

REPUBLIC OF KENYA

THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 88/2020 OF 25TH JUNE 2020

BETWEEN

MAGAL SECURITY SYSTEMS LTD.....APPLICANT

AND

THE ACCOUNTING OFFICER,

KENYA RAILWAYS CORPORATION.....RESPONDENT

AND

HORSE BRIDGE NETWORK SYSTEMS (EAST AFRICA)

LIMITED IN JOINT VENTURE WITH FLIR SYSTEMS

(UK).....1st INTERESTED PARTY

AND

ACHELIS KENYA LIMITED, DAMS CONSULT LIMITED

**OTTO MRUTTU + PARTNERS ARCHITECTS, ARMSTRONG &
DUNCAN, BRILLITECH ENGINEERING SERVICES LIMITED,**

COM TENTY ONE LIMITED, GLOSEC SOLUTIONS

LIMITED.....2nd INTERESTED PARTY

Review against the decision of Kenya Railways Corporation in relation to Tender No. KR/SCM/064/2019-2020 for Design, Supply, Installation, Testing and Commissioning and Maintenance of Unified Security Management System (USMS) for the Standard Gauge Railway (SGR).

BOARD MEMBERS

1. Ms. Faith Waigwa -Chairperson
2. Mr. Ambrose Ogetto -Member
3. Ms. Robi Chacha -Member

IN ATTENDANCE

1. Mr. Phillip Okumu -Holding brief for the Secretary

BACKGROUND TO THE DECISION

The Bidding Process

Kenya Railways (hereinafter referred to as “the Procuring Entity”) advertised an Expression of Interest from qualified firms for Design, Supply, Installation, Testing and Commissioning and Maintenance of Unified Security Management System (USMS) for the Standard Gauge Railway (hereinafter referred to as “the subject tender”) on 15th October 2019. At the end of the Expression of Interest Stage, the Procuring Entity pre-qualified the following firms: -

- *M/s Top Choice Surveillance Limited and Mer Security & Communications Systems Ltd;*
- *M/s Elbit Systems, H-Young & Co. Ltd and Megason Electronics & Control;*
- *M/s Horsebridge Network Systems EA Ltd & FLIR;*

- *M/s Achelis Kenya Limited, Dams Consult Ltd, Otto Mruttu + Partners Architects, Armstrong & Duncan, Brillitech Engineering Services Ltd, Com Twenty-One Ltd, Glosec Solutions Limited; and*
- *M/s Magal Security Systems Ltd, Aviation and General Security Consultants Ltd and Mahathi Infra EA Ltd.*

Issuance of Tender Documents

On 30th March 2020, the Procuring Entity issued the Document for Design, Supply, Installation, Testing and Commissioning and Maintenance of Unified Security Management System (USMS) for the Standard Gauge Railway (hereinafter referred to as “the Tender Document”) to the five pre-qualified firms listed hereinbefore. In addition to this, the Procuring Entity issued seven Addenda clarifying provisions in the Tender Document.

Bid Submission Deadline and Opening of Bids

The Procuring Entity received a total of 3 No. of bids by the bid submission deadline of 12th May 2020. The same were opened shortly thereafter by a Tender Opening Committee and recorded as follows: -

- i. M/s Achelis Kenya Limited, in Joint Venture with Dams Consult Ltd, Otto Mruttu + Partners Architects, Armstrong & Duncan, Brillitech Engineering Services Ltd, Com Twenty-One Ltd, and Glosec Solutions Limited;*
- ii. M/s Magal Security Systems Ltd – Israel, in Joint Venture with Magal Security Systems Ltd–Kenya, Aviation and General Security Consultants Ltd and Mahati East Africa Ltd; and*
- iii. M/s Horsebridge Networks Systems EA Ltd in joint venture with FLIR.*

Evaluation of Bids

Having appointed an Evaluation Committee, evaluation of bids in the subject tender was carried out in the following three stages: -

- i.** Mandatory Requirements Evaluation;
- ii.** Technical Evaluation; and
- iii.** Financial Evaluation.

1. Mandatory Requirements Evaluation

At this stage, the Evaluation Committee applied the criterion under Clause A. Mandatory Requirements of Appendix B. Evaluation Criteria found in the Appendix to Instructions to Tenderers at page 23 to 25 of the Tender Document. Based on the evaluation and observations made by the Evaluation Committee, M/s Magal Security Systems Limited (Israel) (in Joint Venture with Magal Security Systems Ltd–Kenya, Aviation and General Security Consultants Ltd and Mahati East Africa Ltd) did not meet the mandatory requirements and therefore did not proceed to Technical Evaluation. The other two bidders met the mandatory requirements and therefore proceeded to the Technical Evaluation Stage.

2. Technical Evaluation

At this stage, the Evaluation Committee applied the criterion under Clause B. Technical Evaluation of Appendix B. Evaluation Criteria found in the Appendix to Instructions to Tenderers at page 26 to 29 of the Tender

Document which required bidders to achieve a minimum technical score of 70% to qualify for Financial Evaluation. At the end of Technical Evaluation, M/s Achelis Kenya Limited (in Joint Venture with Dams Consult Ltd, Otto Mruttu + Partners Architects, Armstrong & Duncan, Brillitech Engineering Services Ltd, Com Twenty-One Ltd, and Glosec Solutions Limited) scored 97.4 points out of 110 points, converted to 88.5 % whereas, M/s Horsebridge Networks Systems EA Ltd (in joint venture with FLIR – UK) scored 102.6 points out of 110 points, converted to 93.3% and therefore qualified for Financial Evaluation.

Notification to Bidders

In letters dated 11th June 2020, the Procuring Entity invited the bidders who qualified for Financial Evaluation for the Financial Opening on 16th June 2020 whereas M/s Magal Security Systems Limited (Israel) (in Joint Venture with Magal Security Systems Ltd–Kenya, Aviation and General Security Consultants Ltd and Mahati East Africa Ltd) was notified that its bid was unsuccessful.

THE REQUEST FOR REVIEW

M/s Magal Security Systems Ltd (hereinafter referred to as “the Applicant”) lodged a Request for Review dated and filed on 25th June 2020 together with a Statement in Support of the Request for Review sworn and filed on even date, through the firm of KAZI Advocates LLP, seeking the following orders:

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- a. An order annulling and setting aside the Respondent's decision awarding TENDER NO. KR/SCM/064/2019-2020; DESIGN, SUPPLY, INSTALLATION, TESTING AND COMMISSIONING AND MAINTENANCE OF UNIFIED SECURITY MANAGEMENT SYSTEM (USMS) FOR THE STANDARD GAUGE RAILWAY (SGR) to any other pre-qualified firm;***
- b. An order annulling and setting aside the Respondent's notification of unsuccessful tender dated 11th June 2020 in TENDER NO. KR/SCM/064/2019-2020; DESIGN, SUPPLY, INSTALLATION, TESTING AND COMMISSIONING AND MAINTENANCE OF UNIFIED SECURITY MANAGEMENT SYSTEM (USMS) FOR THE STANDARD GAUGE RAILWAY (SGR);***
- c. An order declaring that the other two bids submitted by Achelis consortium and Horsebridge consortium did not conform with the mandatory requirements set out in the tender documents;***
- d. The Board be pleased to review all records of the procurement process relating to TENDER NO. KR/SCM/064/2019-2020; DESIGN, SUPPLY, INSTALLATION, TESTING AND COMMISSIONING AND MAINTENANCE OF UNIFIED SECURITY MANAGEMENT SYSTEM (USMS) FOR THE STANDARD GAUGE RAILWAY (SGR) and grant an order directing the Procuring Entity to readmit the Applicant to the process and evaluate its bid in accordance with the tender document and the Act;***

- e. Further and/ or in the alternative and without prejudice to any of the foregoing prayers sought, an order annulling the entire tender process and direct the Respondent to re – advertise the tender with clear specifications in strict adherence to the provisions of the constitution, the Act and all other enabling provisions of the law;***
- f. An order directing the Respondent to pay the costs of and incidental to these proceedings; and***
- g. Such other or further relief (s) as this Board shall deem fit and expedient.***

In response, the Respondent lodged a Statement in Response sworn on 1st July 2020 and filed on even date, through the firm of Karanja Kiarie & Co. Advocates, the 1st Interested Party lodged a Replying Affidavit sworn on 9th July 2020 and filed on 10th July 2020 through the firm of Gerivia Advocates LLP while the 2nd Interested Party lodged an Affidavit in Support of the Review, which Affidavit is sworn on 9th July 2020 and filed on 10th July 2020 through the firm of Wandabwa Advocates. However, on 13th July 2020, the 2nd Interested Party, through its firm of Advocates, lodged a Notice of Withdrawal of their Replying Affidavit in support of the Review. As a result, the same shall not form part of the record of these proceedings.

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 and filed on 6th July 2020 together with a List of Authorities dated and filed on 15th July 2020, the Respondent lodged Written Submissions dated and filed on 13th July 2020, while the 1st Interested Party lodged Written Submissions dated and filed on 14th July 2020.

BOARD'S DECISION

The Board has considered all 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 Applicant's allegation that the Procuring Entity failed to comply with Clause 16-Mandatory Requirements of Appendix B-Evaluation Criteria found in the Appendix to Instructions to Tenderers of the Tender Document.**

Depending on the outcome of issue No. (I) above: -

- II. Whether the Procuring Entity complied with Clause 16-Mandatory Requirements of Appendix B-Evaluation Criteria found in the Appendix to Instructions to Tenderers of the Tender Document.**
- III. Whether the Board has jurisdiction to entertain the Applicant's allegation that the Procuring Entity's waiver of the site visits through Addendum No. 5 dated 30th April 2020 prejudiced the Applicant.**

Depending on the outcome of issue No. (III) above: -

- IV. Whether the Applicant was prejudiced as a result of the Procuring Entity's waiver of site visits through Addendum No. 5 dated 30th April 2020.**
- V. Whether the Board has jurisdiction to entertain the Applicant's allegation that the Procuring Entity failed to comply with Clause 2.17 of Section II. Instructions to Tenderers of the Tender Document.**

Depending on the determination of Issue No. (V) above: -

- VI. Whether the Procuring Entity complied with Clause 2.17 of Section II. Instructions to Tenderer of the Tender Document.**
- VII. Whether the Procuring Entity had an obligation to disclose the successful tenderer in the letter dated 11th June 2020 addressed to the Applicant.**
- VIII. Whether the Applicant complied with the mandatory requirements at the Preliminary Evaluation Stage with respect to the following two criteria outlined in the Tender Document: -**
 - a) Clause 7-Mandatory Requirements of Appendix B. Evaluation Criteria found in the Appendix to Instructions to Tenderers of the Tender Document read together with Clause 27 of Addendum No. 5 dated 30th April 2020; and**

**b) Clause 19-Mandatory Requirements of Appendix B.
Evaluation Criteria found in the Appendix to Instructions
Tenderers of the Tender Document.**

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

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 downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

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 best taken at inception. "

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. "

This Board is a creature of statute owing to the provision of Section 27 (1) of the Act which provides that: -

"27. Establishment of the Public Procurement Administrative Review Board

(1) There shall be a central independent procurement appeals review board to be known as the Public

Procurement Administrative Review Board as an unincorporated Board."

Further, Section 28 of the Act provides as follows: -

"28. Functions and powers of the Review Board

(1) The functions of the Review Board shall be—

- (a) reviewing, hearing and determining tendering and asset disposal disputes; and***
- (b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law."***

The above provisions demonstrate that the Board is a specialized, central independent procurement appeals review board with its main function being reviewing, hearing and determining tendering and asset disposal disputes. 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 as follows: -

"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”

The Board observes that section 167 (1) of the Act has two limbs within which a candidate or tenderer may file a Request for Review namely;

- *Within fourteen days of notification of award; or*
- *Within fourteen days from the date of occurrence of an alleged breach at any stage of the procurement process, or disposal process.*

The Cambridge English Dictionary, 7th Edition explains that the use of the word or may have a conjunctive or disjunctive meaning as follows:-

“Or as used disjunctively employs a proposition that presents two or more alternative terms

Or when used conjunctively serves to connect ideas, things or sentences”

Having noted that the word “or” may be used disjunctively or conjunctively, the Board notes that the use of word "Or" in legislation depends on the purpose of the said legislation. The import of the use of the word “or” under section 167 (1) of the Act gives aggrieved candidates or tenderers the opportunity to exercise the option available under section 167 (1) of the Act as soon as such candidates or tenderers are aggrieved by the actions of a

procuring entity. This therefore means, it was never the intention of the legislature for tenderers to abuse the options available under section 167 (1) of the Act such that a bidder sits on its right to administrative review waiting for the outcome of its bid to challenge an issue discovered during the early stages of the procurement process or disposal process.

In determining whether this Board has jurisdiction to entertain the question whether the Procuring Entity complied with Clause 16-Mandatory Requirements of Appendix B. Evaluation Criteria found in the Appendix to Instructions to Tenderers of the Tender Document, the Board observes that the Applicant at paragraph 6 of its Request for Review contends that the Procuring Entity allowed other pre-qualified firms to submit tender documents that were not bound and only punched and placed in black box files thus highly prejudicing the Applicant who complied with the aforementioned criteria.

In response, the Procuring Entity at paragraph 13 (c) of its Response avers that all the three tenderers submitted bid documents that were held/fastened together and that the same were paginated, therefore met the criterion of submission of bound tender documents. Further to this, the Procuring Entity avers that the Tender Document did not specify any particular manner in which the tender documents were to be bound together. In the Procuring Entity's view, any tender document that was tightly fastened was found to have met the set criteria.

On its part, the 1st Interested Party at paragraph 22 of its Replying Affidavit submits that the Applicant's allegation that the Procuring Entity accepted bids that were not bound properly ought to have been raised within fourteen (14) days after the date of tender opening, which fourteen days had lapsed and thus could not invoke section 167 of the Act in the circumstances. In the 1st Interested Party's view, the Applicant is only complaining about binding of tender documents because its bid was found unsuccessful. Further in paragraph 42 of its Written Submissions, the 1st Interested Party submits that having submitted itself and fully participated in the subject procurement process with full knowledge of any alleged breaches of the Act, the Applicant cannot later complain of the said breaches so late in the process, because its bid was found unsuccessful.

Having considered parties' submissions, the Board notes that the 1st Interested Party raised a jurisdictional issue that was never responded to by the Applicant through either a Further Statement. In its Written Submissions, the Applicant only makes submissions as to why this was a mandatory requirement that ought to have been complied with. The Board notes that the Applicant did not file a Supplementary Affidavit to address this issue. As a result, the Board is left with only the Interested Party's deposition that the Applicant was time-barred to invoke the jurisdiction of this Board because instant issue under consideration has been raised outside the statutory period required under section 167 (1) of the Act and moreso, which issue

was not responded to by the Applicant. Accordingly, a determination whether or not bidders complied with this requirement can only be made once the Board addresses the issue of jurisdiction that was raised by the 1st Interested Party.

It is worth noting that section 167 (1) of the Act outlined hereinbefore requires aggrieved candidates and tenderers seeking administrative review to do so, 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.

The Board studied the Procuring Entity's Tender Opening Minutes dated 12th May 2020 and notes that the following bidders' representatives were present at the tender opening: -

No	Name	Firm
1	Ronald Kirui	Magal Security Systems
2	Doris Muyua	Achelis Kenya Ltd
3	Gulf Ambellem	Magal Security Sytems
4	George Kuya	Horsebridge Network System EA Ltd
5	Rox Kimathi	Horsebridge Network System EA Ltd
6	Evans Vata	Horsebridge Network System EA Ltd

From the foregoing, it is worth noting that, all bidders who participated in the subject procurement process were represented on the tender opening

date of 12th May 2020 and witnessed the number of bids submitted by each bidder. Two of the Applicant's representatives namely; Ronald Kirui and Gulf Ambellem, were present on the tender opening date and witnessed the manner in which other pre-qualified bidders had bound their bid documents and could therefore approach this Board on the said allegation within 14 days after 12th May 2020, which period lapsed on 26th May 2020.

The Applicant never challenged the issue of bidding of tenders within the aforementioned period and neither did it respond to the 1st Interested Party's objection that the allegation is time-barred in raising the instant issue at this stage. Having found that the Applicant raised this allegation in a Request for Review filed on 25th June 2020, which is outside the period of 14 days specified in section 167 (1) of the Act, the Board is inclined to agree with the 1st Interested Party that the issue under consideration is time-barred and cannot be entertained at this point, thus ousting the jurisdiction of this Board in determining the same.

Accordingly, the Board finds that it lacks jurisdiction to entertain the Applicant's allegation that the Procuring Entity breached Clause 16-Mandatory Requirements of Appendix B. Evaluation Criteria found in the Appendix to Instructions to Tenderers of the Tender Document. The effect of this finding is that the Board shall not address the second issue framed for determination.

On the third issue for determination, the Board observes that at paragraph 12 (g) of its Request for Review, the Applicant contended that it was prejudiced by the Procuring Entity's waiver on site visits. In the Applicant's view, the procurement process was undertaken in unclear conditions which ought to have been clarified in a site visit. In paragraph 8 of its Statement of Response and paragraph 19 of its Written Submissions, the Procuring Entity invites the Board to take judicial notice of the directives by the National Executive and Ministry of Interior and Co-ordination of National Government regarding the effects of the Covid-19 pandemic as well as the Procuring Entity's Addendum No. 5 dated 30th April 2020 that dispensed with site visits due to the Covid-19 pandemic. The Procuring Entity further states that the Applicant ought to have raised this complaint within 14 days after 30th April 2020 when the said Addendum was issued.

Having considered the foregoing submissions, the Board observes that the Procuring Entity raised a jurisdictional issue specifically on the Applicant challenging the waiver of site visits pursuant to Addendum No. 5 dated 30th April 2020. As a result, the Board must address the jurisdictional issue at the earliest opportune moment.

As already observed hereinbefore, section 167 (1) of the Act is very clear on the timelines within which an aggrieved candidate or tenderer may approach this Board, that is, within fourteen (14) days from notification of award or

date of occurrence of an alleged breach of duty by a procuring entity at any stage of the procurement process or disposal process.

The Procuring Entity issued Addendum No. 5 on 30th April 2020, which provides at clause 5 (a) thereof as follows: -

5a	Bidders Request	KR Response
	The site visits have not been completed. When will it be scheduled so that all the companies can attend? After the site visits, we would ask 7 days extra time to ask technical questions	Due to the ongoing COVID-19 pandemic, the PPRA suspended all the site visits for the ongoing procurements. As such, no further site visits shall be undertaken. All the relevant information has been provided in the Tender Document

The Board notes that similar to the issue of binding of documents, the Applicant did not respond to the Procuring Entity's deposition by way of a Further Statement in support of the Request for Review, and/or Supplementary Written Submissions. Accordingly, the Board is only left with the Procuring Entity's deposition that the Applicant is time barred to invoke the jurisdiction of this Board because the instant issue under consideration has been raised outside the statutory period under section 167 (1) of the Act and moreso, which issue the Applicant has failed to address and/or respond to the same.

The Board observes that the Applicant is aggrieved by the Procuring Entity's Response under Clause 5 (a) of Addendum No. 5 dated 30th April 2020. Therefore, it ought to have approached this Board within 14 days after 30th April 2020 challenging Clause 5 (a) of Addendum No. 5 dated 30th April 2020. The Applicant never approached this Board within that period but instead participated in the procurement process and only waited until it was informed of the outcome of its bid to lodge a Request for Review on 25th June 2020. This shows that the Applicant was comfortable with the Procuring Entity's waiver of site visits. If the Applicant was not agreeable to the said waiver, it ought to have exercised its right to administrative review within fourteen days after 30th April 2020 challenging the said Addendum instead of subjecting itself to the procurement process where Addendum No. 5 dated 30th April 2020 would be applied. The Applicant's allegation against issuance of Addendum No. 5 dated 30th April 2020 has been raised so late in the day, noting that the fourteen-day period that was available to the Applicant started running on 1st May 2020 and lapsed on 14th May 2020.

Accordingly, the Board finds that it lacks jurisdiction to entertain the Applicant's allegation that it was prejudiced by the Procuring Entity's waiver on site visits pursuant to Clause 5 (a) of Addendum No. 5 dated 30th April 2020. The effect of this finding is that the Board shall not address the fourth issue that was framed for determination.

On the fifth issue for determination, the Board notes that the Applicant at paragraph 7 of its Request for Review, alleged that the Procuring Entity allowed other pre-qualified firms to submit tender documents that were wrongly sealed and marked by the said firms. According to the Applicant, the said firms submitted two envelopes that were tapped together indicating and bearing the firm's name and address in the outer/top envelope thus highly prejudicing the Applicant as a participant in the subject procurement process. In response, the 1st Interested Party at paragraph 22 (e) and (g) of its Replying Affidavit took the view that the Applicant appears to be alleging that the Procuring Entity accepted bids that were not sealed properly and that the Applicant cannot invoke section 167 of the Act at this stage since fourteen days within which the Applicant ought to have raised the said allegation already lapsed. The Procuring Entity referred the Board to Clause 2.17.2 of Section II. Instructions to Tenders of the Tender Document to support its view that the rationale behind sealing and marking of tenders is to shed off responsibility on the part of the Procuring Entity in the event of misplacement or premature opening of any bidder's envelopes. In the Procuring Entity's view, the Applicant suffered no prejudice as a result of the requirement on sealing and marking of tenders.

Having considered parties' submissions, the Board observes that the 1st Interested Party raised a third jurisdictional issue that was again never responded to by the Applicant through a Further Statement and/or Supplementary Written Submissions. As a result, the Board is only left with the Interested Party's depositions that the instant issue under consideration

has been raised outside the statutory period under section 167 (1) of the Act, which issue was not responded to by the Applicant.

The Board notes that the Applicant has the right to approach this Board at any stage of a procurement process pursuant to section 167 (1) of the Act. It is also worth noting that, once a procuring entity receives bids by the tender submission deadline, the same are opened on the tender opening date by a Tender Opening Committee in the presence of bidders and their representatives who choose to attend the tender opening ceremony.

As already observed hereinbefore, the Procuring Entity's Tender Opening Minutes dated 12th May 2020 shows that all bidders who participated in the subject procurement process were represented on the tender opening date of 12th May 2020 and they witnessed the number of bids submitted by each bidder. Two of the Applicant's representatives were present on the tender opening date and witnessed the manner in which the bids of the other pre-qualified firms were sealed and marked, before the same could be opened by the Tender Opening Committee. This means that the Applicant ought to have exercised its right to administrative review under section 167 (1) of the Act within fourteen (14) days after 12th May 2020, having noted that the manner in which the other pre-qualified firms had sealed and marked their respective bids.

The period within which the Applicant ought to have raised this allegation through a Request for Review started running on 13th May 2020 and such period lapsed on 26th May 2020. The Applicant never challenged the instant within the aforementioned period and did not respond to the 1st Interested Party's deposition that the Applicant is time-barred. Having found that the Applicant challenged the instant issue in a Request for Review filed on 25th June 2020, which is outside the period of 14 days specified in section 167 (1) of the Act, the Board is inclined to agree with the 1st Interested Party that the Applicant is time-barred to challenge the instant issue and cannot be entertained at this point.

Accordingly, the Board finds that it lacks jurisdiction to entertain the Applicant's allegation that the Procuring Entity failed to comply with Clause 2.17 of Section II. Instructions to Tenderers of the Tender Document. The import of this finding is that the Board shall not address the sixth issue framed for determination.

The Board observes that the Introduction provided in the Tender Document shows that the Procuring Entity took over the role of management of the concession and operations of the Standard Gauge Railway. The Procuring Entity further states that it recently completed the implementation of the first phase of the country's mega-flagship project, i.e. the Standard Gauge Railway with operations of the Madaraka Express on course. Furthermore, the Standard Gauge Railway is currently operational in Kenya.

This Board notes that the subject procurement process began with an Expression of Interest Stage advertised on 15th October 2019 wherein the Procuring Entity pre-qualified five firms upon concluding evaluation. This was followed by a Request for Proposal process which has not been concluded more than six months into the year 2020. The subject procurement process will implement the design, supply, installation, testing and commissioning of a Unified Security Management System for the Standard Gauge Railway, which as already noted will serve the Kenyan people.

A bidder that is aggrieved by a procuring entity's action ought to lodge its complaint as soon as possible to save on time within which the Board determines the Request for Review application. Any bidder that fails to challenge the actions by the Procuring Entity that it learnt of at the early stages of the procurement process but only waits until it is notified of the outcome of its bid is mischievous and is only calculated to delay the subject procurement process to the detriment of the people of Kenya.

On the seventh issue for determination, the Board observes that the Applicant contended that the Procuring Entity failed to comply with section 87 (3) of the Act, since the identity of the successful bidder was not disclosed in the Applicant's letter of notification dated 11th June 2020. In response to this allegation, the Procuring Entity submitted that it had not concluded evaluation of bids in the subject tender by the time it notified the Applicant

of the outcome of its bid, therefore no successful bidder had been determined.

Having considered parties' submissions, the Board observes that the Applicant's letter of notification of unsuccessful bid dated 11th June 2020 stated as follows: -

"Reference is made to the above tender where you submitted your RFP

We hereby notify you that your tender was unsuccessful based on the following reasons: -

(i) You and JV partners/firms did not provide a signed and stamped Form 9 as provided in the Tender Document and instead you provided in-house company statements on Anti-bribery and Code/Policy of Ethics that did not capture all the requirements prescribed in the tender document (Form 9)

(ii) You provided a 12-month warranty from the date of handover that does not conform to the requirement of the Tender Document of at least 1-year warranty beyond the Defect Notification Period.

Your bid-bond and unopened Financial Proposal shall be returned to you on completion Tender Process"

From the foregoing, the Board observes that, the Applicant's letter of notification contains the specific reasons why the Applicant's bid was found non-responsive but does not have the identity of a successful tenderer. This prompted the Board to study section 87 the Act in order to determine the contents of a letter of notification and to further determine who a successful tenderer is.

Section 87 of the Act states as follows: -

"(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted

(2)

(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof

To arrive at a definition of who a successful tenderer is, the Board first considered the meaning of the word "tenderer" as defined in section 2 of the Act which provides as follows: -

"tenderer" means a person who submitted a tender pursuant to an invitation by a public entity

Section 2 of the Act also defines the word "tender" as: -

"an offer in writing by a tenderer to supply goods, services or works at a price; or to acquire or dispose stores, equipment or other assets at a price, pursuant to an invitation to tender, request for quotation or proposal by a procuring entity"

From the foregoing definitions, the Board observes that a tenderer is a person who submits an offer in writing to supply goods, services or works at a price; or to acquire or dispose stores, equipment or other assets at a price, pursuant to an invitation to tender, request for quotation or proposal by a procuring entity.

Further, section 86 of the Act provides that: -

(1) The successful tender shall be the one who meets any one of the following as specified in the tender document—

(a) the tender with the lowest evaluated price;

- (b) the responsive proposal with the highest score determined by the procuring entity by combining, for each proposal, in accordance with the procedures and criteria set out in the request for proposals, the scores assigned to the technical and financial proposals where Request for Proposals method is used;***
- (c) the tender with the lowest evaluated total cost of ownership; or***
- (d) the tender with the highest technical score, where a tender is to be evaluated based on procedures regulated by an Act of Parliament which provides guidelines for arriving at applicable professional charges.***

Section 87 of the Act views a successful tenderer to “be the person submitting the successful tender”. In addition to this, section 86 (1) of the Act specifies various ways that a procuring entity may arrive at the successful tender depending on the method of procurement used. For example, in an open tender (where a Request for Proposal method is not used) the successful tender is arrived at by determining the lowest evaluated price in accordance with section 86 (1) (a) of the Act. Where the Request for Proposal method of tendering is used, the successful tender is the responsive proposal with the highest score arrived at by combining the technical and

financial scores pursuant to section 86 (1) (b) of the Act. Section 86 (1) (c) and (d) of the Act further specify two other methods of arriving at a successful tender by determining the tender with the lowest evaluated total cost of ownership and the tender with the highest technical score, where a tender is to be evaluated based on procedures regulated by an Act of Parliament which provides guidelines for arriving at applicable professional charges, respectively.

It is also worth noting that once an evaluation committee concludes evaluation of tenders at the Preliminary, Technical and Financial Evaluation stages, the evaluation committee may recommend a bidder to be awarded a tender depending on the method of procurement used. For example, if the procuring entity used open method of tendering (where a Request for Proposal method was not used) the evaluation committee may recommend award of a tender to the bidder who submitted the lowest evaluated price.

This recommendation is contained in an evaluation report which is submitted to the Head of Procurement function. Section 80 (4) of the Act, states as follows: -

"The evaluation committee shall prepare an evaluation report containing a summary of the evaluation and comparison of tenders and shall submit the report to the person responsible for procurement for his or her review and recommendation."

Section 84 of the Act further provides that: -

"84. Professional opinion

- (1) The head of procurement function of a procuring entity shall, alongside the report to the evaluation committee as secretariat comments, review the tender evaluation report and provide a signed professional opinion to the accounting officer on the procurement or asset disposal proceedings.**
- (2) The professional opinion under sub-section (1) may provide guidance on the procurement proceeding in the event of dissenting opinions between tender evaluation and award recommendations.**
- (3) In making a decision to award a tender, the accounting officer shall take into account the views of the head of procurement in the signed professional opinion referred to in subsection (1)"**

It is worth noting that the Professional Opinion given by the Head of Procurement function serves as an important aspect between tender evaluation and award of a tender. His or her recommendation guides the accounting officer of a procuring entity in making a decision whether or not to award a tender in accordance with the applicable award criteria under section 86 (1) of the Act. Once the accounting officer awards a tender, such

a tender is deemed to be the successful tender and the person submitting the successful tender, is called the successful tenderer.

Accordingly, the Board deduces the definition of a successful tenderer to be the person who submitted an offer which has been recommended for award upon conclusion of evaluation at the preliminary, technical and financial evaluation stages and determined to be the best offer (i.e. successful tender) after award by an accounting officer of a procuring entity has been made depending on the award criterion that applies to the procurement method used by a procuring entity.

Having determined the meaning of the word "**successful tenderer**", the Board observes that section 87 (3) of the Act, requires the accounting officer of a procuring entity to notify the unsuccessful tenderers at the same time the successful tenderer is notified of the outcome of its bid. When notifying the unsuccessful tenderers, the reasons why their bids were found unsuccessful must be specified in the notification and the successful tenderer ought to be disclosed.

In this instance, the Board studied the Procuring Entity's confidential file and notes that the Procuring Entity notified the Applicant of the outcome of its bid through a letter dated 11th June 2020 whereas the 1st and 2nd Interested Parties were notified that they attained the minimum qualifying technical score required to proceed to the Financial Evaluation Stage through letters

dated 11th June 2020. The 1st and 2nd Interested Parties were subsequently invited to the financial opening to be held on 16th June 2020.

From the confidential file submitted to the Board there is no evaluation report regarding financial evaluation of bids in the subject tender. In essence, by the time the Applicant was notified of the outcome of its bid through a letter dated 11th June 2020, Financial Evaluation of bids had not begun. Therefore, no recommendation of award of the subject tender had been made, no professional opinion had been issued by the Procuring Entity’s Head of Procurement function and the Procuring Entity’s Accounting Officer had not awarded the subject tender.

This Board is cognizant of Clause 29 of Addendum No. 5 dated 30th April 2020 which states as follows: -

29	Clause 2.17 Sealing of the tenders	<p>.....</p> <p>The Bidders whose Technical Proposal shall have passed the minimum score of 70% required to proceed to Financial Evaluation shall be invited for Financial Opening.</p> <p><u>The Financial Opening will be done after Three days of notification on outcome of technical evaluation to all bidders</u></p>
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The Board observes that the subject tender was a two-enveloped tender comprising of the Technical Proposal and Financial Proposal. The Technical

Proposal Envelope comprised of requirements at the Preliminary and Technical Evaluation Stages, whereas the Financial Proposal Envelope comprised of requirements at the Financial Evaluation Stage. Pursuant to Clause 29 of Addendum No. 5 dated 30th April 2020, the Procuring Entity opted to notify the Applicant of the outcome of its bid after it was found non-responsive at the end of Preliminary Evaluation. This is sufficient evidence that the Procuring Entity was adhering to the information it had communicated to bidders regarding the time notification will be done and this was after Technical Evaluation had been concluded.

At the end of Technical Evaluation, the Procuring Entity had not determined the successful tenderer. The legislature only views notification under section 87 (1) and (3) of the Act as one that is given after a successful tenderer has been determined hence the reason why successful and unsuccessful tenderers are notified simultaneously after award of a tender has been made.

That notwithstanding, it is the Board's considered view that there was no harm in notifying the Applicant of the outcome of its bid after conclusion of the Technical Evaluation for the following reasons: -

Section 167 (1) of the Act gives aggrieved tenderers the option of seeking 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. This means, an aggrieved tenderer may approach this Board at any stage of a procurement process, i.e. before a procuring entity concludes evaluation of tenders. Furthermore, Article 47 of the Constitution further states that: -

"(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action"

The Procuring Entity already determined the outcome of the Applicant's bid at the end of Preliminary Evaluation and since the Technical Proposal comprised of requirements at the Preliminary and Technical Evaluation Stages, it opted to notify the Applicant of the outcome of its bid at the end of Technical Evaluation. This gave the Applicant the opportunity to challenge such outcome as soon as possible in accordance with the timelines available to it under section 167 (1) of the Act. In the Board's view, one way that the right to administrative action is protected is for a procuring entity to inform bidders of the outcome of their bids as soon as such a determination is made so that such bidders decide whether or not to challenge the outcome of their bids.

The Board is also mindful that procurement processes are time-bound given the strict timelines specified under the Act. Section 171 (1) of the Act is one such provision that gives this Board a maximum of twenty-one days to complete a review, so that a procuring entity may continue with the procurement process (if the same had not been completed by the time a Request for Review is lodged) without further delay. Accordingly, there was no harm in informing the Applicant of the outcome of its bid before the Procuring Entity determined the successful tenderer.

Having found that the Procuring Entity had not determined the successful tenderer by the time the Applicant was notified of the outcome of its bid through a letter dated 11th June 2020, the Board finds that in the circumstances, the Procuring Entity had no obligation to disclose the successful tenderer in the letter dated 11th June 2020 addressed to the Applicant.

On the last issue for determination, the Board observes that the Applicant challenged the following two reasons why its bid was found unsuccessful: -

- i. You and JV partners/firms did not provide a signed and stamped Form 9 as provided in the Tender Document and instead you provided in-house company statements on Anti-bribery and Code/Policy of Ethics that did not capture all the requirements prescribed in the tender document (Form 9); and*

ii. You provided a 12-month warranty from the date of handover that does not conform to the requirement of the Tender Document of at least 1-year warranty beyond the Defect Notification Period

The Board has considered parties' submissions on the two criteria under consideration and now proceeds to address the same as follows: -

a) Integrity Declaration Form

Clause 7-Mandatory Requirements of Appendix B. Evaluation Criteria found in the Appendix to Instructions to Tenderers of the Tender Document provides as follows: -

A	Mandatory Requirements	MUST COMPLY
7	Bidders must duly fill, sign and stamp Integrity Declaration Form provided in the Tender Document (Form 9)	Mandatory

The Tender Document further provided Form 9. Integrity Declaration under Section VII. Standard Forms with the following details: -

Form 9

Integrity Declaration

Undertaking by Tenderer on Anti-Bribery Policy/Code of Conduct and Compliance Programme

- 1. Each Tenderer must submit a statement, as part of the Tender documents, in either of the two given formats which must be signed***

personally by the Chief Executive Officer or other appropriate Senior Corporate Officer of the Tendering company and, where relevant, of its subsidiary in the Kenya. If a Tender is submitted by a subsidiary, a statement to this effect will also be required of the parent company, signed by its Chief Executive Officer or other appropriate Senior Corporate Officer.

- 2. Tenderers will also be required to submit similar No-bribery commitments from their subcontractors and consortium partners; the Tenderer may cover the subcontractors and consortium partners in its own statement, provided the Tenderer assumes full responsibility.***
 - a) Payment to agents and other third parties shall be limited to appropriate compensation for legitimate services.***
 - b) Each Tenderer will make full disclosure in the Tender documentation of the beneficiaries and amounts of all payments made, or intended to be made, to agents or other third parties (including political parties or electoral candidates) relating to the Tender and, if successful, the implementation of the contract.***
 - c) The successful Tenderer will also make full disclosure [quarterly or semi-annually] of all payments to agents and other third parties during the execution of the contract.***
 - d) Within six months of the completion of the performance of the contract, the successful Tenderer will formally certify that no bribes or other illicit commissions have been paid. The final accounting shall include brief details of the goods and services provided that they are sufficient to establish the legitimacy of the payments made.***

- e) Statements required according to subparagraphs (b) and (d) of this paragraph will have to be certified by the company's Chief Executive Officer, or other appropriate senior corporate officer.***
- 3. Tenders which do not conform to these requirements shall not be considered.***
- 4. If the successful Tenderer fails to comply with its No-bribery commitment, significant sanctions will apply. The sanctions may include all or any of the following:***
 - a) Cancellation of the contract;***
 - b) Liability for damages to the public authority and/or the unsuccessful competitors in the Tendering possibly in the form of a lump sum representing a pre-set percentage of the contract value (liquidated).***
- 5. Tenderers shall make available, as part of their Tender, copies of their anti-Bribery Policy/Code of Conduct, if any, and of their-general or project - specific - Compliance Program.***
- 6. The Government of Kenya has made special arrangements for adequate oversight of the procurement process and the execution of the contract, and has invited civil society and other competent Government Departments to participate in the oversight. Those charged with the oversight responsibility will have full access to all documentation submitted by Tenderers for this contract, and to which in turn all Tenderers and other parties involved or affected by the project shall have full access (provided, however, that no proprietary information concerning a Tenderer may be disclosed to another Tenderer or to the public)***

Further, the Tender Document provided for Form 11. Anti-Corruption Declaration Commitment/Pledge under Section VII. Standard Forms with the following details: -

ANTI-CORRUPTION DECLARATION COMMITMENT/ PLEDGE

(Sections 62 of the PPAD Act, 2015)

I/We/Messrs.....

of Street, Building, P O Box.....

.....

Contact/Phone/E mail.....

Declare that Public Procurement is based on a free and fair competitive Tendering process which should not be open to abuse.

I/We.....

Declare that I/We will not offer or facilitate, directly or indirectly, any inducement or reward to any public officer, their relations or business associates, in connection with

Tender/Tender No

for or in the subsequent performance of the contract if I/We am/are successful.

Authorized**Signature.....**

Name and Title of Signatory.....

The Board studied the two forms and notes that Form 9. Integrity Declaration Form required bidders to make a commitment that they are not involved in any form of bribery during the procurement process and execution of contract. On the other hand, Form 11. Anti-Corruption Commitment/Pledge required bidders to make a declaration that they will not offer or facilitate, directly or indirectly, any inducement or reward to any public officer, their relations or business associates, in connection with the subject tender and subsequent performance of the same. In addition to this, Form 9 did not have a place for signing whereas Form 11 had a blank space at the foot of the said form where an authorized signatory of a bidder would append their signature.

The Board further notes that, Clause 27 of Addendum No. 5 dated 30th April 2020 made the following clarifications: -

No	Bidders Request	KR Response
27	Format for Integrity Declaration Form	Bidders are required to fill, sign and stamp the Integrity Declaration (Form 11) provided in the Tender Document

From the foregoing, the Board notes that, whereas one of the bidders, through the clarification outlined hereinbefore, requested for the "**Format**

for Integrity Declaration Form” the Procuring Entity, through its response, directed bidders that they were required to “fill, sign and stamp the Integrity Declaration (Form 11) provided in the Tender Document”.

At this juncture, the Board deems it necessary to address its mind on the purpose of addenda issued by procuring entities. Section 75 of the Act provides that: -

- "(1) A procuring entity may amend the tender documents at any time before the deadline for submitting tenders by issuing an addendum without materially altering the substance of the original tender.***
- (2) An amendment may be made on the procuring entity's own initiative or in response to an inquiry by a candidate or tenderer.***
- (3) A procuring entity shall promptly provide a copy of the addendum to each person to whom the procuring entity provided copies of the tender documents.***
- (4) The addendum shall be deemed to be part of the tender documents.***
- (5) If the tender documents are amended when the time remaining before the deadline for submitting tenders is less than one third of the time allowed for the preparation of tenders, or the time remaining is less than the period indicated in instructions to tenderers, the***

accounting officer of a procuring entity shall extend the deadline as necessary to allow the amendment of the tender documents to be taken into account in the preparation or amendment of tenders.”

The above provision gives a procuring entity discretion to amend the tender documents on its own volition or in response to enquiries made by candidates and tenderers before the deadline for submitting tenders by issuing an addendum without materially altering the substance of the original tender. Pursuant to section 75 (4) of the Act, such an addendum is deemed to be part of the tender documents. To support this view, the Board observes that section 80 (2) of the Act provides as follows: -

“The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents”

The Board notes that, an addendum issued by a procuring entity forms part of the tender document that was submitted to bidders pursuant to the procuring entity’s invitation notice. As a result, bidders ought to take such an addendum into account when preparing their bids because the addendum will form part of the procedures and criteria that are applied during evaluation. In the instant Request for Review, the Procuring Entity, through Clause 27 of Addendum No. 5 dated 30th April 2020 directed bidders to fill the Integrity Declaration Form as Form 11. No further clarification was given to bidders as to whether the bidders should rely on the contents of Form 9 (which deal with Integrity Declaration) or the contents of Form 11 (which

deals with Anti-Corruption Commitment/Pledge). As a result, a bidder would fill, sign and stamp Form 11 as the Integrity Declaration, because Clause 27 of Addendum No. 5 dated 30th April 2020 amended Clause 7-Mandatory Requirements of Appendix B. Evaluation Criteria found in the Appendix to Instructions to Tenderers of the Tender Document even though there was no cross referencing in the said addendum.

In response to this criterion, the Applicant at page 0040 of its original bid provided a letter dated 21st April 2020 with the following details: -

Re: Tender No. KR/SCM/064/2019-2020-Integrity Declaration-Undertaking by Tenderer on Anti-Bribery Policy/Code of Conduct and Compliance Program

- 1. We, Magal Security Systems Ltd, hereby declare and guarantee that no offer, gift or payment consideration or benefit of any kind, which constitutes an illegal or corrupt practice, has been or will be made to anyone by our organization or agent, either directly or indirectly, as an inducement or reward for the award or execution of Tender No. KR/SCM/064/2019-2020-Design, Supply, Installation, Testing and Commissioning and Maintenance of Unified Security Management System (USMS) for the Standard Gauge Railway (the Tender).***

- 2. We declare and guarantee to make full disclosure in the Tender Documentation of the beneficiaries and amounts of all payments made, or intended to be made, to agents or other third parties (if any), including political parties or electoral candidates, relating to the Tender and, if successful, the implementation of the contract.***
- 3. If being awarded, we will also make full disclosure [quarterly or semi-annually] of all payments to agents and other third parties during execution of the contract, if any.***
- 4. In addition, if being awarded, within six months of the completion of the performance of the contract, we agree to formally certify that no bribes or other illicit commissions have been paid.***
- 5. Lastly, we shall make available, as part of our Tender, copies of our anti-bribery policy/code of conduct-compliance program***

At page 0050 of its original bid, the Applicant attached a letter dated 4th May 2020 with the subject titled as **“Tender No. KR/SCM/064/2019-2020-Integrity Declaration-Undertaking by Tenderer on Anti-Bribery Policy/Code of Conduct and Compliance Program.”** The letter dated 4th May 2020 has similar contents as the letter dated 21st April 2020 found at page 0040 of the Applicant’s original bid.

Having studied the two letters, the Board notes that the Applicant based the contents of the said letters on some aspects of what was provided in Form 9 found in Section VII. Standard Forms of the Tender Document. The Procuring Entity by stating that the **Integrity Declaration is Form 11** pursuant to Clause 27 of Addendum No. 5 dated 30th April 2020 required bidders to fill, sign and stamp Form 11 (which was an Anti-Corruption Declaration Commitment/Pledge) as an Integrity Declaration. The Board notes that the Applicant had no signed and stamped Form 11 in its entire bid. What it had were letters dated 4th May 2020 and 21st April 2020 whose contents had some aspects of Form 9 whose contents were not similar to the contents provided in Form 11 (Anti-Corruption Declaration Commitment/Pledge) but subsequently referred to as the Integrity Declaration pursuant to Clause 27 of Addendum No. 5 dated 30th April 2020.

Accordingly, the Board finds that the Procuring Entity evaluated the Applicant's bid in accordance with Clause 7-Mandatory Requirements of Appendix B. Evaluation Criteria found in the Appendix to Instructions to Tenderers of the Tender Document read together with Clause 27 of Addendum No. 5 dated 30th April 2020.

b) Warranty

Clause 19-Mandatory Requirements of Appendix B. Evaluation Criteria in the Appendix to Instructions to Tenderers of the Tender Document provides as follows: -

19	Bidders must undertake to provide a warranty for all the installation lasting for at least 1 year beyond the Defect Notification period (6 months from the date of official handover) Provide a signed sworn statement signed by a commissioner for oaths	Mandatory
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In response to this criterion, the Applicant at page 1592 of its original bid provided the following: -

Warranty

- a) Subject to the provisions set forth below, Magal hereby warrants for 12 months that all Supplies and Services performed and furnished by Magal to KRC hereunder shall be free from defects in materials and workmanship and shall conform to the requirements of this Contract and its attachments.***
- b) Magal shall repair or replace, at Magal's election and at its premises or on site, any defective part (s) of any item or Supplies and/or Services which is (are) demonstrated to KRCs satisfaction to have been at the time of delivery to KRC defective in material and workmanship or not in conformance with the requirements of this Contract, provided that: -***
- i. Such defect is discovered within twelve (12) months following the date of delivery of the respective item; and***

ii. Buyer gives seller written notice within fifteen (15) days of the discovery of such defect and within the time limit as aforesaid...”

The Board studied Clause 19-Mandatory Requirements of Appendix B. Evaluation Criteria found in the Appendix to Instructions to Tenderers of the Tender Document and notes that the Procuring Entity required bidders to provide a warranty of 12 months that would start running after the defect notification period. Further to this, the said clause explains that the defect notification period is 6 months from the date of Official Handover. This means, a bidder ought to have taken into account the provision that 6 months from the date of Official Handover would be the Defect Notification Period and to provide a warranty of 12 months after the Defect Notification Period.

The Board observes that the Tender Document did not specify a specific date of delivery or Official Handover. However, At Clause 2. Work Plan of Technical Evaluation Criteria of the Tender Document, bidders were required to provide details of the proposed main activities of the assignment with clear timelines for each activity. Accordingly, bidders would propose dates for delivery of the system to be implemented in the subject tender.

Having noted that the last day of the defects notification period ends with 6 months, then the warranty would be 12 months beyond the defect notification period/delivery (i.e. 6 months plus 12 months). The Warranty provided by the Applicant covers defects that have been discovered within

twelve (12) months following the date of delivery of the respective item and falls short of 6 months beyond the defect notification period/delivery, because the defect notification period/delivery must first lapse in order for the 12-month warranty period to start running.

It is the Board's considered view that the Warranty provided by the Applicant at page 1592 of its original bid falls short of the required period of 1 year by six months beyond the Defect Notification Period required under Clause 19-Mandatory Requirements of Appendix B. Evaluation Criteria in the Appendix to Instructions to Tenderers of the Tender Document.

Accordingly, the Board finds that the Procuring Entity evaluated the Applicant's bid in accordance with Clause 19-Mandatory Requirements of Appendix B. Evaluation Criteria found in the Appendix to Instructions to Tenderers of the Tender Document.

From the foregoing, the Board observes that the two criteria challenged by the Applicant which comprise of the reasons why its bid was found non-responsive were all considered at the Preliminary Evaluation Stage. The Tender Document informed bidders that: -

"Pursuant to section 79 of the Public Procurement and Asset Disposal Act, 2015, any tender not meeting the mandatory

and other eligibility criteria will not proceed to Technical Evaluation Stage”

Section 79 (1) of the Act which applies in the instant case provides as follows:

-

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

The above provision demonstrates that a bidder’s failure to comply with all mandatory requirements renders such a bidder’s bid non-responsive. In **Miscellaneous Application No. 407 of 2018, Republic v Public Procurement Administrative Review Board; Arid Contractors & General Supplies (Interested Party) Ex parte Meru University of Science & Technology [2019] eKLR**, the court held that: -

“Compliance with the mandatory requirements for a valid tender process, issued in accordance with the constitutional and legislative procurement framework, is a legal requirement under section 79 (1) of the Act. These requirements are not merely internal prescripts that the Procuring Entity or the Review Board or even this court may disregard at whim. To hold otherwise would undermine the demands of equal treatment, transparency and efficiency under the Constitution.”

The above case demonstrates that bidders have an obligation to meet all mandatory requirements in a Tender Document and such requirements should not be disregarded by a Procuring Entity. Accordingly, the Applicant's failure to comply with all mandatory requirements at the Preliminary Evaluation Stage, means that it could not proceed to Technical Evaluation and the Evaluation Committee had no option but to render the Applicant's bid non-responsive.

Accordingly, the Board finds that the Applicant failed to comply with the mandatory requirements under Clause 7 and 19-Mandatory Requirements of Appendix B. Evaluation Criteria found in the Appendix to Instructions to Tenderers of the Tender Document read together with section 79 (1) of the Act and could not proceed to the Technical Evaluation Stage.

In totality, the Request for Review fails and the Board proceeds to issue 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 Request for Review filed on 25th June 2020 by the Applicant herein with respect to Tender No. KR/SCM/064/2019-2020 for Design, Supply, Installation, Testing and Commissioning and Maintenance of Unified Security Management System (USMS) for the Standard Gauge Railway (SGR), be and is hereby dismissed.**
- 2. The Procuring Entity is hereby directed to proceed with the procurement process to its logical conclusion.**
- 3. 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 16th day of July 2020

CHAIRPERSON

SECRETARY

PPARB

PPARB