

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO.11/2022 OF 9TH FEBRUARY 2022

BETWEEN

TUV NORD Egypt 1ST APPLICANT

AND

THE ACCOUNTING OFFICER OF

KENYA BUREAU OF STANDARDS.....1ST RESPONDENT

KENYA BUREAU OF STANDARDS..... 2ND RESPONDENT

BUREAU VERITAS.....1ST INTERESTED PARTY

WORLD STANDARDIZATION CERTIFICATION

& TESTING GROUP (SHENZHEN) CO.LTD... 2ND INTERESTED PARTY

CHINA CERTIFICATION & INSPECTION

GROUP CO.LTD..... 3RD INTERESTED PARTY

TUV AUSTRIA TURK..... 4TH INTERESTED PARTY

CHINA HANSOM INSPECTION &

CERTIFICATION CO.LTD..... 5TH INTERESTED PARTY

SGS 6TH INTERESTED PARTY

Review against the decision of the Accounting Officer, Kenya Bureau of Standards in relation to Tender No: KEBS/RT010/2021/2024 International Tender for Provision of Pre-Export Verification of Conformity (PVO) to Standards Services (Re-Tender).

BOARD MEMBERS

1. Ms. Faith Waigwa - Chairperson

2. Ms. Phyllis Chepkemboi - Member

'Tender Document').

the subject tender's blank tender document (hereinafter referred to as the and Addendum No.2 dated 24th August 2021 amending various provisions of initiative, the 1st Respondent issued Addendum No.1 dated 17th August 2021 clarifications were sought on various issues and on the 2nd Respondent's own Following a virtual pre-tender meeting held on 16th August 2021, to which

Addenda

(hereinafter referred to as the 'subject tender').

Verification of Conformity (PVO) to Standards Services (Re-Tender) KEBS/RT010/2021/2024 International Tender for Provision of Pre-Export prospective tenders on 9th August 2021, for sealed tenders for Tender No: Thereafter, invitations by email, were sent to twenty five (25) identified Tender No: KEBS/RT010/2021/2024 for Provision of Pre-Export Verification of Conformity (PVO) to Standards Services- Goods on 2nd August 2021. to procure through limited tender by way of restricted tender, Restricted The 2nd Respondent, published on its website (www.kebs.org), an intention

The Tendering Process

BACKGROUND TO THE DECISION

Mr. Stanley Miheso - Holding brief for the Acting Board Secretary

IN ATTENDANCE

- 3. Mr. Ambrose Ogeto - Member
- 4. r. Joseph Gitari - Member
- 5. QS. Hussein Were - Member

Clarifications

The 2nd Respondent offered various clarifications on the subject tender on 11th August 2021, 14th August 2021, 20th August 2021 and 24th August 2021.

Tender Submission Deadline and Opening of Tenders

The tender submission deadline for the subject tender was 31st August 2021 at 11.00 a.m. By the tender submission deadline, as captured in the minutes of tender opening dated and signed by the Tender Opening Committee on 31st August 2021 (hereinafter referred to as the 'Tender Opening Minutes'), thirteen (13) tenders submitted their tenders from the twentyfive (25) prospective tenderers invited to tender. Tenders were shortly thereafter opened in the presence of tenderers' representatives present. The following tenderers were recorded in the tender opening register of 31st August 2021 (hereinafter referred to as the 'Tender Opening Register') as having submitted documents with respect to the subject tender:

1. Bureau Veritas;

2. Cotecna Inspection SA;

3. TUV Nord Egypt, the Applicant herein;

4. TUV Rheinland;

5. TUV Austria Turk;

6. World Standardization Certification & Testing Group (Shenzhen) Co. Ltd;

7. China Certification & Inspection Group Co. Ltd;

8. Premier Verification Quality Services;

9. China Hansom Inspection & Certification Co. Ltd;

10. Helmsman Quality & Technology Services Co. Ltd;

11. LTI Testing & Certification Ningbo Co. Ltd;

At this stage, the Evaluation Committee was required to apply the criteria provided under Clause 1.1.1 Preliminary Evaluation of Section III – Evaluation and Qualification Criteria at page 27 and 28 of the Tender Document. At the end of evaluation at this stage, the Evaluation Committee found four (4) tenders non-responsive thus could not proceed to the next stage of evaluation. However, the Evaluation Committee found nine (9) tenders responsive at this stage of evaluation, which included the Applicant's tender, thus proceeded to the next stage of evaluation.

Preliminary Evaluation

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

the following three stages:

A Tender Evaluation Committee appointed by the 1st Respondent (hereinafter referred to as the 'Evaluation Committee') evaluated thirteen (13) tenders in

Evaluation of Tenders

The Applicant was represented by Abobaker Allam who signed the Tenderers Attendance Register at tender opening on 31st August 2021.

12. Societe Generale De Surveillance (SGS); and
13. Intertek International Limited

Technical Evaluation

At this stage, the Evaluation Committee was required to apply the criteria provided under Clause 1.1.2 Technical Evaluation of Section III – Evaluation and Qualification Criteria at page 28 to 31 of the Tender Document. Tenders were to be scored against the specific criteria provided and only tenders that attained a minimum score set out in the Tender Document would proceed to the next stage of evaluation. Tenders were grouped and evaluated in the respective zones tendered for.

At the end of evaluation at this stage, the Evaluation Committee found one (1) out of two (2) tenders with respect to Zone 1 non-responsive for failure to attain a minimum score of 75 marks out of 100 marks. The Applicant's tender attained a score of 48.5 marks out of 100 marks thus, could not proceed to the next stage of evaluation with respect to Zone 1.

With respect to Zone 2, the Evaluation Committee found four (4) out of eight (8) tenders non-responsive. The four (4) tenders that were found responsive proceeded to the next stage of evaluation with respect to Zone 2.

With respect to Zone 3, the Evaluation Committee found four (4) out of five (5) tenders non-responsive for failure to attain a minimum score of 80 marks out of 100 marks. The Applicant's tender attained a score of 49.5 marks out of 100 marks thus, could not proceed to the next stage of evaluation with respect to Zone 3.

With respect to Zone 9, the Evaluation Committee found one (1) out of two (2) tenders non-responsive. The one (1) tender that was found responsive proceeded to the next stage of evaluation with respect to Zone 9.

With respect to Zone 8, the Evaluation Committee found all the three (3) tenders responsive thus proceeded to the next stage of evaluation with respect to Zone 8.

With respect to Zone 7, the Evaluation Committee found three (3) out of six (6) tenders non-responsive for failure to attain a minimum score of 80 marks out of 100 marks. The Applicant's tender attained a score of 59.5 marks out of 100 marks thus could not proceed to the next stage of evaluation with respect to Zone 7.

With respect to Zone 6, the Evaluation Committee found one (1) out of two (2) tenders non-responsive. The one (1) tender that was found responsive proceeded to the next stage of evaluation with respect to Zone 6.

With respect to Zone 5, the Evaluation Committee found three (3) out of four (4) tenders non-responsive. The one (1) tender that was found responsive proceeded to the next stage of evaluation with respect to Zone 5.

With respect to Zone 4, the Evaluation Committee found one (1) out of four (4) tenders non-responsive. The three (3) tenders that were found responsive proceeded to the next stage of evaluation with respect to Zone 4.

With respect to Zone 13, the Evaluation Committee found one (1) out of three (3) tenders non-responsive for failure to attain a minimum score of 80 marks out of 100 marks. The Applicant's tender attained a score of 46.5 marks out of 100 marks thus could not proceed to the next stage of evaluation with respect to Zone 13.

With respect to Zone 12, the Evaluation Committee found two (2) out of five (5) tenders non-responsive for failure to attain a minimum score of 80 marks out of 100 marks. The Applicant's tender attained a score of 58.5 marks out of 100 marks thus could not proceed to the next stage of evaluation with respect to Zone 12.

11.
With respect to Zone 11, the Evaluation Committee found two (2) out of three (3) tenders non-responsive. The one (1) tender that was found responsive proceeded to the next stage of evaluation with respect to Zone

With respect to Zone 10, the Evaluation Committee found all three (3) tenders responsive thus proceeded to the next stage of evaluation with respect to Zone 10.

At this stage, the Evaluation Committee was required to apply the criteria provided under Clause 1.1.3 Financial Evaluation of Section III – Evaluation and Qualification Criteria at page 31 to 32 of the Tender Document.

Financial Evaluation

18.

With respect to Zone 18, the Evaluation Committee found one (1) out of three (3) tenders non-responsive. The two (2) tenders that were found responsive proceeded to the next stage of evaluation with respect to Zone

evaluation with respect to Zone 16.

With respect to Zone 16, the Evaluation Committee found five (5) out of seven (7) tenders non-responsive for failure to attain a minimum score of 80 marks out of 100 marks. The Applicant's tender attained a score of 63.5 marks out of 100 marks thus, could not proceed to the next stage of

15.

With respect to Zone 15, the Evaluation Committee found three (3) out of four (4) tenders non-responsive. The one (1) tender that was found responsive proceeded to the next stage of evaluation with respect to Zone

With respect to Zone 14, the Evaluation Committee found one (1) out of two (2) tenders non-responsive. The one (1) tender that was found responsive proceeded to the next stage of evaluation with respect to Zone 14.

Recommendation

The following tenderers were found to have submitted the highest evaluated royalty as per the Zones of the subject tender:

Zone 1 - Bureau Veritas;

Zone 2 - World Standardization Certification & Testing Group (Shenzhen) Co. Ltd;

Zone 3 -China Certification and Inspection Group Co. Ltd;

Zone 4 - TÜV Austria Turk;

Zone 5 -China Certification & Inspection Group Co. Ltd;

Zone 6 - China Hansom Inspection & Certification Co. Ltd

Zone 7 - Societe Generale De Surveillance (SGS);

Zone 8 -Societe Generale De Surveillance (SGS);

Zone 9 - Societe Generale De Surveillance (SGS);

Zone 10 -Societe Generale De Surveillance (SGS);

Zone 11 -Societe Generale De Surveillance (SGS);

Zone 12 - Societe Generale De Surveillance (SGS);

Zone 13 - Societe Generale De Surveillance (SGS);

Zone 14 - Societe Generale De Surveillance (SGS);

Zone 15 - Societe Generale De Surveillance (SGS);

Zone 16 - Societe Generale De Surveillance (SGS); and

Zone 18 -Societe Generale De Surveillance (SGS).

Notification to tenderers

The 1st Respondent approved the recommendation of the Evaluation Committee and the 2nd Professional Opinion on 16th December 2021 having earlier approved the recommendations contained in the 1st Professional Opinion on 18th October 2021.

audits and review.

due diligence fortified where the contract awarded shall be managed through subject tender for goods as recommended by the Evaluation Committee and referred to as the 'Act') and recommended the approval of award of the with the Public Procurement and Asset Disposal Act, 2015 (hereinafter Report'), opined the procurement process of the subject tender complied Committee on 14th October 2021 (hereinafter referred to as the 'Evaluation reviewed the tender evaluation report signed by members of the Evaluation December 2021 (hereinafter referred to as the '2nd Professional Opinion') '1st Professional Opinion') and another professional opinion dated 15th a professional opinion dated 15th October 2021 (hereinafter referred to as the The Chief Manager, Supply Chain of the 2nd Respondent, Ms. Jane Ndinya, by

Professional Opinion

Zone of the subject tender as enumerated hereinbefore.

tenderers that submitted tenders with the highest evaluated royalty for each The Evaluation Committee recommended award of the subject tender to the

In letters dated 22nd December 2021, the 1st Respondent notified tenderers of the outcome of the subject tender.

REQUEST FOR REVIEW NO.01/2022 OF 3RD JANUARY 2022

Interek International Limited had lodged a Request for Review dated 3rd January 2022 on even date together with a Supporting Affidavit sworn by Douglas Nyamori, its Regional Manager, Liaison Offices (EA), on 3rd January 2022 through the firm of Chepkuto Advocates, seeking the following orders:

a) The procurement proceedings in Tender No. KEBS/RT010/2021/2024 -INTERNATIONAL TENDER FOR PROVISION OF PRE-EXPORT VERIFICATION OF CONFORMITY (PVOC) TO STANDARDS SERVICES (RE-TENDER) be and are hereby annulled in their entirety and set aside.

b) That the Respondent be ordered to re-tender the tender in question in conformity with the provisions of the Constitution and the Public Procurement and Asset Disposal Act 2015, using an appropriate standard tender document issued by the Public Procurement Regulatory Authority.

c) That procuring entity be directed to prepare a fresh tender document that is complete taking into consideration the addendum and clarifications sorted by bidders where applicable.

d) The procuring entity, in preparation of the new tender document consult with the Director General of the Public Procurement Regulatory Authority to ensure that the

document is compliant with the provisions of the Act and the constitution.

e) The Respondents be compelled to pay the costs to the Applicant arising from/and incidental to this Application.
f) The Board to make such and further orders as it may deem fit and appropriate in ensuring that the ends of justice are fully met in the circumstances of this Request for Review.

REQUEST FOR REVIEW NO.04/2022 OF 5TH JANUARY 2022

Tuv Nord Egypt, the Applicant herein, had lodged a Request for Review dated 5th January 2022 on even date together with a Statement of the Applicant signed by Ahmed Marei, its Managing Director, and a Supplementary Affidavit sworn by Ahmed Marei through the firm of Gladys Wamatha Advocates, seeking the following orders:

1. Declaration that the Respondent failed in its duty as stipulated under the Public Procurement Act to either

- i. to request the Applicant for further documentary proof, of documents submitted information or authorizations that the Respondent required if any, in relation to ownership and control;
- ii. to examine and evaluate the technical aspects of the Tender submitted by the Applicant and confirm that the Applicant had actually complied with the technical requirements of the tender

2. An Order directing the Respondent to Re-evaluate the technical proposal of TUV NORD Egypt regarding Zone 16

"UAE" based on the evidences/documents submitted during

the tender.

3. An Order directing the Respondent to Re-launch the tender as it is in clear breach of the procurement act.

4. An Order for the cost of and incidental to this Request for Review

5. Such other, further, additional and/or alternative reliefs as this Honorable Board may deem just, appropriate and expedient.

CONSOLIDATION OF REQUEST FOR REVIEW NO.01/2022 OF 3RD
JANUARY 2022 WITH REQUEST FOR REVIEW NO.04/2022 OF 5TH
JANUARY 2022

The Public Procurement Administrative Review Board (hereinafter referred to as the 'Board'), upon observing the request for review applications No.01/2022 and No.04/2022 had been instituted arising from the same tender with the respondents therein being the same and on grounds for review revolving around the same tender, was satisfied that the two request for review applications met the requirements for consolidation under Regulation 215 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020'). The Board consolidated request for review applications No.01/2022 and No.04/2022 and proceeded to determine them as one request for review application and the parties in the consolidated request for review were as follows:

In determining the first issue, the Board will make a determination on the following limbs to the first issue;

1. Whether the Board has jurisdiction to hear and determine the consolidated Request for Review.

The Board in the consolidated request for review considered each of the parties' cases, documents, pleadings, written submissions, list and bundles of authorities together with confidential documents submitted to it by the respondents therein pursuant to Section 67 (3) (e) of the Act and framed the following issues for determination:

- INTERTEK INTERNATIONAL LIMITED 1ST APPLICANT
- TUV NORD Egypt 2ND APPLICANT
- THE ACCOUNTING OFFICER,
- KENYA BUREAU OF STANDARDS 1ST RESPONDENT
- KENYA BUREAU OF STANDARDS 2ND RESPONDENT
- BUREAU VERITAS 1ST INTERESTED PARTY
- WORLD STANDARDIZATION CERTIFICATE
- & TESTING GROUP (SHENZHEN) CO.LTD 2ND INTERESTED PARTY
- CHINA CERTIFICATION & INSPECTION
- GROUP CO. LTD 3RD INTERESTED PARTY
- TUV AUSTRIA TURK 4TH INTERESTED PARTY
- CHINA HANSOM INSPECTION &
- CERTIFICATION CO. LTD 5TH INTERESTED PARTY
- SOCIETE GENERALE DE SURVEILLANCE (SGS) 6TH INTERESTED PARTY

a. Whether the allegations raised by the 1st & 2nd Applicants (Intertek International Limited and Tuv Nord Egypt) in the consolidated Request for Review No.01/2022 and No.04/2022 with respect to the contents of the Tender Document, its attendant Addenda and Clarifications and the failure to read out loud the total royalties and related zone of each tender during opening of tenders on 31st August 2021 are time barred pursuant to Section 167 (1) of the Act read with Regulation 203(2)(c) of Regulations 2020 requiring the same to have been raised within 14 days of notification of award or date of occurrence of alleged breach at any stage of the procurement process.

Depending on the determination of the first limb of the first issue;

b. Whether, by dint of Section 167(4)(a) of the Act, the allegation by the 1st Applicant (Intertek International Limited) that the Respondents ought to have used the open tendering method as opposed to the restricted tendering method is not subject to review;

Depending on the determination of the second limb of the first issue;

c. Whether the 1st Applicant (Intertek International Limited) has suffered or risks suffering loss or damage due to the alleged breach of duties imposed on the 2nd Respondent by the Act and Regulations 2020;

the Act;

4. Whether the Respondents issued Addenda and Clarifications in the subject tender that materially altered the substance of the original Tender Document in contravention to Section 75(1) of

August 2021;

representatives present at the opening of tenders on 31st prepare a Tender Opening Record for execution by tenderers' for each tender during the opening of tenders and for failure to for failure to read out loud the total royalties and related zone Instructions To Tenderers at page 18 of the Tender Document read with Clause 27.5, 27.8 and 27.9 of Section I – 3. Whether the Respondents breached Section 78(6) of the Act

tender;

2. Whether the Respondents breached Section 102 of the Act read with Regulation 89 of Regulations 2020 by conducting restricted tendering for the subject tender as opposed to open

Depending on the determination of the fourth limb of the first issue;

of the Act;

d. Whether the Request for Review No.04/2022 is fatally defective for failure by the 2nd Applicant (Tuv Nord Egypt) to join the successful tenderers as parties as provided in Section 170

Depending on the determination of the third limb of the first issue;

5. Whether the Respondents breached Section 75(5) of the Act read with Clause 10.3 of Section I - Instructions To Tenderers at page 12 of the Tender Document for failure to extend the tender submission deadline after issuance of Addenda and Clarifications in the subject tender;

6. Whether the Respondents acted arbitrarily in giving effect to Section 155 of the Act by prescribing two schemes in the subject tender at the technical evaluation stage in contravention of Section 3(b) of the Act;

7. Whether the Respondents failed to clearly spell out in the Tender Document specific requirements for instructions on preparation and submission of tender that ensures preference and reservation are applied to and benefit citizen contractors contrary to Section 60(1) and 70(6)(e)(vi) of the Act;

8. Whether the Respondents breached Section 60(1) of the Act by using the Standard Tender Document template for procurement of non-consulting services instead of procurement of management services;

9. Whether the 1st Respondent's letter of notification of regret dated 22nd December 2021 notifying the 2nd Applicant (Tuv Nord Egypt) of the outcome of evaluation of the subject tender was

issued in accordance with Section 87 of the Act read with Regulation 82 of Regulations 2020.

BOARD'S ORDERS IN REQUEST FOR REVIEW NO.01/2022 OF 3RD JANUARY 2022 CONSOLIDATED WITH REQUEST FOR REVIEW NO.04/2022 OF 5TH JANUARY 2022

Upon consideration of each of the parties' cases, documents, pleadings, written submissions, list and bundles of authorities together with confidential documents submitted to the Board by the respondents pursuant to Section 67 (3) (e) of the Act and in exercise of the powers conferred upon it by Section 173 of the Act, the Board issued the following orders in the Request for Review No.01/2022 consolidated with Request for Review No.04/2022 on 24th January 2022:

1. The Request for Review No.01/2022 of 3rd January 2022 and dated 3rd January 2022 be and is hereby struck out for want of jurisdiction.
2. The letters of notification of award in Tender No: KEBS/RT010/2021/2024 International Tender for Provision of Pre-Export Verification of Conformity (PVO) to Standards Services (Re-Tender) dated 22nd December 2022 issued by the 1st Respondent to the 1st, 2nd, 3rd, 4th, 5th and 6th Interested Parties be and are hereby cancelled and set aside.
3. The letters of notification of regret in Tender No: KEBS/RT010/2021/2024 International Tender for Provision of

While making reference to the Decision of the Board dated 24th January 2022 in consolidated request for review application numbers 01 and 04 of 2022, the 1st Respondent informed the Applicant vide a letter dated 27th January 2022 that its tender was not successful outlining specific reasons for the Applicant's tender unsuccessfulness in zones 1, 3, 7, 12, 13 and 16 of the subject tender and disclosing the tenderers whose tenders were successful in zones 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 18 of the subject tender together with their respective royalty percentages.

2022

NOTIFICATION TO ENTER INTO A CONTRACT DATED 27TH JANUARY

5. Given that the Request for Review No.01/2022 consolidated with Request for Review No.04/2022 has partially succeeded, each party shall bear its own costs in the Request for Review.

4. The 1st Respondent is hereby directed to issue fresh letters of intention to enter into a contract in Tender No: KEBS/RT010/2021/2024 International Tender for Provision of Pre-Export Verification of Conformity (PVO) to Standards Services (Re-Tender) in accordance with Section 87 of the Act read with Regulation 82 of Regulations 2020 within seven (7) days from the date hereof.

1st Respondent to all the unsuccessful tenderers (including the 1st and 2nd Applicants) in the subject tender be and are hereby cancelled and set aside.

REQUEST FOR REVIEW NO.11 OF 2022

Tuv Nord Egypt, the Applicant herein, lodged this Request for Review dated 9th February 2022 on even date together with a Supporting Affidavit sworn by Ahmed Marei, its Managing Director, on 8th February 2022, Grounds of Opposition to the 1st and 2nd Respondents Preliminary Objection dated and filed on 17th February 2022 and a Further Replying Affidavit sworn by Ahmed Marei through the firm of Gladys Wamaita Advocates, seeking the following orders:

1. The notification of award of the subject tender number KEBS/RT010/2021/2024 for Provisions of Pre-Export Verification of Conformity (PvOC) to Standards Services to M/S BUREAU VERITAS, M/S WORLD STANDARDIZATIO CERTIFICATION & TESTING GROUP (SHENZHEN) CO. LTD, M/S CHINA CERTIFICATION & TESTING GROUP CO. LTD, M/S CHINA CERTIFICATION & TESTING GROUP CO. LTD, M/S TUV AUSTRIA TURK, M/S CHINA HANSON INSPECTION & CERTIFICATION CO. LTD, M/S SGS be annulled and set aside.
2. The notification of unsuccessful bid dated 27th January 2022 and addressed to the Applicant and any other bidders in the subject procurement proceedings in tender number KEBS/RT010/2021/2024 for Provision OF Pre-Export Verification OF Conformity (PvOC) to Standards Services be annulled and set aside.

3. The procuring entity be directed to re-evaluate the Applicant's bid in accordance with the criteria contained in the tender document.
4. Any other relief that the Review Board may deem fit and just to grant.
5. Costs of the Request for Review Application be provided for in favour of the Applicant.

In a Notification of Appeal and a letter dated 9thFebruary 2022, the Acting Board Secretary notified the 1st Respondent of the existence of the instant Request for Review and the suspension of procurement proceedings for the subject tender while forwarding to the 1st Respondent a copy of this Request for Review together with the Board's Circular No.02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of Covid-19. Further, the 1st Respondent was requested to submit a response to this Request for Review together with confidential documents concerning the subject tender within 5 days from 9thFebruary 2022.

The 1st Respondent filed a Notice of Preliminary Objection dated 14thFebruary 2022 and the 1st and 2nd Respondents' Memorandum of Response dated 14thFebruary 2022 on even date through the firm of Muchemix & Co. Advocates.

Vide letters dated 17thFebruary 2022, the Acting Board Secretary notified all tenderers in the subject tender, of the existence of the instant Request for Review while forwarding to the tenderers a copy of the instant Request for Review. Further, all tenderers were invited to submit to the Board any

information and arguments about the subject tender within 3 days from 17th February 2022.

On 18th February 2022, the 5th Interested Party, filed Notice of Preliminary Objection dated 16th February 2022 through the firm of Wesonga, Mumbel & Kigen Advocates.

On 23rd February 2022, the 6th Interested Party, filed the 6th Interested Party's Memorandum of Response dated 22nd February 2022 together with the 6th Interested Party's List and Bundle of Documents dated 22nd February 2022 through the firm of Muriu Mungai & Company Advocates LLP.

Pursuant to the Board's Circular No.2/2020 dated 24th March 2020, the Board dispensed with physical hearings and directed all requests for review applications be canvassed by way of written submissions. Clause 1 on page 2 of the said Circular also stated that pleadings and documents would be deemed properly filed if they bore the Board's official stamp.

On 17th February 2022, the Applicant filed Applicant's Submissions to the Preliminary Objection dated on even date together with the Applicant's Written Submissions dated 16 February 2022 and the Applicant's List of Authorities dated 17th February 2022.

On 24th February 2022, the 1st and 2nd Respondents filed Written Submissions dated 23rd February 2022.

On 18th February 2022, the 5th Interested Party filed the 5th Interested Party's Skeleton Submissions dated 16th February 2022.

The 6th Interested Party filed the Interested Party's Written Submissions dated 18th January 2021 on 19th January 2021 together with the Interested Party's List & Bundle of Authorities.

APPLICANT'S CASE

The 2nd Applicant's Managing Director posits in his Supporting Affidavit that the Applicant submitted a tender with all information that was complete, current and accurate in full satisfaction of the requirements of the Tender Document of the subject tender within the tender submission deadline yet the Applicant received a notification of regret dated 22nd December 2021 notifying it that its tender was unsuccessful.

Being aggrieved with the Respondents' decision as contained in the aforementioned notification of regret dated 22nd December 2022, the Applicant successfully challenged the same before the Board in a Request for Review No.04/2021 of 5th January 2022 and in a Decision dated 24th January 2022, the Board found the aforementioned notification of regret offended Section 87(1) and (3) of the Act read with Regulation 82(3) of Regulations 2020 for failure to disclose the specific reasons why the Applicant's tender was deemed not to have met the minimum technical requirements and for failure to disclose why the successful tenderers were deemed successful rendering the aforementioned notification of regret null and void. The Board proceeded to order the 2nd Respondent to issue fresh letters of notification of

award and notification of regret in accordance with Section 87 of the Act and Regulation 82 of Regulations 2020.

The Applicant alleges that in an attempt to comply with the orders of the Board of 24th January 2022, the 2nd Respondent issued it with a new notification of regret dated 27th January 2022. However, it is the Applicant's allegation that such notification of regret contravened Section 87(3) of the Act and Regulation 82 of Regulations 2020 to the extent that it failed to specifically disclose the reasons why the Interested Parties' tenders were deemed successful as directed in the Board's Decision of 24th January 2022, thus the same was null and void to such extent.

The Applicant further alleges that the reasons given for disqualification of its tender were arbitrary and do not reflect diligent evaluation of its tender in accordance with the criteria for evaluation set out in the Tender Document of the subject tender. The Applicant proceeded to specifically illustrate how its tender was disqualified with respect to Zone 7 and 16 of the subject tender. With respect to Zone 16 of the subject tender which the Applicant was disqualified for failure to provide the physical location and contact information including email and telephone, name, title and contact information of the person responsible for services being tendered, the Applicant alleges that it did provide the required information as follows:

Office	Physical Location	Contact Information	Name Of Person Responsible	Title & Contact Information	Evidence of Compliance in Applicant's Bid
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Document	Files Page Number	International INDEX	International INDEX
e	TUV Dubai P.O BOX 54895 MIDDLE Airport EMAIL: me-Sahil Free pcd@tuv-4 Zone-4 nord.me Eb (East Side)	TUV Office P.O BOX 46030, MIDDLE No.1, ABU DHABI E EAST Danat W.L.L Tower A, TEL: ABU M-Floor, +97124411146 DHABI Airport HEAD Road OFFIC (Behind pcd@tuv- Holiday nord.me Inn Hotel)	TUV Flat 202,
n	TUV Dubai P.O BOX 54895 MIDDLE Airport EMAIL: me-Sahil Free pcd@tuv-4 Zone-4 nord.me Eb (East Side)	TUV Office P.O BOX 46030, MIDDLE No.1, ABU DHABI E EAST Danat W.L.L Tower A, TEL: ABU M-Floor, +97124411146 DHABI Airport HEAD Road OFFIC (Behind pcd@tuv- Holiday nord.me Inn Hotel)	TUV Flat 202,
n	TUV Dubai P.O BOX 54895 MIDDLE Airport EMAIL: me-Sahil Free pcd@tuv-4 Zone-4 nord.me Eb (East Side)	TUV Office P.O BOX 46030, MIDDLE No.1, ABU DHABI E EAST Danat W.L.L Tower A, TEL: ABU M-Floor, +97124411146 DHABI Airport HEAD Road OFFIC (Behind pcd@tuv- Holiday nord.me Inn Hotel)	TUV Flat 202,
s	TUV Dubai P.O BOX 54895 MIDDLE Airport EMAIL: me-Sahil Free pcd@tuv-4 Zone-4 nord.me Eb (East Side)	TUV Office P.O BOX 46030, MIDDLE No.1, ABU DHABI E EAST Danat W.L.L Tower A, TEL: ABU M-Floor, +97124411146 DHABI Airport HEAD Road OFFIC (Behind pcd@tuv- Holiday nord.me Inn Hotel)	TUV Flat 202,

The Applicant further alleges that contrary to being disqualified for failing to provide evidence of current accreditation to ISO/IEC 17020:2012 with scope covering the products being insufficient with only 2 out of 10 scopes being provided and for not having evidence of experience in the provision of conformity assessment services as per requirement with respect to Zone 7 and 16 of the subject tender, it duly complied with these requirements as follows:

EVIDENCE OF CURRENT ACCREDITATION TO ISO/IEC 17020:2012

UAE

BOARD OF ACCREDITATION	ACCREDITATION	N	1. Egypt	ACCREDITATION CERTIFICATE	RAL	FOOD & AGRICULTURAL PRODUCTS	869 TO PRE- SHIPMENT	INSPECTION OF LABELING AND MARKING OF FINAL PRODUCTS	FIELD	PAGE	NUMBER
			1. Egypt	ACCREDITATION CERTIFICATE	RAL	FOOD & AGRICULTURAL PRODUCTS	869 TO PRE- SHIPMENT	INSPECTION OF LABELING AND MARKING OF FINAL PRODUCTS			
			1. Egypt	ACCREDITATION CERTIFICATE	RAL	FOOD & AGRICULTURAL PRODUCTS	870	INSPECTION OF LABELING AND MARKING OF FINAL PRODUCTS			
			1. Egypt	ACCREDITATION CERTIFICATE	RAL	FOOD & AGRICULTURAL PRODUCTS	886 TO	INSPECTION OF LABELING AND MARKING OF FINAL PRODUCTS			
			1. Egypt	ACCREDITATION CERTIFICATE	RAL	FOOD & AGRICULTURAL PRODUCTS	889	INSPECTION OF LABELING AND MARKING OF FINAL PRODUCTS			
			1. Egypt	ACCREDITATION CERTIFICATE	RAL	FOOD & AGRICULTURAL PRODUCTS	886 TO	INSPECTION OF LABELING AND MARKING OF FINAL PRODUCTS			

EMIRATES AUTHORITY FOR STANDARDISA AND	CERTIFICATE NUMBER UAENB179	MECHANICA PRODUCTS	2.FOOD & AGRICULTU PRODUCTS 1065	MECHANICAL PRODUCTS
EMIRATES AUTHORITY FOR STANDARDISA TION & METROLOGY	CERTIFICATE OF NOTIFICATIO N NUMBER UAENB178	PRODUCTS ELECTRONIC PRODUCTS FILE	INDEX FOR CONTRACT S TO 2183 TO 2184	EAST TUV Middle N COUNCIL for 19006B & TECHNICAL AGRICULTU 995 PRODUCTS AND FOOD & 992 to ELECTRICAL
EMIRATES AUTHORITY FOR STANDARDISA TION & METROLOGY	CERTIFICATE OF NOTIFICATIO N NUMBER UAENB177	PRODUCTS ELECTRONIC PRODUCTS FILE	INDEX OF CONTRACT S FILE TO 2181 TO 2182	EAST TUV Middle N COUNCIL for 19006B & TECHNICAL AGRICULTU 995 PRODUCTS AND FOOD & 992 to ELECTRICAL

<p>NATIONAL CERTIFICATE</p> <p>ACCREDITATION NUMBER 015</p> <p>FOR</p> <p>ON</p> <p>CERTIFICATE</p> <p>ON BODIES</p> <p>Egypt CERTIFICATE</p>	<p>FOOD</p> <p>MINERALS</p>	<p>FOOD</p> <p>AGRICULTURE</p> <p>978</p>	<p>FOOD</p> <p>AGRICULTURE</p> <p>978</p>	<p>FOOD</p> <p>AGRICULTURE</p> <p>978</p>	<p>INSPECTION</p> <p>TYPE</p> <p>FIELD</p> <p>IN</p> <p>THE</p> <p>CERTIFIED</p> <p>BODY</p>
<p>NATIONAL CERTIFICATE</p> <p>ACCREDITATION NUMBER 015</p> <p>FOR</p> <p>ON</p> <p>CERTIFICATE</p> <p>ON BODIES</p>	<p>FOOD</p> <p>PETROLEUM</p>	<p>FOOD</p> <p>AGRICULTURE</p> <p>959</p>	<p>FOOD</p> <p>PETROLEUM</p> <p>959</p>	<p>FOOD</p> <p>PETROLEUM</p> <p>959</p>	<p>INSPECTION</p> <p>TYPE</p> <p>FIELD</p> <p>IN</p> <p>THE</p> <p>CERTIFIED</p> <p>BODY</p>
<p>NATIONAL CERTIFICATE</p> <p>ACCREDITATION NUMBER 015</p> <p>FOR</p> <p>ON</p> <p>CERTIFICATE</p> <p>ON BODIES</p>	<p>FOOD</p> <p>AGRICULTURE</p>	<p>FOOD</p> <p>AGRICULTURE</p> <p>959</p>	<p>FOOD</p> <p>AGRICULTURE</p> <p>959</p>	<p>FOOD</p> <p>AGRICULTURE</p> <p>959</p>	<p>INSPECTION</p> <p>TYPE</p> <p>FIELD</p> <p>IN</p> <p>THE</p> <p>CERTIFIED</p> <p>BODY</p>

<p>CERTIFIED IN THE FIELD OF TYPE A INSPECTION BODY</p>		<p>81001</p>	<p>60</p>	<p>FOOD & AGRICULTURAL PRODUCTS</p>	<p>Administrati on file</p>	<p>ELECTRO & TECHNICAL PRODUCTS</p>	<p>Administrati on file</p>	<p>CERTIFICATE NUMBER 015</p>	<p>316003B</p>	<p>NATIONAL ACCREDITATION NUMBER 015</p>	<p>for Egypt for TUV Nord Egypt (India) is included as a physical location at the end of the scope of (accreditation)</p>
<p>CERTIFIED IN THE FIELD OF TYPE A INSPECTION BODY</p>		<p>81001</p>	<p>60</p>	<p>FOOD & AGRICULTURAL PRODUCTS</p>	<p>Administrati on file</p>	<p>ELECTRONIC PRODUCTS</p>	<p>Administrati on file</p>	<p>CERTIFICATE NUMBER 316003B</p>	<p>316003B</p>	<p>Egypt ACCREDITATION NUMBER 316003B</p>	<p>for Egypt for TUV Nord Egypt (India) is included as</p>

<p>a physical location at the end of the scope of accreditation)</p>	<p>NATIONAL ACCREDITATION NUMBER 015</p>	<p>MECHANICAL PRODUCTS</p>	<p>FOOD AGRICULTURE TO & 1040</p>	<p>CERTIFIED IN THE FIELD OF TYPE A INSPECTION BODY</p>
<p>NATIONAL ACCREDITATION NUMBER 015</p>	<p>CERTIFICATE</p>	<p>PRODUCTS</p>	<p>FOOD AGRICULTURE TO & 1040</p>	<p>CERTIFIED IN THE FIELD OF TYPE A INSPECTION BODY</p>
<p>NATIONAL ACCREDITATION NUMBER 015</p>	<p>CERTIFICATE</p>	<p>CIVIL BUILDINGS & CONSTRUCTION PRODUCTS</p>	<p>FOOD AGRICULTURE TO & 1102</p>	<p>CERTIFIED IN THE FIELD OF TYPE A INSPECTION BODY</p>
<p>for Egypt for 316003B</p>	<p>ON COUNCIL NUMBER</p>	<p>Administrative on file</p>	<p>60</p>	<p>60</p>

<p>Egypt ACCREDITATION NUMBER ON COUNCIL 316003B for Egypt for</p>	<p>Egypt ACCREDITATION NUMBER ON COUNCIL 316003B for Egypt for TUV Nord Egypt (India is included as a physical location at the end of the scope of accreditation)</p>	<p>TUV Nord Egypt (India is included as a physical location at the end of the scope of accreditation</p>
<p>Chemical products Administrati 60 on file</p>	<p>TEXTILE AND LEATHER PRODUCTS Administrati 60 on file</p>	

EVIDENCE OF CURRENT ACCREDITATION TO ISO/IEC 17020:2012

PAKISTAN

TUV Nord Egypt (India is included as a physical location at the end of the scope of accreditation)					
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BOARD OF ACCREDITATION	NATIONAL CERTIFICATE	FOOD & FOOD	AGRICULTURE & AGRICULTURE	R	PAGE NUMBER
ACCREDITATION ON BODIES CERTIFICATE ON FOR IS RAL AGRICULTURE NUMBER	NATIONAL CERTIFICATE FOOD & FOOD AGRICULTURE & AGRICULTURE NUMBER	FOOD & FOOD AGRICULTURE & AGRICULTURE NUMBER	AGRICULTURE & AGRICULTURE NUMBER	R	PAGE NUMBER
Egypt CERTIFICATE CHEMICAL ADMINISTRATION 60	NATIONAL CERTIFICATE CHEMICAL ADMINISTRATION 60	CHEMICAL ADMINISTRATION 60	ADMINISTRATION 60	ADMINISTRATION 60	ADMINISTRATION 60

<p>NATIONAL CERTIFICATE NUMBER 015</p>	<p>NATIONAL CERTIFICATE NUMBER 015</p>	<p>for Egypt for TUV Nord Egypt (India is included as a physical location at the end of the scope of accreditation)</p>
<p>MINERALS</p>	<p>PETROLEUM FOOD</p>	
<p>AGRICULTURA 978</p>	<p>AGRICULTURA 959</p>	
<p>FOOD</p>	<p>FOOD</p>	
<p>AGRICULTURA 978</p>	<p>AGRICULTURA 959</p>	
<p>INSPECTIO</p>	<p>INSPECTIO</p>	

<p>CERTIFIED IN THE FIELD OF TYPE A INSPECTION BODY</p>	<p>81001 & 1019</p>	<p>FOOD & AGRICULTURAL PRODUCTS</p>	<p>ELECTRO TECHNICAL & ELECTRONIC PRODUCTS</p>	<p>Egypt CERTIFICATE ACCREDITATION NUMBER 316003B</p>	<p>TUV Nord for Egypt for ON COUNCIL 316003B ACCREDITATION NUMBER Egypt CERTIFICATE ACCREDITATION NUMBER 316003B</p>
<p>CERTIFIED IN THE FIELD OF TYPE A INSPECTION BODY</p>	<p>60</p>	<p>Administration file</p>	<p>Administration file</p>	<p>Egypt CERTIFICATE ACCREDITATION NUMBER 316003B</p>	<p>TUV Nord for Egypt for ON COUNCIL 316003B ACCREDITATION NUMBER Egypt (India) is included as a physical location at the end of the scope of accreditation)</p>

<p>Egypt (India is included as a physical location at the end of the scope of accreditation)</p>	<p>NATIONAL CERTIFICATE NUMBER 015 L</p>	<p>MECHANICAL PRODUCTS</p>	<p>AGRICULTURAL PRODUCTS</p>	<p>IN THE FIELD OF TYPE A INSPECTION BODY</p>
<p>NATIONAL CERTIFICATE NUMBER 015</p>	<p>CIVIL BUILDINGS &</p>	<p>FOOD</p>	<p>AGRICULTURAL PRODUCTS</p>	<p>IN THE FIELD OF TYPE A INSPECTION BODY</p>
<p>NATIONAL CERTIFICATE NUMBER 015</p>	<p>CONSTRUCT FILES</p>	<p>FOOD</p>	<p>AGRICULTURAL PRODUCTS</p>	<p>IN THE FIELD OF TYPE A INSPECTION BODY</p>
<p>NATIONAL CERTIFICATE NUMBER 015</p>	<p>CONSTRUCT FILES</p>	<p>FOOD</p>	<p>AGRICULTURAL PRODUCTS</p>	<p>IN THE FIELD OF TYPE A INSPECTION BODY</p>
<p>NATIONAL CERTIFICATE NUMBER 015</p>	<p>CONSTRUCT FILES</p>	<p>FOOD</p>	<p>AGRICULTURAL PRODUCTS</p>	<p>IN THE FIELD OF TYPE A INSPECTION BODY</p>

<p>Egypt ACCREDITATION NUMBER ON COUNCIL 316003B TUV Nord Egypt (India is included as a physical location at the end of the scope of (accreditation)</p>	<p>ACCREDITATION CERTIFICATE ON COUNCIL NUMBER for Egypt for 316003B TUV Nord Egypt (India is included as a physical location at the end of the scope of accreditation</p>
<p>CERTIFICATE TEXTILE AND LEATHER PRODUCTS</p>	<p>Administration file</p>
<p>Administration 60</p>	<p>Administration file 60</p>
<p></p>	<p></p>

Egypt	ACCREDITAT	AND	TEXTILE	Administrat	(Civil +	Chemicals +	Contra	Electrical +	cts	Leather and	textile +	Telecommunic	ation devices	+	Automotive	spare parts +	EMC + ROHS)	products
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According to the Applicant the unfair evaluation of its tender by the Respondents was replicated in all the zones of the subject tender which the Applicant submitted its tender.

The Applicant alleges that the Respondents violated Section 80(1),(2), (3) and (4) of the Act read with Regulation 76 of Regulations 2020 by (a) failing to evaluate the Applicant using the procedures and criteria set out in the Tender Document and Addendums 1 & 2 dated 17th August 2021 and 24th August 2022 respectively; (b) failing to perform the technical evaluation of the Applicant objectively, comprehensively and confirm that the Applicant had submitted and complied with all the specifications of the technical requirements as stipulated in the Tender Document and (c) awarding the Applicant scores arbitrarily.

Act.

First, that the Request for Review is fatally defective for being *res judicata* to the extent that it raises same issues which were directly and substantially in contention in previous proceedings between the same parties in Request for Review Application No.4 of 2022 contrary to Section 7 of the Civil Procedure

the following grounds.

The Respondents have objected to the validity of the Request for Review on

1ST & 2ND RESPONDENTS' PRELIMINARY OBJECTION AND RESPONSE

From the foregoing, the Applicant alleges that it has suffered loss and damage by losing income and profit that would have accrued to it from award of the subject tender noting that it had incurred substantial expenses towards preparation and submission of its tender and prays for the orders sought in its Request for Review be granted with costs.

The Applicant alleges that the Respondents failed to conduct post qualification evaluation on the interested parties to ascertain their respective qualifications in accordance with the provisions of Section 83 of the Act as read with Regulation 80 of Regulations 2020.

The Applicant further alleges the Respondents breached Article 227(1) of the Constitution by failing to uphold and promote the principles of fairness, equitability, transparency and competitiveness in procurement proceedings.

With respect to Zone 7 and 16 of the subject tender the Respondents contend that the Applicant failed to disclose to the Board its non-compliance with the following aspects (a) there was no evidence of experience in the provision of conformity assessment service as per the requirements under Zone 7 of the subject tender and (b) the Applicant did not provide physical location of registered offices and contact information including email and

the Board.

The Respondents contend that the Applicant's tender was evaluated and found not to comply with all mandatory requirements of the Tender Document and did not provide all information on details of ownership as required in the Tender Document and this is evidenced in the Evaluation Report submitted as a confidential document by the Respondents for use by

of in the instant Request for Review.

Board cannot sit as an appellate court on its own decision as is being asked the Board made a determination on its decision of 24th January 2022 and the different from the issues raised in the instant Request for Review in which Review No.04 of 2022 raising issues that were substantively and materially memorandum of response contend that the Applicant filed Request for On their preliminary objection, the Respondents at paragraph 3 of their

Secondly, that there is currently a Judicial Review Application No.E11 of 2022 at the High Court of Nairobi: Intertek International Limited v Kenya Bureau of Standards & 6 Others over the same subject tender effectively staying these proceedings as a matter of law with Judgment slated for 3rd March 2022.

telephone, name title and contact information of the person responsible for services being tendered with respect to Zone 16 of the subject tender.

The Respondents contend that the regret letter addressed to the Applicant notified the Applicant of the successful tenderers and the reasons thereof by clearly highlighting the royalty percentage in USD that was returned by the successful tenderers which was the highest evaluated responsive royalty percentage in accordance with Section 87(3) of the Act and Regulation 82(1)(2)(3) of Regulations 2020 and in compliance with the Board's decision of 24th January 2022.

The Respondents contend that the Tender Document at Clause 44 provided for debriefing and which debriefing was conducted with respect to the Applicant on 4th January 2022 yet the Applicant has failed to disclose to the Board that the Applicant's representative was fully debriefed.

The Respondents contend that they could not request the Applicant for further proof after the Applicant had submitted its tender because modification or withdrawal of tender was only allowed before the tender submission deadline.

The Respondents contend that the Applicant's tender was subjected to the same standards, rules and instructions that were applied to other tenderers as provided for under the Tender Document.

The Respondents contend that the Applicant did not adduce any evidence before the Board as required under Section 107 and 109 of the Evidence Act,

Chapter 80 of the Laws of Kenya (hereinafter referred to as the 'Evidence Act') that it has been prejudiced to warrant the re-evaluation of the tender as per the Applicant's request for review.

In the circumstances, the Respondents posit that the Request for Review is frivolous or vexatious or made solely for the purpose of delaying the procurement proceedings or performance of a contract and prays for dismissal of the same with costs in accordance with Section 172 of the Act.

APPLICANT'S GROUNDS OF OPPOSITION TO THE PRELIMINARY OBJECTION AND REJOINER

In response to the Respondents objection to the validity of the instant Request for Review, the Applicant opposes the same on grounds that the preliminary objection (a) is frivolous, vexatious and scandalous and (b) is an abuse of the Boards process.

The Applicant contends that the principle of *res judicata* does not apply to the instant Request for Review because Request for Review No.04 of 2022 was based on the notification of regret dated 22nd December 2021 and which notification of regret was rendered null and void *ab initio* whilst the instant Request for Review is based on the notification of regret dated 24th January 2022 which is substantially and materially different in fact and issue.

The Applicant contends that the leave granted to operate as a stay in Judicial Review Application No. E011 of 2022 filed by Intertek International Ltd was issued on 3rd February 2022 staying all orders granted by the Board on 24th

January 2022 and any steps that may be taken by the Interested Parties to enter into any contract and or any steps taken in the performance of any contract entered into in relation to the subject tender. However, the said order of stay had been overtaken by events because the Respondents had already issued the Applicant with a notification of regret dated 27th January 2022 in compliance with the Board's decision of 24th January 2022 and further, the Applicant was neither a successful tenderer to enter and contract or take steps in the performance of any contract with the Respondents nor cited as an Interested Party to the judicial review thus not precluded from filing the instant Request for Review within 14 days from the date of receipt of the notification of regret dated 27th January 2022 in accordance with Section 167(1) of the Act.

In its Further Replying Affidavit sworn by the Applicant's Managing Director, Ahmed Marei, and in response to paragraph 4, 5, 6, 13, 15, 16 and 23 of the Respondents Memorandum of Response, the Applicant reiterated paragraphs 11, 12 and 13 of the Request for Review and paragraphs 10, 11, 12, 13, 14, 15, 16, 17, 20, 21, 22 and 23 of the Applicant's Supporting Affidavit to the Request for Review.

The Applicant contends that the Respondents did not disclose why the Interested Parties were successful and on the issue of debriefing, the Applicant contends that the Board found all communications and enquiries between parties on procurement proceedings should be in writing in accordance with Section 64(1) of the Act.

6TH INTERESTED PARTY'S RESPONSE

In the circumstances, the 5th Interested Party depones that the Request for Review is incompetent, lacks merit and should be dismissed with costs.

the decision vide Request for Review No.04 of 2022.

Applicant seeks to have a second bite at the cherry having failed to overturn the Board's process in so far as it challenges a non-existent decision, the cannot re-open the matter again, (c) the Request for Review is an abuse of regrets with reason, which was done and the Board is *functus officio* and application, the Respondents were merely asked to issue notification of on 27th January 2022 by the Respondents to warrant a fresh review relate to such unsuccessful tenderer's tender, (b) there is no decision made 2020 requires reason to be disclosed to an unsuccessful tenderer to only tenders were deemed successful because Regulation 82(2) of Regulations Respondents failure to disclose the reasons why the Interested Parties Regulations 2020 to the extent that the Applicant is aggrieved by the namely, (a) the Request for Review contravenes Regulation 82(2) of The 5th Interested Party objects the Request for Review on points of law

5TH INTERESTED PARTY'S OBJECTION

the Constitution.

Finally the Applicant contends that the Request for Review is merited since the evaluation did not meet the criteria or threshold of being fair, transparent, competitive and cost effective as stipulated in Article 227(1) of

The 6th Interested Party contends that in compliance with orders of the Board of 24th January 2022, it was issued with a fresh letter of notification of intention to enter into a contract by the 2nd Respondent dated 27th January 2022 and that the notification of regret dated 27th January 2022 issued to the Applicant disclosed the specific reasons why the successful tenders were deemed successful in accordance with Section 87(3) of the Act and the orders of the Board of 24th January 2022. According to the 6th Applicant, the reasons were the evaluated responsive royalty percentage for each zone as provided by way of tabulation of the successful tenderers alongside the highest evaluated responsive royalty percentage provided for each zone as provided in the Tender Data Sheet at page 26 of the Tender Document under the heading: 'F. Award of Contract'.

The 6th Interested Party contends that the Applicant failed to show that it provided complete information as claimed, or that the 2nd Respondent applied extraneous evaluation criteria in arriving at the Applicant's technical score. According to the 6th Interested Party, the myriad allegations by the Applicant with respect to the 2nd Respondent's failures is not supported by any evidence and the Applicant should be put to strict proof thereof.

The 6th Interested Party contends that the Applicant has failed to controvert the reasons given for the Applicant's disqualification of Zone 1, 3, 12 and 13 of the subject tender which in essence should be construed as an admission by the Applicant.

With respect to Zone 7 and 16 of the subject tender, the 6th Interested Party contends that the Applicant provided no evidence on how it met the

requirement of experience in the provision of conformity assessment services.

In the circumstances, the 6th Interested Party asserts that the Request for Review failed to demonstrate the veracity of any of the allegations against the 2nd Respondent in conducting the technical evaluation of the Applicant's tender and being completely without merit, should be dismissed with costs.

BOARD'S DECISION

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

1. Whether the issues raised by the Applicant in its Request for Review with respect to the notification of intention to enter into a contract dated 27th January 2022 issued to the Applicant by the 1st Respondent pursuant to the orders of the Board of 24th January 2022 are barred by the doctrine of *res judicata*.
2. Whether Nairobi High Court Judicial Review Application No. E11 of 2022 *Intertek International Limited v Kenya Bureau of Standards and 6 Others* effectively stayed the proceedings of the instant Request for Review as a matter of law.
3. Whether the Applicant satisfied the technical evaluation criteria with respect to Zone 7 and 16 of the subject tender to warrant the evaluation of the Applicant's tender at the financial evaluation stage.

The Board will now proceed to determine the issues framed as follows.

We elect to consider the preliminary objections raised by the 1st and 2nd Respondents and the 5th Interested Party as part of the substantive instant Request for Review and proceed to render one decision.

209(4) The Review Board may hear the preliminary objection either separately or as part of the substantive request for review and give a separate or one decision.

Regulation 209(4) of Regulations 2020 provides as follows: objections as part of a substantive request for review and give one decision. Regulation 209(4) of Regulations 2020 permits the Board to hear preliminary

We note that on 14th February 2022, the 1st and 2nd Respondents filed a Notice of Preliminary Objection dated 14th February 2022 and on 18th February 2022, the 5th Interested Party filed a Notice of Preliminary Objection dated 16th February 2022.

4. Whether the 1st Respondent disclosed the reasons why the Interested Parties' tenders were deemed successful and if not, whether the Applicant was prejudiced by such failure to disclose the reasons the Interested Parties' tenders were deemed successful.

The Applicant opposes the 1st and 2nd Respondents preliminary objection for being frivolous, vexatious, scandalous and an abuse of the Board's process. The Applicant while making reference to Section 7 of the Civil Procedure Act

Request for Review No.04/2022 and cannot reopen the matter again. the cherry having failed to overturn the decision of the Respondents vide *functus officio* and the Applicant is merely seeking to have a second bite at regrets with reasons, which the Respondents have done, thus the Board is because the Respondents were merely directed to issue notification of there was no decision made on 27th January 2022 by the Respondents The 5th Interested Party objected to the Request for Review on the basis that

its own decision as is being asked of it in the instant Request for Review. 2nd Respondents contend that the Board cannot sit as an appellate court on Board made a determination on, on 24th January 2022. With this, the 1st and Request for Review No.04/2022 of 5th January 2022 and which issues the same issues which were directly and substantially raised by the Applicant in and 2nd Respondents contend that the instant Request for Review raises the the same is barred by the doctrine of *res judicata*. To support this, the 1st by opposing the validity of the instant Request for Review on grounds that The 1st and 2nd Respondents have objected to the instant Request for Review

Res Judicata.

Whether the instant Request for Review is barred by the doctrine of

The Black's law Dictionary defines *res judicata* as: -

The Applicant contends the doctrine of *res judicata* does not apply to the instant Request for Review because Request for Review No.04/2022 of 5th January 2022 was based on the letter of notification of regret dated 22nd December 2021 whilst the instant Request for Review is based on the notification to enter into a contract dated 27th January 2022 which are substantially and materially different in fact and issue.

The Applicant further contends that the Board in its decision dated 24th January 2022 held that the Applicant's tender was deemed not to have met the minimum technical requirements was not disclosed and neither was the Applicant's tender scores at the technical evaluation stage disclosed thus hampered the Applicant's capacity to challenge the evaluation of its tender because it was not aware of which particular criterion it did not satisfy at the technical evaluation stage for the Applicant to specifically challenge the same which violated the provisions of Article 47 of the Constitution.

contends that the doctrine of *res judicata* would come into play where a matter in issue is similar to that which was previously in issue between same parties and such a matter has been determined on merit by a court of competent jurisdiction and where a matter is an issue in a subsequent case a party ought to have raised the same in a previous case between the same parties.

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Section 7 of the Civil Procedure Act, Chapter 21, Laws of Kenya (hereinafter referred to as "the Civil Procedure Act"), which codifies the plea of *res judicata* in our laws, states as follows: -

The doctrine is therefore a method of preventing injustice to the parties to a case. It acts to avoid unnecessary waste of resources in the dispute adjudication system. A court or an adjudicating body will thus use *res judicata* to deny reconsideration of a matter.

An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties...

“...where a given matter becomes the subject of litigation in an adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which

Procedure Act), Wigram V-C, stated:-

In *Henderson v. Henderson* (1843) 67 ER 313, 319, a dictum which the Privy Council described in *Yat Tung Investment Co. Ltd v. Dao Dao Heng Bank Ltd* (1975) AC 581, 590 as the *locus classicus* of the aspect of *res judicata* (which is codified by Explanation 4 to Section 7 of the Civil

Any matter which might or ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Procedure Act provides as follows:

The Civil Procedure Act provides explanations with respect to the application of the doctrine of *res judicata*. Explanation 4 to Section 7 of the Civil

the parties, exercising reasonable diligence, might have brought forward at the time."

In the case of **The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, Nairobi CA Civil Appeal No. 105 of 2017** ([2017] eKLR (hereinafter referred to as "Maina Kiai Case"), the Court of Appeal addressed the components of the doctrine of res judicata as outlined in Section 7 of the Civil Procedure Act and in so doing held that:

- "Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms:*
- a) The suit or issue was directly and substantially in issue in the former suit.*
 - b) That former suit was between the same parties or parties under whom they or any of them claim.*
 - c) Those parties were litigating under the same title.*
 - d) The issue was heard and finally determined in the former suit.*
 - e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."*

In the Mainakiai case, the Court of Appeal explained the role of the doctrine as follows:

.....”

Upon completion of evaluation of tenders, the 1st Respondent notified the Applicant vide a letter of notification of regret dated 22nd December 2021, that its tender was unsuccessful and the said letter read as follows in part:

included the Applicant's. the tender submission deadline of 31st August 2021 at 11:00 a.m. which for the subject tender. The 2nd Respondent received a total of 13 tenders by tender by way of restricted tender, via email on 9th August 2021, to tender 2nd Respondent invited twenty-five (25) prospective tenderers, through limited Turning to the circumstances of the instant Request for Review is that the

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

ZONES	BIDDERS NAME	ROYALTY % (USD)
1	M/S Bureau Veritas	32
2	M/S World Standardization Certification & Testing Group (Shenzhen) Co. Ltd	40
3 and 5	M/S China Certification & Inspection Group Co. Ltd	33
4	M/S Tuv Austria Turk	35
6	M/S China Hansom Inspection & Certification	34
7 to 18	M/S SGS	32.5

The successful bidders were:

- Did not meet the minimum technical requirements.

The brief reason is as follows:-

We refer to your Tender dated 31st August 2021 and regret to inform you that following the evaluation, your tender is unsuccessful. It is therefore not accepted.

RE: NOTIFICATION OF REGRET – TENDER NO. KEBS/RT010/2021/2024: FOR PROVISION OF PRE-EXPORT VERIFICATION OF CONFORMITY (PVO) TO STANDARD SERVICES

However, this notification does not reduce the validity period of your Tender Security. In this regard, we request you to relook at the provisions regarding the Tender Security in the tender document.

You may collect the tender security from KEBS Supply Chain Office, Head office, Administration Block only after expiry of fourteen (14) days from the date hereof on Mondays and Wednesdays ONLY between 9.00a.m. to 12.30 pm and 2.00p.m to 4.00p.m.

When collecting the Security, you will be required to produce the original or certified copy of this letter.

We thank you for the interest shown in participating in this tender and wish you well in all your future endeavours.

.....
"

Aggrieved by the decision of the 1st Respondent as contained in the letter of notification of regret dated 22nd December 2021, the Applicant filed Request for Review No. 4/2022 of 5th January 2022 challenging the same. In specific, the Applicant raised the following issues in the Request for Review No.04/2022:

The Board in the consolidated request for review framed nine (9) issues for determination with the first issue having four (4) limbs to it. The issues framed for determination with respect to the Applicant in the consolidated request for review were;

The Board noting that another Request for Review No.01/2022 of 3rd January 2022 arose from the subject tender consolidated Request for Review No.01/2022 and Request for Review No.04/2022 (hereinafter referred to as the consolidated request for review) pursuant to Regulation 215 of Regulations 2020 and the Applicant herein became the 2nd Applicant in the consolidated request for review.

- (i) that the 2nd Respondent failed to examine and evaluate the Applicant's tender's technical aspects to confirm that the Applicant actually complied with the technical requirements and more so with respect to Zone 16 of the subject tender,
- (ii) that the 1st Respondent was in breach of Section 87(3) of the Act for failure to disclose to the Applicant the outcome of its tender and more so the overall technical score in each item of the evaluation criteria; and
- (iii) that 2nd Respondent failed to announce the royalty fees to all tenderers during the opening of tenders on 31st August 2021 in breach of the law.

c.

issue;

Depending on the determination of the second limb of the first

b.

issue;

Depending on the determination of the first limb of the first

a. Whether the allegations raised by the 1st & 2nd Applicants in the consolidated Request for Review No.01/2022 and No.04/2022 with respect to failure to read out loud the total royalties and related zone of each tender during opening of tenders on 31st August 2021 are time barred pursuant to Section 167 (1) of the Act read with Regulation 203(2)(c) of Regulations 2020 requiring the same to have been raised within 14 days of notification of award or date of occurrence of alleged breach at any stage of the procurement process.

following limbs to the first issue;

In determining the first issue, the Board made a determination on the

consolidated Request for Review.

1. Whether the Board has jurisdiction to hear and determine the

Depending on the determination of the third limb of the first issue;

d. Whether the Request for Review No.04/2022 is fatally defective for failure by the 2nd Applicant to join the successful tenderers as parties as provided in Section 170 of;

Depending on the determination of the fourth limb of the first issue;

2.;

3. Whether the Respondents breached Section 78(6) of the Act read with Clause 27.5, 27.8 and 27.9 of Section I – Instructions To Tenderers at page 18 of the Tender Document for failure to read out loud the total royalties and related zone for each tender during the opening of tenders and for failure to prepare a Tender Opening Record for execution by tenderers' representatives present at the opening of tenders on 31st August 2021;

4.;

5.;

6.;

7.;

8.;

9. Whether the 1st Respondent's letter of notification of regret

dated 22nd December 2021 notifying the 2nd Applicant of the

outcome of evaluation of the subject tender was issued in accordance with Section 87 of the Act read with Regulation 82 of Regulations 2020.

The Board in its decision dated 24th January 2022 held as follows with respect to the aforementioned issues framed for determination in the consolidated request for review:

1. At page 57 thereof, with respect to the first limb of the first issue framed for determination, the Board held that it lacks jurisdiction only to the extent of hearing and determining the allegations raised by the 1st & 2nd Applicants in the consolidated request for review with respect to failure to read out loud the total royalties and related zone of each tender during opening of tenders for being time barred pursuant to Section 167 (1) of the Act read with Regulation 203(2)(c) of Regulations 2020 which rendered the third issue framed for determination moot.

2. At page 71 thereof, with respect to the fourth limb of the first issue framed for determination, the Board held that the Applicant's failure to join successful tenderers to Request for Review No.04/2022 did not render the same fatally defective in the instance where all tenderers were invited to participate in the consolidated request for review proceedings but some opted not to.

3. At page 81 thereof, with respect to the ninth issue framed for determination, the Board held that the letter of notification of regret dated 22nd December 2021 issued to the Applicant by the 1st Respondent did not comply with Section 87 of the Act read with

Regulation 82 of Regulations 2020 for failure to disclose the specific reasons why the Applicant's tender was deemed not to have met the minimum technical requirements and for failure to disclose why the successful tenderers were deemed successful.

In totality of its findings in the consolidated request for review, the Board issued the following orders in its decision dated 24th January 2022:

1. The Request for Review No.01/2022 of 3rd January 2022 and dated 3rd January 2022 be and is hereby struck out for want of jurisdiction.

2. The letters of notification of award in Tender No: KEBS/RT010/2021/2024 International Tender for Provision of Pre-Export Verification of Conformity (PVO) to Standards Services (Re-Tender) dated 22nd December 2021 issued by the 1st Respondent to the 1st, 2nd, 3rd, 4th, 5th and 6th Interested Parties be and are hereby cancelled and set aside.

3. The letters of notification of regret in Tender No: KEBS/RT010/2021/2024 International Tender for Provision of Pre-Export Verification of Conformity (PVO) to Standards Services (Re-Tender) dated 22nd December 2021 issued by the 1st Respondent to all the unsuccessful tenderers (including the 1st and 2nd Applicants) in the subject tender be and are hereby cancelled and set aside.

4. The 1st Respondent is hereby directed to issue fresh letters of intention to enter into a contract in Tender No: KEBS/RT010/2021/2024 International Tender for Provision of

Pre-Export Verification of Conformity (PVOC) to Standards Services (Re-Tender) in accordance with Section 87 of the Act read with Regulation 82 of Regulations 2020 within seven (7) days from the date hereof.

5. Given that the Request for Review No.01/2022 consolidated with Request for Review No.04/2022 has partially succeeded, each party shall bear its own costs in the Request for Review.

In essence, the Board in the consolidated request for review cancelled and set aside the letters of notification of award and of regret dated 22nd December 2021 issued by the 1st Respondent to the Interested Parties and the Applicants therein respectively. The Board also directed the 1st Respondent to issue fresh letters of intention to enter into a contract in the subject tender in accordance with Section 87 of the Act and Regulation 82 of Regulations 2020 within 7 days from 24th January 2022.

On 27th January 2022, the 1st Respondent while making reference to the decision of the Board of 24th January 2022, issued the Applicant with a notification of intention to enter into a contract dated 27th January 2022 which reads as follows:

"Our Ref: KEBS/T010/2021/2024 "AMS"

Date: 27th January, 2022

M/s TUV Nord Egypt

No.	Zone	Points	Reasons
1.	1	48.5	1. (i) The bidder did not provide physical location of registered offices and contact information including email and Telephone,

breakdown is as follows.

- Did not meet the minimum technical requirements. The reason for the unsuccessful bid in accordance with Section 87 of the Public Procurement and Asset Disposal Act, No. 33 of 2015 as read with Regulation 82 of the Regulations 2020 is as follows: -
- The reason for the unsuccessful bid in accordance with Section 87 of the Public Procurement and Asset Disposal Act, No. 33 of 2015 as read with Regulation 82 of the Regulations 2020 is as follows: -
- We refer to your Tender dated 31st August, 2021 and the decision of the Public Procurement Administrative Review Board dated 24th January, 2021 in consolidated Applications No. 1 & 4 of 2022. The Procuring Entity regrets to inform you that following the evaluation, your tender is unsuccessful. It is therefore not accepted.

SERVICES

RE: NOTIFICATION OF INTENTION TO ENTER INTO A CONTRACT - TENDER NO. KEBS/RT010/2021/2024: FOR PROVISION OF PRE-EXPORT VERIFICATION OF CONFORMITY (PVO) TO STANDARDS

Dear Sirs/ Madams,

EGYPT

Tel: + 2020330-51948

Email: tuegypt@tuv-nord.com

34, Alriyad St.El Mohandissen Giza,

<p><i>Name, title and contact information of the person responsible for services being tendered.</i></p> <p><i>2. The evidence of current accreditation to ISO/IEC 17020:2012 with scope covering the products was insufficient. Only one (1) scope out of ten (10) Scopes was Provided.</i></p> <p><i>3. The bidder did not provide evidence of experience in the provision of conformity assessment services as per the requirements.</i></p>	49.5	3	2.
<p><i>2. There was no evidence of experience in the provision of conformity assessment services as per the requirements.</i></p> <p><i>4(i) There was no evidence of the relevant management of the service required.</i></p>	59.5	7	3.
<p><i>2. The evidence of current accreditation to ISO/IEC 17020:2012 with scope covering the products was insufficient. Only two (2) out of ten (10) scopes was Provided.</i></p>	59.5		

<p>3. There was no evidence of experience in the provision of conformity assessment services as per the requirements.</p>			
<p>3. There was no evidence of experience in the provision of conformity assessment services as per requirements.</p> <p>4. There was no evidence on qualifications of the company's personnel for that zone as per the requirements.</p>	46.5	4. 12	
<p>1. The bidder did not provide physical location of registered offices and contact information including email and Telephone. Name, title and contact information of the person responsible for services being tendered.</p> <p>2. There was no evidence of current accreditation to ISO/IEC 17020:2012 as per the requirements.</p> <p>3. There was no evidence of experience in the provision of conformity assessment services as per the requirements.</p>	46.5	5. 13	
<p>1. The bidder did not provide physical location of registered offices and contact information including email and Telephone. Name, title and contact information of the person</p>	63.5	6. 16	

However, this notification does not reduce the validity period of your Tender Security. In this regard, we request you to relook at

ZONES	BIDDERS NAME	ROYALTY %(USD)
1.	M/S Bureau Veritas	32
2.	M/S World Standardization Certification & Testing Group (Shenzhen) Co.Ltd	40
3. And 5.	M/S China Certification & Inspection Group Co. ltd	33
4.	M/S TUV Austria Turk	35
6.	M/S China Hansom Inspection & Certification Co. Ltd	34
7. To 18.	M/S SGS	32.5

The successful bidders were:

<p>responsible for services being tendered.</p> <p>2.The evidence of current accreditation to ISO/IEC 17020:2012 with scope covering the products was insufficient. Only six (6) out of ten (10) scopes was Provided.</p> <p>3. There was no evidence of experience in the provision of conformity assessment services as per the requirements.</p>			
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the provisions regarding the Tender Security in the tender document.

You may collect the tender security from KEBS Supply Chain Office, Head office. Administration Block only after expiry of fourteen (14) days from the date hereof on Mondays and Wednesdays ONLY between 9.00 a.m. to 12.30 p.m. and 2.00p.m to 4.00p.m.

When collecting the Security, you will be required to produce the original or certified copy of this letter.

We thank you for the interest shown in participating in this tender and wish you well in all your future endeavors.

Yours faithfully,

Lt Col(Rtd) Benard Njiraini
MANAGING DIRECTOR

In an attempt to comply with the orders of the Board of 24th January 2022, the 1st Respondent notified the Applicant of the specific reasons why its tender was not successful with respect to Zone 1, 3, 7, 12, 13 and 16 of the subject tender which the Applicant had tendered for.

Aggrieved by the 1st Respondent's decision as contained in the notification of intention to enter into a contract dated 27th January 2022, the Applicant filed the instant Request for Review challenging the same. The Applicant in the instant Request for Review raises the following issues:

the Interested Parties' tenders were deemed successful.

24th January 2022, that the Respondent failed to disclose the reasons why with Regulation 82 of Regulations 2020 held, at page 81 of its decision of Applicant by the 1st Respondent complied with Section 87 of the Act read whether the notification of regret dated 22nd December 2021 issued to the However, the Board in the consolidated request for review while considering more so the overall technical score in each item of the evaluation criteria. that the 1st Respondent did not notify it of the outcome of its tender and Request for Review No.04/2022. The Applicant only raised issue with the fact for Review, we do note that the same was not raised by the Applicant in the With respect to the first issue raised by the Applicant in the instant Request

Regulations 2020.

accordance with the provisions of the Act and Regulation 80 of on the Interested Parties to ascertain their respective qualification in 3. That the Respondents failed to conduct a post qualification evaluation

of the subject tender;

date of the Tender Document with specific emphasis on Zone 7 and 16 of the tender document were complete, current and accurate as at the the information provided by the Applicant pursuant to the requirements Applicant's tender met the minimum technical score considering that all extraneous evaluation criteria and in so doing failed to find that the 2. That the Respondents contravened Section 80(2) of the Act by applying

request for review;

by the Board in a decision dated 24th January 2022 in the consolidated why the Interested Parties were deemed to be successful as directed 1. That the Respondent's have failed to specifically disclose the reasons

From the foregoing, we are of the considered opinion that the doctrine of *res judicata* does not apply to two issues raised in the instant Request for Review because, the first issue was not raised by the Applicant in the Request for Review No.04/2022 even though the Board made a determination on the same and the Board did not make a finding on the second issue in the Request for Review No.04/2022. Further, we do note that the Request for

the same is a new issue.

With respect to the third issue raised by the Applicant in the instant Request for Review, we do note that the Applicant did not raise any issue with respect to post qualification evaluation in the Request for Review No.04/2020 thus the specific reasons why the Applicant's tender was deemed unsuccessful.

With respect to the second issue raised by the Applicant in the instant Request for Review, we do note that there is some similarity to the issue raised by the Applicant that the 2nd Respondent failed to examine and evaluate the Applicant's tender's technical aspects to confirm that the Applicant actually complied with the technical requirements and more so with respect to Zone 16 of the subject tender in the Request for Review No.04/2022. However, the Board in the consolidated request for review considered that the Applicant unsuccessfully challenged the evaluation of its tender for lack of specificity on what evaluation criterion it did not satisfy at the technical evaluation stage and held at page 82 of its decision of 24th January 2022, that the Board cannot convert into an evaluation committee to evaluate the Applicant's original tender and for this reason, the Board nullified the notification of regret dated 22nd December 2021 to pave way for a fresh letter to be issued to the Applicant by the 1st Respondent outlining the specific reasons why the Applicant's tender was deemed unsuccessful.

Review No.04/2022 was filed challenging the decision of the Respondents on evaluation and award of the subject tender as communicated in the notification of regret dated 22nd December 2021 issued to the Applicant by the 1st Respondent whilst the instant Request for Review was filed challenging the decision of the Respondents on evaluation and award of the subject tender as communicated in the notification of intention to enter into a contract dated 27th January 2022, issued to the Applicant by the 1st Respondent.

On the third issue raised in the instant Request for Review, we note that the same was not raised in the Request for Review No.04/2022. However, the issue being that of post qualification evaluation on the Interested Parties, we are of the considered view that since the Applicant was aware of those who were successful tenderers (i.e. the Interested Parties) in the subject tender pursuant to a notification of regret dated 22nd December 2021, the issue of postqualification evaluation of the Interested Parties ought to have been raised by the Applicant in the Request for Review No.04/2022. To this end, we are of the considered opinion that the doctrine of *res judicata* applies to this issue and the Applicant is estopped from raising the same as guided by Explanation 4 to Section 7 of the Civil Procedure Act.

The Board is alive to the fact that any new issues raised regarding the notification of intention to enter into a contract dated 27th January 2022 issued to the Applicant by the 1st Respondent pursuant to orders of the Board of 24th January 2022 in the consolidated request for review Review No. 156/2020 would not be barred by the doctrine of *res judicata*.

Nyamweya,] as she then was, in a High Court decision in Republic v Public Procurement Administrative Review Board & 3 others Ex parte Techno Relief Services Limited [2019] eKLR held as follows: -

"68. In the second Request for Review, the ex parte Applicant alleges that there was non-compliance by the 2nd Respondent with the 1st Respondent's directives to re-evaluate all bids in accordance with its stated criteria, as regards the 3rd Respondent's bid. Therefore, the new set of intervening facts created a new cause of action, which arose as a result of the 1st Respondent's own orders. In other words, even though the same set of circumstances may have existed in the First Request for Review as regards the 3rd Respondent's bid, the 1st Respondent's orders of 26th July 2019, which were final and binding, that the 3rd Respondent's bid among others be re-evaluated in line with specified criteria opened the gate for a new cause of action, in the event that there was non-compliance. It is also notable that the complaints raised by the ex parte Applicant's Request for Review was specifically on the non-compliance by the 2nd Respondent with the 1st Respondent's orders of 26th July 2019.

69. This Court therefore finds that in the circumstances of the Second Request for Review, the 1st Respondent did make an error

In the circumstances, we find the issues raised by the Applicant in the instant Request for Review with respect to the notification of intention to enter into a contract dated 27th January 2022 issued to the Applicant by the 1st

The Board notes that in its decision of 24th January 2022 in the consolidated Request for Review, it directed the 1st Respondent to issue fresh letters of intention to enter into a contract in accordance with Section 87 of the Act read with Regulation 82 of Regulations 2020 within 7 days from the 24th January 2022. The 1st Respondent subsequently issued notification of intention to enter into a contract on 27th January 2022 and the Applicant is now challenging the contents of the said notification of intention to enter into a contract dated 27th January 2022. This in our considered opinion cannot be said to be barred by the doctrine of *res judicata* because the orders of the Board of 24th January 2022 created a new cause of action with respect to the notification of intention to enter into a contract dated 27th January 2022 issued to the Applicant by the 1st Respondent.

of law in holding that the doctrine of res-judicata on account of cause of action estoppel applied to the complaints raised by the ex parte Applicant as regards the 3rd Respondent's bid. This is for the reasons that its orders of 26th July 2019 materially changed the context in which the parties were operating after the First Request for Review and created a new cause of action."

Respondent pursuant to the orders of the Board of 24th January 2022 are not barred by the doctrine of *res judicata*.

Whether Nairobi High Court Judicial Review Application No.E11 of 2022 Intertek International Limited v Kenya Bureau of Standards and 6 Others effectively stayed the proceedings of the instant Request for Review as a matter of law.

The 1st and 2nd Respondents objected to the instant Request for Review on account that the proceedings of the instant Request for Review have been stayed as a matter of law by the existence of Nairobi Judicial Review Application No.E11 of 2022 Intertek International Limited v Kenya Bureau of Standards & 6 Others with respect to the subject tender and whose judgment is reserved for 3rd March 2022. We however note that the 1st and 2nd Respondent did not quote any law to support this objection save that they merely stated that it is as a matter of law.

The Applicant opposed the 1st and 2nd Respondents preliminary objection on grounds that Intertek International Limited was granted leave to file judicial review proceedings and for such leave to operate as a stay of all orders granted by the Board on 24th January 2022 and any steps that may be taken by the Interested Parties to enter into a contract and or any steps taken in the performance of any contract entered into in relation to the subject tender.

We have studied the pleadings of Judicial Review Application No.E11 of 2022, in which the Board is the Respondent, together with the orders issued therein on 3rd February 2022 and note that the orders by Justice Anthony Ndungu are specific to staying the orders of the Board dated 24th January 2022 and not staying the proceedings before the Board with respect to the instant Request for Review. Nothing stopped the 1st and 2nd Respondents from seeking specific orders on judicial review staying the proceedings of the instant Request for Review. No specific orders staying the proceedings before the Board of the instant Request for Review have been brought to our attention.

Secondly, the said orders of Justice Anthony Ndungu of 3rd February 2022 were overtaken by events in so far as the 4th order of the Board issued on 24th January 2022 is concerned because the 1st Respondent had already complied with the same on 27th January 2022.

Thirdly, the Applicant herein is not listed as an Interested Party in the Judicial Review Application No.E11 of 2022 neither is it a successful tenderer in the subject tender likely to enter into a contract with respect to the subject tender to be bound by the stay order issued by Justice Ndungu.

We also note that the instant Request for Review was filed pursuant to Section 167(1) of the Act and within 14 days of the Applicant being issued with the notification to enter into a contract dated 27th January 2022 which cause of action is different from that addressed in the decision of the Board of 24th January 2022 and which decision of the Board is now being challenged in Judicial Review Application No.E11 of 2022.

In the circumstances, we find Nairobi High Court Judicial Review Application No.E11 of 2022 Intertek International Limited v Kenya Bureau of Standards and 6 Others did not stay the proceedings of the instant Request for Review as a matter of law.

Whether the Applicant satisfied the technical evaluation criteria with respect to Zone 7 and 16 of the subject tender to warrant the evaluation of the Applicant's tender at the financial evaluation stage.

The Applicant alleges that the Respondents contravened Section 80(2) of the Act by applying extraneous evaluation criteria and in so doing failed to find that the Applicant's tender met the minimum technical score considering that all the information provided by the Applicant pursuant to the requirements of the Tender Document were complete, current and accurate as at the date of the tender submission deadline.

To support its allegation, the Applicant demonstrated in form of a table reproduced hereinbefore where to find information with respect to (i) physical location and contact information on Zone 7 and 16 of the subject tender and (ii) current accreditation to ISO/IEC 17020:2012 covering ten scopes covering the products on Zone 7 and 16 of the subject tender.

The 1st and 2nd Respondents contend that the tender submitted by the Applicant did not provide all information on details of ownership as required in the Tender Document. The 1st and 2nd Respondents contend that the

We have carefully studied the Tender Document together with its respective Addenda and more specifically Addendum No.1 dated 17th August 2021 which amended the minimum score at the technical evaluation stage from 75% to 80%, the Evaluation Report signed by the Evaluation Committee on 14th October 2021, the reasons for disqualification of the Applicant's tender given in the notification of intention to enter into a contract dated 27th January 2022, the Applicant's original tender and our analysis with respect to Zone 7 and 16 is captured in the below table:

We note that though the Applicant was notified of the reasons why its tender was unsuccessful in the six zones of the subject tenderit tendered for, the Applicant elected to only contest the reasons for disqualification of its tender with respect to Zone 7 and 16. We shall therefore proceed to interrogate and make a determination on the Applicant's compliance with the criteria for evaluation at the technical evaluation stage with respect to Zone 7 and 16 of the subject tender which the Applicant has attempted to prove that it satisfied.

Applicant failed to specifically disclose to the Board evidence of the experience in the provision of conformity assessment services as per the requirements with respect to Zone 7 of the subject tender and physical location of registered offices and contact information including email and telephone, name, title and contact information of the person responsible for services being tendered with respect to Zone 16.

Zone 7

Requirement No.2 of Clause 1.1.2.1 Criteria for Evaluation of Technical Proposals at page 29 to 30 of the Tender Document in which the Applicant was scored 4 out of 21 marks with respect to Zone 7 of the subject tender.

Reason given in the notification of intention to enter into a contract dated 27 th January 2022	Criterion 2 of Technical Evaluation at page 29 to 30 of the Tender Document	Eval. Scores out of 21	Applicant's Evidence	Certificate No.	Product	Applicant's original tender's page number
2. The evidence of current accreditation to ISO/IEC 17020:2012 with scope covering the products was insufficient. Only two (2) out of ten (10) scopes was Provided	2. Evidence of current accreditation to ISO/IEC 17020:2012 with scope covering the products in this tender and the country where physical presence is required. (Max 21 marks) The products scope per country where physical presence is required:		India			

Reason given in the notification of intention to enter into a contract dated 27 th January 2022	Criterion 2 of Technical Evaluation at page 29 to 30 of the Tender Document		Eval. Scores out of 21 marks	Applicant's Evidence			
	No.	Requirements		Board of accreditation	Certificate No.	Product	Applicant's original tender's page number
		<ul style="list-style-type: none"> ▪ Food and agricultural products (3 Marks) 	0	National accreditation for certification bodies(India and Pakistan)	IB 015	Food & agricultural products	941 to 959
		<ul style="list-style-type: none"> ▪ Chemical products (2 Marks) 	0	Egypt accreditation council for Egypt for TUV Nord Egypt (India is included as a physical location at the end of the scope of accreditation)(India and Pakistan)	316003B	Chemical products	60
		<ul style="list-style-type: none"> ▪ Pharmaceutical products (2 Marks) 	0	None			
		<ul style="list-style-type: none"> ▪ Medical devices (2 Marks) 	0	None			
		<ul style="list-style-type: none"> ▪ Petroleum products (2 Marks) 	0	National accreditation for certification bodies(India and Pakistan)	IB 015	Petroleum products	941 to 959
		<ul style="list-style-type: none"> ▪ Minerals (2 Marks) 	0	Egypt accreditation council for Egypt for TUV Nord Egypt (India is included as a physical location at the end of the scope of accreditation) (India and Pakistan)	316003B	Minerals	60
				National accreditation for certification bodies(India and Pakistan)	IB 015	Minerals	960 to 978
		<ul style="list-style-type: none"> ▪ Electrotechnical and electronic products (2 Marks) 	2	National accreditation for certification bodies(India and Pakistan)	015	Electro technical & electronic products	1001 to 1019

Reason given in the notification of intention to enter into a contract dated 27 th January 2022	Criterion 2 of Technical Evaluation at page 29 to 30 of the Tender Document		Eval. Scores out of 21 marks	Applicant's Evidence				
	No.	Requirements		Board of accreditation	Certificate No.	Product	Applicant's original tender's page number	
		<ul style="list-style-type: none"> ▪ Mechanical products (2 Marks) 	2	Egypt accreditation council for Egypt for TUV Nord Egypt (India is included as a physical location at the end of the scope of accreditation) (India and Pakistan)	316003B	Electro technical & electronic products	60	1040 to 1058
		<ul style="list-style-type: none"> ▪ Civil, building and construction products (2 Marks) 	0	National accreditation for certification bodies(India and Pakistan)	015	Civil buildings & construction products	60	1102 to 1121
		<ul style="list-style-type: none"> ▪ Textiles and leather products (2 Marks) 	0	Egypt accreditation council for Egypt for TUV Nord Egypt (India is included as a physical location at the end of the scope of accreditation)(India)	316003B	Textile and leather products	60	
				Egypt accreditation council for Egypt for TUV Nord Egypt (India is included as a physical location at the end of the scope of accreditation)	316003B	Textile and leather products	60	

Upon perusal of the Applicant's original tender, we note that the Applicant did not provide evidence of current accreditation to ISO/IEC 17020:2012 with scope covering two products under this criterion namely; pharmaceuticals and medical devices products. However and as can be seen from the above table, the Applicant provided some form of evidence of current accreditation to ISO/IEC 17020:2012 with scope covering for food and agriculture, chemical, petroleum, minerals, civil, building, construction, textiles and leather products but was scored zero in all of them. We are of the considered opinion that the Applicant ought to have been scored some marks if not all marks for providing evidence of current accreditation to ISO/IEC 17020:2012 with scope covering for food and agriculture, chemical, petroleum, minerals, civil, building, construction, textiles and leather products. Assuming the Applicant was scored the maximum marks for providing evidence of current accreditation to ISO/IEC 17020:2012 with scope covering for food and agriculture, chemical, petroleum, minerals, civil, building, construction, textiles and leather products, the Applicant would have scored a total of 17 out of 21 marks under this criterion yet the Applicant was scored a total of 4 out of 21 marks essentially losing out on 13 marks in this criterion.

Requirement No.3 of Clause 1.1.2.1 Criteria for Evaluation of Technical Proposals at page 30 of the Tender Document in which the Applicant was scored 0 out of 10 marks with respect to Zone 7 of the subject tender.

Reason given in the notification of intention to enter into a contract dated 27 th January 2022	Criterion 3 of Technical Evaluation at page 30 of the Tender Document	Eval. scores	Applicant's Evidence (it does not necessarily correspond to the requirement as they provided many)
	No. Requirements		
<p>3. There was no evidence of the provision of conformity assessment services as per the requirements.</p>	<p>3. Experience in the provision of conformity assessment services. (Max 10 marks)</p> <p>A brief description of similar conformity assessment contract (s) performed by the Tenderer for period of not less than five (5) years in the last 10 years including the name of the regulatory authorities, nature of service provided, duration of service provision and the contract details of the contracting authority.</p>		
<p>i. Evidence, by way of testimonials with contacts authority (ies), having performed a similar conformity assessment contract/s for a period of not less than five (5) years in the last ten (10) years. Tenderer to include the name of contracting authority/ies, nature of the service provided, and duration served – (7 marks for contract(s) carried out for a minimum of five years)</p>	0	NO EVIDENCE	
<p>ii. Evidence, by way of testimonials with contacts from contracting authority (ies), of having carried out</p>	0	NO EVIDENCE	

Reason given in the notification of intention to enter into a contract dated 27 th January 2022	Criterion 3 of Technical Evaluation at page 30 of the Tender Document		Eval. scores	Applicant's Evidence (it does not necessarily correspond to the requirement as they provided many)
	No.	Requirements		
		certification of medical devices under the above contract – (3 Marks)		

Upon perusal of the Applicant's original tender, we note the Applicant did not provide evidence of experience in the provision of conformity assessment services. We are of the considered opinion that the Applicant was properly scored a zero in this criterion.

In essence, the maximum score the Applicant may have lost if it were to be awarded full marks where it provided some form of evidence with respect to Zone 7 would be 13 marks. The Applicant scored a total of 59.5 marks with respect to Zone 7. If the 13 marks that the Applicant may have lost if awarded full marks where it provided some form of evidence is added to the 59.5 marks, the Applicant would have obtained a total of 72.5 marks as its technical score and which marks would still fall short of the minimum score of 80% required to proceed to the next stage of evaluation with respect to Zone 7 of the subject tender.

Zone 16

Requirement No.1 of Clause 1.1.2.1 Criteria for Evaluation of Technical Proposals at page 29 of the Tender Document in which the Applicant was scored 10 out of 18 marks with respect to Zone 16 of the subject tender.

Reason given in the notification of intention to enter into a contract dated 27 th January 2022	Criterion 1 of Technical Evaluation at page 29 of the Tender Document		Eval. scores	Applicant's Evidence (Applicant provided the office physical location, contact information (address and email), name of person responsible, title and where the evidence of compliance in applicant's bid document is found.)		
	No.	Requirements		Office	Document	Page Numbers
1. The bidder did not provide physical location of registered offices and contact information including email and Telephone, Name, title and contact information of the person responsible for services being tendered.	1.	Evidence of the tenderer's physical presence and location, to provide PVoC services. (Max. 18 Marks)	0	TUV Middle East	Index for zone files & relevant managers CV file	436 & 493 1730-1731
				Abu Dhabi Head Office	Index for zone files	432
				TUV Middle East W.L.L	Index For Zone Files	432
				W.L.L.-UAE Dubai Office		
	ii.	Notarized/Certified copy(ies) of title/ lease/tenancy agreement for offices. – 8 marks Note 1: A Tenderer cannot score marks in either i or ii in isolation Note 2: A Tenderer must provide information required above for each of the countries in the zones as listed	8	TUV Middle East Kuwait	Relevant CV File	1855-1857

Reason given in the notification of intention to enter into a contract dated 27 th January 2022	Criterion 1 of Technical Evaluation at page 29 of the Tender Document		Eval. scores	Applicant's Evidence (Applicant provided the office physical location, contact information (address and email), name of person responsible, title and where the evidence of compliance in applicant's bid document is found.)		
	No.	Requirements		Office	Document	Page Numbers
		in Column 4 of Table 1 in Section VII.				
	iii.	Organizational structure clearly highlighting technical management and quality assurance in the provision of the service being tendered. – 2 marks	2	TUV Middle East Oman TUV Middle East Qatar	Relevant CV file Relevant CV file	1841-1846 1827-1830

Upon perusal of the Applicant's original tender, we note that the Applicant provided some form of evidence of its physical location (address) of registered offices and contact information (email and telephone, name, title, and contact information of the person responsible for services being tendered but was scored zero in all of them. We are of the considered opinion that the Applicant ought to have been scored some marks if not all marks for providing some form of evidence of its physical location (address) of registered offices and contact information (email and telephone, name, title, and contact information of the person responsible for services being tendered. Assuming the Applicant was scored the maximum marks for providing some form of evidence of its physical location (address) of registered offices and contact information (email and telephone, name, title, and contact information of the person

responsible for services being tendered, the Applicant would have scored a total of 18 out of 18 marks under this criterion yet the Applicant was scored a total of 10 out of 18 marks essentially losing out on 8 marks in this criterion.

Requirement No.2 of Clause 1.1.2.1 Criteria for Evaluation of Technical Proposals at page 29to 30 of the Tender Document in which the Applicant was scored 13 out of 21 marks with respect to Zone 16 of the subject tender.

Reason given in the notification of intention to enter into a contract dated 27 th January 2022	Criterion 2 of Technical Evaluation at page 29 to 30 of the Tender Document	Eval. scores	Applicant's Evidence (it does not necessarily correspond to the requirement as they provided many)			
			No. Requirements	Board of accreditation	Certificate No.	Product
2. The evidence of current accreditation to ISO/IEC 17020:2012 with scope covering the products in this tender and the country where physical presence is required. Only six (6)	2. Evidence of current accreditation to ISO/IEC 17020:2012 with scope covering the products in this tender and the country where physical presence is required. (Max 21 Marks)					

Reason given in the notification of intention to enter into a contract dated 27 th January 2022	Criterion 2 of Technical Evaluation at page 29 to 30 of the Tender Document		Eval. scores	Applicant's Evidence (it does not necessarily correspond to the requirement as they provided many)			
	No.	Requirements		Board of accreditation	Certificate No.	Product	Page number
<i>out of ten (10) scopes was Provided.</i>		Food and agricultural products (3 Marks)	3	Egypt accreditation council for TUV Middle East	319006B	Food & agricultural products	869 to 870
		Chemical products (2 Marks)	2	Egypt accreditation council for TUV Middle East	319006B	Chemical products	886 to 889
		Pharmaceutical products (2 Marks)	0	None			
		Medical devices (2 Marks)	0	None			
		Petroleum products (2 Marks)	0	None			
		Minerals (2 Marks)	0	None			
		Electro Technical and electronic products (2 Marks)	2	Egypt accreditation council for tuv middle east.	319006B	Electro technical & electronic products	992 to 995
			2	Emirates authority for standardisation & metrology	UAENB178	Electro technical & electronic products	2183 to 2184
			2	Emirates authority for standardisation & metrology	UAENB179 And	Mechanical products	1058 to 1065

Reason given in the notification of intention to enter into a contract dated 27 th January 2022	Criterion 2 of Technical Evaluation at page 29 to 30 of the Tender Document		Eval. scores	Applicant's Evidence (it does not necessarily correspond to the requirement as they provided many)			
	No.	Requirements		Board of accreditation	Certificate No.	Product	Page number
					UAENB019		
		<ul style="list-style-type: none"> ▪ Civil, building and construction products (2 Marks) 	2	Egypt accreditation council for TUV Middle East	319006B	Civil buildings & construction products	992 to 995
		<ul style="list-style-type: none"> ▪ Textiles and leather products (2 Marks) 	2	Egypt accreditation council for TUV Middle East	319006B	Textile and leather products	1134 to 1137

Upon perusal of the Applicant's original tender, we note the Applicant did not provide evidence of current accreditation to ISO/IEC 17020:2012 with scope covering pharmaceuticals, medical devices, petroleum and mineral products. We are of the considered opinion that the Applicant was properly scored a zero with respect to evidence of current accreditation to ISO/IEC 17020:2012 with scope covering pharmaceuticals, medical devices, petroleum and mineral products.

Requirement No.3 of Clause 1.1.2.1 Criteria for Evaluation of Technical Proposals at page 30 of the Tender Document in which the Applicant was scored 0 out of 10 marks with respect to Zone 16 of the subject tender.

Reason given in the notification of intention to enter into a contract dated 27 th January 2022	Criterion 3 of Technical Evaluation at page 30 of the Tender Document	No.	Requirements	Eval. scores	Applicant's Evidence				
					Contracting Authorities	country	Number of years	Nature of Services	Evidence in Bid Doc (Pages)
3. There was no evidence of experience in the provision of conformity assessment services as per the requirements.	3.		Experience in the provision of conformity assessment services. (Max 10 marks) A brief description of similar conformity assessment contract (s) performed by the Tenderer for period of not less than five (5) years in the last 10 years including the name of the regulatory authorities, nature of service provided, duration of service provision and the contract details of		GASC (General Authority for supplied commodities.	Egypt	5 years Since 2017 (current)	Conformity assessment on Food / Agri. products	2146 to 2158

Reason given in the notification of intention to enter into a contract dated 27 th January 2022	Criterion 3 of Technical Evaluation at page 30 of the Tender Document		Eval. scores	Applicant's Evidence				
	No.	Requirements		Contracting Authorities	country	Number of years	Nature of Services	Evidence in Bid Doc (Pages)
		the contracting authority.						
	i.	Evidence, by way of testimonials with contacts authority (ies), having performed a similar conformity assessment contract/s for a period of not less than five (5) years in the last ten (10) years. Tenderer to include the name of contracting authority/ies, nature of the service provided, and duration served – (7 marks for contract(s) carried out for a minimum of five years)	0	GOEIC (General Authority of export and import control	Egypt	5 years Since 2016 (Current)	Conformity assessment for (Food and agricultural products + Chemical products + Minerals + Electro technical and electronic products + Mechanical products + Civil, building and construction products + Textiles and leather products)	2159 to 2160
				NFSA (National Food safety authority)	Egypt	2 years Since 2020 (Current)	Conformity assessment for food and agriculture products.	2161 to 2179
				ESMA	UAE	3 years Since 2019 (Current)	Conformity assessment for Food + Chemicals + Electrical + Mechanical + Industrial measurement system + ROHS	2181 to 2192
				Indonesia	Indonesia	6 years Since 2016 (Current)	Conformity assessment for Food products	2193 to 2333

Reason given in the notification of intention to enter into a contract dated 27 th January 2022	Criterion 3 of Technical Evaluation at page 30 of the Tender Document		Eval. scores	Applicant's Evidence				
	No.	Requirements		Contracting Authorities	country	Number of years	Nature of Services	Evidence in Bid Doc (Pages)
				SASO	KSA	2 years Since 2020 (Current)	Conformity assessment for (Civil + Minerals + Chemicals + Electrical + Leather and textile + Telecommunication devices + Automotive spare parts + EMC + ROHS) products	2180
	ii.	Evidence, by way of testimonials with contacts from contracting authority (ies), of having carried out certification of medical devices under the above contract – (3 Marks)	0	NO EVIDENCE PROVIDED				

Upon perusal of the Applicant's original tender, we note that the Applicant provided some form of evidence by way of testimonials with contacts from contracting authorities having performed similar conformity assessment contracts for a period of not less than five (5) years in the last ten (10) years including the name of contracting authorities, nature

of the service provided and duration served but was scored zero in all of them. We are of the considered opinion that the Applicant ought to have been scored some marks if not all marks for providing some form of evidence by way of testimonials with contacts from contracting authorities having performed similar conformity assessment contracts for a period of not less than five (5) years in the last ten (10) years including the name of contracting authorities, nature of the service provided and duration served. Assuming the Applicant was scored the maximum marks for providing evidence by way of testimonials with contacts from contracting authorities having performed similar conformity assessment contracts for a period of not less than five (5) years in the last ten (10) years including the name of contracting authorities, nature of the service provided and duration served, the Applicant would have scored a total of 7 out of 10 marks under this criterion yet the Applicant was scored a total of 0 out of 10 marks essentially losing out on 7 marks in this criterion.

In essence, the maximum score the Applicant may have lost if it were to be awarded full marks where it provided some form of evidence of its physical location (address) of registered offices and contact information (email and telephone, name, title, and contact information of the person responsible for services being tendered and some form of evidence by way of testimonials with contacts from contracting authorities having performed similar conformity assessment contracts for a period of not less than five (5) years in the last ten (10) years including the name of

contracting authorities, nature of the service provided and duration served with respect to Zone 16 would be 8 and 7 marks respectively making a total of 15 marks. The Applicant scored a total of 63.5 marks with respect to Zone 16. If the 15 marks that the Applicant may have lost if awarded full marks where it provided some form of evidence of its physical location (address) of registered offices and contact information (email and telephone, name, title, and contact information of the person responsible for services being tendered and some form of evidence by way of testimonials with contacts from contracting authorities having performed similar conformity assessment contracts for a period of not less than five (5) years in the last ten (10) years including the name of contracting authorities, nature of the service provided and duration served is added to the 63.5 marks, the Applicant would have obtained a total of 78.5 marks as its technical score and which marks would still fall short of the minimum score of 80% required to proceed to the next evaluation stage with respect to Zone 16 of the subject tender.

From the foregoing, we find the Applicant did not satisfy the technical evaluation criteria with respect to Zone 7 and 16 of the subject tender to warrant the evaluation of the Applicant's tender at the financial evaluation stage because the Applicant's tender fell short of the required minimum technical score of 80%.

87. Notification of intention to enter into a contract

Section 87 of the Act states as follows: -

The 1st and 2nd Respondents contend that the notification of intention to enter into a contract addressed to the Applicant and dated 27th January 2022 disclosed to the Applicant the successful tenderers and reasons thereto by clearly highlighting the royalty percentage in USD that was returned by the successful tenderers in accordance with Section 87 (3) of the Act and Regulation 82(1), (2) and (3) of Regulations 2020.

The Applicant alleges that the notification of intention to enter into a contract contravenes Section 87(3) of the Act and Regulation 82 of Regulations 2020 and was issued by the 1st Respondent contrary to the decision of the Board of 27th January 2022 to the extent that the Respondents have failed to specifically disclose the reasons why the Interested Parties tenders were deemed successful.

Whether the 1st Respondent disclosed the reasons why the Interested Parties' tenders were deemed successful and if not, whether the Applicant was prejudiced by such failure to disclose the reasons the Interested Parties' tenders were deemed successful.

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

by the Board]

successful tenderer as appropriate and reasons thereof. [Emphasis 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. [Emphasis

award.

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

his tender has been accepted.

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

Having considered the provisions of Section 87 of the Act and Regulation 82 of Regulations 2020, the Board observes that a letter of notification of unsuccessful tender issued to an unsuccessful tenderer (i) is issued in writing and made at the same time the successful tenderer is notified, (ii) discloses the reasons relating to non-responsiveness of the unsuccessful tenderer's tender, (iii) includes the name of the successful tenderer, the tender price and the reason why the successful tenderer's tender was successful in accordance with Section 86 (1) of the Act.

the Act

(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

(2) For greater certainty the reason to be disclosed to the unsuccessful bidder shall only relate to their respective bids.

82. (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.

As regards, notification to unsuccessful tenderer(s), the procedure for notification under Section 87 (3) of the Act is explained by Regulation 82 of Regulations 2020 which provides as follows: -

Section 86(1) of the Act provides as follows:

86. Successful tender

(1) The successful tender shall be the one who meets any one of the following as specified in the tender document-

- (a) the tender with the lowest evaluated price;**
- (b) the responsive proposal with the highest score determined by the procuring entity by combining, for each proposal, in accordance with the procedures and criteria set out in the request for proposals, the scores assigned to the technical and financial proposals where Request for Proposals method is used;**
- (c) the tender with the lowest evaluated total cost of ownership; or**
- (d) the tender with the highest technical score, where a tender is to be evaluated based on procedures regulated by an Act of Parliament which provides guidelines for arriving at applicable professional charges.**

(2)

The uniqueness and peculiarity of the subject tender is that successful tenderers are required to pay royalties to the 2nd Respondent on a

This omission in our view is not grave in these unique circumstances where the Applicant was already aware from page 80 the Decision of the Board of 24th January 2022 that the Interested Parties were successful because they had submitted the highest evaluated responsive royalty percentages for the zones of the subject tender such Interested Parties were awarded.

We have hereinbefore reproduced the notification of intention to enter into a contract dated 27th January 2022 addressed to the Applicant by the 1st Respondent. We note that indeed the 1st Respondent disclosed who the successful tenderers were and their respective royalty percentages in USD. However, the 1st Respondent did not disclose that the successful tenderers were successful because they submitted the highest evaluated responsive royalty percentages for the zones of the subject tender awarded.

percentage basis of inspection fees chargeable as opposed to the 2nd Respondent paying successful tenderers for the services offered by the successful tenderers on behalf of the 2nd Respondent. The subject tender therefore, is a revenue earning one. It would therefore be absurd for the 1st Respondent to award the subject tender to a tenderer who submitted a tender with the lowest evaluated royalty percentage as envisaged under Section 86(1)(a) of the Act. We say so because, doing so would mean the 2nd Respondent earns less in royalties compared to earning more in instances where a successful tenderer is one who submits the highest evaluated royalty percentage.

PPARB

CHAIRPERSON



PPARB

SECRETARY



Dated at Nairobi this 2nd day of March, 2022.

Review.

- b. Each party to bear its own costs in the instant Request for Review.
- be and is hereby dismissed.
- a. The Request for Review No.11/2022 of 9th February 2022

February 2022:

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 dated 9th

FINAL ORDERS

In view of the unique circumstances of this instant Request for Review, we find that even though the 1st Respondent did not disclose the reasons why the Interested Parties' tenders were successful, no prejudice was occasioned to the Applicant by such an omission because the Applicant had knowledge of why the successful tenderers were deemed successful from the decision of the Board of 24th January 2022.

In totality of our findings in the instant Request for Review, we find the same is not meritorious and is ripe for dismissal.



