

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 66/2024 OF 12TH JULY 2024

BETWEEN

GREENCOM ENTERPRISE SOLUTIONS LIMITED.....APPLICANT

AND

THE CHIEF EXECUTIVE OFFICER,

NATIONAL GOVERNMENT CONSTITUENCIES

DEVELOPMENT FUND BOARD1ST RESPONDENT

NATIONAL GOVERNMENT CONSTITUENCIES

DEVELOPMENT FUND BOARD.....2ND RESPONDENT

AGILE BUSINESS SOLUTIONS LIMITED.....INTERESTED PARTY

Review against the decision of the Chief Executive Officer, National Government Constituencies Development Fund Board in respect of Tender No. NG-CDFB/RFP/02/2023-2024 Request for Proposal to Undertake Supply, Installation, Implementation, Testing, Training, Commissioning and Maintenance of an Integrated NG-CDF Board Enterprise Resource Planning (ERP) Solution.

BOARD MEMBERS PRESENT

1. Mr. George Murugu, FCI Arb, I.P-Chairperson
2. Dr. Susan Mambo - Member
3. Mr. Daniel Langat - Member



IN ATTENDANCE

Mr. James Kilaka - Ag. Board Secretary

Mr. Anthony Simiyu - Secretariat

PRESENT BY INVITATION

APPLICANT

GREEN COM ENTERPRISE SOLUTIONS LIMITED

Mr. Alphas Rono Advocate, Green Com Enterprise Solutions Limited

RESPONDENTS

**THE CHIEF EXECUTIVE OFFICER
NATIONAL GOVERNMENT
CONSTITUENCIES DEVELOPMENT FUND
BOARD
NATIONAL GOVERNMENT
CONSTITUENCIES DEVELOPMENT FUND
BOARD**

Mrs. Irene Kashindi Advocate, Munyao Muthama & Kashindi Advocates

INTERESTED PARTY

AGILE BUSINESS SOLUTIONS LIMITED

Mr. Sisule Musungu Advocate, Sisule & Associates LLP

Mr. Andrew Mwango Advocate, Sisule & Associates LLP

BACKGROUND OF THE DECISION

The Tendering Process

1. The National Government Constituencies Development Fund Board, the Procuring Entity together with the 1st Respondent herein, vide an advert in the MyGov Publication, PPIP Portal and NG-CDF website, PPIP Portal and NG-CDF website (www.ngcdf.go.ke) , invited interested suppliers to submit their tenders in response to Tender No. NG-CDFB/RFP/02/2023-2024 Request for Proposal to Undertake Supply, Installation, Implementation, Testing, Training, Commissioning and Maintenance of an Integrated NG-CDF Board Enterprise Resource Planning (ERP) Solution (herein "the subject tender"). The advert set the tender deadline as Friday, 7th June 2024 at 10:00 a.m.

Addendum

2. Subsequently, on 5th June 2024 the Procuring Entity issued an addendum offering clarifications in respect various inquiries that were made by various suppliers who had expressed interested in participating in the tender. However, the tender submission deadline was retained as Friday, 7th June 2024 at 10:00 a.m.

Submission of Tenders and Tender Opening

3. According to the signed Tender Opening Minutes dated 7th June 2024, submitted under the Confidential File submitted by the Procuring Entity, the following five (5) tenderers were recorded as having submitted in response to the subject tender by the tender submission deadline:



#	Name of Tenderer
1.	Impax Business Solutions Limited
2.	Agile Business Solutions Limited
3.	Attain Enterprise Solutions Limited
4.	Green Com Enterprise Solutions Limited
5.	Kingsway Business Systems Limited

Evaluation of Tenders

4. The Respondent constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") to undertake an evaluation of the received tenders in the following 4 stages as captured in the Evaluation Report
- i. Preliminary Evaluation
 - ii. Technical Compliance Evaluation
 - iii. Technical Capacity Evaluation
 - iv. Financial Evaluation

Preliminary Evaluation

5. At this stage of the evaluation, the submitted tenders were to be examined using the criteria set out as Clause 1. Mandatory Requirements Evaluation- Stage 1- Compliance with Mandatory Preliminary Requirements under Section 2(B) Data Sheet at pages 22 to 24 of the Tender Document.

6. The evaluation was to be on a Pass/Fail basis and tenders that failed to meet any criterion outlined at this Stage would be disqualified from further evaluation.
7. At the end of the evaluation at this stage, 3 tenders were found non-responsive, with only 2 tenders being those of the Applicant and Interested Party qualifying for further evaluation at the Technical Compliance Evaluation Stage.

Technical Compliance Evaluation

8. The Evaluation Committee was required at this stage to examine tenders successful at the Preliminary Stage using the criteria set out Clause 2 Mandatory Evaluation- Stage 2- Mandatory Technical Requirements under Section 2(B) Data Sheet at pages 24 to 29 of the Tender Document.
9. The evaluation was to be on a Yes /No basis and tenders that failed to meet any criterion outlined at this Stage would be disqualified from further evaluation.
10. At the end of the evaluation at this stage, both tenders i.e. that of the Applicant and Interested Party were found non-responsiv and thus qualifying for further evaluation at the Technical Capacity Evaluation Stage.

Technical Capacity Evaluation

11. The Evaluation Committee was required at this stage to examine tenders successful at the Technical Compliance Evaluation Stage using the criteria

set out as Stage 2: Technical Evaluation (Capacity to Deliver the Service) under Section 2(B) Data Sheet at pages 29 to 35 of the Tender Document.

12. The evaluation was to be on the basis of 10 requirements that carried various weighted scores.
13. Requirements No. 1 to 9 carried a total weighted score of 80 marks and a tender was required to garner at least 70 marks in order to qualify for evaluation under Requirement No. 10. Requirement No. 10 was on system demonstration and carried a total of 20 marks.
14. Overall, a tender was to garner a score of 80 marks in respect of Requirements No. 1 to 10 so as to qualify for further evaluation at the Financial Evaluation Stage.
15. At the end of the evaluation at this stage, the Evaluation Report records that the Applicant's tender was found unresponsive with only the Interested Party's tender, qualifying for further evaluation at the Financial Evaluation Stage.

Financial Evaluation

16. The Evaluation Committee was required at this stage to examine tenders successful at the Technical Evaluation Stage using the criteria set out as Clause 29.1 (QCBS only) under Section 2(B) Data Sheet at page 35 of the Tender Document.
17. The Evaluation Committee was to combine the technical and financial scores of tenders evaluated at this Stage. The tenderer's technical score

was given a weighted score of 0.80 while the financial score was given a weighted score of 0.20.

18. A tenderer's financial score was to be determined by multiplying 100 by the lowest tender price at the Financial Evaluation Stage and dividing the result by the specific tenderer's tender price.
19. The tender established to have the highest combined technical and financial scores would be the successful tender.
20. At the end of the evaluation at this stage it was established that the Interested Party's tender with a tender price of Kshs. 854,752,678.40 was the successful tender being that it was the only tender that qualified for evaluation at the Financial Evaluation Stage.

Evaluation Committee's Recommendation

21. The Evaluation Committee through a signed Evaluation Report forming part of the Confidential File, recommended the award of the subject tender to the Interested Party, at its tendered price of **Kenya Shillings Eight Hundred and Fifty-Four Million, Seven Hundred and Fifty-Two Thousand, Six Hundred and Seventy-Eight and Forty Cents (Kshs. 854,752,678.40)** inclusive of taxes.

Professional Opinion

22. In a Professional Opinion dated 14th June 2024 (hereinafter referred to as the "Professional Opinion") the Procuring Entity's Manager Supply Chain, Mr. Shafee Yaqub Mohamed, reviewed the manner in which the subject procurement process was undertaken including the evaluation of tenders

and recommended the award of the subject tender to the Interested Party.

23. Subsequently on the same day, 14th June 2024, the 1st Respondent, Mr. Yusuf Mbuno, concurred with the Professional Opinion.

Notification to Tenderers

24. Accordingly, the tenderers was notified of the outcome of the evaluation of the tenders in the subject tender vide letters dated 14th June 2024.

REQUEST FOR REVIEW

25. On 12th July 2024, the Applicant filed a Request for Review dated 12th July 2024 supported by an affidavit sworn on 12th July 2024 by Geoffrey Mwanthi, a Director at the Applicant, seeking the following orders from the Board in verbatim:

a) The decision of the Respondents disqualifying the Applicant from Tender No. NG-CDFB/RFP/02/2023-2024: Request for Proposal to Undertake Supply, Installation, Implementation, Testing, Training, Commissioning and Maintenance of an Integrated NCDF Board Enterprise Resource Planning (ERP) Solution at the Evaluation Stage be and is hereby cancelled and set aside.

b) The Letter of Award issued to the Interested Party herein naming it as the successful tenderer in respect of Tender No. NG-CDFB/RFP/02/2023-2024: Request for Proposal to Undertake Supply, Installation, Implementation, Testing, Training, Commissioning and Maintenance of an Integrated NCDF Board Enterprise Resource Planning

- (ERP) Solution be and hereby cancelled and set aside;***
- c) The Letter of Award issued to the Applicant herein naming it as an unsuccessful tenderer in respect of Tender No. NG-CDFB/RFP/02/2023-2024: Request for Proposal to Undertake Supply, Installation, Implementation, Testing, Training, Commissioning and Maintenance of an Integrated NCDF Board Enterprise Resource Planning (ERP) Solution. be and is hereby cancelled and set aside;***
- d) The Applicant's tender be and is hereby readmitted for further evaluation at the Financial Evaluation Stage in respect of Tender No. NG-CDFB/RFP/02/2023-2024: Request for Proposal to Undertake Supply, Installation, Implementation, Testing, Training, Commissioning and Maintenance of an Integrated NCDF Board Enterprise Resource Planning (ERP) Solution;***
- e) The Respondent be and is hereby directed to reconvene the Evaluation Committee for purposes of re-evaluating the Applicant's tender alongside the tenders that qualified for evaluation at the Financial Evaluation Stage.;***

26. In a Notification of Appeal and a letter dated 12th July 2024, Mr. James Kilaka, the Acting Board Secretary of the Board notified the Respondents of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said 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 said 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 12th July 2024.

27. On 19th July 2024, the Respondents through the firm of Munyao Muthama & Kashindi Advocates filed a Notice of Appointment of Advocates.
28. On the same day, 19th July 2024, the Acting Board Secretary, sent out to the parties a Hearing Notice notifying parties that the hearing of the instant Request for Review would be by online hearing on 26th July 2024 at 2:00 p.m. through the link availed in the said Hearing Notice.
29. On 22nd July 2024, Respondents filed a Memorandum of Response in the form of a letter dated 19th July 2024 and equally forwarded the Confidential Documents under Section 67(3) of the Act.
30. On the very day, 22nd July 2024, the Respondents through the firm of Muthama Munyao & Kashindi Advocates filed a Memorandum of Response dated 22nd July 2024.
31. Vide letters dated 22nd July 2024, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the subject Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within 3 days from 22nd July 2024.

32. On the same day, 22nd July 2024, the Interested Party through the firm of Sisule & Associates LLP filed a Notice of Appointment of Advocates of even date.
33. On 23rd July 2024, the Respondents through the firm of Munyao, Muthama & Kashindi Advocates wrote a letter dated 23rd July 2024 to the Board formally withdrawing the Memorandum of Response previously filed by the Respondents in the form of a letter dated 19th July 2024. The Respondents equally filed a List and Bundle of Authorities.
34. On 24th July 2024, the Interested Party filed a Replying Affidavit sworn on 24th July 2024 by Peter Macharia, the Interested Party's Tenders and Bids Executive.
35. On 26th July 2024, the Applicant filed Written Submissions dated 25th July 2024.
36. On the same day, 26th July 2024, the Respondents equally filed Written Submissions dated 25th July 2024.
37. On 26th July 2024, the Interested Party filed Written Submissions of even date.
38. On 26th July 2024 at 2:00 p.m., when the Board convened for the online hearing, all the parties were represented by their various Advocates. The Board read out to the parties the documents filed by the parties and requested them to confirm if the same had been served upon them of which all responded in the affirmative.



39. The Board gave hearing directions and the order of address directing that each party would have 10 minutes to address it with the Applicant getting a right to offer a rejoinder to the address by the Respondents and the Interested Party.

PARTIES SUBMISSIONS

Applicant's Submissions

40. Counsel for the Applicant, Mr. Rono, indicated that he would be placing reliance on the Applicant's filed documents in the matter.
41. Relying on Sections 79 and 80 of the Act as well as the judicial pronouncement in ***Nairobi High Court Misc. Application No. 407 of 2018; Republic v The Public Procurement Administrative Review & Others Ex parte Meru University of Science and Technology*** the Applicant argued that the Tender Document is the primary document that should guide the Evaluation Committee in undertaking evaluation of tenders.
42. Counsel challenged the Applicant's disqualification from the subject tender at the Technical Capacity Evaluation Stage arguing that the Applicant surpassed the 80 marks threshold required for one to qualify for further evaluation at the Financial Evaluation Stage. Mr. Rono advanced two alternative arguments for this:
43. First, it was his contention that the Technical Capacity Evaluation Stage in the subject tender required a tenderer to garner at least 70 marks before qualifying for assessment at System Demonstration within the

same evaluation stage. Mr. Rono submitted that the Applicant was invited for a System Demonstration of their solution for which they were scored 11.9 marks and this cemented their view that they scored a combined minimum score of 81.9 marks at the Technical Capacity Evaluation Stage.

44. Mr. Rono equally advanced an alternative argument that the reasons the Procuring Entity gave in the Notification sent to the Applicant were unmerited as they spoke to unresponsiveness on the part of the Applicant to requirements under the subject tender when the Applicant's tender was in fact responsive to those requirements.
45. Counsel contended that Technical Requirement No. 2 at the Technical Capacity Evaluation Stage required a tenderer to provide evidence of implementing 6 nationwide solutions for public institutions where the solution's cost was over Kshs. 70 Million, with each contract carrying 2.5 marks. Further, that the Applicant submitted as part of its tender 3 responsive contracts from Kenyan Judiciary, the Ministry of Information, Communications and Technology for the Government of the Kingdom of Eswatini (USD 1,380,390.84) and Uganda's National Environmental Management Authority (USHS. 11,099,967,000) but only the Kenyan Judiciary's contract was recognized with the result that the Applicant was denied 5 marks
46. Mr. Rono maintained that the Tender Document did not offer a definition word "nationwide" and from the Online Oxford Advanced Learners' Dictionary, the word meant "happening or existing in all parts of a particular country." Further that Clarification No. 6 in Addendum 1 on whether the contracts to be supplied extended to projects done in Africa

was equally unhelpful as the Procuring Entity only responded with "Remains as it is in the RFP document", which phrase was variously used in the addendum with no clarity whatsoever. He argued that if the subject tender was limited to projects within Kenya, nothing would have been easier than for the Tender Document or the issued Addendum to speak as much.

47. Mr. Rono further argued that Technical Requirement No. 9j required tenderers to have a GIS Technology Expert with an examination-based certification in GIS Technology or Geomatics. Further, that despite attaching documents of its GIS Expert who held ESRI Certificates the Applicant was scored 0 and erroneously denied 3 marks.
48. Counsel equally referred to Technical Requirement No. 9k which according to him required a tenderer to have at least 1 Network/Security Expert with an examination-based certificate in computer networking. Further, that despite attaching documents of its Network/Security Expert who held Certificates from Internet Society the Applicant was scored 0 and erroneously denied 3 marks
49. He further argued that from the evaluation results it received from the Procuring Entity it was clear that the Procuring Entity had in respect of a requirement that attracted 6 marks scored the Applicant -2.1 with the result that the Applicant unfairly lost 2.1 marks. In sum, Counsel argued that the Applicant was unfairly denied 13.1 which means it ought to have scored 86.5 marks which surpasses the 80 marks threshold at the Technical Evaluation Stage.

Respondents' Submissions

50. Counsel for the Respondent, Mrs. Kashindi, indicated that she would be placing reliance on the Respondents' filed documents in the matter.
51. Mrs. Kashindi, while relying on Section 79(1) of the Act and 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***, argued that a tender is only responsive if it meets all the eligibility and other mandatory requirements in the Tender Document.
52. She argued that the Applicant was successful at the Preliminary and Mandatory Technical Requirements evaluation stages but failed to meet all the requirements at Technical Capacity Evaluation Stage.
53. Relying on Section 80(2) of the Act and the case of ***Republic v Public Procurement Administrative Review Board; Kenya Medical Supplies Authority (KEMSA) (Interested Party) Ex parte Emcure Pharmaceuticals Limited [2019]eKLR***, Mrs. Kashindi submitted that the evaluation of tenders has to be in strict conformity to the requirements under the Tender Document.
54. According to Counsel, the Applicant did not meet Requirement No. 2 which required tenderers to provide evidence of implementation of 6 nationwide solutions for public institutions. She argued that only 1 of the contracts provided i.e. for the Kenyan Judiciary satisfied this requirement and the Applicant was awarded 2.5 marks for this. She indicated that the contracts for Uganda and the Kingdom of Eswatini were for foreign

countries and that data involving the solutions implemented in these foreign countries would not be easily verified as part of due diligence. She argued that the tender was a national open tender and thus limiting the scope to contracts in Kenya.

55. She submitted that Requirement No. 9j required tenderers to have a GIS Expert with among others, an examination-based Certification in GIS technology, geomatics to qualify for award of 3 marks. She argued that the Applicant submitted ESRI Certifications that were not examination-based as required and therefore received 0 marks for failing to meet this requirement.
56. Additionally, that the required GIS Expert certification was a professional examination-based qualification for which a professional certificate is issued to demonstrate a professional's skill, experience and competence in the area. She contended that the Applicant did not provide any such evidence as part of its tender and therefore warranted the score of 0 marks.
57. Mrs. Kashindi argued Requirement No. 9k required tenderers to have a Network/Security Expert who held among others examination-based certificate in computer networking for an award of 3 marks. That, the Applicant submitted a Certificate of Completion and did not provide any evidence of an examination-based certification as required.
58. Additionally, that the required Network/Security Expert Certification was a professional examination-based qualification for which a professional certificate is issued to demonstrate a professional's skill, experience and

competence in the area. She argued that Requirement No.9k gave examples of such certifications including CompTIA's, Network+, Cisco, CCNA etc.

59. Mrs. Kashindi maintained that the certifications provided by the Applicant were not based on any recognized modulated examination processes. Further, that the website Certifications provided in the Request for Review were not provided as part of the Applicant's tender.
60. Counsel argued that the Applicant's cumulative score at the Technical Capacity Evaluation Stage portion that was out of 80 marks was 61.5 marks and thus falling short of the 70 marks threshold as to qualify for System Demonstration. She therefore argued that the Applicant did not qualify for System Demonstration and its participation in the System Demonstration was inconsequential.
61. She contended that at the System Demonstration stage, tenderers were required to conduct end to end demonstration of the system's functionalities and the Applicant scored 11.9 marks out of 20 marks at this stage. Counsel therefore indicated that even assuming the Applicant qualified for the System Demonstration assessment, its total score at the Technical Evaluation Stage was 73.4 marks which is below the 80 marks threshold required to qualify for further evaluation at the Financial Evaluation Stage.
62. She argued that the Evaluation Committee fully complied with Section 80(2) of the Act in evaluating the Applicant's tender.

Interested Party's Submission

63. Counsel for the Interested Party, Mr. Sisule, indicated that he would be placing reliance on the Interested Party's filed documents in the matter.
64. He contended that on 11th June 2024, the Interested Party was invited for system demonstration that took place on 13th June 2024 and was thereafter informed that it qualified for evaluation at the Financial Evaluation Stage. Further that its Financial Proposal was opened and the Interested Party was ultimately notified by the Procuring Entity that it was the successful tenderer in the subject tender.
65. Counsel argued that the Procuring Entity's response to the instant Request for Review had shed light on the evaluation of the Applicant's tender. That it was apparent that the Applicant's tender scored 61.5 marks at the stage of Technical Evaluation Stage that required tenders to garner a minimum of 70 marks so as to qualify to be subjected to System Demonstration.
66. He added that though the Applicant scored 11.9 marks at the System Demonstration Stage, its cumulative score at the Technical Capacity Evaluation Stage was 73.4 marks which was below the 80 marks threshold required for a tender to proceed for further evaluation at the Financial Evaluation Stage.
67. Mr. Sisule argued that the technical evaluation conducted by the Procuring Entity substantially complied with the provisions of Section 80(2) of the Act and Regulation 76 of the Regulations 2020. He pointed out that the only irregularity the Procuring Entity committed was

progressing the Applicant's tender for system demonstration when the Applicant did not satisfy the 70 marks threshold.

68. Counsel argued that it was not for the Procuring Entity to exercise discretion to progress the Applicant to the demonstration phase when the Tender Document was clear on the evaluation requirements and the Interested Party had a legitimate expectation that the Procuring Entity would adhere to the requirements under the Tender Document. For this proposition reliance was placed on the case of ***Republic v Public Procurement Administrative Review Board' Consortium of GBM Projects Limited and ERG Insaat Ticaret Ve Sanayi A.S. (Interested Party); National Irrigation Board Ex parte [2020]eKLR.***
69. Counsel submitted that it was not fair for the Applicant who did not meet the threshold for System Demonstration to participate in the same and that the Procuring Entity should have restricted itself to the requirements outlined in the Tender Document. He nonetheless argued that the irregularity was inconsequential and that the decision of the Procuring Entity was substantially sound.
70. On Technical Requirement no. 2 on supply of 6 nationwide contracts of similar projects, Counsel argued that the Procuring Entity issued Addendum 1 whose Clarification No. 6 clarified that evidence of 6 nationwide solutions for public institutions was restricted to institutions within the Republic of Kenya since candidates would not request the Procuring Entity to "expand to projects within Africa". Further that from

the Procuring Entity's response it was clear that the Procuring Entity did not have an intention of expanding the reference scope.

71. On Requirement No. 9j on GIS Expert, Mr. Sisule argued that an examination-based certification is a professional certification awarded upon passing of an examination, to signify completion of a program or study and competence to undertake certain roles, tasks or jobs. Further, that the Applicant's certification was by no means the examination-based certification contemplated under the Tender Document.
72. He continued that the Requirement for the Network/Security Expert Certification suffered a similar fate as the Applicant failed to avail an expert with an examination-based certification for evaluation. He contended that the Applicant's certificates from Internet Society were not examination based certification.
73. He argued that since the evaluation was substantially sound, the Request for Review should be dismissed.

Applicant's Rejoinder

74. In his brief rejoinder, Counsel for the Applicant, Mr. Rono, submitted that the use of the word "open national tender" in the subject tender only signified that only suppliers registered in Kenya were eligible to participate in the tender. Further, that discounting the Applicant for works undertaken outside Kenya would be tantamount to punishing a supplier who has previously taken its expertise outside the country.

75. He equally argued that the Procuring Entity was estopped from refusing the Certificates of the Applicant since the Tender Document did not specify the examination body for which the certificates were to be obtained. He indicated that if the Procuring Entity had a preferred examination body say KNEC, CLE or other body, nothing would have been easier than for the Tender Document to spell out as much. He affirmed that the courses leading to the award of certificates to its experts had exercises, quizzes, polls and surveys and that it would be absurd for the subject tender which was IT-related to insist that the only recognized certificates would be those attained upon attending physical classes.
76. Further, that the Applicant's certificates were verifiable through the online platform. According to Counsel such verification does not qualify as seeking out for more evidence since it is common practice for various certificates including Advocates Practicing Certificates and KRA Tax Compliance Certificates to be verified through databases that are available online by the issuing institutions.

CLARIFICATIONS

77. The Board inquired from the Applicant what it thought its score was at the portion of the Technical Capacity Evaluation Stage prior to the System Demonstration stage. Counsel for the Applicant, Mr. Rono, affirmed that the Applicant's score stood at a minimum of 70 marks being that it qualified and was invited for evaluation at the System Demonstration Stage.
78. The Board further inquired from the Applicant where exactly was it denied marks. Counsel for the Applicant referred to the 4 grounds appearing on

the Letter of Regret sent to it and indicated that it unfairly lost 13.1 marks from these grounds.

79. The Board equally asked the Respondents to confirm why they subjected the Applicant to System Demonstration if its tender did not meet the 70 marks threshold. Counsel for the Respondents, Mrs. Kashindi, submitted that the Applicant was taken through the System Demonstration was inconsequential since the Applicant did not attain the 70 marks threshold provided for in the Tender Document. According to Counsel, the Applicant scored 61.5 marks and could thus could not qualify to be invited for the System Demonstration.
80. The Board asked the Respondents to confirm whether it was express or implied in the Tender Document that the experience being sought was limited to works done in Kenya. Counsel for the Respondents, Mrs. Kashindi, submitted that the totality of the subject tender limited it to contracts in Kenya mentioning that the tender advert indicated it was a national open tender and the requirement mentioned "nationwide solutions". Further that the addendum issued by the Procuring Entity limited the experience to that in Kenya.
81. The Board asked the Applicant to clarify whether it sought clarification from the Procuring Entity on the interpretation of "nationwide". Counsel for the Applicant, Mr. Rono indicated that the Applicant did not seek any clarification but in its Addendum to tenderers, the Procuring Entity did not accurately respond to an inquiry on whether the experience sought could be extended to the rest of the countries in Africa. He argued that the Procuring Entity's response to this inquiry was "Remains as is in the RFP",

which phrase offered no clarity but left it open for interpretation by interested suppliers.

82. The Board asked the Applicant to offer a distinction between a certificate of award and certificate of recognition. Counsel for the Applicant submitted that the Tender Document called for an exam-based certificate without offering a definition of examination and therefore the Applicant sought definition from the dictionary and since the subject tender involved technology, the Applicant produced certificates that were issued online after online learning. He argued that there a number of Certificates including TOEFL and GRE that are issued online and are recognized certificates for whatever they stand for.
83. Counsel for the Respondents, Mrs. Kashindi, submitted that Respondents was not contesting that the Applicant supplied certificates for its expert just that the certificates were not examination-based. To illustrate her point Counsel indicated that the Interested Party had submitted an Esri Certificate that indicated that the bearer had successfully completed the requirements to be recognized as Esri certified as opposed to the Applicant's certificates that indicated the bearers attended and completed a course.
84. The Board asked the Applicant to indicate their understanding of an open national tender. Counsel for the Applicant, Mr. Rono, submitted that open tenders are open for the participation of Kenyan companies only.
85. The Board asked the Applicant to confirm if it would meet the 70 marks threshold if was to be awarded marks for its experience. Counsel for the

Applicant, Mr. Rono, indicated that if the marks on experience and certification were to be properly awarded, the Applicant would surpass the 70 marks threshold.

86. Counsel for the Respondents, Mrs. Kashindi affirmed that if the applicants were to be awarded marks for contract experience in Eswatini and Uganda, it would cumulatively add 5 marks and the applicants score would be 66.5 marks which would still be below the 70 marks threshold.
87. Counsel for the Interested Party, Mr. Sisule, agreed with the Respondents submission that the Applicant's score would only change to 66.5 marks. Further, that the fact that the Applicant made it to System Demonstration was an irregularity but this did not affect the substance of the evaluation process.
88. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 12th July 2024 the same had to be determined by 2nd August 2024. Therefore, the Board would communicate its decision on or before 2nd August 2024 to all parties via email.

BOARD'S DECISION

89. The Board has considered all documents, submissions and pleadings together with confidential documents submitted to it pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination:
 - I. ***Whether the Procuring Entity's Evaluation Committee's disqualification of the Applicant from the subject tender was in line with the provisions of the Constitution of Kenya,***

2010, the Act, the Regulations 2020 and the Tender Document?

II. What orders should the Board issue in the circumstance?

Whether the Procuring Entity's Evaluation Committee's disqualification of the Applicant from the subject tender was in line with the provisions of the Constitution of Kenya, 2010, the Act, the Regulations 2020 and the Tender Document?

90. The Applicant instituted the instant Request for Review taking issue with the manner in which its tender was evaluated with the result that it was disqualified at the Technical Capacity Evaluation Stage. According to Counsel for the Applicant, Mr. Rono, the Evaluation Committee erroneously found that the Applicant failed to satisfy the 80 marks threshold as to qualify for further evaluation at the Financial Evaluation Stage.
91. Counsel argued that the Applicant participated in the System Demonstration, which stage was only available to tenders that garnered 70 marks against the requirements in the first part of Technical Capacity Evaluation Stage and having scored 11.9 marks in the demonstration its overall score at the Technical Capacity Evaluation Stage the Applicant's tender surpassed the 80 marks threshold to qualify for evaluation at the Financial Evaluation Stage. He equally argued that the 4 reasons outlined by the Procuring Entity in the Letter of Regret to the Applicant, were unsubstantiated as the Applicant was unfairly denied marks on account of the said reasons. He posited that the Applicant's score ought to have been 86.5 marks, which is above the 80 marks threshold required to qualify for evaluation at the Financial Evaluation Stage.

92. On the other hand, the Respondents maintained that the Applicant was correctly disqualified from the subject tender at the Technical Capacity Evaluation Stage for failing to garner the 80marks threshold required for one to qualify for evaluation at the Financial Evaluation Stage. Counsel for the Respondents, Mrs. Kashindi, argued that though the Applicant's tender was evaluated at System Demonstration stage this was inconsequential as it garnered 61.5 marks which was below the required 70 marks threshold. Further, that on experience, the Applicant supplied contracts of projects undertaken in Eswatini and Uganda when the subject tender required experience in Kenya. Additionally, that the Applicant's submitted Certificates for its GIS and Network/Security experts were not examination-based.
93. The Interested Party acknowledged that the Respondents breached the tender requirements when they allowed the Applicant's tender to be evaluated at the System Demonstration stage when it had in fact failed to garner the required 70 marks threshold. Counsel for the Interested Party, Mr. Sisule, however pointed out that this did not affect the substance of the evaluation process.
94. The Board is therefore at this stage invited to interrogate the Procuring Entity's Evaluation Committee's evaluation of the tenders in the subject tender that culminated in the disqualification of the Applicant's tender .
95. For starters, Section 80 of the Act offers guidance on how an Evaluation Committee should proceed with the evaluation of tenders in the following terms:

"80. Evaluation of tenders

(1) The evaluation committee appointed by the accounting officer pursuant to section 46 of this Act, shall evaluate and compare the responsive tenders other than tenders rejected.

(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered."

96. Additionally, Section 79 of the Act offers clarity on the responsiveness of tenders in the following terms:

"79. Responsiveness of tenders

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

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

97. This Board is further guided by the dictum of the High Court in **Republic v Public Procurement Administrative Review Board & 2 others**

Exparte BABS Security Services Limited [2018] eKLR; Nairobi Miscellaneous Application No. 122 of 2018 where the court while considering a judicial review application against a decision of this Board illuminated on the responsiveness of a tender under section 79 of the Act:

"19. It is a universally accepted principle of public procurement that bids which do not meet the minimum requirements as stipulated in a bid document are to be regarded as non-responsive and rejected without further consideration.[9] Briefly, the requirement of responsiveness operates in the following manner:- a bid only qualifies as a responsive bid if it meets with all requirements as set out in the bid document. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements.[10] Bid formalities usually require timeous submission of formal bid documents such as tax clearance certificates, audited financial statements, accreditation with standard setting bodies, membership of professional bodies, proof of company registration, certified copies of identification documents and the like. Indeed, public procurement practically bristles with formalities which bidders often overlook at their peril.[11] Such formalities are usually listed in bid documents as mandatory requirements – in other words they are a sine qua non for further consideration in the evaluation process.[12] The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as

functionality, pricing or empowerment. Bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome.

20. In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions."

See also ***Nairobi High Court Judicial Review Misc. Application No. 407 of 2018; Republic v Public Procurement Administrative Review Board; Arid Contractors & General Supplies (Interested Party) Ex parte Meru University of Science & Technology [2019] eKLR; Republic v Public Procurement Administrative Review***

Board & anor; Ex parte Wilis Protocol & Concierge Services Limited [2021]eKLR; Republic v Public Procurement Administrative Review Board & Ors Ex parte Roben Aberdare (K) Limited [2019]eKLR; Republic v Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex parte Tuv Austria Turk 2020 eKLR

98. Drawing from the above, (i) the Tender Document is the key guide in the evaluation of tenders submitted in response to any tender invitation; (ii) A tender is responsive only if satisfies all the eligibility and mandatory requirements in the Tender Document; (iii) Tenderers who overlook requirements under the Tender Document do so at their own peril as they stand to be disqualified notwithstanding the merit of their tenders; and (iv) Excusing non-responsive tenders from meeting certain requirements in the Tender Document undermines competition among tenderers and equally defeats the essence of these requirements being communicated to tenderers beforehand.
99. Turning to the instant Request for Review, the Applicant challenged various reasons advanced in the Letter of Regret sent to it by the Procuring Entity. These reasons were as below:
- i. Alleged failure to provide evidence of implementing 6 nationwide solutions;
 - ii. Alleged failure to provide GIS Expert's examination-based certificate;

- iii. Alleged failure to provide Network/Security Expert's examination-based certificate; and
- iv. Alleged failure to demonstrate functional and technical capabilities using dummy data for some modules during System Demonstration.

100. The above reasons shall now be interrogated in turn:

Alleged failure to provide evidence of implementing 6 nationwide solutions

101. The Board has keenly studied the Tender Document and noted that Requirement No. 2 at page 29 of the Tender Document was prescriptive in terms of the experience it required of the tenderers participating in the subject tender. The said Requirement No. 2 is herein reproduced for ease of reference:

	<i>FIRMS EXPERIENCE</i>	<i>Max Marks</i>
<i>1.</i>	<i>...</i>	<i>...</i>
<i>2</i>	<i>Provide evidence of implementation of six (6) nationwide solutions for public institutions where the firm has provided implementation services for online integrated enterprise solutions for Financial. Strategic, Project Planning, Management, Monitoring & Evaluation or similar ERP solutions over the past years. Provide/Attach Completion Certificate/the Contract/LSO/LPO showing dates, amounts of at least Kshs. 70,000,000 (Seventy Million Shillings Only) and client contact for each institution listed above. Indicate the physical size, complexity, methods/technology or other characteristics.</i>	<i>15</i>

	<p><i>(2.5 marks per contract of similar nature ×6=15 marks</i></p> <p><i>NB: Reference checks will be carried out and the references must be contactable. Non-adherence to this will nullify the reference.</i></p> <p><i>Letters of award or recommendation letters will not be considered.</i></p>	
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102. From the above the above, the Board gathers that the Tender Document:

- i. Required tenderers to submit evidence of having implemented 6 nationwide solutions for public institutions.
- ii. The evidence to be submitted was to be in the form of Completion Certificates, Contracts, LPOs or LSOs.
- iii. Letters of award and recommendation were expressly excluded.
- iv. The projects in question had to be valued at a minimum of Kshs. 70 Million
- v. The tenderers were to equally provide contacts of each institution for verification purposes.
- vi. Tenderers were to also to provide details of physical size, complexity, methods, technology and other characteristics.
- vii. For each compliant project, a tenderer would garner 2.5 marks.

103. It is therefore apparent from the foregoing that for every compliant project that a tenderer indicated in its tender as part of its experience and supplied the necessary information, earned the tenderer 2.5 marks. Equally, any non-compliant project earned the tenderer 0 marks.

104. Further, it is not in dispute that the Applicant's tender scored 2.5 marks under Requirement No. 2 above in respect of the solution the Applicant offered to the Kenyan Judiciary. It is equally not in dispute that the Applicant's tender made reference to similar projects it had undertaken for the Ministry of Information, Communications and Technology of the Government of the Kingdom of Eswatini and the National Environment Management Authority of Uganda.
105. The Applicant supplied the contract for the solution offered to the Ministry of Information, Communication and Technology in Eswatini at pages 489 to 490 of its tender and the same was valued at USD 1,380,390.84, which amount translates to about Kshs 179,450,809.20 when the applicable currency conversion rate as at the tender submission deadline is applied.
106. The Applicant equally supplied the contract for the solution it offered to the National Environmental Management Authority in Uganda at page 483 to 485 of its tender and the same was valued at USHS. 1,380,390.84, which amount translates to about Kshs. 380,774,827.62 when the applicable currency conversion rate as at the tender submission deadline is applied.
107. Further, it was not in dispute that the Applicant provided the contacts of each of the institutions as well as the details of physical size, complexity, methods, technology and other characteristics of the solutions it offered to the said institutions. The only dispute on these projects was whether they constituted "nationwide solutions" as contemplated under the Tender Document. Whereas the Applicant argued

that they did, the Respondents and Interested Party argued that they did not.

108. The Board has keenly studied the documents in the subject tender and noted the following:

- i. The tender advertisement indicated that the subject tender was an open national tender.
- ii. The Tender Document indicated that the subject tender was an open national tender.
- iii. On 5th June 2024, the Procuring Entity issued an Addendum whose Clarification No. 6 offered a response *"Remains as it is in the RFP"* with respect to an inquiry *"Please confirm if the Requirements for similar site references can be expanded to projects within Africa."*
- iv. Clarification No. 5 in the Addendum offered a response *"Remains as it is in the RFP"* with respect to an inquiry *"The Revenue Turnover threshold of 300M, please confirm if it is 3 years or 4 years"*

109. In the Board's view, the subject tender being designated as an open national tender was an invitation for interested suppliers registered in Kenya to submit their tenders in response to the invitation to tender. We do not agree with the Respondents and Interested Party's apparent suggestion that the subject tender being an open national tender required tenderers participating in the tender to offer evidence of past projects limited to those undertaken in Kenya.

110. In the instant case the Tender Document was silent on whether the experience was limited to solutions offered locally in Kenya or those

offered in foreign nations. The only catch in the Tender Document was that the solution ought to have been offered to a public institution of nationwide reach. The Procuring Entity could therefore not fault the Applicant for submitting contracts in respect of projects undertaken for the public institutions in the Kingdom of Eswatini and Uganda. On this account, we find that the Applicant was unjustifiably denied 5 marks at the first stage of the Technical Capacity Evaluation.

111. We have also reviewed the Addendum issued by the Procuring Entity and find that the same was unhelpful in respect of clarifying whether the projects to be included in the tender extended to projects undertaken in other African nations. We say so, because in offering the response "*Remains as is in the RFP*", the Procuring Entity did not offer any clarity to the tenderer who sought the clarification. Interested suppliers seek clarifications on ambiguous or at times unclear tender clauses in an attempt to better understand the requirements a Procuring Entity expects of tenderers to meet. However, when the Procuring Entity fails to offer clarity, such as in the present case, tenderers cannot be faulted if they give a reasonable interpretation to an unclear clause and proceeds to act as per the reasonable interpretation.

112. The Board equally noted from Clarification No.5 in the Addendum that the Procuring Entity was using the response "Remains as it is in the RFP" liberally including in instances where inquiries related to different sets of options. In the said clarification the Procuring Entity was required to clarify on whether the turnover requirement was limited to 3 or 4 years but the Procuring Entity did not offer any guidance with its response on the applicable period.

113. In view of the foregoing, the Board finds fault in the Evaluation Committee's evaluation of the Applicant's tender in respect to Requirement No. 2 at the Technical Capacity Evaluation Stage. The Applicant was unfairly denied 5 marks for the two contracts for projects it had indicated as having undertaken in Uganda and in the Kingdom of Eswatini.

ii. Alleged failure to provide GIS Expert's examination-based certificate;

114. The Board's attention was drawn to Requirement No. 9j under the Technical Capacity Evaluation Stage at page 34 of the Tender Document and the same is reproduced below for ease of reference:

	<i>FIRM EXPERIENCE</i>	<i>Max Marks</i>
<i>9j</i>	<p><i>Geographical Information System (GIS) Technology Experts (at least 1)</i></p> <p><i>Bsc degree in computer science/IT or relevant field</i></p> <p><i>Examination-based certification in GIS technology, geomatics</i></p> <p><i>Three (3) years' experience in technical design applications (e.g. ArcView GIS or ESRI extensions, AutoCAD or related GIS applications)</i></p> <p><i>(3 Mks for meeting all the requirements and having more than 3 years' experience.</i></p> <p><i>1Mks for meeting all the requirements and having 3 years of experience</i></p>	<i>3</i>

	0 Mks for not meeting any one of the requirements.)	

115. From Requirement No.9j above, the Board discerns the following:

- i. The Tender Document required a tenderer to have at least 1 GIS Expert.
- ii. The GIS Expert was required to be a holder of a BSc. Degree in Bsc in Computer Science/IT or a related field, **an examination-based certification in GIS Technology and geomatics.**
- iii. The GIS Expert had to have a minimum of 3 years' experience
- iv. Any tender that met requirements (i) to (iii) and its GIS Expert had more than 3 years' experience, would score 3 marks on Requirement 9j.
- v. Any tender that met requirements (i) to (iii) and its GIS Expert had 3 years' experience, would score 1 mark on Requirement 9j.
- vi. Any tender that failed to meet (i) to (iii) above would score 0 marks on Requirement 9k

116. It is not in dispute that the Applicant's tender contained documents of its proposed GIS Expert. The only dispute that became apparent on the Applicant's tender on Requirement No. 9j was on whether the Applicant submitted examination-based certificates for its GIS Expert.

117. **Oxford Advanced Learners Dictionary defines examination as "a formal written, spoken or practical test, especially at school or college, to see how much you know about a subject, or what you can do"**



118. The Board has keenly studied the Applicant's original tender as forwarded to it by the Procuring Entity as part of the Confidential Documents and made the following observations:

- i. Page 771 bears an Esri Certificate showing that its expert attended and completed the 6 week MOOC *Spatial Data Science: The New Frontier in Analytics*
- ii. Page 772 bears an Esri Certificate showing that its expert attended and completed the 6 week MOOC *Imagery in Action*
- iii. Page 773 bears an Esri Certificate showing that its expert attended and completed the 6 weeks MOOC *Cartography*
- iv. Page 774 bears an Esri Certificate showing that its expert attended and completed the 6 weeks MOOC *The Location Advantage*
- v. Page 775 bears an Esri Certificate showing that its expert attended and completed the 6 weeks MOOC *Do-It-Yourself Geo Apps*

119. In the Board's considered view, none of these certificates qualifies as an examination-based Certificate. While they may confirm attendance of certain courses they do not on the face thereof confirm any examinable modules that were being offered for the said courses as well as the Applicant's scores on these modules or any examination administered and result of such examination and neither do they confirm any examinable qualification other than a recognition of attendance of the said courses.

120. In view of the foregoing, the Board cannot find fault in the Evaluation Committee's assessment that the Applicant did not submit examination-based certificates for its GIS Expert. The Tender Document was clear that failure to meet any of the requirements under Requirement No. 9j would

lead to a score of 0Marks. The Applicant therefore fairly lost 3 marks under Requirement No. 9j.

iii. Alleged failure to provide Network/Security Expert's examination-based certificate;

121. The Board's attention was equally drawn to Requirement No. 9k on Network/Security Expert and the same is herein reproduced for ease of reference:

	<i>FIRM EXPERIENCE</i>	<i>Max Marks</i>
<i>9k</i>	<p><i>Network/security Expert (at least 1 No.)</i></p> <p><i>Bsc degree in computer science/IT or relevant field</i></p> <p><i>Examination-based certification in computer networking certifications (e.g. CompTIA's Network+, Cisco, CCNA etc)</i></p> <p><i>At least 5 years' experience in computer networking</i></p> <p><i>(3Mks for meeting all the requirements and having more than 5 years' experience</i></p> <p><i>1 Mks for meeting all the requirements and having 5 years of experience</i></p> <p><i>0 Mks for not meeting any one of the requirements)</i></p>	<i>3</i>

122. From Requirement No.9k above, the Board discerns the following:

- i. The Tender Document required a tenderer to have at least 1 Network/Security Expert.
- ii. The Network/Security Expert was required to be a holder of a BSc. Degree in Bsc in Computer Science/IT or a related field, **an examination-based certification** in computer networking such as CompTIA's Network+, Cisco, CCNA and the like.

- iii. The Network/Security GIS Expert had to have a minimum of 5 years' experience in networking.
- iv. Any tender that met requirements (i) to (iii) and its Network/Security Expert had more than 5 years' experience, would score 3 marks on Requirement 9k.
- v. Any tender that met requirements (i) to (iii) and its Network/Security Expert had 5 years' experience, would score 1 mark on Requirement 9k.
- vi. Any tender that failed to meet (i) to (iii) above would score 0 marks on Requirement 9k.

123. It is not in dispute that the Applicant's tender contained documents of its proposed Network/Security Expert. The only dispute that became apparent in respect of the Applicant's tender on Requirement No. 9k was on whether the Applicant submitted examination-based certificates for its Network/Security Expert.

124. The Board has keenly studied the Applicant's original tender as forwarded to it by the Procuring Entity as part of the Confidential Documents and made the following observations:

- i. Page 786 bears a certificate issued by Internet Society showing that the Applicant's Network/Security Expert successfully completed a course *Introduction to Network Operations: UNIX/Linux, Networking and DNS*
- ii. Page 787 bears a certificate issued by Internet Society showing that the Applicant's Network/Security Expert successfully completed a course *Network Services and Monitoring Course*

125. In the Board's considered view, just like the Applicant's GIS Expert's certificates, none of these certificates qualifies as an examination-based Certificate. While they may confirm attendance of certain courses they do not on the face thereof confirm any examinable modules that were being offered for the said courses as well as the Applicant's scores on these modules or any examination administered and result of such examination and neither do they confirm any examinable qualification other than a recognition of attendance and completion of the said courses.
126. In view of the foregoing, the Board cannot find fault in the Evaluation Committee's assessment that the Applicant did not submit examination-based certificates for its Network/Security Expert. The Tender Document was clear that failure to meet any of the requirements under Requirement No. 9k would lead to a score of 0 Marks. The Applicant therefore fairly lost 3 marks under Requirement No. 9k.
127. At this stage the Applicant's overall score in respect of Requirement No.1 to 9 at the Technical Capacity Evaluation Stage has moved from 61.5 marks to 66.5 marks owing to the mistaken evaluation on Requirement No.2 as pointed above for failing to include the collective 5 marks in respect of the applicants contract experience in Eswatini and Uganda.
128. The Tender Document was clear at page 34 of the document that a tender could not qualify for evaluation under Requirement No. 10 on System Demonstration unless they garnered a threshold of 70 marks in respect of Requirements No. 1 to 10 at the Technical Capacity Evaluation Stage. Noting that the Applicant's score stands at 66.5 marks which is still below the 70 marks threshold to qualify for System Demonstration, the Applicant's tender ought to have been disqualified at that stage. Even

with its previous score of 61.5 marks, the Applicant did not qualify for evaluation under Requirement No. 10 on System Demonstration and its previous evaluation at that Stage was an error for which the Board faults the Procuring Entity's Evaluation Committee. That said, the Board will for the same reason not offer an analysis on the fourth reason for disqualification as contained in the Applicant's letter of Regret in the subject tender.

129. Notwithstanding the lapses that the Board has picked from the Evaluation Committee's evaluation process in the subject tender i.e. evaluation of the Applicant's tender on Requirement No. 2 at the Technical Capacity Evaluation Stage, it is apparent that even with the corrected score of 66.5 out of 70 as analysed above, the applicants tender would not have qualified for further evaluation and the assessment of the Applicant's tender on the System demonstration was thus irregular, null and void and therefore nothing turns on the same.

130. In view of the foregoing, the Board finds that the Request For Review herein is lacking in merit.

What orders the Board should grant in the circumstances?

131. The upshot of our finding is that the Request for Review dated 12th July 2024 in respect of Tender No. NG-CDFB/RFP/02/2023-2024 Request for Proposal to Undertake Supply, Installation, Implementation, Testing, Training, Commissioning and Maintenance of an Integrated NG-CDF Board Enterprise Resource Planning (ERP) Solution fails in the following specific terms:

FINAL ORDERS

132. 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 12th July 2024:

- 1. The Request for Review dated 12th July 2024 be and is hereby dismissed.**

- 2. The Respondent be and is hereby directed to proceed with Tender No. NG-CDFB/RFP/02/2023-2024 Request for Proposal to Undertake Supply, Installation, Implementation, Testing, Training, Commissioning and Maintenance of an Integrated NG-CDF Board Enterprise Resource Planning (ERP) Solution to its lawful and logical conclusion.**

- 3. Each party shall bear its own costs in the Request for Review.**

Dated at NAIROBI, this 2nd Day of August 2024.


.....
CHAIRPERSON
PPARB


.....
SECRETARY
PPARB



