

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO.03/2024 OF 11<sup>TH</sup> JANUARY 2024**

**BETWEEN**

**GREEN COM ENTERPRISE SOLUTIONS LIMITED.....APPLICANT**

**AND**

**THE ACCOUNTING OFFICER,**

**NATIONAL ENVIRONMENT**

**MANAGEMENT AUTHORITY.....RESPONDENT**

**AGILE BUSINESS SOLUTIONS LIMITED.....INTERESTED PARTY**

Review against the decision of the Accounting Officer, National Environment Management Authority in relation to Tender No. NEMA/T/011/2023-2024 for Development and Implementation of Integrated Environmental Information Management System and Enterprise Resource Planning System (ERP).

**BOARD MEMBERS PRESENT**

- |                      |   |                   |
|----------------------|---|-------------------|
| 1. Mr. Joshua Kiptoo | - | Panel Chairperson |
| 2. Ms. Alice Oeri    | - | Member            |
| 3. Dr. Susan Mambo   | - | Member            |

**IN ATTENDANCE**

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

## **PRESENT BY INVITATION**

**APPLICANT** **GREEN COM ENTERPRISE SOLUTIONS LIMITED**

Ms. Nthenge -Advocate, Kimitei, Nthenge & Company Advocates

**RESPONDENT** **ACCOUNTING OFFICER, NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY**

Mr. E.K. Gitonga -Advocate, National Environment Management Authority

**INTERESTED PARTY** **AGILE BUSINESS SOLUTIONS LIMITED**

Ms. Desma Nungo -Advocate, NOW Advocates LLP

## **BACKGROUND OF THE DECISION**

### **The Tendering Process**

1. National Environment Management Authority, the Procuring Entity together with the Respondent herein, invited submission of sealed tenders in response to Tender No. NEMA/T/011/2023-2024 for Development and Implementation of Integrated Environmental Information Management System & Enterprise Resource Planning System

(ERP) using an open competitive tender method. The subject tender's submission deadline was Friday, 24<sup>th</sup> November 2023 at 10.00 a.m.

### **Submission of Tenders and Tender Opening**

2. According to the signed Tender Opening Minutes for 24<sup>th</sup> November 2023, submitted under the Confidential File submitted by the Procuring Entity, the following 15 tenderers were recorded as having submitted their respective tenders in response to the subject tender by the tender submission deadline:

<b>No.</b>	<b>Name of Tenderer</b>
<b>1.</b>	<b>Craft Silicon</b>
<b>2.</b>	<b>Ecletics International Limited</b>
<b>3.</b>	<b>Surestep System and Solutions Limited</b>
<b>4.</b>	<b>Iansoft Technology</b>
<b>5.</b>	<b>Agile Business Solutions</b>
<b>6.</b>	<b>Brisk Solutions Limited</b>
<b>7.</b>	<b>Greencom Enterprises Solutions Limited</b>
<b>8.</b>	<b>Panache Technohub</b>
<b>9.</b>	<b>Synaptic Solutions Limited</b>
<b>10.</b>	<b>Once Inc Limited</b>
<b>11.</b>	<b>Dynasoft Business Solutions Limited</b>
<b>12.</b>	<b>MFI Document Solutions Limited</b>
<b>13.</b>	<b>Coretec</b>
<b>14.</b>	<b>Appkings</b>

<b>15.</b>	<b>Amband Limited</b>
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### **Evaluation of Tenders**

3. The Accounting Officer of the Procuring Entity constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") to undertake an evaluation of the received 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 submitted tenders were to be examined using the criteria set out as Clause 3. Preliminary examination for Determination of Responsiveness under Section III – EVALUATION AND QUALIFICATION CRITERIA on pages 36 to 37 of the Tender Document.
5. Tenderers who failed to meet any criterion outlined at this Stage would be disqualified from further evaluation.



6. At the end of the evaluation at this stage, 12 tenders were found non-responsive with only 3 tenders including those of the Applicant and the Interested Party qualifying for further evaluation at the Technical Evaluation Stage.

### **Technical Evaluation**

7. The Evaluation Committee was required at this stage to examine tenderers successful at the Preliminary Stage using the criteria set out as Technical Evaluation under Section III – EVALUATION AND QUALIFICATION CRITERIA on pages 37 to 38 of the Tender Document.
8. At this stage, tenderers were to be examined on a Yes/No basis against the technical criteria set out in the Tender Document. In order to qualify for further evaluation at the Financial Stage, a tenderer was required to meet all the mandatory requirements under this stage.
9. At the end of the evaluation at this stage, only the Interested Party's tender was found responsive and thus qualifying for further evaluation at the Financial Evaluation Stage. The other 2 tenders including that of the Applicant were found non-responsive after they failed to meet the mandatory technical requirements under this stage of evaluation.

### **Financial Evaluation**

10. At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the Criteria set out as Financial Evaluation

under Section III– EVALUATION AND QUALIFICATION CRITERIA on pages 38 to 39 of the Tender Document.

11. Tenders were to be examined by price comparison from among the qualified tenderers and the successful tender would be one with the lowest tender price.
12. At the end of the evaluation at this stage, it was established that the Interested Party' tender which was the only tender examined at this stage was the lowest evaluated tender in the subject tender.

#### **Evaluation Committee's Recommendation**

13. Accordingly, the Evaluation Committee recommended the award of the subject tender to the Interested Party at its tendered price of **Kenya Shillings Ninety-Nine Million One Hundred and Five Thousand Nine Hundred and Thirty Four (Kshs. 99,105,934.00).**

#### **Professional Opinion**

14. In a signed Professional Opinion dated 21<sup>st</sup> December 2023 (hereinafter referred to as the "Professional Opinion"), the Procuring Entity's Head of 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. The Accounting Officer concurred with the Professional Opinion and approved it on 22<sup>nd</sup> December 2023.

## **Notification to Tenderers**

15. Tenderers were notified of the outcome of the evaluation of tenders submitted in response to the subject tender vide letters dated 22<sup>nd</sup> December 2023.

## **REQUEST FOR REVIEW**

16. On 11<sup>th</sup> January 2024, the Applicant through the firm of Kimitei, Nthenge & Company Advocates LLP, filed a Request for Review dated 10<sup>th</sup> January 2024 supported by an affidavit sworn on 10<sup>th</sup> January 2023 by Geoffrey Mutisya Mwanthi, a Director at the Applicant, seeking the following orders from the Board in verbatim:
  - i. **The Respondent's determination made by way of a letter dated 22<sup>nd</sup> December 2023 that the Applicant's tender for the DEVELOPMENT AND IMPLEMENTATION OF INTERGRATED ENVIRONMENTAL INFORMATION MANAGEMENT SYSTEM & ENTERPRISE RESOURCE PLANNING SYSTEM (ERP) under Tender No. NEMA/T/011/2023-2024 was unsuccessful, be annulled and set aside;**
  - ii. **The Respondent's determination made by way of a letter dated 22<sup>nd</sup> December 2023, that the Interested Party's tender for the DEVELOPMENT AND IMPLEMENTATION OF INTERGRATED ENVIRONMENTAL INFORMATION MANAGEMENT SYSTEM & ENTERPRISE RESOURCE PLANNING SYSTEM (ERP) for NEMA under Tender No.**



**NEMA/T/011/2023-2024 was unsuccessful, be annulled and set aside;**

- iii. The Honourable Board be pleased to review all records of the procurement process relating Tender No. NEMA/T/011/2023-2024 for the DEVELOPMENT AND IMPLEMENTATION OF INTERGRATED ENVIRONMENTAL INFORMATION MANAGEMENT SYSTEM & ENTERPRISE RESOURCE PLANNING SYSTEM (ERP) and do substitute the decision of the Respondent/Procuring Entity with an Order for award of the Tender to the Applicant being the lowest evaluated bidder;**
- iv. Costs of and incidental to these proceedings be awarded to the Applicant;**
- v. Any other Order that the Honourable Board may deem fit and appropriate to issue.**

17. In a Notification of Appeal and a letter dated 11<sup>th</sup> January 2024, 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 24<sup>th</sup> 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 11<sup>th</sup> January 2024.

18. On 17<sup>th</sup> January 2024, Mr. James Kilaka, the Board's Acting Secretary wrote a letter to the Respondent herein reminding him to furnish a response to the filed Request for Review as their statutory response period of 5 days from date of service had lapsed. A subsequent reminder was sent to the Respondent on 19<sup>th</sup> January 2024.
19. In response to the Request for Review, on 23<sup>rd</sup> January 2024, the Respondent through Erastus K. Gitonga-Advocate, filed a Notice of Appointment of Advocates of even date together with a Memorandum of Response in the form of an Affidavit sworn on 23<sup>rd</sup> January 2024 by Mamo B. Mamo. The Respondent equally filed a Notice of Preliminary Objection dated 23<sup>rd</sup> January 2024.
20. Vide letters dated 23<sup>rd</sup> January 2024, 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 24<sup>th</sup> 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 23<sup>rd</sup> January 2024.
21. On 24<sup>th</sup> January 2024 the Interested Party through the firm of NOW Advocates LLP filed a Notice of Appointment of Advocates dated 24<sup>th</sup> January 2024 and a Replying Affidavit sworn on 24<sup>th</sup> January 2024 by Nathan Kimutai Bett Yator.



22. The 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 24<sup>th</sup> January 2024 at 11.00 hrs. through the link availed in the said Hearing Notice.
23. On 24<sup>th</sup> January 2024, at 12.00 p.m. parties joined the online session through their respective Advocates.
24. The Board read through the documents that had been filed in the matter and asked parties to confirm having filed or been served upon the said documents as well to indicate their readiness to proceed with the scheduled hearing. The parties' respective Advocates indicated that they were ready to proceed with the hearing.
25. Noting that a Preliminary Objection had been filed in the proceedings, the Board directed that the same shall be heard as part of the substantive Request for Review in line with Regulation 209(4) of the Regulations 2020. Accordingly, the Board gave the following directions in terms of the order of address:
  - i. The Respondent would go first and argue its Preliminary Objection in 5 minutes;
  - ii. Next, the Applicant would respond to the Preliminary Objection in 5 minutes;
  - iii. Then, the Interested Party would submit on the Preliminary Objection in 5 minutes;
  - iv. The Respondent would then offer a rejoinder on the Preliminary Objection in 1 minute;

- v. The Applicant would prosecute the Request for Review in 10 minutes;
- vi. Thereafter , the Respondent would offer a response to the Request for Review in 10 minutes;
- vii. Subsequently, the Interested Party would offer its response to the Request for Review in 10 minutes; and
- viii. Lastly, the Applicant would offer a rejoinder on any arising matters in 5 minutes.

## **PARTIES SUBMISSIONS**

### **Respondent's Submissions on the Preliminary Objection**

- 26. Counsel for the Respondent, Mr. Gitonga submitted that the Procuring Entity and the Interested Party had already executed a procurement contract in respect of the subject tender and thus under Section 167(4) of the Act, the Board was divested of its jurisdiction to hear and determine the instant Request for Review.
- 27. Accordingly, Mr. Gitonga sought that the instant Request for Review be struck out for lack of jurisdiction.

### **Applicant's Submissions on the Preliminary Objection**

- 28. Counsel for the Applicant, Ms. Nthenge submitted that the Request for review was filed on 11<sup>th</sup> January 2024 and within 14 days from the date of Notification of Intention to Award. According to her upon the filing of the Request all procurement proceedings were put on hold pending the

Board's Decision on the request. Therefore, she submitted that the Procuring Entity's decision to conclude a procurement contract during the pendency of the instant proceedings was irregular.

29. Ms. Nthenge further indicated that though the Procuring Entity alleged that they did not receive a Notification of Appeal following the filing of the instant Request for Review, no evidence was furnished that the Request for Review was misplaced by an intern as alleged. She therefore sought for the Preliminary Objection to be dismissed.

#### **Interested Party's Submissions on the Preliminary Objection**

30. Counsel for the Interested Party, Ms. Nungo, associated herself with the submissions made by Mr. Gitonga on behalf of the Respondent. She further pointed out that the Interested Party learnt of the pendency of the instant Request for Review on 23<sup>rd</sup> January 2024 which was after the conclusion of the procurement contract. Further, that subsequent to the Interested Party's filing of their Replying Affidavit in response to the Request for Review, the Applicant has not filed any affidavit in challenge of the averments in the Interested Party's affidavit.

#### **Respondent's Rejoinder on the Preliminary Objection**

31. In a brief rejoinder, Counsel for the Respondent, Mr. Gitonga submitted that the Procuring Entity was not served with the Request for Review on 11<sup>th</sup> January 2024 and that no evidence of service on the said date had been produced before the Board. Further that the physical documents

were only availed on 15<sup>th</sup> January 2024 and that the procurement contract in the subject tender was regularly executed.

### **Applicant's Submissions on the Request for Review**

32. Counsel for the Applicant, Ms. Nthenge, placed reliance on the Applicant's filed documents i.e. Request for Review dated 10<sup>th</sup> January 2024 and the accompanying affidavit sworn on 10<sup>th</sup> January 2024 by Geoffrey Mutisya Mwanthi.
33. Ms. Nthenge indicated that the letter of regret sent to the Applicant, indicated that it was disqualified at the technical evaluation stage for 3 reasons, none of which the Applicant deemed valid. The said reasons were that none of the contracts met the similarity requirement in all the tested aspects; none of the contracts presented met the requirement for similarity through recommendation letters; and Environmental Expert had only done boreholes.
34. She submitted that the Applicant asked for a debrief and thereafter moved the Board. She indicated that the Applicant submitted a responsive tender containing contracts that met the similarities requirement stipulated in the Tender Document. She for instance referred to a letter of recommendation from the National Land Commission which involved building of a mobile phone application.
35. Counsel submitted that the Tender Document required tenderers to supply contracts and letters of recommendation and that the Applicant



provided these. She argued that the Procuring Entity in disqualifying the Applicant was attempting to introduce an alien criterion not provided for in the Tender Document since the Tender Document was not specific that the contracts should be equivalent in monetary value. However, we note that this averment was provided from the bar because the same had not been pleaded by the Applicant.

36. It was her contention that during the pre-bid meeting the Procuring Entity offered clarification on what similarity meant and that the Applicant had submitted multiple similar contracts including the ones from the Judiciary and the National Construction Authority.
37. She further argued that the Applicant provided an EIA Expert under the expert requirement, which requirement under the Tender Document contained a slash (/) symbol implying either of the requirements under this requirement. She maintained that the Applicant was compliant in this regard.
38. Additionally, Counsel argued that the Applicant supplied as part of its tender various recommendation letters including a letter from the Procuring Entity itself.
39. She therefore sought for the Request for Review to be allowed as prayed.

### **Respondent's Submissions on the Request for Review**

40. Counsel for the Respondent, Mr. Gitonga, submitted that the Applicant was disqualified at the Technical Stage after the Evaluation Committee established that none of the contracts met the similarity requirement in



all the tested aspects; none of the contracts presented met the requirement for similarity through recommendation letters; and the Applicant's Environmental Expert had only done boreholes.

41. According to Counsel, the sample contract supplied as part of the Applicant's tender did not pass the similarity of contract test as per the Tender Document. Mr. Gitonga argued that the similarity alluded to in the subject tender was in respect of monetary value, technical aspect as well as scope of work.
42. He indicated that the Procuring Entity convened a pre-bid meeting where all tenderers including the Applicant were invited but the Applicant skipped this meeting. He maintained that during this meeting clarity was offered on the meaning of similarity under the Tender Document and that this clarification was also uploaded on the Procuring Entity's website. Further, that the Applicant also wrote an email requesting clarity on the same and that this was offered to it.
43. Additionally, the Applicant was also offered further clarity during the debriefing session it sought subsequent to the issuance of the notification of intention to award.
44. According to Counsel, the sample contracts offered by the Applicant did not meet the similarity of contracts requirements. On the pecuniary aspect, it was indicated that the Applicant gave a contract for 2.5 Million.

45. Mr. Gitonga indicated that the Applicant appeared mistaken as to the tender requirement on monetary value when it adverted to the cumulative value of projects it had done instead of the individual value of the said projects.

### **Interested Party's Submissions on the Request for Review**

46. Counsel for the Interested Party, Ms. Nungo indicated that the Interested Party would be relying on its filed Replying Affidavit in the matter.
47. She argued that Article 227 of the Constitution requires public tenders to be conducted through fair processes and that Sections 79 and 80 requires tenders to conform with eligibility requirements alongside the other requirements in the Tender Document. Counsel invited the Board to look at the tender requirements alongside the Applicant's tender.
48. Ms. Nungo argued that on similarity, a tenderer was required to offer at least 3 similar contracts in system development and integration in the last 5 years and at least 2 recommendation letters or completion certificates for the said projects.
49. Counsel submitted that the Applicant had admitted that clarification was sought and offered on the meaning of similarity to include technical, scope and monetary value.
50. Counsel pointed out that the Applicant had disclosed 12 contracts by providing their details in the instant Request for Review. From the 12 contracts, only one i.e. from Judiciary would satisfy the monetary

requirement but was not supported by a recommendation letter or certificate of completion as per the comments indicated by the Applicant.

51. On experience of staff, the Interested Party submitted that the Applicant was required to have an EIA Expert with experience of having participated in 10 projects in different sectors but the Applicant has not denied that its EIA Expert was only experienced in 1 sector i.e. boreholes. Accordingly, she maintained that the Applicant did not meet the staff experience requirement as per the Tender Document.
52. Ms. Nungo further argued that the Applicant could not claim to be the lowest evaluated tender when in fact it had been disqualified at the Technical Stage and was thus not evaluated at the Financial Evaluation Stage.

### **Applicant's Rejoinder**

53. In a brief a rejoinder, Counsel for the Applicant, Ms. Nthenge maintained that the Applicant was responsive to the requirements stipulated under the Tender Document and invited the Board to independently look at its submitted tender alongside the tender requirements. She therefore prayed for the Request for Review to be allowed as prayed.

### **CLARIFICATIONS**

54. The Board sought clarity from the Respondent on the date when it was served with the Request for Review. Mr. Gitonga indicated that the Request for Review was physically served upon the Procuring Entity on



15<sup>th</sup> January 2024 but it was not until 22<sup>nd</sup> January 2024 that its existence was brought to the attention of the Respondent.

55. The Board sought clarity on whether the Respondent was aware that the instant Request for Review was filed within the 14 days statutory timeline under Section 167(1) of the Act. Mr. Gitonga responded that this was doubtful on the part of the Respondent since the letter of regret to the Applicant is dated 22<sup>nd</sup> December 2023.
56. When asked how the Respondent effected service of the letter of regret upon the Applicant, Mr. Gitonga indicated that it was dispatched by both email and physical service.
57. The Board asked whether there was any evidence of the service of the letter of regret to the Applicant by the said means but Mr. Gitonga indicated that none had been filed in the instant proceedings.
58. Thereafter the Board asked Mr. Gitonga to confirm the lapse of the standstill period if the Board was to go by the Applicant's contention that it was served with the letter of regret on 29<sup>th</sup> December 2023. Mr. Gitonga indicated 12<sup>th</sup> January 2024.
59. The Board inquired from the Applicant why it termed its tender as the lowest evaluated tender when in fact its tender was not evaluated at the Financial Evaluation Stage. Ms. Nthenge indicated that the Applicant's tender was irregularly disqualified at the Technical Evaluation Stage and that if it was to be evaluated at the Financial Evaluation Stage, it would

be established that its tender price was in fact lower than that of the Interested Party.

60. The Board asked the Applicant to confirm whether its tender was responsive to the requirements at the Technical Evaluation Stage. Ms. Nthenge responded in the affirmative.
61. The Board also inquired from the Applicant on whether it sought a clarification from the Procuring Entity on the slash (/) symbol appearing on the EIA Expert requirement to which Ms. Nthenge answered in the negative.
62. The Board asked the Respondent to confirm the budget that was set aside for the subject tender and whether the same was disclosed to the tenders. Mr. Gitonga indicated that the budget was Kshs. 100 Million and that this information was published to the public.
63. Additionally, the Board sought to understand the scoring method adopted by the Procuring Entity during the Technical Evaluation Stage of the subject tender. Mr. Gitonga indicated that the Procuring Entity adopted a Yes/No approach where any tenderer getting a No on any of the requirements at the Technical Evaluation Stage would be disqualified from further evaluation.

#### **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 procurement contract between the Procuring Entity and the Interested Party was executed in compliance with Section 135 of the Act as to divest the Board of jurisdiction over the instant Request for Review pursuant to Section 167(4)(c) of the Act?***

Depending on the Board's finding on the first issue above;

***II. Whether the Procuring Entity's Evaluation Committee properly evaluated the Applicant's tender in accordance with Sections 79 and 80 of the Act as well as the provisions of the Tender Document?***

***III. What orders should the Board issue in the circumstance?***

**Whether the procurement contract between the Procuring Entity and the Interested Party was executed in compliance with Sections 135 of the Act as to divest the Board of jurisdiction over the instant Request for Review pursuant to Section 167(4)(c) of the Act?**

65. The Respondent filed before the Board a Notice of Preliminary Objection dated 23<sup>rd</sup> January 2024 urging that the Board was divested of jurisdiction over the instant Request for Review under Section 167(4) of the Act following the conclusion of a procurement contract in the subject tender.

66. Counsel for the Respondent, Mr. Gitonga argued that the Procuring Entity and Interested Party having already executed a procurement contract in respect of the subject tender the Board lacked jurisdiction.
67. Counsel for the Interested Party, Ms. Nungo, associated herself with the submissions made by Mr. Gitonga on behalf of the Respondent. She further pointed out that the Interested Party learnt of the pendency of the instant Request for Review on 23<sup>rd</sup> January 2024 which was after the conclusion of the procurement contract. Further, that subsequent to the Interested Party's filing of their Replying Affidavit in response to the Request for Review, the Applicant has not filed any affidavit to challenge the averments in the Interested Party's affidavit.
68. On the flip side Counsel for the Applicant, Ms. Nthenge submitted that upon the filing of the instant Request for Review on 11<sup>th</sup> January 2024 all procurement proceedings were put on hold pending the Board's Decision on the request. Therefore, the Procuring Entity's decision to conclude a procurement contract on 17<sup>th</sup> January 2024 during the pendency of the instant proceedings was irregular.
69. Ms. Nthenge further indicated that though the Procuring Entity alleged that they did not receive a Notification of Appeal following the filing of the instant Request for Review, no evidence was furnished that the Request for Review was misplaced by an intern as alleged. She therefore sought for the Preliminary Objection to be dismissed.

70. This Board is therefore called upon to determine as a preliminary issue, whether it has jurisdiction over the instant Request for Review.

71. The 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.

72. 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."***

73. On its part, Halsbury's Laws of England (4<sup>th</sup> 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."***

74. 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 draws tools in respect of the matter before it the moment it holds that it is without jurisdiction."***

75. 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...."***



76. 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."***

77. 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."***

78. Whereas Section 167(1) of the Act grants jurisdiction to this Board to hear and determine Requests for Review in respect of public procurement processes, Section 167(4) of the Act specifically excludes certain subject matters from the jurisdiction of the Board:

***"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...***

***(2)...***

***(3)...***



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

***(a) the choice of a procurement method;***

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

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

79. From Section 167(4)(c) of the Act above, public procurement processes where a contract has been signed in accordance with Section 135 of the Act are exempt from the jurisdiction of this Board. The said Section 135 of the Act reads:

***135. Creation of procurement contracts***

***(1) The existence of a contract shall be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract shall be signed by the accounting officer or an officer authorized in writing by the accounting officer of the procuring entity and the successful tenderer.***

***(2) An accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications that emanate from the procurement proceedings.***

***(3) The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification***

**provided that a contract shall be signed within the tender validity period.**

**(4) No contract is formed between the person submitting the successful tender and the accounting officer of a procuring entity until the written contract is signed by the parties.**

**(5) An accounting officer of a procuring entity shall not enter into a contract with any person or firm unless an award has been made and where a contract has been signed without the authority of the accounting officer, such a contract shall be invalid.**

**(6) The tender documents shall be the basis of all procurement contracts and shall, constitute at a minimum**

**(a) Contract Agreement Form;**

**(b) Tender Form;**

**(c) price schedule or bills of quantities submitted by the tenderer;**

**(d) Schedule of Requirements;**

**(e) Technical Specifications;**

**(f) General Conditions of Contract;**

**(g) Special Conditions of Contract;**

**(h) Notification of Award.**

**(7) A person who contravenes the provisions of this section commits an offence."**

80. From the above, it is clear that the Board's jurisdiction is only ousted where a contract has been signed in accordance with Section 135 of the

Act. On its part, Section 135(3) of the Act imposes conditions that a contract must be signed within the tender validity period but not before the lapse of the fourteen (14) days following the Procuring Entity's giving of a Notification of Intention to Award the tender in question.

See ***PPARB Application No. 98 of 2023; Equistar Limited v Accounting Officer, County Government of Kilifi & Ors; PPARB Application No. 103 of 2023; JV Howard Humphreys (East Africa) Limited and Real Plan Consultants Limited v Accounting Officer County Government of Isiolo & Ors.***

81. Turning to the instant Request for Review, whereas the Applicant submitted that it received its letter of regret dated 22<sup>nd</sup> December 2023, on 29<sup>th</sup> December 2023, the Respondent argued that it sent the letter by way of email and a physical copy on 22<sup>nd</sup> December 2023.
82. The Board has gone through the documents filed in the matter and noted that the Applicant produced as Exhibit GMM2 an email sent from the email address [procurement@nema.go.ke](mailto:procurement@nema.go.ke) to [info@greencom.co.ke](mailto:info@greencom.co.ke) on 29<sup>th</sup> December 2023 at 3.00 p.m. under the Subject NOTIFICATION TO ENTER CONTRACT. The Respondent neither disputed to have sent this email nor provided evidence of sending the notification in the subject tender on 22<sup>nd</sup> December 2023. Absent, any evidence contradicting the Applicant's contention that it received the notification on 29<sup>th</sup> December 2023, the Board is satisfied that the Applicant received the letter of regret dated 22<sup>nd</sup> December 2023 on 29<sup>th</sup> December 2023.



83. The Board will now proceed to compute the standstill period within which the Applicant could possibly challenge the procurement proceedings in the subject tender by way of a Request for Review and for this 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.***



84. When computing standstill period, 29<sup>th</sup> December 2023 is excluded as per Section 57(a) of the IGPA being the day that the Letter of Regret was dispatched. This means time started to run on 30<sup>th</sup> December 2023 and lapsed on 12<sup>th</sup> January 2024. Essentially, no contract could validly be entered into between 29<sup>th</sup> December 2023 and 12<sup>th</sup> January 2024.
85. Further, since the instant Request for Review was filed on 11<sup>th</sup> January 2024 no contract could be validly entered after filing the Request for Review with the Board by virtue of Section 168 of the Act.
86. Section 168 of the Act reads:
- "168. Notification of review and suspension of proceedings  
Upon receiving a request for a review under section 167, the  
Secretary to the Review Board shall notify the accounting  
officer of a procuring entity of the pending review from the  
Review Board and the suspension of the procurement  
proceedings in such manner as may be prescribed."***
87. The above section places an obligation on this Board Secretary upon an Applicant's filing of a Request for Review to notify the Accounting Officer of the concerned Procuring Entity of the pendency of the Request for Review. Additionally, the Board Secretary should also give directions suspending the procurement process under challenge.

88. The Board has keenly reviewed this matter and observed that on 11<sup>th</sup> January 2024, the Board Secretary sent out by email to both the Applicant and the Respondent a Notification of Appeal and the Request for Review. The contents of the Notification of Appeal bears reproducing:

***"To: 1) The Director General***

***National Environment Management Authority***

***P.O. Box 67839-00200***

***NAIROBI***

***2) Green Com Enterprise Solutions Ltd***

***c/o Kimitei, Nthenge & Company Advocates LLP***

***\*\*\****

**NOTIFICATION OF APPEAL**

***Tender No: NEMA/T/011/2023-2024***

***Item: FOR DEVELOPMENT AND IMPLEMENTATION OF  
INTEGRATED ENVIRONMENTAL MANAGEMENT SYSTEM &  
ENTERPRISE RESOURCE PLANNING SYSTEM (ERP)***

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***You are hereby notified that on the 11<sup>th</sup> January 2024, a Request for Review was filed with the Public Procurement Administrative Review Board in respect of the above-mentioned tenders.***

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

***A copy of the Request for Review is forwarded herewith to the Procuring Entity and the PPARB Circular No. 02/2020 of 24<sup>th</sup> March 2020.***

***Dated on 11<sup>th</sup> January 2024***

***Signed***

***AG. BOARD SECRETARY***

89. From the above Notification of Appeal, the Accounting Officer was on 11<sup>th</sup> January 2024 notified of the pendency of the instant Request for Review as well as the suspension of the procurement process in respect of the subject tender until the Request for Review was determined.
90. Surprisingly, and in a strange turn of events, on 17<sup>th</sup> January 2024, just 6 days after receiving this Board's Notification of Appeal cautioning against any signing of a contract in respect of the subject tender, the Procuring Entity and the Interested Party went ahead to sign the contract. On this account alone, the procurement contract between the Procuring Entity and the Interested Party is irregular.
91. The Board has also noted the Respondent's position that the physical copies of the Request for Review and the Notification of Appeal were served on the Procuring Entity on 15<sup>th</sup> January 2024 but owing to some administrative lapses involving its intern, the Respondent only learnt of the instant proceedings on 22<sup>nd</sup> January 2024. The Respondent tacitly made an admission that it was served with the physical copies of the documents on 15<sup>th</sup> January 2024 which was 2 days before it signed the procurement contract in the subject tender. Accordingly, it matters not



that the Respondent's officers and interns delayed in bringing this to the attention of the Respondent. If the Board was to entertain such an argument, then it would open a floodgate of cases where Procuring Entities would frustrate proceedings before this Board by feigning dates when they became aware of the filing of a Request for Review before the Board.

92. The Board therefore finds that the procurement contract between the Procuring Entity and the Interested Party was not executed in compliance with Sections 135 of the Act thus did not divest the Board of jurisdiction over the instant Request for Review pursuant to Section 167(4)(c) of the Act. The Board therefore affirms that it has jurisdiction over the instant Request for Review.

**Whether the Procuring Entity's Evaluation Committee properly evaluated the Applicant's tender in accordance with Sections 79 and 80 of the Act as well as the provisions of the Tender Document?**

93. The Applicant assailed the Procuring Entity's decision to disqualify it from the subject tender. According to Counsel for the Applicant, Ms. Nthenge, the Applicant submitted a tender responsive to the requirements under the Tender Document and that the Evaluation Committee irregularly disqualified it at the Technical Evaluation Stage.



94. She affirmed that the Applicant submitted as part of its tender contracts that met the similarity requirement and that its EIA Expert equally met the requirements under the Tender Document.
95. On their part, the Respondent maintained that the Applicant was regularly disqualified at the Technical Evaluation Stage for providing contracts that did not meet the similarity requirement as well as providing details of its EIA Expert who did not meet the requirements stipulated under the Tender Document.
96. Counsel for the Respondent, Mr. Gitonga indicated that despite the Procuring Entity having offered clarity on similarity requirement, the Applicant still appeared mistaken on the same.
97. The Interested Party supported the position taken by the Respondent that the Applicant was properly disqualified from the subject tender. Counsel for the Interested Party, Ms. Nungo pointed out that it was apparent from the contracts disclosed by the Applicant that the Applicant's tender did not satisfy the similarity requirement. Further that the Applicant did not dispute the allegation that its EIA Expert was only experienced in one sector i.e. boreholes when the tender document required experience in different sectors.
98. The Board is therefore invited to inquire into the validity of the Applicant's disqualification from the subject tender.

99. Section 80 of the Act is instructive that the Procuring Entity's Evaluation Committee should approach the evaluation process in strict adherence to the criteria set out in the Tender Document:

***"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. On its part, 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. 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*** further illuminated on the responsiveness of a tender under section 79 of the Act. In the case, the court while considering a judicial review application against a decision of this Board pronounced itself thus:

***"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."***

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. The Board has seen the Letter of Regret dated 23<sup>rd</sup> November 2023 sent to the Applicant and the same reads:

"...

***M/s Greencom Enterprises Solutions Limited  
P.O. BOX (DETAILS WITHHELD)***

***Dear Sir/Madam,***

***RE: NOTIFICATION OF INTENTION TO ENTER INTO A CONTRACT  
TENDER NO: NEMA/T11/2023-2024***

***SUBJECT: DEVELOPMENT AND IMPLEMENTATION OF  
INTEGRATED ENVIRONMENTAL INFORMATION MANAGEMENT  
SYSTEM & ENTERPRISE RESOURCE PLANNING SYSTEM (ERP)***

***This Notification of Intention to Award (Notification) notifies you of our decision to award the above contract. The transmission of this Notification begins the Standstill Period...***

***The successful tenderer was:***

***Agile Business Solutions Limited***

***P.O. Box (Details withheld)***

***...***

***The reasons for your tender being unsuccessful were as follows:***

- ✓ None of complete contracts presented the similarity requirement in all the three aspect. No mobile application development experience cited in the presented evidence)***
- ✓ None of the contracts presented above meets the requirement for similarity through recommendation letters in the tender document***
- ✓ Environmental Expert had only done boreholes. No evidence of experience in EIA's in other sectors as required in the tender...***

***...***

***Signed***

***MAMO B. MAMO, EBS***

***DIRECTOR GENERAL"***

104. From the above letter, it is apparent that the Applicant was found unsuccessful in the subject tender on account of similarity requirements as well as a requirement on its EIA Expert.

105. The Board has keenly studied the Blank Tender Document and noted the requirements in issue at page 37 of the document and the same are hereinafter reproduced:

***TECHNICAL EVALUATION (NON RATED CRITERIA SHALL BE APPLIED)***

***Bidders must meet the following technical criteria on YES/NO basis without any material deviation, reservation or omission.***

***i. Specific Experience of the Tenderer, as a firm relevant to the provision of IT systems:***

- The Tenderer MUST have offered at least three similar contracts in system development and integration in the past five years. (Attach signed contracts)***
- Provide atleast TWO Recommendation letters or completion certificate for successful implementation of the above mentioned Contracts***

106. The Applicant also produced as Exhibit GMM5 the clarification that the Procuring Entity offered on the above criterion during the pre-bid meeting:

***... The following are clarifications which should be factored by bidders in preparing their tenders***

***PART 2***

<b><i>S/ No.</i></b>	<b><i>Tender Document Reference(s)</i></b>	<b><i>Content of Tenders Requiring Clarification</i></b>	<b><i>Points of Clarification</i></b>	<b><i>Response as at 10<sup>th</sup></i></b>

	<b>Section &amp; Page Number(s)</b>			<b>November 2023</b>
...	...	...	...	...
<b>6.</b>	<b>TECHNICAL EVALUATION (NON RATED CRITERIA SHALL BE APPLIED) Page 41</b>	<b>The Tenderer MUST have offered at least three similar contracts in system development and integration in the past five years (Attach signed contracts)</b>	<b>Kindly elaborate on "similar contracts"</b>	<b>Similar contracts refers to previous work done or experience in developing and/or integration of ICT systems that compares to the solution being sought <u>technically,</u> <u>monetary</u> <u>value and</u> <u>scope.</u></b>

107. From the above, for a tender to be responsive in the subject tender it had to contain 3 similar contracts in system development and integration in the past 5 years as well as a minimum of 2 recommendation letters or



completion certificates on the successful completion of the supplied contracts. Equally, any tender that did not contain the minimum 3 similar contracts or 2 recommendation letters would be considered non-responsive.

108. Similarity of a past contract was to be aligned to the technical, monetary value and scope of the solution being sought.
109. The technical specifications of the solution being sought are (i) functional, architectural and performance requirement for each module specified in the Tender Document and (ii) system inventory, assessment of adequacy and completeness of relevant system inventory tables pursuant to Clause 4 Technical Evaluation (Non-Rated Criteria shall be applied) of Section III-Evaluation and Qualification Criteria at page 38 of the Tender Document.
110. The monetary value of the solution being sought according to the Applicant was Kshs.87,918,00 as pleaded by the Applicant at paragraph 10(b) at page 4 of the Request for Review.
111. The scope of the solution being sought is developing, supplying, installing, testing, migrating, training, commissioning and maintaining an intergrated environmental information management system which supports work flows with enhanced graphical user interface (GUI) for simplicity and ease for use for all users, dynamic and scalable to accommodate future functionalities pursuant to Clause 1.2 Project Objective and Scope of Section V-Requirements of the Information

System of the Tender Document as admitted by the Applicant at paragraph 10(c ) of the Applicant Request for Review.

112. The Board has keenly studied the Applicant's original tender document and noted the following that the Applicant provided as part of its tender at pages 68 to 114 excerpts of 9 contracts which were as follows:

- i. Pages 68 to 70 of the Applicant's tender is an excerpt of a contract 29<sup>th</sup> June 2018 with the National Construction Authority for annual renewal of Microsoft Dynamics Navison and System Integration whose contract value is Kshs. 9,400,000;
- ii. Pages 73 to 74 of the Applicant's tender is an excerpt of a contract dated 16<sup>th</sup> January 2020 with the National Construction Authority for Supply and Installation of BREP Licenses for NAV ERP and System Support services for Microsoft SharePoint and Microsoft Navison whose contract value was Kshs. 22.5 Million;
- iii. Pages 81 to 83 of the Applicant's tender is an excerpt of a contract with the Unclaimed Financial Assets Authority for provision of Maintenance Support Services for Microsoft Dynamics NAV ERP and Microsoft SharePoint whose contract value was Kshs. 2.5 Million;
- iv. Pages 86 to 87 of the Applicant's tender is an excerpt of a contract dated 7<sup>th</sup> February 2022 with the National Land Commission for Provision of Automation of an Integrated E-commission Management System and Digitisation of Records for National Land Commission valued at Kshs.7,854,000.00

- v. Page 89 to 91 of the Applicant's tender is an excerpt of a contract dated 10<sup>th</sup> August 2020 with Best Link Developers Limited for Development and Implementation of Enterprise Resource Planning System (ERP) and Two Years Service Level Agreement for Support whose contract value was Kshs. 53,317,960.
- vi. Pages 100 to 102 of the Applicant's tender is an excerpt of a contract dated 1<sup>st</sup> September 2023 with the Judiciary of Kenya for Supply, Delivery, Design, Customization, Configuration, Installation, Training and Commissioning of an Enterprise Resource Planning (ERP) System at the Judiciary whose contract value was Kshs.297,436,000;
- vii. Pages 103 to 107 of the Applicant's tender is an excerpt of a contract dated 14<sup>th</sup> July 2023 with the Tea Board of Kenya for Supply, Installation, Configuration and Commissioning of Enterprise Resource Planning (ERP) System based on Microsoft Dynamics 365 Business Central Version 21 whose contract value was Kshs. 13,800,000;
- viii. Pages 108 to 110 of the Applicant's tender is an excerpt of a contract dated 4<sup>th</sup> July 2023 with the State Department for Roads for Supply, Installation and Commissioning of Enterprise Resource Planning (ERP) system for Kenya Engineering Technology Registration Board (KETRB) whose contract value was Kshs. 44,266,000;
- ix. Page 111 to 113 of the Applicant's tender is an excerpt of a contract dated 6<sup>th</sup> April 2023 with the Unclaimed Financial Assets Authority

for Provision of Microsoft Cloud Services and whose contract value was Kshs. 9,200,844.00.

113. The Board has also spotted 6 recommendation letters at pages 92 to 98 of the Applicant's tender:

- i. Page 92 of the Applicant's tender is a letter dated 13<sup>th</sup> February 2023 from the National Environment Authority recommending the Applicant in respect of Development, customization and support of licensing platform; Integration of SharePoint Licensing Solution; E-citizen Payment Gateway Integration to E-Citizen payment platform and Development of payment APIs;
- ii. Page 93 of the Applicant's tender is a letter dated 27<sup>th</sup> October 2023 from the Unclaimed Financial Assets Authority recommending the Applicant in respect of Installation, Implementation, Customization, Training, Testing, Quality Assurance and System Upgrade of NAV 2016 to Microsoft Dynamics 365 Business Central ERP.
- iii. Page 94 of the Applicant's tender is a letter dated 14<sup>th</sup> February 2023 from the National Construction Authority recommending the Applicant in respect of Supply and Installation of BREP Licenses for Microsoft NAV ERP and System Support Service for Microsoft SharePoint and Microsoft Navision Systems Integration;
- iv. Pages 95 to 96 of the Applicant's tender is a letter dated 20<sup>th</sup> May 2022 recommending the Applicant in respect of Automation of an integrated E-commission management system and the Digitization of the Record Management System;



- v. Pages 97 of the Applicant's tender is a letter dated 21<sup>st</sup> January 2020 recommending the Applicant in respect of Microsoft Dynamics Navision Licenses provision and installation; Configuring of Microsoft Dynamics Navision Licenses and Customization of Dynamics Navision (ERP)
- vi. Page 98 of the Applicant's tender is an undated letter from Best Link Developers Limited recommending the Applicant in respect of developing and implementing an Enterprise Resource Planning (ERP) System.

114. The Tender Document as already pointed above required a tenderer to submit a tender that contained at least 3 similar contracts in system development and integration in the past 5 years as well as a minimum of 2 recommendation letters or completion certificates on the successful completion of the supplied similar contracts.

115. The Applicant's tender price in the subject tender was Kshs.87,918,000 which according to the Applicant forms the benchmark for checking for similarity of past contracts in terms of monetary value as pleaded at paragraph 10b at page 4 of the Request for Review. From the contracts the Applicant submitted as part of its tender, the only contract that can be termed as similar in monetary value with the subject tender would be the contract at Pages 100 to 102 of the Applicant's tender i.e. contract dated 1<sup>st</sup> September 2023 with the Judiciary of Kenya for Supply, Delivery, Design, Customization, Configuration, Installation, Training and Commissioning of an Enterprise Resource Planning (ERP) System at the

Judiciary whose contract value was Kshs.297,436,000. This contract was similar in monetary value.

116. All the other contracts the Applicant supplied were of a lower monetary value compared to Kshs. 87,918,000. Further, the Applicant did not submit any recommendation letter from the Judiciary in respect of the said contract.

117. Considering that the Applicant only supplied 1 out of the required 3 that only conformed to the monetary value and the said similar contract was not supported by any recommendation letter, the Board cannot fault the Procuring Entity's disqualification of the Applicant on account of being non-responsive to the requirement on Specific Experience of the Tenderer.

118. On the staffing page 38 of the Tender Document provides as follows:

***iii.Description of Organization and Staffing for the contract in reference to the project key staff requirements as provided in the procuring Entity's schedule of requirements.***

119. Further page 115 of the Tender Document contained staffing requirements which are hereinafter reproduced:

***4.1.9 Project Key staff***

***The vendor(s) must provide the following minimum key experts as part of the project implementation team. The number of staff***

*is to be determined by the vendor based on the project implementation approach the vendor chooses to adopt to realise the Authority's implementation timeframes and objectives.*

<b>#</b>	<b>Position</b>	<b>Min. Yrs of relevant experience</b>	<b>Minimum Education and Certifications</b>	<b>Minimum experience</b>
<b>1.</b>	<b>...</b>	<b>...</b>	<b>...</b>	<b>...</b>
<b>...</b>	<b>...</b>	<b>...</b>	<b>...</b>	<b>...</b>
<b>9.</b>	<b>Environmental Management Expert</b>	<b>10</b>	<b>Environmental science/ studies degree or related field</b>	<b>He/She must be a registered and practicing Environmental assessment expert- with demonstrated experience in Environmental Impact Assessment/Audits for at least 10 projects in different sectors</b>

120. From the above, a tenderer was required to have as part of its key staff an Environmental Management Expert with an Environmental Science or

Studies Degree or related field in terms of educational training. Further, the expert was to be a registered and practicing Environmental assessment expert with demonstrated experience in Environmental Impact assessment for at least 10 projects in different sectors or Environmental audits for at least 10 projects in different sectors noting that the symbol slash (/) denotes either or.

121. The Board has independently studied the Applicant's original tender document and spotted the documents of its Proposed Environmental Management Expert, Harrison Muli Makenzi at pages 524 to 529:

- i. At page 527 of the Applicant's tender is a Bachelor of Science Degree in Soil, Water and Environmental Engineering Certificate indicating on its face as having been issued to Harrison Muli Kilonzo by Jomo Kenyatta University of Science and Technology on 28<sup>th</sup> June 2013.
- ii. At page 528 is a NEMA Environmental Impact Assessment/Audit (EIA/EA) Practicing License indicating on its face as having been issued to Harrison Muli Makenzi on 9<sup>th</sup> February 2023 and scheduled to expire on 31<sup>st</sup> December 2023;
- iii. At page 529 is NEMA's Certificate of Registration as an Environmental Impact Assessment/Audit Expert indicating on its face as having been issued to Harrison Muli Makenzi on 25<sup>th</sup> August 2021



122. In terms of experience of the Applicant's tender, pages 524 to 526 of the Applicant's tender are herein after reproduced for ease of reference:

*"...Summarize professional experience over the last twenty years, in reverse chronological order. Indicate particular technical and managerial experience relevant to the project.*

*A. EIA Comprehensive Project Reports*

<i>Applica tion ID</i>	<i>Propose d Project Title</i>	<i>Project Scope</i>	<i>Project Location</i>	<i>Reg No.</i>	<i>Date</i>	<i>Description of th Activities</i>
<i>NEMA/ EIA/PS R</i>	<i>EIA for the Propose d Borehol e Drilling</i>	<i>Drilling, equippin g</i>	<i>Plot L.R. No. Kabete/L.Ka bete/849, Kabete subcounty, Kiambu County</i>	<i>12218</i>	<i>07/09/ 2023</i>	<i>Proposed Boreho Drilling of a 290 borehole to abstra 20M3/day for domest purposes &amp; equip th borehole with steel casin material; Installation of motorised pump wil draw pipes to help dra water from the borehole</i>
<i>NEMA/ EIA/PS R/4/07 51</i>	<i>Propose d Borehol e Drilling</i>	<i>Drilling, equippin g</i>	<i>Plot L.R. No. Nairobi/Block 82/7130 Donholm Phase 8,</i>	<i>12218</i>	<i>17/04/ 2023</i>	<i>Drilling of one boreho for domestic use</i>

			<i>Embakasi Sub-County, Nairobi City County</i>			
<i>NEMA/ EIA/PS R/3950 4</i>	<i>Borehole drilling</i>	<i>Drilling equipping</i>	<i>Castle Village, Lamuria</i>	<i>12218</i>	<i>01/03/ 2023</i>	<i>Obtain water for domestic use</i>
<i>NEMA/ 39262</i>	<i>Borehole drilling</i>	<i>Drilling. equipping</i>	<i>Drumvale Kamulu</i>	<i>12218</i>	<i>23/02/ 2023</i>	<i>OBTAIN WATER FOR DOMESTIC USE</i>
<i>NEMA/ EIA/PS R/3635 5</i>	<i>Borehole drilling</i>	<i>Drilling equipping</i>	<i>KIBRA</i>	<i>12218</i>	<i>19/10/ 22</i>	<i>OBTAIN WATER FOR DOMESTIC USE</i>
<i>NEMA/ EIA/PS R/3552 0</i>	<i>Borehole drilling</i>	<i>DRILL AND EQUIP</i>	<i>Hawa, Isinya</i>	<i>12218</i>	<i>15/09/ 2022</i>	<i>Obtain water for domestic use</i>
<i>NEMA/ EIA/PS R/3467 2</i>	<i>Borehole drilling</i>	<i>DRILL AND EQUIP</i>	<i>NDEIYA</i>	<i>12218</i>	<i>03/08/ 2022</i>	<i>Get water for domestic use</i>

<i>NEMA/ EIA/PS R/3333 93</i>	<i>Borehol e drilling</i>	<i>DRILL AND EQUIP</i>	<i>Chania Thika</i>	<i>12218</i>	<i>03/08/ 2022</i>	<i>Obtain water for domest. use</i>
<i>NEMA/ EIA/PS R3337</i>	<i>Borehol e drilling</i>	<i>DRILL AND EQUIP</i>	<i>Utawala Nairobi</i>	<i>12218</i>		<i>Drill water for househo use</i>

*B. EIA Summary Project Reports*

<i>Title</i>	<i>Application Ref. No</i>	<i>Proposed Project Name</i>	<i>Objectives And Project Scope</i>	<i>Plot LR No</i>
<i>SELY CHEMELI</i>	<i>NEMA/SPR/KJD/5/2/1578</i>	<i>Drilling of a borehole</i>	<i>DRILL A BOREHOLE FOR DOMESTIC WATER USE</i>	<i>KAJIADO/OLCHORO ONYORE/35754</i>
<i>ROSE NDAKALA ORONJE</i>	<i>NEMA/SPR/KJD/5/2/1444</i>	<i>Drilling of a borehole</i>	<i>DRILL A BOREHOLE FOR DOMESTIC WATER USES</i>	<i>KAJIADO/KIPETO/221</i>
<i>CATHERINE MUTAVE KAUNGA</i>	<i>NEMA/SPR/MKN/5/2/325</i>	<i>Drilling of a borehole</i>	<i>Drill a borehole for</i>	<i>PLOT NO. 595-EKA MALILI</i>



			<i>domestic water uses</i>	
<i>ALFONCE MUTUNGA MUTUKU</i>	<i>NEMA/SPR/MKN/5/2/326</i>	<i>Drilling of a borehole</i>	<i>Obtain water for domestic water uses</i>	<i>Konza South/ Koi South Block 4 (AIMI . KILUNGU))/2647</i>
<i>GEORGE MUGO GICHUKI</i>	<i>NEMA/SPR/NDR/5/2/780</i>	<i>Drilling of a borehole</i>	<i>Obtain water for domestic water uses</i>	<i>Nyandarua/Lesirko/40</i>
<i>KITUU NYAMAI</i>	<i>NEMA/SPR/MKN/5/2277</i>	<i>Drilling of a borehole</i>	<i>Obtain water for domestic water uses  Drilling and equipping the borehole</i>	<i>Konza South/Koi South Block (Konza)/610</i>
<i>SHADRACK MWENDWA MUTHINI</i>	<i>NEMA/SPR/MKN/5/2/276</i>	<i>Drilling of a borehole</i>	<i>Obtain water for domestic use.  Drilling and equipping the borehole</i>	<i>Malili Commercial Plot</i>

123. The Tender Document required a tenderer to have as part of its key staff an Environmental Management Expert with an Environmental Science or Studies Degree or related field in terms of educational training. Further, the expert was to be a registered and practicing Environmental assessment expert with demonstrated experience in Environmental

Impact assessment for at least 10 projects in different sectors or Environmental audits for at least 10 projects in different sectors.

124. The Applicant proposed Harrison Muli Makenzi as its Environmental Management Expert and supplied his degree certificate in Bachelor of Science in Soil, Water and Environmental Engineering and thus satisfied the education requirement limb. However, when it came to the professional experience limb, the Applicant was partially compliant as it supplied a Certificate of Registration as an Environmental Impact Assessment/Audit Expert and Environmental Impact Assessment/Audit (EIA/EA) Practicing License but failed to demonstrate experience in 10 projects in different sectors in either the Environmental Impact Assessment or Environmental Audit. The Applicant's expert as shown above only exhibited experience in borehole drilling and which has not been denied by the Applicant.
125. Having an Environmental Management expert with experience in either Environmental Impact Assessment for at least 10 projects in different sectors or Environmental Audit for at least 10 projects in different sectors was a technical mandatory requirement in the tender Document, failure by the Applicant to provide for the same rendered the Applicant's bid non-responsive at the Technical Evaluation stage.
126. The Board therefore finds difficulty in faulting the Procuring Entity's Evaluation Committee for disqualifying the Applicant on this ground.

127. In view of the Board's finding above, the Board finds that that the Procuring Entity's Evaluation Committee properly evaluated the Applicant's tender in accordance with Sections 79 and 80 of the Act as well as the provisions of the Tender Document.

**What orders the Board should grant in the circumstances?**

128. The Board has found that the procurement contract between the Procuring Entity and the Interested Party was not executed in compliance with Section 135 of the Act thus did not divest the Board of jurisdiction over the instant Request for Review pursuant to Section 167(4)(c) of the Act.

129. The Board has equally found that the Procuring Entity's Evaluation Committee properly evaluated the Applicant's tender in accordance with Sections 79 and 80 of the Act as well as the provisions of the Tender Document.

130. The upshot of our finding is that both the Preliminary Objection dated 23<sup>rd</sup> January 2024 and the Request for Review dated 10<sup>th</sup> January 2024 in respect of Tender No. NEMA/T/011/2023-2024 for Development and Implementation of Integrated Environmental Information Management System and Enterprise Resource Planning System (ERP) fail in the following specific terms:


**FINAL ORDERS**



131. 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 10<sup>th</sup> January 2024
- a. The Respondent's Notice of Preliminary Objection dated 23<sup>rd</sup> January 2024 be and is hereby dismissed;**
  - b. The Request for Review dated 10<sup>th</sup> January 2024 be and is hereby dismissed;**
  - c. The procurement contract executed by the Procuring Entity and the Interested Party on 17<sup>th</sup> January 2024 and 18<sup>th</sup> January 2024 respectively in respect of Tender No. NEMA/T/011/2023-2024 for Development and Implementation of Integrated Environmental Information Management System and Enterprise Resource Planning System (ERP) be and is hereby annulled and set aside;**
  - d. The Respondent is hereby directed to enter into a fresh contract with the lowest evaluated bidder in respect of Tender No. NEMA/T/011/2023-2024 for Development and Implementation of Integrated Environmental Information Management System and Enterprise Resource Planning System (ERP) forthwith in accordance with Section 135 of the Act.**
  - e. The Respondent is hereby directed to proceed with Tender No. NEMA/T/011/2023-2024 for Development and Implementation of Integrated Environmental Information Management System and Enterprise Resource Planning System (ERP) to its logical conclusion;**

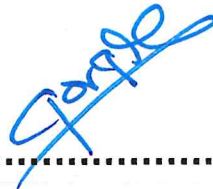
- f. Given the Board's finding above, each party shall bear its own costs in the Request for Review.

Dated at NAIROBI, this 30<sup>th</sup> Day of January 2024.



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**PANEL CHAIRPERSON**

**PPARB**



.....  
**SECRETARY**

**PPARB**