

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 33/2024 OF 15TH APRIL 2024

BETWEEN

AGILE BUSINESS SOLUTIONS LIMITEDAPPLICANT

AND

ACCOUNTING OFFICER,

NUCLEAR POWER & ENERGY AGENCY (NUPEA).....1ST RESPONDENT

NUCLEAR POWER & ENERGY AGENCY (NUPEA).....2ND RESPONDENT

GREENCOM ENTERPRISE SOLUTIONS LTDINTERESTED PARTY

Review against the decision of the Accounting Officer, Nuclear Power & in relation to Tender No NuPEA/OT/DICT/004/23-24 for Supply, Delivery, Installation, Testing, Training, Commissioning and Support Services for Enterprise Resource Planning (ERP) System

BOARD MEMBERS PRESENT

1. Mr. George Murugu, FCI Arb - Chairperson
2. Ms. Alice Oeri - Vice-Chairperson
3. Mr. Daniel Langat - Member

IN ATTENDANCE

- Mr. James Kilaka - Ag. Board Secretary
- Mr. Anthony Simiyu - Secretariat



PRESENT BY INVITATION

APPLICANT

AGILE BUSINESS SOLUTIONS LIMITED

Mr. Kimutai Rotich

Advocate, Nyaanga & Mugisha Advocates

RESPONDENTS

ACCOUNTING OFFICER, NUCLEAR POWER & ENERGY AGENCY (NUPEA) NUCLEAR POWER & ENERGY AGENCY (NUPEA)

Ms. Catherine Kianji

Advocate, Nuclear Power & Energy Agency

Ms. Cynthia Akeyo

Advocate, Nuclear Power & Energy Agency

Mr. Edwin Chesire

Principal Capacity Building Officer, Nuclear
Power & Energy Agency

Dr. Antony Lusuli

Head of Procurement, Nuclear Power & Energy
Agency

INTERESTED PARTY

GREENCOM ENTERPRISE SOLUTIONS LTD

Ms. Nthenge

Advocate, Kimitei, Nthenge & Company
Advocates

BACKGROUND OF THE DECISION

The Tendering Process

1. Nuclear Power & Energy Agency, the Procuring Entity together with the 1st Respondent herein, invited submission of tenders in response to Tender No. NuPEA/OT/DICT/004/23-24 for Supply, Delivery, Installation, Testing, Training, Commissioning and Support Services for Enterprise Resource Planning (ERP) System using the open tender method. The

tender submission deadline was set as Thursday, 22nd February 2024 at 10:00 a.m.

Submission of Tenders and Tender Opening

2. According to the signed Tender Opening Minutes dated 22nd February 2024, 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:

No.	Name of Tenderer
1.	BMC Holdings Limited
2.	Bharathbrands Limited
3.	Iansoft Technologies Limited
4.	Serpentcs Africa Limited
5.	AppKings Solutions Limited
6.	Dynasoft Business Solutions Limited
7.	JV Agile Business Solutions Limited & Dhanush Healthcare Systems Private Limited
8.	JV Seamless Limited & Finsprint Limited
9.	Techbiz Infotech Limited
10.	Smartpeople Africa Limited
11.	Skyworld Limited
12.	Attain Enterprise Solutions Limited
13.	Panache Technohub Limited
14.	JV University of Nairobi Enterprises and Services Limited & Surestep Systems and Solutions Limited
15.	Greencom Enterprise Solutions Limited

Evaluation of Tenders

3. The 1st Respondent 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 2. Preliminary Evaluation for Determination of Responsiveness under Section III – EVALUATION AND QUALIFICATION CRITERIA on pages 25 to 26 of the Tender Document.
5. 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.
6. At the end of the evaluation at this stage, 12 tenders including that of the Applicant were found unresponsive with only 3 tenders including that of 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 tenders successful at the Preliminary Stage using the criteria set out as Technical Evaluation Criteria under Section III – EVALUATION AND QUALIFICATION CRITERIA on pages 27 to 53 of the Tender Document.

8. The tenders were to be examined in 2 Parts i.e. Part I-Technical Firm Capacity and Part II- Specific Module Technical Specifications. Tenders were to be responsive to all the requirements under Parts I and II in order to be eligible for further evaluation at the Financial Evaluation Stage.
9. At the end of the evaluation at this stage, 2 tenders were found unresponsive with only the Interested Party's tender qualifying for further evaluation at the Financial Evaluation Stage.

Financial Evaluation

10. At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the Criteria set out as Financial Schedule under Section III– EVALUATION AND QUALIFICATION CRITERIA on pages 53 to 54 of the Tender Document.
11. The tender prices of the tenders evaluated at this stage were to be compared with the successful tender being that constituted the lowest evaluated tender.
12. At the end of the evaluation at this stage, it was established that the Interested Party's tender was the lowest evaluated tender being that it was the only tender that qualified for evaluation at this stage.

Evaluation Committee's Recommendation

13. Accordingly, the Evaluation Committee recommended the award of the subject tender to the Interested Party at a cost of **Kenya Shillings Ninety-Eight Million, Five Hundred and Eighty-Three Thousand and One Only** (Kshs.98,583,001.00) inclusive of taxes.

Professional Opinion

14. In a Professional Opinion dated 25th March 2024 (hereinafter referred to as the "Professional Opinion"), the Procuring Entity's Manager Supply Chain, Dr. Antony Lusuli reviewed the manner in which the subject procurement process was undertaken including the evaluation of tenders and agreed with the Evaluation Committee's recommendation for the award of the subject tender to the Interested Party.
15. Thereafter, on 2nd April 2024, the 1st Respondent concurred with the Professional Opinion.

Notification to Tenderers

16. Accordingly, tenderers were notified of the outcome of the evaluation tenders submitted in response to the subject tender vide letters dated 2nd April 2024.

REQUEST FOR REVIEW

17. On 15th April 2024, the Applicant through the firm of Nyaanga & Mugisha Advocates, filed a Request for Review dated 11th April 2024 supported by an Affidavit sworn on 11th April 2024 by Anthony Kibet Komen, a Director at the Applicant, seeking the following orders from the Board in verbatim:
 - a) ***The 1st and 2nd Respondents' decision contained in the Letter of Notification dated 2nd April 2024 purporting to disqualify the Applicant's bid in relation to the Tender No. NuPEA/OT/DICT/004/23-24 for Supply, Delivery, Installation, Testing, Training, Commissioning and Support Services for Enterprise Resource Planning (ERP) System be and is hereby nullified and set aside;***

- b) The 1st and 2nd Respondents' decision contained in the Letter of Notification dated 4th April 2024 purporting to disqualify the Applicant's bid in relation to the Tender No. NuPEA/OT/DICT/004/23-24 for Supply, Delivery, Installation, Testing, Training, Commissioning and Support Services for Enterprise Resource Planning (ERP) System be and is hereby nullified and set aside;***
- c) The 1st and 2nd Respondents' decision contained in the Letter of Notification dated 2nd April 2024 awarding the Tender No. NuPEA/OT/DICT/004/23-24 for Supply, Delivery, Installation, Testing, Training, Commissioning and Support Services for Enterprise Resource Planning (ERP) System to the Interested Party herein be and is hereby nullified and set aside;***
- d) An order be and is hereby issued directing the 1st and 2nd Respondents to re-evaluate the Applicant's bid in relation to the Tender No. NuPEA/OT/DICT/004/23-24 for Supply, Delivery, Installation, Testing, Training, Commissioning and Support Services for Enterprise Resource Planning (ERP) System and to award the tender to the lowest evaluated bidder as provided in the tender document;***
- e) The Respondents be ordered to pay costs of and incidental to these proceedings;***
- f) Such other or further reliefs as this board shall deem just and expedient.***

18. In a Notification of Appeal and a letter dated 15th April 2024, Mr. James Kilaka, the Acting Board Secretary of the Board notified the Respondents

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 Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 15th April 2024.

19. On 22nd April 2024, the Respondents filed a Memorandum of Response of even date. The Respondents also availed to the Board the Confidential Documents under Section 67 of the Act.
20. Vide letters dated 23rd April 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 23rd April 2024.
21. On 25th April 2024, the Interested Party through the firm of Kimitei, Nthenge & Company Advocates LLP filed a Notice of Appointment of Advocates, Notice of Preliminary Objection and Written Submissions, all dated 25th April 2024.
22. On 29th April 2024, the Acting Board Secretary, sent out to the parties a Hearing Notice notifying parties that the hearing of the instant Request

for Review would be by online hearing on 30th April 2024 at 11:00 a.m. through the link availed in the said Hearing Notice.

23. On the same day, 29th April 2024, the Applicant filed a Reply to the Procuring Entity's Memorandum of Response and Interested Party's Notice Preliminary Objection and Supplementary List and Bundle of Documents, both dated 26th April 2024. The Applicant equally filed Written Submissions dated 29th April 2024.
24. On 30th April 2024 at 11:00 a.m., the parties joined the scheduled online hearing session through their respective Advocates.
25. 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. Counsel for the respective advocates acknowledged filing and receipt of service of the documents filed in the matter.
26. The Board observed that since the Respondent had raised a Preliminary Objection, the same would be heard within the Request for review in accordance with Regulation 209 of the Regulations 2020. It then gave the following hearing directions on the order of address:
 - i. The Interested Party would go first on its Preliminary Objection
 - ii. The Applicant would be next and make an address on both the Preliminary Objection and the Request for Review
 - iii. Thereafter, the Respondents would make their address on the Preliminary Objection and Request for Review.
 - iv. The Interested Party would make an address on the Request for Review

- v. The Applicant would close by way of a rejoinder limited to issues of law arising from the submissions made in response to the Request for Review.

PARTIES SUBMISSIONS

Interested Party's Submissions on the Preliminary Objection

27. Counsel for the Interested Party, Ms. Nthenge, submitted that the Board lacks jurisdiction over the instant Request for Review since the Applicant had not pleaded loss or damages as per Section 167 of the Act. According to Counsel, the said Section only allows candidates and tenderers who have suffered or were at the risk of suffering loss or damage to invoke the jurisdiction of the Board. For this proposition reliance was placed on ***PPARB Application No. 8 of 2023; Toddy Civil Engineering Company Limited Chief Executive Officer, Lake Victoria North Water Works Development Agency & Anor.***
28. She further contended that the Applicant lacked the locus standi to bring the instant Request for Review since despite the Applicant having submitted its tender in a Joint Venture, it did not at the time of filing provide any authority or Board Resolution showing that its Joint Venture Partner authorised the institution of the instant Request for Review. Counsel relied upon the cases of ***Law Society of Kenya v Commissioner of Lands & Ors; Nakuru High Court Case No. 464 of 2000*** and ***Alfred Njau & Ors v City Council of Nairobi 91982)KAR 229*** for the definition of the term "locus standi"

Applicant's Submissions on both the Preliminary Objection and Request for Review

29. Counsel for the Applicant, Mr. Rotich, indicated that the Applicant would be placing reliance on its filed documents i.e. Request for Review, Reply to the Procuring Entity's Memorandum of Response and Interested Party's Notice of Preliminary Objection and Written Submissions.
30. Mr. Rotich argued that the Preliminary Objection by the Interested Party lacked merit citing that the Interested Party raised the ground of lack of authority through its Submissions when the same was not indicated in its Preliminary Objection. It was Counsel's contention that a Preliminary objection must be specifically pleaded to enable a party to respond to it.
31. He submitted that the Applicant's tender contained a Joint Venture Agreement where its Joint Venture Partner, Dhanush Healthcare Systems Private Limited that gave the Applicant authority to deal with matters arising from the tender including the filing of the Request for Review.
32. Counsel argued that the Applicant has the locus standi to bring the Request for Review having been a tenderer within the meaning of Section 2 of the Act.
33. Further, that the definition of the phrase "risks losses and damages" under Section 167(1) of the Act does not contemplate enumeration of financial risk of loss or damages but relates to arising loss including legitimate expectation of being awarded the tender which arises out of breach of duty by the Procuring Entity. It was his contention that the particulars of breach had been specified at paragraph 32 of the Request for Review. He argued that Section 28 of the Act grants the Board

jurisdiction on all disputes relating to public tenders and thus the Interested Party's Preliminary Objection was unmerited.

34. On the substance of the Request for Review, Counsel argued that according to the Letter of notification of Intention to Award dated 2nd April 2024, the Applicant was disqualified for the alleged reason that it failed to sequentially serialize its tender. He indicated that this was an erroneous finding on the part of the Procuring Entity since the Applicant had in fact sequentially serialized its tender from page 1 to 674. Further, it had also initialized "Pgm" on all the pages of its tender.
35. Accordingly, on 3rd April 2024, the Applicant sought a debrief by writing to the Accounting Officer, who happens to have responded via email on the same day citing that though the Applicant had serialized its tender, it introduced other documents bearing the Numbers 7AA, 7BB, 7CC and 7DD. The Applicant contended that the said documents were 4 recommendation letters that the Procuring Entity had specifically asked for at page 26 of the Tender Document to be submitted as part of a tenderer's tender as well as separately. According to Counsel, at the Tender Opening the Procuring Entity labelled the Applicant's separately submitted recommendation letters 7AA, 7BB, 7CC and 7DD. Further that copies of the recommendation letter were also at pages 407, 433, 420 and 456 of the Applicant's tender. Counsel therefore urged that the Letter of Notification of Intention to Award of 2nd April 2024 ought to be cancelled.
36. He pressed on that on 4th April 2024, the Procuring Entity sent out a subsequent letter changing the reason for the Applicant's disqualification

to failure to include a letter from a certifying authority in addition to its ISO Certificate which contained a link.

37. Mr. Rotich challenged the letter of 4th April 2024 which according to him was worded like a Notification of Intention to Award when it was in fact a response to the Applicant. It was his contention that the letter could not constitute a notification under Section 87 of the Act since once a Procuring Entity issues a notification, the Accounting Officer lacks powers to amend the reasons for disqualification. He argued that there was no law that allows alteration of the reasons for disqualification of a tenderer and thus what the Accounting Officer purported to do was illegal.
38. Counsel argued that the Applicant submitted an ISO Certificate at page 391 of its tender. He pressed on that the Certificate contained a link that the Procuring Entity could use to verify its validity. Further, that the letter from the certifying authority was equally meant to assist in the verification of the validity of the certificate. He urged the Board to independently use the link to verify the validity of the Applicant's validity using the link on the ISO Certificate it submitted as part of its tender and allow the Request for Review.

Respondent' Submissions

39. Counsel for the Respondents, Ms. Kianji, indicated that the Respondents would be placing reliance on their Memorandum of Response. She argued that the Procuring Entity had undertaken evaluation process of the subject tender in accordance with the Constitution of Kenya, 2010 and the Act, and that the tender process was fair, transparent and competitive.

40. Counsel submitted that the Applicant's failure to submit a letter from the certifying authority in respect of its ISO Certificate was not a minor deviation as alleged by the Applicant. She argued that the Applicant makes an admission at paragraph 27E that it failed to submit as part of its tender a letter from the certifying authority, notwithstanding the fact that it was a mandatory requirement for the same to be supplied.
41. It was her contention that exempting the Applicant from such a requirement when the other tenderers went out of their way to get the letters from the certifying authority would constitute discrimination against the compliant tenderers.
42. The Procuring Entity's Head of Procurement, Dr. Lusuli, took up from Ms. Kianji and argued that the evaluation process was evidenced by the individual score sheets and Evaluation report by the Evaluation Committee.
43. It was his contention that the Tender Document spelt out the evaluation criteria to enable tenderers prepare their tenders. According to him, Mandatory Requirement No. 22 required tenders to contain (i) a copy of a valid certificate in quality management system ISO 9001;2015; (ii) a verification link and (iii) a letter from certifying authority
44. Dr. Lusuli argued that the Applicant had argued that its failure to submit a letter from the certifying authority was a minor deviation when this was not the case as it constituted deviation from a mandatory requirement. It was his contention that ITT 8.1 in the Tender Data Sheet gave room to all tenderers to seek clarifications in respect of the tender but the Applicant did seek any clarification.

45. Further, an argument was made that there was no law that barred the correction of an error in communication. Accordingly, the Procuring Entity's letter of 4th April 2024 correcting the errors in the previous letter of 2nd April 2024 was proper. He attributed the error to a mistake that took place when the letter of 2nd April 2024 had been forwarded to the typing pool at the Procuring Entity. Dr. Lusuli maintained that the evaluation score sheets, evaluation report, Professional Opinion were all aligned.

Interested Party's Submission

46. Counsel for the Interested Party, Ms. Nthenge, clarified that contrary to the Applicant's suggestion that the Interested Party had not pleaded the issue of locus standi in its Preliminary Objection, the said issue was in fact pleaded as Ground 3 of the Preliminary Objection.
47. She argued that the Applicant admitted being part of a Joint Venture but the Agreement had not been filed in the Request for Review to demonstrate the Applicant had authority to bring the instant Request for Review. Further, that the Applicant despite being a company did not attach a Board resolution authorizing the instant Request for Review.
48. She argued that paragraph 32 of the Request for Review did not demonstrate loss and damage or the risk of suffering loss and damage as required under Section 167(1) of the Act.

Applicant's Rejoinder

49. In his rejoinder, Counsel for the Applicant, Mr. Rotich, argued that the issue of Board resolution and authority had been introduced at submission stage when it was not indicated in the Preliminary Objection.
50. He referred the Board to the definition of both tenderer and a candidate under Section 2 of the Act and urged that the Applicant brought the instant Request for Review as a tenderer having submitted its tender in the subject tender.
51. He argued that the Applicant had been denied an opportunity to fully participate in the tender process and secure the award in the subject tender.
52. According to Counsel, the verification link and letter from the certifying authority serve a common purpose i.e. to verify the validity of the ISO Certificate a tenderer had submitted as part of its tender.
53. Additionally, that the Procuring Entity's letter of 4th April 2024 did not constitute a notification under Section 87 of the Ac7

CLARIFICATIONS

54. The Board sought confirmation from the Interested Party on whether their pleading lack of locus standi in general terms impaired the Applicant in offering an appropriate response to the Interested Party's Notice of Preliminary Objection. Counsel for the Interested Party, Ms. Nthenge, indicated that locus standi was pleaded in their Notice of Preliminary Objection and expounded upon in the Written Submissions.

55. The Board sought for the Respondents to clarify the stage at which the Applicant was disqualified and the reason as contained in the letter of notification of Intention to Award. The Procuring Entity's Head of Procurement, Dr. Lusuli, indicated that the Applicant was disqualified at the Preliminary Evaluation Stage and the reason indicated in the letter of Notification of Intention to Award was that the Applicant's tender was not sequentially serialized.
56. The Board questioned the Applicant to confirm that it was relying on paragraph 31 of the Request to demonstrate the requirement to plead suffering or being at the risk of suffering loss and damage. Counsel for the Applicant, Mr. Rotich responded in the affirmative adding that they were also relying of paragraph 32 of the Request for Review as well as paragraph 35 of the Supporting Affidavit in support of the Request for Review.
57. The Board inquired from the Respondents whether the letter dated 4th April 2024 was a letter of notification of Intention to Award. The Procuring Entity's Head of Procurement, Dr. Lusuli, confirmed that the said letter was not a notification but a response to the Applicant's letter requesting for a clarification.
58. The Board sought to understand the Applicant's understanding on what the Tender Document required of it in respect of the ISO Certificate. Counsel for the Applicant, Mr. Rotich, responded that the Requirement under the tender was for submission of a valid verification in quality management system ISO 9001;2015 together with a verification link and letter from a certifying authority.

BOARD'S DECISION

59. The Board has considered all documents, 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 Applicant lacks locus standi to bring the instant Request for Review and thus the Board is divested the jurisdiction to hear and determine the same?***

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

II. ***Whether the Applicant's disqualification from the subject tender was in accordance with the Act, Regulations 2020 and the provisions in the Tender Document?***

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

Whether the Applicant lacks locus standi to bring the instant Request for Review and thus the Board is divested the jurisdiction to hear and determine the same?

60. Subsequent to the filing of the instant Request for Review, on 25th April 2024, the Interested Party filed a Notice of Preliminary Objection dated 24th April 2024 contending that the Applicant lacked the locus standi to bring the Request for Review for failing to plead loss as required under Section 167(1) of the Act.

61. On 29th April 2024, the Applicant filed a Reply to the Procuring Entity's Memorandum of Response and Interested Party's Notice arguing that the Applicant had the requisite locus standi to bring the Request for Review having participated in the subject tender as a tenderer.

62. During the hearing Counsel for the Interested Party, Ms. Nthenge, submitted that the Board lacks jurisdiction over the instant Request for Review since the Applicant had not pleaded loss or damages as per Section 167 of the Act. According to Counsel, the said Section only allows candidates and tenderers who have suffered or were at the risk of suffering loss or damage to invoke the jurisdiction of the Board.
63. She further contended that the Applicant lacked the locus standi to bring the instant Request for Review since despite the Applicant having submitted its tender in a Joint Venture, it did not at the time of filing provide any authority or Board Resolution showing that its Joint Venture Partner authorised the institution of the instant Request for Review.
64. On the flip side, Counsel for the Applicant, Mr. Rotich, argued that the Preliminary Objection by the Interested Party lacked merit citing that the Interested Party raised the ground of lack of authority through its Submissions when the same was not indicated in its Preliminary Objection. It was Counsel's contention that a Preliminary objection must be specifically pleaded to enable a party to respond to it.
65. He submitted that the Applicant's tender contained a Joint Venture Agreement where its Joint Venture Partner, Dhanush Healthcare Systems Private Limited that gave the Applicant authority to deal with matters arising from the tender including the filing of the Request for Review. Further, that the Applicant has the locus standi to bring the Request for Review having been a tenderer within the meaning of Section 2 of the Act.

66. Mr. Rotich made the argument, that the definition of the phrase “risks losses and damages” under Section 167(1) of the Act does not contemplate enumeration of financial risk of loss or damages but relates to arising loss including legitimate expectation of being awarded the tender which arises out of breach of duty by the Procuring Entity. It was his contention that the particulars of breach had been specified at paragraph 32 of the Request for Review. He argued that Section 128 of the Act grants the Board jurisdiction on all disputes relating to public tenders and thus the Interested Party’s Preliminary Objection was unmerited.
67. This Board acknowledges the established legal principle that courts and decision-making bodies can only preside over cases where they have jurisdiction and when a question on jurisdiction arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before doing anything concerning such a matter in respect of which it is raised.
68. 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.”***

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

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

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

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

71. 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....”

72. 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.”

73. 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.”***

74. In terms of timelines of invoking the Board’s jurisdiction Section 167(1) of the Act sets out parties who can invoke the Board’s jurisdiction in the following terms:

167. Request for a review

(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the

procurement process, or disposal process as in such manner as may be prescribed.

75. Superior Courts in this country have previously pronounced themselves on the issue of pleading loss and damage under Section 167(1) of the Act. The Court of Appeal in ***James Oyondi t/a Betoyo Contractors & another v Elroba Enterprises Limited & 8 others [2019] eKLR*** considered an appeal against a Decision of the High Court that had quashed a Decision by this Board as having been made without jurisdiction on account of absence of a plea of loss or damage or risk of loss or damage. In upholding the Decision of the High Court, the Court of Appeal decreed that an Applicant who fails to plead loss or risk of loss or damage is fatal in a Request for Review before the Board, lack the locus standi to bring the Request and the Board is divested the jurisdiction to hear the Request:

"...It is not in dispute that the appellants never pleaded nor attempted to show themselves as having suffered loss or damage or that they were likely to suffer any loss or damage as result of any breach of duty by KPA. This is a threshold requirement for anyone who would file a review before the Board in terms of section 167(1) of the PPADA;...

...It seems plain to us that in order to file a review application, a candidate or tenderer must at the very least claim to have suffered or to be at risk of suffering loss or damage. It is not every candidate or tenderer who has the right to file for administrative review...

...The Board ought to have ruled them to have no locus, and the learned judge was right to reverse it for failing to do so. We have no difficulty to do so..."

76. From the above decision, which is binding on this Board, we take the view that an Applicant seeking administrative review under Section 167 of the Act must at the very least plead that they have suffered loss or damage or risk suffering loss and damage out of breach of a statutory duty placed upon a Procuring Entity.

77. Guided by the above decision, the Board will now interrogate the Request for Review as filed by the Applicant to establish whether their suffering or risk of loss or damage was pleaded. During the hearing Counsel for the Applicant, Mr. Rotich , told the Board that this had been pleaded at paragraphs 31 and 32 of the Request for Review . The said Paragraphs are hereinafter reproduced:

31. As a result of the Respondent's breach of the tender requirements, the constitution as well as the PPAD Act and regulations therein, the Applicant has been denied legitimate expectation to fully participate in the tendering process and too secure an award of the tender.

32. Based on the foregoing provisions of law and the tender documents, the Applicant states that it is aggrieved by the 1st and 2nd Respondent's decision as particularized below:

a) That the reasons given for the disqualification of the Applicant's bid are illegal and draconian.

b) That the Respondent's actions do not conform to the requirements of the tender documents, the Constitution of

Kenya 2010 as well as the Public Procurement and Asset Disposal Act;

c) The disqualification does not promote competition and/or ensure that competitors are treated fairly;

d) The disqualification on the said grounds does not promote the integrity and fairness of those procedures;

e) The disqualification does not increase transparency and accountability;

f) The disqualification decreases public confidence in public procurement

78. Paragraph 35 of the Supporting Affidavit sworn on 11th April 2024 by Anthony Kibet Komen in support of the Request for Review provided as follows:

35. THAT the Applicant's bid is valid and responsive and if fully evaluated through technical and financial evaluation given that it is the lowest bidder, and if the award is made in accordance with the tender document and the law as well as the regulations, the Applicant would emerge the successful bidder.

79. The foregoing paragraphs of the Request for Review highlight that the Applicant's complaint that the alleged breach on the part of the Respondents denied it its legitimate expectation to secure the award in the subject tender. Notwithstanding the fact that the Applicant did not use the words "loss", "risk" and "damages" in its Request for Review, we find that it did actually plead loss in the form of its plea of being denied an opportunity by the Respondents to fully participate in the tender

process and to secure the award in the subject tender. The Applicant pleaded loss in accordance with the requirement under Section 167(1) of the Act.

80. Accordingly, this ground of the Interested Party's Preliminary Objection predicated on Section 167(1) of the Act fails.
81. Counsel for the Interested Party equally urged that the Applicant lacked locus standi to bring the instant Request for Review on the allegation that there was no board resolution from both the Applicant Company and its Joint Venture Partner, Dhanush Healthcare Systems authorizing the institution of the instant Request for Review.
82. The Board has independently studied the Applicant's tender and sighted at pages 11 to 24 of the tender, a Joint Venture Agreement dated 16th February 2024 between the Applicant herein and Dhanush Healthcare Systems Private Limited. The said Joint Venture Agreement appoints the Applicant herein as the Lead Partner and equally authorizes it to bring the instant Request for Review. The Board is therefore satisfied that the Applicant had the requisite authority to bring the instant Request for Review.
83. The Board therefore finds that the Applicant has the requisite locus standi to bring the instant Request for Review and thus the Board is not divested of the jurisdiction to hear and determine the same.

Whether the Applicant's disqualification from the subject tender was in accordance with the Act, Regulations 2020 and the provisions in the Tender Document?

84. The Applicant instituted the instant Request for Review challenging the process that led to its ultimate disqualification from the subject tender terming it illegal. Counsel for the Applicant, Mr. Rotich argued that according to the Letter of Notification of Intention to Award dated 2nd April 2024, the Applicant was disqualified for the alleged reason that it failed to sequentially serialize its tender. He indicated that this was an erroneous finding on the part of the Procuring Entity since the Applicant had in fact sequentially serialized its tender from pages 1 to 674.
85. Mr. Rotich contended that on 3rd April 2024, the Applicant sought a debrief by writing to the Accounting Officer, who happens to have responded via email on the same day citing that though the Applicant had serialized its tender, it introduced other documents bearing the Numbers 7AA, 7BB, 7CC and 7DD. It was the Applicant's case that the said documents were four (4) recommendation letters that the Procuring Entity had specifically asked for at page 26 of the Tender Document to be submitted as part of a tenderer's tender as well as separately. According to Counsel, at the Tender Opening the Procuring Entity labelled the Applicant's separately submitted recommendation letters 7AA, 7BB, 7CC and 7DD. Further that copies of the recommendation letter were also at pages 407, 433, 420 and 456 of the Applicant's tender.
86. Counsel submitted on that on 4th April 2024, the Procuring Entity sent out a subsequent letter changing the reason for the Applicant's disqualification to failure to include a letter from a certifying authority in addition to its ISO Certificate which contained a link.

87. On the flip side, the Respondents maintained that the Applicant's disqualification from the subject tender was in accordance with the law. Counsel for the Respondents, Ms. Kianji, argued that the Procuring Entity had undertaken evaluation process of the subject tender in accordance with the Constitution of Kenya, 2010 and the Act, and that the tender process was fair, transparent and competitive. She contended that the Applicant failed to comply with a mandatory tender requirement to submit a letter from the certifying authority in respect of its ISO Certificate.
88. The Procuring Entity's Head of Procurement, Dr. Lusuli equally reiterated the sentiments of Ms. Kianji and argued the Procuring Entity's letter of 4th April 2024 correcting the errors in the previous letter of 2nd April 2024 was proper. He attributed the error to a mistake that took place when the letter of 2nd April 2024 had been forwarded to the typing pool at the Procuring Entity. Dr. Lusuli maintained that the evaluation score sheets, evaluation report, Professional Opinion were all aligned.
89. The Interested Party did not make any submissions on the merits of the Request for Review.
90. The Board is therefore at this stage invited to interrogate the Procuring Entity's Evaluation Committee's evaluation process that culminated in the disqualification of the Applicant's tender .
91. 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."

92. 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."

93. 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.*

94. The 1st Respondent sent to the Applicant, a letter of Notification of Award dated 2nd April 2024 in accordance with Section 87 of the Act. The contents of the said letter are hereinafter reproduced:

Ref. No. NuPEA/OT/DICT/004/23-24

2nd April 2024

Agile Business Solutions Limited

P.O. Box (Details withheld)

Nairobi

Tel: (Details withheld)

Email: (Details withheld)

RE: NuPEA/OT/DICT/004/23-24 FOR SUPPLY, DELIVERY, INSTALLATION, TESTING, TRAINING, COMMISSIONING AND SUPPORT SERVICES FOR ENTERPRISE RESOURCE PLANNING (ERP) SYSTEM

We refer to your bid for Supply, Delivery, Installation, Testing, Commissioning and Support Services for Enterprise Resource Planning (ERP) System and wish to inform you that following evaluation, your bid was unsuccessful because your firm did not meet all the mandatory requirements as follows:

The bid document was not serially paginated

The successful bidder is M/S Green Com Enterprise Solutions Limited at a price of Kshs. 98,583,001.00

We thank you for the interest shown in participating in this tender and wish you well in all your future endeavors.

Signed

CS Justus A. Wabuyabo, LL.M (UoN)

CHIEF EXECUTIVE OFFICER

95. From the above letter, the reason for the Applicant's disqualification is communicated as a failure to sequentially serialise its tender.
96. Upon receipt of the Letter of Notification of Award dated 2nd April 2024, on 3rd April 2024 the Applicant wrote a letter of even date to the Procuring Entity:

Ref No: NuPEA/OT/DICT/004/23-24

3^d April 2024

To the Chief Executive Officer

Nuclear Power and Energy Agency

Kawi Complex, Off Red Cross

P.O. Box 26374-00100

NAIROBI

Dear Sir/Madam,

***RE: REQUEST FOR A DEBRIEF; TENDER NO.
NuPEA/OT/DICT/0004/23-24***

Reference is made to your Notification of Intention to Award letter for the above-referenced tender, dated 2nd April 2024.

Subsequent to the notification of award, it has been brought to our attention that the tender submission by Agile Business Solutions Limited was disqualified on grounds of deficient serial pagination in our bid document.

In light of this, we kindly request further clarification regarding the specific nature of the discrepancy. We would appreciate it if you could provide detailed information on how the lack of serial pagination was determined to be the case,

including the number of pages that were found to be non-serially paginated.

Thank you for your attention to this matter.

Sincerely

Signed

Peter Macharia

Bids and Tender Executive

97. From the above, the Applicant was seeking clarity from the Procuring Entity on the specifics of its alleged failure to serialize its tender.

98. The Procuring Entity responded to the Applicant's letter by way of email on the same day, 3rd April 2024 at 1:03 p.m.:

From: NUPEA CEO CEO@nuclear.co.ke

Sent: Wednesday, 3 April 2024 13:02

To: Peter Macharia Gichimu

Cc Antony Lusuli, Alexander Kyalo, Sales Team; info@ppra.go.ke

Subject: REQUESTT FOR A DEBRIEF TENDER NO. NuPEA/OT/DICT/004/23-24

R: ERP Tender:

The above subject matter refers;

I am writing in response to your letter of 3/4/2024 following the ward of the above tender. Please note the following.

1. The Public Procurement and Asset Disposal Act 2015 section 74(i) requires an invitation to bid (tender) shall meet among

others a requirement of serialization of pages by the bidder for each bid submitted.

2.To give effect to the above legal requirement, while preparing the tender document under the mandatory requirement no.1 bidders were required to ensure that All pages of the bidder's document (including attachments) MUST be serially paginated (i.e. 1,2,3...)

Your firm did not write to the Agency to inquire how the pagination was to be done hence the assumption the instructions were clear.

3.The tender document you submitted was serially paginated from page 1 to 674 which was the bid that was evaluated.

However, you introduced other documents paginated separately from the bid document as 7aa, 7bb, 7cc and 7dd contrary to instructions as 1,2,3 etc. Moreover, the documents do not bear any rubber stamp to be identified with the firm that submitted them. The documents were contained in a separate envelope.

In the table of contents in the bid document, there is no pagination 7aa, 7bb, 7cc and 7dd. In view of the above, your bid failed at mandatory stage having failed to comply with pagination. Attached are the documents being referred to.

99. Subsequently, on 4th April 2024, the 1st Respondent did a follow up letter to the Applicant:

Ref. No.NuPEA/OT/DICT/004/23-24

04th April 2024

Agile Business Solutions Limited

P.O. Box (Details withheld)

Tel: (Details withheld)

Email: (Details withheld)

RE: DEBRIEFING TENDER NO. NuPEA/OT/DICT/004/23-24

Reference is made to your letter dated 03rd April 2024 on the above subject matter.

This is to clarify that your bid was evaluated in line with the evaluation criteria alongside all documents presented in the tender document. The results indicated that you provided the ISO certification together with the link but did not provide a letter from the certifying authority as per the mandatory evaluation criterion number twenty (20).

During preparation of award letters, an error was made whereby you were informed that your document was not serialized. In view of the above, your firm did not meet all the mandatory requirements to be considered for further evaluation.

On the same note the Agency is inviting you for debriefing as requested in your letter where all necessary documents will be availed for your perusal. The Agency regrets for any inconvenience caused by the earlier communication.

Signed

CS Justus A. Wabuyabo, LLM (UoN)

CHIEF EXECUTIVE OFFICER

100. From the 1st Respondent's letter above, the Procuring Entity appears to be changing the reason for the Applicant's disqualification from a question of serialization to failing to submit a letter from a certifying

authority in respect of its ISO Certificate. Curiously, however, the Procuring Entity's letter of 4th April 2024 neither withdraws nor cancels its earlier letter of 2nd April 2024 to the Applicant. During the clarification session, the Procuring Entity's Head of Procurement, Dr. Lusuli equally told the Board that the letter of 4th April 2024 was not a letter of notification of Intention to Award.

101. Absent any withdrawal or cancellation of the Procuring Entity's letter of Intention to Award dated 2nd April 2024 issued pursuant to section 87 of the Act and regulation 82 of the regulations, 2020, it remains on record that the Applicant was disqualified from the subject tender on account of failing to sequentially serialize its tender document. The Board shall therefore interrogate whether the Applicant was properly disqualified on this account.

102. Section 74(1)(i) of the Act places an obligation on the part of the Accounting Officer of a Procuring Entity to ensure that in the preparation of an invitation to tender, there is requirement for the pages of a tender to be serialized before submission. The section reads

"74. Invitation to tender

(1) The accounting officer shall ensure the preparation of an invitation to tender that sets out the following—

(a) ...

(b) ...

(c) ...

(d) ...

(e) ...

(f) ...

(g) ...

(h) ...

(i) requirement of serialisation of pages by the bidder for each bid submitted

103. Further, Regulation 74(1)(b) of the Regulations requires the Evaluation Committee as part of the Preliminary Evaluation to verify that the pages of the received tenders have been serialized:

"74. Preliminary evaluation of open tender

(1) Pursuant to section 80 of the Act and upon opening of tenders, the evaluation committee shall first conduct a preliminary evaluation to determine whether—

(a) ...

(b) the tender has been submitted in the required format and serialized in accordance with section 74(1)(i) of the Act;

(c) ...

(d) ...

104. Additionally, there exists a body of case law affirming the importance of serialization of tenders as part of yardsticks against which tenders should be evaluated. In ***Nairobi High Court Judicial Review Application No. 312 of 2018; R v Public Procurement Administrative Review Board & Anor Ex parte Fourway Construction Company Limited*** the High Court was explicit in its Judgment that failure to serialize a tender could not be termed a minor deviation under Section 79 of the Act:

"49. The requirement of serialization was in the present case indicated to be a mandatory requirement in the 1st Interested

Party's tender document, and it was indicated in tender document that a firm lacking in any of the requirements would be dropped at the preliminary stage and would not progress to the Technical evaluation stage. It is also a mandatory requirement under section 74 of the Act, and failure to serialise every page cannot therefore be interpreted as a minor deviation from the requirements set out in the tender documents, and cannot fall within the exceptions provided for in section 79. It is also evident that the discretion given by section 79 to waive a requirement that has not been conformed with only applies where that conformity can be corrected without causing prejudice to the other bidders, or is quantifiable, which is not the case with the requirement of serialization of every page because of the objective of the requirement and attendant risks of non-conformity that have been explained in the foregoing."

105. In yet another case, the High Court in ***Nairobi High Court Judicial Review Miscellaneous Civil Application No. 19 of 2020; Republic v Public Procurement Administrative Review Board & Anor Ex parte The Accounting Officer Kenya Ports Authority & Anor*** was explicit that serialization of tenders is a mandatory requirement in all tenders whether or not this is indicated as a requirement in the Tender Document since it is a statutory requirement under Section 74 of the Act:

"49. In light of the foregoing, it becomes apparent to this court that the aspect of serialisation of each and every page of a bid document aims to promote fairness, equal treatment, good governance, transparency, accountability and to do

away with discrimination. Failure to conform to this mandatory requirement, and/or exempt or give an opportunity to those who had not earlier on conformed to this mandatory requirement translates to unequal and unfair treatment of other tenderers and it shall also encourage abuse of power and disregard of the law by not only bidders but also procuring entities.

50. I therefore find that despite the fact that serialisation was not a mandatory requirement in the ex-parte applicants tender document, it is a mandatory requirement under section 74 of the PPAD Act of 2015 and all bidders ought to have fully complied.

52. That failure to serialise each and every page of a tender document cannot translate to a minor deviation from the laid down principles set down in law as explained hereinabove. It is my finding that the decision by the respondent directing the ex-parte applicants' to re-admit non-responsive bids is in contravention with the provisions of sections 74 and 79 of the PPAD Act of 2015 and thus ultra vires."

106. From the above decisions, it is apparent that (i) serialization is a mandatory requirement under Section 74 of the Act; (ii) All tenders submitted in response to a tender invitation should be serialized whether or not the tender document provides for serialization; (iii) Failure to serialize a tender cannot be termed a minor deviation under Section 79 of the Act; and (iv) Failure to enforce the mandatory requirement of serialization translates to unequal treatment and encourages abuse of power.

107. In the present Request for Review, it is not in dispute that the Applicant submitted a sequentially paginated 674-page tender. The Board has equally independently verified that the Applicant's tender was sequentially serialized. The Procuring Entity's letter of 4th April 2024 equally confirms this by asking the Applicant to ignore the earlier communication on serialization.
108. Surprisingly, Page 38 of the Evaluation Report in the Confidential File submitted to the Board under Section 67 of the Act contains an entry to the effect that the Applicant's tender was not serially paginated. This is an obvious error on the part of the Evaluation Committee as the Board has confirmed from the Applicant's original tender that the same was serially paginated.
109. The Applicant having submitted a chronologically serialized tender could not therefore properly be disqualified on account of failing to chronologically serialise its tender as noted in the Procuring Entity's Letter of Notification of Award dated 2nd April 2024 and which notification was neither withdrawn nor cancelled.
110. During the Board's independent perusal of the Documents in the Confidential File it noted some discrepancies on the disqualification of the Applicant:
- i. Page 38 of the Evaluation Report dated 22nd March 2024 records that the Applicant was non-responsive on account of failing to serially paginate its tender.
 - ii. Page 9 of the Professional Opinion dated 25th March 2024 records the Applicant was non-responsive on account of failing to provide a

verification link and letter from certifying authority in respect of its submitted ISO 9001;2015 Certificate

111. The above observation raises questions as to the integrity of the evaluation process in the subject tender. Article 227 of the Constitution of Kenya 2010 espouses that public procurement processes should be fair, equitable, transparent, competitive and cost effective. However, questions around fairness and transparency emerge when the Head of Procurement and Evaluation Committee of the same Procuring Entity report different reasons for the disqualification of a specific tenderer.
112. However, this is not to suggest that the Head of Procurement cannot in his professional opinion take a different position on the manner in which the evaluation process has been done. Where such a situation is obtaining the Head of Procurement should recommend to the Accounting Officer to direct the Evaluation Committee to relook in to the areas of reservation as identified in the Professional Opinion. This was not done.
113. It was therefore absurd in the circumstance for the Evaluation Report and Professional Opinion to cite separate and distinct reasons for the Applicant's disqualification. Accordingly, it will befitting to remind Accounting Officers of Procuring Entities that they bear the primary responsibility of ensuring that the constitutional principles under Article 227(1) of the Constitution of Kenya 2010 are upheld by their Procuring Entity. Further, that these principles should reflect in the decision-making processes by all officers in the said Procuring Entities.

114. The Board therefore finds that the Applicant's disqualification from the subject tender was not in accordance with the Constitution, the Act, Regulations 2020 and the provisions in the Tender Document.
115. Section 8 of the Act establishes the Public Procurement Regulatory Authority (hereinafter referred to as "Authority") whose functions are laid out in Section 9 of the Act and include, inter alia, to monitor and assess or investigate and act on complaints received on procurement and asset disposal proceedings. Pursuant to Section 35 of the Act, the Authority has the power to investigate and examine records of a procuring entity relating to procurement or disposal proceedings for the purposes of determining whether there has been a breach of the Act. Such investigation may be initiated by the Authority or on request in writing by a public institution or any other person.
116. We find the instance case to be a classic example of a procuring entity that requires the intervention of the Authority in exercising its mandate under Section 9 1(a) and 34 of the Act and deem it fit and just to, through the Acting Board Secretary, share this decision with the Director General of the Authority to monitor and ensure that the procurement and evaluation processes of Tender No. NuPEA/OT/DICT/004/23-24 for Supply, Delivery, Customisation, Installation, Testing, Training, Commissioning and Support Services for Enterprise Resource Planning (ERP) System by the Procuring Entity herein respects the national values and other provisions of the Constitution, including Article 227 thereof and provisions of the Act Regulations 2020 and the tender document.

What orders the Board should grant in the circumstances?

117. The Board has found that the Applicant has the requisite locus standi to bring the instant Request for Review and thus the Board is not divested the jurisdiction to hear and determine the same.
118. The Board has equally found that the Applicant's disqualification from the subject tender was not in accordance with the Constitution, Act, Regulations 2020 or provisions in the Tender Document.
119. The upshot of our finding is that the Request for Review dated 11th April 2024 in respect of Tender No. NuPEA/OT/DICT/004/23-24 for Supply, Delivery, Installation, Testing, Training, Commissioning and Support Services for Enterprise Resource Planning (ERP) System succeeds in the following specific terms:

FINAL ORDERS

120. 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 11th April 2024:

- 1. The Interested Party's Notice of Preliminary Objection dated 24th April 2024 be and is hereby dismissed.**

- 2. The Applicant's tender submitted in response to the invitation to tender in Tender No NuPEA/OT/DICT/004/23-24 for Supply, Delivery, Installation, Testing, Training, Commissioning and Support Services for Enterprise**

Resource Planning (ERP) System be and is hereby re-admitted for fresh evaluation.

3. The letter of Notification of Intention to Award dated 2nd April 2024 issued by the Respondent to the Interested Party with respect to Tender No. NuPEA/OT/DICT/004/23-24 for Supply, Delivery, Customisation, Installation, Testing, Training, Commissioning and Support Services for Enterprise Resource Planning (ERP) System be and is hereby nullified and set aside.

4. The letters of Notification of Intention to Award dated 2nd April 2024 issued by the Respondent to the Applicant with respect to Tender No. NuPEA/OT/DICT/004/23-24 for Supply, Delivery, Customisation, Installation, Testing, Training, Commissioning and Support Services for Enterprise Resource Planning (ERP) System be and is hereby nullified and set aside.

5. The 1st Respondent be and is hereby directed to reconvene the Evaluation Committee for purposes of re-evaluating the Applicant's tender that was submitted in response to the invitation to tender in Tender No. NuPEA/OT/DICT/004/23-24 for Supply, Delivery, Installation, Testing, Training, Commissioning and Support Services for Enterprise Resource Planning (ERP) System, having consideration to the Constitution, the Act,

Regulations 2020, the tender document and the Board's finding in this Decision.

- 6. The Interested party's tender submitted in response to the invitation to tender in Tender No NuPEA/OT/DICT/004/23-24 for Supply, Delivery, Installation, Testing, Training, Commissioning and Support Services for Enterprise Resource Planning (ERP) System be and is hereby re-admitted for evaluation at technical evaluation stage in keeping with this Boards Decision and orders made in Request for Review No.34 of 2024.**

- 7. Further to Order 6 above, the Respondent is hereby ordered to ensure that the procurement process with respect to Tender No. NuPEA/OT/DICT/004/23-24 for Supply, Delivery, Customisation, Installation, Testing, Training, Commissioning and Support Services for Enterprise Resource Planning (ERP) System proceeds to its lawful and logical conclusion within 30 days from the date of this decision.**

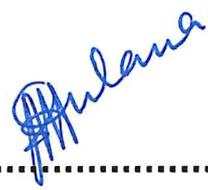
- 8. A copy of this decision be served upon the Director General of the Public Procurement Regulatory Authority forthwith to monitor the evaluation processes of this tender to ensure compliance with the orders issued herein and the 1st Respondent is ordered to furnish a report on the evaluation of this tender upon the Director General of the Public**

Procurement Regulatory Authority herein within fourteen (14) days from the date of this decision.

9. Each party shall bear its own costs in the Request for Review.

Dated at NAIROBI, this 6th Day of April 2024.


.....
CHAIRPERSON
PPARB


.....
SECRETARY
PPARB



