

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 34/2024 OF 16TH APRIL 2024

BETWEEN

IANSOFT TECHNOLOGIES LIMITED APPLICANT

AND

ACCOUNTING OFFICER,

NUCLEAR POWER AND ENERGY AGENCY (NUPEA) RESPONDENT

GREEN COM ENTERPRISE SOLUTIONS LIMITED INTERESTED PARTY

Review against the decision of the Accounting Officer, Nuclear Power and Energy Agency in relation 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.

BOARD MEMBERS PRESENT

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



IN ATTENDANCE

1. Ms. Sarah Ayoo - Holding Brief for Acting Board Secretary
2. Ms. Evelyn Weru - Secretariat

PRESENT BY INVITATION

APPLICANT

IANSOFT TECHNOLOGIES LIMITED

Ms. Andrew Muge

- Advocate, Muge Law Advocates

RESPONDENTS

ACCOUNTING OFFICER, NUCLEAR POWER AND ENERGY AGENCY

1. Dr. Antony Lusuli (PhD) Manager Supply Chain, Nuclear Power and Energy Agency
2. Mr. Alex Kyalo Supply Chain Department Nuclear Power and Energy Agency
3. Ms. Cynthia Akeyo Nuclear Power and Energy Agency

INTERESTED PARTY

GREEN COM ENTERPRISE SOLUTIONS LIMITED

Ms. Nthenge

Advocate, Kimitei, Nthenge & Co. Advocates

BACKGROUND OF THE DECISION

The Tendering Process

1. The Nuclear Power and Energy Agency, the Procuring Entity herein invited qualified and interested tenderers to submit sealed tenders in response 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. (hereinafter referred to as the "subject tender"). Tendering was conducted under open competitive method and the invitation was by way of an advertisement on 30th January 2024 on My Gov publication, the Procuring Entity's website www.nuclear.co.ke and on the Public Procurement Information Portal (PIIP) website www.tenders.go.ke where the blank tender document for the subject tender issued to tenderers (hereinafter referred to as the 'Tender Document') was available for download. The tender's submission deadline was scheduled on 22nd February 2024 at 10.00 a.m.

Submission of Tenders and Tender Opening

2. According to the Minutes of the subject tender's opening held on 22nd February 2024 signed by members of the Tender Opening Committee on 22nd February 2024 (hereinafter referred to as the 'Tender Opening Minutes') and which Tender Opening Minutes were part of confidential documents furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') by the Respondent

pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), a total of fifteen (15) tenders were submitted in response to the subject tender. The fifteen (15) tenders were opened in the presence of tenderers' representatives present at the tender opening session, and were recorded as follows:

Bidder No.	Name
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.	Agile Business Solutions Limited & Dhanush Health Care Systems Private Limited- Joint Venture
8.	Seamless Limited & Finsprint Limited- Joint Venture
9.	Techbiz Infotech Limited
10.	Smartpeople Africa Limited

11.	Sky World Limited
12.	Attain Enterprise Solutions Limited
13.	Panache Technohub Limited
14.	University of Nairobi Enterprises and Services Limited & Surestep Systems and Solutions Limited- Joint Venture
15.	Green Com Enterprise Solutions Limited

Evaluation of Tenders

3. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the Respondent undertook evaluation of the fifteen (15) tenders as captured in an Evaluation Report for the subject tender signed by members of the Evaluation Committee on 22nd March 2024 (hereinafter referred to as the "Evaluation Report") in the following stages:

- i Mandatory Evaluation;
- ii Technical Evaluation; and
- iii Financial Evaluation

Mandatory Evaluation

4. The Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Mandatory Requirements of Section III- Evaluation and Qualification Criteria at page 25 to 26 of the Tender Document. Tenderers were required to

meet all the mandatory requirements at this stage to proceed to the next stage of evaluation.

5. At the end of evaluation at this stage twelve (12) tenders were determined non-responsive, including the Applicant's tender, while three (3) tenders were determined responsive and proceeded for evaluation at the Technical Evaluation stage.

Technical Evaluation

6. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Section III – Evaluation and Qualification Criteria at page 27 to 53 of the Tender Document.
7. Evaluation at this stage was carried out in three (3) stages being (a) Technical Requirements – System Functionality at page 27 to 28 of the Tender Document where tenderers were required to have met all the Technical Requirements to proceed for further evaluation; (b) Technical Capacity Evaluation stage at page 28 to 53 of the Tender Document where tenderers were required to meet the various requirements to progress for further evaluation; and (c) the System Demo Evaluation stage at page 53 of the Tender Document where evaluation was to be on a Yes/No basis and tenderers who failed to meet any of the outlined criterion at this stage would be disqualified from further evaluation.

8. At the end of evaluation at this stage, the two (2) tenders were determined non-responsive while one (1) tender, being the Interested Party's tender was determined responsive and proceeded to the Financial Evaluation stage.

Financial Evaluation

9. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Financial Evaluation of Section III- Evaluation and Qualification Criteria at page 53 to 54 of the Tender Document.
10. Following the conclusion of evaluation at this stage, the Evaluation Committee found that the Interested Party, Green Com Enterprise Solutions Limited, had met the financial requirements and was recommended for award of the subject tender.

Evaluation Committee's Recommendation

11. The Evaluation Committee recommended award of the subject tender to the Interested Party, Green Com Enterprise Solutions Limited, being at a total cost of Kenya Shillings Ninety-Eight Million Five Hundred and Eighty-Three Thousand and One only (Kshs. 98,583,001.00).

Professional Opinion

12. In a Professional Opinion, dated 25th March 2024 (hereinafter referred to as the "Professional Opinion"), the Manager, Supply Chain, Dr. Antony Lusuli (PhD), reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender to the Interested Party herein, Green Com Enterprise Solutions Limited, being at a total cost of Kenya Shillings Ninety-Eight Million Five Hundred and Eighty-Three Thousand and One only (Kshs. 98,583,001.00).

13. He recommended for the Procuring Entity to enter into (a) a six (6) month contract with the Interested Party for delivery of the Enterprise Resource Planning with clear deliverables at each stage as the basis for payment and (b) a service level agreement after commissioning of the project for Maintenance.

14. Thereafter, the Professional Opinion was approved by the Procuring Entity's Chief Executive Officer, CS Justus A. Wabuyabo, LL.M (UoN), the Respondent herein, on 2nd April 2024.

Notification to Tenderers

15. Tenderers were notified of the outcome of evaluation of the subject tender vide letters dated 2nd April 2024.

REQUEST FOR REVIEW NO. 34 OF 2024

16. On 16th April 2024, Iansoft Technologies Limited, the Applicant herein filed a Request for Review dated 15th April 2024 together with a Supporting Affidavit sworn on 15th April 2024 by Solomon Kimutai, its Director (hereinafter referred to as the 'instant Request for Review') through Muge Law Advocates seeking the following orders from the Board:

a) The Decision of the Respondent contained in its letter of regret dated 2nd April 2024 notifying the Applicant that its bid in regard 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 was unsuccessful be and is hereby set aside and/or nullified;

b) The Decision of the Respondent contained in its letter dated 4th April 2024 rewriting the regret letter dated 2nd April 2024 in regard 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 be and is hereby set aside and/or nullified;

- c) The Award issued by the Respondent to the Interested Party, GREEN COM ENTERPRISE SOLUTIONS LIMITED, in regard 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 be and is hereby set aside, vacated, and/or nullified;***
- d) The Applicant's tender be re-evaluated from the Preliminary/Mandatory stage;***
- e) The Evaluation Committee be reconstituted with members that are heads of department and that have requisite technical expertise;***
- f) In the alternative to a) to d) above, the entire evaluation process be and is hereby cancelled and/or terminated and thereafter restarted with a newly constituted Evaluation Committee;***
- g) Such other orders and reliefs as the Review Board may deem fit and just to grant; and***
- h) The costs of this review be awarded to the Applicant.***

17. In a Notification of Appeal and a letter dated 16th April 2024, Mr. James Kilaka, the Acting Board Secretary of the Board notified the Respondent of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondents 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 16th April 2024.
18. On 22nd April 2024, the Respondent filed a Memorandum of Response to the Request for Review dated 22nd April 2024 signed by the Chief Executive Officer, CS Justus A. Wabuyabo, LL.M (UoN), the Respondent herein, a List and Bundle of Documents together with confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.
19. *Vide* email 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 three (3) days.

20. On 25th April 2024, the Interested Party filed through Kimitei Nthenge & Co. Advocates a Notice of Appointment dated 24th April 2024, a Notice of Preliminary Objection dated 24th April 2024 together with Written Submissions dated 24th April 2024.
21. On 29th April 2024, the Applicant filed through its advocates a Supplementary Affidavit sworn on 26th April 2024 by Solomon Kimutai, its Director together with Written Submissions dated 29th April 2024.
22. *Vide* a Hearing Notice dated 29th April 2024, the Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the instant Request for Review slated for 2nd May 2024 at 11.00 a.m., through the link availed in the said Hearing Notice.
23. At the hearing of the instant Request for Review on 2nd May 2024, the Board read out the pleadings filed by parties in the matter and directed that the hearing of the preliminary objection by the Interested Party would be heard as part of the substantive instant Request for Review. This was in accordance with Regulation 209(4) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020') which also allows the Board to deliver one decision having considered the preliminary objections as part of the substantive instant Request for Review.

24.Mr. Muge took issue with the capacity of Dr. Lusuli to represent the Respondent in the instant Request for Review citing that a party can only represent itself or appoint counsel to represent it in the proceedings pursuant to the provisions of the Advocates Act. The Board directed Mr. Muge to make his submission on the issue while highlighting the Applicant's case for parties to respond on the same.

25.The Board further allocated time for parties to highlight their respective cases and the instant Request for Review proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

Interested Party's submissions on its Notice of Preliminary Objection.

26.In her submissions, Ms. Nthenge relied on the Interested Party's Notice of Preliminary Objection dated 24th April 2024 together with Written Submissions dated 24th April 2024 and accompanying authorities filed before the Board.

27.Counsel submitted that the Board lacks jurisdiction to hear and determine the instant Request for Review as filed since the Applicant failed to plead loss and damages as required under Section 167(1) of the Act which is set in mandatory terms and requires a party lodging a review before the Board to specifically plead loss and damages. She pointed out that the assertion by the Applicant at paragraph 12 of its

Request for Review was that it suffered prejudice and argued that the term prejudice is a general term, cannot be construed to mean loss and damages and would be sending the Board on a fishing expedition to construct terms for the Applicant.

28. Counsel submitted that the Board has been consistent in dismissing request for review applications where the Applicant does not plead loss and damage and referred the Board to the holding in *PPARB Application No. 8 of 2023 Toddy Civil Engineering Company Limited v Chief Executive Officer, Lake Victoria North Water Works Development Agency & Another* (hereinafter referred to as "the Toddy case") and as such, the Applicant lacks the standing before the Board to seek an administrative review by the Board for failure to claim or plead that it has suffered or risks suffering loss or damage due to breach of duty imposed on the Procuring Entity by the Act and Regulations 2020.

29. Ms. Nthenge submitted that the Board lacks jurisdiction to hear and determine the instant Request for Review since the information relied upon by the Applicant was obtained contrary to the provisions of Section 65(1) of the Act. She further submitted that the Applicant colluded with the employee of the Respondent and solicited for information as seen in the instant Request for Review. She referred the Board to paragraph 25 of the Applicant's Supporting Affidavit where the Applicant made reference to the Interested Party's Certification in Quality Managing (ISO) 9001:2015) Certificate registered on 21st February 2024 and questioned how the Applicant

came to know of the same considering that it was a confidential document in the Interested Party's bid document and in the custody of the Procuring Entity.

30. Ms. Nthenge further took issue with the disclosure made by the Applicant of members of the Evaluation Committee referring to paragraph 32 of the Applicant's Supporting Affidavit where it deponed that *Mr. Chesire the personal Assistant to the CEO was a member of the evaluation committee despite being unqualified to be such a member* and argued that this illustrates elements of collusion between the Applicant and the Respondent's employee since this was confidential and protected information.

31. Counsel submitted that in view of Section 65(1) & (2) of the Act, the Applicant was constructively disqualified by operation of law and lacks the *locus standi* to come before the Board.

32. On the last ground of the preliminary objection relied on, Ms. Nthenge submitted that the Board lacks jurisdiction to hear and determine the instant Request for Review since the information relied on by the Applicant was obtained contrary to Section 67(1)(c) of the Act which makes it an offence for a procuring entity, employee or agent to disclose information relating to the evaluation, comparison or clarification of tenders, proposals or quotations. Counsel further submitted that given the illegalities under which the Applicant obtained information relating to composition of the Evaluation Committee,

information relating to evaluation of tenders and information relating to the details of the Interested Party's tender, it was clear that the Applicant breached the provisions of Section 65 of the Act.

33. Ms. Nthenge while referring to the holding by the Court of Appeal decision in the case of *The Owners of Motor Vessel "Lilian S" v Caltex Oil Kenya Limited [1989] eKLR; Mombasa Court of Appeal Civil Appeal No. 50 of 1989* invited the Board to note that courts and decision making bodies should only act in cases where they have jurisdiction and where it finds that it has no jurisdiction, it ought to down its tools in respect of the matter before it.

34. She urged the Board to strike out the instant Request for Review with costs.

Applicant's Submissions on the Interested Party's Notice of Preliminary Objection and substantive issues in the Request for Review

35. In his submissions, counsel for the Applicant, Mr. Muge, relied on the Request for Review dated 15th April 2024 together with a Supporting Affidavit sworn on 15th April 2024 by Solomon Kimutai, Supplementary Affidavit sworn on 26th April 2024 by Solomon Kimutai, together with Written Submissions dated 29th April 2024 filed before the Board.

36. With regard to the Interested Party's Preliminary Objection, Mr. Muge submitted that the same was frivolous and incompetent as it did not

raise pure points of law as espoused in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696* and in *Oraro v Mbaja (2005) 1 KLR 141*. He urged the Board to dismiss the Interested Party's Notice of Preliminary Objection since it was littered with scandalous unproven claims, cast wild aspersions and was in regard to disputed facts that require to be proven by way of evidence.

37. On the first ground of the Interested Party's Notice of Preliminary Objection claiming that the Applicant failed to plead loss and damages in the instant Request for Review, Counsel submitted that the Applicant in its Request for Review, Supporting Affidavit, and Supplementary Affidavit exhaustively pleaded that the impugned actions of the Respondent were contrary to the provisions of the Act, Regulations 2020, the Constitution, and caused substantial harm for which the Applicant pleaded that it clearly suffered prejudice since the Respondent's unlawful impugned actions and decision were extremely prejudicial to it causing rejection of its bid for no valid reason contrary to its interests and rights.

38. Mr. Muge submitted that the words loss and damage cannot be given a narrow construction and that loss does not mean financial loss and damage does not mean that the Applicant has to list a bevy of damages. He referred the Board to the holding by the High Court in *Kamau Murango v Attorney General & another; Cabinet Secretary Ministry of Water, Sanitation and Irrigation (Interested Party) (2022)* where the word prejudice was defined to mean damage and detriment.

He further referred to the Oxford English Dictionary which defines prejudice as '*to affect injuriously or unfavorably by doing some acts to injure or impair*' and pointed to paragraphs 11 and 20 of the Request for Review, paragraphs 12 and 21 of the Supporting Affidavit and paragraphs 5, 8, 11, 15 and 18 of the Supplementary Affidavit where the Applicant pleaded that it has suffered prejudice and that the actions of the Respondent are extremely prejudicial and caused it harm.

39. On the allegation of collusion by the Applicant with the Respondent's employees, counsel submitted that the Applicant's Director went for a debriefing meeting held on 4th April 2024 where he met all the persons listed when he walked in to the Respondent's offices and was introduced to the whole of the Evaluation Committee team including Mr. Chesire, who was introduced as the Personal Assistant to the Respondent.

40. Counsel further submitted that the information pertaining the Interested Party's ISO details was public knowledge and by conducting an online search on <https://www.iafcertsearch.org/> which provided the Certificate annexed as "SK-7" and further provided the verification body known as Indraprastha Systemcert Pvt in India with a verification link found at <https://www.isplcert.com/clients.php> which provided a Certificate of 21st February 2024 marked as annexure SK-8 in the Applicant's Supplementary Affidavit.

41. On the substantive issues in the Request for Review, Mr. Muge submitted that the Applicant's bid was rejected for no reason and that the letter of notification of intention to award the subject tender dated 2nd April 2024 did not meet the threshold required under Section 87 (3) of the Act read with Regulation 82 of Regulations 2020, the provisions of the Tender Document under ITT 48 or Article 47 and 227 of the Constitution.

42. Mr. Muge further submitted that the Respondent was required to provide the name of the winning bidder, the contract price, the reasons for rejection of the Applicant's bid, the standstill period and information on seeking a debriefing or filing a complaint as provided under ITT 48 of the Tender Document. Counsel pointed out that the reason for rejection of its bid in the letter dated 2nd April 2024 was that it did not provide item nine under the Mandatory Evaluation Requirements since it provided a copy of a valid certification in quality management systems (ISO 9001:2015) but did not provide verification link and letter from the certifying authority. He argued that the alleged documents had been provided and that the notification letter had no basis in law as it failed to provide (a) valid reasons for the disqualification of the Applicant's bid, (b) the address of the winning bidder, (c) the expiry date of the standstill period and (d) instructions on how to request a debriefing or submit a complaint during the standstill period. He invited the Board to look at pages 67, 68, and 202 of the Applicant's Tender Document.

43. Mr. Muge submitted that the Applicant sought a debriefing meeting and in response, Mr. Lusuli wrote an email to the Applicant purporting to walk back the Respondent's reasons earlier provided for rejection of its bid and attached excerpts of the Evaluation Report showing that all members of the Evaluation Committee claimed that the Applicant did not provide Litigation History but also showing that it complied with all the requirements including an ISO 9001:2015 with provided certificate, letter from certifying authority and verification link.
44. Counsel further submitted that subsequent to the email by Mr. Lusuli, the Respondent sent a letter dated 4th April 2024 explaining their mistake and affirming the errors in the letter dated 2nd April 2024 and providing the subsequent reason for disqualification of the Applicant's bid. Counsel argued that this second letter cannot be termed as a valid notification of intention to award contract in line with Section 87(3) of the Act and was but a mere clarification and correction of errors. He pressed on that this second letter failed to provide valid reasons for disqualification of the Applicant's bid, introduced a criteria foreign to the Tender Document, did not disclose the name and address of the winning bidder nor provide the expiry date of the Standstill Period.
45. It is the Applicant's case that the Tender Document did not provide signing and stamping of the Litigation History Report as a mandatory requirement and invited to take note of the fact that the Applicant had filled, signed and stamped its litigation history and also signed and stamped all pages of its bid document.

46. Counsel argued that the Respondent could only have withdrawn the first letter dated 2nd April 2024 and issued a compliant letter noting that according to Section 87(3) of the Act read with Regulation 82 of Regulations 2020, the notification to the unsuccessful bidder under Section 87(3) of the Act ought to be made at the same time the successful bidder is notified.

47. In support of his arguments, counsel referred to, *Inter alia*, the holding in *PPARB Application No. 06/2022 Lonestar Enterprises Limited v The Accounting Officer, Parliamentary Joint Services & Another*, *PPARB Application No. 92 of 2021 BOC Kenya v KNH*, *PPARB Application No. 3 of 2024 Green Com Enterprises Solutions Limited v National Environmental Management Authority*, *PPARAB Application No. 20 of 2024 Intercity Security Homes Ltd v Kenya Power & Lightening Co. Plc* and *Republic v Public Procurement Administrative Review Board & 2 others ex parte BABS Security Services Limited (2018) eKLR*.

48. Ms. Muge urged the Board to allow the instant Request for Review as prayed.

Respondents' submissions on the Interested Party's Notice of Preliminary Objection and the substantive issues raised in the Request for Review

49. In her submissions, Ms. Cynthia Akeyo relied on the Memorandum of Response to the Request for Review dated 22nd April 2024, the List

and Bundle of Documents together with confidential documents concerning the subject tender submitted to the Board pursuant to Section 67(3)(e) of the Act. Ms. Akeyo also associated herself with the Interested Party's submissions regarding the Preliminary Objections raised.

50. Ms. Akeyo informed the Board that the letter of 2nd April 2024 was the one considered as the notification letter since it has the contents required for a notification of award in that it disclosed both the reason for disqualification of the Applicant's bid and the successful tenderer in the subject tender in line with Section 87 of the Act.

51. She further pointed out that the letter dated 4th April 2024 was a mere correction of an error on the reason for disqualification of the Applicant's bid and was issued upon realization of the mistake on the reason given for disqualification of the Applicant's bid. She pressed on that the letter of 4th April 2024 was issued to correct an error that the Procuring Entity had accepted and which resulted from mistyping.

52. On the debriefing meeting referred to by the Applicant, Ms. Akeyo submitted that no debriefing meeting took place on 4th April 2024 at the Respondent's office or any other day regarding the subject matter. She indicated that no minutes could be availed on what transpired at the alleged debriefing meeting that took place the 4th April 2024.

53. Ms. Akeyo submitted that the procurement process in the subject tender was done in accordance with the law and adhered to all

provisions of the Act and the Constitution, that the Applicant did not meet the evaluation requirements stipulated in the Tender Document and was thus non-responsive pursuant to Section 79 of the Act. She urged the Board to dismiss the Request for Review with costs.

54. At this juncture, Dr. Lusuli submitted that in response to the issue raised by counsel for the Applicant on whether he could represent the Respondent in the instant Request for Review, he referred the Board to the provisions under Regulation 208 of Regulations 2020 and argued that a party could either be represented by an advocate or representative of his choice.

55. Dr. Lusuli referred the Board to the Affidavits sworn by the Applicant in support of the Request for Review and pointed out to some untrue statements deponed therein such as the averment made claiming that Mr. Lusuli, the Supplies Manager was a member of the Evaluation Committee which was not true as the Head of Procurement cannot be a member of the Evaluation Committee. He also took issue with the fact that in the said affidavits, individuals were identified under one name yet Procuring Entity may have several staff members sharing a name who were not part of the Evaluation Committee.

56. He further submitted that nowhere in the said notifications did the issue of EDRMS come up yet the same was brought up in the Applicant's sworn statements. He pointed out that the subject tender closed on 22nd February 2024 and not on 21st February 2024 and

invited the Board to look at the organization structure of the Procuring Entity both on its website and the strategic plan to determine whether there was any position of PA to the Accounting Officer.

57. Dr. Lusuli submitted that information relied upon by the Applicant in the instant Request for Review was not in the public domain and that the Applicant ought to disclose who informed it of the composition of the members of the Evaluation Committee as such information could only be obtained internally.

58. He further reiterated that no debriefing meeting was held on 4th April 2024 as alleged by the Applicant and submitted that the Applicant had made false declarations contrary to the law amounting to perjury and was hence guilty of a misdemeanor.

59. Dr. Lusuli submitted that it is the duty of the Evaluation Committee and not the Applicant to carry out due diligence on any documents submitted in response to the subject tender in line with Section 83 of the Act.

60. He urged the Board to dismiss the Request for Review with costs.

61. When asked by the Board if he was willing to avail the CCTV footage of 4th April 2024 at around 10.00 a.m. in proof of the allegation that no debriefing meeting took place for the Board's inspection, Dr. Lusuli submitted that the issue had been addressed under paragraph 11 of

the Respondent's Memorandum of Response and the Applicant was aware that the Respondents had pleaded that no debriefing meeting took place. He pressed on that there must be a notice of a meeting and the meeting must have a chair, a secretary and be well composed and as such, when a person walks into an office and meets several individuals, that cannot be said to be a meeting.

62. Dr. Lusuli submitted that he did not have the capacity to confirm if the CCTV within the building and the offices was working.

63. He further informed the Board that with regard to the issue of a debriefing meeting, he advised the Respondent that the Act does not make any provision for the same on how it should be conducted and who ought to attend the said meeting and as such, he informed the Respondent that he could not undertake a process that is not spelled out clearly with the procurement laws.

64. When asked to clarify the contents of paragraph 11 of the Respondent's Memorandum of Response referred to with regard to the debriefing meeting, Dr. Lusuli confirmed that the same had not been filed with the Board or addressed in the respondents response as claimed in his submissions.

65. When asked to clarify the reason for disqualification of the Applicant's bid document, Dr. Lusuli informed the Board the reason was as captured in the letter dated 4th April 2024 being that the Applicant did

not provide a duly filled, signed and stamped litigation form as required under mandatory requirement no. 9 of the Tender Document. He further pointed out that what was attached by the Applicant in its Supporting Affidavit was the individual scores by the members of the Evaluation Committee and not the Evaluation report per se.

Interested Party's Rejoinder to its Notice of Preliminary Objection and submissions on the substantive issues in the Request for Review.

66. In her submissions, counsel for the Interested Party, Ms. Nthenge reiterated that the Interested Party's Notice of Preliminary Objection was merited and compliant to the criteria set out in the Mukisa Biscuit case.

67. She submitted that it was a fact that the Applicant did not plead loss and damages as required under the law and invited the Board to determine if this issue was beyond the language of the law or the language of trade as alleged by the Applicant.

68. Counsel pointed out that the Respondents had denied having any debriefing meeting with the Applicant and there was no justification on how the Applicant obtained confidential documents and information relied upon in its Request for Review.

69. Ms. Nthenge joined issues with the Respondents and submitted that the Respondents ought to undertake internal investigations with the

aim of finding out the employees who colluded with the Applicant in the subject tender.

Applicant's Rejoinder

70. In a rejoinder, Mr. Muge reiterated that the Interested Party's Notice of Preliminary Objection was unmerited and ought to be dismissed as it raised issues which would require the Board to investigate.
71. Counsel submitted that he was astounded that the representative of the Respondent would blatantly lie that no debriefing meeting took place noting that Mr. Solomon Kimutai attended the said meeting and met all the members of the Evaluation Committee including Dr. Lusuli.
72. Counsel further submitted that the only way that the said debriefing meeting could be proven was for the Board to request for CCTV footage of 4th April 2024 at around 10.00 a.m. from the Respondent.
73. At this juncture, Mr. Muge raised an objection to the factual evidence produced by members representing the Respondents being evidence that was brought outside the Respondent's Memorandum of Response and submitted that all issues and evidence pertaining to denial of the debriefing meeting taking place ought to be provided to the Applicant
74. When asked by the Board to clarify whether the Applicant requested for a debriefing meeting, Mr. Muge submitted that the Applicant requested for a meeting in a letter dated 2nd April 2024 and that the

Respondents first sent an email attaching summary reports and thereafter the second letter issued to the Applicant on 4th April 2024 was an invitation to the debrief meeting and that Mr. Lusuli had changed tune to say that the meeting that the Applicant attended was not a debriefing meeting.

75. When asked by the Board to expound on whether the Applicant had specifically pleaded that it had suffered loss and damage, Mr. Muge reiterated that the same had been pleaded as seen at paragraphs 11 and 20 of the Request for Review and paragraphs 11 and 21 of the Supporting Affidavit and in the Supplementary Affidavits at paragraphs 5, 8, 11, 15, and 18. He further pointed out that the documents relied upon by the Applicant emanated from the Respondents in response to the Applicant's query, as attached in the email of 3rd April 2024 explaining reasons for disqualification of the Applicant's tender.

76. At the conclusion of the online hearing, the Board noted that the Applicant had raised an objection to the submissions made by the Respondent from the bar on whether or not a debriefing meeting was held. Having considered parties' submissions and in trying to establish the facts and truth on this issue, the Board noted that the Respondent's Memorandum of Response to the Request for Review was silent on the issue of the debriefing meeting and directed (a) the Respondent to file and serve a Supplementary Affidavit/ Memorandum of Response limited to explaining the occurrence or absence of the debriefing meeting, (b) the Respondent to provide to the Board CCTV

footage of the 4th April 2024 from 10.00 a.m. to 12 noon illustrating whether or not there was attendance of the Applicant's Director's for a debrief meeting and if no CCTV footage was available, reasons given for the absence of the same, by 3.00 p.m. on 2nd April 2024, (c) the Applicant was granted commensurate leave to file and serve its rejoinder limited to the issues raised in the Respondent's Supplementary Affidavit/ Memorandum of Response addressing the question of the debriefing meeting by 6.00 p.m. on 2nd April 2024. Parties were cautioned to adhere to the strict timelines as specified in the Board's directions and that any pleading filed outside the stipulated timelines would be struck out since the Board would rely strictly on the documentation filed before it in rendering its decision.

77. The Board also informed parties that the instant Request for Review having been filed on 16th April 2024 was due to expire on 7th May 2024 and the Board would communicate its decision on or before 7th May 2024 to all parties to the Request for Review via email.

78. On 2nd May 2024, the Respondent filed a Further Response to the Request for Review and Preliminary Objection by the Applicant on 02/05/2024 dated 2nd May 2024 and signed by Dr. Lusuli for the Respondent and also sent to the Board, via email, a link to the CCTV footage of 4th April 2024 as received from its ICT team.

79. On 2nd May 2024, the Applicant filed through its advocates a Further Affidavit sworn on 2nd May 2024 by Solomon Kimutai, its Director.



BOARD'S DECISION

80. The Board has considered each of the parties' cases, documents, pleadings, oral and written submissions, list and bundle of authorities together with confidential documents submitted to the Board by the Respondents pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination.

A. Whether the Board has jurisdiction to hear and determine the instant Request for Review;

In determining the first issue, the Board will make a determination on:

- i Whether the Applicant has locus standi before the Board;*
- ii Whether the documents and information relied upon by the Applicant in the instant Request for Review is confidential in nature and in breach of Section 65 (1) and 67(1)(c) of the Act.*

Depending on the outcome of issue A;

B. Whether the Applicant has substantiated its allegation that the Evaluation Committee failed to bear the requisite competence to evaluate tenders submitted in the subject tender;

C. Whether the Procuring Entity's Evaluation Committee evaluated the Applicant's tender in the subject tender in accordance with the provisions of the Tender Document read with Section 80 of the Act and Article 227(1) of the Constitution.

D. Whether the Letter of Notification of Intention to Award the subject tender dated 2nd April 2024 issued to the Applicant in the subject tender met the threshold required in Section 87(3) of the Act read with Regulation 82 of Regulations 2020.

E. What orders should the Board grant in the circumstances?

Whether the Board has jurisdiction to hear and determine the instant Request for Review;

81. It is trite law that courts and decision making bodies should only act in cases where they have jurisdiction and when a question of jurisdiction arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before taking any further steps in the matter.

82. 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."

83. The celebrated Court of Appeal decision in **The Owners of Motor Vessel "Lilian S" v Caltex Oil Kenya Limited [1989]eKLR; Mombasa Court of Appeal Civil Appeal No. 50 of 1989** underscores the centrality of the principle of jurisdiction. In particular, Nyarangi JA, decreed:

"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 evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction."

84. The Supreme Court added its voice on the source of jurisdiction of a court or other decision making body in the case **Samuel Kamau Macharia and another v Kenya Commercial Bank Ltd and 2**

others [2012] eKLR; Supreme Court Application No. 2 of 2011 when it decreed that;

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with Counsel for the first and second Respondent in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings."

85. In the persuasive authority from the Supreme Court of Nigeria in the case of **State v Onagoruwa [1992] 2 NWLR 221 – 33 at 57 – 59** the Court held:

"Jurisdiction is the determinant of the vires of a court to come into a matter before it. Conversely, where a court has no jurisdiction over a matter, it cannot validly exercise any judicial power thereon. It is now common place, indeed a well beaten legal track, that jurisdiction is the legal right by which courts exercise their authority. It is the power and authority to hear and determine

judicial proceedings. A court with jurisdiction builds on a solid foundation because jurisdiction is the bedrock on which court proceedings are based."

86. In the case of **Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others [2013] eKLR**, the Court of Appeal emphasized on 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 overarching 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...."

87. Such is the centrality of jurisdiction that the Court of Appeal has held in **Isaak Aliaza v Samuel Kisiavuki [2021] eKLR**, that:

"whether it is raised either by parties themselves or the Court suo moto, it has to be addressed first before delving into the interrogation of the merits of issues that may be in controversy in a matter."

88. The jurisdiction of a court, tribunal, quasi-judicial body or an adjudicating body can only flow from either the Constitution or a Statute (Act of Parliament) or both.

89. This Board is a creature of statute owing to the provisions of Section 27 (1) of the Act which provides:

"(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."

90. Further, Section 28 of the Act provides for the functions and powers of the Board as follows:

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

91. The above provisions demonstrate that the Board is a specialized, central independent procurement appeals review board with its main function being reviewing, hearing and determining tendering and asset disposal disputes.

92. The jurisdiction of the Board is provided for and also limited under Part XV – Administrative Review of Procurement and Disposal Proceedings

and specifically in Section 167 of the Act which provides for what can and cannot be subject to proceedings before the Board and Section 172 and 173 of the Act which provides for the Powers of the Board as follows:

PART XV — ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS

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. [Emphasis by the Board]

(2)

(3)

.....

173. Powers of Review Board

Upon completing a review, the Review Board may do any one or more of the following—

(a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings,



including annulling the procurement or disposal proceedings in their entirety;

(b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;

(c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;

(d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and

(e) order termination of the procurement process and commencement of a new procurement process.

93. Given the forgoing provisions of the Act, the Board is a creature of the Act and its jurisdiction flows from and is circumscribed under Section 28 and 167 of the Act. It therefore follows, that an applicant who seeks to invoke the jurisdiction of the Board must do so within the four corners of the aforesaid provisions. Section 167(1) of the Act allows an aggrieved candidate or tenderer to seek administrative review within 14 days of (i) notification of award or (ii) date of occurrence of alleged breach of duty imposed on a procuring entity by the Act and Regulations 2020 at any stage of the procurement process in a manner prescribed.

94. Part XV – Administrative Review of Procurement and Disposal Proceedings of Regulations 2020 and specifically under Regulation 203

of Regulations 2020 read with the Fourteenth Schedule of Regulations 2020 prescribes the format of the request for review as follows:

PART XV – ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS

203. Request for a review

(1) A request for review under section 167(1) of the Act shall be made in the Form set out in the Fourteenth Schedule of these Regulations.

(2) The request referred to in paragraph (1) shall—

(a)

(b)

(c) be made within fourteen days of —

(i) the occurrence of the breach complained of, where the request is made before the making of an award;

(ii) the notification under section 87 of the Act; or

(iii) the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder.

(d)

(3) Every request for review shall be filed with the Review Board Secretary upon payment of the requisite fees and refundable deposits.

(4)

95.Regulation 203 of Regulations 2020 prescribes an administrative review sought by an aggrieved candidate or tenderer under Section 167(1) of the Act is by way of (i) a request for review which is to be (ii) accompanied by such statements as the applicant considers necessary in support of its request. The request for review is to be in a form set out in the Fourteenth Schedule of Regulations 2020. The Fourteenth Schedule of Regulations 2020 provides for a form known as a Request for Review.

i Whether the Applicant has locus standi before the Board

96.The Interested Party contends at ground a) of its Notice of Preliminary Objection dated 24th April 2024 and filed on 25th April 2024 that the Board lacks jurisdiction to hear and determine the instant Request for Review since the Applicant has not pleaded any financial loss or indicated the damages they will suffer or are likely to suffer for breach of duty imposed on the Respondent contrary to Section 167(1) of the Act. During the hearing, counsel for the Interested Party, Ms. Nthenge submitted that the assertion by the Applicant in the Request for Review

was that it suffered prejudice as a result of the alleged breach of duty by the Respondent and that the term prejudice is a general term and cannot be construed to mean loss and damages.

97. In response, the Applicant submitted that it has exhaustively pleaded in its Request for Review, Supporting Affidavit and Supplementary Affidavit that the impugned actions and decision of the Respondent caused it substantial harm for which it has suffered extreme prejudice. Counsel for the Applicant, Mr. Muge referred the Board to the Oxford English Dictionary which defines prejudice as '*to affect injuriously or unfavorably by doing some acts to injure or impair*' and submitted that prejudice was defined in the case of *Kamau Murango v Attorney General & another; Cabinet Secretary Ministry of Water, Sanitation and Irrigation (Interested Party) (2022)* to mean damage and detriment. He referred the Board to paragraphs 11 and 20 of the Request for Review, paragraphs 12 and 21 of the Supporting Affidavit and paragraphs 5, 8, 11, 15 and 18 of the Supplementary Affidavit and argued that these clearly demonstrates that loss and damages was sufficiently pleaded in compliance with Section 167(1) of the Act and that the Applicant has *locus standi* before the Board.

98. On its part, the Respondent aligned itself with the submissions of the Interested Party in support of the objection raised.

99. This Board is cognizant of the holding by the Court of Appeal in **Mombasa Civil Appeal No. 131 of 2018 James Ayodi t/a Betoyo Contractors & Another vs Elroba Enterprises Ltd &**

Another (2019) eKLR (hereinafter referred to as “the James Oyondi case”) where the court was called upon to render itself in an appeal challenging the decision of the High Court which held that the Board ought to have ruled that the Appellants had no *locus standi* before it as they had not demonstrated that they had suffered loss or were likely to suffer loss. The Court of Appeal held as follows:

“That ought to dispose of this appeal but on the second issue as well, the learned Judge cannot be faulted. 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 a result of any breach of duty by KPA. This is a threshold requirement for any who would file a review before the Board in terms of section 167(1) of the PPADA;

“(1) subject to the provisions of this part, a candidate or a tender, 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.”

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 the risk of suffering loss or damage. It is not any and every candidate or tenderer who has a right to file for administrative review. Were that the case, the Board would be inundated by an avalanche of frivolous review applications. There is sound reason why only candidates or tenderers who have legitimate grievances may approach the Board. In the present case, it is common ground that the appellants were eliminated at the very preliminary stages of the procurement process, having failed to make it even to the evaluation stage. They therefore were, with respect, the kind of busy bodies that section 167(1) was designed of keep out. 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 upholding the learned Judge.

[Emphasis]

100. In essence, the Court of Appeal held that in seeking an administrative review before the Board, a candidate or tenderer must at the very least claim to have suffered or to be at the risk of suffering loss or damage due to the breach of a duty imposed on a procuring entity by the Act or Regulations 2020.

101. Turning to the circumstances in the instant Request for Review, the question that the Board is called to answer is whether the Applicant has at the very least claimed or demonstrated that it has suffered or risks suffering loss and damage due to the breach of duty imposed on the Procuring Entity by the Act or Regulations 2020 from its pleadings to enable it establish whether the Applicant has *locus standi*.

102. We note that the Applicant pleaded at paragraphs 11 and 20 of the Request for Review as follows:

"11. THAT the attempt by the Respondent to provide different reasons for the failure of the Applicant's bid subsequent to the Regret letter is unlawful and prejudicial to the Applicant, contrary to fair administrative action and offends section 87(3) of the Act with the consequence that the second letter is not a valid regret letter and thereby void.

.....

20. THAT the impugned decisions of the Respondent to reject the Applicant's bid were extremely prejudicial to the Applicant, and was made in grave error: without legal basis; contrary to the constitutional rights of the Applicant as provided under Article 47 of the Constitution of Kenya that requires administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair; and contrary to Article 227 of the Constitution of Kenya that requires a

procurement system that is fair, equitable, transparent, competitive and cost-effective."

103. The Applicant also pleaded at paragraph 12 and 21 of its Supporting Affidavit sworn on 15th April 2024 by Solomon Kimutai as follows:

"12. THAT I am advised by the advocates on record for the Applicant, which advise I believe to be true, that the attempt by the Respondent to provide different reasons for the failure of the Applicant's bid subsequent to the Regret Letter is unlawful, prejudicial to the Applicant, contrary to fair administrative action, and offends section 87(3) of the Act with the consequence that the second letter is not a valid regret letter and thereby void;

.....

21. THAT I am advised by the advocates on record for the Applicant, which advise I believe to be true, that the impugned decisions of the Respondent to reject the Applicant's bid were extremely prejudicial to the Applicant, and were made in grave error: without legal basis; contrary to the constitutional rights of the Applicant as provided under Article 47 of the Constitution of Kenya that requires administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair; and contrary to Article 227 of the Constitution of Kenya that requires a procurement system that is fair, equitable, transparent, competitive and



cost-effective.

104. We also note that the Applicant pleaded at paragraphs 5, 8, 11, 15 and 18 of the Supplementary Affidavit sworn on 26th April 2024 by Solomon Kimutai as follows:

"5. THAT the reasons provided in the letter dated 2nd April 2023 were false and extremely prejudicial to the Applicant and occasioned undue distress including legitimate fear and loathing to the Applicant's Directors and employees that they had been ejected from the procurement process for obviously invalid reasons inimical to their rights and interests, both economic and emotional, given the fact that the Applicant's officers and employees used substantial time and resources in the careful preparation of its bid ensuring that all mandatory provisions of the Tender were met – only to be faced with egregious negligence on the part of the Respondent in absolute and demonstrable disregard of the provisions of the Act.

.....

8. THAT on the debrief attended by myself on 4th April 2024, the Evaluation Committee on perusing the Applicant's bid documents confirmed that the requirements on Litigation History were met by the Applicant. The Litigation History form was filled, signed, and stamped. The actions of the Respondent in rejecting the Applicant's bid for the reasons



contained in both letters was erroneous and illegal thereby unlawfully causing harm to the Respondent.

.....

11. THAT the Applicant was obligated to first and foremost, with due diligence, ensure that the procurement process was fair, equitable, transparent, competitive and cost-effective; and that any administrative action taken by it was expeditious, efficient, lawful, reasonable and procedurally fair. The actions of the Respondent were instead contrary to the Act, negligent, unfair, inequitable, opaque, not competitive or cost effective, inefficient, unlawful, unreasonable, contrary to the tenets of natural justice, the Act, the Constitution, and definitely injurious and detrimental to the Applicant who was ejected from the procurement process for no valid reason.

.....

15. THAT in response to the contents of paragraph 13 of the Memorandum of Response, the Applicant reiterates that the reasons provided for the rejection of its bid were admitted as erroneous in the first instance in regard to the reasons provided in the letter dated 2nd August 2024, and in the second instance in regard to the letter dated 4th April 2024 the error was also admitted during the debrief attended by myself. The rejection of the Applicant's bid was for no valid



reason and was unlawful. The actions and decisions of the Respondent in rejecting the Applicants bid caused the Applicant to suffer great prejudice by being unceremoniously ejected from a procurement process despite a responsive bid.

.....

18. THAT in the end, the Applicant's bid was rejected by actions of the Respondent taken in absolute disregard of mandatory provisions of the Act and the regulations therein, in violation of Articles 201 and 227 in regard to public procurement, and in violation of the rights and fundamental freedoms of the Applicant protected by Articles 47 of the Constitution thereby causing substantial harm to the Applicant."

105. From the above paragraphs, we note that the Applicant claims that it was extremely prejudiced by the Respondent's decision to disqualify its bid and the reasons issued for its disqualification in addition to the Respondent's actions of issuing it with the two notification letters communicating the reasons and decision to disqualify its tender. We further note that at various instances in the instant Request for Review, the Applicant pleaded that the reasons contained in these two letters of notification were prejudicial to it, erroneous and illegal thereby unlawfully causing it harm.



106. Cambridge Dictionary defines 'prejudice' as a verb meaning '*to have a harmful influence on something*'. Collins Dictionary defines 'prejudice' as a transitive verb meaning '*to injure or harm, as by some judgment or action.*'

107. In view of the foregoing, it is our considered opinion that the words 'prejudice' and 'harm' as pleaded by the Applicant at paragraphs 11 and 20 of the Request for Review, paragraphs 12 and 21 of the Supporting Affidavit and paragraphs 5, 8, 11, 15 and 18 of the Supplementary Affidavit denotes a claim by the Applicant of a grievance in the procurement proceedings of the subject tender emanating from a breach of duty imposed upon the Procuring Entity by the Act and that it has demonstrated that its legal rights risks being adversely affected as a result of the decision of the Procuring Entity in disqualifying its tender. We find that this in itself is an express attempt by the Applicant to at the very least claim in its pleadings that it has suffered or risks suffering loss and damage as a result of breach of duty by the Procuring Entity and therefore meets the threshold requirement for a tenderer intending to file a review before the Board in terms of Section 167(1) of the Act.

108. In the circumstances, we find and hold that the Applicant has the *locus standi* to seek an administrative review by the Board in the subject tender. Accordingly, this ground of opposition of the Interested Party's Notice of Preliminary Objection dated 24th April 2024 and filed on 25th April 2024 fails.

ii Whether the documents and information relied upon by the Applicant in the instant Request for Review is confidential in nature and in breach of Section 65(1) & (2) and 67(1)(c) of the Act.

109. The Interested Party contends at grounds c), d) and e) of its Notice of Preliminary Objection dated 24th April 2024 and filed on 25th April 2024 that the Board lacks jurisdiction to hear and determine the instant Request for Review since information and documents relied upon by the Applicant herein are confidential in nature and were obtained contrary to the provisions of Section 65(1) & (2) and 67(1)(c) of the Act.

110. Ms. Nthenge submitted that the instant Request for Review is marred with illegalities as the documents and information relied on and annexed to the Supporting Affidavit sworn on 15th April 2024 by Solomon Kimutai, the Applicant's Director, are confidential documents protected under the Act and that there were elements of collusion between the Applicant and the Respondent's employees. She questioned how the Applicant obtained information relating to the composition of the subject tender's Evaluation Committee, information relating to evaluation of tenders, including details in its own tender document and urged the Board to find that the instant Request for Review as filed was a non-starter and a nullity since the Applicant stood disqualified by operation of Section 65(2) of the Act.

111. In response, the Applicant submitted that during a debrief meeting held on 4th April 2024 at the Procuring Entity's premises, the Respondent introduced the whole evaluation team including his Personal Assistant, Mr. Edwin Chesire, and that is how it came to know the said members of the Evaluation Committee. The Applicant further submitted that being ICT experts with requisite capability to do in-depth online research, it conducted an online search on <https://www.iafcertsearch.org/> which provided it with the information pertaining to the Interested Party's ISO information and that this was public knowledge.

112. On its part, the Respondent during the hearing submitted through Ms. Akeyo that no debriefing meeting took place on 4th April 2024 with the Applicant at the Respondent's office or any other day regarding the subject matter. Further, Dr. Lusuli the Procuring Entity's Manager, Supply Chain, reiterated that no debriefing meeting was held on 4th April 2024 as alleged by the Applicant and submitted that information relied upon by the Applicant in the instant Request for Review was not in the public domain and that the Applicant ought to disclose who informed it of the composition of the members of the Evaluation Committee as such information could only be obtained internally. In a Further Response to the Request for Review dated 2nd May 2024, the Respondent reiterated that no debriefing meeting was held as alleged by the Applicant but conceded that the Applicant visited the offices of

the Procuring Entity on 4th April 2024 as per the CCTV footage submitted to the Board.

113. In a rejoinder, the Applicant submitted that the submissions made by Dr. Lusili pertaining attendance of a debriefing meeting were false and calculated to intentionally mislead the Board. Mr. Muge submitted that the Applicant requested for a debrief on receipt of the notification letter dated 2nd April 2024 and was invited by the Procuring Entity for a debrief meeting vide email of 3rd April 2024 and letter dated 4th April 2024 and attended the said debrief meeting on the 4th April 2024 at around 11.00 a.m. and left after 1.00 p.m.

114. Having considered parties pleadings and submissions, we note that Section 65 (1) and (2) of the Act reads:

"(1) After the deadline for the submission of tenders, proposals or quotations—

(a) A person who submitted a tender shall not make any unsolicited communications to the procuring entity or any person involved in the procurement proceedings that might reasonably be construed as an attempt to influence the evaluation and comparison of tenders; and

(b) A person shall not attempt, in any way, to influence that evaluation and comparison.

(2) A person who contravenes the provisions of subsection (1) commits an offence and shall lead to the tenderer being disqualified and the public officer facing disciplinary action in addition to any other action under this Act."

115. In essence, a tenderer should not to make any unsolicited communications to a procuring entity or any person involved in the procurement proceedings that might reasonably be construed as an attempt to influence evaluation of bids. A tenderer in contravention of this provision commits an offence and shall be disqualified for the procurement process.

116. Further, Section 67 of the Act provides for confidentiality as follows:

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

- (a) Information relating to a procurement whose disclosure would impede law enforcement or whose disclosure would not be in the public interest;***
- (b) Information relating to a procurement whose disclosure would prejudice legitimate***

commercial interests, intellectual property rights or inhibit fair competition;

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

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

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

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

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

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

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

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

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

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

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

117. Section 67 (1) of the Act provides for confidential information that should not be disclosed by a procuring entity, employee or agent of the procuring entity or member of a board, commission or committee of the procuring entity. However, disclosure is allowed if any of the circumstances listed in section 67 (3) of the Act apply. Further, an applicant seeking a review is entitled to a summary of the proceedings of the opening of tenders, evaluation and comparison of the tenders, proposals or quotations, including the evaluation criteria used pursuant to section 68 (2) (d) (iii) of the Act. In essence, an applicant is not entitled to a disclosure of the contents of another bidder's bid because such a disclosure would prejudice legitimate commercial interests, intellectual property rights or inhibit fair competition. Section 68(2)(d)(iii) of the Act provides as follows:

"(2) The records for a procurement shall include –

.....



(d)

(iii) a summary of the proceedings of the opening of tenders, evaluation and comparison of the tenders, proposals or quotations, including the evaluation criteria used as prescribed;"

118. The import of the above provision is that a person submitting a tender is entitled to be furnished with a summary of the proceedings of the opening of tenders, evaluation and comparison of the tenders, proposals or quotations, including the evaluation criteria used as prescribed. However, this entitlement only crystallizes when such a person submitting a tender makes a request to the Procuring Entity to be furnished with the same.

119. The Board has carefully studied the Applicant's Request for Review, Supporting Affidavit, Supplementary Affidavit and Further Affidavit and notes that the Applicant avers at paragraph 6, 7, 8, and 9 of the Supporting Affidavit that:

"6. THAT on receipt of the regret letter and on noting the obvious error by the Respondent, the Applicant immediately wrote a letter dated 2nd April 2024 to the Applicant requesting a debrief and detailing the purportedly missing documents. [Annexed herewith and marked "SK-2" are copies of the Applicant's letter requesting debrief dated 2nd April 2024 and the forwarding Email]



7. THAT in response to the Applicant's request for review, the Respondent's 'Head of Supply Chain', Mr. Antony Lusuli, wrote an email to the Applicant purporting to walk-back the Respondent's reasons earlier provided for the failure of the Applicant's bid stating verbatim thus:

"I am in receipt of your email concerning the reason why your company failed in the above tender and would like to clarify as follows:

i). In our letter of 2/4/2024, it was indicated that you had failed because of failure to provide a verification link and letter from the certifying authority for ISO Management systems. This was an error of commission during typing which i am sorry and wish to correct. The documents were provided as per the evaluation report however an error during typing of the letter occurred to your firm." [Emphasis added]

8. THAT the Respondent then purported to correct, in the same Email, their reasons claiming, again verbatim, that "ii). As part of the mandatory requirements, bidders were requested under item no. 9 to provide litigation history and the form was attached in the tender document. However your firm did not fill, sign and stamp

the form as was required hence failed at the mandatory stage.”

[Annexed herewith and marked "SK-3" is a copy of the Respondent's Email walking back their reason for rejection]

9. THAT together with its email purporting to amend its reasons, the Respondent attached excerpts of the valuation report showing that members of the Evaluation Committee all claimed that the Applicant did not provide Litigation History but also showing that the Applicant complied with requirements on ISO 9001:2015 with provided certificate, letter from certifying authority, and verification link. [Annexed herewith and marked "SK-4" are copies of the excerpted reports]

120. From the above paragraphs, the Applicant contends that (a) on receipt of the notification letter dated 2nd April 2024, it wrote to the Respondent requesting a debrief on the issue of disqualification of its tender, and (b) in response to its request, Mr. Lusuli, Head of Supply Chain responded via email dated 3rd April 2024 and attached excerpts of the evaluation in the subject tender.

121. We note that the Applicant's exhibit marked "SK3" is an extract of an email dated 3rd April 2024 sent at 10.02 a.m. to one Bonfave

(Boniface) Mucheru, PMO Executive at the Applicant's company from Dr. Lusuli, Head of Supply Chain at the Procuring Entity and reads:

"....."

Dear Sir:

REF: TENDER FOR ERP:

I am in receipt of your email concerning the reason why your company failed in the above tender and would like to clarify as follows:

i). In our letter of 2/4/2024, it was indicated that you had failed because of failure to provide a verification link and letter from the certifying authority for ISO Management systems. This was an error of commission during typing which i am sorry and wish to correct. The documents were provided as per the evaluation report however an error during typing of the letter occurred to your firm.

ii). As part of the mandatory requirements, bidders were requested under item no. 9 to provide litigation history and the form was attached in the tender document. However your firm did not fill, sign and stamp the form as was required hence failed at the mandatory stage.

iii). A quick look at your bid table of contents will confirm that the requirement or the form was not fulfilled, stamped and signed.

Attached is a copy of the signed evaluation score sheet for your firm to confirm the above.

In conclusion, your form did not meet the mandatory requirement on litigation history and therefore was disqualified at the mandatory stage.

You or any representative of your company are free to come and verify the information from the source documents if not satisfied.

I once more take this opportunity to thank you for participating in the tender and any inconveniences caused I say we are sorry as an Agency."

122. From the contents of the above email, it is clear to the Board that the Applicant and the Respondent were in communication with regard to the decision communicated to the Applicant on reasons for disqualification of its bid. It is also quite clear that the Procuring Entity through Dr. Lusuli, who was present at the hearing of the instant Request for Review, proceeded to issue the Applicant with a copy of the signed evaluation score sheet for its bid which the Applicant annexed and marked as Exhibit "SK 4" at paragraph 9 of its Supporting Affidavit.

123. In view of the provisions stipulated under Section 65(1) and (2) of the Act, nothing from the above communication between the Procuring

Entity and the Applicant can be construed as an attempt by the Applicant to influence evaluation of bids as the said communication emanated from a notification issued to the Applicant on the outcome of evaluation of its bid. Whatever documents that the Applicant made reference to with regard to evaluation of the subject tender were made available to it by Dr. Lusuli.

124. We note that the issue of whether or not a debriefing meeting took place at the Procuring Entity's offices was highly contested with Dr. Lusuli submitting that no debriefing meeting took place while the Applicant contends that the same did take place on 4th April 2024 regardless of the formalities that the Respondent claims would render the meeting attended a debriefing meeting and that it was at this meeting that the Applicant's Director was introduced to members of the Evaluation Committee.

125. The Applicant filed a Further Affidavit sworn 2nd May 2024 by Solomon Kimutai, its Director where he depones that he attended a debrief meeting at the Procuring Entity's offices on 4th April 2024 and lays out the events that followed at the said meeting and persons introduced being members of the Evaluation Committee including Dr. Lusuli. The Respondent in its Further Response to the Request for Review and Preliminary Objection by the Applicant on 02/05/2024 dated 2nd May 2024 confirms that the Applicant was at the Procuring Entity's offices as claimed.



126. The Board is therefore convinced without any doubt that the Applicant did attend a meeting at the Procuring Entity's offices and was briefed on evaluation of its tender and came to learn of the information relied upon in these proceedings pertaining the names of members of the Evaluation Committee that its Director had met on 4th April 2024.

127. In the same vein, the Board notes that the letter of notification dated 2nd April 2024 issued to the Applicant by the Respondent disclosed the name of the successful bidder as the Interested Party herein and with this knowledge, the Applicant averred in its Supporting Affidavit that it conducted a search to verify the ISO information of the Interested Party. In our considered view, this information cannot be said to be confidential because information held by a verification body is public information that is furnished to any individual upon request.

128. In the circumstances, the Board finds and holds that the Applicant did not breach the provisions of Section 65(1) & (2) and 67(1)(c) of the Act and that the documents and information relied upon by the Applicant in the instant Request for Review are not confidential in nature. Accordingly, this ground of the Interested Party's Notice of Preliminary Objection dated 24th April 2024 and filed on 25th April 2024 fails.

129. In totality of the foregoing, the Interested Party's Notice of Preliminary Objection dated 24th April 2024 and filed on 25th April 2024

fails. The Board has jurisdiction to hear and determine the instant Request for Review and now proceeds to address the substantive issues framed for determination.

Whether the Applicant has substantiated its allegation that the Evaluation Committee failed to bear the requisite competence to evaluate tenders submitted in the subject tender;

130. The Applicant deponed at paragraphs 30, 31, 32, and 33 of its Supporting Affidavit sworn on 15th April 2024 by Solomon Kimutai that the Evaluation Committee lacked requisite technical expertise and was comprised of unqualified persons contrary to Section 46(1) of the Act. The Applicant further deponed at paragraph 17 of its Supplementary Affidavit that:

"...Other than Mr. Barchok of the ICT Department, none of the other members are technically qualified to evaluate a Enterprise Resource Planning System as the instant Tender requires. While the members will casually use the system, they are not equipped to evaluate the technicalities of such a complex system. None of the Evaluation team members have proven technical ICT certification....."

131. Having carefully studied the Applicant's pleadings and annexures in view of the above allegation, we note that the Applicant failed to adduce any evidence in support of the allegation that the members of

the Procuring Entity's Evaluation Committee as appointed by the Respondent pursuant to Section 46 of the Act are not equipped with the technical expertise to evaluate the subject tender. At the very least, the Applicant ought to have particularized the names of the members of the Evaluation Committee against their respective skills and competency to prove that they are not equipped and qualified to evaluate tenders submitted in the subject tender.

132. In saying so, we are guided by the holding of the Board in **PPARB Application No. 130 of 2021 Uniprint A Division of Insidedata (South) PTY Ltd v The Accounting Officer, Independent Electoral and Boundaries Commission & Others**, where the Board held as follows:

"On the first issue framed for determination, the Board notes the Applicant merely made allegations that the Respondents failed to ensure the Evaluation Committee bore requisite competence which was in violation of the provisions of the Act. However, we note that no evidence was adduced to support this allegation neither did the Applicant particularize the names of the members of the Evaluation Committee against their respective skills and competency they lack as alleged. In the circumstances, the Applicant's allegation remains unsubstantiated and the same fails as a ground in the instant Request for Review."



133.It is worth noting that a party to a case has an obligation to provide a basis for any allegation made against the other party to defend itself against any allegations propounded against it. An allegation, in our view, ought to be supported by persuasive facts and evidence so as to assist a decision maker arrive at an informed decision.

134.In view of the foregoing, and in the absence of any information in support of the Applicant's allegations that the Evaluation Committee failed to bear the requisite competence to evaluate tenders submitted in the subject tender, the Board finds that the said allegation has not been substantiated and fails as a ground in the instant Request for Review.

Whether the Procuring Entity's Evaluation Committee evaluated the Applicant's tender in the subject tender in accordance with the provisions of the Tender Document read with Section 80 of the Act and Article 227(1) of the Constitution.

135.We understand the Applicant's case on this issue to be that the decision by the Procuring Entity to disqualify its bid at the Preliminary Evaluation stage was made in grave error, without a legal basis, and was contrary to the provisions of the Constitution, the Act and Regulations 2020. It is the Applicant's case that its tender met all the eligibility and mandatory requirements and that the Evaluation Committee introduced a criteria foreign to the Tender Document when

evaluating its tender contrary to the provisions of Article 227(1) of the Constitution read with Section 79(1) and 80(1) & (2) of the Act.

136. We understand the Respondents' response on this issue to be that the Applicant's tender failed to meet the mandatory requirements provided in the Tender Document and was non-responsive as stipulated under Section 79(1) of the Act. The Respondent contend that the Evaluation Committee adhered to the set out evaluation criteria in the Tender Document and complied with the provisions of the Constitution and the Act.

137. On its part, the Interested Party associated itself with the Respondent's submissions and contends that the Applicant failed to meet the threshold on the requirements set out in the Tender Document to warrant it being issued the orders sought in the instant Request for Review.

138. Having considered parties' submissions herein, we note that the objective of public procurement is to provide quality goods and services in a system that implements the principles specified in Article 227 of the Constitution which provides as follows:

"227. Procurement of public goods and services

(1) When a State organ or any other public entity contracts for goods or services, it shall do so in

accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

(2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following –

- a)**
- b)**
- c) and**
- d)"**

139. Justice Mativo (as he then was) in **Nairobi High Court Misc. Application No. 60 of 2020; Republic v The Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020] eKLR** (hereinafter referred to as "Misc. Application No. 60 of 2020") spoke to the principles under Article 227 of the Constitution as follows:

"45. Article 227 of the Constitution provides that when procuring entities contract for goods or services they must comply with the principles of fairness, equity, transparency, competitiveness and cost-effectiveness. For there to be fairness in the public procurement process, all bids should be considered on the basis of



their compliance with the terms of the solicitation documents, and a bid should not be rejected for reasons other than those specifically stipulated in the solicitation document.

46. However, there is a need to appreciate the difference between formal shortcomings, which go to the heart of the process, and the elevation of matters of subsidiary importance to a level, which determines the fate of the tender. The evaluation Committee has a duty to act fairly..."

140. The Board observes that the legislation contemplated in Article 227(2) of the Constitution is the Act. Section 3 of the Act underpin good governance, integrity, transparency and accountability as key pillars in public procurement and asset disposal proceedings and provides as follows:

"Public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of the Constitution and relevant legislation—

(a) the national values and principles provided for under Article 10;

(b) the equality and freedom from discrimination provided for under Article 27;

(c) affirmative action programmes provided for under Articles 55 and 56;

(d) principles of integrity under the Leadership and Integrity Act, 2012 (No. 19 of 2012);

(e) the principles of public finance under Article 201;

(f) the values and principles of public service as provided for under Article 232;

(g) principles governing the procurement profession, international norms;

(h) maximisation of value for money;

(i) promotion of local industry, sustainable development and protection of the environment; and

(j) promotion of citizen contractors."

141. Section 58 of the Act requires a procuring entity to use a standard tender document which contains sufficient information and provides as follows:

"(1) An accounting officer of a procuring entity shall use a standard procurement and asset disposal documents issued by the Authority in all procurement and asset disposal proceedings.

(2) The tender documents used by a procuring entity under subsection (1) shall contain sufficient information

to allow fairness, equitability, transparency, cost-effectiveness and competition among those who may wish to submit their applications."

142. Further Section 60(1) provides:

"(1) An accounting officer of a procuring entity shall prepare specific requirements relating to the goods, works or services being procured that are clear, that give a correct and complete description of what is to be procured and that allow for fair and open competition among those who may wish to participate in the procurement proceedings."

143. In the same vein, section 70 of the Act requires a procuring entity to use a standard tender document which contains sufficient information to allow for fair competition among tenderers. Section 70(3) reads as follows:

"(3) The tender documents used by a procuring entity pursuant to subsection (2) shall contain sufficient information to allow fair competition among those who may wish to submit tenders."

144. Section 80 of the Act is instructive on how evaluation and comparison of tenders should be conducted by a procuring entity as follows:

"80. Evaluation of tender

- (1) The evaluation committee appointed by the accounting officer pursuant to Section 46 of the 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.**
- (3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)-**

 - (a) the criteria shall, to the extent possible, be objective and quantifiable;**
 - (b) each criterion shall be expressed so that it is applied, in accordance**

with the procedures, taking into consideration price, quality, time and service for the purpose of evaluation; and

(4)"

145. Section 80(2) of the Act as indicated above requires the Evaluation Committee to evaluate and compare tenders in a system that is fair using the procedures and criteria set out in the Tender Document. A system that is fair is one that considers equal treatment of all tenders against a criteria of evaluation known by all tenderers since such criteria is well laid out for in a tender document issued to tenderers by a procuring entity. Section 80(3) of the Act requires for such evaluation criteria to be as objective and quantifiable to the extent possible and to be applied in accordance with the procedures provided in a tender document.

146. Section 79 of the Act provides for responsiveness of tenders as follows:

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

147. Responsiveness serves as an important first hurdle for tenderers to overcome. From the above provision, a tender only qualifies as a responsive tender if it meets all eligibility and mandatory requirements set out in the tender documents. In the case of **Republic v Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020] eKLR** the High Court stated that:

"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."

148. The Board notes that Regulation 74(1) of Regulations 2020 provides that:

"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) a tenderer complies with all the eligibility requirements provided for under section 55 of the Act;

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

(c) any tender security submitted is in the required form, amount and validity period, where applicable;

(d) the tender has been duly signed by the person lawfully authorized to do so through the power of attorney;

(e) the required number of copies of the tender have been submitted;

- (f) the tender is valid for the period required;***
- (g) any required samples have been submitted; and***
- (h) all required documents and information have been submitted.***

149. The import of the aforementioned provisions of the Act and case law is that mandatory requirements cannot be waived. In this instance, the Evaluation Committee was mandated to evaluate the Applicant's tender together with all other tenders submitted in the subject tender using the procedures and criteria set out in the Tender Document having regard to provisions of the Act and the Constitution. A laid out evaluation criteria must, to the extent possible, be objective and quantifiable.

150. Turning to the circumstances in the instant Request for Review, we note that the Applicant was notified in a notification letter dated 2nd April 2024 that its tender was unsuccessful in the subject tender as follows:

".....
We refer to your bid for Supply, Delivery, Installation, Testing, Training, 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:

- *Provided a copy of valid certification in quality management systems (ISO 9001:2015) but did not provide verification link and letter from the certifying authority.*

.....”

151. From the above notification letter dated 2nd April 2024, the Applicant was informed that the reason for disqualification of its bid was because it provided a copy of valid certification in quality management systems (ISO 9001:2015) but did not provide verification link and letter from certifying authority.

152. Being aggrieved by the decision of the Procuring Entity, we note that the Applicant in response to the above notification letter of 2nd April 2024 wrote to the Respondent vide a letter dated 2nd April 2024 as follows:

”.....

**REF: REQUEST FOR DEBRIEFING ON
NUPEA/OT/DICT/004/23-24 FOR SUPPLY, DELIVERY,
CUSTOMISATION, INSTALLATION, TESTING, TRAINING,
COMMISSIONING AND SUPPORT SERVICES FOR
ENTERPRISE RESOURCE PLANNING (ERP) SYSTEM**

We write in reference to your letter dated 2nd April 2024 on the intent of award and reason for our company,



Iansoft Technologies Limited, not meeting one of the mandatories in response to the above named tender.

We would like to bring to your attention that the mentioned document and link ' provide a copy of valid certification in quality management systems (ISO 9001:2015) but did not provide verification link and letter from certifying authority' were part of the document submitted to NuPEA.

Herein attached is a copy of the verification letter submitted with the ERP tender response document and the reference for the same under the submitted document.

Under the submitted document, please find the requested ISO certificate, verification letter and the link under "Section 7.5, Sub-section 7.5.1 and Sub-section 7.5.2 under page 67 & 68" respectively for your reference.

We look forward to hearing from you soon.

....."

153. In essence, the Applicant contested the reason issued by the Procuring Entity for disqualification of its bid and pointed out that the



verification link and letter from certifying authority allegedly not submitted had indeed been submitted at Section 7.5, Sub-section 7.5.1 and Sub-section 7.5.2 under page 67 & 68 of its bid document.

154. Subsequently, the Procuring Entity responded to the Applicant's letter vide email dated 3rd April 2024 sent by Dr. Lusuli who acknowledged that indeed the said documents had been provided and apologized for the error made in the notification letter. He further indicated that

"As part of the mandatory requirements, *bidders were requested under item no. 9 to provide litigation history and the form was attached in the tender document. However, your firm did not fill, sign and stamp the form as was required hence failed at the mandatory stage.*

iii). A quick look at your bid table of contents will confirm that the requirement or the form was not fulfilled, stamped and signed... [Emphasis ours]

155. The Board notes that the Respondent further wrote to the Applicant vide letter dated 4th April 2024 which reads:

"RE:REQUEST FOR DEBRIEFING ON NUPEA/OT/DICT/004/23-24 FOR SUPPLY, DELIVERY, CUSTOMISATION, INSTALLATION, TESTING, TRAINING, COMMISSIONING AND SUPPORT SERVICES FOR ENTERPRISE RESOURCE PLANNING (ERP) SYSTEM

Reference is made to your letter dated 02nd 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 as presented in the tender document. The results indicated that you did not provide a dully filled, signed and stamped litigation history form in line with mandatory criterion number nine (9).

During preparation of award letters, an error was made whereby you were informed that you provided a copy of valid certification in quality management systems (ISO 9001:2015) but did not provide a verification link and letter from the certifying authority. In view of the above, your firm did not meet all the mandatory requirements to be considered for 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.

.....”

156. We note that the Tender Document provided for evaluation of mandatory requirements under Mandatory Requirements of Section

III- Evaluation and Qualification Criteria at page 25 to 26 of the Tender Document. Mandatory Requirement No. 9 reads as follows:

"

	DESCRIPTION	YES	NO
...
9.	Provide Litigation History		
....

157. Mandatory Requirement No. 9 required a bidder to provide its Litigation History. In line with this, item No. 9 of the Qualification Form at page 55 of the Tender Document provided as follows:

Ite m No.	Qualificatio n Subject	Qualificatio n Requiremen t to be met	Document to be Complete d by Tenderer	For Procuring Entity's Use (Qualificatio n Met or Not Met)
....
9.	Pending Litigation	Tenderer's financial position and prospective long-term	Form CON - 2	

		<p><i>profitability still sound according to criteria established in 2.3.1 below and assuming that all pending litigation will be resolved against the Tenderer.</i></p>		

158. The blank Qualification Form was provided at page 58 of the Tender Document as follows:

"4. Form CON – Historical Contract Non-Performance and Pending Litigation

.....



<i>Pending Litigation, in accordance with Section III, Evaluation and Qualification Criteria</i>			
<i>No pending litigation in accordance with Sub-Factor 2.2.3 of Section III, Evaluation Criteria</i>			
<i>Pending litigation in accordance with Sub-Factor 2.2.3 of Section III, Evaluation Criteria, as indicated below</i>			
<i>Year</i>	<i>Outcome as Percent of Total Assets</i>	<i>Contract Identification</i>	
-	-	<i>Contract Identification: Name of Procuring Entity: Address of Procuring Entity: Matter in dispute:</i>	-
-	-	<i>Contract Identification: Name of Procuring Entity: Address of Procuring Entity: Matter in dispute:</i>	-

159. In essence, a bidder was required to fill in the above qualification form pertaining to pending litigation in accordance with Section III- Evaluation and Qualification Criteria of the Tender Document.

160. According to the Evaluation Report, we note that the Applicant was disqualified at the Preliminary Evaluation stage as follows:

Table 8: Bidder No. 3 – Iansoft Technologies Limited

No	Criterion	Evaluator No. 1	Evaluator No. 2	Evaluator No. 3	Evaluator No. 4	Evaluator No. 5
..
9.	Provide Litigation History	N	N	N	N	N
...

161. Having carefully studied the Applicant's original bid document submitted by the Respondent to the Board pursuant to Section 67(3) of the Act, we note that in response to Mandatory Requirement No. 9 of the Tender Document, the Applicant submitted at pages 202 of its bid document Form CON -1 Historical Contract Non-Performance and Pending Litigation as follows:

"4. Form CON – Historical Contract Non-Performance and Pending Litigation

.....

<i>Pending Litigation, in accordance with Section III, Evaluation and Qualification Criteria</i>
<i>No pending litigation in accordance with Sub-Factor 2.2.3 of Section III, Evaluation Criteria</i>
<i>Pending litigation in accordance with Sub-Factor 2.2.3 of Section III, Evaluation Criteria, as indicated below</i>



Year	Outcome as Percent of Total Assets	Contract Identification	
-	-	Contract Identification: N/A Name of Procuring Entity: N/A Address of Procuring Entity: N/A Matter in dispute: N/A Party who initiated dispute: N/A Status of dispute: N/A	-

(Stamped) (signed)

162. From the foregoing, it is clear to the Board that the Applicant provided at page 202 of its original bid document a duly filled, signed and stamped Litigation History Form in compliance with Mandatory Requirement No. 9 of the Tender Document.

163. We are therefore left with the inevitable conclusion that the Applicant's tender satisfied Mandatory Requirement No. 9 of Mandatory Requirements of Section III- Evaluation and Qualification Criteria at page 25 to 26 of the Tender Document and was therefore responsive at the Mandatory Evaluation stage and ought to have progressed for further evaluation at the Technical Evaluation stage.



164. In the circumstances, the Board finds that the Procuring Entity's Evaluation Committee **did not** evaluate the Applicant's tender in accordance with the provisions of the Tender Document, Section 80(2) of the Act and Article 227(1) of the Constitution.

Whether the Letter of Notification of Intention to Award the subject tender dated 2nd April 2024 issued to the Applicant in the subject tender met the threshold required in Section 87(3) of the Act read with Regulation 82 of Regulations 2020.

165. Section 87 of the Act is instructive on how notification of the outcome of evaluation of the successful and unsuccessful tenderers should be conducted by a procuring entity and provides as follows:

"87. Notification of intention to enter into a contract

(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.

(2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.

(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of

the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.

(4) For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security."

166. Section 87 of the Act recognizes that notification of the outcome of evaluation of a tender is made in writing by an accounting officer of a procuring entity. Further, the notification of the outcome of evaluation ought to be done simultaneously to the successful tenderer(s) and the unsuccessful tenderer(s). A disclosure of who is evaluated as the successful tenderer is made to the unsuccessful tenderer with reasons thereof in the same notification of the outcome of evaluation.

167. The procedure for notification under Section 87(3) of the Act is explained by Regulation 82 of Regulations 2020 which provides as follows:

"82. Notification of intention to enter into a contract

(1) The notification to the unsuccessful bidder under Section 87(3) of the Act, shall be in writing and shall be made at the same time the successful bidder is notified.

(2) For greater certainty, the reason to be disclosed to the unsuccessful bidder shall only relate to their respective bids.

(3) The notification in this regulation shall include the name of the successful bidder, the tender price and the reason why the bid was successful in accordance with Section 86(1) of the Act."

168. In view of the provisions of Section 87 of the Act read with Regulation 82 of Regulations 2020, the Board observes an accounting officer of a procuring entity must notify, in writing, the tenderer who submitted the successful tender, that its tender was successful before the expiry of the tender validity period. Simultaneously, while notifying the successful tenderer, an accounting officer of a procuring entity notifies other unsuccessful tenderers of their unsuccessfulness, giving reasons why such tenderers are unsuccessful, disclosing who the successful tenderer is, why such a tenderer is successful in line with Section 86(1) of the Act and at what price is the successful tenderer awarded the tender. These reasons and disclosures are central to the principles of public procurement and public finance of transparency and accountability enshrined in Article 227 and 232 of the Constitution.

169. This means all processes within a public procurement system, including notification to unsuccessful tenderers must be conducted in a transparent manner. In **Judicial Review Miscellaneous**

Application No. 531 of 2015, Republic v Public Procurement Administrative Review Board & 2 others ExParte Akamai Creative Limited (hereinafter referred to as "the Akamai Case") the High Court held as follows:

"In my view, Article 47 of the Constitution requires that parties to an administrative proceeding be furnished with the decision and the reasons therefor within a reasonable time in order to enable them decide on the next course of action. It is not merely sufficient to render a decision but to also furnish the reasons for the same. Accordingly, where an administrative body unreasonably delays in furnishing the parties with the decision and the reasons therefor when requested to do so, that action or inaction may well be contrary to the spirit of Article 47 aforesaid"

170. The High Court was basically expounding on one of the rules of natural justice as provided for in Article 47 (2) of the Constitution which provides:

"If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action"

171. In essence, the rules of natural justice as provided for in Article 47 of the Constitution require that a procuring entity promptly notifies tenderers of the outcome of evaluation to afford an unsuccessful tenderer the opportunity to challenge such reasons if need be. Further, the Act does not require that an unsuccessful tenderer seeks clarification in order for the accounting officer to provide it with the outcome of evaluation or reasons leading to its disqualification in a tendering process.

172. We have hereinbefore established that the reason given for disqualification of the Applicant's tender as communicated in the letter dated 2nd April 2024 being that the Applicant '***Provided a copy of valid certification in quality management systems (ISO 9001:2015) but did not provide verification link and letter from the certifying authority***' was admitted by the Respondent to be incorrect and to have been issued inadvertently. As such, the letter of notification dated 2nd April 2024 failed to meet the threshold required in Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020 since it did not disclose reasons as to why the Applicant's bid was unsuccessful following evaluation of its tender in the subject tender.

173. We have further established that the Respondent resulted to issue the Applicant with a subsequent letter dated 4th April 2024 detailing a different reason for disqualification of its bid document being that the Applicant '***did not provide a dully filled, signed and stamped***

litigation history form in line with mandatory criterion number nine (9).' This however cannot be deemed to be a notification of intention to award the subject tender envisioned under Section 87 of the Act read with Regulation 82 of Regulations 2020 having been issued as a clarification following the Applicant's response to the notification letter dated 2nd April 2024 and having not been issued simultaneously with the notifications issued to both the successful and unsuccessful tenderers in the subject tender. Despite issuing a new reason for disqualification of the Applicant's tender in the subject tender, the notification letter dated 4th April 2024 also failed to disclose the successful tenderer in the subject tender, the successful tenderer's tender price and reasons why the tenderer was successful in the subject tender.

174. Consequently, failure by the Respondent to issue the Applicant with a proper and lawful letter of notification of intention to award the subject tender amounted to a breach of Section 87 of the Act read with Regulation 82 of Regulations 2020 and the principle of transparency in Article 227(1) of the Constitution. As such, the letter of Notification of Intention to Award dated 2nd April 2024 issued to the Applicant **did not** meet the threshold required in Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020.

What orders should the Board grant in the circumstances?

175. We have established that the Board has jurisdiction to hear and determine the instant Request for Review.

176. We have found that the Evaluation Committee did not evaluate the Applicant's tender at the Mandatory Evaluation stage in accordance with Section 80(2) of the Act read with Article 227(1) of the Constitution with respect to Mandatory Requirement No. 9 of Mandatory Requirements of Section III- Evaluation and Qualification Criteria at page 25 to 26 of the Tender Document.

177. We have also found that the letter of Notification of Intention to Award the subject tender issued to the Applicant dated 2nd April 2024 did not meet the requirements of Section 87(3) of the Act read with Regulation 82 of Regulations 2020.

178. We therefore deem it fit to cancel the letter of Notification of Intention to Award the subject tender issued to the Interested Party herein, being the successful tenderer together with the letters of Notification of Intention to Award the subject tender issued to the applicant and qualifying tenderers at technical evaluation stage in the subject tender herein and to order the Respondent to admit the Applicant's tender to the Technical Evaluation stage and direct the Evaluation Committee to evaluate the Applicant's tender together with all other tenders that qualified and progressed for evaluation at the

Technical Evaluation stage and to proceed with the procurement proceedings of the subject tender to its lawful and logical conclusion taking into consideration the Board's findings herein, the provisions of the Tender Document, the Act and the Constitution as all the reasons proffered by the Respondent to justify disqualification at Preliminary Evaluation and from technical evaluation of the Applicant's bid are indeed grounded in impropriety and grave untruths and the Applicant has demonstrated to our satisfaction that its bid is merited for further evaluation at the technical evaluation stage.

179. This Board is called to safeguard, promote and protect the rule of law and ensure the integrity of procurement proceedings by public entities in upholding the national values and principles espoused in Article 10, 201, 227(1) of the Constitution. Integrity is the firm adherence to moral and ethical values in one's behavior and is not only about an individual's or institution's own perception about the correctness or appropriateness of their conduct but also a fundamental social and public quality.

180. 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 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.

181. 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 ensure that the procurement 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.

182. The upshot of our findings therefore is that the instant Request for Review succeeds in terms of the following orders:

FINAL ORDERS

183. 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 15th April 2024 and filed on 16th April 2024:



A. The Interested Party's Notice of Preliminary Objection dated 24th April 2024 and filed on 25th April 2024 be and is hereby dismissed.

B. 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.

C. The letters of Notification of Intention to Award dated 2nd April 2024 issued by the Respondent to the Applicant and all other unsuccessful tenderers qualifying and evaluated at technical evaluation stage in 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 are hereby nullified and set aside.

D. The Respondent is hereby ordered to admit the Applicant's tender for evaluation at the Technical Evaluation stage and direct the Evaluation Committee to evaluate the Applicant's tender together with all other tenders that qualified and progressed for evaluation at the Technical Evaluation stage taking into consideration the findings of the Board in this decision, the provisions of the Tender Document, the Constitution, the Act and Regulations 2020.

E. Further to Order D 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.


F. 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 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.

G. In view of the Board's findings and orders above, each party shall bear its own costs in the Request for Review.

Dated at NAIROBI this 6th Day of May 2024.


.....
CHAIRPERSON
PPARB


.....
SECRETARY
PPARB



