

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 114/2024 OF 15<sup>TH</sup> NOVEMBER 2024**

**BETWEEN**

**GREEN COM ENTERPRISE SOLUTIONS LIMITED ..... APPLICANT**

**AND**

**ACCOUNTING OFFICER,**

**EMALI-SULTAN HAMUD MUNICIPALITY**

**GOVERNEMENT OF MAKUENI COUNTY ..... 1<sup>ST</sup> RESPONDENT**

**EMALI-SULTAN HAMUD MUNICIPALITY**

**GOVERNEMENT OF MAKUENI COUNTY ..... 2<sup>ND</sup> RESPONDENT**

Review against the decision of the Accounting Officer Emali-Sultan Hamud Municipality Government of Makueni in relation to Tender No. GMC/WM/T/001/2024-2025 for Supply, Delivery, Installation, Configuration, Customization, Testing, Commissioning and Maintenance of an Enterprise Resource Planning (ERP) System for Emali-Sultan Hamud Municipality, Wote Municipality and Makueni County Fruit Development & Marketing Authority.

**BOARD MEMBERS PRESENT**

- |                         |                     |
|-------------------------|---------------------|
| 1. Ms. Alice Oeri       | - Panel Chairperson |
| 2. Ms. Jessica M'mbetsa | - Member            |
| 3. Mr. Stanslaus Kimani | - Member            |

## **IN ATTENDANCE**

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

## **PRESENT BY INVITATION**

### **APPLICANT GREEN COM ENTERPRISE SOLUTIONS LIMITED**

Mr. Mulaku - Advocate, Koome Muketha Advocates

### **1<sup>ST</sup> & 2<sup>ND</sup> RESPONDENT ACCOUNTING OFFICER, EMALI-SULTAN HAMUD MUNICIPALITY GOVERNEMENT OF MAKUENI COUNTY & EMALI-SULTAN HAMUD MUNICIPALITY GOVERNEMENT OF MAKUENI COUNTY**

Mr. Njeru Runji - Advocate, Office of the County Attorney

## **BACKGROUND OF THE DECISION**

### **The Tendering Process**

1. The County Government of Makueni, the Procuring Entity and 2<sup>nd</sup> Respondent herein invited sealed tenders in response to Tender No. GMC/WM/T/001/2024-2025 for Supply, Delivery, Installation, Configuration, Customization, Testing, Commissioning and Maintenance

of an Enterprise Resource Planning (ERP) System for Emali-Sultan Hamud Municipality, Wote Municipality and Makueni County Fruit Development & Marketing Authority (hereinafter referred to as “the subject tender”). The invitation was by way of an advertisement on 9<sup>th</sup> September 2024 published on the Procuring Entity’s website [www.makueni.go.ke](http://www.makueni.go.ke) and the Public Procurement Information Portal [www.tenders.go.ke](http://www.tenders.go.ke) where the blank tender document for the subject tender issued to tenderers by the Procuring Entity (hereinafter referred to as the Tender Document’) was available for download. The subject tender’s submission deadline was scheduled on 29<sup>th</sup> September 2024 East Africa Time.

**Submission of Tenders and Tender Opening**

2. According to the Tender Opening Minutes signed by members of the Tender Opening Committee and which Tender Opening Minutes were part of confidential documents furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the ‘Board’) by the Respondent pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the ‘Act’), a total of seven (7) tenders were submitted in response to the subject tender and were recorded as follows:

<b>Bidder No.</b>	<b>Name</b>
1.	Stelden East Africa Limited
2.	Green Com Enterprise Solutions Ltd
3.	Kobby Technologies Ltd

4.	Surestep Systems & Solutions Ltd
5.	Dynasoft Business Solutions Limited
6.	Appkings Solutions Limited
7.	Surestep Systems & Solutions Ltd

### **Evaluation of Tenders**

3. A Tender Evaluation Committee appointed by the Respondent undertook evaluation of the seven (7) tenders as captured in a Tender Evaluation Report for the subject tender in the following stages:

- i Preliminary Evaluation
- ii Technical Evaluation
- iii Financial Evaluation

### **Preliminary Evaluation**

4. The Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Preliminary Evaluation of Section III- Evaluation and Qualification Criteria of the Tender Document. Tenderers were required to meet all the mandatory requirements at this stage to proceed for Technical Evaluation.

5. At the end of evaluation at this stage, five (5) tenders were determined non-responsive including the Applicant's tender, while two (2) tenders were determined responsive and proceeded to Technical Evaluation.

### **Technical Evaluation**

6. The Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Technical Evaluation Criteria of Section III- Evaluation and Qualification Criteria of the Tender Document. Tenderers were required to score 70% (equivalent of 49 marks of the total technical scores) at this stage to proceed for Financial Evaluation.

7. At the end of evaluation at this stage the two (2) tenders that had progressed to this stage were determined responsive and proceeded to Financial Evaluation.

**Financial Evaluation**

8. The Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Financial Evaluation Criteria of Section III- Evaluation and Qualification Criteria of the Tender Document. The tender with the lowest evaluated price would be awarded the subject tender following computation of the price schedule table and the recurrent cost summary table.

9. At the end of evaluation, bids were ranked as follows:

<b><i>S/NO</i></b>	<b><i>FIRM</i></b>	<b><i>TECHNICAL SCORES</i></b>	<b><i>FINANCIAL</i></b>	<b><i>RANK</i></b>
<b><i>1</i></b>	<b><i>STELDEN EAST AFRICA LIMITED</i></b>	<b><i>58</i></b>	<b><i>10,240,460.00</i></b>	<b><i>1</i></b>

<b>2</b>	<b><i>DYNASOFT BUSINESS SOLUTIONS LIMITED</i></b>	<b>55</b>	<b>21,614374.17</b>	<b>2</b>
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### **Evaluation Committee's Recommendation**

10. The Evaluation Committee recommended award of the subject tender to the lowest evaluated bidder being Stelden East Africa Limited at a contract price of Kenya Shillings Ten Million Two Hundred and Forty Thousand Four Hundred and Sixty Shillings (Kshs. 10,240,460.00) only.

### **Professional Opinion**

11. In a Professional Opinion dated 22<sup>nd</sup> October 2024, the Head of Procurement, CM Fidel Muema, MKISM reviewed the manner in which the procurement process in the subject tender was undertaken including evaluation of tenders and recommended for the accounting officer of the Procuring Entity to consider rejecting the recommendations made by the tender evaluation committee and to terminate the procurement proceedings in the subject tender pursuant to Section 63(1)(d) and (f) of the Act since the second lowest evaluated responsive bidder had quoted an amount above the available budget.

12. The Professional Opinion was approved as recommended by the 1<sup>st</sup> Respondent, Mr. Philip Ngila, on 23<sup>rd</sup> October 2024.

## **Notification to Tenderers**

13. Tenderers were notified of the outcome of evaluation of the subject tender vide letters dated 30<sup>th</sup> October 2024.

## **REQUEST FOR REVIEW NO. 114 OF 2024**

14. On 15<sup>th</sup> November 2024, Green Com Enterprise Solutions Limited, the Applicant herein, filed a Request for Review dated 11<sup>th</sup> November 2024 together with an Applicant's Statement in Support of the Request for Review sworn by Geoffrey Mwanthi on 11<sup>th</sup> November 2024, a Notice of Appointment of Advocates dated 11<sup>th</sup> November 2024 and Authority to Swear Affidavit dated 11<sup>th</sup> November 2024 (hereinafter referred to as "the instant Request for Review") seeking the following orders from the Board:

***a) The 2<sup>nd</sup> Respondent's Letter of Regret dated 30th October, 2024 notifying the Applicant of its unsuccessfulness in Tender No: GMC/WM/T/001/2024-2025: Supply, Delivery, Installation, Configuration, Customization, Testing, Commissioning and Maintenance of an Enterprise Resource Planning (ERP) System for Emali-Sultan Hamud Municipality, Wote Municipality and Makueni County Fruit Development & Marketing Authority be nullified.***

***b) The Applicant's tender be and is hereby readmitted for re-evaluation at the Preliminary Evaluation Stage in respect of Tender No: GMC/WM/T/001/2024-2025: Supply, Delivery,***

***Installation, Configuration, Customization, Testing, Commissioning and Maintenance of an Enterprise Resource Planning (ERP)System for Emali-Sultan Hamud Municipality, Wote Municipality and Makueni County Fruit Development & Marketing Authority.***

***c) The Respondents be and are 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 Preliminary Evaluation Stage in respect of Tender No: GMC/WM/T/001/2024-2025: Supply, Delivery, Installation, Configuration, Customization, Testing, Commissioning and Maintenance of an Enterprise Resource Planning (ERP)System for Emali-Sultan Hamud Municipality, Wote Municipality and Makueni County Fruit Development & Marketing Authority.***

***d) The Respondents be compelled to pay to the Applicant the costs arising from, and incidental to, this Request for Review; and***

***e) Such other and further relief that this Board shall deem just and appropriate in ensuring that the ends of justice are fully met in the circumstances of this Request for Review.***



15. In a Notification of Appeal and a letter dated 15<sup>th</sup> November 2024, Mr. James Kilaka, the Acting Secretary of the Board notified the 1<sup>st</sup> and 2<sup>nd</sup> Respondents of the filing of the Request for Review and the suspension of the procurement proceedings of the subject tender, while forwarding to the said Procuring Entity a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Procuring Entity was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 15<sup>th</sup> November 2024.
  
16. On 20<sup>th</sup> November 2024, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed through the County Attorney a 1<sup>st</sup> and 2<sup>nd</sup> Respondents Memorandum of Response to the Request for Review dated 19<sup>th</sup> November 2024, Respondents' Replying Affidavit sworn on 19<sup>th</sup> November 2024 by Philip Ngila together with confidential documents submitted pursuant to Section 67(3)(e) of the Act.
  
17. *Vide* letters dated 21<sup>st</sup> November 2024, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the 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 24<sup>th</sup> March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the tender within three (3) days.

18. *Vide* a Hearing Notice dated 21<sup>st</sup> November 2024, the Acting Board Secretary, notified parties and all tenderers of an online hearing of the instant Request for Review slated for 28<sup>th</sup> November 2024 at 11:00 a.m. through the link availed in the said Hearing Notice.
19. At the hearing on 28<sup>st</sup> November 2024, the Board read out the pleadings filed by parties in the matter and allocated time for parties to highlight their respective cases. Thus the instant Request for Review proceeded for virtual hearing as scheduled.

## **PARTIES' SUBMISSIONS**

### **Applicant's submissions**

20. In his submissions, counsel for the Applicant, Mr. Mulaku relied on the documents filed by the Applicant before the Board in the instant Request for Review.
21. Counsel submitted that the Applicant submitted a duly compliant bid in response to the subject tender and vide regret letter dated 30<sup>th</sup> October 2024 and transmitted by email on 4<sup>th</sup> November 2024, it was informed that its bid was unsuccessful for the reason that it failed to attach a CR12 and copies of national identity card/passport of proprietors for the business names and proof of directorship and shareholding of the company issued in the last six months from the tender closing date.
22. Mr. Mulaku argued that the reasons given for disqualification of the Applicant's bid are false and pointed to the Applicant's CR12 attached at

page 29 of its bid document. He further argued that from the contents of the Respondents' Memorandum of Response at paragraphs 12 and page 10 of their Replying Affidavit, the Respondents acknowledge that the Applicant did submit its CR12.

23. Mr. Mulaku pointed out that the Applicant is a company incorporated and registered in Kenya under the Companies Act and the only legal proof of directorship or shareholding is the CR12 being what was provided as a requirement in the Tender Document and to which the Applicant duly complied. He further pointed out that a bidder incorporated as a business name was required to submit copies of its owners' identity card or passport.

24. Counsel submitted that the Applicant's CR12 as submitted is valid and that it met all the preliminary requirements set out in the Tender Document. He further submitted that the Applicant had a legitimate expectation that its bid would be evaluated with transparency, fairness and in line with the provisions of the Constitution and the Act.

25. He pressed on that evaluation of the Applicant's bid resulting to its disqualification was unfair and the Applicant had suffered loss and damages due to the Respondent's actions.

26. Mr. Mulaku urged the Board to allow the instant Request for Review as prayed.

## **1<sup>st</sup> and 2<sup>nd</sup> Respondents' submissions**

27. In his submissions, counsel for the Respondents, Mr. Njeru relied on the documents filed by the Respondents before the Board in the instant Request for Review.
28. Counsel submitted that the Applicant's bid did not fully conform to the requirements of the Tender Document and that the Evaluation Committee evaluated bids submitted in the subject tender in strict compliance with the evaluation criteria as provided in the Tender Document and pursuant to Section 80(2) of the Act.
29. He argued that the Applicant failed to comply with mandatory requirement no. 13 of the Tender Document which required a bidder to attach its CR12 and copies of national identity cards or passports of its proprietors. He further stated that the Applicant only submitted its CR12 but failed to submit the copies of national identity cards or passports of its proprietors.
30. He submitted that bidders in the subject tender were notified that the procurement proceedings had been cancelled because the qualified bidder had quoted above the budgeted amount.
31. He reiterated that the Respondents did not act contrary to the provisions of the Constitution, the Act and the Tender Document and urged the Board to dismiss the instant Request for Review with costs.

## **Applicant's Rejoinder**

32. In a rejoinder, Mr. Mulaku submitted that the Respondents had misled the Board since a look at the Applicant's regret letter against the Tender Document, it was clear that a bidder was only required to submit copies of national identity cards or passport of the proprietor where the said bidder is registered under a business name and if registered as a company, it was required to submit a CR12 showing proof of directorship and shareholding of the company.

33. On the issue of cancellation of the subject tender, he submitted that a procuring entity cannot purport to terminate the procurement proceedings of the subject tender within the period which a review has been filed before the Board.

34. He argued that the Applicant ought to be subjected to the correct evaluation criteria and due process and pointed out that no good faith had been demonstrated by the Respondent in the procurement proceedings in the subject tender.

## **Clarifications**

35. When asked to clarify to the Board whether the Respondents complied with Section 63 of the Act with regard to termination of the procurement proceedings in the subject tender and if a report had been filed with the Public Procurement Regulatory Authority (hereinafter referred to as "the Authority"), Mr. Njeru submitted that a report had not been filed with the Authority.

36. As to whether the Board has jurisdiction to hear and determine the instant Request for Review, both Mr. Mulaku and Mr. Njeru submitted that the Board has jurisdiction to hear and determine the review as filed.

37. When asked to expound on the requirement under mandatory requirement 19 of the Tender Document, Mr. Njeru referred to averments at paragraph 11 of the Respondents Memorandum of Response and submitted that bidders were required to attach a CR12 and copies of national identity cards or passports of the proprietors of the business name. He indicated that the Respondents intended for the copies of national identity cards or passports be attached to the submitted bid document.

38. As to whether the Applicant had any challenge in understanding what was required of it with regard to mandatory requirement no. 13 of the Tender Document, Mr. Mulaku submitted that the wording under mandatory requirement no. 13 of the Tender Document was clear to the Applicant hence the reason why it did not seek any clarification and there was no ambiguity in interpreting the said provision. He indicated that bidders who were business owners were required to submit copies of their national identity cards or passports while bidders who were companies were required to submit CR 12 which provides proof of directorship and shareholding.

39. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 15<sup>th</sup> November 2024

was due to expire on 6<sup>th</sup> December 2024 and that the Board would communicate its decision on or before 6<sup>th</sup> December 2024 to all parties to the Request for Review via email.

### **BOARD'S DECISION**

40. The Board has considered each of the parties' submissions and documents placed before it and find the following issues call for determination.

**A. Whether the Procuring Entity terminated the subject tender in accordance with the provisions of Section 63 of the Act as to oust the jurisdiction of the Board.**

**B. Whether the Procuring Entity evaluated the Applicant's bid with regard to Mandatory Requirement No. 13 in strict compliance with the provisions of the Tender Document, the Act and the Constitution.**

**C. What orders should the Board grant in the circumstances?**

**Whether the Procuring Entity terminated the subject tender in accordance with the provisions of Section 63 of the Act as to oust the jurisdiction of the Board.**

41. Termination of procurement proceedings is governed by Section 63 of the Act, which stipulates that when a termination of procurement and asset disposal proceedings meets the threshold of the said provision, the jurisdiction of this Board is ousted by virtue of section 167 (4) (b) of the Act which provides as follows: -

***"The following matters shall not be subject to the review of procurement proceedings under subsection (1)—***

***(a) .....***;

***(b) a termination of a procurement or asset disposal proceedings in accordance with section 63 of this Act" [Emphasis by the Board]***

42. In the case of **Miscellaneous Civil Application No. 1260 of 2007, Republic v. Public Procurement Administrative Review Board & Another Ex parte Selex Sistemi Integrati (2008) eKLR**, the High Court while determining the legality of sections 36 (6) and 100 (4) of the repealed Public Procurement and Disposal Act, 2005 that dealt with termination of procurement proceedings held as follows:

***"I now wish to examine the issues for determination. The first issue is whether the Public Procurement and Disposal Act, 2005, s 100 (4) ousts the jurisdiction of the court in judicial review and to what extent the same ousts the jurisdiction of the Review Board. That question can be answered by a close scrutiny of section 36 (6) of the said Act which provides:***



**"A termination under this section shall not be reviewed by the Review Board or a court."**

***In the literal sense, section 36 (6) quoted above purports to oust the jurisdiction of the court and the Review Board. The Court has to look into the ouster clause as well as the challenged decision to ensure that justice is not defeated. In our jurisdiction, the principle of proportionality is now part of our jurisprudence. In the case of *Smith v. East Elloe Rural District Council* [1965] AC 736 Lord Viscount Simonds stated as follows:***

***"Anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal."***

***It is a well settled principle of law that statutory provisions tending to oust the jurisdiction of the Court should be construed strictly and narrowly... The court must look at the intention of Parliament in section 2 of the said Act which is inter alia, to promote the integrity and fairness as well as to increase transparency and accountability in Public Procurement Procedures.***

**To illustrate the point, the failure by the 2<sup>nd</sup> Respondent to render reasons for the decision to terminate the Applicant's tender makes the decision amenable to review by the Court since the giving of reasons is one of the fundamental tenets of the principle of natural justice. Secondly, the Review Board ought to have addressed its mind to the question whether the termination met the threshold under the Act, before finding that it lacks jurisdiction to entertain the case before it, on the basis of a mere letter of termination furnished before it.**

43. The court in the *Selex Sistemi Integrati* case cited above, held that the Board has the duty to question whether a decision by a procuring entity terminating a tender meets the threshold of Section 63 of the Act, and that this Board's jurisdiction is not ousted by the mere fact of the existence of a letter of notification terminating procurement proceedings.

44. Further, in **Judicial Review Miscellaneous Application No. 142 of 2018, Republic v. Public Procurement and Administrative Review Board & Another ex parte Kenya Veterinary Vaccines Production Institute(2018) eKLR** (hereinafter referred to as "JR No. 142 of 2018") the High Court held as follows:

***"The main question to be answered is whether the Respondent [Review Board] erred in finding it had jurisdiction***

***to entertain the Interested Party's Request for Review of the Applicant's decision to terminate the subject procurement...***

***A plain reading of section 167 (4) (b) is to the effect that a termination that is in accordance with section 63 of the Act is not subject to review. Therefore, there is a statutory pre-condition that first needs to be satisfied in the said subsection namely that the termination proceedings are conducted in accordance with the provisions of section 63 of the Act, and that the circumstances set out in section 63 were satisfied, before the jurisdiction of the Respondent can be ousted.***

***As has previously been held by this Court in Republic v Kenya National Highways Authority Ex Parte Adopt –A- Light Ltd [2018] eKLR and Republic v. Secretary of the Firearms Licensing Board & 2 others Ex parte Senator Johnson Muthama [2018] eKLR, it is for the public body which is the primary decision maker, [in this instance the Applicant as the procuring entity] to determine if the statutory pre-conditions and circumstances in section 63 exists before a procurement is to be terminated...***

**However, the Respondent [Review Board] and this Court as review courts have jurisdiction where there is a challenge as to whether or not the statutory precondition was satisfied, and/or that there was a wrong finding made by the Applicant in this regard...**

**The Respondent [Review Board] was therefore within its jurisdiction and review powers, and was not in error, to interrogate the Applicant's Accounting Officer's conclusion as to the existence or otherwise of the conditions set out in section 63 of the Act, and particularly the reason given that there was no budgetary allocation for the procurement. This was also the holding by this Court (Mativo J.) in R v Public Procurement Administrative Review Board & 2 Others Ex-parte Selex Sistemi Integrati which detailed the evidence that the Respondent would be required to consider while determining the propriety of a termination of a procurement process under the provisions of section 63 of the Act"**

45. In ***Nairobi High Court Judicial Review Misc. Application No. 390 of 2018; R v Public Procurement Administrative Review Board & Ors Ex parte Kenya Revenue Authority***, the High Court considered a judicial review application challenging the decision of this Board. The Board dismissed a preliminary objection on grounds that it lacked jurisdiction to hear a Request for Review before it on account of the fact

that it related to the termination of a procurement process under section 63 of the Act. In dismissing the judicial review application, the Court affirmed that the Board has jurisdiction to first establish whether the preconditions for termination under section 63 of the Act have been met before downing its tools:

***"33. A plain reading of Section 167(4) (b) of the Act is to the effect that a termination that is in accordance with section 63 of the Act is not subject to review. Therefore, there is a statutory pre-condition that first needs to be satisfied in the said sub-section namely that the termination proceedings are conducted in accordance with the provisions of section 63 of the Act, and that the circumstances set out in section 63 were satisfied, before the jurisdiction of the Respondent can be ousted...***

***See also Nairobi High Court Judicial Review Misc. Application No. 117 of 2020; Parliamentary Service Commission v Public Procurement Administrative Review Board &Ors v Aprim Consultants***

46. It is therefore important for the Board to determine the legality, or lack thereof, of the Procuring Entity's decision terminating the procurement proceedings in the subject tender, which determination can only be made by interrogating the reason cited for the impugned termination. It is only

then, that a determination whether or not the Board has jurisdiction can be made.

47. The Procuring Entity submitted that termination of the subject tender was as a result of the second lowest qualified bidder having quoted above the budgeted amount.

48. We note from the Evaluation Report that upon conclusion of evaluation of the subject tender, the Evaluation Committee recommended award of the subject tender to Stelden East Africa Limited at a contract price of Kenya Shillings Ten Million Two Hundred and Forty Thousand Four Hundred and Sixty Shillings (Kshs. 10,240,460.00) only.

49. However, from the Professional Opinion dated 22<sup>nd</sup> October 2024 prepared by the Head of Procurement, CM Fidel Muema, he indicated that he had reviewed the procurement file and bid documents and established as follows:

**11. Conclusion:**

***This professional opinion is issued Pursuant to section 84 of the Public Procurement and Asset Disposal Act, 2015.***

***The procurement file was submitted to the Head of Procurement on 17<sup>th</sup> October, 2024.***

***Upon review of the procurement file and bid documents, it was established that;***

***i. Invitation to tender in Line with section 74 of the PPADA, 2015.***

***Pursuant to section 74 (1) (i) the accounting officer shall ensure the preparation of an invitation to tender that sets out the requirement of serialization of pages by the bidder for each bid submitted.***

***Clause 6 of the Invitation to tender stated that, the Tenderer MUST serialize all pages of the tender documents submitted. The invitation to tender met al the requirements as per the law.***

***ii. Evaluation and comparison of tenders in line with section 80(2) of the PPADA, 2015.***

***Pursuant to section 80 (2) of the PPAD Act, 2015, the evaluation and comparison of tenders shall be done using the procedures and criteria set out in the tender documents.***

***a. Evaluation criteria No. 12.***

***Preliminary mandatory criteria number twelve (12) required bidders to submit a tender document in the required format and serialized/Paginated. Upon examining the recommended bidder's bid document, it was established that the first four (4) pages had not been serialized.***

***Further, the attached Tender Security, which was between pages serialized 1 and 2 of 361 was not serialized as required by law and in line with the evaluation criteria No. 12.***

***Also, three documents attached between pages 46 and 47 of 361 of the recommended bidder's bid document were not serialized.***

***The documents were:***

- i. Recommendation Letter issued by Nzoia Sugar Company Limited dated 9<sup>th</sup> September, 2021 and referenced No. NSC/PUR/SUPP/42/895/2021.***
- ii. Recommendation Letter issued by Mbagathi County Hospital dated 11<sup>th</sup> October, 2018 and without any reference No.***
- iii. Recommendation Letter issued by Kofisi Africa dated 20<sup>th</sup> March, 2024 and without any reference No.***

***b. Evaluation criteria No. 17.***

***Preliminary mandatory criteria number seventeen (17) required bidders to submit a declaration letter under oath that the tenderer will surrender the source code & intellectual property rights to the Procuring entity once awarded the tender.***



***Upon examining page 44 of 361 of the recommended bidder's bid document, it was established that the Letter was not under oath but rather certified by an advocate as a true copy of the Original.***

***The recommended bidder did not therefore meet all of the preliminary mandatory requirements as set out in the tender documents.***

***Additionally, the opening minutes were not in the format prescribed by the PPADA 2015. In accordance with section 78 (5) of the PPADA 2015, the tender opening committee shall assign an identification number to each tender and record the number of pages received.***

***The number of pages for the recommended bidder and all the other bidders had not been recorded as required by law.***

***The accounting officer should therefore consider both rejecting the recommendations of the tender evaluation committee and terminating the procurement proceedings pursuant to section 63 (1) (d) and (f) since the second lowest evaluated responsive bidder had quoted an amount above the available budget.***

***If the tender is terminated, the Accounting Officer to ensure compliance with section 63 (2) (3) and (4) and PPRA Circular No. 4 of 1 st July, 2022 and reporting the termination to PPRA within fourteen (14) days.***

***Upon termination, the tender should be re-advertised immediately.***

50. From the contents of the above Professional Opinion, Mr. Muema made a recommendation for termination of the subject tender pursuant to Section 63(1)(d) and (f) of the Act and the same was approved by the 1<sup>st</sup> Respondent.

51. We note that in reaching this recommendation, Mr. Muema proceeded to review the bid document of Stelden East Africa Limited and carried out an evaluation process by examining the said bidder's bid against Mandatory Requirement No. 12 and 17 of the Tender Document. He further pointed out that the tender opening minutes were not in the format prescribed under Section 78 of the Act and advocated for termination of the subject tender since the second lowest evaluated bidder had quoted an amount above the available budget.

52. We note that Section 63 of the Act is instructive in the manner in which a procuring entity may terminate procurement or asset disposal proceedings and provides as follows:

***"(1) An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies—***

***(a) the subject procurement has been overtaken by—***

***(i) operation of law; or***

***(ii) substantial technological change;***

***(b) inadequate budgetary provision;***

***(c) no tender was received;***

***(d) there is evidence that prices of the bids are above market prices;***

***(e) material governance issues have been detected;***

***(f) all evaluated tenders are non-responsive;***

***(g) force majeure;***

***(h) civil commotion, hostilities or an act of war; or***

***(i) upon receiving subsequent evidence of engagement in fraudulent or corrupt practices by the tenderer.***

***(2) An accounting officer who terminates procurement or asset disposal proceedings shall give the Authority a written report on the termination within fourteen days.***

***(3) A report under subsection (2) shall include the reasons for the termination.***

***(4) An accounting officer shall notify all persons who submitted tenders of the termination within fourteen days of termination and such notice shall contain the reason for termination."***

53. Section 63 (1) of the Act stipulates that termination of procurement proceedings is only done by an accounting officer prior to notification of award of a tender and when any of the pre-conditions listed in sub-section (a) to (i) exist. Additionally, Section 63 (2), (3), and (4) outlines the procedure to be followed by a procuring entity when terminating a tender. It is trite law that for the termination of procurement proceedings to pass the legal muster, a procuring entity must demonstrate compliance with both the substantive and procedural requirements under Section 63 of the Act.

54. In essence, Section 63 of the Act is instructive on termination of procurement proceedings being undertaken by an accounting officer of a procuring entity at any time before notification of award is made and such termination must only be effected if any of the pre-conditions enumerated in Section 63(1) (a) to (i) of the Act are present. Further, following such termination, an accounting officer is required to give the Public Procurement Regulatory Authority (hereinafter referred to as "the Authority") a written report on the termination with reasons and notify all tenderers, in writing, of the termination with reasons within fourteen (14) days of termination. These are the procedural statutory pre-conditions

that must be satisfied before a termination of procurement proceedings is deemed lawful.

**On the substantive requirements for termination of procurement proceedings in the subject tender;**

55. Section 63(1)(d) and (f) of the Act as relied upon in the Professional Opinion stipulates that procurement proceedings may be terminated where (a) there is evidence that the prices of bids are above market prices and (b) all evaluated tenders are non-responsive. An examination of the regret letters issued to the bidders in the subject tender indicate that bidders were not informed of the above provisions of Section 63 of the Act as having informed the decision to terminate the procurement proceedings in the subject tender.

56. It is imperative to also note that from the contents of the confidential documents submitted to the Board, the Evaluation Committee made a recommendation for award of the subject tender to the most responsive bidder being Stelden East Africa Limited at a contract price of Kenya Shillings Ten Million Two Hundred and Forty Thousand Four Hundred and Sixty Shillings (Kshs. 10,240,460.00) only. This recommendation was only overturned by the Head of Procurement following his re-evaluation of the recommended bidder's bid with regard to Mandatory Requirement No. 12 and 17 of the Tender Document rendering the bidder non-responsive and

the second lowest evaluated bidder as also non-responsive for having quoted an amount above the available budget.

57. The Board observes that the role of the Evaluation Committee and the Head of Procurement as provided under the Act varies and is distinct.

58. Section 46 of the Act provides for establishment of an ad hoc Evaluation Committee. Section 46 (4) further provides that:

***"(4) An evaluation committee established under subsection (1), shall—***

***(a) deal with the technical and financial aspects of a procurement as well as the negotiation of the process including evaluation of bids, proposals for prequalification, registration lists, Expression of Interest and any other roles assigned to it;***

***(b) consist of between three and five members appointed on a rotational basis comprising heads of user department and two other departments or their representatives and where necessary, procured consultants or professionals, who shall advise on the evaluation of the tender documents and give a recommendation on the same to the committee within a reasonable time;***

**(c) have as its secretary, the person in charge of the procurement function or an officer from the procurement function appointed, in writing, by the head of procurement function;**

**(d) complete the procurement process for which it was appointed and no new committee shall be appointed on the same issue unless the one handling the issue has been procedurally disbanded;**

**(e) adopt a process that shall ensure the evaluation process utilized adheres to Articles 201(d) and 227(1) of the Constitution.”**

59. In essence, it is the sole responsibility of the Evaluation Committee to *inter alia* deal with evaluation of bids and complete the procurement process for which it was appointed while ensuring that it adheres to the provisions of Articles 201(d) and 227(1) of the Constitution and the evaluation criteria set out in the tender documents.

60. As such, evaluation and comparison of tenders is conducted with a view of making recommendations to the accounting officer through the head of procurement to inform the decision of the award to the successful bidder.

61. Section 47 of the Act provides for the Procurement function as follows:

***"(1) A procurement function shall be handled by procurement professionals whose qualifications are recognized in Kenya.***

***(2) The head of the procurement function shall among other functions under this Act, be responsible for rendering procurement professional advice to the accounting officer.***

***(3) The Cabinet Secretary shall make regulations for the better carrying out of this section in respect to low value procurement."***

62. Regulation 33 of Regulations 2020 further provides for establishment and role of the procurement function as follows:

***"1) A procuring entity shall establish a procurement function in accordance with section 47 of the Act.***

***(2) The procurement function shall be handled by the procurement professionals whose qualification and experience are recognized in Kenya.***

***(3) The role of the procurement function shall be—***

***(a) to maintain and continually update standing lists of registered suppliers for the procuring entity under sections 57 and 71 of the Act;***

***(b) to liaise with the Authority in respect of the Authority's register of procuring agents;***

***(c) to prepare tender and asset disposal documents to facilitate fair competition;***



***(d) to prepare, publish and distribute procurement and disposal opportunities including invitations to tender, request for quotations and proposals, prequalification documents and invitations for expressions of interest;***

***(e) coordinate the receiving and opening of tender documents;***

***(f) to submit a list of registered or prequalified suppliers or contractors or consultants to the accounting officer for approval;***

***(g) to issue procurement and asset disposal documents to candidates in accordance with the Act and these Regulations;***

***(h) to propose the membership of relevant committees under the Act to the accounting officer for consideration and appointment;***

***(i) to coordinate the evaluation of tenders, quotations and proposals;***

***(j) to recommend for consideration of the negotiation of a procurement by the evaluation committee where negotiations are allowed by the Act and these Regulations and participate in negotiations;***

***(k) to prepare and publish tender awards;***

***(l) to prepare contract documents in line with the award decision;***

***(m) to prepare and issue debriefing letters;***

***(n) to prepare contract variations and modifications documents;***

- (o) to maintain and archive procurement and asset disposal documents and records for the required period;***
- (p) to provide information, as required, for any petition or investigation to debar a tenderer or contractor or any investigation under review procedures;***
- (q) to implement the decisions of the accounting officer, including disposal committee and coordinating all procurement activities;***
- (r) to act as a secretariat to the evaluation, inspection and acceptance, and disposal committees;***
- (s) to liaise with the National Treasury or relevant county treasury and the Authority on matters related to procurement and asset disposal;***
- (t) to prepare and submit to the National Treasury or relevant county treasury and the Authority reports required under the Act, these Regulations and guidelines of the Authority;***
- (u) to monitor contract management by user departments to ensure implementation of contracts in accordance with the terms and conditions of the contracts;***
- (v) to report any significant departures from the terms and conditions of the contract to the head of the procuring entity or accounting officer;***
- (w) to recommend for transfer of a procurement or asset disposal responsibility to another procuring entity by the head of the procuring entity when need arises;***

***(x) to prepare consolidated procurement and asset disposal plans;***

***(y) to advise the procuring entity on aggregation of procurement to promote economies of scale;***

***(z) to co-ordinate internal monitoring and evaluation of the procurement and supply chain function;***

***(aa) to carry out market surveys to inform the placing of orders or adjudication by the relevant awarding authority;***

***(bb) to conduct periodic and annual stock taking;***

***(cc) to certify the invoices and vouchers to facilitate processing of payment to suppliers;***

***(dd) to recommend extension of the tender validity period;***

***(ee) to verify that the available stock levels warrant initiating a procurement process; and***

***(ff) to carry out any other functions and duties as are provided under the Act and these Regulations and any other functions that might be stipulated by the National Treasury or relevant county treasury, or the Authority.”***

63. In essence, the head of the procurement function is primarily responsible for rendering procurement professional advice to the accounting officer and is tasked *inter alia* with proposing the membership of relevant committees under the Act for the consideration of the Accounting Officer while acting as a secretariat to the Evaluation, Inspection and Acceptance and Disposal Committees established under the Act.

64. With regard to rendering of procurement professional advice to the accounting officer, Section 84 of the Act provides for provision of a professional opinion by the head of procurement function to the accounting officer as follows:

***"(1) The head of procurement function of a procuring entity shall, alongside the report to the evaluation committee as secretariat comments, review the tender evaluation report and provide a signed professional opinion to the accounting officer on the procurement or asset disposal proceedings.***

***(2) The professional opinion under sub-section (1) may provide guidance on the procurement proceeding in the event of dissenting opinions between tender evaluation and award recommendations.***

***(3) In making a decision to award a tender, the accounting officer shall take into account the views of the head of procurement in the signed professional opinion referred to in subsection (1)."***

65. The import of the above provision is that the head of procurement function as secretariat to the Evaluation Committee shall (a) review the tender evaluation report, (b) provide a signed professional opinion alongside the report by the evaluation committee to the accounting

officer on the procurement and asset disposal proceedings. In the event that there is a dissenting opinion between the tender evaluation and award recommendations by the evaluation committee, the professional opinion may provide guidance on the procurement proceedings and in the making of a decision to award a tender, the accounting officer is obligated to take into account the views of the head of procurement provided in the signed professional opinion.

66. With this in mind, it is clear to the Board that the evaluation process in the subject tender came to an end upon submission of the Evaluation Report by the Evaluation Committee to the Head of Procurement Function of the Procuring Entity. The Head of Procurement, Mr. Muema overstepped his mandated provided under the Act in purporting to evaluate the recommended bidder's bid document submitted in the subject tender and finding it to be non-responsive. A recommendation that all evaluated tenders in the subject tender were non-responsive could only have been made by the Evaluation Committee.

67. The Board has also not had sight of any evidence that a market survey was carried out by the Procuring Entity establishing that the prices of the bids submitted in the subject tender were above market prices.

68. Superior courts in this country have previously warned against the growing trend of procuring entity's reproducing the grounds of termination under Section 63 of the Act without any further information. In **Republic v Public Procurement Administrative Review Board**

**Exparte Nairobi City & Sewerage Company; Webtribe Limited t/a Jambopay Limited (Interested Party) [2019] eKLR; Nairobi High Court Judicial Review Application 437 of 2018** the High Court considered a judicial review application challenging the decision of this Board that had found that the Procuring Entity irregularly terminated the tender under consideration. In dismissing the judicial review application, the High Court sounded a warning to Procuring Entities that mere recitation of grounds of termination of a tender under Section 63 of the Act without information establishing the alleged ground of termination is insufficient to justify such termination:

**"45. The mere recitation of the statutory language, as has happened in this case is not sufficient to establish the grounds or sufficient reasons. The reasons for the termination must provide sufficient information to bring the grounds within the provisions of the law. This is because the tender process and in particular, the termination, must be done in a transparent and accountable and legal manner as the law demands. This is because the question whether the information put forward is sufficient to place the termination within the ambit of the law will be determined by the nature of the reasons given. The question is not whether the best reasons to justify termination has been provided, but whether the reasons provided are sufficient for a reasonable tribunal or body to conclude, on the**

***probabilities, that the grounds relied upon fall within any of the grounds under section 63 of the Act. If it does, then the party so claiming has discharged its burden under section 63”***

69. From the above holding, which is binding on this Board, public procurement processes, including termination or cancellation of a public tender, should be done in an open and transparent manner and mere recitation of the statutory language under Section 63 of the Act does not suffice. In our considered view, fairness and transparency during termination of procurement proceedings require as of necessity that an accounting officer of a procuring entity should not only recite the statutory language as reasons for termination but also provide real and tangible reasons backed with sufficient evidence for such termination. With this information and evidence, aggrieved tenderers will critically weigh their options on whether to challenge or not to challenge such a termination in light of being in possession of sufficient evidence of the reasons for such termination

70. Guided by the above holdings, the Board finds and holds that the Respondents have failed to fulfill the substantive requirements for the termination of procurement proceedings in the subject tender as required by Section 63(1)(d) and (f) of the Act.

***With regard to procedural requirements for termination of procurement proceedings in the subject tender;***

71. From the confidential file, we note that the bidders in the subject tender were notified of termination of the procurement proceedings in the subject tender vide letters dated 30<sup>th</sup> October 2024. However, the said letters do not muster the threshold of termination notice contemplated under Section 63(4) of the Act for failing to sufficiently give reasons pertaining to the alleged grounds of termination under Section 63(1)(d) and (f) of the Act.

72. The 1<sup>st</sup> Respondent also failed to include in the confidential file the Written Report on termination of the subject tender addressed to the Director General of the Authority as contemplated under Section 63 (2) of the Act as read with PPRA Circular No. 4/2022 dated 1<sup>st</sup> July 2022 on Mandatory Reporting in the PPIP Portal addressing the reasons for termination of the subject tender.

73. As such, the procedural statutory pre-conditions that must be satisfied before a termination is deemed lawful as required by Section 63(2) & (3) of the Act have not been met by the Respondents.

74. Having established that the Respondents failed to satisfy both the substantive and procedural statutory pre-conditions of termination of procurement proceedings in line with Section 63 of the Act the Board finds and holds that the Respondents failed to terminate the procurement proceedings of the subject tender in accordance with Section 63 of the Act.



75. Consequently, the Board's jurisdiction to hear and determine the instant Request for Review has not been ousted by dint of Section 167(4)(b) of the Act.

**Whether the Procuring Entity evaluated the Applicant's bid with regard to Mandatory Requirement No. 13 in strict compliance with the provisions of the Tender Document, the Act and the Constitution**

76. It is the Applicant's case that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in disqualifying its bid document failed to adhere to the requirements of the Tender Document, the Act and the Constitution. The Applicant contends its bid complied with the requirements set out under Mandatory Requirement No. 13 of the Tender Document and that the Evaluation Committee ought to have progressed its bid for further evaluation at the Technical Evaluation stage.

77. In response, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents contend that they adhered to the provisions of the Tender Document in evaluation of the Applicant's bid submitted in the subject tender and that the Applicant's bid was found to be non-compliant to mandatory requirement no. 13 of the Tender Document.

78. The Board is alive to the objective of public procurement which is to provide quality goods and services in a system that implements the

principles specified in Article 227 of the Constitution which provides as follows:

**"227. Procurement of public goods and services**

**(1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.**

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

**a) .....d)"**

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

**"80. Evaluation of tender**

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

- (2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, .....**
- (3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)-**
- (a) The criteria shall, to the extent possible, be objective and quantifiable;**
- (b) each criterion shall be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality, time and service for the purpose of evaluation; and**
- (4) ....."**

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

81. The Applicant in the instant Request for Review is aggrieved by the regret letter dated 30<sup>th</sup> October 2024 which reads in part as follows:

"....."

***In reference to the above mentioned tender, you are hereby notified that you were not successful.***

***Reasons:-***

***1. You did not attach CR12 and Copies of National Identity Card(s) / Passport (s) of Proprietors for Business names and Proof of Directorship and Shareholding of the company (CR12) issued in the last 6 months from the tender closing date.***

***You are also notified that tender has been cancelled since the qualified bidder quoted above the budgeted amount.***

....."

82. According to the above notification letter, the Applicant's tender was disqualified for having not provided a CR12 together with copies of national identity cards/ passport(s) of proprietors of business names and proof of directorship and shareholding issued in the last six months from the date of the tender closing deadline.

83. Having carefully studied the Tender Document, we note that the evaluation procedure and criteria for the tender subject of this Request for Review is set out at Section III- Evaluation and Qualification Criteria

of the Tender Document. Mandatory Requirement 13 was provided as follows:

***PRELIMINARY EVALUATION***

	<b><i><u>Mandatory documents</u></i></b>	<b><i><u>Provided</u></i></b>  <b><i><u>YES/NO</u></i></b>	<b><i><u>Specify reference</u></i></b>  <b><i><u>Page(s)</u></i></b>
.....	.....		
<b><i>13</i></b>	<b><i>Attach CR 12 and Copies of National Identity Card(s) / Passport(s) of Proprietors for Business Names.  Proof of Directorship and Shareholding of the company (CR12) issued in the last 6 months</i></b>		
....	.....		

84. In essence, Mandatory Requirement No. 13 recognized that a bidder could either be registered as a business name or a company and as such where the bidder was a business name, it was required to submit copies

of its proprietors National Identity Cards/Passports and where the bidder was a company, it was required to submit a CR12 evidencing proof of directorship and shareholding issued in the last 6 months.

85. We are cognizant of the fact that the Registration of Business Names Act defines a business name as:

***"business name means the name or style under which any business is carried on, whether in partnership or otherwise"***

86. The Companies Act No. 17 of 2014 defines a company as:

***"a company formed and registered under this Act or an existing company."***

87. Further, an existing company is defined as:

***"(a) a company formed and registered under the repealed Act;  
or***

***(b) a company that was formed and registered under either of the repealed Ordinances (as defined by that Act)."***

88. The Board notes from the Applicant's original bid document submitted by the 1<sup>st</sup> Respondent as part of the confidential documents that the Applicant submitted at page 29 of its bid document a CR12 detailing its details held at the Companies Registry as at 1<sup>st</sup> May 2024 which consist, inter alia, its company number, name of directors and shareholders including their particulars.

89. In view of the above CR12, the Board is satisfied that the Applicant's bid satisfied Mandatory Requirement No. 13 of the Tender Document and faults the Respondents for disqualifying the Applicant's bid at the Preliminary Evaluation stage.

90. In the circumstances, we find that the Applicant's tender was not fairly evaluated with regard to Mandatory Requirement No. 13 in strict compliance with the provisions of the Tender Document, the Act and the Constitution.

**What orders the Board should grant in the circumstances?**

91. We have established that the Board has jurisdiction to hear and determine the instant Request for Review and that the termination of the procurement proceedings of the subject tender was irregular and in breach of Section 63 of the Act.

92. Having found that the Applicant's tender was not fairly evaluated in accordance with Article 227(1) of the Constitution and Section 80(2) of the Act, any action undertaken thereafter emanating from an improper exercise cannot be allowed to stand since such actions are consequently null and void.

93. Accordingly, we deem it fit and just to order the 1<sup>st</sup> Respondent to direct the 2<sup>nd</sup> Respondent's Evaluation Committee to admit the Applicant's bid and all other unsuccessful bidders bids to the Preliminary Evaluation stage

and proceed with re-evaluation of the subject tender to its logical conclusion while taking into consideration the findings of the Board in the instant Request for Review, the provisions of the Tender Document, the Act and the Constitution. This is in view of the fact that several observations had been made with regard to compliance of the mandatory requirements by the Procuring Entity's Head of Procurement which the Evaluation Committee will be required to take into consideration.

94. The upshot of our finding is that the instant Request for Review succeeds with respect to the following specific orders:

### **FINAL ORDERS**

95. 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 this Request for Review:

**A. The decision to terminate the procurement proceedings of Tender No. GMC/WM/T/001/2024-2025 for Supply, Delivery, Installation, Configuration, Customization, Testing, Commissioning and Maintenance of an Enterprise Resource Planning (ERP) System for Emali-Sultan Hamud Municipality, Wote Municipality and Makueni County Fruit Development & Marketing Authority be and is hereby quashed and set aside.**



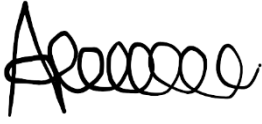
**B. The letters of Regret dated 30<sup>th</sup> October 2024 with respect to Tender No. GMC/WM/T/001/2024-2025 for Supply, Delivery, Installation, Configuration, Customization, Testing, Commissioning and Maintenance of an Enterprise Resource Planning (ERP) System for Emali-Sultan Hamud Municipality, Wote Municipality and Makueni County Fruit Development & Marketing Authority addressed to the Applicant and to all other unsuccessful tenderers be and are hereby nullified and set aside.**

**C. The 1<sup>st</sup> Respondent is hereby ordered to direct the 2<sup>nd</sup> Respondent's Evaluation Committee to admit the Applicant's tender and all other tenders submitted in the subject tender to the Preliminary Evaluation stage and proceed with re-evaluation of the subject tender in accordance with the provisions of the Tender Document, Regulations 2020, the Act, and Article 227 of the Constitution while taking into consideration the Board's findings in this Request for Review.**

**D. Further to Order C above, the Respondents are hereby directed to proceed with the procurement process to its logical conclusion.**

**E. Given the findings herein, each party shall bear its own costs in the Request for Review.**

**Dated at NAIROBI this 6<sup>th</sup> Day of December 2024.**



.....

.....

**PANEL CHAIRPERSON**

**SECRETARY**

**PPARB**

**PPARB**