

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO 51 OF 8TH OCTOBER, 2012

BETWEEN

HORSEBRIDGE NETWORK SYSTEMS (E.A.) LTD,.....APPLICANT

AND

CENTRAL BANK OF KENYA PROCURING ENTITY

Review against the decision of the Tender Committee of the Central Bank of Kenya in the matter of Tender No. CBK/46/2011-2012 for Supply, Installation and Commissioning of an Integrated Security Management System.

BOARD MEMBERS PRESENT

Mr. P.M. Gachoka	-	Chairman
Ms. Judith Guserwa	-	Member
Eng. Christine Ogut	-	Member
Mr. Akich Okola	-	Member.
Mr. Joshua Wambua	-	Member.

IN ATTENDANCE

Ms. Pauline Opiyo - Ag. Secretary
Ms. Shelmith Miano - Secretariat.

PRESENT BY INVITATION

Applicant - M/s Horsebridge Networks Systems

Mr. Njunguna C. M. - Advocate
Mr. P. W. Kago - Representative

Procuring Entity - Central Bank of Kenya

Mr. George Nganga Mbugua - Advocate
Mr. Benson W. Chumah - Advocate
Mr. Z. O. Isaaka - Assistant Director

Interested Parties

Mr. Chris Maondo - Advocate, Indra Limited
Mr. Jonathan Gitari - Representative, ORAD Ltd

BOARD'S DECISION

Upon hearing the submissions of the parties and interested candidates and upon considering the information in all the documents before it, the Board decides as follows:

BACKGROUND OF AWARD

Advertisement

An International tender for Supply, Installation and Commissioning of an Integrated Security Management System was advertised in the Daily Nation of 14th May, 2012.

Closing/Opening

The tenders closed/opened on 3rd July, 2012 at 2.30 p.m. Bidders' representatives witnessed the closing/ opening of the tenders. Out of the fifty-eight (58) prospective bidders that bought the tender documents, the following six (6) firms submitted their bids by the deadline for tender closing/ opening:

1. AUA Industria
2. Orad Limited
3. Indra Limited
4. Azicon Kenya Ltd
5. Horse Bridge Network Systems E.A. Ltd
6. Engineered Systems Solutions

EVALUATION

Introduction

The Tender reference No: CBK/46/2011- 2012 for supply, delivery, installation and commissioning of an Integrated Security Management System (ISMS) for the Central Bank of Kenya, was publicly advertised in accordance with the Public Procurement Rules and Regulations. Tenders closed on 3rd July 2012 at 2.30 p.m.

The Governor appointed the relevant Tender Opening and Tender Evaluation Committees. The former carried out the tender opening exercise on July 3rd, 2012 and minutes of the proceedings were recorded accordingly.

Out of the 58 prospective bidders that bought the tender documents, only six (6) companies responded by submitting their bids as shown in the following table:

Table 1: Companies which submitted bids in response to the tender

No	Tenderer	Tender Price	Tender price (in Kshs); 1 USD = Kshs 84.1231*	Bid Bond	Bid Bond provider
1	Azicon Kenya Ltd	Kshs 805, 043, 775.80	805, 043, 775.80	Kshs 2,000,000.00	African Banking Corporation
2	Engineered Systems Solution	USD 11, 202, 578.95	942,395,669.27	USD 23, 981.00	ABSA Bank
3	Indra Limited	EURO 11,235,265.29	945,145,345.52	Kshs 2,000,000.00	Bank of Africa Kenya Ltd
4	Horsebridge Network Systems E.A. Ltd (Horsebridge)	Kshs 1,238, 784, 864.00	1,238, 784, 864.00	Kshs 2,000, 000.00	Victoria Commercial Bank
5	Orad Limited (ORAD)	USD 18, 653, 689.56	1,569,206,192.22	USD 23,981.00	First International Bank of Israel
6	AUA Industria	Kshs 2,338,075,505.03	2,338,075,505.03	USD 23,981.00	GM Financial Services

*This is as recorded during the tender opening meeting

1. Tender Evaluation Process

During the evaluation of the tenders, the committee adopted the following approach as guided by the tender document:

- 1) **Mandatory Requirements:** Evaluation of the mandatory requirements of the tender. Only bids that fully met the mandatory requirements were permitted to proceed to evaluation based on the comprehensive specifications articulated in volume 2 of the tender document.
- 2) **Comprehensive Technical Specifications:** At this stage bids that did not meet the minimum technical specifications were disqualified.
- 3) **Technical Competence (TC):** Bidders whose bids met the minimum technical specifications of the tender were evaluated on technical competence and allocated scores out of 100%.
- 4) **Presentations (P):** Only those bidders who attained the minimum score of seventy five per cent (75%) under the Technical Competence were invited to make presentations and scored out of 100%. The final score for each bidder was weighted thus: $\text{Total Score (TS)} = (0.7 T + 0.3 P)$ where T is the score awarded on Technical Competence and P is the score awarded on Presentation.
- 5) **Financial Evaluation:** Only bidders who attained a combined score of 75% and above on Technical Competence and Presentation had their price proposals evaluated.
- 6) **Recommendation for award:** The bidder with the Lowest Evaluated Price was recommended for consideration for award.

2. Mandatory Requirements

As was required before evaluation of the bids submitted; the committee confirmed from the register of attendance that all the six bidders indeed came for site visits to Nairobi, Mombasa, Kisumu, Eldoret and Nyeri Currency Centre.

The Mandatory Requirements were then evaluated based on the criteria given in the tender document. The results are given in the table below.

Table 2: Evaluation of responses to mandatory requirements

No	Requirements	AUA Industria	ORAD	Indra	Azicon	Horse bridge	ESS
MR 1	Provide documentary evidence of the company's Certificate of Incorporation.	√	√	√	√	√	√
MR 2	Provide copy of the company's current Certificate of Tax Compliance from the jurisdiction in which you are operating. The certificate should be valid at least up to the date of opening the Tender.	X Expired tax compliance certificate	√	√	√	√	√

MR 3	Submit a completed company's profile using the Confidential Business Questionnaire provided in this tender document.	√	√	√	√	√	√
MR 4	Provide a bid bond (tender Security) for Kshs.2 million or Euros 18,519.00; US Dollar 23,981.00; Sterling Pound. 14,878.00.	X Submitted a letter but not a bid bond ***	√ US\$ 23,981.00	√ Kshs.2 million	√ Kshs.2 million	√ Kshs.2 million	√ US\$ 23,981.00
MR 5	Provide signed copies of audited accounts for the company for the past three consecutive accounting years i.e. 2008, 2009 and 2010.	√ 2008-2010	√ 2008 - 2011	X 2009-2011	√ 2008-2010	√ 2008-2010	X 2009-2011
MR 6	Provide Manufacturer's letter(s) of authorization confirming the bidder as dealer/vendor of the proposed products.	√	√	√	√	√	√

MR 7	Provide letter of undertaking for provision of comprehensive service maintenance and support of the entire system for a period of 24 months after installation and commissioning within the contract sum i.e. at no extra cost to the employer.	X	√	√	√	√	√
------	---	---	---	---	---	---	---

*** The tender opening committee recorded a letter from AUA Industria as a bid bond. But on further examination by the evaluation committee, it was established that it was NOT a bid bond.

√ - Means the bidder met the required

X - Means the bidder failed to meet the requirement.

Note:

- Three bidders (AUA Industria, ESS and Indra) failed to meet the mandatory requirements in the respective areas as above.
- ESS and Indra did not provide signed copies of audited accounts for the past three years. The tender document required the bidders submit audited accounts for 2008, 2009 and 2010. The two bidders did not submit accounts for 2008.

The following three companies qualified for the next stage of evaluation

1. ORAD Limited
2. Azicon Kenya Limited and
3. Horsebridge Network Systems East Africa Limited.

3. Technical Specifications Analysis

Bids were evaluated against comprehensive specifications articulated in volume 2 of the tender document. Analysis of the technical specifications was to confirm how each of the three remaining bidders met the minimum requirements of the tender. The following is a summary of the results from this analysis.

Table 3: Evaluation - Technical Requirements

No	Company	Result / Comments
1	Azicon Kenya Limited	Failed. <ul style="list-style-type: none">• Failed to specify the Intrusion Alarm Systems to be provided e.g. Fixed/Wireless Panic Buttons, Strong Rooms walls protection.• The CCTV Camera systems proposed did not match the minimum requirement for Outdoor PTZ controlled camera.• Did not show how access control software connects to a Security Management Architecture as a single graphical source.• Specification for access control badges not given.• Functionality for the PC security not was specified.• Security Communication specifications not provided e.g. Wireless Radio Network, Video intercom system and Public Address.• Gate and Pedestrian controlled passage specifications not provided.
2	ORAD Kenya Ltd	Pass
3	Horsebridge Network Systems E.A. Ltd	Pass

Azicon Kenya Limited failed to provide the required technical specifications for key items in the tender document as shown above.

The bids from Horsebridge and ORAD met the minimum technical specifications and were therefore subjected to the next stage of the evaluation.

4. Evaluation against Technical Competence

The technical competencies of each company were assessed based on the evaluation criteria reproduced below. An average score was assigned for each category.

Table 4: Evaluation - Technical Competence

	Evaluation Attribute	Max score	ORAD	Horsebridge
1.	Size of Company	10	9.65	10
	<p>Give details of the strength of the primary company that has tendered for the ISMS in terms of human resource capacity of the organization.</p> <p><i>(A company with 50 or more employees -10 marks</i></p> <p><i>Those with fewer than 50 prorated). Bidders were to provide a detailed organizational structure of the company</i></p>			
2.	Technical Capability to Install & Maintain the ISMS as Quoted	40	26.12	40

	Evaluation Attribute	Max score	ORAD	Horsebridge
	<p><i>Provide detailed Résumés/Curriculum Vitae (CV) of key Technical staff with the requisite competencies who would likely be assigned to this project (Attach relevant technical certificates)</i></p> <ul style="list-style-type: none"> • Five (5) technical personnel with 3 yrs experience in the ISMS key areas – <i>(15 marks)</i> • Each additional technical personnel (up to 10 in total) with 3 yrs or more in experience and relevant experience and skill <i>(2.5 marks each)</i>. 			
	<ul style="list-style-type: none"> • 15 or more personnel with experience in consultancy, design, implementation, installation and maintenance of CCTV, Intrusion & Panic Systems, Access Control & Personnel/Visitor Management, Fire detection & suppression and related accessories and security management software. <i>(40 marks)</i> 			
3.	Past Performance	10	10	7.625
	<ul style="list-style-type: none"> • Give at least three reference sites (provide names of contact persons and date completed) where similar installations worth more than two (2) million dollars (US\$2 million) have been carried out during the last five years. <i>(5 marks)</i> • Any additional reference site fitting above <i>(additional 1 mark each up to 5)</i> 			
4.	Local Presence	20	20	20

	Evaluation Attribute	Max score	ORAD	Horsebridge
	<ul style="list-style-type: none"> • Presence of an established Local Office (<i>Provide Proof</i>) (20 marks) OR • Partnering/ Joint Venture etc with a local Company (15 marks)(<i>Provide proof</i>) OR <ul style="list-style-type: none"> • Commitment to establish a local Office- (<i>Provide letter of undertaking</i>) - (10 marks) 			
5.	Years of Experience in Similar Work	10	10	10
	<ul style="list-style-type: none"> • Years of existence as a company and track record in dealing with security related projects or work. • Attach certified copy of certificate of registration /incorporation as a business. (<i>Experience of 10 years and above will earn 10 marks</i>) other will be prorated			
6.	FINANCIAL STABILITY (LIQUIDITY)	10	8.856	8.587
	<p>a) Profitability margin (<i>a margin of 1 will score 2 marks</i>)</p> <p>b) Liquidity ratio (the highest ratio will earn 8 marks, others will be prorated)</p> <p>Attach company audited accounts for the last three consecutive years (i.e. 2008- to date)</p>			
TOTAL (100%)			84.63	96.21

Seventy five per cent (75%) was the minimum score required for one to qualify to be considered for the next stage of the evaluation process. Both ORAD and Horsebridge met this requirement.

5. Evaluation on Presentations

As required in the tender document, the above two bidders who obtained the minimum score of seventy five per cent (75%) and above on Technical Competence were invited to make presentations to the Tender Evaluation Committee. As required by the tender document, each member of the evaluation committee independently scored for each bidder. The table below indicates the average score attained by each bidder.

Table 5(a): Evaluation - Presentations

	Attribute	Max. score	Horsebridge	ORAD
1.	Bidder's understanding of the scope of work.	30	26.56	25.33
2.	Credibility of the proposed methodology for project planning, implementation, monitoring and closure.	10	8.67	7.67
3.	Adequacy of resource outlay for the project.	20	17.78	17.78
4.	Clear comparison of alternative systems and justification for selection of the systems offered.	10	8.44	7.67
5.	Suitability of the proposed systems and equipment.	10	8.56	8.44

6.	Credibility of the total cost of ownership of installations of the systems.	10	8.78	7.89
7.	Report on level of success of similar completed projects by the bidder.	10	7.44	9.44
	Total	100	86.22	84.22

The total score (TS) awarded to each bidder as per the criteria was as follows:

Table 5(b): Total Score - Technical Competence and Presentation

Ranking	Company	Total Score (TS)
1	Horsebridge Systems Limited	93.22
2	ORAD Limited	84.51

The total score awarded to the bidder was computed thus: $TS = 0.7T + 0.3P$

Where:

TS is the total combined scores of Technical Competence and Presentation scores;

T is the Technical Competence score out of 100%;

P is the presentation score out of 100%.

6. Financial Evaluation

The two companies having scored above the required pass mark of 75% therefore qualified for financial evaluation.

The bills of quantities as provided by each were analyzed to check for any arithmetic errors. Differences were discovered and corrected as shown in the tables below:

Table 6: Summary of BQs

SUMMARY FOR HORSEBRIDGE			
ITEM	ITEM DETAILS	TOTAL	TOTAL (Corrected)
NO.		KShs	KShs
1.	Installations at Head Office B/F Page 213 Total for Security	241,449,639.00	231,951,199.00
2.	Total for Fire Installations at Head Office B/F Page 225	33,108,063.00	33,093,843.00
3.	Installations at Warehouse B/F Page 235 Total for Security	23,502,763.00	23,160,763.00
4.	Installations Marshall House B/F Page 245 Total for Security	55,725,796.00	55,375,796.00
5.	Installations at KSMS 255 B/F Page Total for Security	10,940,565.00	10,940,565.00
6.	Installations at Kisumu Branch B/F Page 273 Total for Security	105,514,707.00	105,514,707.00
7.	Total for Fire Installations at Kisumu Branch B/F Page 288	20,306,053.00	20,306,053.00

8.	Installations at Eldoret Total for Security B/F Page 312 Branch	129,826,526.00	129,827,523.00
9.	Total for Fire Installations at Eldoret Branch B/F Page 318	17,548,753.00	17,548,753.00
10.	Installations at Total for Security B/F Page 336 Branch Mombasa	120,574,801.00	119,874,801.00
11.	Total for Fire Installations at Mombasa Branch B/F Page 343	17,347,373.00	17,347,373.00
12.	Installations at Nyeri Total for Security Currency Centre B/F Page 364	71,079,917.00	66,455,757.00
13.	Installations at Total for Security Nakuru Currency Centre B/F Page 381	58,960,099.00	59,235,655.00
14.	Installations at Meru Total for Security Currency Centre B/F Page 399	64,949,478.00	64,699,478.00
15.	Total cost of two years comprehensive maintenance, support and warranty which will be part of this tender	-	-
16.	Sub-Total for the above	970,834,533.00	955,332,266.00
17.	VAT 16%	155,333,525.28	152,853,162.56
18.	Total	1,126,168,058.28	1,108,185,428.56
19.	Contingency Sum being 10% of the above total	112,616,805.83	110,818,542.86
20.	Grand Total to Tender Form	1,238,784,864.11	1,219,003,971.42
Total Difference			19,780,892.69

SUMMARY FOR ORAD			
ITEM	ITEM DETAILS	TOTAL	TOTAL (Corrected)
NO.		USD	USD
1.	Installations at Head Office Total for Security B/F Page 213	3,073,496.74	2,965,070.72
2.	Total for Fire Installations at Head Office B/F Page 225	307,480.00	307,180.00
3.	Installations at Warehouse Total for Security B/F Page 235	463,046.79	463,046.79
4.	Installations Marshall House Total for Security B/F Page 245	822,176.46	812,175.80
5.	Installations at KSMS Total for Security 255 B/F Page	176,196.87	155,991.47
6.	Installations at Kisumu Branch Total for Security B/F Page 273	2,212,606.85	1,993,820.68
7.	Total for Fire Installations at Kisumu Branch B/F Page 288	253,760.00	253,760.00
8.	Installations at Eldoret B/F Page 312 Branch Total for Security	1,894,458.69	1,798,138.92
9.	Total for Fire Installations at Eldoret Branch B/F Page 318	230,980.00	245,380.00
10.	Installations at B/F Page 336 Branch Mombasa Total for Security	1,818,572.70	1,824,573.15

11.	Total for Fire Installations at Mombasa Branch B/F Page 343	192,710.00	199,910.00
12.	Installations at Nyeri Total for Security Currency Centre B/F Page 364	1,246,068.36	1,203,989.83
13.	Installations at Nakuru Total for Security Currency Centre B/F Page 381	925,904.27	867,898.30
14.	Installations at Meru Total for Security Currency Centre B/F Page 399	1,001,421.23	1,001,071.89
15.	Total cost of two years comprehensive maintenance, support and warranty which will be part of this tender	-	-
16.	Sub-Total for the above	14,618,878.96	14,092,007.55
17.	VAT 16%	2,339,020.63	2,254,721.21
18.	Total	16,957,899.59	16,346,728.76
19.	Contingency Sum being 10% of the above total	1,695,789.96	1,634,672.88
20.	Grand Total to Tender Form	18,653,689.55	17,981,401.63
	Exchange Rate	85.9569	85.9569
		1,603,413,327.28	1,545,625,541.77
Total difference			57,787,785.51

Horsebridge Network Systems Limited had a total difference of Kenya Shillings nineteen million seven hundred eighty thousand eight hundred ninety two and sixty nine cents (Kshs 19,780,892.69).

ORAD Limited had a total difference (above the quoted price) of Kenya Shillings fifty seven million seven hundred eighty seven thousand seven hundred eighty five cents fifty one only (Kshs 57,787,785.51).

These differences were each communicated to the respective bidders. They both confirmed and accepted the corrections and further committed that all items not priced in the Bill of Quantities will be covered and supplied under the amended tender sum.

The final price schedule for the bidders after the above corrections and conversion to single currency (i.e. Kenya Shillings) were made as shown:

Table 7: Final Price Schedule

Ranking	Company	Price (Kshs)	USD
1	Horsebridge Systems EA Limited	1,219,003,971.42	-
2	ORAD Limited	1,545,625,541.77	17,981,401.63

Exchange rate: Kshs 85.9569 = 1 USD on 5th June 2012 being the date 28 days before the final date for the submission of tenders as was provided in the tender document.

Note:

- There were items under bills of quantities for which only unit prices were given as provided in the tender document.

7. Observations and Recommendation

7.1 Observations

- The committee observed that the two companies (Horsebridge Network Systems EA Limited and ORAD Limited) met the minimum requirements of this tender to be considered for award. Horsebridge Network Systems EA Limited obtained an overall average score of 93.22% while ORAD Limited had 84.51% which scores are above the minimum requirement of 75 percent.
- The two companies demonstrated capacity to undertake the project.

The committee also made observations specific to each company as follows:

ORAD

- 1) The company proposed an estimated completion period of 6 months for this project
- 2) Has 30 years' experience as a specialised security systems integrator with its own Research and Design (R& D) facilities.
- 3) The bidder indicated they can facilitate site visits to their installed systems at short notice.

Horsebridge

- 1) The company has eleven years of experience as a specialised security systems integrator.
- 2) The bidder indicated they can facilitate site visits to their installed systems with prior arrangements.
- 3) Gave an estimated completion period of 59 weeks for the project.

7.2 Recommendation

In accordance to the requirements of the tender, Horsebridge Network Systems Limited has submitted the most technically responsive bid and has the lowest evaluated price.

1. The committee recommends **Horsebridge Network Systems Limited** to be considered for the award of tender Ref. No. CBK/46/2011- 2012 for Supply, Delivery, Installation, Testing and Commissioning of an Integrated Security Management System (ISMS) for the Central Bank of Kenya at the quoted price of **Kenya Shillings One Billion two hundred and nineteen million three thousand nine seventy one and forty two cents (Kshs.1,219,003,971.42) inclusive of taxes with a completion period of fifty nine weeks.**
2. The committee further recommends that consideration for award should be made subject to a comprehensive due diligence to confirm the facts presented by the bidder.

8. Tender Committee Decision

The Central Bank of Kenta Tender Committee at its 140th Meeting held on 23rd August, 2012 deliberated on the submissions for supply, Installation and Commissioning of an Integrated Security Management System and noted that the objective of the requirement for submission of Audited Accounts was to assess the financial stability of a bidder, hence those bidders that provided accounts for three years upto 2011 albeit omitting the accounts for 2008 as stated in the Tender Document should be deemed to have met the mandatory requirements No 3. The Committee guided that this omission be treated as a minor deviation in line with

the provisions of the Public Procurement and Disposal Act Section 64 which states that:-

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

(2) The following do not affect whether a tender is responsive –

(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.

In view of the foregoing and taking into account the above observations, the Tender Committee declined to award the tender as recommended and directed as follows:

1. That the tenders of Indra Limited and Engineering Systems Solution be allowed to participate in the Technical Evaluation and be evaluated and ranked with the other two that were already evaluated on technical Specifications;

2. That if the two firms attain a score above the pass mark, they be invited to demonstrate their products and services and the same be evaluated as well like the other two and new ranking be made;
3. That if the two firms also pass the criteria set in 2 above, they be progressed to Financial Evaluation after which a final ranking would be reached to facilitate preparation of a recommendation to the Tender Committee;
4. That the Evaluation Committee to commence the evaluation process as guided above and prepare a report to be considered by the Tender Committee which should be ready on or before 7th September, 2012.

THE REVIEW

The Applicant, M/s Horsebridge Network Systems (E.A.) Ltd lodged this Request for Review on 8th October, 2012 against the decision of the Tender Committee of Central Bank of Kenya in the matter of Tender No. CBK/46/2011-2012 for Supply, Installation and Commissioning of an Integrated Security Management System.

The Applicant was represented by Mr. Njunguna C. M, Advocate while the Procuring Entity was represented by Mr. George Nganga Mbugua, Advocate. The interested parties present were M/s ORAD Limited represented by Mr. Jonathan Gitari and M/s Indra Systems, represented by Mr. Chris Maundu, Advocate.

The Applicant requested the Board for the following orders:-

- 1. The decision of Tender Committee rejecting the recommendations of Evaluation Committee and directing the evaluation of bids which did not satisfy the mandatory requirements be set aside.*
- 2. Direction that Tender Committee do adopt the decision of the Evaluation Committee and award the tender.*
- 3. Any other order or relief the Board may consider appropriate.*

The Applicant raised eight (8) grounds of review which the Board deals with as follows:

Grounds 1, 2, 3, 4, 5, 6 and 7- Breach of Sections 64 & 66 of the Public Procurement and Disposal Act, 2005 "hereafter referred to as "the Act," Regulations 10, 11, 46, 47& 48 of the Regulations thereof hereafter referred to as "the Regulations," and Clauses 6.2, 23.4, 26 and 26.7 of the Tender Documents.

The above grounds of review have been consolidated as they raise similar issues regarding evaluation of tenders and the role of the Tender Committee.

At the outset, upon reading the pleadings of the Procuring Entity in response to Applicant's claim, the Applicant stated that the issues which were not in dispute were as follows:

1. Six bidders participated in the tender;
2. Only three of those who submitted bids were determined by the Procuring Entity to be responsive to the technical requirements;
3. On completion of technical evaluation only two bidders, namely, Orad Ltd and the Applicant, were invited by the Procuring Entity to make presentation of their submissions;
4. After presentation, the two bidders then proceeded to the Financial Evaluation Stage;
5. Upon evaluation of the Financial Submissions and combining them with the Technical Proposals, the Applicant emerged the overall winner with the combined total of 93.5 marks against those of ORAD Ltd which were 84.5.

The Applicant argued that on the basis of these scores, it expected to be awarded the tender, but that instead of this being done, the Tender Committee of the Procuring Entity, directed the Evaluation Committee to carry out a re-evaluation

of two bidders, namely, Engineered System Solutions; and Indra Limited, whose bids had been found by the evaluation committee to be unresponsive, on the premise that the grounds for their disqualification were minor deviations. In its view, this directive was motivated by two considerations: firstly it was because the Procuring Entity had a preferred bidder, who did not win; and secondly, because the Applicant is a foreigner the Procuring Entity did not want to award the tender to it. It stated that since only two bidders qualified for presentations and since the prices had been read at the tender opening, it therefore expected to be awarded the tender as its price was the lowest.

The Applicant submitted that the Procuring Entity's tender committee breached Regulations 10, 11(2), 11(3) and 11(4) and Clauses 6.2, 23.4 and 26 of the Tender Document in directing an evaluation of tenders which did not satisfy the mandatory requirements and were therefore not responsive. In support of this contention, it referred the Board to Regulation 10(2), which sets forth the functions of the tender committee, and argued that these functions did not include the power to re-evaluate tenders. In its view the power to carry out evaluation, or re-evaluation, is the responsibility of the evaluation committee as prescribed under Regulation 16. It averred that a decision as to whether or not a bidder has satisfied the benchmarks set forth in a tender document as to mandatory requirements can only be determined by the evaluation committee and thus, in directing further evaluation and consideration of tenders which had not passed the technical evaluation on the ground that the deviations were minor, the tender committee was acting ultra vires its powers. It submitted that consideration as to whether a deviation was minor was an issue of evaluation, which could only be exercised by the evaluation committee.

It further submitted that in issuing the directive, the tender committee in effect modified the decision of the evaluation committee contrary to Regulation 11(2), which states that:-

"The tender committee shall not -

(a) modify any submission with respect to the recommendations for award or in any other respect."

The Applicant further averred that the Procuring Entity's tender committee breached Regulation 11(2)(b) in rejecting the evaluation committee recommendations without justifiable and objective reasons.

The Applicant further submitted that the Procuring Entity breached Sections 64 and 66 of the Act and Regulation 47(2) and 48 in proceeding to evaluate tenders which were not responsive and by failing to reject all tenders which were not responsive. It argued that once a procuring entity provides that certain requirements are mandatory, it cannot waive them by declaring them as minor deviations, as this would be prejudicial to bidders who, upon reading the tender documents, refrain from submitting their bids in the belief that they are not capable of meeting the stated mandatory requirements. It cited Clause 6.2.1 and 6.2.2, respectively, of the Tender Documents which states that:

6.2.1 A bid must meet the mandatory requirements detailed in Part A of Section A of the standard documents of this tender document in order to qualify for technical analysis.

6.2.2 Only bids that fully meet mandatory requirements will be permitted to proceed to evaluation based on the comprehensive specifications articulated in volume 2 of this tender document. At this stage bids that

will not have met the minimum technical specifications will be disqualified.

The Applicant stated that the mandatory requirements specified by the Procuring Entity, required among other things, for bidders to attach audited accounts for the years 2008, 2009 and 2010. It stated that the rationale for providing audited accounts was to enable the Procuring Entity to compare the performance of the bidders over similar periods and to prevent bidders from selecting years that were favourable to them, and further to enable the Procuring Entity to determine consistency of performance by bidders. It argued that waiver of this mandatory requirement would give some bidders undue advantage, and thus could not be declared as a minor deviation. It further stated that in any event, as per Clauses 23.4 and 26, respectively, of the tender document, the Procuring Entity did not reserve the right to waive the mandatory requirements.

As regards breach of Section 66(2) of the Act, the Applicant stated that the Procuring Entity having set out the criteria to be used by it in evaluating the tenders, could not set out and use other criteria other than those specified.

The Applicant further averred that the Procuring Entity breached Section 66(6) of the Act as read together with Regulation 46 and Clause 26.7 of the Tender Document in failing to complete the evaluation of the tenders within the prescribed period.

The Applicant concluded by urging the Board set aside the decision by the Procuring Entity on the grounds of the alleged breaches of the Act, Regulations and the tender document.

In response, the Procuring Entity questioned the source of the Applicant's information and how it obtained such information. It argued that disclosure by

the Applicant on its source of information was crucial to determination by the Board as whether it had jurisdiction to entertain the Request for Review. It observed that when asked by the Board as to the source of its information, the Applicant had failed to give a direct answer and merely prevaricated. It argued that information in the hands of the Procuring Entity was protected by the requirement of confidentiality as set out in Section 44 of the Act. In light of this provision, and the fact that the Applicant could not disclose how it obtained the information, which was otherwise confidential in nature, it urged the Board to find that the Applicant had obtained the information corruptly. This being the case, the Procuring Entity argued, the Applicant was further in breach of Section 38 of the Act, and the appropriate sanction which should be imposed on the Applicant is debarment.

The Procuring Entity further stated that looking at the Request for Review as filed, it was not clear as which decision by the two bodies in the Procuring Entity involved in the processing of this tender the Applicant was complaining about. It argued that in any event, since the process was not complete in that the Procuring Entity had not made a decision on the award of the tender, the request by the Applicant that it should be awarded the tender was premature.

As to the claim by the Applicant that the Procuring breached Regulations 10 and 11, the Procuring Entity submitted that it did not breach these Regulations and that to the contrary, it had fully complied with every requirement under the Act and the Regulations. It stated that the Tender Committee had acted within its powers as set forth in Regulation 11 by stating the reasons why it wanted the Evaluation Committee to re-evaluate the tenders. It stated that in this connection the Tender Committee has power and responsibility to ensure that in carrying

(3) Any submission rejected by the tender committee may be resubmitted and the tender committee shall provide an explanation and a justification for its decision thereof."

The Board further notes the provisions of Clause 6.2 of the tender document which states that:-

"Clarification of tender shall be requested by the tenderer to be received by the Procuring Entity not later than 7 days prior to the deadline for submission of tenders."

The Board further notes the provisions of Clauses 23.4 and 26 of the Tender Documents, respectively, which provide that:-

"23.4 A tender determined to be not substantially responsive will be rejected by the Employer and may not subsequently be made responsive by the tenderer by correction of the non-conforming deviation or reservation"

Clause 26:-

"26.1 The Employer will evaluate only tenders determined to be substantially responsive to the requirements of the tender documents in accordance with clause 23.

.....

.....

26.7 The tender evaluation committee shall evaluate the tender within 30 days of the validity period from the date of opening the tender.

....."

The Board further notes Sections 64 and 66 of the Act and Regulations 46, 47(2) & 48 which provide as follows:

Section 64:-

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

(2) The following do not affect whether a tender is responsive —

(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.

Section 66:-

66.(1) The procuring entity shall evaluate and compare the responsive tenders other than tenders rejected under section 63(3).

(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and no other criteria shall be used.

(3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2) —

(a) the criteria must, to the extent possible, be objective and quantifiable; and

(b) each criterion must be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality and service for the purpose of evaluation.

(4) The successful tender shall be the tender with the lowest evaluated price.

(5) The procuring entity shall prepare an evaluation report containing a summary of the evaluation and comparison of tenders.

(6) The evaluation shall be carried out within such period as may be prescribed.

Regulations 46, 47(2) and 48

"46. A procuring entity shall, for purposes of Section 66 (6) of the Act, evaluate the tenders within a period of thirty days after the opening of the tender."

"47 (2) The evaluation committee shall reject tenders, which do not satisfy the requirements set out in paragraph (1)."

"48. (1) A procuring entity shall reject all tenders, which are not responsive in accordance with Section 64 of the Act."

"(2) the classification of a deviation from the requirements as minor under section 64(2) (a) of the Act shall be applied uniformly and consistently to all the tenders received by the procuring entity."

The Board further notes the following:

1. The tenders were closed/opened on 3rd July, 2012 and the Evaluation was concluded on 27th July, 2012 which is 24 days from the date of opening of the tenders.

2. The Tender Committee at its meeting held on 23rd August 2012 noted that the objective of the requirement for submission of Audited Accounts was to assess the financial stability of a bidder, hence those bidders that provided accounts for three years up to 2011 albeit omitting the accounts for 2008 as stated in the Tender Document should be deemed to have met the mandatory requirements No 3. The Committee guided that this omission be treated as a minor deviation in line with the provisions of Section 64 of the Act.

3. Clauses 4.1.1 and 4.14.1 of the Tender Document provided as follows:

4.1.1- "This section outlines the submission requirements of the Tender. It should be noted that failure to comply with the mandatory requirements will lead to automatic disqualification of the submitted bid at preliminary evaluation stage and no further technical analysis of the proposed solution will be undertaken."

4.14.1 - "Tenders shall supply audited financial accounts for the past three consecutive accounting years (i.e. 2008, 2009 and 2010)."

4. M/s Indra Limited submitted with its bid audited financial accounts for three consecutive years namely 2009, 2010 and 2011.
5. M/s Engineering Systems Solution submitted with its bid audited financial accounts for three consecutive years ended February 2010, February 2011 and February 2012 respectively.
6. M/s Indra Limited and M/s Engineering Systems Solution were disqualified at the Preliminary Evaluation stage for not submitting audited financial accounts for the year 2008.

7. The Applicant and two other firms met all the preliminary / mandatory requirements and were evaluated for responsiveness to technical requirements.
8. The Procuring Entity's Tender Committee declined to award contract to M/s Horsebridge Network Systems as recommended by the Evaluation Committee and directed as follows:
 - i) That the tenders of Indra Limited and Engineering Systems Solution be allowed to participate in the Technical Evaluation and be evaluated and ranked with the other two that were already evaluated on technical Specifications;
 - ii) That if the two firms attain a score above the pass mark, they be invited to demonstrate their products and services and the same be evaluated as well like the other two and new ranking be made;
 - iii) That if the two firms also pass the criteria set in 2 above, they be progressed to Financial Evaluation after which a final ranking would be reached to facilitate preparation of a recommendation to the Tender Committee;
 - iv) That the Evaluation Committee to commence the evaluation process as guided above and prepare a report to be considered by the Tender Committee which should be ready on or before 7th September, 2012.
9. A re-evaluation of the tenders was conducted as directed by the Tender Committee and was concluded on 7th September, 2012.
10. In the re-evaluation, the following five firms met all the mandatory requirements and qualified for Technical Evaluation.
 - i) ORAD Limited
 - ii) Azicon Kenya Limited
 - iii) Horsebridge Network Systems (E.A.) Ltd

iv) Indra Limited

v) Engineering Systems Solutions Ltd

11. In the re-evaluation for compliance to Technical Specification, Azicon Kenya Limited and Indra Limited failed to meet the required minimum technical specifications for key items in the Tender Documents. The Two firms were therefore disqualified from further analysis. The bids from ORAD, Horsebridge and Engineering Systems Solutions (ESS) met the minimum technical specifications and were therefore subjected to the next stage of the evaluation i.e. evaluation against technical competence.
12. ORAD, Horsebridge and ESS scored 84.63%, 96.21% and 66.44% respectively in the evaluation for technical competencies against a pass mark of 75%.
13. ORAD and Horsebridge met the minimum requirement for Technical Competencies while ESS failed to meet the requirement and was disqualified from the next stage in the evaluation.
14. In the re-evaluation, the scores from the presentations which the two firms had already done were used. The scores were as follows:
- Horsebridge – 86.22%
- ORAD – 84.22%
15. The average scores on technical competencies and presentations for the two firms were derived as follows:

Ranking	Company	Technical Competency score	Presentation score	Average score
1	Horsebridge	96.21	86.22	93.22
2	ORAD	84.63	84.22	84.51

16. When the two firms were subjected to financial evaluation, Horsebridge emerged to be the lowest evaluated bidder and was recommended by the Evaluation Committee for award of contract after the re-evaluation as directed by the Tender Committee.
17. The Procuring Entity has not disclosed to the Board the steps it took with regard to the procurement process from the time the re-evaluation was concluded on 7th September, 2012 to the time the Request for Review was lodged which is a period of 1 month. The Applicant lodged a Request for Review against the decision of the Tender Committee on 8th October 2012.
18. The Applicant has not disclosed how it obtained information that the initial Evaluation Committee Report and Recommendation had been rejected by the Procuring Entity's Tender Committee, though it states that it was relying on the fact that only two bidders had been invited for presentations and that it had quoted the lowest price.

From the foregoing, the Board observes that, whereas Regulation 10 spells out *approval of the selection of the successful tender or proposal and award of procurement contracts in accordance with thresholds prescribed in First Schedule* as some of the roles of the Tender Committee, Regulation 11 provides the Tender Committee with the option of *rejecting a submission with reasons*. In the instant tender, the Tender Committee rejected the Evaluation Committee's recommendation because it noted that two firms had been disqualified at the preliminary evaluation stage for not providing audited financial accounts for 2008, an omission which according to the Tender Committee, ought to have been considered as a minor deviation in accordance to Section 64(2) of the Act. It accordingly ordered the Evaluation Committee to reevaluate all the tenders. It is this decision which has aggrieved the Applicant, hence this Application.

The Board also observes that, even after the Evaluation Committee accepted the financial statements submitted by M/s Indra Limited and M/s Engineered Systems Solution, this did not change the substance of the tender or prejudice the Applicant or other bidders in any way.

It is not in doubt that the Procuring Entity set out in the Tender Documents certain mandatory requirements, which were the minimum thresholds to be met by all the bidders, before their respective bids could be evaluated for their technical responsiveness. Among these was the requirement that each bidder should attach its audited accounts for the years 2008, 2009 and 2010. Upon evaluation of the tenders at the preliminary evaluation stage, the Evaluation Committee correctly disqualified two bidders, namely Indra Ltd, and Engineered Systems Solutions, for failure to attach the audited accounts for the years 2008, 2009, 2010, which were mandatory requirements. As the Board has stated many times before, a procuring entity is at liberty to prescribe in its tender document what it considers to be mandatory requirements which should be met by a bidder in order for such bidder's submission to be evaluated for its technical responsiveness. Once this is done each bidder has no choice but to comply with these requirements if it hopes to win the tender in question. Failure to do so can only lead to disqualification, which is the painful price a bidder must be prepared to pay for failure to comply with what is prescribed as mandatory.

Taking the above into account, the Board finds that the Tender Committee erred in describing the mandatory requirement for audited accounts as minor deviations, and directing the Evaluation Committee to re-evaluate the tenders of Indra Ltd and Engineered Systems Solutions Ltd, in breach of the tender document, and Section 64(2) of the Act. The Board further finds that, insofar as the Evaluation Committee acted within its mandate by evaluating tenders in

accordance with the criteria set out in the tender document, and pursuant to the provisions of Section 64 of the Act, the Tender Committee exceeded its mandate as set forth in Regulation 11(1)(b) by rejecting the recommendation of the Evaluation Committee. There was no justifiable ground for directing that the bids of M/s Indra and M/s Engineered Systems Solution be evaluated afresh as the two bidders had failed to meet a mandatory requirement.

In view of the above these grounds of the Request for Review succeed.

With regard to the allegation that the Procuring Entity breached Clause 6.2 of the Tender Documents, the Board finds that the Applicant has not demonstrated what the Procuring Entity did or did not do in breach of this Clause. The Board further notes that, on 19th June 2012, the Procuring Entity issued clarifications to all questions/ requests for clarification that were received from the date of tender advertisement to 18th June 2012 in compliance to Clause 6.2.

With regard to the allegation that the Procuring Entity failed to evaluate the tenders within prescribed period in breach of Regulation 46 and Clause 26.7 of the Tender Documents, the Board notes that the Procuring Entity conducted the evaluation within 24 days which is 6 days earlier than the prescribed period of 30 days. Consequently, the Procuring Entity complied with the requirements of Regulation 46 and Clause 26.7.

Accordingly, this limb of the Request for Review fails.

Ground 8 – Statement of Loss

The Applicant submitted that it stands to suffer loss and prejudice for failure by the procuring entity to follow the law and the action of the Procuring Entity is unlawful and ought to be set aside.

The Procuring Entity submitted that the Tender Committee acted in strict compliance with the provisions of the Act to ensure equality, due process, transparency and accountability in line with Section 2 of the Act and the national values and principles of governance under the Constitution.

The Board finds no merit in the claim by the Applicant on this ground of the Request for Review. Accordingly, this limb of the Request for Review fails.

Regarding the question as to whether the application is premature, the Board finds as a matter of fact that the award for this tender has not been made by the body empowered by statute, namely, the Tender Committee, to make an award. The circumstances surrounding the delay in making the award is the subject of observations by the Board in the concluding paragraphs of this decision.

The Board observes that whereas the Evaluation Committee completed the re-evaluation of the tenders on 7th September 2012, as directed by the Tender Committee, the Tender Committee had taken no action to adjudicate the tender. Indeed, when the Board sought information from the representatives of the Procuring Entity present during the hearing of this Request for Review as to whether or not any decision had been made, it drew a blank from them. This question became even more imperative when the Board realised that the tender validity period for this tender was due to expire on 3rd November, 2012, which would be before the Board would be in a position to determine the Application.

In order to forestall this untenable situation, the Board ordered the Procuring Entity to take immediate steps to seek extension of the validity period of the tenders by communicating with all the bidders.

The delay by the Tender Committee to adjudicate this tender without any explanation whatsoever raises fundamental questions as to the efficiency in the institution in the processing of tenders, and indeed, harmony among the bodies responsible for the procurement function in the organisation. This is so, especially in light of the push and pull that is evident in the relationship between the Evaluation Committee and the Tender Committee in the subject tender. The Procuring Entity is well advised to observe timeliness in decision making in all stages in the tendering process in order to avoid unnecessary delays in the implementation of projects. As the Board has already noted, the Evaluation Committee evaluated and re-evaluated the tender and the same bidder was successful. There are no reasons which have been given as to why the Tender Committee has not awarded the Tender.

The Board also observes with concern the phenomenon of leakage of confidential information to bidders in the course of processing of tenders. Notwithstanding the clear provisions of Sections 27 and 44 of the Act, each of which fixes responsibility for compliance with the Act, and maintenance of confidentiality squarely, with parties involved in procurement. The Board advises that all parties respect confidentiality.

With regard to the prayer by the Procuring Entity that the Applicant should be disbarred, the Board dismisses this prayer as it has no power to grant such a

prayer under the Act. The Board observes that the power to debar a party is vested on the Director General under Section 106 of the Act.

With regard to costs, as the Board has held severally, tendering costs are commercial business risks taken by the parties in the course of doing business and as such, each party should bear its own costs.

Taking into account all the foregoing and the chronology of events in this tender, the Board, pursuant to Section 98(b) of the Act, directs as follows:

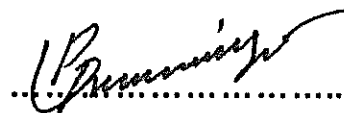
1. The Procuring Entity through its Tender Committee to consider the recommendation of the Evaluation Committee and proceed to finalize the award in accordance with the Act and the Regulations within the next thirty (30) days from the date of this decision.
2. There shall be no orders as to costs.

Dated at Nairobi on this 6th Day of November, 2012.



CHAIRMAN

PPARB



AG. SECRETARY

PPARB

