

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 62/2020 OF 14TH MAY 2020

BETWEEN

AVTECH SYSTEMS LIMITED.....APPLICANT

AND

THE ACCOUNTING OFFICER,

COUNTY ASSEMBLY OF MAKUENI.....1ST RESPONDENT

COUNTY ASSEMBLY OF MAKUENI.....2ND RESPONDENT

KENSUN ENTERPRISES.....3RD RESPONDENT

Review against the decision of the County Assembly of Makueni dated 21st April 2020 with respect to Tender No. 788378/2019-2020 for Supply, Delivery, Installation, Testing, Commissioning & Maintenance of an Integrated Hansard System.

BOARD MEMBERS

- | | |
|----------------------------|------------------|
| 1. Arch. Steven Oundo, OGW | -Member Chairing |
| 2. Mr. Nicholas Mruttu | -Member |
| 3. Ms. Phyllis Chepkemboi | -Member |

IN ATTENDANCE

1. Mr. Philip Okumu

-Holding brief for the Secretary

BACKGROUND TO THE DECISION

The Bidding Process

The County Assembly of Makueni (hereinafter referred to as “the Procuring Entity”) invited sealed bids from eligible bidders for the Supply, Installing, Testing, Commissioning and Maintenance of an Integrated Hansard System (hereinafter referred to as “the subject tender”) advertised in *The Standard* Newspaper of 12th March 2020. The Procuring Entity held a Pre-Bid Site Visit on 16th March 2020 which attracted seven bidders.

Bid Submission Deadline and Opening of bids

The Procuring Entity received a total of 6 No. of bids by the bid submission deadline of 26th March 2020. The same were opened shortly thereafter by a Tender Opening Committee in the presence of bidders who chose to attend and recorded as follows:-

OPENING SERIAL	FIRM	POSTAL ADDRESS
1	Kensun Enterprises	P.O. Box 46507-00100 NAIROBI
2	Hardsoft Systems Limited	P.O. Box 10862-00100 NAIROBI
3	Compland Company limited	P.O. Box 5546-00100 NAIROBI.

OPENING SERIAL	FIRM	POSTAL ADDRESS
4	Avtech Systems Limited	P.O. Box 13060-00100 NAIROBI.
5	Statlan Enterprises Limited,	P.O. Box 17386-00100 NAIROBI.
6	Adrian Kenya Limited	P.O. Box 9808-00100 NAIROBI.

Evaluation of Bids

The tenders were evaluated on the Integrated Financial Management System (IFMIS) Matrix system out of which a report was generated on 17th April 2020. The Evaluation Committee undertook the evaluation process in the following three stages:-

- i.** Preliminary Evaluation;
- ii.** Technical Evaluation; and
- iii.** Financial Evaluation

1. Preliminary Evaluation

At this stage, the Evaluation Committee applied the evaluation criteria at page 5, Tender Submission Checklist of Section I. Invitation to Tender read together with Clause 2.23 of the Appendix to Instructions to Tenderers of the Document for Supply, Installing, Testing, Commissioning and Maintenance of an Integrated Hansard System (hereinafter referred to as “the Tender Document”) and as specified in the Request for Quotation (RFQ)

outlined in the IFMIS portal wherein evaluation was based on yes/no basis. At the end of this stage, five (5) bidders were eliminated at the Preliminary Evaluation Stage. Only one bidder, M/s Kensun Enterprises was found responsive, hence proceeded to Technical Evaluation.

2. Technical Evaluation

At this stage, the Evaluation Committee applied the criteria in Clause 2.23 of the Appendix to Instructions to Tenderers at pages 27 to 30 of the Tender Document, and as specified in the RFQ outlined in the IFMIS portal wherein bidders were required to attain a minimum technical score of 70% to proceed to Financial Evaluation. M/s Kensun Enterprises, achieved the minimum technical score 70% therefore proceed to Financial Evaluation.

3. Financial Evaluation

At this stage, the Evaluation Committee applied the award criteria specified in Clause 2.27 (b) of the Appendix to Instructions to Tenderers at page 30 of the Tender Document and as specified in the RFQ outlined in the IFMIS portal, which required that award be made to the Highest Responsive Bidder. M/s Kensun Enterprises, scored 28.73 marks at this stage, thus awarded a total of 98.73 (70.00 + 28.73) marks for the entire evaluation.

Recommendation

The Evaluation Committee recommended award of the subject tender to M/s Kensun Enterprises at its bid price of Kshs. 47,230,350/- having been determined to have the highest responsive bid.

Professional Opinion

In a professional opinion dated 17th April 2020, the Head of the Procurement Unit, the Senior Procurement Officer, issued his Professional Opinion in which he concurred with the procurement process and the recommendation of the Evaluation Committee on the award of the subject tender. He therefore urged the Accounting Officer of the Procuring Entity (i.e. the Clerk of the County Assembly) to approve award of the subject tender to M/s Kensun Enterprises at its tender sum of Kshs. 47,230,350/-. The said professional opinion was approved by the Clerk of the County Assembly on the same date of 17th April 2020.

Notification to Bidders

In letters of Notification dated 21st April 2020, the successful and all unsuccessful bidders were notified of the outcome of their bids.

THE REQUEST FOR REVIEW

M/s Avtech Systems Limited (hereinafter referred to as "the Applicant") lodged a Request for Review dated 13th May 2020 and filed on 14th May 2020 together with a Statement in Support of the Request for Review sworn and filed on 14th May 2020, through the Applicant's Director, Mr. Ahmed Ben Bella, seeking the following orders:-

- a) An order cancelling the Notification of Award to Kensun Enterprises as the successful tenderer;***
- b) An order declaring the entire decision made on 21st April, 2020 via letter Ref. PROC/CA/RFQ/788378 addressed to the Applicant null and void;***
- c) An order directing the Procuring Entity to pass the Applicant's bid as responsive in line with section 80(2) of the Public Procurement and Asset Disposal Act No. 33 of 2015 and proceed to evaluate the Applicant's bid under Technical Evaluation and Award the contract to the Applicant;***
- d) That in the alternative to (c) above the Board be pleased to give directions to the Procuring Entity with respect to anything to be done or redone to ensure that the procurement proceedings are fair and unbiased;***
- e) That the Applicant be awarded the costs of and incidental to these proceedings;***

f) Such other or further orders and/or directions the honourable Board may deem fit to grant.

In response, the 1st and 2nd Respondents lodged a Memorandum of Response to the Request for Review dated and filed on 20th May 2020, a Response to the Applicant's Reply, dated and filed on 27th May 2020, a Memorandum of Response to the Request for Review filed by M/s Hardsoft Systems Limited, which response is dated and filed on 27th May 2020 and a Notice of Preliminary Objection dated and filed on 27th May 2020, through the firm of Caroline Oduor & Associates Advocates. The 3rd Respondent lodged a Notice of Preliminary Objection dated and filed on 27th May 2020 and a Replying Affidavit sworn and filed on 19th May 2020 through the firm of Abdullahi, Gitari & Odhiambo LLP while M/s Hardsoft Systems Limited lodged a Request for Review dated 19th May 2020 and filed on 22nd May 2020 through the firm of Shabaan & Co. Advocates.

On 16th March 2020, the Board issued Circular No. 1/2020 and the same was published on the Public Procurement Regulatory Authority's website (www.ppra.go.ke) in recognition of the challenges posed by the COVID-19 pandemic. Through the said Circular, the Board instituted certain measures to restrict the number of representatives of parties that may appear before the Board during administrative review proceedings in line with the presidential directives on containment and treatment protocols to mitigate against the potential risks of the virus.

On 24th March 2020, the Board issued Circular No. 2/2020 further 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. Clause 1 at page 2 of the said Circular further specified that pleadings and documents shall be deemed as properly filed if they bear the official stamp of the Board.

Accordingly, the Applicant filed a Reply to the 1st and 2nd Respondents' Response, which reply is dated and filed on 22nd May 2020, a Reply to the 3rd Respondents' Written Submissions, which reply is dated 29th May 2020 and filed on 2nd June 2020. The 1st and 2nd Respondents lodged Written Submissions dated and filed on 29th May 2020 in relation to the Applicant's Request for Review and the Request for Review filed by M/s Hardsoft Systems Limited while the 3rd Respondent lodged Written Submissions on 29th May 2020.

BOARD'S DECISION

The Board has considered each of the parties' pleadings and written submissions together with the confidential documents submitted to it pursuant to section 67 (3) (e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") and finds that the following issues call for determination:-

- I. Whether the Board has jurisdiction to entertain the Request for Review filed by M/s Hardsoft Systems Limited.***

- II. Whether the Procuring Entity rightfully found the Applicant's bid non-responsive at the Preliminary Evaluation Stage in accordance with section 79 (1) and 80 (2) of the Act.***

The Board now proceeds to address the above issues as follows:-

On the first issue for determination, the Board observes that the 1st and 2nd Respondents' Notice of Preliminary Objection and the 3rd Respondent's Notice of Preliminary Objection oppose the jurisdiction of this Board to entertain the Request for Review dated 19th May 2020 and filed on 22nd May 2020 by M/s Hardsoft Systems Ltd. According to the 1st and 2nd Respondents, M/s Hardsoft Systems Ltd lodged a Request for Review outside the statutory timeline of fourteen (14) days under section 167 (1) of the Act and the same ought to be struck out with costs to the 1st and 2nd Respondents.

The 3rd Respondent submits that M/s Hardsoft Systems Ltd has lodged another request for review within Request for Review Application No. 62 of 2020, which request for review (lodged by M/s Hardsoft Systems Ltd) raises new issues and seeks its own set of prayers parallel or over and above those sought by the Applicant herein. According to the 3rd Respondent, the Request for Review filed by M/s Hardsoft Systems Ltd is hopelessly incompetent,

fatally defective, inadmissible and an abuse of judicial process, therefore urges the Board to dismiss the same with costs.

It has well been an enunciated principle that jurisdiction is everything, following the decision in **The Owners of Motor Vessel 'Lillian 'S' vs Caltex Oil Kenya Ltd 1989 K.L.R 1**, where Justice Nyarangi held that:-

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

Further in **Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Ltd and 2 Others, Civil Application No. 2 of 2011**, the court had occasion to interrogate the instruments that arrogate jurisdiction to courts and other decision making bodies. The court held as follows:-

"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. "

To invoke the jurisdiction of this Board, a party must file its Request for Review within the timelines specified in Section 167 (1) of the Act, which provides that:-

"Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed"

Section 167 (1) of the Act gives aggrieved candidates and tenderers the right to seek administrative review within 14 days of notification of award or date of occurrence of an alleged breach at any stage of the procurement process or disposal process. On the other hand, section 170 of the Act provides as follows:-

"The parties to a review shall be—

(a) the person who requested the review;

- (b) the accounting officer of a procuring entity;***
- (c) the tenderer notified as successful by the procuring entity; and***
- (d) such other persons as the Review Board may determine***

According to section 170 of the Act, the parties to a review include; the person who requested the review (known as an applicant), the accounting officer of a procuring entity, the successful bidder and such other persons as this Board may determine. The intention of the legislature in providing for section 170 (d) of the Act was to afford other tenderers (not being the successful tenderer and the applicant seeking the review) in a procurement process, the opportunity to participate in Request for Review proceedings before this Board, if they wish to do so.

Section 168 of the Act further provides that:-

"Upon receiving a request for a review under Section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed"

The Board observes that when notifying a procuring entity of a pending Request for Review application, the Board Secretary instructs the procuring entity to forward to the Board a list of all tenderers who participated in the procurement process. Upon receiving the said list, the Board proceeds to notify all tenderers of the pending Request for Review attaching the Request for Review application.

Such tenderers may be joined as parties to the Request for Review if they wish to be joined as such pursuant to section 170 (d) of the Act and may file their respective pleadings, if they wish to do so. Hence, it is not just any person that may be joined as a party. Section 167 (1) of the Act is very clear that it is only tenderers or candidates who may approach this Board, thereby locking out any busy bodies who would lodge applications or ask to be joined as parties yet they never participated in the procurement process.

It is worth noting that the Applicant herein already joined the necessary parties under section 170 (b) of the Act [i.e. the accounting officer of the procuring entity as the 1st Respondent] and section 170 (c) of the Act [i.e. the successful bidder in the subject tender as the 3rd Respondent]. However, upon being notified of the existence of Request for Review No. 62 of 2020 filed by the Applicant, M/s Hardsoft Systems Ltd lodged a request for review within the Applicant's Request for Review No. 62 of 2020 in relation to the subject tender, in the following format:-

SCHEDULE 1
FORM RB1
REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 62 OF 2020

BETWEEN

AVTECH SYSTEMS LIMITED.....APPLICANT

AND

**THE ACCOUNTING OFFICER,
COUNTY ASSEMBLY OF MAKUENI.....1ST RESPONDENT**

AND

COUNTY ASSEMBLY OF MAKUENI.....2ND RESPONDENT

AND

KENSUN ENTERPRISES.....3RD RESPONDENT

AND

HARDSOFT SYSTEMS LTD.....INTERESTED PARTY

Review against the decision of the County Assembly of Makueni for the award of Tender for the Proposed Supply, Delivery, Installation, Testing, Commissioning & Maintenance of an Integrated Hansard System dated 21st day of April 2020 in the matter of Tender No. 788378/2019-2020.

REQUEST FOR REVIEW

We Hardsoft Systems Ltd of the above named Interested Party of physical address;.....hereby request the Public Procurement Administrative Review Board to be enjoined in the above referenced application in order to review the whole of the above mentioned decision on the following grounds namely:

- 1. The 1st and 2nd Respondent fundamentally breached the law and regulations governing the tender process in declaring the Interested Party's tender not responsive.....**

.....

By this memorandum, the Interested Party request for the Board for ORDERS that:

- 1. The decision of the 2nd Respondent vide a letter under reference PROC/CA/RFQ/788378 dated 21st day of April 2020 be quashed;**
- 2. The Notification of Award of Tender No. 788378/2019-2020 to Kensun Enterprises as the successful tenderer be cancelled and declared forthwith null and void;**
- 3. The Respondent do declare the Interested Party's bid as responsive in line with section 79 (1) of the Public Procurement and Asset Disposal Act No. 33 of 2015;**
- 4. The Respondent do declare the Interested Party the successful tenderer of Tender No. 788378/2019-2020 in line with section 86 (1) of the Public Procurement and Asset Disposal Act;**
- 5. Such other and/or further orders as the Honourable Board deems fit;**
- 6. The Interested Party be awarded costs of this application"**

From the foregoing, the Board notes that, whereas M/s Hardsoft Systems Ltd referred to itself as an Interested Party seeking to be joined as such, it lodged a request for review through the backdoor [i.e. within an existing Request for Review] raising new grounds and seeking its own prayers separate from the ones sought by the Applicant herein.

The Supreme Court in **Petition No. 12 of 2013, Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others [2014] eKLR**, while addressing the meaning of "Interested Party", held as follows:-

"Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the

cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way.”

The Board observes that M/s Hardsoft Systems Ltd is one of the bidders that participated in the subject procurement process. According to the definition of an Interested Party in the above case, there is a likelihood for the said bidder to be affected by the decision of this Board in the instant Request for Review.

The role of an Interested Party, joined as a party to a review pursuant to section 170 (d) of the Act, in the Board’s view, is limited. Such a bidder should not champion its own grievances in relation to the outcome of its bid, but instead ought to either support the Applicant’s case or any of the Respondents. At the very least, such an Interested Party responds to legal issues raised by the Applicant or the Respondents, if it wishes to do so, especially in instances where it may not have filed any documentation before the Board relating to factual issues.

M/s Hardsoft Systems Limited is aggrieved by the decision of the 1st and 2nd Respondents on its bid, therefore ought to have filed a separate Request for Review application as an applicant [and not file a request for review within an existing Request for Review] within fourteen days from the date it was notified of the outcome of its bid. The 1st and 2nd Respondents submit that M/s Hardsoft Systems Ltd was notified of the outcome of its bid on 1st May

2020, which position was not challenged by the said bidder. 1st May 2020 was a Public Holiday that fell on a Friday.

Section 57 of the Interpretation and General Provisions Act, on computation of time states that:-

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

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

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

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

Section 57 (b) of the Interpretation and General Provisions Act cites Sunday and Public Holidays as excluded days. Section 2 of the Public Holidays Act, Chapter 110, Laws of Kenya provides that:-

"The days specified in Part I of the Schedule shall in every year be kept as public holidays."

Part 1 of the Schedule, referenced in section 2 of the Public Holidays Act lists Labour day as one of the public holidays celebrated in Kenya on 1st May of every year. The next day, 2nd May 2020 was a Saturday, which is an official non-working day for the Board, whereas 3rd May 2020 is identified in section 57 (b) of the Interpretation and General Provisions Act as an official non-working day. Accordingly, the period within which M/s Hardsoft Systems Limited ought to have lodged a separate Request for Review application as an applicant started running on 4th May 2020 and the fourteenth day lapsed on 17th May 2020. M/s Hardsoft Systems Limited filed a request for review on 22nd May 2020 and the same is therefore outside the fourteen-day period specified under section 167 (1) of the Act.

This Board would like to reiterate that the notification sent to all bidders by the Board Secretary pursuant to section 168 of the Act, is not an opportunity for such bidders to champion their own cause with respect to their bids, in an already existing Request for Review application. Such bidders ought to take into account the timelines specified under section 167 (1) of the Act, if they are aggrieved by the outcome of their bids and file a separate Request

for Review application that will be allocated a different **“Application Number”**. This Board would then perhaps exercise its discretion and consolidate the new Request for Review with a previously filed Request for Review, if they relate to the same tender. A bidder who fails to lodge a separate Request for Review may choose to be joined as a party to an existing request for review, where its role would be limited to supporting the applicant’s case, or supporting the respondents in the existing request for review.

M/s Hardsoft Systems Limited acted in a manner that amounts to an abuse of the process of this Board, in that, while it seeks to be joined as an Interested Party, it is on the other hand advancing its own case relating to the outcome of its bid whilst seeking separate prayers from the ones sought by the Applicant therein. Such conduct cannot be entertained by this Board noting that the said request for review was filed outside the period of fourteen days specified in section 167 (1) of the Act.

Accordingly, the Board finds that it lacks jurisdiction to entertain the Request for Review filed by M/s Hardsoft Systems Limited, and the same is hereby struck out.

On the second issue for determination, the Board observes that the Applicant challenged the outcome of its bid as communicated by the Procuring Entity in a letter dated 21st April 2020, which contains the following details:-

"Our Ref: PROC/CA/RFQ/788378

.....

Dear Sir,

**RE: TENDER DEBRIEFING-TENDER NO.
MCA/RFQ/788378/2019/20-PROPOSED SUPPLY,
DELIVERY, INSTALLATION, TESTING AND
COMMISSIONING OF PROPOSED HANSARD SYSTEM-
MAKUENI COUNTY ASSEMBLY**

Pursuant to section 67 sub-section (2) of the Public Procurement and Disposal Act 2005 and Regulations 2006, I am writing to notify you that your tender for Proposed Supply, Delivery, Installation, Testing and Commissioning of Proposed Hansard System was not responsive because your manufacturers authorization letter did not indicate credit worthiness of 40 Million. The tender was awarded to Kensun Enterprises at his tender sum of Kshs. 47,230,350.00 being the most competitive evaluated bidder... "

The Board considered parties' submissions in relation to the letter of notification addressed to the Applicant and notes the following:-

- a) *The Applicant is of the considered view that the 1st and 2nd Respondents deliberately delayed issuing the letter of notification of unsuccessful bid dated 21st April 2020, by sending the same to the*

Applicant on 1st May 2020, in order to defeat the Applicant right to administrative review;

b) According to the Applicant, the 1st and 2nd Respondents cited a wrong tender reference number, thereby rendering the letter of notification of unsuccessful bid dated 21st April 2020 invalid;

c) In the Applicant's view, the Procuring Entity failed to take the provisions of section 79 (1) and 80 (2) of the Act in evaluating the Applicant's bid.

On the first sub-issue, the Applicant contends that the 1st and 2nd Respondents deliberately delayed notifying the Applicant of the outcome of its bid, in that, whereas the letter was dated 21st April 2020, the same was only received by the Applicant on email on 1st May 2020. In response to this, the 1st and 2nd Respondents submit that due to logistical challenges brought by the corona virus pandemic and that most of their staff are working from home, letters of notification were sent via email on 1st May 2020. The 3rd Respondent on the other hand submits that it received its letter of notification on 1st May 2020 and that the Applicant suffered no prejudice.

Having considered the above submissions, the Board observes that none of the Respondents challenge the Applicant's assertion that it received the letter of notification on 1st May 2020. As a matter of fact, the 1st and 2nd Respondents acknowledge the delay in notifying bidders of the outcome of their bids vide letters dated 21st April 2020 and confirm that the same were

sent on 1st May 2020. The 3rd Respondent asserts that it was notified on the same date of 1st May 2020. Therefore, there was no deliberate effort by the 1st and 2nd Respondents to lock out the Applicant from approaching the Board through a Request for Review.

Accordingly, the Board finds that the Applicant has suffered no prejudice even though it received its letter of notification dated 21st April 2020, on 1st May 2020, since it was able to exercise its right to administrative review under section 167 (1) of the Act within the timeline specified therein.

On the second sub-issue, the Applicant challenged the tender reference number cited in its letter of notification, stating that the same is not the tender reference number of the subject tender. In the Applicant's view, by citing the wrong tender reference number, the letter of notification of unsuccessful bid sent to it is invalid. The Board notes that the letter of notification dated 21st April 2020 that was sent to the Applicant cites "**Tender No MCA/RFQ/788378/2019/20**" whereas the Tender Reference Number of the subject tender is "**Tender No. 788378/2019-2020**".

The Applicant raised the difference in the tender reference numbers in a letter dated 4th May 2020 addressed to the Procuring Entity. Subsequently thereafter, the Procuring Entity, in a letter dated 4th May 2020 states as follows:-

"...(b) Tender No MCA/RFQ/788378/2019/20" was a typo that is regrettable. The correct reference should have been "Tender No. 788378/2019-2020" that has since been corrected"

In addressing the second sub-issue, this Board is guided by Article 159 (2) (d) of the Constitution which provides as follows:-

- "159 (1);***
- (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles***
- (a);***
- (b);***
- (c);***
- (d) justice shall be administered without undue regard to procedural technicalities"***

Justice Nyamweya in **Judicial Review Application No. 181 of 2018, Republic v Public Procurement Administrative Review Board & 2 others Ex parte Kenya Power & Lighting Company [2019] eKLR** when faced with a similar issue held that:-

"I have considered the pleadings, submissions and arguments made by the parties herein, and in this regard noted that while

the Applicant in its prayers in the Notice of Motion referred to a decision delivered on 19th April 2018 in Request for Review No. 98 of 2018, its supporting grounds and submissions refer to the decision delivered on the same date in Request for Review No. 42 of 2018, which is the decision the Applicant also annexed in support of its application. The Respondents, 1st Interested Party and 2nd Interested Party also all refer to the to the decision delivered on 19th April 2018 in Request for Review No 42 of 2018, and the Request for Review stated in the Notice of Motion was therefore clearly a typographical error, which is one that is amenable to correction by this Court pursuant to Article 159 of the Constitution.” [Emphasis by the Board]

The Board being in possession of the Applicant’s original bid, submitted together with the Procuring Entity’s confidential file pursuant to section 67 (3) (e) of the Act, verified that the Applicant participated in **Tender No. 788378/2019-2020**. It is therefore the Board’s considered view that the tender reference number cited in the Applicant’s letter of notification is a typographical error that can be cured by Article 159 (2) (d) of the Constitution, noting that the Procuring Entity acknowledged this error as soon as it was raised and corrected the same.

Accordingly, the Board finds that the typographical error in the Applicant's letter of notification dated 21st April 2020 does not invalidate the said letter of notification.

Turning to the main substantive issue for determination, this Board observes that the Applicant was informed that its bid was non-responsive because its manufacturer's authorization letter did not indicate credit worthiness of 40 Million.

All parties to the Request for Review do not dispute the fact that the Procuring Entity used the electronic method of procurement (commonly referred to as e-procurement) in the subject tender. Notably, Clause 1.10 of Section I. Invitation to Tender of the Tender Document states that:-

"Tenders will be closed, opened and evaluated online through the IFMIS Portal"

Further to this, Clause 2.28.1 read together with Clause 3.30.1 of Section II. Instructions to Tenderers of the Tender Document and the Tender Advertisement Notice dated 12th March 2020 provide as follows:-

"Tenders must be received online through the IFMIS portal and close automatically after the deadline and thereafter the procurement process will start immediately"

Apart from the Tender Document and the Tender Advertisement Notice, the Procuring Entity issued a Request for Quotation that cites the tender reference number of the subject tender and further informed bidders of the following:-

"This is a two-stage RFQ and all responses will be evaluated in two stages-Technical and Commercial"

The said Request for Quotation was outlined in the Government of Kenya, Integrated Financial Management Information System (IFMIS) Portal wherein bidders had been instructed would be used in submission, closing/opening and evaluation of tenders. Since the Request for Quotation was fed into the IFMIS portal, the 1st and 2nd Respondents provided a print out of the same to the Board while the Applicant attach an extract of the said RFQ print out, to its Reply to the 3rd Respondent's Written Submissions.

With that background, this Board observes, the Applicant contends that Criteria MR6 at page 25 of the Tender Document did not specify that a monetary value of 40 Million Kenya Shillings was to be provided by bidders in the letter of manufacturer/distributor showing credit grant with a tenderer. In the Applicant's view, bidders were at liberty to specify the amount of credit grant provided by the manufacturer. The Applicant also alleges that the Procuring Entity equated Criteria MR6 at page 25 of the Tender Document with Criteria T.S.8 at page 29 of the Tender Document which required bidders to provide a copy of certified bank statement for the last two years;

net worth of 40 Million and above and used the amount specified in Criteria T.S.8 at page 29 of the Tender Document to lock out the Applicant yet the two are separate and independent criteria.

It is important at this juncture to address our minds on how Request for Quotations are applied in an e-procurement process. The answer to this question will settle another question; that is, what was the specific requirement with respect to demonstrating a credit grant and whether the Applicant satisfied this criterion.

Section 2 of the Act provides that:-

"e-procurement" means the process of procurement using electronic medium such as the internet or other information and communication technologies

In the **Handbook of Research on Information Management and the Global Landscape**, edited by Hunter, M. Gordon, Tan and Felix B (IGI Global Publishers, 2008), ways in which "e-procurement" facilitates some methods of procurement is explained at page 446 and 448 as follows:-

"[446] E-procurement provides functions for gathering RFI (Request for Information), RFP (Request for Proposal) and RFQ (Request for Quotation) and for purchasing through the online market...

[448] In an ideal online market, market making activities that is, from request for quotation, supplier selection, competitive bidding to contract award are mediated through an internet based system. Through an online market, buyers may achieve cost-saving and ensure transparency while suppliers may benefit from reduced transaction cost and achieve exchange efficiency”

Further, Jaijit Bhattacharya in his Book on “**Technology in Government**” (2006) provides a chapter on “Suitability of Service Oriented Architecture for E-Procurement” at page 32 thereof, where he states as follows:-

“Advances in Information and Communication Technology (ICT) has led to a paradigm shift in the way governments have begun to think about public administration and execution of activities through greater participation of the public and other enterprises. Among others, purchase of goods is a frequently occurring activity in most of the government organizations, yet a cumbersome and time-confusing one.

Electronic procurement (e-procurement) essentially includes all aspects of procurement related functions that are supported by different electronic communication channels where by information is fed into a system by the potential suppliers, created for the method of procurement used”

Lastly, in the book, “**E-Democracy for Smart Cities**” (2017) edited by T.M. Vinod Kumar, provides Chapter 14 that deals with “Attaining E-Democracy through Digital Platforms in Kenya”. At page 451 thereof it is stated as follows:-

"In 2014, Kenya's government launched an online system for submitting and evaluating government related procurement applications. The e-procurement system which is part of the Integrated Financial Management System (IFMIS) under the National Treasury is set to reduce corruption in government tendering, reduce government spending and expedite procurement processes. The system also contains an in-built price referencing for all tenders, bid submission guidelines and procedures"

From the foregoing, the Board observes that e-procurement is a process of procurement using electronic medium such as the internet or other information and communication technologies. E-procurement system provides functionalities that can be used for gathering RFI (Request for Information), RFP (Request for Proposal) and RFQ (Request for Quotation) and for purchasing goods and services. In Kenya, the IFMIS portal is a system that the Government uses for e-procurements in order to reduce corruption in government tendering, reduce government spending and expedite procurement processes. As a result, procuring entities are

encouraged to adopt the global trend of using e-procurement in when purchasing goods and services from potential suppliers and contractors.

Therefore, this being a tender that applied the e-procurement method, the Request for Quotation information fed into the IFMIS portal by the Procuring Entity applied in addition to the information provided in the Tender Document. As earlier noted, all bidders were already informed that the bids would be submitted, closed/opened and evaluated online using the IFMIS portal. Furthermore, all bidders could log into the IFMIS portal and access the RFQ details fed into the IFMIS portal that they ought to have taken into account when submitting their bids. The Applicant was well aware of this fact, hence the reason why it attached an extract of the RFQ print out in the IFMIS portal, that was applicable in the subject tender.

It is worth noting that Criteria MR 6 at page 25 of the Tender Document provides as follows:-

"A letter from manufacturer/distributor showing credit grant with the tenderer and of how much"

On the other hand, Item 6. Preliminary Evaluation of the Request for Quotation, which was submitted to the Board as a print out from the IFMIS portal provides as follows:-

"Currency

RFQ currency: KES

1.;

2.;

3.;

4.;

***6. Attach a letter from manufacturer/distributor
showing credit grant of about 40M with tenderer***

.....

The Board studied the RFQ print out from the IFMIS portal provided by the Procuring Entity and notes that Item 6 on Preliminary Evaluation which is repeated at page 4 of 10 of the said print out required bidders to attach a letter from the manufacturer/distributor showing credit grant of 40 Million Kenya Shillings. The amounts of 40 Million Kenya Shillings was not indicated in Criteria MR 6 at page 25 of the Tender Document. However, this Board has already established that bidders already had knowledge that the RFQ requirements in the IFMIS portal would apply to the subject procurement process, which requirements could be viewed upon logging into the IFMIS portal.

Accordingly, the Board finds that the requirement for demonstrating credit grant of a tenderer is that a bidder had the obligation to "***Attach a Letter from Manufacturer/Distributor Showing Credit Grant of 40 Million (Kenya Shillings) with Tenderer***" in accordance with Criteria MR6 at page 25 of the Tender Document read together with Item 6. Preliminary Evaluation of the RFQ print out outlined in the IFMIS portal.

The 1st and 2nd Respondents referred the Board to a letter dated 17th March 2020 on the letter head of Televic Conference submitted together with the Applicant's original bid with the following details:-

"...County Government of Makueni

P.O. Box 572 - 90300

MAKUENI.

***RE: TENDER NO. MKCA/FY2019/2020-02180/HANSARD –
SUPPLY, DELIVERY, INSTALLATION, TESTING,
COMMISSIONING AND MAINTENANCE OF AN
INTEGRATED HANSARD SYSTEM SUB: CREDIT
FACILITIES***

***We wish to confirm that we have credit facilities with AVTECH
SYSTEMS LIMITED to the tune of 50,000 Euros.***

***This has been running for the last three years and we are
comfortable working with them.***

Regards”

According to the 1st and 2nd Respondents, the amount of 50,000 Euros specified in the letter dated 17th March 2020 does not satisfy the requirement of 40 Million Kenya Shillings since 50,000 Euros translates to Kshs. 5,847,500.00. The Board studied the Applicant’s original bid and notes that this is the only letter wherein a manufacturer (in this case, Televec Conference) specified that it has a credit facility of 50,000 Euros with the Applicant, which amount does not meet the threshold of Kshs. 40,000,000.00 when translated to Kenya Shillings.

Having found that the Applicant had the obligation to attach a Letter from Manufacturer/Distributor Showing Credit Grant of 40 Million Kenya Shillings, the Board finds that the letter dated 17th March 2020 fails to satisfy this criterion.

The Board further makes an observation that the Applicant contends that the Procuring Entity equated Criteria MR 6 at page 25 of the Tender Document to Criteria T.S.8 at page 29 of the Tender Document. Criteria T.S.8 at page 29 of the Tender Document provides as follows:-

"T.S.8 A copy of certified bank statement for the last 2 years

Net worthy of 40m & above -10 mks

Net worthy of 40m-25m -5 mks

Net worthy of below 25m -2mks"

At paragraph 3 of its Request for Review, the Applicant submits that since Criteria MR 6 at page 25 of the Tender Document asked bidders to provide a credit grant from the manufacturer whereas Criteria T.S.8 at page 29 of the Tender Document asked bidders to provide certified bank statements to show their net worth, both Criteria MR 6 and T.S.8 demonstrate that a successful bidder has the resources or capacity to undertake works in the subject tender, therefore asked this Board to find that the aim of the two criteria are the same such that a bidder would satisfy Criteria MR 6 by providing certified bank statements of 40 Million Kenya Shillings. On the other hand, since the Applicant is of the view that no amount was specified in the Tender Document for Criteria MR 6, it challenged the outcome of its bid on the basis that the 1st and 2nd Respondents used the amount of 40 Million Kenya Shillings meant for Criteria T.S.8 to evaluate its bid on Criteria MR6.

Having considered the Applicant's submissions, the Board notes that Criteria MR 6 at page 25 of the Tender Document read together with Item 6. Preliminary Evaluation of the RFQ print out in the IFMIS portal was a criterion for consideration at the Preliminary Evaluation Stage. On the other hand, Criteria T.S.8 at page 29 of the Tender Document read together with Item

8. Technical Evaluation of the RFQ print out in the IFMIS portal was considered during Technical Evaluation.

These criteria were in the Applicant's knowledge before the tender submission deadline of 26th March 2020, and the Applicant was comfortable submitting its bid knowing that one criterion would be applied during Preliminary Evaluation while the other one would be applied during Technical Evaluation.

If at all the Applicant was of the view that the two are similar, it ought to have sought clarification from the Procuring Entity as to whether the documentation with respect to certified bank statements under Criteria T.S.8 at page 29 of the Tender Document read together with Item 8. Technical Evaluation of the RFQ print out in the IFMIS portal would apply to Criteria M.R 6 at page 25 of the Tender Document read together with Item 6. Preliminary Evaluation of the RFQ print out in the IFMIS portal Tender Document.

Further, the Applicant had a right to challenge the two criteria before the tender submission deadline or fourteen days thereafter pursuant to section 167 (1) of the Act, which it failed to do, and is hereby estopped from raising the same, so late in the day having subjected itself to the said evaluation criteria. This Board finds that it lacks jurisdiction to entertain this specific issue raised by the Applicant challenging Criteria M.R 6 at page 25 of the

Tender Document read together with Item 6. Preliminary Evaluation of the RFQ print out in the IFMIS portal and Criteria T.S.8 at page 29 of the Tender Document read together with Item 8. Technical Evaluation of the RFQ print out in the IFMIS portal.

Having established that the Applicant's bid was found non-responsive at the end of Preliminary Evaluation, this Board wonders whether the Procuring Entity could elect to evaluate the Applicant's bid on a criterion at the Technical Evaluation Stage, as alleged by the Applicant. In addressing this issue, the Board notes that section 79 (1) of the Act on responsiveness of bids provides that:-

"A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents"

In **Judicial Review Application No. 90 of 2018, Republic v Public Procurement Administrative Review Board & 3 others Ex-Parte Saracen Media Limited [2018] eKLR**, the court while considering responsiveness of bids held as follows:-

"In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender

conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. "

Further, in **Civil Appeal No. 145 of 2011, Kenya Pipeline Company Limited v Hyosung Ebara Company Limited & 2 others [2012] eKLR**, the Court of Appeal held that:-

"Further by Reg. 48 an evaluation committee is required to reject all tenders which are not responsive as stipulated in S.64 [that is section 79 (1) of the 2015 Act] of the Act – that is to say, to reject tenders which do not conform with the mandatory requirements in the tender documents..."
[Emphasis by the Board]

Having considered the finding in the above case, the Board observes that one of the tender conditions in the subject tender that all bidders were required to comply with as a mandatory requirement was to attach a Letter from Manufacturer/Distributor Showing Credit Grant of 40 Million Kenya Shillings which the Applicant failed to do. Section 80 (2) of the Act further requires the Evaluation Committee to evaluate and compare tender using the criteria set out in the tender documents, and in this case where e-procurement method was used, to apply the criteria specified in the RFQ document in the IFMIS portal.

Having found that the Applicant's bid was rightfully found non-responsive for failure to satisfy a mandatory requirement at the Preliminary Evaluation Stage, i.e. Criteria M.R 6 at page 25 of the Tender Document read together with Item 6. Preliminary Evaluation of the RFQ print out in the IFMIS portal, the Board observes that the Applicant's bid could not proceed to Technical Evaluation as this criterion was a mandatory requirement.

The Board studied the Evaluation Report dated 17th April 2020 and notes that the Applicant's bid was never subjected to Technical Evaluation therefore the allegation that the Procuring Entity evaluated the Applicant's bid with respect to Criteria M.R 6 at page 25 of the Tender Document on the basis of Criteria T.S.8 at page 29 of the Tender Document, has not been substantiated. In any case, the Applicant created its own misfortune by ignoring the fact that Criteria M.R.6 at page 25 of the Tender Document read together with Item 6. Preliminary Evaluation specified in the RFQ print out outlined in the IFMIS portal already specified a credit grant of 40 Million Kenya Shillings.

Accordingly, the Board finds that the Procuring Entity rightfully found the Applicant's bid non-responsive at the Preliminary Evaluation Stage, in accordance with section 79 (1) and 80 (2) of the Act.

In totality, the Request for Review is hereby dismissed and the Board proceeds to make 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, the Board makes the following orders in the Request for Review:-

- 1. The Request for Review dated 13th May 2020 and filed on 14th May 2020 by the Applicant herein with respect to Tender No. 788378/2019-2020 for Supply, Delivery, Installation, Testing, Commissioning & Maintenance of an Integrated Hansard System, be and is hereby dismissed.**
- 2. Each party shall bear its own costs in the Request for Review.**

Dated at Nairobi this 4th day of June 2020

CHAIRPERSON

SECRETARY

PPARB

PPARB