

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 72/2024 OF 30TH JULY 2024

BETWEEN

CIRCUIT BUSINESS SYSTEMS LIMITED.....APPLICANT

AND

THE ACCOUNTING OFFICER,

KENYA PORTS AUTHORITY.....RESPONDENT

AND

NEXT TECHNOLOGIES LIMITED.....INTERESTED PARTY

Review against the decision of the Accounting Officer, Kenya Ports Authority in respect of Tender No. KPA/200/2023-24/ICT for Provision of LAN Infrastructure Support and Maintenance Services.

BOARD MEMBERS PRESENT

- | | | |
|-------------------------|---|--------------------------------|
| 1. Ms. Alice Oeri | - | Vice-Chairperson & Panel Chair |
| 2. CPA Alexander Musau | - | Member |
| 3. Mr. Stanslaus Kimani | - | Member |
| 4. Ms. Jessica M'mbetsa | - | Member |

IN ATTENDANCE

- | | | |
|--------------------|---|-------------|
| Ms. Sarah Ayoo | - | Secretariat |
| Mr. Anthony Simiyu | - | Secretariat |

PRESENT BY INVITATION

APPLICANT

CIRCUIT BUSINESS SYSTEMS LIMITED

Mr. Osodo

Advocate, S.O. Owino & Associates Advocates

RESPONDENT

**THE ACCOUNTING OFFICER, KENYA
PORTS AUTHORITY**

Ms. Oduru

Advocate, Momanyi & Associates Advocates

INTERESTED PARTY

NEXT TECHNOLOGIES LIMITED

Ms. Njueini

Advocate, Nyiha, Mukoma & Co. Advocates

BACKGROUND OF THE DECISION

The Tendering Process

1. Kenya Ports Authority, the Procuring Entity together with the Respondent herein, vide an advert in the PPIP Portal (www.tenders.go.ke) and Kenya Ports Authority website (www.kpa.co.ke) , invited interested suppliers to submit their bids in response to Tender No. KPA/200/2023-24/ICT for Provision of LAN Infrastructure Support and Maintenance Services (herein “the subject tender”). Tenderers were required to submit their bid documents in both physical and electronic formats. The tender closing date was also set as Thursday, 7th March 2024 at 10:00 a.m.

Addendum

2. Subsequently, on 6th March 2024 the Procuring Entity issued an addendum offering clarifications in response to various inquiries that were made by different suppliers who had expressed interest in participating in

the tender. The tender closing date was also rescheduled to Wednesday, 13th March 2024 at 10:00 a.m.

Submission of Tenders and Tender Opening

3. According to the signed Tender Opening Minutes dated 13th March 2024, submitted under the Confidential File submitted by the Procuring Entity, the following Three (3) tenderers were recorded as having submitted in response to the subject tender by the tender submission deadline:

#	Name of Tenderer
1.	Yabra Technologies Limited
2.	Next Technologies Limited
3.	Circuit 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 3 stages as captured in the Evaluation Report
 - i. Preliminary Evaluation
 - ii. Technical Evaluation
 - iii. 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 2.1 Preliminary examination for Determination of Responsiveness under Section III-Evaluation and Qualification Criteria at pages 33 to 34 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, 2 tenders including that of the Applicant were found non-responsive, with only the Interested Party's tender qualifying for further evaluation at the Technical Compliance Evaluation Stage.

Technical Evaluation

8. The Evaluation Committee was required at this stage to examine tenders successful at the Preliminary Stage using the criteria set out as Clause 2.2 Technical Evaluation (ITT 35) under Section III-Evaluation and Qualification Criteria at pages 34 to 35 of the Tender Document.
9. 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.
10. At the end of the evaluation at this stage, the Interested Party's tender which was also the only tender evaluated at this stage was found

responsive and thus qualified for further evaluation at the Financial Evaluation Stage.

Financial Evaluation

11. The Evaluation Committee was required at this stage to examine tenders successful at the Vendor Evaluation Stage using the criteria set out as Clause 2.3 Price Evaluation under Section III-Evaluation and Qualification Criteria at page 35 of the Tender Document.
12. The Evaluation Committee was to compare the tender prices indicated in the tenders according and establish the lowest evaluated tender.
13. At the end of the evaluation at this stage the Interested Party's tender, which was the only tender evaluated at this stage was established as the lowest evaluated tender.

Evaluation Committee's Recommendation

14. The Evaluation Committee through an Evaluation Report dated 26th March 2024 forming part of the Confidential File, recommended the award of the subject tender to the Interested Party at its tenderer price of **Kenya Shillings Fifty-Two Thousand Million and Two Hundred Thousand (Kshs. 52,200,000.00)** inclusive of taxes.

Professional Opinion

15. In a Professional Opinion dated 17th April 2024 (hereinafter referred to as the "Professional Opinion") the Procuring Entity's General Manager, Supply Chain Management, Ms. Eveline I. Shigholi, 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.

16. Subsequently on 19th June 2024, the Respondent concurred with the Professional Opinion.

Notification to Tenderers

17. Accordingly, the tenderers was notified of the outcome of the evaluation of the tenders in the subject tender vide letters dated 11th July 2024.

REQUEST FOR REVIEW

18. On 30th July 2024, the Applicant through the firm of S.O. Owino & Associates Advocates filed a Request for Review dated 29th July 2024 supported by an affidavit sworn on 29th July 2024 Godfrey Owino, the Managing Director at the Applicant, seeking the following orders from the Board in verbatim:

- a) To review all records of the procurement process (particularly the tender opening thereof) relating to Tender No. KPA/200/2023-24/ICT;*
- b) To direct the Respondent to award the tender to the most responsive or successful tenderer and award the tender to the Applicant;*
- c) Further and in the alternative, the entire tender process be nullified and the Respondent be ordered to re-tender afresh;*
- d) Costs of the Request for Review.*

19. In a Notification of Appeal and a letter dated 30th July 2024, Mr. James Kilaka, the Acting Board Secretary of the Board notified the Respondent of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondent a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the said Respondent were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 30th July 2024.
20. On 2nd August 2024, the Respondent through the firm of Momanyi & Associates Advocates wrote a letter of even date through which they sought an extension of time to file a response to the Request for Review.
21. On 6th August 2024, the Respondent through the firm of Momanyi & Associates Advocates filed a Memorandum of Response dated 6th August 2024 and equally forwarded the Confidential Documents under Section 67(3) of the Act
22. Vide letters dated 7th August 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 7th August 2024.

23. On 9th August 2024, the Applicant filed its Written Submissions of even date.
24. On the same day, 9th August 2024, the Interested Party through the firm of Nyiha, Mukoma & Company Advocates filed a Memorandum of Response of even date.
25. Still on 9th August 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 14th August 2024 at 11:00 a.m. through the link availed in the said Hearing Notice. Through a Notice shared by the Board, the parties were notified of the rescheduling of the hearing to 14th August 2024 at 2.00 p.m.
26. On the morning of 14th August 2024 the Respondent filed Written Submissions dated 13th August 2024.
27. On 14th August 2024 at 2:00 p.m., when the Board convened for the online hearing, all parties save for the Interested Party, were represented by their respective Advocates. The Board directed the Secretariat to reach out to the firm of Nyiha, Mukoma & Company Advocates to confirm if they were keen on attending the hearing.
28. Shortly thereafter at around 2:15 p.m., Counsel for the Interested Party, Ms. Njueini joined the session and apologized for the late attendance. Counsel proceeded to make a request for an adjournment citing that she had just received the hearing notice from the Interested Party and that

she needed to obtain instructions from her colleague, Mr. Nyiha, who had personal conduct of the matter.

29. Counsel for the for the Applicant, Mr. Osodo, confirmed that the Applicant was ready to proceed with the hearing and was equally mindful of the time-bound nature of procurement matters.
30. Counsel for the Respondent, Ms. Oduru, equally confirmed her readiness to proceed with the hearing but was willing to accommodate the Interested Party's request for an adjournment for hearing. She suggested the hearing date be set for the following day, 15th August 2024
31. The Board asked the Secretariat to confirm if the said date of 15th August was convenient but upon checking the Board's diary, the date was found inconvenient as the Board had previously scheduled other matters for hearing on the same day. Accordingly, the Board rescheduled the hearing of the Request for Review to 16th August 2024 at 10:00 a.m.
32. On 16th August 2024 10:00 a.m., when the Board convened for the online hearing, all parties were represented by their various Advocates. On the Board's part, its composition had changed with Ms. Jessica Mmbetsa replacing Mr. Stanslaus Kimani.
33. The Board directed the Secretariat to reach out to the firm of Nyiha, Mukoma & Company Advocates to confirm if they were keen on attending the hearing.

34. The Board then directed the 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 .

PARTIES SUBMISSIONS

Applicant's Submissions

35. Counsel for the Applicant, Mr. Osodo, submitted that the initial tender closing date of 7th March 2024 was moved to 13th March 2024 through an addendum issued on the eve of the initial tender closing date.
36. He urged that the Applicant received a letter dated 11th July 2024 communicating that its tender was unsuccessful as its tender security contained lesser days than those prescribed in the Tender Document. Counsel argued that the Applicant supplied a tender security document valid for 210 days with the initial tender closing date in mind. Further, that the tender security provided that its issuing Bank was ready to offer an extension in the event one was required. Additionally, that the tender security was also explicit that it would remain valid for a period of 30 days after the expiry of the tender validity period.
37. Mr. Osodo, therefore argued that it was incorrect for the Respondents to allege that the Applicant's tender security contained less than the required days of validity. According to Counsel if the Procuring Entity discovered that the days were in fact less, they should have sought clarification from the Applicant who would have then obtained an extension from its issuing Bank.

38. Counsel also questioned the Applicant's disqualification on account of serialization of its tender citing that this was not raised as an issue at the point of Tender Opening as the Tender Opening Register captured that the Applicant's tender contained 393 pages. Further, that the subject tender required tenderers to submit both physical and soft copies of their tenders and that these would bear out that the Applicant's tender was chronologically serialized.
39. Mr. Osodo questioned the validity of the Addendum issued on 6th March 2024 arguing that it contained material changes to the Tender Document which in turn required tenderers to make material changes to their tenders. He argued that under Section 75(5) of the Act the Procuring Entity should have issued the Addendum at least 9 days to the tender closing date and thus the issuance of the addendum on the eve of the closing date rendered it null and void.

Respondents' Submissions

40. Counsel for the Respondents, Ms. Oduru, submitted that a substantially responsive tender is one that meets the requirements under the Tender Document without material deviation, reservation or omission. She highlighted that the Preliminary Evaluation Stage set out having a tender security of Kshs. 200,000 which was to remain valid for 240 days from the date of tender closing.
41. .She argued that under Section 75 of the Act which permits the issuance of an addendum at any point before tender closing, the Procuring Entity issued an addendum which reviewed the tender closing date to 13th March 2024. Further, that pursuant to Clause 10 under Section I of the Tender

Document, the issued addendum formed part of the Tender Document and thus the tender validity period began to run on 13th March 2024 and not 7th March 2024. She argued that though the Applicant submitted its tender on 13th March 2024, it conveniently chose to argue that the tender validity period began running on 7th March 2024.

42. Mr. Oduru argued that the Tender Document made room for clarifications being sought by the interested suppliers participating in the subject tender and in the event the Applicant needed clarity on their tender security they were at liberty to obtain clarification from the Procuring Entity.
43. Additionally, she argued that some of the pages of the Applicant's tender were not serialized as per the requirements of the Tender Document.
44. Counsel also argued that the Request for Review was defective for failing to include the Procuring Entity as a party to the proceedings.
45. Relying on ***Republic v Public Procurement Administrative Review Board Ex parte Guardforce Group Limited; Pwani University & 2 others (Interested parties) [2021] eKLR; Republic v Public Procurement Administrative Review Board & 3 Others Ex parte Nomads Construction Limited [2017]eKLR and OOJSC Power Machines Limited, Transcentury Limited and Civicon Limited v Public Procurement Administrative Review Board [2015]eKLR*** Counsel sought for the Request to be dismissed as the Applicant's tender did not conform to the requirements set out in the Tender Document.

Interested Party's Submissions

46. Counsel for the Interested Party, Ms. Njueini, indicated that she would be relying upon the Interested Party's Memorandum of Response and equally associated herself with the submissions made on behalf of the Respondent.
47. She argued that the Interested Party submitted a responsive tender that met all the requirements in the Tender Document. Further, that the Interested Party's tender security indicated on its face to be valid for a period of up to 270 days which period was longer than that stipulated under the Tender Document.

Applicant's Rejoinder

48. In his brief rejoinder, Counsel for the Applicant, Mr. Osodo, argued that Section 61 of the Act permits a Procuring Entity to require a tenderer to extend the validity period of its tender security and thus this option was available to the Procuring Entity the moment it noticed that the Applicant's tender contained fewer than the stipulated days.
49. Further that the Applicant's tender security indicated on its face that the issuing Bank was ready to extend its validity period.
50. Additionally, that though the Respondent argued that the Applicant's tender not properly serialized, the exact location of the pages in question were not specified.

CLARIFICATIONS

51. The Board inquired from the Respondent the exact location of the pages of the Applicant's tender that were not serialized but the Respondent's Counsel, Ms. Oduru indicated that she did not have the benefit of seeing the Applicant's tender. She nonetheless asked the Board to look up the Applicant's tender as supplied by the Respondent.
52. The Board asked the Applicant to comment on the Interested Party's submission that the Interested Party's tender complied with requirements on the validity period on the tender security. Counsel for the Applicant, Mr. Osodo, indicated that he could not make a comment as he had not had sight of the Interested Party's tender.
53. The Board further asked the Applicant why it could not obtain an extension of its tender security subsequent to becoming aware of the Addendum changing the tender closing date. Counsel for the Applicant, Mr. Osodo, indicated that the Applicant had already bound its tender when it received the addendum and that it considered the validity period of its tender security adequate in the circumstance.
54. The Board asked the Respondent to comment on Section 75 of the Act and the period given to the tenderers to amend their tenders. Counsel for the Respondent, Ms. Oduru argued that the 6 days given to tenderers was adequate for them to obtain other tender securities and seek any clarification in respect of the addendum.
55. The Board asked the Applicant why it did not seek any clarification to which Counsel for the Applicant, Mr. Osodo argued that there was no need as the validity period of its tender security was adequate. Further

that the Applicant had participated in a separate tender advertised by Kenya Power Plc in which a clarification was issued to the effect that in the event of any changes in the tender closing date, for purposes of evaluating the tender security regard shall be made to the original tender closing date.

56. The Board asked the parties to confirm the stage of the evaluation at which the Applicant was disqualified. Counsel for the Applicant indicated he was uncertain at the said stage. Counsel for the Respondent, Ms. Oduru confirmed that the Applicant was disqualified at the Preliminary Evaluation Stage.
57. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 30th July 2024 the same had to be determined by 20th August 2024. Therefore, the Board would communicate its decision on or before 20th August 2024 to all parties via email.

BOARD'S DECISION

58. 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, Act, 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, Act, Regulations 2020 and the Tender Document?

59. The Applicant instituted the instant Request for Review taking issue with its disqualification from the subject tender on account of serialization of its tender as well as its tender security submitted as part of its tender. Counsel for the Applicant, Mr. Osodo, maintained that the Applicant submitted a compliant tender security and that in the event the validity period of its tender security was less than the prescribed period, the Procuring Entity should have reached out to the Applicant to extend the tender security period. The Applicant equally argued that they serialized their tender and that this fact was also noted in the Tender Opening Register that their tender had 393 pages.
60. Mr. Osodo also questioned the validity of the Addendum issued on 6th March 2024 arguing that it contained material changes to the Tender Document which in turn required tenderers to make material changes to their tenders. He argued that under Section 75(5) of the Act the Procuring Entity should have issued the Addendum at least 9 days to the tender closing date and thus the issuance of the addendum on the eve of the closing date rendered it null and void.
61. On the flip side, the Respondent maintained that the evaluation process leading to the disqualification of the Applicant was lawful and regular. Counsel for the Respondents, Ms. Oduru, submitted that a substantially responsive tender is one that meets the requirements under the Tender Document without material deviation, reservation or omission. She

highlighted that the Preliminary Evaluation Stage set out having a tender security of Kshs. 200,000 which was to remain valid for 240 days from the date of tender closing.

62. .She argued that pursuant to Section 75 of the Act and Clause 10 of the Tender Document, the Procuring Entity issued an addendum which reviewed the tender closing date to 13th March 2024, from which date, a computation of validity period of the Applicant's tender security was found short of the validity period stipulated under the Tender Document. Ms. Oduru also argued that that some of the pages of the Applicant's tender were not serialized as per the requirements of the Tender Document. Counsel also assailed the Request for Review was defective for failing to include the Procuring Entity as a party to the proceedings.
63. Counsel for the Interested Party, Ms. Njueini, associated herself with the submissions made on behalf of the Respondent and maintained that the Interested Party had submitted a tender security that was compliant with the requirements of the Tender Document.
64. The Board is therefore at this stage called upon to interrogate the circumstances surrounding the evaluation process that culminated in the disqualification of the Applicant from the subject tender.
65. 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."

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

"79. Responsiveness of tenders

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

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

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

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

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

a) be quantified to the extent possible; and

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

67. This Board takes further guidance from the dictum of the High Court in ***Republic v Public Procurement Administrative Review Board & 2 others Ex parte 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.*** and ***Nairobi High Court***

Misc. Civil Application No. 60 of 2020; Republic v Public Procurement Administrative Review Board & Ors Ex parte Tuv Austria Turk,

68. Drawing from the above, the Tender Document is the key guide in the evaluation of tenders submitted in response to any tender invitation. Further, for a tender to be deemed responsive in respect of any requirement, it must comply with the specification of the actual requirement as set out in the Tender Document.
69. Turning to the instant Request for Review, the Applicant is challenging its disqualification from the subject tender as communicated to it through a Notification Letter dated 11th July 2024, which indicates that the Applicant was disqualified on account of (i) its tender security having less days and (ii) its tender not being chronologically serialized.
70. Each of these grounds shall now be analyzed in turn.

(i) Applicant's alleged non-responsive Tender security

71. Whereas the Applicant contended that its tender security was compliant to the requirements under the Tender Document, the Respondent maintained that the Applicant's tender security was not compliant.
72. The Board has perused the blank Tender Document and established that Clause (iii) at page 34 of the Tender Document contained the requirement for a tender security. The said required requirements expressed as follows:

iii. Tender Security shall be for Kenya Shillings Two Hundred Thousand (Kshs. 200,000) in the form of a Banker's guarantee or an Insurance Company Guarantee issued by an insurance firm approved by the Public Procurement Oversight Authority (PPOA) , letter of credit or guarantee by a deposit taking microfinance institution, Sacco Society, the Youth Enterprise Development Fund or the Women Enterprise Fund valid for 240 days from the date of tender opening in the tender document.

73. From the above it is apparent that:

- i. The tender security to be provided was for Kshs. 200,000.
- ii. The tender security was to be in the form of a Banker's guarantee or an Insurance Company Guarantee issued by an insurance firm approved by the Public Procurement Oversight Authority (PPOA) (presumably the Public Procurement Regulatory Authority being the successor of the Public Procurement Oversight Authority), letter of credit or guarantee by a deposit taking microfinance institution, Sacco Society, the Youth Enterprise Development Fund or the Women Enterprise Fund;
- iii. The tender security was to be valid for 240 days from the date of tender opening.
- iv. The tender document was to be in the format provided for in the Tender Document.

74. The Tender Document equally provided for the format of the tender security at page 54 and the same is hereinafter reproduced for ease of reference:

Beneficiary: _____

Request for Tender No: _____

Date: _____

TENDER GUARANTEE NO: _____

Guarantor: _____

1. We have been informed that _____ hereinafter called "the Applicant") has submitted or will submit to the Beneficiary its Tender (hereinafter called "the Tender" for the execution of _____ under Request for Tenders No _____ ("the ITT").

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

3. At the request of the Applicant, we as Guarantor, hereby undertake to pay the Beneficiary any sum or sums not exceeding in total an amount of _____ upon receipt by us of the Beneficiary's complying demand, supported by the Beneficiary's statement, whether in the demand itself or a separate signed document accompanying or identifying the demand, stating that either the Applicant:
(a) has withdrawn its Tender during the period of Tender validity set forth in the Applicant's Letter of Tender ("the Tender Validity Period"), or any extension thereto provided by the Applicant; or

(b) having been notified of the acceptance of its Tender by the Beneficiary during the Tender Validity Period or any extension

thereto provided by the Applicant, (i) has failed to execute the contract agreement, or (ii) has failed to furnish the Performance.

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

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

Signature(s)

75. Initially, the Tender Document stipulated 7th March 2024 as the tender closing date. However, through an addendum dated 6th March 2024, the tender closing date was moved to 13th March 2024. Drawing from the foregoing, Clause (iii) of the Tender Document required the tender security to be valid at least 240 days from the tender opening date of 13th March 2024 which date is also happens to be the tender closing date.

76. In computing the 240 days stipulated under the Tender Document, we take guidance from section 57 of the Interpretation and General Provisions Act:

"57. Computation of time

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

(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;

(b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;

(c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;

(d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time"

77. When computing time for which a compliant tender security ought to remain valid 13th March 2024 is excluded as per section 57(a) of the IGPA being the tender opening date. This means time started to run on 13th March 2024 and lapsed on 8th November 2024. Essentially, a compliant tender security would be one whose validity period run through to 8th November 2024.

78. From the parties address before the Board, it was not in dispute that the Applicant submitted a tender security for Kshs. 200,000. It was equally not in dispute that the institution offering the tender security was among the institutions contemplated under the Tender Document. Further, it was also not in dispute that the Applicant's tender security was in the format provided for under the Tender Document. The only dispute appears to be the validity period of the Applicant's tender security, which we shall now consider.
79. The Board has keenly studied the Applicant's tender and spotted the Applicant's tender security at page EA 00001 and the same is reproduced herein for ease of reference:

SUMAC FINANCE

SMB/BS/GG/BLE/24/101

TENDER SECURITY

***BENEFICIARY: THE GENERAL MANAGER SUPPLY CHAIN
MANAGEMENT***

KENYA PORTS AUTHORITY

P.O. BOX 95246-80104

MOMBASA, KENYA

REQUEST FOR TENDERS NO: KPA/200/2023-24/ICT

DATE: 5TH MARCH 2024

TENDER GUARANTEE NO: SMB/BS/GG/BLE/24/101

GUARANTOR: SUMAC MICROFINANCE BANK

We have been informed that CIRCUIT BUSINESS SYSTEMS (KENYA) LIMITED of P.O. BOX 48867-00100 NAIROBI (hereinafter called "the Applicant") has submitted or will submit to the Beneficiary its Tender dated 7TH MARCH, 2024 (hereinafter called "the Tender") for the execution of PROVISION OF LAN INFRASTRUCTURE SUPPORT AND MAINTENANCE SERVICES under Request for Tenders No. KPA/200/2023-24/ICT ("the ITT")

Furthermore, we understand that, according to the Beneficiary's conditions, Tenders must be supported by a Tender guarantee. At the request of the Applicant, we SUMAC MICROFINANCE BANK of P.O. Box 11687-00100, NAIROBI, having our registered office at CONSOLIDATED BNAK BUILDING, KOINANCE STREET as Guarantor, hereby irrevocably undertake to pay the Beneficiary any sum or sums not exceeding in total an amount of (KES 200,000.00) KENYA SHILLINGS: TWO HUNDRED THOUSAND ONLY upon receipt by us of the Beneficiary's complying demand, supported by the Beneficiary's statement, whether in the demand itself or a separate signed document accompanying or identifying the demand, stating the either the Applicant:

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

(b) having been notified of the acceptance of its Tender by the Beneficiary during the Tender Validity Period or any extension thereto provided by the Applicant, (i) has failed to execute the

contract agreement, or (ii) has failed to furnish the Performance.

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

Consequently, any demand for payment under this guarantee must be received by us at the office indicated above on or before 2ND NOVEMBER 2024.

Signed

AUTHORISED SIGNATORY

Signed

AUTHORISED SIGNATORY

80. The Applicant's tender security bears out the following:

- i. The expiry of the tender security was dependent on whether or not the Applicant's tender was successful or not.
- ii. In the event the Applicant was successful, the tender security would expire upon Sumac Finance's receipt of the contract agreement executed by the Applicant and the Performance Security.
- iii. In the event the Applicant was unsuccessful, the earlier of (i) Sumac Finance's receipt of the Notification on the results of the evaluation or (ii) 30 days after the end of the tender validity period.
- iv. Any claim for payment under the tender security had to be made on or before 2nd November 2024.

81. Whereas the Applicant's tender security appeared to give a range of options as to when the tender validity expires, the last paragraph was categorical that 2nd November 2024 was the last date for which the Procuring Entity could make a claim in respect of the tender security. Essentially, 2nd November 2024 was the effective date that the Applicant's tender security was scheduled for expiry.
82. Having already pointed out that the 240 days from the tender opening required tender securities to be valid through to 8th November, 2024, it would follow that the Applicant's tender security provided for a lesser period than that stipulated under the Tender Document. Accordingly, we find no fault on the part of the Evaluation Committee for disqualifying the Applicant on this account.
83. The Board is unable to follow through the Applicant's argument that the Procuring Entity shouldered the obligation of seeking a clarification from Applicant so that the Applicant could request its Bank to extend the validity period of the tender security. We say so, mindful of Section 76(2) of the Act which prohibits tenderers from modifying their already submitted tenders after tender closing:
- "76. Modification of bids***
- (1) Before the deadline for submitting tenders, a person who submitted a tender may only change or withdraw it in accordance with the following—***
- (a) the change or withdrawal shall be in writing; and***
- (b) the change or withdrawal shall be submitted before the deadline for submitting tenders and in accordance with the procedures for submitting tenders.***

(2) After the deadline for submitting tenders, a person who submitted a tender shall not change, or offer to change the terms of that tender."

84. From Section 76(2) of the Act above, changes to tenders after tender closing are not permitted. Accordingly any invitation by the Procuring Entity to the Applicant to offer an alternative tender security as suggested by the Applicant would be tantamount to sanctioning an irregularity. Accordingly, if there was any clarification to be sought, the same was to be made by the Applicant on the import of the addendum issued by the Entity.

85. The Applicant equally assailed the addendum issued on 6th March 2024 terming it as invalid.

86. Section 75 of the Act provides as follows:

75. Modifications to tender documents

(1) A procuring entity may amend the tender documents at any time before the deadline for submitting tenders by issuing an addendum without materially altering the substance of the original tender.

(2) An amendment may be made on the procuring entity's own initiative or in response to an inquiry by a candidate or tenderer.

(3) A procuring entity shall promptly provide a copy of the addendum to each person to whom the procuring entity provided copies of the tender documents.

(4) The addendum shall be deemed to be part of the tender documents.

(5) If the tender documents are amended when the time remaining before the deadline for submitting tenders is less than one third of the time allowed for the preparation of tenders, or the time remaining is less than the period indicated in instructions to tenderers, the accounting officer of a procuring entity shall extend the deadline as necessary to allow the amendment of the tender documents to be taken into account in the preparation or amendment of tenders.

87. From Section 75 of the Act above:

- i. A Procuring Entity may amend the Tender Document at any time before tender closing through an addendum;
- ii. The amendment may be by the Procuring Entity's own initiative or in response to an inquiry by a supplier interested in participating in the tender.
- iii. The Procuring Entity should upon amendment of a Tender Document promptly supply the addendum to each person it supplied copies of the Tender Document;
- iv. The addendum is deemed part of the Tender Document; and
- v. Where an addendum is issued when the time remaining to tender closing is less than the time the tender was open, the Accounting Officer shall extend the tender closing date to allow for the amendment of tenders by suppliers.

88. From the above, it is apparent that though a Procuring Entity can issue an addendum, the Act does not prescribe the period within which the tender closing date should be moved. In the circumstance, the Accounting Officer exercises discretion on the period of extension and this discretion

is to be exercised judiciously having regard to among others the nature of changes introduced by the addendum and the time it would reasonably take a candidate to comply with the new requirement brought about by the addendum.

89. In the instant case, the Procuring Entity issued an addendum dated 6th March 2024 which reads:

PSM/CTC/1/01 (200) VOL. 1

6th March 2024

Dear Bidder,

RE: ADDENDUM NO.1

TENDER NO. KPA/200/2023-24/ICT-PROVISION OF LAN INFRASTRUCTURE SUPPORT AND MAINTENANCE SERVICES

Pursuant to clause 10.1 of the tender document, the Authority hereby issues the following clarifications:-

The price schedule format has been amended as follows:

<i>No.</i>	<i>Item Description</i>	<i>Price VAT Inclusive</i>
<i>1.</i>	<i>Maintenance Services for Mombasa Campus</i>	
<i>2.</i>	<i>Maintenance Services for ICD Campus</i>	
<i>3.</i>	<i>Maintenance Services for Kisumu Pier Campus</i>	
<i>4.</i>	<i>Maintenance Services for Kampala Liaison Office</i>	

5.	Maintenance Services for Kigali Liaison Office	
6.	Maintenance Services for Lamu Jetty Office	
7.	Maintenance Services for Lamu Port	
8.	Maintenance Services for Shimoni	
9.	Maintenance Services for Naivasha ICD	
10.	Maintenance Services for Goma Liaison Office	
Tender annual Cost		
Tender Price (Three Year Recurrent) to be carried to Tender Form		

Subsequently the closing date for the tender submission has been extended to before 1000HOURS on WEDNESDAY 13TH MARCH 2024

All other conditions of the tender remain the same.

Yours faithfully,

Signed

Moses K Sirgoi

Ag. Manager Procurement and Contract Management

FOR: GENERAL MANAGER SUPPLY CHAIN MANAGEMENT

FOR: MANAGING DIRECTOR

90. The Price Schedule appearing in the original Tender Document is herein reproduced:

Currencies in accordance with ITT 15	Date
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				ITT No:			
				Alternative No:			
				Page No.			
Sr No.	Item Description	Country of Origin	Delivery Date	Physical Unit	Quantity	Unit Price	Total Price
1.	Maintenance Services for Mombasa Campus				1		
2.	Maintenance Services for ICD Campus				1		
3.	Maintenance Services for Kisumu Pier Campus				1		
4.	Maintenance Services for Kampala Liaison Office				1		
5.	Maintenance Services for Kigali Liaison Office				1		

6.	Maintenance Services for Lamu Jetty Office				1			
7.	Maintenance Services for Lamu Port				1			
8.	Maintenance Services for Shimoni				1			
9.	Maintenance Services for Naivasha ICD				1			
1.	Maintenance Services for Goma Liaison Office				1			
		Tender Price (annual cost)						

Name of Tenderer.....[insert complete name of Tenderer]

Signature of Tenderer [Signature of person signing the Tender]

Date [insert date]

91. Flowing from the above, it is apparent that the only changes introduced to the by the addendum was a change in the format of the Price Schedule

and extension of the tender submission deadline. The information to be filled in the new format of the price schedule largely remained the same as that interested candidates would have already filled up in the original Price Schedule.

92. Having already established that the Procuring Entity is at liberty to modify its Tender Document prior to tender closing, the Board finds that the issuance of the addendum in the circumstance was proper having been done prior to the tender closing date. Further, the Procuring Entity equally afforded all the candidates a day extension of the tender submission deadline, which extension the Board upholds as reasonable in the circumstances.

ii. Applicant's alleged failure to chronologically serialize its tender

93. The Applicant and the Respondent took different positions on whether the Applicant's tender was chronologically serialized as per the requirements of the Tender Document. Whereas the Applicant held that its tender was properly serialized the Respondent maintained that this was not the case indicating that certain pages were not serialized.
94. The Board is therefore invited to verify whether the Applicant's tender was chronologically serialized as per the requirements of the Tender Document.
95. For starters, the requirement for serialization of tenders is anchored in statute. Section 74(1)(i) of the Act places an obligation on the part of the Accounting Officer of a Procuring Entity to ensure that in the preparation

of an invitation to tender, there is requirement for the pages of a tender to be serialized before submission. The said section reads:

"74. Invitation to tender

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

(a) ...

(b) ...

(c) ...

(d) ...

(e) ...

(f) ...

(g) ...

(h) ...

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

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

"74. Preliminary evaluation of open tender

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

(a) ...

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

(c) ...

(d) ...

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

"49. The requirement of serialization was in the present case indicated to be a mandatory requirement in the 1st Interested Party's tender document, and it was indicated in tender document that a firm lacking in any of the requirements would be dropped at the preliminary stage and would not progress to the Technical evaluation stage. It is also a mandatory requirement under section 74 of the Act, and failure to serialise every page cannot therefore be interpreted as a minor deviation from the requirements set out in the tender documents, and cannot fall within the exceptions provided for in section 79. It is also evident that the discretion given by section 79 to waive a requirement that has not been conformed with only applies where that conformity can be corrected without causing prejudice to the other bidders, or is quantifiable, which is not the case with the requirement of serialization of every page because of the objective of the requirement and attendant risks of non-conformity that have been explained in the foregoing."

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

"49. In light of the foregoing, it becomes apparent to this court that the aspect of serialisation of each and every page of a bid document aims to promote fairness, equal treatment, good governance, transparency, accountability and to do away with discrimination. Failure to conform to this mandatory requirement, and/or exempt or give an opportunity to those who had not earlier on conformed to this mandatory requirement translates to unequal and unfair treatment of other tenderers and it shall also encourage abuse of power and disregard of the law by not only bidders but also procuring entities.

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

52. That failure to serialise each and every page of a tender document cannot translate to a minor deviation from the laid down principles set down in law as explained hereinabove. It is my finding that the decision by the respondent directing the ex-parte applicants' to re-admit non-responsive bids is in

contravention with the provisions of sections 74 and 79 of the PPAD Act of 2015 and thus ultra vires.”

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

100. Turning to the subject tender, Clause 7 under the Invitation to Tender at page 5 of the Tender Document contained instructions on serialization in the following terms:

7.The Tenderer shall chronologically serialize all pages of the tender documents submitted in the format 1,2,3,4,5....n (where n is the last page number).

101. The above requirement was also reproduced under Clause 2 under Section III Evaluation and Qualification Criteria at page 33 of the Tender Document:

2.The Tenderer shall chronologically serialize all pages of the tender documents submitted in the format 1,2,3,4,5....n (where n is the last page number). (Mandatory)

...

NOTE: Tenderers who will not meet the above requirements will not be evaluated further.

102. Under Section III of the Tender Document, serialization of all the pages of a tender was stipulated as a mandatory requirement such that failure to serialize any of the pages in a tender in the prescribed format would lead to automatic disqualification at the Preliminary Evaluation Stage.
103. Guided by the above, the Board has keenly studied the Applicant's original tender as forwarded to it by the Respondent as part of the Confidential Documents and made the following observations:
- i. The tender contains 395 pages.
 - ii. The first page is a cover page and the same is not serialized.
 - iii. The second page is a table of contents and the same is not serialized.
 - iv. The next 393 pages are serialized E.A. 00001 to E.A. 00393.
104. From the foregoing it is apparent that the first 2 pages of the Applicant's tender are not serialized. The next 393 pages are serialized albeit in the format of E.A. 00001 to E000393, which is a departure from the prescribed format of 1,2,3...n. Since Clause 2 under Section III made it mandatory for all the tender documents to be serialized in the prescribed format, the Board finds no fault on the part of the Evaluation Committee disqualifying the Applicant's tender on account of its mode of serialization which is a departure from the requirement stipulated under the Tender Document.
105. In view of the foregoing, the Board finds that 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, Act, Regulations 2020 and the Tender Document.

106. Before concluding this Decision, the Board wishes to point out that the Respondent's Advocates, Ms. Oduru attempted to sneak in a Preliminary Objection during her oral address citing that the Request for Review was incompetent for not enjoining the Procuring Entity. The Board shall not address itself on this issue on account of the fact that it was brought about as an ambush on the Applicant as the same was not formally pleaded in any of the Respondent's documents.

What orders the Board should grant in the circumstances?

107. The Board has found that 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, Act, Regulations 2020 and the Tender Document.

108. The upshot of our finding is that the Request for Review dated 29th July 2024 in respect of Tender No. KPA/200/2023-24/ICT for Provision of LAN Infrastructure Support and Maintenance Services fails in the following specific terms:

FINAL ORDERS

109. In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review dated 29th July 2024 :

1. The Request for Review dated 29th July 2024 be and is hereby dismissed.

2. The Respondent be and is hereby directed to oversee Tender No. KPA/200/2023-24/ICT for Provision of LAN Infrastructure Support and Maintenance Services to its logical conclusion in accordance with the provisions of the Constitution of Kenya, 2010, Act, Regulations 2020 and the Tender Document.
3. Each party shall bear its own costs in the Request for Review.

Dated at NAIROBI, this 20th Day of August 2024.

PANEL CHAIRPERSON

PPARB

SECRETARY

PPARB

