

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 15/2024 OF 1ST MARCH 2024

BETWEEN

NASH EQ INC.....APPLICANT

AND

THE CHIEF EXECUTIVE OFFICER,

SACCO SOCIETY REGULATORY AUTHORITY.....1ST RESPONDENT

SACCO SOCIETY REGULATORY AUTHORITY.....2ND RESPONDENT

AGILE BUSINESS SOLUTIONS LIMITED.....INTERESTED PARTY

Review against the decision of the Accounting Officer, Sacco Society Regulatory Authority in relation to Tender No. SASRA/OIT/007/2023-20124 for Supply, Installation, Configuration, Customization, Testing, Commissioning and Maintenance of a Risk-Based Supervision System.

BOARD MEMBERS PRESENT

- | | | |
|-------------------------------|---|-------------|
| 1. Mr. George Murugu, FCI Arb | - | Chairperson |
| 2. Eng. Lilian Ogombo | - | Member |
| 3. Mr. Daniel Langat | - | Member |
| 4. Mr. Stanlaus Kimani | - | Member |

IN ATTENDANCE

Mr. Philemon Kiprop - Secretariat

Ms. Evelyn Weru - Secretariat

Mr. Anthony Simiyu - Secretariat

PRESENT BY INVITATION

APPLICANT NASH EQ INC

Mr. Anthony Kiprono -Advocate, A.E. Kiprono & Associates

RESPONDENT THE CHIEF EXECUTIVE OFFICER, SACCO SOCIETY REGULATORY AUTHORITY

**SACCO SOCIETY REGULATORY
AUTHORITY**

Mr. Leonard Omogo -Advocate, Sacco Societies Regulatory Authority

INTERESTED PARTY AGILE BUSINESS SOLUTIONS LIMITED

Mr. Kimutai Rotich -Advocate, Nyaanga & Mugisha Advocates.

BACKGROUND OF THE DECISION

The Tendering Process

1. Sacco Society Regulatory Authority, the Procuring Entity together with the 1st Respondent herein, invited submission of tenders in response to Tender No. SASRA/OIT/007/2023-20124 for Supply, Installation, Configuration, Customization, Testing, Commissioning and Maintenance

of a Risk-Based Supervision System using an open international competitive method. The subject tender's submission deadline was Wednesday, 27th September 2023 at 3.00 p.m.

Addendum No.1

2. On 22nd September 2023, the Procuring Entity issued Addendum No.1 offering various clarifications in respect of the subject tender and also extending the tender submission deadline to 5th October 2023 at 3.00 p.m. E.A.T.

Submission of Tenders and Tender Opening

3. According to the signed Tender Opening Minutes for 5th October 2023, submitted under the Confidential File submitted by the Procuring Entity, the following 12 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.	Agile Business Solutions Limited
2.	Konza National Data Centre
3.	Foresight TLC Limited
4.	Pathways Technologies Limited
5.	CSM Technologies Private Limited
6.	Bharathbrands Limited
7.	Nextmile System and Solutions Limited
8.	Iansoft Technologies Limited
9.	Bluechip Technologies
10.	Coseke Kenya Limited
11.	Attain Enterprise Solutions Limited
12.	Nash EQ Inc

Evaluation of Tenders

4. The 1st Respondent constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") which was to undertake an evaluation of the received tenders in the following 4 stages as captured in the Tender Document
- i. Preliminary Evaluation
 - ii. Technical Evaluation
 - iii. Financial Evaluation
 - iv. Due Diligence

Preliminary Evaluation Stage

5. At this stage of the evaluation, the submitted tenders were to be examined using the criteria set out as Stage 1. Preliminary examination- Determination of Responsiveness under Section III – EVALUATION AND QUALIFICATION CRITERIA on pages 37 to 44 of the Tender Document.
6. The evaluation was to be on a Yes/No basis and tenderers who failed to meet any criterion outlined at this Stage would be disqualified from further evaluation.
7. Under Lot I of the subject tender there were 7 tenderers and at the end of the evaluation at this stage, 5 tenders were found non-responsive with only 2 tenders, being those of the Applicant and the Interested Party being found responsive.

8. Under Lot II of the subject tender there were 6 tenderers and at the end of the evaluation at this stage, 3 tenders were found non-responsive with the other 3 tenders, including those of the Applicant and the Interested Party being found responsive.
9. Under Lot III of the subject tender there were 7 tenderers and at the end of the evaluation at this stage, 5 tenders were found non-responsive with only 2 tenders, being those of the Applicant and the Interested Party being found responsive.

Technical Evaluation Stage

10. The Evaluation Committee was required at this stage to examine tenderers successful at the Preliminary Stage using the criteria set out as Stage 2-Technical Evaluation under Section III – EVALUATION AND QUALIFICATION CRITERIA on pages 30 to 37 of the Tender Document.
11. At this stage, tenderers were to be examined in 2 sub-stages. i.e. Capacity to Deliver the Service and Technical Specifications Evaluation. Depending on the Lot a tenderer participated in they would be subjected to the criteria unique to that Lot.
12. At the end of the evaluation at this stage, the outcome was as follows:
 - i. Under Lot I, the Applicant and Interested Party scored 99 marks and 99.5 marks respectively.
 - ii. Under Lot II, the Applicant, Interested Party and Bluechip Technologies Limited scored 98.5 marks, 92.5 marks and 99.84 marks respectively.
 - iii. Under Lot III, the Applicant and Interested Party scored 90.6 marks and 72.6 marks respectively.

13. In order to qualify for further evaluation at the Financial Evaluation Stage a tenderer had to garner at least 80 marks at this Stage. Accordingly, only the Applicant's and the Interested Party's tenders qualified for further evaluation at the Financial Evaluation Stage.
14. For purposes of scoring the combined technical and financial scores, the technical scores were rebased at 80 marks with the result that:
 - i. Under Lot I the Applicant and Interested Party had 79.2 marks and 79.6 marks respectively.
 - ii. Under Lot II the Applicant and Interested Party had 78.8 marks and 74 marks respectively.

Financial Evaluation Stage

15. At this stage of evaluation, the Evaluation Committee was required to examine the tenders per line item using the Criteria set out as Stage 3- Financial Evaluation under Section III– EVALUATION AND QUALIFICATION CRITERIA on page 53 of the Tender Document.
16. Tenders were to be examined by comparing the financial proposals by the tenderers under each lot with the lowest evaluated tender garnering the full 20 marks under this evaluation stage. All other tenderers were to be awarded proportionate points in respect of the full 20 marks.
17. In terms of overall ranking the points garnered at the Financial Evaluation stage would be added to those garnered at the Technical Evaluation Stage. The tenderer whose tender garnered the highest combined technical and financial score would be considered for award of the tender.

18. In terms of the combined technical and financial scores the results were as follows:

Combined Scores – Lot I

No	Firm	GLOBAL TECHNICAL SCORE (REBASED TO 80)	FINANCIAL EVALUATION POINTS	FINAL SCORE	RANK
1	Agile Business Solutions Ltd	79.6	20	99.6	1
12	Nash Financial Services Ltd	79.2	19.45	98.65	2

Combined Scores – Lot II

No	Firm	GLOBAL TECHNICAL SCORE (REBASED TO 80)	FINANCIAL EVALUATION POINTS	FINAL SCORE	RANK
1	Agile Business Solutions Ltd	74	19.87	93.87	2
9	Bluechip Technologies Ltd	79.87	4.51	84.38	3
12	Nash Financial Services Ltd	78.8	20	98.8	1

Combined Scores – Lot III

No	Firm	GLOBAL TECHNICAL SCORE (REBASED TO 80)	FINANCIAL EVALUATION POINTS	FINAL SCORE	RANK
12	Nash Financial Services Ltd	72.48	20	92.48	1

19. In terms of the combined technical and financial scores the results were as follows:
- i. Under Lot I the Applicant garnered 98.65 marks against the Interested Party's 99 marks.
 - ii. Under Lot II the Applicant garnered 98.8 marks against the Interested Party's 93.87 marks.

Due Diligence

20. The Evaluation Report records that due diligence was conducted on 3 tenderers' tender including those of Applicant and the Interested Party by checking the submitted tender security and bank references. The result of this was that the Applicant's tender was disqualified on a finding that its tender security expired on 17th December 2023 which was against a requirement at the Preliminary Evaluation Stage for the tender security to be valid for 150 days from the date of submission.

Evaluation Committee's Recommendation

21. Accordingly, the Evaluation Committee made the following recommendations:
- i. The award of Lot I- Risk Based Supervision Processes Software to the Interested Party herein at its tendered sum of Kshs. 37,911,758.
 - ii. The award of Lot II- Business Intelligence, Extraction, Transformation and Loading (ETL) and Data Warehouse to the Interested Party at its tendered price of 18,950,456.
 - iii. The retendering of Lot III-API Gateway since all evaluated tenders were found non-responsive.

Professional Opinion

22. In a signed Professional Opinion dated 19th February 2024 (hereinafter referred to as the "Professional Opinion"), the Procuring Entity's Head of Procurement, Mr. Julius Muraguri, reviewed the manner in which the subject procurement process was undertaken including the evaluation of tenders and agreed with the Evaluation Committee's recommendation under each of the Lots.
23. On the same day, 19th February 2024, the Accounting Officer, Mr. Peter Njuguna expressed his concurrence with the Professional Opinion.

Notification to Tenderers

24. Accordingly, tenderers were notified of the outcome of the evaluation of the tenders in the subject tender vide letters dated 19th February 2024.

REQUEST FOR REVIEW

25. On 1st March 2024, the Applicant through the firm of A.E. Kiprono Advocates, filed a Request for Review dated 29th February 2024 supported by an Affidavit sworn on 29th February 2024 by Anthony Wagacha, the Applicant's Chief Executive Officer, seeking the following orders from the Board in verbatim:

- 1. An order annulling and setting aside the award of Lots I and II of the Tender to the Interested Party at the tender sum of Kshs. 37,911,758 for Lot I and Kshs. 18,950,456 for Lot II.***
- 2. An order annulling and setting aside the Respondent's declaration and/or decision declaring all bids for Lot III non-responsive.***

- 3. An order quashing the 1st Respondent's decision contained in the letter dated 19th February 2024 declaring the Applicant's bid unsuccessful;***
- 4. A declaration that the Respondent's decision that the Applicant's tender security is invalid when the Applicant's bid had been evaluated at the Preliminary and technical evaluation stages was unfair, illegal, invalid, null and void.***
- 5. An order directing the Respondents to re-instate and re-evaluate the Applicant's tender at the financial evaluation for all the Lots in accordance with the directions issued by the Review Board in this matter.***
- 6. An order awarding costs of the request for review to the Applicant;***
- 7. Any other relief that the Review Board deems fit to grant under the circumstances.***

26. In a Notification of Appeal and a letter dated 1st March 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 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 1st March 2024.
27. On 6th March 2024, the Respondents through Leonard Omogo-Advocate filed a Memorandum of Appearance and a Memorandum of Reply to the

Request for Review and a List of Documents, all dated 6th March 2024. The Respondents also forwarded to the Board the confidential documents in the subject tender pursuant to Section 67(3)(e) of the Act.

28. Vide letters dated 8th March 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 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 8th March 2024.
29. On 11th March 2024 the Interested Party through the law firm of Nyaanga & Mugisha Advocates filed a Notice of Appointment of Advocates dated 5th March 2024 as well as Replying Affidavit sworn on 6th March 2024 by Anthony Kibet Komen, a Director at the Interested Party.
30. On the same day, 11th March 2024, the Acting Board Secretary, sent out to the parties a Hearing Notice dated 1st March 2024 notifying parties and all tenderers in the subject tender that the hearing of the instant Request for Review would be by online hearing on 14th March 2024 at 11:00 a.m. through the link availed in the said Hearing Notice.
31. On 13th March 2024, the Applicant filed Written Submissions of even date.
32. On the same day, 13th March 2024 the Interested Party filed Written Submissions of even date.

33. On 14th March 2024 the Respondents filed Written Submissions of even date.
34. On the morning of 14th March 2024, the Board Secretary sent out a notice to the parties that the hearing had been rescheduled to 2:30 p.m. on the same day. At the scheduled time, the parties through their respective Advocates joined the scheduled online hearing session.
35. The Board read out to the parties the documents that had been filed in the Request for Review and sought for each party to confirm that each of the said documents had been served upon them. Parties' Advocates confirmed having filed and been served with each of the documents in the Request for Review.
36. The Board also gave hearing directions on the order of address being that the Applicant would go first, thereafter the Respondents would offer submissions in response with the Applicant closing with a rejoinder on the Respondents submissions.

PARTIES SUBMISSIONS

Applicant's Submissions

37. Counsel for the Applicant, Mr. Kiprono indicated that the Applicant would be placing reliance on its filed documents i.e. Request for Review and Written Submissions dated 29th February 2024 and 13th March 2024 respectively.
38. Mr. Kiprono submitted that the Applicant was disqualified on what the Respondents indicated to be submission of an invalid tender security.

Counsel argued that tenders were to be evaluated in 4 stages i.e. Preliminary, Technical, Financial and Due Diligence Evaluation Stages and that the question of whether the Applicant had a valid tender security was one that was answered in the Preliminary Evaluation Stage. He argued that the Respondents in their response to the Request for Review and Submissions admitted that the Applicant's tender was responsive at the Preliminary Evaluation Stage.

39. Counsel urged the Board to interrogate whether the Due Diligence was conducted in accordance with Section 83 of the Act. Relying on ***PPARB No. 158 of 2020; The Mark Security Ltd v Kenya Revenue Authority & Another*** and ***Republic v Public Procurement Administrative Review Board; Kenya Airports Authority & another Ex parte Kenya Airports Parking Services Limited [2019] eKLR*** it was argued that this was not in conformity with the Act since instead of looking at the qualifications or capability of the Applicant, the Procuring Entity went to look at requirements at the Preliminary Evaluation Stage, when they had already evaluated the Applicant at this stage and found it responsive.
40. Mr. Kiprono argued that the Procuring Entity made an inquiry from the Applicant's Bank and was informed that the tender security was valid and that the same would expire on 30th March 2024.
41. Counsel argued that though the Interested Party had argued that the Applicant had breached confidentiality by accessing confidential information no evidence of such breach was presented. He indicated that the said information was actually read out to the tenderers during the

tender opening on 3rd October 2023. Further that during the tender opening though the subject tender provided for multiple cost items including recurrent costs, only the recurrent costs were read out while omitting the other cost items.

42. Mr. Kiprono urged the Board to allow the Request for Review as prayed.

Respondents' Submissions

43. Counsel for the Respondents, Mr. Omogo indicated that the Respondents would be placing reliance on their filed documents i.e. Memorandum of Reply, List of Documents and Submissions dated 6th March 2024, 6th March 2024 and 14th March 2024 respectively.
44. Mr. Omogo indicated that the Request for Review hinges on the Respondents' conduct of Due Diligence and that Article 1.4 of the Tender Document set out the stages of evaluation which included Due Diligence. He argued that the Applicant even admitted that Due Diligence was part of the evaluation and thus the suggestion that the Procuring Entity failed to follow due process was unfounded.
45. Counsel argued that Section 83 of the Act requires Due Diligence to be conducted and a Professional Opinion prepared by a Procuring Entity's Head of Procurement and that these reports are then presented for a decision by the Accounting Officer. According to Counsel, the Accounting Officer can either approve or reject the recommendation and thus it was farfetched in the circumstance for the Applicant to suggest that they were deprived the award of the subject tender.

46. Reliance was placed on ***R v PPARB Ex parte Kenya Pipeline & anor*** for the definition of Due Diligence being the diligence reasonably expected from and ordinarily exercised by a person who seeks to satisfy a legal requirement or discharge of an obligation.
47. Mr. Ombogo argued that the Accounting Officer was compliant with Section 83 of the Act which was part of the evaluation stages. Further, he relied on Article 1.2 of Section III of the Tender Document that only the Tender Document could spell out the evaluation criteria in the subject tender. Counsel invited the Board to interrogate the Confidential File to ascertain this.
48. Additionally, Counsel invited the Board to interrogate the Applicant's tender security to ascertain whether it conformed with the tender requirement for the security to be valid for 150 days.
49. He submitted that the Applicant had not established any breach on the part of the Respondents in respect of the subject tender and that relying on the case of ***Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & anor [2014]eKLR*** it was argued that a party's submissions does not constitute evidence. Accordingly, the Respondents urged the dismissal of the instant Request for Review.

Interested Party's Submissions

50. Counsel for the Interested Party, Mr. Rotich, indicated that the Interested Party would be placing reliance on its filed documents i.e. Replying Affidavit sworn on 6th March 2024 by Anthony Kibet Komen.

51. Mr. Rotich indicated that the instant Request for Review was anchored on only 2 grounds i.e. the validity of the Applicant's tender security and the figures read out for Lots I and II during the tender opening.
52. On the first ground, the Interested Party associated itself with the submissions made on behalf of the Respondents. Further, that the Applicant was inviting the Board to consider documents that were not submitted as part of its tender and were introduced after close of the subject tender. He urged that these documents ought to be disregarded.
53. Counsel, relying on ***PPARB Application No. 57 of 2017; Real Appraisal Limited v National Social Security Fund (NSSF)*** stated that it was not permissible to introduce a document in a Request for Review while seeking to overturn the decision of a Procuring Entity when the said document was not part of the submitted tender.
54. On the second ground of the figures read out during tender opening, the Interested Party took the view that this ground was time-barred since despite coming to the Applicant's attention on 3rd October 2024, the Applicant failed to file a Request for Review within 14 days.
55. Mr. Rotich further argued that the question of Due Diligence was not raised in the Applicant's Request for Review but only came up in the submissions. Accordingly, since parties are bound by their pleadings, it was not open for this new ground to be introduced at submission stage.

Applicant's Rejoinder

56. In a brief rejoinder, Counsel for the Applicant, Mr. Kiprono argued that the question of Due Diligence was raised by the Respondents in their

response to the Request for Review and that it is equally not in issue that the Applicant's tender was disqualified when the Procuring Entity conducted Due Diligence.

57. In respect of the documents the Interested Party termed foreign, the said documents were filed by the Procuring Entity and not the Applicant. Counsel therefore urged the Board to consider them.
58. Further, that the Court of Appeal in Sinopec International v the Accounting Officer Kenya Electricity Generating Company Plc had indicated that no breach is committed by the Procuring Entity during tender opening. Accordingly, the 14 days alluded to by the Interested Party was inapplicable.

CLARIFICATIONS

59. The Board inquired from the Applicant whether it took issue with the credibility of the Due Diligence process or the validity of its tender security to which Mr. Kiprono indicated it was both. He argued that the Applicant submitted a valid tender security which the Procuring Entity found responsive at the Preliminary Evaluation Stage. Further, that the subsequent inquiry from the Applicant's bank equally indicated that it was a valid security.
60. The Board sought the Respondents to clarify on the point in time when they established that the Applicant's tender security was not valid. Mr. Omogo indicated that the defect was detected at the Due Diligence Stage

and was prompted by an unsolicited letter dated 30th December 2024 from the Applicant's Bank.

61. The Board sought to understand from the Applicant whether it submitted a valid tender security to which Mr. Kiprono answered in the affirmative.
62. The Board equally asked the Applicant to give the validity period of the tender security it submitted to which Mr. Kiprono indicated it had 3 alternative dates for expiry one being 17th December 2023.
63. The Board also inquired from the Applicant on what could have necessitated the subsequent letters to the Applicant's Bank. Mr. Kiprono indicated that the Applicant was aware of the letter dated 9th February 2024 and response dated 12th February 2024 by the Applicant's Bank and therefore the Respondents were better placed to shed light on this.
64. Counsel for the Respondent, Mr. Ombogo, indicated that the unsolicited letter dated 30th December 2023 from the Applicant's bank is what prompted the Respondents to look in to the Applicant's tender security.
65. The Board inquired from the Applicant whether it had requested its Bank to send out the unsolicited letter of 30th December 2023, to which Counsel for the Applicant, Mr. Kiprono answered in the negative. He indicated that the proper letter for consideration would be that of the Applicant's Bank dated 12th February 2024 which was a response from an inquiry by the Procuring Entity.

66. Counsel for the Interested Party urged the Board not to consider the letter dated 12th February 2024 as this would amount to a modification of the Applicant's tender in breach of Section 76(2) of the Act
67. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 1st March 2024 had to be determined by 22nd March 2024. Therefore, the Board would communicate its decision on or before 22nd March 2024 to all parties via email.

BOARD'S DECISION

68. 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 Respondents properly disqualified the Applicant from the subject tender at the Due Diligence Stage?***
 - II. ***Whether the Interested Party was the successful tenderer in the subject tender?***
 - III. ***What orders should the Board issue in the circumstance?***

Whether the Respondents properly disqualified the Applicant from the subject tender at the Due Diligence Stage ?

69. The Applicant brought the instant Request for Review challenging its disqualification from the subject tender at the Due Diligence Stage on account of what the Respondents termed an invalid tender security.

70. Counsel for the Applicant, Mr. Kiprono submitted that the question of whether the Applicant had a valid tender security was one that was answered at the Preliminary Evaluation Stage.
71. Counsel submitted that the Due Diligence by the Procuring Entity was not in conformity with the Act since instead of looking at the qualifications or capability of the Applicant, the Procuring Entity went to look at requirements at the Preliminary Evaluation Stage, when they had already evaluated the Applicant at this stage and found it responsive.
72. On the flip side, the Respondents maintained that they carried out the procurement process in the subject tender in conformity with the Act and the Tender Document which made provision for Due Diligence.
73. Counsel for the Respondent, Mr. Omogo argued that the 1st Respondent's decision to approve the Head of Procurement's Professional Opinion for the award of Lots I and II of the subject tender to the Interested Party was informed by the Evaluation Report by the Procuring Entity's Evaluation Committee. It was Counsel's submission that the Applicant's tender security was invalid.
74. On its part, the Interested Party associated itself with the Respondents. Counsel for the Interested Party, Mr. Rotich further added that the Applicant had attempted to introduce the ground of due diligence at submission stage when it was not a ground in its Request for Review.
75. Counsel equally urged the Board not to consider the documents that were not submitted as part of the Applicant's tender as this would amount to modification of the Applicant's tender.

76. The Board is therefore invited to interrogate the Procuring Entity's Evaluation Committee's process that culminated in the disqualification of the Applicant's tender at the Due Diligence Stage.

77. 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."

78. 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."*

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

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

80. 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.
81. Turning to the Tender Document, Mandatory Requirement No. 6 under both Lot I and Lot II of the subject tender made provision for tender security in the following terms:

Stage 1: Preliminary Requirements

Bid evaluation shall be based on pass/fail for each LOT and any bid that does not meet any of the following mandatory requirements shall be rejected at this stage. Each LOT has SOME DISTINCTIVE REQUIREMENTS thus bidders should ensure compliance

Lot I-RBSS

<i>No.</i>	<i>Requirement</i>
<i>1.</i>	<i>...</i>
<i>2.</i>	<i>...</i>
<i>...</i>	<i>...</i>

6	<u>Original Tender Security valid for thirty (30) days beyond the tender validity period, in the format of a 'Bank Demand Guarantee' as provided herein</u>
...	...
18	...

Lot II-BI, ETL AND DW

No.	Requirements
1.	...
2.	...
...	...
6	<u>Original Tender Security valid for thirty (30) days beyond the tender validity period, in the format of a 'Bank Demand Guarantee' as provided herein</u>
...	...
18	...

82. From the foregoing, Stage 1 of the evaluation process made provision for mandatory requirements that tenderers were required to comply with under each Lot under the subject tender and non-compliance with any of the requirements would lead to the disqualification of a tenderer from the subject tender.
83. Further, Mandatory Requirement No. 6 above required Tenderers to submit as part of their tender a tender security for thirty (30) days beyond the tender validity period, in the format of a 'Bank Demand Guarantee' provided under the Tender Document.
84. The Tender Document outlined the Form of Tender security at page 81:

FORM OF TENDER SECURITY-[Demand Bank Guarantee]

Beneficiary: _____

Request for Tenders No: _____

Date: _____

TENDER GUARANTEE No: _____

Guarantor: _____

1. We have been informed that _____ (hereinafter called "the Applicant") has submitted or will submit to the Beneficiary its Tender (herein after called the Tender") for the execution of under Request for Tenders No:
("the ITT")
2. Furthermore, we understand that, according to the Beneficiary's conditions, Tenders must be supported by a Tender guarantee.
3. At the request of the Applicant, we as Guarantor, hereby irrevocably undertake to pay the Beneficiary any sum or sums not exceeding in total an amount of (_____) upon receipt by us of the Beneficiary's complying demand, supported by the Beneficiary's statements, whether in the demand itself or a separate signed document accompanying or identifying the demand, stating that either the Applicant:
 - a) has withdrawn its Tender during the period of Tender validity set forth in the Applicant's Letter of Tender ("the Tender Validity Period"), or any extension thereto provided by the Applicant; or

b) having been notified of the acceptance of , (its Tender by the Beneficiary during the Tender Validity Period or any extension there to provided by the Applicant, (i) has failed to execute the contract agreement, or (ii) has failed to furnish the Performance Security.

4. This guarantee will expire:(a) if the successful Tenderer, upon our receipt of copies of the contract agreement signed by the Applicant and the Performance Security and, or (b) if the Applicant is not the successful Tenderer, upon the earlier of (i) our receipt of a copy of the Beneficiary's notification to the Applicant of the results of the Tendering process; or (ii) thirty days after the end of the Tender Validity Period.

5. Consequently, any demand for payment under this guarantee must be received by us at the office indicated above on or before that date.

Signature(s)

Note: All italicized text is for use in preparing this form and shall be deleted from the final product.

85. From the above provisions it is apparent that tenderers participating in Lots I and II of the subject tender were required to provide as part of their tenders, tender security documents valid for 30 days beyond the tender validity and in the format given at Page 81 of the Tender Document. Accordingly, any tenderer who failed to provide as part of their tender a tender security valid for 30 days beyond the tender validity and

in the format given at page 81 of the Tender Document would be non-responsive to Mandatory Requirement No. 6 at the Preliminary Evaluation Stage in the subject tender.

86. The Tender Document provided at ITT 21.1 on page 33 that the tender validity period shall be 120 days. Accordingly, for a tenderer to be responsive to Mandatory requirement No. 6 above they had to have provided a tender security valid for 150 days from tender opening. The subject tender was opened on 5th October 2023.

87. The Board will now proceed to compute the expiry date of tender securities contemplated under the Tender Document. In computing the 150 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"

88. When computing time for the validity of the tender security contemplated under the Tender Document, 5th October 2023 is excluded as per section 57(a) of the IGPA being the day that the tender was opened. This means time started to run on 5th October 2023 and up to the 150th day . Essentially, each tenderer was to ensure that its submitted tender security was valid through to the lapse of 150 days.

89. The Board has keenly studied the Form of Tender Security supplied by the Applicant and it bears reproducing the same:

"OUR REF:EBKL/BBG1410232023

03RD OCTOBER 2023

SACCO SOCIETIES REGULATORY AUTHORITY-SASRA

MANAGER SUPPLY CHAIN MANAGEMENT

P.O. BOX 25089-00100

NAIROBI

KENYA

Dear Sir/Madam,

RE: BID BOND-TENDER NO. SASRA/OIT/007/2023-2024:

FOR SUPPLY, INSTALLATION, CONFIGURATION,

CUSTOMIISATION, TESTING, COMMISSIONING AND

MAINTENANCE OF A RISK-BASED SUPERVISION SYSTEM

We have been informed that Nash Financial Services Limited (hereinafter called "the Applicant") has submitted you its Tender dated 04th October 2023 (herein after called the Tender") for the execution of SUPPLY, INSTALLATION, CONFIGURATION, CUSTOMIZATION, TESTING, COMMISSIONING AND MAINTENANCE OF A RISK-BASED SUPERVISION SYSTEM under RFT No. SASRA/OIT/007/2023-2024 ("the ITT")

Furthermore, we understand that, according to the Beneficiary's conditions, Tenders must be supported by a Tender guarantee.

At the request of the Applicant, we EQUITY BANK (KENYA) LTD, hereby irrevocably undertake to pay the Beneficiary any sum or sums not exceeding in total an amount of Kenya Shillings One Million Only upon receipt by us of the Beneficiary's complying demand, supported by the Beneficiary's statements, whether in the demand itself or a separate signed document accompanying or identifying the demand, stating that either the Applicant:

- a) has withdrawn its Tender during the period of Tender validity set forth in the Applicant's Letter of Tender ("the Tender Validity Period"), or any extension thereto provided by the Applicant; or***
- b) having been notified of the acceptance of its Tender by the Beneficiary during the Tender Validity Period or any extension there to provided by the Applicant, (i) has failed to execute the contract agreement, or (ii) has failed to furnish the Performance Security in accordance with Instructions to Tenders (ITT) of the Beneficiary's tendering document.***

This guarantee will expire:(a) if the Applicant is the successful Tenderer, upon our receipt of copies of the contract agreement signed by the Applicant and the Performance Security and, or (b) if the Applicant is not the successful Tenderer, upon the earlier of (i) our receipt of a copy of the Beneficiary's notification to the Applicant of the results of the Tendering process; or (ii) thirty days after the end of the Tender Validity Period (iii) 17th December 2023 (Hereinafter called "the Expiry Date"). Consequently, any demand for payment under this guarantee must be received by us at Equity Bank (Kenya) Limited, Trade Finance Department, Equity Centre, 4th Floor, Wing A, P.O. Box 75104-00200 Nairobi on or before the said expiry date.

This guarantee is subject to the Uniform Rules for Demand Guarantee (URDG) 2010 Revision, ICC Publication No. 758.

Issued by Equity Bank (Kenya) Limited this 03rd day of October 2023

Duly Authorised Signatory

Signed

Name: David Mugo

Designation: Relationship Manager

Duly Authorised Signatory

Signed

Name: Florence Muthama

Designation: Snr Branch Manager

90. The Applicant's Tender Security adopts the format outlined in the blank Tender Document but with some modifications. For instance, whereas the form outlined at page 81 of the Tender Document provided for 2 alternatives of when the tender security would expire if a tenderer was unsuccessful, the Applicant's tender security form provides for 3

alternatives. The extra alternative in the Applicant's form of tender expresses 17th December 2023 to be the expiry date of the tender security.

91. From the above, the Applicant's tender security contemplated an instance when its validity would be shorter than the stipulated 150 days under the Tender Document. For this, the Applicant's tender was unresponsive to Mandatory Requirement No. 6 at the Preliminary Evaluation Stage and ought to have been disqualified at that stage for both Lots I and II of the subject tender.
92. However, the Evaluation Committee failed to detect this irregularity on the part of the Applicant's tender at the Preliminary Evaluation Stage. According to the Procuring Entity's Evaluation Report, it is at the Due Diligence Stage that it became apparent to the Evaluation Committee that the Applicant's tender was non-responsive to Mandatory Requirement No. 6 under the Preliminary Evaluation Stage.
93. It is the disqualification at the Due Diligence Stage that the Applicant now contests to be in breach of the law.
94. Section 83 of the Act provides room for a Procuring Entity's Evaluation Committee to conduct due diligence on tenderers before an award is made and this serves to verify the qualification of a tenderer:

83. Post-qualification

(1) An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest

evaluated responsive tender to be awarded the contract in accordance with this Act.

(2) The conduct of due diligence under subsection (1) may include obtaining confidential references from persons with whom the tenderer has had prior engagement.

(3) To acknowledge that the report is a true reflection of the proceedings held, each member who was part of the due diligence by the evaluation committee shall —

(a) initial each page of the report; and

(b) append his or her signature as well as their full name and designation.

95. Turning to the instant Request for Review, the Tender Document made Due Diligence the last evaluation stage after Preliminary, Technical and Financial Evaluation Stages. Page 54 of the Tender Document provides:

Stage 4: Post-Qualification Due Diligence conducted for each lot separately

a) Documentation Verification

The Authority will verify reference documents provided by the bidder (company references, team references, bank letters, and team members CVs and certificate). Submission of forged documents will lead to disqualification of bidder.

b) Litigation History

There shall be no consistent history of court/arbitral award decisions against the Tenderer in the last 5 years. All parties to the contract shall furnish the information in the appropriate form about any litigation or arbitration resulting from

contracts completed or ongoing under its execution over the years specified . A consistent history of awards against the Tenderer or any member of a JV will result in rejection of the tender.

96. From the above provisions, the Procuring Entity would during Due Diligence conduct document verification and a check on tenderer's litigation history. Under document verification, the Procuring Entity could conduct checks on among others bank letters.
97. In the instant case, the Evaluation Report submitted to the Board as part of the Confidential Documents indicates that the Evaluation Committee conducted checks on the Applicant's, Interested Party's and Bluechip Technologies Limited's bank reference letters. The Report further notes that though all the bank references turned out to be authentic, the Applicant had sent an extension of tender security dated 30th December 2023 whereupon it was discovered that the Applicant's tender security submitted under its tender expired on 17th December 2023. It was only then that the Applicant was disqualified from the subject tender.
98. The Respondents annexed the said extension of tender security as part of its response to the Request for Review. The same is hereinafter reproduced:

"OUR REF:EBKL/BBG1410232023

30TH DECEMBER 2023

SACCO SOCIETIES REGULATORY AUTHORITY-SASRA

MANAGER SUPPLY CHAIN MANAGEMENT

P.O. BOX 25089-00100

NAIROBI

KENYA

Dear Sir/Madam,

RE: BID BOND-TENDER NO. SASRA/OIT/007/2023-2024:
FOR SUPPLY, INSTALLATION, CONFIGURATION,
CUSTOMISATION, TESTING, COMMISSIONING AND
MAINTENANCE OF A RISK-BASED SUPERVISION SYSTEM

We have been informed that Nash Financial Services Limited (hereinafter called "the Applicant") has submitted you its Tender dated 04th October 2023 (herein after called the Tender") for the execution of SUPPLY, INSTALLATION, CONFIGURATION, CUSTOMIZATION, TESTING, COMMISSIONING AND MAINTENANCE OF A RISK-BASED SUPERVISION SYSTEM under RFT No. SASRA/OIT/007/2023-2024 ("the ITT")

Furthermore, we understand that, according to the Beneficiary's conditions, Tenders must be supported by a Tender guarantee.

At the request of the Applicant, we EQUITY BANK (KENYA) LTD, hereby irrevocably undertake to pay the Beneficiary any sum or sums not exceeding in total an amount of Kenya Shillings One Million Only upon receipt by us of the Beneficiary's complying demand, supported by the Beneficiary's statements, whether in the demand itself or a separate signed document accompanying or identifying the demand, stating that either the Applicant:

a) has withdrawn its Tender during the period of Tender validity set forth in the Applicant's Letter of Tender ("the Tender Validity Period"), or any extension thereto provided by the Applicant; or

b) having been notified of the acceptance of its Tender by the Beneficiary during the Tender Validity Period or any extension there to provided by the Applicant, (i) has failed to execute the contract agreement, or (ii) has failed to furnish the Performance Security in accordance with Instructions to Tenders (ITT) of the Beneficiary's tendering document.

This guarantee will expire:(a) if the Applicant is the successful Tenderer, upon our receipt of copies of the contract agreement signed by the Applicant and the Performance Security and, or (b) if the Applicant is not the successful Tenderer, upon the earlier of (i) our receipt of a copy of the Beneficiary's notification to the Applicant of the results of the Tendering process; or (ii) thirty days after the end of the Tender Validity Period (iii) THIS GUARANTEE HAS BEEN EXTENDED FROM 30TH DECEMBER 2023 TO 30TH MARCH 2024 (HEREINAFTER CALLED "THE EXPIRY DATE"). Consequently, any demand for payment under this guarantee must be received by us at Equity Bank (Kenya) Limited, Trade Finance Department, Equity Centre, 4th Floor, Wing A, P.O. Box 75104-00200 Nairobi on or before the said expiry date. Payment under this guarantee will only be made upon presentation of the claim accompanied by original guarantee to the aforesaid address of the Bank on or before the Expiry Date. Payment will be made within five (5) working days from the date of receipt of the demand Expiry Date.

This guarantee is subject to the Uniform Rules for Demand Guarantee (URDG) 2010 Revision, ICC Publication No. 758.

Issued by Equity Bank (Kenya) Limited this 30th day of December 2023

Duly Authorised Signatory

Signed

Name: David Mugo

Designation: Relationship Manager

Duly Authorised Signatory

Signed

Name: Samuel Gitonga

***Designation: Relationship
Manager Operations***

Branch Stamp: Lavington Supreme Branch Stamp

99. The above extension letter from the Applicant's Bank was a variation of the Tender Security Form presented under the Applicant's tender. The import of the letter was that (i) the Applicant's Bank had extended their original expiry date from 30th December 2023 to 30th March 2024; (ii) to secure payment under the guarantee, the original guarantee has to be presented to the Applicant's Bank; and (iii) the Applicant's Bank would make payment under the guarantee would be made within 5 working days.
100. The Respondents equally annexed to their response a letter dated 9th February 2024 addressed to the Applicant's Bank inquiring on the Applicant's tender security:

"SASRRA/OIT/007/2023-2024(4)

The Head Office,

Equity Bank (K) Limited

Equity Centre,

NAIROBI,

Dear Sir/Madam,

RE: NASH FINANCIAL SERVICES LIMITED-BID BOND

The SACCO Societies Regulatory Authority (SASRA) advertised a tender referenced SASRA/OIT/007/2023-2024

We are in receipt of the Bid Bond references EBKL/BBG1410232023 dated 3rd October 2023 (copy attached) as part of the tender documentation submitted to the authority by M/S Nash Financial Services Limited.

As part of the normal tender evaluation process, we hereby request you to confirm:-

***If the guarantee originated from yourselves and,
The interpretation of the contents thereof in particular its validity period.***

Your written confirmation will be helpful in the processing of the said tender. For efficiency, an advance copy of your reply can be sent on email address procurement@sasra.go.ke with a copy to ceo@sasra.go.ke

Yours sincerely,

Signed

Peter Njuguna

Chief Executive Officer

101. From the letter, the Procuring Entity appears to be requesting the Applicant's Bank to confirm the authenticity of the tender security forming part of the Applicant's tender as well as an interpretation of its validity period. The Applicant's Bank responded to this letter on 12th February 2024:

"Our Ref: EBKL/141/BBG1410232023

Date: 12TH FEBRUARY 2024

To:

SACCO SOCIETIES REGULATORY AUTHORITY-SASRA

MANAGER SUPPLY CHAIN MANAGEMENT

P.O. BOX 25089-00100

NAIROBI

Dear Sir/Madam,

**RE: VERIFICATION OF BANK GUARANTEE-
EBKL/141/BBG1410232023**

We hereby confirm that the Bank Guarantee under the subject reference number for KES 1,000,000 (ONE MILLION KENYA SHILLINGS ONLY) is authentic and was issued by Equity Bank (Kenya) Limited of P.O. Box 75104-00200 Nairobi on behalf of M/S NASH FINANCIAL SERVICES LIMITED.

The Bid Bond will expire on 30th March 2024.

We further confirm that the Bank Guarantee was duly executed by authorized officials of the bank.

Please quote our Reference Number BBG1410232023 in all correspondence relating to this undertaking.

Yours Sincerely,

For and on behalf of Equity Bank (Kenya) Limited

Signed

Mercy King'ori

Authorized Signatory

Signed

Winnie Mwangi

Authorized Signatory

102. From the above response the Applicant's Bank confirmed that the Applicant's tender security originated from the Bank and that it was to expire on 30th March 2024. The Applicant's Bank's response on genuineness of the tender security is not in issue. However, the response

on the interpretation of the validity of the tender security dated 3rd October 2023 is problematic. Whereas the Applicant's tender security dated 3rd October 2023 indicates 17th December 2023 as the expiry date, the Applicant in their response appeared to suggest that the said expiry date be interpreted as 30th March 2024, which is outrightly inaccurate.

103. The Board has already observed in the foregoing parts of this Decision that the Applicant's tender contained a tender security that provided for a shorter validity period than the 150 days stipulated in the Tender Document, and thus non-responsive. Can the Applicant validly claim it was erroneously disqualified at the Due Diligence stage when it is apparent that it was non-responsive to a Mandatory requirement at the Preliminary Evaluation Stage? We think not. We say so because Article 227(1) of the Constitution of Kenya, 2010 espouses among others the principles of fairness, transparency and competitiveness in public procurement processes.

104. Firstly, Stage 4 of the evaluation process under the subject tender provided for a Due Diligence exercise that would include checks on documents such as bank letters. The Evaluation Committee was therefore not in error when it disqualified the Applicant after establishing at the Due Diligence Stage that the Applicant's tender security was non-responsive to the requirements at the Preliminary Evaluation Stage.

105. Additionally, allowing a non-responsive tenderer to qualify for award of the subject tender would be inimical to the principle of fairness and competition as this would be unfair especially to other tenderers whose tenders are responsive to that specific requirement. This is in line with

this Board's finding in **PPRAB Application No. 109 of 2021; Ernie Campbell & Co. Ltd -v- The Accounting Officer, National Housing Corporation & others** where it held that excusing a non-responsive tender stifles competition:

"...In the same vein, the Board cannot shut its eyes and excuse the Applicant on a material irregularity in its bid security as that would amount to flouting the principles of fairness by subjecting the applicant to different tender requirements. Its Board's view that clarifications by the procuring entity would not have cured the material irregularity in the Applicant's tender as contended by the Applicant. The Board accordingly finds the applicant's bid with respect to bid security was properly evaluated in accordance with the tender requirements. The Applicant's bid was not responsive within the meaning of section 79 of the Act for failure to meet the mandatory provisions of the tender notice regarding submissions of the bid security.

106. Also, in **PPARB Application No. 34 of 2023** the Board sanctioned a re-evaluation of tenders where it had new information emerged during Due Diligence that a tenderer's tender was unresponsive to a mandatory requirement in the subject tender:

'On their part, the Respondents contend that the entire procurement process was fair, equitable, transparent, competitive, and cost effective in accordance with the Constitution, the Act and Regulations 2020 and that in view of the fact that the certificate of the ICT Authority was a mandatory requirement, and a tenderer who failed to meet

the said mandatory requirement ought to be declared non-responsive, hence the 2nd Respondent requested the issuing Authority of the Certificate i.e. ICT Authority to confirm the genuineness and validity of the Applicant's Certificate. It is the Respondents' case that the material time when the certificate from ICT Authority ought to have been valid was at the date of the tender submission deadline of 21st March 2023 and as such, having verified the Applicant's certificate and found that it had expired on 2nd February 2023 and was not valid, meant that the Applicant failed to meet a mandatory requirement and on account of this new information, the Evaluation Committee's was justified to conduct re-evaluation of tenders in the subject tender.

107. In light of the foregoing analysis, the Board finds that the Respondents properly disqualified the Applicant from the subject tender at the Due Diligence Stage?

Whether the Interested Party was the successful tenderer in the subject tender?

108. The Applicant assailed the tender process in the subject tender citing that though the subject tender provided for multiple cost items including recurrent costs, during the tender opening, only the recurrent costs were read out while omitting the other cost items. According to the Applicant it was erroneous for the Interested Party to be awarded Lot I and II of the subject tender at Kshs. 37,911,758 and Kshs. 18,950,456 as these figures did not include supply and installation costs and the 6 months

handholding and 1-year warranty. Counsel for the Applicant, Mr. Kiprono therefore submitted that this was in breach of Section 82 of the Act.

109. Counsel for the Interested Party, Mr. Rotich, argued the figures were read out during tender opening, and took the view that this ground was time-barred since despite coming to the Applicant's attention on 3rd October 2024, the Applicant failed to file a Request for Review within 14 days.

110. As a preliminary matter the Board takes cognizance of the Court of Appeal case in *Sinopec International v Accounting Officer, Kenya Electricity Generating Company Plc* where it was held that the 14 days statutory timeline to institute a Request for Review does not apply to the tender opening process. Guided by the above case which is binding on this Board, we hold that this ground was properly urged before the Board.

111. Section 82 of the Act provides as follows:

***"82. Correction, revision, adjustment or amendment of tender
(1) Subject to subsection (2) of this section, the tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be the subject of correction, revision, adjustment or amendment in any way by any person entity.***

(2) For avoidance of doubt, the provisions of subsection (1) shall not apply to sections 103, 131 and 141 of this Act."

112. Section 82(1) above makes the tender sum as read out during tender opening final and not subject to revision. The tender sum is usually read

out aloud during the tender opening so as to protect the integrity of the tender process with tenderers at tender opening having an early chance of knowing the tender prices submitted by their competitors.

113. This Board is therefore invited to interrogate whether the Procuring Entity breached the provisions of Section 82 of the Act in awarding the Interested Party Lots I and II of the subject tender at the aforesaid tender sums.
114. The Board has studied the Interested Party's Forms of Tender submitted under its Tender Document and notes that the Interested Party quoted Kshs. 37,911,758 as its total cost for Lot I and Kshs. 18,950,456 as its total cost for Lot II respectively. These are the same figures appearing on the Tender Opening Minutes as well as the letter of Notification of Intention to Award sent to the Interested Party. Absent any variation in the Interested Party's tender sums, the Board cannot impute breach of Section 82 of the Act on the Interested Party.
115. In view of the foregoing, the Board finds that the Interested Party was the successful tenderer in respect of Lots I and II in the subject tender?

What orders the Board should grant in the circumstances?

116. The Board has found that the Respondents properly disqualified the Applicant from the subject tender at the Due Diligence Stage.
117. The Board has equally found that the Interested Party was the successful tenderer in respect of Lots I and II in the subject tender

118. The upshot of our finding is that the Request for Review dated 29th February 2024 in respect of Tender No SASRA/OIT/007/2023-20124 for Supply, Installation, Configuration, Customization, Testing, Commissioning and Maintenance of a Risk-Based Supervision System fails in the following specific terms:

FINAL ORDERS

119. 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 29th February 2024:

- 1. The Request for Review dated 29th February 2024 be and is hereby dismissed.**
- 2. The 1st Respondent be and is hereby directed to proceed with the Tender No SASRA/OIT/007/2023-20124 for Supply, Installation, Configuration, Customization, Testing, Commissioning and Maintenance of a Risk-Based Supervision System to its lawful and logical conclusion.**
- 3. Given the subject procurement proceedings are not complete, each party shall bear its own costs in the Request for Review.**

Dated at NAIROBI, this 22nd Day of March 2024.


.....
CHAIRPERSON
PPARB


.....
SECRETARY
PPARB

