

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 9/2020 OF 21ST JANUARY 2020

INTERNET SOLUTIONS (K) LIMITED.....APPLICANT
AND
KENYA AIRPORTS AUTHORITY.....PROCURING ENTITY

Review against the decision of the Accounting Officer of Kenya Airports Authority with respect to Tender No. KAA/OT/ICT/0020/2019-2020 for Provision of Service for Maintenance of Passenger Internet Wireless Hotspots for Kenya Airports Authority.

BOARD MEMBERS

- | | |
|---------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mr. Ambrose Ogeto | -Member |
| 3. Mr. Nicholas Mruttu | -Member |
| 4. Ms. Phyllis Chepkemboi | -Member |

IN ATTENDANCE

- | | |
|-------------------------|-------------------------------|
| 1. Mr. Philemon Kiprop | - Holding brief for Secretary |
| 2. Ms. Maryanne Karanja | - Secretariat |

PRESENT BY INVITATION

APPLICANT

1. Mr. Apollo Mboya (holding brief for Mr. Jude Nalinya)

2. Ms. Moreen Muyuma

3. Mr. Sylvester Wasonga

4. Mr. Richard Muthua

-INTERNET SOLUTIONS (K) LIMITED

-Advocate, Nalinya, Muruka & Co. Advocates

-Advocate, Nalinya, Muruka & Co. Advocates

-Chief Commercial Officer

-Executive Head, Business Consulting

PROCURING ENTITY

1. Mrs. Lilian Okidi

2. Ms. Sharon Luvaga

3. Ms. Cecilia Mwangangi

-KENYA PORTS AUTHORITY

-Procurement Manager

INTERESTED PARTIES

A. SAFARICOM LIMITED

1. Mr. Edwin Wesonga

2. Ms. Faith Njoroge

-Sector Manager

-Account Manager

B. ENCAPSULATED EAST AFRICA LIMITED

1. Mr. John Gitonga

-Business Development

C. SIMBANET COM LIMITED

1. Mr. Joseph Njogu

-Head of Enterprise

BACKGROUND TO THE DECISION

The Bidding Process

Kenya Airports Authority (hereinafter referred to as “the Procuring Entity”) through the Restricted method of tendering invited bidders to submit bids for Tender No. KAA/OT/ICT/0020/2019-2020 for Provision of Service for Maintenance of Passenger Internet Wireless Hotspots for Kenya Airports Authority by addressing letters dated 25th October 2019 to the following bidders:-

- i.** M/s Wananchi Group Limited;
- ii.** M/s Safaricom Limited;
- iii.** M/s Encapsulated East Africa;
- iv.** M/s Jamii Telecommunications Ltd;
- v.** M/s Simbanet Com Ltd;
- vi.** M/s Liquid Telecommunications Kenya Ltd;
- vii.** M/s Telkom Kenya;
- viii.** M/s Airtel Kenya; and
- ix.** M/s Internet Solutions (K) Ltd.

Bid Submission and Opening of Bids

The letter dated 25th October 2019 specified the bid submission deadline as 5th November 2019. However, upon issuance of Addendum No. 1 dated 1st November 2019, this date was postponed to 14th November 2019. However, on 5th November 2019, the Procuring Entity issued Addendum No. 2 thereby extending the bid submission deadline to 19th November 2019, then issued Addendum No. 3 dated 7th November 2019 which rescheduled but did not extend the bid submissions deadline. Subsequently on 19th

November 2019 all bids submitted in response to the subject tender were opened. wherein the Procuring Entity received a total of 4 No. bids in response to its invitation to bid. The same were recorded as follows:-

No.	Bidder's Name	Original	Copy	Amount Quoted (Kshs.)	Tender Security (Kshs)
1	Encapsulated East Africa Limited	1	1	75,282,240.00	NCBA 150,000.00
2	Safaricom Limited	1	1	72,331,396.88 (for 3 years)	Barclays Bank of Kenya Limited 150,000.00
3	Internet Solutions Kenya Limited	1	1	40,386,808.01 (for 3 years)	NCBA 150,000.00
4	Simbanet Com Limited	1	1	41,752,369.00	NCBA 150,000.00

Evaluation of Bids

Having appointed an Evaluation Committee, the bids were evaluated in the following 3 stages;

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

1. Preliminary Evaluation

At this stage, the Procuring Entity applied the evaluation criteria of Stage 1. Preliminary (Mandatory Criteria) at page 21 of the Tender Document, which required bidders to submit a list of 11 documents, failure to which would

lead to a bidder being found non-responsive, hence disqualified from further evaluation.

Three out of four bidders were found to be substantively responsive to proceed to Technical Evaluation. M/s Simbanet Com Ltd was found non-responsive for the reason stated hereinbelow:-

Bidder 4	Simbanet Com Ltd	1) The bidder submitted a Tender security that expires earlier on 13 th April 2020 instead of the required expiring date of 17 th April, 2020. 2) CR12 of Wananchi Group was not provided and they have beneficial ownership.
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2. Technical Evaluation

At this stage, the Procuring Entity applied the evaluation criteria of Stage 2. Technical Evaluation at page 22 of the Tender Document which required bidders to satisfy mandatory requirements relating to the technical specifications of the Tender Document, failure to which a bidder would be found non-responsive and be disqualified from further evaluation. At the end of this stage, only two bidders that were found to be substantively responsive to proceed to Financial Evaluation. M/s Internet Solutions Kenya Limited was found non-responsive for the following reasons:-

Bidder 3	Internet Solutions K. Ltd	1) It was disqualified because they did not provide academic qualification (diploma/degree) of a team leader. 2) They did not provide four (4) onsite personnel based at JKIA to be on shift basis as required.
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3. Financial Evaluation

At this stage, the Procuring Entity applied the evaluation criteria of Stage 3. Financial Evaluation at page 23 of the Tender Document read together with Clause 2.24.3 of Section II. Instruction to Tenderers of the Tender Document which required award of the subject tender to be made to the lowest evaluated bidder. At the end of this stage, the amounts quoted by bidders was recorded as follows:-

S/No	Firm	Tender Sum (Kshs)
1	Encapsulated East Africa Ltd	75,282,240.00
2	Safaricom Ltd	72,331,396.88

Recommendation

The Evaluation Committee recommended that the subject tender be awarded to the lowest evaluated bidder, **M/s Safaricom Ltd** at the quoted price of Seventy-Two Million Three Hundred and Thirty-One Thousand,

Three Hundred and Ninety-Six shillings and Eighty-Eight Cents (**Kshs 72,331,396.88**) only, inclusive of VAT, for a period of three (3) years.

Professional Opinion

In a professional opinion dated 23rd December 2019, the Procuring Entity's General Manager (Procurement & Logistics) opined that the procurement process was done in accordance with the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") and concurred with the Evaluation Committee's recommendation that award of the subject tender be made to M/s Safaricom Ltd. This professional opinion was approved by the Procuring Entity' Acting Managing Director on 24th December 2019.

Notification to Bidders

In letters dated 6th January 2019, the Procuring Entity notified successful and unsuccessful bidders of the outcome of their bids.

THE REQUEST FOR REVIEW

M/s Internet Solutions (K) Limited lodged a Request for Review on 21st January 2020 under a Certificate of Urgency dated and filed on the same date and a Statement in Support of the Request for Review sworn and filed on even date and a List of Documents also filed on the same date. In response, the Procuring Entity lodged a Reply by the Procuring Entity

(hereinafter referred to as “the Procuring Entity’s Response”) dated and file on 23rd January 2020.

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

- 1. An order setting aside the decision by the Respondent to award Tender No. KAA/OT/ICT/0020/2019-2020 for Provision of Service for Maintenance of Passenger Internet Wireless Hotspots for Kenya Airports Authority of September 2019 to Safaricom Limited; and***
- 2. An order declaring the Applicant the lowest evaluated bidder for Tender No. KAA/OT/ICT/0020/2019-2020 for Provision of Service for Maintenance of Passenger Internet Wireless Hotspots for Kenya Airports Authority of September 2019.***

During the hearing, the Applicant was represented by Mr. Apollo Mboya holding brief for Mr. Jude Nalinya on behalf of the firm of Nalinya Muruka & Company Advocates while the Procuring Entity was represented by its Procurement Manager, Mrs. Lilian Okidi. Other bidders present at the hearing, including the successful bidder, M/s Safaricom Ltd stated that they would not address the Board.

PARTIES’ SUBMISSIONS

Applicant’s Submissions

In his submissions, Counsel for the Applicant, Mr. Apollo Mboya, fully relied on the Request for Review. Mr. Mboya submitted that the Request for Review is premised on 12 issues itemised in the said application.

On his first issue, he submitted that the Applicant was aggrieved by the Procuring Entity's award of the tender which in his view was in direct violation of section 3 of the Act which contains the guiding principles regarding procurement, including maximization of value for money.

Counsel then referred the Board to the letter of notification dated 6th January 2019 issued to the Applicant and submitted that the subject tender was advertised in September 2019 yet the Procuring Entity issued a letter dated 6th January 2019 to the Applicant. In Counsel's view, the Procuring Entity had a predetermined bidder for award of the tender. Upon enquiry by the Board, Counsel submitted that this letter was sent to the Applicant through an email dated 7th January 2020.

Further and regarding the letter of notification issued to the Applicant, Counsel submitted that the same is "signed for" one Patrick Wanjuki, General Manager of Procurement and Logistics. Further, it was Counsel's submission that the letter is then issued "for" the Acting Managing Director. In his view, there existed three layers within which delegation was done in the issuing of the said letter of notification.

According to Counsel for the Applicant, section 87 (3) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") requires notification to be made by the accounting officer of a procuring

entity and not any other person. He therefore took the view that the Procuring Entity failed to comply with the aforementioned provision.

He then cited the second issue raised in the Request for Review regarding the reason why the Applicant's bid was found non-responsive, that is, that it failed to provide academic qualification of the team leader. He submitted that upon studying the Applicant's original bid, the Board will find that the Applicant did provide academic qualifications for its team leader itemized in the section named as "S". According to Counsel, the criteria as required in the Tender Document was that the Team Leader was supposed to provide a Diploma/Degree in IT and be certified in network installation with 3 years' experience in networking. Upon enquiry by the Board, Mr. Wasonga, the Chief Commercial Officer of the Applicant submitted that Mr. Mattu (referred to by Counsel for the Applicant), is the Cyber Security Team Leader of the Applicant.

The other reason cited in the letter of notification was that the Applicant never provided 4 onsite personnel to be based at JKIA on a shift basis. In response to this, Counsel submitted that the team specified in "Section S" of the Applicant's original bid as from pages 364 and 378 thereof provided a project implementation team, which comprised of more than 4 personnel and therefore met this requirement. To support this view, Counsel referred the Board to a list of 5 persons namely, Thowet Leonard, Anne Kanyi, Yvonne

Njoki, Robert Musamba and Erick Muchangi whose respective Curriculum Vitae were provided by the Applicant.

On his final issue, Counsel submitted that the Procuring Entity failed to adhere to the guiding principle in section 3 (h) of the Act which requires it to maximize value for money. To support this view, he submitted that the Procuring Entity will spend Thirty-Five Million Shillings (35,000,000/-) more by awarding the subject tender to M/s Safaricom Limited, yet in his view, the Applicant submitted the lowest bid price.

In conclusion, Counsel submitted that the Procuring Entity breached the provisions of the Act and urged the Board to allow the Request for Review as prayed by the Applicant.

Procuring Entity's Submissions

In her submissions, the Procuring Entity's Procurement Manager, Mrs Okidi, submitted that the Procuring Entity would fully rely on its Response and documents submitted to the Board by virtue of section 67 (3) (e) of the Act and further responded to questions asked by the Board as follows:-

On the criteria applied during Technical Evaluation, Mrs. Okidi submitted that the Applicant clearly specified that Mr. James Matu would be its Team Leader and that all other personnel were specified in another section marked as

project implementation team. She further submitted that in respect of Mr. Matu, the Applicant only provided his CISCO certification without a degree/diploma certificate as required of the Team Leader.

Secondly, Mrs. Okidi submitted that the Applicant did provide a list of its personnel but failed to specify whether they will be working offsite or onsite at Jomo Kenyatta International Airport (JKIA). According to Mrs. Okidi, the Procuring Entity required at least 4 personnel to work on site at JKIA.

On the letter dated 6th January 2019 that was addressed to the Applicant, Mrs. Okidi submitted that the same was a typographical error which the Procuring Entity acknowledged and issued fresh notifications letters to bidders clarifying of the said error and stating the correct date as 6th January 2020. Further, as regards issuance of the said letter of notification, Mrs. Okidi referred the Board to a memo that was approved by the Acting Managing Director/CEO of the Procuring Entity authorizing the General Manager, Procurement and Logistics to issue notification letters to bidders.

Upon being prompted by the Board that some other person signed the said notification letter addressed to the Applicant for the General Manager, Procurement and Logistics, Mrs. Okidi submitted that the General Manager, Procurement and Logistics was on leave and therefore some other person signed the letters on his behalf.

On the Applicant's contention that it submitted the lowest bid price and ought to have been awarded the tender, Mrs. Okidi submitted that the Applicant had the lowest bid price as recorded in the Tender Opening Register but was not the lowest evaluated bidder. She further submitted that at the tender opening date, a procuring entity is not able to tell whether or not a bidder is responsive hence, the reason why the Procuring Entity in this instance subjected all bidders to an evaluation process starting with the mandatory requirements (preliminary evaluation), technical evaluation and financial evaluation. According to Mrs. Okidi, the Applicant was found non-responsive at the end of Technical Evaluation.

Given that Counsel for the Applicant raised a new issue in rejoinder, the Board gave Mrs. Okidi an opportunity to respond to the same. This was in reference to registration of M/s Safaricom Limited as an ICT Service Provider whereby Mrs. Okidi submitted that this was one of the eligibility requirements in the Tender Document and the same was satisfied by M/s Safaricom Limited.

Applicant's Rejoinder

In a rejoinder, Mr. Mboya submitted that if it is true that the Applicant was found non-responsive to mandatory requirements of the subject tender, then it ought not to have proceeded to Technical Evaluation. Counsel then raised a new issue in his rejoinder, that the Appendix to Instructions to Tenderers provided for eligibility requirements to participate in the subject tender at

pages 18 to 19 of the Tender Document. According to Counsel, the subject tender was awarded to a bidder who is not registered as an ICT service provider in Kenya.

Upon being asked whether he has documentation to support this allegation, Counsel submitted that since M/s Safaricom Limited is not registered as an ICT service provider, there is no documentation regarding its status in that respect. On further enquiry, Counsel submitted that the ICT authority is the one that issues registration as an ICT service provider.

BOARD'S DECISION

The Board has considered each of the parties' cases, the documentation filed before it, including 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 oral submissions of the parties.

The issues for determination are as follows: -

- I. Whether the Procuring Entity rightfully found the Applicant's bid non-responsive in accordance with the criteria provided in Stage 2. Technical Evaluation of the Tender Document and sections 79 (1) and 80 (2) of the Act;***
- II. Whether the Procuring Entity awarded the subject tender in accordance with the award criteria specified in the Tender***

Document and applicable to the subject tender by dint of section 86 (1) (a) of the Act;

III. Whether the Applicant's notification letter was issued in accordance with section 87 of the Act;

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

Before addressing the issues framed for determination, the Board would like to dispense with an issue raised by the Applicant in its rejoinder. Counsel for the Applicant, Mr. Apollo Mboya submitted that the Procuring Entity awarded the subject tender to a firm that is not registered as an ICT service provider, that is, M/s Safaricom Limited.

The Board having noted that this was a new issue raised through a rejoinder, allowed the Procuring Entity's Procurement Manager, Mrs. Lilian Okidi to respond to the same, but she submitted that she was not privy to the said information noting that she was not part of the Evaluation Committee that had occasion to evaluate all bids submitted to the Procuring Entity. According to Mrs. Okidi, she could not therefore give the correct position regarding the findings by the Evaluation Committee, if at all, regarding registration of M/s Safaricom Limited.

The Board having heard parties' submissions observes that Clause 7 of Stage 1. Preliminary (Mandatory) Criteria at page 21 of the Tender Document provides as follows:-

"Tenderers are requested to submit the following documents, failure to which they shall not be considered for further evaluation

...7. Provide a copy of a relevant and valid Communications Authority of Kenya (CAK) Permit/licence

.....

(Failure to meet any of the above MANDATORY criteria will result in automatic disqualification and bidder shall not be eligible for technical or financial evaluation"

From the above criterion, bidders were only required to provide a copy of a relevant and valid Communications Authority of Kenya (hereinafter referred to as "the Authority") Permit or Licence, which would be sufficient evidence that a bidder has been authorized by the Authority to do the things pertaining to the said permit or licence.

The Evaluation Report received on 23rd December 2019 shows that M/s Safaricom Limited provided a copy of a relevant and valid Communications Authority of Kenya (CAK) licence. This Board, being privy to confidential

information submitted to it pursuant to section 67 (3) (e) of the Act studied the original bid of M/s Safaricom Limited and observes the following:-

- At pages 79 to 82 of its original bid, a Network Facilities Provider-Tier 1 License granted to M/s Safaricom Limited by Communications Authority of Kenya on 23rd June 2014 valid for a period of ten (10) years, otherwise referred to as CAK NFP license, is attached;
- At pages 83 to 87 of its original bid, an Application Services Provider License granted to M/s Safaricom Limited by Communications Authority of Kenya on 23rd June 2014 valid for a period of 10 years, otherwise referred to as CAK ASP license, is attached;
- At pages 88 to 91 of its original bid, an International Gateway Systems and Services Provider License granted to M/s Safaricom Limited by Communications Authority of Kenya on 23rd June 2014 valid for a period of 10 years, otherwise known as CAK International Gateway License, is attached; and
- At pages 92 to 95 of its original bid, a Content Services Provider License granted to M/s Safaricom Limited on 23rd June 2014 valid for a period of 10 years, otherwise known as CAK ASP Content Service Provider License, is attached.

This is sufficient evidence that M/s Safaricom Limited satisfied the requirement under Clause 7 of Stage 1. Preliminary (Mandatory) Criteria at page 21 of the Tender Document.

The Board therefore finds that, the Applicant's allegation that M/s Safaricom Limited was required to be registered as an ICT service provider has not substantiated noting that M/s Safaricom Limited was only required to attach a copy of a relevant and valid Communications Authority of Kenya (CAK) licence which it did, to meet the mandatory requirement of Clause 7 of Stage 1. Preliminary (Mandatory) Criteria at page 21 of the Tender Document.

Having dispensed with the above issue, the Board now proceeds to address the issues framed for determination as follows:-

On the first issue for determination, the Applicant herein having participated in the subject tender received a letter of notification dated 6th January 2019 notifying it of the outcome of its bid in terms of the following details:-

"Reference is made to your bid submitted on 19th November 2019 on the above subject tender.

The evaluation process for the subject tender has been finalized and we regret to inform you that your bid was unsuccessful

It was noted that:

- ***You did not provide academic qualification (diploma/degree) of a team leader;***
- ***You did not provide four (4) on site personnel based at JKIA to be on shift basis as required***

...”

The Applicant, through this Request for Review, challenged the reasons why the Procuring Entity found its bid non-responsive. The Board having considered parties’ submissions, the documentation before it, proceeds to make the following findings:-

i. Technical Personnel- Team Leader

According to Clause 3 of Stage 2. Technical Evaluation at page 22 of the Tender Document, the requirements of a Team Leader were provided as follows:-

ITEM	CRITERIA	SUB-CRITERIA	MEETS CRITERIA
3	Technical Personnel Bidder to provide CVs, academic and professional certificates	<u>Team Leader</u> <ul style="list-style-type: none"> • Diploma/Degree in IT; • Certified in Networking Installations (CCNA or CCNP or equivalent) • Three (3) years’ experience in networking 	YES/NO

In response to this criterion, the Applicant provided the following:-

- At page 354, a Blue Divider labelled as Team Leader;
- At pages 356 to 358, Curriculum Vitae of James Matu whose position as at the time the Applicant submitted its bid was the Senior Installations Engineer of the Applicant; and
- At page 360, a CISCO Certified Network Professional Routing and Switching Certification awarded to James Matu valid from 17th December 2014 to 17th December 2017 for having successfully completed the CISCO Certification Requirements.

The Applicant's Chief Commercial Officer, Mr. Sylvester Wasonga, who was present on the hearing date submitted that Mr. James Matu was the Cyber Security Leader and not the Team Leader, despite the Applicant's original bid having clearly labelled the Blue Divider at page 354 as "Team Leader". This in our view, was the Applicant's representation that the ensuing pages will have documentation to support the qualifications of the person the Applicant nominated as its Team Leader and that is Mr. James Matu. We say so because, for every requirement in the Tender Document, the Applicant arranged its bid in the form of Blue Divider pages each time it was introducing documents to support specific requirements in the Tender Document.

The Board considered the pages referred to by the Applicant to support its view that such pages contain the Degree/Diploma Certificate of its Team Leader and observes as follows:-

- Page 370 referred to by the Applicant's Chief Commercial Officer, contains a Curriculum Vitae of one Derrick Adaka who is named as part of the Applicant's Project Implementation Team as can be noted on the Blue Divider at page 362 of the Applicant's original bid, with no Degree/Diploma Certificate in IT;
- Page 373 referred to by the Applicant's Chief Commercial Officer is blank and does not contain any details.

The Board studied the entire bid of the Applicant but did not find a Degree/Diploma Certificate in IT of Mr. James Matu that would have met the requirement of Clause 3 of Stage 2. Technical Evaluation at page 22 of the Tender Document. This therefore means that the Applicant failed to satisfy this requirement as stipulated in the Tender Document.

On this criterion, the Board finds that the Procuring Entity rightfully found the Applicant's bid non-responsive in accordance with the criterion of Clause 3 of Stage 2. Technical Evaluation at page 22 of the Tender Document.

ii. Implementation Methodology

This requirement was provided in Clause 2 of Stage 2. Technical Evaluation of the Tender Document as follows:-

ITEM	CRITERIA	SUB-CRITERIA	MEETS CRITERIA
2.	Implementation Methodology Propose methodology specific to this project, in sufficient detail to address the following requirements:	a. Project Plan (2 months) (b) Business Continuity Plan -Bidder to indicate potential risks to the 24-hour provision of wireless internet hotspots that may materialize and the Risk Management and Control that will be put in place to ensure business continuity/availability of the system c) Standard Operating Procedures (SOPs) or equivalent of a 24 hour-operation or Business Hours <ul style="list-style-type: none"> • Personnel availability (on shift basis); • Comprehensive Draft SLA 	YES/NO

The dispute in issue relates to requirement No. 2 (c) of Stage 2. Technical Evaluation of the Tender Document reproduced hereinabove and which is contained in the Applicant's letter of notification as the second reason why its bid was found non-responsive. This requirement was further explained by Addendum No. 2 dated 5th November 2019 as follows:-

"The following are tender clarifications/addendum issued regarding the above tender in accordance to instructions to

tenderers clause 2.5 of the bidding document for the reference tender

Query	Response
.....
.....
How many personnel are required to be on shift at JKIA	JKIA should have four (4) personnel on shift arrangement

The Procuring Entity submitted that the Applicant provided the required four (4) personnel in response to the above criterion but failed to specify the personnel that would be working on-site at Jomo Kenyatta International Airport (JKIA). The Applicant on the other hand submitted that it provided a list of more than 4 personnel that would be based at JKIA together with their qualifications.

The Board makes an observation that the Procuring Entity contended that it required the staff proposed by a bidder to work on a shift arrangement, on site and not off-site. The requirement of clause 2 (c) of Stage 2. Technical Evaluation of the Tender Document read together with the Response to Clarification sought by bidders on this criterion as provided for in Addendum No. 2 dated 5th November 2019 did not expressly state whether or not the Procuring Entity required the staff proposed by a bidder to be on-site or off-site.

It is however clear that bidders ought to have indicated at least 4 personnel on shift arrangement. This means, while others are out of shift (that is, not at JKIA) at least 4 personnel should be on-shift (that is, at JKIA). In other words, at least 4 personnel would be on-site, when others are not.

The Board studied the Applicant's original bid and notes that at page 1 thereof, it indicated that the documentation supporting its qualification on Standard Operating Procedures at clause 2 (c) of Stage 2. Technical Evaluation of the Tender Document can be found at pages 309-335 of its original bid. In addition to this, at pages 338 to 350 thereof, the Applicant provided a Client Support Team in the form of a List together with a summary of qualifications and experience of seventeen (17) of its support team. However, there is no details on the shift arrangement that the 17 personnel would take when implementing the subject tender.

Clause 6.21 at page 506 of the Applicant's original bid, the Applicant provided details of the Guaranteed Service Level Agreements & Support by stating as follows:-

"The SLA above will be based on offsite Trouble Shooting, support and problem resolution and in the case of onsite support; an extra minimum of one hour will be required"

The Board notes that, the Applicant provided a list of its personnel and further indicated at page 506 of its bid that it will provide offsite Trouble Shooting whereas the Procuring Entity required at least 4 personnel to be on shift at JKIA, therefore the Applicant failed to satisfy this criterion.

Accordingly, the Board finds that the Procuring Entity rightfully found the Applicant's bid non-responsive in accordance with clause 2 (c) of Stage 2. Technical Evaluation of the Tender Document read together with the Response to Clarification sought by bidders as provided for in Addendum No. 2 dated 5th November 2019.

At this juncture, it is important for this Board to explain the rationale behind responsiveness of a tender. Section 79 (1) of the Act defines a responsive tender as follows:-

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

From the above explanation, the Board observes that a responsive tender is one that conforms to all the eligibility and mandatory requirements in the tender documents. Peter Volmink in his article, ***Legal Consequences of Non Compliance with Bid Requirements***, published in the African Public Procurement Law Journal (2014) 1 APPLJ 41, while citing Article 43 (2) (c) of the United Nations Convention on International Trade Law (Model Law)

on Public Procurement (A/66/17 of 1st July 2011) (UNCITRAL) stated as follows:-

"It is a universally accepted principle of public procurement that bids which do not meet the minimum requirements as stipulated in a bid document are to be regarded as non-responsive and rejected without further consideration."

Notably, Article 43 (2) (c) of the UNCITRAL Model law on Public Procurement states as follows:-

- "43 (1)**
- (2) The procuring entity shall reject a tender:**
- (a)**
- (b)**
- (c) If the tender is not responsive"**

The above provisions support the Board's view that a procuring entity has no obligation to continue evaluating a tender which fails to meet eligibility and mandatory requirements in the tender document when it has already found such a tender non-responsive. This is the essence of providing tender documents to bidders so that they are made aware of the criteria that will be used to evaluate their tenders.

A procuring entity has a further obligation to stick to the criteria and procedures provided in its tender document, when evaluating tenders. Section 80 (2) of the Act states that:-

"The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered."

In **Miscellaneous Application No. 118 of 2019, Republic v Public Procurement Administrative Review Board; Kenya Medical Supplies Authority (KEMSA) (Interested Party) Ex parte Emcure Pharmaceuticals Limited [2019] eKLR**, the court held that:-

"A proper construction of section 79 (1) of the law on procurement shows that the requirement of responsiveness operates in the following manner:- a bid only qualifies as a responsive bid if it meets with all requirements as set out in the bid documents..."

Indeed, public procurement practically bristles with formalities, which bidders often overlook at their peril. Such formalities are usually listed in bid documents as mandatory requirements – in other words, they are a sine qua non for

further consideration in the evaluation process” [Emphasis by the Board]

As rightly put by the court in the above case, mandatory requirements are absolutely necessary (i.e. sine qua non) for further consideration in the evaluation process. This means, the Applicant’s failure to meet all mandatory requirements at the Technical Evaluation stage would render its bid non-responsive and could not be considered any further for the next stage of evaluation.

On the first issue, the Board finds that the Procuring Entity rightfully found the Applicant’s bid non-responsive in accordance with the criteria provided in Stage 2. Technical Evaluation of the Tender Document and sections 79 (1) and 80 (2) of the Act.

On the second issue for determination, the Applicant contended that it had the lowest bid price and therefore ought to have been awarded the subject tender whereas M/s Safaricom Limited did not submit the lowest bid price yet was awarded the subject tender.

The Procuring Entity’s Procurement Manager, refuted the Applicant’s submission and stated that the Procuring Entity awarded the subject tender to the lowest evaluated bidder and not the bidder who submitted the lowest

bid price. According to the Procuring Entity, bidders cannot be determined to be responsive at tender opening where evaluation has not begun. In the Procuring Entity's view, evaluation begins by conducting a preliminary evaluation, technical evaluation and lastly, consideration of price is done at the last stage of evaluation which is referred to as Financial Evaluation Stage.

The Board observes that the Procuring Entity herein specified the award criterion in Clause 2.24.3 of Section II. Instruction to Tenderers of the Tender Document as follows:-

"Subject to paragraph 2.29, the Procuring Entity will award the contract to the successful tenderer whose tender has been determined to be substantially responsive and has been determined to be the lowest evaluated tender, provided further that the tenderer is determined to be qualified to perform the contract satisfactorily"

This award criterion is identified in section 86 (1) (a) of the Act applicable when the Request for Proposal method of tendering is not used and is stated as follows:-

"(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"

The court in **Judicial Review No. 106 of 2014, Republic v Public Procurement Administrative Review Board & 3 others Ex-Parte Olive Telecommunication PVT Limited [2014] eKLR**, while considering the issue of award of a tender based on the lowest evaluated price held as follows:-

"the documents before the Board demonstrated the manner in which the lowest evaluated price was to be reached and the same documents also showed that the lowest evaluated price awarded was reached in that manner...There is no requirement in the Act, the Regulations and the tender document, requiring a procuring entity to award a tender at the price set in the form of tender without carrying out bid evaluation"

The Board while addressing the first issue hereinbefore found that a bid must first meet the eligibility and mandatory requirements (including technical specifications) of a tender document. The Court in the above case observed that the Act and the Public Procurement and Disposal Regulations, 2006 do not have a requirement to award a tender based on the price set out by a bidder in its Form of Tender. This explains why consideration of price is done at the last stage of evaluation after bidders already demonstrated their responsiveness to eligibility and mandatory requirements (including technical specifications) of a tender document.

It is worth noting that Article 227 (1) of the Constitution cites principles that guide public procurement process. The said provision states:-

"When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective"

Procurement of goods and services in a cost-effective manner is one out of five principles that guide public procurement. The principles of fairness, equitability, transparency and competitiveness dictate that bidders are subjected to the same evaluation criteria so that they compete on an equal footing for award of a tender. Therefore, the price a bidder quoted in its Form of Tender does not count as the sole consideration for award of a tender.

From the Procuring Entity's Evaluation Report received on 23rd December 2019, only two bidders proceeded to Financial Evaluation to compete for award of the subject tender. Had the Applicant met all mandatory requirements at Preliminary Evaluation as well as the ones at Technical Evaluation, its bid would have been subjected to Financial Evaluation together with the other two bidders who made it to that stage, so that they all compete on an equal footing for award of the subject tender.

The Applicant however, failed to overcome the second hurdle at Technical Evaluation, and cannot therefore cry foul for award of the subject tender based on the price quoted in its Form of Tender when it failed to demonstrate its responsiveness during the initial stages of evaluation (i.e. Preliminary and Technical Evaluation stages).

The Procuring Entity applied the award criteria set out in its Tender Document and as applicable by dint of section 86 (1) (a) of the Act, noting that M/s Safaricom Limited was found to be the bidder with the lowest evaluated price at the end of Financial Evaluation.

Accordingly, the Board finds that the Procuring Entity awarded the subject tender in accordance with the award criteria specified in Clause 2.24.3 of Section II. Instruction to Tenderers of the Tender Document and applicable to the subject tender by dint of section 86 (1) (a) of the Act.

On the third issue for determination, the Board would like to first make an observation that all letters of notification issued to bidders, including the Applicant herein were dated 6th January 2019. The Applicant took issue with this date and submitted that it appears the Procuring Entity had a predetermined successful bidder even before it advertised the subject tender on 25th October 2019.

The Procuring Entity explained that the letter of notification issued to the Applicant was erroneously dated 6th January 2019 instead of 6th January 2020. The Board having considered parties' submissions on this issue, studied the Procuring Entity's confidential file and notes that upon realizing that it previously issued letters dated 6th January 2019 to bidders, the Procuring Entity proceeded to issue another set of notification letters to all bidders including the Applicant herein which are dated 9th January 2020. The Applicant's letter of 9th January 2020 stated as follows:-

"Reference is made to our letter dated 6th January 2019 in response to your bid submitted on 19th November 2019 in response to the above tender.

It has been noted that we erroneously captured the date of notification as 6th January 2019 instead of 6th January 2020

Kindly note that the correct date of Notification is 6th January 2020

We regret for any inconvenience and we look forward to working with you in future when other opportunities arise."

The above letter demonstrates that the Procuring Entity realised it issued letters of notification by erroneously dating the said letters as 6th January 2019 and not 6th January 2020, acknowledged the error and remedied the same.

This Board is guided by Article 159 (2) (d) of the Constitution which provides as follows:-

"159 (1)

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles

(a)

(b)

(c)

(d) justice shall be administered without undue regard to procedural technicalities"

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

"I have considered the pleadings, submissions and arguments made by the parties herein, and in this regard noted that while the Applicant in its prayers in the Notice of Motion referred to a decision delivered on 19th April 2018 in Request for Review No 98 of 2018, its supporting grounds and submissions refer to the decision delivered on the same date in Request for Review No 42 of 2018, which is the decision the Applicant also annexed in support of its application. The Respondents, 1st

Interested Party and 2nd Interested Party also all refer to the to the decision delivered on 19th April 2018 in Request for Review No 42 of 2018, and the Request for Review stated in the Notice of Motion was therefore clearly a typographical error, which is one that is amenable to correction by this Court pursuant to Article 159 of the Constitution.” [Emphasis by the Board]

It is therefore the Board’s considered view that the erroneous date of 6th January 2019 can be cured by Article 159 (2) (d) of the Constitution, noting that the Procuring Entity corrected this error as soon as it realized the same. Hence, the allegation that the Procuring Entity had a pre-determined decision on award of the subject tender has not been proved to the satisfaction of the Board, as the same lacks merit.

The second sub-issue raised by the Applicant regarding its letter of notification relates to the manner in which the letter was issued. The foot of the said letter dated 6th January 2019 appears as follows:-

“Reference is made to your bid submitted on 19th November 2019 on the above subject tender

.....

Yours faithfully,

.....*[signature affixed]*

for Patrick K. Wanjuki

GM (Procurement and Logistics)

For: AG. Managing Director/CEO”

The Applicant took the view that the said letter of notification was issued on behalf of the Acting Managing Director/CEO of the Procuring Entity by the General Manager (Procurement and Logistics) who also had somebody else sign *for* him. According to the Applicant, it is only the accounting officer of a procuring entity who issues letters of notification to bidders.

On its part, the Procuring Entity submitted that the Acting Managing Director/CEO (the Accounting Officer) delegated his authority to issue notification letters to the General Manager, Procurement and Logistics. To support this submission, the Procuring Entity’s Procurement Manager, Mrs. Okidi, referred the Board to a memo dated 6th January 2020 that was approved by the Acting Managing Director/CEO stating as follows:-

“...in regard to the above, kindly approve the notification to the unsuccessful bidder and delegation to the undersigned to sign for the unsuccessful bidders”

Mrs. Okidi further submitted that the General Manager, Procurement and Logistics was on leave from office hence, someone else signed the notification letters on his behalf.

Having heard parties' submissions on the person who issues letters of notification and whether such authority can be delegated, the Board proceeds to make the following findings:-

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"

From the above provision, it is clear that the accounting officer is the one that issues notification letters to successful and unsuccessful bidders alike. As regards the question whether an accounting officer can delegate his authority to issue notification letters, section 37 of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya provides that:-

"Where by or under an Act, powers are conferred or duties are imposed upon a Minister or a public officer, the President, in the case of a Minister, or the Minister, in the case of a public officer, may direct that, if from any cause the office of that Minister or public officer is vacant, or if during any period, owing to absence or inability to act from illness or any other cause, the Minister or public officer is unable to exercise the powers or perform the duties of his office, those powers shall be had and may be exercised and those duties shall be performed by a Minister designated by the President or by a person named by, or by the public officer holding an office designated by, the Minister; and thereupon the Minister, or the person or public officer, during that period, shall have and may exercise those powers and shall perform those duties, subject to such conditions, exceptions and qualifications as the President or the Minister may direct."

The above provision specifies that a public officer, such as the Accounting Officer herein may delegate his authority because of inability to act in certain

circumstances. However, in exercise of his function as a public officer, the Accounting Officer is bound by principles of leadership and integrity under the Constitution and other legislation. Article 10 (2) (c) of the Constitution outlines national values and principles of governance that bind all State organs, State officers and public officers including "*good governance, integrity, transparency and accountability*". Article 232 (1) (e) of the Act puts it more strictly, that "*the values and principles of public service include accountability for administrative acts*".

Section 5 of the Public Service (Values and Principles) Act No. 1 A of 2015 requires public officers to maintain high standards of professional ethics in that:-

"5 (1) *Every public officer shall maintain high standards of professional ethics*

(2) *For purposes of subsection (1), a public officer maintains high standards of professional ethics if that public officer*

(a) *.....;*

(b) *.....;*

(c) *is transparent when executing that officer's functions;*

(d) *can account for that officer's actions;*

(e) *.....;*

- (f)**;
- (g)**;
- (h) *observes the rule of law.***

From the above provisions, the Board notes that the Accounting Officer has the obligation to maintain high standards of professional ethics as he is held accountable for administrative acts, whether performed personally or through delegated authority.

The above provisions demonstrate that the Accounting Officer has power to delegate his authority, but he must still remain accountable for acts performed by persons to whom he has delegated authority to act on his behalf. In order to observe the national values and principles of governance, it is more efficient for an accounting officer to specify the tender for which the delegated authority is given to avoid instances where such authority is exercised contrary to the manner in which he had specified. The person to whom the authority is delegated may use such delegated authority to undermine the Accounting Officer.

The Constitution and the aforementioned legislation gives responsibilities to all persons in the public service including the Procuring Entity's Accounting Officer to take necessary steps to ensure that his authority, when delegated,

is specific, is given in writing and not open to misuse contrary to the manner he had specified.

It is the Board's finding that to achieve the underlying principles and national values of governance, the delegated authority by an accounting officer must be in writing and specific to a particular tender to avoid instances where such authority is exercised contrary to the manner in which he had specified, thus undermining the accounting officer.

With respect to delegation of authority, the Board finds that the Accounting Officer has the power to delegate his authority to issue letters of notification to successful and unsuccessful bidder.

In this instance, upon delegation of authority to the General Manager, Procurement and Logistics, he had the obligation to act in accordance with the authority delegated to him, and not delegate such authority further especially in this instance where the Accounting Officer did not expressly state that he would allow further delegation of authority that he already delegated.

The court in **Judicial Review Miscellaneous Application No. 115 of 2018, Republic v Kenya Institute of Supplies Management Ex- parte**

Mwaniki Gachuba [2019] eKLR when addressed with a similar issue held as follows:-

"The power to delegate relied upon by the Respondents on the other hand in section 7 is given to the Respondent itself, and in which the Council is one of the delegates as follows:

"Subject to this Act, the Institute may either generally or in any particular case, delegate to any committee of the Council or to any member, officer, employee or agent of the Institute, the exercise of any of the powers of the Institute under this Act."

Therefore, the Council is bound by the general position in law that a person to whom powers or duties are delegated cannot delegate their performance to someone else, under the principle expressed by the maxim delegatus non potest delegare (a delegate has no powers to delegate).

The maxim, "*delegatus non potest delegare*" (a delegate has no powers to delegate) supports the Board's view that even upon delegation of the authority of the Accounting Officer, he still remains accountable for administrative acts done by persons to whom he has delegated his authority. Therefore, authority should not be delegated further by a delegatee (that is,

the General Manager, Procurement and Logistics) without the Accounting Officer's authorization, to avoid instances where such authority is exercised contrary to the manner in which the Accounting Officer had specified thereby undermining the Accounting Officer and his or her office.

In the instant scenario, a person to whom authority was delegated (i.e. the General Manager, Procurement and Logistics) allowed further delegation of his delegated authority (i.e. signing notification letters on behalf of the General Manager, Procurement and Logistics) contrary to the extent of delegation allowed by the Accounting Officer.

It is the Board's finding that the person who signed notification letters for the General Manager, Procurement and Logistics acted without authority, since the General Manager, Procurement and Logistics had no powers to further delegate authority delegated to him.

It is worth noting that it is only letters of notification addressed to unsuccessful bidders including the Applicant herein that were signed for the General Manager, Procurement and Logistics and issued on behalf of the Acting Manager, Procurement and Logistics.

Hence, the letters of notification of unsuccessful bid (including the one issued to the Applicant) dated 6th January 2019 signed for the General Manager,

Procurement and Logistics and issued on behalf of the Acting Managing Director/CEO, are null and void.

This Board has already made an observation that upon realizing the erroneous date of 6th January 2019, letters dated 9th January 2020 were addressed to all bidders including the Applicant acknowledging the error of dates and rectifying the same. However, the letters dated 9th January 2020 to all unsuccessful bidders were signed as follows:-

"Yours Faithfully

.....[signature affixed]

for GM (Procurement and Logistics)

For: Managing Director/CEO"

The letters of 9th January 2020 did not cure the manner in which the letters dated 6th January 2019 were signed, noting that they were issued the same way and as already noted, the General Manager, Procurement and Logistics could not further delegate his delegated authority where it was not expressly allowed by the Accounting Officer. Hence, the letters dated 9th January 2020 are also null and void.

Having dispensed with letters of notification issued to unsuccessful bidders, the Board observes that the letter of notification to the successful bidder, M/s Safaricom Ltd dated 6th January 2019 appears as follows:-

"Reference is made to your bid submitted on 19th November 2019 on the above tender

The evaluation process for the subject tender has been finalized and we are pleased to inform you that your bid has been determined to be the lowest evaluated...

.....

The contract shall be signed by the parties within the tender validity period but not earlier than fourteen (14) days from the date of this letter

This letter of notification is issued in accordance with the Public Procurement and Asset Disposal Act, 2015

.....***[signature affixed]***

Alex Gitari

AG. MANAGING DIRECTOR/CEO

Further, the letter dated 9th January 2020 addressed to the successful bidder upon realizing the erroneous date of 6th January 2019 has the following details:-

"Reference is made to our notification of intention to enter into a contract which was dated 6th January 2019 in response to your bid submitted on 19th November 2019 in response to the above tender

It has been noted that we erroneously captured the notification of intention to enter into a contract date as 6th January 2019 instead of 6th January 2020

Kindly note that the correct notification of intention to enter into a contract date is 6th January 2020" and amend your acceptance letter and performance bond accordingly

This letter of notification is issued in accordance with the Public Procurement and Asset Disposal Act, 2015

.....***[signature affixed]***

Alex Gitari

AG. MANAGING DIRECTOR/CEO

From the foregoing, the letter dated 6th January 2019 and the one dated 9th January 2020 were all issued by the Acting Managing Director/CEO (the Accounting Officer) of the Procuring Entity, despite letters to unsuccessful

bidders having been signed for the General Manager, Procurement and Logistics and issued on behalf of the Accounting Officer.

This Board is guided by the often cited legal maxim as stated by Lord Mansfield CJ in **Holman v Johnson (1775) 1 Cow 341** that:

"... No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act

In **Civil Appeal No. 56 of 2010, Isaac Kirubi v Juderaph Muturi [2015] eKLR**, the court held that:-

"An illegality remains as such, and no party should benefit from such"

Therefore, despite the letters addressed to the successful bidder having been issued by the Accounting Officer as required by section 87 (1) of the Act, this Board will not allow the Procuring Entity to benefit from an act that is null and void to the extent that notification letters to unsuccessful bidders were signed for the General Manager, Procurement and Logistics and issued on behalf of the Acting Managing Director/CEO without evidence that the Acting Managing Director/CEO allowed further delegation of the authority he delegated to the General Manager, Procurement and Logistics. It is the Board's considered view that the Procuring Entity failed to act in a manner

that promotes the rule of law and must be held accountable for its administrative acts.

In addition to this, section 87 (3) of the Act requires the accounting officer of a procuring entity to issue notification letters simultaneously to the successful and the unsuccessful bidders.

In summary, the Board finds that the Letter of Notification of unsuccessful bid issued to the Applicant (including all unsuccessful bidders) were not issued in accordance with section 87 (3) of the Act.

In determining the appropriate orders to grant as the last issue framed for determination, the Board already established that the Procuring Entity rightfully found the Applicant's bid non-responsive at the Technical Evaluation stage and could not therefore proceed to Financial Evaluation to compete for award of the subject tender.

Even if the Board found that the Applicant ought to have proceeded to Financial Evaluation, this Board would have directed the Procuring Entity to re-instate the Applicant's bid at the Financial Evaluation stage, to carry out a re-evaluation at that stage and award the tender in accordance with the award criteria specified in Clause 2.24.3 of Section II. Instruction to

Tenderers of the Tender Document read together with section 86 (1) (a) of the Act.

Hence, the Applicant's prayer that it be declared the lowest evaluated bidder cannot be granted.

The Board has also found that the notification letters issued to unsuccessful bidders are null and void and that the Procuring Entity cannot be allowed to benefit from an act that is null and void, hence, it should be held accountable for its administrative acts. It is therefore just that this Board directs the Procuring Entity to issue new notification letters simultaneously to the successful and unsuccessful bidders alike, in accordance with section 87 (1) and (3) of the Act, taking into consideration the Board's finding on the manner in which delegated authority may be exercised.

As regards, the issue of costs, the court in **Judicial Review Application No. 6 of 2014, Republic vs Rosemary Wairimu Munene, Ex-Parte Applicant & Ihururu Dairy Farmers Co-operative Society Ltd** held as follows:-

"The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event....."

The **Halsbury's Laws of England 4th Edition (Re-issue), [2010], Volume 10** at paragraph 16 reads that:-

"The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice" [Emphasis added].

In the instant case, the Applicant's grounds in the Request for Review challenging the outcome of its bid have failed, which would have made the Procuring Entity the successful party in these proceedings. However, the Board has found that the manner in which notification letters were issued to unsuccessful bidders offends section 87 of the Act, therefore making the Applicant a successful party, but to the extent of issuance of letters of notification to bidders. In essence, both parties have lost and won on particular aspects. It is the Board considered view that it should refrain from awarding costs to either party in the circumstances.

In totality of the foregoing, the Request for Review succeeds only in respect of 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 letter of notification of Intention to enter into a contract dated 6th January 2019 addressed to M/s Safaricom Ltd with respect to Tender No. KAA/OT/ICT/0020/2019-2020 for Provision of Service for Maintenance of Passenger Internet Wireless Hotspots for Kenya Airports Authority, be and is hereby cancelled and set aside.**

- 2. The letters of Notification of Unsuccessful bid dated 6th January 2019 addressed to all unsuccessful bidders including the Applicant herein with respect to the subject tender, are hereby cancelled and set aside.**

- 3. The Procuring Entity is hereby directed to issue new letters of notification to the successful bidder and all unsuccessful bidders in accordance with section 87 (1) and (3) of the Act within seven (7) days from the date of receipt of the signed decision, taking into consideration the findings of the Board in this case.**

4. Each party shall bear its own costs in the Request for Review

Dated at Nairobi this 12th day of February 2020

CHAIRPERSON

SECRETARY

PPARB

PPARB

Delivered in the presence of:-

- i.** Mr. Mboya for the Applicant;
- ii.** Ms. Okidi for the Respondent;
- iii.** Mr. Gitanga for M/s Encapsulated East Africa Limited; and
- iv.** Mr. Wesonga and Ms. Njoroge for M/s Safaricom Ltd.