

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 21/2020 OF 12TH FEBRUARY 2020

BETWEEN

PARITY PERFORMANCE

& COMPLIANCE LIMITED.....APPLICANT

AND

DIRECTOR GENERAL KENYA NATIONAL

QUALIFICATIONS AUTHORITY.....RESPONDENT

Review against the decision of the Director General of the Kenya National Qualification Authority with respect to Tender No. KNQA/01/2019-2020 for Supply, Installation, Configuration and Commissioning of a National Qualifications Information Management System

BOARD MEMBERS

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

IN ATTENDANCE

- | | |
|------------------------|------------------------------|
| 1. Mr. Philemon Kiprop | -Holding brief for Secretary |
|------------------------|------------------------------|

2. Ms. Judy Maina

-Secretariat

PRESENT BY INVITATION

APPLICANT

-PARITY PERFORMANCE & COMPLIANCE LIMITED

1. Mr. Mwaniki Gachuba

-Advocate, Mwaniki Gachuba Advocates

2. Mr. Jared Mugendi

-Legal Assistant, Mwaniki Gachuba Advocates

RESPONDENT

-KENYA NATIONAL QUALIFICATIONS AUTHORITY

1. Mr. Stephen Mogaka

-Advocate, Musyoki Mogaka & Company Advocates

2. Mr. Paul Macharia

-Advocate, Musyoki Mogaka & Company Advocates

INTERESTED PARTIES

A. TECHNO BRAIN

1. Mr. Srinadh Kotturu

-General Manager

2. Mr. Wellington Nyugi

-Account Executive

B. DYNASOFT

1. Mr. Trevor Ojiro -Business Development
2. Mr Eric Ndegwa -Technical Pre-Sales Executive

C. REEVE

1. Mr. Peter Simeon -Developer

D. ABNO SOFTWARE

1. Mr. Simon Njogu -Business Analyst

BACKGROUND TO THE DECISION

The Bidding Process

Kenya National Qualifications Authority (hereinafter referred to as "the Procuring Entity) invited eligible and interested bidders to submit their bids in response to Tender No. KNQA/01/2019-2020 for Supply, Installation, Configuration and Commissioning of a National Qualifications Information Management System (hereinafter referred to as "the subject tender"). The Request for Proposal was advertised on KNQA website and *myGov* Newspaper.

Bidders were instructed to download tender documents from the Procuring Entity's website on www.knqa.go.ke or pay Kshs. 3000/- to collect hard copies from the Procuring Entity's offices located at Uchumi House, 6th Floor, Nairobi.

Bid Submission Deadline and Opening of bids

A total of seven (7) firms submitted bids and the same were opened on 27th November 2019 as follows: -

No	Firm name
1.	M/s Parity Performance and Compliance Limited
2.	M/s Dynasoft Business Solutions Limited
3.	M/s Abno Software International
4.	M/s Techno Brain
5.	M/s Reeve Technologies Limited
6.	M/s Systems Re-engineering Limited
7.	M/s Surestep Systems Solutions

Evaluation of bids

According to the Procuring Entity's Tender Document with respect to the subject tender, evaluation was to be conducted in the following three stages:-

- Preliminary Evaluation
- Technical Evaluation;
- Financial Evaluation.

The Evaluation Committee developed an evaluation tool with the main scoring areas as indicated below: -

ITEM	SCORE
Preliminary/mandatory requirements	Maximum 40
Company details	Maximum 5
Firms proof of prior experience	Maximum 10
Financial capability	Maximum 5
Solution	Maximum 15
Methodology	Maximum 10
Staff and competencies	Maximum 5

Training and support	Maximum 5
Payment integration	Maximum 5
TOTAL SCORE	100

Preliminary Evaluation

At this stage of evaluation, bidders were evaluated against the following mandatory criteria and any bidders who failed in any of the criteria did not proceed to the next stage of evaluation.

The Evaluation criteria were as follows:-

Criteria/Bidders
1. Pay a bid bond of Kshs 50,000
2. Duly filled, signed and stamped RFP
3. Copy of Certificate of registration/incorporation in Kenya
4. Copy of valid KRA tax compliance certificate
5. Pin registration certificate
6. Valid business permit
7. Duly filled and signed confidential business questionnaire
8. Duly filled signed bidder declaration and integrity
9.. Submit one copy and one original of tender document
10. Dully filed and signed financial submission forms
11. All pages original and copy of the tender documents be serialized and initialized by the tender including attachment to the bid
12. Tenders must submit manufacturers authorization or letter of product ownership

Upon conclusion of Preliminary Evaluation, four (4) firms proceeded for technical evaluation as follows: -

- a) M/s Abno Softwares International
- b) M/s Dynasoft Business Solutions Limited
- c) M/s Techno Brain

d) M/s Parity Performance & Compliance Limited

Three (3) firms failed to meet the preliminary mandatory requirements and were disqualified from further evaluation as follows: -

a) M/s Reeve Technologies Limited

b) M/s System Re-engineered Limited

c) M/s Surestep System and Solutions Limited.

Technical Evaluation

At this stage of evaluation, bidders were required to obtain a minimum pass mark of 70% out of the possible 100%, in order to proceed to the next stage of evaluation.

The Technical Evaluated Scores were as follows: -

Bidder Name	Score
M/s Abno Softwares International	80
M/s Dynasoft Business Solutions Limited	30
M/s Techno Brain	
M/s Parity Performance Limited	

Technical Weighted Scores were calculated for each proposal as follows: The technical score of a firm divided by 100 multiplied by 70, which was the maximum score of technical evaluation.

The Technical Weighted Evaluated Scores for each proposal were as follows:

Bidder Name	Score %
M/s Abno Softwares International	55.3
M/s Dynasoft Business Solutions Limited	52.5
M/s Techno Brain	67.2
M/s Parity Performance Limited	51.8

Financial Evaluation

The following financial proposals proceeded for financial evaluation: -

- M/s Abno Softwares International – Kshs. 46,429,000.00/-
- M/s Dynasoft Business Solutions Limited - Kshs. 22,901,300.00/-
- M/s Techno Brain - Kshs. 20,799,868.00/-
- M/s Parity Performance and Compliance Limited - Kshs. 18,792,000.00/-

Financial scores were computed and the lowest evaluated financial proposal was given a maximum score of 30%.

The scores were as follows: -

FINANCIAL PROPOSAL (F) %	100%
MAXIMUM SCORE %	100 %
ABNO SOFTWARES INTERNATIONAL	40.47 %
DYNASOFT BUSINESS SOLUTIONS LIMITED	82.06 %
TECHNO BRAIN	90.35 %
PARITY PERFORMANCE AND COMPLIANCE LIMITED	100 %

Weighted financial scores were calculated and the results were as follows: -

WEIGHTED FINANCIAL PROPOSAL (F) %	30%
MAXIMUM SCORE %	30 %
ABNO SOFTWARES INTERNATIONAL	12.14 %
DYNASOFT BUSINESS SOLUTIONS LIMITED	24.62 %
TECHNO BRAIN	27.10 %
PARITY PERFORMANCE AND COMPLIANCE LIMITED	30 %

Combination of Technical and Financial Scores

The Evaluation Committee then combined the technical weighted scores (T), computed to 70% and the financial scores (P), computed to 30% to give a total of 100 %, (T+P) =100, to give the total evaluated score of a firm.

The results were as follows: -

SCORES %	MAXIMUM SCORE %	ABNO SOFTWARES INTERNATIONAL	DYNASOFT BUSINESS SOLUTIONS LIMITED	TECHNO BRAIN	PARITY PERFORMANCE AND COMPLIANCE LIMITED
% OF WEIGHTED TECHNICAL TOTAL SCORE (T)	70%	55.3%	52.5%	67.2 %	51.8%
% OF WEIGHTED FINANCIAL SCORE (P)	30%	12.14 %	24.62 %	27.10%	30 %

TOTAL EVALUATED SCORE (T+P)	100%	67.44%	77.12%	94.30%	81.80%
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The Evaluation Committee’s Recommendations

Upon conclusion of the evaluation process, **M/s Techno Brain** was recommended for the award of the subject tender for being the best technically and financially evaluated bidder at the total cost of **Ksh 20,799,868.00/-**.

Professional Opinion

In view of the evaluation process, the Procuring Entity’s Head of Procurement reviewed the Evaluation Report and concurred with the recommendation of award made by the Evaluation Committee which was approved by the Accounting Officer on 30th January 2020.

THE REQUEST FOR REVIEW NO. 4 OF 2020

M/s Parity Performance & Compliance Limited (hereinafter referred to as “the Applicant”), lodged a Request for Review dated 10th February 2020 and filed on 12th February 2020 (hereinafter referred to as “the Request for Review”) together with a Verifying Affidavit sworn on 10th February 2020 and filed 12th February 2020 (hereinafter referred to as “the Applicant’s Affidavit”). The Applicant further filed a Further Affidavit in Support of the Request for Review (hereinafter referred to as “the Applicant’s Further Affidavit”) sworn and filed on 25th February 2020.

In response, the Procuring Entity filed a Replying Affidavit sworn and filed on 18th February 2020 (hereinafter referred to as “the Procuring Entity’s Affidavit”). The Procuring Entity further filed a Notice of Preliminary Objection dated 24th February 2020.

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

- i. An order annulling the tender;***
- ii. An order annulling and cancelling any contract executed pursuant to the impugned tender award;***
- iii. An order directing the Respondent to award the tender to the Applicant;***
- iv. An order awarding costs to the Applicant***

During the hearing, the Applicant was represented by Mr. Gachuba on behalf of the firm of Mwaniki Gachuba Advocates whereas the Procuring Entity was represented Mr. Mogaka on behalf of the firm of Musyoki Mogaka and Company Advocates.

PARTIES’ SUBMISSIONS

The Applicant’s Submissions

In his submissions, Counsel for the Applicant, Mr. Gachuba, fully relied on the Request for Review, the Applicant’s Affidavit, Further Affidavit and supporting documentation thereto.

Mr. Gachuba submitted that it was clear from the Procuring Entity's Tender Document in Clause 2.8, 3, 2.14.8 and 2.14.9 that the Procuring Entity had undertaken to award the tender to a bidder who achieved the minimum score of 70% at technical evaluation and submitted the lowest quote. Mr Gachuba submitted that the Applicant submitted the lowest quote in its bid to the Procuring Entity, which fact had not been disputed by the latter. It was therefore the Applicant's submission, that it met the minimum score of 70% and submitted the lowest quote and therefore the Procuring Entity was obligated to comply with its Tender Document and award the subject tender to the Applicant.

Mr Gachuba submitted that the Tender Document did not provide for a weighted score thus the Procuring Entity in calculating a weighted score for all the bids at both technical and financial evaluation, introduced a new criteria not in the Tender Document. It was therefore the Applicant's submission that based on the submissions of the Procuring Entity and the scores provided in its Response that it was possible to assume that the Applicant met the minimum score of 70%.

Mr. Gachuba referred the Board to the Applicant's annexure JW which was a letter from the Applicant to the Procuring Entity dated 6th January 2020 requesting for information with respect to the outcome of the subject tender. He submitted that the Procuring Entity in its letter dated 20th December 2020, did not provide any scores but merely informed the Applicant that its bid was found to be technically responsive. Mr.

Gachuba submitted that the Applicant sent two letters seeking clarification from the Procuring Entity on this basis, but as at the time of the hearing, the Applicant was yet to receive a response from the Procuring Entity.

Mr. Gachuba contended that no notice was given to the Applicant that new evaluation criteria would be used by the Procuring Entity to evaluate its bid. As a result of these new criteria, the tender was awarded to a bidder who did not submit a cost effective financial proposal and it was therefore the Applicant's submission that the said tender process was conducted contrary to the Procuring Entity's Tender Document.

It was also the Applicant's contention that the Procuring Entity did not issue a letter of notification to the Applicant in accordance with section 87 (3) of the Act. Mr. Gachuba contended that contrary to the Procuring Entity's submission, it did not serve the Applicant by registered mail and submitted that the number referred to in paragraph 17 of the Procuring Entity's Affidavit, was the number of the purported certificate of postage with respect to M/s Dynasoft Limited and not to the Applicant.

Mr Gachuba contended that section 64 of the Act provides how service should be effected and the modes of services provided for are e-service or ICT service and not postage or registered mail. He invited the Board to consider section 3(5) of the Interpretation and General Provisions Act Chapter 2 of the Laws of Kenya (hereinafter referred to as "the IGPA")

which provides that service by post can only occur where the Act provides for that mode of service, which in this case it did not.

Mr Gachuba submitted that the Tender Document provided for service by email so it was the Applicant's contention that the Procuring Entity departed from the mode of service provided for in its own Tender Document.

Counsel submitted that the purported service referred to in the Procuring Entity's submissions was effected on 14th January 2020. However, the same submissions reflect that the tender was awarded on 28th January 2020, the successful bidder accepted the award on the same date and the contract was signed two days later, on 30th January 2020.

Mr Gachuba contended that the Applicant's Request for Review application was based on its letter dated 5th February 2020, which the Procuring Entity did not respond to, which thus prompted the Applicant to lodge its review application. The Applicant filed its Request for Review within seven days from the 5th of February 2020 and therefore it was the Applicant contention that it filed the same within time.

Mr Gachuba submitted that although the subject tender was titled RFP, it was an open tender that was to be awarded under section 86 (1) (a) of the Act, yet the Procuring Entity purported to award the tender on the

basis of section 86 (b) of the Act, which was not provided for under the Tender Document.

In conclusion, Mr Gachuba urged the Board to allow the Request for Review and award the Applicant costs due to the Procuring Entity's failure to resolve the matter accordingly.

Respondent's/The Procuring Entity's Submissions

In his submissions, Mr Mogaka, fully relied on the Procuring Entity's Affidavit, and supporting documentation thereto.

Mr. Mogaka submitted that the Procuring Entity filed a Notice of Preliminary Objection on the basis that the Applicant's Request for Review application was filed out of time, contrary to section 167 (1) of the Act and Regulations 73 (2) (ii) of the Public Procurement and Disposal Regulations (2006 Regulations).

Mr. Mogaka submitted that the Procuring Entity annexed a copy of the certificate of postage to its Notice of Preliminary Objection which at its top left indicated that the sender of the document was the Procuring Entity and the addressee/recipient was the Applicant. In response to the Applicant's contention that the certificate number referred to in its submissions is with respect to M/s Dynasoft and not to the Applicant, the Procuring Entity submitted that the same was a typographical error in its Affidavit, and invited the Board to examine the certificates of

postage submitted to the Board in its confidential documents and confirm that indeed the Applicant was duly served by the Procuring Entity.

Mr Mogaka contended that the Tender Document did not expressly provide for a mode of service and in the Procuring Entity's view, registered post was the best mode of service. Mr Mogaka submitted that the Procuring Entity was guided by section 3(5) of the IGPA and accordingly, where registered post is used, it is assumed that service is effected at the time the letter would have been delivered.

In support of the Procuring Entity's submission in this regard, Mr Mogaka invited the Board to consider its list of authorities which are persuasive with respect to service and the interpretation of section 3(5) of the IGPA.

On the second limb of the Preliminary Objection, Mr Mogaka submitted that the successful bidder was a necessary party to the review application and that any decision in this matter would affect its contractual rights noting that a contract had already been executed between the Procuring Entity and the said bidder.

In response to a query from the Board, Mr. Mogaka submitted that the Procuring Entity's Affidavit had several typographical errors with respect to the dates cited therein. In reference to paragraph 21 and 22 of the

Procuring Entity's Affidavit, Mr. Mogaka clarified that notification of award to the successful bidder was dated 8th January 2020 whereas the successful bidder accepted the same vide a letter dated 28th January 2020. He further submitted that although the Professional Opinion was forwarded on 30th January 2020 and approved on the same date, this was not the date that the opinion was prepared and approved and it was the Procuring Entity's submission that the Professional opinion must have been prepared and approved by the Accounting Officer following the evaluation of tenders on 31st December 2019.

In response to another query from the Board, Mr. Mogaka submitted that the subject tender was an RFP and the invited bidders were accredited ICT service providers. He submitted that service being sought was an upgrade of its ICT system and an installation of the software necessary for implementation of the same.

Mr. Mogaka submitted that the Applicant was found to be non-responsive since the award criteria was not that of the lowest quote but was based on the combined weighted score of both the technical and financial evaluation. As a result therefore, the Applicant's bid was not the most responsive tenderer and therefore it was the Procuring Entity's submission that the award of tender was not due to the Applicant.

Mr Mogaka submitted that the award criteria used was not expressly provided for in the Tender Document but section 86 (b) of the Act was provided for in the Tender Document and further implied in this

instance. In any event, it was the Procuring Entity's submission that no party was prejudiced as a result.

Finally, Mr Mogaka urged the Board to uphold the award and the contract executed thereto; dismiss the Request for Review application and award costs to the Procuring Entity.

The Applicant's Rejoinder

In a rejoinder, Mr Gachuba submitted that section 3 (5) of the IGPA provides that service was deemed to happen the day a letter is posted unless the contrary is proved. Mr Gachuba submitted that the Applicant has provided contrary evidence by way of its letter dated 5th February 2020 addressed to the Procuring Entity informing the latter that it had not received any communication on the outcome of its bid and the subject tender.

In any event, Mr Gachuba contended that the notification that was purportedly issued by the Procuring Entity could not be a notification of award as there cannot be an award without the Accounting Officer considering the Professional Opinion which was done on 30th January 2020, after an award had been made and accepted by the successful bidder. It was the Applicant's submission that a contract that arises from such an award is unlawful and does not satisfy section 135 (3) of the Act as read with section 167 (1) of the Act.

Further, Mr. Gachuba submitted that there is no provision in the Tender Document that states that section 86 (b) of the Act would be applied as the award criteria and the Tender Document only makes reference to award to the lowest quote.

He therefore urged the Board to allow the Applicant's Request for Review and grant the orders therein.

BOARD'S DECISION

The Board has considered each of the parties' cases, the documents filed before it, including confidential documents submitted to it pursuant to section 67 (3) (e) of the Public Procurement and Asset Disposal Act (hereinafter referred to as "the Act") and the oral submissions by all parties to the Request for Review.

The issues for determination are as follows:-

I. Whether the Request for Review filed on 12th February 2020 was lodged outside the statutory period under section 167 (1) of the Act thus ousting the jurisdiction of this Board;

Depending on the outcome of this issue: -

II. Whether the Request for Review is fatally incompetent for the Applicant's failure to join the successful tenderer as a party to the Request for Review;

Depending on the outcome of the second issue: -

III. Whether the contract dated 30th January 2020 with respect to the subject tender signed between the Procuring Entity and M/s Techno Brain Limited ousts the jurisdiction of this Board.

Depending on the outcome of third issue: -

IV. Whether the Procuring Entity evaluated the Applicant's bid in accordance with section 80 (2) of the Act as read with Article 227 (1) of the Constitution;

V. What are the appropriate reliefs to grant in the circumstances?

The nature of a preliminary objection, was explained in **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A. 696** as follows:-

"A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit."

The Board observes that the Procuring Entity raised a Preliminary Objection to the Request for Review challenging the jurisdiction of this Board on two grounds:

Firstly, that the Request for Review filed on 12th February 2020 offends section 167 (1) of the Act, having been filed thirty days after the Procuring Entity's notification of award dated 8th January 2020, which was issued to the Applicant through its registered mail on 14th January 2020.

Secondly, that the Request for Review filed on 12th February 2020 is fatally defective in that it invites the Board to condemn unheard a person/entity not party to the proceedings, that is the successful bidder in the subject tender, in violation of Article 47, 48 and 50 of the Constitution of Kenya 2020 and section 4 of the Fair Administrative Act, 2015.

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

Whether the Request for Review filed on 12th February 2020 was lodged outside the statutory period under section 167 (1) of the Act thus ousting the jurisdiction of this Board;

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

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

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

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

"So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as

any judicial proceedings is concerned. It is a threshold question and best taken at inception. "

Accordingly, once a jurisdictional issue is before a court or a decision making body, it must be addressed at the earliest opportune moment and it therefore behooves upon this Board to determine whether it has the jurisdiction to entertain the substantive Request for Review.

The jurisdiction of this Board flows from section 167 (1) of the Act which provides that:-

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

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 Board considered the use of the word 'or' and notes that the Concise Oxford English Dictionary (11 Edition, Oxford University Press) defines "or" as a **'conjunction used to link alternatives.'**

Applying the foregoing construction, the Board notes that the use of the word "or" in section 167 (1) of the Act connotes a conjunction that gives alternatives. The first option which an aggrieved candidate or tenderer has, is to file its Request for Review within fourteen (14) days of notification of award. The alternative option is to file a Request for Review within fourteen (14) days from the date the aggrieved candidate or tenderer learns of the alleged breach by the Procuring Entity at any stage of the procurement process or disposal process.

To determine the time the Applicant ought to have approached this Board we find it necessary to give a brief background to the subject procurement process.

The Procuring Entity, through a Request for Proposals, invited interested and eligible tenderers to collect Tender Documents and submit their bids with respect to the subject tender. By the tender closing date of 27th November 2019, the Procuring Entity received a total of seven (7) bids which were evaluated by the Procuring Entity's Evaluation Committee.

Through an Evaluation Report signed on 31st December 2019, the Procuring Entity's Evaluation Committee recommended award of the subject tender to the successful bidder, that is, M/s Techno Brain for being the best technically and financially evaluated bidder.

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

It was the Applicant's contention that it was not notified of the outcome of its bid. The Applicant submitted that vide a letter dated 5th February 2020, it enquired from the Procuring Entity as to the status of its bid and the procurement process. However, the Applicant submitted that on 6th February 2020, the Procuring Entity called the Applicant's Chief Executive Officer on phone and informed him that the tender had already been awarded and that the Applicant's notification of the same had been sent by post.

It was the Applicant's submission that as at the hearing date, the Applicant was yet to receive a response to its letter dated 5th February 2020 and/ or a notification of the outcome of its bid from the Procuring Entity.

In response, the Procuring Entity disputed the Applicant's submissions and contended that notifications to unsuccessful bidders, including the Applicant herein, were dispatched via registered post on 14th January 2020. In support of its assertions, the Procuring Entity annexed a certificate of postage to its Response as proof that the said notification was issued and delivered to the Applicant.

According to the Procuring Entity, notifications were sent out to bidders via registered post which in its view was the best mode of service and according to section 3 (5) of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya (hereinafter referred to as "the IGPA"), service shall be deemed to be effected at the time at which the letter would be delivered in the ordinary course of the post.

In its determination of this issue, the Board first studied section 87 of the Act which 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) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.***
- (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.***
- (4) For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security.” [Emphasis by Board]***

Accordingly, a procuring entity must notify, in writing, the bidder who submitted the successful tender, that its tender was successful before the expiry of the tender validity period. This section further requires that in the same breath, a Procuring Entity must also notify other bidders who participated in the subject tender that their respective bids were not successful.

Moreover, a procuring entity's notification of unsuccessful bid to a bidder should disclose the reasons why its bid was unsuccessful and further disclose the successful bidder in the procurement process therein, who is determined at the conclusion of an evaluation process.

However, the Board notes that section 87 (3) of the Act is silent on the mode of communication that a procuring entity ought to employ in conveying notifications to both successful and unsuccessful bidders.

Nevertheless, the Board studied section 64 of the Act which reads as follows: -

(1) All communications and enquiries between parties on procurement and asset disposal proceedings shall be in writing.

(2) Information and Communication Technologies (ICT) may be used in procurement and asset disposal proceedings as prescribed with respect to—

(a) publication of notices;

(b) submission and opening of tenders;

(c) tender evaluation;

(d) requesting for information on the tender or disposal process;

(e) dissemination of laws, regulations and directives;

(f) digital signatures; or

(g) as may be prescribed by regulations.

Accordingly, all communications and enquiries between parties on procurement and asset disposal proceedings should be in writing and

Internet and Communication Technologies (ICT) may be used with respect to publication of notices, submission and opening of tenders, tender evaluation, requesting for information on the tender or disposal process, dissemination of laws, regulations and directives and digital signatures.

The Board examined the Procuring Entity's Tender Document and notes that no procedure was provided therein for notification of award to bidders.

However, the Board heard submissions from the Procuring Entity that notifications were sent to bidders via registered post as it considered registered post to be the best mode of service, noting that according to section 3 (5) of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya (hereinafter referred to as "the IGPA"), service shall be deemed to be effected at the time at which the letter would be delivered in the ordinary course of the post.

In this regard therefore, the Board studied section 3 (5) of the IGPA which makes provision on service by registered post which reads as follows: -

"Where any written law authorizes or requires a document to be served by post, whether the expression "serve" or "give" or "send" or any other expression is used, then, unless a contrary intention appears, the service shall be deemed to be effected by properly addressing to the last

known postal address of the person to be served, prepaying and posting, by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of the post. [Emphasis by Board]

From the above provision, it is worth noting that, when a letter is sent via registered post, it should be properly addressed to the last known postal address of the intended recipient and delivery is only effected the time at which the letter would be delivered in the ordinary course of the post, unless the contrary is proved.

However, the Board studied the confidential documents submitted to it in accordance with section 67 (3) (e) of the Act and observes that following evaluation of tenders by the Procuring Entity's Evaluation Committee, which proceedings were captured in a report dated 30th January 2020, the Evaluation Committee recommended award of the subject tender to M/s Techno Brain Limited.

The Board further observes therein that a Professional Opinion was prepared by the Procuring Entity's Supply Chain Manager which was dated and signed on 30th January 2020 and that the Procuring Entity's Accounting Officer signified its approval of the said professional opinion on the same date, that is, 30th January 2020. A contract was then executed between the Procuring Entity and the successful bidder on 30th January 2020.

Notably, notifications of award to both the successful and unsuccessful bidders were prepared by the Procuring Entity and dated 8th January 2020, before the professional opinion was prepared and issued by the Procuring Entity's Supply Chain Manager and further approved by the Accounting Officer on 30th January 2020.

When this discrepancy was brought to the attention of the Procuring Entity, its Counsel indicated that the Professional Opinion was only approved on 30th January 2020 but was issued on an earlier date.

In view of this submission, the Board considered section 84 of the Act which reads as follows: -

"(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).”

From the above provision, the Board observes that the head of procurement function has the responsibility to review an evaluation report in order to give a professional opinion that serves the following functions:-

- a) Provides guidance on the procurement proceedings in the event of dissenting opinions between tender evaluation and award recommendations; and
- b) Guides an accounting officer in making a decision to award a tender.

This means that in making a decision to award a tender, an accounting officer takes into account the views of the head of procurement in his/her professional opinion. In essence, no award can be made before the head of procurement function issues/renders his/her professional opinion in writing and having signed it, so that an accounting officer can take into account the said professional opinion.

Turning to the circumstances of the case, we note that the Procuring Entity’s Supply Chain Manager issued her Professional Opinion which is dated 30 January 2020, after a notification of award dated 8th January 2020 was prepared and posted to the successful and unsuccessful bidders on 14th January 2020.

Even if we were to say that the Professional Opinion was prepared and signed earlier than the 30th of January 2020, we note that the Accounting Officer approved the said professional opinion on 30th of January 2020. Moreover, a contract was executed between the Procuring Entity and the successful bidder on the same date, that is 30th January 2020, which the Board observes is after the issuance and posting of the notifications of award to the successful and unsuccessful bidders.

In view of the foregoing, the Board finds that the notifications of award dated 8th January 2020 and posted to successful and unsuccessful bidders on 14th January 2020, were not notifications of award as envisaged under section 87 of the Act, as the same were issued prior to approval of the Evaluation Committee's recommendation of award by the Accounting Officer.

Having found that there was no notification of award with respect to the subject tender, any contract entered into between the Procuring Entity and the successful bidder herein is null and void noting section 135 (5) of the Act which states that: -

"An accounting officer of a procuring entity shall not enter into a contract with any person or firm unless an award has been made and where a contract has been signed without the authority of the accounting officer, such a contract shall be invalid."

Accordingly a contract cannot be entered into unless an award has been made and such a contract cannot be signed or executed without the authority of the accounting officer. Furthermore, such a contract shall be invalid.

Since no notification of award was made in this instance, the Procuring Entity could not execute a contract with the successful bidder herein, and the contract signed on 30th January 2020 is hereby null and void.

Further, time within which the Applicant ought to have filed its Request for Review could not start running based on the date of postage of the notification of award to the Applicant since the Board has established that the said notification was not a notification of award.

Noting this finding, the question that the Board must now answer is when did an alleged breach of duty occur for the fourteen-day period under section 167 (1) of the Act to start running.

The Board observes that vide a letter dated 5th February 2020, the Applicant enquired from the Procuring Entity as to the status of the procurement process as it had not received a notification from the Procuring Entity informing it of the outcome of its bid.

The Board notes, at this point in time, the Applicant was not aware of an alleged breach of duty by the Procuring Entity as the Applicant was

seeking information regarding the outcome of evaluation of its bid and therefore could not challenge reasons unknown to it.

The Board heard submissions that on 6th February 2020, the Applicant received a letter from the Procuring Entity dated 20th December 2019, inviting the Applicant for the opening of financial bids on 30th December 2019. On the same date, the Applicant submitted that the Procuring Entity called the Applicant's Chief Executive Officer on phone and informed the Applicant that the tender had already been awarded and that the Applicant's notification of the same had been sent by post.

Further, on 7th January 2020, the Applicant wrote to the Procuring Entity requesting for the results of the opening of financial bids, which results the Applicant averred were availed to him verbally on 7th January 2020.

In the absence of any written communication, the Board cannot rely on the notification made by the Procuring Entity to the Applicant by phone, on either 6th or 7th January 2020, noting section 64 (1) of the Act which provides that: -

"All communications and enquiries between parties on procurement and asset disposal proceedings shall be in writing." [Emphasis by the Board]

Accordingly, all communication and enquiries between a procuring entity and bidders should be in writing.

From the above sequence of events, we note that it is not possible for this Board to ascertain the exact date when the Applicant learnt of an alleged breach of duty by the Procuring Entity in order to compute when the statutory fourteen day period under section 167 (1) of the Act started running.

It is however clear in view of the above narrative of events, that the Applicant took reasonable steps after contacting the Procuring Entity to exercise its right to administrative review and lodged its Request for Review before this Board.

Noting the above circumstances, the Board finds that the Applicant's Request for Review was filed within the statutory period required under section 167 (1) of the Act.

The Board will now proceed to determine: -

Whether the Request for Review is fatally incompetent for the Applicant's failure to join the successful tenderer as a party to the Request for Review

The Board notes a determination on this issue falls squarely on an interpretation of section 170 (c) of the Act which reads as follows: -

"Parties to review

The parties to a review shall be—

(a).....;

(b)

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

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

The Board in its examination of section 170 (c) of the Act notes that the mischief that the said section intends to cure is to eliminate instances where a request for review is heard and determined by the Board in the absence of a successful bidder who was neither joined as a party to the request for review nor notified of the hearing. In such an instance, when the successful bidder becomes aware that a decision on the issue was rendered by the Board, such decision may have adversely affected the award made on the successful bidder.

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

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

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

"On the face of the Request for Review, it is clear that there were only two parties to the application and these were the interested party and the procuring entity. Clearly therefore, the Request fell foul of section 96 of the Public Procurement and Disposal Act (i.e. section 170 of the 2015 Act). It is however clear that the applicants were made aware of the said application. The law, as I understand it, is that Rules of procedure are the handmaids and not the mistresses of justice and should not be elevated to a fetish since theirs is to facilitate the administration of justice in a fair, orderly and predictable manner, not to fetter or choke it and where it is evident that a party has attempted to comply with the rules but has fallen short of the prescribed standards, it would be to elevate form and procedure to fetish to strike out the proceedings. Deviations from, or lapses in form and procedure, which do not go to jurisdiction of the court or prejudice the adverse party in any fundamental respect, it has been held, ought not to be treated as nullifying the legal instruments thus affected. In those instances, the court

should rise to its calling to do justice by saving the proceedings in issue. See Microsoft Corporation vs. Mitsumi Garage Ltd & Another Nairobi HCCC No. 810 of 2001; [2001] 2 EA 460.

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

"Using an incorrect form of procedure which has, in fact, brought the parties before the court and has, in fact, enabled the parties to present their respective cases to the court is not an incorrect act of such a fundamental nature that it should be treated as if it, and everything consequent upon it, did not exist and never had existed."

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

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

sought an adjournment in order to study the pleadings filed by the applicant and found that the successful bidder intimated that it was ready to proceed with the hearing and did not suffer prejudice by the applicant's failure to strictly comply with section 96 (c) of the Public Procurement and Disposal Act, 2005 (which is now section 170 (c) of the Act).

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

Turning to the circumstances of the case, the Board notes that the Applicant herein submitted that it did not receive a letter of notification from the Procuring Entity informing the Applicant of the outcome of its bid or the outcome of the subject procurement process. According to the Applicant, it was also unaware at the point of filing its Request for Review whether the subject tender had been awarded and to whom.

However, upon lodging of the Request for Review before this Board, we note that the successful bidder of the subject tender received a notification of hearing of these review proceedings through the Secretary to the Board and on the hearing date on 25th February 2020, two of its representatives that is, one Mr Srinadh Kotturu, its General Manager and one Mr Wellington Nyugi, its Account Executive, appeared before the Board.

During the hearing, the Board notes that the successful bidder opted not to file any pleadings before the Board and further declined the opportunity to address the Board. The Board therefore finds that the successful bidder's right to a fair hearing has not been affected in these proceedings since the successful bidder's two representatives were present during the review proceedings but opted not to actively participate in the same

It is therefore the Board's finding that the successful bidder has suffered no prejudice by the Applicant's failure to join it as a party to the Request for Review, noting its presence and its decision not to actively participate in the review proceedings.

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

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

As stated in the determination of the first issue herein, the jurisdiction of this Board flows from section 167 of the Act which states as follows: -

(1) 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...

(2).....;

(3).....;

(4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)—

(a) the choice of a procurement method;

(b) a termination of a procurement or asset disposal proceedings in accordance with section 62 of this Act; and

(c) where a contract is signed in accordance with section 135 of this Act.

Section 167 (4) (c) of the Act expressly stipulates that the jurisdiction of this Board is ousted only if a contract is signed in accordance with section 135 (3) of the Act.

The Board studied section 135 (3) of the Act which reads as follows: -

"The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification

provided that a contract shall be signed within the tender validity period.”

This means that a written contract shall be entered into within the period specified in the notification but not before the lapse of fourteen days following the giving of a notification of award and within the tender validity period.

Further, section 135 (2) of the Act clearly stipulates: -

“An accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications that emanate from the procurement proceedings.” [Emphasis by the Board]

Accordingly, a contract entered into between a procuring entity and a successful bidder in any procurement process ought to be reduced into writing.

As stated hereinabove, the Board has established that the notifications of award dated 8th January 2020 and posted to the successful and unsuccessful bidders on 14th January 2020, was not a notification of award as envisaged under section 87 of the Act, noting that the notifications of award were issued prior to the approval of the Evaluation Committee’s recommendation of award by the Accounting Officer.

In this regard therefore, as there was no notification of award, any contract entered into between the Procuring Entity and the successful bidder herein is null and void noting section 135 (5) of the Act which states that: -

"An accounting officer of a procuring entity shall not enter into a contract with any person or firm unless an award has been made and where a contract has been signed without the authority of the accounting officer, such a contract shall be invalid."

Accordingly a contract cannot be entered into unless an award has been made and such a contract cannot be signed or executed without the approval and the authority of the accounting officer. Furthermore, such a contract shall be invalid.

As no notification of award was made in this instance, the Procuring Entity could therefore not execute a contract with the successful bidder herein. More so, we have established that the Professional Opinion with respect to the subject tender was prepared by the Procuring Entity's Head of Procurement and approved by its Accounting Officer on the same date that a contract was executed between the Procuring Entity and the successful bidder, that is, on 30th January 2020. This was after the issuance and posting of the notifications of award to the successful and unsuccessful bidders.

We note that this flies in the face of section 135 (3) of the Act as cited hereinbefore which requires that a written contract shall only be entered

into between a procuring entity and a successful bidder fourteen days following the giving of a notification of award and within the tender validity period.

This means that the Procuring Entity interfered with the rights of all bidders who participated in the subject procurement process, including the rights of the Applicant herein, to approach the Board and challenge the Procuring Entity's decision within fourteen (14) days from the date of notification and prior to execution of a contract between the Procuring Entity and the successful bidder.

In totality of the foregoing, the Board found that the contract executed on 30th January 2020 between the Procuring Entity and the successful bidder was null and void.

In view of this finding, we find that this Board has jurisdiction to hear the Request for Review and shall now proceed to address the issues raised in the substantive Request for Review.

In its submissions, the Applicant contended that it submitted the most substantially responsive bid and the Procuring Entity ought to have awarded it the subject tender in accordance with the award criteria stipulated in the Tender Document.

According to the Applicant, Clause 2.8 Note III, Clause 2.14.8 and Clause 2.14.9 of the Tender Document clearly stipulated that the tender was to be awarded to the bidder whose bid met the minimum score of 70% and who submitted the lowest quote.

The Applicant contended that the Procuring Entity introduced new criteria not in the Tender Document whereby it calculated the weighted score for all the bids at both technical and financial evaluation. As a result, the Procuring Entity awarded the tender to a bidder who did not submit a cost effective financial proposal and it was therefore the Applicant's submission that the subject procurement process was conducted contrary to the Procuring Entity's Tender Document.

In response, the Procuring Entity submitted that the subject tender was a Request for Proposal whereby an award was based on the combined weighted score of a bid in both technical and financial evaluation. The Procuring Entity submitted that the award criteria to be used with respect to the subject tender, was not expressly provided for in the Tender Document. Nevertheless, section 86 (b) of the Act was expressly provided for in the Tender Document and was further implied noting that the subject tender was a Request for Proposals. In any event, it was the Procuring Entity's submission that no party was prejudiced as a result of this omission in the Tender Document.

In this regard therefore, it was the Procuring Entity's submission that the Applicant's bid was not the most responsive tenderer and therefore the award of tender was not due to the Applicant.

In its determination of this issue, the Board first sought to answer the question: what is a Request for Proposal?

The interpretation section of the Act defines procurement as: -

"the acquisition by purchase, rental, lease, hire purchase, license, tenancy, franchise, or by any other contractual means of any type of works, assets, services or goods including livestock or any combination and includes advisory, planning and processing in the supply chain system"

Accordingly, procurement is the acquisition of works, assets, services or goods by purchase, rental, lease, hire purchase, license, tenancy, franchise or by any other contractual means.

The Board studied section 91 of the Act which provides as follows: -

"(1) Open tendering shall be the preferred procurement method for procurement of goods, works and services.

(2) The procuring entity may use an alternative procurement procedure only if that procedure is allowed and satisfies the conditions under this Act for use of that method.

(3) Despite sub-sections (1) and (2) open tendering shall be adopted for procurement of goods, works and services for the threshold prescribed in the respective national and county Regulations.”

Accordingly, procurement or the acquisition of works, assets, services or goods under the Act, shall be by open tendering. However, a procuring entity may use an alternative procurement procedure if that procedure is allowed and satisfies the conditions under this Act for use of that method.

Alternative procurement procedures that may be used by a procuring entity are stipulated under section 92 of the Act which provides as follows: -

“Subject to this Act and prescribed provisions, an accounting officer of a procuring entity shall procure goods, works or services by a method which may include any of the following—

(a) open tender;

(b) two-stage tendering;

(c) design competition;

(d) restricted tendering;

(e) direct procurement;

(f) request for quotations;

(g) electronic reverse auction;

(h) low value procurement;

- (i) force account;***
- (j) competitive negotiations;***
- (k) request for proposals;***
- (l) framework agreements; and***
- (m) any other procurement method and procedure as prescribed in regulations and described in the tender documents."***

From the above provision, the Board observes that one of the alternative procurement procedures that a procuring entity may employ includes a request for proposals.

In this regard, the Board studied section 116 of the Act which reads as follows: -

"(1) An accounting officer of a procuring entity may use a request for proposals for a procurement if—

(a) the procurement is of services or a combination of goods and services; and

(b) the services to be procured are advisory or otherwise of a predominately intellectual nature.

(2) Subject to any prescribed restrictions, a procuring entity may use a request for proposals in combination with other methods of procurement under this Act."

Accordingly, a request for proposals is an alternative procurement procedure or a method of procurement which may be employed by a procuring entity in two instances: -

- a) where a procurement is of services or a combination of goods and services; and
- (b) where the services to be procured are advisory or otherwise of a predominantly intellectual nature.

At this juncture, the Board finds it necessary to establish the meaning of goods, a services and services of an advisory or predominantly intellectual nature.

The Board observes that section 2 of the Act defines 'goods' to include: -

"raw materials, products, equipment, commodities in solid, liquid or gaseous form, electricity and services that are incidental to the supply of the goods, works and services"

Further, 'services' are defined as follows: -

"any objects of procurement or disposal other than works and goods and includes professional, consultancy services, technical services, non-professional and commercial types of services as well as goods and works which are incidental to but not exceeding the value of those services"

From the above two provisions, it is clear that **goods** are raw materials, products, equipment, commodities in solid, liquid or gaseous form, electricity and services that are incidental to the supply of the goods,

works and services whereas **services** are objects of procurement or disposal other than works or goods which include professional, consultancy services, technical services, non-professional and commercial types of services of services as well as goods and works which are incidental to but not exceeding the value of those services.

From this definition, the question that now arises is what is a service of an advisory or predominantly intellectual nature?

The Board notes that the Black's Law Dictionary defines the term 'advisory' as: -

"Counselling, suggesting, or advising, but not imperative"

This means that an advisory service can be imputed to mean a service that involves the provision of counsel, suggestions, advice or information.

The Board further notes that the term 'intellectual' is defined by the Cambridge Dictionary as: -

"relating to the ability to think and understand things, especially complicated ideas"

From this definition, services of an intellectual nature can be taken to mean services that involve the ability to think and understand issues particularly of a complicated nature.

Moreover, the Board notes that services of an advisory or predominantly intellectual nature are classified under section 2 of the Act as consultancy services which are defined as: -

"services of predominantly an intellectual, technical or advisory nature, and includes services offered by all professionals"

Accordingly, consultancy services are of an intellectual, technical or advisory nature and are services offered by all professionals.

In view of the foregoing, it is therefore clear that a request for proposals is an alternative procurement procedure or a method of procurement which may be employed by a procuring entity where a procurement is of services or a combination of goods and services; and where the services to be procured are advisory or otherwise of a predominantly intellectual nature.

Having established what a request for proposals is, the Board examined the Procuring Entity's Tender Document in order to determine whether the subject tender was a Request for Proposals.

The Board observes the title of the Tender Document on page 1 which reads as follows: -

"Kenya National Qualifications Authority

Request for Proposals

For Supply, Installation, Configuration and Commissioning of a National Qualifications Information Management System (NAQIMS)

RFP NUMBER: TENDER NUMBER: KNQA/01/2019-2020”

From the above excerpt, the Board notes, the subject tender was indicated to be a Request for Proposals for the Supply, Installation, Configuration and Commissioning of a National Qualifications Information Management system (hereinafter referred to as NAQIMS system).

The Board examined Clause 3.3 of Section III Terms of Reference on page 16 of the Tender Document which reads as follows: -

"The scope of work includes:

- i. The supply, installation, configuration and commissioning of NAQIMS system with a web interface;***
- ii. Supply and installation/setup of the appropriate software, licences and kits;***
- iii. Migration of data from manual systems;***
- iv. Training of users: End users and Senior Management Staff;***
- v. Provision of Service Level Agreement after successful commissioning (go-live) of system”***

From the above excerpt, two things are clear. One, that the Procuring Entity sought to procure for a service, that is, the supply, installation, configuration and commissioning of NAQIMS system with a web-interface; migration of data from manual systems and training of users of the system.

Secondly, that the Procuring Entity further sought to procure goods, that is, for the supply and installation of the appropriate software, licences and kits. It therefore follows that the subject procurement process was for a combination of goods and services.

Further, from a cursory look of the services that the Procuring Entity sought to procure, the Board notes that these services were predominantly of an intellectual nature, noting that the service in question involves several technical aspects with respect to Information and Communication Technology which would be offered by a professional conversant with the same.

In view of the foregoing, it is therefore clear that the method of procurement employed under the subject procurement process was a Request for Proposals.

The question that now arises is what is the procedure for awarding a tender under a Request for Proposals?

The Board studied section 86 (1) (b) of the Act which reads as follows: -

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

a);

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);

Accordingly, under a request for proposals, the successful tenderer shall be the tenderer with the highest score as determined by the procuring entity. This score shall be determined by combining the scores assigned to each proposal, that is, the technical and financial proposals, in accordance with the procedures and criteria set out in the request for proposals and ranking them accordingly. It therefore follows that the tenderer with the highest combined score will be considered the most responsive proposal and should be awarded the tender.

The Board examined the Procuring Entity's Tender Document and realized the following Clauses in the Tender Document: -

Clause 2.8 Note (iii) of Section II Instructions to Bidders on page 11 of the Tender Document provides as follows: -

"The bidders who achieve the minimum score of 70% with the lowest score will be awarded this tender"

Also, Clause 2.14.8 of Section II Instructions to Bidders on page 14 of the Tender Document provides as follows: -

"The award will be to the bidder with the lowest cost in the evaluation criteria in the RFP document provided they meet the minimum score in the Technical Proposal Evaluation"

Further, Clause 2.14.9 of Section II Instructions to Bidders on page 14 of the Tender Document provides as follows: -

"Request for Proposal 'Financial Proposal' with the lowest cost shall be recommended for contract award"

From an examination of the above clauses in the Tender Document, the Board observes that the three clauses outlined hereinabove provide for an award to be made to a tenderer whose technical proposal attains a minimum score of 70% and is found to have submitted the lowest cost in its financial proposal.

Moreover, the Board observes Clause 2.14.2 of Section II Instructions to Bidders on page 13 of the Tender Document which provides as follows: -

"The method of selection is: Request for Proposals

Quality and Cost Based Selection (QCBS) shall be the method for evaluating the proposals"

According to this provision of the Tender Document, bids under the subject tender would be evaluated based on the quality and cost of the bidder's proposal.

Having compared the above provisions of the Tender Document, the Board notes that the Procuring Entity provided for two different criteria for the evaluation of bids received with respect to the subject tender.

The Board proceeded to examine the Procuring Entity's Evaluation Report dated and signed on 31st December 2019 and observes the comments of the Evaluation Committee on page 9 as follows: -

"Combination of Technical and Financial Evaluated Scores

The technical weighted scores (T) computed to 70% and the financial scores (P) computed to 30% are combined by adding them together to give a total of 100% (T+P) =100 to give the total evaluated score of a firm....

Recommendations

The best technically and financially evaluated bidder was Techno Brain with a total 94.30 points and ranking number 1, therefore Techno Brain of P.O. Box 57666-00200 Nairobi is recommended for the proposal for supply,

installation, configuration and commissioning of a National Qualifications Information Management System.”

From the above excerpt of the Evaluation Report, the Board observes that the Procuring Entity combined the highest score assigned to the technical and financial proposals of each bid and recommended award of tender to the bidder with the highest combined score, which in this instance was M/s Techno Brain Limited, in accordance with section 86 (1) (b) of the Act.

Despite this observation, this Board is of the view that the Procuring Entity’s Tender Document stipulated award criteria to be applied in the subject procurement process, contrary to section 86 (1) (b) of the Act, noting that the method of procurement under the subject tender is a Request for Proposals.

The Board is cognizant of section 80 (2) of the Act which provides that:

-

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

This means that the evaluation and comparison of tenders by a procuring entity should be done in accordance with the procedures and criteria set out in the tender document.

In this regard, the Board considered the decision of the High Court in **Judicial Review No. 137 of 2015 Republic v. The Public Procurement and Administrative Review Board & 2 Others ex parte CNPC Northeast Refining & Chemical Engineering Co. Ltd/Pride Enterprises (The Civicon Case)** where the Court observed that:

"...We are of the view, that in order to achieve a transparent system of procurement as required under Article 227 of the Constitution, it is important that procuring entities should set out to achieve a certain measure of precision in their language in the tender documents and not leave important matters for speculation and conjecture as was the case in this matter...If indeed the Review Board had found that there was a problem with the Tender Document, it ought to have asked the PE to retender. You cannot use a faulty Tender Document to award a tender... the Review Board exceeded its authority by purporting to read its own words in the Tender Document. If the Tender Document was defective, then the only order that was available to the Board was to direct the PE to commence the tender process afresh."

In this matter the High Court was of the view that a tender document ought to be clear and precise in its provisions and where a tender document is found to be faulty, the said tender document cannot be used to award a tender. More so, the only remedy available in such an instance is for a procuring entity to re-tender and commence the procurement process afresh.

It is also the Board's considered view that all tenderers who participated in the subject procurement process were duly guided by the provisions in the Procuring Entity's Tender Document and as such a legitimate expectation was created in the minds of all tenderers that the evaluation process would comply strictly with the Tender Document and that both the technical and financial competence of all bidders would be considered and evaluated in accordance with the criteria provided in the Tender Document.

In the instant case, the Board has established that the method of procurement employed under the subject procurement process was a Request for Proposals. Further, that the Procuring Entity in its Tender Document outlined an award criteria contrary to section 86 (1) (b) of the Act which stipulates that under a request for proposals, the successful tenderer shall be the tenderer with the highest combined score determined by the procuring entity in accordance with the procedures and criteria set out in the tender document.

This is contrary to the procurement principle of fairness as articulated under Article 227 (1) of the Constitution of Kenya which provides that: -

***"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."* [Emphasis by the Board]**

Accordingly, a public procurement system must be seen to be fair and equitable to all bidders participating in a procurement process and as such a procuring entity should employ the award criteria as stipulated in a tender document, in line with the expectations of all bidders.

In this regard therefore, it is the finding of this Board that the Procuring Entity's Tender Document is defective; hence anything emanating from it cannot stand. The Board thus finds that the Tender Document with respect to the subject tender is null and void.

In totality, the Board finds that the Procuring Entity failed to evaluate the Applicant's bid in accordance with section 80 (2) of the Act as read with Article 227 (1) of the Constitution.

The Board is now left with the question as to what are the appropriate reliefs to grant in the circumstances.

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

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

(a).....;

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

Having found that the Tender Document is defective and therefore null and void, the Board finds that the most appropriate order is to direct the Procuring Entity to re-tender for *'Supply, Installation, Configuration and Commissioning of a National Qualifications Information Management System'*.

Finally, the Board would like to emphasize that all procuring entities are mandated to use the standard tender documents in all procurement and asset disposal proceedings as provided by the Public Procurement Regulatory Authority in accordance with section 58 of the Act which stipulates as follows: -

"(1) An accounting officer of a procuring entity shall use standard procurement and asset disposal documents issued by the Authority in all procurement and asset disposal proceedings.

(2) The tender documents used by a procuring entity under subsection (1) shall contain sufficient information to allow fairness, equitability, transparency, cost-effectiveness and competition among those who may wish to submit their applications."

In view of the Board's findings in this matter, we hereby direct the Procuring Entity to seek assistance from the Authority and utilize the standard tender documents in all its procurement and asset disposal

proceedings in accordance with section 58 of the Act and adopt the necessary changes, if need be.

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

FINAL ORDERS

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

- 1. The Contract dated 30th January 2020 in Tender No. KNQA/01/2019-2020 for Supply, Installation, Configuration and Commissioning of a National Qualifications Information Management System signed between the Procuring Entity and M/s Techno Brain Limited be and is hereby cancelled and set aside.**

- 2. The Procuring Entity's Letter of Notification of Award dated 8th January 2020 addressed to M/s Techno Brain Limited, with respect to Tender No. KNQA/01/2019-2020 for Supply, Installation, Configuration and Commissioning of a National Qualifications Information Management System be and is hereby cancelled and set aside.**

- 3. The Procuring Entity's Letters of Notification of Unsuccessful Tender dated 8th January 2020 addressed to all unsuccessful bidders with respect to Tender No. KNQA/01/2019-2020 for the Supply, Installation, Configuration and Commissioning of a National Qualifications Information Management System be and is hereby cancelled and set aside.**

- 4. The Procuring Entity's Tender Document for Supply, Installation, Configuration and Commissioning of a National Qualifications Information Management System Tender No. KNQA/01/2019-2020 be and is hereby nullified and set aside.**

- 5. The Procuring Entity is hereby directed to re-tender for the Supply, Installation, Configuration and Commissioning of a National Qualifications Information Management System within thirty (30) days from the date of receipt of the signed decision of the Board.**

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

Dated at Nairobi, this 4th Day of March 2020

CHAIRPERSON

SECRETARY

PPARB

PPARB

Delivered in the presence of: -

- i.** Mr. Jared Mwaniki holding brief for Mr Gachuba for the Applicant;
- ii.** Mr. Mokuu for the Respondent;