

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 51/2020 OF 11TH APRIL 2020

BETWEEN

ON THE MARK SECURITY LIMITED.....APPLICANT

AND

THE ACCOUNTING OFFICER,

KENYA REVENUE AUTHORITY.....1ST RESPONDENT

AND

SKAGA LIMITED.....2ND RESPONDENT

Review against the decision of Kenya Revenue Authority contained in the letter dated 27th March 2020 with respect to Tender No. KRA/HQS/NCB-046/2019-2020 for the Supply and Delivery of K9dogs and training of dog handlers.

BOARD MEMBERS

- | | |
|----------------------------|------------------|
| 1. Arch. Steven Oundo, OGW | -Member Chairing |
| 2. Mr. Alfred Keriolale | -Member |
| 3. Dr. Joseph Gitari | -Member |

IN ATTENDANCE

1. Mr. Philemon Kiprop -Holding brief for the Secretary

BACKGROUND TO THE DECISION

The Bidding Process

Kenya Revenue Authority (hereinafter referred to as "the Procuring Entity") invited sealed bids for Tender No. KRA/HQS/NCB-046/2019-2020 for the Supply and Delivery of K9dogs and training of dog handlers (hereinafter referred to as "the subject tender") through an advertisement on 7th January 2020. A Pre-Bid meeting was held thereafter on 16th January 2020.

Bid Submission Deadline and Opening of Bids

Upon issuance of an Addendum on 24th January 2020, the bid submission deadline was extended to 29th January 2020. The Procuring Entity received 2 bids by the bid submission deadline through the Procuring Entity's Supplier Relations Management electronic system. The same were opened shortly thereafter by a Tender Opening Committee in the presence of bidders' representatives.

Evaluation of Bids

Having appointed an Evaluation Committee, the bids were evaluated in the following stages:-

- i. Tender Responsiveness;**
- ii. Technical Evaluation; and**
- iii. Financial Evaluation.**

1. Tender Responsiveness

At this stage, the Evaluation Committee applied the criteria specified in Clause (c) of Section VI. Criteria for Selecting Bidders at page 35 of the Tender Document. The two bidders were found responsive hence proceeded to Technical Evaluation.

2. Technical Evaluation

At this stage, the Evaluation Committee applied the technical evaluation criteria specified in Clause (c) of Section VI. Criteria for Selecting Bidders at page 35 of the Tender Document which required bidders to achieve a total score of 86 points in order to proceed to Financial Evaluation.

3. Financial Evaluation

At this stage, the Evaluation Committee applied the criteria specified in Clause (c) of Section VI. Criteria for Selecting Bidders at page 35 of the Tender Document wherein award would be made to the bidder who submitted the lowest evaluated price.

Recommendation

The Evaluation Committee recommended award to M/s Skaga Limited.

Professional Opinion

In a professional opinion dated 16th March 2020, the Head of Procurement function expressed his views on the procurement process stating that the same met the requirements of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") and concurred with the Evaluation Committee's recommendation that the subject tender be awarded to M/s Skaga Limited. This professional opinion was approved by the Accounting Officer.

Notification to Bidders

In letters dated 27th March 2020, the Accounting Officer notified the successful bidder and the unsuccessful bidder of the outcome of their respective bids.

REQUEST FOR REVIEW

On the Mark Security Limited (hereinafter referred to as "the Applicant") lodged a Request for Review dated and filed on 14th April 2020 together with a Statement in Support of the Request for Review sworn and filed on even date, and a Further Statement sworn and filed on 27th April 2020 through

the firm of Caroline Oduor & Associates Advocates, seeking the following orders:-

- 1. An order cancelling and setting aside the 1st Respondent's decision contained in the letter dated 27th March 2020 and related notifications to other tenderers;***
- 2. An order annulling the subject procurement proceedings undertaken by the 1st Respondents in relation to financial evaluation;***
- 3. An order directing the 1st Respondent to re-admit the Applicant's bid at the Financial Evaluation stage and evaluate their bid together with all other bids eligible for consideration at the financial evaluation stage;***
- 4. An order directing the 1st Respondent to conduct the financial evaluation and make an award to the successful bidder in compliance with section 86 (1) (a) of the Public Procurement and Asset Disposal Act, No 33 of 2015;***
- 5. An order directing the 1st Respondent to pay costs of the Review; and***
- 6. Any other necessary orders as are necessary for the ends of justice.***

In response, the 1st Respondent filed a Preliminary Objection dated and filed on 20th April 2020 together with a Memorandum of Response that is dated and filed on even date through Carol Mburugu Advocate while the 2nd

Respondent lodged Written Memorandum of Response dated and filed on 30th April 2020.

On 16th March 2020, the Board issued Circular No. 1/2020 and the same was published on the Public Procurement Regulatory Authority's website (www.ppra.go.ke) in recognition of the challenges posed by the COVID-19 pandemic. Through the said Circular, the Board instituted certain measures to restrict the number of representatives of parties that may appear before the Board during administrative review proceedings in line with the presidential directives on containment and treatment protocols to mitigate against the potential risks of the virus.

On 24th March 2020, the Board issued Circular No. 2/2020 further detailing the Board's administrative and contingency management plan to mitigate the COVID-19 disease. Through this circular, the Board dispensed with physical hearings and directed that all request for review applications shall be canvassed by way of written submissions.

Thus, the Applicant lodged its Written Submissions that are dated and filed on 27th April 2020 and Supplementary Submissions on 4th May 2020. The 1st Respondent lodged its Written Submissions dated and filed on 29th April 2020 while the 2nd Respondent did not lodge their Written Submissions.

BOARD'S DECISION

The Board has considered each of the parties' pleadings together with the confidential documents submitted to it pursuant to Section 67 (3) (e) of the Act and finds that the following issues call for determination:-

- I. Whether the Request for Review was filed outside the statutory period specified in section 167 (1) of the Act, thus ousting the jurisdiction of the Board;**

- II. Whether the Board has jurisdiction to address the Applicant's contention that the Addendum dated 24th January 2020 issued by the 1st Respondent failed to satisfy the provision of section 60 (4) (a) of the Act;**

- III. Whether the Procuring Entity applied extrinsic criteria in evaluating the Applicant's bid contrary to section 80 (2) of the Act.**

- IV. Whether the Procuring Entity fairly evaluated the Applicant's bid at the Technical Evaluation Stage in accordance with section 79 (1) and 80 (2) of the Act read together with Article 227 (1) of the Constitution**

V. Whether the Procuring Entity colluded with the 2nd Respondent to the exclusion of other tenderers contrary to section 66 of the Act.

The Board now proceeds to address the above issues as follows:-

The 1st Respondent lodged a Preliminary Objection to the jurisdiction of this Board based on the following ground:-

"The Request for Review No. 51 of 2020 is improperly before the Public Procurement Administrative Review Board by reason of having been filed outside the timelines prescribed by section 167 (1) of the Public Procurement and Asset Disposal Act, 2015"

In its Written Submissions, the Applicant urged the Board to consider what amounts to a preliminary objection and we hereby proceed to observe the following:-

Sir Charles Newbold P, in the case of **Mukisa Buscuit Manufacturing Co. Ltd v. West End Distributors Ltd (1969) EA** defined a preliminary objection by stating as follows:-

"a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact is not be ascertained or what is sought is the exercise of judicial discretion"

The Applicant and the Procuring Entity are both in agreement that the Applicant was sent its letter of notification of unsuccessful bid through an email on 1st April 2020. This fact is not disputed therefore leaving the Board with an easy task of concluding that a preliminary objection based on a pure point of law has been raised by the 1st Respondent. The question of time within which the Request for Review ought to have been lodged affects the jurisdiction of this Board and we therefore deem it necessary to address the same at the earliest opportune moment.

It has well been an enunciated principle that jurisdiction is everything, following the decision in **The Owners of Motor Vessel 'Lillian 'S' vs Caltex Oil Kenya Ltd 1989 K.L.R 1**, where Justice Nyarangi held that:-

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no

basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

Similarly, in the case of **Kakuta Maimai Hamisi vs. Peris Pesi Tobiko & 2 Others (2013) eKLR**, the Court of Appeal emphasized on the centrality of the issue of jurisdiction and stated thus:-

"So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question best taken at inception. "

Further in **Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Ltd and 2 Others, Civil Application No. 2 of 2011**, the court had occasion to interrogate the instruments that arrogate jurisdiction to courts and other decision making bodies. The court held as follows:-

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. "

This Board is a creature of statute owing to the provision of Section 27 (1) of the Act which provides that:-

"27. Establishment of the Public Procurement Administrative Review Board

(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."

Further, Section 28 of the Act provides as follows:-

"28. Functions and powers of the Review Board

(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."***

The above provisions demonstrate that the Board is a specialized, central independent procurement appeals review board with its main function being reviewing, hearing and determining tendering and asset disposal disputes. To invoke the jurisdiction of this Board, a party must file its Request for

Review within the timelines specified in section 167 (1) of the Act, which provides as follows:-

"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"

Section 167 (1) of the Act specifies that one of the persons who may approach this Board is a tenderer such as the Applicant herein, within fourteen (14) days of notification of award or date of occurrence of an alleged breach of duty at any stage of the procurement process or disposal process. The Applicant herein as agreed by parties was notified of the outcome of its bid on 1st April 2020.

In **PPARB Application No. 80 of 2018, Consortium of GBM Projects and ERG Insaat Ticaret Sanayi A.S v. National Irrigation Board**, cited by the Applicant, the Board held as follows:-

"The Board is of the considered view that when it comes to notification, it is not the date on the letter of notification that

counts, rather what counts is the date that the letter is brought to the attention of the intended recipient

It is therefore recognized as was held in the foregoing case, that the letter of notification of unsuccessful bid dated 27th March 2020 was brought to the attention of the Applicant on 1st April 2020 as confirmed by the Applicant and the 1st Respondent.

In computing time within which the Applicant was required to approach this Board, we are guided by the provision of section 57 (a) of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya which states as follows:-

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

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

It therefore follows that 1st April 2020 is excluded from the computation of time meaning that time started running on 2nd April 2020 and the fourteenth day within which the Applicant was required by law to lodge its Request for Review was 15th April 2020. The Request for Review was lodged on 14th April

2020 and is therefore within the 14-day period specified under section 167 (1) of the Act.

On the second issue, the Board observes that the Procuring Entity in paragraph 5 of its Written Submissions opposed the time within which the Applicant raised its contention that the Addendum dated 24th January 2020 failed to fully satisfy the requirement of section 60 (4) (a) of the Act. In its Statement in Support of the Request for Review, the Applicant's director deponed as follows:-

"THAT the 1st Respondent responded to the Applicant's point of clarification together with those of other tenderers by issuing an Addendum dated 24th January 2020. Annexed hereto and marked "SK3" is a copy of the same

THAT in response to the Applicant's query, the said Addendum stated that the dogs can be registered with not only East Africa Kennels Club but also any other recognized club worldwide The 1st Respondent's response failed to address the specific concerns raised by the Applicant and was instead an attempt to defeat the law prohibiting use of a name in tender documents. The said response did not meet the requirement of law in entirety as stated in section 60 of the PPDA"

The 1st Respondent on the other hand submits in its Memorandum of Response that:-

"In conformity to sections 60 (4) (b) and 75 of the Act, the Procuring Entity issued an addendum/clarification dated 24th January 2020 explaining that membership to any other internationally recognized institution was admissible (Annex 2)"

The Board studied the Addendum issued on 24th January 2020 by the 1st Respondent and notes that it provides for the following:-

S/No	Clarification	KRA Response
1
2
3
4
5	<p>Table 1. Minimum requirements for Narcotics sniffer dogs. Point 4. (Registration) Proposed dogs MUS be registered with East Africa Kennels Club (attach proof)</p> <p>-NITA is the body mandated by the government to certify and approve trainers. The East Africa Kennel Club is a private entity; therefore, it is not in the interest of all potential bidders to insist on bidders being members of this club. It is a club with no value addition to working dogs. By asking members to be members of kennel club, KRA has automatic become a marketing agent for a private club.</p> <p>Under the club registration act people should not be coerced to join any club (directly of indirectly) and the same should not be used as a condition. KRA are looking for securing working dogs and not show dogs hence no relevance whatsoever unless its tuned to favour certain group</p>	<p>The dogs <u>can</u> be registered with not only East Africa Kennels Club but also any other recognized club worldwide</p>

The 1st Respondent contends that the Addendum issued on 24th January 2020 addressed section 60 (4) (b) of the Act, whereas the Applicant contends that it failed to satisfy the provision of section 60 of the Act in its entirety.

It is worth noting that the Applicant admits that it raised a query with the 1st Respondent and that the response received on 24th January 2020 was not satisfactory to the Applicant. This is sufficient proof that the Applicant learnt of an alleged breach of duty by the 1st Respondent on 24th January 2020.

The Addendum dated 24th January 2020 was issued before the tender submission deadline and the Applicant having obtained the Tender Document pursuant to an Invitation Notice by the 1st Respondent, met the definition of a candidate under section 2 of the Act, which states as follows:-

"candidate" means a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity"

The Board observes that a candidate is one of the persons recognized in section 167 (1) of the Act who may invoke the jurisdiction of this Board through a Request for Review within fourteen days from the date such a candidate learns of an alleged breach of duty by a procuring entity.

Therefore, the Applicant could have approached this Board within fourteen days after 24th January 2020, challenging the contents of the Addendum issued on 24th January 2020 by the 1st Respondent.

The Applicant had a right to approach this Board by 7th February 2020, being the fourteenth day after 24th January 2020, challenging the Addendum dated 24th January 2020. However, the Applicant failed to do so, subjected itself to the subject procurement process and is hereby estopped from raising an issue at this time with respect to its allegation that the Addendum dated 24th January 2020 failed to satisfy section 60 of the Act in its entirety.

Having noted that the Request for Review raises other issues which the Applicant learnt of after receiving its letter of notification of unsuccessful bid, the Board finds that in so far as the contention that the Addendum dated 24th January 2020 failed to satisfy section 60 (4) of the Act, is concerned, this Board lacks jurisdiction to entertain such allegation. However, the Board finds that it has jurisdiction to entertain the other issues framed for determination in the Request for Review and we now proceed to address them as follows:-

On the third issue, the Board notes that the letter of notification of unsuccessful bid dated 27th March 2020 addressed to the Applicant contained the following details:-

"The above subject refers

We have now completed the evaluation of the tender and regret to advise you that your bid was not successful as you failed to meet the cut off score for both Narcotic and explosive Sniffer Dogs, you failed to provide documentary proof of an internationally recognized kennel club where the dogs are registered. This registration authenticates the origin of the breed which provides critical details about specific history of a dog in regards to health and performance tracking"

The contract has been awarded to Skaga Limited being the lowest evaluated bidder at a total cost of Kshs. 18,473,000.00

We take this opportunity to thank you for participating and wish you success in your future bid with us."

The Applicant being dissatisfied by the 1st Respondent's decision on its bid, challenged the same through this Request for Review. The Board having considered parties' submissions observes that, the Applicant contended that the 1st Respondent introduced extrinsic/additional criteria that was not supposed to be applied during Technical Evaluation. In the Applicant's view, the 1st Respondent having specified in the letter of notification of unsuccessful bid that "*this registration authenticates the origin of the breed which provides critical details about specific history of a dog in regards to health and performance tracking*", used a criteria applicable at the post

qualification stage at the time of assessing pre-delivery conditions provided for under Table 4 at page 31 of the Tender Document.

In response to this contention, the 1st Respondent submitted in its Written Submissions that, there was no extrinsic or new criterion to evaluate the bids as alleged by the Applicant and that the Applicant is only aggrieved by the wording on the letter of notification that its bid was unsuccessful. In the 1st Respondent’s view, the letter of notification issued to the Applicant simply explained the reasons why the Applicant’s bid was found non-responsive.

Having considered the foregoing submissions, the Board notes that the criterion under consideration is outlined in Table 1 and 2 at pages 28 and 29 of the Tender Document which provided the minimum requirements for Narcotics sniffer dogs and explosives sniffer dogs as follows:-

Table 1. Minimum Requirements for Narcotics Sniffer dogs

No	Feature	Requirement	Maximum score	Cut Off Score	Bidder’s Response
1					
2					
3					
4	Registration	Proposed dogs MUST be registered with East	7	7	

		Africa Kennels Club (attach proof)			
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Table 2. Minimum Requirements for Explosives Sniffer dogs

No	Feature	Requirement	Maximum score	Cut Off Score	Bidder's Response
1					
2					
3					
4	Registration	Proposed dogs MUST be registered with East Africa Kennels Club (attach proof)	7	7	

According to the above criteria, a bidder was required to propose dogs that are registered with East Africa Kennels Club and attach proof of such registration. Further to this, the Addendum dated 24th January 2020 further stated that *"the dogs can be registered with not only East Africa Kennels Club but also any other recognized club worldwide"*.

This means, the Evaluation Committee only had the sole duty of evaluating the documentation provided by bidders with a view of establishing whether such documentation demonstrate registration of a dog with the East Africa Kennels Club and if a bidder proposed another recognized club worldwide,

whether there is documentation to show the proposed dog is registered by that club.

The Board further studied Table 4 at pages 31 and 32 of the Tender Document which provides as follows:-

The winning bidder shall be required to meet the following pre-delivery condition.

Table 4: Pre-Delivery Conditions

	Pre-Delivery Conditions	Identification Proposed dogs shall be imbedded with a micro-chip for proper identification
		Medical Records Bidder shall Provide medical records of Narcotics Detection Dogs <u>before delivery</u> covering the following. a. Proper medical certificates showing vaccinations against canine distemper, rabies, parvovirus, with no history of chronic disease/condition, free from skin diseases, free from fleas and ticks. b. Hip dysplasia -provide a proof of x rays forms. Attach a certificate of the X-rays carried on the K9, c. The teeth and gum should be clean with no signs of cavities or wounds. d. The stomach part should be thin/narrow NOTE: The winning bidder shall present a medical Report from Kabete Veterinary Hospital during delivery
		Bidder shall deliver dogs which meet the following conditions: a) Able to identify the concealed explosive material within a span of not more than three minutes. b) With high level of enthusiasm, focused, jovial, agile free from physical parasites or injuries. c) Not distracted by the surrounding environment or moving/noisy machines.

		d) Not afraid of people around it. e) Not showing any signs of attacking people either by bucking to them or by the actual attack to the people. f) Able to work independently either on leash or off leash without being dependent on the handler. g) Obedient and executing commands given by the handler either on or off leash
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Having considered the requirements under Table 4 at pages 31 and 32 of the Tender Document, the Board observes that the 1st Respondent specified Pre-Delivery Conditions that the proposed dog of the winning bidder ought to meet. To assess the health of the proposed dog, the Tender Document specifies requirements relating to the medical record of the dog. The second section of Table 4 specifies requirements relating to the performance and competence of the dog in terms of the training it has received and how it would respond to its surrounding environment.

It is the Board's considered view that Table 4 at pages 31 and 32 of the Tender Document deals with the health and performance tracking of the dog proposed by a successful bidder, which the Procuring Entity would assess before delivery of the dogs.

Section 80 (2) of the Act provides that:-

"The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents"

In this instance, the requirements under Table 4 of the Tender Document did not form part of the procedures and criteria to be applied during Technical Evaluation. The requirements under Table 4 would only become relevant when assessing the health and performance of the dog proposed by the successful bidder but before delivery of the same. This means, the Evaluation Committee would have already concluded Preliminary, Technical and Financial Evaluation, determined the lowest evaluated bidder and award made by the 1st Respondent to that lowest evaluated bidder. It is only after award of the subject tender to the winning bidder has been made that the requirements under Table 4 of the Tender Document would be applied.

According to the Evaluation Report, the Evaluation Committee observed that:-

"On the Mark Security Ltd failed to meet the cut off score for both Narcotics and Explosive Sniffer Dogs because the bidder failed to provide documentary proof of an internationally recognized kennel club where the dogs are registered. This registration authenticates the origin of the breed which provides critical details about specific history of a dog in regards to health and performance tracking"

It is evident from the foregoing that the Evaluation Committee applied the requirements under Table 4 of the Tender Document when evaluating the

Applicant's bid at the Technical Evaluation Stage, which requirements did not form part of the Technical Evaluation Criteria.

Accordingly, the Board finds that the Procuring Entity applied extrinsic/additional criteria when it applied the requirements of Table 4 at pages 31 and 32 of the Tender Document in evaluating the Applicant's bid at the Technical Evaluation Stage contrary to section 80 (2) of the Act.

On the fourth issue for determination, the Board observes that pursuant to prayer (3) of the Request for Review, the Applicant urges this Board to direct the 1st Respondent to re-admit the Applicant's bid at the Financial Evaluation Stage and evaluate its bid together with all other bidders eligible for consideration at the Financial Evaluation Stage.

In considering this prayer, the Board observes that according to the 1st Respondent, the Applicant was found non-responsive at the end of Technical Evaluation. However, the letter of notification issued to the Applicant did not specify the technical score achieved by the Applicant at that stage. Since the Applicant was informed that it did not provide documentary proof of an internationally recognized kennel club where the dogs are registered and that since this criteria carried a total of 14 marks, then it ought to have proceeded to Financial Evaluation. In the Applicant's view, if they only lost 14 marks allocated to the criteria in issue they then qualified for Financial Evaluation.

It is evident that the letter of notification issued to the Applicant does not specify the technical score achieved by the Applicant at the end of Technical Evaluation. However, in order to determine whether the Applicant qualifies for Financial Evaluation together with the 2nd Respondent, this Board must determine whether the Applicant's bid and that of the 2nd Respondent were fairly evaluated at the Technical Evaluation Stage.

In particular, the Board studied the manner in which the Evaluation Committee evaluated the Applicant's bid in the categories where the Applicant lost marks. Having studied the Evaluation Report, the Board notes that category 4 of Table 1 and 2 of Technical Evaluation is not the only category under which the Applicant lost marks, but also lost some marks in the following categories:-

a) Key Staff Competency Profile

This criterion is provided under Clause (b) (1). Vendor Evaluation Criteria of Section VI. Criteria for Selecting the Bidders at page 34 of the Tender Document as follows:-

	Criteria Description	Maximum Score	Cut off Score
1	Key Staff Competency Profiles for at least two (2) dog trainers- 1) Academic Qualifications atleast O Level (KCSE) Certificate 2)..... 3).....	6	3

Attach CVs and supporting documents for each trainer (3 marks each)		
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In the Board’s view, the word “at least”, means the bare minimum required by the Procuring Entity. Therefore, any academic qualification beyond an “O” level (KCSE) Certificate would be acceptable, for example, a Certificate, Diploma, Degree, which would ordinarily be acquired post-KCSE or other post-Secondary Education, academic qualification.

The Evaluation Committee observed that the Applicant did not provide the KCSE Certificate of Mr. Solomon Kimeu therefore the Applicant lost 1 mark and was awarded 5 marks. As regards Mr. Solomon Kimeu, the Applicant provided the following:-

- Curriculum Vitae of Mr. Solomon Kimeu identified as the Managing Director of the Applicant indicating that he undertook his Kenya Certificate of Secondary Education at Oloitoktok Secondary School between 1989 and 1992;
- A Certificate in Supplies Management issued to Mr. Solomon Kimeu by Kenya National Examination Council in November 1994;
- A Certificate issued on 22nd March 2014 to Mr. Solomon Kimeu for being one of the top 50 Pistol Marksmen in Kenya
- A Certificate issued on 13th December 2015 to Mr. Solomon Kimeu from Dog Detective Ltd for completing a Detection Dog Training.

On the other hand, the 2nd Respondent attached documentation of its two proposed personnel, among them, Mr. Donald Blair who according to his Curriculum Vitae undertook his education in Trinidad, Colorado. There was no evidence of a "O" level KCSE Certificate attached in the 2nd Respondent's bid for Mr. Donald Blair. However, the following documentation were attached:-

- A Certificate issued on 21st February 2014 in recognition of 15 years of service offered by Mr. Donald Blair to the Government of the United States of America;
- A Certificate of recognition of contribution made to the Internal Security Program issued to Mr. Donald Blair by the Department of the Treasury Internal Revenue Service;
- A Certificate issued to Mr. Donald Blair for completing the Vapor Wake Chief Instructor Course on 21st March 2008;
- A Certificate for attending a seminar for Police Dog I, Certified held on 7th to 9th July 1989;
- A Certificate for completing the Basic Officers Course on 3rd June 1985;
- A Certificate for completing a Vapor Wake Chief Instructors Course at the Canine Detection Training Centre on 21st March 2008;
- A Certificate issued on 8th December 2011 by the United States Homeland Security to Mr. Donald Blair for being a founding members of the Department of Homeland Security;
- A Certificate of Membership issued to Mr. Donald Blair by the California Narcotic Canine Association on 31st December 2003;

- A Certificate for attending a Workshop on 8th December 2011 regarding Contemporary Animal Training and Management;
- A Certificate of attendance of the 12th Annual CNCA Conference on 24 Hours of K-9 Narcotic/Explosive Detection Instruction issued by California Narcotic Canine Association.

Whereas the Applicant lost one mark for not providing evidence of a KCSE Certificate for Mr. Solomon Kimeu, the 2nd Respondent scored the maximum score of 6 even though he did not provide a KCSE Certificate for Mr. Donald Blair.

Accordingly, the Board finds that the Procuring Entity unfairly evaluated the Applicant's bid under this criterion.

b) Breed of Dogs

Table 1 and 2 of the Tender Document provided this criterion as follows:-

			Maximum Score	Cut off Score
1	Breed of Dogs	Breed of Dogs Labradors, English springer spaniels, German Shepherd Dog, Sables, Belgium Mallinois, Labradors, Jack Russel, German Pointers, Golden retriever etc.. (State your proposed breed)	3	2

The Board notes that in response to this criterion, the Applicant proposed dogs of the following breed for both the Narcotic Sniffer Dog and Explosive Sniffer Dog:-

- German Wirehaired pointer (Mixed Breeds and Hunting Breeds),
- Vizsla; and
- Border Collie.

On the other hand, the 2nd Respondent proposed the following breeds for both the Narcotic Sniffer Dog and Explosive Sniffer Dog:-

- English Spaniels;
- German Shepherd;
- Sables-German Shepherded Belgian Malinols;
- English German Pointer.

This criterion did not specify how the Evaluation Committee would allocate marks for each breed of dog proposed by a bidder, neither did it bar bidders from proposing only one breed noting that a plain interpretation of the term "state your proposed breed" shows that a bidder had leeway to propose only one type of breed and get full marks under this criterion. This means, a bidder was capable of even proposing only one breed of several dogs in both categories of Narcotic sniffer dogs and Explosive Sniffer dogs and would therefore be entitled to the full marks under this criterion.

The Applicant was awarded 2 marks whereas the 2nd Respondent was awarded the maximum score of 3 marks under this category, even though the Tender Document only required bidders to state their proposed breed of dogs.

The Board finds that the Procuring Entity unfairly evaluated the Applicant’s bid noting that the Applicant earned 2 marks out of 3.

c) Five Pseudo Training Aids for Narcotics and Explosives

This criterion is provided under Clause (b). Vendor Evaluation Criteria of Section VI. Criteria for Selecting the Bidders at page 34 of the Tender Document as follows:-

	Criteria Description	Maximum Score	Cut off Score
1	<p>Physical Facilities Proof of physical Facilities and Capacity to deliver Training services 1)) 2 marks 2)) 2 marks 3) 5 marks 4) Provide a set of Five pseudo Training aids for narcotics (cocaine, heroin, meth, marijuana, Ecstasy) (5 marks) 5) Provide a set of Five pseudo Training aids for explosives (TATP, RDX, TNT, SENTEX, and HMTD) (5marks).</p> <p>For items 4 and 5 provide relevant document e.g. licenses of possession, importation documents etc.</p>	16	11

In response to this criterion, the Applicant provided the following in its bid:-

- An Invoice from Polymath Interscience llc to Mr. Solomon Kimeu on behalf of On the Mark Security Limited for the sale of 1 Box of Canine Training Aids on 22nd January 2020;
- An Invoice from Polymath Interscience llc to Mr. Solomon Kimeu on behalf of On the Mark Security Limited for the sale of 1 Box of Canine Training Aids on 22nd January 2020;
- An Invoice from Polymath Interscience llc to Mr. Solomon Kimeu on behalf of On the Mark Security Limited for the sale of 1 Box of Canine Training Aids on 22nd January 2020;
- A Certificate of Completion issued to the Applicant by the Procuring Entity on 9th August 2018 for the supply of 5 trained dogs and veterinary documents, cages, training aids and Training and accommodation for 5 handlers.

On the other hand, the 2nd Respondent provided the following;-

- A Quote from Polymath Interscience dated 15th November 2018 for the shipment of 2 HMTD + Four (4) Explosive Scent Kits, Dynamite K9-Training Single Aid Scent Kit;
- A Quote from Polymath Interscience dated 15th November 2018 for the shipment of 3 K9 Training Single Aid ScentKit;
- An Invoice issued by Polymath Interscience dated 30th December 2016 for the payment of 4 Signature Series Explosives Detection KitSet and Accessories.

The Board observes that the Applicant and the 2nd Respondent both provided either invoices or quotations from the same organization, namely, Polymath Interscience. However, the Applicant was awarded a total of 6 marks out of 10 for the two sub-categories whilst the 2nd Respondent was awarded the full score of 10 marks available under the two sub categories.

Accordingly, the Board finds that the Procuring Entity unfairly evaluated the Applicant's bid.

d) Registration of Dogs

This criterion is provided under Category 4 of Table 1 and 2 at pages 28 and 29 of the Tender Document as follows:-

Table 1. Minimum Requirements for Narcotics Sniffer dogs

No	Feature	Requirement	Maximum score	Cut Off Score	Bidder's Response
1					
2					
3					
4	Registration	Proposed dogs MUST be registered with East Africa Kennels Club (attach proof)	7	7	

Table 2. Minimum Requirements for Explosives Sniffer dogs

No	Feature	Requirement	Maximum score	Cut Off Score	Bidder's Response
1					

2					
3					
4	Registration	Proposed dogs MUST be registered with East Africa Kennels Club (attach proof)	7	7	

As already noted, the Addendum dated 24th January 2020 further stated that “the dogs can be registered with not only East Africa Kennel Club but also any other recognized club worldwide”.

The Board studied the Applicant’s original bid but did not find any documentation of registration with the East Africa Kennel Club or any other recognized club worldwide with respect to the dogs it had proposed.

On the other hand, the 2nd Respondent attached the following in its original bid:-

- 11 Certificates of Registration of German Shepherd dogs issued by the East Africa Kennel Club to Mr. S Kabuga as the owner;
- A Certificate of Registration of an Imported Dog-Belgian Shepherd Dog (Malinois) issued by the East Africa Kennel Club to S & G Kabuga.

The Board observes that the 2nd Respondent was awarded a score of 14 under this criterion for providing evidence that the proposed dogs are registered by the East Africa Kennel Club. On the other hand, the Applicant

did not achieve any score under this criterion noting that the Applicant indicated that its proposed dogs are registered with other international clubs, but did not provide documentary proof of such registration. In the absence of any documentation of registration of the dogs proposed by the Applicant either at the East Africa Kennel Club or any other recognized club worldwide, the Evaluation Committee could not allocate the Applicant any score under this criterion.

Accordingly, the Board finds that the Procuring Entity fairly evaluated the Applicant's bid under this criterion.

e) Cut Off Score

The Board observes that the Tender Document provided for a Cut Off Score in addition to a Maximum Score in each sub-category considered during Technical Evaluation.

On the other hand, page 35 of the Tender Document provided as follows:-

"Bidders shall be required to meet all the mandatory requirement and score 86 and above for them to proceed to the next evaluation stage."

The Board observes that whereas each sub-category of Technical Evaluation had a maximum technical score, it was possible that a bidder could fail to achieve the maximum score in each sub-category. Despite this, a bidder score at the Technical Evaluation Stage ought to have been weighted in that, if a bidder failed to attach all the 3 required documents where the score was 3, but only attached 2 documents, then such a bidder was entitled to a score of 2 marks.

Section 80 (3) of the Act provides that:-

- "(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;"***

In the Board's considered view, there was no need to impose an additional cut off score, when a bidder's score could be weighted from the maximum scores allocated in each sub category of Technical Evaluation. A cut off score in the Board's view, is punitive and of no significance, since a bidder ought to have been informed whether it met the minimum technical score of 86% after the scores in all the sub-categories are added.

Article 227 (1) of the Constitution requires the Procuring Entity to contract for goods and services in a system that is fair, equitable, transparent, competitive and cost-effective. The imposition of a cut off score despite having provided a maximum score during Technical Evaluation, especially in this instance where there were only two bidders competing at the Technical Evaluation Stage, it is possible that the cut off score would favour one bidder to the detriment of the other, assuming one bidder misses out even on one document or information required in the Tender Document.

Furthermore, in most of the sub categories considered during Technical Evaluation, the cut off score was similar to the maximum score, therefore making the cut off score a superfluous method of evaluation and of no significance. The cut off scores used by the Procuring Entity were an unfair method of weighting the scores achieved by the Applicant and the 2nd Respondent during Technical Evaluation, and the same should not be used during evaluation of bids at the Technical Stage, especially in this instance where there is already imposition of maximum scores in each sub category of Technical Evaluation and a minimum technical score of 86% in total, for a bidder to proceed to Financial Evaluation Stage.

Accordingly, the Board finds that the Procuring Entity's evaluation at the Technical Evaluation Stage by imposing a cut off score violates the provisions of section 80 (3) (a) and the principle of fairness under Article 227 (1) of the Constitution.

On the fifth issue for determination, the Board observes that the Applicant contended that upon conducting a search of the directors of the 2nd Respondent, the Applicant established that one of its directors (i.e. 2nd Respondent's directors) is known as Mrs. G. Kabuga who is the sitting Vice-Chairperson of the East Africa Kennels Club thus corroborating the Applicant's suspicion that the subject tender document was prepared to unfairly favour the 2nd Respondent at the exclusion of other tenderers thus contravening the law.

The 1st Respondent on the other hand, submitted that it takes issue with the allegation that it colluded with the 2nd Respondent and that the Applicant failed to table any evidence in support of the alleged collusion but did not deny the allegation that Mrs. G Kabuga is a director of the 2nd Respondent and the sitting Vice Chairperson of the East Africa Kennel Club. The Board studied the 2nd Respondent's Written Memorandum of Response and observes that the 2nd Respondent did not respond to the Applicant's contention that 2nd Respondent's director, known as Mrs. G. Kabuga, is the sitting Vice-Chairperson of the East Africa Kennel Club and that the Tender Document was prepared to favour the 2nd Respondent.

The Board has considered parties' submission on the issue under consideration and notes that section 66 of the Act provides as follows:-

"66 (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.

(4) The voiding of a contract by the procuring entity under subsection (7) does not limit any legal remedy the procuring entity may have.

(5) An employee or agent of the procuring entity or a member of the Board or committee of the procuring entity who has a conflict of interest with respect to a procurement—

(a) shall not take part in the procurement proceedings;

- (b) shall not, after a procurement contract has been entered into, take part in any decision relating to the procurement or contract; and**
- (c) shall not be a subcontractor for the bidder to whom was awarded contract, or a member of the group of bidders to whom the contract was awarded, but the subcontractor appointed shall meet all the requirements of this Act.**
- (6) An employee, agent or member described in subsection (1) who refrains from doing anything prohibited under that subsection, but for that subsection, would have been within his or her duties shall disclose the conflict of interest to the procuring entity.**
- (7) If a person contravenes subsection (1) with respect to a conflict of interest described in subsection (5) (a) and the contract is awarded to the person or his relative or to another person in whom one of them had a direct or indirect pecuniary interest, the contract shall be terminated and all costs incurred by the public entity shall be made good by the awarding officer.**

(8) For the purpose of this section, a person has a conflict of interest with respect to a procurement if the person or a relative of the person—

(a) seeks, or has a direct or indirect pecuniary interest in another person who seeks, a contract for the procurement; or

(b) owns or has a right in any property or has a direct or indirect pecuniary interest that results in the private interest of the person conflicting with his duties with respect to the procurement.

(9) The ownership of, or right in, any property referred to in subsection (8) (b) shall not include rights arising by virtue of owning shares in publicly listed companies.

(10) For the purpose of subsection (8), the following are persons seeking a contract for a procurement—

(a) a person submitting a tender, proposal or quotation; or

(b) if direct procurement is being used, a person with whom the procuring entity is negotiating.

(11) In this section, "relative" means—

(a) a spouse, child, parent, brother or sister;

(b) a child, parent, brother or sister of a spouse; or

(c) any other prescribed persons.

(12) Any person who contravenes the provisions of this section commits an offence.

Section 66 of the Act prohibits any person from being involved in any corrupt, coercive, obstructive, collusive or fraudulent practice; or conflicts of interest in any procurement or asset disposal proceeding. A person involved in the practices prohibited by section 66 (1) of the Act, is disqualified from entering into a contract for a procurement or asset disposal proceeding and if a contract is already entered into, the contract shall be voidable and such person commits an offence under the Act.

This means, at the time of bidding, bidders ought to make a declaration that they are not involved in any corrupt, coercive, obstructive, collusive or fraudulent practice; or conflicts of interest that would disqualify them from a procurement or asset disposal proceeding, or rendering a contract voidable if already executed.

The Applicant attached an extract of the Official Website of the East Africa Kennel Club to its Request for Review bearing the domain, eastafricakennelclub.com, which the 1st Respondent and the 2nd Respondent did not oppose neither did they respond to the same.

Upon studying the same, the Board visited the said website (i.e. <http://eastafrikakennelclub.com/aboutus/>) and noted that under the tab named as “**About the EAKC**”, a brief history of the East Africa Kennel Club is given, members of the EAKC Committee 2019 are listed and an explanation given for anyone desirous of buying a dog.

As regards, the EAKC Committee 2019 membership, the following are listed on the said website:- “

EAKC Chairlady	Mrs. B. E. Davis	
EAKC Vice Chairladies	Mrs. G. Kabuga	Mrs. D. Galot – Dave
Treasurer	Mr, R. F. Maranga	
Executive Officer	Ms. N. Rosenstok	
Chairman of the Showground	Mr. Y. Hussein	Ms. A. L. Rapp & Mrs. A. McFerran
Chairman of the Show	Mrs. A. McFerran	
Committee Members	Mr. A. J. Davies	Mrs. P. Galley
	Ms. A. Rapp	Mr. M. N. Butt
	Mrs. J. Seton	Mr. R. Wayumba
	Dr. M. M. Kahangara	Dr. Luvai
	Mrs. N. James (eo)	

From the foregoing, the Board notes that Mrs. G. Kabuga is one of the Vice Chairladies of EAKC Committee 2019. The Board studied the 2nd Respondent’s original bid to establish whether Mrs. G Kabuga has any relation to the 2nd Respondent and noted the following:-

- *The 2nd Respondent attached 11 Certificates of Registration issued by East Africa Kennel Club with respect to 11 German Shepherd Dogs and the owner is identified as Mr. S Kabuga;*
- *The 2nd Respondent further attached a Certificate of Registration of an Imported Dog issued by East Africa Kennel Club dated 26th September 2017 with respect to a Belgian Shepherd Dog (Malinois) and the owner is identified as S. & G. Kabuga;*
- *The 2nd Respondent also attached its duly completed Confidential Business Questionnaire Form with the following details:-*

"You are advised that it is a serious offence to give false information on this form

Part 1-GENERAL

.....;

Part 2 (c) –Registered Company

2c.1

2c.2

2c.3 Given details of all Directors as follows

<i>Name</i>	<i>Nationality</i>	<i>Citizenship Details</i>	<i>Shares</i>
<i>1. Wanjiru Wahome</i>			<i>70%</i>
		<i>CITIZEN BY BIRTH</i>	
<i>2. Simon Kabuga</i>			<i>30%</i>
		<i>CITIZEN BY BIRTH</i>	

...../

3.7. Are you under a declaration of ineligibility for corrupt and fraudulent practices?

NO

From the foregoing, the Board observes that, Mrs. G. Kabuga sits as a Vice Chairlady in East Africa Kennel Club Committee 2019 whereas the Certificate of Registration of an Imported Dog issued by East Africa Kennel Club dated 26th September 2017 with respect to a Belgian Shepherd Dog (Malinois) shows that the owner is S. & G. Kabuga. Further to this, the Confidential Business Questionnaire Form, duly completed by the 2nd Respondent identifies Simon Kabuga as one of the 2nd Respondent's Directors.

It is worth noting that when completing its Confidential Business Questionnaire Form, the 2nd Respondent declared that it is not under ineligibility for corrupt and fraudulent practices. Bidders were further cautioned that providing false information in the Confidential Business Questionnaire Form amounts to a serious offence.

It is also worth noting that Clause 2.1.2 of the Appendix to Instructions to Tenderers of the Tender Document provided that:-

"The Declaration of No Conflict of Interest is incorporated in the Confidential Business Questionnaire Form"

In the Board's view, the striking coincidence of names of the owners of the dogs proposed by the 2nd Respondent having been registered by the East Africa Kennel Club and the fact that one Simon Kabuga is a director of the 2nd Respondent, ought to have prompted the 1st Respondent to conduct a due diligence exercise on the 2nd Respondent after it was found to be the lowest evaluated bidder, with a view of establishing whether or not it provided false information in its Confidential Business Questionnaire Form.

According to the Due Diligence Report dated 20th February 2020, the Evaluation Committee's due diligence exercise on the 2nd Respondent comprised of; obtaining confidential information on the reference sites in the bid document and a site visit at the 2nd Respondent's premises. None of these components entailed a verification of the information provided in the 2nd Respondent's Confidential Business Questionnaire Form, which information ought to have been verified by the Evaluation Committee to establish whether or not there was a conflict of interest that would affect the 2nd Respondent's participation in the subject procurement process or would render any contract executed between the 2nd Respondent and the Procuring Entity, voidable.

Accordingly, the Board finds that though the Applicant has not proven any collusion or corrupt practices between the 1st Respondent and the 2nd Respondent, to the satisfaction of the Board, the striking similarities of

names between Simon Kabuga and S. G Kabuga should have been an issue for consideration by the Procuring Entity at the due diligence stage.

In totality, the Request for Review is hereby allowed in the terms of the following specific orders:-

FINAL ORDERS

In exercise of the powers conferred upon it by section 173 of the Act, the Board makes the following orders in the Request for Review:-

- 1. The Procuring Entity's Letter of Notification of Unsuccessful bid dated 24th March 2020 with respect to Tender No. KRA/HQS/NCB-046/2019-2020 for the Supply and Delivery of K9dogs and training of dog handlers addressed to the Applicant, be and is hereby cancelled and set aside.**
- 2. The Procuring Entity's Letter of Notification of Award dated 24th March 2020 with respect to the subject tender addressed to M/s Skaga Limited, the 2nd Respondent herein, be and is hereby cancelled and set aside.**
- 3. The Procuring Entity is hereby directed to re-admit the Applicant's bid and the 2nd Respondent's bid at the Technical Evaluation Stage and re-evaluate the Applicant's bid and the 2nd Respondent's bid at the Technical Evaluation Stage in accordance with the Act and the Constitution, taking into consideration, the Board's findings in this case.**

- 4. Further to Order No. 3 above, the Procuring Entity is hereby directed to conclude the procurement process to its logical conclusion including the making of an award within fourteen (14) days from the date of this decision.**
- 5. Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.**

Dated at Nairobi this 5th day of May 2020

CHAIRPERSON

SECRETARY

PPARB

PPARB