to contact us if you have any further queries on regard to this tender.

65. From the above, the Respondents admit that only one reason was indicated in the notification letter issued to the Applicant on 25th June 2025 and proceed to issue additional reasons as to why the Applicant's tender was rendered non-responsive.

66. As such, it is clear to the Board that the provisions of Section 87(3) of the Act as read with Regulation 82(2) of Regulations 2020 were not

adhered to for the reason that the Respondents failed to inform the Applicant of all the reasons why its tender was declared non-responsive at the Preliminary Evaluation stage in the subject tender at the point of notification of the outcome of evaluation of the subject tender on 25th June 2025.

67. In the circumstances, we find that the Respondents' Letter of Notification of Intention to Award the subject tender dated 25th June 2025 issued to the Applicant in the subject tender did not meet the threshold required in Section 87(3) of the Act read with Regulation 82(2) of Regulations 2020.

Whether the Procuring Entity carried out due diligence in the subject tender in accordance with the provisions of Section 83 of the Act.

68. The Board heard the Respondents confirm that though due diligence is an exercise that is carried out post evaluation, in the present case, due diligence was carried out on the Applicant's tender after the request for review was filed for purposes of presenting all the issues in contest in a factual manner.

69. Mr. Gichuki representing the Respondents submitted that it was necessary to establish that the evaluation carried out on the Applicant's tender was objective hence the reason they sought clarification on the contentious issues. He further submitted that due diligence was not

carried out on all the bidders who failed at the Preliminary Evaluation stage and that it was carried out on the bidders who made it through the Technical Evaluation stage.

70. On its part, the Applicant submitted that due diligence as carried out by the Respondents on its tender was illegal and pointed out that the due diligence exercise was conducted after it had filed the instant Request for Review which is contrary to provisions under Section 83 of the Act as read with Regulation 80 of Regulations 2020 thus rendering any evidence and findings emanating from the said process as inadmissible.

71. From parties' submissions, the Board is invited to make a determination on whether due diligence as carried out by the Procuring Entity in the subject tender was in accordance with the provisions of the Act as read with the Tender Document.

72. 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.”

73. Further Regulation 80 of Regulations 2020 provides as follows:

"80. Post-qualification

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

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

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

74. The import of the above provisions is that an Evaluation Committee **may** after tender evaluation **but prior to award** conduct due diligence and present a Due Diligence Report confirming and verifying the qualifications of the tenderer who submitted the lowest evaluated tender to be awarded the contract.

75. It therefore follows that an evaluation committee of a procuring entity has the discretion to conduct or not to conduct a 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. We say so because, a reading of Section 83 of the Act makes reference to the word 'may' as opposed to the word 'shall'. 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. Put differently, a procuring entity may elect to conduct or not to conduct a due diligence exercise or post qualification evaluation where a tender

document does not provide for such due diligence exercise or post qualification evaluation.

76. In **PPARB Application No. 158/ 2020 On the Mark Security Limited V The Accounting Officer, Kenya Revenue Authority and Another**, the Board 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.

77. The Board has perused the Tender Document in the subject tender and notes that the relevant provisions with regard to due diligence at page 42 state as follows:

"In case the tender was subject to post-qualification, the contract shall be awarded to the lowest evaluated tenderer, subject to confirmation of pre-qualification data, if so required."

78. From the above, in the event the subject tender was subject to a due diligence exercise, award of the contract would be made to the lowest evaluated tenderer, subject to confirmation of its pre-qualification data, if so required. This therefore means that any conduct of due diligence would only be on the lowest evaluated bidder.

79. A perusal of the Evaluation Report submitted to the Board as part of the confidential documents reveals that due diligence was part of the

evaluation process and that the Evaluation Committee proceeded on 26th May 2025 to make a physical visit to the office of Bidder No. 5, being the Interested Party herein, who is indicated to have been the best lowest evaluated bidder so as to ascertain that what was presented in its Tender Document was factual and that it was capable of undertaking the tendered services.

80. Notably, this due diligence appears to have been carried out prior to conclusion of the evaluation process noting that it was done after technical evaluation and before the two bidders who had been determined responsive at the Technical Evaluation stage had progressed to the Financial Evaluation stage and a recommendation for award of the subject tender made.

81. Additionally, the Respondents have in these proceedings admitted to have carried out due diligence on the Applicant's tender after the instant Request for Review was filed for purposes of presenting all the contested issues in a factual manner.

82. It is therefore evident that the information relied upon by the Respondents as to reasons why the Applicant's tender was disqualified, its veracity notwithstanding, was sought after issuance of the letter of notification of intention to award the subject tender and during the pendency of the instant Request for Review as admitted contrary to Section 83 of the Act. Further, the information relied upon by the Respondents as Due Diligence Findings on the Interested Party was

sought prior to Financial Evaluation being carried out and a recommendation for award being made by the Evaluation Committee.

83. Section 83 of the Act as read with Regulation 80 of Regulations 2020 is clear on due diligence being carried out prior to an award of tender and after the tender evaluation process is concluded.

84. In addressing the admission by the Respondent pertaining due diligence carried out during the pendency of the instant Request for Review, we wish to point out that Section 168 of the Act provides for suspension of procurement proceedings as follows:

"168. Notification of review and suspension of proceedings

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

85. In **PPARB Application No. 13 of 2021 Five Blocks Enterprises Limited v Managing Director KEBS & Another** the Board pronounced as follows:

"...upon filing of a request for review application, an automatic stay of proceedings takes effect which suspends all procurement proceedings and prevents any further steps from

being taken in the tender in question. Further, procurement proceedings shall resume at the point they were, when the stay comes to an end, once the request for review has been heard and determined by the Board.”

86. In essence, any action taken by the Respondents in furtherance of the procurement proceedings before the instant Request for Review has been heard and the Board renders its decision is null and void. This therefore means that the purported due diligence carried out by the Respondents during the pendency of the instant Request for Review is null and void.

87. In view of the foregoing, the Board finds that the Procuring Entity failed to carry out due diligence in the subject tender in accordance with the provisions of Section 83 of the Act.

Whether the Respondents lawfully disqualified the Applicant’s tender at the Preliminary Evaluation stage in accordance with the provisions of the Tender Document the Act and the Constitution.

88. We understand the Applicant’s case under this issue to be that the Respondents in evaluating of its tender introduced extraneous evaluation criterion thereby unlawfully disqualifying its tender at the Preliminary Evaluation stage contrary to Article 227 of the Constitution, Section 80(2) of the Act and the provisions of the Tender Document. The Applicant contends that its tender complied with the requirements

stipulated under the Preliminary Evaluation stage and ought to have progressed for further evaluation.

89. We understand the Respondents case to be that the Evaluation Committee complied with provisions of the Constitution, the Act, Regulations 2020 and the Tender Document in evaluation of the Applicant's bid submitted in the subject tender and that the Applicant was rightfully disqualified having failed to meet the mandatory requirements stipulated at the Preliminary Evaluation stage in the Tender Document.

90. We note that the objective of public procurement is to provide quality goods and services in a system that implements the principles specified in Article 227 of the Constitution which provides as follows:

"227. Procurement of public goods and services

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

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

a)d)"

91. The High Court in **Nairobi High Court Misc. Application No. 60 of 2020; Republic v The Public Procurement Administrative Review Board & Ors v Ex-parte Tuv Austria Turk** spoke to the principles under Article 227 of the Constitution and held as follows:

45. Article 227 of the Constitution provides that when procuring entities contract for goods or services they must comply with the principles of fairness, equity, transparency, competitiveness and cost-effectiveness. For there to be fairness in the public procurement process, all bids should be considered on the basis of their compliance with the terms of the solicitation documents, and a bid should not be rejected for reasons other than those specifically stipulated in the solicitation document.

46. However, there is a need to appreciate the difference between formal shortcomings, which go to the heart of the process, and the elevation of matters of subsidiary importance to a level, which determines the fate of the tender. The Evaluation Committee has a duty to act fairly....”

92. The Act was established, *inter alia*, to give effect to Article 227 of the Constitution. Section 80 of the Act is instructive on how evaluation and comparison of tenders should be conducted by a procuring entity as follows:

"80. Evaluation of tender

- (1) The evaluation committee appointed by the accounting officer pursuant to Section 46 of the Act, shall evaluate and compare the responsive tenders other than tenders rejected.**

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

- (3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)-**
 - (a) The criteria shall, to the extent possible, be objective and quantifiable;**
 - (b) each criterion shall be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality, time and service for the purpose of evaluation; and**
- (4)"**

93. Section 80(2) of the Act is clear on the requirement for the Evaluation Committee to evaluate and compare tenders in a system that is fair using the procedures and criteria set out in the Tender Document. The Board's interpretation of a system that is fair is one that considers equal treatment of all tenders against criteria of evaluation known by all tenderers having

been well laid out in the tender document issued by the procuring entity. Section 80(3) of the Act requires for such evaluation criteria to be as objective and quantifiable to the extent possible and to be applied in accordance with the procedures provided in the tender document.

94. The Applicant in the instant Request for Review is aggrieved by the reasons given by the Respondents for disqualification of its tender as communicated in the letter of Notification of Intention to Award dated 25th June 2025 and the subsequent email of 27th June 2025 responding to its request for debrief.

95. As captured hereinabove under Issue A, the reasons for disqualification of the Applicant's tender are indicated to be as follows:

- ***Attached staff payrolls (January, February & March 2025) were not duly certified by the bank (Certification stamp signed but not dated as required) from page 246 to 369.***
- ***Attached copy of Insurance covers for indemnity and WIBA policies were not certified by the underwriter as required (the stamp by the Underwriter is just a general stamp and the Initials C.T.C are not in way justifiable to be a commitment from the Underwriter as true copies, the Underwriter ought to have stamped with the***

general stamp and a certification stamp (just like what you bank has done on the payroll) but then should be duly executed (where dates and signatures are required) Page 371 to 374L

- ***Attached SHA compliance certificate and payroll as required, but not certified as true copies required by SHA (Social Health Authority), however the returns and payroll were purported certified by NHIF (National Hospital Insurance Fund) which transited to SHA from the 1 October, 2024. pages 547 to 630.***

96. 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 of the Tender Document. Mandatory Requirements touching on the reasons for disqualification of the Applicant’s tender were provided as follows:

Note: All copies that require certification SHALL be certified by an Advocate and Commissioner for Oaths, High Court of Kenya

	<i>A. MANDATORY REQUIREMENT</i>	
<i>S/No</i>	<i>REQUIREMENT</i>	<i>COMPLIED</i>
<i>.....</i>	<i>.....</i>	<i>.....</i>
<i>7</i>	<i>Provide copies of staff payrolls for the months of January, February & March</i>	<i>Mandatory</i>

	<i>2025 duly certified by your bank confirming salaries were remitted through the bank</i>	
8	<i>Bidders to provide certified proof of valid insurance cover including: Indemnity against risk & Workman Injuries Benefit Cover (WIBA) Certified by the Underwriter</i>	<i>Mandatory</i>
9	<i>.....</i>	<i>.....</i>
10	<i>Valid NHIF Compliance Certificate and certified returns for the last three consecutive months with Payrolls (January, February & March 2025) Certified by NHIF</i>	<i>Mandatory</i>
<i>.....</i>	<i>.....</i>	<i>.....</i>

97. A perusal of the Evaluation Report submitted to the Board by the 1st Respondent pursuant to Section 67(3)(e) of the Act reveals as follows with respect to evaluation of the Applicant’s tender:

TABLE B: PRELIMINARY EXAMINATION/ RESPONSIVENESS

<i>No.</i>	<i>Parameters/Requirements</i>	<i>B No. 4</i>
<i>.....</i>	<i>.....</i>	<i>.....</i>
7.	<i>Provide copies of staff payrolls for the months of January, February &</i>	<i>N</i>

	March 2025 duly certified by your bank confirming salaries were remitted through the bank	
8.	Bidders to provide certified proof of valid insurance cover including: Indemnity against risk & Workman Injuries Benefit Cover (WIBA) Certified by the Underwriter	N
9.	
10.	Valid SHA Compliance Certificate and certified returns for the last three consecutive months with Payrolls (January, February & March 2025) Certified by SHA	Y
.....
25	Be WIBA compliant – Provide a certified copy of policy as evidence	
.....
Responsive Y / Non- Responsive N		N

.....

Comments on non-responsiveness:

.....

Bidder No. 4 was found to be non-responsive at this stage due to the following reasons;

- **Attached staff payrolls (Jan, Feb & Mar 2025) were not duly certified by the bank (Certification stamp was not dated)**

- ***Attached copy of insurance covers for Indemnity and WIBA policies were not certified by the Underwriter as required.***
- ***Attached SHA compliance certificate and payrolls as required, but not certified by SHA (Social Health Authority), however the returns and payroll were purported certified by NHIF (National Housing Insurance Fund) which transited to SHA from the 1 October, 2024. Pages 547 to 630.***

98. The Board has perused the Applicant's original tender and found as follows with regard to the above non-conforming responses on the mandatory requirements as identified by the Respondents:

i. Mandatory Requirement No. 7 of the Tender Document.

99. Mandatory Requirement 7 required a bidder to provide copies of its staff payrolls for the months of January, February & March 2025 which were duly certified by its bank confirming salaries were remitted through the said bank.

100. We note that the Evaluation Committee disqualified the Applicant for non-compliance with this requirement on the basis that its attached staff payrolls were not duly certified by the bank since the certification stamp was not dated.

101. The Board observes that the Applicant submitted at pages 245 to 369 its staff payrolls for the months of January, February and March 2025 with its bank stamping the same as certified true copy of the original and signing the same. However, the certification stamp was not dated. Additionally, the staff payroll was stamped and signed as a certified true copy of the original by Susan Waithera Kagwe, Advocate and Commissioner for Oaths.

102. In our considered view, the Applicant complied with provisions under Mandatory Requirement No. 7 of the Tender Document having submitted copies of its staff payrolls for the months of January, February & March 2025 which were duly certified by its bank confirming salaries were remitted through the said bank. There was no requirement for the said certification to be dated and failure by the bank to indicate the date when the said documents were certified by it is not a valid reason for disqualifying the Applicant's tender.

ii. Mandatory Requirement No. 8 of the Tender Document

103. Mandatory Requirement No. 8 required a bidder to provide certified proof of valid insurance cover including: Indemnity against risk & Workman Injuries Benefit Cover (WIBA) Certified by the Underwriter.

104. We note that the Evaluation Committee disqualified the Applicant for non-compliance with this requirement on the basis that its attached copy

of insurance covers for Indemnity and WIBA policies were not certified by the Underwriter as required. During the hearing, the Respondents submitted that the stamp by the Underwriter was just a general stamp and above it initials of C.T.C indicated which is not justifiable to be a commitment from the underwriter that these were true copies. They argued that if the initial C.T.C was sufficient, then the Applicant would have used the same initials for the payroll as certification proof rather than have the said payroll stamped as true copies.

105. The Board observes that the Applicant submitted at pages 371 to 374L proof of having a valid Insurance Cover including Indemnity against risk & WIBA policy from Sanlam General Insurance Limited and the same were stamped using the underwriters stamp with initials C.T.C indicated above the said stamp. Additionally, the said documents were stamped and signed as a certified true copy of the original by Susan Waithera Kagwe, Advocate and Commissioner for Oaths.

106. We further observe that though the Evaluation Committee found the Applicant's WIBA Policy from Sanlam General Insurance Limited not to have been certified as required by the Underwriter, it did not expound in its Evaluation Report why it reached this conclusion and what it meant by the underwriter certifying the said policy as required. An explanation on the same only came up at the point of responding to the instant Request for Review by the Respondents whereby they argued that use of a general stamp and indicating the initials C.T.C above it does not suffice as certification by the underwriter.

107. It is not the place of the 1st Respondent to purport to give an explanation as to why the Applicant's WIBA policy was not certified by its Underwriter as required due to use of a general stamp and inscription of the initials C.T.C above it since this conduct amounts to usurping the role of the Evaluation Committee. In saying so, we note that Section 85 of the Act provides that:

"Subject to prescribed thresholds all tenders shall be evaluated by the evaluation committee of the procuring entity for the purpose of making recommendations to the accounting officer through the head of procurement to inform the decision of the award of contract to the successful tenderers"

108. Section 46 of the Act provides for the establishment of an ad hoc evaluation Committee whose role is stipulated under Section 46(4) of the Act as:

"(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.

109. Further, Regulation 30 of Regulations 2020 provides for conduct of the members of the Evaluation Committee as follows:

"In discharging the mandate provided for under the Act, members of the evaluation committee shall—

(a) conduct the technical and financial evaluation of the tenders or proposals availed in strict adherence to the

compliance and evaluation criteria set out in the tender documents;

(b) perform the evaluation or negotiation with due diligence;

(c) conduct the evaluation within the periods specified in the Act;

(d) not enter into direct communication with any of the tenderers participating in a tender or proposal that such evaluation committee is considering;

(e) seek any clarifications on tenders or proposals under consideration through the head of the procurement function; and

(f) prepare a report on the analysis of the tenders availed, and final ratings assigned to each tender and make recommendations and submit the report to the head of the procurement function.”

110. In essence, it is the sole responsibility of the Evaluation Committee to *inter alia* deal with evaluation of bids and complete the procurement process for which it was appointed while ensuring that it adheres to the provisions of Articles 201(d) and 227(1) of the Constitution and the evaluation criteria set out in the tender documents. Additionally, the Evaluation Committee is tasked with (a) conducting due diligence, (b) seeking clarifications on bids under consideration through the head of the procurement function and (c) preparation of a report on the analysis of bids evaluated and final ratings assigned to each bid and

making recommendations to be submitted to the Head of Procurement Function.

111. It is therefore the considered view of the Board that evaluation and comparison of tenders is conducted with a view of making recommendations to the accounting officer through the head of procurement to inform the decision of the award to the successful bidder. Had the 1st Respondent required an explanation as to what the Evaluation Committee meant in disqualifying the Applicant's bid for non-compliance with mandatory Requirement No. 8 of the Tender Document, he would have sought clarification from the head of the procurement function or the evaluation committee prior to approving award of the subject tender in line with Regulation 79(1)(b) of Regulations 2020 which provides that:

(1) Upon receipt of the evaluation report and professional opinion, the accounting officer shall take into account the contents of the professional opinion and shall within a day, in writing —

(a) approve award to the successful tenderer;

(b) seek clarification from the head of the procurement function or the evaluation committee prior to approving or rejecting the award; or

(c) reject the recommendations.

112. The Board notes that the Respondents in their response indicated that the Evaluation Committee in evaluating this requirement also

compared other bids on the issue of certification by the underwriter. We however note that the Interested Party failed to provide the Indemnity against Risk Policy in its tender as required but was nonetheless qualified to progress to the Technical Evaluation stage despite having failed to meet this requirement.

113. We therefore deem it necessary for the Evaluation Committee to further consider bidders compliance with Mandatory Requirement No. 8 of the Tender Document in view of the foregoing observations.

iii. Mandatory Requirement No. 10 of the Tender Document

114. Mandatory Requirement No. 10 required a bidder to submit a valid NHIF Compliance Certificate and certified returns for the last three consecutive months with Payrolls (January, February & March 2025) Certified by NHIF.

115. We note that the Evaluation Committee disqualified the Applicant for non-compliance with this requirement on the basis that though the Applicant had attached a SHA Compliance Certificate and payroll as required, the same were not certified by SHA and the returns and payroll were purportedly certified by NHIF which transited to SHA as from 1st October 2024.

116. We note from the Evaluation Report that though the wording under Mandatory Requirement No. 10 made reference to NHIF, the Evaluation Committee in its Evaluation Report referred to SHA under this requirement. During the hearing, the Board heard the Respondents submit that indication of the word NHIF was an oversight that did not have any need for modification since it was assumed that bidders would submit the correct documents under SHA.

117. We find such argument by the Respondents to be erroneous in view of the fact that Section 58 (2) of the Act requires the tender documents used by a procuring entity to contain sufficient information and states that:

(2) The tender documents used by a procuring entity under subsection (1) shall contain sufficient information to allow fairness, equitability, transparency, cost-effectiveness and competition among those who may wish to submit their applications."

118. Further, Section 60(1) of the Act provides that:

"(1) An accounting officer of a procuring entity shall prepare specific requirements relating to the goods, works or services being procured that are clear, that give a correct and complete description of what is to be procured and that allow for fair and open competition

among those who may wish to participate in the procurement proceedings.”

119. In the same vein, Section 70(3) of the Act provides that:

“(3) The tender documents used by a procuring entity pursuant to subsection (2) shall contain sufficient information to allow fair competition among those who may wish to submit tenders.”

120. In essence, the 1st Respondent bears the responsibility of ensuring that the tender documents used by the procuring entity contain sufficient information and specific requirements relating to what is being procured including the correct description for the sole aim of allowing for fairness, equitability, transparency, cost-effectiveness and competition among tenderers.

121. It follows therefore that requiring bidders to provide NHIF Compliance Certificate and certified returns by NHIF was an error that ought to have been corrected by way of an amendment prior to the tender submission deadline and the Procuring Entity cannot ride on an assumption that all bidders will submit the correct documents despite the erroneous mandatory requirement as captured in the Tender Document. Hence, the Evaluation Committee cannot then proceed to evaluate tenders against a different criteria other than what was categorically indicated in its Tender Document based on an assumption that the requirement was clear to all.

122. The Board is alive to the *doctrine of contra Proferentem* in Interpretation of Contracts which stipulates that if there is ambiguity in any contract, a clause shall be interpreted against the party who puts such clause forward and usually relies on such clause. This doctrine has been defined by Black's Law Dictionary, 9th Edition, at page 377 as:

"The doctrine that, in interpreting documents, ambiguities are to be construed unfavorably to the drafter".

123. In essence, the contra proferentem rule provides for an ambiguous provision of an instrument to be construed against the drafter of the instrument. The prerequisite for the applicability of the *doctrine of Contra Proferentem* is the prevalence of ambiguity as was observed in the case of **Horne Coupar v Velletra & Company 2010 BCSC 483** where the Supreme Court of British Columbia held that "***ambiguity in a contract is the precondition to apply this doctrine though where the ambiguity is established, the rule is applied directly.***" Similarly, in the **Civil Appeal No. 1942 of 2009 Bank of India & Another V K. Mohandas & Others, 2009 (5) SCC 313** where a question arose with respect to the interpretation of some provisions of the voluntary retirement scheme of 2000 of the Appellant, Justice R.M. Lodha opined that "***it was the Appellant who ultimately formulated the terms in the Contractual Scheme which stated, "the optees of voluntary retirement under that Scheme will be eligible to pension under the Pension***

Regulation, 1995,” therefore they bear the risk of lack of clarity, if any.”

124. Turning to the circumstances in the instant Request for Review, we have established that the Tender Document was prepared by the Respondents inviting eligible bidders to submit their bids. As such, the application of the provisions of Mandatory Requirement No. 10 of the Tender Document making reference to NHIF ought to be interpreted against the Respondents, being the drafters of the Tender Document. Put differently, the application of the provisions under Mandatory Requirement No. 10 of the Tender Document ought to be interpreted in favour of the tenderers in the subject tender in view of the admitted oversight that was not rectified prior to the tender submission deadline.

125. The Board is of the considered view that the Evaluation Committee is under a duty to confine itself to the procedures and criteria set out in the Tender Document when evaluating bids as read with provisions of the Act, Regulations 2020 and the Constitution. The integrity of public procurement demands strict adherence to published criteria and this Board is tasked with affirming the primacy of the Tender Document and upholding procurement fairness and legality. This was the holding of Justice Aburili in **Judicial Review E092 of 2025 Minet Kenya Insurance Brokers Limited v The Public Procurement Administrative Review Board & Others** where the High Court

cautioned the Board against introduction of unstated evaluation criterion in the Tender Document and held as follows:

"139. In light of the foregoing analysis, this Court finds that the 1st Respondent's interpretation of the term "valid registration" to include a current practicing license was not only inconsistent with the plain and ordinary meaning of the term "valid registration" as used in the tender documents, but also amounted to the unlawful introduction of an unstated evaluation criterion.

140. Further, the duty to draft clear, unambiguous and comprehensive tender documents lies with the Procuring Entity, and where the procuring entity fails to expressly stipulate specific requirements, bidders are entitled to rely on the document as framed. To hold otherwise would be to sanction retrospective and subjective interpretations that undermine the principles of fairness, transparency and accountability in public procurement processes.

141. Accordingly, I find and hold that the decision to fail to award to the Applicant the required marks during technical evaluation on the basis of an unstated requirement namely, a current practicing license was unlawful, irrational and ultra vires. It offended the principles of legality, procedural fairness and legitimate expectation and violated the Applicant's right

to fair administrative action under Article 47 of the Constitution under Article 47 of the Constitution and the statutory safeguards under the Public Procurement and Asset Disposal Act.

142. I hasten to add that the integrity of public procurement demands strict adherence to published criteria. The Review Board's expansion of the term "valid registration" undermines this principle and should be corrected, the interpretation having been a post facto interpretation by the tender procuring entity. This case demonstrates the absolute need for the Review Board to always affirm the primacy of the tender document and uphold procurement fairness and legality..."

126. In the view of the foregoing, the Board finds that the Respondents unlawfully disqualified the Applicant's tender at the Preliminary Evaluation stage contrary to the provisions of the Tender Document, the Act and the Constitution.

What orders should the Board grant in the circumstances?

127. The Board has found that the Respondents unlawfully disqualified the Applicant's tender at the Preliminary Evaluation stage contrary to the provisions of the Tender Document, the Act, and the Constitution.

128. The Board has also found that the Procuring Entity failed to carry out due diligence in the subject tender in accordance with the provisions of Section 83 of the Act.

129. The Board has further found that the Respondents' Letter of Notification of Intention to Award the subject tender dated 25th June 2025 issued to the Applicant in the subject tender did not meet the threshold required in Section 87(3) of the Act read with Regulation 82(2) of Regulations 2020.

130. We note 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."*

131. In view of the identified anomalies in the evaluation process in the subject tender, we deem it fit and just to order the 1st Respondent to direct the Evaluation Committee to re-admit the Applicant's tender and all other bidders' tenders to the Preliminary Evaluation stage for re-evaluation of the subject tender and to proceed with the procurement process to its logical conclusion within 30 days while taking into consideration the findings of the Board in this decision, the provisions of the Tender Document, the Constitution, the Act and Regulations 2020.

132. The upshot of our finding is that the instant Request for Review succeeds with respect to the following final orders, subject to the right of any party aggrieved with this decision to seek judicial review by the High Court within fourteen days, pursuant to Section 175 of the Act.

FINAL ORDERS

133. 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:

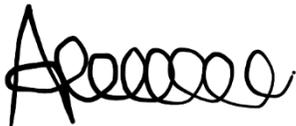
- A. The letter of Notification of Intention to Award dated 25th June 2025 issued by the 1st Respondent to the successful bidder with respect to Tender No. MUT/T 01/SECURITY/2025-2026 for Provision of Security Services be and is hereby cancelled and set aside.**
- B. The letters of Notification of Intention to Award dated 25th June 2025 issued by the 1st Respondent to the Applicant and to all other unsuccessful tenderers with respect to Tender No. MUT/T 01/SECURITY/2025-2026 for Provision of Security Services be and are hereby cancelled and set aside.**
- C. The 1st Respondent is hereby ordered to direct the Evaluation Committee of the Procuring Entity to admit the Applicant and all other bidders back to the Preliminary Evaluation stage and re-evaluate their tenders in line with the evaluation criteria**

contained in the Tender Document as read with the Constitution, the Act and the Regulations 2020 taking into consideration the findings of the Board herein.

D. For certainty, the re-evaluation ordered at C above shall be carried out and completed within 30 days from the date of this decision while taking note of the provisions of Section 175 of the Act.

E. Considering that the procurement process is not complete, each party shall bear its own costs in the Request for Review.

Dated at NAIROBI this 30th Day of July 2025.



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**PANEL CHAIRPERSON
PPARB**



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**SECRETARY
PPARB**