

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 24/2023 OF 14TH APRIL 2023

BETWEEN

ADCC INTERNATIONAL EAST AFRICA LIMITEDAPPLICANT

AND

ACCOUNTING OFFICER,

NATIONAL HOUSING CORPORATION1ST RESPONDENT

NATIONAL HOUSING CORPORATION2ND RESPONDENT

AND

HI-CAD AFRICA LIMITEDINTERESTED PARTY

Review against the decision of the Accounting Officer, the National Housing Corporation, in relation to Tender No. NHC/TECH/BIM/018/2022-23 for Supply, Installation, Configuration and Commissioning of a Building Information Modeling (BIM) System.

BOARD MEMBERS PRESENT

- | | | |
|------------------------|---|-------------|
| 1. QS. Hussein Were | - | Chairperson |
| 2. Mrs. Irene Kashindi | - | Member |
| 3. Dr. Paul Jilani | - | Member |

IN ATTENDANCE

Mr. Philemon Kiprop - Secretariat

PRESENT BY INVITATION

APPLICANT -ADCC INTERNATIONAL EAST AFRICA LIMITED

Mr. Victor Mulindi -Advocate, Khayesi Njambi & Khayesi Advocates LLP

Ms. Hellen Khayesi -Advocate, Khayesi Njambi & Khayesi Advocates LLP

Mr. Vikas Tonge -Director, ADCC International East Africa Limited

RESPONDENT -THE ACCOUNTING OFFICER, NATIONAL HOUSING CORPORATION

NATIONAL HOUSING CORPORATION

Mr. K.N. Nyabare - Advocate, National Housing Corporation

INTERESTED PARTY-HI-CAD AFRICA LIMITED

Mr. Njuguna - Advocate, Wainaina Ileri Advocates LLP

BACKGROUND OF THE DECISION

The Tendering Process

The National Housing Corporation (hereinafter referred to as "the Procuring Entity") advertised Tender No. NHC/TECH/BIM/018/2022-23 for Supply, Installation, Configuration, and Commissioning of a Building Information Modeling (BIM) System (hereinafter referred to as "the subject tender") on

7th February 2023 in *MyGov* Publication as an insert in *The Star* newspaper as well as the Procuring Entity's website www.nhckeny.go.ke and the Public Procurement Information Portal www.tenders.go.ke. The subject tender submission deadline was 1st March 2023 at 11.00 a.m.

Submission of Tender and Tender Opening

According to the Tender Opening Minutes a total of two (2) tenderers were recorded as having submitted their tenders in response to the subject tender as follows:

Tender No.	Name of Tenderer
1.	HI-CAD Africa Limited
2.	ADCC International East Africa Limited

Evaluation of Tenders

The 1st Respondent constituted a Tender Evaluation Committee to undertake an evaluation of the tenders. The tenders were evaluated in the following three stages:

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

Mandatory Preliminary Evaluation

At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the criteria set out as Clause 1 - Mandatory

Evaluation Criteria of Section III – Evaluation and Qualification Criteria at pages 32 to 33 of the tender document.

Tenderers were required to satisfy all the 12 mandatory requirements at this stage to qualify to proceed for evaluation at the Technical Evaluation stage.

At the end of the evaluation at this stage, both tenders were found to be responsive and qualified for evaluation at the Technical Evaluation Stage.

Technical Evaluation

At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the Criteria set out as Clause 2 - Technical Evaluation Criteria of Section III - Evaluation and Qualification Criteria at pages 33 to 34 of the tender document. Tenders were required to meet a minimum score of 70 marks in order to proceed for further evaluation.

At the end of evaluation at this stage, Messrs ADCC International East Africa Limited's tender was found non-responsive while Messrs HI-CAD Africa Limited's tender proceeded for evaluation at the Financial Evaluation Stage.

Financial Evaluation

At this stage of evaluation, the Evaluation Committee was required to examine tenders as outlined under the criteria set out as Clause 3 - Financial Evaluation Criteria of Section III - Evaluation at page 34 of the tender document. The Evaluation Committee was required to conduct a financial

comparison of the technically responsive tenders and rank them based on the evaluated tender price to determine the lowest evaluated price.

At the end of the evaluation at this stage, the Evaluation Committee identified the lowest evaluated responsive tender submitted to be that of Messrs HI-CAD Africa Limited.

Evaluation Committee's Recommendation

The Evaluation Committee recommended award of the subject tender to **HI-CAD Africa Limited** at their tender sum of Kenya Shillings **Thirty-Three Million, Nine Hundred and Fifty-One Thousand, Four Hundred and Eighty-Nine Cents Thirty-Eight (Kshs. 33,951,489.38)**, inclusive of taxes subject to successful due diligence.

Due Diligence

According to a Due Diligence Report submitted by the Evaluation Committee, it conducted due diligence on HI-CAD Africa Limited. The tenderer was found eligible for the award of the subject tender.

Professional Opinion

The Head of Procurement , Mr. Auko C. MC Omondi, reviewed the manner in which the subject procurement process was undertaken and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender.

The Professional opinion was approved by QS. David Mathu, the Procuring Entity's Managing Director and the 1st Respondent herein.

Notification to Tenderers

Tenderers were notified of the outcome of the evaluation of the subject tender *vide* letters of Notification of Intention to Award dated 20th March 2023 signed by the Procuring Entity's Managing Director.

REQUEST FOR REVIEW

On 14th April 2023, Messrs ADCC International East Africa Limited (hereinafter, "the Applicant") filed a Request for Review dated 13th April 2023 together with a Statement in Support of the Request for Review and Supporting Affidavit sworn by Vikas Tonge. The Request for Review, filed through the firm of Khayesi Njambi & Khayesi Advocates LLP, was seeking the following orders:

- 1. A declaration that the determination of the applicant's non-responsiveness in Tender No. NHC/TECH/BIM/018/2022-23 SUPPLY, INSTALLATION, CONFIGURATION AND COMMISSIONING OF A BUILDING INFORMATION MODELING (BIM) SYSTEM by the Respondents was illegal, null and void;*
- 2. A declaration can be made that the purported evaluation process conducted on the Applicant's bid by the Respondents is grossly unfair, unreasonable and fails to comply with the provisions of the law as well as requirements set out in the Tender document.*

3. *The Respondent's decision contained in the letter dated 20th March 2023 to the Applicant declaring that the Applicant's bid was non-responsive and did not attain the 70% threshold be quashed or set aside;*
4. *The Board be pleased to substitute the procuring entity's decision with its own confirming that the Applicant did comply with the requirements in the tender document;*
5. *The award of the Tender to HI-CAD Africa Limited by the Procuring Entity for the sum of Kenya Shillings Thirty-Three Million, Nine Hundred and Fifty-One Thousand, Four Hundred and Eighty-Nine Cents Thirty-Eight;*
6. *The procuring entity be directed to re-evaluate the Applicant's bid herein in accordance with the law, the Tender document and the findings of this Honourable Board;*
7. *In the alternative, the Respondents' decision be substituted with the Board's decision awarding the Tender to the Applicant at the tender sum of Kenya Shillings Twenty-Eight Million Seven Hundred and Thirty-Five Thousand Six Hundred and Seventy-Six and Sixty Cents (Kshs. 28,735,676.60) being the lowest and most responsive bid;*
8. *The costs of this request for review be awarded to the Applicant;*
9. *Any other remedy that the Honourable Board deems appropriate.*

Mr. James Kilaka, the Acting Board Secretary of the Public Procurement Administrative Review Board (hereinafter, referred to as "the Board"), in a letter dated 14th April 2023, notified the Respondent of the filing of the instant Request for Review and the consequent suspension of the procurement proceedings for the subject tender. The Board Secretary also forwarded to the said Respondent a copy of 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 and 2nd Respondents were requested to submit a response to the instant Request for Review together with confidential documents concerning the subject tender within five days from 14th April 2023.

On 24th April 2023, the Respondents, through Mr. K.N. Nyabare, Advocate, filed the Respondents' Notice of Appointment of Advocates dated 20th April 2023, a Memorandum of Response dated 20th April 2023 together with confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act').

Vide letters dated 14th April 2023, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the instant Request for Review while forwarding to them a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March

2020. The tenderers were invited to submit to the Board any information and arguments concerning the tender within 3 days from 14th April 2023.

Vide a Hearing Notice dated 25th April 2023, the Acting Board Secretary, notified parties and tenderers that there would be a hearing of the Request for Review online on 27th April 2023 at 1:30 p.m through a link availed in the said Hearing Notice.

Messrs HI-CAD Africa Limited (hereinafter, 'the Interested Party'), through the firm of Wainaina Ileri Advocates LLP, filed a Notice of Appointment of Advocates, a Memorandum of Response, Written Submissions and a Chamber Summons Application, all dated 26th April 2023.

On 27th April 2023 the Applicant filed a Supplementary Affidavit sworn by Vikas Tonge together with Written Submissions, both dated 26th April 2023.

At the hearing on 27th April 2023, Counsel for the Applicant, Mr. Mulindi sought the Board's direction on the late filing of documents by parties herein. He pointed out that the Respondents and Interested Party filed their documents outside the statutory timelines which fact had occasioned them to file a supplementary affidavit just before the hearing session began.

Mr. Nyabare submitted that the Respondents had filed their Memorandum of Response within the statutory timelines. He further indicated that the

Applicant had not served the Respondents with the supplementary affidavit that the Applicant indicated had just been filed before the start of the hearing and that it would be prejudicial on the part of the Respondents for the hearing to proceed on the basis of the said supplementary affidavit.

Mr. Njuguna submitted that the Applicant failed to enjoin the Interested Party in the proceedings and yet the Interested Party was the successful candidate in the subject tender. He associated himself with the submissions by Mr. Nyabare that parties would be highly prejudiced if the hearing was to proceed on the basis of a supplementary affidavit that was filed just before the hearing and not served upon the parties. Counsel asked for the Applicant to withdraw the supplementary affidavit or in the alternative for the Board to strike it out to enable the hearing to proceed as earlier scheduled.

The Board considered the submissions made by parties and noting that it had not seen the additional documents filed by the Applicant, directed the Applicant to file and serve the Supplementary Affidavit, Written Submissions and any authorities by 3.00 pm on 27th April, 2023. Hearing was then rescheduled for 28th April 2023 at 9.00 a.m. with the Applicant directed to pay the adjournment fee of Kshs. 10,000.

During the online hearing held on 28th April 2023, the Board noted that the Interested Party had raised a Preliminary Objection to the Request for Review in the written submissions it had filed. The Board directed that it

would proceed to hear the objection as part of the substantive request for review in line with Regulation 209 (4) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020') which grants the Board the discretion to hear preliminary objections as part of the substantive Request for Review and render one decision.

PARTIES' SUBMISSIONS

Applicant's Case

Counsel for the Applicant, Mr. Mulindi placed reliance on the documents filed on behalf of the Applicant in the matter *viz* Request for Review and Statement in Support of the Request for Review dated 13th April 2023 and the Supporting Affidavit sworn on 13th April 2023 by Vikas Tonge, Supplementary affidavit and the written submissions dated 26th April 2023.

Counsel referred the Board to the notification letter and indicated that the same was dated 20th March 2023 but there was a postage stamp which showed that it was posted on 31st March 2023.

Relying on Regulation 3 of the Kenya Information and Communication (Postal and courier services) Regulations 2010 which provides that when an article is posted through the postal office it is deemed to have been received on the date it was received at the post office, Counsel argued that the notification of award was done on 31st March 2023.

In computing time, counsel submitted that time would be computed from 1st April 2023 as the date of postage would be excluded in counting the 14 days' statutory time limit. He also indicated that clause 49(2) of the tender document provided that the standstill period starts when the notification of award is transmitted to the tenderers and that, in the present case, the transmission was done on 31st March 2023 which also marked the date of notification.

Counsel submitted that 14 days begun running on 1st April 2023 and ended on 14th April 2023 and thus the Applicant's Request for Review was filed in time having been filed on 14th April 2023.

Turning to the substantive request for review, it was Mr. Mulindi's submission that various violations of the law were made in the manner the Applicant's tender was evaluated. He added that a basic principle in sections 81, 80 (1) and (2) of the Act and Regulation 30 of the Regulations 2020 is that an Evaluation Committee, in evaluating a tender, should not go outside the provisions of the tender document. He argued that in the present case, the notification of award gave six reasons as to why the Applicant's tender was found non-responsive and yet none of the reasons was a criterion laid out in the tender document.

Mr. Mulindi referred to pages 9 to 16 of the Request for Review outlining the issues raised in the letter of notification. Counsel submitted that at page 78 to 93 of its bundle, the Applicant provided evidence of Implementation of

BIM project going beyond and providing the evidence even though it was not a requirement under the tender document.

On experienced and trained AEC instructors, Mr. Mulindi referred to page 34 of the Applicant's bundle and noted that the tender requirement read "Autodesk Authorised Training Centers" and that this was demonstrated by the Applicant on page 307 to 333 of the bundle.

The Board pointed out that one of the reasons the Applicant lost marks at technical evaluation was for lack of agreements or certificates for the Autodesk Training Centre and sought clarification on whether the Applicant furnished such agreements and certificates in its tender. The Applicant's Director Mr. Tonge, in response, referred to pages 58 to 65 of the Applicant's tender.

With regard to evidence of award, deployment and training on submitted records of past projects, the Applicant stated that this was not a requirement under the tender document, and that, it nonetheless provided for it at pages 308 to 333 of its bid document.

The Applicant contented, in regard to the allegation that the reference letters submitted were not agreeing with evidence of past projects, that this was not an evaluation criteria at the Technical Evaluation Stage of the tender.

In counter to the Procuring Entity's allegation that all letters of recommendation were word for word similar although they had been

generated by different companies, the Applicant stated that it complied with the requirement of the tender document to provide five recommendation letters as shown at pages 95 to 100 of its tender document. It was Counsel's submission that the letters were signed by the different CEOs from the different organisations and that the Procuring Entity could verify the authenticity of the letters by reaching out to the said organisations.

The Applicant averred that the Procuring Entity was yet to avail a summary of the evaluation report it had requested on 6th April 2023 pursuant to Section 67(4) of the Act. It also referred to Instructions To Tenderers No. 50 of the Tender Document that required the Procuring Entity to debrief a party aggrieved by the tender process. This would enable participants in the tender to understand how their tenders were evaluated.

The Applicant averred further that upon a self-assessment it found that it had attained 92 marks surpassing the minimum score of 70 marks. Arguing that it was a Gold Premier Partner of Autodesk in this country with over 13 years experience, the Applicant contented that it would have passed the technical evaluation stage and emerged as the lowest evaluated tenderer at the financial stage if it had been properly evaluated.

Mr. Mulindi pressed on that Section 173 of the Act grants various powers to the Board, including the power to substitute the decision of the Accounting Officer with the decision of the Board. Placing reliance on the decision in **Application No. 21 of 2021 (Consolidated); Skaga Limited & anor v**

Accounting Officer, Kenya Revenue Authority & Another, Counsel requested the Board to award the subject tender to the Applicant.

Respondents' Submission

Counsel for the Respondent, Mr. Nyabare relied on the Respondents' filed Memorandum of Response dated 20th April 2023.

Counsel submitted that the Applicant was disqualified at the Technical Evaluation Stage for failure to provide evidence of installation, configuration and training of any organization on the use of a Building Information Modelling (BIM) System. Mr. Nyabare maintained that this was a requirement under the Technical Evaluation items 3 and 4. Item 3 required demonstration of experience and tenderers were required to attach CVs of instructors. Counsel submitted that the Applicant provided CVs of 3 instructors but the said CVs did not demonstrate experience of implementation and training in BIM systems.

It was Counsel's contention that under item 4 of Technical Evaluation, a bidder was required to demonstrate technical capacity in deploying BIM systems by providing evidence of 3 projects. Counsel sought to define the word "deployment" as used in the Tender Document in technical terms derived from a publication by Jing Wang, Weisheng Lu; published on 10th February 2022 in the Engineering, Construction and Architectural Management Journal, explaining that, "*The deployment framework outlines the BIM dimensions (i.e. technology, process and protocol) and the mechanisms (i.e. configuration, coupling and reinterpretation) of BIM*

localization that go through the three 'A's (i.e. analysis, adaptation and assimilation) under the firm's network and contextual factors."

Counsel argued that the evidence provided by the Applicant did not demonstrate that it had ever installed, configured or tested a BIM System in any organization. Counsel further contended that there was no evidence of training in the Applicant's tender.

Mr. Nyabare averred that the Applicant submitted recommendation letters that were not in agreement with the projects they referred to. He gave the example of a letter from GIBBS International Limited which indicated that the Applicant delivered an Autodeck Software between January 2023 and June 2023 when, in fact, the hearing of this review is only in April 2023. Counsel also pointed out that GIBBS International's letter surprisingly indicated that the project was successfully completed.

Mr. Nyabare averred further that the recommendation letter from Laxmanbhai stated that the project was successfully executed whereas the document provided by the Applicant indicated that the project was for a period starting September 2021 to April 2024. He also pointed out that the letter of recommendation from Locam indicated that the project was successfully completed yet from the documents supplied by the Applicant the same is scheduled to end in August 2023.

Mr. Nyabare pointed out that the letters of recommendation were similar word for word and that the Applicant failed to meet the 70 marks threshold required to qualify for evaluation at the financial stage.

Interested Party's Submissions

Counsel for the Interested Party, Mr. Njuguna placed reliance on the Notice of Appointment, Chamber Summons Application, Memorandum of Response and Written Submissions, all dated 26th April 2023.

Counsel first sought for the Interested Party to be formally enjoined in the matter and notified the Board that it would fully rely on their Written Submissions in respect of the Preliminary Objection to which it averred that the Request for Review was filed out of time. It was Counsel's argument that the letter of notification was dated 20th March 2023 and the review application ought to have been filed by 3rd April 2023. According to Mr. Njuguna the Request for Review which was filed on 14th April 2023 was time barred and therefore should be dismissed.

Responding to the Board's inquiry regarding the Applicant's submission on postal service as well computation of time, Mr. Njuguna stated that time starts to run on the date a decision is made which, in this case, was on 20th March 2023 when the notification of award was made.

Turning to the substantive issue of the review, the Interested Party submitted that, contrary to the Applicant's view that they ought to be awarded the subject tender because they were the lowest, they fail to

acknowledge that the High Court and this Board have previously clarified that there is a distinction between the lowest evaluated tender and the lowest tender. It argued that the Applicant had not demonstrated that its tender was the lowest evaluated tender.

Mr. Njuguna referred to paragraph 4 of the Technical Evaluation Criteria appearing on page 34 of the Tender Document and stated that bidders should demonstrate technical competence in supplying BIM implementation by providing evidence on three successful BIM Implementations. In his view, the Applicant erroneously believed that they were not required to provide evidence of 3 successful BIM implementation projects.

Counsel for the Interested Party invited the Board to apply the principles of contractual interpretation and submitted that when interpreting a cause, you have to ascertain the meaning a contractual document would convey to a reasonable person having background knowledge that should have been available to the parties. In this incident paragraph 4 of the Technical Evaluation Criteria cannot be read in isolation but has to be read alongside the other tender provisions, Counsel opined and referred to the heading of the tender pointing out that it was calling for tenderers with expertise on installation, configuration and commissioning of a BIM System.

He further argued that the purpose of Paragraph 4 at page 34 was provided at page 20 of the tender document contending that all information supplied by the tenderers would be subjected to examination. Counsel also referred to

the technical requirements that appear at page 53 to 64 of the tender document and also page 54 which mentions the purpose of the contract.

Counsel went on to submit that the issue of configuration is provided for under page 159 of the Tender Document and that considering the interpretation of competence in deploying BIM System, would include evidence of installation, configuration and training on the system. Counsel argued that the Applicant was disqualified on account of information they supplied and which was found to be non-responsive to the tender requirements.

Applicant's Reply

In a rejoinder, Mr. Mulindi submitted that the tender document is the Bible for the evaluation of tenders and that the Evaluation Committee cannot depart from the evaluation criteria under the tender document. He argued that the notification letter mentioned reasons that fall outside the provisions of the tender document.

Counsel for the Applicant contended that the award of marks is based on specified requirements and once a requirement is met a tenderer is entitled to the marks for that requirement. He contended further that deployment includes installation, configuration and training, all of which the Applicant had demonstrated.

Arguing that there is a difference between supply and deployment, Mr Mulindi pointed out that deployment is a continuous process whereas supply

is a one off exercise and that it had supplied evidence of capacity to offer training at page 384 onwards, of its tender.

In conclusion, Mr. Mulindi averred that the Technical Evaluation of the Applicant's tender was not done fairly.

Respondent's Rejoinder on the Preliminary Objection

In a brief rejoinder on the Preliminary Objection, Mr. Nyabare associated himself with the Interested Party's submissions. He averred that the date of notification was 20th March 2023 and that on this date all parties were invited through telephone calls to collect their letters. Those who did not respond had their letters posted to them. It was his view that computation of time ought to be taken from the date of notification of award.

Responding to inquiry from the Board as to when the Interested Party received the notification letter, Mr. Nyabare stated that this happened within reasonable time after the Interested Party was contacted.

At the conclusion of the online hearing, the Board informed parties that the Board would communicate its decision to them via email on or before 5th May 2023.

BOARD'S DECISION

The Board has considered all documents, pleadings, oral submissions and authorities together with confidential documents submitted to it pursuant to

Section 67(3)(e) of the Act and finds the following issues call for determination:

i. Whether the Board has jurisdiction to hear and determine this Request for Review.

In determining the first issue, the Board will make a finding on whether the instant Request for Review was filed within the statutory period of 14 days in accordance with Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020 to invoke the jurisdiction of the Board.

Depending on the outcome of the first issue;

ii. Whether the Respondents fairly evaluated the Applicant's tender at the Technical Evaluation Stage pursuant to section 80 of the Act as read with Regulation 76 of the Regulations 2020.

iii. What orders the Board should grant in the circumstances.

The Board now proceeds to determine the issues framed for determination.

As to whether the Board has jurisdiction to hear and determine the Request for Review:

It is now a settled principle that courts and decision-making bodies can only hear and determine matters that are within their jurisdiction. Therefore, prudence dictates that a court or tribunal seized of a matter should first enquire into its jurisdiction before considering the matter.

Black's Law Dictionary, *8th Edition*, defines jurisdiction as:

"... the power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties ... the power of courts to inquire into facts, apply the law, make decisions and declare judgment; The legal rights by which judges exercise their authority."

Jurisdiction is defined in Halsbury's Laws of England (4 th Ed.) Vol. 9 as:

"...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision."

The *locus classicus* case on the question of jurisdiction is the celebrated case of **The Owners of the Motor Vessel "Lillians" -v- Caltex Oil Kenya Ltd (1989) KLR 1** where Nyarangi J.A. held:

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

step. Where a court has no jurisdiction there would be no basis for continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction.

In the case of **Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others [2013] eKLR**, the Court of Appeal emphasized on the centrality of the issue of jurisdiction and held that:

"...So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain...."

Such is the centrality of jurisdiction that the Court of Appeal has held in **Isaak Aliaza v Samuel Kisiavuki [2021] eKLR**, that:

"whether it is raised either by parties themselves or the Court suo moto, it has to be addressed first before delving into the interrogation of the merits of issues that may be in controversy in a matter."

The Supreme Court in the case of **Samuel Kamau Macharia and Another v Kenya Commercial Bank Ltd and 2 Others [2012] eKLR** pronounced itself regarding the source of jurisdiction of a court or any other decision making body as follows:

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with Counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings."

The jurisdiction of a court, tribunal, quasi-judicial body or an adjudicating body can only flow from either the Constitution or a Statute (Act of Parliament) or both.

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

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

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

***"(1) The functions of the Review Board shall be—
(a) reviewing, hearing and determining tendering and asset disposal disputes; and
(b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law."***

The above provisions demonstrate that the Board is a specialized, central independent procurement appeals review board with its main function being reviewing, hearing and determining tendering and asset disposal disputes.

The jurisdiction of the Board is provided for and also limited under the Act specifically in Section 167 which provides for what can and cannot be subject to proceedings before the Board and sections 172 and 173 which provides for the Powers of the Board, as follows:

Section 167 - Request for a review

(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed. [Emphasis by the Board]

(2)

(3)

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

(a) the choice of a procurement method;

(b) a termination of a procurement or asset disposal proceedings in accordance with Section 63 of this Act; and

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

Section 172 - Dismissal of frivolous appeals

Review Board may dismiss with costs a request if it is of the opinion that the request is frivolous or vexatious or was solely for the purpose of delaying the procurement proceedings or performance of a contract and the applicant shall forfeit the deposit paid.

Section 173 - Powers of Review Board

Upon completing a review, the Review Board may do any one or more of the following—

(a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;

(b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;

- (c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;***
- (d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and***
- (e) order termination of the procurement process and commencement of a new procurement process.***

Given the foregoing provisions, the Board is a creature of the Act and its jurisdiction flows from Sections 28 and 167 (1), limited under Section 167(4) and exercises its powers under Sections 172 and 173 which donate powers to the Board with respect to an administrative review of procurement proceedings before it. Put differently, if the Act does not apply, then the Board will not have jurisdiction because the Board is only established by the Act, its jurisdiction only flows from the Act and it can only exercise powers as granted under the Act.

It therefore follows that for one to invoke the jurisdiction of the Board, they need to approach the Board as provided under Section 167 (1) of the Act. Section 167(1), allows an aggrieved candidate or tenderer to seek administrative review within 14 days of (i) notification of award or (ii) date of occurrence of alleged breach of duty imposed on a procuring entity by the Act and Regulations 2020 at any stage of the procurement process in a manner prescribed.

The manner in which an aggrieved candidate or tenderer seeks administrative review is prescribed under Regulation 203 of Regulations 2020 read with the Fourteenth Schedule of Regulations 2020 as follows:

Regulation 203 - Request for a review

(1) A request for review under section 167(1) of the Act shall be made in the Form set out in the Fourteenth Schedule of these Regulations.

(2) The request referred to in paragraph (1) shall—

(a)

(b)

(c) be made within fourteen days of —

(i) the occurrence of the breach complained of, where the request is made before the making of an award;

(ii) the notification under section 87 of the Act; or

(iii) the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder.

(d)

(3) Every request for review shall be filed with the Review Board Secretary upon payment of the requisite fees and refundable deposits...

Regulation 203 prescribes an administrative review sought by an aggrieved candidate or tenderer under Section 167(1) of the Act will be by way of a request for review. Further, this request for review is to be in a form set out in the Fourteenth Schedule of Regulations 2020.

Section 87 of the Act referred to in Regulation 203(2)(c)(ii) provides as follows:

Section 87 - Notification of intention to enter into a contract

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

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

(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting

tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.

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

It is clear from a reading of Section 167(1) and 87 of the Act, Regulation 203(1), (2)(c) & (3) of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 that an aggrieved candidate or tenderer invokes the jurisdiction of the Board by filing a request for review with the Board Secretary within 14 days of (i) occurrence of breach complained of, having taken place before an award is made, (ii) notification of intention to enter into a contract having been issued or (iii) occurrence of breach complained of, having taken place after making of an award to the successful tenderer.

Simply put, an aggrieved candidate or tenderer can invoke the jurisdiction of the Board in three instances namely, (i) before a notification of intention to enter into a contract is made, (ii) when a notification of intention to enter into a contract is made and (iii) after a notification to enter into a contract has been made.

The option available for an aggrieved candidate or tenderer in the aforementioned three instances is determinant on when occurrence of breach complained of took place and should be within 14 days of such occurrence of breach. It was not the intention of the legislature that where an alleged breach occurs before notification to enter into a contract is issued,

the same is only complained of after notification to enter into a contract has been issued.

The Board has held in many previous cases that procurement processes are time bound and a candidate or a tenderer who wishes to challenge a decision of a procuring entity with respect to a tender must come before the Board at the earliest by using the earliest option available under Regulation 203(2)(c) so as not to be accused of laches.

The question that arises in this objection for the resolution of the Board is whether the Applicant instituted the instant Request for Review within the statutory period of 14 days provided for under section 167(1) and Regulation 203(2)(c).

The Interested Party objected to the hearing of the Request for Review on account of what it stated to be failure by the Applicant to move this Board by way of a Request for Review within fourteen (14) days from the date of occurrence of the alleged breach by the Respondents pursuant to section 167(1) of the Act. The Interested Party took the view that the allegations of breach stemmed from letters of notification of award dated 20th March 2023 and thus the Applicant was time-barred when it filed the instant Request for Review on 14th April 2023, which view the Respondents associated with.

The Applicant objected to this reasoning and averred that it filed the Request within time since the letter of notification of award was transmitted by post on 31st March 2023. The Applicant argued that under Regulation 3 of the Kenya Information Communications (Postal and Courier Regulations) the date of receipt of notification of award would be 31st March 2023 and not 20th March 2023, the date appearing on the face of the notification of award.

The question that arises is, what were the circumstances in the instant Request for Review that determines the period when the Applicant ought to have approached the Board?

It is common ground that the letter of notification of award was dated 20th March 2023 and the same was received at the postal office on 31st March 2023. The Respondents alleged that the Respondents called the Applicant through telephone to collect the letter of notification of award dated 20th March 2023 shortly after its preparation but the Applicant failed to do so prompting the Procuring Entity to mail it to them on 31st March 2023. The Applicant, on its part, denied ever receiving such a call. The Respondents did not furnish any proof of the date when the alleged telephone call was made to the Applicant inviting them to collect the notification letter.

This Board takes the view that the benchmark date for computing the limitation period within which the instant Request for Review would be filed is the date when the Applicant became aware of the letter of notification. In the absence of proof that the Procuring Entity contacted the Applicant to

collect the notification letter on 20th March, 2023 as alleged, it is reasonable to assume that the Applicant was notified on 31st March, 2023 when the letter was received and stamped at the post office.

The Board takes cognizance of Regulation 3 of the Kenya Information and Communications (Postal and Courier Services) Regulations, 2010 that speaks to service of documents using the postal office. It states as follows:

Regulation 3 - Delivery and acceptance

(1) A postal article shall be considered —

(a) to have been delivered to the addressee —

(i) when it is delivered into a private letter box or bag of the addressee;

The Board's interpretation of the above Regulation is that service of postal articles is deemed to have been effected on the addressee the moment the postal address receives the article being posted. It therefore follows that since the letter of notification was posted on 31st March 2023, then this is the date that the Applicant is presumed to have received the letter of notification of award and thus this date is the benchmark for computing the time for filing the Request for Review.

In computing the 14 days contemplated under the Act, the Board is guided by section 57 of the Interpretation and General Provisions Act (hereinafter the IGPA), which provides:

Section 57 - Computation of time

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

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

(b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;

(c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;

(d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time".

In computing time when the Applicant ought to have sought administrative review before the Board, the 31st March 2023 is excluded as per section 57(a) of the IGPA being the day the Applicant should have learnt of the occurrence of the alleged breach. This means time started to run on 1st April 2023 and lapsed on 14th February 2023. In essence, the Applicant had between 1st April 2023 and 14th April 2023 to seek administrative review before the Board. The instant Request for Review was filed on 14th April 2023

which was the 14th day from the day the Applicant is presumed to have received the notification of intention to award.

The Board finds that this was within the 14-days statutory period required under Section 167(1) of the Act as read with Regulation 203(2)(c) of Regulations 2020. We find fault in the argument by the Interested Party and the Respondents that the Applicant should have filed the Request for Review within 14 days from 20th March 2023. The Applicant could not possibly have filed the Request for Review using 20th March 2023 2023 as a benchmark date since, as at that date, the Applicant was not aware of the existence of the letter of notification which was only posted to the Applicant on 31st March 2023.

In the circumstances, the Board finds that the instant Request for Review was filed within time. The Interested Party's Preliminary Objection raised through the Interested Parties Written Submissions dated 26th April 2023 is hereby dismissed. Accordingly, the Board has jurisdiction to hear and determine the Request for Review.

As to whether the Respondents fairly evaluated the Applicant's tender at the Technical Evaluation Stage in accordance with Section 80 of the Act as read with Regulation 76 of the Regulations 2020.

The Applicant took issue with the manner in which its tender was evaluated by the Evaluation Committee of the Procuring Entity. It argued that a self-evaluation conducted by the Applicant using the criteria set out under the

Tender Document garnered it a score of 92 marks as opposed to a score of 36 marks at the Technical Evaluation Stage that it was awarded by the Evaluation Committee.

The Respondents denied having unfairly evaluated the Applicant's tender and maintained that the Applicant did not meet the 70 marks pass mark to qualify for evaluation at the Financial Stage. The Respondents also submitted that section 80 of the Act does not provide for self-evaluation and thus it was erroneous for the Applicant to insist that they scored 92 marks at Technical Evaluation Stage.

The Interested Party supported the Respondent's position that the Applicant failed to meet the 70 marks pass mark because it failed to meet the technical requirements that were prescribed under the Tender Document.

A brief background is that the Procuring Entity advertised Tender No. NHC/TECH/BIM/018/2022-23 for Supply, Installation, Configuration, and Commissioning of a Building Information Modeling (BIM) System on 7th February 2023. The tender was opened on 1st March 2023 at 11.00 a.m. with two bidders responding: the Applicant and the Interested Party herein.

The submitted tenders were evaluated by the Procuring Entity's Tender Evaluation Committee and the Interested Party emerged successful having been recommended for award. *Vide* letter dated 20th March, 2023 the Interested Party was notified of the award that it was successful. The Applicant was equally notified by the letter of the same date but that it was

unsuccessful having scored 36 marks which was below the 70 marks required to proceed to financial evaluation. The Applicant disagreed with the decision of the Procuring Entity to disqualify its tender and filed this Request for Review on 14th April, 2023.

The Applicant refuted the score and the reasons provided by the Procuring Entity and argued that it was unfairly evaluated by the Procuring Entity and that, in fact, had it been correctly evaluated it would have scored 92 marks at Technical Evaluation Stage.

To establish the veracity of the allegations made by either side in this Request for Review, the Board takes a look at the evaluation criteria of the subject tender and how the same was applied on the Applicant's bid. Section III – ***Evaluation and Qualification Criteria*** – at page 32 of the tender document sets out the criteria for the evaluation of the tender. The part that is relevant to the resolution of this ground of review is Clause 2 – ***Technical Evaluation Criteria*** – found at page 33.

We have reproduced Clause 2 – Technical Evaluation Criteria – in the table below. Columns 1, 2 and 3 are exactly as they appear in the tender document. Column 4 represents how the Applicant was scored by the Procuring Entity's Tender Evaluation Committee at the technical evaluation stage. Column 5 shows the submissions in the Applicant's tender. Column 6 comprises the observations of the Board.

No.	Item description	Score	ADCC Score	Submission in Applicant's Bid	Board's Observation
1.	Manufacturer's authorization letter from Autodesk to supply Architectural, Engineering & Construction Software solutions.	5	5		Allocated full marks by Evaluation Committee
2.	Team Lead: Professional qualifications and experience (Attach copies of certificates)	15	8	Arch. Gurmukh Singh Panesar	
	Possess graduate degree in Engineering, Architecture, Quantity Surveying or related field – (4 mark)			1. Bachelor of Architecture 2012 (pg 310)	Complied.
	Professional certificate in BIM management – (4 marks)			2. BIM Certificate of Registration No.GS001-CABM-2021/00669 (pg 41)	Complied.
	Valid practicing license from relevant professional body – (2 mark)			3. Registered as an Architect 1504 issued on 12/02/2015 (pg. 42)	No practising certificate for Architect attached. Not complied.
	Experience in implementing projects of similar nature and complexity (1 mark for each project up to a maximum of 5 marks) (Attach signed CV)			From CV detailed task assigned- BIM deployment and management in 11 projects between 2016 to present	Complied in respect of two similar projects: affordable housing standards in Rwanda Affordable housing, Kajiado
	BIM facilitator: Professional qualifications	10	5	Vincent Kuria Kimani	

No.	Item description	Score	ADCC Score	Submission in Applicant's Bid	Board's Observation
	and experience (Attach copies of certificates)				
	Possess graduate degree in Engineering, Architecture, Quantity Surveying or related field – (3 mark)			1. Bachelor of Architecture 2019 (pg 45)	Complied.
	Professional certificate in BIM management – (2 marks)			2. Professional Certificate in BIM management valid from January 31, 2022 to January 31, 2024 (pg 46)	Complied.
	Valid practicing license from relevant professional body – (2 marks)			3. No practicing certificate attached	Not complied.
	Experience in the built environment (0.5 mark each year up to a maximum of 3 marks) (Attach signed CV)			Attached cv detailing experience from 2016 to date	Project record not matching year of qualification. Not complied.
	BIM technician: Professional qualifications and experience (Attach copies of certificates)	5	3	Reinier Khamala Wanjala	
	Possess graduate degree in Engineering, Architecture or related field – (2marks)			1. Bachelor of Architecture 2017 (pg 48)	Complied.
	Valid practicing license from relevant professional body – (1 marks)			2. practicing certificate for Architects PCA/285/21-22 page 50 –invalid	Not complied.
	Experience in design, draughting,			Attached cv detailing experience from	Complied.

No.	Item description	Score	ADCC Score	Submission in Applicant's Bid	Board's Observation
	supervision of construction projects (0.5 mark for each project up to a maximum of 2 mark) (Attach signed CV)			2017 to date	
	Authorized reseller (Authorized to provide Autodesk software, Training Services and support to end users) Attach agreements/certificates	10	10		Allocated full marks by Evaluation Committee
3.	Autodesk Authorized Training Centre experience not less than three years. Authorized supplier for Autodesk Attach agreements/certificates	< 3	0	0	Complied.
	Attach CVs of three AEC Instructors and certificates	> = 3	10	<p>Attached authorised training center certificate pages 59 for 2023, pg 60 for 2022, pg 61 for 2021, page 62 for 2020, pg 63 for 2019, page 64 for 2014</p> <p>At pages 65 are CV for AEC Instructor's and certificate-</p> <ol style="list-style-type: none"> 1. Tim Titus Akwara (page 65-68) 2. Obed Kiprotich Bore (page 69-71) 3. Anthony Mwangi Macharia (pages 72-77) 	

No.	Item description	Score	ADCC Score	Submission in Applicant's Bid	Board's Observation	
4.	Demonstrate technical competence in deploying BIM system by providing evidence of three successful BIM implementations. (Provide evidence of managed and implemented BIM on Build Projects in the last one year)	One site	10	0	1. GIBB International Ltd (Page 78-80) of the Applicant's Bid Document 2. Laxmanbhai Construction Ltd (Pg 81-84) 3. Norkun Intakes Ltd (Pg 85-87) 4. Safaricom (Pg 88-91) 5. Metrix Integrated (Pg 92-93) 6. Konza technoplois page 302 7. Kenya Power 8. REA 9. Nairobi Water and sewerage	Provided 9 projects. At least three of them (the first three) meet the set criteria. Complied.
		Two sites	20			
		Three sites	30			
	Attach five recommendation letters from the five clients listed above in client letter head written within the last one year (2 marks each upto a maximum of 15 marks)	10	0	i) GIBB International Ltd (Page 95) of the Applicant's Bid Document ii) Design Partnership limited (pg 98) iii) Laxmanbhai Construction Ltd (Pg 96) iv) Metrix Integrated (Pg 97)	Complied.	
5.	Certificate from ICT Authority	5	5		Allocated full marks by Evaluation Committee	
	Total Score	100	36			

From the above analysis, the Board observes that the scoring by the Procuring Entity's Evaluation Committee was at variance with the submissions in the Applicants's tender in the following areas:

a) Team Lead: Professional qualifications and experience

In the area of experience in implementing projects of similar nature and complexity the Applicant provided a list of 11 projects. The Board notes that two of the projects fit the requirements of the evaluation criteria. These are consultancy for affordable housing standards for Mininfra, Rwanda and affordable housing projects in Kajiado.

b) BIM Technical: Professional qualifications and experience

In the area of experience in design, draughting, supervision of construction projects the Applicant provided a list of 7 projects. The Board did not find any reason to suspect that the projects supplied did not match the requirements in the tender document. Whether the projects exist or not is not a question that can be answered at the evaluation stage. Rather, this can only be determined by the Procuring Entity at the due diligence stage, if the Applicant ever gets to that stage.

c) Autodesk Authorized Training Centre

The Applicant was required to attach agreements/certificates of authorized supplier for Autodesk Training Centre with an experience of not less than three years. CVs of three AEC Instructors and

certificates were also required. An examination of the Applicant's tender by the Board shows that these items were provided to the requirements of the tender document.

d) Demonstrate technical competence in deploying BIM system

The bidder was required to provide evidence of managed and implemented BIM on Build Projects in the last one year. The Board notes that the Applicant, in his bid document, provided nine projects which fit the requirement of the tender document. There is nothing in the Applicant's tender to suggest that these projects do not exist or that they were not implemented by the Applicant. Any doubts the Procuring Entity may have with regard to the projects may be cleared by due diligence, if the Applicant merits to get to that stage of evaluation.

e) Five recommendation letters

The requirement in the tender document was for five recommendation letters listed above in client letter head written within the last one year. The Procuring Entity acknowledged that the Applicant provided five recommendation letters but had a problem with the form of the letters. The Board's look at the recommendation letters provided by the Applicant reveals that they met the requirement of the tender document the similarity in form and wording not being material to the criteria.

It is clear from the foregoing observations that the scoring by the Evaluation Committee left out some marks that would otherwise have been awarded to the Applicant.

The Board further observes that the Evaluation Committee carried out individual score and each scored uniformly arriving at 98 and 36 for the Interested Party and the Applicant, respectively. However, while carrying out individual score the evaluators failed to indicate how they scored for each parameter but rather gave a total for each bidder.

The Procuring Entity is obligated to adhere to the law in all steps of the tender process. Specifically, Evaluation is governed by section 80 of the Act which provides as follows:

Section 80:

"1) The evaluation committee appointed by the accounting officer pursuant to section 46 of this Act, shall evaluate and compare the responsive tenders other than tenders rejected.

(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered."

On its part Regulation 76 of the 2020 Regulations provides as follows:

Regulation 76. Technical evaluation

"(1) Upon completion of the preliminary evaluation under regulation 74, the evaluation committee shall conduct a technical evaluation by comparing each tender to the technical requirements of the goods, works or services in the tender document.

(2) The evaluation committee shall reject tenders which do not satisfy the technical requirements under paragraph (1)".

The import of the above provisions is that the Evaluation Committee of the Procuring Entity is required to conduct evaluation of the tender on the basis of the criteria set out in the tender document and that non-conforming tenders shall be rejected.

The question that arises therefore is, did the Procuring Entity evaluate the Applicant's tender on the basis of the Technical Evaluation Criteria provided in the tender document of the subject tender and therefore in compliance with the provisions of Section 80 (2) of the Act as read together with Regulation 76 of the Regulations 2020?

The reasons provided by the Procuring Entity as the basis to disqualify the Applicant at the technical evaluation stage were as follows:

a. "You submitted evidence of projects that have been implemented using BIM; however, there was no evidence of

having installed, configured and trained any organization on the use of BIM to deliver projects.

b. You did not demonstrate that you have experienced and trained AEC instructors as required.

c. There was no evidence of award, deployment and training on submitted records of past projects.

d. It was observed that the notification letters submitted were not agreeing with the evidence on past projects especially on the expected completion time of the project and the date of recommendation.

e. All letters of recommendation were noted to be similar word to word although they have been generated by different companies.

f. Your tender did not attain the minimum technical score of seventy (70) marks”.

From the reasons advanced in the letter of notification for the disqualification of the Applicant’s tender, the Board notes the following: -

(i) The bidder submitted

The Board notes that the Applicant met the requirement of evidence of projects that have been implemented using BIM. Evidence of having configured any organization on use of BIM to deliver projects was not part of the evaluation criteria in the tender document.

The Board further notes that on the requirement for experienced and trained EAC instructors the Applicant provided CVs for Titus Akwara, Obed Kiprotich and Anthony Mwangi Macharia which met the criteria set out in the tender document.

The Board has heard arguments that the Applicant was disqualified at the Technical Evaluation Stage for failure to provide evidence of installation, configuration and training of any organization on the use of a Building Information Modelling (BIM) System.

The Board has heard further arguments that paragraph 4 of the Technical Evaluation Criteria cannot be read in isolation but has to be read alongside the other tender provisions in the tender document. That may well be so. However, when it comes to evaluation of a tender the hands of the evaluation committee of a Procuring Entity are tied. The Evaluation Committee can not look outside the evaluation criteria set out in the tender document to ascertain the responsiveness of a tender. If the Procuring Entity deemed a requirement of the tender to be so important that it required a bidder to meet, then nothing would have been easier than for the Procuring Entity to provide a criteria upon which the requirement will be evaluated.

As noted herein before some of the requirements met by the Applicant were not awarded any marks. The Applicant attempted to carry out self-evaluation which is the preserve of the evaluation committee.

For all of the foregoing the Board finds that the Applicant's tender was not fairly evaluated at the technical evaluation stage. Accordingly this ground of review succeeds and is allowed.

What orders should the Board grant in the circumstances?

It is the finding of the Board that it that the Board has jurisdiction over the instant Request for Review being that the Request was filed within the statutory timeline of 14 days provided for under section 167(1) of the Act.

It is the further finding of the Board that the Applicant's tender was not evaluated as per the technical criteria provided for under the Tender Document.

The upshot of our finding is that the Request for Review dated 13th April 2023 and filed on 14th April 2023 in respect of Tender No. NHC/TECH/BIM/018/2022-23 for Supply, Installation, Configuration and Commissioning of a Building Information Modeling (BIM) System for the National Housing Corporation is allowed in the following specific terms:

FINAL ORDERS

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

- 1. The 1st Respondent's Notifications of Intention To Award dated 20th March 2023 and issued to the Interested Party and the Applicant be and are hereby nullified and set aside.**

- 2. The 1st Respondent is hereby ordered to direct the Evaluation Committee of the 2nd Respondent to re-admit the Applicant into the tender process and evaluate its tender starting at the technical evaluation stage taking into consideration the findings of the Board in this decision.**

- 3. Further to Order 2, the 2nd Respondent is hereby ordered to proceed with the subject tender to its logical conclusion within fourteen (14) days from the date of this decision.**

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

Dated at NAIROBI, this 5th Day of May 2023.



**CHAIRPERSON
PPARB**



**SECRETARY
PPARB**