

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 148/2020 OF 3RD DECEMBER 2020

BETWEEN

RIVERBANK SOLUTIONS LIMITED & SPORTO

LIMITED.....APPLICANT

AND

THE ACCOUNTING OFFICER,

COUNTY GOVERNMENT OF NAKURU.....RESPONDENT

AND

DYNAMIC FINANCIAL IT RESEARCH CONSULTING

LIMITED.....INTERESTED PARTY

Review against the decision of the Accounting Officer of the County Government of Nakuru with respect to Tender No. NCG/FIN/ONT/001/2020-2021 for the Proposed Supply, Installation, Configuration, Customization, Commissioning and Maintenance of an Integrated Revenue Collection Management System (IRCMS).

BOARD MEMBERS

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|------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mrs. Irene Kashindi | -Member |
| 3. Mr. Ambrose Ogetto | -Member |
| 4. Qs. Hussein Were | -Member |
| 5. Mr. Nicholas Mruttu | -Member |

IN ATTENDANCE

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

BACKGROUND TO THE DECISION

The Bidding Process

County Government of Nakuru (hereinafter referred to as "the Procuring Entity") invited sealed tenders from eligible firms to bid for Tender No. NCG/FIN/ONT/001/2020-2021 for the Proposed Supply, Installation, Configuration, Customization, Commissioning and Maintenance of an Integrated Revenue Collection Management System (IRCMS) (hereinafter referred to as "the subject tender") through an advertisement notice dated 1st October 2020 published on the Procuring Entity's Official Website (nakuru.go.ke), the Kenya Supplier's Information Portal (supplier.treasury.go.ke) and the Public Procurement Information Portal (www.tenders.go.ke).

Tender Submission Deadline and Opening of Tenders

The Procuring Entity received a total of eight (8) tenders by the tender submission deadline of 8th October 2020. The same were opened shortly thereafter by a Tender Opening Committee in the presence of tenderers' representatives and recorded as follows: -

S/No	Tenderer's Name
1	Sense Networks Consultants
2	Kenya Airports Parking Services Ltd (KAPS Ltd)

3	Techno Edge Ltd
4	RiverBank Solutions Limited & Sporto Limited
5	Dynamic Finance and IT Research and Consulting Ltd
6	Nouveta Limited
7	Strathmore Research and Consultancy Centre Ltd
8	Sybil Kenya Ltd

Evaluation of Bids

Having appointed an Evaluation Committee, evaluation of bids in the subject tender was undertaken in the following three stages: -

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

1. Preliminary Evaluation

At this stage, the Evaluation Committee evaluated tenders against the following requirements: -

- Letter of Invitation;
- IFMIS & Hard copy submission;
- Certificate of Registration;
- Valid Tax Compliance Certificate;
- Demonstration/evidence of history of capability to handle revenue collection;
- Duly Completed Confidential Business Questionnaire Form;
- Bid Security of 2% of quoted tender sum;
- Duly executed agreement of 2 or more firms jointly responding to the tender;

- Form of Tender;
- Bidder Declaration Form; and
- Signed Pre-Tender Visit Form/Certificate

At the end of evaluation, only one firm, M/s Dynamic Financial and IT Research & Consulting Ltd was found responsive and thus eligible to proceed to Technical Evaluation.

2. Technical Evaluation

At this stage, the Evaluation Committee applied the criterion outlined in Clause 15.2. Detailed Evaluation of Technical Proposals of Section II. Instructions to Candidates of the Tender Document to determine the extent at which tenderers have addressed the system requirements including compliance with relevant national and international standards. Tenderers were also required to achieve an overall minimum technical score of 75% at the end of Technical Evaluation in the following two categories: -

2.1. Desktop Evaluation

Having subjected the technical proposal of M/s Dynamic Financial and IT Research & Consulting Ltd to a Desktop Evaluation, the Evaluation Committee noted that the tenderer achieved a score of 42%.

2.2. LIVE ICRMS Demonstration

The objective of this category of Technical Evaluation was for tenderers to demonstrate the system's readiness and availability of functionalities that are

critical for successful deployment of the Integrated Revenue Collection Management System (ICRMS) as per specifications in the Tender Document. At the end of evaluation, the Evaluation Committee noted that M/s Dynamic Financial and IT Research & Consulting Ltd achieved a score of 40%.

The overall technical score of M/s Dynamic Financial and IT Research & Consulting Ltd was recorded as follows: -

S/No	Evaluation Description	Score Achieved
1	Desktop Evaluation	42
2	Live ICRMS Demonstration	40
Total Score		82

From the table outlined hereinbefore, the Evaluation Committee concluded that M/s Dynamic Financial and IT Research & Consulting Ltd achieved the minimum overall technical score required to proceed to Financial Evaluation.

3. Financial Evaluation

At this stage, the Evaluation Committee recorded the tender price and the Total Commission for revenue collection proposed by M/s Dynamic Financial and IT Research & Consulting Ltd as follows: -

S/No	Name of Tenderer	Tender Amount	Cost of Maintenance and license (Commission of Total Revenue Collected through the system)

5	Dynamic Financial and IT Research & Consulting Ltd	34,510,000	4.3%
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Recommendation

The Evaluation Committee recommended award of the subject tender to M/s Dynamic Financial and IT Research & Consulting Ltd at its tender price of Kshs. 34,510,000/- and the rate of 4.3% Commission of Total Revenue Collected through the ICRMS for being the lowest evaluated tenderer.

Professional Opinion

In a professional opinion dated 5th November 2020, the Procuring Entity's Acting Director, Supply Chain Management outlined the manner in which the procurement process was undertaken including evaluation of tenders, thus expressed his satisfaction that the requirements of Article 227 (1) of the Constitution and the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") were met. He concurred with the Evaluation Committee's recommendation thus advising the Procuring Entity's Chief Officer, Finance and Economic Planning to approve award of the subject tender to M/s Dynamic Financial and IT Research & Consulting Ltd at its tender price of Kshs. 34,510,000/- at the rate of 4.3% Commission of Total Revenue Collected through the ICRMS for being the lowest evaluated tenderer. The said professional opinion was approved by the Chief Officer, Finance and Economic Planning.

Notification to Tenderers

In letters dated 6th November 2020, the Chief Officer, Finance and Economic Planning notified all tenderers of the outcome of their tenders.

THE REQUEST FOR REVIEW

M/s Riverbank Solutions Limited & Sporto Limited (hereinafter referred to as "the Applicant") lodged a Request for Review dated 3rd December 2020 and filed on even date together with an Affidavit in Support of the Request for Review (hereinafter referred to as "the Applicant's Supporting Affidavit") sworn on 3rd December 2020 and filed on even date, through the firm of Litoro & Omwebu Advocates, seeking the following orders: -

- i. An order annulling the decision of the Procuring Entity awarding Tender No. NCG/FIN/ONT/001/2020-2021 for the Proposed Supply, Installation, Configuration, Customization, Commissioning and Maintenance of an Integrated Revenue Collection Management System (IRCMS) to the purported successful bidder and any contract already signed in that regard;*
- ii. An order directing the Procuring Entity to restart the procurement process for the Supply, Installation, Configuration, Customization, Commissioning and Maintenance of an Integrated Revenue Collection Management System (IRCMS) afresh; and*

iii. An order directing the costs of this Request for Review to be borne by the Procuring Entity.

In response, the Respondent lodged a Response to the Request for Review (hereinafter referred to as "the Respondent's Response") sworn on 16th December 2020 and filed on even date through the Procuring Entity's County Attorney while the Interested Party lodged a Replying Affidavit sworn on 17th December 2020 and filed on even date through P. Sang & Company Advocates.

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 Covid-19 pandemic. Through the said Circular, the Board instituted certain measures restricting the number of representatives of parties that may appear before the Board during administrative review proceedings in line with 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 Covid-19 pandemic. 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. Clause 1 at page 2 of the said Circular further specified that pleadings and documents shall be deemed as properly filed if they bear the official stamp of the Board.

Accordingly, the Interested Party lodged Written Submissions dated 22nd December 2020 and filed on even date. The Applicant sent written submissions dated 22nd December 2020 through the Board's official email but did not file the same as directed through Clause 1 at page 2 of Circular No. 2 dated 24th March 2020. The Respondent did not file written submissions.

BOARD'S DECISION

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

I. Whether the Board has jurisdiction to entertain the Request for Review.

In addressing the above issue, the Board will make a determination on the following: -

- a) Whether the Request for Review is properly filed before the Board in accordance with section 167 (2) of the Act read together with Regulation 204 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as Regulations 2020) regarding payment of 15% deposit of the tender sum by an applicant.*

Depending on the outcome of sub-issue (a): -

b) Whether the Request for Review was filed outside the statutory period of fourteen (14) days specified in section 167 (1) of the Act, thus ousting the jurisdiction of the Board.

Depending on the outcome of sub-issue (b): -

c) Whether the contract dated 1st December 2020 between the Procuring Entity and the Interested Party was signed in accordance with section 135 (3) of the Act thus ousting the jurisdiction of the Board by dint of section 167 (4) (c) of the Act.

Depending on the outcome of sub-issue (c): -

d) Whether the Board has jurisdiction to address the Applicant's allegation that the Procuring Entity breached section 97 (2) of the Act read together with Regulation 119 of the Regulations 2020 regarding time for submission of tenders.

(e) Whether the Board has jurisdiction to address the Applicant's allegation that the Procuring Entity breached section 64 of the Act in providing a telephone number for communications between tenderers and the procuring entity.

Depending on the outcome of the first issue: -

- II. Whether the Procuring Entity breached section 97 (2) of the Act read together with Regulation 119 of Regulations 2020 regarding time for submission of tenders.**
- III. Whether the Procuring Entity breached section 64 of the Act in providing a telephone number for communications between tenderers and the procuring entity.**
- IV. Whether the Procuring Entity evaluated the Applicant's tender at the Preliminary Evaluation Stage in accordance with section 80 (2) of the Act in relation to the mode of submission of tenders.**
- V. Whether the Procuring Entity evaluated bids in the subject tender within the statutory period of thirty (30) days specified in section 80 (6) of the Act.**
- VI. Whether the Letter of Notification dated 6th November 2020 issued to the Applicant meets the threshold of section 87 (3) of the Act read together with Regulation 82 of Regulations 2020.**
- VII. Whether the Interested Party complied with Section 15 of the Tender Document on Evaluation of Technical Proposals.**

Before addressing the issues framed for determination, the Board would like to dispense with a preliminary aspect raised by the Interested Party in its Replying Affidavit.

At paragraph 3 of its Replying Affidavit, the Interested Party depones that the Applicant's Request for Review and Applicant's Supporting Affidavit in were served on it (Interested Party) late in the evening of 15th December 2020 and were incomplete because page 7 of the Request for Review and annexures to the Applicant's Supporting Affidavit were missing. The Interested Party further depones that it addressed an email to the Board requesting to be furnished with the missing page and annexures but did not receive the same by the time it filed its Replying Affidavit on 17th December 2020.

The Board observes that on the same date of 17th December 2020, a representative of the Interested Party, Mr. Mukundi Nganga addressed an email through the Interested Party's email address (dfit.consultants@yahoo.com) to the Board's official email address (pparb@ppra.go.ke) stating as follows: -

"Dear Sir,

We are in receipt of the appeal application and we have noted that page 7 is missing in the 115 pages and they are not part of the ones you have shared. Please share the annexures referred to enable us respond in time"

Thereafter, the Interested Party filed a Replying Affidavit on 17th December 2020 through the firm of P. Sang & Company Advocates indicating the Advocates telephone number as 0202211289/0711915284. Consequently, on 18th December 2020, the Board Secretariat contacted the Interested

Party's Advocates through the Board's official telephone number (i.e. +2540203244000) and spoke to one Ms. Purity Sang who verified that the email of psang.advocates@gmail.com could be used for communication to the Interested Party. On the same date, the Board Secretariat addressed an email to the Interested Party's Advocate's email, attaching the Applicant's Request for Review (with page 7 included), the Applicant's Supporting Affidavit and all annexures thereto, the Respondent's Response and the Board's Circular No. 2 dated 24th March 2020 whilst stating as follows in the body of the email: -

"Dear Purity

See attached circular guiding operation of the Board. You indicated in your affidavit that you needed documents from pages 7 we have attached herein. In case it is not sufficient, you may visit our offices at NBK building, 10th Floor"

On 22nd December 2020, the Interested Party, through its Advocates filed written submissions summarizing its position on the legal issues applicable in the instant case having received the Applicant's Request for Review (with page 7 included), the Applicant's Supporting Affidavit and all annexures thereto, the Respondent's Response and the Board's Circular No. 2 dated 24th March 2020.

Having dispensed with the above preliminary aspect, the Board now turns to address the issues framed for determination.

At the heart of this Request for Review is the issue of jurisdiction. It is a well settled principle that jurisdiction is everything, thus giving a court, a tribunal or any other decision making body the power, authority and legitimacy to entertain any matter before it. In common English parlance, the Oxford Dictionary, 9th Edition defines the term '**Jurisdiction**' as: -

"the authority or power to hear and determine disputes, or to even take cognizance of the same."

This definition clearly shows that before a decision making body can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination on such matter. In the **Matter of Interim Independent Electoral Commission [2011] eKLR, Constitutional Application 2 of 2011**, the Supreme Court cited the celebrated case of the **Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited [1989] KLR 1** whilst stating as follows: -

"Assumption of jurisdiction by Courts [or any other decision making body] in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

'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.'

The Lillian 'S' case establishes that jurisdiction flows from the law, and the recipient Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.'

Further in **Anisminic vs Foreign Compensation Commission (1969) 1 All ER 208 at 233**, Lord Pearce addressed some instances when a tribunal may lack jurisdiction whilst stating as follows: -

"Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to a tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage, while engaged on a proper enquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong

questions; or it may take into account matters which it was not directed to take into account. Thereby it would step out of its jurisdiction. It would turn its enquiry into something not directed by Parliament and fail to make the enquiry which Parliament did direct. Any of these things would cause its purported decision to be a nullity.

The first sub-issue of the first issue for determination challenges the manner in which the Request for Review was filed within the purview of payment of a deposit at a percentage of the Applicant's tender sum. In relation to this specific sub-issue, it is important for the Board to determine whether or not the Applicant was required to pay a deposit at a percentage of its tender sum. This is because if the Board finds such deposit was payable but the same was not paid, it would amount to a nullity for the Board to determine the Request for Review despite an applicant's failure to meet such a requirement.

The Interested Party challenged the manner in which the Request for Review was filed by deponing at paragraph 30 and 31 of its Replying Affidavit that there is no evidence showing the Applicant complied with section 167 (2) of the Act read together with Regulation 204 of Regulations 2020 regarding payment of a deposit amounting to 15% of the Applicant's tender sum. As a result, the Interested Party took the view that the Request for Review is not properly filed before the Board and the same ought to be dismissed.

In addressing the Interested Party's allegation, the Board takes cognizance of section 167 (2) of the Act which states that: -

"A request for review shall be accompanied by such refundable deposit as may be prescribed in the regulations, and such deposit shall not be less than ten per cent of the cost of the contract"

The Board observes that the court in **Judicial Review Application No. 623 & 645 of 2016 (Consolidated), Republic v Public Procurement Administrative Review Board Ex-parte Kenya Power and Lighting Company Limited & another [2017] eKLR** (hereinafter referred to as "the KPLC Case") had occasion to interpret the import of section 167 (2) of the Act when it held as follows: -

"It was contended that the Request for Review is not accompanied by a deposit as required under section 167(2) of the Public Procurement and Asset Disposal Act, 2015..."

This Court has had occasion to deal with a provision couched in similar terms being section 175(2) of the Act which provides as hereunder:

The application for a judicial review shall be accepted only after the aggrieved party pays a percentage of the contract value as security fee as shall be prescribed in Regulations.

In **Republic vs. Public Procurement Administrative Review Board & 2 others Ex Parte Kenya National Highway Authority [2016] eKLR** this Court expressed itself as hereunder:

"...since section 175(2) of the Act places an obligation on the aggrieved party to pay a prescribed percentage of the contract value as security fee, I am unable to agree with the applicant that the said provision does not apply to it. As to what percentage is required to be paid, is a matter for the regulations. It is however contended which contention is not disputed that the regulations prescribing percentages are yet to be formulated. It is my view that section 175(2) of the Act [and section 167 (2)] with respect to payment of the percentage can only be implemented after the Regulations are in place. It is therefore my view and I hold that this application cannot be disallowed on the basis of the failure to pay a percentage which is yet to be prescribed."

It is on that basis that I find the position taken by the Respondent [Board] on the issue incapable of being faulted."
[Emphasis by the Board]

The High Court in the KPLC Case compared provisions of section 175 (2) of the Act with those of section 167 (2) of the Act and in doing so, found that the deposit payable pursuant to section 167 (2) of the Act could only be applied once a percentage is prescribed by way of Regulations.

It is within public knowledge that through Gazette Notice No. 4957 (found in Vol. CXXII —No. 142 of Kenya Gazette of 10th July 2020, the Cabinet Secretary for the National Treasury stated thus: -

"THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT (No. 33 of 2015)

THE PUBLIC PROCUREMENT AND ASSET DISPOSAL REGULATIONS

(LN. No. 53 of 2020)

COMMENCEMENT

IT IS notified for the general information of the public that the Public Procurement and Asset Disposal Regulations, 2020 came into operation on the 2nd July, 2020 following the approval by Parliament under section 180 of the Act.

Dated the 9th July, 2020."

According to the said Gazette Notice, the commencement date for Regulations 2020 was 2nd July 2020, following approval by Parliament pursuant to section 180 of the Act, which provides as follows: -

"The Cabinet Secretary shall make Regulations for the better carrying out of the provisions of this Act and, without limiting the generality of the foregoing, may make Regulations to facilitate the implementation of this Act, and such regulations shall not take effect unless approved by Parliament pursuant to the Statutory Instruments Act, 2013"

Regulation 204 (1) of Regulations 2020 provides as follows: -

"Pursuant to section 167 (2) of the Act the filing of a request for review shall be accompanied by a refundable deposit

valued at fifteen percent (15%) of the applicant's tender sum which shall be paid into a deposit account"

Despite Regulations 2020 coming into force on 2nd July 2020 which in effect made Regulation 204 therein applicable from that date, on 27th July 2020, Honourable Justice Weldon Korir issued conservatory orders in **Petition No. E226 of 2020, Roads and Civil Engineering Contractors Association & Another v. Attorney General & 3 Others** (hereinafter referred to as "Petition No. E226 of 2020") directing as follows: -

"IT IS HEREBY ORDERED

(1) THAT a Conservatory Order is issued staying the implementation and or Operation of any Regulation of the Public Procurement and Asset Disposal Regulations 2020, requiring the deposit of 15% of the Applicant's tender sum before the commencement of Judicial Review Proceedings in respect of the Public Procurement"

Pursuant to the orders issued by the High Court in Petition No. E226 of 2020, application of Regulation 204 (1) of Regulations 2020 was suspended on 27th July 2020 and as such, any Request for Review application filed after issuance of the said orders are not subject to payment of a deposit of 15% of an applicant's tender sum. The Applicant filed its Request for Review on 3rd December 2020 which was after suspension of Regulation 204 (1) of

Regulations 2020 by Justice Weldon Korir in the High Court Petition No. E226 of 2020.

Having considered the finding of the Court in the KPLC Case, the Board observes that the Court found that application of section 167 (2) of the Act could only take effect once a percentage on payment of a deposit is prescribed by way of Regulations. Regulation 204 (1) of Regulations 2020 which came into force to give effect to section 167 (2) of the Act has also been suspended by the High Court through Petition No. E226 of 2020. As a result, both section 167 (2) of the Act and Regulation 204 (1) of Regulations 2020 are not applicable in the circumstances.

Accordingly, the Board finds that the Request for Review is properly filed before it because Regulation 204 (1) of Regulations 2020 on payment of a deposit of 15% of an applicant's tender sum pursuant to section 167 (2) of the Act remains suspended and thus not applicable in the circumstances.

On the second sub-issue of the first issue for determination the Board observes that section 28 of the Act which establishes this Board states that:

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"(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”

On its part, section 167 (1) of the Act specifies the manner in which the jurisdiction of the Board is invoked in exercising the functions under section 28 (1) of the Act. Section 167 (1) of the Act states 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”

From the above provision, an aggrieved applicant or tenderer may seek administrative review before this Board within fourteen (14) days of; (i) notification of award or (ii) date of occurrence of the alleged breach at any stage of the procurement process, or disposal process. The Procuring Entity raised an objection to the jurisdiction of the Board at paragraph 11 of the Respondent’s Response stating that the Applicant’s Request for Review was filed outside the statutory period of 14 days specified in section 167 (1) of the Act. To support this position, the Respondent states that notification of award to the successful tenderer and notification of unsuccessful bid to

unsuccessful tenderers were sent on the same date of 6th November 2020. In support of the Respondent's position, the Interested Party deponed at paragraph 25 of its Replying Affidavit that the Request for Review was filed outside the period of 14 days specified in section 167 (1) of the Act.

At paragraph 14 of its Supporting Affidavit, the Applicant depones that, it collected the letter of notification of unsuccessful bid dated 6th November 2020, from the post office on 2nd December 2020. To support this position, the Applicant referred the Board to a copy of its letter of notification of unsuccessful bid with a Received stamp dated 2nd December 2020, affixed therein.

It is worth noting that on one hand, the Applicant states it received its letter of notification of unsuccessful bid on 2nd December 2020, whilst relying on a Received Stamp affixed on the said letter on 2nd December 2020. The Applicant also attached a letter dated 23rd November 2020 to its Request for Review, which we note was addressed to the Procuring Entity enquiring about the status of the subject tender. The said letter states as follows: -

"STATUS OF TENDER FOR THE SUPPLY, INSTALLATION, CONFIGURATION, CUSTOMIZATION, COMMISSIONING AND MAINTENANCE OF AN INTEGRATED REVENUE COLLECTION MANAGEMENT SYSTEM-NCG/FIN/ONT/001/2021-2021

With reference to the above subject and tender reference we submitted our bid for the service on 8th December 2020 in the

manner prescribed in section 2.5.3 of the RFP document being two copies in the tender box.

We have not received any communication on the same hence this request is to be updated on the status of the tender whether it is closed or it is still in progress.”

The Applicant deponed that the Respondent received the letter dated 23rd November 2020, on 24th November 2020, did not respond to the same despite the Applicant having made efforts to enquire about the status of the subject procurement process. The Board notes that on the face of the letter dated 23rd November 2020, a Received Stamp of Nakuru County Secretary is affixed therein and dated 24th November 2020, thereby demonstrating that the letter dated 23rd November 2020 was received by the Procuring Entity on 24th November 2020. Despite having deponed that the Applicant’s letter of notification was sent to it on 6th November 2020, the Respondent did not furnish the Board with any evidence of dispatch of the said letter of notification to the Applicant.

The Board is mindful that the obligation of notifying tenderers of the outcome of their bids lies on the accounting officer of a procuring entity as stated in section 87 of the Act and thus the burden of proving the date when the Applicant was notified of the outcome of its bid rests with the Respondent. The Court in **Civil Appeal No. 157 of 2016, Ahmed Mohammed Noor v. Abdi Aziz Osman [2019] eKLR** while addressing the question of burden of proof held that: -

"When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person"

It is therefore the Board's considered view that the Respondent has the legal obligation of proving its allegation that notification was made to the Applicant on 6th November 2020 not by merely indicating the said date on the letters of notification but by proving the mode and dates of dispatch to bidders of such letters. This obligation has not been discharged in these proceedings because the Respondent ought to have furnished the Board with evidence of the date when letters of notification were dispatched to tenderers. The Respondent offered no evidence and as such failed to discharge its burden of proof throughout the Request for Review proceedings.

Even assuming the Board considers the evidence presented by the Applicant, the Board notes that the letter dated 23rd November 2020 demonstrates that as at 23rd November 2020, it had not received any communication from the Procuring Entity, hence the reason why it was enquiring about the status of the subject procurement process. The letter dated 23rd November 2020 was received by the Procuring Entity on 24th November 2020 given a Received Stamp of the Procuring Entity dated 24th November 2020 is affixed therein. The evidence furnished to the Board by the Applicant shows that the letter of notification of unsuccessful bid was received by it on 2nd December given that a Received Stamp is affixed therein on 2nd December 2020. Having found that the Respondent failed to discharge his burden of proof by

furnishing the Board with evidence of dispatch of the letter of notification to the Applicant, the evidence adduced by the Applicant persuades this Board to find that the Applicant was notified of the outcome of its bid on 2nd December 2020.

In determining the period within which the Applicant ought to have filed its Request for Review, the Board is guided by section 57 (a) of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya regarding computation of time which states as follows: -

"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"

Section 57 (a) of the Interpretation and General Provisions Act gives guidance that the day an event happens is excluded during computation of time for doing an act or thing. In this case, 2nd December 2020, being the date when the Applicant received its letter of notification, is excluded when computing the time within which the Applicant was required to file its Request for Review. As a result, the same ought to have been filed by 16th December 2020. The Applicant's Request for Review was filed on 3rd December 2020 and the same is therefore within the statutory period of fourteen (14) days under section 167 (1) of the Act.

Accordingly, the Board finds that the Applicant’s Request for Review was filed within the statutory period of 14 days specified in section 167 (1) of the Act.

On the third sub-issue of the first issue for determination, the Respondent and the Interested Party raised another objection to the jurisdiction of this Board by dint of section 167 (4) (c) of the Act. At paragraph 12 of the Respondent’s Response, the Respondent states that the Procuring Entity entered into a contract with the Interested Party on 1st December 2020 in line with section 135 of the Act and thus the Board has no jurisdiction to entertain the Request for Review. On its part, the Interested Party depones at paragraph 18 of its Replying Affidavit that it signed a contract with the Procuring Entity on 1st December 2020, which was also the effective date of the said contract.

In addressing the issue under consideration, the Board observes that section 167 (4) (c) of the Act states that: -

"The following matters shall not be subject to the review of procurement proceedings under subsection (1)—

(a);

(b); and

(c) where a contract is signed in accordance with section 135 of this Act"

Section 167 (4) (c) of the Act imposes a condition that the Board's jurisdiction can only be ousted where a contract is signed in accordance with section 135 of the Act. The Board is mindful of its finding that the Applicant was notified of the outcome of its tender on 2nd December 2020 and thus had up to 16th December 2020 to file a Request for Review before this Board. The timeline of 14 days expressed in section 167 (1) of the Act is hinged on a stand-still period imposed by section 135 (3) of the Act which states that: -

"The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period"

Having found the Applicant had up to 16th December 2020 to file a Request for Review, the Board observes that the earliest date that the Procuring Entity could sign a contract with the Interested Party was 17th December 2020 whilst ensuring they do so within the tender validity period. The Board was furnished with a contract dated 1st December 2020 between the Procuring Entity and the Interested Party signed even before the Applicant received its letter of notification of unsuccessful bid on 2nd December 2020 and in violation of section 135 (3) of the Act. The contract between the Procuring Entity and the Interested Party was subject to the provisions of section 135 (3) of the Act which stipulates a mandatory stand-still period of 14 days during which no execution of contract is permissible so as to protect the right to administrative review specified in section 167 (1) of the Act. The contract dated 1st December 2020 is void ab initio because it seriously

offends the provisions of section 135 (3) of the Act read together with section 167 (1) of the Act and thus the same cannot be allowed to stand.

Accordingly, the Board finds that the contract between the Procuring Entity and the Interested Party signed on 1st December 2020 was not entered in accordance with section 135 (3) of the Act, thus rendering the said contract null and void.

On the fourth sub-issue of the first issue for determination, the Applicant alleged at paragraph 2 and 5 of its Request for Review that the Procuring Entity breached section 97 (2) of the Act and Regulation 119 of Regulations 2020 by uploading a Tender Notice dated 1st October 2020, on the Public Procurement Information Portal on 2nd October 2020 and thereafter, specifying a deadline of 8th October 2020 within which to submit tenders. In the Applicant's view, the aforementioned provisions of law stipulate a minimum period of 7 days and not 6 days as specified by the Procuring Entity in this case. The Applicant further states that any clarification may have been sought by tenderers and the period of 6 days was too short for any engagement with the Procuring Entity. At paragraph 5 of the Respondent's Response, the Respondent states that the Tender Notice was dated 1st October 2020 with a tender submission deadline set for 8th October 2020, therefore bidders had adequate time for preparation of their tenders. On its part, the Interested Party depones at paragraph 8 of its Replying Affidavit that pursuant to Clause 2.2.1 of Section II. Instructions to Candidates of the

Tender Document, bidders had sufficient time between 2nd October 2020 and 8th October 2020 to seek clarifications from the Procuring Entity and therefore the time provided for preparation of tenders was reasonable.

From the foregoing submissions, the Board observes that the Applicant challenges the period set by the Procuring Entity for submission of tenders as stipulated in the Tender Notice dated 1st October 2020 by stating the tender notice was uploaded on the Public Procurement Information Portal on 2nd December 2020. The Applicant also acknowledges that in preparing tenders, it was likely for tenderers to seek clarifications from the Procuring Entity and thus in the Applicant's view, the Procuring Entity provided a period of 6 days that was too short for preparing tenders. It is evident from the foregoing that the Applicant is raising an alleged breach by the Procuring Entity whilst relying on section 97 (2) of the Act which states that: -

- "1) The time allowed for the preparation of tenders shall not be less than the minimum period of time prescribed for the purpose of this subsection.***
- (2) For the purpose of this section, the time allowed for the preparation of tenders shall be exclusive of the day of the tender notice."***

Regulation 119 of Regulations 2020 prescribes the period for preparation of tenders as follows: -

"Pursuant to sections 125 and 97 of the Act the time for preparation of proposal shall be a minimum period of seven days"

Despite acknowledging that tenderers may seek clarification when preparing their tenders, the Applicant did not provide any evidence that it intended to raise any queries with the Procuring Entity regarding the time allocated for preparation of tenders in response to the Tender Notice dated 1st October 2020, especially because Clause 2.2.1 of Section II. Instructions to Candidates of the Tender Document referred to by the Interested Party gave bidders leeway to raise queries with the Procuring Entity. This was an opportunity for the Applicant to seek clarification whether the Procuring Entity is willing to extend the tender submission deadline if the Applicant felt the period given was not sufficient. The Applicant did not furnish the Board with any evidence that it sought or intended to seek clarification from the Procuring Entity which failed to address the Applicant's query on the period for submission of tenders. Furthermore, the Applicant did not approach this Board by way of a Request for Review since section 167 (1) of the Act gives candidates the right to seek administrative review, which they may exercise before subjecting themselves to a procurement process within 14 days from the date of occurrence of an alleged breach by a procuring entity at any stage of the procurement process. The tender submission deadline was 8th October 2020 which was the latest day any candidate to the subject matter would have obtained, prepared and submitted the Tender document if it wished to participate in the subject procurement process as a tenderer. It is the Board's considered view that the Applicant was aware of an alleged

breach by the Procuring Entity, latest on the tender submission deadline of 8th October 2020 and thus had 14 days after 8th October 2020 to file a Request for Review challenging the period provided for submission of tenders.

This means, the Applicant ought to have filed a Request for Review, latest by 22nd October 2020 raising an alleged breach of section 97 (2) of the Act and Regulation 119 of Regulations 2020 but instead, sat on its right to administrative review and raised this ground in a Request for Review filed on 3rd December 2020. The Applicant's allegation that the Procuring Entity breached section 97 (2) of the Act and Regulation 119 of Regulations 2020 has been raised outside the period of 14 days specified in section 167 (1) of the Act thus depriving the Board of jurisdiction to entertain the same.

On the fifth sub-issue of the first issue for determination, the Applicant alleged at paragraph 12 (a) and (b) of its Request for Review that pursuant to section 64 of the Act all communications and enquiries between parties to procurement and asset disposal proceedings shall be in writing. In the Applicant's view, the Tender Notice dated 1st October 2020, instructed tenderers who may experience challenges in accessing and uploading their tender on the Integrated Financial Management Information System (IFMIS) to contact the Procuring Entity through "**0740821542**" for assistance or clarifications. As a result, the Applicant states that the directive given by the Procuring Entity for tenderers to make phone calls violates section 64 of the Act and would amount to canvassing. At paragraphs 23 and 24 of the

Respondent's Response, the Respondent cites the provision of section 64 of the Act to support its view that it acted within section 64 (2) (d) of the Act which permits the use of Information and Communication Technology in procurement and asset disposal proceedings in requesting for information on the tender or disposal process. In the Respondent's view, the Procuring Entity's official number (0740821542) would allow tenderers to contact the Procuring Entity should they experience challenges in accessing and uploading their tenders on IFMIS.

Having considered parties' pleadings, the Board would like to simply reiterate that the Applicant had full knowledge of the Tender Notice dated 1st October 2020 which provided that: -

"bidders who may experience challenges in accessing and uploading bids in the IFMIS please call 0740821542 for assistance and clarifications"

The Applicant participated in the subject procurement process by submitting its bid by the tender submission deadline of 8th October 2020 and never challenged the Procuring Entity's action of providing a phone number for assistance or clarifications if the Applicant felt the same violated section 64 of the Act. By the tender submission deadline of 8th October 2020, the Applicant was well aware that a phone number had been provided by the Procuring Entity for assistance and/or clarifications thus ought to have approached this Board at the latest within fourteen (14) days after 8th October 2020 2020 challenging the use of phone numbers to facilitate

communications between the Procuring Entity and tenderers but instead, raised this ground in a Request for Review filed on 3rd December 2020.

The Applicant's allegation that the Procuring Entity breached section 64 of the Act has been raised outside the statutory period of 14 days specified in section 167 (1) of the Act thus depriving the Board of jurisdiction to entertain the same.

At this juncture, the Board would like to emphasize that it was never the intention of the legislature that candidates or tenderers would abuse the options provided in section 167 (1) of the Act. It has often been the habit of some candidates to participate in a procurement process as tenderers by submitting a tender and for such tenderers to sit patiently waiting for the outcome of their tenders. If such outcome is not favourable, they raise alleged breaches of the Act before this Board even if they learnt of such breaches during the early stages of a procurement process. Such applicants in most instances file request for review applications raising complaints that they ought to have raised before subjecting themselves to a procurement process to delay or nullify a procurement process so as to have a second bite at the cherry by submitting a fresh bid if the Board orders for a re-advertisement of the tender in issue or re-tendering of a procurement process.

Despite the fact that section 167 (1) of the Act gives candidates the right seek administrative review, the Applicant sat on this right, participated in the

subject procurement process as a tenderer, waited patiently for the outcome of its tender and is now raising alleged breaches on the time for submission of tenders and manner of communication between a procuring entity and tenderers, which allegations ought to have been raised, at the latest, within fourteen days after 8th October 2020.

It is important to emphasize that the Request for Review also raised other grounds regarding; responsiveness of the Applicant's tender, period of evaluation of tenders, issuance of notification letters to tenderers and identity of the successful tenderer. These grounds were not raised out of time because the Applicant only learnt of alleged breaches of the Act by the Procuring Entity in so far as the aforelisted grounds are concerned, after receiving its letter of notification of unsuccessful bid, which we have found was received by the Applicant on 2nd December 2020. However, the Applicant's allegations that the Procuring Entity breached section 97 (2) of the Act and Regulation 119 of Regulations 2020 (time for submission of tenders) and section 64 of the Act (Communications in procurement and asset disposal proceedings) have been raised outside the period of 14 days specified in section 167 (1) of the Act thus depriving the Board of jurisdiction to entertain the same. The effect of this finding is that the Board shall not address the second and third issues framed for determination.

In a nutshell, the objections raised by the Procuring Entity and the Interested Party with respect to sub issue a, b and c of issue number 1 fail and the Board finds that it has jurisdiction to entertain the Request for Review in so

far as the grounds on; responsiveness of the Applicant's tender, period of evaluation of tenders, issuance of notification letters to tenderers and the identity of the successful tenderer are concerned.

The fourth issue for determination relates to the manner in which the Procuring Entity evaluated the Applicant's tender at the Preliminary Evaluation Stage. At paragraph 8 of its Request for Review, the Applicant avers that its tender was found non-responsive on the premise that the same was not submitted through IFMIS. The Applicant avers that the instructions regarding IFMIS were given in the Tender Notice dated 1st October 2020 which is not part of the Tender Document. In the Applicant's view, the Tender Document did not require tenders to be submitted through IFMIS and as such the Procuring Entity erred in finding the Applicant's tender non-responsive. At paragraph 27 to 29 of the Respondent's Response, the Respondent states that a tendering process commences from a tendering notice and as such it cannot be said that the Tender Notice dated 1st October 2020 is not part of the Tender Document. According to the Respondent, the Tender Notice to the general public specified that a complete set of tender documents should be submitted through the IFMIS supplier portal. The Respondent further states that if the Applicant was desirous of a successful tender it should have complied with all requirements of the tender. The Interested Party on the other hand deponed at paragraph 11 of its Replying Affidavit that the Tender Document and the Tender Notice are one and the same. In the Interested Party's view, the Applicant's assertion that the

Tender Document did not direct tenderers to submit soft copies and hard copies of their bids is erroneous and misleading.

The crux of the issue under consideration falls squarely on an interpretation of the term **"Tender Notice"** and whether a Tender Notice is part of a Tender Document so as to establish the procedures and criteria for evaluation applicable in the subject procurement process.

Section 2 of the Act does not give an interpretation for the word **"Tender Notice"**. However, several provisions of the Act provide guidance on what the word **"Tender Notice"** means. For instance, section 96 on advertisement of an open tender states as follows: -

- "(1) The accounting officer of a procuring entity shall take such steps as are reasonable to bring the invitation to tender to the attention of those who may wish to submit tenders.***

- (2) Despite the provisions of subsection (1), if the estimated value of the goods, works or services being procured is equal to, or more than the prescribed threshold for county, national and international advertising, the procuring entity shall advertise in the dedicated Government tenders' portals or in its own website, or a notice in at least two daily newspapers of nationwide circulation.***

- (3) In addition to subsection (2) a procuring entity shall—**
- (a) use Kenya's dedicated tenders' portal or any other electronic advertisements as prescribed; and**
 - (b) post advertisements at any conspicuous place reserved for this purpose in the premises of the procuring entity.**
- (4) In regard to county-specific procurements pursuant to section 33, the procuring entity shall advertise the notice inviting expressions of interest in the dedicated Government tenders portal; in its own website, or in at least one daily newspaper of county-wide circulation.**
- (5) Where the estimated value of the goods, works or services being procured is below the prescribed threshold for national advertising, the procuring entity shall advertise using the options available in subsection (3) (a) and (b)''**

The foregoing provision gives the accounting officer an obligation to alert prospective tenderers of an invitation to tender. The accounting officer does so by publishing a notice in the dedicated Government Tenders' Portal, the Procuring Entity's own website, or a notice published in at least two daily newspapers of nationwide circulation. In the case of county-specific procurements, the procuring entity advertises a notice inviting expressions

of interest in the dedicated Government tenders' portal, the procuring entity's website, or at least one daily newspaper of county-wide circulation. This explains why in most instances an advertisement found in the Government Tenders' Portal, a Procuring Entity's Website or in Newspapers may be termed as a Tender Notice or an Advertisement Notice. Other institutions such as the World Bank and the United Nations Development Programme (UNDP) refer to their notices as "**Procurement Notice**" as can be seen from the notices published on the official website of World Bank (i.e. www.worldbank.org.) and that of UNDP (procurement-notices.undp.org). The Board observes that other public institutions refer to this notice as an "**Invitation Notice**" because by the very nature of the advertisement, a procuring entity invites tenders from eligible companies. In essence, a notice which is published for the general public may be referred to as a "**Tender Notice**", "**Advertisement Notice**", "**Procurement Notice**" etc.

The Board studied section 2 of the Act and notes that the term "candidate" is defined as: -

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

On its part, section 98 on provision of tender documents states as follows: -

"(1) Upon advertisement, the accounting officer of a procuring entity shall immediately provide copies of the tender documents and in accordance with the invitation

to tender and the accounting officer shall upload the tender document on the website.

(2) The accounting officer of a procuring entity may charge such fees as may be prescribed for copies of the tender documents.”

Section 98 of the Act gives guidance that an advertisement, which is basically a Tender Notice precedes a Tender Document, hence the reason why an accounting officer of a procuring entity issues a Tender Document after publishing/advertising a tender through a Tender Notice.

It is therefore evident that a **“Tender Notice”**, which may also be referred to as an **“Invitation Notice”**, **“Advertisement Notice”** or a **“Procurement Notice”** is separate from a Tender Document. In the Board’s view, a Tender Notice simply invites tenders from prospective tenderers and the same ought to guide prospective tenderers on where they can obtain the tender documents and the fees payable. On the other hand, the Tender Document enables prospective tenderers to acquaint themselves with all the eligibility and mandatory requirements (including technical specifications) that they ought to take into account in preparing their tenders, because the Tender Document sets out the procedures and criteria for evaluation and comparison of tenders. We say so because section 80 (2) of the Act is very clear in stating that: -

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

Having found that a Tender Notice is separate and distinct from a Tender Document, it is not lost to the Board that in most tender documents, the procuring entity may insert provisions dealing with **"Invitation to Tender"** or **"Invitation for Bids"** which in most cases may include some of the contents that were included in the **"Tender Notice"**. To buttress this view, the Board studied section 74 of the Act which states that: -

"(1) The accounting officer shall ensure the preparation of an invitation to tender that sets out the following—

- (a) the name and address of the procuring entity;***
- (b) the tender number assigned to the procurement proceedings by the procuring entity;***
- (c) a brief description of the goods, works or services being procured including the time limit for delivery or completion;***
- (d) an explanation of how to obtain the tender documents, including the amount of any fee, if any;***
- (e) an explanation of where and when tenders shall be submitted and where and when the tenders shall be opened;***
- (f) a statement that those submitting tenders or their representatives may attend the opening of tenders;***
- (g) applicable preferences and reservations pursuant to this Act;***

- (h) a declaration that the tender is only open to those who meet the requirements for eligibility;***
- (i) requirement of serialization of pages by the bidder for each bid submitted; and***
- (j) any other requirement as may be prescribed"***

One of the provisions that is commonly found in a Tender Notice and the Invitation to Tender is the requirement under section 74 (1) of the Act on how to obtain the tender documents including any fee that is payable. It is the Board's considered view that the Act gives guidance to the accounting officer on the mandatory provisions to be taken into account when preparing an invitation to tender because the invitation to tender is found in the Tender Document and would therefore be part of the procedures and criteria contemplated in section 80 (2) of the Act. On the other hand, a Tender Notice is simply an **"Invitation to Treat"** inviting prospective tenderers to express their willingness to participate in a tender process by submitting their bid documents.

Turning to the instant case, the Board observes that it is only the Tender Notice dated 1st October 2020 which mentions submission of tenders through IFMIS portal whilst stating that: -

"the completed set of tender documents should be submitted through the IFMIS portal and in plain sealed envelope indicating "Tender No. and Name" in "ORIGINAL" and "COPY"

properly tape bound without identifying the sender and addressed to:

***'COUNTY SECRETARY
COUNTY GOVERNMENT OF NAKURU
P.O BOX 2870-20100
NAKURU''' [Emphasis by the Board]***

On its part, Section I. Letter of Invitation of the Tender Document contains the following details: -

"To [name and address of Candidate] Date. 1st October 2020

Dear Sir/Madam,

1.1. The County Government of Nakuru invites proposals for the proposed Supply, Installation, Configuration, Customization, Commissioning and Maintenance of an Integrated Revenue Collection Management System (ICRMS)

1.2. More details of the services are provided in the terms of reference herein.

1.3. The Request for Proposal (RFP) includes the following documents: -

Section I -Letter of Invitation.

Section II -Instructions to Candidates

Section III -Terms of Reference

Section IV -Technical Proposal

Section V -Financial Proposal

Section VI -Standard Contract Form (where applicable)

1.4. On receipt of this SRQ (C & D) please prepare your quotation as required and return before the date and time indicated in the tender document.

1.5. This invitation to bid is open to all eligible bidders”

Clause 2.5.3 and Clause 2.5.4 of Section II. Instructions to Candidates of the Tender Document further state that: -

"2.5.3. The original and all copies of the Technical Proposal shall be placed in a sealed envelope clearly marked "TECHNICAL PROPOSAL" and the original and all copies of the financial quotation in a sealed envelope duly marked "FINANCIAL QUOTATION". Both envelopes shall be placed in an outer envelope and sealed. This outer envelope shall bear the procuring entities address and other information indicated in the appendix to instructions to candidates and clearly marked "DO NOT OPEN before 8th October 2020 at 11.00 am" [Emphasis by the Board]

2.5.4 The completed Technical proposal and financial quotation must be delivered at the submission address on or before the time and date of the submission of the quotations indicated in the appendix to instructions to candidates”

The Board studied the Appendix to Instructions to Candidates which is referenced in Clause 2.5.4 of Section II. Instructions to Candidates of the Tender Document but did not find any provision clarifying the address, time and date of the submission of tenders. It is only Clause 2.5.3 of Section II. Instructions to Candidates of the Tender Document which required tenderers to indicate the Procuring Entity’s address on the outer envelope of their respective Technical Proposals and Financial Quotations. It is also worth noting that the criteria and procedures for evaluation at the Preliminary Evaluation Stage was clearly outlined in Clause 15.1 Responsiveness to Requirements of Section II. Instructions to Tenderers of the Tender Document as follows: -

MR1	Provide Copies of their Certificate of Registration or Incorporation and any other Company Compliance Certificate/Document	Attach copies
MR2	Meet Statutory requirements including Tax Compliance, VAT Registration, PIN Certificate	Serial No. Expiry Date
MR3	Demonstrate evidence of history and capability to handle revenue collection and a large number of transactions both locally and internationally	Attach relevant documents
MR4	Must submit a duly filled up Confidential Business Questionnaire in format provided	Duly filled and signed
MR5	Must provide a bid security of at least 2% of the quoted price from a commercial bank or insurance company approved	Attach a copy

MR6	A duly executed agreement if two or more firms are jointly responding to the tender being evidence of the said firms' collaboration.	Attach a copy
MR7	Must fill in the Form of Tender in the format provided	Duly Filled and signed
MR8	The declaration form should be signed by the authorized signatory of the bidder for joint venture	Signed Copy
MR9	Attendance/Signing of pre-tender site visit form if required	Signed Register
	NR/R	

Key: R-Responsive, NR-Non-Responsive

It is evident that the criteria and procedures specified in Clause 15.1 Responsiveness to Requirements of Section II. Instructions to Tenderers of the Tender Document do not include submission of tenders through IFMIS portal. Section 80 (2) of the Act gives the Procuring Entity an obligation to stick to the procedures and criteria set out in the Tender Document and in this case the procedure applicable was submission of tenders through the Procuring Entity's address indicated on the outer envelope of tenderers' respective Technical Proposals and Financial Quotations. This therefore means, since the Tender Document did not include submission of tenders via IFMIS Supplier Portal, tenderers had an obligation to submit their bids through the Procuring Entity's address indicated on the outer envelope of a tenderer's respective Technical Proposals and Financial Quotations. Submission of tenders via IFMIS Supplier Portal did not form part of the procedures and criteria set out in the Tender Document for evaluation and comparison of tenders, because this requirement was only stated in the Tender Notice dated 1st October 2020 which we have found is not part of the Tender Document applicable in the subject procurement process. As a result, the requirement of IFMIS Supplier Portal was an extraneous criterion

which ought not to have been applied to the detriment of the Applicant having failed to specify the same as part of the procedures and criteria set out in the Tender Document.

The Board observes that Clause 1.3 of Section I. Letter of Invitation of the Tender Document states that: -

"The request for proposal (RFP) included the following documents:

Section I-Letter of Invitation

Section II -Instructions to Candidate

Section III-Terms of Reference

Section IV-Technical Proposal

Section V- Financial Proposal

Section VI-Standard Contract Form (where applicable)"

Submit"

It is evidence that Clause 1.3 of Section I. Letter of Invitation of the Tender Document formed part of the procedures in the Tender Document. According to the Evaluation Report of 5th November 2020, the outcome of Preliminary Evaluation was outlined as follows: -

S/N	Requirement Description	Bidder 1 Sense Networks Consultants	Bidder 2 KAPS Ltd	Bidder 3 Technoedge Ltd	Bidder 4 RiverBank Solutions	Bidder 5 Dynamic Financial and IT Research Consulting Ltd	Bidder 6 Nouveta Ltd	Bidder 7 Strathmore Research and Consultancy Centre Ltd	Sybil Kenya Ltd
1	Letter of Invitation	X	√	X	X	√	X	X	X
2	IFMIS & Hard Copy Submission	√	X	X	X	√	X	√	X
3	Certificate of Registration	√	√	√	√	√	√	√	√
4	Valid Tax Compliance Certificate	√	√	√	√	√	√	√	√
5	Demonstration. Revenue collection	√	√	√	√	√	√	√	√
6	Fully filled Business Questionnaire	√	√	X	√	√	√	√	√
7	Bid Security 2% of quoted price	√	√	X	√	√	√	X	√
8	Duly executed agreement	√	√	√	√	√	√	√	√
9	Form of Tender	-	-	-	-	-	-	-	-
10	Bidder Declaration Form	√	X	X	√	√	X	√	X
11	Signed Pre-tender visit form/certificate	x	√	X	√	√	X	X	√
	Firm's Responsiveness	NR	NR	NR	NR	R	NR	NR	NR

The Board studied the Applicant's original bid but did not find a Letter of Invitation attached therein, which we note, formed part of the procedures applicable in the Tender Document, and thus one of the documents to be submitted by tenderers by virtue of Clause 1.3 of Section I. Letter of Invitation of the Tender Document.

In totality of the issue under consideration, the Board finds that the Procuring Entity failed to evaluate the Applicant's tender at the Preliminary Evaluation Stage because the Procuring Entity applied a criterion on submission of tenders via IFMIS Supplier Portal which did not form part of the procedures and criteria set out in the Tender Document contrary to section 80 (2) of the Act.

The fifth issue for determination relates to the Applicant's allegation at paragraph 10 of its Supporting Affidavit that evaluation of bids in the subject tender took longer than usual. To support its argument, the Applicant avers that the Procuring Entity never communicated the status of the subject procurement process after the tender submission deadline of 8th October 2020, did not notify the Applicant of site visits which formed part of Technical Evaluation and no communication was made on the outcome of the Applicant's tender. The Applicant further states that upon writing to the Respondent on 23rd November 2020, it did not receive any communication from the Procuring Entity and thus concluded that finalization of the subject procurement process, specifically evaluation of tenders had taken longer than usual. At paragraph 19 and 20 of the Respondent's Response, the Respondent refers the Board to section 80 (6) of the Act to support its position that evaluation of tenders in the subject tender was carried out within the statutory period of 30 days and an Evaluation Report submitted on 5th November 2020.

It is worth noting that despite having used several aspects of Request for Quotations in the subject procurement process, the Procuring Entity advertised the subject tender openly for the general public. As such, section 80 (6) of the Act on the period of evaluation is applicable in the circumstances. The said provision states as follows: -

"The evaluation shall be carried out within a maximum period of thirty days"

In addressing this issue, the Board is mindful that on several occasions in the past, it has addressed the meaning of the word **"evaluation"** so as to make a determination on the date from which the period of 30 days under section 80 (6) of the Act ought to start running. Having considered provisions of the Act and Regulations 2020, the Board observes there is no express provision therein stating the date from which the 30 days for evaluation ought to start running. In **PPARB Application No. 136 of 2020, Chania Cleaners Limited v. The Accounting Officer, National Social Security Fund & Another** (hereinafter referred to as the "Chania Cleaners Ltd Case"), the Board considered the meaning of **"tender evaluation"** provided in the Third Schedule of Regulations 2020 and held as follows: -

"Tender evaluation — is the process used to identify the most preferred bidder technically and financially. This process should not take more than 30 calendar days... Having established that evaluation is the process of identifying the most preferred bidder technically and financially, it means

that the period of 30 days for evaluation ought to be the number of days taken by an evaluation committee to identify the most preferred bidder that is technically and financially responsive. Therefore, the number of days between commencement of evaluation and signing of the evaluation report would constitute the period taken to determine the preferred bidder that is both technically and financially responsive” [Emphasis by the Board]

In the Chania Cleaners Limited Case, the Board held that that the period of 30 days for evaluation ought to be the number of days taken by an evaluation committee to identify the most preferred tenderer that is technically and financially responsive. In most instances, the Tender Document does not specify the date from which evaluation ought to start running. In addition to this, the Act and Regulations 2020 are both silent on the issue, save for the Third Schedule to Regulations 2020 which states that evaluation shall take 30 calendar days.

Turning to the circumstances in the instant Request for Review, the Board studied the Tender Document and notes that there is no provision therein specifying the date from which evaluation would commence in the subject procurement proceedings. This leaves the Board with no option but to determine the number of days taken by the Evaluation Committee to identify the most preferred tenderer that is technically and financially responsive. From the Evaluation Report, the Evaluation Committee commenced

evaluation of tenders on 14th October 2020 and submitted a signed Evaluation Report on 5th October 2020. This means, evaluation of bids in the subject tender took 23 days starting from 14th October 2020 up to 5th November 2020, which was within the 30 days specified in section 80 (6) of the Act.

To that end, the Board finds that the Procuring Entity evaluated bids in the subject tender within the maximum period of 30 days specified in section 80 (6) of the Act.

On the sixth issue for determination, the Applicant depones at paragraph 20 of its Supporting Affidavit that the delay in issuing notification to the Applicant was a calculated move to deny the Applicant the opportunity of seeking administrative review pursuant to section 167 (1) of the Act. The Applicant further avers at paragraph 10 of its Request for Review that the letter of notification of unsuccessful bid addressed to it was made in contravention of section 87 (3) of the Act for failure to disclose the identity of the successful tenderer. The Board observes the Respondent and the Interested Party did not respond to this allegation but only stated that notification was made to all tenderers on 6th November 2020, which allegation we have found to be untrue.

As regards notification to unsuccessful tenderers, section 87 (3) of the Act provides that: -

"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"

On its part, Regulation 82 of Regulations 2020 provides as follows: -

- "(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"***

On the first limb of the issue under consideration, the Board would like to emphasize that section 87 (3) of the Act and Regulations 2020 required successful tenderers to be notified the same time unsuccessful tenderers are notified so as to enable unsuccessful tenderers to challenge the decision on their respective bids, if they wish to do so. It is also an offence under section 176 (1) (f) of the Act to **"knowingly withhold notification to an**

unsuccessful tenderer.” It was therefore not the intention of the legislature that a procuring entity would notify the successful tenderer and unsuccessful tenderer on different dates. Such action is unlawful and calculated to ensure an aggrieved tenderer does not exercise their right to administrative review while on the other hand, the procuring entity and the successful tenderer proceed to sign a contract. The Respondent herein has an obligation of ensuring the letters of notification to the successful tenderer and unsuccessful tenderers are issued at the same time.

The second limb of the issue under consideration relates to the ingredients of a letter of notification. The Board studied the Tender Document and notes that apart from submitting a tender price, tenderers were further instructed to indicate the Commission of Total Revenue Collection as part of their Financial Proposal in accordance with Section V. Financial Quotation of the Tender Document.

Having compared section 87 (3) of the Act and Regulation 82 of Regulations 2020, the Board observes that a letter of notification of unsuccessful bid (i) is issued in writing and made at the same time the successful tenderer is notified, (ii) it discloses the reasons relating to non-responsiveness of the unsuccessful tenderer’s tender, (iii) it includes the name of the successful tenderer, the tender price and the reason why the bid was successful in accordance with section 86 (1) of the Act and in this case such reason would be whether the successful tenderer submitted the lowest evaluated tender

price and the commission chargeable on the total Revenue Collected through the Integrated Revenue Collection Management System.

The letter of notification of unsuccessful bid dated 6th November 2020 addressed to the Applicant only informed it of the reason why its tender was unsuccessful as the same contains the following details: -

"Reference is made to your participation in the referenced tender, you are hereby notified that your bid for the Proposed Supply, Installation, Configuration, Customization, Testing, Commissioning and Maintenance of Integrated Revenue Collection Management System (ICRMS) was not successful as you did not submit bid document through IFMIS System as instructed in the tender advert

We wish to thank you for showing interest in our tender and wish you success in future applications.

Yours Faithfully

[signature affixed]

Joseph Muchinah Gitau

Chief Officer-Finance

Nakuru County

The Respondent did not disclose the identity of the successful tenderer, the price at which award was made to the successful tenderer neither was there

an indication whether the successful tenderer was the lowest evaluated tenderer and the commission of total Revenue Collected chargeable through the Integrated Revenue Collection Management System. Furthermore, there was no proof that the letter of notification of unsuccessful bid to the Applicant was issued/dispatched the same time as the letter of notification of successful bid to the Interested Party.

Evidently, the Applicant's letter of notification of unsuccessful bid dated 6th November 2020 did not meet the threshold set by section 87 (3) of the Act read together with Regulation 82 of Regulations 2020 and thus cannot be allowed to stand.

On the last issue for determination, the Applicant states at paragraph 13 of its Request for Review that the identity and existence of the Interested Party may be in issue and as such, the Interested Party did not comply with Section 15 of the Tender Document. At paragraph 23 of its Replying Affidavit, the Interested Party refuted the Applicant's allegation whilst stating that the Interested Party is a credible company registered in Kenya with all the relevant credentials having complied with the requirements under section 15 of the Tender Document. To support this position, the Interested Party referred the Board to Annexure JNM 5a, b and c attached to the Interested Party's Replying Affidavit stating that the same are true copies of its Certificate of Incorporation, Tax Compliance Certificate and KRA PIN Certificate.

Having considered the foregoing submissions, the Board studied the Tender Document and notes that Section 15 referred to by the Applicant deals with Evaluation of Technical Proposals with requirements for Preliminary Evaluation outlined in Clause 15.1. Clause 15.2 deals with Detailed Evaluation of Technical Proposals, whereas Clause 15.3 and Clause 15.4 deal with IRCMS Demonstration and Success Bid in Technical Evaluation, respectively. The Applicant did not particularize the manner in which the Interested Party failed to comply with the requirements of Section 15 which we observe contains documents to be considered at Preliminary Evaluation and other technical specifications which were evaluated through the first component of Detailed Evaluation of Technical Proposals and the second component referred to as IRCMS Demonstration. Thereafter, the Procuring Entity applied Clause 15.4 to determine the overall technical score achieved by a tenderer during Detailed Technical Evaluation and IRCMS Demonstration to determine whether they meet the minimum technical score of 75% required to proceed to Financial Evaluation.

To ascertain the existence and identity of tenderers, the Procuring Entity directed tenderers to provide; copies of their Certificate of Registration or Incorporation and any other Company Compliance Certificate/Document required to demonstrate compliance with statutory requirements on Tax Compliance, VAT Registration & PIN Certificate. Tenderers were also directed to submit a duly completed Business Questionnaire in the format provided in the Tender Document. The Board compared the Annexures attached to

the Interested Party's Replying Affidavit to the documentation in its original bid and notes that the same are similar and include the following: -

- *At page 217 of its original bid, a Certificate of Incorporation No. CPR/2013/121141 issued by the Registrar of Companies stating the Interested Party was incorporated under the repealed Companies Act, Chapter 486, Laws of Kenya on 29th October 2013 as a Limited Company;*
- *At page 218 of its original bid, a KRA PIN Certificate generated on 10th March 2014 in favour of the Interested Party;*
- *At page 219 of its original bid, a KRA Tax Compliance Certificate dated 3^d February 2020 confirming that the Interested Party, Personal Identification Number P051454225W has filed relevant tax returns and paid taxes due as provided by Law and that the certificate is valid for 12 months up to 2nd February 2021;*
- *At page 222 of its original bid, a duly completed Confidential Business Questionnaire Form showing the registration details of the Interested Party including its physical location and that the directors of the Interested Party are; Joseph Nganga Mukundi and Victor Njagi Muriuki who hold 500 shares each in the Interested Party; and*
- *At page 223 of its original bid, a Single Business Permit issued by Nairobi City County on 1st April 2020 specifying that the Interested Party has been granted the said permit to undertake the business of IT Consulting.*

The foregoing documentation is sufficient evidence that the Interested Party complied with the requirements in Clause 15.1 of Section II. Instructions to

Candidates of the Tender Document regarding the existence and identity of tenderers. Having found the Applicant did not particularize the manner in which the Interested Party failed to comply with Section 15 of the Tender Document and having established the Interested Party provided sufficient documentation to demonstrate its identity and existence, the Board is of the considered view that the Applicant is engaging on a fishing expedition without any sufficient evidence to support its allegations.

Accordingly, the Board finds that the Applicant's allegation that the Interested Party's identity and existence may be in issue and as such did not comply with Section 15 of the Tender Document, has not been substantiated.

The Board observes that at paragraph 21 of its Replying Affidavit, the Interested Party deponed that it deployed massive resources to ensure the Procuring Entity does not continue losing revenue due to the shutdown of "ZIZI" system by the Applicant on 2nd December 2020. According to the Interested Party, it installed revenue management system to the Procuring Entity and that the same is fully functional in several sub-counties in major revenue streams.

It is worth noting that the Interested Party did not furnish the Board with any evidence to support its allegation that it has already deployed a system for revenue management in favour of the Procuring Entity neither did the Respondent make any averments in respect to the question whether or not the Interested Party already deployed a system for revenue management in

favour of the Procuring Entity and specifically, any loss of revenue it may have experienced. As a result, the Interested Party's allegations have not been substantiated.

In totality of the foregoing, the Board finds that the Request for Review succeeds only in terms of the finding made hereinbefore that the Procuring Entity failed to evaluate the Applicant's tender at the Preliminary Evaluation Stage in accordance with section 80 (2) of the Act in relation to the mode of submission of tenders and that the Procuring Entity's letter of notification dated 6th November 2020 did not meet the threshold of section 87 (3) of the Act read together with Regulation 82 of Regulations 2020. As a result, the Board allows the Request for Review application in 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 Contract between the Procuring Entity and the Interested Party executed on 1st December 2020 in respect of Tender No. NCG/FIN/ONT/001/2020-2021 for the Proposed Supply, Installation, Configuration, Customization, Commissioning and Maintenance of an Integrated Revenue Collection Management System (IRCMS), be and is hereby cancelled and set aside.**

- 2. The Accounting Officer of the Procuring Entity's Letter of Award of Tender No. NCG/FIN/ONT/001/2020-2021 for the Proposed Supply, Installation, Configuration, Customization, Commissioning and Maintenance of an Integrated Revenue Collection Management System (IRCMS) dated 6th November 2020 addressed to the Interested Party, be and is hereby cancelled and set aside.**
- 3. The Accounting Officer of the Procuring Entity's Letters of Notification of Unsuccessful bid in Tender No. NCG/FIN/ONT/001/2020-2021 for the Proposed Supply, Installation, Configuration, Customization, Commissioning and Maintenance of an Integrated Revenue Collection Management System (IRCMS) dated 6th November 2020 addressed to the Applicant herein and all other unsuccessful tenderers, be and are hereby cancelled and set aside.**
- 4. The Accounting Officer of the Procuring Entity is hereby ordered to reinstate all tenders declared non-responsive for failure to submit tender through IFMIS, at the Preliminary Evaluation Stage and direct the Evaluation Committee to conduct a re-evaluation at the Preliminary Evaluation Stage in accordance with the procedures and criteria set out in the Tender Document read together with section 80 (2) of the Act, taking into consideration the Board's finding in this Review.**
- 5. Further to Order No. 4 above, the Accounting Officer of the Procuring Entity is hereby directed to proceed with the**

procurement process in Tender No. NCG/FIN/ONT/001/2020-2021 for the Proposed Supply, Installation, Configuration, Customization, Commissioning and Maintenance of an Integrated Revenue Collection Management System (IRCMS) to its logical conclusion including issuance of letters of notification to the successful tenderer and all other unsuccessful tenderers in accordance with section 87 of the Act read together with Regulation 82 of Regulations 2020 within fourteen (14) days from the date of this decision.

- 6. 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 23rd day of December 2020

CHAIRPERSON

SECRETARY

PPARB

PPARB