

AREPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 70/2020 OF 4TH JUNE 2020

BETWEEN

PRUDENTIAL SOURCING LIMITED.....APPLICANT

AND

ACCOUNTING OFFICER,

KENYA MEDICAL SUPPLIES AUTHORITY.....1ST RESPONDENT

KENYA MEDICAL SUPPLIES AUTHORITY.....2ND RESPONDENT

NEXT TECHNOLOGIES LIMITED.....INTERESTED PARTY

Review against the decision of Kenya Medical Supplies Authority with respect to Tender No. KEMSA/PROC/RT21/2020 for Procurement and Installation of ICT Infrastructure.

BOARD MEMBERS

- | | |
|-------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mr. Alfred Keriolale | -Member |
| 3. Mr. Nicholas Mruttu | -Member |

IN ATTENDANCE

- | | |
|------------------------|----------------------------------|
| 1. Mr. Philemon Kiprop | -Holding brief for the Secretary |
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BACKGROUND TO THE DECISION

The Bidding Process

On 19th December 2019, the Chief Executive Officer of Kenya Medical Supplies Authority (hereinafter referred to as “the Procuring Entity”) approved procurement and installation of ICT infrastructure on vide internal memo dated 17th December 2019, using the restricted method of tendering.

Accordingly, in letters dated 1st April 2020, thirty (30) firms were invited to participate in Tender No. KEMSA/PROC/RT21/2020 for Procurement and Installation of ICT Infrastructure (hereinafter referred to as “the subject tender”).

Bid Submission Deadline and Opening of Bids

The letters dated 1st April 2020 notified bidders to submit their bids by 10th April 2020, however, an extension of the bid submission deadline was made vide letter Ref: **KEMSA/PROC/RT 21/2020** dated 8th April 2020, to 15th April 2020. Out of the thirty bidders invited to submit their bids, only five bidders submitted their bids by the bid submission deadline of 15th April 2020. The bids were opened shortly thereafter at the Procuring Entity’s Tender Opening Hall by a Tender Opening Committee and recorded as follows:-

Bidder No.	Bidder Name
1	Next Technologies Limited
2	Prudential Sourcing Limited

3	Josamu Energy Limited
4	Talinda East Africa Limited
5	Liflo Electronics Limited

Evaluation of Bids

Having appointed an Evaluation Committee, the evaluation process was carried out in three stages namely: _

- a) Preliminary Examination
- b) Technical Evaluation
- c) Financial Evaluation

1. Preliminary Examination

At this stage, the Evaluation Committee applied the criteria outlined in Stage I. Preliminary Examination at page 75 of the Document for Procurement and Installation of ICT Infrastructure (hereinafter referred to as "the Tender Document") which required bidders to demonstrate their responsiveness to mandatory requirements listed therein. The five bidders were subjected to evaluation but only two bidders (i.e. Bidder No. 1, M/s Next Technologies Limited and Bidder No. 5, M/s Liflo Electronics Limited) were found responsive at the end of Preliminary Examination.

2. Technical Evaluation

At this stage, the Evaluation Committee applied the criteria outlined in Stage II. Technical Evaluation (Documentation) at page 75 of the Tender Document and a bidder would be deemed responsive only if such bidder

attains a technical score of 75% and above. At the end of this stage, the Evaluation Committee observed that Bidder No. 1, M/s Next Technologies Limited and Bidder No. 5, M/s Liflo Electronics Limited achieved the required minimum technical score of 75% and were therefore eligible for Financial Evaluation.

3. Financial Evaluation

At this stage, the Evaluation Committee applied the criteria specified in Stage II. Financial Evaluation at page 76 of the Tender Document which provided that bidders who were found responsive after Technical Evaluation will have their prices compared and award recommended to the lowest evaluated responsive bid. The bid prices of Bidder No. 1, M/s Next Technologies Limited and Bidder No. 5, M/s Liflo Electronics Limited were recorded as follows:-

i. Implementation and Commissioning of Kisumu Warehouse Wide Area Network

Bidder No.	Bidder Name	Total cost bidders currency (VAT) inclusive	Exchange rate	Total cost (Kshs) VAT inclusive
1	M/s Next Technologies Limited	USD 68,382.04	106.0031	7,248,708.22
2	M/s Liflo Electronics Limited	USD 85,775.09	106.0031	9,092,425.44

**ii. Implementation and Commissioning of Mombasa Warehouse
Wide Area Network**

Bidder No.	Bidder Name	Total cost bidders currency (VAT) inclusive	Exchange rate	Total cost (Kshs) VAT inclusive
1	M/s Next Technologies Limited	USD 63,664.11	106.0031	6,748,593.02
2	M/s Liflo Electronics Limited	USD 109,642.56	106.0031	11,662,451.25

Recommendation for Award

Based on the above, the Evaluation Committee recommended award of the subject tender to Bidder No. 1, M/s Next Technologies Limited as follows:-

No	Service Description	Total Price (Bidders Currency)Vat Inc	Recommended Service Provider
1.	Implementation and commissioning of Kisumu warehouse wide area network (WAN)	USD 68,382.04	Next Technologies Limited
2.	Implementation and commissioning of Mombasa warehouse wide area network (WAN)	USD 63,664.11	
Total Award		USD 132,046.15	

Professional Opinion

In a professional opinion dated 19th May 2020, the Director, Procurement reviewed the Evaluation Report dated 8th May 2020 regarding the manner in which evaluation of bids was conducted in the subject tender and advised the Chief Executive Officer of the Procuring Entity to consider award of the subject tender as recommended by the Evaluation Committee. The said professional opinion was approved on the same date of 19th May 2020.

Notification to Bidders

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

THE REQUEST FOR REVIEW

M/s Prudential Sourcing Limited (hereinafter referred to as "the Applicant") lodged a Request for Review dated 3rd June 2020 and filed on 4th June 2020 together with a Statement in Support of the Request for Review sworn and filed on even date and a Further Statement in Support of the Request for Review sworn on 17th June 2020 and filed on 18th June 2020, through the firm of Okatch & Partners Advocates, seeking the following orders:-

- a. An order declaring that the Applicant's HPE partnership Certificates provided in its bid met the mandatory requirements provided in the Standard Tender Document on HPE Certification;***

- b. An order declaring that the Applicant's disqualification on account of the HPE partnership Certificate it provided was unfair and discriminatory, thus offending clear provisions of the Constitution and the Public Procurement and Asset Disposal Act of 2015;***
- c. An order cancelling and setting aside the Notification of successful bid dated the 21st day of May 2020 and the subsequent Notification of unsuccessful bid to the Applicant of even date;***
- d. An order directing the Procuring Entity to conduct fresh evaluation, including the Applicant's bid in the evaluation process; and***
- e. An order awarding the costs of this Request for Review to the Applicant.***

In response, the Respondents lodged a Replying Affidavit sworn on 11th June 2020 and filed on 12th June 2020 through the firm of Titus Makhanu & Associates Advocates while the Interested Party lodged a Memorandum of Reply dated 9th June 2020 and filed on 10th June 2020 together with an Affidavit in Support of the Memorandum of Reply sworn and filed on even date, through the firm of Nyiha, Mukoma & Company 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 lodged Written Submissions dated 17th June 2020 and filed on 18th June 2020 while the Respondents lodged Written Submissions in Opposition of the Request for Review, which submissions are dated 21st June 2020 and filed on 22nd June 2020 and the Interested Party lodged Written Submissions dated and filed on 23rd June 2020.

BOARD'S DECISION

The Board has considered each of the parties' pleadings and written submissions together with the confidential file 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 Procuring Entity evaluated the Applicant's bid at the Preliminary Evaluation Stage in accordance with Clause 8 of Stage 1. Preliminary Examination read together with Clause 8.1 of Section 1. Instructions to Tenderers of the Tender Document and sections 79 (1) and 80 (2) of the Act; and***

- II. Whether the Procuring Entity's verification exercise on the Applicant and the Interested Party was done in accordance with section 83 of the Act.***

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

The Request for Review that is now before this Board touches on the general requirement that a procuring entity ought to consider conforming, compliant and responsive tenders during evaluation. In doing so, such a procuring entity ought to stick to the procedures and criteria specified in the tender document provided to all bidders who choose to participate in a procurement process.

The Applicant herein was among thirty (30) firms invited by the Procuring Entity vide letters dated 1st April 2020 to participate in the subject tender. The Applicant duly submitted its bid by the tender submission deadline of 15th April 2020 in response to the Procuring Entity's invitation. Upon conclusion of evaluation and award of the subject tender, the Procuring Entity notified bidders of the outcome of their bids. The Applicant received a letter of notification of unsuccessful bid dated 21st May 2020 from the Procuring Entity with the following details: -

"Reference is made to the above tender and advise that your bid was unsuccessful due to the following reason: -

- ***HPE partnership certificate you provided was for Integrated Supplies and Consultancy Ltd***

Further be advised that the above tender was awarded as per the attached schedule..."

In response, the Applicant addressed a letter dated 26th May 2020 referring the Procuring Entity to some pages of Applicant's bid document to support its view that it provided a HPE Partnership Certificate that met the requirement in the Tender Document. The said letter partly states as follows:-

"...According to our joint venture partnership agreement in page 15-17 of the tender document we provided, it clearly

states that the contribution of Party 1 and Party 2 when taken together shall constitute one instrument

Therefore, Prudential Sourcing Limited does not accept that we were unsuccessful in the bid because of the HPE Partnership Certificate as it was provided in pages 21 and 25 of our bid document submitted by us. In your tender document page 9 of 76 number 8, 8.1 states that 'A firm shall submit only one tender either individually or as a partner in a Joint Venture. Therefore, our Joint Venture agreement should be recognized... '...."

Being dissatisfied by the Procuring Entity's decision, the Applicant lodged the instant Request for Review. The Board has considered all parties' written submissions on the question whether the Procuring Entity rightfully evaluated the Applicant's bid at the Preliminary Evaluation Stage and proceeds to make the following findings: -

All parties to the Request for Review made reference to Clause 8.1 of Section I. Instructions to Tenderers at page 9 of 76 of the Tender Document which provides as follows: -

"A firm shall submit only one tender either individually or as a partner of a joint venture (other than in cases of alternatives pursuant to ITT clause 20). A firm that submits either individually or, as a member of a joint venture, more than one

tender will cause all the proposals with the firm's participation to be disqualified"

Therefore, it is clear that Clause 8.1 of Section I. Instructions to Tenderers at page 9 of 76 of the Tender Document allowed firms/bidders to submit one tender individually, or as a partner of a joint venture. The Board studied the Applicant's original bid and notes that at pages 15 to 17 thereof, the Applicant attached a Joint Venture Agreement signed on 9th April 2020 between it (Prudential Sourcing Limited) and M/s Integrated Supplies & Consultancy Ltd stating as follows: -

"WHEREAS Party 1 (i.e. Prudential Sourcing Limited) is in the business of Supply and Installation of ICT Infrastructure

WHEREAS Party 2 (i.e. Integrated Supplies & Consultancy Ltd) is in the business of Supply and Installation of ICT Infrastructure

WHEREAS, the parties desire to establish between them a joint venture in order to collaborate in Supply and Installation of ICT Infrastructure at KEMSA for Tender of Supply and Installation of ICT Infrastructure, Tender No. Kemsart-21-2019/2020..."

From the above clause, the Board observes that the Applicant submitted its bid as a partner in joint venture with M/s Integrated Supplies & Consultancy

Ltd as this was permissible under Clause 8.1 of Section I. Instructions to Tenderers at page 9 of 76 of the Tender Document. The criterion in dispute is provided in Clause 8 of Stage I. Preliminary Examination at page 75 of the Tender Document as follows: -

"The vendor must be HPE certified. Provide HPE Partnership Certificate (MANDATORY)"

In determining the import of the above criterion, the Board notes that as a mandatory requirement, bidders (otherwise known as vendors) were required to be HPE certified. Such bidders would demonstrate that they are HPE certified by providing an HPE Partnership Certificate. It is also worth noting that, whereas Clause 8.1 of Section I. Instructions to Tenderers at page 9 of 76 of the Tender Document cited hereinbefore allowed firms to submit one tender individually, or as a partner of a joint venture, Clause 8 of Stage I. Preliminary Examination at page 75 of the Tender Document did not specify which partner in a joint venture would provide the HPE Partnership Certificate, if a firm submits a tender as a partner of a joint venture.

The Board studied the Applicant's original bid and notes that at page 21 thereof, the Applicant attached a *"Certificate of Partnership issued to M/s Integrated Supplies & Consultancy Ltd as an approved member of the HP Partner program and qualified as HP Business Partner FY20"*. It is also worth noting that the Procuring Entity referred the Board to the Clause on

Contributions in the Joint Venture Agreement signed on 9th April 2020 and found at pages 15 to 16 of the Applicant's original bid, which provides as follows: -

"CONTRIBUTIONS

The Parties hereto shall each make an initial contribution to the Joint Venture as follows: -

1. PARTY 1's Contribution [i.e. Prudential Sourcing Limited]: Finance the project fully, lead the quality standards check, documentation of the tender document by providing the required mandatory documents, liaise directly with KEMSA in case of any communications and lead the administrative part of the project

2. PARTY 2's Contribution [i.e. Integrated Supplies & Consultancy Ltd]: Provide technical expertise in the project including previous works, certificates required and to implement the work of installation of the ICT infrastructure at the KEMSA warehouses in Kisumu and Mombasa"

[Emphasis by the Board]

Having studied the Applicant's Joint venture agreement, the Board observes that: -

- *On the recital clause cited hereinbefore, the Applicant and M/s Integrated Supplies & Consultancy Ltd confirm that they will both collaborate to implement the subject tender;*
- *Whereas the Applicant will provide mandatory documents, M/s Integrated Supplies & Consultancy Ltd would also provide required certificates, the technical expertise in the project including previous works among others.*

This in the Board's view, is sufficient evidence that even though an HPE Certificate was a mandatory document, such certificate could have been provided by M/s Integrated Supplies & Consultancy Ltd who was supposed to provide required certificates. Having studied the HPE Partnership Certificate at page 21 of the Applicant's original bid, the Board notes that the same attests to a professional qualification of M/s Integrated Supplies & Consultancy Ltd as an HP Business Partner and is therefore a professional certificate that could be provided by M/s Integrated Supplies & Consultancy Ltd even though it falls under the category of a mandatory document.

It is well established in section 80 (2) of the Act that ***the evaluation and comparison shall be done using the procedures and criteria set out in the tender documents***. The Tender Document at Clause 8 of Stage I. Preliminary Examination at page 75 thereof did not specify which partner ought to provide the HPE Partnership Certificate and the Applicant ought not to have been disqualified because it specified it was the partner that would

provide mandatory documents. In any case, the Joint Venture Agreement already gives guidance that required certificates (whether mandatory or not) would be provided by M/s Integrated Supplies & Consultancy Ltd, which it did at page 21 of the Applicant's original bid.

The Evaluation Committee in this instance ought to have been concerned with the question whether the procedures and criteria in the Tender Document specified which partner in a joint venture ought to have provided the HPE Partnership Certificate. In this instance, the Tender Document was silent and thus the HPE Partnership Certificate, which the Procuring Entity confirms was provided in the Applicant's original bid was sufficient for purposes of evaluation of the Applicant's bid in accordance with the procedure and criteria under Clause 8 of Stage 1. Preliminary Examination read together with Clause 8.1 of Section 1. Instructions to Tenderers of the Tender Document.

Section 79 (1) of the Act on responsiveness of tenders provides that: -

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

The Applicant provided an HPE Partnership Certificate issued to its partner, M/s Integrated Supplies & Consultancy Ltd as required by Clause 8 of Stage

I. Preliminary Examination at page 75 of the Tender Document therefore ought to have been found responsive on this criterion.

Accordingly, the Board finds that the Procuring Entity failed to evaluate the Applicant's original bid at the Preliminary Evaluation Stage in accordance with Clause 8 of Stage 1. Preliminary Examination read together with Clause 8.1 of Section 1. Instructions to Tenderers of the Tender Document and sections 79 (1) and 80 (2) of the Act.

On the second issue for determination, the Board notes that at paragraph 8 of the Procuring Entity's Replying Affidavit, the Procuring Entity submits that during evaluation, the Evaluation Committee examined and/or interrogated the HPE Partnership Certificate furnished by the Applicant, by searching on Hewlett Packard Enterprise's (HPE) website being <<https://selectium.com/partner-locator/>> using the Heading Solution Provider in Kenya provided in the portal. According to the Procuring Entity, the search result generated a list of all the HPE's Listed Solution Providers, which among them, included the Interested Party and that neither the Applicant nor M/s Integrated Supplies & Consultancy Ltd were in the said list of HPE's Solution Providers. On this basis, the Evaluation Committee concluded that neither the Applicant nor M/s Integrated Supplies & Consultancy Ltd were among HPE's duly authorized Solution Providers.

The Procuring Entity further submits at paragraph 9 of its Replying Affidavit that the Evaluation Committee applied the same search method explained above while interrogating and investigating the Interested Party's HPE Partnership Certificate and that the search results revealed that the Interested Party is in HPE's list of Solution Providers in Kenya.

At paragraph 11 of its Replying Affidavit, the Procuring Entity submits that in response to the notification letter dated 21st May 2020, the Applicant addressed a letter dated 26th May 2020 challenging the outcome of its bid and that the Applicant was advised to give the Procuring Entity time to look into its complaint and that upon conclusion of an investigation by the Procuring Entity, the Procuring Entity would revert back to the Applicant. The Procuring Entity further submits that on 2nd June 2020, it wrote to Hewlett Packard Enterprise (HPE) requesting them to confirm the Authenticity of the HPE Partnership Certificate provided in the Applicant's bid. The Procuring Entity received a response from HPE on 4th June 2020 wherein HPE confirmed that the Applicant and M/s Integrated Supplies & Consultancy Ltd were not HPE operated by Selectium Partners. A further clarification was received by the Procuring Entity on 8th June 2020 from HPE who stated that Hewlett Packard was divided into two companies, that is, Hewlett Packard Incorporated (HP Inc.) and Hewlett Packard Enterprise (HPE) and from that time, HP Inc. would supply, distribute and/or provide laptops, computers, desktops and printers to their customers, whereas HPE would provide servers storage and networking equipment. According to the Procuring Entity, HPE confirmed that Integrated Supplies is an HP Inc. Partner

authorized to sell and supply Laptops, Desktops, Printers and accessories and not to supply servers storage and networking equipment.

In response to these averments, the Applicant at paragraph 8 of its Further Statement in Support of the Request for Review urged the Board to note the Procuring Entity's own admission that it subjected the HPE Certificates provided by the Applicant and the Interested Party to an online search through the HPE website for purposes of verification during the evaluation process.

Having considered parties' submissions, the Board studied the Evaluation Report dated 8th May 2020 and notes that the Applicant's bid was disqualified at the Preliminary Evaluation Stage because the Applicant provided HPE Partnership Certificate from M/s Integrated Supplies and Consultancy Ltd and was never subjected to Technical and Financial Evaluation. From the Procuring Entity's submissions, it conducted a first verification on (HPE) website being <<https://selectium.com/partner-locator/>> using the Heading Solution Provider in Kenya provided in the portal and that from the search results, neither the Applicant nor M/s Integrated Supplies & Consultancy Ltd were listed among HPE's Solution Providers.

A second verification was done by addressing a letter dated 2nd June 2020 after the Applicant raised a complaint with the Procuring Entity regarding the outcome of its bid.

At this juncture, it is important to note that the first verification of the HPE Partnership Certificate provided by the Applicant and the Interested Party was done at the Preliminary Evaluation Stage. This action prompted the Board to interrogate how evaluation is conducted at the Preliminary Evaluation Stage. Regulation 47 (1) of the Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as "the 2006 Regulations") provides that: -

"(1) Upon opening of the tenders under section 60 of the 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 authorized 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"***

From the foregoing, the Board observes that Preliminary Evaluation of bids does not involve any process of confirmation or verification of documents submitted by bidders by contacting third parties. Preliminary Evaluation involves the examination of documents and information provided by bidders on face value without resorting to other information that is not contained in the original bid submitted by a bidder as at the tender submission deadline.

It is also worth noting that the second verification exercise conducted by the Procuring Entity on 2nd June 2020 regarding the HPE Partnership Certificate provided by the Applicant was initiated after award of the subject tender had already been made to the Interested Party vide a letter dated 21st May 2020 whereas the Applicant's bid had already been disqualified during Preliminary Evaluation.

The Act only recognizes confirmation and verification as a post-qualification exercise conducted after tender evaluation but prior to award of a tender on the lowest evaluated responsive tenderer. Section 83 (1) of the Act provides as follows: -

"Section 83 (1) *An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest*

evaluated responsive tender to be awarded the contract in accordance with this Act.

(2) The conduct of due diligence under subsection (1) may include obtaining confidential references from persons with whom the tenderer has had prior engagement.

(3) To acknowledge that the report is a true reflection of the proceedings held, each member who was part of the due diligence by the evaluation committee shall—

(a) initial each page of the report; and

(b) append his or her signature as well as their full name and designation.”

This therefore means, if a procuring entity wishes to confirm and verify the documents submitted by a bidder, it can only conduct such an exercise after tender evaluation (i.e. after concluding evaluation at the Preliminary, Technical and Financial Evaluation Stages) after recommending an award to the lowest evaluated responsive tenderer but prior to award of a tender. This Board further notes, such an exercise is not conducted on any bidder, but the same is done on the lowest evaluated responsive tenderer.

In conducting a due diligence exercise, the following procedure must be adhered to: -

Due diligence should be conducted by the Evaluation Committee after tender evaluation but prior to award of the tender to confirm and verify the qualifications of the bidder determined by the Procuring Entity to have submitted the lowest evaluated responsive tender to confirm and verify the qualifications of such tenderer.

Further, an Evaluation Committee is the one that conducts a due diligence exercise. Section 46 (4) (b) of the Act provides that: -

Section 46 (1) An Accounting officer shall ensure that an ad hoc evaluation committee is established in accordance with this Act and Regulations made thereunder and from within the members of staff, with the relevant expertise

(2)

(3)

(4) An Evaluation Committee established under subsection (1) shall: -

(a)

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

From the above provision, the minimum number required to constitute an Evaluation Committee is 3. On the other hand, section 83 (3) of the Act directs that it is only the Evaluation Committee members who took part in the due diligence that sign and initial the due diligence report. Even though it is not mandatory that all Evaluation Committee members participate in a due diligence exercise, the minimum number of three stipulated under section 46 (4) (b) of the Act must be maintained noting that it is an Evaluation Committee that conducts a due diligence exercise.

Prior to commencing the due diligence exercise, the Evaluation Committee must first conclude evaluation of tenders at the Preliminary, Technical and Financial Evaluation Stages and recommend the lowest evaluated responsive tenderer for award of the tender. At this stage, due diligence has not been

conducted yet, hence the date appearing at the end of the Evaluation Report should be a true reflection of when evaluation at the Preliminary, Technical and Financial stages were conducted.

Due diligence is conducted on the lowest evaluated responsive tenderer. This is used to verify and confirm the qualification of the lowest evaluated tenderer after preliminary, technical and financial evaluation. After concluding the exercise, a due diligence report must be prepared outlining how due diligence was conducted together with the findings of the process. The said report is signed only by members of the Evaluation Committee who took part in the due diligence exercise, and they must include their designation. Further, the report must be initialed on each page.

If the qualifications of the lowest evaluated tenderer are satisfactory, the due diligence report is submitted to the Head of Procurement function for his professional opinion and onward transmission to the Accounting Officer who will consider the recommendation of award of the tender to the lowest evaluated tenderer.

Assuming the lowest evaluated tenderer is disqualified after the first due diligence, this fact must be noted in the Due Diligence Report with reasons. In view of the findings of this report that the lowest evaluated tenderer be disqualified after due diligence, the Evaluation Committee then recommends

award to the next lowest evaluated tenderer. Thereafter, a similar due diligence process is conducted on such tenderer.

This procedure is applied until the successful tenderer for award of the tender is determined.

The Procuring Entity in this instance conducted a first verification exercise at the Preliminary Evaluation Stage through an online search at the HPE portal to verify the HPE Partnership Certificate provided by the Applicant and the Interested Party, even though none of these two bidders had been found to be the lowest evaluated responsive bidders at that stage since evaluation had not been concluded and there was no recommendation for award of the subject tender to either of the two bidders. Furthermore, the second due diligence exercise on the Applicant conducted on 2nd June 2020 was done after an award of the tender to the Interested Party had been made, whereas section 83 (1) of the Act specifies that a due diligence exercise is done after tender evaluation but prior to award of a tender.

The Court in **Miscellaneous Civil Application No. 214 of 2019, Republic v Public Procurement Administrative Review Board; Principles Styles Limited & another (Interested Parties) Ex Parte Accounting Officer, Kenya Water Towers Agency & another [2020] eKLR** while describing the procedure for conducting a due diligence exercise and how the same relates to the values and principles of governance under Article 10 of the Constitution held as follows: -

"The Evaluation Committee is required to conduct a post-qualification of the lowest evaluated responsive Tenderer, to determine the Tenderer's physical capability to perform the contract. Using the criteria specified in the Bidding Documents, this review include an assessment of the Tenderer's technical, financial and physical resources available to undertake the contract, including his current and past similar projects. The process should also be guided by the values and principles in Article 10 of the Constitution which include integrity. These principles are binding on all State organs, State officers, public officers and all persons whenever any of them applies, or interprets, the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions. Section 3 of the Act expressly provides that the principles in Article 10 do apply.

If the lowest evaluated responsive Tenderer fails post-qualification, his Tender should be rejected, and the next ranked Tenderer should then be subjected to post-qualification examination. If successful, this Tenderer should receive the award. If not, the process continues for the other Tenderers. The rejection of a Tender for reasons of post-qualification requires substantial justification, which should be clearly documented..."

The Board agrees with the finding of the Court in the above case that a due diligence exercise must adhere to the principles cited under Article 10 of the Constitution which provides that: -

"10. National values and principles of governance

(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

(2) The national values and principles of governance include—

(a)

(b)

(c) good governance, integrity, transparency and accountability; and

(d)"

Section 83 of the Act already provides a procedure for conducting a due diligence exercise and the same must be followed to ensure the integrity of a procurement process is maintained. This is also one way that a procuring entity can ensure that it promotes good governance, transparency and accountability to the public when procuring for goods and services. In this instance, the two verification exercises by the Procuring Entity were unprocedural and the same contravene section 83 of the Act read together

with the principles enshrined in Article 10 (2) (c) of the Constitution. The provisions of section 83 of the Act would serve no purpose if the Procuring Entity is allowed to proceed with its award decision on the subject tender based on a due diligence exercise conducted during evaluation, in which the Procuring Entity states it already confirmed that the Applicant and its Joint Venture Partner are both not HPE certified. Such a due diligence exercise was unprocedural and the same cannot be allowed to stand.

Accordingly, the Board finds that the Procuring Entity's verification exercise on the Applicant and the Interested Party was not done in accordance with section 83 of the Act.

In determining the appropriate orders to grant in the circumstances, the Board notes that according to the Evaluation Report dated 8th May 2020, the Applicant was the only bidder disqualified on the requirement of HPE Partnership Certificate. This Board has already established that the Procuring Entity failed to evaluate the Applicant's bid at the Preliminary Evaluation Stage in accordance with Clause 8 of Stage 1. Preliminary Examination read together with Clause 8.1 of Section 1. Instructions to Tenderers of the Tender Document and sections 79 (1) and 80 (2) of the Act. As such, the Applicant's bid ought to have proceeded to the Technical Evaluation Stage.

The Board has also established that the Procuring Entity conducted a due diligence exercise on the Applicant and the Interested Party using an

unlawful procedure that is not contemplated under section 83 of the Act. Accordingly, the Board finds it appropriate to direct the Procuring Entity to re-admit the Applicant's bid at the Technical Evaluation Stage together with all other bidders who qualified to proceed to Technical Evaluation and conduct a re-evaluation at that stage. The Procuring Entity ought to bear in mind that it is only upon conclusion of Financial Evaluation and recommendation of award to the bidder who shall be determined to be the lowest evaluated responsive tenderer, that it may elect to conduct a due diligence exercise on such tenderer, based on the procedure explained hereinbefore.

Given that Clause 33.1 of Section I. Instructions to Tenderers of the Tender Document already recognized a post-qualification exercise to be conducted on the lowest evaluated tenderer, then the Procuring Entity ought to conduct the same after recommending award of the subject tender to the lowest evaluated tenderer before awarding the subject tender.

In totality of the foregoing, the Request for Review is hereby allowed in terms of the following specific orders: -

FINAL ORDERS

In exercise of the powers conferred upon it by Section 173 of the Act, the Board makes the following orders in the Request for Review: -

- 1. The Procuring Entity's Letter of Notification of Unsuccessful bid dated 21st May 2020 addressed to the Applicant with respect to Tender No. KEMSA/PROC/RT21/2020 for Procurement and Installation of ICT Infrastructure, be and is hereby cancelled and set aside.**

- 2. The Procuring Entity's Letter of Notification of Award dated 21st May 2020 addressed to M/s Next Technologies Limited, the Interested Party herein, with respect to the subject tender, be and is hereby cancelled and set aside.**

- 3. The Procuring Entity is hereby directed to re-admit the Applicant's bid at the Technical Evaluation Stage together with all other bidders who made it to Technical Evaluation and conduct a re-evaluation at the Technical Evaluation Stage.**

- 4. Further to Order No. 3 above, the Procuring Entity is hereby directed to proceed with the subject procurement process to its logical conclusion including the making of an award within fourteen (14) days from the date of this decision subject to a due diligence exercise conducted in accordance with Clause 33.1 of Section I. Instructions to Tenderers of the Tender Document and Section 83 of the Act, taking into consideration the Board's findings in this review.**

5. 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, this 25th day of June 2020

CHAIRPERSON

SECRETARY

PPARB

PPARB