

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 30/2023 OF 25TH MAY 2023

BETWEEN

TOP CHOICE SURVEILLANCE LIMITED APPLICANT

AND

THE ACCOUNTING OFFICER,

NATIONAL HEALTH INSURANCE FUND 1ST RESPONDENT

NATIONAL HEALTH INSURANCE FUND 2ND RESPONDENT

GADGETMEND INTERNATIONAL LIMITED INTERESTED PARTY

Review against the decision of the Accounting Officer, National Health Insurance Fund in relation to Tender No. NHIF/022/2022-2023 for Proposed Refurbishment Works of NHIF Building – Intergrated Security System; Contract Reference Number W.P. Item No. D108/NB/NB/2201 Job No. 10313E.

BOARD MEMBERS PRESENT

- | | | |
|-------------------------------|---|------------------|
| 1. Ms. Faith Waigwa | - | Chairperson |
| 2. Mrs. Njeri Onyango FCI Arb | - | Vice Chairperson |
| 3. QS Hussein Were | - | Member |

IN ATTENDANCE

Ms. Sarah Ayoo

- Secretariat

PRESENT BY INVITATION

APPLICANT

TOP CHOICE SURVEILLANCE LIMITED

Ms. Kiambati

-Advocate, Chepkuto Advocates

RESPONDENTS

THE ACCOUNTING OFFICER, NATIONAL HEALTH INSURANCE FUND & NATIONAL HEALTH INSURANCE FUND

1. Mr. Ogejo

- Advocate, Ogejo, Omboto & Kijala Advocates
LLP

2. Ms. Nyambura

- Advocate, Ogejo, Omboto & Kijala Advocates
LLP

INTERESTED PARTY

GADGETMEND INTERNATIONAL LIMITED

Mr. Sagar Shah

- Brand Manager

BACKGROUND OF THE DECISION

The Tendering Process

National Health Insurance Fund, the Procuring Entity and 2nd Respondent herein invited sealed tenders from interested and qualified tenderers in response to Tender No. NHIF/022/2022-2023 for Proposed Refurbishment Works of NHIF Buildings – Intergrated Security System; Contract Reference Number W.P. Item No. D108/NB/NB/2201 Job No. 10313E (hereinafter referred to as the “subject tender”). The invitation was by way of an advertisement in the local dailies on 6th March 2023 and the blank tender document for the subject tender issued to tenderers by the Procuring Entity and the Respondents herein (hereinafter referred to as the ‘Tender Document’) was available for download from the 2nd Respondent’s website www.nhif.or.ke and on the Public Procurement Information Portal (PPIP) (www.tenders.go.ke). The subject tender’s submission deadline was scheduled for 21st March 2023 at 10.00 a.m.

Addenda

The Respondents issued two Addenda namely: (a) Addendum I dated 14th March 2023 (hereinafter referred to as “Addendum I”) which issued several clarifications on various provisions of the Tender Document; and (b) Addendum III (*perhaps meant to read Addendum II*) dated 17th March 2023 (hereinafter referred to as “Addendum III”) which expunged and updated Item 2 Qualification and Experience of Key Personnel of Clause b) Evaluation

of Technical Aspect of the Tender of Section III- Evaluation and Qualification Criteria at pages 31 of the Tender Document.

Submission of Tenders and Tender Opening

According to the Minutes of the subject tender's opening held on 21st March 2023 signed by members of the Tender Opening Committee on 21st March 2023 (hereinafter referred to as the 'Tender Opening Minutes') and which Tender Opening Minutes were part of confidential documents furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') by the Respondent pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), a total of five (5) tenders were submitted in response to the subject tender. The said five (5) tenders were opened in the presence of tenderers' representatives present at the tender opening session and were recorded as follows:

No.	Bidder's Name
1.	Nyikaland International Technologies Group Ltd
2.	Top Choice Surveillance Limited
3.	Total Security Surveillance Limited
4.	Gadgetmend International Limited
5.	Amiran Communications

Evaluation of Tenders

A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the Respondent undertook evaluation of five (5) tenders as captured in an Evaluation Report for the subject tender signed by members of the Evaluation Committee on 26th April 2023 (hereinafter referred to as the "Evaluation Report") (which Evaluation Report was furnished to the Board by the Respondent pursuant to Section 67(3)(e) of the Act), in the following stages:

- i Mandatory/ Preliminary Evaluation;
- ii Technical Capacity Evaluation; and
- iii Financial Evaluation.

Mandatory/ Preliminary Evaluation

The Evaluation Committee was required to carry out a preliminary evaluation of tenders in the subject tender using the criteria provided under Clause A. Preliminary Evaluation in the Qualification Form of Section III – Evaluation and Qualification Criteria of the Tender Document and Clause a) Preliminary Evaluation of Section III – Evaluation and Qualification Criteria at page 29 to 30 of the Tender Document. Tenders were required to meet all the mandatory requirements at this stage to proceed to the Evaluation of Technical Aspect of the Tender stage.

At the end of evaluation at this stage, three (3) tenders were determined non-responsive including the Applicant's tender while two (2) tenders including the Interested Party's tender were determined responsive. The two

(2) tenders that were determined responsive proceeded for evaluation at the Technical Capacity Evaluation stage.

Technical Capacity Evaluation Stage

At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Clause B. Technical Evaluation in the Qualification Form of Section III – Evaluation and Qualification Criteria of the Tender Document and Clause b) Evaluation of Technical Aspect of the Tender of Section III – Evaluation and Qualification Criteria at page 31 to 32 of the Tender Document. Tenderers were required to meet all the technical requirements at this stage to proceed for financial evaluation.

At the end of evaluation at this stage, one (1) tender was determined non-responsive while one (1) other tender, being the Interested Party's tender was determined responsive and thus proceeded for evaluation at the Financial Evaluation stage.

Financial Evaluation

At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Clause C. Financial Evaluation in the Qualification Form of Section III – Evaluation and Qualification Criteria of the Tender Document and Clause c) Financial Evaluation of Section III – Evaluation and Qualification Criteria at page 32 to 33 of the Tender Document. Tenders would be checked for arithmetic errors

and to confirm consistency of their rates. Recommendation of award of the subject tender would be done to the lowest evaluated tender.

At the end of evaluation at this stage, the Interested Party's tender was determined to have the lowest evaluated tender price of Kenya Shillings Thirty-Nine Million Five Hundred and Ninety-Nine Thousand Six Hundred and Forty-Three and Eighty Cents (Kshs. 39,599,643.80) only.

Evaluation Committee's Recommendation

The Evaluation Committee recommended the award of the subject tender to the Interested Party as the lowest responsive evaluated tenderer at a total cost of Kenya Shillings Thirty-Nine Million Five Hundred and Ninety-Nine Thousand Six Hundred and Forty-Three and Eighty Cents (Kshs. 39,599,643.80) only.

Professional Opinion

In a Professional Opinion dated 26th April 2023 (hereinafter referred to as the "Professional Opinion"), the Ag. Head Supply Chain Management, Dr. Wasike Walubengo, reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender to the Interested Party. He thus requested the 1st

Respondent to approve the award of the subject tender as per the recommendation of the Evaluation Committee.

Thereafter, Dr. Samson Kuhora, Ag. Chief Executive Officer, and 1st Respondent herein, approved the Professional Opinion on 26th April 2023 as can be discerned from page 2 of 2 of the Professional Opinion. The duly approved Professional Opinion was furnished to the Board by the Respondents as part of confidential documents pursuant to Section 67(3)(e) of the Act.

Notification to Tenderers

Tenderers were notified of the outcome of evaluation of the subject tender vide letters of Notification of Intention to Award dated 28th April 2023.

REQUEST FOR REVIEW NO. 30 OF 2023

On 25th May 2023, Top Choice Surveillance Limited, the Applicant herein, filed a Request for Review No.30 of 2023 dated 24th May 2023 together with a Supporting Affidavit sworn on 24th May 2023 by Benson Gakere, the Applicant's Chief Executive Officer, through the firm of Chepkuto Advocates with respect to the subject tender (hereinafter referred to as the 'instant Request for Review') seeking the following orders:

- a) A declaration that the Procurement Entity breached the provisions of Article 227(1) of the Constitution and Section 79(1) of the Public Procurement and Disposal Act;***
- b) The decision of the Procuring Entity to award the Tender to the Interested Party be annulled and set aside;***
- c) The Board be pleased to order a re-evaluation of Tender No. NHIF/022/2022-2023 FOR THE PROVISION OF INTERGRATED SECURITY MANAGEMENT SYSTEM, and award the tender to the Applicant who strongly believes it has the lowest competitive bid;***
- d) The Board be pleased to annul any contract that may have been entered into by the Respondents and the Interested Party before the lapse of the 14- day period within which tenderers may seek administrative review;***
- e) The Board be pleased to stop any implementation of any such contract entered into between the Respondents and Interested Party;***
- f) The Respondent be compelled to pay the costs to the Applicant arising from/and incidental to this Application;***

g) The Board be pleased to make any 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.

In a Notification of Appeal and a letter dated 25th May 2023, Mr. James Kilaka, the Acting Secretary of the Board notified the Respondent and the Procuring Entity of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the Respondent a copy of the 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 Respondent was requested to submit a response to the instant Request for Review together with confidential documents concerning the subject tender within five (5) days from 25th May 2023.

On 2nd June 2023, in response to the Request for Review, the 1st and 2nd Respondents through the firm of Ogejo, Omboto & Kijala Advocates LLP filed a Replying Affidavit sworn on 30th May 2023 by Dr. Wasike Walubengo, the Acting Head of Supply Chain Management of the 2nd Respondent (hereinafter referred to as "the Respondents' Replying Affidavit) together with a file containing confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

Vide letters dated 2nd June 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 all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within three (3) days from 2nd June 2023.

On 2nd June 2023, Chepkuto Advocates on behalf of the Applicant filed a letter dated 2nd June 2023.

Vide a Hearing Notice dated 2nd June 2023, the Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the instant Request for Review slated for 8th June 2023 at 12:00 noon, through a link availed in the said Hearing Notice.

None of the parties filed written submissions.

When the matter came up for hearing on 8th June 2023 at 12.00 noon, the Interested Party confirmed that it would not be addressing the Board during the hearing.

Before parties proceeded with their submissions, Mr. Ogejo raised a preliminary issue being that the 2nd Respondent was in receipt of an advisory

from the Public Procurement Regulatory Authority (hereinafter referred to as “the Authority”) which emanated from a complaint by one of the other tenderers in the subject tender and directed for re-evaluation of tenders in the subject tender. Mr. Ogejo referred the Board to a letter dated 29th May 2023 which informed all tenderers in the subject tender that their tenders would be re-evaluated and having in mind that prayer 3 of the Request for Review sought for the Board to order for re-evaluation of the subject tender, he was of the view that for purposes of prudent use of judicial time, parties could record a consent indicating that the 2nd Respondent would conduct a re-evaluation. In response, Ms. Kiambati submitted that the Applicant did not wish to record a consent since such consent would merely reflect corrections made by the Authority which were based on another tenderer’s issues and not on the Applicant’s issues on the outcome of evaluation of the subject tender.

The Board directed parties to proceed with their submissions and canvass the issues raised in the instant Request for Review including the preliminary issue raised by Mr.Ogejo.

PARTIES’ SUBMISSIONS

Applicant’s Submissions

In her submissions, Counsel for the Applicant, Ms. Kiambati, submitted that the Applicant was before the Board in relation to the subject tender and its argument was pegged on the fact that Article 227(1) of the Constitution provides principles that need to be adhered to by any procurement entity in

a procurement process among which was the principle of transparency and fairness. Ms. Kiambati further submitted that these principles articulated under Article 227(1) of the Constitution have not been met by the 2nd Respondent with regard to the subject tender.

Ms. Kiambati submitted that pursuant to Section 87(3) of the Act, the 2nd Respondent was under an obligation to ensure that once evaluation of the subject tender was completed, both successful and unsuccessful tenderers in the subject tender were notified of the outcome of evaluation. She further submitted that Section 80(6) of the Act provides a timeline of 30 days within which a tender ought to be evaluated and as such the 2nd Respondent breached the provisions of Section 80(6) and 87(3) of the Act by failing to provide proper communication to the Applicant with regard to the outcome of evaluation of the subject tender.

Counsel submitted that failure to communicate the outcome of evaluation of the subject tender prompted the Applicant to send a letter dated 17th May 2023 to the 2nd Respondent seeking clarification on whether the evaluation process had been completed which led the 2nd Respondent to request the Applicant's representative to physically appear at its offices to pick a letter of regret dated 28th April 2023. According to Ms. Kiambati, this Letter of Regret having been collected by the Applicant's representative on 22nd May 2023 was issued two (2) months after the close of the subject tender.

It was Ms. Kiambati's submission that the 2nd Respondent violated the provisions of Section 79(1) of the Act which defines a responsive tender since from the Letter of Regret dated 28th April 2023, the reason as to why the Applicant was unsuccessful in the subject tender was because its audited accounts for years 2018 and 2019 were missing. Counsel referred the Board to mandatory requirement no. 22 at page 30 of the Tender Document (hereinafter referred to as "MR 22") which required tenderers to submit certified copies of audited accounts, signed by auditors and directors for the last three (3) years (2018, 2019, & 2020 or 2019, 2020, & 2021) and which were also certified by an advocate. She submitted that this provision had two options being (a) that a tenderer could submit audited accounts for the years 2018, 2019, & 2020, or (b) that a tenderer could submit audited accounts for the years 2019, 2020, & 2021.

Ms. Kiambati submitted that in compliance with MR22, the Applicant provided audited accounts for the years 2019, 2020, & 2021 which appear at pages 276 to 314 of the Applicant's tender submitted in response to the subject tender. Based on this, Counsel reiterated that the 2nd Respondent acted contrary to the provisions of Section 79(1) of the Act and the principle of fairness outlined under Article 227(1) of the Constitution.

With regard to the Applicant's allegation, which was based on industry knowledge, that the Interested Party, being the successful tenderer in the subject tender did not meet mandatory requirement no. 3 at page 29 of the Tender Document (hereinafter referred to as "MR 3") Ms. Kwamboka

expounded on the requirements of MR3 and submitted that tenderers were required to submit, by the tender submission deadline, a copy of system generated NHIF Compliance Certificate and that the Interested Party failed to meet this requirement.

Ms. Kwamboka reiterated that by awarding the subject tender to the Interested Party as evidenced in the letter dated 28th April 2023, the 2nd Respondent was unfair and in breach of Article 227(1) of the Constitution. Counsel submitted that the Applicant had a legitimate expectation that its tender in the subject tender would be evaluated fairly, communication would be done in a transparent manner and the subject tender would be awarded to the lowest competitive tenderer.

Ms. Kwamboka further submitted that the 2nd Respondent's decision to award the subject tender to the Interested Party was unconstitutional, illegal and as such, the said decision ought to be vacated and the Board should order for re-evaluation of the subject tender and award the subject tender to the Applicant, being the lowest evaluated competitive tenderer.

Upon enquiry by the Board on how the Applicant came across information regarding failure by the Interested Party to comply with MR3, Ms. Kiambati submitted that the Applicant has industry knowledge of the tender process and has been in the business for years and having been in communication with people who were in the business of tendering, some of these

speculations were raised and this argument was made based on this information.

When asked to clarify the Applicant's understanding of the provisions of MR 22 and the manner in which the 2nd Respondent had grouped the years which tenderers were required to submit certified copies of audited accounts, Ms. Kiambati submitted that tenderers were required to submit audited accounts for three (3) consecutive years and had two options being to either (a) provide accounts for years 2018, 2019 and 2020 as option 1 or (b) provide accounts for years 2019, 2020, and 2021. She submitted that the Applicant went with the latter option by providing certified copies of audited accounts for years 2019, 2020, and 2021 and met the provisions of MR 22. Counsel further submitted that the 2nd Respondent's allegation that the Applicant failed to provide audited accounts for years 2018 and 2019 did not fall under any of the two options provided for in MR 22 and the Applicant was not required to provide audited accounts for year 2018 as it had the latter option of providing accounts for 2019, 2020, and 2021 which it complied with.

Respondents' submissions

Counsel for the Respondents, Mr. Ogejo submitted that following evaluation of the subject tender, one of the tenderers, being Nyikaland International Technologies Group Ltd, approached the Authority by way of a compliant which subsequently directed the complaint to the Respondents and issued the Respondents with an opinion dated 24th May 2023 directing the Respondents to conduct a re-evaluation of all tenders submitted.

Mr. Ogejo submitted that pursuant to this opinion, vide a letter dated 29th May 2023, the 2nd Respondent notified all tenderers in the subject tender that there would be a re-evaluation of submitted tenders in the subject tender. Counsel further submitted that it was the position of the 2nd Respondent that the key prayer of the instant Request for Review was prayer 3 being that the Board be pleased to order a re-evaluation of the subject tender.

It was Mr. Ogejo's submission that the 2nd Respondent had not signed any contract with regard to the subject tender and pursuant to its letter dated 29th May 2023 it was willing to undertake re-evaluation of the subject tender. Mr. Ogejo submitted that the Respondents were not willing to waste the Board's time by getting into further submissions by dint of their admission that they were willing to undertake re-evaluation of the subject tender as advised by the Authority.

Upon enquiry by the Board on whether it was the intention of the Respondents to re-evaluate tenders in the subject tender afresh as if no evaluation had taken place or per complaints raised by particular tenderers, Mr. Ogejo submitted that from the contents of the letter dated 29th May 2023 and opinion by the authority, the re-evaluation process would include the three stages of evaluation being the mandatory, technical and financial hence the re-evaluation would be conducted afresh.

Applicant's Rejoinder

In a rejoinder, Counsel for the Applicant, Ms. Kiambati submitted that given the fact that Counsel for the Respondents had mentioned that the Authority issued an opinion which led to issuance of the letter dated 29th May 2023 addressed to all tenderers in the subject tender notifying them that the re-evaluation process was supposed to commence, the Applicant's Request for Review dated 24th May 2023 and filed on 25th May 2023 was filed before the Applicant became aware of any complaint made to the Authority or plans to re-evaluate the subject tender. She submitted that it was a reasonable expectation that the provisions of Section 168 of the Act would take effect suspending any proceedings with regard to the subject tender.

At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 25th May 2023 was due to expire on 15th June 2023 and that the Board would communicate its decision on or before 15th June 2023 to all parties to the Request for Review via email.

BOARD'S DECISION

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

- 1. Whether the instant Request for Review was premature following the admission by the 2nd Respondent that it is re-evaluating tenders in the subject tender;**
- 2. Whether the Applicant's tender in response to the subject tender was evaluated in accordance with Section 80(2) of the Act read with Article 227(1) of the Constitution with respect to Mandatory Requirement No. 22 of Clause a) Preliminary Evaluation of Section III – Evaluation and Qualification Criteria at page 30 of the Tender Document;**
- 3. Whether the Applicant has substantiated its case with respect to the allegation that the Interested Party did not satisfy Mandatory Requirement No. 3 of Clause a) Preliminary Evaluation of Section III – Evaluation and Qualification Criteria at page 29 of the Tender Document and was thus unlawfully awarded the subject tender;**

Depending on the outcome of issue 3;

- 4. Whether the 2nd Respondent's Evaluation Committee evaluated the Interested Party's tender in accordance with Section 80(2) of the Act read with Article 227(1) of the Constitution with respect to Mandatory Requirement No. 3 of Clause a) Preliminary Evaluation of Section III – Evaluation and Qualification Criteria at page 29 of the Tender Document;**

5. Whether the 1st Respondent's Letter of Notification of Intention to Award dated 28th April 2023 issued to the Applicant met the threshold required in Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020.

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

Whether the instant Request for Review was premature following the admission by the 2nd Respondent that it is re-evaluating tenders in the subject tender.

During the hearing of the instant Request for Review, the Respondents through their counsel submitted that the 2nd Respondent received an advisory letter from the Authority, following a complaint by one of the unsuccessful tenderers in the subject tender, which highlighted various anomalies in the procurement process and directed the 2nd Respondent to re-evaluate tenders in the subject tender. The Respondents contend at paragraph 8 of the Respondents' Replying Affidavit sworn on 30th May 2023 by Dr. Wasike Walubengo that in compliance with the directive of the Authority, they have already begun the process of re-evaluating the subject tender and tenderers were notified of the same vide a letter dated 29th May 2023.

On the other hand, the Applicant through its counsel submitted during the hearing of the instant Request for Review that the Applicant filed the instant

Request for Review on 25th May 2023 and this was before the Applicant was notified of the Respondents' intention to re-evaluate tenders in the subject tender and as such, it is only reasonable for the provisions of Section 168 of the Act to take effect suspending any procurement proceedings in the subject tender.

It is necessary for the Board to determine whether the instant Request for Review is premature in view of the fact that the 2nd Respondent has admitted that it is in the process of re-evaluating tenders in the subject tender as directed by the Authority.

Section 9 (1)(h) of the Act provides:

"9. Functions of Authority

(1) The functions of the Authority shall be to –

.....

(h) to investigate and act on complaints received on procurement and asset disposal proceedings from procuring entities, tenderers, contractors or the general public that are not subject of administrative review;

....."

Section 34 of the Act provides:

"34. Powers to ensure compliance

A public entity shall provide the National Treasury or the Authority with such information relating to procurement and asset disposal as may be required in writing.”

Section 35 of the Act provides:

"35. Investigations

(1) The Authority, may undertake investigations, at any reasonable time, by among other things examining the records and accounts of the procuring entity and contractor, supplier or consultant relating to the procurement or disposal proceeding or contract with respect to a procurement or disposal with respect to a State organ or public entity for the purpose of determining whether there has been a breach of this Act or the Regulations made thereunder.

(2) An investigation under sub-section (1) may be initiated by the Authority or on request in writing by a public institution or any other person.

(3) Investigation shall be conducted by an investigator appointed for the purpose by the Authority.”

Section 40 of the Act provides:

"40. No investigation if issue before Review Board

(1) No investigation shall be commenced or continued under this Part, and no order shall be made under this Part, in relation to an issue that the Review Board is reviewing or has reviewed under the relevant provisions of this Act.

(2) Subsection (1) ceases to apply if, after the Review Board has completed its review, information comes to the attention of the Director-General that was not brought before the Review Board in the course of its review.

Section 2 of the Act assigns the meaning of 'Authority' and 'Review Board' as follows-

“Authority” means the Public Procurement Regulatory Authority established under section 8 of this Act; and

“Review Board” means the Public Procurement Administrative Review Board established under section 27 of this Act”

Our interpretation of the aforementioned provisions of the Act is that (a) the Authority has the power to investigate and act on complaints received on procurement proceedings that are not currently before the Board, (b) a procuring entity is under an obligation to provide the Authority with any information relating to procurement proceedings as may be required in writing, (c) an investigation may be initiated by the Authority or on request in writing by a public entity or any other person and it may be done at any reasonable time for purposes of determining whether there has been a

breach of the Act or Regulations in the procurement proceedings, and (d) no investigation shall be commenced or continued and no order shall be made with regard to an issue that is before the Board or has been reviewed by the Board unless once the Board has completed its review and information comes to the attention of the Director General of the Authority that was not brought before the Board in the course of its review.

Turning to the instant Request for Review, we have carefully studied the confidential documents submitted by the 1st Respondent to the Board pursuant to Section 67(3)(e) of the Act and note that the 1st Respondent received a letter dated 5th May 2023 from the Authority informing it of a complaint lodged by M/S Nyikalanda International Technologies Group Ltd with regard to evaluation of its tender following receipt of a Letter of Notification of Intention to Award the subject tender dated 28th April 2023 which informed it of its unsuccessfulness in the subject tender and reasons for its failure. The 1st Respondent was required to share with the Authority its response to the allegations by M/S Nyikalanda International Technologies Group Ltd including a detailed account of how the procurement process was conducted, the current status of the procurement proceedings, and certified copies of procurement documents as listed in the said letter.

Having perused the Respondents' Replying Affidavit sworn on 30th May 2023 by Dr. Wasike Walubengo, we observe that the Respondents annexed at paragraph 5 of the Respondents' Replying Affidavit a letter dated 15th May

2023, marked as Exhibit WW-2, wherein the 1st Respondent shared with the Authority all requested documents pertaining to the subject tender and elaborated on the evaluation process of the tender submitted by M/s Nyikaland International Technologies Group Ltd in the subject tender.

We note that the Respondents annexed at paragraph 6 of the Respondents' Replying Affidavit a letter dated 24th May 2023 addressed to the 1st Respondent by the Authority, marked as Exhibit WW-3, wherein the Authority indicated that the evaluation process of the subject tender was not in conformity to the requirements of Section 80(3) of the Act making the process tainted with anomalies and recommended re-evaluation of the subject tender in line with the provisions of Article 227(1) of the Constitution, the Act, the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "Regulations 2020"), and the three (3) stages of the evaluation process stipulated in the Tender Document. The Respondents were also required to inform the Authority of actions taken by 2nd June 2023.

We further note that the Respondents annexed at paragraph 8 of the Respondents' Replying Affidavit a letter dated 29th May 2023 addressed to all tenderers in the subject tender, marked as Exhibit WW-4, and reads in part as follows:

".....

***RE: RE-EVALUATION OF TENDER NO. NHIF/022/2022-2023 –
FOR PROVISION OF INTEGRATED SECURITY MANAGEMENT***

The above matter refers.

We are in receipt of communication Ref: PPRA/CIE/30/02 VOL.II (22) dated 24th May 2023 from PPRA giving directives that we Re-Evaluate the above quoted tender.

This is therefore to notify you that the exercise will start immediately. The bids shall be subjected to three stage evaluation.

1. Mandatory

2. Technical

3. Financial

You will be notified of the results once the exercise is over.

.....”

From the above letter dated 29th May 2023, tenderers in the subject tender, including the Applicant herein, were notified that the Authority had issued a directive to the Respondents to re-evaluate the subject tender, re-evaluation would commence immediately and tenders would be subjected to three stages of evaluation being mandatory, technical and financial evaluation and tenderers would be notified of the outcome once re-evaluation was completed.

We note that despite the fact that the complaint before the Authority and the Board touch on the same subject tender, the complaint before the Authority as highlighted in the abovementioned letters dated 5th May 2023,

15th May 2023 and 24th May 2023 is different from the claim in the instant Request for Review as it mainly addressed, *inter alia*, the complaint pertaining to M/S Nyikaland Technologies Limited tender and did not address any of the issues raised by the Applicant before the Board in the instant Request for Review. The Authority was justified in issuing the directions for re-evaluation of the subject tender as per the letter dated 24th May 2023 since at that particular time, and in view of Section 40 of the Act, there was no pending administrative review before the Board in regard to the subject tender since the instant Request for Review was filed on 25th May 2023.

However, it is not in contest that the instant Request for Review dated 24th May 2023 and filed on 25th May 2023 was filed before the Board prior to issuance of the Respondents' letter dated 29th May 2023 to all tenderers notifying them of the intended re-evaluation of the subject tender. We note that the Respondents' Replying Affidavit prompted the Applicant to file before the Board a letter dated 2nd June 2023 which reads in part as follows:

".....

We are in receipt of the response to the Application for Review by the Procuring Entity dated 30th May 2023 in which the Procuring Entity under Paragraph 8 states that they are in the process of conducting a re-evaluation of the subject tender following a letter dated 26th May 2023 from the Public Procurement Regulatory Authority highlighting various anomalies in the procurement process and advising the 2nd

Respondent to re-evaluate the tender. We note that the actions of the Procuring Entity are, however, in contravention of Section 168 of the Act which provides for the suspension of all procurement proceedings once a Request for Review Application has been filed with the Public Procurement Administrative Review Board.

Kindly but urgently issue directions on the subject matter taking into consideration that the Applicant's Request for Review dated 24th May 2023 and filed on 25th May 2023 is yet to be determined and is scheduled for hearing on 8th June 2023.

.....”

From the above letter, the Applicant sought for the Board's directions with regard to re-evaluation of the subject tender in view of the provisions of Section 168 of the Act which provides that:

"168. Notification of review and suspension of proceedings

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

In essence, once a Request for Review has been lodged before the Board under Section 167 of the Act, the Board Secretary is under an obligation to notify the accounting officer of a procuring entity of the pending Request for Review and the suspension of procurement proceedings in the subject tender.

We note that in the instant Request for Review, the Board's Acting Secretary issued a Notification of Appeal to the Respondents dated 25th May 2023 via email which reads in part as follows:

".....

You are hereby notified that on the 25th May 2023, a Request for Review was filed with the Public Procurement Administrative Review Board in respect of the above-mentioned tender.

Under Section 168 of the Public Procurement and Asset Disposal Act 2015, the procurement proceedings are hereby suspended and no contract shall be signed between the Procuring Entity and the tenderer awarded the contract unless the Appeal has been finalized.

....."

Notably, the above Notification of Appeal informed the Respondents that the procurement proceedings in the subject tender were immediately suspended when the instant Request for Review was filed.

Section 167(1) of the Act provides for when a tenderer may seek administrative review before the Board as follows:

"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.

Section 173 of the Act provides for the powers of the Board as follows:

"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 forgoing provisions of the Act, for one to invoke the jurisdiction of the Board, they need to approach it as provided under Section 167 (1) of the Act. The manner in which an aggrieved tenderer seeks administrative review is prescribed under Part XV – Administrative Review of Procurement and Disposal Proceedings of Regulations 2020 and specific under Regulation 203 of Regulations 2020 as follows:

"PART XV – ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS

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.

(4)

Regulation 203 prescribes an administrative review sought by an aggrieved candidate or tenderer under Section 167(1) of the Act is by way of a request for review which is to be in a form set out in the Fourteenth Schedule of Regulations 2020 known as a Request for Review. A reading of Regulation 203(1), (2)(c) & (3) of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 confirms 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 under Section 87 of

the Act; or (iii) occurrence of breach complained of, having taken place after making of an award to the successful tenderer.

Section 87 of the Act referred to in Regulation 203(2)(c)(ii) of Regulations 2020 provides as follows:

“87. Notification of intention to enter into a contract

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

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

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

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

It is therefore clear from a reading of Section 87 & 167(1) 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.

Turning to the circumstances of the instant Request for Review, the Board observes that the Applicant approached it following receipt of its Letter of Notification of Intention to Award dated 28th April 2023 and received on 22nd May 2023 which notified it of its unsuccessfulness in the subject tender and the reasons for its failure. Having carefully studied the confidential documents submitted to the Board pursuant to Section 67(3)(e) of the Act, we note that the Letters of Notification of Intention to Award the subject tender were not recalled or cancelled prior to issuance of the letter dated 29th May 2023 advising on re-evaluation of the subject tender. It is trite that any process of re-evaluation of tenders in a procurement process can only be done after nullification of letters of notification of intention to award issued to both successful and unsuccessful tenderers.

The Applicant being aggrieved by the contents of the Letter of Notification of Intention to Award dated 28th April 2023, and having filed the instant Request for Review on 25th May 2023 rendered all procurement proceedings in the subject tender suspended in line with provisions of Section 168 of the Act. This therefore means that the 2nd Respondent's letter dated 29th May 2023 notifying tenderers of commencement of re-evaluation of the subject tender was issued in violation of the provisions of Section 168 of the Act pertaining to suspension of procurement proceedings.

We are guided by the holding of the High Court in **Judicial Review Application 540 of 2017 Republic v Public Procurement Administrative Review Board; Kenya Power & Lighting Company Limited (Interested Party) Exparte Transcend Media Group Limited [2018] eKLR** where it was held:

"..... the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed. The effect of a stay is to suspend whatever action is being stayed, including applicable time limits, as a stay prevents any further steps being taken that are required to be taken, and is therefore time –specific and time-bound.

53. Proceedings that are stayed will resume at the point they were, once the stay comes to an end, and time will continue to run from that point "[Emphasis ours]"

From the foregoing case, the effect of suspension of procurement proceedings is to stay any action, including time limits, as the stay prevents any further steps from being taken that may be required to be taken in procurement proceedings.

As such, any action taken by the Respondents contrary to Section 168 of the Act from receipt of the Notification of Appeal on 25th May 2023 is null and void since any procurement proceedings in the subject tender were suspended as from 25th May 2023 in line with Section 168 of the Act. The Respondents cannot therefore purport to proceed with re-evaluation of the subject tender since all procurement proceedings in the subject tender must be stayed until the Board makes a determination in the instant Request for Review. It is our considered opinion that any re-evaluation of tenders in the subject tender can only be done once ordered by the Board since what takes precedence is the instant Request for Review and procurement proceedings in the subject tender can only resume once the instant Request for Review has been heard and determined by the Board.

In the circumstances, we find that the instant Request for Review was **not** premature following the admission by the 2nd Respondent that it is re-evaluating tenders in the subject tender.

Whether the Applicant's tender in response to the subject tender was evaluated in accordance with Section 80(2) of the Act read with Article 227(1) of the Constitution with respect to Mandatory Requirement No. 22 of Clause a) Preliminary Evaluation of Section III – Evaluation and Qualification Criteria at page 30 of the Tender Document

We understand the Applicant's case to be that its tender was compliant with the requirements of the Tender Document and that it complied with the requirements stipulated in Mandatory Requirement No. 22 of Clause a) Preliminary Evaluation of Section III – Evaluation and Qualification Criteria at page 30 of the Tender Document. The Applicant alleges that the reason for disqualification of its tender being "*Audited accounts for 2018, 2019 missing*" was not fair and was in breach of Mandatory Requirement No. 22 of Clause a) Preliminary Evaluation of Section III – Evaluation and Qualification Criteria at page 30 of the Tender Document and Article 227(1) of the Constitution. The Applicant contends that it had a legitimate expectation that the 2nd Respondent would comply with its own tender conditions and fairly evaluate its tender in accordance with the provisions of the Tender Document.

The Board is cognizant of Article 227 of the Constitution which requires the 2nd Respondent to have a procurement system that is fair, equitable, transparent, competitive, and cost effective and provides for a legislation that governs public procurement and asset disposal framework as follows:

"227. Procurement of public goods and services

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

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

- a)**
- b)**
- c) and**
- d)"**

The Board observes that the legislation contemplated in Article 227(2) of the Constitution is the Act. Section 80 (1) and (2) of the Act is instructive on how evaluation and comparison of tenders should be conducted by a procuring entity as follows:

"80. Evaluation of tender

- (1) The evaluation committee appointed by the accounting officer pursuant to Section 46 of the Act, shall evaluate and compare the responsive tenders other than tenders rejected under Section 82(3).**
- (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.”**

Section 80(2) of the Act as indicated above requires the Evaluation Committee to evaluate and compare tenders in a system that is fair using the procedures and criteria set out in the Tender Document.

We note that according to the Evaluation Report signed by members of the Evaluation Committee on 26th April 2023 and submitted to the Board pursuant to Section 67(3)(e) of the Act, the Applicant was determined non-responsive at the Mandatory/ Preliminary Evaluation stage because its audited accounts for 2018, 2019 were missing as can be discerned from the Evaluation Committee observations at page 3 of 6 of the Evaluation Report. Though the Applicant is only aware that the reason for its disqualification in

the subject tender was due to "Audited accounts for 2018, 2019 missing" as indicated in its Notification of Intention to Award dated 28th April 2023, we have observed that under the Mandatory Requirement Evaluation Table at page 3 of 6 of the Evaluation Report, the Applicant was also marked by the Evaluation Committee as non-responsive to Mandatory Requirement No. 11 of Clause a) Preliminary Evaluation of Section III – Evaluation and Qualification Criteria at page 29 of the Tender Document.

Having carefully studied the Tender Document submitted by the 1st Respondent as part of the confidential documents pursuant to Section 67(3)(e) of the Act, we note the criteria that the 2nd Respondent’s Evaluation Committee was required to use to evaluate and qualify tenderers in the subject tender was provided for under Section III- Evaluation and Qualification Criteria of the Tender Document. We further note that Mandatory Requirement No. 11 and 22 of Clause a) Preliminary Evaluation of Section III – Evaluation and Qualification Criteria at page 30 of the Tender Document provided as follows:

a) PRELIMINARY EVALUATION

Bidders must provide the following:

S/No.	MANDATORY REQUIREMENTS (MR)
.....
MR11	<i>Submission of original tender document TAPE BOUND and sequentially serialized and all pages must be initialed or signed as stipulated in the tender</i>

	<i>advertisement/ invitation letter. (NB: Use of Spring or Box Files will not be allowed and will result in automatic disqualification.)</i>
.....
MR 22	<i>Certified copies of Audited accounts (Signed by Auditors and directors for the last three (3) years (2018, 2019 & 2020 OR 2019, 2020 & 2021). (Certified by an advocate)</i>
.....

From the above Mandatory Requirement No. 11 of Clause a) Preliminary Evaluation of Section III – Evaluation and Qualification Criteria at page 29 of the Tender Document, a tenderer was required to submit a tape bound tender document which was sequentially serialized and all pages ought to have been initialed or signed by the tenderer.

Further, Mandatory Requirement No. 22 of Clause a) Preliminary Evaluation of Section III – Evaluation and Qualification Criteria at page 30 of the Tender Document required a tenderer to submit copies of audited accounts for the last three (3) years being either years 2018, 2019 and 2020 **or** 2019, 2020, and 2021. The Board has considered the use of the word “or” in the abovementioned mandatory requirement and notes that the Oxford Dictionary, Eighth Edition defines the word “or” as one used to introduce another possibility. This therefore means that Mandatory Requirement No. 22 of Clause a) Preliminary Evaluation of Section III – Evaluation and

Qualification Criteria at page 30 of the Tender Document can be interpreted to mean that tenderers had an option of submitting certified copies of audited accounts either for years 2018, 2019, and 2020 and in the alternative years 2019, 2020, and 2021. These audited accounts were also required to be signed by its auditors and directors and certified by an advocate.

We have studied the Applicant's original tender submitted to the Board as part of the confidential documents pursuant to Section 67(3)(e) of the Act in respect to the subject tender and note that in compliance with the requirements under Mandatory Requirement No. 11 of Clause a) Preliminary Evaluation of Section III – Evaluation and Qualification Criteria at page 30 of the Tender Document Applicant submitted a tape bound tender document which was sequentially serialized. However, the Applicant did not initial or sign each and every page of its tender as stipulated under Mandatory Requirement No. 11 of Clause a) Preliminary Evaluation of Section III – Evaluation and Qualification Criteria at page 30 of the Tender Document. The only pages that appear to have been initialed or signed by the Applicant are TCSL/PAGE 1, TCSL/PAGE 81, TCSL/PAGE 86, and TCSL/PAGE 267.

We further note that according to the Applicant's Table of Contents at page 1 of its tender, its certified copies of audited accounts were attached at pages 276 to 314 of its tender. Our observation of the Applicant's submitted certified copies of audited accounts in its tender is as follows:

No.	Title of Financial Statement	Year of Financial Statement	Auditors and date signed	Date signed by Directors	Certified by Advocate
1.	Statement of Financial Position <u>as at</u> 31 st January 2022 at pages 276 to 287	Financial Year 2021 i.e from 1 st February 2021 to 31 st January 2022	Audited by Kago Mukunya and Associates as evidenced by the Auditor's Report signed, stamped and dated 16 th March 2022	Signed by directors on 15 th March 2022 as seen at page 279	Certified by Kirimi David Muthuku on 21 st March 2023
2.	Statement of Financial Position <u>as at</u> 31 st January 2021 at	Financial Year 2020 i.e from 1 st February 2020 to 31 st January 2021	Audited by Wamutu and Associates as evidenced by the	Signed by directors on 12 th February 2021 as seen at page 291	Certified by Kirimi David Muthuku on 21 st March 2023

	pages 288 to 300		Auditor's Report signed, stamped and dated 12 th February 2021		
3.	Statement of Financial Position <u>as at</u> 31 st January 2020 at pages 301 to 314	Financial Year 2019 i.e from 31 st December 2018 to 31 st January 2020	Audited by Wamutu and Associates as evidenced by the Auditor's Report signed, stamped and dated 23 rd March 2020	Signed by directors on 23 rd March 2020 as seen at page 305	Certified by Kirimi David Muthuku on 21 st March 2023

From the analysis above, , it is clear that in response to Mandatory Requirement No. 22 of Clause a) Preliminary Evaluation of Section III –

Evaluation and Qualification Criteria at page 30 of the Tender Document the Applicant submitted certified audited accounts for years 2021, 2020, and 2019. We note that the financial statement for year 2019 comprised of thirteen (13) months from 31st December 2018 to 31st January 2020 which included the 12 months for year 2019. Additionally, we have established that the Applicant's audited accounts were signed by its directors and auditors and were also certified as true copies of the original by an advocate. The Applicant having elected to submit audited accounts for years 2019, 2020 and 2021 needed not to submit audited accounts for year 2018.

The Board is cognizant of provisions of section 79(1) of the Act on responsiveness of tenders which provides that:

"(1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents."

In essence, a responsive tender is one that conforms to all the eligibility and mandatory requirements in the tender document. These eligibility and mandatory requirements were considered by the High Court in **Republic v Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020] eKLR** where it held that:

"In public procurement regulation it is a general rule that procuring entities should consider only conforming,

compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions." [Emphasis ours].

Further, in **Republic v Public Procurement Administrative Review Board ex parte Guardforce Group Limited; Pwani University & 2 Others (Interested Parties) [2021] eKLR** Justice E.K. Ogola, held that;

"...it becomes apparent to this court that the aspect of compliance with the mandatory requirement of the tender document aims to promote fairness, equal treatment, good governance, transparency, accountability and to do away with unfairness. Failure to conform to this mandatory requirement,

and/or exempt or give an opportunity to those who had not earlier on conformed to this mandatory requirement translates to unequal and unfair treatment of other tenderers and, if allowed, may encourage abuse of power and disregard of the law by not only bidders, but also procuring entities."
[Emphasis ours]

In essence, a responsive tender is one that meets all the mandatory requirements as set out in the Tender Document which is the first hurdle that tenderers must overcome for further consideration in an evaluation process. These eligibility and mandatory requirements are mostly considered at the preliminary evaluation stage following which other stages of evaluation are conducted. Further, tenderers found to be non-responsive are excluded from the tender process regardless of the merits of their tenders.

Considering the above, we are left with the inevitable conclusion that the Applicant complied with Mandatory Requirement No. 22 of Clause a) Preliminary Evaluation of Section III – Evaluation and Qualification Criteria at page 30 of the Tender Document having submitted certified audited accounts for years 2021, 2020, and 2020 which were signed by auditors, its directors and certified by an advocate.

In the circumstances, we find that the Applicant's tender in response to the subject tender was **not** evaluated in accordance with Section 80(2) of the Act read with Article 227(1) of the Constitution with respect to Mandatory

Requirement No. 22 of Clause a) Preliminary Evaluation of Section III – Evaluation and Qualification Criteria at page 30 of the Tender Document.

Whether the Applicant has substantiated its case with respect to the allegation that the Interested Party did not satisfy Mandatory Requirement No. 3 of Clause a) Preliminary Evaluation of Section III – Evaluation and Qualification Criteria at page 29 of the Tender Document and was unlawfully awarded the subject tender.

The Applicant at paragraphs 19, 20, and 21 of its Supporting Affidavit sworn by Benson Gakere on 24th May 2023 in support of the Request for Review contends that it had industry knowledge that the Interested Party did not provide in its tender a system generated NHIF Compliance Certificate as at the tender submission deadline contrary to Mandatory Requirement No. 3 of Clause a) Preliminary Evaluation of Section III – Evaluation and Qualification Criteria at page 29 of the Tender Document and was unlawfully awarded the subject tender.

On its part, the Respondents at paragraph 2 of the Respondents' Replying Affidavit sworn on 30th May 2023 by Dr. Wasike Walubengo invoked the doctrines of *ei qui affirmat, non ei qui negat, incumbit probatio* (which means that the burden of proof lies upon the person who affirms but not who denies) and *actori incumbit onus probandi* (which means that the burden of proof is on the plaintiff) in furtherance of their case in the instant Request for Review. In essence, in interpreting the above doctrines we

understand the Respondents’ position to be that the Applicant bears the burden of proof to prove the aspects of its allegations in the Request for Review.

The Interested Party did not respond to the allegation by the Applicant that it did not satisfy Mandatory Requirement No. 3 of Clause a) Preliminary Evaluation of Section III – Evaluation and Qualification Criteria at page 29 of the Tender Document and that it was unlawfully awarded the subject tender.

Having carefully studied the Tender Document submitted by the 1st Respondent as part of the confidential documents pursuant to Section 67(3)(e) of the Act we note that Mandatory Requirement No. 3 of Clause a) Preliminary Evaluation of Section III – Evaluation and Qualification Criteria at page 29 of the Tender Document provided as follows:

a) PRELIMINARY EVALUATION

Bidders must provide the following:

<i>S/No.</i>	<i>MANDATORY REQUIREMENTS (MR)</i>
<i>.....</i>	<i>.....</i>
<i>MR 3</i>	<i>Attach copy of system generated NHIF Compliance Certificate</i>
<i>.....</i>	<i>.....</i>

The above mandatory requirement required tenderers to attach to their submitted tenders a copy of a system generated NHIF Compliance Certificate.

It is trite law that he who alleges must prove. The Evidence Act is an Act of Parliament in Kenya that provides for the law of evidence and provides under Section 107, 108, 109 and 112 as follows:

"107. Burden of proof

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

111.....

112. Proof of special knowledge in civil proceedings

In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

Our understanding of the aforementioned provisions of the Evidence Act is that (a) he who alleges must prove, (b) the burden of proof lies on the person who would fail if no evidence is given on either side, (c) the burden of proof may shift from the person who wishes a court to believe its existence to another person if provided by law, and (d) the burden of proving or disproving a fact is upon a person who has any fact especially within their knowledge in civil proceedings.

In a plethora of cases, courts have interpreted the above mentioned provisions of the Evidence Act. The Supreme Court of Kenya in **Petition No. 12 of 2019 Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others [2020] eKLR** (hereinafter referred to as Samson Gwer's case) held as follows with respect to the principle of burden of proof in civil claims:

"[47] It is a timeless rule of the common law tradition $\frac{3}{4}$ Kenya's juristic heritage $\frac{3}{4}$ and one of fair and pragmatic conception, that the party making an averment in validation of a claim, is always the one to establish the plain veracity of the claim. In civil claims, the

standard of proof is the "balance of probability". Balance of probability is a concept deeply linked to the perceptible fact-scenario: so there has to be evidence, on the basis of which the Court can determine that it was more probable than not, that the respondent bore responsibility, in whole or in part.

[48]

[49] Section 108 of the Evidence Act provides that, "the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;" and Section 109 of the Act declares that, "the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

[50] This Court in Raila Odinga & Others v. Independent Electoral & Boundaries Commission & Others, Petition No. 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:

"...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden...."

[51] In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as

unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent.

[52]

[53] In spite of the commonplace that proof of "indirect discrimination" is difficult, the petitioners ought to have provided sufficient evidence before the Court, to enable it to make a determination. The 1st respondent, by a more positive scheme, went ahead to counter the bare allegations. The petitioners failed, in this regard, to discharge their initial burden of proof.

.....

[64] The petitioners having failed to discharge their evidential burden, the plea of unfair process stood unproven, and there was no material before the Court to show unfair determination."

The Supreme Court in the Samson Gwer's case recognized that a party making an averment in validation of a claim is always the one to establish the veracity of such claim and that in civil claims, the standard of proof is on a balance of probability which requires evidence, on the basis of which a court can determine that it was more probable than not that a respondent bore responsibility, in whole or in part. The Supreme Court went further to hold that a claimant is under obligation to first discharge its burden of proof

(initial burden of proof) before a respondent is invited to bear the evidential burden. Simply put, a claimant/applicant has to prove its case by laying substantial material before a court, and it is only after such proof has been made, that a respondent is called upon to disprove the claimant's/applicant's case and/or to prove the respondent's case. For clarity, the burden of proof is always static and rests on the claimant/applicant throughout a trial and it is only the evidential burden of proof which may shift to the respondent depending on the nature and effect of evidence adduced by the claimant/applicant.

We are also guided by the holding of the Supreme Court in the case of **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others [2014] eKLR** which stated:

"The person who makes such an allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already-discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue" [Cross and Tapper on Evidence, (Oxford University Press, 12th ed, 2010, page 124)]."

Turning to the circumstances of this instant Request for Review, we note that the allegation by the Applicant is entirely hinged on the Applicant's knowledge of the industry that the Interested Party did not submit a copy of system generated NHIF Compliance Certificate and as such could not have been determined responsive in the subject tender. The Applicant has adduced no evidence before the Board whatsoever to support its allegation. As such, we are of the considered view that having failed to adduce any evidence in support of its allegations, the Board cannot assess whether or not the evidential burden of proof has shifted to the Respondent and Interested Party for them to disprove the Applicant's allegation.

We note that during the hearing, the Board sought clarification on how the Applicant came across information pertaining to its allegation that the Interested Party did not submit a copy of system generated NHIF Compliance Certificate and counsel for the Applicant submitted that the Applicant had industry knowledge of the tendering process and being in such business for many years, this speculation was made.

We take cognizance of the fact that the National Health Insurance Fund, which is a state corporation, (hereinafter referred to as "NHIF") is mandated with the function of issuing the system generated NHIF Compliance Certificate and in our considered view, the Applicant could have sought confirmation from NHIF on whether the Interested Party had been issued with a copy of the system generated NHIF Compliance Certificate. We note

that the Applicant failed to furnish the Board with any proof that it sought and obtained as a matter of fact information from NHIF proving that the Interested Party had not been issued with the system generated NHIF Compliance Certificate and instead it preferred to rely on what we regard to be the Applicant's own beliefs, thoughts and apprehensions.

This Board was faced with a similar situation in **PPARB Application No. 19 of 2022 Madison General Insurance Kenya Limited v Lt Col. (RTD) B.N. Njirani, the Accounting Officer (KEBS) and another** where the Board was called upon to make a determination on an allegation by the Applicant from its industry knowledge that the Interested Party did not possess business permits covering major towns specifically Nairobi, Mombasa, Nakuru, Kisumu and Uasin Gishu. The Board held that:

".....

Turning to the circumstances of this instant Request for Review, we note that the same is entirely hinged on the Applicant's own industry knowledge that the Interested Party does not possess business permits covering major towns specifically Nairobi, Mombasa, Kisumu, Nakuru and Eldoret as captured in paragraphs 13 and 14 of the instant Request for Review and paragraph 10 of the Statement in Support of the instant Request for Review. Just to be clear, the Applicant is not alleging that the Interested Party does not have countrywide coverage but is instead alleging that the

Interested Party does not have business permits covering major towns. The Applicant has adduced no evidence whatsoever to support its allegation claiming that the burden of proof shifted to the Interested Party to demonstrate compliance with MR24.

We do not agree with the Applicant that the burden of proof has shifted to the Interested Party. We say so because, we have hereinbefore established that the burden of proof rests with he who alleges, and in this instant, the Applicant. Secondly we have established that such burden of proof remains static throughout court proceedings, like the current proceedings before this Board, and it is only the evidential burden of proof that may shift to a respondent, in this instant the Respondent and the Interested Party, depending on the nature and effect of the evidence adduced by the Applicant. In the instant Request for Review, no evidence whatsoever has been adduced by the Applicant before the Board for the Board to assess whether or not the evidential burden of proof has shifted to the Respondent and Interested Party for them to disprove the Applicant's allegation.

We have studied the Finance Acts of Nairobi City County, County Government of Mombasa, County Government of

Kisumu, County Government of Nakuru and County Government of Uasin Gishu (in which Eldoret falls) and note that for one to run a business in either of the named counties, one must apply for and be issued with either a business permit or trade licence by the concerned County Government. An example is Section 5(2) of the then Mombasa County Finance Act, 2019

.....

County Government offices are public offices that form part of the collectivity of offices, inter alia, comprising of Government of the Republic of Kenya known as the State, when used as a noun, under Article 260 of the Constitution and which State has a constitutional obligation to give public information to a citizen pursuant to Article 35 of the Constitution on the right to access information held by the State.

We are of the considered opinion that a concerned citizen/person, (whether natural or legal) may seek confirmation from the concerned County Government to confirm whether a person, whether natural or legal, who operates business in such a County has been issued with a business permit noting that business permits are public documents.

We note that the Applicant did not furnish the Board with any proof that it sought and obtained as a matter of fact (from Nairobi City County, County Government of Mombasa, County Government of Nakuru, County Government of Kisumu and County Government of Uasin Gishu) that the Interested Party had not been issued with a business permit but rather decided to rely on what in our considered opinion are the Applicant's own beliefs, thoughts and apprehensions.

It is clear that the burden lies with the Applicant to prove its allegation that the Interested Party does not have business permits covering major towns specifically Nairobi, Mombasa, Nakuru, Kisumu and Uasin Gishu because it is the Applicant who stands to fail in the instant Request for Review if no evidence at all is given by either party to the Request for Review.

In the circumstances, we find the Applicant has failed to substantiate its case with respect to the allegation that the Interested Party does not possess business permits covering major towns specifically Nairobi, Mombasa, Kisumu, Nakuru and Eldoret as required under MR 24 of Clause 2.1 Mandatory Requirements of 2. Preliminary examination for Determination of Responsiveness of Section III – Evaluation

and Qualification Criteria at page 27 of 85 of the Tender Document. Consequently, the Applicant has also failed to substantiate that in awarding the subject tender to the Interested Party, the Respondent breached the provisions of the Tender Document, the Act, Regulations 2020 and the Constitution.”

The above decision by the Board was upheld by the Court of Appeal at Nairobi in **Civil Appeal No. E270 of 2022 CIC General Insurance Limited v Madison General Insurance Kenya Limited & Others** which was an appeal from the High Court judgement *in Judicial Review Misc. Application No. 039 of 2022* which had quashed the Board’s decision. The Court of Appeal held as follows:

“22. Contrary to the learned Judge’s conclusion, section 107(1) of the Evidence Act, Revised 2014 (1963) provides in no uncertain terms:

“107 Burden of proof

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

23. On our part, we find nothing to suggest that the burden of proof shifted to the appellant in the absence of any statutory prescription as contemplated in section 109, which reads:

"109 The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person." 24. In addition to the foregoing, we take to mind the Supreme Court decision in *Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others* [2014] eKLR where the court had this to say:

.....

25. The fact that the respondent failed to give evidence to establish its claim that the appellant did not submit business permits to operate in the major towns mentioned above, those allegations could not stand. Indeed, we find no basis for the learned Judge's decision to grant the orders sought by the respondent in its application for judicial review in the absence of any law shifting the burden of proof or otherwise requiring the appellant to give evidence to rebut the respondent's claim. In our considered view, the learned Judge misapplied the rules of evidence relating to the burden of proof and thereby reached a wrong conclusion.

26. Having carefully considered the record of appeal, the written and oral submissions of the respective learned counsel for the parties, the afore-cited statutory provisions and case law, we reach

the conclusion that the appellant's appeal succeeds. Accordingly, we hereby order and direct that –

(a) the appellant's appeal be and is hereby allowed;

(b) the judgment of the High Court (A. K. Ndung'u) delivered on 28th April 2022 in High Court Judicial Review Misc. Application No. E039 of 2022 be and is hereby set aside;

(c) the decision of the Public Procurement Administrative Review Board delivered on 22nd March 2022 in Request for Review No. 19 of 2022 be and is hereby upheld;.....”

From the foregoing, it is our considered view that the Applicant has failed to discharge the burden of proof by proving that the Interested Party failed to submit the system generated NHIF Compliance Certificate required under Mandatory Requirement No. 3 of Clause a) Preliminary Evaluation of Section III – Evaluation and Qualification Criteria at page 29 of the Tender Document.

In the circumstances, we find that the Applicant has failed to substantiate its case with respect to the allegation that the Interested Party did not satisfy Mandatory Requirement No. 3 of Clause a) Preliminary Evaluation of Section III – Evaluation and Qualification Criteria at page 29 of the Tender Document and that the Interested Party was thus unlawfully awarded the subject tender.

The effect of our finding on the third issue framed for determination is that the Board shall not proceed to make a determination on the fourth issue because the Applicant has failed to prove its case on the allegation that the Interested Party did not satisfy Mandatory Requirement No. 3 of Clause a) Preliminary Evaluation of Section III – Evaluation and Qualification Criteria at page 29 of the Tender Document.

Whether the 1st Respondent’s Letter of Notification of Intention to Award dated 28th April 2023 issued to the Applicant met the threshold required in Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020.

It is the Applicant’s case that the 1st Respondent failed to notify it of the outcome of evaluation of its tender in the subject tender and it was only upon being prompted that the Respondents issued the Applicant with the Notification of Award dated 28th April 2023 on 22nd May 2023 contrary to Section 87(3) of the Act and the principle of transparency under Article 227(1) of the Constitution.

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

“87. Notification of intention to enter into a contract

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

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

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

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

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

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

"82. Notification of intention to enter into a contract

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

In view of the provisions of Section 87 of the Act read with Regulation 82 of Regulations 2020, the Board observes an accounting officer of a procuring entity must notify, in writing, the tenderer who submitted the successful tender, that its tender was successful before the expiry of the tender validity period. Simultaneously, while notifying the successful tenderer, an accounting officer of a procuring entity notifies other unsuccessful tenderers of their unsuccessfulness, giving reasons why such tenderers are unsuccessful, disclosing who the successful tenderer is, why such a tenderer is successful in line with Section 86(1) of the Act and at what price is the successful tenderer awarded the tender. These reasons and disclosures are

central to the principles of public procurement and public finance of transparency and accountability enshrined in Article 227 and 232 of the Constitution. This means all processes within a public procurement system, including notification to unsuccessful tenderers must be conducted in a transparent manner.

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

"In my view, Article 47 of the Constitution requires that parties to an administrative proceeding be furnished with the decision and the reasons therefor within a reasonable time in order to enable them decide on the next course of action. It is not merely sufficient to render a decision but to also furnish the reasons for the same. Accordingly, where an administrative body unreasonably delays in furnishing the parties with the decision and the reasons therefor when requested to do so, that action or inaction may well be contrary to the spirit of Article 47 aforesaid"

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

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

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

Consequently, failure by the Respondents to simultaneously notify both successful and unsuccessful tenderers in the subject tender and issue the Applicant with the Letter of Notification of Intention to Award dated 28th April 2023 amounted to a breach of Section 87 of the Act read with Regulation 82 of Regulations 2020. We have established that the Authority received a complaint from Nyikaland International Technologies Group Limited dated 3rd May 2023, in regard to evaluation of its tender and reasons as to why its tender was disqualified in the subject tender which led the Authority to direct the Respondents to re-evaluate the subject tender. This complaint was lodged with the Authority way before the Applicant was issued with its letter of Notification of Intention to Award the subject tender evidencing that the notifications were not issued simultaneously as provided under Section 87 of

the Act. The Applicant at paragraphs 10 and 12 of the Supporting Affidavit sworn on 24th May 2023 by Benson Gakere in support of the Request for Review depones that it waited for feedback on the outcome of evaluation of the subject tender and wrote a letter dated 17th May 2023 enquiring on the outcome of evaluation of the subject tender which led the Respondents to call and invite it, on 22nd May 2023, to collect its letter of Notification of Intention to Award the subject tender dated 28th April 2023.

In the circumstances, we find that the Respondents failed to simultaneously notify both successful and unsuccessful tenderers in the subject tender and failed to issue the Applicant with the Letter of Notification of Intention to Award dated 28th April 2023 in good time in breach of the provisions of Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020 and the principle of transparency in Article 227(1) of the Constitution. As such, the letter of Notification of Award dated 28th April 2023 issued to the Applicant **did not** meet the threshold required in Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020.

What orders should the Board grant in the circumstances?

We have found that instant Request for Review was not premature following the admission by the 2nd Respondent that it is re-evaluating tenders in the subject tender. We have also found that the Applicant's tender was not evaluated in accordance with provisions of Section 80(2) of the Act read with Article 227(1) of the Constitution and the Tender Document.

We have established that the Applicant has not substantiated its case with respect to the allegation that the Interested Party did not satisfy Mandatory Requirement No. 3 of Clause a) Preliminary Evaluation of Section III – Evaluation and Qualification Criteria at page 29 of the Tender Document and was unlawfully awarded the subject tender.

We have also established that the letter of Notification of Award dated 28th April 2023 issued to the Applicant failed to meet the threshold required in Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020.

We therefore find it just and fair to nullify the letters of Notification of Intention to Award the subject tender dated 28th April 2023 issued to all unsuccessful tenderers and to also nullify and set aside the award of the subject tender to the Interested Party. In view of our findings herein we also deem it just and fit to order the 1st Respondent to direct the Evaluation Committee to conduct a re-evaluation of all tenders in the subject tender taking into consideration the findings of this Board and the provisions of the Tender Document, the Act and the Constitution.

The upshot of our findings is that the instant Request for Review succeeds with respect to the following specific orders:

FINAL ORDERS

In exercise of the powers conferred upon it by Section 172 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review dated 24th May 2023 and filed on 25th May 2023:

- 1. The Letter of Notification of Award to the Interested Party dated 28th April 2023 with respect to Tender No. NHIF/022/2022-2023 for Proposed Refurbishment Works of NHIF Building – Intergrated Security System, be and is hereby nullified and set aside.**

- 2. The Letters of Notification of Award addressed to the unsuccessful tenderers including the Applicant dated 28th April 2023 with respect to Tender No. NHIF/022/2022-2023 for Proposed Refurbishment Works of NHIF Building – Intergrated Security System, be and are hereby nullified and set aside.**

- 3. The 1st Respondent is hereby ordered to direct the Evaluation Committee to re-evaluate all tenders in all the stages of evaluation in the subject tender in accordance with the provisions of the Tender Document, Regulations 2020, the Act and the Constitution.**

4. Further to Order No. 3 above, the Respondents are hereby directed to proceed with the procurement process to its logical conclusion including the making of an award to the successful tenderer within fourteen (14) days from the date of this decision while taking into consideration the Board's findings in this Request for Review.

5. Given that the procurement process for the subject tender is not complete, each party shall bear its own costs in the Request for Review.

Dated at Nairobi this 14th Day of June 2023.



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CHAIRPERSON

PPARB



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SECRETARY

PPARB