

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 49/2024 OF 31ST MAY 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. CPA Alexander Musau - Member
3. Mr. Joshua Kiptoo - Member

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IN ATTENDANCE

1. Mr. James Kilaka - Acting Board Secretary
2. Ms. Evelyn Weru - Secretariat

PRESENT BY INVITATION

APPLICANT

IANSOFT TECHNOLOGIES LIMITED

Mr. Andrew Muge - Advocate, Muge Law Advocates

RESPONDENTS

ACCOUNTING OFFICER, NUCLEAR POWER AND ENERGY AGENCY

1. Ms. Catherine Kianji Advocate, Nuclear Power and Energy Agency
2. Mr. Alex Kyalo Supply Chain Department 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 (PPIP) 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
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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 'Request for Review No. 34 of

2024') 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. The Board considered the parties' pleadings, documents, written submissions, the list and bundle of authorities together with the confidential documents submitted by the Respondents to the Board

pursuant to Section 67(3) (e) of the Act and found the following issues called for determination in the Request for Review No. 34 of 2024:

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?

18. On the first issue framed for determination, the Board found that it had jurisdiction to hear and determine Request for Review No. 34 of 2024.
19. On the second issue framed for determination, the Board found that the Applicant had failed to substantiate its allegations that the Evaluation Committee failed to bear the requisite competence to evaluate tenders submitted in the subject tender.
20. On the third issue framed for determination, the Board 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.

21. On the fourth issue framed for determination, the Board 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.

22. On 6th May 2024 and in exercise of the powers conferred upon it by the Act, the Board made the following final orders with respect to Request for Review No. 34 of 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 unsuccessful tenderers 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 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 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 logical conclusion within 14 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 and the Respondent is hereby ordered to furnish a report on the progress of the evaluation of the subject tender upon the Authority on compliance with the orders issued 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.

23. No evidence has been tendered by any party demonstrating that a party to the Request for Review No. 49 of 2024 sought judicial review by the High Court of the Board's Decision dated 6th May 2024 in Request for Review No. 34 of 2024. In the absence of such evidence, it is just to hold that the Board's Decision dated 6th May 2024 in Request for Review No. 34 of 2024 became final and binding to all parties therein after the lapse of 14 days from 6th May 2024 in accordance with Section 175(1) of the Act.

RE-EVALUATION OF THE SUBJECT TENDER

24. Pursuant to the Board's orders of 6th May 2024, the Applicant's tender was admitted for evaluation at the Technical Evaluation stage together with three (3) other tenders that progressed for evaluation at the Technical Evaluation stage as evidenced by an Evaluation Report dated 14th May 2024.

Second Technical Evaluation

25. 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.
26. Evaluation at this stage was to be 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.
27. At the end of evaluation at this stage, the three (3) tenders were determined non-responsive including the Applicant's tender while one (1) tender, being the Interested Party's tender was invited for a demo presentation on 13th May 2024 and was thereafter determined to be responsive and proceeded for further evaluation at the Financial Evaluation stage.

Second Financial Evaluation

28. 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.
29. At the end 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.

Second Evaluation Committee's Recommendation

30. 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).

Second Professional Opinion

31. In a Professional Opinion, dated 15th May 2024 (hereinafter referred to as the "Second 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).

32. 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.

33. 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 17th May 2024.

Notification to Tenderers

34. Tenderers were notified of the outcome of evaluation of the subject tender vide letters dated 17th May 2024.

REQUEST FOR REVIEW NO. 49 OF 2024

35. On 31st May 2024, Iansoft Technologies Limited, the Applicant herein filed a Request for Review dated 31st May 2024 together with a Supporting Affidavit sworn on 31st May 2024 by Geoffrey Rono, 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 17th May 2024 notifying the Applicant that it's 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 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;**
- c) The Applicant's tender be admitted to technical evaluation and/or financial evaluation and a line-by-line comparison of the Applicant's and the Interested Party's bids be undertaken;**

d) In the alternative to (d) above, the Applicant being the only responsive bidder be awarded the contract;

e) Such other orders and reliefs as the Review Board may deem fit and just to grant; and

f) The costs of this review be awarded to the Applicant

36. In a Notification of Appeal and a letter dated 31st May 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 31st May 2024.

37. On 5th June 2024, the Respondent filed a Memorandum of Response to the Applicants Request for Review dated 5th June 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.

38. *Vide* email dated 6th June 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.
39. *Vide* a Hearing Notice dated 7th June 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 13th June 2024 at 2.00 p.m., through the link availed in the said Hearing Notice.
40. On 10th June 2024, the Interested Party filed through Kimitei Nthenge & Co. Advocates a Notice of Appointment dated 7th June 2024, and a Replying Affidavit of the Interested Party sworn on 7th June 2024 by Geoffrey Mutisya Mwanthi.
41. On 10th June 2024, the Applicant filed through its advocates a Supplementary Affidavit sworn on 10th June 2024 by Geoffrey Rono, its Director.

42. *Vide* email dated 12th June 2024, the Applicant's advocates on record sought to arrest the Applicant's Supplementary Affidavit sworn on 10th June 2024 by Geoffrey Rono, its Director following receipt of the Interested Party's Replying Affidavit filed on 10th June 2024.
43. On 12th June 2024, the Applicant filed through its advocates a Supplementary Affidavit sworn on 12th June 2024 by Geoffrey Rono, its Director together with Written Submissions dated 12th June 2024.
44. *Vide* email dated 13th June 2024, parties were notified that the hearing slated for 13th June 2024 had been rescheduled to 17th June 2024 at 2.30 p.m. due to unforeseen circumstances.
45. *Vide* a Hearing Notice dated 14th June 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 18th June 2024 at 11.00 a.m., through the link availed in the said Hearing Notice in view of the fact that the 17th June 2024 had been declared a holiday necessitating postponement of the hearing slated for 17th June 2024.
46. At the hearing of the instant Request for Review on 18th June 2024, the Board read out the pleadings filed by parties in the matter. Counsel for the Applicant, Mr. Muge sought to withdraw the Applicant's Supplementary Affidavit sworn on 10th June 2024 by Geoffrey Rono having also filed a Supplementary Affidavit sworn on 12th June 2024 by Geoffrey Rono addressing issues raised in both the Respondent's Memorandum of Response to the Applicants Request for Review dated

5th June 2024 and the Interested Party's Replying Affidavit sworn on 7th June 2024 by Geoffrey Mutisya Mwanthi. There being no objection by parties, the Board directed that the Applicant's Supplementary Affidavit sworn on 10th June 2024 by Geoffrey Rono be marked as withdraw.

47. Ms. Nthenge raised an objection in regard to the Applicant's submissions dated 12th June 2024 on the ground that the Applicant sought to introduce new facts in the said submissions by raising issue with the evaluation criteria provided for in the Tender Document. The Board 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.

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

PARTIES' SUBMISSIONS

Applicant's Submissions

49. In his submissions, counsel for the Applicant, Mr. Muge, relied on the Request for Review dated 31st May 2024 together with a Supporting

Affidavit sworn on 31st May 2024 by Geoffrey Rono, Supplementary Affidavit sworn on 12th June 2024 by Geoffrey Rono, its Director together with Written Submissions dated 12th June 2024 filed before the Board.

50. Mr. Muge submitted that the regret letter issued by the Respondent to the Applicant dated 17th May 2024 failed to comply with Section 87 of the Act as read with Regulation 82 of Regulations 2020 in addition to provisions under ITT 48 of the Tender Document. Counsel argued that the Respondent failed to (a) provide the Applicant with valid reasons for the failure of its bid, (b) disclose the name and address of the tenderer submitting the successful tender, (c) provide the expiry date of the standstill period and (d) provide instructions on how to request a debriefing and/or submit a complaint during the standstill period. In support of his argument, counsel referred to the holding in PPARB Application No. 6 of 2022, the Court of Appeal decision in Judicial Service Commission v Mbalu Mutava & Another, and the High Court decision in Walunya v Kenyatta University (Constitutional Petition E470 of 2021).

51. Counsel submitted that the Board's orders issued on 6th May 2024 in Request for Review No. 34 of 2024 required that subsequent re-evaluation of bids in the subject tender ought to have been monitored by the Director General of the Public Procurement Regulatory Authority (hereinafter "the Authority") which did not take place and as such, the re-evaluation of tenders took place in total disregard of the Board's

orders since it was incumbent on the Respondent to notify the Director General for him to monitor the evaluation process. Counsel pressed on that the Procuring Entity was wrong in claiming that the Director General did not have to participate in the re-evaluation, circumvented the Board's orders which were not issued in vain and was in contempt for proceeding with re-evaluation of the subject tender without engaging the Director General which made the whole process void.

52. On the issue of evaluation of the Applicant's bid, Mr. Muge submitted that the Applicant's bid was rejected purportedly on a no/yes criteria for failing to have the requisite firm experience. Counsel requested the Board to note that the Applicant had complied with all mandatory provisions and that the subsequent rejection was based on insufficient reasons at the Technical Evaluation stage.
53. Counsel submitted that the main reason for rejecting the Applicant's bid was because it did not provide two (2) completion certificates and not that the firm did not have requisite experience. He pointed out that the averments made at paragraph 28 of the Respondent's Memorandum of Response claiming that the Applicant did not provide a price for a contract signed with KERRA amounting to Kshs. 95 Million were false and argued that the Respondent was obligated to undertake a substantive evaluation of the Applicant's bid.
54. Mr. Muge submitted that the Applicant provided in its tender four (4) contracts above Kshs. 40 M accompanied by two (2) completion

certificates, recommendation letters and other various contracts in a bid to prove firm experience as deponed at paragraphs 7 of the Applicant's Supporting Affidavit, paragraphs 6 & 7 of the Applicant's Supplementary Affidavit and as submitted at pages 133 to 196 of the Applicant's bid document. He indicated that the Applicant provided two (2) completion certificates for two Kenya Police Sacco contracts exhibited and various recommendation letters which detailed that the contracts undertaken by the Applicant were completed and served the same purpose as the completion certificates.

55. Counsel submitted that the reason for disqualification of the Applicant in the subject tender was pegged on those two completion certificates with an intention to cause the public to lose 10 Million Shillings due to an insufficient reason for disqualification. He further submitted that the Respondent's decision was contrary to the provisions of Section 79 and 80 of the Act since the Respondent refused to objectively evaluate the Applicant's bid noting that the Applicant had provided extensive proof of firm experience and that the completion certificates were just but supporting documents.

56. He argued that the recommendation letters were substantive and sufficient in proving successful implementation of the submitted contracts and if the same were not successfully completed, the procuring entities therein would not have issued the same.

57. Counsel submitted that even if the factor of the submission of completion certificates was considered, it ought to have been used on a scale basis meaning that under the firm experience requirement, the Applicant ought to have been scored between 0 to 5 marks and that this was categorically provided for under the Standard Tender Document for Procurement of Information Technology issued by the Authority on 22nd April 2021 and updated on 21st April 2022. In support of his argument, counsel relied on the provisions under Section 9(1)(f) of the Act read with Section 70 of the Act and Regulation 68 of Regulations 2020 which dictates that the standard tender document must be used by a procuring entity so as to ensure that the evaluation criteria is objective and in line with Section 80 of the Act. Counsel further relied on the preface of the standard tender document and submitted that it is a mandatory requirement for a procuring entity to use the standard tender document and failure to do so is a violation of the law.

58. Mr. Muge urged the Board to allow the instant Request for Review as prayed.

Respondents' submissions

59. In her submissions, Ms. Kianji relied on the Memorandum of Response to the Applicants Request for Review dated 5th June 2024 signed by the Chief Executive Officer, CS Justus A. Wabuyabo, LLM (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.

60. Ms. Kianji submitted that the procurement process in the subject tender was undertaken in adherence with the provisions of the Act, Regulations 2020, and the Board's orders in Request for Review No. 34 of 2024. She further submitted that the process was in compliance with the principles under Article 227(1) of the Constitution and that the Applicant's allegations against the Respondent were unfounded.
61. Ms. Kianji referred the Board to paragraph 30 of the Respondent's response in the instant Request for Review and submitted that the Respondent reconvened the Evaluation Committee in compliance with the Board's orders issued in Request for Review No. 34 of 24 and an Evaluation Report submitted to the Director General of the Authority on 17th May 2024. She further submitted that contrary to the Applicant's submissions, the Procuring Entity was not required to be overly supervised unless it was intended for the Director General to be part of the evaluation committee which would be contrary to the law.
62. Counsel submitted that the regret letter dated 17th May 2024 was proper in law and that Section 87(3) of the Act read with Regulation 82 of Regulations 2020 does not require an unsuccessful bidder to be notified of the address of the successful bidder. She indicated that the successful bidder's name as provided in the regret letter was sufficient and any other details pertaining to the Interested Party was

confidential in nature hence why they are submitted to the Board in confidence.

63. Ms. Kianji referred the Board to paragraph 21 of its Memorandum of Response to the instant Request for Review and pointed out that the Evaluation Criteria as stipulated in the Tender Document was on a Yes/No basis and no scores would be awarded as an evaluation criterion in evaluating bids at the technical evaluation stage. She submitted that despite the Applicant alleging that the requirement for contracts to be in the tune Kshs. 40 Million was insurmountable, as at the tender submission deadline the Applicant had not sought any clarification nor complaint on any matter touching on the Tender Document including the evaluation criteria therein. She further submitted that the Applicant ought to have raised any issue touching on the evaluation criteria from the onset and not at this stage of the procurement process.

64. Counsel indicated that the Evaluation Committee applied the same criteria to all bidders who passed the mandatory criteria including the Interested Party and the Applicant and that the recommendation letters required to be submitted could not equate to the completion certificates required to be submitted by bidders and failure to avail the same was not a minor deviation.

65. Ms. Kianji reiterated that no amount was stated in the KERRA contract submitted by the Applicant and that the Applicant had



submitted contracts for year 2023 which beyond the stipulated years under the evaluation criteria.

66. She urged the Board to dismiss the instant Request for Review with costs.

67. At this juncture, Mr. Kyalo clarified that the Authority issues the standard tender document and that procuring entities are required to customize the same in line with their needs and that in the Procuring Entity's customization, the tender data sheet of the Tender Document prevails in the event of a conflict. He expounded on the criteria under Clause 1 A of the Technical Firm Capacity at page 28 of the Tender Document and reiterated that the Applicant did not meet this evaluation criterion noting that the requirement for recommendation letters was a second part of this criterion.

68. Mr. Kyalo pointed out that the Applicant submitted various recommendation letters but there was no evidence of four (4) contracts with the required amount and accompanying completion certificates for the stipulated period.

69. He submitted that the Applicant in participating in the subject tender was aware of the requirements stipulated in the Tender Document in terms of challenging or seeking clarifications on any requirement in the subject tender and is assumed to have agreed to the said terms by submitting their bid document. He further submitted that the

Applicant not being the lowest evaluated bidder is not guaranteed award of the subject tender by virtue of having the lowest bid price.

Interested Party's submissions and Preliminary Objection

70. In her submissions, counsel for the Interested Party, Ms. Nthenge relied on the Replying Affidavit of the Interested Party sworn on 7th June 2024 by Geoffrey Mutisya Mwanthi filed before the Board.
71. Ms. Nthenge sought to have the Applicant's Written Submissions dated 12th June 2024 expunged on the ground that the Applicant sought to introduce new facts in its submissions such as the issue of whether the regret letter dated 17th May 2024 complied with Section 87 of the Act read with Regulation 82 of Regulations 2020.
72. Counsel submitted that the Applicant's contention of the evaluation criteria as provided for in the Tender Document was time barred and ought to have been raised at the point the Applicant received the Tender Document and before the Applicant participated in the subject tender.
73. On the substantive issues in the instant Request for Review, Ms. Nthenge associated herself with the Respondent's submissions. Counsel pointed out that the Applicant was disqualified for failure to provide four (4) completion certificates for proof of experience in implementing similar ERP technology project or value of Kshs. 40

Million and above as provided for in the Tender Document having only provided two (2) completion certificates, a fact that was not in dispute.

74. Ms. Nthenge submitted that a completion certificate cannot serve the purpose of a recommendation letter as it shows the project has been completed successfully in line with the terms of the contract while a recommendation letter only states that the person is capable of performing a particular task.

75. Ms. Nthenge further submitted that the orders of the Board in Request for Review No. 34 of 2024 was for the Evaluation Committee to reconvene and evaluation was to be monitored by the Director General of the Authority and this did not mean that the Director General was required to sit in the Evaluation Committee as any complaint emanating from the procurement proceedings would be resolved by his office hence the likelihood of a conflict of interest.

76. Counsel submitted that allowing the Applicant's bid to be read and compared with the Interested Party's bid would be occasioning an illegality in view of the fact that a bidder is evaluated against the stipulated evaluation criteria provided for in the tender document. She pointed out that it was incumbent for the Applicant to ensure that its application was based on merited grounds.

77. She urged the Board to dismiss the Request for Review with cost

Respondent's Submission on the Interested Party's Preliminary Objection

78. With regard to the preliminary objection raised by the Interested Party, Ms. Kianji associated herself with the submissions made by Ms. Nthenge.

79. Counsel submitted that the Applicant had an earlier opportunity to object to the evaluation criteria when the subject tender came before the Board in Request for Review No. 34 of 2024 and raising the issue in the instant Request for Review was aimed at delaying the procurement process.

Applicant's Rejoinder and response to the Interested Party's Preliminary Objection

80. In a rejoinder, Mr. Muge submitted that a preliminary objection of any kind should flow from pleadings and that both the Applicant's Supporting Affidavit and Supplementary Affidavit raised the issue of the regret letter dated 17th May 2024 having been issued contrary to the Act and the issue regarding use of the standard tender documents.

81. He pointed out that the proceedings in the instant Request for Review and in Request for Review No. 34 of 2024 are materially different and in regard to two (2) different evaluation processes in the subject tender.

82. Counsel submitted that the Tender Data Sheet provided in the tender document do not in any way modify the Instructions to Tenderers in regard to evaluation and as such, the applicable criteria ought to have been the scale system and not the yes/no basis. He further submitted that in view of ITT 31 to 33 providing for omissions and deviations, the Applicant's failure to submit the two completion certificates was not material and ought not to have been a ground for disqualification.

83. Mr. Muge reiterated that the Applicant's recommendation letters were specific that the contracts undertaken had been completed and were sufficient proof of experience in implementing a similar project worth Kshs. 40M. He pointed out that the price for the KERRA certificate had been submitted at page 147 of the Applicant's bid document.

84. Counsel submitted that the Evaluation Committee was required to verify each and every document submitted in regard to the firm experience including the completion certificates and recommendation letters to ascertain that the contracts were completed.

CLARIFICATIONS

85. When asked by the Board when the Applicant submitted its tender for consideration, Mr. Muge indicated that the Applicant submitted its tender on 21st February 2024 when the subject tender was closed. He further clarified that by this time, the Applicant had not sought any clarification from the Procuring Entity and that the only clarification

sought in the procurement process was the debriefing following the last evaluation.

86. When asked by the Board if it was fair to conclude that by 21st February 2024 when the Applicant was submitting its tender it was aware of all the requirements stipulated in the Tender Document, counsel submitted that regardless of the fact that the Applicant submitted its tender, that in itself did not take away any legal issue that may arise in preparation of the tender and more specifically in evaluation of the subject tender just because the Procuring Entity decided to use a particular criteria does not mean that the said criteria is correct since the Applicant may not even have been aware of the correctness or not of the said criteria.

87. When asked to expound on whether or not the Applicant was aware of what they were subjecting themselves to, counsel submitted that the Applicant was aware of the documents that they were required to provide but were not aware that the evaluation criteria was on a yes/no basis instead of scale based.

88. When asked by the Board whether the Board has jurisdiction to consider the issue of the evaluation criteria as raised through the Applicant's Supplementary Affidavit as a ground in the Request for Review in view of Section 167(1) of the Act read with Regulation 203 of Regulations 2020, and in view of the fact that the issue was not raised in Request for Review No. 34 of 2024, counsel submitted that

the reason that this issue did not come up in the previous application was that the Applicant had not progressed beyond the mandatory stage which was on a yes/no basis and that issues in the previous application were different from the present case. He further submitted that he could not have raised issues which he was not aware would come up.

89. When asked by the Board to clarify whether the Applicant admits that there was a criteria requiring for four (4) completion certificates of projects previously handled, counsel answered in the affirmative. When asked if the Applicant actually submitted the four (4) completion certificates, counsel submitted that the Applicant only provided two (2) certificates.

90. When asked whether the Applicant admits that the requirement for four (4) recommendation letters and four (4) completion certificates were distinct requirements for them to progress further at the Technical Evaluation stage, counsel submitted that the requirement was to provide proof of firm experience by providing four contracts above Kshs. 40 Million and that the reason why the other documentation was in brackets was in support and as such, the completion certificates and the recommendation letters were in support of firm experience of successfully implementing those projects. He further submitted that the recommendation letters stated that the projects were completed successfully and are substantive proof of completion of those certificates hence the Respondent was

under an obligation to follow up on the documents availed so as to verify that it was legitimate and that the four (4) contracts were actually completed.

91. When asked whether it was necessary for the Applicant to seek clarification on whether the completion certificates and recommendation letters could be used interchangeably, counsel submitted that it was not necessary pointing out that not all contracts have completion certificates since some of them were sign offs, some completed and paid off and for the projects above Kshs. 40M that were completed, the Applicant had two (2) completion certificates. He further submitted that should the Board analyze the recommendation letters, it would be clear that those projects were completed and the Evaluation Committee would have undertaken their duty as provided at page 32 of the Tender Document to verify those documents and it would be clear why the omission was non-material to lead to disqualification.

92. Counsel confirmed that from his submissions that (a) the uncertainty on existence of the Applicant's projects ought to have been the subject of a clarification, (b) the omission in its tender document was not a material deviation and can be cured, and (c) considering the evaluation criteria, the Board ought to allow room for the recommendation letters to stand in place for the two (2) completion certificates that possibly remain in deficit by the Applicant.

93. When asked how the Board should address the Applicant's issue against other bidders, Mr. Muge submitted that he had sought in the instant Request for Review that a comparative analysis be undertaken so as to prove that the use of the two (2) completion certificates was just not used to reject the Applicant's bid yet according to industry knowledge, it was clear that the Interested party does not match the firm experience of the Applicant and having been allowed to proceed while the Applicant was rejected can only have been through fraud. He further submitted that the prayer for a comparative analysis was within the power of the Board.

94. When asked by the Board to expound on how he would score the Applicant in a criterion that was on a yes/no basis, Mr. Muge submitted that the standard tender document provided for scoring between 0-5 and he would score the Applicant at 4 instead of rejecting its bid since it didn't provide the four (4) contracts.

95. At this juncture, counsel for the Interested Party was asked to comment on the assault made by the Applicant on the Interested Party's tender. Ms. Nthenge submitted that the purpose of an evaluation criteria is to compare a bid with the set evaluation criteria and that the Interested Party's bid was subjected to the same evaluation criteria as other bids and found to be successful having complied with the stipulated criteria and it was not a matter of comparing the Interested Party's bid against the Applicant's bid since that would be occasioning an illegality.

96. On the reason why the evaluation criteria was on a yes/no basis, Ms. Kianji submitted that according to the nature of the subject tender, what was being supplied was intangible goods and using the yes/no basis meant that a bidder had to comply with what the Procuring entity wanted. She further submitted that the criterion was used since it was clear in the Act and Regulations 2020 that procuring for goods and services is a matter of compliance. When asked whether the Evaluation Report at the Technical Evaluation stage comprised of some scoring at some point, counsel submitted that it did not include scoring and this criterion was clear from the Tender Document.

97. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 31st May 2024 was due to expire on 21st June 2024 and that the Board would communicate its decision on or before 21st June 2024 to all parties to the Request for Review via email.

BOARD'S DECISION

98. 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 this issue, the Board will make a determination on whether the issue raised by the Applicant pertaining to the decision by the Procuring Entity to base the Technical Evaluation criteria in the Tender Document on a Yes/No basis has been raised within the statutory period of 14 days of occurrence of alleged breach of duty imposed on the Procuring Entity by the Act in accordance with Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020 so as to invoke the jurisdiction of the Board.

b) Whether the Procuring Entity complied with the Board's orders issued on 6th May 2024 in Request for Review No. 34 of 2024.

c) Whether the Procuring Entity's Evaluation Committee evaluated and compared tenders in the subject tender with respect to Clause 1A of Tender Firm Capacity of Section III – Evaluation and Qualification Criteria at page 28 of the Tender Document in accordance with Section 80(2) of the Act read with Article 227(1) of the Constitution.

d) Whether the Letter of Notification of Intention to Award the subject tender dated 17th May 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;

99. 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.

100. 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."

101. 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."

102. 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."

103. 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."

104. 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...."

105. 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."

106. 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.

107. 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."

108. 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."***

109. 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.

110. 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.***

111. 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.

112. 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)

113. 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.

114. A reading of Regulation 203(1), (2)(c) & (3) of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 confirms that an aggrieved candidate or tenderer invokes the jurisdiction of the Board by filing a request for review with the Board Secretary within 14 days of (i) occurrence of breach complained of, having taken place before an award is made, (ii) notification under Section 87 of the Act; or (iii) occurrence of breach complained of, having taken place after making of an award to the successful tenderer.

115. Section 87 of the Act referred to in Regulation 203(2)(c)(ii) of Regulations 2020 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.

116. It is therefore clear from a reading of Section 167(1) and 87 of the Act, Regulation 203(1), (2)(c) & (3) of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 that an aggrieved candidate or tenderer invokes the jurisdiction of the Board by filing a request for review with the Board Secretary within 14 days of (i) occurrence of breach complained of, having taken place before an award is made, (ii) notification of intention to enter into a contract having been issued or (iii) occurrence of breach complained of, having taken place after making of an award to the successful tenderer. Simply put, an aggrieved candidate or tenderer can invoke the jurisdiction of the Board in three instances namely, (i) before a notification of intention to enter into a contract is made, (ii) when a notification of intention to enter into a contract is made and (iii) after a notification to enter into a contract has been made. The option available for an aggrieved

candidate or tenderer in the aforementioned three instances is determinant on when occurrence of breach complained of took place and should be within 14 days of such occurrence of breach. It was not the intention of the legislature that where an alleged breach occurs before notification to enter into a contract is issued, the same is only complained of after notification to enter into a contract has been issued. We say so because there would be no need to provide under Regulation 203 (2)(c) of Regulations 2020 the three instances within which a Request for Review may be filed.

- i Whether the issue raised by the Applicant pertaining to the decision by the Procuring Entity to base the Technical Evaluation criteria in the Tender Document on a Yes/No basis has been raised within the statutory period of 14 days of occurrence of alleged breach of duty imposed on the Procuring Entity by the Act in accordance with Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020 so as to invoke the jurisdiction of the Board.***

117. During the hearing, counsel for the Interested Party, Ms. Nthenge sought to have the Applicant's Written Submissions dated 12th June 2024 expunged from record and submitted that the Applicant's contention that the evaluation criteria of a Yes/No basis at the

Technical Evaluation stage as provided for in the Tender Document was time barred and ought to have been raised at the point the Applicant received the Tender Document and before the Applicant participated in the subject tender.

118. Ms. Kianji fully associated herself with submissions made by Ms. Nthenge and submitted that the Applicant had an earlier opportunity to object to the said evaluation criteria when the subject tender came before the Board in Request for Review No. 34 of 2024 and raising this issue in the instant Request for Review was aimed at delaying the procurement process.

119. On its part, the Applicant contends at paragraph 12 of its Supplementary Affidavit sworn on 12th June 2024 by Geoffrey Rono that the decision by the Respondent to base the Technical Evaluation on a Yes/No basis is draconian, arbitrary, without basis and is an unwarranted deviation from the Authority's Standard Tender Document for Procurement of Information Technology issued on 22nd April 2021 and updated on 21st April 2022 which procuring entities are obligated to use. During the hearing, counsel for the Applicant submitted that the Applicant submitted its bid on 21st February 2024 and was aware of all the requirements stipulated in the Tender Document but was not aware that the evaluation criteria was on a Yes/No basis instead of scale based. Counsel further submitted that the reason this criterion was not previously challenged in Request for

Review No. 34 of 2024 was because the Applicant had not progressed to the Technical Evaluation stage and the issues in the instant Request for Review are different from the issues in Request for Review No. 34 of 2024.

120. Having considered parties' pleadings, submissions and the confidential documents contained in the confidential file submitted by the Respondent to the Board pursuant to section 67(3)(e) of the Act, we understand the Interested Party's and Respondent's contention to be that, by the Applicant's own admission of having elected to participate in the subject tender by submitting its tender on 21st February 2024 before the tender submission deadline of 22nd February 2024, any contents of the Tender Document ought to have been challenged by the Applicant before the Board on or before the 21st February 2024.

121. This Board has in a plethora of cases held that procurement proceedings are time bound and a candidate or a tenderer who wishes to challenge a decision of a procuring entity with respect to a tender must come before the Board at the earliest, by using the earliest option available under Regulation 203(2)(c) of Regulations 2020 so as not to be accused of laches. This was the holding by this Board in **PPARB Application No. 87 of 2022 Nectar Produce (K) Limited v Accounting Officer, Kenya Airports Authority & others** and in

PPARB Application No. 97 of 2022 Peesam Limited v The Accounting Officer, Kenya Airports Authority & Others.

122. The Board is also guided by the holding in **Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Kemotrade Investment Limited [2018] eKLR** where the High Court at paragraphs 65, 66 and 67 noted that to determine when time starts to run, such determination can only be made upon an examination of the alleged breach and when the aggrieved tenderer had knowledge of the said breach and held:

66. The answer then to the question when time started to run in the present application can only be reached upon an examination of the breach that was alleged by the 2nd Interested Party in its Request for Review, and when the 2nd Interested Party had knowledge of the said breach. The said Request for Review was annexed as "Annexure C04" to the 2nd Interested Party's replying affidavit. Paragraphs 2 to 4 of the said Request address the first breach that the 2nd Interested Party's representative, one Charles Obon'go noted and notified the Chairman of the tender opening committee about at the tender opening, namely that the Applicant had not supplied the sample of 3m of the sleeve and mill certificate and had not been issue with a delivery note, and that the said Applicant sought to introduce the sample after the commencement of the tender opening.

67. It is not in dispute that the tender opening was on 10th November 2017 at 10.00am, which all the parties attest to in their various affidavits. It is therefore evident that for this particular breach the 2nd Interested Party had knowledge of the same and admits to notifying the 1st Interested Party's tender opening committee of the same on 10th November 2017. Therefore, time for filing a review against this particular alleged breach started to run on 10th November 2017, and the Respondent had no jurisdiction to consider the alleged breach when it was included in the Request for Review filed on 21st February 2017, as the statutory period of filing for review of 14 days had long lapsed. Any decisions by the Respondent on the alleged breach were therefore ultra vires and null and void.

123. Turning to the circumstances in the instant Request for Review, it is not in contest that the Applicant was aware of the contents and provisions of the Tender Document of the subject tender advertised on 30th January 2024 and scheduled to close on 22nd February 2024 since it chose to participate on 21st February 2024 in the tendering process. It was only after its tender was found non responsive that it opted to challenge, *inter alia*, the evaluation criterion of a Yes/No basis provided under the Technical Evaluation stage of the Tender Document as being arbitrary and an unwarranted deviation from the Authority's Standard Tender Document for Procurement of



Information Technology issued on 22nd April 2021 and updated on 21st April 2022 which procuring entities are obligated to use.

124. In our considered view, this objection by the Applicant ought to have been raised by virtue of Regulation 203(2)(c)(i) of Regulations 2020 since the occurrence of the alleged breach of duty by the Respondent complained of took place on 30th January 2024 when the subject tender was advertised and way before the subject tender closed on 22nd February 2024 and an award made in the subject tender. We are not convinced by the Applicant's argument that despite being aware of all the requirements stipulated in the Tender Document it was not aware that the evaluation criteria was on a Yes/No basis instead of a scale based as it was expected to take note of all the contents of the Tender Document prior to committing to participate in the subject tender.

125. In computing time, the Board is guided by Section 57 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya (hereinafter the IGPA) which provides as follows:

"57. Computation of time

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

a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be

- exclusive of the day on which the event happens or the act or thing is done;***
- b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;***
- c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;***
- d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time."***

126. In computing time when the Applicant should have sought administrative review before the Board with respect to challenging the contents and provisions of the evaluation criterion of a Yes/No basis provided under the Technical Evaluation stage of the Tender Document the 30th January 2024 is excluded pursuant to Section 57(a) of IGPA being the day when the Applicant learnt of the occurrence of the alleged breach with respect to allegations that the provisions of



the Tender Document were inconsistent with the Standard Tender Document. This means, 14 days started running from 31st January 2024 and lapsed on 13th February 2024. In essence, the Applicant had between 31st January 2024 and 13th February 2024 to seek administrative review before the Board.

127. Assuming that the last day that the Applicant became aware of the alleged breach of duty by the Respondent was on the day it submitted its tender on 21st February 2024, the 21st February 2024 is excluded pursuant to Section 57(a) of IGPA. This means that 14 days started running from 22nd February 2024 and lapsed on 6th March 2024. In essence, the Applicant had between 22nd February 2024 and 6th March 2024 to seek administrative review before the Board with respect to its allegations that the Respondent provided an evaluation criterion of a Yes/No basis under the Technical Evaluation stage of the Tender Document which is arbitrary and an unwarranted deviation from the Authority's Standard Tender Document for Procurement of Information Technology issued on 22nd April 2021 and updated on 21st April 2022 that procuring entities are obligated to use.

128. However, the Applicant opted to raise the aforesaid allegations in the instant Request for Review filed on 31st May 2024 which was the 101 day from the date it was assumed to have received the Tender Document at the latest. Even if the Applicant had raised these

allegations in Request for Review No. 34 of 2024 filed on 16th April 2024, the same would have been the 56th day from the date it was assumed to have received the Tender Document at the latest. As such, the aforesaid allegations by the Applicant are time barred and contrary to Section 167(1) of the Act read with Regulation 203 (2)(c)(i) of regulations 2020 in so far as the Applicant became aware of the alleged breach of duty complained of with respect to the provisions of the Tender Document in the subject tender.

129. In the circumstances, we find and hold that the allegations by the Applicant pertaining to the decision by the Procuring Entity to base the Technical Evaluation criteria in the Tender Document on a Yes/No basis has been raised outside the statutory period of 14 days of occurrence of alleged breach of duty imposed on the Procuring Entity by the Act in accordance with Section 167(1) of the Act read with Regulation 203(2)(c)(i) of Regulations 2020 thus ousting the jurisdiction of the Board only to this extent.

130. The Board, however, wishes to invite the respondent to reflect on the evaluation criteria adopted at the Technical Evaluation stage of this tender and satisfy itself that the same accords with the Provisions of the Constitution, the Act, Regulations 2020 and standard tender document number 10 for procurement of information technology issued on 22nd April, 2021 and updated on 21st April, 2022 which is published on the Public Procurement Regulatory Authority website.

Whether the Procuring Entity complied with the Board's orders issued on 6th May 2024 in Request for Review No. 34 of 2024.

131. The Applicant contends at paragraph 18 of the Request for Review that the Procuring Entity failed to comply with orders of this Board issued on 6th May 2024 in Request for Review No. 34 of 2024 since it failed to ensure that the re-evaluation of the subject tender was within the bounds of law, undertaken under the supervision of Director General of the Authority and a report provide on the same.

132. On its part, the Respondent contends that the Board's orders were for it to reconvene the Evaluation Committee and re-evaluate the subject tender. Counsel for the Respondent, Ms. Kianji submitted that the Procuring Entity submitted a copy of the Re-Evaluation Report to the Director General of the Authority on 17th May 2024 in compliance with the Board's directions and that the Director General was not meant to be part of the Evaluation Committee in the subject tender as that would be outside his mandate per the Act.

133. On 6th May 2024 the Board under Order No. (d) in Request for Review No. 34 of 2024 as follows:

" 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 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."

134. Further, Order (f) issued on 6th May 2024 in Request for Review No. 34 of 2024 directed as follows:

"A copy of this decision be served upon the Director General of the Public Procurement Regulatory Authority and the Respondent is hereby ordered to furnish a report on the progress of the evaluation of the subject tender upon the Authority on compliance with the orders issued herein within fourteen (14) days from the date of this decision."

135. In essence, the Respondent was required to (a) admit the Applicant's tender for evaluation at the Technical Evaluation stage, (b) direct the Evaluation Committee to evaluate the Applicant's tender together with other responsive tenders at this stage while taking into consideration the findings of the Board, the provisions of the Tender Document, the Constitution, the Act and Regulations 2020. Additionally, the Respondent was required to furnish the Authority with a report on the

progress of evaluation of the subject tender on compliance with the orders of the Board within 14 days from the 6th May 2024.

136. The Board has had an opportunity to scrutinize the confidential file submitted by the Respondent pursuant to Section 67(3)(e) of the Act and has had sight of an evaluation Report signed by members of the Evaluation Committee on 14th May 2024 wherein we note that the Applicant's bid document was admitted for evaluation at the Technical Evaluation Stage together with other bids which had progressed to this stage.

137. We also note that according to the letter dated 17th May 2024 addressed to the Director General of the Authority with regard to implementation of the Board's orders in Request for Review Application No. 33 and 34 of 2024 an evaluation report was forwarded to the Director General of the Authority pertaining to the subject tender. The said and reads in part as follows:

"

In compliance with the ruling of the Public Procurement Administrative Review Board (PPARB), please find attached the evaluation report for tender number NuPEA/OT/DICT/004/23-24 for Supply, Delivery, Installation, Testing, Training, Commissioning and



Support Services for Enterprise Resource Planning (ERP) System.

The Agency looks forward to closely working with the Authority in ensuring efficient execution of the Agency mandate.

.....”

138. From the above letter, it is clear to the Board that the Respondent forwarded an evaluation report of the subject tender to the Authority with the aim of updating the Authority on the progress of evaluation of the subject tender and compliance with Board orders of 6th May 2024 within the stipulated period of 14 days as ordered.

139. As such, the Board finds that the Procuring Entity complied with the Board’s orders issued on 6th May 2024 in Request for Review No. 34 of 2024.

Whether the Procuring Entity’s Evaluation Committee evaluated and compared tenders in the subject tender with respect to Clause 1A of Tender Firm Capacity of Section III – Evaluation and Qualification Criteria at page 28 of the Tender Document in accordance with Section 80(2) of the Act read with Article 227(1) of the Constitution.

140. We understand the Applicant's case on this issue to be that its tender was substantially responsive having provided proof of sufficient firm experience in its bid document which is unmatched by any of the other bidders including the Interested Party and that a scrutiny of firm experience of the bidders especially between the Applicant and the Interested Party on line by line basis will ascertain that the Applicant's bid was responsive pursuant to Section 79 and 80 of the Act. Counsel for the Applicant, Mr. Muge, submitted that the uncertainty on existence of the Applicant's projects as submitted in its bid document ought to have been the subject of a clarification by the Procuring Entity. He further submitted that the omission in the Applicant's bid document was not a material deviation and could be cured, and that considering the evaluation criteria at the Technical Evaluation stage, the Board ought to allow room for the recommendation letters submitted by the Applicant to stand in place for the two (2) completion certificates that possibly remain in deficit in the said bid document.

141. We understand the Respondent's response on this issue to be that the Applicant's tender did not meet the technical requirements provided in the Tender Document and was non responsive as stipulated under Section 79 of the Act. The Respondent contend that they adhered to the set out evaluation criteria in the Tender Document which was objective and quantifiable and complied with provisions of the Act and Constitution.

142. 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.

143. 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)"



144. Further to the above provision, the national values and principles of governance under Article 10 of the Constitution apply to State organs and public entities contracting for goods and services. Article 10 provides as follows:

"(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

(2) The national values and principles of governance include—

(a)

(b)

(c) good governance, integrity, transparency and accountability" [Emphasis ours].

145. Efficient good governance in public procurement proceedings provides tenderers with an assurance that public procurement and asset disposal processes are operating effectively and efficiently. Such processes are also underpinned by broader principles such as the rule of law, integrity, transparency and accountability amongst others.

146. The Board observes that the legislation contemplated in Article 227(2) of the Constitution is the Act. 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)"

147. 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.

148. 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.

(2) A responsive tender shall not be affected by—



(a) minor deviations that do not materially depart from the requirements set out in the tender documents; or

(b) errors or oversights that can be corrected without affecting the substance of the tender.

(3) A deviation described in subsection (2)(a) shall—

(a) be quantified to the extent possible; and

(b) be taken into account in the evaluation and comparison of tenders.”

149. From the above provision, a tender only qualifies as a responsive tender if it meets all 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 Court stated:

"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

bidder 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. [Emphasis ours].

150. The Board notes that Regulation 76 of Regulations 2020 provides:

"76. Technical evaluation

(1) Upon completion of the preliminary evaluation under regulation 74, the evaluation committee shall conduct a technical evaluation by comparing each tender to the technical requirements of the goods, works or services in the tender document.

(2) The evaluation committee shall reject tenders which do not satisfy the technical requirements under paragraph (1)."

151. Turning to the circumstances in the instant Request for Review, we note that the Applicant was notified in a notification letter dated 17th

May 2024 that its tender was unsuccessful at the Technical evaluation stage 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 failed at the technical firm capacity requirements as follows:**

- Out of the LPOs/LSOs contracts submitted as proof of having done similar ERP technology projects with a value of Ksh 40,000,000 and above, only two had completion certificates against a requirement of four completion certificates.**

The successful bidder is M/s Green Com Enterprise Solutions Limited at a price Ninety-Eight Million, Five Hundred and Eighty-Three and One Shillings Ksh 98,583,001.00 as the lowest evaluated bidder.

....."

152. From the above notification letter dated 17th May 2024, the Applicant was informed that the reason for disqualification of its bid was because it submitted only two (2) completion certificates against a requirement



of four (4) completion certificates, a fact that the Applicant admitted to during the hearing.

153. We have carefully studied the Tender Document of the subject tender and note that the criteria for evaluation of the subject tender was set out in Section III-Evaluation and Qualification Criteria at page 25 to 57 of the Tender Document. Clause 1 A of the Tender Firm Capacity of Section III – Evaluation and Qualification Criteria at page 28 of the Tender Document provides as follows:

".....

Technical Firm Capacity

<i>Evaluation Criteria</i>		
<i>NOTE: VERIFICATION WILL BE DONE FOR ALL THE DOCUMENTS</i>		
<i>A. Specific experience of the firm, relevant to the Assignment</i>		
<i>1.</i>	<i>Firm Experience</i>	
	<i>i Experience in implementing the Proposed Technology of similar nature from at least Four (4) clients in the years (2018, 2019, 2020, 2021 and 2022. (Attach LPO/LSO/Contracts clearly showing the scope, value, and date of the projects. Each</i>	



	<p><i>contract must Kenya Shillings Forty Million (Ksh. 40,000,000,000) and above. Attach copies of completion certificates showing the start & end dates of the same.</i></p> <p><i>ii Provide at least four (4) recommendations of successful implementations of ERPs submitted directly to the procuring entity and copies together with the tender document.</i></p>	
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154. In essence, a bidder was required to have experience in implementing the proposed technology of a similar nature for at least four (4) clients in the years 2018, 2019, 2020, 2021, and 2022. To prove this experience, a bidder was required to submit four (4) copies of LPO/LSO/Contracts valued at Kshs. 40 M and above clearly showing the scope, value, and date of the projects in addition to four (4) copies of completion certificates showing the start and end dates of the same. Additionally, a bidder was required to submit at least four (4) copies of the recommendation letters of successful implementations of ERPs. As such, a bidder was required to submit four (4) copies of completion

certificates of completed projects and four (4) copies of recommendation letters of successful implementation of ERPs.

155. Clause 1 A (i) of the Tender Firm Capacity of Section III – Evaluation and Qualification Criteria at page 28 of the Tender Document was to be evaluated on a Yes/No basis and failure to satisfy the same rendered a tender non-responsive and such tender would not proceed for further evaluation.

156. The Board has studied the Evaluation Report and observes that upon evaluation, the Applicant's tender was determined non-responsive at the Technical Evaluation stage for having failed to comply with Clause 1 A (i) of the Tender Firm Capacity of Section III – Evaluation and Qualification Criteria at page 28 of the Tender Document. In our considered view, the Applicant's prayer to allow room for the various recommendation letters submitted in its bid document to stand in place of the two (2) completion certificates not submitted cannot suffice since the requirement under Clause 1A of the Tender Firm Capacity was set in mandatory terms of a YES/NO basis and required four (4) copies of Completion certificates and four (4) copies of recommendation letters and one was not supposed to substitute the other.

157. Having studied the Applicant's tender submitted to the Board as part of the confidential documents pursuant to Section 67(3)(e) of the Act in response to the subject tender, we note the following with respect

to its adherence to the requirement under Clause 1 A (i) of the Tender Firm Capacity of Section III – Evaluation and Qualification Criteria at page 28 of the Tender Document:

No.	Requirement (Evaluation Criteria)	Documents submitted by the Applicant in its original bid document	Observation by the Board of the Applicant's Bid document
1 A (i)	Experience in implementing the Proposed Technology of similar nature from at least Four (4) clients in the years (2018, 2019, 2020, 2021 and 2022. (Attach LPO/LSO/Contracts clearly showing the scope, value, and date of the projects. Each contract must Kenya Shillings Forty Million (Ksh.	<ul style="list-style-type: none"> ➤ Contract with Kenya Police Sacco dated 5th March 2019 amounting to USD 1,179,871.09 (Kshs. 118,197,244.04113) Per conversion rates of Tuesday 5th march 2015) \$1 USD = KSh100.1781 ➤ Attached Completion Certificate dated 27th November 2023 	<ul style="list-style-type: none"> ➤ It is not clear if the completion certificate was from Kenya Police Sacco or Kenya Police DT Sacco



	40,000,000,000) and above. Attach copies of completion certificates showing the start & end dates of the same.		
		<ul style="list-style-type: none"> ➤ Contract with Kenya Police DT Sacco Upgrade dated 22nd September 2023 amounting to Kshs. 40,000,000 ➤ Completion certificate dated 27th November 2023 	<ul style="list-style-type: none"> ➤ The contract being dated year 2023 was outside stipulated period.
		<ul style="list-style-type: none"> ➤ Contract with Afya Sacco dated 22nd September 2023 amounting to Kshs. 50,284,074.40 ➤ No completion certificate submitted 	<ul style="list-style-type: none"> ➤ Did not meet criterion as contract was outside stipulated period and no completion certificate was submitted.
		<ul style="list-style-type: none"> ➤ Contract with Kenya Rural Roads 	<ul style="list-style-type: none"> ➤ Did not meet criterion

		<p>Authority dated 27th October 2021.</p> <ul style="list-style-type: none"> ➤ Submitted notification of award of Ksh. 95,797,040.64 and payment voucher of Ksh.36,516,991.00 ➤ No completion certificate submitted 	
		<ul style="list-style-type: none"> ➤ Contract with Bandari Sacco dated 5th October 2023 amounting to Kshs. 39,200,000.00 ➤ No completion certificate submitted 	<ul style="list-style-type: none"> ➤ Did not meet criterion
		<ul style="list-style-type: none"> ➤ Contract with Kenyatta International Convention Centre dated October 2023 	<ul style="list-style-type: none"> ➤ Did not meet criterion



		<p>amounting to Kshs. 22,150,000.00</p> <ul style="list-style-type: none"> ➤ No completion certificate submitted 	
		<ul style="list-style-type: none"> ➤ Contract with Kenya Police Investment Cooperative Society for the year 2023 amounting to Kshs. 5,000,000 ➤ No completion certificate submitted 	<ul style="list-style-type: none"> ➤ Did not meet criterion
		<ul style="list-style-type: none"> ➤ Contract with Ushuru Sacco dated January 2022 amounting to Kshs. 9,223,000.00 ➤ Completion certificate dated 7th September 2022 	<ul style="list-style-type: none"> ➤ Did not meet criterion
		<ul style="list-style-type: none"> ➤ Contract with Kenya Development Response to Displacement Impacts Project 	<ul style="list-style-type: none"> ➤ Did not meet criterion

		<p>dated March 2019 amounting to Kshs. 30,000,000</p> <ul style="list-style-type: none"> ➤ No completion certificate submitted 	
		<ul style="list-style-type: none"> ➤ Contract with Mhasibu Sacco dated January 2022 amounting to Kshs. 13,392,564.00 ➤ Completion certificate dated 19th January 2022 	<ul style="list-style-type: none"> ➤ Did not meet criterion
		<ul style="list-style-type: none"> ➤ Kenya World Life Conservation Association ➤ No contract ➤ Completion certificate dated 5th August 2022 	<ul style="list-style-type: none"> ➤ Did not meet criterion

158. We also note that two (2) other tenderer's bids (namely, Appkings Solutions Limited and Dynasoft Business Solutions) were determined non-responsive for also having failed to comply with Clause 1 A (i) of

the Tender Firm Capacity of Section III – Evaluation and Qualification Criteria at page 28 of the Tender Document. Only the Interested Party's bid was determined responsive to progress for further evaluation having met all the technical firm capacity requirements at this stage of evaluation.

159. Having studied the Interested Party's tender submitted to the Board as part of the confidential documents pursuant to Section 67(3)(e) of the Act in response to the subject tender, we note the following with respect to the completion certificates submitted by the Interested Party in response to the requirement under Clause 1 A (i) of the Tender Firm Capacity of Section III – Evaluation and Qualification Criteria at page 28 of the Tender Document that the Evaluation Committee found the Interested Party's tender responsive:

No.	Requirement (Evaluation Criteria)	Contract and Completion Certificates submitted by the Interested Party in its original bid document	Observation by the Board of the Interested Party's Contracts and Completion Certificates
1 A (i)	Experience in implementing the Proposed Technology of similar nature from	➤ Contract with Ministry of Roads State Department of Roads dated 4 th July 2023 amounting to Ksh. 44,266,000.00	The contract and completion certificate did not meet the evaluation criteria since it was outside

<p>at least Four (4) clients in the years (2018, 2019, 2020, 2021 and 2022. (Attach LPO/LSO/Contracts clearly showing the scope, value, and date of the projects. Each contract must Kenya Shillings Forty Million (Ksh. 40,000,000,000) and above. Attach copies of completion certificates showing the start & end dates of the same.</p>	<p>➤ Completion Certificate dated 30th January 2024</p>	<p>the stipulated period (years 2023 and 2024 respectively).</p>
	<p>➤ Contract with Best Link Developers Ltd dated 10th August 2020 amounting to Kshs. 53,317,960.00</p>	<p>The contract and completion certificate met the evaluation criteria</p>
	<p>➤ Completion certificate dated 23rd August 2022</p>	
	<p>➤ Contract with African Field Epidemiology Network dated 2nd February 2021 amounting to USD 550,844.00 (Kshs. 60,595,484.0512) per the conversion rates as on Tuesday 2nd February 2021 \$1 USD = KSh110.0048</p> <p>➤ Completion certificate dated 3rd February 2022</p>	<p>The contract and completion certificate met the evaluation criteria</p>

		<p>➤ Contract with Abted Company Limited dated 2nd January 2020 amounting to UGX 1,506,002,388.14 (Kshs.49,305,012,185.315) Uganda Shilling exchange rate on 2nd January 2020 1 KES = 32.739 UGX.</p> <p>➤ Completion certificate dated 25th March 2023 for the period 2/01/2020 to 4/01/2022</p>	<p>There is a notable discrepancy between the period stipulated in the contract and the completion certificate in that the contract was to be an annual subscription service contract period of three (3) years from 2nd January 2020 whereas the completion certificate indicated the period of the contract as two years from 2/01/2020 to 4/01/2022</p>
		<p>➤ Contract with Megasilicon Building & Construction Limited dated 25th October 2022 amounting to Kshs. Kshs. 46,075,200.00</p>	<p>The contract and completion certificate met the evaluation criteria</p>



	<ul style="list-style-type: none"> ➤ Completion certificate dated 22nd December 2022 	
	<ul style="list-style-type: none"> ➤ Contract with National Land Commission dated 7th February 2022 amounting to Kshs. 7,854,500.00 ➤ Completion certificate dated 20th May 2022 	Did not meet the criterion as amount was below Kshs. 40 Million.
	<ul style="list-style-type: none"> ➤ Contract with National Construction Authority dated 16th January 2020 amounting to Kshs. 22,500,000.00 ➤ Completion certificate dated 5th October 2021 	Did not meet the criterion as amount was below Kshs. 40 Million.
	<ul style="list-style-type: none"> ➤ Contract with Unclaimed Financial Assets Authority dated 15th June 2021 amounting to Kshs. 1,600,000.00 	Did not meet the criterion as amount was below Kshs. 40 Million.

		<ul style="list-style-type: none"> ➤ Completion certificate dated 27th October 2021 	
		<ul style="list-style-type: none"> ➤ Contract with Unclaimed Financial Assets Authority dated 24th February 2020 amounting to Kshs/ 2,500,000.00 ➤ No completion certificate submitted 	Did not meet the criterion as amount was below Kshs. 40 Million and no completion certificate was submitted.

160. From the analysis enumerated above, we note that despite the Interested Party's bid having been determined compliant to the requirement under Clause 1 A (i) of the Tender Firm Capacity of Section III – Evaluation and Qualification Criteria at page 28 of the Tender Document, the Interested Party submitted three (3) contracts and completion certificates which met the evaluation criterion. In our considered view, the Contract with Abted Company Limited dated 2nd January 2020 and accompanying completion certificate dated 25th March 2023 for the period 2/01/2020 to 4/01/2022 failed to meet the aforementioned evaluation criterion in that there is a notable discrepancy between the period stipulated in the contract and the

completion certificate since the contract was to be an annual subscription service contract period of three (3) years from 2nd January 2020 whereas the completion certificate indicated the period of the contract as two years from 2/01/2020 to 4/01/2022.

161. In view of the foregoing, we find that the provisions of Clause 1 A (i) of the Tender Firm Capacity of Section III – Evaluation and Qualification Criteria at page 28 of the Tender Document were not fairly or equally applied by the Evaluation Committee when evaluating the Applicant's and Interested Party's tenders since it is the duty of the Evaluation Committee to verify all the information submitted by bidders so as to ascertain that they have satisfied the stipulated requirements in the Tender Document.

162. In the circumstances we find that the Procuring Entity's Evaluation Committee evaluated and compared tenders in the subject tender with respect to Clause 1A of Tender Firm Capacity of Section III – Evaluation and Qualification Criteria at page 28 of the Tender Document in an unfair manner contrary to the provisions of Section 80(2) of the Act read with Article 227(1) of the Constitution.

Whether the Letter of Notification of Intention to Award the subject tender dated 17th May 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.



163. The Applicant contends at paragraph 13 of its Request for Review dated 31st May 2024 that the letter of Notification of Intention to Award the subject tender dated 17th May 2024 did not adhere to Section 87(3) of the Act due to the fact that the reasons provided therein are substantively erroneous rendering it void. During the hearing counsel for the Applicant, Mr. Muge, submitted that the said notification letter failed to comply with Section 87 of the Act as read with Regulation 82 of Regulations 2020 in addition to provisions under ITT 48 of the Tender Document due to the Respondent's failure to (a) provide the Applicant with valid reasons for the failure of its bid, (b) disclose the name and address of the tenderer submitting the successful tender, (c) provide the expiry date of the standstill period and (d) provide instructions on how to request a debriefing and/or submit a complaint during the standstill period.

164. In response, the Respondents submitted that the notification letter dated 17th May 2024 was issued in compliance with the provisions of Section 87 of the Act read with Regulation 82 of Regulations 2020 and that there was no requirement to disclose to the Applicant the address of the successful bidder as alleged. Ms. Kianji submitted that the successful bidder's name as provided in the regret letter was sufficient and any other details pertaining to the Interested Party was confidential in nature.

165. Ms. Nthenge for the Interested party sought to have the submissions made by the Applicant on this issue expunged on the basis that it was

introducing new facts in its submissions on the issue regarding whether the regret letter dated 17th May 2024 complied with Section 87 of the Act read with Regulation 82 of Regulations 2020.

166. We note that 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."

167. 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.

168. 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."

169. 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.

170. 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 thereof 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"

171. From the above case, the Board observes that 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"

172. 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 to seek 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.

173. We have hereinbefore established that the reason given for disqualification of the Applicant's tender as communicated in the letter dated 17th May 2024 was that '***Out of the LPOs/LSOs contracts submitted as proof of having done similar ERP technology projects with a value of Ksh 40,000,000 and above, only two had completion certificates against a requirement of four completion certificates.***'

174. We note that the Procuring Entity also notified the Applicant that the successful bidder was M/s Green Com Enterprise Solutions Limited at a price Ninety-Eight Million, Five Hundred and Eighty-Three and One Shillings Ksh 98,583,001.00 being the lowest evaluated bidder.

175. In our considered view, the Applicant was sufficiently notified of the reason for its disqualification in the subject tender as well as the name of the successful bidder, why it was successful and at what price it was awarded the subject tender in line with Section 87 of the Act read with Regulation 82 of Regulations 2020.

176. In the circumstances, we find that the Respondent's Letter of Notification of Intention to Award the subject tender dated 17th May 2024 issued to the Applicant in the subject tender met 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?

177. We have found that the Board lacks jurisdiction to hear and determine the allegations by the Applicant pertaining to the decision by the Procuring Entity to base the Technical Evaluation criteria in the Tender Document on a Yes/No basis having been raised outside the statutory period of 14 days of occurrence of alleged breach of duty imposed on the Procuring Entity by the Act in accordance with Section 167(1) of the Act read with Regulation 203(2)(c)(i) of Regulations 2020.

178. We have also found that the Procuring Entity complied with the Board's orders issued on 6th May 2024 in Request for Review No. 34 of 2024.

179. We have established that the Respondent's Letter of Notification of Intention to Award the subject tender dated 17th May 2024 issued to the Applicant in the subject tender met the threshold required in Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020.

180. We have also established that the Procuring Entity's Evaluation Committee evaluated and compared tenders in the subject tender with respect to Clause 1A of Tender Firm Capacity of Section III – Evaluation and Qualification Criteria at page 28 of the Tender

Document in an unfair manner contrary to the provisions of Section 80(2) of the Act read with Article 227(1) of the Constitution.

181. This Board is cognizant of the provisions of Section 83 of the Act read with Regulation 80 of Regulations 2020 which provides for post qualification/due diligence carried out by an Evaluation Committee to confirm and verify the qualifications of a tenderer who submitted the lowest evaluated responsive tender.

182. Section 83 of the Act provides that:

“(1) An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act.

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

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

(a) initial each page of the report; and

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

183. Further, Regulation 80 of Regulations 2020 provides that:

"(1) Pursuant to section 83 of the Act, a procuring entity may, prior to the award of the tender, confirm the qualifications of the tenderer who submitted the bid recommended by the evaluation committee, in order to determine whether the tenderer is qualified to be awarded the contract in accordance with sections 55 and 86 of the Act.

(2) If the bidder determined under paragraph (1) is not qualified after due diligence in accordance with the Act, the tender shall be rejected and a similar confirmation of qualifications conducted on the tenderer—

(a) who submitted the next responsive bid for goods, works or services as recommended by the evaluation committee; or

(b) who emerges as the lowest evaluated bidder after re-computing financial and combined score for consultancy services under the Quality Cost Based Selection method."

184. In essence, an evaluation committee may after evaluating and prior to award of tender conduce due diligence to confirm and verify qualifications presented by a bidder who submitted the lowest evaluated responsive tender and this may include obtaining confidential references from persons with whom the tenderer has had prior engagement. This aids that evaluation committee in establishing whether the tenderer is qualified to be awarded the contract in accordance with Section 55 and 86 of the Act.

185. Turning to the circumstances in the instant Request for Review, we deem it fit to cancel the letter of Notification of Award of the subject tender dated 17th May 2024 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 all unsuccessful tenderers in the subject tender including the Applicant herein and to order the Respondent to reconvene the Evaluation Committee for purposes of re-evaluating all tenders determined responsive at the Technical Evaluation stage and carrying out due diligence on the completion certificates submitted by bidders in response to Clause 1A of Tender Firm Capacity of Section III – Evaluation and Qualification Criteria at page 28 of the Tender Document in accordance with the provisions of Section 80 as read together with section 83 of the Act noting the manifest contradictions identified hereinabove in the Applicant's and Interested Party's completion certificates.

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

FINAL ORDERS

187. 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 31st May 2024 and filed on even date:

- a) The letter of Notification of Intention to Award dated 17th May 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.**

- b) The letters of Notification of Intention to Award dated 17th May 2024 issued by the Respondent to the Applicant and all unsuccessful tenderers 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 are hereby nullified and set aside.**

- c) The Respondent is hereby ordered to reconvene the Evaluation Committee for purposes of re-evaluating all tenders that qualified and progressed for evaluation at the Technical Evaluation stage and to order the Evaluation Committee to conduct scrutiny on the authenticity of all the bidder's completion certificates submitted in response to Clause 1A of Tender Firm Capacity of Section III – Evaluation and Qualification Criteria at page 28 of the Tender Document taking into consideration the findings of the Board in this decision, the provisions of the Tender Document, the Constitution, the Act and Regulations 2020.**
- d) Further to Order c) above, the Evaluation Committee is hereby ordered to ensure that it conducts due diligence in accordance with the provisions of Section 80 as read together with section 83 of the Act.**
- e) 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 thirty (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 and the Respondent is hereby ordered to furnish a report on the progress of the evaluation of the subject tender upon the Office of the Director General of the Authority on compliance with the orders issued herein within twenty one (21) 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 21st Day of June 2024.


.....
CHAIRPERSON
PPARB


.....
SECRETARY
PPARB

