

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 97/2023 OF 22ND NOVEMBER 2023

BETWEEN

SWISS GRADE CONSULT LIMITED APPLICANT

AND

ACCOUNTING OFFICER/ COUNTY SECRETARY

COUNTY GOVERNMENT OF KISUMU 1ST RESPONDENT

THE DIRECTOR OF PROCUREMENT

COUNTY GOVERNMENT OF KISUMU 2ND RESPONDENT

THE CHIEF OFFICER- TRADE, TOURISM,

INDUSTRY, MARKETING, COUNTY

GOVERNMENT OF KISUMU 3RD RESPONDENT

QUEENO INVESTMENT LIMITED INTERESTED PARTY

Review against the decision of the Accounting Officer, County Government of Kisumu in relation to Tender No. CGK/CG/TTIM/001/2023-2024 for the Proposed Construction of County Aggregation and Industrial Parks.

BOARD MEMBERS PRESENT

- | | | |
|------------------------|---|-------------------|
| 1. Ms. Alice Oeri | - | Panel Chairperson |
| 2. Dr. Susan Mambo | - | Member |
| 3. CPA Alexander Musau | - | Member |

IN ATTENDANCE

Mr. Philemon Kiprop - Secretariat

Mr. Anthony Simiyu - Secretariat

PRESENT BY INVITATION

APPLICANT SWISS GRADE CONSULT LIMITED

Ms. Luvai Mwenesi -Advocate, Nyaberi & Company Advocates

RESPONDENTS: COUNTY GOVERNMENT OF KISUMU T DIRECTOR OF PROCUREMENT, COUNTY GOVERNMENT OF KISUMU THE CHIEF OFFICER- TRADE, TOURISM, INDUSTRY AND MARKETING COUNTY GOVERNMENT OF KISUMU

Mr. Ouma Njoga -Advocate, Office of the County Attorney, County
Government of Kisumu

INTERESTED PARTY QUEENO INVESTMENT LIMITED

Mr. Moses Muchiri -Advocate, Mwaniki Gachoka & Company
Advocates

BACKGROUND OF THE DECISION

The Tendering Process

1. The County Government of Kisumu, the Procuring Entity together with the 3rd Respondent herein, invited submission of sealed tenders in response to Tender No. CGK/CG/TTIM/001/2023-2024 for the Proposed Construction of County Aggregation and Industrial Parks. using an open

competitive tender method. The subject tender's submission deadline was Friday, 1st September 2023 at 11:00 a.m.

Submission of Tenders and Tender Opening

2. According to the signed Tender Opening Minutes dated 1st September 2023, submitted under the Confidential File submitted by the Procuring Entity, the following 5 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.	Okonos Building Cont. Limited
2.	Queeno Investment Limited
3.	Global Eng. International Limited
4.	Swiss Grade Consultant Limited
5.	Homefix Limited

Evaluation of Tenders

3. The Respondent constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") to undertake an evaluation of the 5 tenders in the following 3 stages as captured in the Evaluation Report
- i. Preliminary Evaluation
 - ii. Technical Evaluation
 - iii. Financial Evaluation

Preliminary Evaluation

4. At this stage of the evaluation, the Evaluation Committee was required to examine the tenders using the criteria set out as Clause 2 Preliminary Examination for Determination of Responsiveness on pages 21 to 22 of the Tender Document.
5. The evaluation was to be on Yes/No basis and tenderers who failed to meet any criteria outlined at this Stage would be disqualified from further evaluation.
6. At the end of the evaluation at this stage, 2 tenders were found unresponsive with the other 3 tenders including that of the Applicant and Interested Party qualifying for further evaluation at the Technical Evaluation Stage.

Technical Evaluation

7. At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the Criteria set out as on pages 26 to 26 of the Tender Document.
8. The evaluation was to be on a Met/Not Met basis. Tenderers were required to meet all the requirements outlined at this Stage and those who failed to meet any of them would be disqualified from further evaluation at the Financial Evaluation Stage.
9. At the end of the evaluation at this stage, 2 tenders were found unresponsive with only 1 tender i.e. the Interested Party's tender qualifying for further evaluation at the Financial Evaluation Stage.

Financial Evaluation

10. At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the Criteria set out as Stage 3- Financial Evaluation under Section III– EVALUATION AND QUALIFICATION CRITERIA on page 48 of the Tender Document.
11. According to the Tender Document, the Evaluation Committee was to conduct verify the arithmetic entries in the Bill of Quantities while checking for consistency in the tendered sums and compare the tendered sums.
12. At the end of the evaluation at this stage, the Evaluation Committee found only the Interested Party's tender made it to this stage and its tender price of Kshs. 488,649,380 was within the Procuring Entity's Approved budget of Kshs. 500,000,000.

Evaluation Committee's Recommendation

13. Accordingly, the Evaluation Committee recommended the award of the subject tender to the Interested Party at its tender sum of **Kenya Shillings Four Hundred and Eighty-Eight Million, Six Hundred and Forty-Nine Thousand, Three Hundred and Eighty only (Kshs. 488,649,380.00)** inclusive of taxes.

Professional Opinion

14. In a Professional Opinion dated 22nd September 2023 (hereinafter referred to as the "Professional Opinion"), the Procuring Entity's Director Supply Chain Management, Ms. Joan Kajenjo, 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.

15. The 3rd Respondent herein subsequently concurred with the Professional Opinion.

Notification to Tenderers

16. Accordingly, tenderers were notified of the outcome of the evaluation tenders submitted in response to the subject tender vide letters dated 22nd November 2023. The said letters were sent on 22nd September 2023 through the emails the tenderers provided in their respective tenders.

REQUEST FOR REVIEW

17. On 22nd November 2023, the Applicant filed a Request for Review dated 22nd November 2023 supported by an Affidavit sworn on 22nd November 2023 by Simon Oguri, a Project Manager at the Applicant, seeking the following orders from the Board in verbatim:

- 1. The Board do set aside the award to the Interested Party in the tender and make a finding that the Applicant is the most favourable tenderer for the said tender and be awarded the same;***
- 2. In the alternative, the Board do set aside the award and a new tender process take place ab initio;***
- 3. The Board do find the whole tendering process did not comply with the tendering process and rules as provided under provisions under Articles 10, 47, 50 and 227 of the Constitution, Section 87 of the Public Procurement and Asset Disposal Act No. 33 of 2015 and the Guiding***

principles of Public Procurement and Asset Disposal under Section 3 of the Public Procurement and Asset Disposal Act No. 33 of 2015;

4. Any other relief that the Board may deem fit and just to grant;

5. Costs of the Review

18. In a Notification of Appeal and a letter dated 22nd 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 22nd November 2023.

19. In response to the Request for Review, on 28th November 2023, the Respondents filed a Notice of Appointment of Advocates, Notice of Preliminary Objection and a Memorandum of Response, all dated 27th November 2023 together with a Supporting Affidavit sworn on 27th November 2023 by Bovince Ochieng, the 3rd Respondent herein. The Respondents also submitted the confidential documents in the subject tender pursuant to Section 67(3)(e) of the Act.

20. Vide letters dated 29th 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 29th November 2023.
21. On 5th December 2023, the Applicant filed a Response sworn by Simon Oguri on even date together with a Response to the Preliminary Objection sworn on 5th December 2023 by the said Simon Oguri.
22. On 6th December 2023 the Interested Party through the firm of Mwaniki Gachoka & Company Advocates filed a Notice of Appointment of Advocates and Notice of Preliminary Objection, both dated 1st December 2023 together with a Statement of Response sworn on 4th December 2023 by Michael Odhiambo Muma, a Director at the Interested Party. The Interested Party equally filed its Written Submissions and Bundle of Authorities, both dated 5th December 2023.
23. On the same day, 6th December 2023, the Acting Board Secretary, sent out to the parties a Hearing Notice dated 6th December 2023 notifying parties and all tenderers in the subject tender that the hearing of the instant Request for Review would be by online hearing on 7th December 2023 at 12.00 noon through the link availed in the said Hearing Notice.
24. On 7th December 2023 at 12:00 noon, parties through their respective Advocates joined the online hearing session.

25. 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.
26. The Board also noted that the Respondents and Interested Party had filed Notices of Preliminary Objection in the matter and directed that this would be heard alongside the Request for Review in line with Regulation 209(4) of the Regulations 2020.

PARTIES SUBMISSIONS

Interested Party's Submissions on their Notice of Preliminary Objection

27. Counsel for the Interested Party, Mr. Muchiri, relying on the cases of ***Samuel Kamau Macharia & anor v Kenya Commercial Bank Ltd & 2 Ors [2012] eKLR*** and ***The Owners of Motor Vessel "Lilian S" v Caltex Oil Kenya Limited [1989] eKLR*** submitted that a jurisdictional issue ought to be addressed before delving into the merits of a dispute before a court or Board.
28. He urged that under Section 167 of the Act and Regulation 203 administrative review proceedings should be commenced within 14 days from the date of knowledge of the alleged breach on the part of the Procuring Entity. Counsel argued that though the Applicant claimed to have received the Notification of Intention to Award in the subject tender on 8th November 2023, it was in fact dispatched on 7th November 2023.

He referred the Board to Exhibit SGCL 003 annexed to the Applicant's Request for Review showing that the email bearing the Notification was dispatched on 7th November 2023 at 12:10 p.m.

29. It was therefore Counsel's submission that the Applicant had until 21st November 2023 to file their Request for Review and that since the instant Request was filed on 22nd November 2023, it was time-barred.
30. Mr. Muchiri also pointed out that rejoinder by the Applicant was undated and thus offending Section 5 of the Oaths and Statutory Declarations Act.

Respondents' Submissions on their Notice of Preliminary Objection

31. Counsel for the Respondent, Mr. Ouma, urged that the Notification of Intention to Award the subject tender was first sent to the Applicant on 7th November 2023 and thus the 14 days' statutory timeline within which the Request for Review ought to have been filed lapsed on 21st November 2023.
32. Counsel argued that the Board was divested the jurisdiction to hear and determine the instant Request for Review as the same was time-barred having been filed after the lapse of the standstill period.
33. Mr. Ouma contended that the Notification was shared through an email address supplied by the Applicant in its tender and thus if there was any error, the error should be blamed on the Applicant for supplying an erroneous email address. Counsel sought for the Request for Review to be struck out.

Applicant's Response to the Notices of Preliminary Objection

34. Counsel for the Applicant, Ms. Luvai, argued that after sending out sending out to the tenderers, the emails bearing the Notifications of Intention to Award the subject tender, the Procuring Entity realized that they had used an erroneous email address with respect to the Applicant.
35. She argued that the Procuring Entity reached out to a Director at the Applicant to be furnished with the correct email and when this was provided, the Applicant received the email bearing the Notification of Intention to Award the subject tender on 8th November 2023. Ms. Luvai therefore argued that the Applicant's deadline for filing the Request for Review was 23rd November 2023, since there was a holiday in the intervening period between 8th November 2023 and 22nd November 2023. She argued that initial service on 7th November 2023 was not proper service as the Notification was not received by the Applicant.

Interested Party's Rejoinder on their Notice of Preliminary Objection

36. Counsel for the Interested Party, Mr. Muchiri in a brief rejoinder submitted that the Notification was sent on 7th November 2023 and that the Applicant was to blame for its own supply of an erroneous email address.

Respondents' Rejoinder on their Notice of Preliminary Objection

37. Counsel for the Respondents, Mr. Ouma in his rejoinder affirmed that where service is effected by way of email or postage, service is deemed as effected at the time the item forming the subject of service is sent. He added that it was a requirement of the Tender Document that tenderers supply working emails for purposes of communication and the email used

by the Procuring Entity in dispatching the Notification was the one supplied by the Applicant.

Applicant's Submissions

38. Counsel for the Applicant, Ms. Luvai submitted that under Section 80 of the Act, evaluation of tenders should be done within 30 days but the Evaluation Committee surpassed this timeline and took an extra 38 days to finalize the evaluation process.
39. Ms. Luvai urged that the evaluation was to be conducted by the Directorate of Procurement in the County Government of Kisumu and not the Chief Officer, Department of Trade. She pointed out that it appears the Directorate was not involved and thus the evaluation process was in this regard not transparent. According to Counsel, the Chief Officer, Department of Trade usurped the role of the procuring department and is in breach of the rules of natural justice.
40. She argued that the Respondents' Affidavit by Mr. Ochieng' consists of hearsay and thus ought to be struck. Further, that in his averments in the affidavit he interfered with the procurement process and introduced an evaluation criterion that was not part of the Tender Document.
41. Counsel submitted that on 29th November 2023 she received the Respondents' Supporting Affidavit whose supporting documents had been torn or redacted including the Minutes of the Evaluation Committee and the Evaluation Report. According to Counsel this spoke to mischief on the part of the Respondents as they were hiding something. She therefore urged the Board to compel the Respondents to avail all the original tender documents to enable a just determination of the Request for Review.

42. Counsel also alleged that the Interested Party failed to participate in the site visit which was a mandatory requirement in the tender and thus the evaluation process was according to Counsel a sham process.

Respondents' Submissions

43. Counsel for the Respondents, Mr. Ouma indicated that he would be relying on the Respondents' filed documents i.e. Memorandum of Response dated 27th November 2023 and Supporting Affidavit sworn by Mr. Bovince Ochieng' on 27th November 2023.

44. Mr. Ouma submitted that the Evaluation of the tenders commenced on 19th September 2023 and was concluded on 22nd September 2023. He further urged that whereas the Act was clear on the period of evaluation, it did not spell out the timelines for the communication of the evaluation exercise and thus any evaluation conducted within the 30 days but whose communication is made outside the 30 days should not be affected by the delayed communication.

45. On the competency of Mr. Ochieng', Counsel submitted that Mr. Ochieng' is an Accounting Officer of the Procuring Entity by virtue of Section 149 of the Public Finance and Management Act and Section 87(3) of the Act and was thus competent to be involved in the subject tender.

46. On the allegation of redaction of documents to conceal certain facts, Counsel pointed out that the documents in question were confidential documents under Section 67 of the Act and that the originals of these documents had been supplied to the Board. Further, that the

Respondents did the redaction on the advice of this Board's Secretariat at the point of filing of the Respondents' response.

47. Mr. Ouma submitted that it was open for the Applicant, if they needed a debrief, to apply for such and it is during the debriefing session that they would get clarity on the evaluation of their tender.
48. Counsel also refuted the allegation that the Respondents introduced an alien evaluation criterion in the course of tender evaluation.

Interested Party's Submissions

49. Counsel for the Interested Party, Mr. Muchiri associated himself with the submissions made on behalf of the Respondents.
50. Mr. Muchiri submitted that under the Tender Document, the successful tender had to pass the Preliminary and Technical Stage and be the lowest evaluated tender. He argued that the Applicant's tender could not be the successful tender in the subject tender as its tender was found non-responsive at the Technical Stage after it was established that it failed to fill certain forms.
51. Counsel submitted that only the Applicant's tender met the requirements at the Preliminary and Technical Stages and was therefore the only one that merited consideration at the Financial Evaluation Stage.
52. He also referred to the Instructions To Tenderers and urged that site visits were not a pre-requisite for participation in the subject tender.

Applicant's Rejoinder

53. In a brief rejoinder, Counsel for the Applicant, Ms. Luvai informed the Board that the site visit was provided for in a previous advert on the subject tender but this requirement was removed in a subsequent advert.
54. She also affirmed that the Applicant participated in a debrief process but was still disqualified despite having submitting all the required documents under its tender documents.
55. Counsel further questioned how the Applicant could interrogate the dates when evaluation took place as well as the contents of the minutes when the said documents were not made available to it on account of confidentiality.

CLARIFICATIONS

56. The Board questioned the Applicant on when it received its Notification of Intention to Award the subject tender to which Ms. Luvai maintained it was on 8th November 2023.
57. The Board asked the Respondents to clarify the position on the site visits. Mr. Ouma while referring to Clause 7.2. of the Tender Document maintained that no site visit was contemplated in respect of the subject tender. He indicated that the Applicant appeared to have mistaken a previous advert by the Procuring Entity on a different tender for the subject tender.
58. The Board inquired from the Applicant the email address they supplied and the email the Procuring Entity initially used to send the Notification of Intention to Award the subject tender. Ms. Luvai indicated that the Applicant supplied the email addresses "info@swissgrade.com" and

"swissgrade@gmail.com" but the Procuring Entity used "swissgradeconsultingltd@yahoo.com"

59. The Board equally inquired from the Respondents the email address the Applicant supplied as well as that used to dispatch the Notification. Mr. Ouma confirmed that the email address the Procuring Entity used for dispatch the Notification was swissgradeconsultingltd@yahoo.com and requested the Board to verify the email the Applicant supplied from the Applicant's original tender which had been supplied to the Board as part of the confidential documents.
60. The Board asked the Applicant to clarify on the criterion that the Procuring Entity allegedly introduced in the subject tender that was not part of the Tender Document. Ms. Luvai indicated that she was unaware of this criterion only that the Applicant took issue with paragraph 25 of the Supporting Affidavit by Mr. Ochieng'.
61. When asked whether the Applicant filled all the mandatory forms, Ms. Luvai was emphatic that all the forms were filled.
62. The Board also asked Ms. Luvai to confirm whether she was conversant with Section 67 of the Act on confidential documents to which she answered in the affirmative.
63. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 22nd November 2023 had to be determined by 13th December 2023. Therefore, the Board would communicate its decision on or before 13th December 2023 to all parties via email.

BOARD'S DECISION

64. The Board has considered all documents, oral submissions 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 Board has jurisdiction to hear and determine the instant Request for Review:***

In determining this issue, the Board will interrogate whether the Applicant filed in the instant Request for Review within the 14 days' statutory timeline provided for under Section 167 of the Act and Regulation 203 of the Regulations 2020.

Depending on the determination of the first issue above,

- II. ***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?***
- 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 Board has jurisdiction to hear and determine the instant Request for Review?

65. The Respondents and Interested Parties filed Notices of Preliminary Objection dated 27th November 2023 and 1st December 2023 respectively. Both Notices of Preliminary Objection urged that the instant Request for Review was time-barred. Counsel for the Interested Party, Mr. Muchiri submitted that the Request for Review ought to have been filed within 14 days from the date of the dispatch of the Notification of Intention to Award i.e. 7th November 2023. According to Counsel the Applicant ought to have filed the instant Request for Review by 21st November 2023 and since the instant Request was filed on 22nd November 2023, it was time-barred.
66. Counsel for the Respondents, Mr. Ouma associated himself with the submissions made on behalf of the Interested Party. He submitted that the instant Request for Review was filed outside the standstill period and thus the Board was divested the jurisdiction to hear and determine it. Additionally, he pointed out that the Applicant was sent the initial email containing the Notification of Intention to Award on 7th November 2023 and that any error that emanated from the provision of an erroneous email address should be blamed on the Applicant.
67. On the other hand, Counsel for the Applicant, Ms. Luvai, maintained that the Request for Review was filed within the 14 days' statutory timeline provided for under Section 167 of the Act and Regulation 203 of the Regulations 2020. She argued that on 7th November 2023 the Procuring Entity sent an initial email bearing the Notification of Intention to Award but this was not delivered, a fact that prompted the request for the Applicant to supply an alternative email to which the Procuring Entity sent the Notification on 8th November 2023. According to Counsel, the

Applicant's deadline for filing a Request for Review was 23rd November 2023 and that since the instant Request for Review was filed on 22nd November 2023, the same was filed within time.

68. This Board acknowledges the established legal principle that courts and decision-making bodies can only preside over cases where they have jurisdiction and when a question on jurisdiction arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before doing anything concerning such a matter in respect of which it is raised.

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

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

70. On its part, Halsbury's Laws of England (4th Ed.) Vol. 9 defines jurisdiction as:

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

71. The locus classicus case on the question of jurisdiction is the celebrated case of ***The Owners of the Motor Vessel "Lillian S" -v- Caltex Oil Kenya Ltd (1989) KLR 1*** where Nyarangi J.A. made the oft-cited dictum:

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction."

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

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

73. This Board is a creature of statute owing to its establishment as provided for under Section 27(1) of the Act which provides that:

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

74. Further, Section 28 of the Act provides for the functions of the Board as:

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

75. The Board shall now interrogate the circumstances under which the instant Request for Review was filed to establish whether it is time-barred.

76. A reading of section 167 of the Act denotes that the jurisdiction of the Board should be invoked within a specified timeline of 14 days:

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.

77. Regulation 203(2) (c) of the Regulations 2020 equally affirms the 14-days timeline in the following terms:

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) state the reasons for the complaint, including any alleged breach of the Constitution, the Act or these Regulations;

b) be accompanied by such statements as the applicant considers necessary in support of its request;

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

78. Our interpretation of the above provisions is that an Applicant seeking the intervention of this Board in any procurement proceedings must file their request within the 14-day statutory timeline. Accordingly, Requests for Review made outside the 14 days would be time-barred and this Board would be divested of the jurisdiction to hear the same.

79. It is therefore clear from a reading of section 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 in to a contract having been issued or (iii) occurrence of breach complained of, having taken place after making of an award to the successful tenderer. Simply put, an aggrieved candidate or tenderer can invoke the jurisdiction of the Board in three (3) instances namely (i) before notification of intention to enter in to a contract is made (ii) when notification of intention to enter into a contract has been made and (iii) after notification to enter into a contract has been made. The option available to an aggrieved candidate or tenderer in the aforementioned instances is determinant on when occurrence of breach complained took place and should be within 14 days of such breach.

80. It was not the intention of the legislature that where an alleged breach occurs before notification to enter in to contract is issued, the same is only complained after the notification to enter into a contract has been issued. We say so because there would be no need to provide 3 instances within which such Request for Review may be filed.
81. Section 167 of the Act and Regulation 203 of the 2020 Regulations 2020 identify the benchmark events for the running of time to be the date of notification of the award or the date of occurrence of the breach complained of.
82. Turning to the case at hand, the gravamen of the Applicant's Request for Review is that the it was erroneously disqualified in the subject tender and that the Interested Party's tender was also erroneously found as the

successful tender in the subject tender. The above, all stem from the communication contained in the Notifications of Intention to Award dated 7th November 2023.

83. Whereas the Interested Party and Respondents maintain that the Notifications of Intention to Award the subject tender were first sent on 7th November 2023, the Applicant insists that it did not receive the Notification sent on the 7th November 2023 and that its only after providing an alternative email address that it received a Notification sent on 8th November 2023.
84. It is not in dispute that the Procuring Entity sent out to the tenderers Notifications of Intention to Award the subject tender on 7th November 2023. Further, it is also not disputed that the Notification sent through email to the Applicant on 7th November 2023 was not delivered as this was what informed the request to the Applicant to supply an alternative email. It is through the email address subsequently provided that the Procuring Entity subsequently shared the Notification to the Applicant on 8th November 2023. The alternative email addresses supplied at the request of the Procuring Entity were info@swissgradeconsult.co.ke, and swissgradelimitedconsult@gmail.com.
85. The Board perused the Applicant bid and indeed established at page 541 of the Applicant original bid that: Mr. Simon Nyamari Oguri PO Box 79246 -00200 Nairobi, Mobile No +254711 685 971, Email address swissgradelimitedconsult@gmail.com is the email provided in the Tenderers Information Form and this then would have been the primary email address for the purpose of email correspondence.

86. This Board takes the view that 8th November 2023 should be the benchmark date of when the 14 days' statutory timelines should run as this is the date when the Applicant actually got knowledge of the outcome of the evaluation process in the subject tender. We say so because knowledge of an alleged breach is the trigger of the running of the statutory timeline as was affirmed by the High Court in ***Nairobi High Court Judicial Review Application No. 102 of 2023; Republic v Public Procurement Administrative Review Board and Anor Ex parte Sheemax Consulting.***

87. In the above recent case, which is binding on this Board, the High Court endorsed the long strand of cases that hold that the 14 days' statutory timeline under Section 167 of the Act and Section 203 of the Regulations 2020 starts to run when a candidate or tenderer learns of the breach being complained of:

"120. In Republic v Public Procurement Administrative Review Board & 2 others Ex- parte Kemotrade Investment Limited [2018] eKLR the High Court noted that to determine when time starts to run, such determination can only be made upon examination of the alleged breach and when the aggrieved tenderer had knowledge of the said breach"

88. From the foregoing, it is clear that the Applicant learnt of the outcome of the evaluation process in the subject tender when it received its Notification on 8th November 2023. The Board will now proceed to compute the timeline within which the instant Request for Review ought to have been filed before it. In computing the 14 days contemplated under

the Act, we take guidance from section 57 of the Interpretation and General Provisions Act:

"57. Computation of time

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

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

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

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

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

89. When computing time when the Applicant ought to have sought administrative review before the Board, 8th November 2023 is excluded as per section 57(a) of the IGPA being the day that the Applicant learnt of the occurrence of the alleged breach. This means time started to run on 9th November 2023 and lapsed on 22nd November 2023. In essence,

the Applicant had between 8th November 2023 and 22nd November 2023 to seek administrative review before the Board. The instant Request for Review was filed on 22nd November 2023 which was the deadline of bringing the instant Request for Review and therefore within the 14 days' statutory timeline. Consequently, the Respondents' and Interested Party's Notices of Preliminary Objection fail.

90. In light of the foregoing, the Board finds that it has jurisdiction to hear and determine the instant Request for Review.

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?

91. Counsel for the Applicant, Ms. Luvai took issue with the evaluation process submitting that:

- i. The evaluation process took longer than 30 days as contemplated under Section 80 of the Act;
- ii. The Chief Officer, Department of Trade was involved in the subject tender when he was not an Accounting Officer. According to Counsel, the Chief Officer, Department of Trade usurped the role of the procuring department and is in breach of the rules of natural justice.
- iii. The Procuring Entity introduced an evaluation criterion that was not part of the Tender Document.
- iv. During the hearing, the Respondents supplied redacted documents including the Minutes of the Evaluation Committee and the Evaluation

Report. According to Counsel this spoke to mischief on the part of the Respondents as they were hiding something.

92. On the flip side, the Respondents and Interested Party maintained that the evaluation process was properly conducted and that the Applicant was properly disqualified from the subject tender.
93. Counsel for the Respondents, Mr. Ouma, submitted that the Evaluation of the tenders commenced on 19th September 2023 and was concluded on 22nd September 2023.
94. On the competency of Mr. Ochieng', Counsel submitted that Mr. Ochieng' is an Accounting Officer of the Procuring Entity by virtue of Section 149 of the Public Finance and Management Act and Section 87(3) of the Act and was thus competent to be involved in the subject tender.
95. On the allegation of redaction of documents to conceal certain facts, Counsel pointed out that the documents in question were confidential documents under Section 67 of the Act and that the originals of these documents had been supplied to the Board. Further, that the Respondents did the redaction on the advice of this Board's Secretariat at the point of filing of the Respondents' response.
96. Counsel also refuted the allegation that the Respondents introduced an alien evaluation criterion in the course of tender evaluation.
97. Counsel for the Interested Party, Mr. Muchiri, submitted that the successful tenderer had to be responsive at the Preliminary and Technical Stages of Evaluation and thereafter be established as the lowest

evaluated tender at the Financial Evaluation Stage. He urged that the Applicant could not be deemed the successful tenderer after it was disqualified at the Technical Stage in on account of failure to fill certain mandatory forms.

98. From the above rival positions, this Board is invited to interrogate whether the disqualification of the Applicant from the subject tender was preceded by a properly conducted tender evaluation process.

99. 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."

100. 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.”*

101. This Board is further guided by the dictum of the High Court in *Republic v Public Procurement Administrative Review Board & 2 others Ex parte 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 bidders 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.***

102. 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.

103. Turning to the instant Request for Review, the Board has spotted the Notification of Intention to Award sent to the Applicant in the Confidential File supplied to the Board by the Respondents. The Notification has also been annexed by the Applicant to its Request for Review as Annexure SGL005 and it reads in part as follows:

"...

3.Reason/s Why Your Bid was Unsuccessful

Your bid was unsuccessful due to the following reason(s):

- a) Form FIN 3.1 was not attached as it was the document to be filled for technical evaluation requirement 11***
- b) Form FIN 3.2 was not attached as it was the document to be filled for technical requirement 12***
- c) The attached contracts and letters of award as evidence for FORM 4.1 and 4.2 were not consistent and had anomalies as evidenced from Page 514 to 528 of your document for technical evaluation requirement 13 and 14***
- d) There was no evidence of owning/leasing some of the equipment listed. These were Tower crane, forklift, Water bowser (20 litres) and Backhoe (1.2m³) for technical requirement 15.***
- e) You did not have an ICT works supervisor and artisans with the required test certificates for technical evaluation requirement 16.***

..."

104. From the above, it is apparent that the Applicant's tender was disqualified from the subject tender on account of failure to fill Forms FIN 3.1 and 3.2; inconsistencies in supplied Forms 4.1 and 4.2; failure to supply evidence of ownership/ leasing of equipment; and lack of an ICT works supervisor.

105. Page 25 to 26 of the Blank Tender Document outlines the technical evaluation requirements that the Respondents contend that the Applicant failed to meet. The said requirements are hereinafter reproduced for ease of reference as follows:

Item No.	Qualification Subject	Qualification Requirement	Document to be completed by Tenderer	For Procuring Entity's Use (Qualification Met or Not Met)
11	Financial capabilities	<p>(i) The Tenderer shall demonstrate that it has access to or has available, liquid assets, unencumbered real assets, lines of credit and other financial means (independent of any contractual advance payment) sufficient to meet the construction cash flow requirements estimate as Kenya Shillings 147,000,000 equivalent for the subject contract(s) net of the Tenderer's other commitments.</p> <p>(ii) The Tenderer shall also demonstrate to the satisfaction of the Procuring Entity, that it has adequate sources of finance to meet the cash flow requirements on works currently in progress and for future contract commitments</p> <p>(iii) The audited balance sheets or, if not required by the laws of the Tenderer's country other financial statements acceptable to the Procuring Entity, for the last [3] years shall be submitted and must demonstrate the current soundness of the Tenderers financial position and indicate its prospective long-term profitability. Attach evidence inform of letter from bank overdraft facility, current bank statements for the last 6 months)</p>	FORM FIN 3.1 with attachments	
12	Average Annual Construction Turnover	Minimum average annual construction turnover of Kenya Shillings 1,287,000,000.00 equivalent calculated as total	Form FIN-3.2	

		<i>certified payments received for contracts in progress and/or completed within the last 3 years, divided by 3 years. Attach evidence in form of audited accounts serialized on every page duly signed and stamped by a registered auditor/audit firm (ICPAK REGISTERED)</i>		
13	<i>General Construction Experience</i>	<i>Experience under construction contracts in the role of prime contractor, JV Member, sub-contractor, or management contractor for at least 3 years, starting January 2017</i>	<i>Form EXP-4.1</i>	
14	<i>Specific Construction & Contract Management Experience</i>	<i>A minimum number of 2 similar contracts specified below that have been satisfactorily and substantially completed as a prime contractor, joint venture member, management contractor or sub-contractor between 1st January 2017 and tender submission deadline (Contracts, each of minimum value Kenya Shillings 412,000,000.00 equivalent [Bidders shall attach copies of the following: Letters of Award or Signed Contract and Completion Certificate for the respective projects or If project is ongoing it must be at least 80% complete. Bidder to attach copies of interim certificates. The similarity of the contracts shall be based on Section VII, Scope of Works, specify the minimum key requirements in terms of physical size, complexity, construction method, technology and/or other</i>	<i>Form EXP 4.2 (a)</i>	

		<i>characteristics including part of the requirements that may be met by specialized subcontractor, if permitted in accordance with ITT 34.3]</i>		
15	<i>Contractors key equipment</i>	<p>1.Pickup (2 tons)- Four (4) 2.Low loader (12Hp and above) 1-no. 3.Grader 1no. 4.Forklift-1no. 5.Tower crane 6.Water bowser (20 litres) 2 no. 7.Backhoe (1.2m³)-1no. 8.Diesel generator (200kVA)-One (1) 9.Tippers-Three (3)</p> <p><i>Notes</i> <u>If the equipment is owned, must provide CLEAR copies of logbook or proof of ownership</u> <u>If equipment is hired or leased provide a commitment letter from the lessor of the equipment addressed to the Chief Officer Trade, Tourism, Industry and Marketing-County Government of Kisumu indicating that the lessor shall avail the equipment upon award of the tender and submit a copy of a written agreement to lease between the lessor and lessee indicating list of equipment and their corresponding copies of logbooks or proof of ownership by lessor.</u> The equipment listed shall be available on site when required.</p>	<i>Form EQU: Equipment</i>	
<i>Key Personnel</i>				
16	<i>Contractor's Representative and Key Personnel</i>	<p>a) Project Manager ... b) Site Agent ...</p>	<i>Form PER-1 & Form PER-2</i>	

		<p><i>c)Foreman</i></p> <p>...</p> <p><i>d)Artisans</i></p> <p><i>Minimum qualifications and technical experience</i></p> <p><i>1.Trade Test certificate in relevant field</i></p> <p><i>2.Experience-5years</i></p> <p>...</p> <p><i>e) Occupational Health and Safety Personnel</i></p> <p>..</p> <p><i>f) ICT Works Supervisor</i></p> <p><u><i>Minimum qualification and technical experience</i></u></p> <p><u><i>1.Bachelor's degree/diploma holder in Information Technology/ Computer Science/ Computer Engineering</i></u></p> <p><u><i>2.Experience -5 years</i></u></p> <p><i>Note: Certified copies of certificates to be provided as evidence</i></p>		
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106. The Board, will now interrogate each of the above Technical Requirements against the Applicant's original tender document.

107. From the above it is apparent that Technical Requirement No. 11 required tenderers to demonstrate having assets or access to finances sufficient to meet cash flow requirements of at least Kshs. 147 Million and enough to sustain the tenderer's current and future projects. In order to be considered responsive to this tender requirement, a tenderer was to supply as part of its tender a duly filled Form FIN 3.1 together with audited financial statements for the previous 3 years.

108. The Board has sighted at pages 404 to 448 as well as at page 806 to 852 Annual Reports and Financial Statements for the years 2020, 2021

and 2023 indicating on their face as having been prepared by MK-Eliud & Associates. The Applicant therefore satisfied the part of Mandatory requirement 11 on providing audited financial statements. However, the Applicant did not comply with the other part of Mandatory Requirement 11 that required tenderers to fill Form FIN 3.1. The Board has keenly perused the Applicant's original tender but has not seen any such Form FIN 3. Accordingly, the Procuring Entity cannot be faulted for observing that the Applicant failed to supply the said form.

109. Technical Requirement 12 required tenderers to meet a minimum annual construction turnover of Kshs. 1.287 Billion. In order to demonstrate this, a tenderer was required to duly Form FIN 3.2 and provide the audited accounts.

110. As already pointed, the Applicant supplied as part of its tender Annual Reports and Financial Statements for the years 2020, 2021 and 2022 at pages 404 to 448 and 806 to 852 of its original tender document. The Applicant therefore satisfied part of the requirement which called for the supply of audited financial statements. However, the same cannot be said of the requirement to duly fill Form FIN 3.2 as the Applicant failed to provide the duly filled form as part of its tender document. Once again, we cannot fault the Procuring Entity for making the observation that the Applicant did not provide this form.

111. Technical Requirement No. 13 required tenderers to demonstrate at least 3 years' experience under construction in the role of prime contractor, JV member, sub-contractor or management contractor. In

order to be considered responsive to this requirement, a tenderer was required to duly fill Form EXP-4.1.

112. The Board has keenly perused the Applicant's original tender but not seen any attached Form EXP-4.1.

113. Technical Requirement No. 14 required tenderers to demonstrate having successfully completed at least 2 contracts each worth at least Kshs. 412 Million between 1st January 2017 and the subject tender's closing date. In order to be considered responsive to this tender requirement a tenderer was to duly fill Form EXP4.2(a) and attach Letters of award, contract and Certificate of completion for the said projects.

114. The Board has spotted 2 duly filled Forms EXP 4.2 (a) at page 513 and 521 of the Applicant's original tender document. The Form at page 513 refers to a contract for construction of Tororo Railway Gravity Flow between Justnice Limited and Uganda's National Water Sewerage Corporation. The role of the Applicant in the said contract is not disclosed but surprisingly at page 519 the Applicant supplies a certificate of practical completion of the project issued in its name for the said project which was awarded to Justnice Limited. The Board observed further inconsistencies when it interrogated the Form at page 521. This Form refers to a contract for the Construction of Kenya Leather Park in Machakos between Justnice Limited and Epcu Builders Limited. At page 522 of the Applicant's tender is a Notification letter awarding a sub contract to the Applicant herein but the Form at page 521 describes the Applicant as the prime contractor. Further confusion on the part of the Applicant is seen at pages 523 to 526 of its original tender where the Applicant supplies an agreement between Kenya Leather Development

Council and the Applicant but the same agreement is executed by the Kenya Development Council, Epco Builders Limited and Justnice Limited.

115. This Board therefore agrees with the observation by the Procuring Entity that the Applicant supplied documents that were characterized with inconsistencies.
116. Technical Requirement No. 15 required tenderers to demonstrate access to construction equipment i.e. pick up, low loaders, graders, forklift, tower crane, water bowser, diesel generator and tipper. In order to be considered responsive to this tender requirement, a tenderer was required to duly fill Form EQU: Equipment and provide clear copies of log books where the equipment was owned by a tenderer. In the event the equipment was under lease, the tenderer was required to provide a commitment letter from the owner undertaking to supply the equipment for the contract as well as a copy of the lease agreement.
117. The Board has spotted at pages 644 to 655 of the Applicant's original tender document, a list of various equipment and images of the equipment. The Applicant's tender document neither contains a duly filled Form EQU nor any log book or any lease document to show ownership of the equipment. Accordingly, the Board cannot fault the Procuring Entity for making an observation that the Applicant was unresponsive to Requirement No. 15.
118. Technical Requirement No. 16 required tenderers to demonstrate that they had certain key personnel including an ICT Works Supervisor who held at a minimum a Degree or diploma in Information Technology,

Computer Science or Computer Engineering and also hold at least 5 years of experience as well as an artisan who held trade test certificate in construction and with 5 years of experience. In order to be considered responsive to this tender requirement, a tenderer was to duly fill Forms PER 1 and PER 2 and provide certified copies of the supervisor's and artisan's academic certificates.

119. The Board has keenly studied the Applicant's original tender as submitted to the Procuring Entity and observed that at pages 656 to 788 the Applicant provided CVs and academic certificates of its various personnel, none of which included its proposed ICT Works supervisor and artisans as required under Technical Requirement No. 16. Accordingly, the Board cannot fault the Procuring Entity for finding that the Applicant was unresponsive to this requirement of the Tender Document.

120. The Applicant also took issue with the length of time the Procuring Entity's Evaluation Committee took to evaluate the tender documents submitted in response to the subject tender.

121. Section 80(6) of the Act is instructive that the evaluation process shall be carried out within a maximum period of 30 days. Further, Section 80(7) provides the Evaluation Report, a marker for conclusion of the evaluation exercise, to be signed by all members of the Evaluation Committee.

122. Turning to the present Request for Review, the Board has perused the Confidential File submitted to it and notes from the Evaluation Report dated and signed on 22nd September 2023 that the Evaluation process commenced on 19th September 2023 and was concluded on 22nd

September 2023. No evidence was led during hearing to show that evaluation did not happen on the said dates. Accordingly, we find no reason to doubt the Procuring Entity's representation that the evaluation process took 4 days which is within the 30 days' timeline provided for under Section 80(6) of the Act.

123. The Applicant also took issue with the involvement of the 3rd Respondent in the present tender citing that he was not an Accounting Officer. The Board notes that this is a misdirection on the part of the Applicant. Section 148 of the Public Finance Management Act grants authority to the County Executive Member in charge of Finance of a County to appoint the Accounting Officer

"148. Designation of accounting officers for county government entities by the County Executive Committee member for finance (1) A County Executive Committee member for finance shall, except as otherwise provided by law, in writing designate accounting officers to be responsible for managing the finances of the county government entities as is specified in the designation."

124. The Respondents annexed to the Supporting Affidavit of Bovince Ochieng as Annexure BO1 an appointment letter by Mr. George O. Okong'o, Kisumu County's CEC Member- Finance, Economic Planning & ICT Services, appointing the 3rd Respondent herein as an Accounting Officer. It would therefore follow that the 3rd Respondent's involvement in the subject tender was regular.

125. During hearing of the Request for Review, Counsel for the Applicant, Ms. Luvai alluded to the use of an evaluation criterion alien to those provided for under the Tender Document. However, when the Board sought clarity from Counsel on the alleged foreign criterion, she abandoned her allegation. The Board will not therefore address this any further.

126. The Applicant's Counsel, Ms. Luvai also took issue with the fact that the Respondents' documents served upon her specifically the Evaluation Committees Minutes and Evaluation Report were redacted under the guise of confidentiality. We wish to refer to Section 67 of the Act which safeguards against the disclosure of confidential information in respect of public procurement processes:

"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.

127. From the above, it is clear that the Act upholds the confidentiality of confidential documents relating to public procurement. Specifically, the

section prohibits the Procuring Entity and its officers and agents 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.

128. This Board has also in the recent past 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.

See ***PPARB Application No. 95 of 2023; Imperial Investment K Limited v Accounting Officer, Commission on Revenue Allocation & Ors*** and ***PPARB Application No. 11 of 2016; Amro Insurance Brokers Limited v Kenya Wildlife Service***

129. In deference to Section 67 of the Act, the Board finds that the redaction on the Evaluation Committees minutes and Evaluation Report was not irregular as the information on the said document is what would in the ordinary circumstance be considered confidential information under section 67 of the Act.

130. 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 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?

131. Counsel for the Applicant, Ms. Luvai also alleged that the Interested Party failed to participate in the site visit which was a mandatory requirement in the tender and thus the evaluation process was according to Counsel a sham process.

132. Counsel for the Respondent, Mr. Muchiri, submitted that only the Interested Party's tender met the requirements at the Preliminary and Technical Stages and was therefore the only one that merited consideration at the Financial Evaluation Stage. He also referred to the Instructions to Tenderers 7.2 and urged that site visits were not a pre-requisite for participation in the subject tender.

133. The Board is therefore invited to interrogate whether there was a mandatory provision in the Tender Document for tenderers to participate in a site visit.

134. We have keenly perused the blank Tender Document and noted that ITT 7.2 at page 17 speaks to site visits and the same is herein reproduced for ease of reference:

<i>Reference to ITC Clause</i>	<i>PARTICULARS OF APPENDIX TO INSTRUCTIONS TO TENDERERS</i>
<i>ITT 7.2</i>	<i>(A) A pre-arranged pretender site visit [insert ""shall not"] take place at the following</i>

	<p><i>date, time and place: As indicated in the tender advertisement</i></p> <p><i>Date:</i></p> <p><i>Time:</i></p> <p><i>Place:</i></p>
--	---

135. From ITT 7.2 above, it is apparent that no pretender visit was to take place. Accordingly, no tenderer participating in the subject tender was under an obligation to attend any site visit as presented by the Applicant. Further, since Counsel for the Applicant did not point the Board to any provision in the Tender Document that made a site visit a mandatory criterion in the evaluation of tenders, in the subject tender, we find that it was erroneous on the part of the Applicant to assume that such a criterion in fact existed in the subject tender.

136. In the absence of any other allegation against the Interested Party's qualifications, we find that the Procuring Entity's Evaluation Committee 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.

What orders the Board should grant in the circumstances?

137. The Board has found that the instant Request for Review was filed within the 14 days' statutory timeline and thus the Board has jurisdiction to hear and determine it.

138. The Board has also found that the Procuring Entity properly evaluated the Applicant's and Interested Party's tender documents submitted in

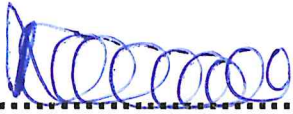
response to the subject tender in accordance with Section 80 of the Act and the provisions of the Tender Document.

139. The upshot of our finding is that the Request for Review dated 22nd November 2023 in respect of Tender No. CGK/CG/TTIM/001/2023-2024 for the Proposed Construction of County Aggregation and Industrial Parks fails in the following specific terms:

FINAL ORDERS


140. 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 22nd November 2023:
- 1. The Respondents' Notice of Preliminary Objection dated 27th November 2023 be and is hereby dismissed.**
 - 2. The Interested Party's Notice of Preliminary Objection dated 1st December 2023 be and is hereby dismissed.**
 - 3. The Request for Review dated 22nd November 2023 be and is hereby dismissed.**
 - 4. The Procuring Entity is at liberty to proceed with the Tender No. Tender No. CGK/CG/TTIM/001/2023-2024 for the Proposed Construction of County Aggregation and Industrial Parks to its logical conclusion.**
 - 5. Given the Board's finding above, each party shall bear its own costs.**

Dated at NAIROBI, this 13th Day of December 2023.



.....
PANEL CHAIRPERSON

PPARB



.....
SECRETARY

PPARB

