

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 36/2020 OF 17TH MARCH 2020

BETWEEN

XRX TECHNOLOGIES LIMITED.....APPLICANT

AND

TEACHERS SERVICE COMMISSION.....1ST RESPONDENT

THE ACCOUNTING OFFICER,

TEACHERS SERVICE COMMISSION.....2ND RESPONDENT

Review against the decision of the Teachers Service Commission with respect to Tender No. TSC/T/53/2019-2022 for Provision of Services for Printing and Photocopying in TSC Headquarters and 47 TSC Counties

BOARD MEMBERS

- | | |
|---------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mr. Ambrose Ngare | -Member |
| 3. Ms. Phyllis Chepkemboi | -Member |

IN ATTENDANCE

- | | |
|----------------------|------------------------------|
| 1. Mr. Phillip Okumu | -Holding brief for Secretary |
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PRESENT BY INVITATION

APPLICANT

-XRX TECHNOLOGIES LIMITED

1. Mr. Emmanuel Mumia

-Advocate, MG Law Advocates

1ST AND 2ND RESPONDENTS

-THE ACCOUNTING OFFICER, TEACHERS SERVICE COMMISSION

1. Mr. Cavin Amyuor

-Advocate

2. Mr Oimo Lawrence

-Head of SCMS

INTERESTED PARTIES

A. MFI

1. Mr. G. Narrender Reddy

-AGM

B. OFFICE TECHNOLOGIES

1. Mr. Alan Kili

BACKGROUND TO THE DECISION

The Bidding Process

The Teachers Service Commission (hereinafter referred to as “the Procuring Entity”) advertised Tender No. TSC/T/053/2019-2020 for Provision of Printing and Photocopying in TSC Headquarters and 47 TSC

Counties (hereinafter referred to as “the subject tender”), in MyGov pullout on 14th January 2020. Interested eligible bidders were directed to download the tender documents from the Procuring Entity’s website www.tsc.go.ke or www.tenders.go.ke and forward their particulars to ddprocurement@tsc.go.ke.

Bid Submission Deadline and Opening of bids

A total of three (3) firms/bidders submitted bids and the same were opened on 29th January 2020 in the presence of bidders and their representatives who chose to attend and bids were recorded as follows:

Item	Bidder(s)
1.	XRX Technologies
2.	MFI
3.	Office Technologies Limited

Evaluation of Bids

The Evaluation Committee conducted evaluation of bids in the following three stages:-

- Preliminary Evaluation
- Technical Evaluation;
- Financial Evaluation.

1. Preliminary Evaluation

At this stage of evaluation, bids were evaluated against the following mandatory requirements: -

NO.	REQUIREMENTS
MR 1	Must submit a copy of certificate of Registration/Incorporation
MR 2	Must submit a copy of a valid Tax Compliance Certificate/Exemption Certificate
MR 3	Valid business license permit from county government
MR 4	Must fill up signed and stamped integrity declaration form in the format provided
MR 5	Must fill up signed and stamped Form of Tender in the format provided. The price in the form must be written in figures and words. Any inconsistency in word and figures shall lead to disqualification
MR 6	Must fill up signed and stamped non-debarment form in the format provided
MR 7	Evidence of physical address (attach documentary evidence in form of any of the following: lease agreement/title deed or payment for utilities e.g. water bills or electricity bills)
MR 8	Must provide tender security of Kshs 240,000.00 in form of bank guarantee or insurance approved by PPRA valid for 150 days from the date of tender opening
MR 9	Must provide duly filled confidential business questionnaire signed and stamped by the authorized officer (Director)
MR 10	Must attach valid certificate of authorization from the Manufacture OR approved/licensed dealer
MR 11	Must fill the price schedule in the format provided. The total price must be transferred to the form of tender
MR 12	Must provide CR 12 for Directors from the Registrar of Companies for limited companies or attach CR13 or copies of ID card for sole proprietorship
MR 13	This tender is open to general citizen contractors with at least 51% shares

Upon conclusion of preliminary evaluation, only one bidder, Bidder No. 2 was found to be responsive and therefore proceeded for technical evaluation.

2. Technical Evaluation

At this stage of evaluation, bids were evaluated against the technical criteria as outlined in the Tender Document. Bidders were required to score 75 marks and above in order to qualify for the next stage of evaluation.

Bidder No. 2 attained 93 marks and thereby proceeded to financial evaluation.

3. Financial Evaluation

Only Bidder No 2 proceeded to financial evaluation.

Bidder No. 2 quoted the following prices: -

S/NO	ITEM	DESCRIPTION	Bidder 02		
			Cost per copy (Kshs)	VAT (16%) (Kshs)	Total Cost per copy (incl. VAT) (Kshs)
1.		Black & White printing/copying A4/A3	1.68	0.27	1.95
2.		Black & White printing/copying A4/A3	1.68	0.268	1.95
3.		Color	7.80	1.25	9.04

		printing/copying A4/A3			
4.		Black & White printing/copying A4/A3	1.80	0.29	2.09
TOTAL			12.96	2.078	15.03

The Evaluation Committee's Recommendation

In view of the evaluation process, the Evaluation Committee recommended award of the subject tender to **Bidder No. 2, M/s MFI Managed Document Solutions Limited** for being the only lowest evaluated bidder at a total cost of **Kshs. 15.03 inclusive of VAT.**

Professional Opinion

The Head of Supply Chain Management reviewed the Evaluation Report and concurred with the recommendation of award made by the Evaluation Committee which was approved by the Accounting Officer on 27th February 2020.

THE REQUEST FOR REVIEW

M/s XRX Technologies Limited (hereinafter referred to as "the Applicant"), lodged a Request for Review dated 13th March 2020 and filed on 17th March 2020 (hereinafter referred to as "the Request for Review") together with a Statement sworn on 16th March 2020 and filed on 17th March 2020 (hereinafter referred to as "the Applicant's Statement"), a Further Statement sworn and filed on 25th March 2020 (hereinafter referred to as "the Applicant's Further Statement") and

written submissions dated and filed on 27th March 2020 (hereinafter referred to as "the Applicant's Written Submissions").

In response, the Procuring Entity filed a Response to the Request for Review dated and filed on 23rd March 2020 (hereinafter referred to as "the Procuring Entity's Response") together with written submissions dated and filed on 1st April 2020 (hereinafter referred to as "the Procuring Entity's Written Submissions").

The Applicant sought for the following orders in the Request for Review:-

- i. An order setting aside/nullifying the Respondent's decision to award Tender No. TSC/T/53/2019-2020 to the alleged successful bidder M/s MFI Managed Document Solutions;***
- ii. An order setting aside/nullifying the Respondent's decision to notify the Applicant that it had not been successful in Tender No. TSC/T/53/2019-2020 by way of the letter dated 3rd March 2020;***
- iii. An order substituting the decision of the Respondent with that of the Review Board following its review of all the records of the procurement process relating to Tender No. TSC/T/53/2019-2020 and an award to the Tender to the Applicant;***

- iv. Consequent to order (iii) above, an order directing the Respondent to sign a contract with the Applicant in accordance with the Tender and the decision of the Board;***
- v. Further and/or in the alternative and without prejudice to any of the other prayers sought herein, an order directing the Respondent to undertake fresh financial evaluation of the responsive bids received in Tender No. TSC/T/53/2019-2020 in strict adherence to the Tender, the Act and the Regulations and award to the lowest competitive bidder;***
- vi. An order directing the Respondent to pay the costs of an incidental to these proceedings;***
- vii. Such other or further relief or reliefs as this Board shall deem just and expedient.***

On 24th March 2020, the Board issued Circular 1/2020 detailing the Board's administrative and contingency management plan to mitigate the COVID-19 disease. Through this circular, the Board dispensed with physical hearings and directed that all request for review applications shall be canvassed by way of written submissions.

When the Request for Review came up for hearing on 25th March 2020, the Applicant was represented by Mr Emmanuel Mumia on behalf of the firm of Mwaniki Gachoka & Co. Advocates, the Procuring Entity was represented by its Advocate, Mr. Cavin Anyuor whereas the Interested

Party was represented its Acting General Manager, Mr. G. Narrender Reddy.

During the hearing, the Applicant was directed to file and serve its written submissions via email by 5pm on Friday 27th March 2020. The Respondent was also directed to file and serve its written submissions by 5pm on Wednesday, 1st of April 2020.

BOARD'S DECISION

The Board has considered each of the parties' cases, the documents before it, including confidential documents submitted to it pursuant to section 67 (3) (e) of the Public Procurement and Asset Disposal Act (hereinafter referred to as "the Act") and find that the following issues call for determination: -

I. Whether the Request for Review filed on 17th March 2020 was fatally incompetent for the Applicant's failure to join the successful bidder as a party to the Request for Review;

Depending on the outcome of this issue: -

II. Whether the Procuring Entity evaluated the Applicant's bid at Preliminary Evaluation in accordance with section 80 (2) of the Act, Regulation 47 of the Public Procurement and Disposal Regulations, 2006 as read together with Article 227 (1) of the Constitution of Kenya 2010 with

respect to the following mandatory requirement in the Tender Document:

a) MR11 – Must fill the price schedule in the format provided. The total price must be transferred to the form of tender

III. Whether the Procuring Entity evaluated the successful bidder's bid at Preliminary Evaluation in accordance with section 80 (2) of the Act, Regulation 47 of the Public Procurement and Disposal Regulations, 2006 as read together with Article 227 (1) of the Constitution of Kenya 2010 with respect to the following mandatory requirement in the Tender Document:

a) MR11 – Must fill the price schedule in the format provided. The total price must be transferred to the form of tender

IV. What are the appropriate orders to issue in the circumstances?

As stated in the Court of Appeal case of **The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) KLR 1**, jurisdiction is everything and without it, a court or any other decision making body has no power to make one more step the moment it holds that it has no jurisdiction.

The Supreme Court in the case of **Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Ltd and 2 Others, Civil Application No. 2 of 2011** held that:

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with Counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings."

Similarly, in the case of **Kakuta Maimai Hamisi vs. Peris Pesi Tobiko & 2 Others (2013) eKLR** the Court of Appeal emphasized on the centrality of the issue of jurisdiction and stated thus:

"So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. "

Accordingly, once a jurisdictional issue is before a court or a decision making body, it must be addressed at the earliest opportune moment

and it therefore behooves upon this Board to determine whether it has the jurisdiction to entertain the substantive Request for Review.

In its submissions, the Procuring Entity contended that the Board lacked the requisite jurisdiction to entertain the Request for Review application on the basis that it was bad in law, incompetent and incurably defective hence a nullity in law *ab initio* for failure by the Applicant to include the successful bidder as a party to the Request for Review, contrary to section 170 of the Act.

It was the Procuring Entity's submission that a successful bidder must be made a party to any request for review application before the Board as the successful bidder had a right to be heard as a substantive party since it was the award to the successful bidder that formed the cause of action before the Board.

According to the Procuring Entity, the willful failure by the Applicant to enjoin the successful bidder ran contrary to the doctrine of fair hearing enunciated in Article 50 of the Constitution and section 47 of the Fair Administrative Action Act thus rendering the proceedings herein a nullity.

In support of its submissions, the Procuring Entity referred the Board to the decision of the High Court in **Judicial Review 201 of 2017 Peesam Limited v Public Procurement Administration Review**

Board & 2 others [2018] eKLR hereinafter referred to as “the Peesam Case”) where the court held as follows: -

"My view is that it was not sufficient for the Review Board to merely notify the exparte applicant that there were review proceedings lodged before it by the interested party. This is so because the exparte applicant had every right to be enjoined to those review proceedings and not as a periphery party but as a major player since the award that was made to it as a successful bidder prompted the interested party to approach the Review Board seeking to set aside that award.

The exparte applicant had every right conferred by Section 170 of the Act to participate as a substantive party to the request for review and there are no two ways to this requirement which is couched in mandatory terms.

In the same vein, the Review Board did not, therefore, have any statutory power to receive, hear and consider and determine a request for review which request excluded the exparte applicant successful bidder being a party.

.....Accordingly, I find and hold that the proceedings before the Review Board were illegal and irregular as they were conducted in total breach of the mandatory statutory provisions. The Review Board and the Interested Party had no discretion to oust the applicant successful bidder

from participating fully as a substantive party in the request for review proceedings. Such proceedings therefore, cannot stand. They are must be quashed as they are a nullity ab initio. Moreso, where it is apparent that the request for review proceedings appear to have been deliberately conducted in mystery so as to oust the exparte applicant from the seat of justice, I find that they were not conducted in a transparent manner and therefore they lack integrity. They are a nullity

..... In this case, the applicant was never made a party to the review proceedings yet it was not only a necessary party but a mandatory party; it was never notified in sufficient time of the time, place and nature of the hearing. The absence of all the above features make this case a suitable candidate for this court's interference with the Review Boards decision which decision as I have stated above is a nullity for want of observance of the mandatory provisions of Section 170 of the Public Procurement and Asset Disposal Act, 2015. 116."

The Board observes from the Applicant's pleadings and its written submissions filed before it that the Applicant did not respond to this jurisdictional challenge to its Request for Review application for good reason that the issue was only raised by the Procuring Entity in its Written Submissions dated and filed on 1st April 2020, way after the Applicant had filed in Written Submissions 27th March 2020. Accordingly,

the Board notes that the Applicant did not have an opportunity to address the said issue.

Nevertheless, the Board notes, a determination on this issue falls squarely on interpretation of section 170 (c) of the Act which states as follows:-

"Parties to review

The parties to a review shall be—

(a);

(b);

(c) the tenderer notified as successful by the procuring entity"

Accordingly, the successful tenderer is a necessary party to a request for review application.

The Board considered the decision of the High Court in **Judicial Review Miscellaneous Application No. 356 & 362 of 2015 (Consolidated) Republic v. Public Procurement Administrative Review Board & 2 Others ex parte MIG International Limited & another (2016) eKLR** (hereinafter referred to as "JR. Miscellaneous Application No. 356 & 362 (Consolidated) of 2015") where the court held that:-

"On the face of the Request for Review, it is clear that there were only two parties to the application and these were the interested party and the procuring entity. Clearly

therefore, the Request fell foul of section 96 of the Public Procurement and Disposal Act (i.e. section 170 of the 2015 Act). It is however clear that the applicants (referring to the successful bidder) were made aware of the said application. The law, as I understand it, is that Rules of procedure are the handmaids and not the mistresses of justice and should not be elevated to a fetish since theirs is to facilitate the administration of justice in a fair, orderly and predictable manner, not to fetter or choke it and where it is evident that a party has attempted to comply with the rules but has fallen short of the prescribed standards, it would be to elevate form and procedure to fetish to strike out the proceedings. Deviations from, or lapses in form and procedure, which do not go to jurisdiction of the court or prejudice the adverse party in any fundamental respect, it has been held, ought not to be treated as nullifying the legal instruments thus affected. In those instances, the court should rise to its calling to do justice by saving the proceedings in issue. See Microsoft Corporation vs. Mitsumi Garage Ltd & Another Nairobi HCCC No. 810 of 2001; [2001] 2 EA 460.

In Boyes vs. Gathure [1969] EA 385, it was held by Sir Charles Newbold, P that:

"Using an incorrect form of procedure which has, in fact, brought the parties before the court and has, in fact, enabled the parties to present their respective

cases to the court is not an incorrect act of such a fundamental nature that it should be treated as if it, and everything consequent upon it, did not exist and never had existed."

It is therefore my view that the mere fact that the interested party did not make the applicants [successful bidders] parties to the Request for Review as mandated under the law does not render those proceedings fatally incompetent."

In the above case, the High Court considered the failure by the applicant therein to include the successful bidder therein as a party to its request for review application and in its determination it first examined the circumstances pertaining to the request for review application.

In the abovementioned case, the High Court noted that the successful bidder therein had been notified by the Board of the existence of the request for review application and consequently received a letter of notification from the Board Secretariat informing it of the scheduled date of the hearing of the request for review. Further, the successful bidder was present on the hearing date, but contended that the Board had failed to avail other pleadings attached to the filed request for review application.

The High Court further addressed the question whether the successful bidder sought an adjournment in order to study the pleadings filed by the applicant and found that the successful bidder therein intimated that

it was ready to proceed with the hearing and did not suffer prejudice by the applicant's failure to strictly comply with section 96 (c) of the Public Procurement and Disposal Act, 2005 (which is now section 170 (c) of the Act).

Accordingly, the High Court found that the request for review was not fatally defective for the applicant's failure to join the successful bidder therein as a party to the request for review who fully participated in the review proceedings and suffered no prejudice.

Turning to the circumstances of the case, the Board would like to distinguish the Peesam Case as cited by the Procuring Entity in its submissions from the present Request for Review in that, the successful bidder herein, that is M/s MFI Managed Document Solutions Limited, received a notification of the hearing of the Request for Review through the Secretary to the Board and on the hearing date on 25th March 2020, its representative that is, Mr. G. Narrender Reddy, appeared before the Board.

At the time of determination of this matter, the Board notes that the successful bidder herein had not filed any pleadings before the Board. Unlike the successful bidder in the Peesam Case, the successful bidder herein, was notified of the review proceedings on 24th March 2020, appeared before the Board on 25th March 2020 but opted not to file any pleadings in this matter, hence the circumstances in the instant review proceedings differ from those of the Peesam Case.

The Board in its examination of section 170 (c) of the Act notes that the mischief that the said section intends to cure is to eliminate instances where a request for review is heard and determined by the Board in the absence of a successful bidder who was neither joined as a party to the request for review nor notified of the hearing. In such an instance, a decision of the Board may have adversely affected the successful bidder without the successful bidder having been afforded an opportunity to be heard.

The failure therefore by an Applicant to join a successful bidder or the failure to notify a successful bidder of the hearing interferes with the successful bidder's right to a fair hearing who subsequently learns that a decision was made against its award. The right to a fair hearing is a principle of natural justice recognized under Article 50 of the Constitution, 2010 which states as follows: -

"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."

The Board therefore finds that the successful bidder's right to a fair hearing has not been affected in these proceedings since the successful bidder's representative was notified of the existence of the Request for Review application, was present before the Board on 25th March 2020 but nevertheless opted not to file any pleadings in this matter.

It is therefore the Board's finding that the successful bidder has suffered no prejudice by the Applicant's failure to join it as a party to the Request for Review.

In totality, the Board finds that the Applicant's failure to join the successful bidder to this Request for Review does not make the review application fatally incompetent and thereby finds that it has jurisdiction to entertain the Request for Review application.

The Board will now proceed to the second issue for determination: -

A brief background to the Request for Review is that the Procuring Entity advertised the subject tender on 14th January 2020 and the Applicant duly submitted its bid in response to the same.

By the bid submission deadline of 29th January 2020, the Procuring Entity received a total of three (3) bids which were opened in the presence of bidders and their representatives.

At the conclusion of the evaluation process, the Procuring Entity's Evaluation Committee recommended award of the tender to M/s MFI Managed Document Solutions Limited for having the lowest responsive evaluated bid.

The Accounting Officer approved the recommendation made by the Evaluation Committee, having been reviewed by the Head of Procurement. The successful bidder, including all unsuccessful bidders, were duly notified of the outcome of their bids.

The Applicant's notification of unsuccessful bid from the Procuring Entity dated 3rd March 2020 stated as follows: -

"This is to notify you that your application for Tender No. TSC/T/53/2019-2020 dated 14th January 2020 was unsuccessful. In particular:

(i) MR11: You did not fill the price schedule in the format provided. You introduced columns in the price schedule separating A3 and A4 contrary to the instruction to fill up the price schedule in the format provided.

However, M/s MFI Managed Document Solutions Limited was successful having quoted the lowest evaluated price.

We wish to thank you for participating in the said tender."

Aggrieved by the decision of the Procuring Entity, the Applicant moved the Board through this Request for Review.

The Applicant submitted that under the subject tender, bidders were required to provide the total price per copy (inclusive of VAT) of

printing/copying for A4 paper size and A3 paper size in their price schedule forms and not the total average price per copy for both paper sizes.

According to the Applicant, the A4 paper size and the A3 paper size were two different paper sizes and therefore it was practically impossible to have one cost/price for both. The Applicant therefore submitted that it introduced a column in its price schedule form in order to demarcate the prices for each paper size which in its view did not in any way deviate from the format provided in the Tender Document and therefore its bid ought to have been found responsive at preliminary evaluation by the Procuring Entity.

On its part, the Procuring Entity submitted that it was a mandatory requirement for bidders to strictly fill in their price schedule form in the format provided in the Tender Document. The Procuring Entity submitted that the Tender Document required bidders to provide one total price per copy and not the price per copy per paper size as alleged by the Applicant in its submissions.

According to the Procuring Entity, the Applicant introduced additional columns and rows that were materially inconsistent with the mandatory format of the price schedule and further failed to provide the total price per copy for both A3 and A4 paper sizes as required under the last column of the price schedule. The Procuring Entity contended that the Applicant provided segregated prices for both A3 and A4 paper sizes

contrary to the price schedule format in the Tender Document which only required one total price per copy produced and thus it was impossible to compare the Applicant's bid price against the bid prices submitted by other bidders.

Having considered all the documents, pleadings and written submissions by parties, the Board must now determine whether the Procuring Entity evaluated the Applicant's bid at Preliminary Evaluation in accordance with section 80 (2) of the Act, Regulation 47 of the 2006 Regulations as read together with Article 227 (1) of the Constitution of Kenya, 2010.

Mandatory Requirement No. 11 of the Preliminary/Mandatory Evaluation Criteria on page 17 of the Tender Document reads as follows: -

***"MR11: Must fill the Price Schedule in the format provided.
The total price must be transferred to the form of tender***

.....

Note: After preliminary evaluation of the tenders, those tenders that shall not have fulfilled the above requirements shall be declared non-responsive and will be eliminated from the evaluation process and will therefore not be considered further."

According to this criterion, bidders were required to fill in their price schedules in the format provided in the Tender Document and further, transfer the total price to their form of tender. Failure to adhere to this

mandatory requirement would render a bid non-responsive and the same would be disqualified from further evaluation.

The Board examined the Tender Document and observes the Price Schedule Format in Section VI Standard Forms on page 40 of the Tender Document which is outlined as follows: -

"PRICE SCHEDULE

No.	Item	Description	Cost per copy (Kshs)	VAT (16%) Kshs	Total Cost per copy (incl. VAT) Kshs
1.		Black & White printing/copying A4/A3			
2.		Black & White printing/copying A4/A3			
3.		Color printing/copying A4/A3			
4.		Black & White printing/copying A4/A3			
TOTAL					

In the above price schedule format, bidders were required to provide the cost per copy in Kenya Shillings for both printing/copying in either black and white and/or colour for A4/A3 paper sizes and further provide a total cost per copy inclusive of VAT for each of the four items therein. It was not clear from the price schedule, whether bidders were to provide cost per copy of A4 and A3 separately or jointly. In fact, an

interpretation of A4/A3 would either mean; A4 or A3, in the alternative, it would mean A4 and A3.

In the first interpretation, it is the Board's view that it would result in a bidder quoting for either A4 alone or A3 alone. In the second interpretation, it is the Board's view that a bidder would quote the cost for A4 separately and further quote the cost of A3 separately or quote for both A4 and A3 jointly.

The Board examined the Applicant's original bid and observes on page 15 therein the Applicant's price schedule as follows: -

<i>Item</i>	<i>Description</i>	<i>Cost per copy (Kshs)</i>	<i>VAT (16%) Kshs</i>	<i>Total Cost per copy (incl. VAT) Kshs</i>
	<i>Black & White printing/copying A4/A3</i>	<i>A4 – 1.40</i>	<i>0.22</i>	<i>1.62</i>
		<i>A3 – 2.80</i>	<i>0.45</i>	<i>3.25</i>
	<i>Black & White printing/copying A4/A3</i>	<i>A4 – 1.40</i>	<i>0.22</i>	<i>1.62</i>
		<i>A3 – 2.80</i>	<i>0.45</i>	<i>3.25</i>
	<i>Color printing/copying A4/A3</i>	<i>A4 – 6.03</i>	<i>0.97</i>	<i>7.00</i>
		<i>A3 – 12.06</i>	<i>1.94</i>	<i>14.00</i>
	<i>Black & White printing/copying A4/A3</i>	<i>A4 – 1.40</i>	<i>0.22</i>	<i>1.62</i>
		<i>A3 – 2.80</i>	<i>0.45</i>	<i>3.25</i>

From the above excerpt, the Board observes that the Applicant provided in its price schedule form the total cost per copy for printing/copying for both the A3 and A4 paper sizes separately, in clearly demarcated columns for each of the four items therein.

The Board compared the price schedule format in the Tender Document against the price schedule as submitted by the Applicant and observes that the Applicant introduced additional rows not in the price schedule format on page 40 of the Tender Document. However, the Board observes that the Applicant introduced these additional rows in order to provide a separate price for A3 and A4 paper sizes for the four items as outlined and described in the price schedule form.

We note, the price schedule format on page 40 of the Tender Document did not specify that bidders were to provide one single unit price that would apply for both the A4 and the A3 paper sizes. It was therefore possible for a bidder, in its interpretation of the price schedule format in the Tender Document to either provide one unit price that would apply for both the A4 and the A3 paper sizes or provide separate or segregated unit prices for each paper size.

However, according to the Procuring Entity's Evaluation report dated 24th February 2020, the Board notes on page 7 therein, the Procuring Entity disqualified the Applicant's bid at Preliminary Evaluation for the following reason:-

"Bidder 01: XRX Technologies

- i. At criteria MR11 the bidder did not fill the price schedule in the format provided”***

The Board is cognizant of Regulation 47 of the 2006 Regulations which reads as follows: -

(1) Upon opening of the tenders under section 60 of the Act, (the Repealed Act) the evaluation committee shall first conduct a preliminary evaluation to determine whether-

(a) the tender has been submitted in the required format;

(b) any tender security submitted is in the required form, amount and validity period;

(c) the tender has been signed by the person lawfully authorised to do so;

(d) the required number of copies of the tender have been submitted;

(e) the tender is valid for the period required;

(f) all required documents and information have been submitted; and

(g) any required samples have been submitted.

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

According to the above provision, the evaluation committee of a procuring entity conducts preliminary evaluation of tenders received in response to a subject tender to ascertain *interalia* that all required documents and information have been submitted with respect to a particular tender.

Turning to the circumstances of the case, we are of the considered view that the Applicant interpreted that it should fill the cost for A4 separately and for A3 separately. The Board having noted that one could interpret the above provision in 3 different ways, the lack of clarity on this provision could not be visited upon the Applicant.

The Applicant herein duly filled the price schedule form and provided the necessary information as required in the said form and the Procuring Entity ought not to have disqualified the Applicant's bid at Preliminary Evaluation, noting that Mandatory Requirement No. 11 and the price schedule format on page 40 of the Tender Document did not specify that bidders were to provide one single unit price that would apply for both the A4 and the A3 paper sizes.

The question as to whether the Applicant submitted prices in its price schedule form that would enable the Procuring Entity to evaluate and compare the Applicant's bid prices against other bidder's bid prices in order to determine the lowest evaluated responsive bid, would not arise at the preliminary evaluation stage but at the financial evaluation stage,

assuming that the Applicant would be found responsive at technical evaluation and thus qualify for financial evaluation.

The Board therefore finds that the Applicant satisfied Mandatory Requirement No. 11 of the Preliminary/Mandatory Evaluation Criteria on page 17 of the Tender Document.

It is the finding of this Board that the Procuring Entity did not evaluate the Applicant's bid at Preliminary Evaluation in accordance with section 80 (2) of the Act as read together with Regulation 47 of the 2006 Regulations, Article 227 (1) of the Constitution of Kenya 2010.

With respect to the third issue for determination, the Board observes that the Applicant submitted that the successful bidder of the subject tender, that is, M/s MFI Managed Document Solutions Limited did not provide a separate unit price for printing/copying for A4 paper size and A3 paper size in its price schedule but instead provided a singular price that applied to both paper sizes, contrary to the requirement in the Tender Document. It was the Applicant's submission that the successful bidder provided the total average price for printing/copying of both the A4 and A3 paper sizes which was not a requirement under the Tender Document and therefore its bid ought to have been found non-responsive at Preliminary Evaluation by the Procuring Entity.

On its part, the Procuring Entity submitted that the successful bidder met all the mandatory requirements in the Tender Document and was therefore found responsive at preliminary evaluation and further found responsive the technical stage of evaluation. The Procuring Entity submitted that the successful bidder was the only bidder that qualified for financial evaluation and was therefore awarded the subject tender for being the lowest evaluated and responsive bidder.

Mandatory Requirement No. 11 of the Preliminary/Mandatory Evaluation Criteria on page 17 of the Tender Document as cited hereinbefore required bidders to fill in their price schedules in the format provided in the Tender Document and further, transfer the total price to their form of tender. Failure to adhere to this mandatory requirement would render a bid non-responsive and the same would be disqualified from further evaluation.

Further, the Price Schedule Format as provided in Section VI Standard Forms on page 40 of the Tender Document as outlined hereinbefore required bidders to provide the cost per copy in Kenya Shillings for both printing/copying in either black and white and/or colour for A4/A3 paper sizes and further provide a total cost per copy inclusive of VAT for each of the four items therein.

The Board examined the successful bidder's original bid and observes therein its price schedule as follows: -

"PRICE SCHEDULE

No.	Item	Description	Cost per copy (Kshs)	VAT (16%) Kshs	Total Cost per copy (incl. VAT) Kshs
5.		Black & White printing/copying A4/A3	1.68	0.27	1.95
6.		Black & White printing/copying A4/A3	1.68	0.268	1.95
7.		Color printing/copying A4/A3	1.68 Mono 7.80 Color	0.268 Mono 1.25 Color	1.95 Mono 9.04 Color
8.		Black & White printing/copying A4/A3	1.80	0.29	2.09

From the above excerpt, the Board observes that the successful bidder provided the cost and the total cost per copy for printing/copying for A3/A4 paper sizes for each of the four items outlined and described therein.

The Board has established hereinbefore that it was possible for bidders in their interpretation of the price schedule format on page 40 of the Tender Document to provide one single unit price for printing/copying that would apply for both the A4 and the A3 paper sizes or in the alternative provide separate or segregated unit prices for each paper size, noting that the price schedule did not specify the same.

On the part of the successful bidder herein, we note that it provided a singular unit price for printing/copying that would apply for A4/A3 paper sizes in its price schedule form in its bid document.

The Board therefore finds that the successful bidder satisfied Mandatory Requirement No. 11 of the Preliminary/Mandatory Evaluation Criteria on page 17 of the Tender Document.

It is the finding of this Board that the Procuring Entity evaluated the successful bidder's bid at Preliminary Evaluation in accordance with section 80 (2) of the Act, Regulation 47 of the 2006 Regulations as read together with Article 227 (1) of the Constitution of Kenya 2010 with respect to Mandatory Requirement No. 11 of the Preliminary/Mandatory Evaluation Criteria on page 17 of the Tender Document.

The Board must now determine the appropriate reliefs to grant in the circumstances as the fourth issue framed for determination.

The Board takes cognizance of section 173 (b) of the Act, which states that:-

"Upon completing a review, the Review Board may do any one or more of the following-

(a).....;

(b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings..."

Having found that the Procuring Entity did not evaluate the Applicant's bid at Preliminary Evaluation in accordance with section 80 (2) of the

Act, Regulation 47 of the 2006 Regulations as read together with Article 227 (1) of the Constitution of Kenya 2010, this Board is of the considered view that the most appropriate order in these circumstances is to direct the Procuring Entity to conduct a re-evaluation of the Applicant's bid together with all other bidders' bids at the Preliminary Evaluation Stage taking into consideration the Board's findings in this matter on the manner in which preliminary evaluation ought to be conducted.

In doing so, the Procuring Entity must adhere to the principle of fairness provided in Article 227 (1) of the Constitution, in the sense that, the failure by the Procuring Entity to provide clarity of the Mandatory Requirement No. 11 of the Preliminary/Mandatory Evaluation Criteria on page 17 of the Tender Document should not be visited upon the Applicant, and further should not be used only for the benefit of the successful bidder herein who responded to this criterion in terms of one of the ways the said criterion could have been interpreted and was therefore found responsive.

In totality, the Request for Review succeeds with respect to the following specific orders:-

FINAL ORDERS

In exercise of the powers conferred upon it by section 173 of the Public Procurement and Asset Disposal Act, 2015, the Board makes the following orders in the Request for Review:-

- 1) The Procuring Entity's Letter of Notification of Award of Tender No. TSC/T/53/2019-2022 for Provision of Services for Printing and Photocopying in TSC Headquarters and 47 TSC Counties addressed to M/s MFI Managed Document Solutions Limited dated 3rd March 2020, be and is hereby cancelled and set aside.**

- 2) The Procuring Entity's Letter of Notification of Unsuccessful bid with respect to Tender No. TSC/T/53/2019-2022 for Provision of Services for Printing and Photocopying in TSC Headquarters and 47 TSC Counties addressed to the Applicant herein, dated 3rd March 2020, be and is hereby cancelled and set aside.**

- 3) The Procuring Entity is hereby directed to conduct a re-evaluation of the Applicant's bid and all other bidders' bids at the Preliminary Evaluation taking into consideration the Board's finding in this case, and proceed with the procurement process to its logical conclusion including the making of an award within fourteen (14) days from the date of this decision.**

4) Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.

Dated at Nairobi on this 7th day of April 2020

CHAIRPERSON

SECRETARY

PPARB

PPARB