

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 92/2023 OF 10TH NOVEMBER 2023

BETWEEN

MASHARIKI LIMITED.....APPLICANT

AND

THE MANAGING DIRECTOR,

KENYA PORTS AUTHORITY.....1ST RESPONDENT

KENYA PORTS AUTHORITY.....2ND RESPONDENT

VILCOM NETWORKS LIMITED.....INTERESTED PARTY

Review against the decision of the Accounting Officer, Kenya Ports Authority in relation to Tender No. KPA/016/2023-24/ICT for the Provision of Primary Internet and Wide Area Network (WAN) Capacity Links for Kenya Ports Authority

BOARD MEMBERS PRESENT

- 1. Mr. Joshua Kiptoo. - Panel Chairperson
- 2. CPA Alexander Musau - Member
- 3. Dr. Susan Mambo - Member

IN ATTENDANCE

- Mr. Philemon Kiprop - Secretariat
- Mr. Anthony Simiyu - Secretariat

PRESENT BY INVITATION

APPLICANT

MASHARIKI LIMITED

Mr. Anthony Kiprono

-Advocate, A.E. Kiprono & Associates.
Advocates

RESPONDENTS

THE ACCOUNTING OFFICER, KENYA PORTS AUTHORITY, KENYA PORTS AUTHORITY

Mr. Geoffrey Nyaanga

-Advocate, Nyaanga & Mugisha Advocates

Mr. Thomas Rotich

- Advocate, Nyaanga & Mugisha Advocates

INTERESTED PARTY

VILCOM NETWORKS LIMITED

Ms. Desma Nungo

- Advocate, NOW Advocates LLP

BACKGROUND OF THE DECISION

The Tendering Process

1. The Kenya Ports Authority, the Procuring Entity together with the 1st Respondent herein, invited submission of sealed tenders in response to Tender No. KPA/016/2023-24/ICT for the Provision of Primary Internet and Wide Area Network (WAN) Capacity Links for Kenya Ports Authority using an open competitive tender method. The subject tender's submission deadline was Thursday, 31st August 2023 at 10:00 a.m.

Addenda

2. On various dates between 23rd August 2023 and 22nd September 2023 the Procuring Entity issued 5 Addenda offering clarifications in respect of the subject tender while variously changing the tender submission deadline. According to Addendum No. 5 the tender submission was last set at Thursday, 28th September 2023.

Submission of Tenders and Tender Opening

3. According to the signed Tender Opening Minutes for 28th September 2023 under the Confidential File submitted by the Procuring Entity, the following 6 tenderers were recorded as having submitted their respective tenders in response to the subject tender by the tender submission deadline:

No.	Name of Tenderer
1.	Mashariki Limited
2.	Telkom Kenya Limited
3.	Seacom
4.	Xtranet Communications Limited
5.	Jamii Telcom Limited
6.	Vilcom Networks Limited

Evaluation of Tenders

4. The Respondent constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") to undertake an evaluation of the 6 tenders in the following 3 stages as captured in the Evaluation Report
- i. Preliminary Stage

- ii. Technical Stage
- iii. Financial Stage

Preliminary Evaluation

- 5. At this stage of the evaluation, the Evaluation Committee was required to examine the tenders using the criteria set out as Clause 3. Preliminary examination for Determination of Responsiveness under Section III – EVALUATION AND QUALIFICATION CRITERIA on pages 33 to 34 of the Tender Document.
- 6. The evaluation was to be on Yes/No basis and tenderers who failed to meet any criteria outlined at the Preliminary Evaluation Stage would be disqualified from further evaluation at the Technical Evaluation Stage.
- 7. At the end of the evaluation at this stage, 5 tenders including that of the Applicant were found non-responsive with only 1 tender i.e. the Interested Party's tender qualifying for further evaluation at the Technical Evaluation Stage.

Technical Evaluation

- 8. At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the Criteria set out as a) Technical Evaluation under Section III– EVALUATION AND QUALIFICATION CRITERIA on pages 34 to 35 of the Tender Document.
- 9. Tenderers were required to meet all the requirements outlined at the Technical Evaluation Stage and those who failed to meet any of them

would be disqualified from further evaluation at the Financial Evaluation Stage.

10. At the end of the evaluation at this stage, the Evaluation Committee found the Interested Party's tender responsive to the requirements at the Technical Evaluation Stage.

Financial Evaluation

11. At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the Criteria set out as Clause b) Price Evaluation under Section III– EVALUATION AND QUALIFICATION CRITERIA on pages 35 of the Tender Document.
12. According to the Tender Document, the tenderer submitting the lowest evaluated tender would be considered for award of the subject tender.
13. At the end of the evaluation at this stage, the Evaluation Committee found the Applicant's tender, being the only one that made it for Financial Evaluation, to be the lowest evaluated tender at Kshs. 222,169,000.

Evaluation Committee's Recommendation

14. Accordingly, the Evaluation Committee recommended the award of the subject tender to the Applicant at its tender sum of **Kenya Shillings Two Hundred and Twenty-Two Million One Hundred and Sixty-Nine Thousand only (Kshs. 222,169,000.00)**.

Professional Opinion

15. In a Professional Opinion dated 30th October 2023 (hereinafter referred to as the "Professional Opinion"), the Procuring Entity's General Manager,

Supply Chain Management, , reviewed the manner in which the subject procurement process was undertaken including the evaluation of tenders and agreed with the Evaluation Committee's recommendation for the award of the subject tender to the Interested Party.

16. On 30th October 2023, the 1st Respondent concurred with the Professional Opinion.

Notification to Tenderers

17. Accordingly, tenderers were notified of the outcome of the evaluation of tenders submitted in response to the subject tender vide letters dated 31st October 2023.

REQUEST FOR REVIEW

18. On 10th November 2023, the Applicant through the firm of A.E. Kiprono & Company Advocates filed a Request for Review dated 10th November 2023 supported by a Supporting Affidavit sworn on 10th November 2023 by Jimmy Omae Omoke, a Director at the Applicant, seeking the following orders from the Board in verbatim:

1. ***An order annulling and setting aside the award of the Tender to Interested Party at the tender sum Kshs. 222,169,000/-;***
2. ***An order quashing the 1st Respondent's decision contained in the letter dated 31st October 2023;***
3. ***A declaration that the Applicant submitted a valid NSE7 Certification;***
4. ***An order directing the 1st Respondent to re-instate, re-evaluate and compare the Applicant's bid with the***

tenderers whose tenders met the Tender's mandatory requirements;

5. An order awarding costs of the request for review to the Applicant;

6. Any other relief that the Review Board deems fit to grant under the circumstances.

19. In a Notification of Appeal and a letter dated 10th November 2023, Mr. James Kilaka, the Acting Board Secretary of the Board notified the Respondent of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said 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 Request for Review together with confidential documents concerning the subject tender within five (5) days from 10th November 2023.

20. In response to the Request for Review, on 21st November 2023, the Respondents through the law firm of Nyaanga & Mugisha Advocates filed a Notice of Appointment of Advocates and a Memorandum of Response both dated 20th November 2023 together with a Replying Affidavit sworn on 20th November 2023 by Daniel Amuyunzu, the Procuring Entity's Manager Procurement and Contract Management. The Respondent also submitted the confidential documents in the subject tender pursuant to Section 67(3)(e) of the Act.

21. Vide letters dated 23rd November 2023, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the subject 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 3 days from 23rd November 2023.
22. On 24th November 2023, the Acting Board Secretary, sent out to the parties a Hearing Notice notifying parties and all tenderers in the subject tender that the hearing of the instant Request for Review would be by online hearing on 28th November 2023 at 2.00 p.m. through the link availed in the said Hearing Notice.
23. On 27th November 2023, the Interested Party through the law firm of NOW Advocates LLP filed a Notice of Appointment of Advocates dated 27th November 2023 together with a Replying Affidavit sworn on 27th November 2023 by Peter Kipkoech Arthur, a Director at the Interested Party.
24. Still on 27th November 2023, the Applicant filed Written Submissions on even date together with its Bundle of Authorities. On 27th November 2023, the Respondents also filed a Further Affidavit sworn on 24th November 2023 by Daniel Amuyunzu and their Written Submissions dated 27th November 2023.
25. On the morning of 28th November 2023, the Interested Party filed Written Submissions and a Bundle of Authorities, both dated 27th November 2023.

Later on the same date, 28th November 2023 at 2:00 p.m., parties through their respective Advocates joined the online hearing session.

26. The Board read out to the parties the documents that had been filed in the Request for Review and sought for parties' confirmation that those were the documents that had been filed and served upon them. Parties' Advocates confirmed having filed and been served with the said documents.
27. The Board also assigned to each party 10 minutes to highlight their case, with the Applicant going first, thereafter the Respondents and then the Interested Party. It was also directed that the Applicant would thereafter have an additional 5 minutes to offer any rejoinder on issues raised by the Respondents and Interested Party.

PARTIES SUBMISSIONS

Applicant's Submissions

28. Counsel for the Applicant, Mr. Kiprono, indicated that the Applicant would be placing reliance on its documents filed in the matter i.e. Request for Review dated 10th November 2023; Further Affidavit sworn on 22nd November 2023 by Jimmy Omae Omoke, Written Submissions dated 27th November 2023.
29. Mr. Kiprono submitted that the Applicant was disqualified on account of what the Respondents termed its submitted NSE7 Certificate was not valid. According to Counsel, the Applicant submitted a valid NSE7 Certificate, and thus the Evaluation Committee erred in its validation of the Applicant's NSE7 Certificate.

30. He submitted that the validation of the NSE7 Certificate could be done by either scanning the QR Code on the face of the certificate or by using the link that was equally provided on the face of the certificate. Counsel indicated that the Applicant's NSE7 Certificate if validated by either of the above methods, it would yield that the certificate was valid. To this end, Counsel referred to an annexure marked ML7, a screenshot of the verified NSE7 Certificate.
31. Mr. Kiprono invited the Board to scan the QR Code and use the URL link together with the code on the certificate to confirm the validity of its submitted Certificate.
32. It was also contended that the Evaluation Committee possibly scanned the QR code from a poorly printed NSE7 Certificate or used the wrong code in an attempt to verify the certificate using the URL link. According to Counsel, it was plausible that the Evaluation Committee used the lowercase letter "l" instead of the uppercase letter "I" appearing on the code on the face of the certificate.
33. Counsel submitted that if the Respondents were in doubt as to the validity of the Applicant's submitted NSE7 Certificate they could have sought clarification from the Applicant under Section 81 of the Act and Cause 29.1 of the Tender Document.
34. Mr. Kiprono also indicated that the Interested Party herein did not meet the mandatory requirement of supplying a complete set of audited accounts for the last three (3) years 2020, 2021 and 2022 at the Technical Evaluation Stage. He argued that the Interested Party was incorporated

on 11th November 2020 and subsequently registered for VAT on 4th March 2021 thus the Interested Party could not possibly have completed audited accounts for the year 2020.

35. Therefore, it was argued that the Respondents breached Regulations 75(1) and 76(2) of the Regulations in allowing the Interested Party's tender to qualify for Financial Evaluation.

36. Counsel relied on the case *John Musambi Mutisya v Mash Bus Services Limited [2018] eKLR* and *Jackline Awuor Ochieng v The Aga Khan University Hospital [2018] eKLR* for the proposition that a year translates to 365 or 366 days.

37. Relying on the case of *Republic v Public Procurement Administrative Review Board; Arid Contractors & General Supplies (Interested Party) ex parte Meru University of Science & Technology [2019] eKLR* the Applicant submitted that the Interested Party's tender was unresponsive.

38. Mr. Kiprono maintained that the Respondents in response to the Request for Review had chosen to cast aspersions on how the Applicant obtained the Interested Party's "confidential documents" instead of offering a substantive response on the qualifications of the Interested Party.

Respondents' Submissions

39. Counsel for the Respondent, Mr. Nyaanga, indicated he would be placing reliance on the Respondents' filed documents i.e. Memorandum of Response, Replying Affidavit and Further Affidavit sworn by Daniel Amuyunzu on 20th and 24th November 2023 respectively.

40. Counsel while relying on this Board's decision in ***PPARB Application No. 99 of 2022; Jubilee Health Insurance Limited v Accounting Officer, Kenya Medical Supplies Authority & Ors*** argued that Section 80 of the Act requires that tender evaluation should be as per the procedures outlined in the tender document.
41. Mr. Nyaanga indicated that Requirement No. ix at page 34 of the Tender Document required tenderers in the subject tender to have personnel with NSE7 Certification. He indicated that the Applicant submitted as part of its tender at page 188 an NSE7 Certification which the Evaluation Committee found invalid after an attempt at scanning the QR Code and keying the code validation number: w2Hoac9vvlx to https://training.fortine.om/mod/customcert/verify_certificate.php.
42. According to Counsel the QR Code on the Applicant's submitted NSE7 certificate is not functional and the ULR link returned the validation as invalid. He therefore submitted that the Applicant's disqualification was in the circumstance as per the terms of the tender document as this was a mandatory requirement.
43. Counsel submitted that the Applicant was attempting to modify its submitted tender after the tender submission deadline by purporting to refer to the screenshot marked ML-8.
44. Relying on the cases of ***Republic v Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex parte Tuv Austria Turk [2020]eKLR*** and ***Republic v Public Procurement Administrative Review Board; Kenya Medical Supplies Authority***

(KEMSA) (Interested Party) Ex parte Emure Pharmaceuticals Limited [2019]eKLR he argued that when determining what amounts to a minor deviation the primary consideration should be the prejudice to other tenderers and not on the degree of non-conformity.

45. He therefore argued that the Applicant's tender was rightfully disqualified and any evaluation of the Applicant's tender on the basis of annexure ML8 would be contrary to the principle of fairness.
46. Counsel further submitted that the Applicant should not be permitted to rely on its annexures ML6, i.e. Certificate of Incorporation, CR 12 and KRA Pin Certificate as the Applicant irregularly accessed confidential documents in breach of section 67 of the Act.
47. It was argued that the Applicant had attached a screenshot of the Public Information Portal but the same was not part of the Applicant's tender. Reliance was placed on this Board's decision in ***PPARB Application No. 57 of 2017; Real Appraisal Limited v National Social Security Fund*** seeking to exclude the said screenshot.
48. The Respondents therefore urged the dismissal of the Request for Review.

Interested Party's Submissions

49. Counsel for the Interested Party, Ms. Nungo associated herself with the submissions made on behalf of the Respondents. She also indicated that the Interested Party would be relying on its filed documents in the matter i.e. Replying Affidavit sworn on 27th November 2023 by Peter Kipkoech Arthur.

50. Relying on the High Court cases of ***Republic v Public Procurement Administrative Review Board & Anor; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex parte Tuv Austria Turk[2020] eKLR*** and ***Republic v Public Procurement Administrative Review Board Arid Contractors & General Supplies (Interested Party) Ex parte Meru University of Science and Technology[2019]eKLR***. Ms. Nungo argued that Sections 79(1) and 80(1) and (2) of the Act refer to a responsive tender as one that conforms to all eligibility and mandatory requirements in the Tender Document. She argued that it was a mandatory requirement on page 34 of the Tender Document that a tenderer provides its personnel, and more so one of its engineers, with NSE7 certification for integrating the solution to the Procuring Entity's infrastructure. The said certificate was to be attached for the Procuring Entity's online verification.
51. Counsel argued that the Respondents had confirmed that upon verification of the Applicant's attached NSE7 certification, which was on page 188 of the tender, the same was found invalid. She pressed on that the Applicant could not now seek to produce annexure ML5 for verification as this certificate was not what was submitted as part of its tender and that this amounted to a modification of its tender.
52. Counsel urged the Board to verify the Applicant's purported NSE7 Certificate appearing on page 188 of the Applicant's submitted tender and not annexure ML5. According to her, the Applicant's tender was properly disqualified from further evaluation.

53. Ms. Nungo raised an objection on documents relied upon by the Applicant i.e. annexures marked ML6 (Interested Party's Certificate of Incorporation, CR12 and KRA PIN Certificate), ML9 (PPIP website screenshot) and ML10 (KRA website screenshot) citing that the documents were of a confidential nature under Section 67 of the Act and that the Applicant had not provided information on how these documents were obtained. She indicated that breach in respect of unauthorized access to confidential information attracted debarment from procuring processes.
54. She highlighted that the attached CR12 certificate was addressed to the Interested Party and this begged the question how the Applicant got this document
55. Relying on the Supreme Court decision in ***Petition No. 13 of 2020; Kenya Railways Corporation & 2 Others v Okiya Omtatah Okiiti & 3 Others*** Counsel argued that the above documents ought to be disregarded as they constituted illegally obtained evidence.
56. It was also Counsel's contention that ML9 and ML10 constituted computer screenshots from PPIP and KRA website but were not accompanied by a Certificate of electronic evidence. Relying on the High Court case of ***Republic v Barisa Wayu Mataguda [2011]eKLR***, she urged the Board to disregard the said documents.
57. Ms. Nungo further submitted that the Interested Party's tender was responsive to the Tender Document requirement and pointed out that contrary to the Applicant's allegations, the Interested Party supplied

audited accounts for the years 2020, 2021 and 2022 at pages 321 to 371 of the Interested Party's tender.

Applicant's Rejoinder on the Request for Review

58. Counsel for the Applicant, Mr. Kiprono in a brief rejoinder submitted that there was no evidence that the Applicant obtained any of the so called confidential documents from the Procuring Entity.

CLARIFICATIONS

59. The Board sought clarity from the Applicant on whether they had any evidence that the Interested Party did not submit as part of their tender statement of accounts for the years 2020, 2021 and 2022. Mr. Kiprono confirmed that though he did not have any direct evidence on this, it was impossible for the Interested Party as a company incorporated on 10th November 2020 to have submitted complete accounts for the year 2020.
60. The Board also sought clarification from the Respondents as to whether the Procuring Entity's Evaluation Committee used both the QR Code and URL Link in verifying the validity of the NSE7 Certificate supplied as part of the Applicant's tender. The Respondents confirmed that in verifying the certificates online, they used both the QR code and the URL link as appearing on the face of the certificate at page 188 of the Applicant's tender.
61. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 10th November 2023 had to be determined by 1st December 2023. Therefore, the Board would communicate its decision on or before 1st December 2023 to all parties via email.

BOARD'S DECISION

62. The Board has considered all documents and pleadings 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 Procuring Entity properly evaluated the Applicant's tender document submitted in response to the subject tender in accordance with Section 80 of the Act and the provisions of the Tender Document?***
 - II. ***Whether the Applicant substantiated its allegations that the Interested Party did not provide audited accounts for years 2020, 2021 and 2022?***
 - III. ***Whether the Procuring Entity properly evaluated the Interested Party's tender document submitted in response to the subject tender in accordance with Section 80 of the Act and the provisions of the Tender Document?***
 - IV. ***What orders should the Board issue in the circumstance?***

Whether the Procuring Entity properly evaluated the Applicant's tender document submitted in response to the subject tender in accordance with Section 80 of the Act and the provisions of the Tender Document?

63. Counsel for the Applicant, Mr. Kiprono submitted that the Applicant was disqualified on allegations that its submitted NSE7 Certificate was not valid. According to Counsel, the Applicant submitted a valid NSE7 Certificate, and thus the Evaluation Committee erroneously arrived at a finding that that the Applicant's NSE7 certificate was invalid.

64. Mr. Kiprono submitted that the validation of the NSE7 Certificate could be done by either scanning the QR Code on the face of the certificate or by using the URL link that was equally provided on the face of the certificate. He attributed any invalid finding on the Applicant's NSE7 Certificate on the Respondents' possible scan of the QR Code from a poorly printed NSE7 Certificate or use of the wrong code in an attempt to verify the certificate using the URL link.
65. On the flip side, the Respondents urged that the Applicant's tender was non-responsive as it failed to provide a valid NSE7 Certification. Counsel for the Respondents, Mr. Nyaanga argued that the QR Code on the Applicant's submitted NSE7 certificate is not functional and the URL link returned the validation as invalid. He therefore submitted that the Applicant's disqualification was in the circumstance just.
66. Counsel submitted that the Applicant was attempting to modify its submitted tender after the tender submission deadline by purporting to refer to the screenshot marked ML-8.
67. Counsel for the Interested Party, Ms. Nungo associated herself with the submissions by the Respondents. She added that the Respondents had confirmed that upon verification of the Applicant's attached NSE7 certification, which was on page 188 of the tender, the same was found invalid. She therefore pressed that the Applicant could not now seek to produce annexure ML5 for verification as this certificate was not what was submitted as part of its tender and that this amounted to a modification of its tender.

68. From the foregoing rival positions, this Board is invited to inquire into whether the Applicant submitted a valid NSE7 Certificate and consequently whether the Evaluation Committee properly evaluated the Applicant's tender.

69. Section 80 of the Act offers guidance on how an Evaluation Committee should proceed with the evaluation of tenders in the following terms:

"80. Evaluation of tenders

(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."

70. Additionally, Section 79 of the Act offers clarity on the responsiveness of tenders in the following terms:

"79. Responsiveness of tenders

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

(2) A responsive tender shall not be affected by—

a) minor deviations that do not materially depart from the requirements set out in the tender documents; or

b) errors or oversights that can be corrected without affecting the substance of the tender.

***(3) A deviation described in subsection (2)(a) shall—
a) be quantified to the extent possible; and
b) be taken into account in the evaluation and comparison of
tenders.”***

71. This Board is further guided by the dictum of the High Court in ***Republic v Public Procurement Administrative Review Board & 2 others Exparte BABS Security Services Limited [2018] eKLR; Nairobi Miscellaneous Application No. 122 of 2018*** where the court while considering a judicial review application against a decision of this Board illuminated on the responsiveness of a tender under section 79 of the Act:

“19. It is a universally accepted principle of public procurement that bids which do not meet the minimum requirements as stipulated in a bid document are to be regarded as non-responsive and rejected without further consideration.[9] Briefly, the requirement of responsiveness operates in the following manner:- a bid only qualifies as a responsive bid if it meets with all requirements as set out in the bid document. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements.[10] Bid formalities usually require timeous submission of formal bid documents such as tax clearance certificates, audited financial statements, accreditation with standard setting bodies, membership of professional bodies, proof of company registration, certified copies of identification documents and the like. Indeed, public procurement practically bristles with formalities which

bidder often overlook at their peril.[11] Such formalities are usually listed in bid documents as mandatory requirements – in other words they are a sine qua non for further consideration in the evaluation process.[12] The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing or empowerment. Bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome.

20. 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."

See also ***Nairobi High Court Judicial Review Misc. Application No. 407 of 2018; Republic v Public Procurement Administrative Review Board; Arid Contractors & General Supplies (Interested Party) Ex parte Meru University of Science & Technology [2019]eKLR.***

72. Drawing from the above, the Tender Document is the key guide in the evaluation of tenders submitted in response to any tender invitation. Further, for a tender to be deemed responsive in respect of any requirement, it must comply with the specification of the actual requirement as set out in the Tender Document.

73. Turning to the instant Request for Review, Mandatory Requirement No. ix at page 34 of the Tender Document provided as follows:

3.Preliminary examination for Determination of Responsiveness

The Procuring Entity will start by examining all tenders to ensure they meet in all respects the eligibility criteria and other mandatory requirements provided for in the preliminary evaluation criteria outlined below. Tenders that do not pass the Preliminary Examination will be considered non-responsive and will not be considered further...

...The bid submission shall contain the following documents; clearly marked and arranged in the following order:-

a...

b...

c...

ix. The bidder must have personnel with NSE7 certification for integrating the solution to the Authority's infrastructure. Attach certificate for verification (MANDATORY).

x...

xi...

74. Further, Mandatory Requirement No. v at page 35 of the Tender Document provides as follows:

a) Technical Evaluation

v. Skills for Current Environment Integration: KPA has Fortinet security fabric where Internet links terminate. The supplier/bidder must have a High-level expertise in cyber security & data networking deployments for proper integration of Internet capacity links. The bidder must also attach two technical engineers in Telecommunication field with five years' experience. One of the engineers MUST be NSE7 certifications. Attach certifications & CV of the engineers and due diligence confirmation will be carried out including online verification and background checks (MANDATORY).

75. From the above provisions it is apparent that tenderers participating in the subject tender were required to have personnel with NSE7 certification for integrating the solution to the Procuring Entity's infrastructure. It was also mandatory for each tenderer to attach an NSE7

certificate as part of its tender and that the attached certificate would be subject to verification by the Procuring Entity.

76. Accordingly, it would follow that any tender that either lacked an NSE7 certificate or one that had an invalid NSE7 Certificate would be unresponsive to the above requirements.
77. The Board has keenly studied the Applicant's original tender and noted that on page 188 of the tender, the Applicant submitted an NSE7 Certificate from Fortinet Training Institute bearing the name Samuel Macharia and which is indicated on its face as being valid until 25th August 2025. The said Certificate has a QR code and URL link with the Certificate Validation Number: w2Hoac9vix.
78. Pursuant to an invitation by all parties, the Board independently scanned the QR Code on the NSE7 Certificate at page 188 of the Applicant's original tender but the scan did not yield anything. Various QR Code readers were unable to decode the QR Code on the Certificate.
79. The Board subsequently used the alternative method of the URL link https://training.fortinet.com/mod/customcert/verify_certificate.php and the Certification Validation number w2Hoac9vix in an attempt to verify the Applicant's NSE7 Certificate. The outcome displayed on the Fortinet Training Institute's website was that the Certification Validation Number was invalid.
80. From the Board's own independent scanning of the QR Code at page 188 of the Applicant's original tender as well as use of the URL link, the Applicant's attached NSE7 Certificate was invalid.

81. The Board has glanced at the Evaluation Report and noted that the Evaluation Committee made an observation that the Applicant attached an NSE7 that was not valid. In view of the foregoing analysis, we find no reason to fault this observation by the Evaluation Committee.
82. The Applicant through the annexure marked **ML7** and **ML8** and annexed to the Further Affidavit of Jimmy Omae Omoke presented a subsequent NSE7 Certification bearing the name Samuel Macharia and screenshot indicating that Samuel Macharia NSE7 certification was verified. We note from the face of the **ML8** that the attached certificate is not paginated yet the certificate appearing on the Applicant's tender bears page 188. Since the Evaluation Committee considered the certificate appearing at page 188 of the Applicant's tender and not the certificate annexed as **ML8** to the Applicant's Further Affidavit, it would be inappropriate for the Board to verify the latter certificate in an attempt to check whether the Evaluation Committee properly evaluated the Applicant's tender.
83. In light of the above analysis, we find that the Procuring Entity properly evaluated the Applicant's tender document submitted in response to the subject tender in accordance with Section 80 of the Act and the provisions of the Tender Document.

Whether the Applicant substantiated its allegations that the Interested Party did not provide audited accounts for years 2020, 2021 and 2022?

84. The Board wishes to point out that there has been a growing trend of Applicants invoking the jurisdiction of the Board while attaching

Confidential Documents as part of their evidence in support of their case. In the instant Request for Review, the Applicant attached 3 Confidential Documents as part of Annexure **ML6** to the Supporting Affidavit of Jimmy Omae Omoke.

85. Through Annexure ML6 the Applicant produced before the Board the Interested Party's Certificate of Incorporation, CR12 Certificate and KRA PIN. The Applicant and its Counsel, Mr. Kiprono could not substantiate how the Applicant accessed these documents which ordinarily should be in the custody of the Procuring Entity or the Interested Party. In fact, during the hearing, the Interested Party through their Counsel, Ms. Nungo denied having furnished the Applicant any of the said documents.

86. Section 67 of the Act safeguards against the integrity of parties' tender documents in the following terms:

67. Confidentiality

(1) During or after procurement proceedings and subject to subsection (3), no procuring entity and no employee or agent of the procuring entity or member of a board, commission or committee of the procuring entity shall disclose the following—

(a) information relating to a procurement whose disclosure would impede law enforcement or whose disclosure would not be in the public interest;

(b) information relating to a procurement whose disclosure would prejudice legitimate commercial interests, intellectual property rights or inhibit fair competition;

(c) information relating to the evaluation, comparison or clarification of tenders, proposals or quotations; or

(d) the contents of tenders, proposals or quotations.

(2) For the purposes of subsection (1) an employee or agent or member of a board, commission or committee of the procuring entity shall sign a confidentiality declaration form as prescribed.

(3) This section does not prevent the disclosure of information if any of the following apply—

(a) the disclosure is to an authorized employee or agent of the procuring entity or a member of a board or committee of the procuring entity involved in the procurement proceedings;

(b) the disclosure is for the purpose of law enforcement;

(c) the disclosure is for the purpose of a review under Part XV or requirements under Part IV of this Act;

(d) the disclosure is pursuant to a court order; or

(e) the disclosure is made to the Authority or Review Board under this Act.

(4) Notwithstanding the provisions of subsection (3), the disclosure to an applicant seeking a review under Part XV shall constitute only the summary referred to in section 68 (2)(d)(iii).

(5) Any person who contravenes the provisions of this section commits an offence as stipulated in section 176(1)(f) and shall be debarred and prohibited to work for a government entity or where the government holds shares, for a period of ten years.

87. From the above, it is clear that the Act upholds confidential documents relating to public procurement. Specifically, the section prohibits the Procuring Entity and its officers from disclosing of any procurement information that would (i) be against public interest; (ii) prejudice the legitimate commercial interest of tenderers; (iii) disclose the evaluation and comparison of tenders and (iv) the contents of tenders. The Act further creates an offence attracting criminal sanctions for any such disclosure.
88. This Board has also in its past Decisions affirmed that Requests for Review that are founded on confidential documents militate against public interest and are thus destined for dismissal as parties who breach the law should not be permitted to benefit from such breaches.
89. In ***PPARB Application No. 21 of 2015; Thwama Building Services v Tharaka Nithi County Government this Board*** while discussing Section 44 of the preceding statute to the present Act affirmed that Applicant's producing founding their Requests for Review on Confidential Documents in breach of procurement laws should not be allowed to benefit from such breach:
- "The Applicant while referring to the same undisclosed source then proceeded to state in paragraph 1.9 of the Request for Review that the Interested Party had been awarded the tender despite the fact that as per the tender requirement it had not provided: -***
- a) A bid validity period which was sufficient***
 - b) Litigation history***
 - c) Proof of similar works***

d) The bid was higher than the Applicant's

The Board wishes to observe that whereas items (a) and (d) above could be established at the tender opening meeting, items (b) and (c) could only be established upon an access to the successful bidder's tender document. The Board is therefore unable to accept the Applicant's argument that there was no disclosure of information and finds that contrary to the Applicant's submissions, there was in fact such a disclosure and reliance on what was clearly confidential information...

...It is therefore clear from the above provisions of the Act and the above authority that the issue of reliance on confidential information is a serious one and bears heavy consequences. The Applicant in this Request for Review and any other bidder are therefore warned that the Board will not in future allow reliance on confidential information as a basis for any Request for Review and will not hesitate to recommend sanctions against any bidder who breaches the provisions of the Act on confidentiality."

90. In ***PPARB Application No. 11 of 2016; Amro Insurance Brokers Limited v Kenya Wildlife Service*** this Board dismissed the Request for Review and referred the matter to the Anti-corruption authorities after the Applicant was found to have based its case on confidential documents:

"The Board has looked at the Applicant's conduct in this application and finds the same to be gross and highly inappropriate. The Applicant's conduct of obtaining evaluation reports and other bidders tender and other confidential documents defeats the objectives of Article 227 and the objectives of Public Procurement and is not capable of any reasonable explanation. Such if allowed to occur will adversely affect completion, fair treatment to all bidders, it will diminish integrating reduce transparency and accountability and diminish public confidence in Procurement processes.

Owing to the gravity of this matter the Board finds that the Applicant's application cannot stand and therefore fails.

The Board further directs the Ethics and Anti-Corruption Commission and other relevant authorities to investigate the circumstances under which the Applicant in this Request for Review came into the possession of confidential documents including the tender documents belong to other bidders with a view of taking any such remedial action as it or they deem appropriate."

91. In the present case, it is not clear where the Applicant obtained the Interested Party's Certificate of Incorporation, CR12 Certificate and KRA PIN Certificate but what can be inferred is that the same were obtained irregularly and/or through illegal means. Though Counsel for the Applicant purported to indicate that a CR12 Certificate can be obtained from the Companies Registry e-citizen platform, the attached CR12 Certificate was addressed to the Interested Party and not the Applicant, meaning the

Applicant never obtained this document on its own. Equally, the Interested Party's Certificate of Incorporation and KRA PIN Certificate are not documents of a nature that anyone can freely access without formal requests to the relevant authorities. In this regard, the Board finds that the Applicant's conduct in the present matter is below par.

92. The Board relies on the Supreme Court decision in **Petition No.13 of 2020 as consolidated with Petition No.18 (E019) of 2020 Kenya Railways Corporation & 2 others v Okiya Omtatah Okoiti & 3 others** where it held as follows:

"91. We agree with and affirm the Court of Appeal decision to admit the illegally obtained information is detrimental to the administration of justice and the provision of Article 50 (4) of the Constitution. Allowing such documents is akin to sanitizing illegal action of the 1st, 2nd and 3^d Respondents of irregularly obtaining evidence, in violation of Article 31 of the Constitution on the right to privacy including privacy of communication.....Even if the authenticity or contents of the documents was not questioned by the Applicant, the production of such documents as evidence must be in accordance with the law. Not having obtained and adduced the evidence, in the manner set out under Section 80 and 81 of the Evidence Act or

requested for information under Article 35 of the Constitution, the documents are inadmissible, we so declare.”

Having found that the documents adduced in evidence by the Applicant were irregularly an/or illegally obtained, the Applicant cannot benefit from the same irregularity and/or illegality. To this end the Board shall disregard such evidence as the same is ripe for striking out and/or being expunged from the records herein.

The Board equally relies on the Court of Appeal decision in **Civil Appeal No.E270 of 2020 CIC General Insurance Limited v Madison General Insurance Kenya Limited & 2 Others** where the decision of the Review Board in **PPARB No.19 of 2022 Madison General Insurance Kenya Limited v Lt Col. (Rtd) P.N. Njiraini, The Accounting Officer Kenya Bureau of Standards and another** was upheld and stated as follows:-

“21....the learned judges decisive dictum suggest that, once the Respondent alleged that they did not comply with certain mandatory requirements in the tender document, the burden shifted to the Appellant to prove otherwise .

22. Contrary to the learned judges conclusion, section 107(1) of the Evidence Act revised 2014 (1963) provide in no uncertain terms

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

The above case is in all fours with the instant review and we find no difficulty in holding the burden of proof that the Interested Party did not submit audited accounts for years 2020, 2021 and 2023 lies with the Applicant and the Respondents will only be required to disprove such allegations once the Applicant has discharged its burden.

Having found out that the evidence adduced by the Applicant is confidential, cannot be relied upon to benefit the Applicant and is for striking out we find the Applicant has failed to substantiate its allegation.

Whether the Procuring Entity properly evaluated the Interested Party’s tender document submitted in response to the subject tender in accordance with Section 80 of the Act and the provisions of the Tender Document?

93. Following the Board’s finding in the second issue, it is not tenable for the Board to make a determination on this issue because the Applicant has failed to substantiate its allegations on this issue.

94. The Board’s dispositive orders shall be as per the subsequent parts of this Decision.

What orders the Board should grant in the circumstances?

95. The Board has found that the Procuring Entity properly evaluated the Applicant's tender document submitted in response to the subject tender in accordance with Section 80 of the Act and the provisions of the Tender Document.
96. The Board has also found that the Procuring Entity properly evaluated the Interested Party's tender document submitted in response to the subject tender in accordance with Section 80 of the Act and the provisions of the Tender Document.
97. The upshot of our finding is that the Request for Review dated 10th November 2023 in respect of Tender No. Tender No. KPA/016/2023-24/ICT for the Provision of Primary Internet and Wide Area Network (WAN) Capacity Links for Kenya Ports Authority fails in the following specific terms:

FINAL ORDERS

98. 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 dated 10th November 2023:
- 1. The Request for Review dated 10th November 2023 be and is hereby dismissed.**
 - 2. The Procuring Entity is at liberty to proceed with the Tender No. KPA/016/2023-24/ICT for the Provision of Primary Internet and Wide Area Network (WAN) Capacity Links for Kenya Ports Authority to its logical conclusion in accordance with the provision of Tender Document, the Act and the Constitution.**

3. Given the Board’s finding above, each party shall bear its own costs.

Dated at NAIROBI, this 1st Day of December 2023.



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PANEL CHAIRPERSON

PPARB



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SECRETARY

PPARB

